

No. 07-0001

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

KEVIN HAMLIN,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF FOR RESPONDENT

STATEMENT REGARDING ORAL ARGUMENT

The Court has classed this case for oral argument. A Writ of Certiorari was granted on October 15, 2007. The request for oral argument was granted, and oral argument is set for February 8, 2008.

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STATEMENT OF JURISDICTION

Judgment of the Court of Appeals for the Fourth Circuit was entered on October 1, 2007, which reversed and remanded the United States District Court for the District of South Carolina's holding. The jurisdiction of the Court was evoked under 28 U.S.C. § 1254(1). The Petitioner filed a timely petition for the writ of certiorari. The Court granted the petition for Writ of Certiorari on October 15, 2007.

STATEMENT OF THE ISSUES

- I. Did the Petitioner violate Respondent's Sixth Amendment Right to Counsel by requiring MobileGuard Enterprises, Inc. to cease paying Respondent's legal defense costs as a condition of MobileGuard Enterprises, Inc.'s non-prosecution?

- II. Did Petitioner violate the Respondent's rights under the Due Process Clause of the Fifth Amendment by interfering with Respondent's attorney/client relationship and, thus, Respondent's right to prepare and present an adequate and timely defense?

STATEMENT OF THE CASE

I. COURSE OF PROCEEDING AND DISPOSITION BELOW.

Respondent, Kevin Hamlin (“Hamlin”) filed a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33(a) in the United States District Court for the District of South Carolina (the “District Court”), citing violations of his Fifth and Sixth Amendment Rights on November 13, 2006. (J.A. at 17.) On January 20, 2007, the District Court denied Hamlin’s motion for a new trial. (J.A. at 17.) The United States Court of Appeals for the Fourth Circuit (the “Fourth Circuit Court of Appeals”) reversed and remanded the District Court’s opinion on October 1, 2007, stating the District Court abused its discretion in denying the respondent’s motion for a new trial. (J.A. at 28.) Petitioner, the United States of America (the “Government”), then petitioned the Supreme Court for a Writ of Certiorari, which was granted on October 15, 2007.

II. STATEMENT OF FACTS.

Hamlin was the president of MobileGuard Enterprises, Inc. (“MobileGuard”). (J.A. at 2.) He began his service as president of MobileGuard in 1985. (J.A. at 16.) MobileGuard was a corporation that manufactured armored panels for military ground vehicles, and the United States Department of Defense was their primary customer. (J.A. at 3.) Business began to dwindle due to other companies coming into the market, and as a result, MobileGuard’s Vice President, Mark Gordon (“Gordon”), under Hamlin’s direction, transferred company stock and cash to United States Congressman Matthew Johnson. (J.A. at 3.) Over a two year period, Gordon transferred cash and stock worth over \$3 million to Congressman Johnson. (J.A. at 3.) This transfer allowed MobileGuard to enter into over \$1 billion of defense contracts with the government. (J.A. at 3.)

The Government began investigation of certain MobileGuard employees for corporate fraud pursuant to Executive Order 13271. (J.A. at 16.) The President of the United States executed Executive Order 13271 (the “Order”) on July 9, 2002. (J.A. at 3.) The Order established a Corporate Fraud Task Force, which General Henry J. Sanford, a United States Deputy Attorney (“Sanford”), headed. Sanford issued a document entitled Principle of Federal Prosecution of Business Organizations known as the “Sanford Memorandum” on January 20, 2003. (J.A. at 3.)

The Sanford Memorandum was designed as a tool for federal prosecutors to aid in corporate criminal offenses. (J.A. at 3.) This included guidelines for charging, sentencing, and plea bargain agreements. (J.A. at 3.) A corporation’s willingness to fully assist the government in its investigation was one of the major factors contained in the memorandum. (J.A. at 3-4.)

With respect to a corporation’s assistance in an investigation the Sanford Memorandum states:

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. A corporation’s promise of support to culpable employees and agents, either through the advancement 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. By the same token, the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.

Sanford Memorandum at 6. (J.A. at 4.)

After the Sanford Memorandum was issued, approximately thirty MobileGuard executives and employees received a letter advising them that he or she was within the scope of a grand jury investigation on February 9, 2004. (J.A. at 4.) Shortly after the letters were issued, MobileGuard CEO, Tom Davis (“Davis”), and United States Attorney General for the District of

South Carolina, Scott Harper (“Harper”), had a meeting. (J.A. at 4.) MobileGuard’s payment of legal fees for employees was discussed during the meeting. (J.A. at 4.)

Prior to the meeting with Harper, MobileGuard had a clear and longstanding policy providing for the payment of legal fees for their officers and employees. (J.A. at 5.) During the meeting, both parties stipulated that prior this meeting MobileGuard had a longstanding practice of paying legal fees for partners, principals, officers, and employees of the corporation in situations where separate counsel was appropriate in any criminal, civil, or regulatory proceeding, as long as the issue regarded something which occurred during the scope of the individual’s employment. (J.A. at 5.) The parties also stipulated that there was never a cap placed on the amount of money to be paid for legal fees, and as the MobileGuard’s knowledge no individual had been indicted for conduct arising out of the scope of their employment with MobileGuard since 1974. (J.A. at 5.)

Further, Davis stated that MobileGuard had acted within South Carolina law with regard to paying for legal fees, but stated that he felt it was in the best interest of the company to stop payment of legal fees for any employee who does not choose to cooperate with the government or plead the Fifth Amendment during the investigation. (J.A. at 5.) MobileGuard’s deputy general counsel, John Alexander, informed Davis that he did not believe MobileGuard had any binding legal obligation to pay for their employees legal fees. (J.A. at 6.) Soon after, Davis contact Harper and stated that MobileGuard would be implementing the new cap and limitations on the company’s policy regarding payment of legal fees. (J.A. at 6.)

On March 1, 2004, Davis sent a letter to each employee who received a subject letter, and sent a copy to the United States Attorney’s Office (“USAO”), stating the new conditions of MobileGuard’s payment of legal fees. (J.A. at 6.) The letter clearly outlined that full cooperation

was necessary to receive the payment of legal fees, and the company would only pay for a maximum of \$300,000 in legal fees. (J.A. at 6.) More importantly the letter stated that payment of legal fees would cease within ten business days upon non-cooperation with the government's investigation. (J.A. at 6.) A letter made for a broader audience was sent to MobileGuard personnel. (J.A. at 6.) The letter urged employees to cooperate with the investigation and outlined employee rights when dealing with the government. (J.A. at 6-7.) The letter to the personnel did not mention that legal fees would cease to be paid by MobileGuard in the event of non-cooperation, and that MobileGuard placed a cap of \$300,000 for the payment of legal fees. (J.A. at 7.)

After all employees were notified, MobileGuard attorneys again met with the USAO on March 29, 2004. (J.A. at 7.) In an effort to show MobileGuard was behind the efforts of the investigation, Davis asked the government to notify the company of any employee who refused to cooperate. (J.A. at 7.) In each case in which the USAO felt an employee was not fully cooperating they notified MobileGuard. (J.A. at 7.) The employee's attorney was then in turn notified that legal fees would cease to be paid due to the employee's lack of cooperation. (J.A. at 7.) If employees still did not wish to cooperate with the investigation, their employment was terminated; solely because in the eyes of the government, they were not cooperating. (J.A. at 7-8.) In the majority of cases, employees gave in under pressure from MobileGuard's policies. (J.A. at 7.)

When Hamlin chose not to sign a proffer letter, as the Government wanted, MobileGuard ceased payment of Hamlin's legal fees. (J.A. at 16-17.) On May 27, 2004, Hamlin was indicted on charges of bribery. (J.A. at 17.) During discovery, the Government produced approximately 5 million pages of documents, both in electronic and paper form. (J.A. at 19). A jury determined

Hamlin was guilty of bribing public officials in order for MobileGuard to gain government contracts on November 7, 2006. (J.A. at 17.)

III. STANDARD OF REVIEW.

This Court reviews under the standard of abuse of discretion the determinations on which the District Court denied Hamlin's Motion for a New Trial under Federal Rule of Criminal Procedure 33(a). *See United States v. Stokes*, 261 F.3d 496, 502 (4th Cir. 2001). Motions for a New Trial under Rule 33(a) start with the premise that "a court should exercise its discretion to grant a new trial sparingly . . . and . . . should do so only when the evidence weighs heavily against the verdict." *United States v. Perry*, 335 F.3d 316, 320 (4th Cir. 2003). The denial of a Motion for New Trial "will not be overturned unless the court has abused its discretion." *United States v. Arrington*, 757 F.2d 1484, 1486 (4th Cir. 1985). A court abused its discretion when it did not apply the correct law or it rested its decision on a clearly erroneous finding of a material fact. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

SUMMARY OF ARGUMENT

The District Court erred in denying Hamlin's Motion for New Trial under Rule 33(a). In its analysis, the District Court erred when it incorrectly applied the law and ruled that Hamlin's constitutional rights were not violated.

The Sixth Amendment right to counsel attached when adversarial proceedings began, which can occur prior to an indictment. The Sixth Amendment also provided for a defendant to obtain the counsel of his or her choice, and any purposeful instruction by the government would be a violation of a defendant's Sixth Amendment right. Further, the Due Process Clause provided that every person accused of a crime is entitled to a fundamentally fair trial and that those accused of a crime are entitled to be treated fairly throughout the criminal process. The Sanford Memorandum was created to aid federal prosecutors in determining whether to charge a business entity with a criminal offense.

However, it was not the intention of the Sanford Memorandum to provide an overly broad rule that would allow the government to be able to indict any business entity that made payments for its employees' legal fees. But rather, the intent was to make the payment of legal fees part of the government's decision in whether to charge a business entity only when those payment were part of an obstruction of justice.

In this case, Hamlin's right to counsel attached prior to his indictment because the Government began adversarial proceedings against Hamlin prior to filing his indictment. The adversarial proceedings against Hamlin began when the Government intentionally obstructed with Hamlin's right to counsel of his choice. The Government pressured MobileGuard that it would be indicted if it did not cut off legal fees to employees who did not completely cooperate with the Government. As a result of the Government's active interference with Hamlin's

defense, the Government also violated Hamlin's Fifth Amendment Due Process rights to fairness in the criminal proceedings.

ARGUMENT AND CITATION OF AUTHORITY

I. THIS COURT SHOULD UPHOLD THE COURT OF APPEALS' DECISION THAT PETITIONER VIOLATED RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL WHEN PETITIONER FORCED MOBILEGUARD TO STOP PAYMENT OF LEGAL DEFENSE COSTS, WHICH LIMITED RESPONDENT'S DEFENSE

The Sixth Amendment of the United States Constitution states, “[i]n all criminal prosecutions, the accused shall enjoy the rightto have the assistance of counsel for his defense.” U.S. Const. amend. VI. In addition to a defendant’s right to legal counsel, there is a general presumption allowing a criminal defendant the right to choose his or her counsel. *Wheat v. U.S.*, 486 U.S. 153, 164 (1988). Further, the court in *U.S. v. Alvarez* held that depriving a defendant of their choice of counsel was not a harmless error. 816 F.2d 813, 818 (1st Cir. 1987). In *U.S. v. Perez*, the court recognized that the right to counsel of choice is not an absolute right, but the right should not willingly be obstructed. 325 F.3d 115, 124-25 (2nd Cir. 2003).

In addition, the case *U.S. v. Harrison* provided the court with other guidelines. The court concluded:

When there is a close nexus between the focus of a pre-indictment investigation and the ultimate charges brought in the indictment, a defendant's ongoing relationship with counsel that is known (or should be known) by the government invokes the Sixth Amendment right to counsel once that right attaches.

213 F.3d 1206, 1213 (9th Cir. 2000).

The Respondent, Kevin Hamlin, served as president of MobileGuard, a defense manufacturing company for many years. (J.A. at 16.) Throughout MobileGuard’s history, the company had a strong policy of paying for and providing legal representation for executives and employees. (J.A. at 5.) The Sanford Memorandum was designed to be a tool for federal prosecutors to aid them in corporate criminal offenses. (J.A. at 4.) The Sanford Memorandum also instructed prosecutors to take into account whether or not corporations attempted to shield

employees from liability by providing them with legal assistance. (J.A. at 4.) In an effort to comply with the Sanford Memorandum and to avoid federal indictment, MobileGuard changed their long standing policy providing payment of employee legal fees. (J.A. at 5.) MobileGuard's new policy based its payment of legal fees for employees on the condition that the employees cooperate fully with the Government's investigation, and MobileGuard placed a cap on the payment of legal fees. (J.A. at 5.) Hamlin, already using an attorney provided by MobileGuard, did not choose to sign a proffer letter, causing the company to cease payment of his legal fees and his attorney to be removed from his case. (J.A. at 8.)

In our present case, it is clear that the Hamlin's choice of counsel was the attorney which MobileGuard had provided for him, as one of their employees, prior to interference from the Government. The reasoning behind MobileGuard providing attorneys for their employees was simple: the attorneys with the best ability to represent a MobileGuard employee in any litigation would be an attorney who was attune to the way the company operated. This was the same logic the Hamlin used when he chose to work with a MobileGuard attorney. Hamlin's case was complex, with several million pages of documentation produced. (J.A. at 19.) Although it is not an impossibility that another attorney could have the ability to provide the skilled legal counsel needed in this intricate case, it was simply more efficient to use a MobileGuard attorney.

Using the reasoning from *U.S. v. Harrison*, the close nexus between the pre-indictment investigations of Hamlin, and the charges brought against him existed in this case. The Government's pre-indictment investigation dealt with fraud within corporations, and Hamlin was ultimately charged with bribery, a form of fraud. Also, Hamlin had a pre-existing relationship with the attorneys being paid by MobileGuard. It was not until the Government made the CEO of MobileGuard aware that Hamlin would not cooperate with prosecutors by signing a proffer

letter and consent to be interviewed, that his legal assistance was terminated by MobileGuard. (J.A. at 16-17.) The Government was certainly aware of the existence of this relationship because the CEO of MobileGuard informed the Government that each employee who was within the scope of the investigation had representation. (J.A. at 7.) Since a relationship between Hamlin and his attorney already existed prior to his attorney's removal from his case, Hamlin's right to that particular attorney was concrete.

The Government focused on the fact that forcing MobileGuard to cease payment of Hamlin's attorney fees, resulting in his loss of counsel, did not harm him. The Government mistakenly argued that the Hamlin's salary should be taken into account. The Government is correct in recognizing that Hamlin's salary as president of MobileGuard easily would have allowed him the ability to pay for his own defense. However, as accurate as this argument may be, precedent does not take a defendant's ability to pay for his own defense into account when determining if the Sixth Amendment Right to attorney of choice was violated.

In this case, Hamlin was not allowed to exercise his constitutionally protected right of having the attorney of his choice. He desired to have the MobileGuard attorney, with whom he had already forged a relationship with, represent him. However, less than one month prior to his indictment, Hamlin was stripped of his attorney of choice. (J.A. at 8.) This was unquestionable instance of the Government willingly obstruct Hamlin's right to his choice of counsel, which directly contradicts the court's opinion in *Wheat v. U.S*, *U.S. v. Alvarez*, *U.S. v. Perez*, and *U.S. v. Harrison*; thereby resulting in a violation of the Sixth Amendment right to counsel.

A. Respondent's right to counsel attached prior to indictment, causing a Sixth Amendment violation because he was denied counsel of choice.

The Court generally handled issues concerning the attachment of Sixth Amendment right to counsel with a bright line rule. The Court in *Kirby v. Illinois* held the Sixth Amendment right to counsel attached only after adversarial proceedings have been initiated. 406 U.S. 682, 688 (1972). However, in Hamlin's case, this type of bright light rule cannot be justly applied. Other factors, outside of the whether the Government had formally charged Hamlin need to be considered.

Courts have found in some cases this premature attachment of the Sixth Amendment Right to counsel was possible. In *U.S. v. Rosen* the court stated the finding that the Sixth Amendment right to counsel attached only after indictment was only a rebuttable presumption, and not an absolute rule. 487 F. Supp. 2d 721, 732 (E.D. Va. 2007). *U.S. v. Rosen* continued this explanation when the court stated the reason for allowing pre-indictment attachment of the Sixth Amendment right to counsel was because, "there [was] no doubt that the government's commitment to prosecute a defendant in some cases becomes concrete well before indictment, and that events prior to indictment can imperil a defendant's rights." *Id.* at 732. The case *U.S. v. Larkin* adds to the ability to rebut the presumption. The case states, in order for the Sixth Amendment right to attach prior to indictment, the respondent needs to prove "the government had crossed the constitutionally significant divide from fact-finder to adversary." 978 F.2d 964, 969 (7th Cir.1992).

In our present case, the Sanford Memorandum was created as a guide to assist prosecutors in corporation fraud cases. (J.A. at 3.) The Government pressured MobileGuard by telling the company that the act of paying for the legal representation of employees who did not cooperate with their investigation would be viewed as an attempt to assist the employee in

their non-cooperation. (J.A. at 3.) Under pressure from the Government, MobileGuard established new conditions on payment of legal fees for their employees. (J.A. at 6.)

Once the Government threatened to use MobileGuard's payment of legal fees for certain employees as an issue in their possible case against the company for fraud charges, Hamlin's Sixth Amendment right to counsel attached. Regardless of the fact he had yet to be indicted, this created a second infringement on his Sixth Amendment right to counsel by the Government.

When the Government pressured MobileGuard into changing their policy, the Government stopped acting in a mere fact-finding capacity. Fact-finding is generally considered to be a simple collection of evidence or information, which may be useful to the trier of fact at a later time. In this case, the Government targeted its investigation of MobileGuard and its employees around one specific criminal act, fraud. In addition, the Government specifically narrowed their investigation to MobileGuard's payments of Hamlin's legal fees, when it contacted MobileGuard's CEO regarding the Hamlin's non-cooperation. (J.A. at 8.) Therefore, the Government did in fact begin to act in an adversarial capacity against both MobileGuard and Hamlin, before Hamlin was ever indicted.

The Government argued the court should not make any special finding in this case for the early attachment of the Sixth Amendment right to counsel. The Government believed the courts should decide this case along the lines of *Kirby v. Illinois*; that the right of counsel did not attach until after Hamlin was indicted, thereby creating no violation. If this were a run of the mill criminal fraud lawsuit, the Government would be correct. However, because the Government made MobileGuard's payment of Hamlin's legal services an issue early on in this case, and forced legal fee payments to be ceased prior to indictment, the Government took adversary action against Hamlin. Therefore, the Government crossed the line from fact-finding to

adversary actions, as mentioned in *U.S. v. Larkin*, thereby attaching the right prior to indictment. 978 F.2d 964, 969.

Typically in a criminal case, adversary proceedings do not begin until charges are filed or an indictment is entered. *Kirby v. Illinois*, 406 U.S. at 688. However, in this case, the Government began adversarial proceedings against Hamlin prior to his indictment. These early adversarial proceedings began when Hamlin was denied counsel by MobileGuard because of the possibility of it being used against the company in fraud proceedings. Therefore, because these adversarial actions by the Government began prior to his indictment, the Sixth Amendment Right to counsel attached early in this case. When the Government denied Hamlin the right to his counsel, the Government again violated the Sixth Amendment.

II. THIS COURT SHOULD UPHOLD THE COURT OF APPEALS' DECISION TO REVERSE AND REMAND THE TRIAL COURT'S DECISION BECAUSE THE GOVERNMENT'S ACTIONS VIOLATED HAMLIN'S FIFTH AMENDMENT DUE PROCESS RIGHTS

A. Criminal defendants have a fundamental right under the Due Process Clause of the Fifth Amendment to fairness in the criminal process

The Due Process Clause of the Fifth Amendment provides that a person cannot be “deprived of life, liberty, or property, without due process of law” U.S. Const. amend. V. The main principle of the Due Process Clause is that every person accused of a crime is entitled to a fundamentally fair trial. *Id.* This Court has consistently held that those accused of a crime are entitled to be treated fairly throughout the criminal process and that such entitlement was fundamental. *See In re Oliver*, 333 U.S. 257, 273 (1948); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Holmes v. South Carolina*, 547 U.S. 310 (2006).

The Court must apply the standard of strict scrutiny since an individual's right to due process is so fundamental. *Troxel v. Granville*, 530 U.S. 57, 59 (2000) (strict scrutiny is the

appropriate standard of review to apply to infringements of fundamental rights), *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (the Due Process Clause provided heightened protection against government interference with certain fundamental rights and liberty interests). Therefore, the Government's actions must be narrowly tailored to achieve a compelling government interest in order to succeed under strict scrutiny.

B. The Sanford Memorandum Fails Under Strict Scrutiny Because The Government's Interest Is Too Broad.

“[C]oncern with [the] protection of the individual against the unfair use of the great power of the government is ‘deeply rooted in this Nation’s history and tradition.’” (J.A. at 23.) *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The Due Process Clause “prevents the prosecution from interfering actively with the defense and from passively hampering the defendant’s efforts.” (J.A. at 23.) *See California v. Trombetta*, 467 U.S. 479 (1984). Therefore, to prevail under strict scrutiny, The Government’s actions “must be narrowly tailored to achieve a compelling government interest.” (J.A. at 24.) *See Washington v. Glucksberg*, 521 U.S. 702 (1997).

The Fourth Circuit Court of Appeals set forth three main goals that the Sanford Memorandum attempted to achieve: (1) to assist prosecutors in determining whether to charge a business entity with a crime by measuring its level of cooperation, (2) it encouraged a business entity to pressure its employees to cooperate with a government investigation, and (3) it looked to punish business entities that are considered to be responsible. (J.A. at 24.) Overall, the Sanford Memorandum appeared to be the government’s justification in taking away any aid a business entity might otherwise provide for its employees by labeling such aid as “protecting . . . culpable employees” (J.A. at 24.)

It is undisputed that the government has a high interest in investigating crimes and punishing those who commit crimes in a just manner. Further, a business entity's compliance with a government investigation may be considered in its decision of whether that entity should be charged, especially when a business entity was protecting culpable employees. (J.A. at 25.) However, the scope of the Sanford Memorandum stretched much further. The Sanford Memorandum stated that "the advancement of attorneys fees...may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." Sanford Memorandum at 6. It did not provide a carve-out for instances where there was no indication that the business entity was impeding a government investigation. In cases where a business entity has a practice of advancing legal fees to employees, which is in full compliance with South Carolina law, and there is no indication of obstruction, then that advancement of legal fees should not need to be considered. (J.A. at 5.)

However, when the advancement of legal fees was considered regardless of evidence that a business entity was not interfering with the investigation, it prevented business entities from providing employees the means to fully exercise their fundamental constitutional rights. Moreover, the extremely broad language of the Sanford Memorandum even effected a state's regulation which expressly provided that business entities could advance legal fees without fear of liability.

Here, it was strongly suggested to MobileGuard that the advancement of legal fees to its employees would be seen as an indictable offense even though there was no evidence that MobileGuard was obstructing justice, but rather following its long standing corporate policy. (J.A. at 6.) The pressure of this flawed reasoning placed an undue burden on the constitutional rights of employees, which prejudices their ability to defend themselves. The Government's

actions were excessively broad for the government interest, and therefore, the Stanford Memorandum's provision regarding the advancement of legal fees fails strict scrutiny.

C. Government's Actions Pursuant to the Sanford Memorandum Violated Hamlin's Fifth Amendment Due Process Rights.

Hamlin's right to a fair trial under the Due Process Clause of the Fifth Amendment was violated as a result of the Sanford Memorandum's effect on MobileGuard's decision to withhold payment of legal fees. The Sanford Memorandum was issued on January 20, 2003 by United States Deputy Attorney General Henry J. Sanford in response to Executive Order 13271, which established a Corporate Fraud Task Force. (J.A. at 3.) The Sanford Memorandum was created to aid federal prosecutors in determining whether to charge a business entity with a criminal offense. (J.A. at 3.)

The Sanford Memorandum set forth guidelines to assist federal prosecutors in charges, sentencing, and plea bargain decisions. (J.A. at 3.) Specifically, the Sanford Memorandum discussed certain factors, such as a corporation's willingness to cooperate with the government's investigation, including, encouraging employees of a business entity to cooperate. The Sanford Memorandum states:

A[] factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents...through the advancement of attorneys fees...may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

Sanford Memorandum at 6.

MobileGuard's policy, prior to the Government's investigation in February 2004, regarding the payment of legal fees for employees, was "to advance and pay legal fees and costs, without a preset cap or condition of cooperation with the government" (J.A. at 5.) Further, the policy "was followed without regard to economic costs or considerations with respect to

individuals or the corporation.” (J.A. at 5.) MobileGuard’s policy is also in line with South Carolina law, which did not prohibit MobileGuard from advancing and paying legal fees and costs for its employees. (J.A. at 5.)

On behalf of the Government, Scott Harper, the United States Attorney for the District of South Carolina (“Harper”), met with MobileGuard to discuss its policy for advancing and paying legal fees for its employees. Prior to that meeting, Harper and other attorneys from the United States Attorney’s Office (the “USAO”) asked MobileGuard whether it was currently paying legal fees for the employees who were being investigated by the Government. (J.A. at 4.) Then, during the meeting, MobileGuard told the USAO that it “would do what [it had] to do to avoid [being charged].” (J.A. at 5.) Moreover, Harper told MobileGuard that any “lack of cooperation cannot...be rewarded” and pointed to factors outlined in the Sanford Memorandum. (J.A. at 6.)

Following the MobileGuard’s meeting with the USAO, MobileGuard contacted Harper to inform him of MobileGuard’s plan to change its policy regarding the payment of legal fees for employees. (J.A. at 6.) Harper gave his approval of the proposed changes and stated that “any payment of legal fees to an individual under investigation [would] be considered non-cooperation by MobileGuard and may result in an indictment of [MobileGuard].” (J.A. at 6.) As a result of MobileGuard’s meeting with the USAO and the subsequent conversation, MobileGuard gave up its current policy and placed a condition of cooperation on whether employee legal fees would be paid by MobileGuard. MobileGuard also placed a cap on the amount of legal fees it would pay. (J.A. at 6.) If an employee did not completely cooperate with the Government or if the employee chose to protect himself by pleading the Fifth Amendment, MobileGuard would not pay employee’s legal fees. (J.A. at 6.) MobileGuard made the change to its policy to appease the Government so that MobileGuard would not be indicted.

MobileGuard's policy on the payment of legal fees for employees who were being investigated within the scope of their responsibilities at MobileGuard was consistent prior to the Government's investigation in February 2004. MobileGuard's policy did not change in January 2003 when the Sanford Memorandum was issued and took effect. MobileGuard only reviewed and changed its policy once the Government pressured MobileGuard and indicated that MobileGuard would be charged if it did not put pressure on its employees.

Further, MobileGuard never officially changed its policy. MobileGuard sent letters to the individuals being investigated in the matter informing them of the cap on legal fees and the fact that the payment of legal fees would cease if that individual did not fully cooperate or chose to plead the Fifth Amendment. (J.A. at 6.) However, in a corporate-wide statement sent by MobileGuard to employees, it was never mentioned or otherwise made formal that the cap on legal fees and the fact that legal fees would end if employees did not completely cooperate or chose to plead the Fifth Amendment. (J.A. at 7.) Those specific changes were only made known to employees who had received notice letters that they were within the scope of the Government's investigation. The fact that the policy in the eyes of all officers and employees not part of the current investigation did not change, would indicate that MobileGuard did not alter its policy in order to comply with the Sanford Memorandum, but rather to comply with the pressures of the Government in one particular investigation.

The change in MobileGuard's policy for the investigation was not enough to ensure that it would not be indicted. The Government contacted MobileGuard every time an employee did not sign a proffer agreement or did not meet the Government's terms. (J.A. at 7.) MobileGuard would then send a letter to that individual warning him or her that any legal fee payments would cease if he or she did not sign the proffer agreement or cooperate as the Government wished.

(J.A. at 7.) In many cases, if the employee did not then cooperate, he or she was terminated.

(J.A. at 8.) Employees would cooperate under the pressure of the Government and out of fear of being terminated by MobileGuard. (J.A. at 7-8.)

D. Hamlin Need Not Establish Prejudice To Remedy The Constitutional Violations In This Case.

In *Strickland*, the Court stated that there is a “right to the effective assistance of counsel” and that right was violated “when [the government] interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Although *Strickland* generally requires convicted defendants to demonstrate that the result of the trial probably would have been different but for the ineffective assistance of counsel...does not apply where a violation resulting in a “structural defect[] in the constitution of a trial mechanism that “affected – and contaminated – the entire criminal proceeding.”¹ *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988). Structural defects exist where a defendant was actively or constructively denied counsel at a critical stage of the proceedings. When structural errors such as this exist, prejudice is presumed.

In April 2004, Hamlin chose not to sign a proffer letter. (J.A. at 6-7.) The enormous pressure the Government placed on MobileGuard could be seen as prejudicial to Hamlin. If the Government did not unduly pressure MobileGuard, MobileGuard would not have changed its policy for paying legal fees. Further, the Government interfered with Hamlin’s effective assistance of counsel when it took advantage of MobileGuard’s position. The Government contacted MobileGuard regarding Hamlin’s failure to sign a proffer letter. (J.A. at 7.) Hamlin is

¹ There are two types of Constitutional errors: trial errors and structural errors. Trial errors occur during trial when the evidence is presented. Structural errors affect the entire proceeding.

entitled to refuse to sign a proffer letter or cooperate with the Government under the Fifth and Sixth Amendments. Such refusal does not indicate guilt. However, MobileGuard, in order to appease the pressures of the Government, cut off Hamlin's payment of legal fees. Therefore, the Government interfered with Hamlin's counsel and Hamlin's counsel's ability to make independent decisions. Moreover, the Government's actions interfered in the same manner with other employees, some of which lost their jobs as a result. Since the Government's conduct threatened to contaminate the entire proceedings before they had even begun. Therefore, there was no need for a particularized showing of prejudice here.

CONCLUSION

For the reasons stated above, Respondent, Kevin Hamlin, respectfully ask this court to uphold the Court of Appeal's judgment to reverse and remand the District Court's ruling on the motion for a new trial; pursuant to Federal Rule of Criminal Procedure 33(a) on violations of Respondent's Fifth and Sixth Amendment rights.

Respectfully submitted this 11th day of January 2008.