07-3042-cr

In the United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

JEFFREY STEIN, JOHN LANNING, RICHARD SMITH, JEFFREY EISCHEID, PHILIP WIESNER, MARK WATSON, LARRY DELAP, STEVEN GREMMINGER, GREGG RITCHIE, RANDY BICKHAM, CAROL G. WARLEY, CARL HASTING, RICHARD ROSENTHAL,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES JEFFREY STEIN, JOHN LANNING, RICHARD SMITH, RANDY BICKHAM, AND RICHARD ROSENTHAL

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INTRODUCTION

This appeal presents a single, straightforward question: may prosecutors, without justification, deprive a criminal defendant of funds that otherwise would lawfully be available for his defense? While the facts of this case are unusual, basic constitutional principles provide a clear answer: prosecutors may not tilt the playing field in their favor by interfering with a defendant's ability to pay counsel to defend him. Both the Sixth Amendment right to the assistance of counsel and the Fifth Amendment right to due process forbid such conduct.

The district court found that prosecutors in this case wielded the threat of indictment—the corporate equivalent of a death sentence—against the accounting firm KPMG to pressure it not to pay attorneys' fees for partners and employees who were subjects of the prosecutors' investigation. It is undisputed—indeed, the government stipulated below—that prior to this case, KPMG had always paid attorneys' fees for partners and employees in all criminal, civil, and regulatory actions arising out of their employment, unconditionally and without regard to cost. As the district court found, however, matters changed when the U.S. Attorney's Office commenced its criminal investigation of KPMG in early 2004.

KPMG determined early that, to avoid indictment, it would cooperate as fully as possible with the USAO's investigation. What it meant to "cooperate," however, was up to the USAO. The 2003 Thompson Memorandum—since

repudiated by the Justice Department—required prosecutors assessing a business entity's cooperation to consider whether the entity was paying attorneys' fees for employees whom prosecutors deemed "culpable." And the USAO made very clear to KPMG that it would view payment of attorneys' fees as evidence that KPMG was not cooperating. KPMG therefore took an unprecedented step: rather than advancing fees fully and unconditionally, as it had always previously done, it decided to make only limited payments, conditioned on full cooperation with the USAO's investigation—and to cut off all fees immediately for anyone indicted.

Following a three-day evidentiary hearing, and based on the testimony of numerous witnesses, KPMG's own representations, and substantial documentary evidence, the district court found that, absent the government's pressure, KPMG would have paid all of appellees' attorneys' fees, both before and after indictment—just as it always had. Most of the government's brief is devoted to overt or covert attacks on this factual finding. But the government cannot demonstrate that the finding is clearly erroneous. While the government presents its own preferred interpretation of the evidence, nothing required the district court to adopt that interpretation. The court's findings were squarely based on the evidence and eminently reasonable—far more so than the government's preferred findings. In no event can they be set aside as clearly erroneous.

On the facts found by the court, the government violated appellees' Sixth Amendment right to counsel. That right has long been understood to mean that the government may not unjustifiably interfere with a criminal defendant's retention of counsel to assist in his defense. The government does not contest that, without good reason, it may not stop a defendant from spending his own money to hire the counsel of his choice. Likewise, the government may not, without justification, prevent a third party from lawfully advancing funds to a defendant to pay for his counsel. The government's only response is that the Sixth Amendment confers no right to spend other people's money. But appellees claim no such right: they merely contend that when a third party would otherwise lawfully provide defense funds—as businesses do every day for their employees, and as the district court found KPMG would have done absent the government's pressure—the government may not stand in the way without good reason.

No such reason was present here. While the government contends that payment of employees' legal fees may appropriately weigh in favor of indictment when an organization is "circling the wagons"—paying fees to buy employees' silence or otherwise impede an investigation—the government concedes that it never believed any "wagon-circling" was occurring here. As the district court found, far from revealing any legitimate justification for pressuring KPMG to limit its payment of fees, the record shows that the government's evident purpose was "a

desire to minimize the involvement of defense attorneys." *Stein* A.861; *see also* *Stein* A.1651. Such a purpose runs counter to the basic guarantee of the Sixth Amendment.

The government's actions also violated the Fifth Amendment's guarantee that all defendants receive a fair trial. The government's conduct here ensured just the opposite, by taking away, without justification, resources appellees otherwise would have had to defend themselves. Our criminal-justice system is premised on the notion that prosecutor and defendant face each other as equals. Simply put, the government may not tie one hand behind a defendant's back.

Finally, the district court did not abuse its discretion in concluding—reluctantly, and after exhausting all other options—that dismissal of the indictment was required. Absent payment of appellees' attorneys' fees—something the government refused to make any effort to accomplish—no remedy but dismissal could redress the constitutional violation. Deprived of the fees they would otherwise have received from KPMG, appellees were left to rely wholly on their own limited resources to fund the defense of "the largest tax fraud case in United States history," *Stein* A.870 (*Stein I*), involving novel and intricate issues of tax law, over 22 million pages of documents, and the prospect of a trial lasting many months. As the district court found, the government's interference has thus severely impaired appellees' ability to defend this enormous and complex case.

Indeed, the government rightly conceded below that if the district court's findings and conclusions in *Stein I* were correct, only dismissal of the indictment could redress appellees' injury.

The government now contends that it "cured" any harm to appellees by proclaiming, some five to seven months after appellees were indicted, that it would not hold payment of fees against KPMG. But the government's remarks—made long after KPMG had already cut off appellees' fees—could not restore appellees to the position they would have occupied had the government never applied its improper pressure in the first place. Absent that pressure, the district court found, KPMG would have paid all of appellees' fees. The government's argument thus reduces to the contention that the district court's factual finding is clearly erroneous. It is nothing of the kind. To the contrary, it was firmly based on the government's own stipulation, KPMG's own representations to the court, and a wealth of documentary evidence.

In short, the government's unjustified actions crippled appellees' ability to defend themselves, and nothing short of dismissal could adequately remedy that harm. The district court's judgment should be affirmed.

STATEMENT OF ISSUES

1. Whether the district court's findings of fact were clearly erroneous.

2. Whether, on the facts as found, the government violated appellees' Sixth Amendment right to counsel.

3. Whether, on the facts as found, the government violated appellees' Fifth Amendment right to due process.

4. Whether the district court abused its discretion in concluding that dismissal of the indictment was the appropriate remedy for the constitutional violations.

STATEMENT OF FACTS

A. The Widespread Practice Of Indemnification And Advancement Of Legal Fees For Employees

For many years, business organizations have indemnified employees who are civilly sued or criminally charged in connection with their employment for legal fees expended in the successful defense of such actions.[1] In addition, because such fees can pose an enormous burden on employees, who may themselves lack sufficient funds to mount a robust defense, organizations commonly advance fees as they are incurred.

Indemnification and advancement policies are both widespread and, for many business organizations, essential. "Indemnification encourages corporate

[1] For simplicity, this brief will use the term "employees" to encompass partners (including principals) and employees, unless otherwise noted.

service by capable individuals by protecting their personal financial resources from depletion by the expenses they incur during an investigation or litigation that results by reason of that service." *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005). And "[a]dvancement is an especially important corollary to indemnification" because it ensures that such individuals will have the funds to obtain and pay counsel while legal action is in progress. *Id.*

Indemnification and advancement are "salutary public policy" as well as sound corporate policy. *Homestore*, 888 A.2d at 218. As the Chamber of Commerce and other business amici explained in the district court, organizations "routinely … use indemnification and advancement policies as recruiting tools to attract the best-qualified directors and officers." Dkt. 470, at 11. Beyond "attracting the most capable people into corporate service" by protecting them against personal loss, *Homestore*, 888 A.2d at 218, these policies constitute a "desirable mechanism to manage risk in return for greater corporate benefits" for shareholders, *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509 (Del. 2005). For this reason, every state now has a statute authorizing (some even requiring) corporate indemnification, and many also authorize advancement of fees. *Stein* A.862-863 (*Stein I*).[2]

[2] We cite the government's brief in this appeal as "Br." and use the same abbreviations for the various appendices as that brief does. *See* Br. 7 n.*. We cite

B. KPMG's Longstanding Practice Of Advancement

Prior to the events at issue here, KPMG had an unbroken practice of advancing, and indemnifying employees against, legal fees incurred in defending actions arising out of their employment. Indeed, the government and appellees stipulated that "[p]rior to February 2004, … it had been the longstanding voluntary practice of KPMG to advance and pay legal fees, without a preset cap or condition of cooperation with the government, for counsel for … employees of the firm … in any civil, criminal or regulatory proceeding" arising from their employment. *Smith* A.1133. Moreover, "[t]his practice was followed without regard to economic costs or considerations with respect to individuals or the firm." *Smith* A.1134. KPMG's general counsel testified that full, unconditional payment of fees was the rule throughout his 19 years with the firm. *Smith* A.469-471.

This consistent practice stretched back at least 30 years, to a 1974 case in which KPMG paid the pre- and post-indictment fees of a partner and employee convicted of a federal offense. *Stein* A.848 (*Stein I*); *see also Smith* A.1134. The practice continued through several criminal investigations in the 1980s. *Smith* A.473. And it included a more recent criminal investigation into KPMG's relationship with Xerox Corporation, as well as related civil litigation with the

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the government's briefs in the related appeal (No. 06-3999) as "Suppression Br." and "Suppression Reply."

SEC; KPMG paid over $20 million in legal fees incurred by four partners in connection with the Xerox matter. *Smith* A.471-472. In sum, it is undisputed that before the USAO initiated its investigation of KPMG in this matter, KPMG had always paid its employees' legal fees in civil and criminal proceedings arising from their employment, without regard to cost.[3]

Several pieces of evidence demonstrate that, during the early stages of the USAO's investigation, KPMG intended to adhere to its longstanding practice. Just before the USAO's investigation began, KPMG was under intense pressure resulting from an IRS investigation and Senate hearings into its tax-shelter activities. In January 2004, KPMG requested the resignation of appellee Jeffrey Stein, then serving as deputy chairman of the board of directors and chief operating officer of the firm. KPMG's severance agreement with Stein provided that, "[c]onsistent with the Firm's general policy and practice," KPMG would pay for Stein's representation in any legal proceeding brought against him arising out of his responsibilities as a partner of the firm. S.A.6-7. Stein's agreement included

[3] Notably, because KPMG was a partnership, those costs were borne by the partners. Thus, those appellees who were partners at KPMG themselves bore a share of the burden of the millions of dollars in fees KPMG paid over the years on behalf of other partners and employees. In part for that reason, KPMG had a particularly strong stake in continuing its long-established practice of paying fees. *See, e.g.*, *Smith* A.1146 (KPMG's counsel told the government that because KPMG was a partnership, "it would be a big problem" not to advance fees); *Stein* A.1639 (*Stein IV*).

neither any limitation on fee payments nor any requirement that Stein cooperate with any government investigation.

Also in January 2004, KPMG reassigned appellee Richard Smith from his position as vice chair of tax services to a new position with KPMG International. *Stein* A.928. In January and early February 2004, Smith and KPMG negotiated the terms of a retention agreement providing—like Stein's contract—that, "consistent with the Firm's general policy and practice," KPMG would pay for Smith's legal representation in any action against him arising out of his responsibilities as a partner. *Stein* A.942. Also like Stein's contract, Smith's draft agreement included neither a cap on fees nor a requirement of cooperation.

In early February 2004, the USAO notified counsel for KPMG—Robert Bennett and others at the law firm of Skadden, Arps, Slate, Meagher & Flom—that it had begun a criminal investigation into KPMG's conduct. *Smith* A.610-611. Within days, KPMG's then-CEO sent a voice message to all partners informing them of the investigation and stating that "[a]ny present or former members of the firm asked to appear will be represented by competent coun[se]l at the firm's expense." *Stein* A.1070. The message made no mention of any limitations on fee payments, and it expressly referred to the Xerox matter, in which KPMG had paid more than $20 million in legal fees for four partners. *Id.* KPMG also continued to negotiate with Smith, sending him a new draft retention agreement in mid-

February that contained the same provisions as the earlier draft regarding payment of attorneys' fees. *Stein* A.949, 952-953. Smith and KPMG's then-CEO arranged a meeting for February 27 to finalize and execute the agreement. *Stein* A.930.

The record thus demonstrates that, at the outset of the USAO's investigation, KPMG intended to continue its decades-old, uninterrupted practice of full and unconditional advancement of fees. As will be seen below, however, KPMG's attitude changed after its counsel's first meeting with the USAO—a meeting that ultimately led KPMG to abandon its longstanding practice.

C. The Thompson Memorandum

The USAO's decision whether to indict KPMG was informed by a memorandum issued in January 2003 by then-Deputy Attorney General Larry Thompson. *Smith* A.1135-1144. Entitled "Principles of Federal Prosecution of Business Organizations," but commonly referred to as the "Thompson Memorandum," this document comprised a "set of principles to guide Department prosecutors as they [decide] whether to seek charges against a business organization." *Smith* A.1135. Federal prosecutors were required to consider those principles in making charging decisions. Suppression Br. 17 n.*.

The Thompson Memorandum directed prosecutors to scrutinize whether an organization was cooperating with the government, in part by examining "whether [it] appears to be protecting its culpable employees and agents." *Smith* A.1139.

More specifically, the Memorandum explained, "a corporation's promise of support to culpable employees and agents, either *through the advancing of attorneys fees* [or in other ways] may be considered by the prosecutor" in deciding whether it was cooperating. *Id.* (emphasis added). A footnote attached to this sentence carved out a single exception, stating that if state law required a corporation to advance fees, compliance with that law "should not be considered a failure to cooperate." *Smith* A.1144.

The Thompson Memorandum thus required prosecutors, in deciding whether to indict a business organization, to consider whether the organization was voluntarily advancing legal fees for its employees—a widespread practice long recognized as legitimate and beneficial. As the district court found, the Memorandum made clear that advancement might "be viewed as protection of culpable employees and thus cut in favor of indicting the entity." *Stein* A.871.[4]

[4] As discussed in Part I.A below, the fee-advancement and other provisions of the Thompson Memorandum engendered significant controversy. In 2006, then-Deputy Attorney General Paul McNulty issued a revised set of charging guidelines. S.A.76-77. These new guidelines, which remain in effect, "instruct prosecutors that they *cannot* consider a corporation's advancement of attorneys' fees to employees when making a charging decision." S.A.76 (emphasis added). Although there is an exception for cases in which advancement is "intended to impede a criminal investigation," the guidelines label such cases "extremely rare" and require prosecutors to obtain approval from the Deputy Attorney General before considering fee advancement in making charging decisions. S.A.94 n.3.

D. The February 25, 2004 Meeting

The USAO first met with Skadden to discuss the investigation of KPMG on February 25, 2004. Before that meeting, prosecutors decided—consistent with the Thompson Memorandum—to ask whether KPMG was paying or would pay legal fees incurred by employees as a result of the investigation. *Smith* A.408. A multi-page agenda for the meeting, drafted by AUSA Justin Weddle and reviewed by other prosecutors, *Smith* A.405-406, 624-625, read on the first page: "Is KPMG paying/going to pay the legal fees of employees? Current or former? … Any agreements or other obligations to do so? What are they?" *Smith* A.1145, 1183.

The Skadden team came to the meeting convinced that an indictment of KPMG would amount to a death sentence for the firm, a belief shared by top KPMG officials. *Smith* A.613.[5] Bennett voiced this belief in his opening remarks. *Smith* A.421. He also said that to avoid being charged, KPMG would cooperate

[5] That belief was well-founded: "In the 212-year history of the U.S. financial markets, no major financial-services firm has ever survived a criminal indictment." Brown, *Called to Account: Indictment of Andersen in Shredding Case Puts Its Future in Question*, Wall St. J., Mar. 15, 2002, at A1. Arthur Andersen—once, like KPMG, one of the "Big Five" accounting firms—lost nearly all its clients following its indictment stemming from the Enron scandal. Bryan-Low, *Andersen Staff Works To Tie Up Loose Ends*, Wall St. J., June 17, 2002, at C1. The indictment itself sounded the "death knell" for Andersen, well before its conviction, *id.*, and despite the conviction's later reversal, *see Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). KPMG's general counsel testified that his belief that an indictment would kill the firm derived partly from his knowledge about the Andersen case. *Smith* A.473-474.

fully with the investigation. *Smith* A.613, 1196-1197. Weddle responded that the USAO "would follow the federal guidelines," *Smith* A.1197—a clear reference to the Thompson Memorandum, *see Smith* A.655.

Following discussion of other topics, Weddle broached the subject of fees. *Smith* A.374-375. Adhering to the prosecutors' written agenda, Weddle asked if KPMG was paying legal fees for its employees and whether KPMG was obligated to make such payments. *Smith* A.614. Bennett responded by asking prosecutors for their views on the subject. *Smith* A.1338. AUSA Shirah Neiman, the senior prosecutor on the case, replied that although the USAO would take account of any legal obligations KPMG had regarding advancement, "the Thompson memorandum and the factors in that memo" were "a point that had to be considered." *Smith* A.365; *see also Smith* A.1338. Bennett and another Skadden attorney told prosecutors that KPMG was still checking on its legal obligations but noted that KPMG's "common practice" had been to pay fees, *Smith* A.365-366, and that "generally, KPMG would pay the legal fees of a partner involved in legal proceedings," *Smith* A.1199. They added that as a way to demonstrate its cooperation, KPMG would likely not pay fees for those who invoked their privilege against self-incrimination. *Id.* But, they stressed, "no final decisions had been made." *Smith* A.422; *see also Smith* A.1338.

Later in the meeting Weddle again raised the issue of advancement, reiterating that KPMG should determine whether it was legally obligated to advance fees. *Smith* A.618. Neiman added that "under [the] federal guidelines misconduct" cannot or should not "be rewarded." *Smith* A.1189; *see also Smith* A.1338. The district court found that this statement "was understood by both KPMG and government representatives as a reminder that [under the Thompson Memorandum] payment of legal fees by KPMG, beyond any that it might legally be obligated to pay, could well count against KPMG in the government's decision whether to indict the firm." *Stein* A.852. Weddle then reinforced Neiman's message by warning that if KPMG had discretion regarding the advancement of fees, the USAO would "look at that under a microscope." *Smith* A.1339.

Based on the evidence regarding the February 25 meeting, the district court found that "while the USAO did not say in so many words that it did not want KPMG to pay legal fees, no one at the meeting could have failed to draw that conclusion." *Stein* A.852.

E. The Aftermath Of The February 25 Meeting

As soon as the meeting ended, Skadden briefed KPMG officials on what had transpired. *Smith* A.506-507. KPMG executive Greg Russo's notes from that briefing begin with the words "[a]ngry" and "[t]ake everything in our power not to charge the firm," and attribute to Neiman the statement that KPMG faced an

"uphill battle." *Stein* A.1072. Next to the words "[p]aying legal fees" and "severance," Russo wrote "not a sign of cooperation." *Id.* Based on those notes, the district court found that the Skadden lawyers had conveyed to KPMG "that the government was 'angry,'" that "avoiding an indictment of the firm would be an 'uphill battle,'" and that "payment of legal fees and entering into severance agreements would increase the chance that KPMG would be indicted" and thus destroyed. *Stein* A.1645-1646 & n.77.

The USAO's message immediately had the intended effect. Two days later, Richard Smith met with KPMG's then-CEO, as planned, to finalize and execute Smith's fully negotiated retention agreement, which provided that KPMG would pay legal fees in all actions arising out of Smith's activities at KPMG. The CEO, however, informed Smith that KPMG had decided that it could not enter into the retention agreement while the USAO's investigation was ongoing. *Stein* A.930.

Several days later, Bennett told Weddle that although KPMG believed it had no legal obligation to advance fees, "it would be a big problem" for the firm not to do so. *Smith* A.1146. Bennett added that a final decision still had not been made, but that KPMG was tentatively planning to limit the amount of fees it would pay,

and to pay the limited amount only to those who "cooperat[ed] fully with the company and the government." *Id.*[6]

On March 11, Skadden forwarded the USAO a letter that it simultaneously sent to lawyers for KPMG employees identified as subjects of the USAO's investigation. *Smith* A.1204, 1214-1215. Consistent with Bennett's earlier conversation with Weddle, the letter imposed a $400,000 cap on legal fees and expenses, and conditioned payment on cooperation with the government. *Smith* A.1214-1215.[7] It also provided that "payment of … legal fees and expenses will cease immediately" if the recipient "is charged by the government with criminal wrongdoing." *Smith* A.1215.[8]

At the same time that KPMG imposed these unprecedented limitations on the payment of legal fees for employees in criminal proceedings, it continued its longstanding practice of full advancement for those same employees in civil

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[6] In an internal email reporting this conversation, Weddle noted that he had told Bennett that he "had had a bad experience in the past with a company conditioning payments on a person's cooperation, where the company did not define cooperation as 'tell the truth' the[] way we define it," and that Bennett had "said he understood and it would not be a problem." *Smith* A.1146.

[7] Because Stein's severance agreement included no such limitations on fee payments, neither he nor his counsel received this letter.

[8] Confirming that KPMG's decisionmaking was driven by the USAO's pressure, an attorney for a KPMG defendant testified that a Skadden attorney told him in early March that "KPMG wanted to pay attorney's fees, [but] the government did not want KPMG to pay attorney's fees," and that KPMG was "doing a balancing act" by capping and conditioning fees. *Smith* A.981-982.

actions arising out of the same conduct, subject to only one condition—that the same lawyer not represent the employee in both the civil and criminal proceedings. *Smith* A.558; *Stein* A.1343-1344, 1541-1543, 1547, 1559-1560, 1592-1594, 1623-1626, 1643-1644 (*Stein IV*). Through the date of dismissal of the indictment against appellees, these payments exceeded $3.4 million. *Stein* A.1557-1558, 1643-1644 (*Stein IV*).

F. KPMG's Advisory Memorandum

Around the same time that it sent its March 11 letter regarding fees to subjects of the government's investigation, Skadden sent the USAO an "advisory memorandum" that KPMG was simultaneously distributing to all other firm personnel regarding the government's investigation. *Smith* A.1296-1299. The memorandum informed recipients that they had a right to consult with counsel and to have counsel present during any meeting with government officials (or, of course, to meet with the government without counsel). *Smith* A.1298-1299. It also stated that the firm had hired independent attorneys with whom employees could consult if the government contacted them, and that because the government would likely ask "about matters that you dealt with in your capacity as a KPMG professional," KPMG would pay those attorneys' fees. *Smith* A.1298. Noting the benefits of counsel, the memorandum explained: "[C]onsultation with independent legal counsel may help you to better understand the nature of the investigation and

to ensure that any interview is conducted in accordance with your legal rights. Counsel can also take notes on your behalf at the interview to avoid future misunderstandings of what was said." *Smith* A.1299.

The advisory memorandum displeased the USAO, *Smith* A.491-492, which wrote to Bennett that it was "disappointed with the tone" of the memorandum and its "one-sided presentation of potential issues …, as well as the substance of certain of its directives," *Smith* A.1300. The USAO declared that "[t]hese problems must be remedied," and "propose[d] that the firm send out a supplemental memorandum to do so." *Id.* The government's "proposal" was attached. The USAO's letter concluded by invoking Bennett's earlier acknowledgment that KPMG had to cooperate fully in order to avoid extinction-by-indictment, stating: "The proposal assumes that KPMG truly is committed to fully cooperating with the Government's investigation." *Id.*

The USAO's proposed supplement repeatedly stated that employees were not required to use the attorneys the firm had retained—or any attorneys at all. *Smith* A.1301. It also omitted any discussion of the benefits of consulting with counsel. And it omitted language from the original memo explaining that employees had the right not to speak to the government, that it would be "improper for investigators to resort to threats or intimidation, whether express or implied, in order to obtain an interview," and that employees who did agree to an interview

"retain[ed] the right to suspend or terminate [the] interview at any time." *Smith* A.1298-1299.

Bennett initially responded by noting that KPMG had sent out similar memoranda in other matters without objection. *Smith* A.1346. But after the USAO refused to relent, with Weddle stating that "[s]o far, we're not getting coop[eration]," *id.*, KPMG capitulated and (after pre-clearing it with the USAO, *Smith* A.1303) issued a supplemental memorandum in question-and-answer format. One question in the supplement asked: "Do I have to be assisted by a lawyer?" *Smith* A.1309 (italics omitted). The four-sentence answer stated in three different ways that there was no such requirement—the first being a flat "No." *Id.*

G. KPMG's Termination Of Attorneys' Fees For Persons The Government Asserted Were Not Cooperating

Shortly after the original advisory memorandum was distributed, Skadden—seeking to demonstrate KPMG's full cooperation, *see Stein* A.1099-1100—asked prosecutors to notify it if they believed that any current or former KPMG employee was not fully cooperating with their investigation. *Smith* A.436-437. The USAO repeatedly obliged. *See, e.g.*, *Smith* A.1216, 1226, 1228. When prosecutors were displeased with an individual's cooperation, Skadden wrote to the individual's counsel stating that payment of legal fees would cease unless the firm promptly received word from the USAO that the individual had begun to cooperate. *See, e.g.*, *Smith* A.1225, 1227, 1229. Letters sent to current employees also threatened

"disciplinary actions, including expulsion from the Firm." *Smith* A.1227. As Bennett later wrote to Weddle: "Whenever your Office has notified us that individuals have not … cooperat[ed], KPMG has promptly and without question encouraged them to cooperate and threatened to cease payment of their attorneys fees and … to take personnel action, including termination." *Smith* A.1244.

Skadden sent a copy of every such letter to the USAO, making sure prosecutors were aware that KPMG was leaving it up to them to decide whether a person had cooperated sufficiently to warrant continued payment of fees. *Smith* A.1227. As AUSA Stanley Okula confirmed, "KPMG ultimately … looked to us to determine whether … somebody had … cooperated or not cooperated." *Smith* A.462. In some instances these letters led the targeted individuals to change course. *See, e.g.*, *Smith* A.1231. When the letters did not have that effect, KPMG terminated fee payments and, in some cases, fired the purportedly non-cooperating employees. *See, e.g.*, *Smith* A.1234, 1260-1261, 1290, 1355-1356; *see also Smith* A.447 (Okula: "[Y]es, I think almost invariably it resulted in [fees] being cut off.").

H. KPMG's Struggle To Avoid Indictment And Its Repudiation Of Stein's Agreement

As the investigation proceeded, KPMG did its best to persuade prosecutors not to indict the firm, but the USAO remained skeptical. At a meeting in early March 2005 with Skadden and KPMG's top leadership, then-U.S. Attorney David

Kelley stated that he found the case "very troubling," adding that a non-prosecution agreement "was not likely." *Stein* A.1120. Kelley also expressed reservations about KPMG's cooperation, stating: "I've seen a lot better from big companies." *Smith* A.529, 1350. Bennett defended KPMG's cooperation, stressing its decision to limit fee payments and to terminate payments for those who did not cooperate. *Smith* A.1350; *Stein* A.1121.

Kelley ultimately decided that KPMG could not be allowed to escape indictment. *Stein* A.1095-1096. In a late April meeting, however, he told Skadden that he would give KPMG time to appeal his decision to Deputy Attorney General James Comey. *Stein* A.1089, 1091.

Facing a last-ditch appeal, KPMG grew increasingly concerned about the terms of its severance agreement with Stein. In an earlier meeting, prosecutors had made clear to Skadden that they strongly disapproved of KPMG's decision to grant Stein a severance package, describing it as a "troubling issue under the 'Thompson Memo.'" *Smith* A.1177. Moreover, by early May 2005, KPMG had paid substantially more than $400,000 in legal fees for Stein pursuant to its obligation under Stein's contract, *Stein* A.803-804—a fact that conflicted with KPMG's representations to the government that each individual's fees had been capped at $400,000 and that it had no legal obligation to advance fees. *Stein* A.855-856 (*Stein I*). On May 5, 2005, KPMG wrote to Stein repudiating its obligations to

advance Stein's attorneys' fees and to make further severance payments. S.A.10. According to KPMG's general counsel, who signed the letter to Stein, the timing of the letter was not coincidental: KPMG repudiated its contract with Stein precisely in order to "help [the firm] with the government." *Smith* A.538; *see also Stein* A.855-856 & n.80 (*Stein I*).

During its meeting with Comey, Skadden again touted KPMG's cooperation. Bennett stated that KPMG "had done something 'never heard of before'—conditioned the payment of attorney's fees on full cooperation with the investigation." *Smith* A.1355-1356. He added, "We said we'd pressure—although we didn't use that word—our employees to cooperate," and explained that KPMG had threatened to terminate fee payments every time the USAO reported that a current or former employee was not cooperating. *Smith* A.1356. The result, Bennett argued, was that people "who otherwise would not have cooperated did cooperate, and those who did not had their fees cut off." *Id.* Bennett emphasized that "what was really 'precedent-setting' about the case was the conditioning of payment of legal fees on cooperation." *Smith* A.1357.

These and other arguments persuaded Comey, *Stein* A.1203, who allowed KPMG to avoid indictment by entering into a deferred prosecution agreement ("DPA") under which KPMG admitted wrongdoing, paid a $456 million fine, and accepted restrictions on its practice, *Stein* A.317-344. KPMG also obligated itself

"to cooperate fully and actively" with the government in "any investigation, criminal prosecution or civil proceeding … relating in any way to the [USAO]'s investigation." *Stein* A.325, 328. This obligation continued even after the January 2007 dismissal of the information against KPMG. *Stein* A.328.

I. Proceedings In The District Court

In August 2005, the government indicted six of the thirteen appellees; an October 2005 superseding indictment added the remaining seven. Dkts. 1, 57. Upon indictment, KPMG promptly cut off legal fees for each appellee who was still receiving them.

In January 2006, appellees filed a pre-trial motion "to remedy the violation of [their] constitutional rights to counsel and a fair trial resulting from the prosecutors' wrongful interference with [appellees'] ability to obtain advancement of legal fees from KPMG." Dkt. 272, at 1. Appellees did not argue that dismissal of the indictment was the only available remedy, stating that "it is not too late to remedy the injury … by an order directing advancement of legal fees." *Id.* at 27. The district court ordered an evidentiary hearing and allowed limited discovery. Dkts. 433-434.

KPMG aggressively sought to broker stipulations among the parties that would limit the scope of the contested issues. As part of that effort, KPMG wrote to the district court, offering to stipulate that:

> The Thompson [M]emorandum in conjunction with the government's statements relating to payment of legal fees substantially influenced KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees with respect to the investigation and prosecution of this case.

S.A.51 (internal quotation marks omitted). KPMG went on to state: "We are unaware of any basis upon which the parties could dispute the accuracy of the above-quoted statements." *Id.*

Following a three-day evidentiary hearing, *Smith* A.343-773, the district court ruled that the USAO had violated appellees' Fifth and Sixth Amendment rights by pressuring KPMG into departing from its longstanding practice of advancing fees. *Stein* A.890. The court declined to dismiss the indictment, however, observing that there were at least two less drastic ways to remedy the harm: either the USAO could persuade or direct KPMG—which was obligated by the DPA to cooperate fully with the government—to pay appellees' fees in full, or appellees could successfully sue KPMG for those fees. *Stein* A.888.

Neither alternative bore fruit. As to the first, the USAO claimed to have no authority to direct KPMG to pay appellees' fees, and it refused to do anything to persuade KPMG to pay other than proclaiming that payment of fees would not harm KPMG's standing with the government—a step the district court explained was inadequate. *Stein* A.882. As to the second, the district court sought to exercise ancillary jurisdiction over a civil suit brought against KPMG by appellees.

Stein A.890; *United States v. Stein*, 452 F. Supp. 2d 230 (S.D.N.Y. 2006). This Court subsequently held, however, that the district court lacked such jurisdiction. *Stein v. KPMG, LLP*, 486 F.3d 753 (2d Cir. 2007). In its opinion, this Court observed that "[d]ismissal of an indictment for Fifth and Sixth Amendment violations is always an available remedy." *Id.* at 762-763; *see also id.* at 763 (noting that if there was a due process violation, "dismissal of the indictment is the proper remedy").

The district court then held another hearing, inviting additional submissions regarding the proper remedy for the constitutional violations. Though continuing to dispute the findings and conclusions in *Stein I*, the government told the court that if those findings and conclusions were correct, there was no adequate remedy other than dismissal. Dkt. 1051, at 1-6; *Stein* A.1375. Moreover, appellees submitted affidavits—which the government did not contest—detailing the crippling effect of the government's conduct on their ability to defend themselves against the sprawling and complex charges. *E.g.*, *Stein* A.1311-1318.

The district court considered and rejected the government's arguments that its factual findings in *Stein I* were erroneous, reviewing the evidence once again and noting that additional evidence not discussed in *Stein I*—some of which was not produced until after the fee hearing—further supported its findings. *Stein* A.1631-1646. In light of the government's acknowledgment that dismissal was the

only adequate remedy as long as *Stein I* stood, the court dismissed the indictment as to the thirteen defendants whose fees the court found KPMG would have paid in full but for the government's pressure. *Stein* A.1664. The court observed that it did so "only after pursuing every alternative short of dismissal and only with the greatest reluctance." *Id.*

SUMMARY OF ARGUMENT

The Sixth Amendment right to the assistance of counsel and the Fifth Amendment right to due process preclude the government from interfering with criminal defendants' access to resources that would otherwise be lawfully available to finance their defense. The prosecution in this case violated these rights by inducing KPMG to depart from its longstanding policy and withhold fees from appellees. The district court properly concluded that the only cure for appellees' constitutional injuries was dismissal of the indictment.

The government's attacks on the court's careful factual findings amount to little more than an effort to wish away the voluminous evidence of its unconstitutional conduct. The district court found, and the record amply demonstrates, that prosecutors, invoking the Thompson Memorandum, successfully pressured KPMG to depart from its unbroken practice of full and unconditional advancement of fees. But for prosecutors' interference, the court found, KPMG would have paid appellees' fees both before and after indictment.

Those findings are not only supported by substantial record evidence, but are also by far the most plausible interpretation of that evidence. They cannot be deemed clearly erroneous.

The government's conduct violated appellees' Sixth Amendment right to retain and pay counsel to assist in their defense. That right, which stands at the historical core of the Sixth Amendment, reflects the fundamental principle that, in an adversarial system, the government may not prevent a criminal defendant from employing all legitimate resources at his command in order to confront the government on an equal footing. The government's contention that it may interfere with impunity with businesses' lawful efforts to assist in their employees' defense—without any justification other than the desire to tilt the playing field in the government's favor—has no legal support and affronts basic Sixth Amendment values.

Perhaps recognizing the weakness of that argument, the government retreats to the irrelevant contentions—never raised below, and therefore forfeited—that it did not unconstitutionally "coerce" KPMG and that KPMG's conduct thus was not state action. But appellees need not show that the government's pressure on KPMG was the type of coercion that would render a confession or plea agreement involuntary; it is sufficient that, as the district court found, KPMG would have paid appellees' fees absent the government's improper pressure. And it is that

pressure—not KPMG's decision not to pay fees—that is the challenged "state action." These arguments ultimately amount to nothing more than thinly disguised, and unavailing, challenges to the district court's factual finding.

The government's conduct likewise violated the Fifth Amendment's guarantee of due process. At its core, that guarantee ensures that the prosecution may not gain an unfair tactical advantage by impeding a defendant's ability to defend himself—whether by withholding exculpatory evidence, presenting perjured testimony, or otherwise acting with the purpose of denying the defendant a fair and equal playing field. By depriving appellees of funds KPMG otherwise would have advanced, and thus seriously impairing their ability to defend this extraordinarily complex case, prosecutors did exactly that.

The government's unjustified hobbling of appellees' defense violated their procedural due process right to a fair trial. This alone warrants affirming the district court's Fifth Amendment ruling, without considering whether the government's conduct also violated the Fifth Amendment's substantive due process protections. Were the Court to reach that issue, however, it should affirm the district court's conclusion that, by deliberately wielding the threat of indictment against KPMG to deny appellees the resources to defend themselves, the government grossly abused its authority, in violation of appellees' fundamental rights.

Finally, the district court correctly concluded that dismissal of the indictment was the only adequate remedy for the serious harm the government inflicted on appellees' ability to defend themselves. Having failed in its efforts to provide a means for securing payment of appellees' legal fees—efforts in which the government resolutely refused to assist—the court found itself with no other choice. Indeed, the government conceded below that, in light of the court's findings and conclusions in *Stein I*, no other remedy was adequate. It is no answer for the government to argue now that it cured its violation in March 2006—many months after KPMG cut off appellees' fees—by stating that KPMG would not be penalized for paying fees. As the district court found, the government's improper and unconstitutional pressure caused KPMG to withhold appellees' legal fees, all of which it otherwise would have paid. No subsequent statement by the government could change that fact or reverse the injury it had already caused. The district court acted well within its discretion in dismissing the indictment.

STANDARD OF REVIEW

The district court's factual findings are reviewed for clear error. They may thus be set aside only if, after viewing the evidence "in the light most favorable to" appellees, *United States v. Harrell*, 268 F.3d 141, 145 (2d Cir. 2001), this Court is left "with the definite and firm conviction that a mistake has been committed," *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). "Where there are

two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. Factual findings based on the testimony and observation of witnesses are entitled to "particular deference." *United States v. Morrison*, 153 F.3d 34, 52 (2d Cir. 1998); *see also United States v. Quinones*, ___ F.3d ___, 2007 WL 4571412, at *13 (2d Cir. Dec. 28, 2007) (reaffirming "the deferential standard of review for factual findings based on oral testimony and documentary evidence").

The district court's conclusions as to pure questions of law are reviewed *de novo*. *United States v. Thorn*, 446 F.3d 378, 387 (2d Cir. 2006).

The district court's decision that dismissal of the indictment was the appropriate remedy for any constitutional violations is reviewed for abuse of discretion. *See United States v. Artuso*, 618 F.2d 192, 196 (2d Cir. 1980); *United States v. Fields*, 592 F.2d 638, 646-647 (2d Cir. 1978). It may therefore be reversed only if it rests on an error of law or a clearly erroneous factual finding, or if it "cannot be located within the range of permissible decisions." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

ARGUMENT

I. THE EVIDENCE FULLY SUPPORTS THE DISTRICT COURT'S FINDINGS OF FACT

After hearing days of live testimony and receiving hundreds of pages of documentary evidence, the district court made factual findings regarding the USAO's investigation of KPMG and KPMG's concomitant decision to depart (on this occasion only) from its longstanding practice of full, unconditional indemnification of its employees. Those findings, laid out in detail in *Stein I* and elaborated in *Stein IV*, provide the following coherent, credible explanation for all the evidence in the record:

At the start of the USAO's investigation, KPMG decided that in order to avoid indictment—which it believed would kill the firm—it had to cooperate fully with the investigation. At the same time, KPMG wanted to adhere to its long-standing practice of full advancement of fees; indeed, as Bennett told the USAO, it would be a "big problem" not to do so. The Thompson Memorandum, however, made KPMG aware that any non-mandatory advancement of fees could be deemed evidence of non-cooperation and thus increase its risk of indictment. Skadden therefore came to the February 25 meeting looking to sound out the USAO on advancement and to float the idea of paying fees only for employees who cooperated with the investigation. At the meeting, the USAO conveyed extreme hostility to non-mandatory fee payments, raising the specter of the Thompson

Memorandum (and hence indictment) in its first substantive comment and during every subsequent discussion of fees. It also drove home its views by threatening to look at any non-mandatory payments "under a microscope."

Convinced by these comments that it could not avoid death-by-indictment unless it abandoned its longstanding practice of full advancement of fees, KPMG succumbed to the government's pressure, formulating and eventually adopting a plan under which fees would be capped, conditioned on cooperation, and cut off upon indictment. Prosecutors voiced no objection to this plan. Indeed, they repeatedly took advantage of it by reporting to Skadden those individuals who, in the government's view, were not cooperating. This led KPMG to threaten those people with termination of fees and (for current employees) dismissal. Those who resisted the pressure were indeed cut off (and sometimes fired); others were coerced into cooperating. After repeatedly seeking credit for sacrificing its employees in this way, KPMG was rewarded with a deferred prosecution agreement.

The government's brief is replete with challenges to these findings. But those challenges amount to nothing more than the contention that the court should have adopted the government's preferred interpretation of the evidence. That is insufficient: even if the government's preferred interpretation explained the evidence as well as the district court's—and it does not—the clearly erroneous

standard "does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573. Rather, the government can prevail only if, after reviewing the evidence in the light most favorable to appellees, this Court is left "with the definite and firm conviction that a mistake has been committed." *Id.* As demonstrated below, the government cannot meet that burden. The record amply supports all the district court's findings.

A. The District Court's Findings Regarding The Thompson Memorandum Are Correct

Contrary to the impression the government seeks to convey, the Thompson Memorandum was not the sole, or even the most significant, element of the constitutional violations in this case. Rather, it was the use to which prosecutors put the Memorandum—as a tool to convey their message that payment of fees would increase KPMG's likelihood of indictment—that, as the district court found, convinced KPMG not to pay appellees' fees. Nevertheless, the government expends much of its effort disputing the district court's findings regarding the Thompson Memorandum. Those efforts fail.

The government contends that the district court clearly erred in finding that the Thompson Memorandum "discourage[d] payment of legal fees for company employees by increasing the risk of indictment of a company under investigation that chooses to make such payments." *Stein* A.1632. That claim is refuted by the

text of the Memorandum itself. The Memorandum required prosecutors to consider an organization's "willingness to cooperate with the government's investigation" before deciding whether to bring criminal charges. *Smith* A.1139. In prescribing the manner in which prosecutors should assess cooperation, it provided:

> [One] factor to be weighed … is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either *through the advancing of attorneys fees* [or in other ways] may be considered by the prosecutor in weighing the extent and value of the corporation's cooperation.

Id. (emphasis added). In a footnote, the Memorandum carved out a single exception, noting that "[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt," and that "a corporation's compliance with governing law should not be considered a failure to cooperate." *Smith* A.1144 n.4. The Memorandum was thus unambiguous: advancement of fees, unless required by law, increased an organization's risk of being deemed uncooperative and thus of being criminally charged.[9]

[9] The Thompson Memorandum, issued in January 2003, updated a 1999 advisory document known as the "Holder Memorandum." Although the Thompson Memorandum adopted many of the Holder Memorandum's provisions, including those regarding fee advancement, it departed from its predecessor in one significant respect: it made consideration of the factors it set out mandatory. *See* Suppression Br. 17 n.*. Even under the non-binding Holder Memorandum, it had

The government's claim (Br. 74) that the Thompson Memorandum disfavored fee advancement only "in rare cases" in which an organization advanced fees as part of a concerted effort to "circle the wagons" does not withstand scrutiny. As the district court observed, "[i]f the government means to take the payment of legal fees into account in making charging decisions only where the payments are part of an obstruction scheme … it would be easy enough to say so. But that is not what the Thompson Memorandum says." *Stein* A.872 (*Stein I*); *see also United States v. Rosen*, 487 F. Supp. 2d 721, 724 (E.D. Va. 2007) ("[T]he Thompson Memorandum suggests that an organization that advances attorneys' fees to an employee the government deems 'culpable' is more likely to be prosecuted than a similarly situated organization that does not advance fees, unless the organization is required by law to advance fees.").[10]

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become increasingly common "for defense counsel to be confronted by a federal prosecutor who believes that a corporation is not fully cooperating … solely because the corporation is paying the legal fees for an officer, director or employee." American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 Duq. L. Rev. 307, 335 (2003). "By replacing loose guidelines with strict requirements," Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 321 (2007), the Thompson Memorandum worsened that problem and increased the pressure on organizations not to pay fees.

[10] The Thompson Memorandum's reference to "culpable" employees does not support the government's position. That reference simply encouraged prosecutors—early in an investigation and before the facts were known—to view certain employees as "culpable" and to treat payment of fees to such employees as a factor favoring indictment. As one commentator put it, "[T]he Thompson

Indeed, the government's reading of the Memorandum is entirely backward. The Memorandum did not instruct prosecutors to consider whether an organization was "circling the wagons"—that is, obstructing an investigation—in order to determine whether its payment of fees was permissible; rather, it authorized prosecutors to treat fee advancement as evidence of non-cooperation. In other words, whereas the government asserts that the Memorandum allowed consideration of advancement only if advancement was being used to protect culpable employees, the text of the Memorandum made clear that advancement was itself evidence of such protection—even though such advancement had long been recognized to be lawful and beneficial.[11]

Memorandum treat[ed] virtually any employee who might be involved in misconduct as culpable well before the investigation [was] complete." Henning, *Targeting Legal Advice*, 54 Am. U. L. Rev. 669, 699 (2005); *see also The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Judiciary Comm.*, 109th Cong. 93 (2007) [hereinafter "*Thompson Memorandum's Effect*"] (statement of ABA President Karen J. Mathis) ("When implementing the … Thompson Memorandum, prosecutors often [took] the position that … employees … [were] 'culpable' long before their guilt ha[d] been proven or the company … had an opportunity to complete its own internal investigation.").

[11] In support of its reading of the Memorandum, the government identifies a company (HVB) that avoided indictment despite advancing fees. Br. 80-81; Suppression Br. 52. This proves nothing. Contrary to the government's characterization (Br. 51), appellees do not contend that the Thompson Memorandum *required* prosecutors to indict every company that advances fees, but only that it treated advancement as a factor weighing in favor of indictment—and, more importantly, that prosecutors *here* used the Thompson Memorandum,

Commentators agree that this was the Thompson Memorandum's meaning and effect: as one former DOJ official put it, "[a]fter the Thompson Memo, corporations seeking lenient treatment from Justice Department prosecutors r[a]n the risk that, if they advance[d] legal fees to their employees who [were] also under investigation, they [might] not qualify for leniency."[12] Prosecutors took the Thompson Memorandum as a green light to "pursue[] a strategy that put[] companies at risk of being branded as uncooperative," and thus of being indicted, if they refused to cut off fee payments.[13]

Growing concern about the Thompson Memorandum's coercive nature and its chilling effect on businesses' payment of attorneys' fees culminated in congressional hearings in 2006. Witness after witness testified that, in the words of former Attorney General Richard Thornburgh, the Memorandum's fee-advancement provision had "led to government pressure on companies to refuse to

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along with other statements, to send KPMG a clear message that paying fees would increase its risk of indictment.

[12] Robinson, *Get-Out-of-Jail Free Cards: Amnesty Developments in the United States and Current Issues*, 8 Sedona Conf. J. 29, 35 (2007); *see also* Sitarchuk & Smith, *New Department of Justice Guidelines on Corporate Prosecutions: Does the Song Remain the Same?*, Bus. L. Today, July/Aug. 2007, at 49, 51 ("Thompson explicitly stated that [advancement of fees] could be considered by prosecutors as a strike against the corporation[.]").

[13] Koppel, *U.S. Pressures Firms Not To Pay Staff Legal Fees*, Wall St. J., Mar. 28, 2006, at B1.

pay the legal expenses of employees or former employees."[14] Other witnesses confirmed that "[i]n light of the Draconian consequences of an indictment the Thompson Memorandum offer[ed] prosecutors enormous leverage."[15] Indeed, "the most troubling aspect of the Thompson [M]emorandum[] [was] the impact that it ha[d] on the ability of corporate employees to gain access to separate and competent legal counsel."[16] As former Attorney General Edwin Meese put it: "Companies reasonably consider each of the Thompson Memorandum factors to be mandatory. Given the Thompson Memorandum's indefiniteness about how the government will weigh its nine factors and the examples provided for each, in my judgment, corporate counsel would be irresponsible to advise their clients otherwise."[17]

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[14] *Thompson Memorandum's Effect* 142; *see also id.* at 23 (statement of ABA President Karen J. Mathis) ("[The Thompson Memorandum] instructs prosecutors to deny cooperation credit to companies that assist or support their so-called culpable employees … by paying for their legal counsel[.]").

[15] *Id*. at 25 (statement of Andrew Weissman, Partner, Jenner & Block).

[16] *Id*. at 27 (statement of Mark B. Sheppard, Partner, Sprague & Sprague).

[17] *Id.* at 127. The district court's findings mirrored Meese's assessment. *See Stein* A.872 (*Stein I*) ("Few if any competent defense lawyers would advise a corporate client at risk of indictment that it should feel free to advance legal fees to individuals in the face of the language of the Thompson Memorandum itself. It would be irresponsible to take the chance that prosecutors might view it as 'protecting … culpable employees and agents.'").

Faced with mounting pressure from the legal community, as well as with proposed legislation that would have foreclosed consideration of attorneys' fees entirely, *see* S.186, 110th Cong. § 3 (2007), the Justice Department abandoned the Thompson Memorandum in late 2006 in favor of a new document known as the "McNulty Memorandum." In stark contrast to the Thompson Memorandum, the McNulty Memorandum provides that "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment." S.A.87. In a footnote, the Memorandum sets out a narrow exception: "In extremely rare cases [and only with the approval of the Deputy Attorney General], the advancement of attorneys' fees may be taken into account when the totality of the circumstances show[s] that it was intended to impede a criminal investigation." S.A.94 n.3.[18]

[18] The government points out (Br. 19) that this footnote cites the government's opening brief in the suppression appeal, intimating that prosecutors in this case followed the policies laid out in the McNulty Memorandum. That suggestion is unfounded. The government has already represented to this Court that "the AUSAs in this case … never had the belief that KPMG was using its fee advancement policy to shield culpable employees," Suppression Reply 53, and the USAO's actions thus cannot be explained by the notion that it faced the "extremely rare case" of obstruction alluded to in the McNulty Memorandum. The government also notes (Br. 19) that under the McNulty Memorandum, "[r]outine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid" are not prohibited. S.A.94 n.4. Of course, as the district court found, the government's conduct here went well beyond such "[r]outine questions."

The Thompson Memorandum's fee provisions were thus repudiated in the McNulty Memorandum: while the former instructed prosecutors to view fee advancement as a sign of non-cooperation subject to one narrow exception (a legal obligation to pay fees), the latter precludes prosecutors from viewing fee advancement as a sign of non-cooperation subject to one narrow exception (intent to obstruct an investigation). As a high-ranking DOJ official explained in a recent statement to Congress:

> [T]he Thompson Memorandum … directed that a federal prosecutor, as part of assessing whether a corporation cooperated with a government investigation, may look at whether the company is paying the attorneys' fees of individuals alleged to have committed the fraud. The [McNulty Memorandum] generally prohibits prosecutors from considering whether a corporation is advancing attorneys' fees to employees or agents under investigation or indictment.[19]

In short, the government cannot credibly assert that the district court committed clear error by refusing to find that the contradictory fee advancement provisions of the Thompson Memorandum and the McNulty Memorandum somehow meant the same thing. The court correctly found that the Thompson

[19] *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Judiciary Comm.*, 110th Cong. 21-22 (2007) (statement of Deputy Assistant Att'y Gen. Barry M. Sabin); *see also* 153 Cong. Rec. S181 (daily ed. Jan. 4, 2007) (statement of Sen. Specter) (noting that the McNulty Memorandum departs from the Thompson Memorandum, "which effectively denied the payment of counsel fees").

Memorandum sent an unmistakable message to organizations under investigation: advance legal fees at your peril.

B. The Government's Challenges To The District Court's Findings Regarding The February 25 Meeting Lack Merit

As the district court correctly found, the USAO clearly conveyed that same message—that by advancing legal fees for employees the USAO deemed "culpable," KPMG risked indictment and thus destruction—to counsel for KPMG at their initial February 25 meeting.

1. The district court's findings regarding what was said at the February 25 meeting are fully supported by documentary evidence and witnesses' testimony

Although the government does not expressly challenge any of the district court's findings regarding what was said at the February 25 meeting, it repeatedly intimates that some of those findings are suspect. For example, the government observes that no witness at the fee hearing admitted to recalling Weddle's threat that the USAO would scrutinize non-mandatory fee payments by KPMG "under a microscope"—without expressly arguing that the district court committed clear error in finding that the statement was made. Br. 22; Suppression Br. 30-31 n.*, 56 n.*. The reason the government restricts itself to innuendo is that any such argument would be frivolous: notes taken during the meeting clearly attribute the threat to Weddle, *Smith* A.1339, and the government has suggested no reason why their author would have contemporaneously recorded (and underlined) the

statement had it not been made.[20] Nor did the government put on any witness—such as Weddle himself—to deny that the statement was made. Any failure of the witnesses who did testify to recall Weddle's statement is easily explained (even ignoring motivation *not* to recall it) by the 26-month gap between the meeting and the fee hearing. The government's unstated assertion that the district court clearly erred in relying on uncontradicted, unchallenged, contemporaneous notes—the very purpose of which is to guard against imperfect memories—is absurd.[21]

Equally unworthy of this Court's attention are similar backhanded attacks on other findings the district court made regarding what was said at the February 25

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[20] The government points out (Br. 98) that a different set of notes taken by an IRS agent do not reflect the comment. But putting aside that the absence of a specific comment in one set of notes hardly casts doubt on the accuracy of its inclusion in another set, the government ignores the IRS agent's testimony that she had missed something Weddle said around the time of the "microscope" comment, and had so indicated in her notes. *Smith* A.589-590.

[21] The government suggests (Br. 99 n.*) that the day after testimony closed at the fee hearing, the district court rejected a government offer to reopen the evidence and have Weddle testify. The full exchange tells a different story. When the court observed that Weddle "didn't take the stand," *Smith* A.758, government counsel stated, "[T]here are … reasons strategically not to call certain witnesses. I hope I have some credibility with the court," adding, "If we have to put Mr. Weddle on to deny making that statement, fine. Nobody came into the courtroom and recalled that statement." *Smith* A.759. The court responded, "Let's just go on. I frankly can't decide this matter on the basis of which lawyers have credibility with me." *Id*. Even if that constituted a genuine offer to have Weddle testify—and the district court clearly did not understand it as such—the government does not explain why the court was obligated to excuse its admittedly "strategic[]" decision not to call him before the close of evidence.

meeting. For example, the government observes (Suppression Br. 29-30 n.*) that one Skadden lawyer testified, consistent with his notes from the meeting, that when Weddle initially inquired about fees, Bennett responded by asking for the USAO's views on the subject, to which Neiman replied that the Thompson Memorandum "had to be considered." *Smith* A.365; *see also Smith* A.1338. But the government goes on to state that "no other notes or testimony regarding the meeting reflect that exchange." Suppression Br. 29-30 n.*. Again, the government apparently hopes this Court will question the district court's finding that the exchange occurred. Yet, again, the government cannot actually argue for such a result, knowing there is no serious basis to contend that the district court was required to reject testimony that was not only uncontradicted but also corroborated by contemporaneous notes.[22]

[22] Similarly, relying on testimony given at the fee hearing, the government contends (Suppression Br. 30-31 n.*) that Neiman's comment that "misconduct" should not "be rewarded" referred to severance packages, rather than legal fees. The district court, which heard the relevant testimony, found that the statement "was understood by both KPMG and government representatives as a reminder that payment of legal fees by KPMG … could well count against KPMG in the government's decision whether to indict the firm." *Stein* A.852. The government nowhere expressly argues that this finding was clearly erroneous, and it could not credibly do so, in light of the fact that the handwritten notes and memorandum of the IRS agent present at the meeting, as well as the notes of a Skadden attorney, each juxtapose Neiman's comment with the discussion of fees. *See Stein* A.851 (quoting notes and memorandum).

Finally, there is no merit to the government's footnoted claim that the USAO's statements at the meeting were "directed solely at determining whether KPMG was attempting to shield culpable employees under the guise of entity cooperation." Suppression Br. 55-56 n.*. The government's lone supporting piece of evidence is Neiman's testimony that Weddle's "microscope" comment, if made, "would suggest that it's perfectly fine to pay legal fees, but they could be scrutinized if, in fact, they were paid in an effort to circle the wagons." *Smith* A.637. But the government has already represented to this Court that "the AUSAs in this case … never had the belief that KPMG was using its fee advancement policy to … shield culpable employees." Suppression Reply 53. Neiman herself testified similarly, saying that prosecutors "were not concerned that KPMG w[as] circling the wagons, because they didn't appear to be doing that." *Smith* A.657. Moreover, Neiman's post-hoc explanation cannot be squared with Weddle's actual comment as recorded in contemporaneous notes: "[I]f [you] have discretion re fees—we'll look at that under a microscope." *Smith* A.1339. That comment does not suggest that the government would scrutinize payment of fees if KPMG were "circling the wagons," but rather that it would do so if KPMG had any "discretion" to pay fees. The government's "circling the wagons" explanation is thus both wholly implausible and flatly inconsistent with the government's own representations to this Court.

2. The district court correctly found that the USAO's statements conveyed the message that payment of legal fees would increase KPMG's risk of indictment

In addition to attacking the district court's specific findings regarding what occurred at the February 25 meeting, the government contends (Suppression Br. 56-57) that the court clearly erred in finding that "while the USAO did not say in so many words that it did not want KPMG to pay legal fees, no one at the meeting could have failed to draw that conclusion." *Stein* A.852. According to the government, this finding is "notable" for two reasons: first, "no witness testified that any such conclusion was drawn from the meeting," and second, Bennett began the meeting by announcing KPMG's intention to cooperate and subsequently stated that KPMG's tentative plan was not to pay fees for employees who declined to cooperate. Suppression Br. 57.

As to the government's first objection, the unstated premise that direct evidence on the point was required is faulty. In any event, there is such evidence: at the evidentiary hearing on several appellees' motions to suppress their proffer statements, a witness testified that, soon after the February 25 meeting, a Skadden lawyer who attended told him that "KPMG wanted to pay attorney's fees, [but] that the government did not want KPMG to pay attorney's fees." *Smith* A.981. This testimony—which the government neither objected to nor challenged on cross-examination, perhaps because it was corroborated by both contemporaneous

notes, *Smith* A.1342, and a contemporaneous e-mail, S.A.74—allows for no serious argument that the district court clearly erred in finding that at the February 25 meeting the USAO conveyed the message that it did not want KPMG to pay fees. To the contrary, in combination with the statements that prosecutors themselves made at the meeting—statements clearly suggesting that payment of fees would increase KPMG's risk of death-by-indictment—this testimony shows that the court's finding was correct.[23]

As to the government's second point, two responses are in order. First, the government does not explain why KPMG's announcement during the meeting that it planned to pay fees only for those who cooperated—a plan that was in any event avowedly tentative, *see, e.g.*, *Smith* A.1199, 1338—is inconsistent with the USAO having conveyed a message that it did not want payments made.

Second, the government conflates two related but distinct issues, namely KPMG's decision to cooperate and its decision to depart from its longstanding practice regarding fees. It is true that even before the February 25 meeting, the Thompson Memorandum had persuaded KPMG that it needed to cooperate with the USAO's investigation, and that Bennett voiced this view early in the meeting. But it is equally true that by the start of the meeting (and indeed by the end),

[23] The court's finding is also consistent with the testimony of one of the AUSAs present at the February 25 meeting that he did not believe KPMG should advance fees unless it was legally required to do so. *Smith* A.411.

KPMG had made no decision regarding fee payments.[24] On the one hand, "KPMG wanted to pay attorney's fees," *Smith* A.981, as it had in every other case, and believed "it would be a big problem" not to do so, *Smith* A.1146. On the other hand, because KPMG had read the Thompson Memorandum's fee provisions and discussed the Memorandum with Skadden, it knew that prosecutors could consider fee payment evidence of non-cooperation weighing in favor of indictment. *Smith* A.475-476. Skadden therefore came to the meeting to gauge the USAO's reaction to fee payments—indeed, the first thing out of Bennett's mouth on the topic was a request for the USAO's views, *Smith* A.365, 1338—and Bennett emphasized, even as he floated a tentative proposal, that no decisions had been made, *Smith* A.422. In short, Bennett's comments do nothing to undermine the district court's finding that the USAO conveyed to Skadden the message that KPMG should not pay fees.

The government also briefly suggests (Suppression Br. 57) that even if the USAO did convey such a message during the February 25 meeting, the district court clearly erred in finding that KPMG received that message. The only point

[24] The government appears to dispute this at one point, saying that "the record is clear that KPMG made its decision on its legal fee policy" before the February 25 meeting. Suppression Br. 68. No citation to the "clear" record is provided, however, and elsewhere in the same brief the government concedes that during the February 25 meeting Skadden "reiterated that no final decision regarding payment of fees had been made." *Id.* at 30 (citing *Smith* A.1199, 1338); *see also, e.g.*, *Smith* A.1146 (Weddle e-mail summarizing his March 2 call with Bennett: "[Bennett's] preliminary view on legal fees was as follows: (he said it was not decided yet[.])").

the government makes in support of this suggestion is that KPMG's then-deputy general counsel, Joseph Loonan, did not recall having discussed the issue with Skadden after the meeting. The government does not explain, however, either why the district court had to credit this part of Loonan's testimony (another part of which the court labeled "perfectly absurd," *Smith* A.739), or why, even if the court did credit the testimony, Loonan's limited recall of two-year-old events proves that Skadden did not convey the message to him or others at KPMG.

In any event, other documentary evidence—notes taken by KPMG executive Greg Russo at a debriefing the Skadden attorneys provided KPMG directly after the February 25 meeting—clearly establishes that Skadden did pass on the USAO's message. Russo's notes juxtapose the phrases "paying legal fees" and "not a sign of cooperation," *Stein* A.1072, demonstrating, as the district court found, that Skadden lawyers had conveyed to KPMG that "payment of legal fees … would increase the chance that KPMG would be indicted" and thus destroyed, *Stein* A.1646 (*Stein IV*). Although the government's brief (at 92-94) addresses the other new evidence that the district court relied on in *Stein IV*, it is silent on this aspect of the Russo notes. Those notes, together with the other evidence in the record—such as KPMG's decision to back out of its agreement to pay Richard Smith's fees just two days after the February 25 meeting—show that the district court's finding that KPMG "got the message" was manifestly correct.

Finally, the government argues (Suppression Br. 57) that even if the USAO communicated the message that KPMG should not pay fees, "the evidence is uncontested that KPMG … ignored that [message] and … paid the fees, subject to terms and conditions of its own devising." This statement sounds a recurring theme in the government's briefs: the notion that because the USAO never suggested the precise approach to advancement that KPMG adopted, any coercive tactics the USAO engaged in must have failed. That reasoning is untenable. KPMG's withholding of fees was not, from the USAO's perspective, an end in itself. It was instead a means to make convictions easier by impairing appellees' ability to defend themselves. The plan for limited and conditioned fee payments that Skadden and KPMG devised after the February 25 meeting furthered the USAO's goal even more effectively than a decision not to pay fees at all, by giving the USAO the ability (through KPMG) to pressure appellees and others into giving proffer statements that helped the government build its case and eventually indict a host of individuals—at which point fees *were* completely cut off. It thus makes no sense to argue, as the government does, that because the USAO did not specifically devise KPMG's fee plan, its adoption undermines the court's finding that the USAO's pressure caused KPMG to abandon its previously inviolate practice of paying fees in favor of that plan. KPMG can hardly be said to have resisted the prosecutors' pressure by giving them even more than they had demanded.

C. The District Court Correctly Found That KPMG Would Have Paid All Of Appellees' Fees But For The Government's Pressure

The government next challenges (Suppression Br. 63-70) what it correctly characterizes as the "factual linchpin" of the district court's decisions (*id.* at 63): the court's finding that "[a]bsent the Thompson Memorandum and the actions of the USAO, KPMG would have paid the legal fees and expenses of all of its partners and employees both prior to and after indictment, without regard to cost," *Stein* A.861 (*Stein I*). Far from being clearly erroneous, that finding has a wealth of support.

1. The government stipulated that KPMG had always paid legal fees fully and unconditionally before this case

One piece of evidence alone suffices to support the district court's finding: the government's stipulation that KPMG had paid fees in every previous case, civil or criminal, without a condition of cooperation and without regard to cost. As the stipulation stated:

> Prior to February 2004, … it had been the longstanding voluntary practice of KPMG to advance and pay legal fees, without a preset cap or condition of cooperation with the government, for counsel for partners, principals, and employees of the firm … in any civil, criminal or regulatory proceeding involving activities arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee.

Smith A.1133. Moreover, "[t]his practice was followed without regard to economic costs or considerations with respect to individuals or the firm." *Smith*

A.1134. In light of this stipulation, the government cannot credibly contend that the court committed clear error in finding that KPMG would have continued its decades-long practice absent the Thompson Memorandum and the USAO's actions.

The government's effort to undermine the significance of its stipulation is unavailing. Noting that the most recent prior indictment of a KPMG employee occurred in the 1970s, it argues—while not contesting that KPMG paid pre- and post-indictment fees on that occasion—that one occasion is insufficient evidence to support a finding that KPMG would similarly have paid fees here. Suppression Br. 64. That argument fails for several reasons. First, it rests on the notion that the district court was required to disregard KPMG's long history of paying fees in civil and regulatory matters. The text of the stipulation itself refutes that notion, addressing criminal and non-criminal cases as indistinguishable—undoubtedly because that is precisely how KPMG always treated them, fully indemnifying employees in all cases, regardless of type.

Moreover, even if only prior payment of fees for indicted employees was relevant, the government's argument is curious. It objects to the district court's finding that KPMG would have acted as it had previously, yet its preferred finding is that KPMG would have acted in a way that it *never* had before. The government's position, then, is that the district court was required to find that

KPMG would have acted differently than it had in the past, and committed clear error in finding that it would have acted similarly. Merely stating this position reveals its incoherence.

The only rationale the government offers for this argument is that this case was qualitatively different from the one in the 1970s. The government points to a Skadden attorney's statement during the February 25 meeting that KPMG generally paid legal fees for employees, but that because "this was new territory," KPMG was tentatively planning to condition fees on cooperation. Suppression Br. 65 (quoting *Smith* A.615). But the government's view that this comment referred to the "unprecedented convergence of civil, criminal, and regulatory crisis" facing KPMG (Suppression Br. 64) is not required by anything in the record; that is simply the government's preferred inference. An at least equally plausible inference—and the one that must be drawn when viewing the evidence in the light most favorable to the prevailing party—is that the "new territory" referred to was a world in which the Department of Justice had directed its prosecutors that any non-mandatory fee payments could be viewed as an indication of non-cooperation weighing in favor of indictment. The government's only evidence on this point thus actually supports the district court's finding.

2. KPMG itself represented that the Thompson Memorandum and the USAO's actions substantially influenced its decision regarding fees

KPMG's past practice of full and unconditional payment of fees was hardly the only evidence supporting the district court's finding. Indeed, before the fee hearing, KPMG itself asked the court to accept its "unequivocal[]" and "categorical[]" representation that "[t]he Thompson memorandum in conjunction with the government's statements relating to payment of legal fees substantially influenced [its] determination(s) with respect to the advancement of legal fees" in this case. S.A.50-51 (internal quotation marks omitted). In light of this representation, the district court's finding that the government led KPMG to depart from its longstanding practice cannot be clear error; rather, it is manifestly correct.

The government attempts to minimize the import of KPMG's representation by arguing (Br. 84) that it is "consistent" with the conclusion that KPMG would have abandoned its longstanding practice even without government pressure. That argument drains KPMG's words of any meaning. To say that the Thompson Memorandum and the USAO's actions "substantially influenced" KPMG's decision regarding fee payments is to say that it is all but certain that if not for those factors the decision would have been different. This is clearly the view that KPMG held when it made its representation, because it characterized the representation as resolving "one of the ultimate factual issues in defendants'

motion." S.A.51. That issue, of course, was whether KPMG's decision not to pay fees was the result of government pressure. Yet the government now takes the position that not even KPMG's "unequivocal[]" representation regarding that issue can suffice to support the district court's finding. That position is indefensible.

3. A wealth of other record evidence indicates that KPMG intended to adhere to its practice of advancing fees in this case prior to its meeting with the USAO

As discussed above, other record evidence further supports the district court's finding that KPMG would have adhered to its past practice but for the government's conduct:

- Just days before the USAO's investigation began, KPMG executed a severance agreement with Jeffrey Stein that obligated the firm to pay all his legal fees without limitation. S.A.6-7. KPMG later repudiated that contract for the specific purpose (as the firm's general counsel testified) of improving its standing with the government. *Smith* A.538.

- Before the February 25 meeting, KPMG negotiated a retention agreement with Richard Smith that likewise would have obligated the firm to pay all his legal fees, but when Smith met with KPMG's then-CEO two days after the February 25 meeting to finalize and execute the agreement, KPMG refused to sign. *Stein* A.928-930.

- KPMG's then-CEO sent a voice message to all partners shortly before the February 25 meeting stating that employees' fees would be paid by the firm, with no mention of any cap or condition of cooperation, and referring to a recent matter in which KPMG had paid more than $20 million to defend four partners. *Stein* A.1070.

- KPMG executive Greg Russo's notes of his briefing from Skadden regarding the February 25 meeting make clear that the USAO had told Skadden that "[p]aying legal fees" was "not a sign of cooperation." *Stein* A.1072.

- One Skadden lawyer said shortly after the meeting that "KPMG wanted to pay attorney's fees [but] that the government did not want KPMG to pay attorney's fees," *Smith* A.981, and another Skadden lawyer told Weddle a few days later that it "would be a big problem" for KPMG not to pay fees, *Smith* A.1146.

- KPMG has paid over $3.4 million in legal fees in civil and regulatory proceedings involving these same appellees arising from the same conduct at issue in the criminal proceedings—on the condition that appellees not use the lawyers representing them in the criminal case. *Stein* A.1557-1558; *Smith* A.558.

In response to the district court's observation that the government's challenge to the court's factual finding ignored all of this evidence, *Stein* A.1642-1643 (*Stein IV*), the government now ventures explanations for several of these facts, *see* Br. 90-94—while claiming (90 pages into its 25,690-word brief) that space considerations preclude "a point-by-point rebuttal." The issue, however, is whether this Court "*on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added). Though the government may not care to make (or may not have) explanations for the remaining pieces of evidence—such as the Russo notes—this Court must consider them in deciding whether the district court's finding should be set aside.[25]

[25] The government also complains about the district court's observation in *Stein IV* that the government failed to call any witnesses to testify regarding KPMG's fee advancement decisions, noting—as it does repeatedly in its brief—that "the defendants bore the burden of proof on the issue." Br. 25 (citing *Stein* A.1642-1643). But the court was merely responding to the government's argument

The government's partial attempt to explain away this evidence falls well short of proving the court's finding clearly erroneous. A notable example is the government's feeble explanation for KPMG's decision to sign, and later repudiate, Stein's contract. That contract provided, in no uncertain terms, that Stein "shall be represented in all legal proceedings or actions … brought against [him] arising from and within the scope of his duties and responsibilities … by qualified counsel," including, if appropriate, counsel separate from KPMG's, and that "[t]he cost of such separate counsel, and related expenses, shall be the responsibility of the Firm and not that of [Stein]." S.A.6-7. The government now invokes the testimony of KPMG's general counsel, Joseph Loonan, that this provision actually imposed *no* obligations on KPMG because the payment of fees was described as "consistent with the Firm's general policy and practice"; according to Loonan, this meant that if KPMG's "policy and practice" changed after Stein's agreement was executed, the new policy would apply to Stein as well. Br. 90 (citing *Smith* A.173, 179). The district court found this testimony "perfectly absurd," *Smith* A.739, and

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that its findings in *Stein I* were clearly erroneous. In doing so, it both explained that the existing record more than supported its findings and pointed out that the government had the opportunity to make a fuller record if it believed such a record might have required different findings. That response is entirely legitimate, and it does not, as the government implies, amount to burden-shifting. More generally, the government's proclamations about who bore the burden of proof below, while true, are irrelevant. Appellees carried their burden. The issue now is whether the government can carry *its* heavy burden to have the district court's factual findings set aside.

in light of the contract's unequivocal requirement that KPMG pay fees, that characterization was justified. *See also Smith* A.697-698.

As to Smith's retention agreement, the government's argument (Br. 94) is that although KPMG backed out of the agreement just two days after the February 25 meeting, Smith's affidavit recounting KPMG's excuse at the time "makes no mention of the legal fees payment provisions being an issue." But the government nowhere explains why the timing of events did not by itself give the district court ample basis to conclude that those provisions were indeed an issue—in fact the driving issue—for KPMG's refusal to sign.

Regarding KPMG's decision to pay appellees' fees in civil and regulatory actions arising from the same conduct, the government contends (Br. 91) that the decision was driven by KPMG's liability insurance, which does not cover criminal matters. Indeed, the government calls it "[i]nexplicabl[e]" that the court "rejected this eminently practical reason for the distinction." *Id.* But the government argues as if the terms of KPMG's policies were established fact. To the contrary—although the government fails to mention it—those policies were never put in evidence, and the district court made clear during the fee hearing that it would not countenance the government's effort to inject insurance into the case without introducing the actual policies. *See Smith* A.560-562, 738-739. While KPMG's counsel testified that the firm's policies did not cover criminal matters, in light of

the government's failure to introduce the policies, the district court had no obligation to credit that assertion. Far from being inexplicable, the court's decision not to view KPMG's insurance as explaining the firm's disparate treatment of this case and the related civil and regulatory proceedings was entirely rational.[26] Further, as noted above, KPMG's stipulation makes clear that its fee decisions had previously been made regardless of economic considerations, *Smith* A.1134, which hardly squares with the government's attempt to pin the change in policy on insurance limitations.

Finally, the government points to KPMG's representation, in the statement of facts accompanying its DPA, that it had departed from its longstanding practice of full indemnification "on its own initiative." *See, e.g.*, Suppression Br. 31-32 n.*.[27] But the government's characterization of this statement as "the only direct evidence relating to the impetus for KPMG's decision on fees," *id.* at 63, is simply false. As discussed above, KPMG "unequivocally" represented to the district court

[26] The government suggested that it did not put the policies into evidence only because KPMG refused to produce them. *Smith* A.561. But KPMG's DPA obligated the firm to cooperate with the government's prosecution, *see Stein* A.325-328, so there is no reason it could not have been required to produce the policies.

[27] The district court correctly observed that "the government failed to offer th[e DPA] in evidence or make this argument on the present motion." *Stein* A.861 n.97. In addition to being meritless for the reasons given in text, this argument is thus forfeited.

that "[t]he Thompson memorandum in conjunction with the government's statements relating to payment of legal fees substantially influenced KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees" in this case. S.A.50-51 (internal quotation marks omitted). Moreover, that representation—unlike the one in the statement of facts—was made in connection with the fee hearing and in order to resolve the "ultimate factual issue[]" of the effect of the USAO's conduct on KPMG's decision regarding fees. S.A.51. In light of KPMG's "unequivocal[]" representation on that subject, the district court was under no obligation to give the sentence in the statement of facts the talismanic significance the government ascribes to it.

In the end, the government's argument that the district court erred in finding that KPMG cut off appellees' fees because of government pressure is simply that the court "gave unduly short shrift to the many reasons, wholly unrelated to the Thompson Memorandum [and the USAO's conduct], that would necessarily have been factored in to KPMG's thinking on this issue." Suppression Br. 65. Even were that the case, the court's weighing of various factors and its finding as to the factor that actually drove KPMG's decision could not be deemed clearly erroneous. But that is not the case. Rather, the entire record—including KPMG's undisputed past practice, its unequivocal representation that the government's

conduct substantially influenced its decision, and a wealth of documentary evidence—strongly supports the district court's conclusion that KPMG would have paid appellees' fees but for the government's pressure not to do so.

D. The District Court's Finding That The USAO Sought To Minimize The Involvement Of Defense Counsel Was Amply Supported

The government also challenges (Suppression Br. 58-63) the district court's finding that the USAO's conduct revealed "a desire to minimize the involvement of defense attorneys." *Stein* A.861 (*Stein I*). Although this finding is not necessary to the conclusion that the government's actions violated appellees' constitutional rights, the record abundantly supports it.

The primary support, of course, is the USAO's successful efforts to induce KPMG to depart from its longstanding practice of full advancement. The whole point of these efforts was to minimize the involvement of defense counsel. In so doing, the government ensured that the subjects of the USAO's investigation would have their ability to pay for a lawyer severely limited, and that persons who were indicted would have their fees cut off altogether, depriving them of substantial resources with which to defend against the charges. As demonstrated above, the district court's finding that KPMG's actions were indeed the result of the government's pressure is unassailable, and by itself suffices to support the

court's subsidiary finding about the government's effort to minimize the involvement of defense counsel.

The district court, however, pointed to additional evidence that bolsters that subsidiary finding, principally the USAO's conduct in regard to the "advisory memo" that KPMG distributed to employees in March 2004. *See supra* pp.18-20. The district court found that "the government's purpose in demanding [that KPMG issue a supplemental memo] was to increase the chance[] that KPMG employees would agree to interviews without consulting or being represented by counsel." *Stein* A.855. The government argues that it merely wanted to alert KPMG employees that they could hire their own attorneys rather than using those retained by KPMG (Suppression Reply 41-42) and that "the only substantive difference" between the original memo and the USAO's proposed supplement was that the latter flagged the "third option of retaining counsel independently" and noted that lawyers paid by KPMG would not report an employee's contact with the government to KPMG absent consent (Suppression Br. 60). That explanation does not withstand scrutiny.

To begin with, the government is wrong that the "only" difference between the advisory memo and its proposed supplement is the one it identifies. For example, the original memo—but not the government's supplement—detailed the benefits employees would enjoy by opting to have counsel, *Smith* A.1299, making

it more likely that employees would do so. In addition, the original memo—but not the supplement—advised employees that they had the right not to speak to the government, *Smith* A.1298, that it would be "improper for investigators to resort to threats or intimidation, whether express or implied, in order to obtain an interview," *Smith* A.1299, and that employees who did agree to an interview "retain[ed] the right to suspend or terminate [the] interview at any time," *id.*[28]

Yet more damning to the government's post-hoc explanation is the fact that the supplement KPMG ultimately distributed nowhere mentioned the "third option" of retaining independent counsel that the government claims was so important. *Smith* A.1322-1325. That is so even though KPMG sent a draft of the supplement to the USAO (at the USAO's request) and asked prosecutors to share "any questions or concerns" they had. *Smith* A.1303. The USAO did express concerns about other aspects of the memo, leading to additional changes, *Smith* A.1319, but it raised no objection to the draft supplement's omission of the "third option." Were it true that the USAO was motivated by a desire to inform KPMG employees about that option—rather than a desire to downplay the benefits of counsel and stress employees' freedom to forego counsel (two things the draft and

[28] The government is also wrong in claiming (Suppression Br. 60) that its supplement was needed to inform employees about whom KPMG-paid attorneys would represent: the original memo addressed the topic, stating that lawyers paid by the firm "would not represent KPMG … but rather would provide independent legal representation" to the employee. *Smith* A.1298.

final supplements actually did)—prosecutors surely would have flagged the omission for KPMG.

After appellees in the suppression appeal raised this point (Smith Br. 49; Watson Br. 44), the government responded only that the events merely demonstrated "that KPMG was not the Government's agent and did not 'do its bidding'" (Suppression Reply 42). That misses the point. In light of the USAO's previous statement to Skadden that the problems it perceived with the original memo "must be remedied," *Smith* A.1300, and its willingness to raise other concerns about the supplement, it is implausible that prosecutors would have allowed the supplement to be issued unless their concerns had been addressed.

In short, while simply offering a credible alternative explanation for its actions would not be enough to render the district court's explanation clearly erroneous, the government does not even offer its own credible explanation. The district court correctly found that the government's conduct of this investigation demonstrated an improper intent to minimize the involvement of defense attorneys.

II. THE GOVERNMENT'S CONDUCT VIOLATED APPELLEES' SIXTH AMENDMENT RIGHT TO COUNSEL

A. The Sixth Amendment Bars The Government From Unjustifiably Interfering With Funds Lawfully Available To Defendants To Obtain Counsel And Mount A Defense

The government's conduct in this case offended the most fundamental guarantee of the Sixth Amendment: that the government will not interfere with a defendant's retention of counsel to assist in his defense. The Sixth Amendment right to counsel originated in response to the English common-law rule that generally prohibited prisoners charged with treason or felony from availing themselves of the assistance of counsel. *See Powell v. Alabama*, 287 U.S. 45, 60 (1932); *Faretta v. California*, 422 U.S. 806, 823-825 (1975); *see generally* Tomkovicz, *The Right to the Assistance of Counsel* 2-21 (2002). The American response to this "passionately assailed" practice, *Powell*, 287 U.S. at 60—first in the constitutions and statutes of the colonies and then in the Sixth Amendment itself—was to ensure that defendants could choose whether to defend themselves or to retain counsel to represent them. *Id.* at 60-65; *Faretta*, 422 U.S. at 828-829. "This right to retained counsel … recognized the defendant's freedom of choice to use his resources to provide that form of representation … that he deemed best suited for his defense." 3 LaFave et al., *Criminal Procedure* 461 (2d ed. 1999).

Thus, from its inception, the Sixth Amendment was designed to bar the government from meddling with a defendant's decision regarding whether, or how,

to employ counsel. A central aspect of that guarantee is a defendant's "'right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.'" *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2561 (2006) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989)). "This right to use one's own resources—financial or otherwise—to secure representation by a defense attorney has never been seriously questioned. When occasions have arisen, the Supreme Court has consistently and resoundingly affirmed its solid constitutional foundation." Tomkovicz, *supra*, at 51. At its core, the Sixth Amendment thus requires the government "to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command." 3 LaFave, *supra*, at 461-462.

In contrast, it was not until the early twentieth century that courts began to recognize the Sixth Amendment right to counsel as embracing not only a negative right against government interference with the defendant's ability to control his representation, but also a guarantee of positive entitlements, such as an indigent defendant's right to appointed counsel or the rule that the assistance counsel provides must meet a minimal level of effectiveness. *See, e.g.*, *Powell*, 287 U.S. at 57-58, 72; *McMann v. Richardson*, 397 U.S. 759, 771 & n.14 (1970); *see also*

Gonzalez-Lopez, 126 S. Ct. at 2562-2563 (explaining the distinct roots of the Sixth Amendment right to retain counsel of choice and the later-recognized right to the effective assistance of counsel). Appellees do not contend here that the government's conduct rendered their counsel's performance constitutionally ineffective. Nor do they assert that the Sixth Amendment guarantees them an affirmative right either to a particular amount of money for legal fees or to have KPMG pay those fees. Rather, the Sixth Amendment right at issue here is a defendant's right to use the resources lawfully available to him to secure representation by counsel, free of government interference. That right is at the historical core of the Sixth Amendment.

Freedom from government interference with the exercise of the right to counsel serves two purposes. First, it ensures fairness within the adversary system. *See Wheat v. United States*, 486 U.S. 153, 158 (1988); *United States v. Morrison*, 449 U.S. 361, 364 (1981). When the government is represented by counsel, a fair trial cannot be assured without permitting the defendant the assistance of counsel. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Powell*, 287 U.S. at 68-69. But that "equalizing effect," *United States v. Ash*, 413 U.S. 300, 309 (1973), cannot be achieved if one side is permitted to interfere with and undermine the efforts of its adversary.

Second, the prohibition against government interference protects a defendant's "broad[] right to control the presentation of his defense." *Lainfiesta v. Artuz*, 253 F.3d 151, 154 (2d Cir. 2001); *see also Gonzalez-Lopez*, 126 S. Ct. at 2562 (recognizing that the Sixth Amendment protects not only the generalized right to a fair trial, but also the defendant's specific interest in controlling his defense). The right to make a defense belongs to the defendant personally, *Faretta*, 422 U.S. at 819-820, and a defendant's choice of counsel, as well as the steps counsel takes on his behalf, are intrinsic to control of his own defense. They are not proper subjects for government meddling.

The Supreme Court and this Court have thus recognized that the Sixth Amendment shields defendants' exercise of the right to counsel against various forms of government interference. "[T]he prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine v. Moulton*, 474 U.S. 159, 170-171 (1985). The government's obligation not to interfere begins with a defendant's decision whether to represent himself or to seek the assistance of counsel. *Faretta*, 422 U.S. at 834. For a defendant who chooses to retain counsel, the government cannot interfere without justification with his choice of counsel or with his use of his own funds to retain preferred counsel. *Caplin & Drysdale*, 491 U.S. 624-625; *Gonzalez-Lopez*, 126 S. Ct. at 2561; *Powell*, 287 U.S. at 53. Once a

defendant is represented by counsel, the government cannot arbitrarily intrude on his ability to consult with counsel, *Geders v. United States*, 425 U.S. 80 (1976), or circumvent the attorney-client relationship by obtaining incriminating statements made by a defendant outside his counsel's presence, *Moulton*, 474 U.S. at 176-180; *see also United States v. Henry*, 447 U.S. 264, 275 (1980) (government's deliberate elicitation of incriminating statements constituted "impermissible interference with the right to the assistance of counsel").

Likewise, the government may not interfere with the tactical decisions made by a defendant and his attorney. "[T]here can be no restrictions upon the function of counsel in defending a criminal prosecution[.]" *Herring v. New York*, 422 U.S. 853, 857 (1975). Accordingly, government action that "restricts the defense—particularly counsel—in the planning of its case" violates the right to counsel. *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) (invalidating state law requiring a defendant to testify, if at all, before any other defense witnesses); *see also Herring*, 422 U.S. at 853, 864-865 (invalidating state law allowing judge to deny counsel's opportunity to make closing summation); *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (invalidating state law prohibiting defense counsel from eliciting defendant's testimony through direct examination). Simply put, the government may not "interfere[] … with the ability of counsel to make independent decisions

about how to conduct the defense." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *accord Lainfiesta*, 253 F.3d at 154.

In sum, the history and purposes of the Sixth Amendment make plain that the government may not, without justification, interfere with a defendant's exercise of his right to counsel. That prohibition bars government interference with a defendant's use of resources that would otherwise be lawfully available to him to obtain counsel. A defendant's right to use those resources as he sees fit, in order to retain his chosen counsel, control his own defense, and confront the government on an equal footing in defending the charges against him, is at the core of the Sixth Amendment's protections. The facts as found by the district court make clear that that right was violated here.

B. Unjustified Government Interference With Lawfully Available Funds Violates The Sixth Amendment Even Where The Funds Are Voluntarily Advanced By Third Parties

The government does not, and cannot, contest that the Sixth Amendment shields a defendant's exercise of the right to counsel from arbitrary government interference, and thus that it may not constitutionally prevent a defendant from using his own funds to retain counsel. Rather, it contends (Br. 63-66) that it was permitted to interfere with KPMG's advancement of fees for appellees because appellees have no constitutional right to "spend another person's money" to fund their defense. As an initial matter, because KPMG is a partnership, any fees

advanced would have come from funds belonging to the partnership as a whole, in which every member of the firm had a stake. But even if the fees advanced by KPMG did amount to "another person's money," nothing in the government's submission supports its position that it is free, absent some legitimate law-enforcement justification, to prevent a third party from advancing funds for a defendant's counsel.

To bolster its untenable claim, the government relies heavily (Br. 63-64) on *Caplin & Drysdale*. There, the Supreme Court held that a statute prohibiting a defendant from using forfeitable assets—that is, assets that a court had powerful reason to believe were the proceeds of crime and properly belonged to the government—to pay his defense counsel did not violate the Sixth Amendment. 491 U.S. at 624-626; *see also United States v. Monsanto*, 491 U.S. 600 (1989). Like a robbery suspect seeking to use stolen funds to pay for his defense, the Court held, the defendant in *Caplin & Drysdale* had no Sixth Amendment right "to spend another person's money" to hire counsel. 491 U.S. at 626.

The government's reliance on *Caplin & Drysdale* fails. At the outset, the government misrepresents the nature of the Sixth Amendment right at issue. Appellees claim no affirmative constitutional entitlement to spend KPMG's money in their defense, but a negative right to be free of unjustified interference with their exercise of the right to counsel. An aspect of this right is that the government

cannot arbitrarily interfere with the availability of resources—the defendant's or a third party's—that the defendant could lawfully have used to retain counsel. Here, KPMG's resources would have been lawfully available to appellees, and the government was therefore not free arbitrarily to cause those funds to be cut off. This is so whether KPMG's decision to advance fees would have been pursuant to legal obligation or strictly voluntary. For Sixth Amendment purposes, all that matters is that—as the district court expressly found—but for the government's pressure, KPMG would have advanced appellees' legal fees.[29]

The circumstances in *Caplin & Drysdale* were very different. As noted above, the assets at issue were forfeitable as proceeds of criminal activity. 491 U.S. at 619-621; *see also Monsanto*, 491 U.S. at 614. Unlike KPMG's money in this case, those assets thus were never legitimately available to the defendant. *See Caplin & Drysdale*, 491 U.S. at 630 (rejecting "any notion of a constitutional right to use the proceeds of crime to finance an expensive defense"). Rather, the government had a substantial interest in the forfeitable assets, and nothing in the

[29] Appellees believe that KPMG was indeed legally obligated to advance fees. *See Stein* A.864 & n.119 (*Stein I*) (setting out the arguments that "all [appellees] had contractual and other legal rights to … advancement"). But the district court did not rest its conclusion that the Sixth Amendment had been violated on that premise, *see id.*; rather, it concluded that, regardless of any legal obligation, KPMG would have paid the fees, consistent with its past practice, but for the government's interference. *Stein* A.861. This Court thus need not reach the question whether KPMG was legally obligated to pay appellees' fees.

Sixth Amendment required the government to turn over the proceeds of the defendant's criminal activity to fund his preferred defense. *Id.* at 627-628. *Caplin & Drysdale* thus did not present, or even touch on, the question at issue here: whether the government may prevent a third party from voluntarily advancing funds (to which the government has no claim) to pay for a defendant's counsel.

The government's unsupported assertion (Br. 64) that there is nothing to prevent it from "interfer[ing] with a third party's purely voluntary decision to pay the legal fees of a criminal defendant" has astonishingly broad, and unacceptable, implications. On the government's theory, it would be free to prevent a law firm from offering its services pro bono and thus shouldering the cost of a criminal defendant's fees and expenses simply because the defendant has no legal right to such assistance. Similarly, it would be free to threaten a defendant's parents to prevent them from retaining counsel for their child. The government offers no justification for the conclusion that it could constitutionally interfere with those lawful, common, and beneficial practices. The same is true of a business organization's decision to advance legal fees for its employees.

C. The Government Had No Legitimate Justification For Interfering With KPMG's Payment Of Appellees' Legal Fees

Government action that has the effect of limiting or undermining a defendant's exercise of the right to counsel is permissible only when those limitations serve legitimate interests unrelated to a desire to impede the conduct of

the defense. For instance, a defendant may not insist on representation by an attorney who is not a member of the bar or is laboring under a conflict of interest. *Wheat*, 486 U.S. at 159-163. Those limitations serve the legitimate purposes of ensuring a fair trial and maintaining the ethical standards of the legal profession. *Id.* at 160-163.

Caplin & Drysdale recognized that principle in the context of legal fees. Even if the forfeiture order in that case limited the defendant's ability to retain counsel and mount his preferred defense, the order served the "strong governmental interest in obtaining full recovery of all forfeitable assets" that overrode any Sixth Amendment interest in "permitting criminals to use assets adjudged forfeitable to pay for their defense." 491 U.S. at 631. Thus, the forfeiture in *Caplin & Drysdale* was not designed to deny the defendant legal fees, but instead served legitimate government interests, including the interest in "depriving criminals of economic power." *Id.* at 630.

Similarly, *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993) (discussed at Br. 64-65), recognized that, in cases involving "benefactor payments" within an organized crime ring, legal fees may be paid to further the interests of a criminal enterprise, and evidence of such payments could help prosecute such an enterprise by proving its existence. In such situations, the government may have legitimate law-enforcement reasons for inquiring into or even preventing the payment of legal

fees. 6 F.3d at 932-933. Moreover, such an enterprise's payment of fees to "house counsel" to represent individuals can create a conflict of interest, and threaten the fairness of the criminal proceeding, if the payments' true purpose is to minimize the enterprise's own liability, potentially at the expense of counsel's nominal client. *Id.* at 932, 935. In such circumstances, third-party payment of a defendant's attorneys' fees can warrant close scrutiny. *See id.*

No such legitimate interest justified the government's interference with appellees' Sixth Amendment rights. There can be no suggestion that KPMG's payment of appellees' legal fees was in any way unlawful. Far from the kind of criminal enterprise at issue in *Locascio*, KPMG was a legitimate business organization whose longstanding practice of advancing fees was consistent with widespread practice in the business community and recognized by state law as appropriate and beneficial. *See supra* pp.6-7. Nor was there any reason to suspect that KPMG would have paid fees for the reasons an organized criminal enterprise might—that is, to protect the enterprise itself from discovery and ensure that individual defendants will not reveal its criminal conduct.

The government asserts that if it may properly treat the payment of legal fees as evidence of the existence of a criminal enterprise, "then surely the Government can treat such payments, to the extent they are deemed to undermine a corporation's professed desire to cooperate, as a factor to consider in its

discretionary charging decision concerning the payor." Br. 65. Whether or not that analogy holds in the abstract, it provides no justification for the government's actions here. It may be that, as the McNulty Memorandum provides, the government may permissibly consider a corporation's payment of legal fees for its employees as a factor favoring indictment when other evidence makes clear that the corporation is attempting to obstruct an investigation by buying its employees' silence. But the government has already represented to this Court that it "never had the belief that KPMG was using its fee advancement policy to shield culpable employees." Suppression Reply 53. As Neiman testified, prosecutors "were not concerned that KPMG w[as] circling the wagons because they didn't appear to be doing that." *Smith* A.657. Indeed, there was no evidence whatsoever that KPMG would have paid attorneys' fees in an effort to shield its own improper conduct from scrutiny or to induce appellees or others not to cooperate with the government's investigation.

The government thus had no law-enforcement or other legitimate interest in preventing KPMG from paying appellees' legal fees. To the contrary, the district court found, based on ample record evidence, that the USAO's conduct was driven by "a desire to minimize the involvement of defense attorneys," *Stein* A.861 (*Stein I*), and that prosecutors "deliberate[ly]" "used KPMG to strip any of its employees who were indicted of means of defending themselves that KPMG otherwise would

have provided to them," *Stein* A.1651 (*Stein IV*).[30] This falls far short of the justification needed to override appellees' constitutional right to counsel. Indeed, such a purpose contravenes the core guarantee of the Sixth Amendment.

D. The Government's Coercion And State-Action Arguments Fail

The government argues at length that it did not unconstitutionally "coerce" KPMG to cut off appellees' legal fees (Br. 45-53), and that KPMG's decision to do so was not "state action" (Br. 53-63). The government never raised these points before the district court in the context of appellees' fee motion. They are therefore forfeited, and this Court should not consider them. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005). In any event, they fail. The concept of "coercion" is simply irrelevant to the Sixth Amendment analysis; and because appellees are challenging the government's conduct—not KPMG's—there is no state-action issue here. Properly understood, these arguments are merely thinly veiled challenges to the district court's finding that, but for the government's interference, KPMG would have advanced appellees' legal fees. As demonstrated above, that finding cannot be deemed clearly erroneous.

[30] *See also Stein* A.874-875 (*Stein I*) ("The government here acted with the purpose of minimizing these defendants' access to resources necessary to mount their defenses or, at least, in reckless disregard that this would be the likely result of its actions.").

The government borrows the concept of unconstitutional "coercion" from cases involving the admissibility of confessions and other incriminating statements, and the voluntariness of guilty pleas. *See, e.g.*, Br. 45-47. That concept is relevant to the government's appeal from the district court's suppression of certain appellees' proffer statements, because an incriminating statement may be suppressed if the defendant was coerced into making it. *See, e.g.*, U.S. Const. amend. V (prohibiting "compelled" self-incrimination); *Arizona v. Fulminante*, 499 U.S. 279, 287-288 (1991). Similarly, because a guilty plea must be made "voluntarily," it can be retracted if it is coerced or otherwise involuntary. *See, e.g.*, *Henderson v. Morgan*, 426 U.S. 637, 644-645 (1976) (a guilty plea "cannot support a judgment of guilt unless it [is] voluntary in a constitutional sense"). Thus, if KPMG were asking this Court to suppress a statement it had made or to set aside its DPA, the question whether the government "coerced" KPMG would be germane.

But that question simply has no relevance to the analysis of whether the government violated appellees' right to counsel—which is doubtless why the government never raised it during the fee proceedings in district court. The issue in this appeal is appellees' right to be free from unjustified government interference with their exercise of the right to counsel, not KPMG's right to be free of unconstitutional "coercion." While various forms of government "coercion"

could certainly result in unconstitutional interference with the right to counsel, a finding of "coercion" is not necessary to determine that such interference has taken place. *See supra* Part II.A (collecting cases regarding improper interference with right to counsel). Because, as the district court correctly found, KPMG would have paid appellees' attorneys' fees but for the government's unjustified actions, those actions violated appellees' Sixth Amendment rights—by depriving appellees of the resources they would otherwise have had to defend themselves—whether or not the government "coerced" KPMG in the narrow sense that the government employs the word.[31]

The "state action" argument is equally far afield. The state-action doctrine is designed to determine when "seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). That test is met where there is a "close nexus between the State and the challenged action," *id*., such as where the state exercises coercive power or provides the private actor with significant encouragement, *see Flagg v.*

[31] Even in the absence of coercion, the government may properly be held responsible for the consequences of a third party's reasonably foreseeable decision resulting from government action. *See Zahrey v. Coffey*, 221 F.3d 342, 351 (2d Cir. 2000). "*Even if the intervening decision-maker … is not misled or coerced*, it is not readily apparent why the chain of causation should be considered broken where the initial wrongdoer can reasonably foresee that his misconduct will contribute to an 'independent' decision that results in a deprivation of liberty." *Id.* at 352 (emphasis added).

Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 187 (2d Cir. 2005). Here, however, there is no occasion for application of the state-action doctrine. While KPMG may well have breached its contractual obligations or violated state laws by refusing to advance appellees' legal fees, it was the government that effected the constitutional violation by causing KPMG not to pay appellees' fees—thus unjustifiably depriving appellees of resources that would otherwise have been lawfully available for their defense. Because it is the government's own conduct that is the basis for appellees' constitutional claim, there is no "seemingly private behavior" at issue, and no question that "state action" was present.[32]

At bottom, then, the government's arguments about "coercion" and "state action" are nothing more than a disguised attack on the district court's factual finding that, but for the government's conduct, KPMG would have paid appellees' fees. *See, e.g.*, Br. 51 (KPMG's motivation came "from a desire to display corporate responsibility in the face of allegations of wrongdoing …. Even though the company might not have done any of those things in the absence of the

[32] Even if the question were whether KPMG's actions violated appellees' constitutional rights, the district court's unassailable finding that the government caused KPMG to cut off appellees' legal fees is more than sufficient to establish the requisite "close nexus" between KPMG's actions and the government. *See Flagg*, 396 F.3d at 187 (close nexus exists where government exercises "coercive power" or provides "significant encouragement, either overt or covert"); *see also United States v. Stein*, 440 F. Supp. 2d 315, 337 (S.D.N.Y. 2006) (finding KPMG's acts of economic coercion "fairly attributable" to the government for purposes of defendants' motions to suppress).

investigation, ultimately the decision remained its own."); Br. 62 ("The USAO did not 'solicit, initiate, or guide' KPMG's decision to condition fees on cooperation and cap payment of those fees at $400,000[.]"). Disguising these disagreements with the district court's factual findings as disputes about "coercion" and "state action" makes them no more persuasive. The district court's holding that the government violated appellees' Sixth Amendment right to counsel should be affirmed.

III. THE GOVERNMENT'S CONDUCT VIOLATED APPELLEES' FIFTH AMENDMENT DUE PROCESS RIGHTS

As the district court correctly held, the government's conduct also contravened appellees' Fifth Amendment right to due process. "Due process guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982); *see also, e.g., California v. Trombetta*, 467 U.S. 479, 485 (1984) ("Under the Due Process Clause …, criminal prosecutions must comport with prevailing notions of fundamental fairness."). In the criminal context, the heart of the due process guarantee is, of course, a fair trial. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial … is a basic requirement of due process."), *quoted in United States v. Nelson*, 277 F.3d 164, 206 (2d Cir. 2002). "The right to a fair trial is a fundamental liberty[.]" *Estelle v. Williams*, 425 U.S.

501, 503 (1976); *accord, e.g.*, *United States v. Harvey*, 991 F.2d 981, 997 (2d Cir. 1992) (reversing conviction because the defendant was "denied … his fundamental right to a fair trial"). The government's unjustified, and unjustifiable, interference with appellees' ability to defend themselves violated that basic right.

A. The Government's Conduct Violated Appellees' Procedural Due Process Right To A Fair Trial

Starting from the indisputable premise that the right to fairness in the criminal process is fundamental to our system of justice, *Stein* A.868, the district court concluded that the government's conduct violated substantive due process. It is unnecessary, however, to reach that conclusion to affirm the district court's judgment. The government's efforts to deprive appellees of their liberty without a fair trial violated "[t]he most familiar office of [the Due Process] Clause"—to provide procedural due process, "a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

1. The due process right to a fair trial is independent of the Sixth Amendment right to counsel

The due process right to a fair trial is independent of the Sixth Amendment right to counsel. To be sure, "the Constitution … defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Strickland*, 466 U.S. at 684-685. But that amendment does not exhaust those

elements. Were it otherwise, there would be no viable constitutional objection to, for example, a conviction based on less than proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), one secured before a biased judge, *Tumey v. Ohio*, 273 U.S. 510 (1927), or one obtained by withholding exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), or proffering perjured testimony, *Napue v. Illinois*, 360 U.S. 264 (1959). Ultimately, "[t]he Constitution guarantees a fair trial through the Due Process Clauses." *Strickland*, 466 U.S. at 684-685.

Though distinct and independent, the rights to counsel and to a fair trial are of course related, in that deprivation of the right to counsel often results in a fundamentally unfair trial. Nonetheless, unless a reviewing court finds a violation that moots any remaining claims, it must separately consider whether each right was infringed. As the Supreme Court has explained, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, … we examine each constitutional provision in turn." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49-50 (1993) ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another. … The proper question is not which Amendment controls but whether either Amendment is violated.").

These principles apply with equal force in the Sixth Amendment context. *See Kirby v. Illinois*, 406 U.S. 682, 690-691 & n.8 (1971) (plurality opinion) (conduct that does not violate the right to counsel might still deny due process); *Moore v. Illinois*, 434 U.S. 220, 227 (1977) (same); *United States v. Perez*, 387 F.3d 201, 204 (2d Cir. 2004) ("Because one touchstone of a fair trial is an impartial trier of fact, the [Sixth Amendment] right to an impartial jury also implicates due process rights." (citation and internal quotation marks omitted)). Thus, should this Court conclude that the government's conduct did not infringe appellees' right to counsel, it would still need to address whether that conduct denied appellees a fair trial.

2. Unjustified government interference with a defendant's ability to defend himself denies him a fair trial

In successfully pressuring KPMG to depart from its longstanding practice of fully and unconditionally advancing its employees' legal fees, the government violated appellees' due process right to a fair trial. It is incompatible with fundamental fairness for the prosecution, absent a legitimate justification, to undermine an accused's ability to defend himself at trial. "[O]ur adversarial system of justice … is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal quotation marks omitted). Government interference with a criminal defendant's ability to present his

"powerful statement[]" thus runs afoul of a cornerstone of our criminal-justice system. Indeed, "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker v. Wingo*, 407 U.S. 514, 532 (1972). The government's role is to make its case for conviction while leaving the defendant free to make his best case for acquittal—not to improve the chances of conviction by tying one of the defendant's hands behind his back. *See Wardius v. Oregon*, 412 U.S. 470, 474 (1973) ("[T]he Due Process Clause … speak[s] to the balance of forces between the accused and his accuser."). Put simply, it is fundamentally unfair for the government to impede the ability of those against whom it has brought criminal charges to respond to those charges as fully and vigorously as they are lawfully able. *See United States v. Bieganowski*, 313 F.3d 264, 291 (5th Cir. 2002) ("[T]he Fifth Amendment protects the defendant from improper governmental interference with his defense."). That is precisely what the government did in this case when, without any legitimate justification, it interfered with appellees' receipt of money that they otherwise lawfully would have been able to use to mount their defense.

That the Due Process Clause precludes the government from unjustifiably interfering with an accused's ability to defend himself is hardly a novel concept; it is well-established in several other contexts. For example, due process prohibits the government from seeking to gain a tactical advantage at trial by delaying the

filing of an indictment. *United States v. Marion*, 404 U.S. 307, 324 (1971); *see also United States v. Lovasco*, 431 U.S. 783, 795 n.17 (1977) (noting government concession that "[a] due process violation might … be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense"). Similarly, substantial government interference with testimony by defense witnesses—another way to hinder a defendant's ability to defend himself—can violate due process if it is not driven by a legitimate purpose (such as safeguarding a witness's privilege against self-incrimination). *See, e.g.*, *United States v. Pinto*, 850 F.2d 927, 932 (2d Cir. 1988) ("[I]ntimidation or threats that dissuade a potential defense witness from testifying may infringe a defendant's due process rights."); *Webb v. Texas*, 409 U.S. 95, 98 (1972) (per curiam) (summarily reversing conviction because "the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process").[33] Due process likewise bars prosecutors from depriving a defendant of a fair chance to contest the charges against him by withholding material exculpatory

[33] These two examples highlight the independence of appellees' due process claim: each example relates to a provision of the Sixth Amendment (the Speedy Trial Clause and the Compulsory Process Clause, respectively), yet the case law makes clear that the relevant government conduct can also violate due process.

information that could aid in his defense. *See, e.g.*, *Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of [material] evidence favorable to an accused … violates due process[.]").

Government actions that limit a defendant's access to funds he could otherwise lawfully use to fund his defense can unquestionably impair his ability to defend himself at trial, no less than government interference with defense witnesses or prosecutorial suppression of exculpatory evidence. When no legitimate justification exists, such interference with the defense violates the defendant's due process right to a fair trial. That is precisely the situation here.

3. The government's actions crippled appellees' ability to defend themselves at trial

It is undisputed that appellees suffered substantial prejudice as a result of the government's actions. As the district court observed, this case involved novel and arcane questions of tax law, highly complex transactions, and a staggering number of documents. *Stein* A.1655. The trial alone was expected to last from six to eight months, preceded by many months of intense preparation. *Id.* Appellees submitted detailed evidence to the district court regarding the myriad ways in which KPMG's departure from its longstanding practice of advancing fees harmed their ability to defend a case of such enormous scope and complexity. For example, appellees were forced to forego the retention of experts who could help the jury understand the complex subject matter of the government's charges. *Stein*

A.1317, 1494.[34] They were also forced to curtail or abandon efforts "to interview many of the approximately 180 witnesses whom the government interviewed and designated as trial witnesses or as persons having potentially exculpatory information." *Stein* A.1269-1270; *see also Stein* A.1263-1264. Several appellees were even forced to "take[] the lead on reviewing" the "22 million pages of electronic files provided by the government," and the "over 150,000 pages of trial exhibits" included on the government's proposed exhibit list. *See, e.g., Stein* A.1315-1316. As the district court found, appellees also submitted evidence about their own financial circumstances that demonstrates their inability to afford the likely cost of defending such an enormous, intricate, and document-intensive case. *E.g.*, *Stein* A.1257-1259, 1272-1273; *see Stein* A.1660-1662 (*Stein IV*). This evidence, none of which the government contested, conclusively establishes that the government's actions crippled appellees' ability to defend themselves,

[34] Such experts would also have helped the jury understand the substantial questions that exist about whether any of the charged conduct was actually criminal—questions noted by outside observers at the time of the indictment. *See, e.g.*, *KPMG in Wonderland*, Wall St. J., Oct. 6, 2005, at A14 ("[T]he tax shelters in this case have never been brought before a judge, so their legality and legitimacy has never been settled as a point of law. … That gives this KPMG trial an Alice-in-Wonderland quality; the accused are on trial for promoting a fraudulent tax shelter that has never been proved to be fraudulent in the first place.").

depriving them of the opportunity for a fair trial at which they could meet the government on an equal footing.[35]

The point is not that it is impossible to have a fair trial when a criminal defendant has limited resources. Limited resources do not by themselves deny due process any more than it would violate due process for a criminal defendant to lack access to exculpatory evidence for reasons beyond prosecutors' control. The point is that it is fundamentally unfair for the government to interfere, without a legitimate justification, with a defendant's ability to defend himself against criminal charges, and that if such interference adversely affects the defendant's ability to mount a defense, the attendant trial is necessarily unfair. That standard has certainly been met here. As discussed in Part II.C above, the government has offered no legitimate justification for its actions, and in particular has expressly denied being motivated by concern that KPMG was obstructing the investigation by paying fees. Suppression Reply 53. Under the circumstances, the government's unjustified effort to hinder appellees' defense violated due process.

[35] The same evidence made clear that the prosecution of appellees has already substantially drained their resources: many have drawn down their personal assets to pay for counsel and still owe millions of dollars in fees (while at the same time being unable to secure gainful employment). *See Stein* A.1660 & nn.167-170.

B. In The Alternative, The Government's Actions Violated Appellees' Right To Substantive Due Process

The government's violation of appellees' procedural due process right to a fair trial is by itself sufficient to sustain the district court's conclusion that appellees' Fifth Amendment rights were infringed. There is accordingly no need for this Court to address whether the government's conduct violated substantive due process—just as there was not in *Brady*, *Winship*, or any of the other cases establishing the content of the due process right to a fair trial. Were the Court to reach the substantive due process question, however, the district court's holding should be affirmed.

The government wrongly asserts (Br. 66-70) that a substantive due process claim is precluded by the principle, first articulated in *Graham v. Connor*, 490 U.S. 386 (1989), that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not … substantive due process, must be the guide for analyzing" challenges to that behavior. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (internal quotation marks omitted). As the Supreme Court more recently explained, that principle does not bar every substantive due process claim relating to the subject matter of a specific constitutional amendment. *Graham* "does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendment[]," but only that

"if a constitutional claim is covered by a specific constitutional provision, … the claim must be analyzed under the standard appropriate to that specific provision." *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).[36]

The government argues (Br. 68) that the Sixth Amendment is "an explicit textual source of constitutional protection" barring a substantive due process claim. But, as discussed above, while the Sixth Amendment safeguards various specific rights related to criminal prosecutions, its protections do not exhaust the broader right to fairness in the criminal process, which lies at the heart of appellees' Fifth Amendment claim. Accordingly, if the Court were to conclude that appellees' claim is not properly analyzed as an aspect of the right to counsel, the claim would not be "covered by" the Sixth Amendment, but may nevertheless be protected by the Fifth Amendment's guarantee against arbitrary and unfair government conduct. *See Lewis*, 523 U.S. at 843; *Poe v. Leonard*, 282 F.3d 123, 137 (2d Cir. 2002).

That guarantee encompasses the government's conduct here. The government accuses the district court (Br. 72-73) of improperly "proclaiming a new fundamental right," which it characterizes as the "right to third-party resources to pay for counsel of choice." The right at issue, however, is not a right

[36] *See also* 1 Tribe, *American Constitutional Law* 1364 n.4 (3d ed. 2000) ("The upshot of *County of Sacramento* is that … [nothing] require[s] … all substantive due process claims relating to personal association to be tested under the First Amendment.").

to a third party's money, but a defendant's right to receive a fair trial on criminal charges, and in particular to defend himself against such charges without the government tying one hand behind his back. As discussed above, that right lies at the core of our adversarial system of criminal justice, and accordingly has long been recognized as among the most fundamental of rights.

The USAO's conduct—wielding the threat of indictment against KPMG in order to obtain an unfair advantage in prosecuting appellees—improperly infringed that fundamental right. The government's argument to the contrary again consists largely of attacks on the district court's factual findings. *See* Br. 78-100. Although the government at points purports to argue on the assumption that the court's findings are correct (Br. 100-101), even then it repeatedly offers a benign characterization of its conduct that is utterly inconsistent with those findings. *Compare, e.g.*, Br. 101 (referring to the government's mere "promulgation of a list of [charging] factors … that includes a reference to payment of legal fees when used to protect culpable employees"), *and* Br. 105 ("At the February 25 Meeting, the USAO did no more than follow [the Thompson Memorandum]."), *with Stein* A.1630 (*Stein IV*) ("The government threatened to indict, and thus to destroy, … KPMG …. It coerced KPMG to limit and then cut off its payment of the legal fees of KPMG employees."). Because the district court's findings were demonstrably correct, the government's efforts to evade those findings should be rejected.

Once the district court's factual findings are genuinely accepted, the government's arguments fail. First, as deployed in this case, the Thompson Memorandum's policy of treating payment of legal fees for employees as weighing in favor of indictment served no compelling governmental interest. While the government argues (Br. 74) that, "in rare cases," a corporation can impede a criminal investigation by paying fees in order to buy employees' silence, it does not even suggest that this is one of those "rare cases"—and, as discussed above, it has conceded that it never believed KPMG was attempting to "circle the wagons" by paying fees. To the contrary, as the district court found, the government's aim here was to obtain an improper advantage by "minimizing these defendants' access to resources necessary to mount their defenses." *Stein* A.874; *see also Stein* A.1651. That can never be a legitimate, let alone compelling, government interest.

In any event, the constitutional violation in this case was not effected by the Thompson Memorandum alone, but also by the USAO's wielding the threat of indictment to prevent KPMG from paying appellees' fees. The district court correctly held that such conduct "shocked the conscience," that is, "constitute[d] a gross abuse of governmental authority," *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001), and was "arbitrary in the constitutional sense," *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003). From the earliest stages of the investigation, prosecutors strove to ensure that

KPMG employees who became ensnared in the investigation would, notwithstanding their presumption of innocence, be sharply limited in their ability to defend themselves against any criminal charges and to enjoy the legitimate benefits of being represented by counsel during the investigation. Prosecutors decided that their role was not simply to gather the evidence and pursue whatever criminal charges that evidence warranted, but to rig the adversary system so that anyone ultimately charged with a crime would be at a serious and unfair disadvantage. They did so by threatening KPMG with destruction unless it sacrificed its employees by abandoning its consistent, decades-long practice of advancing legal fees, "strip[ping] … employees who were indicted of means of defending themselves." *Stein* A.1651 (*Stein IV*). The district court found that this conduct constituted "deliberate interference with the defendants' rights." *Id*. It did not err in holding that the USAO's conscious attempt to increase appellees' likelihood of conviction and lengthy prison sentences, based not on the evidence but rather on its evasion of "the crucible of meaningful adversarial testing," *Alabama v. Shelton*, 535 U.S. 654, 667 (2002), violated substantive due process.[37]

[37] *See Lewis*, 523 U.S. at 849 ("[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."). Moreover, as the district court noted, prosecutors had ample time to reflect upon and consider their conduct beforehand, and their actions occurred only after extended deliberation. *Stein* A.1651. Accordingly, their conduct would be a gross abuse of authority even if it amounted

IV. DISMISSAL OF THE INDICTMENT WAS THE ONLY ADEQUATE REMEDY FOR THE GOVERNMENT'S MISCONDUCT

Having found that the government's interference with KPMG's advancement of attorneys' fees violated appellees' constitutional rights, the district court acted well within its discretion in dismissing the indictment. Indeed, by the time of *Stein IV*, dismissal was the only adequate remedy for the constitutional violation.

Dismissal of an indictment is appropriate where a violation of a defendant's constitutional rights has had an "adverse impact upon the criminal proceedings," and where the taint resulting from that violation cannot be neutralized by less drastic measures. *See Morrison*, 449 U.S. at 365, 367; *Brown v. Doe*, 2 F.3d 1236, 1245 (2d Cir. 1993). The remedy for a constitutional violation must be "one that as much as possible restores the defendant to the circumstances that would have existed had there been no constitutional error." *United States v. Carmichael*, 216 F.3d 224, 227 (2d Cir. 2000). Thus, "dismissal of an indictment is justified" when necessary "to eliminate prejudice to a defendant." *Fields*, 592 F.2d at 647; *see also id.* at 648 ("[W]here it is impossible to restore a criminal defendant to the position that he would [otherwise] have occupied[,] … the indictment may be dismissed.").

Mindful of these standards, the district court dismissed the indictment only after exploring several alternative remedies. *Stein A.*881-888 (*Stein I*). Indeed,

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only to deliberate indifference to appellees' rights. *See Lewis*, 523 U.S. at 853; *Pabon v. Wright*, 459 F.3d 241, 251 (2d Cir. 2006).

appellees themselves first brought the government's misconduct to the district court's attention in an effort to obtain an immediate remedy (advancement of fees from KPMG or the government) that would have prevented further harm and obviated the need for dismissal. *See, e.g.*, Dkt. 272, at 27 ("[I]t is not too late to remedy the injury … by an order directing advancement of legal fees."); Dkt. 458, at 1-9 (same; suggesting numerous alternative remedies). Although the court concluded that it lacked authority to order the government to pay appellees' fees, *Stein* A.882-884, it attempted to avoid dismissal by exercising ancillary jurisdiction over proceedings brought by appellees directly against KPMG, *Stein* A.885-888, and also suggested that the government could use its substantial influence under the DPA to cause KPMG to advance appellees' fees—as KPMG would have done absent the government's pressure, *Stein* A.888 & n.240.

The government, for its part, did nothing to assist in this effort. In the eighteen months that passed between appellees' first motion raising the Fifth and Sixth Amendment violations and the district court's dismissal of the indictment, the government was on notice that dismissal was possible if no other remedy was found. Yet there is no evidence that it took any steps to repair the damage it had done. For example, despite the leverage it held by virtue of the DPA—which obligated KPMG "to cooperate fully and actively with the [government] regarding any matter relating to the [USAO's] investigation," *Stein* A.325—the government

refused to encourage KPMG to pay appellees' fees. And the government insisted that there was no way to advance appellees' legal fees from the money KPMG agreed to pay pursuant to the DPA. *See, e.g.*, Dkt. 1051, at 37-38.[38] Thus, once this Court rejected the district court's assertion of ancillary jurisdiction, no other remedy was adequate to cure the harm. Even the government agreed that this was the case, conceding that if the district court's rulings in *Stein I* were correct, "the only action the Court could take consistent with those rulings would be dismissal of the Indictment." *Id.* at 1-2.

Dismissal was necessary because, as the district court found, the government's interference with KPMG's payment of appellees' legal fees had a substantial adverse impact on appellees' exercise of their right to counsel and their ability to have a fair trial at which they could defend themselves in the manner they otherwise would have. *See Stein* A.1655-1656 (cut-off of post-indictment fees has caused appellees to restrict activities of counsel); *Stein* A.1660 (appellees have been forced "to curtail the defenses they would have mounted had KPMG paid those costs"); *Stein* A.1662 (none of the appellees has resources needed to defend case as he or she would have if KPMG were paying). The district court's findings

[38] At the time of *Stein I*, KPMG had not yet paid $200 million of the penalty imposed under the DPA. *Stein* A.319. The government has not explained why, had it truly wished to cure the harm it had caused, it could not have reached agreement with KPMG to amend the DPA so that a portion of that as-yet-unpaid money would be set aside for attorneys' fees.

in this regard rested both on the "exceptional demands" placed on appellees by the singular magnitude and complexity of the case, *Stein* A.1653-1655, and on the unchallenged declarations submitted by the KPMG defendants and their attorneys describing the specific ways in which KPMG's refusal to pay their post-indictment legal fees limited their ability to prepare for trial, *see* Part III.A.3 above. The government did not contest these assertions below, *Stein* A.1655, nor has it done so here. This case is thus fundamentally different from *Morrison*, where the defendant had made "no allegation that the claimed violation had prejudiced the quality or effectiveness of [her] legal representation." 449 U.S. at 363; *see also id.* at 366 ("Here, respondent has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings.").

Indeed, the true extent of the prejudice appellees have suffered can never be fully assessed. Rather, by so broadly impeding appellees' presentation of their entire defense, the government's violation of appellees' constitutional rights has infected the entire "framework within which the trial [would] proceed[]." *Gonzalez-Lopez*, 126 S. Ct. at 2564. "It is impossible to know what different choices" appellees and their attorneys would have made had the government not caused KPMG to forego advancement of appellees' legal fees, and impossible "to quantify the impact of those different choices on the outcome of the proceedings."

Id. at 2565. Identifying a remedy narrower than dismissal that would have "restore[d] [appellees] to the circumstances that would have existed had there been no constitutional error," *Carmichael*, 216 F.3d at 227, would thus require "a speculative inquiry into what might have occurred in an alternate universe," *Gonzalez-Lopez*, 126 S. Ct. at 2565.

The government nevertheless argues (Br. 44) that the proper remedy would be to remand the case for trial "with the impediment to the defendant's [rights] removed"—that is, appellees should be permitted "to hire their counsel of choice using whatever resources KPMG was willing to give them, if any, free from Government influence." Such a remedy is possible, the government argues, because it "cured" any constitutional violation by asserting at a March 30, 2006 motion hearing—several months after appellees were indicted and their attorneys' fees cut off—that it would not hold KPMG's voluntary payment of fees against the firm. Br. 31-44; *see also Smith* A.249-250. According to the government (Br. 31), this assertion left KPMG "free to decide, without influence from the Government, whether to pay the defendants' legal fees," thereby undoing the damage done by the government's previous pressure. In fact, this supposed remedy neither

neutralized the taint caused by the government's misconduct nor restored appellees to the position they would have enjoyed absent that misconduct.[39]

The government's "cure" argument rests on two flawed assumptions, one conceptual and one factual. First, the government contends (Br. 32) that "the District Court identified the harm caused by the Government here as its supposed pressure on KPMG [not to] pay legal fees for its employees." But the harm here was not the application of pressure alone; had KPMG resisted that pressure and adhered to its longstanding practice of full and unconditional advancement of fees, there would have been no harm to appellees and no warrant for dismissal. The harm lies in the fact that the government's coercive tactics succeeded, inducing KPMG to depart from its longstanding practice and instead conditionally pay each appellee a limited amount of fees that would be cut off upon indictment—crippling appellees' ability to defend themselves. In the face of that harm, the only remedy that could "restore[] [appellees] to the circumstances that would have existed had

[39] As an initial matter, the government's assertion hardly conveyed a clear change in its position, since the government simultaneously claimed—contrary to the district court's findings—that it had "always been the case" that the government had no objection to KPMG's payment of appellees' legal fees. *Smith* A.249-250. Moreover, the letter to the district court that the government cites in its brief (at 33-34) as "stat[ing] unequivocally" that the government would not find KPMG's payment of fees to violate the DPA in fact included no such statement, as the government acknowledged in its October 29, 2007 letter to this Court. As discussed in text, however, even had the government's statement been as unequivocal as it now represents, it would not have cured the constitutional violation.

there been no constitutional error," *Carmichael*, 216 F.3d at 227, would be for appellees' fees to be paid in full. Whether or not the government's March 2006 declaration eliminated the pressure the government had exerted on KPMG for over two years, it plainly did not bring about that remedy or otherwise neutralize the taint produced by the government's constitutional violations.

Second, the government's argument rests on the incorrect factual premise—rejected by the district court—that KPMG's continued refusal to pay appellees' legal fees after the March 30, 2006 declaration was a decision made "without influence from the Government." Br. 31. "Even assuming," the government asserts, "that KPMG … would have decided initially to pay the defendants' legal fees without condition, there is no basis to conclude that [it] would have continued to do so indefinitely, and particularly after indictment." Br. 36. But that argument is a direct attack on the district court's factual finding that "[a]bsent the Thompson Memorandum and the actions of the USAO, KPMG would have paid the legal fees and expenses of all of its partners and employees both prior to and after indictment, without regard to cost." *Stein* A.861. Contrary to the government's contention, the "basis" for that finding was the stipulated fact that it was KPMG's "longstanding voluntary practice … to advance and pay legal fees, without a preset cap or condition of cooperation with the government … in any civil, criminal or regulatory proceeding involving activities arising within the scope of the

individual's" employment. *Smith* A.1133. Apart from this case, KPMG has adhered to this policy without exception. *See, e.g.*, *Smith* A.471 (Loonan testifying that "throughout [his] 19 years … at KPMG," full and unconditional payment of fees "had always been the rule"). The government—which assured the district court at the fee hearing that it was "certainly not running away from the stipulation," *Smith* A.562—has not offered a single example, other than this case, of KPMG's departing from this policy. As demonstrated above, far from being clear error, the district court's finding that KPMG would have done in this case what it has done in every other case—including in civil and regulatory proceedings involving the same appellees and same subject matter—was entirely reasonable.

Undaunted, the government quotes at length from statements in briefs filed by KPMG's attorneys to the effect that the firm's departure from its longstanding practice was its own decision, and that it would not have paid appellees' fees after indictment even without the government's pressure. Br. 37-40.[40] The government does not explain, however, why the district court was required to credit these patently self-serving statements, which were neither made under oath nor subject to cross-examination, and which were made in the context of KPMG's defense

[40] The government also quotes one witness's testimony that "KPMG's historical practice … was voluntary and subject to revision." Br. 36. Even if true, that is irrelevant to whether KPMG, but for the government's pressure, would have departed from or adhered to that consistent, decades-long practice.

against appellees' efforts to force it to pay their fees. As the district court observed, for KPMG to say anything else—*i.e.*, either that it would pay fees or that it was still refusing to do so because it did not believe the government's declaration—would have been to acknowledge to every one of its current (and potential) employees that the firm had sacrificed numerous members of its corporate family by caving to the government's pressure. *Stein* A.882 (*Stein I*). That sacrifice, moreover, would have come without the firm having done its own investigation or reached its own conclusion that any of the sacrificed employees had done anything wrong. *Smith* A.1199. The district court's decision to discount KPMG's statements in light of the firm's powerful motive not to reveal itself as prepared to abandon its employees so readily was wholly rational, and certainly cannot be deemed clearly erroneous.

The government's remaining arguments warrant only brief response. In passing, the government observes that "the defendants received the effective assistance of counsel throughout the relevant time period" and were "represented by competent counsel during the pendency of the criminal proceeding." Br. 41. Whether that is so is irrelevant, for the simple reason that appellees are not advancing an ineffective-assistance claim. Rather, appellees contend that the government violated appellees' Sixth and Fifth Amendment rights by unjustifiably interfering with resources that appellees otherwise would have had at their disposal

to fund their defenses. Appellees' claim thus is fundamentally different from one that professionally unreasonable conduct by defense counsel deprived them of the Sixth Amendment's guarantee of effective assistance. The government offers no authority for the notion that it may interfere with impunity with a defendant's exercise of the right to counsel, or otherwise arbitrarily impair his ability to defend himself, so long as its interference does not render defense counsel's performance constitutionally inadequate. Indeed, *Strickland* itself is directly to the contrary; there, the Court carefully distinguished between claims of government interference with the right to counsel and claims of actual ineffectiveness caused by counsel's own errors, and made clear that the standard it announced applied only in the latter category. *See* 466 U.S. at 686, 692. As *Strickland* makes plain, where the government's own interference impairs a defendant's right to counsel, the defendant is entitled to a remedy even if counsel's performance is not rendered constitutionally ineffective. *See id*. at 692.[41]

The government also suggests (Br. 42-43) that various accommodations it made in advance of trial, including construction of an online discovery database,

[41] *Morrison* thus did not adopt a standard for prejudice like the one later set out in *Strickland* for ineffective assistance claims, but instead required only that the defendant show an "adverse impact upon the criminal proceedings," 449 U.S. at 367, or "continuing prejudice" that "could not be remedied by a new trial or suppression of evidence," *id.* at 365 n.2, in order to justify dismissal on the ground of government interference.

coupled with the delay in trial occasioned by the district court's rulings and efforts to bring KPMG into the case, "have had the unintended effect of giving the defendants precisely the remedy appropriate for any infringement on their resources for a few months: more time to prepare for trial" and that "[n]o other sanction was appropriate or necessary." But the government expressly agreed below that if the constitutional holdings in *Stein I* were correct, dismissal was the only appropriate remedy. Dkt. 1051, at 1-6. The government's new argument to the contrary is therefore waived, and the Court should not entertain it. In any event, as discussed above, the government's actions affected every aspect of appellees' defense, causing pervasive and unquantifiable harm. That harm could not be redressed merely by the provision of additional time—or by a discovery database—because neither would render appellees any more able to pay for the attorneys, experts, and others needed to mount a defense against the complex charges against them. As the district court concluded, the government's violation of appellees' rights could not be remedied by the piecemeal measures the government now suggests.

Dismissal of the indictment was thus appropriate under the standards set forth in *Morrison*. Indeed, it was the only possible remedy that remained after the district court's efforts to bring KPMG into the case failed and the government refused even to attempt to use its influence to cause KPMG to pay the fees or

effect some other remedy. The district court dismissed the indictment "only after pursuing every alternative short of dismissal and only with the greatest reluctance." *Stein* A.1664 (*Stein IV*). At a minimum, the court acted well within its discretion and adopted a remedy that fell squarely "within the range of permissible decisions." *Zervos*, 252 F.3d at 169.

CONCLUSION

This Court should affirm the order of the district court dismissing the indictment against appellees.

Dated: January 11, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellees Jeffrey Stein, John Lanning, Richard Smith, Randy Bickham, and Richard Rosenthal complies with this Court's January 7, 2008, order granting those appellees leave to file a brief of up to 25,690 words. According to the word-processing system used to prepare the brief (Microsoft Word), the brief contains 25,604 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

s/ Daniel S. Volchok
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ANTI-VIRUS CERTIFICATION

I hereby certify that on this 11th day of January, 2008, I scanned the pdf version of the foregoing Brief for Appellees Jeffrey Stein, John Lanning, Richard Smith, Randy Bickham, and Richard Rosenthal, and that no viruses were detected during that scan.

s/ Daniel S. Volchok
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2008, I caused a pdf version and two paper copies of the foregoing Brief for Appellees Jeffrey Stein, John Lanning, Richard Smith, Randy Bickham, and Richard Rosenthal to be sent via electronic mail and overnight delivery service to the following individuals:

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