

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-20770-CR-COOKE

_____)
UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
BENEDICT P. KUEHNE,)
OSCAR SALDARRIAGA,)
and)
GLORIA FLOREZ VELEZ,)
)
Defendants.)
_____)

“There 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.” John K. Villa, Banking Crimes: Fraud, Money Laundering and Embezzlement

**MOTION TO DISMISS COUNT ONE OF THE
THIRD SUPERSEDING INDICTMENT
(CONSPIRACY TO VIOLATE 18 U.S.C. § 1957)**

In 1986 Congress enacted 18 U.S.C. § 1957 which criminalized for the first time the knowing receipt of tainted funds in payment for legitimate goods or services. Then, in 1988 Congress amended § 1957 to exempt from its coverage transactions involving payment for legitimate criminal defense services. *See* 18 U.S.C. § 1957(f)(1).

Congress enacted the exemption for criminal defense fees not because it believed that it was appropriate for a lawyer knowingly to receive tainted funds as his fee—indeed tainted fees knowingly received are subject to forfeiture. *See* 21 U.S.C. § 853. Instead, Congress exempted legitimate criminal defense fees from § 1957 in order to remove “the chilling effect” that *criminal liability* would have on the willingness of lawyers to take on clients. *See infra* at 4-7.

The problem is that there will often be *uncertainty* about whether the funds used to pay defense fees are tainted, and a prosecutor may well differ later with the defense lawyers' judgment on the issue.¹ If the lawyer knows he is subject to criminal prosecution and imprisonment when his judgment on whether to take a fee is flawed, even a client who has untainted funds may not be able to find a lawyer willing to take his case. A lawyer may be willing to take a case knowing that there is a risk that his fee may later be *forfeited*.² However, the threat of *criminal* prosecution imposes too grave a burden on Sixth Amendment rights. As one commentator put it, "there 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."³ That is why Congress exempted criminal defense fees from § 1957. *See infra* at 4-8.

In this unprecedented case, the government has alleged in Count One of the Third Superseding Indictment a conspiracy to violate § 1957, the "object and purpose" of which was "paying *legal fees* to the Ochoa *criminal defense team*."⁴ As stated above, however, transactions involving criminal defense fees have been exempted from the reach of § 1957 by Act of Congress. *See* 18 U.S.C. § 1957(f)(1). The charge contained in Count One has thus been brought in the teeth of that exemption and the policies that underlie it. Consequently, the defendants file this motion to dismiss Count One of the Third Superseding Indictment.

¹ As just one example, the issue may turn on whether the defendant is guilty of the underlying charge. The prosecution and the defense may have sharply different views on that.

² *See Caplin and Drysdale v. United States*, 491 U.S. 617, 625 (1989) (a defendant "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 [the] defendant might come by in the future").

³ John K. Villa, *Banking Crimes: Fraud, Money Laundering and Embezzlement* § 8.74 (2007).

⁴ Third Superseding Indictment at ¶ 38 (emphasis added).

FACTS – THE INDICTMENT

The Third Superseding Indictment (“Indictment”) alleges that Mr. Kuehne was hired by the Ochoa criminal defense team to investigate the funds to be used by Fabio Ochoa Vasquez (“Ochoa”) to pay “legal fees” to the “Ochoa criminal defense team.” Indictment at ¶¶ 6, 7. The Indictment alleges further that the funds for legal fees were first transferred to Mr. Kuehne’s attorney trust account; that Mr. Kuehne then advised the Ochoa criminal defense team by written opinion that he had concluded the funds were “free from taint”; and that the funds were then transferred to the Ochoa criminal defense team to pay for Ochoa’s defense. *Id.* at ¶¶ 8, 10, 19.

The Indictment alleges that Mr. Kuehne and the other two defendants knew that the funds were tainted, and charges them with conspiring to violate 18 U.S.C. § 1957. *Id.* at ¶¶ 10 and 37. The Indictment then explicitly alleges that “the object and purpose of the conspiracy alleged in Count One” was to engage in “monetary transactions” “for the purpose of *paying legal fees to the Ochoa criminal defense team.*” *Id.* at ¶ 38 (emphasis added). Indeed, this Court has stated that all Counts in the Indictment “were brought in connection with the funds and the transfer of funds used to pay Fabio Ochoa’s criminal defense team.” Order on Second Motion for Bill of Particulars dated July 11, 2008, at 2 (Dkt. # 130).

As set forth immediately below, however, “monetary transactions” engaged in for the purpose of paying legal fees to a criminal defense lawyer are simply not criminal under § 1957. . . *See* 18 U.S.C. § 1957(f)(1).

LAW

1. The Statutory Exemption for Criminal Defense Fees

Section 1957(f)(1) provides that “monetary transactions” prohibited by § 1957(a) do “not include any transaction necessary to preserve a person’s right to representation as guaranteed by the sixth amendment to the Constitution.” As would seem obvious in light of the Sixth Amendment language in § 1957(f)(1), this exemption applies to transactions involving funds paid to an attorney for legitimate criminal defense services. The courts have uniformly so stated.

2. The Case Law

The Court of Appeals for the Eleventh Circuit has stated simply in *United States v. Elso*, 422 F.3d 1305, 1309-10 (11th Cir. 2005), that “it is true that § 1957 exempts the receipt of certain attorney’s fees from the conduct criminalized in § 1957.” The Seventh Circuit stated in *United States v. Hoogenboom*, 209 F.3d 665, 669 (7th Cir. 2000) that “the exception appears to have been inserted to prevent the broad reach of the statute from criminalizing a defendant’s bona fide payment to her attorney.” *Id.* The court continued:

Correctly read, the statute offers a defense where a defendant engages in a transaction underlying a money laundering charge with the present intent of exercising Sixth Amendment rights.

Id. See also *United States v. Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 1997) (recounting history of § 1957 and noting that “[w]ithout the [1988] amendment a drug dealer’s check to his lawyer might have constituted a new federal felony”).

Similarly, in *United States v. Ferguson*, 142 F. Supp. 2d 1350 (S.D. Fla., 2000), the court stated:

As the Seventh Circuit observed, § 1957(f)’s exception should be read to decriminalize transactions that are legitimately entered into for the legal services of a criminal defense attorney.

Id. at 1358. The *Ferguson* court thus concluded that “Section 1957(f)’s exception squarely applies when legitimate legal fees are paid *from a tainted source* by a criminal defendant directly to his attorney.” *Id.* at 1360 n.9 (emphasis added).

3. The Policy Underlying the Statute

A review of the legislative history reveals the policies that underlie the statute. Congress was concerned that in the absence of an exemption for legitimate criminal defense fees, the threat of criminal prosecution would place “a chilling effect” on the willingness of lawyers to take on clients, thus imposing an unacceptable burden on the exercise of “the Sixth Amendment right to counsel.” A brief outline of the legislative events leading to the passage of the exemption follows.

a. Passage of 18 U.S.C. § 1957

Congress passed 18 U.S.C. § 1957 in 1986. Section 1957 prohibits a person from engaging in “monetary transactions” in “criminally derived property” having a value greater than \$10,000, “knowing” that the property consists of proceeds of crime. Section 1957 thus criminalized, for the first time, the knowing receipt of tainted funds in return for legitimate goods and services. 132 Cong.Rec. E3827-01 (Nov. 6, 1986) (statement of Rep. Hughes). (Tab 1)

The version of the bill adopted by the Sub-Committee on Crime of the House Judiciary Committee (the “Sub-Committee”) in 1986 contained the following provision:

This paragraph does not apply to financial transactions involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or any proceeding arising therefrom.

132 Cong. Rec. H6608-06 (Sept. 11, 1986). (Tab 2) This provision was included because of concern that the bill would otherwise threaten to “impact upon the exercise of the sixth amendment right to the effective assistance of counsel in the event of application of this offense to bona fide fees received by attorneys.” ABA Report No. 1 of the Criminal Justice Section, at 324 (Feb. 1987) (quoting H.R. Rep. No. 99-855, 99th Cong. 2d Sess., at 14 (Sept. 19, 1986)).

(Tab 3) The Chair of the Sub-Committee, Representative William Hughes, explained:

We certainly don’t want the statute to be so broad we either chill the relationship between defense attorneys and their clients or that, in fact, we expose defense attorneys in receiving fees to possible criminal prosecution where they have not participated in any way in a criminal offense either in the underlying participation in the criminally derived property or the attempt to conceal or launder those funds.

See ABA Report, at 323 (quoting Markup by the Subcommittee on Crime of H.R. 5077, Money Laundering Control Act of 1986, at 5 (July 16, 1986)). Representative Bill McCollum, ranking minority member of the Sub-Committee, and the author of the language exempting criminal defense fees, stated:

I am concerned, as you are, I have been for some time, about the impact our statute might have on chilling the relationships between a defense attorney in a criminal proceeding and his client.

ABA Report, at 323 (quoting Markup by the Subcommittee on Crime of H.R. 5077, Money Laundering Control Act of 1986, at 7 (July 16, 1986)).

The Senate Bill, however, contained no such provision. And the provision was dropped after informal conferences involving House and Senate members. ABA Report at 324-25. House Sub-Committee Chair Hughes and ranking minority member Bill McCollum each explained that the House had acquiesced in dropping this attorney fee exemption because of the “lateness of the hour,” and because it believed the Department of Justice would never prosecute an attorney for receipt of bona fide attorney’s fees. Each suggested that the exemption might be revisited in “the next Congress.”⁵

b. Passage of 18 U.S.C. § 1957(f)(1)

In February of the following year (*i.e.*, 1987), the Section on Criminal Justice of the American Bar Association issued a Report (the “ABA Report”) strongly urging Congress to enact the exemption that had been dropped in conference in 1986. Specifically, it urged passage of an amendment to § 1957:

[T]o exempt monetary transactions involving the bona fide fees an attorney accepts for representing a client subject to criminal investigation or any proceeding arising therefrom.

ABA Report, at 319 (Feb. 1987).

The ABA Report stated that, without the exemption, § 1957 could have “pernicious and deleterious effects upon both attorney and client.” ABA Report, at 321 (Feb. 1987).

The Report continued:

[t]he fear of criminal prosecution may cause an attorney to reject representation of a client and thus deprive an accused of counsel of choice.

* * * * *

⁵ 132 Cong. Rec. E3821-03 (Nov. 6, 1986) (statement of Rep. McCullom) (Tab 4); 132 Cong. Rec. E3827-01 (Nov. 6, 1986) (statement of Rep. Hughes). (Tab 1)

In the absence of immediate congressional action to exempt transactions involving bona fide attorneys' fees, the Act [*i.e.*, § 1957] presents a grave threat to honest, ethical attorneys, to the constitutional rights of the accused, to the preservation of the attorney-client relationship, and to the future of our adversary system of criminal justice.

Id. at 322, 329.

During the next Congress, the exemption was indeed revisited. The Sub-Committee on Crime of the House Judiciary Committee reintroduced, and the full House approved on September 22, 1988, an amendment to § 1957 virtually identical to the one proposed by the ABA. It became later § 6113 of H.R. 5210 and it provided:

This subsection [*i.e.* § 1957(a)] does not apply to monetary transactions involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or any proceeding arising therefrom.

134 Cong. Rec. H7074-02 (Sept. 7, 1988) (setting forth provision) (Tab 5); 134 Cong. Rec. E3740-01 (Nov. 10, 1988) (statement of Rep. Hughes). (Tab 6)

This time the Senate agreed in concept, but the language was altered in conference. The altered language provides that the key operational term “monetary transaction” contained in § 1957(a):

does not include 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).

This language was passed by both the House and Senate on October 21, 1988, and became law on November 18, 1988.⁶ The final legislative summary of the bill—issued by the House on October 22, 1988—explained that the bill:

[E]xclude[d] monetary transactions involving bona fide attorney fees from consideration as unlawful activity for particular racketeering law purposes.

Barry Tarlow, *Rico Report*, 25 *Champion* 49, 52 (Aug. 2001) (quoting final legislative summary of H.R. 5210, Tit. VI, Subtit. E, 100th Cong. (Oct. 22, 1988)). (Tab 9)

⁶ 134 Cong. Rec. D1384-02 (Oct. 21, 1988) (Senate agreeing to H.R. 5210 with no further amendment) (Tab 7); 134 Cong. Rec. H11287-01 (Nov. 10, 1988). (Tab 8)

The Section by Section Analysis issued by the Senate on November 10, 1988 was similar.

It states with regard to the exemption:

This section amends 18 U.S.C. § 1957 to exempt attorneys fees from the prohibition against conducting a monetary transaction involving criminally derived property.

134 Cong. Rec. S17360-02, Section Analysis of Judiciary Committee Issues in H.R. 5210 (Nov. 10, 1988). (Tab 10) The analysis goes on to make clear that civil attorney's fees are not exempted and that only fees "necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution" are exempted. *Id.*

Also on November 10, 1988, Senator Edward Kennedy and Representative Hughes, each of whom participated in the conference leading to the final language enacted into law, made remarks explaining that the amendment to § 1957 was adopted because of concern that § 1957 would otherwise "discourage attorneys . . . from taking on clients" and "from communicating with them," and because "an attorney's fear of being prosecuted and imprisoned" "places an intolerable burden on the constitutional right to counsel." 134 Cong. Rec. S17360-01 (Nov. 10, 1988) (statement of Sen. Kennedy) (Tab 11); 134 Cong. Rec. E3740-01 (Nov. 10, 1988) (statement of Rep. Hughes). (Tab 12) Both also emphasized that the change in the language of the exemption in conference was designed to cast the exemption in Sixth Amendment language "without altering the House provision's substantive effect." *Id.*

Thus, according to one commentator:

In 1988, Congress made explicit its intent that Attorneys not be prosecuted under Section 1957 for accepting bona fide attorneys' fees for representing a client in a criminal matter.

John K. Villa, *Banking Crimes: Fraud, Money Laundering and Embezzlement* § 8.73 (2007).

(Tab 13)

ARGUMENT

The reason why Count One should be dismissed is simple and straightforward. The conduct alleged in Count One has been exempted from criminal liability by Act of Congress. The Department of Justice has been hostile to this exemption for many years, and appears not to accept the policies that underlie it. However, it is Congress that makes the laws.

A. **The Exemption Is Part of the Definition of “Monetary Transaction”**

Section 1957 criminalizes “monetary transactions” in “criminally derived property” with a “value greater than \$10,000” by a person “knowing” that the transaction involves proceeds of crime. *See* 18 U.S.C. § 1957(a). Section 1957(f)(1) contains the definition of “monetary transaction,” one of the essential elements of the crime contained in § 1957(a). This definitional section provides that the term “monetary transaction” “does not include any transaction necessary to preserve a person’s right to representation as guaranteed by the Sixth Amendment to the Constitution.” Congress thus exempted payments for legitimate criminal defense services from the reach of § 1957. *See, supra*, at 3-7.

The exemption as written by Congress applies to the *transaction*. Consequently, it means that no one—not the client, not the criminal defense attorney, and not any third party—may be prosecuted under § 1957 for *transactions* that involve payment for legitimate criminal defense services.

B. **The Indictment Alleges a Conspiracy to Engage in “Monetary Transactions” that are Excluded from the Reach of § 1957**

The Third Superseding Indictment alleges in Count One a conspiracy to violate § 1957, the “object and purpose” of which was “to engage in monetary transactions” “for the purpose of paying legal fees to the Ochoa criminal defense team.” *Id.* at ¶ 38.

Count One of the Indictment thus on its face charges a conspiracy to engage in transactions that are expressly exempted from criminal liability by Act of Congress. Consequently, Count One of the Indictment must be dismissed.

C. The Government's Position

The government has taken the position for many years that the exemption contained in 18 U.S.C. § 1957(f)(1) is a nullity.⁷ The government's argument is based on the Supreme Court's decision in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), a case involving the forfeiture laws. In that case, criminal defense attorneys challenged the constitutionality of the forfeiture laws as applied to criminal defense fees, arguing that the forfeiture laws imposed an unacceptable burden on Sixth Amendment rights. *Id.* at 624, *et. seq.*⁸ The Court rejected this contention. It pointed out that Congress had provided no exception in the forfeiture laws for criminal defense fees. *Id.* at 623. It emphasized the limited nature of the burden on Sixth Amendment rights imposed by the forfeiture laws. *Id.* at 624-625. *See also* n.2, *supra*. And it noted that a defendant has no Sixth Amendment right to use proceeds of crime to pay his lawyer, a proposition that the Court regarded as "neither extraordinary or novel." *Id.* at 626-27.

The government later seized on the Court's observation that a defendant has no Sixth Amendment right to use the proceeds of crime to pay his lawyer; and has taken the position that, since Congress chose to exempt transactions necessary to preserve "Sixth Amendment" rights, the exemption is by its own terms inapplicable whenever the fees in question are derived from proceeds of crime. The government has argued that *Caplin & Drysdale* should be read as having "vitiating" the exemption. *See* n.7, *supra*.

⁷ *See* Money Laundering: Federal Prosecution Manual, U.S. Dept. of Justice, at 284-85 (1992) ("the statutory exemption for 'attorney fee' transactions in essence has been vitiating."); *see also* *United States v. Ferguson*, 142 F. Supp. 2d 1350, 1356 (S.D. Fla. 2000).

⁸ The Court held that the attorneys had standing to raise the claim on the ground that "the attorney-client relationship ... is one of special consequence" and that "it is credibly alleged that the statute at issue here may 'materially impair the ability of third persons in [the client's] position to exercise their constitutional rights.'" *Id.* 623-624 n.3.

The government has missed the entire point of the exemption. Congress did not enact the exemption in the mistaken belief that a criminal had a Sixth Amendment right to pay a lawyer with proceeds of crime. Congress was concerned with the *chilling effect* that the threat of criminal prosecution would have on the willingness of defense lawyers to represent persons who might have untainted funds. If there were a magical way of determining with certainty whether a fee is tainted at the time when it is offered, the exemption would be unnecessary. But there is no magical way of doing so. That is why Congress believed the exemption was “necessary to *preserve*” Sixth Amendment rights.

Caplin & Drysdale dealt with the forfeiture laws; and Congress provided no exemption for criminal defense fees in its forfeiture laws. However, Congress most decidedly *did* include such an exemption from criminal prosecution under § 1957. Thus, Congress did *not* believe that application of the *forfeiture laws* to criminal defense fees would impose an unacceptable burden on Sixth Amendment rights. But Congress *did* believe the threat of *criminal* penalties, including imprisonment, would unacceptably burden Sixth Amendment rights. Under our system of government that was Congress’ choice to make. *And if the government’s argument were accepted, it would mean that when Congress enacted this exemption into law, it intended the exemption to have no effect at all.* This argument makes no sense, and no court has ever accepted it. *See, supra* at 3-4.

The court in *United States v. Ferguson, supra*, rejected the government’s position stating,

If § 1957 were construed in the manner that the United States urges, the exception for transactions necessary to protect an individual’s Sixth Amendment rights would amount to no exception, at all.

142 F. Supp. 2d at 1358.

Responding specifically to the government’s argument based on *Caplin and Drysdale*, the *Ferguson* Court stated:

The United States’ analysis, however, is basically flawed because the federal forfeiture statutes do not include a parallel exception to the one contained in § 1957(f). . . .

* * * * *

[R]equiring the forfeiture of assets received by a criminal defense attorney for his services is far less draconian than making the attorney a criminal for receiving such assets for his services.

Id. at 1357, 1358.

The government's other argument seems to be that the Ochoa criminal defense team used the fees at issue in this case to pay Mr. Kuehne for his services;⁹ and that payment of Mr. Kuehne's fees was not "necessary" to preserve Ochoa's Sixth Amendment rights within the meaning of § 1957(f)(1) because Mr. Kuehne did not represent Ochoa. Consequently, as we understand the government's position, it contends that payment of Mr. Kuehne's fees is outside the exemption.¹⁰

This argument only underscores the government's unwillingness to accept what Congress has done; and the argument should be rejected. The exemption, by its terms, applies to "any transaction necessary to preserve" Sixth Amendment rights. *See* § 1957(f)(1) (emphasis added). Mr. Kuehne's fee was a necessary expense for the Ochoa criminal defense team. Nearly every criminal defense lawyer must pay expenses to third parties in the course of providing representation to the client. The expenses are nearly always borne by the client: they are either paid for out of the "fee," or billed separately to the client as expenses. Such expenses may include payments to investigators, expert witnesses, and others. Such expense payments plainly constitute "any transaction necessary to preserve" the client's Sixth Amendment rights. In this case, Mr. Kuehne's fee was one of the necessary expenses for the Ochoa criminal defense team: it arose directly out of their representation of Ochoa, and it made it possible for them to represent him. It would defeat the purpose of the exemption in § 1957(f)(1) if the government could

⁹ *See* Indictment at ¶¶ 19, 20.

¹⁰ *See* Government's Response to Defendant Kuehne's Request for Extension of Motions Cut-Off Date, filed May 14, 2008, at 4 (Dkt. # 108).

prosecute the expert witnesses, investigators, and other third parties—and indeed the criminal defense lawyer who paid them—whenever they are paid out of funds received from the client.

The government recognized in its original indictment that the funds paid to the Ochoa criminal defense team represented “payments by Ochoa for his *legal fees and expenses*.” See Superseding Indictment at ¶ 12 (emphasis added). When the government added the § 1957 count in the Third Superseding Indictment, it removed the word “expenses.” Indictment at ¶ 41. But that is a change in form only, not a change in substance. Expenses paid by criminal defense lawyers arising out of their representation of the accused are necessary to preserve Sixth Amendment rights, and are necessarily within the exemption in § 1957(f)(1).¹¹

D. The Rule of Lenity

We submit that the statutory language and the legislative history of 18 U.S.C. § 1957 are clear that payments for legitimate criminal defense services are exempt from the reach of Section 1957. If, however, the Court were to conclude that any doubt exists on that question, the rule of lenity requires that such doubt be resolved in favor of Mr. Kuehne. See *United States v. Blankenship*, 382 F.3d 1110, 1130-31 (11th Cir. 2004) (“Even if we believed this to be a close case, the rule of lenity would compel us to interpret the statute as excluding the conduct at issue from the scope of money laundering, thereby giving the [defendants] the benefit of the doubt.”); *United States v. Chandler*, 388 F.3d 796, 805 (11th Cir. 2004) (rule of lenity requires doubt to be resolved in favor of the accused). As the Supreme Court recently held in *United States v. Santos*, also a money laundering case, “[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” 128 S. Ct. 2020, 2025 (2008).

¹¹ The Third Superseding Indictment also states that the purpose of the conspiracy alleged in Count One was to engage in monetary transactions “for the purpose of paying legal fees to the Ochoa criminal defense team *and enriching themselves*.” *Id.* at ¶ 38 (emphasis added). It is difficult to see what, of substance, the italicized language adds. Every lawyer or other professional who works for a fee or for a salary may be said to take his fee or salary for the purpose of “enriching” himself. Such an allegation cannot possibly be a way of circumventing § 1957(f)(1).

The Eleventh Circuit is clear that “[w]hen there are two rational readings of a criminal statute, one harsher than the other, the rule of lenity dictates that we are to choose the harsher one only when Congress had spoken ‘in language that is *clear and definite.*’” *United States v. Inclema*, 363 F.3d 1177, 1182 (11th Cir. 2004) (emphasis added). Absent a clear and definite indication from Congress that it intended to criminalize the conduct of a lawyer who engages in a monetary transaction involving *bona fide* legal fees, the rule of lenity requires that Count One be dismissed. Otherwise, Mr. Kuehne would be “held accountable for a violation of a statute whose commands are uncertain” and “subjected to punishment that is not clearly proscribed.” *United States v. Santos*, 128 Ct. at 2025.

E. This Motion is Ripe for Decision

In *Ferguson, supra*, the defendant was alleged to have received funds from a major drug dealer who was not his client, at a time when the major drug dealer’s assets were subject to a restraining order. 142 F. Supp. 2d at 1352, 1355 n.5. In its opinion, the court stated that “the superseding indictment does not aver that the money was transferred to Defendant as payment for his legal services”. *Id.* at 1355. Based on that fact, and based also on the court’s belief that the exemption for criminal defense fees was an affirmative defense, the court declined to adjudicate, at the motion to dismiss phase of the proceedings, the question whether the exemption barred the prosecution. *Id.* at 1360.

Here, however, the Indictment explicitly alleges that the monetary transactions involved in this case were for payment of criminal defense fees. And where the *Indictment* makes clear that a prosecution should not proceed, the Indictment must be dismissed even if the dismissal is based on an affirmative defense. The statute of limitations, for example, is an “affirmative defense.” *United States v. Najjar*, 283 F.3d 1306, 1309 (11th Cir. 2002). And where that defense is “clear from the face of the indictment,” it is properly raised through a pretrial motion to dismiss. *United States v. Ramirez*, 324 F.3d 1225, 1227-28 (11th Cir. 2003). *See also, e.g., United States v. Treto*, 904 F. Supp. 1374 (S.D. Fla. 1995) (granting pre-trial motion to dismiss

on statute of limitations grounds); *United States v. Cardoen*, 882 F. Supp. 1045 (S.D. Fla. 1994) (same).

Moreover, we submit that the attorney's fee exemption is not an affirmative defense. The exemption is part and parcel of the definition of one of the *essential elements* of the offense: "monetary transaction." It is axiomatic that the prosecution must *allege* and *prove* every *element* of an offense. *Russell v. United States*, 369 U.S. 749, 763-64 (1962). Thus, under § 1957 the prosecution must allege that the defendants conspired, *inter alia*, to engage in a "monetary transaction" within the statutory definition of that element. And here the prosecution has failed to do so.

Indeed, even the *Ferguson* court stated:

reading § 1957(f) naturally, the exception *appears* to be part of the statutory definition of prohibited "monetary transactions," which would support the exception being an element of the money laundering crime.

142 F. Supp. 2d at 1359 (emphasis added). We submit that the exception does not simply *appear* to be part of the statutory definition of monetary transaction—it *is* part of the statutory definition of "monetary transaction"—and therefore it *is* an essential element of the crime. Thus, Count One of the Third Superseding Indictment fails on its face to allege a crime and must be dismissed.

* * * * *

The issue raised in this motion is one of grave importance to our legal system. A very large portion of federal crimes are crimes that produce "proceeds." And most of them are covered by the prohibitions in § 1957. Thus, not only defendants in narcotics cases, but defendants in mail fraud, wire fraud, bank fraud, securities fraud and tax evasion cases (to name only a few) will *if guilty* have "proceeds" of crime in their possession at the time when they endeavor to find an attorney to represent them. These are the people criminal defense lawyers deal with continually throughout their careers as a regular part of performing their proper functions in the criminal justice system. Even when the fees tendered by the client appear to be

untainted, there will almost always be some level of uncertainty. And without an exemption from *criminal* prosecution, many clients with untainted funds will be unable to find lawyers willing to take their cases.

This case exemplifies why Congress exempted transactions involving criminal defense fees from criminal prosecution under 18 U.S.C. § 1957. The Ochoa criminal defense team did not want to represent Ochoa unless he had clean funds with which to pay them. So they took the step of hiring Mr. Kuehne to investigate the source of their fees and to render an opinion.

Mr. Kuehne traveled to Colombia. He learned that the Ochoa family had acquired substantial wealth before Ochoa had entered the drug trade—wealth that both Ochoa and his family members were permitted to retain after extensive investigations by the Colombian government and after findings by the Colombian courts in forfeiture proceedings.¹²

Mr. Kuehne concluded that the assets Ochoa and his family members were permitted to keep were available for sale to raise funds for legal fees. The government now—five years later—alleges that in fact the assets were tainted and claims that Mr. Kuehne must have known it.

Under the statutory scheme enacted by Congress, the dispute over whether the assets were tainted and whether Mr. Kuehne knew they were tainted is to be resolved in a civil forfeiture proceeding – not in a criminal prosecution under § 1957. If this case is permitted to go to trial, few lawyers will be willing to take on clients where there is *any* uncertainty about the source of

¹² The findings from those Colombian court proceedings are described in part in Mr. Kuehne's Request for an Early Status Conference, filed February 7, 2008 at 2-3 (Dkt. # 13).

the fee, and few will be willing to perform the role Mr. Kuehne performed here. This is precisely the “chilling effect” Congress sought to prevent when it enacted § 1957(f)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being served via transmission of notices of electronic filing generated by CM/ECF on this 15th day of July, 2008, on:

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