

**UNITED STATES v. VELEZ**

*United States Court of Appeals for the Eleventh Circuit  
586 F.3d 875 (2009)*

BARKETT, CIRCUIT JUDGE:

The United States Government appeals the dismissal of Count One of its indictment against Gloria Florez Velez, Benedict P. Kuehne, and Oscar Saldarriaga Ochoa ("Saldarriaga") (collectively "Defendants"), in which the Government charged Defendants with money laundering in violation of 18 U.S.C. §§ 1956(h) and 1957. The district court dismissed Count One on the ground that Defendants are exempt from criminal prosecution under § 1957(a) because the plain language of § 1957(f)(1) excludes from the statute's scope "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." The parties do not dispute that the money allegedly laundered was used for the payment of legal fees. This appeal presents an issue of first impression in this circuit regarding the meaning of the exemption in § 1957(f)(1).

Kuehne, a Miami attorney, was hired by the Miami-based criminal defense team of Fabio Ochoa, an accused Colombian drug leader, to review the source of funds to be used to pay Ochoa's legal defense fees in the United States. The purpose of the review was to determine whether the funds to be used for Ochoa's defense were derived from criminal proceeds. Kuehne hired Colombian attorney Saldarriaga and Colombian accountant Velez to assist him. After conducting his investigation, Kuehne issued "opinion letters" in which he concluded that several monetary transfers from Ochoa to him, as an intermediary, were not comprised of proceeds of criminally derived property. Kuehne then transferred the fees, totaling approximately \$ 5.3 million, to Ochoa's defense team. The Government alleged that Kuehne and his co-defendants supported their conclusion that the funds were untainted with false documents and statements, knowing that the funds were criminally derived and intending to conceal their true source.

Kuehne and his co-defendants moved to dismiss Count One of the indictment on the ground that monetary transactions made for the purpose of securing legal representation are exempt from criminal penalties under § 1957(f)(1). The district court granted the motion, and we affirm. . . .

Section 1957(a) prohibits knowingly engaging or attempting to engage "in a monetary transaction in criminally derived property that is of a value greater than \$ 10,000 and is derived from specified unlawful activity." 18 U.S.C. § 1957(a). However, the statute exempts "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). Thus, the plain meaning of the exemption set forth in § 1957(f)(1), when considered in its context, is that transactions involving criminally derived proceeds are

exempt from the prohibitions of § 1957(a) when they are for the purpose of securing legal representation to which an accused is entitled under the Sixth Amendment. Accordingly, the exemption is limited to attorneys' fees paid for representation guaranteed by the Sixth Amendment in a criminal proceeding and does not extend to attorneys' fees paid for other purposes. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.").

The Government argues that the exemption in § 1957(f)(1) has been "nullified" or "vitiating" because, shortly after the provision was enacted, the Supreme Court held in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) that the Sixth Amendment right to counsel does not protect the right of a criminal defendant to use criminally derived proceeds for legal fees. However, *Caplin & Drysdale*, which addresses a different statute governing the civil forfeiture of criminally derived proceeds, has no bearing on § 1957(f)(1) and indeed supports the conclusion that such proceeds have been statutorily exempted from criminal penalties. The Government has pointed to no principle of statutory construction--nor indeed to any legal principle--that supports the conclusion that a statutory provision may be "nullified" by a Supreme Court decision on a completely different issue, absent any indication that Congress intended such a result. . . .

The Court recognized that Congress could statutorily exempt tainted proceeds used to pay attorneys' fees from the forfeiture provision and therefore looked first to the statute to determine whether it had done so. . . . After concluding that the forfeiture provision contained no such exemption, . . ., the Court held simply that Congress may require the forfeiture of criminally derived proceeds, even if those proceeds are used for legal representation, without running afoul of the Sixth Amendment right to counsel. . . . Contrary to the Government's argument, *Caplin & Drysdale* did not alter or refine the meaning of the Sixth Amendment limitation to the exemption in § 1957(f)(1) by its (unremarkable) holding that the Sixth Amendment alone does not require an exemption from forfeiture for tainted proceeds used for attorneys' fees. Rather, the opinion supports our interpretation of § 1957(f)(1) by highlighting the contrast between Congress's failure to exempt criminally derived proceeds used for attorneys' fees from forfeiture and its subsequent decision to exempt such proceeds from criminal penalties. . . .

We likewise view the exemption for attorneys' fees as a crucial distinction between the criminal charges at issue under § 1957 and the forfeiture provision, and we do not read *Caplin & Drysdale* as having any bearing on the phrase "representation as guaranteed by the sixth amendment" in § 1957(f)(1), except to affirm that distinction.

As the Government concedes, accepting its interpretation of § 1957(f)(1) would read all meaning out of the exemption. Section 1957 criminalizes only transactions involving criminally derived proceeds. It would therefore make little sense--and would

be entirely superfluous--to read § 1957(f)(1) as an exemption from criminal penalties for non-tainted proceeds spent on legal representation, as those funds can always be used for any legal purpose. We do not believe Congress intended such an absurd result, which nullifies the provision and divorces it from its statutory context, thereby violating basic canons of statutory construction. . . . Rather, as we have noted, the phrase "representation as guaranteed by the sixth amendment" refers, as it always has, to the type of legal representation to which a criminal defendant is entitled under the Sixth Amendment. In short, it is the representation itself--not the transaction--that must be guaranteed by the Sixth Amendment before the statutory exemption may be applied.

The district court was eminently correct in holding that Defendants are not subject to criminal prosecution under § 1957(a), because the plain language of § 1957(f)(1) clearly exempts criminally derived proceeds used to secure legal representation to which an accused is entitled under the Sixth Amendment. Affirmed.