UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, vs. ROBERT T. MITRIONE and MARLA A. DEVORE, Defendants.	))))))))))	Case No. 00-30021

MEMORANDUM OF THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF DEFENDANTS' MOTION FOR A NEW TRIAL

The Association of American Physicians & Surgeons, Inc. ("AAPS"), a nationwide physicians' organization founded in 1943, respectfully submits this memorandum in support of defendants' motion for a new trial. *See, e.g.*, *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversing, on the strength of AAPS' amicus brief, many of the convictions related to Medicare fraud); *Siddiqi v. United States*, 98 F.3d 1427, 1429 (2d Cir. 1996) (reversing Medicare fraud convictions for "claim[s] for services rendered by somebody else").

Defendants' convictions are unprecedented because they are based on ***compliance with federal law, rather than violation of it.*** These convictions are impermissible under the Supremacy and Due Process Clauses. Federal law ***requires*** Illinois to fund defendants' medical services that underlie their convictions, which must therefore be reversed.

FEDERAL LAW REQUIRES REVERSAL OF DEFENDANTS' CONVICTIONS

The Medicaid program is a federally funded program for the poor, and hence reimbursement rules must abide by federal law. Illinois regulations cannot deny Medicaid funding

in conflict with applicable federal law, nor can the convictions here be sustained.

An essential medical service for the needy is counseling, and the Illinois Department of Public Aid (IDPA) must fund it through Medicaid as fully as federal law mandates. Defendants cannot be convicted, let alone face prison sentences, for billing for counseling in adherence to the letter and purpose of federal law. Nor can Illinois regulations be construed and applied in conflict with federal Medicaid law to convict a physician.

Federal Law Requires Funding of Defendants' Services to the Poor.

The purpose of the federally funded Medicaid program is to provide efficient medical services to the needy. "Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals. 42 U.S.C. § 1396 (1982 ed., Supp. V.). Although participation in the program is voluntary, participating States must comply with certain requirements imposed by the Medicaid Act (Act) and regulations promulgated by the Secretary of Health and Human Services (Secretary)." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). The Seventh Circuit has reiterated this supremacy of federal law with respect to the Medicaid program. "Although participation in the Medicaid program is entirely optional, **once a state elects to participate, it must comply with the requirements of Title XIX**." *Roloff v. Sullivan*, 975 F.2d 333, 335 (7th Cir. 1992) (emphasis added). *See also Pennsylvania Med. Soc'y v. Snider*, 29 F.3d 886, 888 (3d Cir. 1994). ("A state is not required to participate in the Medicaid program, but if it decides to participate, it must comply with the Medicaid Act and its implementing regulations. § 1396c."); *Weaver v. Reagen*, 886 F.2d 194, 197 (8th Cir. 1989) ("Although a state's participation [in the Medicaid program] is voluntary, once a state chooses to participate in the program it must comply with federal statutory and regulatory requirements."). Accordingly, the Illinois cannot deny

funding in conflict with the federal law governing the program.

As recognized by the Seventh Circuit, federal law requires states to reimburse for Medicaid services provided in mandatory categories. *See Illinois Physicians Union v. Miller*, 675 F.2d 151, 154 n.4 (7th Cir. 1982) (holding that there are "five categories of medical services which Title XIX mandates must be provided"). Specifically, Illinois must reimburse defendants "for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1905(a) [42 U.S.C. § 1396d(a)(1)-(5), (17) and (21)]." 42 U.S.C. § 1396a(a)(10)(A). Section 1396d(a)(5)(A) requires reimbursement for "physicians' services furnished by a physician." The HHS rule implementing the Medicaid Act defines "physician services" to include services provided (a) within the scope of practice of medicine or osteopathy as defined by State law; **and** (b) **by or under the personal supervision** of an individual licensed under State law to practice medicine or osteopathy." 42 C.F.R. § 440.50 (emphasis added). This prohibits Illinois from denying Medicaid reimbursement to counselors acting under the supervision of a physician like Dr. Mitrione.

Other provisions of the Medicaid Act reinforce this federal intent to reimburse these physician-supervised services. For example, Section 1396d states that "For purposes of this title [the Medicaid Act] – No service (**including counseling**) shall be excluded from the definition of 'medical assistance' solely because it is provided as a treatment service for alcoholism or drug dependency." 42 U.S.C. § 1396d(a) (emphasis added). The term "counseling", in fact, is used throughout federal regulations to include reimbursable, non-physician services. *See, e.g.*, 42 C.F.R. § 410.130 (reimbursing for "counseling services provided by a registered dietitian or

nutrition professional"). Federal law plainly covers non-physician counseling services.

Indeed, the Medicaid Act specifically authorizes payment to an employer of a physician, 42 U.S.C. §1396a(a)(32)(A), and the federal Medicaid rule requires states to allow payments for physician services to be made to a clinic or group practice. 42 C.F.R. §447.10(c), (g)(3). In §4708(a) of the Omnibus Budget Reconciliation Act (OBRA) of 1990, Congress further authorized substitute billing under Medicaid for services furnished "by, or **incident to** the services" of another physician. 42 U.S.C. §1396a(a)(32)(C) (emphasis added). The Joint Explanatory Statement of the Committee on Conference for OBRA of 1990 explains that a prior prohibition on states from issuing Medicaid payments to anyone other than a provider, employer or facility was amended to allow Medicaid billing for incident to services of a substitute physician "to follow Medicare policy." Joint Explanatory Statement of the Committee on Conference for OBRA of 1990, P.L. 101-508. *See also* 42 C.F.R. § 410.26 (applying Medicare funding to services furnished by auxiliary personnel "incident to" a physician's services). HHS makes clear in its preamble to this rule that it does not restrict the type of auxiliary personnel who may perform a given "incident to" service: "We deliberately used the term any individual so that the physician (or other practitioner), **under his or her discretion and license**, may use the service of **anyone** ranging from another physician to a medical assistant." 66 Fed. Reg. 55268 (Nov. 1, 2001) (emphasis added).

Federal courts are vigilant in adhering to federal preemption in the Medicaid context. The Second Circuit, for example, invoked federal preemption to allow Section 1983 recourse for a psychiatrist against the New York Medicaid Program based on its refusal to approve Medicaid reimbursement for services provided by his employees under his supervision. *Yapalater v. Bates*,

494 F. Supp. 1349 (S.D.N.Y. 1980), *aff'd*, 644 F.2d 131 (2d Cir. 1981), *cert. denied*, 455 U.S. 908, 102 S. Ct. 1255 (1982). The court determined that the federal Medicaid rule at 42 C.F.R. § 440.50 defining "physician services" unquestionably included supervisees other than the physician, just as the same rule must apply here to vacate defendants' convictions. *Id.* at 1363-64. The court allowed that the New York Medicaid program could condition payment for services on compliance with the scope of the practice of medicine as defined by state law, but defendants' billed counseling here easily falls within the scope of lawful medical practice. *See id.* at 1364. Only if the services fall outside of the definition of the practice of medicine does the claim for reimbursement fail. *See id.* at 1363-65. Likewise, the Third Circuit invalidated a Pennsylvania restriction on Medicaid reimbursement due to federal preemption. *See Pennsylvania Med. Soc'y*, *supra*, 29 F.3d at 891.

Even a prominent state court has agreed that the federal Medicaid rules preempt its own state rules for the program. An appellate state court in California recently invalidated its own Medicaid rule in favor of the federal rule. *Olszewski v. ScrippsHealth*, 88 Cal. App. 4th 1268 (Cal. App. 4th Dist.), *appeal granted*, 30 P.3d 580 (Cal. 2001). A California statute permitted a caregiver in the Medicaid (Medi-Cal) program to collect on a bill by imposing a lien against a personal injury recovery by the patient from a third party. 88 Cal. App. 4th at 1277-78. Relying on a decision by federal court in Central Illinois, the court observed that federal law has been interpreted to "bar hospitals that have been paid by Medicare from placing liens on settlements or judgments obtained by patients from third parties." *Id.* at 1276 n.5 (citing, *inter alia*, *Holle v. Moline Public Hosp.*, 598 F. Supp. 1017, 1021 (C.D. Ill.1984)). The California court observed

that "[a]s a condition of receipt of Medicaid funds, the Medi-Cal program must comply with federal laws and regulations." 88 Cal. App. 4th at 1276. There, as here, the complaint "contained an imbedded claim for declaratory relief as to the validity of" the state law, and "the judgment, insofar as it encompasses the declaration that [the state law] is valid and not preempted by federal law, was erroneous and to that extent cannot stand." *Id.* at 1295. Likewise, defendants' convictions here contain "an imbedded claim" that Illinois can bar reimbursement for counseling in conflict with federal law, and "cannot stand."

Supreme Court precedents invalidating state regulations that crimp on federal mandates are far too many to recite here, and the principle they represent is undisputed. In *Philpott v. Essex County Welfare Board*, 409 U. S. 413 (1973), the Court held that a federal mandate bars a State from attempting to attach Social Security benefits as reimbursement for state welfare assistance payments. In *Rose v. Arkansas State Police*, 479 U. S. 1 (1986), the Court emphasized that "[t]here can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress." *Id.* at 3. In a *per curiam* decision, the *Rose* Court invalidated a state law limiting state benefits, which was in conflict with the federal mandate, because it "is repugnant to the Supremacy Clause." *Id.* at 4. Likewise, the Court of Appeals for the Sixth Circuit enjoined Ohio's practice of reducing benefits aid to families with dependent children because it conflicted with regulations promulgated under the Social Security Act, 42 U.S.C. § 401 *et seq.* *See also Snider v. Creasy*, 728 F.2d 369 (6th Cir. 1984). The Seventh Circuit has also construed ambiguous state regulations to conform to federal Medicaid requirements, an approach worth revisiting here with respect to Sections 140.411 and 140.413 of the Illinois Administrative Code. *See Evanston Hosp. v. Hauck* 1 F.3d 540 (7th Cir.1993), *cert.*

denied, 510 U.S. 1091 (1994).

Interpreting Illinois regulations to deny Medicaid funding for defendants' supervised counseling to the poor is in conflict with applicable federal law and cannot survive application of the Supremacy Clause. "[T]his amounts to a 'conflict' under the Supremacy Clause – a conflict that the State cannot win." *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (*per curiam*). *Contra United States v. Mitrione*, 160 F. Supp. 2d 993, 995 (C.D. Ill. 2001). The State's attempt to restrict Medicaid funding, if in fact it has done so, must yield to the federal mandate. Such preemption also advances the purpose of the Medicaid program, which is to fund mental health services for the homeless and other needy in ways that go far beyond the availability of physicians themselves. Mental health services to the poor in metropolitan areas would lose their effectiveness if such counseling were defunded and defendants' convictions not reversed.

Illinois cannot terminate Medicaid funding for non-physician counseling, just as it cannot terminate Medicaid funding for other types of medical services mandated by applicable federal law. Illinois can opt out of the federally funded Medicaid program entirely. But because it opted in, it must fund medical services to the poor as broadly as the federal law requires.

The Legal Uncertainty Requires Vacating the Conviction.

It is axiomatic that a criminal conviction is unjustified if it relies on a vague, ambiguous, or conflicting legal requirement. As the Seventh Circuit recently emphasized in *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000), **criminal penalties require a "high level of clarity**." *Id.* at 908 (emphasis added). A year earlier, the Seventh Circuit also held:

> The vagueness doctrine holds that a person cannot be held liable for conduct he could not reasonably have been expected to know was a violation of law. It is well-settled that, as a

> matter of due process, a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions is void for vagueness.

United States v. Brierton, 165 F.3d 1133, 1138-39 (7th Cir. 1999) (as amended).

The Supreme Court has emphasized this same principle on numerous occasions. In *United States v. Harriss*, 347 U.S. 612 (1954), the Court held that:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Id. at 617 (citations omitted).

Here, defendants complied with the letter and spirit of federal law governing the Medicaid program, and yet were convicted based on an unprecedented application of a Illinois regulation in conflict with federal law. Even if the Illinois regulation is upheld to deny reimbursement for these counseling services to the poor, defendants' convictions cannot be sustained amid the uncertainty and vagueness created by the federal-state conflict. Defendants' convictions run afoul of the Seventh Circuit holdings in *Gresham* and *Brierton*, and the Supreme Court precedents following *Harriss.*

This Court, in rejecting defendants' arguments that they complied with federal law in submitting their claims, held that "[s]uch a contention would go to the Defendants' intent and be relevant. This argument is not a basis for dismissing or striking parts of the indictment, however." *United States v. Mitrione*, 160 F. Supp. 2d at 995. But compliance with federal law is an absolute legal defense to prosecution, not an issue for a jury to weigh against conflicting state law. The uncertainty created by the conflict between federal and state law creates a legal issue for

the judge, not the jury, to decide. It was reversible error to present facts connected with this legal uncertainty to the jury for it to attempt to sort out.

The Medicaid program has been recognized to constitute one of the most complex and intractable regulatory systems in our country. *See Herweg v. Ray*, 455 U.S. 265, 279 (1982) (Burger, J., dissenting) (observing that "the Medicaid program is a morass of bureaucratic complexity"). Moreover, Medicaid generally provides the lowest level of reimbursement, and requires treatment of the most ill and difficult patients. Physicians who participate in the Medicaid program are to be encouraged, not imprisoned based on a game of "gotcha". Conviction of Medicaid physicians based on regulatory gamesmanship is both unjust to defendants and catastrophic to the needy patients, because it drives small practitioners out of Medicaid. Courts are increasingly dismissing these types of fraud charges against physicians, and dismissal is appropriate here. *See, e.g.*, *State v. Vainio*, 2001 MT 220, 35 P.3d 948 (Mont. 2001) (reversing a Medicaid conviction because it was based on an improperly promulgated state regulation); *Siddiqi*, *supra*, 98 F.3d at 1427 ("We nevertheless vacate his conviction and sentence. The government has, throughout this prosecution, adopted shifting theories of guilt.").

Defendants' Other Convictions Must Also be Vacated.

As in the case of Dr. Siddiqi, cited *supra*, the government here admits that "the foundation for many of the fraud charges ... was that the defendants submitted false claims to IDPA suggesting that Dr. Mitrione had provided services to certain patients on certain dates knowing that the services, if any, were provided by someone other than Mitrione." Govt. Consolid. Resp. to Defs. Post-Trial Motions at 8. The "Manner and Means of the Conspiracy," set forth on pages

3 through 4 of the indictment, consist almost entirely of charges relating to defendants' billing for counseling services provided under their supervision. *See* Indictment ¶ 7 ("Billing for Services of Robert T. Mitrione Rendered by Others"); *id.* ¶ 6 ("Billing of Services Performed by Unqualified Therapist"). The most damaging testimony at trial relied on the incorrect premise that defendants' billing for counseling by others was illegal. Once these charges are dismissed and the testimony stricken, the remaining convictions must likewise be dismissed, as in the *Siddiqi* decision. "He was convicted on a then newly-minted, now-abandoned, theory that he defrauded the government because he had not arranged coverage .... It takes no great flash of genius to conclude that something is wrong somewhere." *Siddiqi*, 98 F.3d at 1438.

Four of the counts here (I, XII, XIII, XIV) relate to the allegedly inadequate qualifications of the therapist Walter Woods, but federal law requires the reimbursement under Medicare for such counseling, as demonstrated above. There is no law requiring a college degree or license by the counselor, nor is there an affirmative duty for defendants to disclose the academic credentials of a counselor to patients. Defendants cannot be guilty of fraud for something they did not falsely represent. *See, e.g.*, *United States ex. rel. Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001) ("[A] claim under the [False Claims] Act is legally false only where a party certifies compliance with a statute or regulation as a condition to governmental payment."). The government opposed defendants' motion to dismiss these counts by arguing that "[t]he record is replete with examples of these claims" of Dr. Mitrione billing for services provided under his supervision. Indeed, the record is replete with these prosecutorial claims, which falsely misled the jury to think defendants engaged in a pattern of illegal conduct, when in fact this practice is fully legal. The government does not and cannot cite any law prohibiting the defendants' billing for Walter Woods as a

counselor to provide the services that federal law mandates under the Medicaid program. These four counts must be dismissed, and defendants are entitled to reimbursement for those services.

The remaining counts relate to isolated instances of missing documentation that lack any statistical significance. Prosecuting a physician for a missing document amid tens of thousands of patient transactions cannot support a finding "beyond reasonable doubt" of the *mens rea* necessary for criminal fraud. For example, Dr. Mitrione was convicted of billing for services to B.D. on July 13, 1995, to T.B. on July 18, 1995, and to B.D. on October 13, 1997, due to inadequate documentation in the file for those claims. In a medical (or legal) practice entailing thousands of bills, it is inevitable that documentation be missing for a small fraction of the claims. Proof of a pattern of intentional wrongdoing is required, at a minimum, and the dismissal of the "substitute billing" counts eliminates any such evidence. A few claims for which documentation is missing, even if dressed up by isolated hearsay, simply cannot support the requisite *mens rea*.

The Seventh Circuit has implicitly held, even in the less demanding context of an audit and civil penalties, that the sample size for inappropriate billing must be random and significant. *See Illinois Physicians Union*, *supra*. There the Court affirmed a recoupment claim of $18,503.30 based on "[a]uditing a sample of 353 records **randomly selected** from a total of 1,302 records for the audit period." 675 F.2d at 152 (emphasis added). The Court affirmed a recoupment there in reliance on the 27% representation of the random sample. Here, in sharp contrast, defendants were convicted using unrepresentative, individual billings. The sample here consisted of far less than 1% of defendants' billings, and it was not random. No criminal intent can be found in such an unrepresentative sample, particularly when highly prejudicial evidence is presented concerning

defendants’ lawful “substitute billing.”

CONCLUSION

AAPS respectfully requests the dismissal of defendants' convictions.

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Respectfully submitted,

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