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## CASE NOTE

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### OF LAUNDERING AND LEGAL FEES: THE IMPLICATIONS OF *UNITED STATES v. BLAIR* FOR CRIMINAL DEFENSE ATTORNEYS WHO ACCEPT POTENTIALLY TAINTED FUNDS

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#### INTRODUCTION

“In the common understanding, money laundering occurs when money derived from criminal activity is placed into a legitimate business in an effort to cleanse the money of criminal taint.”<sup>1</sup> 18 U.S.C. § 1957, however, prohibits a much broader range of conduct. Any person who “knowingly engages” in a monetary transaction involving over \$10,000 of “criminally derived property” can be charged with money laundering under § 1957.<sup>2</sup>

Because § 1957 eliminates the requirement found in other money laundering statutes that the government prove an attempt to commit a crime or to conceal the proceeds of a crime, § 1957 “applies to the most open, above-board transaction,” such as a criminal defense attorney receiving payment for representation.<sup>3</sup> In response to pressure from commentators,

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<sup>1</sup> *United States v. Bolden*, 325 F.3d 471, 486 (4th Cir. 2003); *see also* PRESIDENT’S COMM’N ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (1984) [hereinafter CASH CONNECTION] (defining money laundering as “the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate”).

<sup>2</sup> 18 U.S.C. § 1957(a) (2012).

<sup>3</sup> *United States v. Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 1997); *see also id.* (“This draconian law, so powerful by its elimination of criminal intent, freezes the proceeds of specific crimes out of the banking system.”).

Congress passed an amendment two years after § 1957's enactment defining the term "monetary transaction" so as to exclude "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution."<sup>4</sup>

The statutory safe harbor found in § 1957(f)(1) has successfully immunized defense attorneys from money laundering prosecutions.<sup>5</sup> However, *United States v. Blair*<sup>6</sup> raised concerns among the criminal defense bar because of its holding that an attorney-defendant was not entitled to protection under § 1957(f)(1).<sup>7</sup> In *Blair*, an attorney-defendant was convicted of violating § 1957 for using \$20,000 in drug proceeds to purchase two \$10,000 bank checks to retain attorneys for associates of his client.<sup>8</sup> Noting that Sixth Amendment rights are personal to the accused and that Blair used "someone else's money" to hire counsel for others, the Fourth Circuit held that his actions fell "far beyond the scope of the Sixth Amendment" and were not protected by the safe harbor.<sup>9</sup> In his strongly-worded dissent, Chief Judge Traxler criticized the court for "nullif[ying] the § 1957(f)(1) exemption and creat[ing] a circuit split."<sup>10</sup>

This Case Note discusses the implications of *Blair* for the criminal defense attorney who accepts potentially tainted funds and proposes a solution to ameliorate its unintended consequences. First, Part I provides relevant background information by discussing the money laundering statutory framework, the criticisms leveled at the framework as it was written, the Congressional response to that criticism, and § 1957(f)(1)'s application up until *Blair*. Next, Part II describes the *Blair* decision in detail and examines its implications. Part III then proposes a novel solution to the problems it created. Finally, the Case Note concludes with a brief word of practical advice for the criminal defense bar.

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<sup>4</sup> *Id.*; see also 18 U.S.C. § 1957(f)(1) (defining the safe harbor).

<sup>5</sup> See, e.g., *United States v. Velez*, 586 F.3d 875, 879 (11th Cir. 2009) (holding that the attorney-defendants were 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" as guaranteed by the Sixth Amendment); see also *infra* subsection I.C.1.a. (discussing the *Velez* decision).

<sup>6</sup> 661 F.3d 755 (4th Cir. 2011).

<sup>7</sup> See, e.g., Alain Leibman, *Unsafe Harbor—Attorneys Paid Fees from Criminal Proceeds May Be Charged with Money Laundering*, LEXOLOGY (Nov. 17, 2011), <http://www.lexology.com/library/detail.aspx?g=bob3669d-b9e5-49e3-8010-1d688812cc54> [<https://perma.cc/8T2R-ZKVO>] (arguing that *Blair* weakened the protection for defense attorneys against criminal prosecution when they accept potentially tainted funds as legal fees).

<sup>8</sup> *Blair*, 661 F.3d at 770-71.

<sup>9</sup> *Id.* at 772.

<sup>10</sup> *Id.* at 783 (Traxler, C.J., dissenting in part).

## I. BACKGROUND

### A. Statutory Framework

In response to increasing public awareness of the growth in drug trafficking and organized crime in the 1980s, the President's Commission on Organized Crime issued a report entitled *The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering*.<sup>11</sup> The report detailed the failings of the Bank Secrecy Act in combating money laundering and issued several recommendations to "provide the financial community and law enforcement authorities with the tools needed to . . . cause irreparable damage to the operations of organized crime."<sup>12</sup>

In response, as part of the Anti-Drug Abuse Act of 1986, Congress passed the Money Laundering Control Act of 1986, which amended Chapter 95 of Title 18 of the United States Code to add §§ 1956 and 1957.<sup>13</sup> 18 U.S.C. § 1956 criminalizes commercial transactions in which goods or services are provided in exchange for "dirty money."<sup>14</sup> Specifically, § 1956 provides that:

(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or . . .

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law [shall be subject to criminal punishment].<sup>15</sup>

The term "specified unlawful activity" is defined as to include hundreds of illegal activities.<sup>16</sup> Section 1956 also criminalizes transporting or transmitting with certain knowledge or intent tainted monetary instruments into or out of the United States.<sup>17</sup>

Section 1957, which "creates something close to strict liability for certain types of conduct," prohibits transactions with financial institutions of over \$10,000

<sup>11</sup> CASH CONNECTION, *supra* note 1.

<sup>12</sup> *Id.* at 63.

<sup>13</sup> Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1352, 100 Stat. 3207, 3218-20.

<sup>14</sup> 2 IAN M. COMISKY ET AL., TAX FRAUD & EVASION ¶ 11.02 (2015).

<sup>15</sup> 18 U.S.C. § 1956(a)(1) (2012).

<sup>16</sup> *Id.* § 1956(c)(7).

<sup>17</sup> *See* 2 COMISKY ET AL., *supra* note 14 (describing the extraterritorial reach of § 1956).

in dirty money.<sup>18</sup> Specifically, § 1957 provides that “[w]hoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity [shall be subject to criminal punishment].”<sup>19</sup> The term “monetary transaction” is defined as “the 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.”<sup>20</sup>

Congress enacted § 1957 as a tool in the war against drugs, designed to “make the drug dealers’ money worthless” by criminalizing transactions in which participants knowingly give or accept money derived from unlawful activity.<sup>21</sup> Congress specifically intended for § 1957 to reach both those who engage in the criminal activity generating the illicit funds and those who receive or handle the illicit funds in exchange for or in the course of providing ordinary goods or services.<sup>22</sup> Indeed, Representative E. Clay Shaw, Jr. of the House Judiciary Committee’s Subcommittee on Crime commented:

I am sick and tired of watching people sit back and say, “I am not part of the problem, I am not committing the crime, and, therefore, my hands are clean even though I know the money is dirty I am handling.[”] The only way we will get at this problem is to let the whole community, the whole population, know they are part of the problem and they could very well be convicted of it if they knowingly take these funds.<sup>23</sup>

A previous House version of the bill that became the Money Laundering Control Act contained a provision exempting bona fide attorneys’ fees from the reach of § 1957 because the drafting committee was concerned that without such an exemption the statute would inhibit an attorney’s investigation

<sup>18</sup> *Id.*

<sup>19</sup> 18 U.S.C. § 1957(a) (2012).

<sup>20</sup> *Id.* § 1957(f)(1).

<sup>21</sup> H.R. REP. NO. 99-855, pt. 1, at 13 (1986); see also Jimmy Gurulé, *The Money Laundering Control Act of 1986: Creating a New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?*, 32 AM. CRIM. L. REV. 823, 853 (1995) (“The MLCA strikes at the economic base and lifeblood of organized crime, a critical component of any government strategy intended to wage a successful assault on sophisticated criminal enterprises.”); D. Randall Johnson, *The Criminally Derived Property Statute: Constitutional and Interpretive Issues Raised by 18 U.S.C. § 1957*, 34 WM. & MARY L. REV. 1291, 1303 (1993) (noting that “[s]ection 1957 is a money ‘laundering’ statute only in the sense that [it allows] prosecutors to attack money laundering indirectly”).

<sup>22</sup> See Johnson, *supra* note 21, at 1293 (“Congress fully intended that the *archetypical* section 1957 defendant would be the otherwise law-abiding citizen who is alleged to have simply knowingly accepted illegitimate funds as payment for ordinary, legitimate goods or services, or otherwise knowingly handled illegitimate funds while providing these services.”).

<sup>23</sup> H.R. REP. NO. 99-855, at 13.

of his client's case.<sup>24</sup> However, a conference committee eliminated that provision and § 1957 became law without any safe harbor whatsoever.<sup>25</sup>

### B. Response to § 1957 as Enacted

The critical response to § 1957 was immediate and overwhelming. Commentators attacked Congress's decision not to include a safe harbor exempting attorneys' fees on three main grounds: constitutional, ethical, and practical.

Constitutionally, commentators observed that the threat of criminal prosecution under § 1957 against an attorney may violate the client's Sixth Amendment rights.<sup>26</sup> Under the Sixth Amendment, criminal defendants have a right to competent legal representation.<sup>27</sup> If criminal defense attorneys are vulnerable to prosecution for accepting legal fees that they later discover are tainted, attorneys may seek to shield themselves from liability by failing to undertake a level of investigation necessary to vigorously defend their clients, compromising the adversarial system.<sup>28</sup> Both the American Bar Association and the National Association of Criminal Defense Lawyers (NACDL) called upon Congress to amend the statute, arguing that the lack of a safe harbor

<sup>24</sup> See *id.* at 14 (stating that the bill was amended so that it “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”).

<sup>25</sup> See 132 CONG. REC. E3822 (daily ed. Nov. 6, 1986) (statement of Rep. McCollum) (noting that in the Subcommittee's view, the exemption was unnecessary because the risk that the Department of Justice would prosecute an attorney for accepting tainted funds as payment for legal fees was extremely minimal).

<sup>26</sup> See *infra* note 28.

<sup>27</sup> See *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”).

<sup>28</sup> See Lynne D. Boylston, Note, *Attorneys' Fees and the Money Laundering Control Act of 1986: Further Erosion of Criminal Defense Advocacy*, 21 GA. L. REV. 929, 958 (1987) (“The failure to exclude criminal defense lawyers from the scope of section 1957 raises serious risks of impinging upon a criminal defendant's sixth amendment rights and is potentially so disruptive of the attorney–client relationship that it will damage the adversary system by eroding the availability of the criminal defense bar.”); Mark R. Irvine & Daniel R. King, Comment, *The Money Laundering Control Act of 1986: Tainted Money and the Criminal Defense Lawyer*, 19 PAC. L.J. 171, 174 (1987) (“[T]he new laws threaten the independence of the criminal defense bar, upsetting the balance achieved under an adversarial system.”); Alan J. Jacobs, Note, *Indirect Deprivation of the Effective Assistance of Counsel: The Prospective Prosecution of Criminal Defense Attorneys for “Money Laundering”*, 34 N.Y.L. SCH. L. REV. 303, 345 (1989) (“It is likely then that the attorney who fears such a discovery might avoid penetrating inquiry to preserve his or her own innocence.”); see also Wendy Shuck, *The Impact of Anti-Money Laundering Laws on Attorney–Client Privilege*, 19 SUFFOLK TRANSNAT'L L. REV. 507, 521 (1996) (comparing U.S. and Swiss anti-money-laundering laws and concluding that U.S. laws undermine the confidential nature of attorney–client relationships).

would chill the attorney–client relationship.<sup>29</sup> In addition, they offered amendments to Department of Justice guidelines that would restrict prosecution to attorneys who “knowingly and willfully contribute to the ongoing activities of a criminal enterprise.”<sup>30</sup>

Ethically, defense attorneys face the “Hobson’s choice” of either investigating fully but running the risk of learning that the client’s funds are tainted or avoiding a thorough investigation by breaching a duty owed to the client.<sup>31</sup> Such a predicament creates a conflict of interest, pitting the defense attorney’s best interests against his client’s. Further, applying § 1957 to attorneys who accept bona fide legal fees creates a potential for prosecutorial manipulation. A prosecutor gains tremendous leverage over the defense attorney through § 1957, and one could use that leverage to force a defense attorney to withdraw from a case.<sup>32</sup> A prosecutor also could use the leverage to obtain a more favorable plea bargain.<sup>33</sup> Some commentators go so far as to argue that it is always unethical to represent a criminal defendant when an attorney believes that the defendant’s funds may be criminally derived.<sup>34</sup>

Practically, attorneys who foresee a potential for prosecution or sanction are likely to refuse to represent defendants charged with certain types of crimes, forcing clients to use public defenders. The problem may be particularly acute for complex white-collar crime, an area where highly skilled, specialized attorneys are needed and where the client’s funds are especially likely to be tainted.<sup>35</sup> Additionally, questions of fundamental fairness are

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29 See Paul G. Wolfteich, Note, *Making Criminal Defense a Crime Under 18 U.S.C. Section 1957*, 41 VAND. L. REV. 843, 850–51 (1988) (summarizing the ABA and NACDL’s arguments). But see Kathleen F. Brickey, *Tainted Assets and the Right to Counsel—The Money Laundering Conundrum*, 66 WASH. U. L.Q. 47, 52 (1988) (arguing that Sixth Amendment principles do not support the call for a blanket exemption of attorneys’ fees from § 1957).

30 Wolfteich, *supra* note 29, at 866.

31 *United States v. Blair*, 661 F.3d 755, 778 (4th Cir. 2011) (Traxler, C.J., dissenting in part).

32 See Adam K. Weinstein, Note, *Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime*, 51 LAW & CONTEMP. PROBS. 369, 385–86 (1988) (“The money laundering provisions could be improperly used to selectively threaten prosecution or institute grand jury investigations and, hence, force competent defense attorneys to withdraw from a case due to concerns over imprisonment, ethical violations involving conflicts of interest, and economic pressure.”).

33 See Jacobs, *supra* note 28, at 345–46 (noting that while such actions may offend an individual prosecutor’s own ethical code, the prosecutor’s goal of obtaining the maximum sentence while spending the minimum amount of time in court may override that code).

34 See, e.g., David Orentlicher, *Representing Defendants on Charges of Economic Crime: Unethical When Done for a Fee*, 48 EMORY L.J. 1339, 1340 (1999) (arguing “that it is almost always unethical for attorneys to accept fees for defending individuals charged with economic crimes” and that “[s]uch individuals should have to rely on court-appointed counsel (or pro se representation) for their legal defense”).

35 See Jacobs, *supra* note 28, at 346 (“The ultimate effect of placing so many difficulties in the path of a criminal defense may be to deplete the federal criminal bar. Such a depletion could ultimately lead to the unavailability of criminal defense attorneys, especially those skilled enough to defend an accused client in a complex RICO or CCE prosecution.” (footnote omitted)).

raised when the American taxpayer has to underwrite the legal fees of a defendant with many thousands of dollars in his bank account.<sup>36</sup>

Congress heard the outcry against § 1957 loud and clear. Two years after the enactment of the Money Laundering Control Act, Congress amended the definition of “monetary transaction” in § 1957 so as to exclude “any transaction necessary to preserve a person’s right to representation as guaranteed by the sixth amendment to the Constitution.”<sup>37</sup>

### C. Pre-Blair Application of § 1957(f)(1)

The law surrounding § 1957(f)(1) was relatively clear before the Fourth Circuit’s decision in *Blair*. Federal courts have allowed the use of § 1957(f)(1) to block prosecutions when the funds at issue were clearly intended to pay an attorney for representation in a criminal matter.<sup>38</sup> Courts have found that § 1957(f)(1) is inapplicable to both § 1956 prosecutions and when the defendant did not really intend to use the funds in securing legal representation.<sup>39</sup> Moreover, the Department of Justice took a similar stance in its guidance documents, suggesting that attorneys should not be prosecuted under § 1957 except in exceptional circumstances.<sup>40</sup>

#### 1. Section 1957(f)(1) as Interpreted by the Courts

##### a. Safe Harbor Held Applicable

In *United States v. Velez*, the Eleventh Circuit broadly held that transactions involving funds used to pay for criminal representation are protected by the § 1957(f)(1) safe harbor.<sup>41</sup> In *Velez*, the Miami-based criminal defense team of Fabio Ochoa, an accused Colombian drug leader, hired Miami attorney Benedict P. Kuehne to review the source of the funds that would be used to pay Ochoa’s legal fees.<sup>42</sup> After hiring Colombian attorney Saldarriaga and Colombian accountant Velez, Kuehne issued an opinion letter concluding that several monetary transfers from Ochoa to him, as intermediary,

<sup>36</sup> See Weinstein, *supra* note 32, at 380 (“It seems grossly unfair that tax dollars should be spent to pay the legal fees of a wealthy defendant in order to protect his attorney from prosecution.”).

<sup>37</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6182, 102 Stat. 4181, 4354 (amending 18 U.S.C. § 1957(f)(1)).

<sup>38</sup> See generally *infra* subsection I.C.1 (discussing the federal courts’ application of § 1957(f)(1)).

<sup>39</sup> See *infra* subsection I.C.1.

<sup>40</sup> See generally *infra* subsection I.C.2 (discussing the Department of Justice’s application of § 1957(f)(1)).

<sup>41</sup> 586 F.3d 875, 879 (11th Cir. 2009).

<sup>42</sup> *Id.* at 876.

were not derived from criminal activity.<sup>43</sup> Kuehne then transferred the fees, totaling about \$5.3 million, back to Ochoa's defense team.<sup>44</sup>

The government charged Kuehne and his co-defendants with money laundering in violation of 18 U.S.C. §§ 1956(h) and 1957, on the theory that he and his co-defendants supported the opinion letter with false documents and statements, "knowing that the funds were criminally derived and intending to conceal their true source."<sup>45</sup> The trial court granted a motion to dismiss on the grounds that the plain language of § 1957(f)(1) barred the prosecution because the transaction was necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment.<sup>46</sup> The Eleventh Circuit reviewed to determine the meaning of § 1957(f)(1), an issue of first impression in the circuit.<sup>47</sup>

Affirming the trial court, the Eleventh Circuit held that "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."<sup>48</sup> In interpreting the safe harbor's reference to the Sixth Amendment, the court noted that the exemption does not extend to circumstances in which a defendant is not constitutionally entitled to representation, as in a civil matter.<sup>49</sup> The court asserted that "it is the representation itself—not the transaction—that must be guaranteed by the Sixth Amendment before the statutory exemption may be applied."<sup>50</sup>

In *Caplin & Drysdale, Chartered v. United States*, the Supreme Court held that the Sixth Amendment right to counsel does not protect the right of a criminal defendant to use criminally derived proceeds for legal fees.<sup>51</sup> The government argued that *Caplin & Drysdale* "nullified" or "vitiating" the § 1957(f)(1) safe harbor.<sup>52</sup> However, the court in *Velez* held that since *Caplin & Drysdale* involved a federal drug forfeiture statute without a safe harbor, it had "no bearing" on the case at hand.<sup>53</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 877.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 879.

<sup>51</sup> 491 U.S. 617, 626 (1989).

<sup>52</sup> *Velez*, 586 F.3d at 877-79.

<sup>53</sup> *Id.*; see also *United States v. Ferguson*, 142 F. Supp. 2d 1350, 1357-58 (S.D. Fla. 2000) (holding that *Caplin & Drysdale* did not apply because *Caplin & Drysdale* addressed a drug forfeiture statute without a safe harbor, as opposed to § 1957).



b. *Safe Harbor Held Inapplicable*

In *United States v. Elso*, the Eleventh Circuit held that § 1957(f)(1) is inapplicable to money-laundering prosecutions brought under § 1956.<sup>54</sup> The defendant attorney was charged with money laundering and conspiracy pursuant to 18 U.S.C. § 1956(a)(1)(B)(i) and (ii) and § 1956(h) for “engaging in a transaction involving drug proceeds knowing that the transaction was designed . . . to conceal or disguise the nature, location, source, ownership, or control of the money.”<sup>55</sup> Specifically, the government alleged that Elso had concealed drug proceeds for two of his friends, Andy and Rudy Diaz, cocaine importers whom Elso had represented in the past.<sup>56</sup>

According to the government, Andy Diaz visited Elso’s office after delivering nearly \$500,000 in drug money to an undercover agent posing as a drug courier, stating that law enforcement was following him.<sup>57</sup> When Diaz “expressed concern that law enforcement agents would discover and seize” additional drug money hidden in a safe in his home, Elso retrieved \$266,800 in cash from Diaz’s safe, put it in a briefcase, and attempted to bring it back to his law office.<sup>58</sup> He refused to stop when law enforcement agents attempted to pull him over, continuing to flee “until he was blocked by traffic.”<sup>59</sup>

On appeal, Elso challenged his money laundering convictions, claiming that the court’s failure to give his requested jury instruction prevented him from advancing a § 1957(f)(1) defense that the money he removed from Diaz’s home was a legal fee.<sup>60</sup> He argued that the § 1957(f)(1) exception is “designed to preserve a constitutional right—the Sixth Amendment right to counsel,” and is therefore “highly relevant to a § 1956 defense in which the ‘transaction’ is claimed to be an attorney’s fee.”<sup>61</sup> The court reasoned that even if the transaction involved attorneys’ fees, it was irrelevant whether Elso knew and intended that the transaction was designed to cover up “the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.”<sup>62</sup> Therefore, the court held the § 1957(f)(1) safe harbor provision inapplicable to money laundering prosecutions brought under § 1956.<sup>63</sup>

Similarly, the Seventh Circuit limited the reach of the § 1957(f)(1) safe harbor in *United States v. Hoogenboom*, holding that the provision only applies

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<sup>54</sup> 422 F.3d 1305, 1309-10 (11th Cir. 2005).

<sup>55</sup> *Id.* at 1307.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1308.

<sup>61</sup> *Id.* at 1309.

<sup>62</sup> *Id.* at 1310.

<sup>63</sup> *Id.* at 1309-10.

when a client pays an attorney with the “present intent” to exercise Sixth Amendment rights.<sup>64</sup> In *Hoogenboom*, the defendant, a psychologist, was convicted of money laundering under § 1957 and several charges arising from her fraudulent billing of Medicare.<sup>65</sup> Once she realized that the FBI was investigating her billing practices, she withdrew \$101,000 from one of the bank accounts in which she deposited illicit funds.<sup>66</sup>

On appeal, Hoogenboom argued that since she eventually used the money to pay her attorneys, the withdrawals were covered by § 1957(f)(1) and should not be considered “monetary transactions.”<sup>67</sup> The court described her argument as “preposterous.”<sup>68</sup> According to the court, under the defendant’s reading of the safe harbor provision, defendants could circumvent a § 1957 money laundering charge simply by channeling the illegally obtained money “toward their defense.”<sup>69</sup> The court noted that the safe harbor provision should be read “to prevent the broad reach of the statute from criminalizing a defendant’s bona fide payment to her attorney.”<sup>70</sup> Since the evidence showed that Hoogenboom emptied her account to prevent the FBI from seizing her funds and not with the “present intent” to exercise Sixth Amendment rights, Hoogenboom’s behavior did not fit within the § 1957(f)(1) safe harbor.<sup>71</sup>

## 2. Section 1957(f)(1) as Interpreted by the Department of Justice

Section 9-105 of the U.S. Attorneys’ Manual prescribes certain approval, consultation, and notification requirements when the various U.S. Attorney’s Offices file indictments or criminal complaints containing money laundering charges.<sup>72</sup> According to the Manual, § 1957(f)(1) does not bar prosecution of a defense attorney who receives and deposits tainted funds as part of a “sham or fraudulent transaction” or as legal fees for representation of a client in a non-criminal matter.<sup>73</sup>

Nonetheless, the Manual advises federal prosecutors that prosecution of an attorney under § 1957 is a “highly sensitive area and must be approached

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<sup>64</sup> 209 F.3d 665, 669 (7th Cir. 2000).

<sup>65</sup> *Id.* at 666-68.

<sup>66</sup> *Id.* at 668.

<sup>67</sup> *Id.* at 669.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-105.100 (1997) [hereinafter UNITED STATES ATTORNEYS’ MANUAL], <https://www.justice.gov/usam/usam-9-105000-money-laundering> [<https://perma.cc/A4J6-TTF6>] (describing the purpose of the Department of Justice requirements).

<sup>73</sup> *Id.* § 9-105.600.

with great care.”<sup>74</sup> Specifically, Department of Justice policy is that attorneys should not be prosecuted under § 1957 based on the receipt of bona fide legal fees for legitimate representation in a criminal matter, unless:

(1) [T]here is proof beyond a reasonable doubt that the attorney had actual knowledge of the illegal origin of the specific property received (prosecution is not permitted if the only proof of knowledge is evidence of willful blindness); and (2) such evidence does not consist of (a) confidential communications made by the client preliminary to and with regard to undertaking representation in the criminal matter; or (b) confidential communications made during the course of representation in the criminal matter; or (c) other information obtained by the attorney during the course of the representation and in furtherance of the obligation to effectively represent the client.<sup>75</sup>

In applying the policy, prosecutors must examine: “(1) what constitutes bona fide fees; (2) what constitutes actual knowledge; and (3) what evidence may be relied upon to meet the knowledge requirement of the policy.”<sup>76</sup> The key question in determining if a fee is bona fide is “whether the fee was paid in good faith without fraud or deceit for representation concerning the defendant’s personal criminal liability.”<sup>77</sup> Actual knowledge may only be established if the prosecutor has proof beyond a reasonable doubt that the funds are derived from “specified unlawful activity” and that “the attorney actually knew” the funds were criminally derived.<sup>78</sup> Actual knowledge cannot be proved by “confidential communications” made by the client during the course of the representation or resulting from inquiries about whether the attorney will undertake the representation.<sup>79</sup> It also cannot be proved by information that the attorney obtained “during the course” and “in furtherance of” the representation.<sup>80</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, CRIMINAL RESOURCE MANUAL 2102.

<sup>78</sup> *Id.* at 2103.

<sup>79</sup> *Id.* at 2104.

<sup>80</sup> *Id.*

Some have argued that Congress should amend § 1957 to incorporate these standards directly into the text of the statute.<sup>81</sup> Such advocates also argue that the standards should be extended to representation in civil matters.<sup>82</sup>

While the Department of Justice guidelines may seem reassuring, the United States Attorneys' Manual is merely guidance and does not "create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."<sup>83</sup> Indeed, the prosecution of Benedict Kuehne in *Velex* was contrary to Department of Justice policy. Jon May, former chair of the National Association of Criminal Defense Lawyers' White Collar Crime Committee, wrote in 2010 about his belief that the government "is unlikely [to] ever again prosecute another criminal defense lawyer for the receipt of tainted fees intended to pay for legal services."<sup>84</sup> Unfortunately, only one year later, the government came dangerously close.

## II. *UNITED STATES V. BLAIR* AND ITS IMPLICATIONS

### A. *Factual Background*

Anthony Rankine and several associates "operated a large marijuana distribution ring."<sup>85</sup> At one point in August 2003, Elizabeth Nicely Simpson (Nicely) agreed to store Rankine's safe in her house.<sup>86</sup> After Rankine, his girlfriend, and her son were murdered within a several-week period, Nicely "became aware that the safe contained drug money."<sup>87</sup> Realizing that she could be in danger, she moved the safe to a storage facility.<sup>88</sup> When she began receiving threatening phone calls, she confided in a co-worker who advised her to contact Walter L. Blair, a Maryland criminal defense attorney.<sup>89</sup> Like Rankine and Nicely, Blair was a native of Jamaica.<sup>90</sup>

After Nicely called Blair and explained that she was holding a safe with Rankine's drug money, Blair asked Nicely to "come to his office for a face-to-face

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<sup>81</sup> See, e.g., Johnson, *supra* note 21, at 1297 (arguing that "incorporation of current Justice Department prosecution standards" into § 1957 would better serve the Sixth Amendment).

<sup>82</sup> See U.S. DEP'T OF JUSTICE, *supra* note 77, at 1356 ("The separation of legal services into service for civil and criminal representation is analytically unsound for purposes of determining the extent to which section 1957 threatens the Sixth Amendment right to effective representation in a criminal matter.").

<sup>83</sup> UNITED STATES ATTORNEYS' MANUAL, *supra* note 72, § 1-1.000 (2009).

<sup>84</sup> Jon May, *Attorney Fees and Government Forfeiture: How to Get Paid, Keep the Fee, and Not Become a Target of the Friendly Neighborhood Federal Prosecutor*, CHAMPION, Apr. 2010, at 20, 25.

<sup>85</sup> *United States v. Blair*, 661 F.3d 755, 759 (4th Cir. 2011).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 759-60.

<sup>90</sup> *Id.* at 760.

appointment.”<sup>91</sup> She and her co-worker did so, and under Blair’s advice, returned the next day with a duffle bag full of the safe’s cash.<sup>92</sup> Blair and the co-worker counted approximately \$170,000 in cash outside the presence of Nicely, but when Nicely returned Blair told her that there was around \$70,000 in the bag.<sup>93</sup>

Blair and Nicely agreed to proceed in several steps. First, Blair concocted a cover story for Nicely: she would pretend that the cash was “partner money,” part of a familiar Jamaican asset pooling arrangement.<sup>94</sup> Second, Blair set up a real estate corporation for Nicely, “through which she could use some of the money to buy properties.”<sup>95</sup> Finally, Blair told Nicely to “set aside money to cover the legal fees” for two of Rankine’s associates, Saunders and Bernard, who had been arrested on drug charges.<sup>96</sup> After paying a mortgage broker \$9,000 to find and purchase real estate on behalf of Nicely, Blair retained the remainder of the money and kept control of it “from that point forward.”<sup>97</sup>

Next, Blair contacted two Virginia attorneys, David Boone and James Yoffy, “in an effort to secure representation” for Saunders and Bernard.<sup>98</sup> Then, “Boone agreed to represent Saunders as co-counsel with Blair, and Yoffy agreed to represent Bernard.”<sup>99</sup> Blair used the cash to purchase a \$10,000 cashier’s check for each of the lawyers, and he “retained \$10,000 for himself as co-counsel.”<sup>100</sup>

Based on this and other evidence, Blair was convicted of several charges, including money laundering in violation of § 1957, which prohibits knowingly engaging in a monetary transaction with more than \$10,000 in criminally derived property.<sup>101</sup> On appeal, Blair challenged the district court’s denial of his motion to dismiss the § 1957 money laundering count on the theory that § 1957(f)(1) bars his prosecution because he used the funds to secure legal representation for Saunders and Bernard.<sup>102</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* In a system of “partner money,” the “partners” regularly contribute a certain amount of money to a common pool of funds, and the “banker” distributes the funds until each partner has received a “draw.” The system allows low-income individuals to obtain funding that they could not otherwise obtain. *Id.* at 760-61.

<sup>95</sup> *Id.* at 761.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 770-71.

<sup>102</sup> *Id.* at 771.

### B. *The Decision*

In a 2–1 opinion, the Fourth Circuit held that Blair’s conduct did not fall within the § 1957(f)(1) safe harbor.<sup>103</sup> The majority’s opinion rested primarily on § 1957(f)(1)’s use of the words “as guaranteed by the sixth amendment” to describe the exempted transactions.<sup>104</sup> The majority held that in choosing to tie the safe harbor to Sixth Amendment rights, rather than exempting transactions “for payment of counsel,” Congress intended for “the scope of the safe harbor provision [to be] shaped by the Supreme Court’s ongoing interpretation of the Sixth Amendment.”<sup>105</sup>

To the Fourth Circuit, Blair’s conduct fell outside of the Sixth Amendment’s guarantees because he used “someone else’s unlawful drug proceeds to pay for counsel for others.”<sup>106</sup> In reaching this decision, the Fourth Circuit came to a fundamentally different conclusion regarding the applicability of *Caplin & Drysdale* than the Eleventh Circuit did in *Velez*. The *Velez* court took *Caplin & Drysdale* to apply only to cases involving 21 U.S.C. § 853(c), the federal drug forfeiture statute, and to mean that the Sixth Amendment does not protect the right of a criminal defendant to use illegally obtained proceeds for legal fees.<sup>107</sup> However, according to the dissent, the *Blair* majority hung its hat on *Caplin & Drysdale*’s categorical rule that “[a] defendant has no Sixth Amendment right to spend another person’s money for services rendered by an attorney.”<sup>108</sup> In so construing *Caplin & Drysdale*, the Fourth Circuit had no problem applying it to the money-laundering statute at issue in *Blair*. Responding to Blair’s argument that such an interpretation would render § 1957(f)(1) meaningless, the majority noted simply that Congress was well aware of that possibility when it tied the § 1957(f)(1) safe harbor to the Sixth Amendment.<sup>109</sup>

### C. *The Dissent*

Chief Judge Traxler authored a vigorous dissent criticizing the majority for ignoring the § 1957(f)(1) exception and causing a circuit split.<sup>110</sup> Like the

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *United States v. Velez*, 586 F.3d 875, 877–78 (11th Cir. 2009).

<sup>108</sup> *Blair*, 661 F.3d at 781 (quoting *Caplin & Drysdale*, *Chartered v. United States*, 491 U.S. 617, 626 (1989)); see also *Texas v. Cobb*, 532 U.S. 162, 171 n.2 (2001) (“The Sixth Amendment right to counsel is personal to the defendant and specific to the offense.”).

<sup>109</sup> See *Blair*, 661 F.3d at 774 (“It is more prudent and respectful of congressional design to leave these contestable questions to the Sixth Amendment standard adopted by Congress and interpreted by the Supreme Court.”).

<sup>110</sup> *Id.* at 783 (Traxler, C.J., dissenting in part).

majority, Chief Judge Traxler began his analysis by looking to the text of § 1957(f)(1) and its reference to the Sixth Amendment, acknowledging that the safe harbor does not extend to the civil context.<sup>111</sup> The dissent quickly departed from the majority, however, by concluding that the safe harbor provision “does not require the *transaction* itself [to] be constitutionally protected,” but rather that “the *representation* . . . come within the Sixth Amendment’s guarantee.”<sup>112</sup>

According to Chief Judge Traxler, common sense dictates that the transaction itself need not be protected by the Sixth Amendment to fall within the safe harbor. Rather, the transaction must be “‘*necessary*’ to secure a person’s Sixth Amendment right to representation” because it would make little sense for Congress to protect something already constitutionally protected.<sup>113</sup> Whether a transaction is necessary to secure a person’s right to representation depends on the circumstances.<sup>114</sup>

To highlight that some transactions are not needed to secure a person’s Sixth Amendment rights, the dissent invoked examples of a retainer to provide ongoing legal advice and the payment of an unreasonably large fee in light of the transaction.<sup>115</sup> Chief Judge Traxler cited *Hoogenboom* for the proposition that a defendant must “engag[e] in a transaction . . . with the *present intent* of exercising Sixth Amendment rights” for the safe harbor to apply.<sup>116</sup> The majority criticized pegging the scope of the exemption to the word “necessary” rather than to the Sixth Amendment on the grounds that it would create a “shadow jurisprudence apart from text and precedent” in which lower court judges would be making arbitrary determinations with unclear guidance.<sup>117</sup> The dissent concluded that Blair’s conduct in purchasing two \$10,000 bank checks and using them to secure representation for Saunders and Bernard was necessary to preserve Sixth Amendment rights.<sup>118</sup>

The dissent also attacked the majority’s position that § 1957(f)(1) only applies if a defendant has a Sixth Amendment right to use the funds and its conclusion under *Caplin & Drysdale* that Blair had no such right because the Sixth Amendment does not protect the use of someone else’s property to retain counsel.<sup>119</sup> Such an interpretation, the dissent asserted, renders § 1957(f)(1) largely meaningless because every transaction that might come

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111 *Id.* at 779.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.* at 779 (citing *United States v. Hoogenboom*, 209 F.3d 665, 669 (7th Cir. 2000)).

117 *Id.* at 774 (majority opinion).

118 *Id.* at 779-80 (Traxler, C.J., dissenting in part).

119 *Id.* at 780-81.

within § 1957(f)(1) by definition involves criminally derived proceeds.<sup>120</sup> The majority responded that its reading of § 1957(f)(1), which only covers constitutionally protected transactions, does not necessarily fly in the face of Congressional intent or the words of the statute because Congress often enacts statutes tracking constitutional boundaries.<sup>121</sup> The majority worried about drug lords and organized crime bosses underwriting counsel for their associates, creating serious conflicts of interest for defense attorneys.<sup>122</sup> Chief Judge Traxler contended that the potential for conflicts of interest was overstated because “it is well understood that the attorney’s loyalty is to his client,” not the payer of the fee.<sup>123</sup>

Like the *Velez* court, the dissent insisted that *Caplin & Drysdale* does not apply to § 1957(f)(1) because it speaks only to a drug forfeiture statute that does not have a corresponding safe harbor for attorneys’ fees.<sup>124</sup> As applied to Blair, the dissent would hold that Blair’s securing criminal defense attorneys for Saunders and Bernard was exempt from prosecution under § 1957(f)(1).<sup>125</sup>

The majority countered that to apply § 1957(f) to Blair would “invite the worst kind of abuses.”<sup>126</sup> Perhaps this is a case of bad facts making bad law. The court noted that if Blair could “navigate into any safe harbor” under “heinous circumstances such as these, the ‘safe harbor’ would become a safe ocean, and the statutory exception would swamp the rule.”<sup>127</sup>

#### D. Implications of the Decision

##### 1. The Attorney–Client Relationship

The decision in *Blair* also resurrects the chief problem that § 1957(f)(1) was designed to ameliorate—the inevitable chilling of the attorney–client relationship resulting from a system in which the criminal defense attorney has an incentive to avoid investigating fully his client’s case.<sup>128</sup> *Blair* implies a legal duty for defense lawyers to thoroughly investigate the legitimacy of the

<sup>120</sup> See *id.* at 781 (“Since any transaction that comes within § 1957(f)(1)’s safe harbor will necessarily involve criminally derived proceeds, the government’s position effectively reads this provision out of the statute.”).

<sup>121</sup> See *id.* at 774 (majority opinion) (citing Antiterrorism and Effective Death Penalty Act of 1996, § 104, 28 U.S.C. § 2254(d)(1)).

<sup>122</sup> *Id.* at 775.

<sup>123</sup> *Id.* at 780 (Traxler, C.J., dissenting in part); see also *infra* subsection II.D.2 (discussing third party payments of attorneys’ fees).

<sup>124</sup> *Blair*, 661 F.3d at 782 (Traxler, C.J., dissenting in part).

<sup>125</sup> *Id.* at 779–80.

<sup>126</sup> *Id.* at 775 (majority opinion).

<sup>127</sup> *Id.* at 773.

<sup>128</sup> See *supra* Section I.B. (discussing in detail the constitutional, ethical, and practical problems caused by the *Blair* decision).



source of their fees. However, many lawyers understandably may avoid asking this question to new clients, on the grounds that it would undermine the trust the lawyer is seeking to build with the client, or simply because the question is uncomfortable. At any rate, a client is likely to state that even the dirtiest funds are clean, and the lawyer would have to investigate further anyway.<sup>129</sup> Accordingly, the criminal defense lawyer simply is not likely to inquire into the source of funds directly from the client.

*Blair* may also stifle communication between the lawyer and the client throughout the representation. In addition to lawyers failing to ask the questions, clients may not be as open because they might fear that the lawyer could be forced to provide the government with information harmful to their interests.<sup>130</sup> Further, lawyers may feel less able to provide fulsome advice to their clients because they fear flips or stings.<sup>131</sup>

Even before *Blair*, many commentators believed that the safe harbor was largely toothless. Significantly, because the right to counsel generally does not attach until indictment,<sup>132</sup> the safe harbor is not likely to apply until then.<sup>133</sup> This limitation significantly curtails any protections that the safe harbor might offer because a large number of criminal defendants, especially white-collar defendants, are likely to seek counsel after the commencement of an investigation but before indictment. The white-collar defense lawyer in that situation would not wait until either indictment or until the government walks away to collect his fee. Because of this timing issue, Professors Gaetke and Welling have cautioned that the reach of the safe harbor, even before *Blair*, “should not be overstated” and hypothesized that Congress’s purpose in adopting the exception “must have been not so much to make a substantive change in the law but to make a political statement, to signal its concern about the constitutional implications of prosecuting criminal defense lawyers.”<sup>134</sup> Nonetheless, improvements can be made to restore the § 1957(f)(1) safe harbor to at least the position it was in before the Fourth Circuit’s decision in *Blair*.

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129 See Eugene R. Gaetke & Sarah N. Welling, *Money Laundering and Lawyers*, 43 SYRACUSE L. REV. 1165, 1183 (1992) (“Lawyers who ask the explicit question about whether the fees were criminally derived will have to explain to the client why they are asking such a question. The explanation will likely signal the client that the right answer in terms of the client’s interest is that it is clean. Thus the client’s response to the direct question may not be reliable.” (footnote omitted)).

130 *Id.* at 1225-29.

131 *Id.* at 1229-33.

132 See *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008) (holding that the Sixth Amendment right to counsel attaches at the initiation of adversarial judicial proceedings).

133 See Gaetke & Welling, *supra* note 129, at 1171 (“A criminal defense lawyer who deposits tainted fees from an unindicted client may not be protected by the exception.”).

134 *Id.*

## 2. Third Party Payments

Perhaps the most significant result of *Blair* is its implication for practitioners whose clients' legal bills are paid by third parties. In extending *Caplin & Drysdale's* conclusion that there is no right to spend another person's money for legal defense from applying only to the drug forfeiture context to money laundering, the *Blair* majority ignored the simple reality that there are many legitimate instances where legal bills are paid by third parties.<sup>135</sup>

*Blair* held that the defendant's actions fell outside of the safe harbor largely because the defendant secured representation for two third parties, Saunders and Bernard.<sup>136</sup> The majority was concerned about § 1957(f)(1) "empowering a drug lord to sprinkle money around to hire counsel for his underlings."<sup>137</sup> According to the majority, allowing such transactions ignores the fact that the Sixth Amendment is personal to the accused and would undermine the attorney-client relationship by confusing the lawyer as to where his "allegiance [should] lie."<sup>138</sup>

The dissent countered that there is no basis in the statute for concluding that the safe harbor provision only applies if the transaction was to secure the payer's Sixth Amendment rights.<sup>139</sup> Indeed, the statute reads that a transaction comes within the safe harbor if it is "necessary to preserve a person's right to representation as guaranteed by the sixth amendment."<sup>140</sup> Fundamental principles of professional responsibility dictate that the attorney's allegiance is to his client and not to any third party fee-payer.<sup>141</sup>

The majority's analysis makes sense in organized crime and drug cases. However, because the analysis applies equally to legitimate third party payments, it cuts too broadly. Consider the case of a company agreeing to pay legal fees for one of its employees embroiled in employment-related litigation, as in *United States v. Stein*.<sup>142</sup> *Stein* involved the accounting firm KPMG, which

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<sup>135</sup> See THOMAS D. MORGAN, ABA, LAWYER LAW § 4.E.1 (2007) (listing as examples of legitimate third party payment situations "an insurance company fulfill[ing] its contractual obligation to provide legal representation to an insured person," a family member paying the legal bills of a close relative, and "a company pay[ing] the legal bills of [its] employee for an event related to the employment").

<sup>136</sup> *United States v. Blair*, 661 F.3d 755, 772 (4th Cir. 2011); see also *United States v. Ferguson*, 142 F. Supp. 2d 1350, 1358 (S.D. Fla. 2000) (noting in dicta that the § 1957(f)(1) safe harbor is not an absolute bar to prosecutions where criminally derived money is used to pay attorneys' fees and may not extend to third party payments).

<sup>137</sup> *Blair*, 661 F.3d at 772.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 780 (Traxler, C.J., dissenting in part).

<sup>140</sup> *Id.* (quoting 18 U.S.C. § 1957(f)(1)).

<sup>141</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. ¶¶ 11–12 (AM. BAR ASS'N 2015) (mandating that attorneys who are paid by third parties must obtain consent from the client and decline representation if the arrangement creates a conflict of interest).

<sup>142</sup> 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

had a longstanding policy to pay for the legal defense of its personnel in employment-related litigation.<sup>143</sup> In *Stein*, it was likely that all of the defendants had contractual and other legal rights to indemnification and advancement of legal costs from KPMG.<sup>144</sup> The indictment in *Stein* was dismissed because the government pressured KPMG to cut off the defendants' legal funding in violation of their Sixth Amendment rights.<sup>145</sup>

In *Stein*, the government attempted to analogize to *Caplin & Drysdale* by arguing that the defendants had no right to spend "other people's money."<sup>146</sup> However, the court noted that *Caplin & Drysdale* protects a defendant's right to spend his own money on a defense, and here KPMG's money was in "every material sense" the defendants' money because of the defendants' expectation that KPMG would cover the legal fees associated with their defense.<sup>147</sup>

The *Stein* holding that certain individuals have a *right* for their legal fees to be paid by a third party is significant. It is not hard to imagine a situation in which the funds that a corporation intends to pay as legal fees are potentially tainted. For example, a corporation could be under investigation for fraud, and the funds used to pay for an employee's defense could very well be derived from that fraud. Still, it would make little sense to force an individual employee to pay the legal fees himself, despite his employer's obligation to pay those fees, simply because some of the funds in the corporate coffers may be tainted. In all likelihood, the individual would be foreclosed from counsel of his choice. The same goes for a low or middle class individual whose legal fees are paid by a family member who, unbeknownst to the individual, made his fortune long ago through illicit means.

In these cases, prosecuting attorneys for accepting the funds would do nothing to further the goals of the Money Laundering Control Act, yet these prosecutions would be allowed after *Blair*. In these examples, the defense attorney who accepts funds to represent an individual in a criminal case has every reason to believe that the funds are probably clean. If it turns out later

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143 *Id.* at 335-40. Such an arrangement is a longstanding part of the law. See *Homestore, Inc. v. Tafteen*, 888 A.2d 204, 218 (Del. 2005) (noting that advancement of legal fees "is actually a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide rewards for its shareholders. The broader salient benefits that the public policy . . . seeks to accomplish . . . will only be achieved if the promissory terms of advancement contracts are enforced by courts even when corporate officials . . . are accused of serious misconduct." (footnote omitted)); RESTATEMENT (SECOND) OF AGENCY § 438(2) (AM. LAW INST. 1958) (discussing the principal's duty to indemnify the agent); see also *id.* at cmt. e (describing the modern common law rule which extends to payment of expenses incurred by an employee in defending a lawsuit with respect to which the employee is entitled to indemnity).

144 See *Stein*, 435 F. Supp. 2d at 356 n.119 (describing an implied contract stemming from KPMG's past practice).

145 *Id.* at 382.

146 *Id.* at 367.

147 *Id.*

that the funds were dirty, the proposed safe harbor still authorizes prosecution of the payer for engaging in a transaction involving more than \$10,000 in criminally derived proceeds. However, his lawyer would be protected, even if he came to know through investigating his client's case that the funds were actually criminally derived.

Commentators have been critical of defense attorneys who accept third party fees. Professor Orentlicher has suggested that the legal community should adopt a presumption that a lawyer who accepts a third party payment for a defendant in an organized crime ring is advancing the conspiracy by accepting that payment.<sup>148</sup> Certainly, the likelihood that the fee payer in an organized crime case is a collaborator in the crime is very high and the funds are deserving of extra scrutiny. However, Professor Orentlicher also calls for strict analysis when an ordinary family member pays a legal fee.<sup>149</sup> While Professor Orentlicher acknowledges arguments that a strong duty of inquiry may chill the attorney–client relationship, he argues that such a concern does not justify a lawyer's blind acceptance of third party fees because lawyers have a duty not to participate in client crime and because defendants can always rely on court-appointed counsel.<sup>150</sup>

### 3. Forfeiture of Legal Fees

After *Caplin & Drysdale*, it has been clear that a defendant has no legal right to spend drug proceeds to obtain legal services. *Caplin & Drysdale* involved the federal drug forfeiture statute, 21 U.S.C. § 853, which mandates that any person convicted of certain drug offenses must forfeit any proceeds or instrumentalities from that violation.<sup>151</sup> This should not come as a surprise because the drug proceeds do not really belong to the defendant, but by law become property of the federal government as soon as the defendant commits the violation.<sup>152</sup> Once the government proves that the funds were both forfeitable and transferred to the lawyer after the date of the crime, the lawyer's only possible defense is the bona fide purchaser defense, in which he

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<sup>148</sup> See David Orentlicher, *Fee Payments to Criminal Defense Lawyers from Third Parties: Revisiting United States v. Hodge and Zweig*, 69 *FORDHAM L. REV.* 1083, 1091-92 (2000) (suggesting that such a presumption could be rebutted by a showing that the fee payer had no connection to the crime ring, that the defendant was falsely accused of participating in the crime ring, or that the payment was not tied to the defendant's participation in the conspiracy).

<sup>149</sup> See *id.* at 1095-96 (arguing that defense lawyers in such a case assume the burden of confirming that more likely than not the payment from the family member is not tied to the criminal activity).

<sup>150</sup> *Id.* at 1098.

<sup>151</sup> 21 U.S.C. § 853(a) (2012).

<sup>152</sup> *Id.* § 853(c).

must prove that at the time he received the fee he was “reasonably without cause to believe that the property was subject to forfeiture.”<sup>153</sup>

The Department of Justice’s United States Attorneys’ Manual attempts to put boundaries around this expansive power. Specifically, the Manual specifies that assets transferred to an attorney as legal fees may only be subject to forfeiture when “the transfer was a fraudulent or sham transaction.”<sup>154</sup> In addition, forfeiture may be pursued if “the attorney had actual knowledge” that the assets were forfeitable, excluding any information disclosed during the course of representation.<sup>155</sup> Forfeiture is also authorized in civil matters if the attorney had reasonable grounds “to know that the asset was subject to forfeiture.”<sup>156</sup>

The Sixth Amendment arguments raised in the context of § 1957(f)(1) are equally applicable here.<sup>157</sup> If criminal defense attorneys will not take certain types of cases for fear of having their legal fees disgorged, and court-appointed counsel are unable to handle complex cases, criminal defendants may be denied their right to effective assistance of counsel.<sup>158</sup> Additionally, since the Department of Justice standards are nonbinding, some fear that the government will not follow its own guidelines.<sup>159</sup>

The government shows no sign of reining in its forfeiture activities.<sup>160</sup> Accordingly, criminal defense attorneys need to take adequate precautions to

153 *Id.*; see also *id.* § 853(n)(6) (defining the bona fide purchaser defense); *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 129 (1993) (plurality opinion) (concluding that transferees can assert the innocent owner defense to protect interests in property acquired after the illegal transaction giving rise to the forfeiture).

154 UNITED STATES ATTORNEYS’ MANUAL, *supra* note 72, § 9-120.102 (2010).

155 *Id.* § 9-120.104 (2010).

156 *Id.* § 9-120.103 (2010). For a discussion of forfeiture of attorneys’ fees in a civil case, see *FTC v. Assail, Inc.*, 410 F.3d 256, 265 (5th Cir. 2005) (explaining that when an attorney is “on notice that his fees may derive from a pool of frozen assets, he has a duty to make a good faith inquiry into the source of those fees,” or failure to do so “will result in disgorgement”).

157 See generally William J. Genego, *The Legal and Practical Implications of Forfeiture of Attorneys’ Fees*, 36 EMORY L.J. 837 (1987) (discussing constitutional concerns posed by forfeiture of attorneys’ fees).

158 See Michael J. Sharp, Comment, Caplin & Drysdale, Chartered v. United States: *The Supreme Court’s Decision that Crime Doesn’t Pay—Even for Attorneys’ Fees!*, 24 GA. L. REV. 137, 146-47 (1989) (summarizing arguments that assets used to pay attorneys’ fees should be exempt from forfeiture because a system in which those assets are forfeitable violates both defendants’ right to counsel under the Sixth Amendment and due process under the Fifth Amendment).

159 See Morgan Cloud, *Forfeiting Defense Attorneys’ Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1, 43 (arguing that there are “very real dangers” of government abuse of forfeiture procedures); Genego, *supra* note 157, at 844 (suggesting that the Department of Justice “guidelines can be seen as an aspect of litigation strategy”—the Department of Justice carefully selects fee forfeiture cases, and if it obtains a favorable ruling in one of those cases, the number of forfeiture actions is likely to greatly increase).

160 See Matthew R. Lasky, Comment, *Imposing Indigence: Reclaiming the Qualified Right to Counsel of Choice in Criminal Asset Forfeiture Cases*, 104 J. CRIM. L. & CRIMINOLOGY 165, 169 (2014) (“Today, [the Comprehensive Forfeiture Act] is used indiscriminately and in a way that deprives defendants of a meaningful legal defense.”). *But see* Thomas S. Kearney, Comment, *The Constitutional Retrenchment in the Use of Forfeiture: Are Attorney Fee Forfeitures Destined to Go the Way of the Horse and*

protect themselves. Some prominent defense attorneys have suggested that criminal defense attorneys should always prepare a retainer agreement signed by the client noting that the attorney has been assured that the fee comes from completely legitimate sources.<sup>161</sup> Other commentators have suggested that defense attorneys accept an initial non-refundable retainer.<sup>162</sup>

### III. A PROPOSAL

In defense of its broad holding, the majority posited that the fact that Blair was a lawyer was “pure coincidence” and it had “never suggested that the attorneys hired for Saunders and Bernard” should be prosecuted.<sup>163</sup> According to the majority, a violation of § 1957 would be “apparent” if Blair “were simply the head of a drug organization who decided to bankroll lawyers” for his underlings with drug proceeds.<sup>164</sup> Perhaps the fact that Blair was an attorney was irrelevant to the majority’s reasoning. Nonetheless, the *Blair* majority’s clear holding that the use of \$10,000 or more in criminally derived funds to secure legal representation for another person is a violation of § 1957 has broad implications for the criminal defense attorney who accepts potentially tainted funds. While Blair was not prosecuted in a representative capacity and Saunders and Bernard’s lawyers were not prosecuted at all, the *Blair* holding opens the door to § 1957 prosecutions of attorneys who accept tainted funds. If transmitting over \$10,000 in criminally derived funds for legal representation is a violation of § 1957, the way the statute is currently written dictates that the same would be true for receiving those funds.

*Blair*’s negative implications for the attorney–client relationship, third party payments, and forfeiture of legal fees can be ameliorated most effectively by statute. However, the risks facing the attorney vary based on the potential client’s situation, and a statute seeking to protect the attorney from those risks needs to differentiate based on whether or not the potential client is already under indictment or has had a civil forfeiture complaint filed against him.

The risk that a criminal defense attorney will be prosecuted for accepting potentially tainted funds from a client who is not yet under indictment can

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*Buggy?*, 5 SETON HALL CONST. L.J. 1069, 110-16 (1995) (arguing that the Supreme Court’s decision to expand the innocent owner defense in *92 Buena Vista Avenue* indicates a trend in limiting the use of forfeiture, which should carry over to attorneys’ fee cases).

161 See May, *supra* note 84, at 26 (noting that taking this step is best practice but may not be enough to completely protect an attorney from prosecution).

162 See Sharp, *supra* note 158, at 159 (“By accepting this up-front fee, the defense attorney will have had no way of knowing whether or not the funds received were ‘tainted,’ and consequently, could not possibly have notice that these particular funds were subject to forfeiture.”). *But see* May, *supra* note 84, at 22 (noting that “the ethics of non-refundable retainers are controversial”).

163 *United States v. Blair*, 661 F.3d 755, 773 (4th Cir. 2011).

164 *Id.*

be mitigated by a simple statutory amendment to § 1957, with a parallel amendment to § 1956. The risks that a criminal defense attorney faces when he accepts potentially tainted funds from a client already facing an indictment or civil forfeiture complaint for a violation of an offense likely to lead to tainted funds, however, are more significant because indictments and complaints give the attorney actual knowledge that the client's funds are potentially tainted. To mitigate the risk present in such a case, Congress should enact a statute requiring that the client be referred to a magistrate judge or special master, who would determine a reasonable fee that the client could pay the attorney out of the tainted funds. Only with such a Congressional response can attorneys feel comfortable representing criminal defendants whose funds are potentially tainted.

#### A. *Pre-Indictment*

Situations in which the potential client has not yet been indicted present a lower level of risk because there is no document informing the defense attorney that the potential client's funds may be tainted. A statutory amendment to § 1957, with a parallel amendment to § 1956, should be enacted to protect attorneys from criminal liability for accepting bona fide legal fees to provide representation guaranteed by the Sixth Amendment. Such an amendment would allow for prosecution of those who pay legal fees with criminally derived funds, but would exempt attorneys who receive those funds as long as they believe that it is more likely than not that the funds are legitimate and are being used to represent a defendant in a criminal matter. It would allow the defense attorney to fully investigate his client's case without worrying that any damning evidence he finds may be used against him. Under the proposed amendment, Blair still would be subject to prosecution under § 1957. Accordingly, the amendment mollifies the *Blair* majority's justified concern that applying § 1957(f)(1) to shield a character like Blair from prosecution would invite abuse.<sup>165</sup> However, any lawyer who accepted those funds with a belief that they were bona fide fees for legal representation in a criminal matter would be exempt from prosecution under the safe harbor.

Specifically, the last sentence of § 1957(f)(1) defining "monetary transaction" as to exclude "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution"<sup>166</sup> should be deleted. In its place, a new § 1957(g) should be added defining the safe harbor in terms of the representation, not the

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<sup>165</sup> See *id.* at 773-75 (discussing the Fourth Circuit's concern with adopting a more lenient interpretation of § 1957(f)(1)).

<sup>166</sup> 18 U.S.C. § 1957(f)(1) (2012).

transaction. Section 1957(g) could read: “This section does not apply to an attorney who receives fees he reasonably believes are bona fide in exchange for representing a client in a criminal investigation or any proceeding arising therefrom.” This construction aligns more closely to the safe harbor originally proposed by Congress while also allowing prosecutors freedom to prosecute the client if it later turns out that the funds were not bona fide.<sup>167</sup> The same sentence should be added to the end of § 1956.

“Bona fide” is defined as “[m]ade in good faith; without fraud or deceit” or “[s]incere; genuine.”<sup>168</sup> Courts should have no difficulty applying this standard. The definition implies a reasonable duty for the defense attorney to investigate the potential client’s source of funds. The attorney would not need to undertake Herculean efforts and examine years of the client’s tax documents, but the attorney would likely be expected to do more probing than simply asking the client whether the funds are clean. Assuming the attorney undertakes a good faith effort to determine that the potential client has enough clean funds to pay the legal bill, enacting an amendment establishing a safe harbor for an attorney who receives fees he reasonably believes are bona fide in exchange for legal representation would go far to ensure that criminal defendants receive the representation to which they are constitutionally guaranteed.

### B. *Post-Indictment and Civil Forfeiture*

Additional amendments are needed, however, to protect criminal defense attorneys who deal with potential clients who are already under indictment or who are facing a civil forfeiture complaint parallel to a criminal matter. Since indictments and civil forfeiture complaints give the defense attorney actual knowledge that the client’s funds are potentially tainted, a creative solution is necessary. Congress could define “actual knowledge” so as to exclude information gleaned through an indictment or complaint, but the likelihood of such a measure being passed by Congress is extremely low. Instead, Congress should enact a statute requiring that a potential client who seeks to pay a defense attorney with potentially tainted funds for post-indictment representation or representation in a civil forfeiture matter parallel to an ongoing criminal case be referred to a magistrate judge or special master, who would determine a reasonable fee that the client could pay the defense lawyer out of the tainted funds. The statute would apply only to defendants who

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<sup>167</sup> See *supra* notes 24–25 and accompanying text (discussing the originally proposed safe harbor provision).

<sup>168</sup> *Bona fide*, BLACK’S LAW DICTIONARY (10th ed. 2014).



were indicted or are facing a civil forfeiture complaint for a violation of certain white-collar offenses that likely involve tainted funds.

Magistrate judges or special masters would serve as much-needed middlemen between the potential client and the defense attorney. Since the magistrate judge or special master would be the one who determines the appropriate fee that the client may pay the lawyer out of the potentially tainted funds, the defense attorney need only deal with the potential client on an arms-length basis. By insulating himself from the potential client and accepting only a judicially approved fee, the defense attorney would be released of his burden to personally investigate the source of the potential client's funds, allowing the attorney to focus on vigorously investigating the client's case and effectively representing the client's interests.

The proposed statute would ameliorate the numerous problems facing criminal defense attorneys and the criminal defendants who seek to hire them. Criminal defendants will be able to obtain counsel of their choice, and defense attorneys will be able to represent the defendants without fear of prosecution or fee forfeiture. The attorney-client relationships that are formed will not be hampered by distrust or conflicting incentives, and third parties will be able to pay clients' fees when appropriate. Without the proposed statute, defendants would be forced to rely on already over-burdened public defenders, as private criminal defense attorneys realize that representing criminal defendants who may pay their legal bills with potentially tainted funds is not worth the risk of prosecution or fee forfeiture.

Courts have held that a criminal defendant who is the subject of a civil forfeiture action has the right to a hearing before his assets are forfeited if he seeks to use the funds to obtain counsel of his choice for the parallel criminal matter.<sup>169</sup> Congress should recognize that civil forfeiture actions and parallel criminal actions are essentially one case and should not differentiate the civil action from the criminal action. If Congress interprets parallel civil forfeiture actions in this way, the logic of ensuring that criminal defendants are able to hire counsel of choice to represent them in both criminal and civil matters arising from the same conduct becomes clear.

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<sup>169</sup> See *United States v. Monsanto*, 924 F.2d 1186, 1203 (2d Cir. 1991) (en banc) (holding that the Fifth and Sixth Amendments entitle a criminal defendant seeking to use restrained funds to hire counsel of choice to an adversarial, pre-trial hearing where the court evaluates whether there is a probable cause to believe (1) that the defendant committed the crimes that provide the basis for the forfeiture and (2) that the contested funds are properly forfeitable); see also *United States v. Bonventre*, 720 F.3d 126, 131 (2d Cir. 2013) (holding that a defendant has a right to a *Monsanto* hearing if the civil forfeiture action may affect the defendant's right to counsel in a parallel criminal case if the defendant can show that he does not have alternative assets to fund counsel of choice).

## CONCLUSION

The current state of the § 1957(f)(1) safe harbor is summed up well in the *Criminal Tax, Money Laundering, and Bank Secrecy Act Litigation* treatise:

[T]he precise contours of the exception are still unclear, and fraught with peril for the defense attorney who knows or is willfully blind to the fact that his client is paying for services with tainted funds. To a large extent, the safety zone created by the exception depends upon prosecutorial discretion and restraint. Even if defense counsel is charged but ultimately acquitted under the exception—and some juries may not warmly embrace the procedural safeguards created by the Sixth Amendment—an indictment alone is disastrous.<sup>170</sup>

As the current safe harbor is written, it is both over-inclusive and under-inclusive. Section 1957(f)(1) is too broad because by focusing on the transaction and not the representation, it protects the client who pays the attorney even if the funds later turn out to be dirty. On the other hand, the provision is too narrow because, as shown in *Blair*, it can allow for the prosecution of attorneys who receive legal fees that turn out to be tainted. The current safe harbor is also insufficient because it allows for prosecution under § 1956 and for forfeiture of attorneys' fees. As discussed throughout this Case Note, the status quo poses numerous problems for the criminal justice system. The attorney–client relationship is chilled, the ability of a family member to pay for a relative's legal fees is curtailed, and funds received as attorneys' fees are at risk of forfeiture.

This Case Note has proposed a new statutory safe harbor framework that protects attorneys who accept legal fees that they reasonably believe are bona fide, while also giving prosecutors freedom to prosecute the client if it later turns out that the funds were dirty. Specifically, the proposed legislation tightens the statutory framework both for pre-indictment clients and clients who are already facing an indictment or a civil forfeiture complaint. First, a statutory amendment to § 1957, with a parallel amendment to § 1956, should be enacted to protect attorneys from criminal liability for accepting bona fide legal fees to provide representation guaranteed by the Sixth Amendment to defendants who are not yet under indictment. Second, Congress should enact a statute requiring that a client already facing a criminal indictment or a civil forfeiture complaint for a violation of certain white-collar offenses that likely involve tainted funds be referred to a magistrate judge or special master, who would determine a reasonable fee that the client could pay the criminal

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170 PETER D. HARDY & CAROLYN H. KENDALL, *BLOOMBERG BNA, CRIMINAL TAX, MONEY LAUNDERING, AND BANK SECRECY ACT LITIGATION* 291 (2010).

defense lawyer out of the potentially tainted funds. Amending the money laundering statutes in this way would eliminate the current circuit split, provide much-needed clarity to the criminal justice system, and allow criminal defense attorneys to go about their work without having to worry about prosecution or fee forfeiture for accepting potentially tainted funds. Until new legislation is passed and the money laundering jurisprudence is returned at least to its pre-*Blair* state, criminal defense attorneys would be well served by undertaking a full investigation to determine the source of each potential client's funds to minimize the risk of becoming criminal defendants themselves.

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