UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

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

MEMORANDUM OF THE PEORIA MEDICAL SOCIETY IN SUPPORT OF DEFENDANTS' MOTION FOR A NEW TRIAL

The Peoria Medical Society, founded in 1848, submits this memorandum in support of defendants' motion for a new trial. Numerous recent decisions require that defendants' convictions be set aside. *See, e.g.*, *United States v. Whiteside*, 2002 U.S. App. LEXIS 4610, *18 - *19 (11th Cir. Mar. 22, 2002) ("The government cannot meet its burden in this case because, despite its contention to the contrary, no Medicare regulation, administrative ruling, or judicial decision exists that clearly" proscribes defendants' conduct.); *United States v. Ward*, 2001 U.S. Dist. LEXIS 15897 (E.D. Pa. Sept. 5, 2001) (dismissing an indictment by "prohibit[ing] application of ... informal interpretations against" defendant).[1]

The indictment and convictions here fail to cite violation of any binding federal rule. Accordingly, the convictions directly contravene the recent Supreme Court teaching in *Christensen v. Harris County*, 529 U.S. 576 (2000), and over 150 decisions that have recently relied on it. Defendants administered much-needed services to the poor under the federally

[1]The Association of American Physicians & Surgeons, Inc. ("AAPS"), a national physicians organization founded in 1943, joins this memorandum and is also filing a separate memorandum on a related point.

funded Medicaid program, in full compliance with all applicable federal laws and formal regulations. It is contrary to *Christensen* and its progeny to sustain defendants' convictions for conduct that did not violate any clear and binding rules.

Moreover, the prosecution here used shifting theories of guilt in the manner invalidated in *Siddiqi v. United States*, 98 F.3d 1427 (2d Cir. 1996). There, as here, the prosecution pursued defendants with various theories *on the same claims* that (1) services should have been rendered by defendants but were not, (2) services were provided but were not coded properly, and (3) services were unnecessary. Even more egregious than in *Siddiqi*, though, was the government's reliance here on a chart declaring that defendants had billed for services never rendered in an incredible 28% of cases. Govt. Exhs. 20A & B. This new, inflammatory theory was never mentioned in the indictment, and was sprung on defendants near the end of trial. Defendants' recently filed audit demonstrates that these Exhibits lack any basis in fact. As in *Siddiqi*, the convictions here should be dismissed.

These convictions cause a manifest injustice not only for defendants, but also for thousands of their needy patients. This prosecution eliminated the only Board-certified psychiatrist, specialized in addiction counseling, willing to treat Medicaid patients in Springfield. Hundreds of needy and mentally ill patients have been left stranded without their doctor. Sadly, this appears to be part of a prosecutorial pattern to terminate Medicaid payments. The recent prosecution here of Dr. Rinaldi eliminated one of the few orthodontists in all of Illinois willing to accept Medicaid, leaving poor families stranded with braces on their children's teeth. At least two more physicians willing to accept the meager Medicaid reimbursements are apparently now under investigation. These frequent prosecutions of Medicaid caregivers have the same tragic effect as

prosecuting and eliminating soup kitchens.

1. The *Christensen and Ward* Decisions Require Vacatur of the Convictions.

The Supreme Court held in *Christensen* that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all … lack the force of law." 529 U.S. at 587. The government's entire case, with the exception of the substitute billing issue addressed in the *amicus curiae* brief filed separately by AAPS, relies on testimony lacking the force of law. Nothing in the government's indictment or memoranda cite any specific federal health requirement that defendants supposedly violated. Convictions cannot be properly based on speculation about federal requirements that were not formally promulgated. The *Christensen* precedent applies with even greater force in the criminal context, where defendants have fundamental rights not to be imprisoned based merely on agency or carrier interpretations rather than formal legal requirements. Convictions cannot rely on testimony by government witnesses about their interpretations of the law, which is what happened here in connection with the qualifications of the therapist Walt Wood and other counts.

Christensen is becoming one of the most frequently cited precedents, even though it was decided less than two years ago. It has already been favorably cited by over 150 lower court decisions. In *United States v. Ward*, *supra*, a court applied the *Christensen* holding to dismiss criminal charges analogous to those here. There, as here, the government prosecuted defendants based on agency interpretations of laws, rather than laws themselves. Although defendant's conduct in *Ward* allegedly caused several deaths, the maximum sentence for the crime was actually less than what the government seeks here. Even with the smaller penalties, however, the court dismissed the indictment based on the logic of *Christensen* and the need for fair warning to

defendants.

"It is well known that 'no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" *Ward*, 2001 U.S. Dist. LEXIS 15897, *12 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)). The *Ward* court then detailed the rigorous threshold test necessary for criminalizing conduct in the regulatory arena:

> Especially where a regulation subjects a private party to criminal sanctions, 'a regulation cannot be construed to mean what an agency intended but did not adequately express.' *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). As *Bethlehem Steel* made clear, 'if the language is faulty, the Secretary has the means and obligation to amend.'

Ward, 2001 U.S. Dist. LEXIS 15897, *18 - *19 (quoting *Bethlehem Steel Corp. v. Occupational Safety and Health Review Comm'n*, 573 F.2d 157, 161 (3d Cir. 1978)).

The *Ward* Court cited a legion of precedents requiring dismissal of the indictment, which likewise require reversal of the convictions here. "[I]t is our view that courts should not defer to an agency's informal interpretation of an ambiguous statute or regulation in a criminal case." *Ward*, 2001 U.S. Dist. LEXIS 15897, *22. *See United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) ("In the criminal context, courts have traditionally required greater clarity in draftsmanship than in civil contexts."); *see also United States v. Apex Oil Co., Inc.*, 132 F.3d 1287 (9th Cir. 1997) (affirming dismissal of an indictment turning on the meaning of regulations, because the pertinent regulations did not clearly forbid the conduct), *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (when considering the imposition of criminal sanctions, "a court will not be persuaded by cases urging broad interpretation of a

regulation in the civil-penalty context.").

Courts within the Seventh Circuit are embracing the clarity of the new *Christensen* standard as rapidly as the other circuits. In *Hartman v. Lisle Park Dist.*, 158 F. Supp. 2d 869 (N.D. Ill. 2001), the Court rejected the argument that an agency interpretation should be binding. The Court expressly quoted and relied on the *Christensen* doctrine that "'interpretations contained in policy statements, agency manuals, and enforcement guidelines, all ... lack the force of law'" – a principle that applies with even greater force to the testimony admitted here. *Id.* at 876 (quoting *Christensen*, 529 U.S. at 587). In the less demanding civil context of the *Hartman* case, the Court applied *Christensen* to reject the legal interpretation of the esteemed Chairman of the Federal Trade Commission. Likewise, testimony by government and carrier officials in this case about legal requirements cannot form the basis for conviction.

The Seventh Circuit itself has repeatedly emphasized that a clear and binding legal rule is a necessary prerequisite to criminal conviction. *See Gresham v. Peterson*, 225 F.3d 899, 908 (7th Cir. 2000) (criminal penalties require a "high level of clarity"); *United States v. Brierton*, 165 F.3d 1133, 1138-39 (7th Cir. 1999) (as amended) ("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."). The necessary clarity cannot consist of testimony at trial, but must be in the statute or formal regulation itself.

Here, defendants were convicted on numerous counts by allowing testimony about the

legality of using Walt Woods, with his qualifications, to provide services under Medicaid. Under *Christensen*, it was reversible error to allow interpretations and testimony by a Medicare carrier director (Richard Baer) and others to substitute for formally promulgated regulations and statutes. Nor can this defect be salvaged by shifting the central the theory of guilt from an alleged Medicaid billing violation to an alleged medically unnecessary service. *See Siddiqi*, 98 F.3d at 1427 ("We nevertheless vacate his conviction and sentence. The government has, throughout this prosecution, adopted shifting theories of guilt."). The prosecution relied heavily here on its theory that the therapist Woods was unqualified. This lacked any clear legal basis and greatly prejudiced defendants before the jury, including emotionally charged patient testimony. It was not criminal to utilize a therapist of Walt Woods' qualifications, and reversal of the convictions is required under *Christensen*.

Defendants complied fully with federal law, including the substitute billing issue that the *Siddiqi* Court resolved in favor of the defense. *Siddiqi*, 98 F.3d at 1438 ("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."). 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 should not be submitted to the jury, for it to try to sort out. The Medicaid program is perhaps 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, entailing treatment of the most ill and

difficult patients. Needy patients should not lose their Medicaid physicians based on administrative gamesmanship. *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).

2. *Whiteside* Also Requires Dismissal of Defendants' Convictions.

On March 22nd, a federal appellate court reversed Medicare convictions by holding that "where the truth or falsity of a statement centers on an interpretive question of law, the government bears the burden of proving beyond a reasonable doubt that the defendant's statement is not true under a reasonable interpretation of the law." *Whiteside*, *supra*, 2002 U.S. App. LEXIS at *17 - *18. There, as here, the government claimed that defendants' interpretations of Medicaid rules was unreasonable and even criminal. The Court emphasized that it is impossible for the government to meet its burden where, as here, "no Medicare regulation, administrative ruling, or judicial decision exists that clearly" proscribes the conduct at issue. *Id.* at *19. Defendants' use of assistants, including the therapist Walt Woods, is ordinary medical practice and is not prohibited by any "Medicare regulation, administrative ruling, or judicial decision." *Id. See also United States v. Migliaccio, 34 F.3d 1517, 1525 (10th Cir. 1994)* (government bears the burden to negate any reasonable interpretations that would make support defendant's conduct); *United States v. Johnson, 937 F.2d 392, 399 (8th Cir. 1991)* (one cannot be guilty of a false statement beyond a reasonable doubt when his statement is a reasonable construction of applicable law); *United States v. Race, 632 F.2d 1114, 1120 (4th Cir. 1980)* (same); *United States v. Anderson, 579 F.2d 455, 460 (8th Cir. 1978)* (same); *see also United States v. Calhoon, 97 F.3d 518, 526 (11th Cir. 1996)* (even though where Medicare regulations

were clear, the government failed to establish as a matter of fact that the fees claimed were actually in excess of what was clearly allowed under the regulations, and thus, had "failed to sustain its burden to prove the claim false").

This recent *Whiteside* decision relied on a leading Seventh Circuit precedent. *See United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991). There the Court reversed a conviction for a willful false statement because "usual sources of authority are silent" on the statement at issue. *Id.* at 1132. "We do not remand Harris' case for retrial, however, because Harris had no fair warning that her conduct might subject her to criminal tax liability. Neither the tax code, the Treasury Regulations, or Supreme Court or appellate cases provide a clear answer to whether Harris owed any taxes or not." *Id.* at 1128. *See also United States v. Mallas*, 762 F.2d 361, 363 (4th Cir. 1985) (reversing convictions because the government failed to provide a reasonable notice of what conduct is subject to criminal punishment); *id.* at 361 (emphasizing that "criminal proceedings may not be used to define and punish an alleged failure to conform to [legal] standards"). The indictment and convictions here lack the requisite "clear rule of law" held to be necessary in *Harris*. 942 F.2d at 1131.

CONCLUSION

The Peoria Medical Society respectfully requests the reversal of defendants' convictions.

April __, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this Memorandum of the Peoria Medical Society in support of Defendants' Motion for a New Trial were sent by, postage prepaid, to the following on April __, 2002:

Patrick Hansen
U.S. Attorney's Office
Central District of Illinois
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