UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- against -	:	S1 05 Crim. 888 (LAK)
JEFFREY STEIN, et al.,	:	
Defendants.	:	

BRIEF OF *AMICI CURIAE*
OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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STATEMENT OF INTEREST OF AMICI

The New York Council of Defense Lawyers (NYCDL) is a not-for-profit professional association of approximately 200 lawyers (many of whom are former federal prosecutors) whose principal area of practice is criminal defense in the federal courts of New York. The NYCDL's mission is to support and advance the criminal defense function by enhancing the quality of defense representation, taking positions on important defense issues, fostering understanding and consensus in areas of mutual concern to defense lawyers and prosecutors, and promoting collegiality among lawyers on both sides and the bench. As *amicus*, the NYCDL offers the Court the perspective of practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 13,000 lawyers, including citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or judges of the state or federal courts. The NACDL is the only national bar organization working on behalf of public and private defense lawyers.

The NYCDL and NACDL are vitally interested in the issues before this Court. It is a central premise of the Sixth Amendment that an individual is entitled to counsel in facing serious charges presented by the Government. The ability of an accused to subject the prosecution's proof to adversarial testing by skilled counsel is the very hallmark of a free society, providing the essential safeguard that permits the government to zealously prosecute cases secure in the knowledge that any verdict that is subsequently obtained is both procedurally and substantively fair under the Fifth and Sixth Amendments. In this case, the prosecution does not assert an interest in ensuring the most skilled counsel to test its proof, but the opposite: it has

acted to stack the adversarial deck to weaken the hand of the defense in order to strengthen its own. That interest is anathema to the founding principles of this society and should not be sanctioned by this Court.

STATEMENT OF FACTS

We base this brief on the following facts, which we assume to be true for the purposes of our argument.[1]

On January 23, 2003, the United States Department of Justice, through its Deputy Attorney General Larry D. Thompson, issued a memorandum describing the "Principles of Federal Prosecution of Business Organizations" (hereinafter the "Thompson Memorandum").[2] The Thompson Memorandum promulgated "a revised set of principles" intended to guide the exercise of prosecutorial discretion when determining whether to file criminal charges against corporate entities. Ex. A at 1. In Part II, "Charging a Corporation: Factors to be Considered," five of the nine enumerated "factors" explicitly presume individual criminal culpability: "1. the nature and seriousness of the offense"; "2. the pervasiveness of wrongdoing within the corporation"; "3. the corporation's history of similar conduct"; "4. the corporation's timely and voluntary disclosure of wrongdoing"; and, additionally, in the eight factor, the Thompson Memorandum advises prosecutors to consider "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance." Ex. A at 2-3.

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1 In assembling this brief statement of facts, we rely on our review of the motion papers submitted regarding this issue by both the KPMG defendants and the prosecution, on the transcripts of the May 8, 9, and 10, 2006, hearing on this issue before the Court and on the letter to the Court from David Spears dated April 25, 2006.

2 A copy of the Thompson Memorandum is attached to the Declaration of Lewis J. Liman as Exhibit A, and will be referenced in this brief as such.

In further discussion of the cooperation and voluntary disclosure factor, the Thompson Memorandum instructs as follows:

> Another factor to be weighed by the prosecutor 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, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

Ex. A at 5 (italics added; footnote omitted).

In this case, the United States Attorneys' Office for the Southern District of New York applied these principles in a manner that forced the accounting firm KMPG LLP ("KPMG") to cut off attorneys' fees to its employees and partners who were subsequently indicted.

KMPG had a longstanding practice to advance and pay legal fees, without a preset cap or condition on cooperation with the government, for counsel for partners, principals, and employees of the firm in those situations where separate counsel was appropriate to represent an individual in a proceeding involving activities arising within the scope of the individual's duties, including any criminal or regulatory proceeding. Prior to February 2004, when KPMG cut off fees in this case, this practice was unwavering and was followed without regard to economic costs or considerations with respect to the individual counsel or firm chosen for representation. [3]

The one and only time KMPG has not followed this practice is in this case. In statements made to KPMG and its lawyers in February 2004, prosecutors, relying on and

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[3] Adapted from Letter of David Spears to the Court dated April 25, 2006.

referring to the Thompson Memorandum, made clear that KPMG would face indictment if it continued its policy of paying attorneys' fees for employees and partners the prosecution believed were "culpable."

At the time of those demands, KPMG and its partners and employees had been the subject of intensive civil and criminal investigations by the government. Indeed, the firm and its principals had been the subject of IRS litigation and a congressional investigation.[4] Criminal charges, against both the firm and individuals, were clearly on the prosecution's mind. The prosecution made KPMG believe that the only way to avoid its own indictment, which most certainly would have meant the death knell for the organization, was to accede to the prosecution's demands and abandon its longstanding practice of advancing attorneys' fees.

At the time the attorneys' fees practice was abandoned, KPMG itself had conducted no internal investigation and made no determination of its own that any of its partners or employees were "culpable." In fact, the prosecution made the only assertion with respect to culpability against partners and employees who had not even been charged by a grand jury, let alone convicted. This assertion rested entirely on the prosecution's definition of culpability and its oversight of the way in which individuals interacted with the investigation.

As a result of the prosecution's demands, KPMG took the action that the prosecution wanted it to take and that it virtually had to take: it initially placed a $400,000 cap on legal fees and conditioned legal fees on the cooperation of its employees and partners with the

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[4] "In mid-November 2003, the minority staff of the Senate permanent subcommittee on investigation published a report about so-called tax shelter activities, in which it was partially critical of KPMG's tax group. This followed highly publicized hearings carried on TV where certain employees of KPMG testified and were really roughed up by the senators who questioned them. At the same time, KPMG was embroiled in really hostile and difficult litigation with the IRS, which was doing an audit of KPMG and also subpoenaing information from KPMG investigating tax shelters . . . ." Transcript of May 10, 2006 Hearing at 343:23-25 and 344:1-7.

prosecution's investigation, and then ultimately, at the prosecution's urging, cut off fees to the KPMG defendants altogether. The prosecution thereby ensured, as the natural and inevitable effect of its actions, that such employees and partners would be deprived of the resources to hire counsel of choice to proceed through what would be an exceedingly complex and lengthy litigation when (and not just if) the prosecution brought charges against them.

By exerting irresistible pressure on KPMG to cut off payment of legal fees, the prosecution not only interfered with KPMG's longstanding practice of advancing such fees, but also sought to circumvent the constitutional protections afforded by the Sixth Amendment right to counsel and the Fifth Amendment right to due process by hobbling the defense of KPMG's former partners and employees facing prosecution.

ARGUMENT

I. THE PROSECUTION'S CONDUCT VIOLATES THE SIXTH AMENDMENT

The Sixth Amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. The right to counsel is a cornerstone of our criminal justice system, for "it is through counsel that all other rights of the accused are protected" and "'[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'" Penson v. Ohio, 488 U.S. 75, 84 (1988) (quoting Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956)).

For this reason, "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment," Wheat v. United States, 486 U.S. 153, 159 (1988),[5] and a defendant should "be afforded a fair opportunity to secure counsel of his own choice," Powell v. Alabama, 287 U.S. 45, 53 (1932). The right to counsel of one's choice may not be abridged by the Court or the prosecution, except in extraordinary circumstances, such as where an accused person's choice of counsel threatens to harm the judicial process, see Wheat, 486 U.S. at 159 (a defendant may not select as his attorney "an advocate who is not a member of the bar" or "who has a previous and ongoing relationship with an opposing party"), or where abrogation is a mere byproduct of the government's exaction of a proper criminal penalty, such as seizure of illegally obtained assets, Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989) (Blackmun, J., dissenting). It follows that the prosecution is not permitted to seize property from the accused, absent a duty of criminal forfeiture or some other lawful pretext, with the naked intention of depleting funding reserved for payment of attorneys' fees, thereby restricting the accused person's choice of counsel. [6]

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[5] Accord United States v. Curcio, 694 F.2d 14, 22 (2d Cir. 1982) (Friendly, J.), disapproved on other grounds in Flanagan v. United States, 465 U.S. 259, 263 n.2 (1984).

[6] Indeed, even where asset forfeiture may be appropriate, the potential consequences of such forfeiture on a defendant's Sixth Amendment rights require strict procedural protections. See, e.g., United States v. Unimex, Inc., 991 F.2d 546, 551 (9th Cir. 1993) ("right to counsel under the Sixth Amendment and to Due Process under the Fifth Amendment were violated by taking away all of [defendant's] assets, denying it an opportunity to show cause prior to its criminal trial that an amount it could have used for attorneys' fees was nonforfeitable, and then forcing it to trial without counsel"); United States v. Moya-Gomez, 860 F.2d 706, 724 (7th Cir. 1988) ("[T]he pretrial, post indictment restraint of a defendant's assets without affording the defendant an immediate, post restraint, adversary hearing at which the government is required to prove the likelihood that the restrained assets are subject to forfeiture violates the due process clause to the extent it actually impinges on the defendant's qualified sixth amendment right to counsel of choice."). For example, in Payden v. United States (In re Grand Jury Subpoena Duces Tecum dated January 2, 1985 (Simels)), 767 F.2d 26, 29 (2d Cir. 1985), the Court of Appeals rejected the government's assertion that the defendants' Sixth Amendment right to continue with counsel of his choice was secondary to the government's ability, through an investigation by the grand jury, to seek forfeiture of the funds used to retain the attorney.

It is the very fact that individuals charged with serious and complicated offenses can retain skilled counsel to challenge the prosecution's proof that protects the government's interest in securing convictions that are both procedurally and substantively, which is the hallmark of a free society. Whatever the consequences for a particular prosecution, the government can have no legitimate interest in an individual having other than the best and most skillful counsel. "[T]o refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which [the Supreme Court] has operated in Sixth Amendment cases." United States v. Wade, 388 U.S. 218, 237-38 (1967). The Supreme Court has repeatedly stated that only through defense counsel's testing of the prosecution's proof may the public, and the government, gain comfort that a conviction, once obtained, is just and that the proceedings have reached the correct substantive and procedural result. See, e.g., Penson, 488 U.S. at 84 ("[our criminal justice] system is premised on the well-tested principle that truth – as well as fairness – is best discovered by powerful statements on both sides") (quotation marks and citations omitted); Wade, 388 U.S. at 238 ("law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence" and "[t]hat result . . . can only help insure that the right man has been brought to justice"). For this reason, "when the government's role shifts from investigation to accusation," the assistance of counsel "is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.'" Moran v. Burbine, 475 U.S. 412, 430 (1986) (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)).

The prosecution's use of the Thompson Memorandum furthers no legitimate governmental interest and violates these Sixth Amendment principles. This is not a case in

which the corporate target has acted on its own volition, without pressure by the prosecution. Nor is it a case in which the corporation has conducted its own internal investigation and, on that basis, identified particular culpable employees and determined that it no longer wished to retain them or associate with them. Such cases would present different facts not present here. Nor does the record support the conclusion that KPMG advanced attorneys' fees to culpable employees or partners for fear that, absent such advancement, the employees or partners would testify or provide evidence against KPMG. The prosecution's threat came *after* the prosecution had already formed the conclusion that sufficient evidence existed to bring a charge against KPMG as evidenced by their focus on the Thompson Memorandum. Rather, this is a case where the prosecution, following to the letter the policy undertaken in the Thompson Memorandum, appears to have acted to further the naked interest in depriving individuals whom it contemplated bringing charges against from hiring the most skillful attorneys those individuals could hire with the use of KPMG's resources.

Whatever the outcome should be of those other hypothetical cases,[7] the government can have no legitimate interest in depriving an individual of counsel of choice. To the contrary, the legitimate interest of the government – indeed, its only legitimate interest – is ensuring that defendants' receive the best counsel possible. See supra at 5-7. The choice of an appropriate defense attorney may affect both the quality and the nature of the defense, due to differences in the competence and expertise of counsel and the heavy degree to which defendants come to rely upon their counsel to assist them in navigating the intricacies of criminal proceedings. Profound consequences may flow from this choice, for "[l]awyers are not

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[7] The NYCDL and NACDL take no position in this case with respect to a case involving those facts.

fungible, and often 'the most important decision a defendant makes in shaping his defense is his selection of an attorney.'" United States v. Mendoza-Salgado, 964 F.2d 993, 1014 (10th Cir. 1992) (citations omitted). Furthermore, "once a lawyer has been selected 'law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.'" United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) (quoting Faretta v. California, 422 U.S. 806, 820 (1975)), aff'd, 667 F.2d 365 (3d Cir. 1981).[8]

The prosecution cannot shield its actions or its policy from constitutional scrutiny based on the fact that, at the time that it succeeded in blunting KMPG's long-standing practice of advancing attorneys' fees through indictment and trial, the KPMG defendants had not yet been formally charged with any crime, particularly here, where the withholding of such fees continued post-indictment. If the prosecution's actions had occurred only post-indictment, the Sixth Amendment right to counsel would most certainly have been implicated. But, the return of a felony indictment itself is not a magical moment without which no Sixth Amendment violation could exist. In determining when the Sixth Amendment right to counsel attaches, the focus should not be on the filing of a particular paper, but on the character of the prosecution's relationship to the individual at the specific time in question. Acknowledging the focus on form over substance that such a constitutional doctrine based on the filing of an indictment would sanction, the courts have recognized that the true question in assessing when a defendant's Sixth

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[8] Moreover, "[t]he selected attorney is the mechanism through which the defendant will learn of the options which are available to him. It is from his attorney that he will learn of the particulars of the indictment brought against him, of the infirmities of the government's case and of the range of alternative approaches to oppose or even cooperate with the government's efforts." Laura, 607 F.2d at 56. Equally important, as Justice Scalia has recently commented from the bench in consideration of this very issue, the Sixth Amendment right to counsel embodies a fundamental respect for the autonomy of individuals such that "if you have funds with which you can hire someone to speak for you . . . [y]ou should be able to use all of your money to get the best spokesman for you as possible." United States v. Gonzalez-Lopez, No. 05-352, Oral Argument Tr. 5-6, Apr. 18, 2006.

Amendment right to counsel attaches is whether the prosecutor has crossed the constitutional divide between investigator and adversary, even before the defendant has been formally charged. See, e.g., Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (upholding the right to counsel where "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect" and the government "carr[ies] out a process of interrogations that lends itself to eliciting incriminating statements"); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892-93 (3d Cir. 1999) (en banc) (defendant enjoyed a right to counsel during jailhouse telephone conversations with an informant made prior to preliminary hearing, filing of information, or arraignment, having only surrendered himself into custody pursuant to an arrest warrant). The accused bears the right to the assistance of counsel at any "critical" stage of criminal prosecution when "the accused [is] confronted . . . by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." United States v. Gouveia, 467 U.S. 180, 189 (1984) (quotation marks and citations omitted).

Although the initiation of adversarial proceedings triggering application of the right to counsel is normally signaled "by way of formal charge, preliminary hearing, indictment, information, or arraignment," Kirby v. Illinois, 406 U.S. 682, 689 (1972), the right to counsel "also may attach at earlier stages" where circumstances of procedural complexity or adversarial confrontation so require, Matteo, 171 F.3d at 892. Thus, in practical terms "the right to counsel attaches . . . when 'the government has committed itself to prosecute,'" Roberts v. Maine, 48 F.3d 1287, 1290 (1st Cir. 1995) (quoting Moran, 475 U.S. at 430-32), or when "'the government's role shifts from investigation to accusation.'" Id. (quoting Moran, 475 U.S. at 430); see also United States v. Hamad, 858 F.2d 834, 839 (2d Cir. 1988) ("Moreover, we resist

binding the [Disciplinary] Code's applicability to the moment of indictment. The timing of an indictment's return lies substantially within the control of the prosecutor. Therefore, were we to construe the rule as dependant upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances."); United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992) (citing Bruce v. Duckworth, 659 F.2d 776, 783 (7th Cir. 1981), for the proposition that "government may not intentionally delay formal charges for purpose of holding lineup outside presence of defense counsel"); United States v. Dobbs, 711 F.2d 84, 85 n.1 (8th Cir. 1983) (noting that intentional delay by the prosecution in seeking indictment until after an adversarial interview had taken place in order to prevent the defendant from obtaining advice of counsel may cause the right to counsel to attach "before judicial proceedings have been formally initiated"). Cf. United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992) (vacating sentence on the ground that defendant's trial counsel failed to adequately represent defendant at the plea bargain stage); Matteo, 171 F.3d at 892 (emphasizing that the moment of subjection to the "'prosecutorial forces of organized society'" represents the "crucial point" at which the constitutional right to counsel attaches, and that this may occur at a stage prior to the formal charge or indictment) (citation omitted).

There could be no conduct that more centrally implicates the Sixth Amendment than a prosecutor's direction to a corporation to cut off the payment of attorneys' fees to individuals whom the prosecution believes to be criminally culpable. The very purpose and effect of such conduct is to weaken the defense when and if the prosecution brings criminal charges. There would be no reason for the prosecution to take such action but for its contemplation that it will bring criminal charges – what other reason could the prosecution have for cutting off attorneys' fees in circumstances such as these other than that counsel might be

necessary. This truth is highlighted by the very fact that the prosecution, by directing the corporation not to pay fees, itself has designated the employees or partners as "culpable" – terminology that, when used by the Department of Justice, can only mean criminally culpable.

Thus, whether measured according to whether the government had "committed itself to prosecute," Moran, 475 U.S. at 432 (internal quotation marks and citations omitted), whether "the adverse positions of government and defendant have solidified," Kirby, 406 U.S. at 689, whether the government's demand is an improper interference with counsel akin to Larkin, or whether simply there is a continuing constitutional violation, there should be little question that the Sixth Amendment is implicated (and violated) where the prosecution compels a corporation cut off attorneys' fees to its employees and partners for the naked purpose of depriving them of the most skilled criminal counsel if indicted and then, having succeeded in that demand, turns around and indicts those employees and partners.

Here, the prosecution had no reason to coerce KPMG to withhold advancement of the KPMG defendants' attorneys' fees – and no tactical interest in doing so -- unless the prosecution intended to face those defendants in court.[9] At this stage in the development of its

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[9] See infra at 16-17, n.12 (addressing the prosecution's argument that it has a legitimate tactical interest here to prevent "circling the wagons"); see also Peter J. Henning, Overcriminalization: The Politics of Crime, Targeting Legal Advice, 54 Am. U. L. Rev. 669, 702 (2005) ("In the name of investigating corporate crime, the DOJ has given expression to a mistrust of lawyers as little more than hindrances to the protection of society from wrongdoing. We are told [by the Thompson Memorandum], in effect, that lawyers cannot be trusted because their ethical rules permit them to obstruct justice, and their advice to clients to assert their constitutional rights make it appreciably more difficult to investigate and to prosecute economic crimes committed by corporations and their officers and employees. However, the DOJ's suspicion of lawyers and the targeting of legal advice as something to be limited or eliminated if possible from corporate crimes investigations are steps toward viewing all such allegations of misconduct as proven unless--and until--determined otherwise. I submit that this approach takes the issue of overcriminalization to a new level by making the provision of proper legal advice an indicia of criminality and an instrumentality to be removed from the hands of those subject to a criminal investigation in much the same way an officer would take a weapon or contraband from a suspect."). The Thompson Memorandum, accordingly, stands in stark contrast to the view, embodied in Supreme Court jurisprudence, that skilled defense counsel should be employed to test the prosecution as it tries to meet its burden. See, e.g., Polk County v. Dodson, 454 U.S. 312, 318 (1984) ("The system assumes that adversarial testing will ultimately advance the public interest in

case, having categorized the KPMG defendants as "culpable" the prosecution was actively in the process of interviewing them with the intention to elicit admissions and other inculpatory evidence. Under these circumstances, the "adverse positions of the prosecution and the defendants had solidified," see Kirby, 406 U.S. at 689, and the KPMG defendants had arrived to face difficulties both substantive and procedural which, if they failed to navigate efficiently, may have prejudiced their cases at trial or even rendered trial a "mere formality," see Gouveia, 467 U.S. at 189 (quotation marks and citation omitted). The prosecution's conduct accordingly violated the Sixth Amendment.

II. THE PROSECUTION'S CONDUCT VIOLATES THE FIFTH AMENDMENT

As set forth above, the prosecution's conduct in this matter, as sanctioned and insisted upon by the Thompson Memorandum, served no other purpose than to thwart the KMPG defendants from defending themselves against the Government and to further tip an already uneven playing field into the prosecution's favor. Such conduct reflects a contempt for the function of defense counsel and for the KPMG defendants' undeniable interest in their own defense and cuts at the very heart of the principles of liberty embodied in the Due Process Clause.

A. The Illegitimate And Irrational Deprivation By The Government Of Fundamental Liberty Interests Violates The Fifth Amendment Due Process Clause

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." U.S. Const. Amend. V.

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truth and fairness."); Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

Heightened protection against government interference is warranted under the Due Process Clause when certain fundamental rights and liberty interests are at stake. Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997) (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992) (further quoting Daniels v. Williams, 474 U.S. 327, 331 (1986))). Fundamental liberty interests cannot be subjected to government interference unless such interference bears a reasonable relationship to a legitimate state interest. Washington, 521 U.S. at 719-20. Absent a fundamental liberty interest, the prosecution, however, is still not unhindered in its discretion. The Due Process Clause protects defendants from outrageous government conduct that impairs their protected right to be treated in a fair, evenhanded manner such that an imbalance of forces is created between the accused and the accuser. See United States v. Cuervelo, 949 F.2d 559, 565 (2d Cir. 1991); see also Rochin v. California, 342 U.S. 165, 174 (1952).

B. The KPMG Defendants Have Substantial Liberty Interests At Stake

The liberty interest at issue here could not be more fundamental.[10] In essence, the prosecution is attempting to take away the defendants' very freedom in this case. Implicit in a defendants' unquestionable right to defend against the prosecution's efforts is the notion that individuals, when faced with the force and resources of the prosecutorial arm of the Government seeking to take away personal freedom, have a fundamental interest in planning the defense of their liberty without undue interference, including choosing their own attorney. See Powell, 287

[10] To the extent the interest at stake here is more narrowly characterized as an economic interest in the advancement of counsels' fees or the liberty to agree to such an arrangement, these too are fundamental interests deeply rooted in our Nation's history, and, in this case, in the laws of the State under which KPMG is organized. Delaware law specifically recognizes the rights of partners in a partnership to agree to indemnify one another, and the Delaware courts have interpreted this right to include an agreement to advance counsel fees. Delaware Revised Uniform Limited Partnership Act § 17-108; Morgan v. Grace, C.A. No. 20430, 2003 Del. Ch. LEXIS 113, at *9 (Del. Ch. Oct. 29, 2003).

U.S. at 53; United States v. Kikumura, 947 F.2d 72, 78 (3d Cir. 1991) ("Due process demands that a defendant be afforded an opportunity to obtain the assistance of counsel of his choice to prepare and carry out his defense."). This interest arises not only when an individual is subject to indictment, but, particularly in the case of complex investigations, arises whenever it is clear that the Government is the individual's adversary. See Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 368-71 (1985) (Stevens, J., dissenting) ("What is at stake is the right of an individual to consult an attorney of his choice in connection with a controversy with the Government. In my opinion that right is firmly protected by the Due Process Clause of the Fifth Amendment . . . . [T]he citizen's right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy."). An individual subjected to an investigation by the prosecution has an interest in setting up his possible defenses and strategizing without prosecutorial interference. Where a defendant's pre-indictment strategy includes arranging to have counsel fees advanced in the event of prosecution, the government cannot institute an illegitimate policy to carte blanche circumvent that strategy.

C. The Government Has No Legitimate Interest In Interfering With The KPMG's Defendants' Interests In Pursuing Their Counsel Of Choice

We are deeply concerned about the prosecution's trailblazing employment of the Thompson Memorandum here to cripple the defense before the trial has even started. With only the prosecution's assertion that the KPMG defendants were "culpable" or "uncooperative"[11], the prosecution coerced KPMG into revoking its long-standing policy of advancing attorneys' fees to employees. The notion that the prosecution may legitimately use the Thompson

[11] We believe that the record demonstrates that no internal investigation was conducted by KMPG, and KPMG, consequently, made no findings with respect to the culpability of the KPMG defendants.

Memorandum to pressure KMPG to deprive the KPMG defendants, before they were even indicted, of the power to retain their counsel of choice is deeply unsettling. Caplin & Drysdale, 491 U.S. 617, 640 n.7 (1989) ("The notion that the Government has a legitimate interest in depriving criminals--before they are convicted--of economic power, even insofar as that power is used to retain counsel of choice is more than just somewhat unsettling, as the majority suggest. That notion is constitutionally suspect.") (quotation marks and citations omitted).

In Caplin & Drysdale, the Court was confronted with a challenge to forfeiture statutes that allowed the Government to seize certain assets of a defendant; the petitioner argued that the seizure of funds that the defendant would have used to retain counsel of choice was constitutionally impermissible. Caplin & Drysdale, 491 U.S. at 632-34. Although the Court upheld the forfeiture statutes, it did so on the basis of the government's strong property interest in the money at issue (as expressed in an act of Congress). Id. at 627. Here, the government has no such interest in the money that was to be advanced to the KPMG defendants. Absent this governmental interest, it is our position that this case falls squarely into the kind of interference with the retention of counsel that the majority in Caplin & Drysdale found constitutionally suspect. The Court, addressing the petitioner's Fifth Amendment due process claims, noted that a rule that by its very terms upsets the balance of forces between the accused and the accuser would be unconstitutional. Id. at 633 (quoting Wardius v. Oregon, 412 U.S. 470, 474 (1973)). For the reasons we have articulated, the Thompson Memorandum's implicit requirement that a company, which the prosecution perceives as the situs of "wrongdoing" and "malfeasance", cease advancement of attorneys' fees to individuals that the prosecution deems culpable is an unconstitutional rule that upsets the balance between defendants and the prosecution.

The prosecution's contempt for the role of defense counsel as embodied in the Thompson Memorandum cannot, should not and must not be sanctioned, as it is repugnant to the very core values of an adversarial system of justice. The government has no legitimate interest in increasing the chances of convicting a person by diminishing the quality of his counsel.[12] To the contrary, in any situation where a person's liberty is at stake, the courts have recognized that defense counsel's role is paramount--aiding in identifying legal questions, presenting arguments and, most importantly, challenging the prosecution's proof. See Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973); see also Walters, 473 U.S. at 329-30 (acknowledging that in complex factual situations involving significant interests advice of counsel is essential once an adversary is present). The prosecutor's interest in having defendants with less than the best lawyer they can afford is not a legitimate government interest, as it is the existence of skilled defense counsel testing the prosecution's evidence that gives society comfort that a conviction, once obtained, is

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[12] The prosecution asserts that the Thompson memorandum stands for the proposition that a company is not cooperating when it provides attorneys' fees to culpable employees in an effort to "circle the wagons." Transcript of May 10, 2006 Hearing at 409:20-25. This assertion is disingenuous. The Thompson Memorandum's assessment of whether a company is cooperating with the prosecutor's investigation includes an examination of whether "the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation" and, separately, whether "the corporation appears to be protecting its culpable employees . . . through the advancing of attorneys['] fees . . . ." Ex. A at 5-6. The Thompson Memorandum defines "impeding an investigation" to include "inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed." Id. at 6. The Thompson Memorandum does not suggest that the prosecution only consider the issue of advancement of attorneys' fees if the company is engaged in impeding the investigation/"circling the wagons" as the prosecution asserts. In fact, if the prosecution's interpretation of the Thompson Memorandum were true, that the issue of attorneys' fees would only be raised when a company is impeding the investigation by discouraging employees from being interviewed, then the advancement issue would not have been raised in this case, as it is more than clear from the record that KPMG was fully encouraging its employees to cooperate with the prosecution. Rather, the factors are to be considered separate and apart, the import of which is that the prosecution believes it has an interest, separate from the "circling of the wagons," in ensuring that employees of a company under investigation not be advanced attorneys' fees. It is evident, then, that the Thompson memorandum's focus on the advancement of counsel fees is nothing more than a reflection of the belief that the mere presence of a well-financed lawyer frustrates the government's prosecutorial efforts. This naked interest in ensuring that defendants have less effective counsel is wholly illegitimate.

a just conviction—the substantively correct outcome of a fair process. Wilson v. Mintzes, 761 F.2d 275, 279 (6th Cir. 1985) ("[T]he accused's right to retain counsel of his choice is necessary to maintaining a vigorous adversary system and the objective fairness of the proceeding in which the accused is prosecuted."). The government's true and legitimate interest in all criminal proceedings is not to secure convictions, but, through a fair process, to achieve a just result. See Brady v. Maryland, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly under the federal domain: 'The United States wins a point whenever justice is done its citizens in the courts.'"). It is particularly imperative that in increasingly complex investigations into business crimes defendant's counsel be a skilled advocate. Such skilled advocacy is necessary to enhance the reliability of litigation outcomes involving directors and officers by assuring a level playing field. Ridder v. CityFed Fin. Corp., 47 F.3d 85, 87-88 (3d Cir. 1995); see also Caplin & Drysdale, 491 U.S. at 646 (Allowing counsel of choice ensures "equality between the Government and those it chooses to prosecute.").

Further, the prosecutor's unreasonable interference in the advancement of attorneys' fees to the KMPG defendants is an affront to Due Process. The Supreme Court has recognized in a related context that "for an agent of the state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 32-33 (1977)). The prosecution could not coerce a defendant into taking on a less-skilled counsel by threatening to bring additional charges if he hired a more-skilled counsel. Such an action of prosecutorial vindictiveness would unconstitutionally "up the ante" based solely on a

defendant's constitutionally protected exercise of his rights. See, e.g., Thigpen v. Roberts, 468 U.S. 27, 33 (1984) (holding that prosecuting a defendant for manslaughter following his invocation of his statutory right to appeal his misdemeanor convictions was unconstitutional); North Carolina v. Pearce, 395 U.S. 711 (1969) (holding that prosecutor may not seek imposition of a stiffer sentence after reversal and reconviction). Additionally, such interference would constitute improper and unconstitutional interference with the attorney-client relationship. See United States v. Marshank, 777 F. Supp. 1507, 1518-20 (N.D. Cal. 1991) ("Government misconduct which subverts a defendant's relationship with his [attorney] may be judged under the standards of both the Fifth and Sixth Amendments;" the government cannot be a "knowing participant" in circumstances that interfere with a defendant's right to counsel.); see also United States v. Ofshe, 817 F.2d 1508, 1516 (11th Cir. 1987) (holding that government interference in an attorney-client relationship that offends the "universal sense of justice" violates the Due Process Clause of the Fifth Amendment).[13]

Here, the prosecution should not be allowed to do indirectly what it could not do directly. See Marshank, 777 F. Supp at 1525 ("We . . . have made clear that, at the very least, the 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.") (quoting Maine v. Moulton,

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[13] As stated in another, similar context -- the ascertainment of intent under 18 U.S.C. §1503, the statute which criminalizes obstruction of the administration of justice: "The likely result and attendant circumstances define the context in which the defendant acts . . . . The defendant's design is irrelevant; if the natural result of his plan is to interfere with judicial processes, justice will be obstructed whether he hopes it is or not." United States v. Neiswender, 590 F.2d 1269, 1273-74 (4th Cir. 1979) (18 U.S.C. § 1503 applied to obstruction of the defense); see also United States v. Buffalano, 727 F.2d 50, 53-54 (2d Cir. 1984) (false claim by defendant that he could "fix" the case); United States v. Gage, 183 F.3d 711, 718 (7th Cir. 1999) (Posner, J., concurring) (referring to the Buffalano and other decisions as plausibly reading two Supreme Court cases, Pettibone v. United States, 148 U.S. 197 (1893) and United States v. Aguilar, 515 U.S. 593 (1995), as holding that obstructive conduct is culpable "if the obstruction was the natural and probable consequence of the conduct. It need not have been the intended consequence").

474 U.S. 159, 170-71 (1985)). Those cases involving prosecutorial misconduct in violation of the Fifth Amendment do not turn upon the identity of the recipient of the illegitimate prosecutorial demand, but on an assessment of the effect of the prosecution's conduct and the legitimacy of the government's interest in that effect. Here the prosecution's interests were wholly illegitimate. The prosecution acts unlawfully when its design is solely to further its own chances at trial. That is clearly the natural, inevitable and foreseeable result of the prosecution's conduct here: by threatening KPMG with indictment were it not to cease advancing attorneys' fees to the KPMG defendants, the prosecution has no less effectively or nakedly interfered with those defendants rights to hire the best counsel available than were the prosecution to have threatened a lengthier jail sentence if a defendant hired a particular lawyer. In both circumstances, the prosecution's conduct would run afoul of Fifth Amendment principles central to our society.

CONCLUSION

Accordingly, we urge the Court to find that the prosecution's invocation of the Thompson Memorandum to thwart KMPG defendants' choice of counsel violates the Fifth and Sixth Amendments.

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Respectfully submitted,

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