UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. BENEDICT P. KUEHNE, OSCAR SALDARRIAGA, and GLORIA FLORES VELEZ, Defendants.	CASE NO. 05-20770-CR-COOKE

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT KUEHNE'S MOTION TO DISMISS

The National Association of Criminal Defense Lawyers ("NACDL") submits this brief as amicus curiae in support of Defendant Benedict Kuehne's Motion to Dismiss Count One of the Third Superseding Indictment (Conspiracy to Violate 18 U.S.C. § 1957). Dkt. 135. For the reasons that follow, this Court should grant Mr. Kuehne's motion to dismiss.

INTRODUCTION

NACDL's interest in the action pending before this Court and its impetus for filing this brief in support of Mr. Kuehne's motion to dismiss stem from the dangerous implications for the defense bar of the Government's prosecution of Mr. Kuehne. The effects of the Government's narrow reading of 18 U.S.C. § 1957(f)(1)'s exception for "transaction[s] necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution" go far beyond Mr. Kuehne and threaten to undermine criminal defense across the nation. Without clear protection from criminal prosecution for transactions necessary to a defendant's criminal

representation, experienced criminal defense attorneys may be reluctant to accept complex criminal defense cases in which transactions in furtherance of their client's defense could subject the attorney to criminal prosecution. The Government's imposition of such indirect constraints on individual's Sixth Amendment right to counsel of choice is both constitutionally suspect and inconsistent with the prophylactic exception of 18 U.S.C. § 1957(f)(1).

FACTS

Count One of the Third Superseding Indictment (the "Indictment") alleges that Mr. Kuehne conspired to violate the "criminally derived property" statute, 18 U.S.C. § 1957, in the course of receiving legal fees related to the criminal defense of Fabio Ochoa Vasquez ("Mr. Ochoa"). Indictment ¶¶ 36-41. Mr. Ochoa approached Roy Black to lead his criminal defense team. As a predicate to accepting the engagement, Mr. Black hired Mr. Kuehne to determine the provenance of funds to be used by Mr. Ochoa to pay Mr. Black's legal fees. *Id.* ¶ 7. In connection with that engagement, Mr. Black allegedly paid Mr. Kuehne's fees out of the funds he received from Mr. Ochoa. *Id.* The indictment alleges that Mr. Kuehne knew that the funds he received were tainted. *Id.* ¶ 10.

The criminally derived property statute covers any individual who "knowingly engages . . . in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity." 18 U.S.C. § 1957(a). The statute, however, excludes from the definition of "monetary transaction" "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." *Id.* § 1957(f)(1). Mr. Kuehne moved to dismiss Count One based on this exception, and NACDL files this amicus brief in support of Mr. Kuehne's motion.

ARGUMENT

The Government's prosecution of Mr. Kuehne is based on one or both of two equally untenable theories:

- *Bare necessity theory*. The prosecution is premised on the notion that the exception permits the Government to undertake a hindsight-laden second-guessing of which transactions were "necessary" to Mr. Ochoa's criminal defense. Not surprisingly, the Government takes a much narrower view of what was "necessary" than did Mr. Ochoa's counsel. The consequence of permitting the Government to criminalize transactions by counsel that it believes—with the false clarity of hindsight—were unnecessary to a client's defense would be that criminal defense attorneys will be compelled to represent their clients without knowing whether transactions into which they enter as part of the client's comprehensive criminal defense might later become subject to criminal sanction.
- *Exception-as-nullity theory*. The Indictment appears to presume either that Congress never meant for the exception in Section 1957(f)(1) to mean anything or that subsequent clarification of a related civil forfeiture law (in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)) rendered the exception meaningless. In either case, the Government's approach to this prosecution subverts Congress's purpose when it enacted the exception in Section 1957(f)(1).

Whatever the premise and motive underlying the Government's prosecution of Mr. Kuehne, "an attorney cannot effectively represent a client when he is distracted by concerns about his own potential liability." Obermaier & Morvillo, *White Collar Crime, Business & Regulatory Offenses*, § 2A.05[4]. As a consequence, the Government's approach to this case threatens not

only Mr. Kuehne but the criminal defense bar—and criminal defendants—generally. And that is precisely what Congress sought to avoid when it excepted "transaction[s] necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution" from Section 1957.

I. THE LEGISLATIVE HISTORY OF THE STATUTORY EXCEPTION SHOWS THAT CONGRESS INTENDED TO CREATE A ROBUST EXCEPTION TO A "MONETARY TRANSACTION" UNDER SECTION 1957

Congress enacted the criminally derived property statute as part of the Money Laundering Control Act of 1986. Pub. L. No. 99-570, tit. I, subtit. H, §§ 1351-1366, 100 Stat. 3207-18 (codified in part as amended at 18 U.S.C. §§ 1956-1957 (1988 & Supp. II 1990)). Section 1957 criminalized the act of "knowingly engag[ing] or attempt[ing] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 [that] is derived from specified unlawful activity." 18 U.S.C. § 1957(a).

In the wake of this legislation, the Justice Department threatened prosecution of criminal defense counsel under Section 1957. Two years later, in response to DOJ policy, Congress enacted the exception at issue in this case, which entitles attorneys to represent individuals without fear that their receipt of professional fees could subject them to criminal penalties. By exempting from Section 1957's scope transactions "*necessary to preserve*" an individual's right to criminal representation, Congress shielded from prosecution more than just those transactions necessary to secure the bare minimum of constitutionally effective assistance of counsel. Congress instead protected bona fide criminal defense payments from becoming fodder for over-aggressive federal prosecutions. The Government's position in this case would thwart that congressional purpose.

During the drafting of the 1986 bill, members of the House Subcommittee on Crime included an exemption for transactions "involving the bona fide fees an attorney accepts" in

criminal defense work. H.R. 5217, 99th Cong. § 2 (1986), *reprinted in* H.R. Rep. No. 99-855, at 1 (1986). The exemption was part of the bill that passed the House by a vote of 392 to 16 but was ultimately dropped from the final legislation during informal House-Senate conferences, despite enjoying wide bipartisan support in the House. Two years later, Congress reconsidered and enacted a comparable exemption, which was codified at Section 1957(f)(1).

The proponents of the exception in 1986 "believed the [Section 1957] had a potential impact upon the exercise of the Sixth Amendment right to the effective assistance of counsel in the event this offense were to be applied to bona fide fees received by attorneys." 132 Cong. Rec. E3821 (Oct. 18, 1986) (remarks by Rep. Bill McCollum) ("McCollum Remarks"); *see* H.R. Rep. No. 99-855, at 14. Crime Subcommittee Chairman William Hughes confirmed that: "The Subcommittee on Crime adopted the McCollum Amendment after long debate because we believed the offense had a potential impact upon the exercise of the Sixth Amendment right to the effective assistance of counsel in the event this offense were to be applied to bona fide fees received by attorneys." 132 Cong. Rec. E3827 (Oct. 18, 1986) (remarks by Chairman William Hughes) ("Hughes Remarks 1986").[1]

In a last-minute House-Senate conference, the exception was removed. McCollum Remarks, 132 Cong. Rec. E3821. At least two factors raised during the conference contributed to its removal: concern that the attorney-client relationship was receiving exceptional protection

---

[1] *See* McCollum Remarks, ("The members of the subcommittee felt that the potential for [discovering information that could lead to knowledge that is an element of the criminal derived property crime] might have the effect of inhibiting the attorney's complete investigation of the client's case . . . and would thus have interfered with the client's sixth amendment right to effective assistance of counsel.").

not being afforded other potential recipients of tainted funds (e.g., doctors),[2] and Congress's assumption that the Department of Justice prosecutors would not target defense counsel for prosecution. *See* McCollum Remarks; Hughes Remarks 1986 ("I think that last night most of us working on this issue recognized that the risk that the Department of Justice would prosecute an attorney in this circumstance was really so very remote that a special statutory exception was really not necessary."). Thus, "[g]iven the lateness of the hour and the difficulty of carefully redrafting the provision that would have satisfied all interests concerned, and the unlikelihood that the Justice Department would consider prosecutions of such highly privileged conduct, we concluded to drop the provision." Hughes Remarks 1986.

Despite the assumption by the House-Senate conference that DOJ would not pursue attorneys under Section 1957, DOJ formally condoned prosecutions of attorneys under the statute shortly after it was enacted. *See Justice Department Handbook on the Anti-Drug Abuse Act of 1986* (Mar. 1987) (cautioning that "approval by the Assistant Attorney General of the Criminal Division is required before a prosecution may be initiated where the defendant is an attorney and the property represents bona fide attorneys' fees"); *Report No. 1 of the Criminal Justice Section*, A.B.A. Crim. Just. Sec. 319, at 319 (Feb. 1987) ("ABA Report"); *see id*. at 322 n.8 ("[A] Department of Justice memorandum makes it clear that prosecution of attorneys under the Act is considered permissible under appropriate circumstances."). Notwithstanding its draft

---

[2] During the conference, some members criticized the *narrowness* of the exception, arguing that by excluding only transactions involving bona fide attorney's fees the statute would imply that there would be *no* exception in other privileged contexts. McCollum Remarks. Representative McCollum explained that the Subcommittee had simply not considered other situations during deliberations. *Id*. Rather than exclude the doctor-patient relationship from the exception, Representative McCollum and the other members of the conference decided that they should reconsider the exception and perhaps *broaden* it to include other "transactional" situations in a future session. *Id*.; Hughes Remarks 1986.

guidance to US Attorneys' Offices, DOJ continued to maintain that prosecutorial discretion would obviate the need for an explicit exception: "[A]ttorneys representing clients in criminal matters must not be hampered in their ability to effectively represent their clients within the bounds of the law." Money Laundering Control Act of 1986 and the Regulations Implementing the Bank Secrecy Act: Hearings Before the Subcomm. On Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 100th Cong. 107-108 (1987) (statement of William F. Weld, Assistant Attorney General, Criminal Division).

The American Bar Association ("ABA") and National Association of Criminal Defense Lawyers ("NACDL") were rightly skeptical of DOJ's assurances and urged Congress to revisit the exception. Their arguments largely echoed those raised by Representative McCollum and other supporters of the exception during the drafting of the 1986 legislation. *See, e.g.*, ABA Report 319 (arguing that Section 1957 "will unfairly impact upon fundamental constitutional rights to effective assistance of counsel and due process of law and will have a deleterious effect upon the adversary system of criminal justice"); Tarlow, *Rico Report*, 11:1 Champion 35, 36 (1987) ("Attorneys must now operate in an atmosphere of intimidation and fear, a fact which affects the willingness of attorneys to practice criminal law and the quality of the advocacy by those who practice criminal law.").

Congress agreed with these concerns because it, too, recognized the palpable risk that, given the prosecutorial guidance it had already issued, DOJ could not be trusted to resist the temptation to prosecute defense counsel under Section 1957. Congress therefore enacted the statutory exemption that remains in effect to this day, which exempts from Section 1957 "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth

amendment to the Constitution." 18 U.S.C. § 1957(f)(1). According to its sponsors, the provision that became law as Section 1957(f)(1) was intended to be as broad as the exception in the 1986 bill, while ensuring that it would extend only to "a bona fide fee paid in good faith for legitimate legal representation." 134 Cong. Rec. E3740 (Nov. 10, 1988) (remarks by Chairman Hughes). Significantly, the sponsors of this provision understood that it covered *more* than the transactions necessary to preserve the bare necessities of effective assistance as guaranteed by the Sixth Amendment: the exception's language "*goes beyond the bare right to counsel at trial* and applies at the investigative or grand jury phases of a criminal proceeding—phases which, particularly in RICO, [continuing criminal enterprise] or money laundering cases, can be far more lengthy, complex, and critical than the trial itself." *Id*. (emphasis added); *see also* 134 Cong. Rec. S17360 (remarks by Edward Kennedy) (emphasizing "intolerable burden" that the threat of criminal prosecution and imprisonment places on the Sixth Amendment right to counsel).

II. THE GOVERNMENT'S "BARE NECESSITY" THEORY WOULD THWART CORE STATUTORY PURPOSES

The Government's prosecution of Mr. Kuehne reflects the precise risks that Congress sought to avoid when it adopted the exception in Section 1957(f)(1). Accordingly, the Government now seeks to second-guess, long after the fact, how Mr. Black—Mr. Ochoa's principal criminal defense counsel—took on and orchestrated a complex criminal defense. In particular, the Government presumes that Mr. Black's enlistment of Mr. Kuehne in Mr. Ochoa's as part of the criminal defense team was not "necessary" to defending Mr. Ochoa. However, given that Mr. Kuehne's principal role in the case was to assess the provenance of the funds with which Mr. Ochoa intended to pay his criminal defense fees, Mr. Ochoa could not have exercised his Sixth Amendment right to the counsel of his choice without Mr. Kuehne. Not only were Mr.

Kuehne's services therefore "necessary" to Mr. Ochoa's ability to assert his Sixth Amendment rights, but the criminal justice system should encourage criminal defense counsel to evaluate the provenance of their fees.[3]

A. The Government Turns On Its Head The Traditional Method of Assessing Which Transactions Are "Necessary" To Preserving Defendants' Sixth Amendment Rights In Complex Criminal Cases

The Government's prosecution of Mr. Kuehne rests on its after-the-fact conclusion that Mr. Kuehne's work was not "necessary" to Mr. Ochoa's defense. The Government's approach to evaluating which services were necessary to defending Mr. Ochoa, however, is inconsistent with courts' approach to nearly identical language in the Criminal Justice Act ("CJA"). The permits "[c]ounsel for a person who is financially unable to obtain investigative, expert, or other services ***necessary for adequate representation*** may request them in an ex parte application." 18 U.S.C. § 3006A(e)(1) (emphasis added).

Under the CJA, a district court must authorize funds for third party services as "necessary for adequate representation" *unless* the court "concludes that the defendant does not have a plausible claim or defense." *United States v. Rinchack*, 820 F.2d 1557, 1564 (11th Cir. 1987); *see, e.g.*, Amended Plan for the Composition, Administration, and Management of the Panel Private Attorneys Under the Criminal Justice Act, at 11. Thus, under the CJA, costs incurred to pursue all but implausible defenses may be necessary to vindicate a defendant's Sixth Amendment rights, and district courts in this Circuit therefore routinely authorize expenses on

---

[3] Even assuming the Government is right about what Mr. Kuehne knew about the source of the fees he received for his services in connection with Mr. Ochoa's defense, it is not without remedy. It could have sought the forfeiture of all Mr. Kuehne's fees. *See* 21 U.S.C. § 853; *see also United States v. Stein*, 07-3420 (slip copy) (2d Cir. Aug. 28, 2008) ("[T]he Sixth Amendment does not prevent the government from reclaiming its property from a defendant even though the defendant had planned to fund his legal defense with it.").

the ground that they are "necessary." *See, e.g.*, *United States v. Marshall*, No. 07-20569, 2008 WL 1914862, at *1 (S.D. Fla. Apr. 25, 2008).

The Government gives no similar latitude to the definition of "necessary to preserve a person's right to representation" under Section 1957(f)(1). *Compare* 18 U.S.C. § 3006A(e)(1) *with* 18 U.S.C. § 1957(f)(1). Indeed, the Government purports to have the discretion under the statute to parse—with the benefit of hindsight—which of Mr. Black's "transactions" were necessary to "preserve [Mr. Ochoa's] right to representation." But a prosecutor's perspective on which transactions are "necessary" will always be both constrained and biased: after all, every additional effort by defense counsel in furtherance of his client's defense likely adds to the prosecutor's already onerous burden of proving his case beyond a reasonable doubt. Permitting the Government to substitute its own cramped perspective on which elements of defense counsel's work were "necessary" would encourage defense counsel to err on the side of a timidity, in order to avoid potential indictment.[4]

B. A Narrow Definition of "Necessary" In Section 1957(f)(1) Will Discourage Criminal Defense Counsel From Accepting Clients And Engaging Important Third Party Vendors

The effect of the Government's indictment of Mr. Kuehne is not limited to the facts of this case; nor is it limited to cases involving counsel vetting the provenance of funds being used to pay defense fees; nor is it even limited to criminal defense in this District. Rather, the

---

[4] The potential conflicts of interest between a client's interest in a vigorous defense and criminal defense counsel's fear of his own indictment implicate serious ethical questions. *See, e.g.*, ABA Model Rules of Professional Conduct 1.7(a)(2) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer."); ABA Model Code DR 5-101(A) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own . . . personal interests.").

Government's parsimonious view of "necessity" in the exception to Section 1957(f)(1) threatens to hamstring all complex criminal defense efforts by interjecting the threat of criminal penalties into every transaction greater than $10,000 into which criminal defense counsel enter.

Criminal defense attorneys may be reluctant to take on clients whose defense would involve the engagement of investigators, electronic vendors, or other similarly costly advisers. In addition, any such advisers who, as part of their work, learn that the defendant's legal fees (and hence their own fees) are potentially being paid from the proceeds of criminal activities may be reluctant to participate in a complex criminal defense.[5] For example, assume an attorney was engaged by an entity alleged to have been a ponzi scheme. The attorney would likely engage a forensic accountant to help prepare defense. If the client were convicted and the Government decided that the forensic accountant's efforts were unnecessary to the defense, the attorney's payment of the accountant for his services could subject both of them to prosecution under Section 1957.

The Government's prosecution of Mr. Kuehne reveals that DOJ intends to make that hypothetical a reality. The peril of possible prosecution may well dissuade criminal defense attorneys from taking on clients, and clients will consequently be deprived of their right to counsel. As one commentator observed: "The irony is that the statute was clearly drafted to apply to drug offenses—where the illegality is relatively clear—yet it will have the most pronounced chilling effect in classic white-collar offenses such as securities fraud and bank fraud,

---

[5] Moreover—taking the Government's theory of this case seriously—whether the exception to Section 1957(f)(1) would protect defense counsel and his vendors from prosecution will in some cases hinge entirely on the jury's determination of whether a defendant's admitted conduct is in fact illegal. *Cf. Caplin & Drysdale*, 491 U.S. at 632 n.10 ("[T]he claim is that a law firm's prospect of collecting its fee may turn on the outcome at trial. This, however, may often be the case in criminal defense work.").

where it is often impossible to determine whether the activity is criminal conduct until after the jury's verdict in the criminal case." I Villa, *Banking Crimes: Fraud, Money Laundering, and Embezzlement* § 8:75, at 8-130.

C. Mr. Black's Engagement Of Mr. Kuehne To Vet His Fees Is An Undertaking That The Law Should Encourage

This Court has already rejected the narrow reading of Section 1957(f)(1) that the Government now advances, holding that the exception "shields [from prosecution] otherwise prohibited transactions that are undertaken for *legitimate* criminal defense services." *United States v. Ferguson*, 142 F. Supp. 2d 1350, 1357 (S.D. Fla. 2000) (citing *United States v. Hoogenboom*, 209 F.3d 665, 669 (7th Cir. 2000)). Mr. Black, through Mr. Kuehne, evaluated his client's background and assets, which is customary, in one form or another, at the outset of every legal engagement. *See, e.g.*, ABA Model Code of Professional Responsibility EC 4-1 ("A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client.").[6] The Government's attack on the transaction between Mr. Black and Mr. Kuehne therefore strikes at the heart of Mr. Ochoa's right both to representation generally and to his counsel of choice in particular: if Mr. Ochoa's preferred criminal defense lawyer were unable to engage an investigator to vet Mr. Ochoa's funds, Mr. Ochoa—and all other defendants in his position—would likely not be able to use even *legal* funds to engage counsel.

Thus, the Indictment reflects the Government's attempt to secure indirectly what this Court has already instructed it cannot get directly. In *Ferguson*, the Court rejected the

---

[6] Ironically, the original U.S. Attorneys' Manual's guidelines for attorney prosecutions were purportedly intended to "encourage attorneys to freely investigate and defend their clients." Tarlow, *RICO Report*, 11:6 Champion 16, 18 (July 1987).

Government's effort to use Section 1957 to interfere with a criminal defendant's effort to engage counsel. *See* 142 F. Supp. 2d at 1358. By indicting Mr. Kuehne, the Government now threatens all vetting counsel and thereby seeks to discourage criminal defense counsel from accepting any representations that would require them to engage vetting counsel as part of their defense. This Court should reject the Government's effort to make a surreptitious end-run around *Ferguson*—and thus around Section 1957(f)(1) itself.

III. THE GOVERNMENT'S ATTEMPT TO NULLIFY THE STATUTORY EXCEPTION IS INDEFENSIBLE

The meaning of the exception to Section 1957 is plain: transactions necessary to a criminal defense cannot be the basis for a criminal prosecution. The Government simply ignores the exception, apparently on the basis that it has always been or has become a nullity. The Government's approach violates at least three canons of statutory construction: (1) a statute must not be interpreted to render any provision meaningless; (2) a statute must be interpreted in light of other statutes addressing the same subject matter; and (3) an ambiguous criminal provision (or exception thereto) must be interpreted in favor of the defendant.

A. The Government's Indictment Ignores The Plain Meaning Of Section 1957(f)(1)

"[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *United States v. Ballinger*, 395 F.3d 1218, 1236-1237 (11th Cir. 2005) (citing *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("We are 'reluctant to treat statutory terms as surplusage in any setting,' and we decline to do so here." (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))). The Government theory that Section 1957(f)(1) is a nullity violates this canon in at least one of two ways.

First, the Government's reading of the exception may assume that it has always been superfluous, in the sense that it is merely a hortatory endorsement of a constitutional right that

Congress could not have abridged in the first place. DOJ has long taken that position. *See* U.S. Attorneys' Manual, § 9-105.600 (Oct. 1, 1990). To the contrary, however, the Court must presume that, when Congress passed Section 1957(f)(1), it meant to do more than remind the public that it could not override the Constitution. *See Dickerson v. United States*, 530 U.S. 428, 442-444 (2000). Otherwise, Congress's effort to add the exception two years after it enacted Section 1957 would have been an absurd waste of congressional breath.

Second, the Indictment appears premised on the Government's position that, because "there is no Sixth Amendment right to use criminally derived property to retain counsel" (U.S. Attorneys' Manual, § 9-105.600 (current)) after *Caplin & Drysdale*, the exception in Section 1957(f)(1) does not cover any transaction using criminally derived property, regardless of the end to which the funds are put. *Contra Ferguson*, 142 F. Supp. 2d at 1352. According to the Government, (i) *Caplin & Drysdale* holds that a thief never has title to his criminally derived funds; (ii) he therefore has no Sixth Amendment right to use those funds to pay his criminal counsel; and (iii) the exception in Section 1957(f)(1) has no application because use of illicit funds *cannot* "preserve a person's right to representation as guaranteed by the sixth amendment." 18 U.S.C. § 1957(f)(1); *see, e.g.*, Opposition by the United States to Defendant Ferguson's Motion to Dismiss Indictment, *United States v. Ferguson*, No. 99-116, Dkt. 37, at 6-10 (S.D. Fla. Jan. 24, 2000). The Government's expansive application of *Caplin & Drysdale* to Section 1957 would drain the statutory provision of any meaning or significance.

The just-decided case *United States v. Stein*, 07-3042 (slip copy) (2d Cir. Aug. 28, 2008), rejected a similar Government effort to read *Caplin & Drysdale* out of its context. In *Stein*, the Government pressured the defendants' employer to withhold expected advancement of its employees' legal fees. On appeal, the Government argued that its pressure on the employer did

not interfere with the defendants' Sixth Amendment right to representation because, according to *Caplin & Drysdale*, the defendant-employees had no Sixth Amendment right to spend their employer's money on their own defense. The court rejected the Government's argument, explaining that "***[t]he holding of Caplin & Drysdale is narrow***: the Sixth Amendment does not prevent the government from reclaiming its property from a defendant even though the defendant had planned to fund his legal defense with it." *Id*. at 60 (emphasis added). Consistent with *Stein* and *Ferguson*, the Court should reject the Government's effort to read *Caplin & Drysdale* out of its actual context and as justification of abridging defendants' Sixth Amendment rights. Following *Caplin & Drysdale*, it is clear that the Government may seek forfeiture of tainted funds used to pay criminal defense fees; it does not follow that payment of those tainted funds was not "necessary" for the defendant to procure his counsel of choice.

To give meaning to each term in Section 1957(f)(1), "as guaranteed by the sixth amendment" must be read to modify "right to representation," thereby distinguishing between transactions relating to representation in the criminal context (protected from prosecution by the exception) and representation in civil matters (not protected from prosecution). Thus, Section 1957(f)(1) provides that any "transaction necessary to preserve representation" in a criminal proceeding (i.e., engaging and paying counsel and those who advise and assist them) is not a crime. As a consequence, there is a simple, reasonable, and rational way to read Section 1957(f)(1) meaningfully, even after *Caplin & Drysdale*, which is just what doctrines of statutory construction (as explained by the Supreme Court and the 11th Circuit) require. *See Ballinger*, 395 F.3d at 1236-1237.

B. The Government Ignores The Material Difference Between The Civil Forfeiture Statute And The Criminally Derived Property Statute

"[W]henever Congress passes a new statute, it acts aware of all previous statutes on the same subject." *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972) (declining to import exception in one gambling statute to a different gambling statute). Both the civil forfeiture statute (21 U.S.C. § 853) and the criminally derived property statute (18 U.S.C. § 1957) target the monetary proceeds of illegal activities, but only the criminally derived property statute excepts from liability the use of illicit proceeds in an individual's criminal defense. *Compare* 18 U.S.C. § 853(a) *with* 18 U.S.C. § 1957(a), (f). As reflected in the legislative history, Congress recognized the dangerous chilling effect of threatening criminal defense counsel with indictment based on the source of their professional fees (*see supra* Part I); Congress expressed no similar concern about the effect of confiscating counsel's professional fees when they were derived from a client's illegality.[7]

Given that Congress bothered to amend Section 1957 by adding the exception—thereby distinguishing the criminal provision from the related civil forfeiture provision—the Court must endeavor to give effect to the exception in a manner that distinguishes the operation of Section 1957 from Section 853. *See Ballinger*, 395 F.3d at 1236-37. The Government, however, assumes that the exception to Section 1957 is vestigial and that Sections 1957 and 853 function

---

[7] The civil forfeiture statute was in the public consciousness at the time that Congress opted to amend Section 1957 (and made no analogous change to Section 853). When Congress enacted the exception in Section 1957(f)(1), *Caplin & Drysdale* had been decided by a panel of the Fourth Circuit and then reversed on re-hearing by the full Fourth Circuit; its companion case, *United States v. Monsanto*, 491 U.S. 600 (1989), had already been decided by the Second Circuit. Moreover, both of these cases were on NACDL's radar (*see, e.g.*, Tarlow, *RICO Report*, 12:3 Champion 20, 20-22 (1988)), and NACDL was actively lobbying Congress for the exception to Section 1957. Indeed, the Supreme Court granted a writ of cert for these cases only days after Congress passed the exception for the criminally derived property statute.

identically. That reading ignores the legislative history, the language of the respective statutes, and courts' instructions on how to read statutes. *See Erlenbaugh*, 409 U.S. at 243-244.

C. The Rule Of Lenity Requires Interpreting This Statute In Mr. Kuehne's Favor

Under the rule of lenity, "[w]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Trout*, 68 F.3d 1276, 1280 (11th Cir. 1995) (citations and alterations omitted); *AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc.*, 508 F.3d 995, 1100 (11th Cir. 2007) (defining "ambiguous" as "reasonably susceptible to another interpretation"). The elements of Section 1957 appear at Section 1957(a) and include "[e]ngaging in a monetary transaction," which is defined at Section 1957(f)(1) as a:

> deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument . . . by, through, or to a financial institution . . . but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution.

Thus, the exception in Section 1957(f)(1) for "transaction[s] necessary to preserve a person's right to representation" is part of the definition of one of the elements of Section 1957. As a consequence, any ambiguity in the meaning and scope of the exception would cause an element of the crime (i.e., what counts as a transaction subject to Section 1957's strictures) to be ambiguous—and therefore subject to the rule of lenity. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (granting relief because "proceeds" could reasonably mean "profits" or "receipts").

Assuming the statute is ambiguous, either the rule of lenity applies and the indictment should be dismissed (*see Santos*, 128 S. Ct. at 2025 n.3 (expressing doubt "whether resort to legislative history is ever appropriate when interpreting a criminal statute")) or the Court should look to legislative history to discern congressional intent. *See Moskal v. United States*, 498 U.S.

103, 108 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute" (internal citations omitted)). As discussed in Part I above, the legislative history of the exception contradicts the Government's interpretation of the statute. In light of the plain meaning of the statute and the legislative history of the exception, the exception in Section 1957(f)(1) plainly covers Mr. Kuehne's alleged conduct. However, even if the exception were ambiguous, "the tie must go to the defendant," and Count One of the Indictment must be dismissed. *Id*.

* * *

These statutory construction problems are all resolved by reading the exception in Section 1957(f)(1) as it was intended: to create a buffer zone that permits criminal defense counsel to defend their clients without fear that they must choose between providing effective assistance of counsel and subjecting themselves to potential criminal charges.

CONCLUSION

Count One of the Indictment should be dismissed.

Of counsel:
Howard M. Shapiro
Christopher Davies
Reginald Brown
Kevin H. Moriarty
WilmerHale LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
Phone: (202) 663-6461
Fax: (202) 663-6363

/s/ David Oscar Markus
David Oscar Markus
Fla. Bar No. 119318
DAVID OSCAR MARKUS, PLLC
1200 Alfred I. duPont Building
169 E. Flagler Street
Miami, Florida 33131
Phone: (305) 379-6667
Fax: (305) 379-6668

Counsel for Amicus National Association of Criminal Defense Lawyers

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. BENEDICT P. KUEHNE, OSCAR SALDARRIAGA, and GLORIA FLORES VELEZ, Defendants.	CASE NO. 05-20770-CR-COOKE

Certificate of Service

I hereby certify that on August 29, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ David Oscar Markus
David Oscar Markus

SERVICE LIST
United States of America versus Kuehne, Saldarriaga, and Velez
CASE NO. 05-20770-CR-COOKE
United States District Court, Southern District of Florida

Henry Philip Bell
hbell@bellpalaw.com
Henry P. Bell PA
6333 Sunset Drive
South Miami, FL 33143
Telephone: (305) 665-8625
Facsimile: (305) 665-8624
Attorney for Defendant
Gloria Flores Velez
Notice of Electronic Filing

Benedict P. Kuehne
ben.kuehne@kuehnelaw.com
Law Office of Benedict P. Kuehne, P.A.
Bank of America Tower
100 SE 2nd Street, Suite 3550
Miami, FL 33131-2154
Telephone: (305) 789-5989
Facsimile: (305) 789-5987
Attorney for Defendant
Benedict P. Kuehne
Notice of Electronic Filing

Jane Wollner Moscowitz
jmoscowitz@mmmpa.com
Moscowitz, Moscowitz, and Magolnick
1111 Brickell Avenue
Suite 2050
Miami, FL 33131
Telephone: (305) 379-6700
Facsimile: (305) 379-6700
Attorney for Defendant
Benedict P. Kuehne
Notice of Electronic Filing

Jason C. Raofield
raofieldj@howrey.com
Howrey LLP
1299 Pennsylvania Avenue NW
Washington, DC 20004-2402
Telephone: (202) 383-7267
Facsimile: (202) 383-6610
Attorney for Defendant
Benedict P. Kuehne
Notice of Electronic Filing

John W. Nields, Jr.
nieldsj@howrey.com
Howrey LLP
1299 Pennsylvania Avenue NW
Washington, DC 20004-2402
Telephone: (202) 383-6639
Facsimile: (202) 383-6610
Attorney for Defendant
Benedict P. Kuehne
Notice of Electronic Filing

Evan J. Werbel
werbele@howrey.com
Howrey LLP
1299 Pennsylvania Avenue NW
Washington, DC 20004-2402
Telephone: (202) 383-7259
Facsimile: (202) 383-6610
Attorney for Defendant
Benedict P. Kuehne
Notice of Electronic Filing

Joaquin Mendez, Jr.
jmendezlaw@bellsouth.net
Joaquin Mendez
100 SE 2nd Street
Miami, FL 33131
Telephone: (305) 375-0886
Facsimile: (305) 375-0884
Attorney for Defendant
Oscar Saldarriaga Ochoa
Notice of Electronic Filing

Mark J. Yost
yostm@sec.gov
United States Department of Justice
Asset Forfeiture & Money Laundering Sect
1400 New York Avenue NW
Suite 2116 Bond Building
Washington, DC 20530
Telephone: (202) 514-5616
Facsimile: (202) 616-2547
Attorney for Plaintiff
United States
Notice of Electronic Filing

Thomas Pinder
thomas.pinder@usdoj.gov
United States Attorney's Office
Federal Justice Building
99 NE 4th Street
Miami, FL 33132
Telephone: (202) 514-8171
Facsimile: (202) 616-2547
Attorney for Plaintiff
United States
Notice of Electronic Filing

John W. Sellers
john.sellers@usdoj.gov
United States Department of Justice
1400 New York Avenue NW
Washington, DC 20005
Telephone: (202) 514-1263
Facsimile: (202) 305-8692
Attorney for Plaintiff
United States
Notice of Electronic Filing

Robert Feitel
robert.feitel@usdoj.gov
U.S. Department of Justice (NDDS)
Bond Building Room 8100
1400 New York Avenue NW
Washington, DC 20005-2107
Telephone: (202) 307-3586
Facsimile: (202) 616-2547
Attorney for Plaintiff
United States
Notice of Electronic Filing