

No. 02-4222

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UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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United States of America,  
Plaintiff-Appellee,  
v.  
Marla A. DeVore,  
Defendant-Appellant.

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Appeal From The United States District Court  
For the Central District of Illinois,  
Case No. 00-30021  
The Honorable Judge Jeanne E. Scott

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**REPLY BRIEF OF  
DEFENDANT-APPELLANT, MARLA A. DEVORE**

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**ORAL ARGUMENT REQUESTED**

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I. DeVore Established All The Requirements For A New Trial, And The Evidence Against Her Was Meager. The Perjury And False Audit Results Used To Convict Her Were Material. A New Trial Should Be Granted.

The District Court found that Counts 12 and 14 involved only the use of an unqualified and unlicensed person to facilitate the sexual abuse survivors' group and distinguished Counts 12 and 14 (13 on the verdict form) as counts which permitted a guilty verdict if the jury found that Woods was not qualified to provide the services and the Medicaid program was billed.<sup>1</sup> The District Court ruled that the issues raised by Statler's perjury and the fabricated audit results did not go to those counts (Joint App. 45). The District Court's denial of a new trial was an abuse of discretion. Reversal is required.

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<sup>1</sup>The District Court stated: "Counts 12 and 14 of the indictment, listed as Counts 12 and 13 on the verdict form, however, are of a different category. These are charges arising from bills submitted to Medicaid for Dr. Mitrione when the services were provided by Walt Woods in leading the SOSA group, a group that he wasn't professionally qualified to lead per Dr. Baer . . ." (Doc. 203 at 18, Joint App. 44).

On appeal, DeVore contends an abuse of discretion in that the District Court’s reasoning is flawed.<sup>2</sup> Counts 12 and 14 consist of multiple theories of billing fraud and are not distinguishable from the other counts. Moreover, the Government does not dispute that the qualifications of the non-physician rendering service are immaterial to the Medicaid reimbursement decision.<sup>3</sup> Given the immateriality, the “unqualified person” theory cannot sustain a mail fraud, nor a false claims conviction. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827 (1999). Viewed solely as consisting of the “unqualified person” theory, the convictions are invalid and must be vacated (DeVore’s Brief, 24-25).<sup>4</sup> The District Court’s ruling is thus erroneous as a matter

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<sup>2</sup>An abuse of discretion occurs by definition when a decision is infected by an error of law. *Koon v. United States*, 518 U.S. 81, 99 (1996).

<sup>3</sup> The testimony of Roni Kaluza, Illinois Department of Public Aid, established that licensure and qualifications of a non-physician rendering service are *immaterial* to the Medicaid reimbursement decision. (Vol. 2, 83).

<sup>4</sup>In October, 2002, DeVore filed a motion to reconsider specifically pointing out this defect. (Doc. 212). The District Court summarily denied the motion.

of law. Reversal is required.

The Government makes no specific response to DeVore's argument and apparently disavows the District Court's notion that Counts 12 and 14 are distinguishable as predicated solely on the "unqualified person" theory. Instead, the Government takes a new position and claims that Counts 12 and 14 are solely substitute billing counts.<sup>5</sup> Along with this proposition, the Government misstates DeVore's defense and claims that she advanced a supposed defense of "accidental" versus "intentional" billing. (Govt.'s Brief, 42-43). The Government's arguments must be rejected.

*A. The Government May Not Change Its Position On Appeal*

While it is true that an appellee may seek to support a judgment based upon any ground argued below, even though the argument may involve an attack on the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it, *United States v. Finn*, 502 F.2d 938, 940 (7<sup>th</sup> Cir. 1974), this Court has also ruled that when a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position. *United*

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<sup>5</sup> At page 42 of its brief, the Government states:

“Defendants, however, did not satisfy the requirements for a new trial on the *purely substitute billing counts*” (Govt.'s Brief, 42).

*States v. Krankel*, 164 F.3d 1046, 1053 (7<sup>th</sup> Cir. 1998); *Wilson v. Williams*, 161 F.3d 1078, 1095 (7<sup>th</sup> Cir.1997), vacated and affirmed on rehearing en banc, 182 F.3d 562 (7<sup>th</sup> Cir. 1999), citing *Lumpkin v. Envirodyne Indus, Inc.*, 933 F.2d 449, 460 (7<sup>th</sup> Cir. 1991)(a party cannot blow “hot and cold” during the course of litigation).

The indictment generally pleads the various forms of alleged fraud, and the various counts incorporate the forms of alleged fraud. Prior to trial, DeVore sought to discover with respect to each count which fraud theory or theories the Government intended to prove. The Government took the position that it should not be “hamstrung” and that DeVore could review the files and figure it out for herself. (Doc. 14, 20). In opposing DeVore’s new trial motion, the Government finally explained the theories pertaining to the various counts. The Government claimed that Count 14 included three theories of fraud and Count 12 included two theories. At pages 14 and 15 of the Government’s Response to Joint Motion For New Trial Based Upon Newly Discovered Evidence, the Government stated:

“ . . . there were four different methods of fraud presented. The first was that many of the services billed by Mitrione and DeVore were provided by a person either not licensed, or not recognized by Medicaid or Medicare as an appropriate provider for the service (the so-called ‘substitute billing’). \* \* \* This issue is found in Counts 1, 2, 6, 12, 13 and 14; and, if the defendants’ testimony is to be believed, as part of Counts 3, 4 and 5 as well. A second part of the government’s case, in Counts 1, 3, 4, 5, 11 and 14 dealt with “upcoding” or billing for a higher level of service than that actually provided. \* \* \* A third part of

the fraud was the use by the defendants of an unqualified person to conduct group therapy to survivors of sexual abuse (Counts 1, 12, 13 and 14). \* \* \* The testimony of Statler, the exhibit introduced as Government's Exhibit 20A, and the chart resulting therefrom (Government's Exhibit 20B) dealt only with the fourth issue, that of "ghost billing," or submitting a claim for service when there was no record in the file that such service was performed. Only Counts 7, 8, 9 and 10 dealt solely with the issue of claims filed with no record of service, although this was also a part of the evidence on Counts 1, 2, 6, 11 and 14 (Govt.'s Response To Joint Motion For New Trial, 14-15, Doc. 187) (emphasis added).

In the District Court the Government thus claimed that Count 14 involved the issues of upcoding, ghost billing, use of an unqualified person, and substitute billing. The Government claimed that Count 12 involved the issues of use of an unqualified person and substitute billing.

The practice of taking different positions in litigation on the same issue has been condemned, *Krankel*, 164 F.3d at 1053, and is particularly disheartening when undertaken by the Government in a criminal case. The Government was given tremendous latitude in drafting its indictment, and the indictment incorporated all theories of fraud. The District Court did not "hamstring" the Government by requiring it to disclose to DeVore which billing fraud theory pertained to which count. Only in opposing DeVore's new trial motion was the Government finally forced to disclose which theories pertained to which counts. It then claimed that Counts 12 and 14 consist of specific multiple theories. The Government must be

required to adhere to the position it took in the District Court. *Krankel*, 164 F.3d at 1053. Any arguments to the contrary must be rejected.

Counts 12 and 14 are multiple theory counts. Given the general indictment, no one can say with certainty on which theory the jury relied to reach its verdict. Statler's fabricated audit results and perjury infected Counts 12 and 14. Reversal is required on this ground alone.

*B. DeVore's Defense Was Honest Mistake, Not Accident*

In support of its argument that Statler's fabricated audit and false testimony was not material, the Government mischaracterizes DeVore's defense. The Government claims that Exhibit 20B and Statler's perjured testimony "rebutted only the defense of accidental erroneous billing", not intentional (substitute) billing services of therapists. (Govt. Brief, 42). Aside from the mischaracterization, the supposed "accident/intentional" distinction is erroneous, and the Government's argument must be rejected. DeVore's defense was honest mistake, not accident.<sup>6</sup>

Statler's fabricated audit results and perjured testimony were intended to and did impermissibly refute DeVore's defense of honest mistake and lack of financial

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<sup>6</sup>There is an essential distinction between mistake and accident. An accident is that the result complained of as a wrong was not intended by the defendant, and could not have been foreseen and avoided. A mistake is that though the act was voluntary and the result intended, the defendant acted under an erroneous belief that circumstances existed which would justify the conduct. *Prosser on Torts, Mistake*, §17 (2<sup>nd</sup> ed. 1977).

gain. DeVore did not claim “accidental erroneous billing”. DeVore defended all counts on the basis of an honest mistake. As to substitute billing, DeVore claimed that the billing rules are exceedingly complex, that she had received misleading information and was honestly mistaken as to the correct reimbursement rules regarding billing for therapists.

She established that billing for therapists had been permissible at her former employer, the Springfield Mental Health Clinic and successfully established the unlikelihood of Walters’ testimony that Walters informed her of IDPA billing rules in 1995. The rules are by no means simple. The back of the IDPA claim form contains a certification that leads one to believe that physicians may legitimately bill Medicaid for services of an employee. Through IDPA supervisor, Roni Kaluza, DeVore established that IDPA does not alert psychiatrists of any separate rule. Psychiatrists are not given a separate claim form that would alert them that Medicaid will not pay them for services rendered by an employee--therapists. (Kaluza Testimony, Vol. 2 at 50). DeVore also established that IDPA representative, Gary Vaughn, had been out to train the billers and had never indicated any problem with billing for therapists. Shari McGowan, a former biller, verified that Vaughn had trained her, and had not given her any indication that billing for therapists was improper. (Vol. 19, p. 44). Linda Fein, another former biller, was also trained by Vaughn. Fein also billed for therapists with no idea that such was improper. (Vol.

31, 1165-1166). Through David Parker, a certified fraud examiner, DeVore established that the billing patterns were consistent with an errors rather than fraud. (Vol. 36, 1975-1977, Def. Exh. 15, App. 195).

*C. Statler's Testimony Was Material To DeVore's Defense Of Mistake*

It has been said that “a picture paints a thousand words”. In arguing lack of materiality, the Government fails or does not wish to acknowledge the impact of its fabricated audit results on the jury's verdict. The Government argues that its fabricated audit and Statler's perjury were not “material” to Counts 12 and 14 because they did not “comment” on DeVore's knowledge of Medicaid reimbursement rules for “substitute billing”. (Govt. Brief, 48-49). We disagree. Aside from the fact that Counts 12 and 14 encompassed additional fraud theories, the prosecution's riposte to DeVore's defense was that her mistakes were not honest. This theme was repeated throughout the trial. The fabricated audit results presented as Govt. Exhibit 20B (Joint App. 14) was the prosecution's grand finale which tied up the prosecutor's loose ends and (falsely) established that DeVore was indeed misleading the jury. The following review of the record demonstrates the materiality and impact of the fabricated audit and perjured testimony on DeVore's defense.

*D. Prosecutor's Theme Was That DeVore Was “Misleading” The Jury*

The prosecutor's theme of dishonest mistakes and misleading was repeated throughout DeVore's cross-examination. Regarding her resume, Exhibit 16D-4, the

following colloquy occurred:

- Q. You said that this must be a misprint, because you weren't at the Mental Health Center through 1996?
- A. That's right.
- Q. *You weren't trying to mislead anyone, were you?*
- Q. No.
17. Over state your qualifications?
1. No, absolutely not.
- Q. Were you overstating your qualifications?
- A. No.
17. When you said you weren't the biller in 1995, you weren't trying to mislead anyone, were you? (Vol. 36, 2242-2243). (emphasis added).

The prosecutor continued the misleading theme with individual bills:

17. And you were shown a piece of paper for R.F. which suggested that Terry Kuethe had seen her on October 1<sup>st</sup>; do you remember that?
1. Yes.
17. *That was somewhat misleading, wasn't it?*
1. I don't know how you mean, sir.
17. *In fact, it was very misleading wasn't it? That paper you were talking about was the continuation of a note from the day before, wasn't it? Or from the page before?*
1. I looked at the note on the top and I do not believe it is a continuation of the note. (Vol. 36, 2206).

Through his questioning, the prosecutor suggested that DeVore had shredded

evidence:

17. So when you said you billed for 10/1/97 for a 90844, you're saying that was for Terry because at the time you had a super bill. You don't know where it is now, it must be shredded. (Vol. 36, 2214).

The prosecutor also accused DeVore of fabricating evidence:

17. It is the computer that has been loaded with things that may have been loaded well after things were turned over, right? (Objection omitted)
1. No, I don't know that. (Vol. 36, 2214).

The prosecutor suggested that DeVore's testimony was a lie that she had rehearsed with her counsel:

- 17. You went through these things with Mr. Schanzle-Haskins what, three, four times?
- 1. More than that.
- 17. More than that. And prepared your testimony and practiced it and rehearsed it, right?
- 1. No.
- 17. You practiced sitting there and looking at one person who is asking the questions and then turning and looking at the jury when you answer these questions?
- 1. No, Mr. Hansen. (Vol. 36, 2206).

The prosecutor suggested that others thought that DeVore was manipulative and a liar.

- 17. And that was all after this meeting in October of '95, right?
- 1. That's correct.
- 17. Where they accused you of being manipulative?
- 1. I don't know that they accused me of that.
- 17. Making specific representations?
- 1. They accused me of not having my work done and not being able to keep up with them the way that they thought I should.
- 17. And they accused you of lying to them about that?
- A. They accused me of things that I supposedly said that I did not.
- 17. And they accused you of lying to them about the work being done and applications being filed; right?
- 18. They accused me of that, yes.
- 17. And, they left the practice?
- 1. Yes, they did.
- 17. Because you stayed. (Vol. 36, 2247).

As to Gary Vaughn, the IDPA representative that had trained the billers, the prosecutor continued his theme that DeVore was trying to mislead the jury with the "Vaughn story" and supplemented with his own personal belief that DeVore was lying:

- 17. And it's – for the Department of Public Aid it is put under his provider number, right?
- 1. Per the instruction of Gary Vaughn.
- 17. You're going to spit that out every time even though –
- 1. Every time you give me a chance–
- 17. Even though you have never spoken to –
- 1. Because that's what I believe to be true.
- 17. In your entire life, you have never had that conversation with Gary Vaughn?
- 1. Not that particular conversation, but I would believe he would not come out and

- misrepresent the I.D.P.A. to anyone.  
17. Neither do I. (Vol. 36, 2209).

DeVore's cross examination contains many other instances wherein the prosecutor suggested that she was lying or attempting to mislead the jury. (Tr. 2116, 2181, 2182, 2183, 2184, 2188, 2189, 2202, 2205, 2206, 2209, 2210, 221, 2213, 2214, 2216, 2217, 2239, 2241, 2242, 2243, 2244, 2247, 2248, 2249, 2250, 2251, 2256).

*E. The Cross-Examination of Parker Continued The Theme That DeVore Had Misled Parker By Not Supplying All The Records*

David Parker testified on September 5, 2001. Parker's testimony supported DeVore's defense of mistake insofar as his review of more than 10,000 entries indicated a one-to-one ratio between services documented and not billed versus billed, but undocumented services, and a lack of financial gain. (Vol. 36, 1975-1977).<sup>7</sup> On Parker's cross examination, the prosecutor continued his theme of DeVore's misleading behavior. The prosecutor established that Parker was supplied only limited documentation and insinuated that complete documentation would yield different results:

Q. Dr. Parker, specifically who gave you the information to put in these? Who gave you the information?

A. The basis of the chart was all gone through the defense attorneys.

Q. Specifically, who?

A. The – Kathy Pilkington sent me most of the stuff.

Q. And whatever you didn't get, you didn't get from Kathy Pilkington, right?

A. Yes.

Q. So that is based, this chart is based on the information they wanted you to have to make this chart.

A. That's valid.

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<sup>7</sup>A copy of the chart Parker displayed to the jury containing his findings is reprinted at App. 195 reprinted herein.

- Q. You and I have never talked?  
A. No.  
Q. You never asked me what information was provided to Ms. Pilkington or Mr. Smith or Mr. Schanzle Haskins; right?  
A. That's true.  
Q. So you got what they wanted you to have?  
A. That's correct. (Vol. 35, 1983-1984).

The prosecutor followed up with his theme by citing specific patient instances as to which adequate documentation would have yielded different results. For instance, with respect to patient Tanya Brown, the prosecutor suggested that DeVore failed to provide Parker all the records:

- Q. How many times did she self-pay the 20 dollars?  
A. I believe; and this is off the top of my head; there was three times, I believe.  
Q. From the records you were given?  
A. Yes.  
Q. And if you weren't given them all?  
A. I can only be responsive for what I was given. (Vol. 35, 1988).

The prosecutor also suggested in his cross-examination of Parker that various patients had not been looked at or examined:

- Q. How many unpaid claims are there for – how many times were there no shows or cancelled appointments from Marla Ladsky?  
[Objection omitted]  
A. Marla Ladsky is not listed on this chart.  
Q. How about for David Hines?  
A. First I've ever heard of the client.  
Q. How about for Tina Fields?  
A. I've heard that name, I have part of the records on it, but no complete. I believe that was an objection that you had to one of these 404(b). (Vol. 35, 1998).

The Government's cross-examination of DeVore and Parker required that it demonstrate that a comprehensive audit of the documents would, in fact, produce different findings than those presented by Parker. *United States v. Elizondo*, 920 F.2d 1308, 1314 (7<sup>th</sup> Cir. 1990) (improper for

the Government to ask questions which imply factual predicates the examiner knows that he cannot support by evidence). Parker's testimony supported DeVore's contention of honest mistakes and lack of financial gain. If that were true, then DeVore's explanation that she was mistaken about the billing rules was more probably true. When the defense rested, the Government had to rebut Parker's testimony with evidence that a comprehensive audit established wholly different results and financial gain.

The Government accomplished its purpose with fabricated audit results (Exhibit 20B) and the perjured testimony of Deanna Statler. Exhibit 20B told the jury a story. The story it told was that Dr. Mitrione made an almost \$3.00 profit for every dollar of loss. (Knobloch Testimony, Vol. 43 at 352).<sup>8</sup> By Exhibit 20B, the Government accomplished the dual purposes of establishing that DeVore had misled Parker by supplying limited documentation, refuted Parker's findings of a one-to-one ratio and lack of financial gain, established a profit derived from the alleged scheme and convinced the jury that DeVore had tried to mislead them. By virtue of the perjury and fabricated audit, DeVore's defense of honest mistakes didn't stand a chance.

*F. DeVore Had Every Right To Be Surprised By The Government's Fabricated Rebuttal Audit Results And Perjury By The Government's Auditor*

Citing *United States v. Olson*, 846 F.2d 1103 (7<sup>th</sup> Cir. 1988) and *United States v. Nero*, 733 F.2d 1197, 1204 (7<sup>th</sup> Cir. 1984), the Government argues that DeVore should not have been surprised by Statler's fabricated audit results and perjured testimony. *Olson* was a murder case in which the testimony of the recanting witness was consistent with other witnesses. *Olson*, 846 F.2d at 1112. *Nero* involved a letter written by defendant's husband expressing doubt about his trial testimony.

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<sup>8</sup>Knobloch's testimony on this point is reprinted at App. 196-200 herein.

*Nero, 733 F.2d at 1204.* The fabricated audit and perjury by the Government's auditor in this billing fraud prosecution involving more than 800 patient files and thousands of documents are entirely different facts.

The Government claims that it notified defense counsel of the anticipated testimony, that defense counsel had Exhibit 20A (the summary on which Exhibit 20B is based) weeks in advance and that Defendants are responsible for not detecting Statler's perjury and fraud at trial. (Govt.'s Brief, 52-53). These arguments must be rejected for several reasons.

First, the Government does not contend (nor can it) that it notified the defense that it intended to produce an auditor who would present fabricated audit results and commit perjury. Second, by the Government's own admission in the District Court, the defense could not have prepared. *Statler's fabricated audit results did not even exist until after Parker testified on September 5, 2001.* According to the Government, between September 5 and 6, 2001 (after it heard Parker's testimony), Statler and others commenced modification of the original Exhibit 20A which led to the modified Exhibit 20A and then commenced the hand-count which led to Exhibit 20B. The Government's Response To Joint Motion For New Trial states:

Between September 5 and September 6, when the defendants were given the *modified Government Exhibits 20A and 20B*, Deanna Statler and others attempted to modify the spreadsheet to reflect the parameters set by the testimony, and then to hand-count the specific items relevant to the inquiry. At the time the relevant inquiry was to determine the number of claims created for dates of service

where there was no evidence in the file that a service was in fact provided.

Unfortunately, with at least three people counting the events and at least two attempting to modify the spreadsheet, some mistakes were made and some misunderstanding occurred. (Govt.'s Response, Doc. 187, p. 22).

Also, the defense did exercise as much diligence as possible under the circumstances. Despite the surprise evidence, the defense came very close to exposing Statler's perjury as to how the audit was conducted, the haphazard nature of the work and the unreliability of the results. However, the prosecutor interfered, and the District Court sustained the objection. The following occurred during the cross examination of Statler at trial:

Q. Ma'am, in conducting the analysis to which you've testified, did you manually count up each of the instances to make up these percentages?

A. Yes, I did.

Q. But you did not manually count up all of them; correct?

A. I didn't count what?

Q. You did not manually count up all of them; correct?

A. Yes, we counted – I mean I counted all of them. I went through here and counted the number of instances.

Q. Well, you had other people looking at these files, correct?

A. They were entering them, yes.

Q. Were they looking at the files?

A. Yes.

Q. And who gave the other two people instructions as to how to count?

MR. HANSEN: Judge, I'm going to object. She just asked the question and she was told the answer was no, and she mixed that up with another question.

THE COURT: All right, I'm going to sustain. It's asked

and answered. She said she counted them. (Vol. 37, 2323).

Thus, DeVore was asking the right questions. Had the prosecutor not interfered and the District Court not sustained the objection, Statler's perjury might have been exposed to the jury. The Government's contention that the defense had Exhibit 20A weeks before the trial fails to acknowledge that during the trial, the Government modified the original Exhibit 20A, supposedly to omit hospital and out-of-office claims, and to limit it to claims within certain date parameters. (Landers Testimony, Vol. 43, 412-415). Very near the end of a month long trial, the Government tendered a second version of Exhibit 20A to the defense—without a listing of what specific claims had been omitted. Thus, while prior to trial, the defense was given the original Exhibit 20A which included hospital claims, the defense was also given (during the trial) the modified Exhibit 20A from which hospital and out-of-office claims were *supposedly* omitted by the Government.

No serious question exists that DeVore was taken by surprise by the fabricated audit results and perjured testimony. This Court should so rule. Reversal is required.

*G. The Jury Might Have Reached A Different Verdict Had It Known That the Prosecutor Had No Factual Basis For His Cross-Examinations, The Rebuttal Audit Results Were Fabricated And The Auditor Was Lying*

This Court should reverse if it finds that the jury might have found differently absent the false audit results and perjured testimony. *Larrison v. United States, 24*

*F.2d 82 (7<sup>th</sup> Cir. 1928); United States v. Catton, 89 F.3d 387 (7<sup>th</sup> Cir. 1996).*<sup>9</sup> The record is clear that the prosecutor asked many damning questions which went to the central issues of the case and had no factual basis to support them. The perjured testimony and fabricated audit results led the jury to believe otherwise. This information would likely have tipped the scales against the Government.

The Government argues that the truth would not have mattered to the jury because “overwhelming” evidence exists that DeVore knew the correct substitute billing rules (Govt. Brief, p. 50). The record does not bear this argument out.

Medicaid reimbursement rules are exceedingly complex. A review of the testimony of Roni Kaluza, IDPA supervisor, reveals not only the complexity, but the lack of effort on the part of the Department to alert psychiatrists to the nuances in reimbursement policy between them and other physicians. DeVore’s evidence reasonably supported her defense that she was misled as to the correct rules. The Government offers no explanation whatsoever for the fact that its own witnesses (McGowan and Fein) testified that the IDPA representative trained McGowan and Fein over a period of two years and neither McGowan nor Fein knew that billing for

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<sup>9</sup>The Government argues that the *Larrison* standard should be abandoned. DeVore opposes this argument and joins in the arguments separately made by her co-defendant, Robert Mitrione.

therapists was not permitted. The Government's argument must be rejected.

*H. Acquittals On Counts 2, 6, 7 and 8 Relate To Weakness In Government's Evidence  
And Do Not Speak To DeVore's Credibility*

The Government also argues that the acquittals on Counts 2, 6, 7 and 8 establish that DeVore maintained credibility despite Statler's testimony. (Govt. Brief, 50). This argument must also be rejected. Count 2 involved patients Barbara Duba for service on 7/13/95 and Tanya Brown on 7/18/95. Duba did not testify at all and Tanya Brown did not offer any testimony regarding the 7/18/95 date of service. Shari McGowan signed the claim forms pertaining to those counts. Linda Fein testified as to Counts 7 and 8. Linda Fein had been hospitalized for a breakdown in early 1996 and was impeached by her various versions of events. (Vol. 31, 1152-1153, 1165-66). In contrast to every other witness in the case, Fein claimed that the clinical file was given to her to review the clinical notes when she billed. (Vol 31, 1140). While she claimed that she knew things were wrong, she also admitted that she had told both defense counsels that nothing was wrong. The jury did not believe a word she said. Counts 2 and 6 resulted from no testimony at all (Duba and Brown) and Counts 7 and 8 involved a Government witness that was a fabricator (Fein). This Court should conclude that the acquittals are addressed to weaknesses in the Government's case, not to the jury's assessment of DeVore's credibility.

This record establishes that Statler was a fabricator. Absent Statler's fabricated audit results and perjury, the Government's tactics would have been exposed. DeVore's evidence (given through Parker) as to lack of financial gain and honest mistake would have prevailed. The jury would have taken note of the fact that the prosecutor was unable to show any factual predicate for his damaging questioning of DeVore and of Parker which undeniably went to the central issues of the case. This Court must conclude that absent Statler's fabricated audit results and perjured testimony, the jury might well have found differently. Reversal is required. DeVore is entitled to a new trial.

*II. Prosecutor's Closing Remarks That The Defendants Had Undermined The Same Institution As The Terrorists That Destroyed The World Trade Center Inflamed The Passions Of The Jury. The Remarks Were Not Proper. In The Context Of This Record, They Denied DeVore A Fair Trial.*

The trial was concluding on September 11, 2001, the day terrorists destroyed the World Trade Center and struck the Pentagon. The building was closed for the day and the jury sent home. The next morning, the prosecutor commenced his closing remarks with a reference to the terrorist attack of the previous day and the caveat: "But that's why we need to do this today. That's why we got out of bed today and came here. The very institutions that these people seek to undermine must continue." The defense objected, but the District Court overruled the objection. DeVore contends that in the emotionally charged environment which existed on September 12, 2001, the

prosecutor's closing remarks were highly improper and incurably prejudicial. (DeVore's Brief, 30).

In response, the Government claims that the remarks were proper, that appellate review is limited because only Mitrione's counsel objected before the jury, and that no specific objection to having inflamed the jury's passions was made. (Govt.'s Brief, 38-41).

Review is not limited. To preserve an issue for appeal, the general rule is that objection must be made that alerts the court and the opposing counsel to the specific grounds for the objections. *United States v. Hardamon*, 188 F.3d 843, 848 (7<sup>th</sup> Cir. 1999). The Seventh Circuit recognizes an exception to this general rule when objections are being made to closing arguments. *Carmel v. Clapp & Eisenberg, P.C.*, 960 F.2d 698, 704 (7<sup>th</sup> Cir. 1992). Nearly contemporaneous objection made at the bench at the close of an opponent's argument will preserve the matter for appellate review. *Deppe v. Tripp*, 863 F.2d 1363 (7<sup>th</sup> Cir. 1988). Counsel is entitled to postpone objection to remarks in closing argument until the end of the opponent's argument in order to *avoid highlighting* the objectionable argument to the jury. *Walden v. Illinois Central Gulf Railroad*, 975 F.2d 361, 366 (7<sup>th</sup> Cir. 1992).

This is a case in which DeVore presented a joint defense with her co-defendant, Dr. Mitrione. Objection was made by Dr. Mitrione's counsel before the jury, and the

District Court was permitted an opportunity to correct the argument. The purpose of the contemporaneous objection rule is to give the district judge a chance to deal affirmatively with the remarks. *Hardamon*, 960 F.2d at 698. No purpose is served by requiring a successive defense counsel to make the same objection before the jury. Such a rule merely highlights the problem. The fact that defense counsel did not object that the prosecutor was inflaming the passion of the jury also is not dispositive. Again, this would merely highlight the problem. However, even if reviewed as plain error, the terrorist comparison made *the morning after the attack* in a highly charged emotional environment combined with the fabricated audit results and perjured testimony does raise exceptional circumstances suggesting a miscarriage of justice.

The Government claims that the terrorist comparison remark was entirely proper and attributes only laudable intentions to the prosecutor in trying to focus the jury on the trial. (Govt.'s Brief, 40).<sup>10</sup> According to the Government, the prosecutor's

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<sup>10</sup>The prosecutor's conduct during the trial belies the contention that his motives in closing were laudable. Although the following exchange was directed to DeVore's co-defendant, it unquestionably establishes that the prosecutor's intentions were not laudable. When cross-examining Mitrione's character witness, William Doster, the following occurred:

Q. Mr. Doster, are you aware of the major problem with the jail contract as regards Dr. Mitrione right now?

A. No, I'm not.

Q. You're not aware that there is a bag of drugs sitting in somebody's office

reference to the institutions “these people” seek to undermine referred to the terrorists.

In fact, the prosecutor’s words had a double meaning-- The reference to “these people” referred to “these people” right in the courtroom who, like the terrorists, seek to undermine the Government. The prosecutor’s intentions were not laudable. Given that it was made the morning after the terrorist attacks, in a highly emotionally charged environment, the prejudice was not curable. The Government also contends that the defense virtually parroted the prosecutor’s comments. (Govt.’s Brief, 41). However, even a cursory review of the transcript reference cited does not support that contention.

DeVore’s counsel stated:

I have the opportunity to speak with you for this last time on behalf of Marla DeVore. Other counsel have commented there are a lot of things going on in the world right now, but the most important thing in the world going on as far as Marla DeVore is your deliberations and what you think about her conduct. (Vol. 39 at 2638).

Defense counsel did not parrot the prosecutor’s remarks. In the context of this record, replete with fabricated audit results and perjured testimony by the Government’s auditor, combined with the emotionally charged environment on the day after the

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that Dr. Mitrione or somebody in his employ told people to destroy? (Vol 37, 2292).

Although the District Court sustained an objection and instructed the jury to disregard the comments (Vol. 37 at 2294), the prosecutor’s intentions were clear.

terrorists attacks, the prosecutor's appeal to the jury's emotions denied DeVore a fair trial under any standard. Reversal is required.

WHEREFORE, for these reasons, the Seventh Circuit Court of Appeals should find that DeVore's motion for new trial should have been granted as to Counts 12 and 14 and remand this cause for a new trial. Alternatively, the Court should remand this cause to the district court for re-sentencing without the errors specified herein.

RESPECTFULLY SUBMITTED,

MARLA A. DEVORE,  
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BY: \_\_\_\_\_

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