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 OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES SEEKING AFFIRMANCE

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue N.W.
Washington, D.C. 20036
(202) 588-0302

MICHAEL J. GILBERT
DECHERT LLP
30 Rockefeller Plaza
New York, New York 10112
(212) 698-3500

STEVEN B. FEIRSON
DECHERT LLP
2929 Arch Street
Philadelphia, Pennsylvania 19104
(215) 994-4000

Date: January 23, 2008

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Washington Legal Foundation hereby states that it is a non-stock, non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code and, therefore, there are no parent corporations or publicly held corporations that own stock of *Amicus*.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

RULES

OTHER AUTHORITIES

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with supporters in all fifty states. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. In particular, WLF has frequently appeared in the United States Supreme Court and lower federal courts to address the judicial remedies for unlawful criminal prosecutions against members of the business community. *See, e.g., Stolt-Nielsen, S.A. v. United States, cert. denied,* 127 S. Ct. 494 (2006); *Arthur Andersen LLP v. United States,* 544 U.S. 696 (2005); *Riverdale Mills Corp. v. Pimpare,* 392 F.3d 55 (1st Cir. 2004).

WLF has no direct financial interest in the outcome of this case, and none of the Defendants-Appellees is a member of WLF. *Amicus* is filing due solely to its interest in ensuring that prosecutors do not improperly interfere with the payment of criminal defendants' legal fees by their employers and, thus, their ability to mount a defense. This brief is being filed by leave of Court pursuant to Federal Rule of Appellate Procedure 29.

PRELIMINARY STATEMENT

WLF agrees with the KPMG Defendants[1] that the dismissal of the indictment by the District Court should be affirmed. The conduct of the prosecutors in this case and the Thompson Memorandum's[2] provision regarding payment of attorneys fees amount to unconstitutional interference with the KPMG Defendants' constitutional rights to counsel and to a fair trial. The focus of this submission is to argue that this Court may properly affirm the District Court's dismissal of the indictment without reaching the question whether the government violated the Defendants' constitutional rights.

It is axiomatic that courts should avoid reaching constitutional questions whenever possible. This Court may affirm the District Court's decision on any ground appearing in the record, even if different from the one relied on by the District Court.

---

[1] References herein to "Defendants" and "KPMG Defendants" refer to Defendants-Appellees 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 and Richard Rosenthal, collectively.

[2] References herein to the Thompson Memorandum refer to the memorandum issued on January 20, 2003 by then-Deputy Attorney General Larry D. Thompson entitled, "Principles of Federal Prosecution of Business Organizations."

Under this Court's decision in *United States v. Ming He*, 94 F.3d 782 (2d Cir. 1996), and its progeny, the Court may, under its supervisory powers, remedy improper government conduct that impugns the integrity of the Court and infects the proceedings before it, even without reaching the question whether the conduct violates a statutory provision or the constitution and even if the conduct does not occur in the courtroom itself.

In *Ming He*, this Court invoked its supervisory powers to address prosecutors' practice of conducting debriefing sessions with cooperating defendants without their attorneys present. The Court held that this conduct -- although not unconstitutional and although it occurred outside of the courtroom -- impacted the sentencing phase of the proceedings and, therefore, it was within the scope of the Court's supervisory powers to prohibit the practice and to vacate a sentencing proceeding infected by it. A federal court's exercise of its supervisory powers to protect defendants from specific prosecutorial practices "is not an encroachment on the conduct of executive branch officials." *Ming He*, 94 F.3d at 792. Rather, a federal court exercising such supervisory powers is merely "enforcing [its] general supervisory authority over members of the Bar of this Court, lawyers who are at the same time United States attorneys, and directing the district courts not to further [an improper] practice relied on by a federal prosecutor." *Id.* at 792-93 (internal citation omitted).

The District Court in this case found, based on a substantial evidentiary record, that the government's heavy-handed interference with the KPMG Defendants' access to resources for their defense impacted every phase of this case and, if permitted to do so, would have deprived the KPMG Defendants of a fair trial. This misconduct, which directly impacts Court proceedings, can and should be addressed through exercise of this Court's supervisory powers, because it is necessary to protect the integrity of Court proceedings. Affirming dismissal of the indictment on the basis of the supervisory powers would avoid unnecessarily ruling on constitutional issues, would be consistent with the law in this Circuit and would provide the only remedy that properly addresses the grievous harm that occurred in this case.

The Supreme Court, in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), held that the supervisory powers may only be exercised if the "errors, defects or irregularities" were not "harmless" within the meaning of Federal Rule of Criminal Procedure 52(a). The facts found by the District Court establish unambiguously that the prosecutors in this case interfered with the KPMG Defendants' ability to defend themselves from serious criminal charges in a complex white collar case without justification. This error is far from harmless. It amounts to fundamental, structural error. Any remedy short of dismissal of the indictment will not adequately address the harm to the KPMG Defendants.

ARGUMENT

POINT I

THE COURT MAY REMEDY THE GOVERNMENT'S MISCONDUCT THROUGH EXERCISE OF ITS SUPERVISORY POWERS AND AVOID UNNECESSARILY REACHING CONSTITUTIONAL QUESTIONS

WLF agrees with the District Court's ruling and the KPMG Defendants' arguments in support of affirmance. However, the District Court's decision rests upon constitutional grounds and federal courts should avoid deciding constitutional issues whenever possible. The Supreme Court has made clear that a fundamental precept of judicial restraint is the rule that, prior to reaching constitutional questions, federal courts should first consider whether the matter can be adjudicated on non-constitutional grounds. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-446 (1988); *see also Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183, 191 (2d Cir. 2004). Moreover, this Court may "'affirm the district court's decision on any ground appearing in the record, even if the ground is different from the one relied on by the district court.'" *Blackman v. New York City Transit Authority*, 492 F.3d 95, 100 (2d Cir. 2007) (quoting *ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151, 155 (2d Cir. 2003)).

Federal courts, under their supervisory powers, have a duty to supervise the administration of criminal justice by establishing and maintaining civilized standards of procedure and evidence, and regulating the conduct of government

agents, including federal prosecutors. *McNabb v. United States*, 318 U.S. 332, 340 (1943). First recognized in *McNabb*, the supervisory powers may be used by federal courts to remedy the government's violation of a criminal defendant's recognized right, *id.* at 340, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, *id.* at 345, and as a remedy designed to deter illegal conduct, *United States v. Payner,* 447 U.S. 727, 735-36, n. 8 (1980).

The scope of the supervisory powers varies depending on the nature and setting of the violation. The Supreme Court has essentially divided the types of misconduct – and the degree of supervisory powers available to courts to remedy misconduct – into three categories. *McNabb*, 318 U.S. at 341-42; *United States v. Williams*, 504 U.S. 36, 46-47 (1992).

The first category encompasses misconduct by government agents occurring during the investigation of crimes. Because this activity is traditionally within the province of the executive branch, the supervisory powers may only be invoked in this context when government agents have violated the constitution, a federal statute or a federal rule. *McNabb*, 318 U.S. at 341-42.[3] The second category

[3] The supervisory powers may not be used as a substitute for Fourth Amendment jurisprudence, though, which adequately safeguards against unlawful searches and seizures. *Payner*, 447 U.S. at 735.

involves misconduct occurring before the Grand Jury, a body that is also separate from the court. The Supreme Court has held that courts may not prescribe new rules of procedure applicable to the Grand Jury. Thus, when a prosecutor engages in misconduct before the Grand Jury, the court may dismiss the indictment only if that misconduct violates a Rule of Criminal Procedure, statute, or constitutional guarantee. *Williams*, 504 U.S. at 46-47; *Bank of Nova Scotia,* 487 U.S. at 250.[4] The third category pertains to misconduct occurring before the courts themselves or directly impacting proceedings before the court. *Williams*, 504 U.S. at 47. The extent of federal courts' supervisory authority is greatest in this context, such that courts may prescribe standards of prosecutorial conduct in the first instance rather than only having the ability to sanction conduct already addressed by the constitution, a statute or a rule. *Id.*

In *United States v. Ming He,* 94 F.3d 782 (2d Cir. 1996), this Court held that it was error for a District Court, in determining sentence, to rely on disparaging comments appearing in the prosecution's submission pursuant to United States Sentencing Guidelines Section 5K1.1 (relating to "substantial assistance to

---

[4] Several courts in this Circuit have dismissed indictments under the supervisory powers where extensive hearsay had been presented to the Grand Jury. *See United States v. Hogan*, 712 F.2d 757, 761-62 (2d Cir. 1983); *United States v. Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972); *United States v. Vetere*, 663 F. Supp. 381, 388 (S.D.N.Y. 1987).

authorities"), when those comments were based on statements the cooperating witness made during debriefing sessions with prosecutors at which the cooperating defendant's lawyer was not present. *Ming He,* 94 F.3d at 792-93. This Court did not reach the question whether cooperating defendants have a Sixth Amendment right to have counsel present during debriefing sessions but, rather, relied on its supervisory powers to ensure that sentencing proceedings before the District Court are fair and conducted with integrity. It held that the power to prescribe a rule securing rights not guaranteed by the constitution or by statute stems from the fact that prosecutors' dealings, outside of the courtroom, with cooperating witnesses were integral to the sentencing process, an area of traditional supervisory authority. *Id.* ("[E]xercise of supervisory authority is appropriate when needed to guarantee the defendant a fair sentencing proceeding.")

The *Ming He* court explained that its exercise of supervisory powers was "not an encroachment on the conduct of executive branch officials" because it was "not attempting to govern the conduct of federal agents whose task is to investigate and prevent criminal activity." *Id.* at 792. Instead, it was "enforcing [its] general supervisory authority over members of the bar of this Court, lawyers who are at the same time United States attorneys, and directing district courts not to further this practice relied on by a federal prosecutor." *Id.* at 792-93 (internal citation

omitted).[5]

Ming He was decided eight years after *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), in which this Court also invoked its supervisory powers to address misconduct during the investigatory stage of a criminal proceeding. In *Hammad*, the prosecutor was aware that the defendant was represented by counsel but, in an effort to obtain inculpatory statements, supplied a witness with a sham Grand Jury subpoena and arranged to record the resulting conversation between the witness and the defendant without informing the defendant's attorney. 858 F.2d at 835-36. The District Court found that the witness acted as an alter ego of the prosecutor, and the statements were thus obtained in violation of New York Disciplinary Rule 7-104(A)(1), which prohibits attorneys from contacting represented parties. *Id.* at 837-39. Pursuant to its supervisory powers, this Court held that suppression of evidence was available as a remedy at the discretion of the District Court for the violation of DR 7-104(A)(1) during the course of criminal

---

[5] Courts in this Circuit have relied repeatedly on *Ming He* as authority for the supervisory powers. *See, e.g., United States v. Griffin*, No. 97-1587, 1998 WL 735909, at * 2 (2d Cir. Oct. 16, 1998) ("[W]e held in [*Ming He*] that a defendant has the right, under the court's supervisory power, to the assistance of counsel in the similar circumstances of debriefing in the performance of his cooperation agreement."); *United States v. Perez*, 222 F. Supp.2d 164, 171 (D. Conn. 2002) ("This broad power to regulate practice before the Court was explained in [*Ming He*]."); *United States v. Feliciano*, 998 F. Supp. 166, 170 (D. Conn. 1998). *See also State v. Stewart*, 230 A.D.2d 116, 149 (N.Y. App. Div., 1st Dep't 1999); *State v. Coleman*, 700 A.2d 14, 23 (Conn. 1997).

investigations. *Id.* at 842. This Court held that "[j]udicial supervision of the administration of criminal justice in the federal courts . . . implies the duty of establishing and maintaining civilized standards of procedure and evidence." *Id.* at 841.[6] It is thus clear that through their supervisory powers, federal courts may evaluate and address particular prosecutorial practices occurring outside the courthouse that taint the integrity of the judicial process, even without holding that the constitution has been violated.[7]

---

[6] This Court has since scaled back *Hammad*'s reach insofar as it pertains to DR 7-104(A)(1), by ruling, in *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995), that the disciplinary rule is not a source of rights for prospective criminal defendants, but is merely "a rule of professional courtesy." *Simels*, 48 F.3d at 647. The *Simels* court did not impair the aspect of the *Hammad* decision concerning the supervisory powers of federal courts, though, cautioning only that "[t]he conceded power of federal district courts to supervise the conduct of attorneys should not be used as a means to substantially alter federal criminal law practice." *Id.* at 644. Indeed, *Ming He* cites *Hammad* to support the proposition that federal courts' general supervisory powers over attorneys allow them to promulgate rules of practice in criminal investigations. *Ming He*, 94 F.3d at 792-93.

[7] The Ninth Circuit has also found that courts may remedy prosecutorial misconduct occurring outside of the courthouse pursuant to the supervisory powers. In *United States v. Lopez,* 765 F. Supp. 1433, 1456 (N.D. Cal. 1991), *rev'd on other grounds,* 4 F.3d 1455, 1463 (9th Cir. 1993), the District Court dismissed an indictment because the prosecutor engaged in plea negotiations with the defendant without his attorney's knowledge in violation of the California Code of Ethics. The Ninth Circuit agreed with the District Court's understanding of its supervisory powers, noting that it was within the discretion of the district court "to act in an appropriate manner to discipline [the AUSA] if he subverted the attorney-client relationship" and that "federal courts are

This Court's more recent use of its supervisory powers to preserve judicial integrity in *United States v. Alcantara*, 396 F.3d 189, 203 (2d Cir. 2005) demonstrates the continued validity of the doctrine. In *Alcantara*, one of the defendants brought a Sixth Amendment challenge to the District Court's practice of conducting plea and sentencing hearings in the robing room rather than in open court. *Alcantara,* 396 F.3d at 193. This Court reasoned that the District Court had failed to comply with mandatory procedures for providing notice to the public in the event of a courtroom closure. *Id.* at 202-03. The Court exercised its supervisory powers based on the "unique circumstances" of the case and remanded the case for new plea and sentencing proceedings. *Id.* The Court held that the error "harm[ed] the integrity of our federal judicial system as a whole," and explained, "Holding these significant criminal proceedings behind closed doors-without notice to the public or any statement of reasons for the closure-is inconsistent with our open system of justice." *Id.* at 203.

The government's conduct in this case obviously harmed Defendants in numerous ways, *see* Point II, *infra*, but it also has broader implications, as in

---

empowered to deal with such threats to the integrity of the judicial process." *United States v. Lopez*, 4 F.3d 1455, 1463 (9th Cir. 1993) ("'[F]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'") (quoting *Wheat v. United States,* 486 U.S. 153, 160 (1988).

Alcantara. The District Court explained that the misconduct here extends well beyond the parameters of this case and "'creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general'" and "fundamentally alters the structure of the adversary process." United *States v. Stein*, 435 F. Supp.2d 330, 372 (S.D.N.Y. 2006) ("*Stein I*") (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987)); *see also Offutt v. United States,* 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). Indeed, the prosecutors' impairment of the Defendants' ability to mount a defense runs counter to society's interest in ensuring that the "adversary system of prosecution does not descend to a gladiatorial level" unmitigated by any prosecutorial obligation not to interfere with the legitimate defense function. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995); *see also* Robert J. Jossen & Phillip M. Meyer, *Recent Developments In Securities Cases And Investigations*, 1557 PRACTICING L. INST. 933, 965 (2006).

The government's conduct is also incompatible with the special ethical duties imposed upon prosecutors. According to the Supreme Court:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

Young, 481 U.S. at 802-803 (1987) (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)).

This Court has also acknowledged that prosecutors have "responsibilities different from lawyers in private practice" because of their duty "to seek justice, not merely to convict." *Jenkins v. Artuz,* 294 F.3d 284, 296 n. 2 (2d Cir. 2002). No legitimate interest of the United States is served when the government interferes with the resources lawfully available to defend against criminal charges. The government, in doing so here, put its desire to win the case ahead of its highest and most important duty -- to see that justice is done.

Thus, this Court can and should remedy the misconduct that occurred here pursuant to its supervisory authority even though it did not occur within the confines of the courthouse and is not specifically addressed in the constitution or by any rule or statute. *See Ming He,* 94 F.3d at 792-93.

POINT II

THE GOVERNMENT'S CONDUCT THREATENS THE SUBSTANTIAL RIGHTS OF THE KPMG DEFENDANTS AND IS NOT HARMLESS ERROR

The Supreme Court's two modern decisions on supervisory powers, *Williams* and *Bank of Nova Scotia*, prescribed certain limitations on the use of supervisory powers. Those limitations, however, do not prohibit invocation of the supervisory powers in this case. In *Williams,* the Supreme Court held that courts

may not use supervisory powers to create new procedural rules applicable to Grand Jury proceedings. 504 U.S. at 46. Of course, affirming dismissal of the indictment here would not amount to the creation of rules to govern the Grand Jury.

In *Bank of Nova Scotia*, the Supreme Court held that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)," which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." 487 U.S. at 254 (quoting Fed. R. Crim. P. 52(a)). The supervisory powers may be invoked here because the government's conduct -- severely limiting the KPMG defendants' ability to mount a defense -- caused fundamental, structural error that is, plainly, not "harmless."

The prosecutors' enforcement of the Thompson Memorandum caused KPMG to stop paying Defendants' legal fees, thereby limiting the resources available to fund their defense in this extremely complex, white collar criminal prosecution. The District Court found that four of the Defendants are not being represented by the attorneys that they would have hired had KPMG been paying their fees, and that the ability of all Defendants to conduct discovery and prepare for trial has been severely hampered. *United States v. Stein*, 495 F. Supp.2d 390, 417-18 (S.D.N.Y. 2007) ("*Stein IV*"). The government has produced over 22 million pages of documents and, as the District Court found, many Defendants lack

the resources to pay their counsel to review them. *Id.* at 417-18. The government has also likely interviewed scores of witnesses, many of whom Defendants will not be able to themselves have interviewed due to financial constraints. *Stein I*, at 371. Nor are Defendants likely to be able to afford to hire tax experts to advise their attorneys and possibly even testify at trial. *Id.* The District Court found that, but for the pressure exerted on KPMG by the government, Defendants would not have to limit their legal defenses in these ways. *Id.* at 352-53; *see also* Br. of Defs. Stein, Lanning, Smith, Bickham and Rosenthal at 87-89 (discussing how the "government's actions crippled appellees' ability to defend themselves at trial"); Br. of Defs. DeLap, Gremminger, Warley and Wiesner at 46-47; Br. of Def. Hasting at 5; Br. of Def. Watson at 4-6; Br. of Def. Eischeid at 12, n. 6; Br. of Def. Ritchie at 13-15.

The Supreme Court has spoken eloquently on the severe prejudice that results when defendants are deprived of counsel of their choice. The seminal case concerning the violation of a criminal defendant's right to counsel of choice is *United States v. Gonzalez-Lopez*, in which the issue before the Supreme Court was whether a Sixth Amendment violation is only complete "if the defendant can show that substitute counsel was ineffective [because] substitute counsel's performance was deficient and the defendant was prejudiced by it" or that defendant's "counsel of choice would have pursued a different strategy that would have created a

'reasonable probability that ... the result of the proceedings would have been different.'" 126 S. Ct. 2557, 2561-62 (2006). The Court had "little trouble concluding that erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error" that "def[ies] analysis by harmless-error standards because it affect[s] the framework within which the trial proceeds, and [is] not simply an error in the trial process itself." *Id.* at 2564 (internal quotations omitted). Justice Scalia, writing for the majority of the Court in *Gonzalez-Lopez*, explained the rationale behind the Court's holding:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the framework within which the trial proceeds-or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.
> *Id.* at 2564-65 (internal quotations and citations omitted).

While *Gonzalez-Lopez* involved a constitutional violation and WLF contends that the District Court's decision should be affirmed on non-

constitutional grounds, the reasoning employed in *Gonzalez-Lopez* applies to the KPMG Defendants because the harm that results from being deprived of counsel of choice resembles closely the harm one suffered when the resources expected to be available to her to dedicate towards her defense were wrongly withheld. In both situations, the defendant has been prohibited by the government from mounting the defense of her choosing. In fact, the District Court found those harms to be of equal significance. *Stein I*, at 371 ("[T]he government's interference almost inevitably has affected at least some lawyer selections and, *equally important*, limited what KPMG can pay their attorneys to do.") (emphasis added). It thus held that the logic employed in *Gonzalez-Lopez* was applicable to all thirteen Defendants as to whom the indictment was dismissed, explaining in *Stein I*, "Virtually everything the defendants do in this case may be influenced by the extent of the resources available to them. There simply would be no way to know, after the fact, whether the outcome had been influenced by limitations improperly placed upon the availability of resources." *Id.* at 372.

It is vital to recognize that the government's conduct here implicates the very integrity of the criminal justice system. It harmed not only the Defendants but undermined respect for the judiciary. Courts should not and cannot permit the government to alter fundamentally the criminal justice system by allowing the government to gain an unfair and improper advantage. This Court's decision in

Alcantara (discussed in Point I, *supra*), which concerned a District Court's having held proceedings in the robing room rather than in open court, makes this very point. The *Alcantara* court cited *Bank of Nova Scotia* for the proposition that "the Supreme Court has instructed that courts of appeals should not use their supervisory powers to circumvent the harmless error rule of Federal Rule of Criminal Procedure 52," but went on to hold that the error was "not harmless when viewed from the perspective of the public and press" since "more than the rights of the defendants and the government [we]re at stake." *Alcantara,* 396 F.3d at 203. Similarly, here, the prosecution's conduct—in addition to harming the Defendants—was "not harmless when viewed from the perspective of the public," *id.*, because that conduct "create[d] an appearance of impropriety that diminishe[d] faith in the fairness of the criminal justice system in general," *Stein I*, at 372.

In sum, the *Bank of Nova Scotia* decision holding that the harmless error analysis applies to the supervisory powers does not prevent this Court from invoking those powers here. The Defendants' substantial rights have been impacted by the government's conduct, which is not harmless error.

POINT III

NO REMEDY SHORT OF DISMISSAL IS ADEQUATE

Although dismissal of an indictment due to prosecutorial misconduct is an "extreme and drastic sanction," *United States v. Rubio,* 709 F.2d 146, 152 (2d Cir.

1983) (internal quotation marks omitted), it is the only remedy that adequately remedies the harm caused to Defendants here. While it is true that dismissal should not even be considered unless it is otherwise "impossible to restore a criminal defendant to the position that he would have occupied" but for the misconduct, *United States v. Artuso,* 618 F.2d 192, 196-97 (2d Cir.), *cert. denied,* 449 U.S. 879 (1980), dismissal has been granted in egregious cases like this one. *See, e.g., Hogan,* 712 F.2d at 761-62 (prosecutorial misconduct by presentation to Grand Jury of extensive hearsay and double hearsay about irrelevant but highly prejudicial crimes); *Estepa,* 471 F.2d at 1137 (in the absence of a warning about hearsay, extensive testimony of a police officer with little personal knowledge misled Grand Jury); *Vetere,* 663 F. Supp. at 388 (prosecutorial misconduct by use of hearsay and double hearsay before the Grand Jury that contained prejudicial factual errors about defendant's prior crimes); *United States v. Scrushy*, 366 F. Supp.2d 1134, 1139-40 (N.D. Ala. 2005).

Before dismissing an indictment, the Court must consider whether means more narrowly tailored to deter the government misconduct at issue are available. *Bank of Nova Scotia,* 487 U.S. at 255. Courts have identified several remedies short of dismissal which may effectively deter government misconduct in some circumstances. These include suppression of any evidence obtained through the government misconduct, *Hammad,* 858 F.2d at 842; holding the prosecutor in

contempt of court, *Vetere,* 663 F. Supp. at 386; verbal admonition of the prosecutor, so as to expose him or her to public opprobrium, *United States v. Serubo,* 604 F.2d 807, 818 (3d Cir. 1979); and requesting that the Department of Justice take action against the prosecutor where the court finds misconduct. *United States v. Myers,* 510 F. Supp. 323, 328 (E.D.N.Y. 1980).

Here, the government argues that the proper course of action is to reinstate the indictment, remand the case and "allow the defendants to hire their counsel of choice using whatever resources that KPMG was willing to give to them, if any, free from Government influence." Govt. Br. at 44. It contends that the effects of any pressure put upon KPMG were neutralized by March 30, 2006 (the date on which the government declared that it had no objection to KPMG exercising its business judgment as to the advancement of Defendants' legal costs).[8] *Id.* at 42-44.

---

[8] The government argued previously that another remedy short of dismissal is appropriate: that Defendants simply apply for CJA counsel. As the District Court explained, application for CJA counsel is inadequate as a remedy to the misconduct and resulting harm that occurred here because Defendants would be wiped out financially as a result of the government's actions before they became eligible for CJA representation and that the representation they would receive in that event would be constrained in ways that would not have existed absent the government's interference. *Stein IV*, at 419-421.

The District Court well explained why KPMG is unlikely, at this juncture, to simply pay Defendants' legal fees as though the prosecutors had never exerted any pressure on it. If KPMG were to change course at this point, it would be "admitting that it caved in to government pressure in this respect at the expense of individual members and employees of the firm." *Stein I*, at 374. Furthermore, the situation has changed since 2004 when KPMG, under government pressure, decided to cease paying the legal fees of those employees who were indicted. Namely, "the defense costs that KPMG is being asked to advance perhaps are larger than might earlier have been foreseeable and "[t]he resources available to pay them have been reduced" by way of the $456 million fine levied against KPMG by the government. *Id.*

The "accommodations" suggested by the government fall short of remedying adequately the misconduct at issue. That Defendants were given extra time to review documents and other materials, prepare for trial and consult with counsel does nothing to alleviate the heavy financial strain placed upon them as a result of the prosecutors' actions. WLF fully concurs with the arguments set forth in the KPMG Defendants' briefs as to why any remedy, short of dismissal, is inadequate. Br. of Defs. Stein, Lanning, Smith, Bickham and Rosenthal at 95-106; Br. of Defs. DeLap, Gremminger, Warley and Wiesner at 49-59; Br. of Def. Hasting at 4-5; Br. of Def. Watson at 7-12; Br. of Def. Eischeid at 3; Br. of Def. Ritchie at 36-38.

CONCLUSION

For the reasons set forth above, WLF respectfully submits that this Court should affirm the District Court's dismissal of the indictment in this case.

Dated: New York, New York
January 23, 2008

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302 (telephone)
(202) 588-0386 (facsimile)
pkamenar@wlf.org

Michael J. Gilbert
DECHERT LLP
30 Rockefeller Plaza
New York, NY 10112
(212) 698-3500 (telephone)
(212) 698-3599 (facsimile)
michael.gilbert@dechert.com

-and-

Steven B. Feirson
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000 (telephone)
(215) 994-2222 (facsimile)
steven.feirson@dechert.com

Counsel for Amicus Curiae
The Washington Legal Foundation

CERTIFICATE OF COMPLIANCE

According to the word processing software used to prepare the brief (Microsoft Word), the brief contains 5,266 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Michael J. Gilbert

ANTI-VIRUS CERTIFICATION

I hereby certify that on this 23rd day of January, 2008, I scanned the pdf version of the foregoing Brief for Washington Legal Foundation, and that no viruses were detected during that scan.

Michael J. Gilbert

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2008, I caused a pdf version and two paper copies of the foregoing Brief for Washington Legal Foundation to be sent via electronic mail and overnight delivery service to the following individuals:

Karl Metzner
Office of the United States
Attorney for the Southern District
of New York
One St. Andrew's Plaza
New York, New York 10007
karl.metzner@usdoj.gov
Counsel for the United States

Seth P. Waxman
Danielle Spinelli
Wilmer Cutler Pickering Hale and
Dorr LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
seth.waxman@wilmerhale.com
danielle.spinelli@wilmerhale.com
Counsel for Jeffrey Stein, John Lanning, Richard Smith, Randy Bickham, and Richard Rosenthal

John S. Martin, Jr.
Otto G. Obermaier
Martin & Obermaier, LLC
565 Fifth Avenue, 8th Floor
New York, New York 10017
jsm@martinobermaierlaw.com
ogo@martinobermaierlaw.com
Counsel for Philip Wiesner, Larry DeLap, Carol G. Warley, and Steven Gremminger

I further certify that on this 23rd day of January, 2008, I caused a pdf version

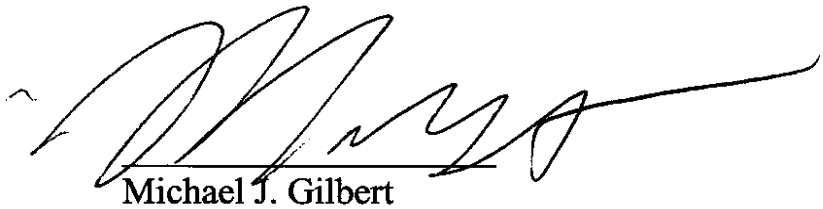
of the foregoing Brief for Washington Legal Foundation to be sent to each of the following individuals, each of whom has consented to service by electronic mail only:

Stanley S. Arkin
Arkin Kaplan Rice LLP
590 Madison Avenue
New York, New York 10022
sarkin@arkin-law.com
Counsel for Jeffrey Eischeid

Christina C. Arguedas
Ted W. Cassman
Raphael M. Goldman
Arguedas, Cassman & Headley, LLP
803 Hearst Avenue
Berkeley, California 94710
arguedas@achlaw.com
cassman@achlaw.com
goldman@achlaw.com
Counsel for Gregg Ritchie

Russell Gioiella
Litman Asche Lupkin Gioiella & Bassin, LLP
45 Broadway, 30th Floor
New York, New York 10006
rmg@lagnyc.com
Counsel for Carl Hasting

Michael S. Kim
Kobre & Kim LLP
800 Third Avenue
New York, New York 10022
michael.kim@kobrekim.com
Counsel for Mark Watson



Michael J. Gilbert