Nos. 02-4222 and 02-4224
Criminal

In The United States Court of Appeals
For The Seventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ROBERT T. MITRIONE, M.D. AND
MARLA A. DEVORE

Defendants-Appellants

Appeal from the United States District Court for the
Central District of Illinois, Judge Jeanne E. Scott, No. 00-30021

Brief of *Amicus Curiae*

Association of American Physicians & Surgeons, Inc. (AAPS)

Filed in Support of Defendants-Appellants
Robert T. Mitrione and Marla A. DeVore
In Favor of Reversal

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Appellate Court No: 02-4222 and 02-4224

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Andrew L. Schlafly, Attorney at Law

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Concise Statement of Identity of *Amicus Curiae*, Interest in the Case, and Source of Authority to File

The Association of American Physicians & Surgeons, Inc. ("AAPS"), a nationwide nonprofit physicians' organization founded in 1943, respectfully submits this memorandum in support of Defendants-Appellants. AAPS has many members in the jurisdiction of this Court with a direct interest in this case. Their willingness to continue participating in the Medicaid program is jeopardized by operation of *stare decisis*. Defendant-Appellant Dr. Mitrione was sentenced to 23 months in jail based on a conviction of only $75.25 in disputed Medicaid charges. He was prosecuted and convicted while compliant with federal rules, because state guidelines were purportedly otherwise. Worse, the government obtained its conviction through testimony that the court later found to be "false to a dramatic degree." If affirmed, many AAPS members could leave the Medicaid program rather than work under such risks for little pay.

AAPS also has a unique perspective that can assist this Court beyond the ability of the parties. "[T]he Medicaid program is a morass of bureaucratic complexity," and we are all too familiar with its Byzantine confusion. *Herweg v. Ray*, 455 U.S. 265, 279 (1982) (Burger, J., dissenting). Courts have previously found AAPS briefs to be helpful in clarifying billing issues. *See, e.g.*, *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997)

(reversing, on the strength of AAPS' *amicus curiae* brief, many of the convictions related to Medicare fraud).

Specifically, AAPS opposes the growing use of prosecutorial "gotcha" in the Central District of Illinois. This case does not stand alone -- in another recent case there, Medicaid orthodontist Dr. Sergius Rinaldi was jailed for months before trial and then induced to plead guilty to a billing practice that was actually legal. Yet the district court there refused to reopen the plea or address the lack of any crime. *United States v. Rinaldi*, 2003 U.S. Dist. LEXIS 2763, *7 & n.2 (C.D. Ill. Feb. 27, 2003) (including even a criticism of advocacy for clear rules by defense counsel); *see also In re Grand Jury Proceedings*, 280 F.3d 1103 (7th Cir. 2002) (affirming the pre-trial imprisonment *and* daily fines of Dr. Rinaldi). Numerous Medicaid providers have been systematically eliminated in Central Illinois based on testimony by the same Illinois Department of Public Aid ("I.D.P.A.") that submitted false evidence here, and the indictments continue. But billing disputes over only $75.25 are not the stuff of real fraud, and AAPS' members have a direct interest in establishing meaningful limits on these prosecutions.

AAPS has filed an accompanying motion for leave to submit this brief.

Argument

"Her trial testimony was false. Her testimony that the 1,178 undocumented claims did not include claims for services rendered at a hospital **was false to a dramatic degree**." Vol. 21, at 7 (Aug. 23, 2002) (emphasis added).[1] So found the court below with respect to the prosecutor's key witness and evidence of intent to defraud the government.

The court vacated nearly all of defendants' convictions, yet sustained a mail fraud count concerning a merely $25 claim (Count 12) and a false claims count entailing only $50.25 (Count 14) – and then proceeded to impose the harsh sentences of 23 and 15 months in jail for these counts. But mail fraud requires a jury finding of specific intent to defraud, beyond reasonable doubt, and the false claims count requires similar scienter. The foregoing testimony was the primary evidence of *mens rea*, and was found by the court to be utterly false. These counts cannot be sustained now that the primary proof of fraudulent intent has been stricken. The remaining evidence on this $75.25 is more consistent with mistake than fraud, and thus cannot establish guilt beyond a reasonable doubt. *See United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971) (quoted *infra* p. 9). Moreover, the

[1] The references to the transcript are indicated by the volume and page numbers, and the date.

taint from this false testimony on the issue of intent requires a new trial even if the remaining evidence supported conviction. *See United States v. Catton*, 89 F.3d 387, 392 (7th Cir. 1996).

In addition, the government failed to prove an actual false representation on these two disputed bills, a necessary element of both mail fraud and false claims. Instead, the government relied on the opinion of its expert to claim that defendants used a therapist who was unqualified under Illinois Medicaid policy, when in fact the published federal regulations expressly authorize defendants to use the therapist of their choosing. Defendants indisputably provided necessary medical care on both the $50.25 and $25 claims, and submitted a bill that accurately represented his compliance with federal law. It is simply not a criminal false statement to accurately certify compliance with federal law. Moreover, the legal requirements in this area are so vague and confused that incarceration is unjustified.

Finally, the harsh sentencing enhancements are utterly devoid of logic, because patients were not harmed by defendants' alleged overcharging of Medicaid. There was no exploitation of patients in not charging them. The judge below impermissibly injected her own personal disapproval of defendants' medical practice – without any basis in Illinois law – to

complain bitterly that defendants' therapist's "credentials were less than a cab driver." Vol. 24, at 153 (Oct. 31, 2002). Offended at credentials that she personally deemed inadequate, the judge below committed reversible error in imposing a vulnerable victim enhancement of two points on both defendants and an abuse of trust enhancement of two points on Dr. Mitrione. Defendants' treatment of the patients was entirely lawful. The patients were not defrauded or victimized in any way by defendants' alleged overcharging of Medicaid, and these enhancements must be reversed.

I. The Court Below Erred in Inferring Fraudulent Intent Rather than Mere Mistake.

The remaining charges have essential scienter elements no longer satisfied in the absence of the stricken testimony about the alleged overcharges. A violation of a billing guideline with respect to $25 is not *de facto* mail fraud (Count 12). Nor is a claim deemed to be false in the amount of $50.25 an automatic violation of 18 U.S.C. § 287 (Count 14). The former requires proof of fraudulent intent; the latter, knowledge of falsity. The court implicitly and erroneously eliminated the government's burden of proof on these key elements in affirming these counts after invalidating the false testimony.

This Court has emphasized, in reversing an analogous conviction, "the importance of the government's proving the defendant's knowledge that the claim is false." *United States v. Catton*, 89 F.3d at 392. In *Catton*, also prosecuted in the Central District of Illinois, this Court reversed the judgment even though "there was enough evidence to convict" the defendant. *Id.* Judge Posner explained as follows:

> [T]he evidence was not so one-sided that the false closing argument and false expert testimony can be disregarded. These errors may well have spelled the difference between conviction and acquittal. Without meaning to condone mixed metaphors, we cannot deny the aptness of the statement in the defendant's brief that "The Prosecutor drove a prosecutorial meat axe into the Appellant's day in court." The defendant is entitled to a new trial.

Id.

Nor can the "false closing argument and false expert testimony ... be disregarded" here. *Id.* The prosecution below repeatedly relied on the false testimony to show the requisite intent. "When the word 'knowingly' is used, knowingly defrauded, it means that the Defendants realized what they were doing and were aware of the nature of the conduct and **did not act through ignorance, mistake or accident**. Knowledge may be proven by the

Defendants' conduct **and all the facts and circumstances surrounding the case**." Vol. 39, at 2584-85 (Sept. 12, 2001) (emphasis added). The prosecutor closed by emphasizing the testimony of state official Deanne Statler to show there was fraudulent intent, not mistake: "These [overbillings] aren't mistakes. These aren't accidents. They are not isolated instances. The Defendants knowingly and intentionally defrauded the Illinois I.D.P.A. ... Deanne Statler, **you heard from her regarding the percentage, the fact that three times more bills were sent out when no service was provided than otherwise**." Vol. 39, at 2562, 2589 (Sept. 12, 2001) (emphasis added). Post-verdict, the court below agreed that this testimony was crucial to the element of intent: "She [Deanne Statler] testified to an actual differential of 28 percent [in overcharges] to 9 percent [in undercharges]. ... Th[is] evidence … goes to the issue of Defendants' intent," and the court accordingly overturned most of the convictions. Vol. 21, at 9, 17 (Aug. 23, 2002). The actual ratio of overcharges to undercharges was no worse than 1:1, entirely consistent with mistake. *Id.* at 15.

The false testimony here was even more egregious and prejudicial than in *Catton*, where this Court ordered a new trial. There the government claimed that defendant violated 18 U.S.C. § 287, the basis for Count 14 here,

for seeking government reimbursement for a drought-induced crop failure. 89 F.3d at 388. It presented expert testimony that a neighboring farmer did not suffer comparable losses, and thus the drought could not have been the cause. *Id.* at 389. As here, the testimony gave an incomplete picture of reality, because some of the neighbor's crops actually did suffer comparable drought-induced losses, and the misleading of the jury on that point sufficed to force a new trial. *Id.* at 390-92. Here, the false testimony was more prejudicial because it directly applied the conduct of defendants and their alleged knowledge and intent, and the court below itself found it to be "false to a dramatic degree" that "goes to the issue of Defendants' intent." Vol. 21, at 17 (Aug. 23, 2002). The *Catton* precedent plainly requires a new trial here as well.

Though the court below struck the government's evidence of intent, it inexplicably sustained charges requiring such proof. In sustaining Count 12 for mail fraud, it never addressed its essential elements of a fraudulent "scheme [and] intent to defraud." *United States v. Silva*, 781 F.2d 106, 108 (7th Cir. 1986) (citing *United States v. Cowart*, 595 F.2d 1023, 1031 n.10 (5th Cir. 1979)). *See also United States v. Gordon*, 780 F.2d 1165, 1170 (5th Cir. 1986) (requiring a "specific intent to defraud"). The court sustained Count 12 simply by assuming the existence of fraudulent intent based on its

own determination – rather than an unbiased jury finding -- that the defendants' claim was improper. Vol. 21, at 18-20 (Aug. 23, 2002). The court found that defendants were not in the office for the services at issue on the remaining counts, and that alcohol and drug counselor Walter Woods provided therapy beyond his specialty. *Id.* at 18. But neither of those findings is adequate to prove fraudulent intent, and defendants had a right to an unbiased jury determination on that essential point. Instead, the court shifted this burden of proof to defendants to prove the negative: "There was no evidence on these counts of the confusion of billing." *Id.* at 19. But the burden is on the government to prove fraudulent intent, not on the defendants to disprove it.

It was reversible error for the court to equate what it deemed to be an improper bill with the requisite criminal intent. Medicaid rejects millions of claims each month as improper, the vast majority of which lack any fraudulent intent. "[W]here the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt." *United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971). Once the false testimony about an alleged fraudulent pattern is stricken, the remaining $75.25 in disputed charges are no more indicative of a fraud than mistake or

honest disagreement about reimbursement. At a minimum, defendants have a constitutional right to an unbiased jury determination on *mens rea* here. The court cannot deprive defendants of their constitutional right to a jury simply by making its own finding of intent. *See United States v. Harris*, 942 F.2d 1125, 1132 n.6 (7th Cir. 1991) (holding that the reasonableness of defendants' interpretation is an issue for the jury, not the judge, to decide).

Merely two claims are plainly insufficient as a sample size to represent defendants' practice. This Court 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 v. Miller*, 675 F.2d 151 (7th Cir. 1982). 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." *Id.* at 152 (emphasis added). The Court affirmed a recoupment there in reliance on the large 27% representation of the random sample. Here, in sharp contrast, defendants were convicted based on merely two disputed claims. The sample here consisted of far less than 0.1% of defendants' billings, and it was not random. No criminal intent can be found in such an unrepresentative sample.

Finally, the jurors almost certainly reached the remaining counts of 12 and 14 after they falsely convicted defendants on the primary counts. A greater prejudicial effect is impossible to imagine. Had the prosecutor declared defendants to have been convicted felons in his closing statement, which would obviously require a mistrial, the prejudice would not have been as great. It is not a fair trial if a prosecutor can falsely persuade the jury to convict on the major charges (1, 2, 3, 4, 5, 6, 9, 10 and 11 for Dr. Mitrione here), and allow the convictions on later, relatively minor counts to stand.

Defendants have a constitutional right to a jury trial without being falsely labeled as convicted felons, and without having their jury be falsely led to that conclusion. *See Turnbill v. Bordenkircher*, 634 F.2d 336 (6th Cir. 1980) (ordering a new trial due to prejudice from jury perception of felony conviction, and despite a lack of defense objection). Even if the judge below feels that defendants defrauded the government on these two small bills, they are still entitled to an untainted jury determination on that issue.

II. Defendants Did Not Make False Representations, Essential Elements of the Mail Fraud and False Claims Counts.

The gravamen of the remaining counts in mail fraud and false claims is that defendants billed for a therapist, Walter Woods, who allegedly had insufficient credentials under Medicaid policies. The government did not, and

cannot, cite any actual false representation by defendants in connection with this allegation. In fact, federal regulations expressly empower the physician to use his discretion in determining whether assistants are adequately qualified to treat patients:

> We have not further clarified who may serve as auxiliary personnel for a particular incident to service because the scope of practice of the auxiliary personnel and the supervising physician (or other practitioner) is determined by State law. 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. In addition, it is impossible to exhaustively list all incident to services and those specific auxiliary personnel who may perform each service.

66 Fed. Reg. 55268 (Nov. 1, 2001) (emphasis added). Dr. Mitrione, not a judge or jury, determines what credentials are adequate for assistants like Walter Woods. *See also* 42 C.F.R. § 410.26 (applying Medicare funding to services furnished by auxiliary personnel "incident to" a physician's services); *Yapalater v. Bates*, 494 F. Supp. 1349, 1363-64 (S.D.N.Y. 1980), *aff'd*, 644 F.2d 131 (2d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982) (discussed *infra* p. 14).

Without an actual false representation, the remaining counts must be reversed. *See, e.g.*, *United States v. Gee*, 226 F.3d 885, 891 (7th Cir. 2000) ("In 1999, the Supreme Court ruled that a 'scheme to defraud' under the wire and mail fraud statutes must include the element of a material falsehood.")

(citing *Neder v. United States*, 527 U.S. 1, 25 (1999)); *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 [falsely] certifies compliance with a statute or regulation as a condition to governmental payment."). Defendants truthfully represented that they complied with federal law. It was a reversible error for the court below to hold that defendants' compliance with federal law "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 993, 995 (C.D. Ill. 2001). Defendants' compliance with federal law does require dismissal of the mail fraud and false claims counts.

The government insists that State of Illinois has a policy that is different from the federal regulation, and that defendants may be convicted of mail fraud and false claims under the State policy. But even if Illinois were allowed to narrow its reimbursement obligations under Medicaid – which is doubtful as explained below – defendants' reliance on federal law was eminently reasonable. "Here, 'competing interpretations of the applicable law [are] far too reasonable to justify these convictions.'" *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002) (quoting *United States v. Mallas*,

762 F.2d 361, 363 (4th Cir. 1985)) (reversing Medicare fraud conviction).

Courts have, in fact, been vigilant in adhering to federal preemption in the Medicaid context. The *Yapalater* court, 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. 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. 494 F. Supp. 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 v. Snider*, 29 F.3d 886, 891-92 (3d Cir. 1994).

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 this likewise "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 for families with dependent children because it conflicted with regulations promulgated under the Social Security Act, 42 U.S.C. § 401 *et seq.* *See Snider v. Creasy*, 728 F.2d 369 (6th Cir. 1984). This Court has also construed ambiguous state regulations to conform to federal Medicaid requirements. *See Evanston Hosp. v. Hauck* 1 F.3d 540 (7th Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994). *See also Bennett v. Arkansas*, 485 U.S. 395,

397 (1988) (*per curiam*) (holding that where there is "a 'conflict' under the Supremacy Clause … the State cannot win.").

It was reversible error for the court below to hold that defendants' compliance with federal law could constitute criminal conduct here. *United States v. Mitrione*, 160 F. Supp. 2d at 995 (quoted *supra* p. 13). To the contrary, it is a matter of law that one cannot be guilty of a false statement beyond a reasonable doubt where, as here, his statement is a reasonable construction of the law. *See United States v. Johnson*, 937 F.2d 392, 399 (8th Cir. 1991). *See also United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980); *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978). As this Court emphasized in the analogous area of taxation, "criminal prosecutions are no place for the government to try out 'pioneering interpretations.'" *United States v. Harris*, 942 F.2d at 1135 (quoting *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979) (en banc)).

The evidence for falsity here relied on so-called expert testimony that fell far short of the standard set by this Court. *See Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997) (a real expert must "gather [] data on the subject, survey the published literature, or do … other things that a genuine expert does before forming an opinion"). Here,

the government expert was Dr. Richard K. Baer, Medical Director for Medicare (***not*** Medicaid – the basis for the two counts) Part A for several states. Vol. 29, at 445 (Aug. 23, 2001). He baldly asserted, without basis, that Walter Woods was not adequately qualified under Medicaid. *Id.* at 478. But Dr. Baer was so unfamiliar with psychotherapy that he did not even know what a "C.A.D.C." therapist is or what qualifications it entailed (it means "Certified Alcohol and Drug Counselor," the proper credential of therapist Walter Woods). *Id.* at 474-75. His opinion cannot possibly justify conviction for mail fraud or false claims. *See, e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant *Chevron*-style deference."); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 882 (7th Cir. 2002) (Easterbrook, J., concurring) ("If the agency abjures the APA's procedures for making decisions, courts owe the administrative interpretation careful attention, **but nothing more**.") (citation omitted, emphasis added); *United States v. Ward*, 2001 U.S. Dist. LEXIS 15897 (E.D. Pa. Sept. 5, 2001) (dismissing indictment because "courts should not defer to an agency's informal interpretation of an ambiguous statute or regulation in a criminal case") (citing appellate precedents).

Finally, the government insists that even if Walter Woods was a qualified therapist under federal law (and he was), then defendants should still be guilty because they were allegedly out of the office during the counseling. But the HHS rule implementing the Medicaid Act defines "physician services" to include services provided "(1) [w]ithin the scope of practice of medicine or osteopathy as defined by State law; **and** (2) [**b]y 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). The Medicaid Act further 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). A fair reading of these regulations allows defendants' billings for the counseling duly provided by Walter Woods. The court below erred in implicitly allowing the "expert" to rewrite 42 C.F.R. § 440.50. Vol. 24, at 160 (Oct. 31, 2002) (relying on Dr. Baer for "some criteria that we can administer to determine who is and who is not capable of giving the services").

III. The Legal Uncertainty Requires Vacating the Convictions.

It is axiomatic that a criminal conviction is unjustified if it relies on a vague, ambiguous, or conflicting legal requirement. As this Court 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, this Court 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). *See also Dowling v. United States*, 473 U.S. 207, 229 (1985) (reversing a conviction because "Congress has not spoken

with the requisite clarity" and affirming the "'time-honored interpretive guideline' that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'") (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985) and *United States v. Hudson*, 7 Cranch 32 (1812), inner quotations omitted).

Here, defendants complied in good faith with federal law governing the Medicaid program, and yet were convicted based on a surprise 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 this Court's holdings in *Gresham* and *Brierton*, and the Supreme Court precedents following *Harriss*. Otherwise, there will be more cases like Dr. Rinaldi's, who amid the immense regulatory complexity pled guilty to a non-existent crime. *See supra* p. 2; *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, commensurate with the bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them."); *see also United States v.*

Apex Oil Co., Inc., 132 F.3d 1287 (9th Cir. 1997) (affirming dismissal of indictment because the conduct was not clearly forbidden by the regulations); *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 649 (2d Cir. 1993), *cert. denied*, 512 U.S. 1245 (1994) (in criminal cases, "a court will not be persuaded by cases urging broad interpretation of a regulation in the civil-penalty context").

The Medicaid program has been recognized to constitute one of the most complex and intractable regulatory systems in our country. *See Herweg v. Ray*, quoted *supra* p. 1. Medicaid generally provides the lowest level of reimbursement, and requires treatment of the most ill and difficult patients. Physicians who participate in the low-paying Medicaid program should not be imprisoned based on a game of "gotcha". *See United States v. Harris*, 942 F.2d at 1132 ("If the obligation … is sufficiently in doubt, willfulness is impossible as a matter of law, and the 'defendant's actual intent is irrelevant.'") (citing *Garber*, 607 F.2d at 98, quoting *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974)). 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 v. United States*, 98 F.3d 1427, 1429 (2d Cir. 1996) (reversing Medicare fraud convictions for "claim[s] for services rendered by somebody else"); *id.* at 1438 ("It takes no great flash of genius to conclude that something is wrong somewhere.").

IV. The Sentencing Enhancements for Vulnerable Victims and Abuse of Trust Were Unjustified and Were Improperly Based on Personal Disapproval of Lawful Medical Services.

The sentencing judge personally disapproved of defendants' use of the therapist Walter Woods for patients with histories of sexual abuse, even though it was entirely lawful medical treatment. Her harsh criticism was not of any advice that Woods gave, or any actual exploitation of patients. Rather, her condemnation was based on Woods' lack of higher education and formal degrees. "[W]hen you look at the facts of this case and the counts of conviction that remain, we have the situation frankly where the doctor delegated to the cab driver. For the functions Walt Woods was performing in the sexual assault group that he was leading, his credentials were less than a cab driver." Vol. 24, at 153 (Oct. 31, 2002). This highly pejorative description of lawful medical services reflected a personal disapproval, when in fact the medical services were lawfully provided. There is no impropriety

here – psychiatrists in Illinois are fully entitled to use their own criteria for therapists rather than requiring formal degrees. This type of delegation of medical responsibility is and should be within the discretion of the physician – not the I.D.P.A. or the court below. *Cf. Zajac v. St. Mary of Nazareth Hosp. Center*, 212 Ill. App. 3d 779 (Ill. App. Ct. 1st Dist. 1991). The only dispute here was whether Medicaid would fund it.

Nevertheless, the judge below enhanced Dr. Mitrione's sentence by a draconian four points, and his wife by two points, based on a personal disapproval of the therapist. Both defendants received a two-point enhancement for vulnerable victims, even though the only possible exploitation in the case was purely financial between defendants and the State of Illinois. The care received by the victims was entirely reasonable under accepted standards of practice, and they did not pay anything for it. After disapproving of this lawful type of care, the court tacked on another two points for Dr. Mitrione for abuse of trust due to "a lack of supervision in deciding the type and quality of services that are necessary and appropriate for these patients." Vol. 24, at 168 (Oct. 31, 2002). But the medical care in this case was entirely proper and lawful, and the only issue was whether the State should pay for it. These enhancements must be reversed. *See, e.g.*, *See United States v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991) (reversing a

sentence for religious bias by the judge); *see also United States v. Cross*, 289 F.3d 476, 479 (7th Cir. 2002) (reversing a sentence because it "the guidelines replace the district judge's reasoning with their own" and it "was an abuse of discretion" for the judge to depart from the guidelines for even a hardened criminal).

Nothing in the record suggests anything improper about a medical practice utilizing a therapist like Walter Woods. The prejudicial sentencing resulted in the foregoing unjustified enhancements, and also inflated the loss calculations themselves. The court had already found that "ghost billing" for services never provided did not occur any more frequently than a failure to bill for services that were provided. Vol. 21, at 17-18 (Aug 23, 2002); *id.* at 15. Yet the court inexplicably added these discredited, phantom overcharges of $2,580.27 to the loss calculation, resulting in an additional enhancement to defendants' sentence of four more points. Vol. 24, at 162-63 (Oct. 31, 2002). This was also reversible error.

Conclusion

For the reasons stated herein, *Amicus* AAPS supports reversal of the decision below.

Dated: March 13, 2003

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Practice 32(a)(7)(C), I certify that the Brief of *Amicus Curiae* for the Defendants-Appellants complies with the type and volume limitations required by Federal Rule of Appellate Practice 32, Federal Rule of Appellate Practice 29(d) and Circuit Rule 32. This brief contains 5,960 words, as determined by the word count of the Microsoft Word 2002 word processing system used to prepare the Brief.

In accordance with Circuit Rule 31(e), I certify that the computer disks, which contain the computer file copy of the foregoing Brief and are filed with the clerk of the court and served on the parties, are virus-free.

_____
Andrew L. Schlafly

CERTIFICATE OF SERVICE

Nos. 02-4222 and 02-4224
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	Appeal from the United States District
Plaintiff-Appellee)	Court for the Central District of
)	Illinois
)	Case No. 00-CR-30021
)	The Honorable Judge Jeanne E. Scott
ROBERT T. MITRIONE, M.D.)	
AND MARLA A. DEVORE,)	
)	
Defendants-Appellants)	

I hereby certify that on March 13, 2002, I sent by overnight delivery an original plus 14 copies and one disk of this Brief to the above Court and on the same day also served via overnight delivery two copies and one disk of this Brief on all of the parties as follows:

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