No. 09-10199

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GLORIA FLORES VELEZ, *et al*.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANTS-APPELLANTS IN SUPPORT OF AFFIRMANCE

DAVID OSCAR MARKUS
DAVID OSCAR MARKUS, PLLC
1200 Alfred I. duPont Building
169 E. Flagler Street
Miami, Florida 33131
(305) 379-6667

HOWARD M. SHAPIRO
JONATHAN E. NUECHTERLEIN
CHRISTOPHER DAVIES
REGINALD J. BROWN
KEVIN H. MORIARTY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

June 15, 2009

CERTIFICATE OF INTERESTED PERSONS

Counsel for the National Association of Criminal Defense Lawyers certify pursuant to Fed. R. App. P. 26.1 that the following is a complete list of the district court judges and attorneys involved in this case, and all persons, associates of persons, firms, partnerships and corporations having an interest in the outcome of this case:

Bell, Henry P.

Black, Roy

Blanco, Kenneth

Brown, Reginald

Colon, Carmen

Cooke, Marcia, United States District Court Judge

Davies, Christopher

Howrey LLP

Feitel, Robert

Florez, Gloria Velez

Markus, David Oscar

Mendez, Joaquin

Moriarty, Kevin

Moscowitz, Jane

National Association of Criminal Defense Lawyers

Nields, John W., Jr.

Nuechterlein, Jonathan

O'Brien, Paul M.

Ochoa, Oscar Saldarriaga

Pinder, Thomas

Raofield, Jason

Sellers, John

Serrano, Richard

Shapiro, Howard

Straffer, G. Richard

Szczepanski, Brian

Vasquez, Fabio Ochoa

Wallbaum, Teresa A.

Weber, Richard

Wilmer Cutler Pickering Hale and Dorr LLP

/s/ Kevin H. Moriarty
Counsel

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers is a non-profit organization with direct national membership of more than 12,000 members, with an additional 35,000 affiliate members in every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating NACDL's substantial interest in criminal procedure and in preserving the procedural and evidentiary mechanisms necessary to ensure fairness in the criminal justice system.

In this case, the United States charged attorney Benedict Kuehne with violating 18 U.S.C. § 1957 by accepting tainted payment in connection with the criminal defense of Fabio Ochoa Vasquez. As discussed below, this charge violates the text and purpose of § 1957, which exempts from prosecution "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).

Pursuant to Federal Rule of Appellate Procedure 20, all parties consented to NACDL's filing of this brief.

SUMMARY OF ARGUMENT

Criminal defense attorneys will likely refuse engagements that may expose them to the threat of criminal prosecution. Such threats not only harm the criminal defense bar and corrupt the adversary process, but also undermine the Sixth Amendment right of criminal defendants to hire the counsel of their choice. Congress foresaw these concerns and took decisive action to avoid them. It included, within Section 1957 (which criminalizes certain transactions that use the proceeds of illicit conduct), an explicit exemption from prosecution for "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." As the government acknowledges on appeal, that statutory exemption would have no significance—would be a "nullity"—if the prosecution of Mr. Kuehne were permissible. Government Br. 14, 18.

The government attempts to read this exemption out of the statute by invoking the Supreme Court's decision in *Caplin & Drysdale*, which held that fees paid to an attorney may be subject to forfeiture without violating the right to

counsel. But *Caplin* cuts against the government's position here because it confirms that a statute's effect on the behavior of criminal defense lawyers—in particular, on their willingness to accept cases—is highly relevant to the Sixth Amendment analysis. In *Caplin* itself, the Court held that the government may recover the proceeds of crime even after a criminal defendant has used the proceeds to pay a criminal defense lawyer, but only because the threat of *losing fees* would not so deter criminal defense lawyers from taking cases as to violate the Sixth Amendment.

In this case, however, the government proposes to place criminal defense attorneys at risk not just of losing their fees but also of going to prison for accepting tainted funds in payment for their services. It was precisely to avoid the *in terrorem* effect of criminal prosecutions that Congress included in Section 1957 what it conspicuously did *not* include in the civil forfeiture provision at issue in *Caplin*: an exemption for transactions implicating the Sixth Amendment rights of criminal defendants. Congress understood that the threat of criminal prosecution will deter criminal defense lawyers from representing clients in a broad range of circumstances where the possibility of losing one's fees would not. This Court should vindicate that judgment and affirm the dismissal of the Section 1957 count.

Appellee amply explains in his brief why, as a matter of statutory construction, the Section 1957(f) exemption must be construed to preclude

prosecutions like this one. For the most part, this brief does not repeat that discussion. Instead, it addresses the broader policy reasons that led Congress to include that exemption in the first place.

FACTUAL BACKGROUND

As described in the parties' briefs, the government is prosecuting Mr. Kuehne and two co-defendants for a violation of the criminally derived property statute, 18 U.S.C. § 1957, which states that it is a crime to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity." The government charged that the transactions were for the purpose of "paying legal fees to the Ochoa criminal defense team." Record Experts 61 (Indictment ¶ 38).

In district court, Mr. Kuehne moved to dismiss this count because of a statutory exception for transactions "necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." 18 U.S.C. § 1957(f). The government opposed, arguing that this exception is null after *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S. Ct. 2646 (1989). NACDL submitted an amicus brief in support of the motion to dismiss. The Court granted Mr. Kuehne's motion, and the government appealed.

ARGUMENT

I. THE THREAT OF CRIMINAL PROSECUTION, FAR MORE THAN THE THREAT OF FORFEITURE, WOULD DETER CRIMINAL DEFENSE ATTORNEYS FROM REPRESENTING CLIENTS WHO WISH TO RETAIN THEM

The Sixth Amendment right to counsel encompasses not simply the right to an attorney, but also the right to an attorney of the defendant's choice, so long as the defendant can afford the attorney and the attorney chooses to take on the representation. *See Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697 (1988); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 144-145, 126 S. Ct. 2557, 2561-2562 (2006) (reversing conviction where defendant was deprived of his counsel of choice). The government's proposed nullification of the Section 1957(f) exemption would indeed chill criminal defendants' ability to secure their attorneys of choice, because criminal defense attorneys will not represent paying clients if doing so exposes them to the risk of indictment, a felony conviction, disbarment, and imprisonment.

Contrary to the government's arguments here, the Court's analysis in *Caplin* cuts in favor of, not against, giving meaning to the exception in Section 1957(f). In *Caplin* and its companion case, *United States v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657 (1989), the Court considered whether applying the forfeiture statute (21 U.S.C. § 853) to the fees paid to, or intended for, criminal defense attorneys would violate the Sixth Amendment and concluded that it did not. At issue in that case

was how severely application of the forfeiture statute would interfere with a defendant's right to secure counsel of his choice. Although the Court held that the forfeiture statute did not so interfere with that right as to threaten Sixth Amendment principles, the Court simultaneously—and just as significantly—held that the effect of such statutes on the behavior of criminal defense lawyers is highly relevant to the Sixth Amendment analysis. *Caplin*, 491 U.S. at 624, 109 S. Ct. at 2652.

In particular, *Caplin* rests on two separate and equally important conclusions. First, from the criminal defendant's perspective, there is no Sixth Amendment right to spend a third party's money on his criminal defense. *Caplin*, 491 U.S. at 626, 109 S. Ct. at 2652. Second, from the criminal defense attorney's perspective, the prospect of forfeiting fees is *insufficiently severe* a sanction to discourage lawyers from representing the accused and therefore does not infringe on a defendant's Sixth Amendment right to counsel of choice. *Id*. at 625, 109 S. Ct. at 2652.[1] In its appellate brief in this case, the government embraces the first—unremarkable—holding, but ignores the second.

[1] The Court explained: "[T]he burden the forfeiture law imposes on a criminal defendant is limited. The forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing. Nor is it necessarily the case that a defendant who possesses nothing but assets the Government seeks to have forfeited will be prevented from retaining counsel of choice. Defendants . . . may be able to find lawyers willing to represent them,

The second holding, however, is dispositive in Mr. Kuehne's case. The Court's analysis in *Caplin* reflects its conclusion that the prospect of forfeiture places only a "limited" burden on a defendant's right to counsel of choice because defendants "may be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future." *Id*. at 625, 109 S. Ct. at 2652. In other words, the Court found that the Sixth Amendment analysis in this context depends on *how severely* the government practice at issue—there, forfeiture; here, criminal prosecution—will deter criminal defense attorneys from agreeing to represent clients who wish to retain them.

The "limited" burden the forfeiture statute places on the Sixth Amendment right to counsel of choice pales in comparison to the burden that Section 1957 would impose on that right if Section 1957 lacked the exemption at issue in this case. As one commentator explains, "[t]here is an inestimable difference . . . between expecting a defendant to be able to find an attorney willing to risk his fee, and expecting him to find an attorney willing to risk his personal liberty." Villa, *Banking Crimes: Fraud, Money Laundering and Embezzlement* § 8.74 (2008). Indeed, the specter of criminal prosecution would dissuade even the most fearless

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hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future." *Id.* at 625, 109 S. Ct. at 2652.

attorneys from taking even the strongest case where the defendant can pay only with funds that the government alleges—or may later allege—were tainted by the supposedly criminal act.

As set forth in defendants' appellate brief, criminal defense lawyers, by definition, must engage in transactions with accused criminals, many of whom have engaged in money-generating enterprises. Defendants' Br. 41-44. If the government were to prevail in this appeal, the criminal defense bar would necessarily treat entire classes of defendants as untouchables. "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, 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, *supra*, § 8:75. That outcome would hamstring the profession and thwart the constitutional right of defendants to hire counsel of their choice.[2]

[2] This concern cannot be addressed by assurances of judicious prosecutorial discretion. The government's "nullity" theory would subject a broad spectrum of criminal defense attorneys to *possible* prosecution. The low probability of prosecution will not overcome the chilling effect of potential indictment and prosecution. *See Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983) (recognizing the dangers of "arbitrary and discriminatory enforcement" of criminal statutes).

In sum, the government's invocation of *Caplin* turns the Court's analysis on its head. The Sixth Amendment protects the relationship between a criminal defendant and his chosen criminal defense counsel from extreme government interference. *Caplin* explicitly recognizes that the effect on defense counsel is central to any analysis of whether such interference is severe enough to raise constitutional concerns. Here the interference is plainly extreme. Criminal defense lawyers simply will refuse to represent defendants if doing so will subject the lawyers themselves to potential criminal liability.

II. THE STATUTORY SCHEME REFLECTS CONGRESS'S UNDERSTANDING THAT THE THREAT OF CRIMINAL PROSECUTION WOULD UNDERMINE SIXTH AMENDMENT VALUES EVEN THOUGH THE THREAT OF FORFEITURE WOULD NOT

The Supreme Court was not alone in recognizing that the Sixth Amendment analysis in this context turns on the severity of the disincentive placed on criminal defense lawyers to represent the defendants who wish to hire them. Congress embedded the same conclusion into the very structure of the statutory scheme. In particular, Congress adopted the exemption at issue here in Section 1957 but *not* in the correlate forfeiture statute. That statutory asymmetry can have only one explanation: Congress intended to expose criminal defense attorneys only to the threat of *losing their fees*—and not to the much more severe threat of *going to prison*—if they accept payment from defendants who wish to exercise their Sixth Amendment right to counsel of choice.

Both the criminal forfeiture statute (21 U.S.C. § 853) and the criminally derived property statute (18 U.S.C. § 1957), authorize prosecutors to target the monetary proceeds of illegal activities. *Compare* 21 U.S.C. § 853(a) *with* 18 U.S.C. § 1957(a). Originally, neither included an exception for payments to criminal defense lawyers. *Compare* 21 U.S.C. § 853 *with* Money Laundering Control Act of 1986, Pub. L. No. 99-570, tit. I, subtit. H, § 1352, 100 Stat. 3207-21. Then, in 1988, Congress amended Section 1957 to prevent its application to "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6182, 102 Stat. 4181, 4354. Congress enacted this amendment shortly *after* both the Fourth Circuit and Second Circuit had held that the plain language of the *forfeiture* statute did *not* have a statutory exception for criminal defense fees. *In re Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988); *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1988). Significantly, however, Congress made this change *only* to Section 1957 and not to the forfeiture provision at issue in *Caplin* and *Monsanto*.

"[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, 93 S. Ct. 477, 480 (1972). If Congress had believed that criminal defendants have a right to spend criminally derived property on a criminal defense lawyer, it

would have introduced an exception not only to the criminally derived property statute at issue here but also to the forfeiture statute, because prosecutors can use *either* of those statutes to target criminally derived funds that might be used for an individual's criminal defense.

The asymmetry between the criminal and civil statutes makes sense only if Congress's motivation for the amendment is understood not in terms of the purported right of an individual to spend criminal proceeds on his criminal defense, but instead by reference to how criminal defense attorneys might react to the threat of indictment and prosecution (as opposed just to forfeiture of their fees). As explained in Part I.A, above, there are two considerations for a law targeting funds destined for criminal defense attorneys: (1) whether the defendant has a Sixth Amendment right to the expenditure, and (2) notwithstanding whether any such right exists, whether targeting receipt of those fees would dissuade criminal defense attorneys from accepting engagements, thereby chilling defendants' ability to exercise their Sixth Amendment rights. Congress's enactment of the exception to Section 1957—just two years after it had enacted Section 1957 without the exception and during the pendency of the *Caplin* and *Monsanto* cases—is understandable if, and only if, Congress took the second consideration into account and decided to preclude prosecutions like this one.

III. THE LEGISLATIVE HISTORY OF THE STATUTORY EXCEPTION CONFIRMS THAT CONGRESS SOUGHT TO SHIELD ATTORNEYS FROM A THREAT OF CRIMINAL PROSECUTION FOR ACCEPTING PAYMENT FROM CLIENTS WHO WISH TO RETAIN THEM

The legislative history further confirms that, even though Congress anticipated criminal defense lawyers would face forfeiture of tainted fees, Congress did *not* intend for them to face felony prosecutions for accepting payment for their work. Congress enacted Section 1957 in 1986. Pub. L. No. 99-570, tit. I, subtit. H, §§ 1351-1366, 100 Stat. 3207-18. At that time, that provision criminalized "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).

The first iteration of Section 1957 lacked an exception to preserve Sixth Amendment rights, despite the concern of several legislators that the law might "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 (daily ed. Oct. 18, 1986) (remarks by Rep. McCollum). Congress did not act on that concern at the time in part because it was satisfied by the assurances of the Department of Justice ("DOJ") that it would not pursue criminal actions against criminal defense attorneys under the law. *See id.*; 132 Cong. Rec. E3827 (daily ed. Oct. 18, 1986) (remarks by Chairman Hughes) ("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.").

Shortly after the statute was enacted, however, DOJ formally announced that such prosecutions might be appropriate after all, so long as the head of the Criminal Division authorized them.[3] Although DOJ quickly added that it would approve such prosecutions only rarely,[4] the American Bar Association ("ABA") and NACDL were skeptical of DOJ's assurances and urged Congress to add an explicit exemption to protect the attorney-client relationship. Their arguments largely echoed those raised by Representative McCollum and others during the drafting of the original 1986 legislation. *See, e.g.*, ABA Report 319 (arguing that

[3] *See Justice Department Handbook on the Anti-Drug Abuse Act of 1986* (Mar. 1987) ("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 327 (Feb. 1987) ("ABA Report") ("[I]t is clear that the Justice Department interprets the new statute to permit prosecution of attorneys for 'receiving and depositing' bona fide legal fees, without more, so long as knowledge of the illicit character of the funds can be demonstrated."); *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.").

[4] *See 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 H. Comm. on Banking, Finance and Urban Affairs*, 100th Cong. 107-108 (1987) (statement of William F. Weld, Assistant Attorney General, Criminal Division) ("[A]ttorneys representing clients in criminal matters must not be hampered in their ability to effectively and ethically represent their clients within the bounds of the law.").

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.").[5]

After considering the implications of DOJ's position, Congress agreed with ABA and NACDL that, given the guidance it had already issued to its prosecutors, 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, as noted, 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, this exemption extends to any "bona fide fee paid in good faith for legitimate legal representation." 134 Cong. Rec. E3740 (daily ed. Nov. 10, 1988) (remarks by Chairman Hughes). Significantly, the sponsors of this

[5] News reports regarding the government's prosecution of Mr. Kuehne included quotes from lawyers that echoed these same concerns. One attorney said that the prosecution of Mr. Kuehne "sends a message that any lawyer is at risk." Pacenti, *Defense Bar Rallies Behind Attorney Charged With Laundering Drug Money*, February 8, 2008, *at* http://www.law.com/jsp/article.jsp?id=1202426499766.

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 (daily ed. Nov. 10, 1988) (remarks by Edward Kennedy) (emphasizing "intolerable burden" that the threat of criminal prosecution and imprisonment places on the Sixth Amendment right to counsel).

CONCLUSION

This case is about whether an explicit congressional mandate, as informed by the Sixth Amendment principles underlying it, will have force. For the reasons discussed, Congress's express instruction should be followed, and this Court should accordingly affirm the dismissal of the Section 1957 count against Mr. Kuehne.

Respectfully submitted,

/s/ David Oscar Markus

DAVID OSCAR MARKUS
DAVID OSCAR MARKUS, PLLC
1200 Alfred I. duPont Building
169 E. Flagler Street
Miami, Florida 33131

HOWARD M. SHAPIRO
JONATHAN E. NUECHTERLEIN
CHRISTOPHER DAVIES
REGINALD J. BROWN
KEVIN H. MORIARTY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006

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FED. R. APP. P. 32 (a)(7)(C) CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(ii), as modified by Fed. R. App. P. 29(d). This brief contains 3565 words.

/s/ Kevin H. Moriarty
Counsel

United States v. Velez
No. 09-10199

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2009, I have filed an original and six copies of the foregoing brief by overnight mail for filing with the Clerk of the U.S. Court of Appeals for the Eleventh Circuit, and that, on the same day, the brief was electronically uploaded on the Court's electronic filing website. I also certify that, on this same day, I have served a copy of the foregoing brief upon all counsel of record by placing a copy in the United States mail, first class postage prepaid and addressed as follows:

Counsel for the United States:

Teresa A. Wallbaum
U.S. Department of Justice
Criminal Division
Narcotic and Dangerous Drug Section
1400 New York Ave., NW, Suite 11000
(Bond Building)
Washington, DC 20530

Counsel for Defendants:

Henry Philip Bell
Henry P Bell PA
6333 Sunset Drive
South Miami, FL 33143

Jane Woilner
Moscowitz Moscowitz Moscowitz & Magolnick
1111 Brickell Avenue Suite 2050
Miami, FL 33131

Joaquin Mendez, Jr.
Joaquin Mendez
100 SE 2nd Street
Miami, FL 33131

John W. Nields, Jr.
Jason Raofield
Evan J. Werbel
Howrey LLP
1299 Pennsylvania Avenue NW
Washington, DC 20004-2402

/s/ Kevin H. Moriarty
Counsel