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

Motion for Leave to File *Amicus Curiae* Brief by the 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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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN FAVOR OF REVERSAL

The Association of American Physicians & Surgeons, Inc. ("AAPS") hereby moves, pursuant to Federal Rule of Appellate Procedure 29(e), to file the accompanying *amicus curiae* brief for reversal of the decision below.

AAPS is a nonprofit organization consisting of thousands of physicians, including many practicing in the jurisdiction of this Court. Founded in 1943, AAPS opposes the overregulation of the practice of private medicine and unjust prosecution based on vague policies rather than clear rules. AAPS has members who have been threatened with prosecution based on confused and conflicting Medicaid policies, and AAPS has at least one member who was recently indicted in the Central District of Illinois. Through operation of *stare decisis* the outcome in this appeal will directly affect AAPS members with respect to participation in the Medicaid program for the poor. AAPS has a direct and vital interest in the issues presented to this Court based on its representation of physicians and individuals. Moreover, AAPS brings a unique perspective to this Court by virtue of our experience in this field.[1]

[1] The government expressly refused to consent to the filing of this brief by *Amicus*.

Amicus Satisfies this Court's Standard for Filing

AAPS satisfies all three prongs for filing an *amicus* brief in this action under the standard outlined in *NOW, Inc. v. Scheidler*, 223 F.3d 615 (7th Cir. 2000). *See also* Federal Rule of Appellate Procedure 29. First, AAPS members are directly affected by the operation of *stare decisis* to the decision here. An AAPS member has been recently indicted in this jurisdiction on charges of Medicaid fraud, and faces a trial subject to the precedent established here. Many other AAPS members are deciding whether to continue serving the poor through the Medicaid program, if 23 months in jail can result based on a picayune dispute over $75.25 in claims (the total amount of the remaining conviction here). Where, as here, the conviction was the product of false government testimony, the precedent at stake is even more important.

Second, AAPS brings a unique perspective that goes beyond what the parties provide. We have monitored or participated in numerous government actions against physicians for many years. The Ninth Circuit, for example, reversed the sentence and numerous counts of conviction of Dr. Jeffrey Rutgard based in part on the strength of our *amicus curiae* brief. *See United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997). The conviction here was as great a miscarriage of justice. Several Circuits have welcomed our

amicus curiae briefs to aid in resolving novel issues of prosecutorial overreaching under the Medicare and Medicaid programs. *See e.g.*, *United States v. Sell*, 282 F.3d 560 (8th Cir. 2002) (noting appearance by *Amicus* AAPS), *cert. granted*, 123 S. Ct. 512 (2002) (granting *certiorari* as briefed by *Amicus* AAPS).

Amicus AAPS submits information on several grounds for reversing the decision below. There is an inadequate showing of *mens rea* to justify criminal conviction here. The government did not even prove any false representations as required by the applicable statutes. Moreover, in a disturbing trend, the prosecutor relied on expert testimony rather than clear laws to convict. Finally, the judge impermissibly increased the sentence based on her personal disapproval of the lawful medical treatments. AAPS, a group of physicians, brings a unique perspective to these arguments in assisting this court's consideration of this case.

None of the *Scheidler* reasons for rejecting an *amicus* brief apply here. The attached brief is already written and submitted, so no reliance is created by granting this motion. 223 F.3d at 616. Appellants did not draft or fund any portions of this brief, and hence this is not an end-run around a page limitation on a party. *Id.* at 617. Nor are there any "interest-group politics" in this effort by *Amicus* AAPS to correct a miscarriage of justice. *Id.*

Finally, it is noteworthy that other circuits have implicitly rejected the restrictive standard of *Scheidler*. *See, e.g.*, *Neonatology Assocs. v. I.R.S.*, 293 F.3d 128, 130 (3d Cir. 2002). As explained below, *Amicus* AAPS raises important and unique arguments, and requests leave to file the accompanying brief.

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

Mistakes are not fraud, and the court below erred in inferring that an improper bill must be fraud rather than mistake. A violation of a billing guideline with respect to $25 is not *de facto* mail fraud (Count 12). Nor does a claim deemed to be false in the amount of $50.25 constitute an automatic violation of 18 U.S.C. § 287 (Count 14, earlier numbered as 13). Vol. 39, at 2578 (Sept. 12, 2001).[2] The prosecutor, knowing he had to prove intent, presented the following closing argument: "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." *Id.* at 2562, 2589. The judge later agreed that this testimony

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

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." Vol. 21, at 9, 17 (Aug. 23, 2002). Faced with government testimony that defendants overcharged by a 3:1 factor, the jury inevitably found fraudulent intent.

But this key testimony was completely false. The actual ratio of overcharges to undercharges was no worse than 1:1, which implied mistake rather than fraud. *Id.* at 15. Post-trial, the court below found that government official Deanne Statler's "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**." *Id.* at 7 (emphasis added). Government officials themselves have repeatedly assured AAPS members that mistake is not fraud. Inspector General June Gibbs Brown of the Department of Health and Human Services assured that a "physician is not personally liable for erroneous claims due to mistakes, inadvertence, or simple negligence" (quoted by HHS 1/7/99, http://oig.hhs.gov/fraud/docs/alertsandbulletins/dmepress.htm). Chief Counsel for the Office of Inspector General, D. McCarty Thornton "emphasized that laws the agency uses to prosecute physicians for fraud do

not apply to billing errors or negligence" (*AM News*, 6/26/00, http://www.aapsonline.org/fraud/janlegsup.htm).

The court below struck the testimony about fraudulent intent, but then left the counts in fraud standing. This was a reversible error. The court did reject defendants' bills for services provided by therapist Walter Woods, but that does not prove that defendants had fraudulent intent. Vol. 21, at 18 (Aug. 23, 2002). The court relied on its own finding that "[t]here was no evidence on these counts of the confusion of billing" (*id.* at 19) – but a jury must find fraudulent intent and the government bears the sole burden of proving it. *See United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971) (evidence equally consistent with innocence rather than guilt requires acquittal); *see also United States v. Catton*, 89 F.3d 387, 392 (7th Cir. 1996) (reversing a similar conviction, emphasizing "the importance of the government's proving the defendant's knowledge that the claim is false"); *United States v. Harris*, 942 F.2d 1125, 1132 n.6 (7th Cir. 1991) (reasonableness of defendants' interpretation is an issue for the jury, not the judge, to resolve – but here the judge decided the issue after striking the false testimony).

Amicus AAPS opposes this circumvention of the basic principle that sample sizes in health care fraud investigation must be significant even in

the more relaxed context of civil proceedings. *See Illinois Physicians Union v. Miller*, 675 F.2d 151 (7th Cir. 1982). There the Court affirmed recoupment in reliance on a sample size of 27%. Here, defendants face lengthy imprisonment based on a court finding that merely two claims were improper. This falls short of the civil standard, and far short of the requisite criminal intent to defraud.

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

The court below did not – and could not – cite any false representations by defendants as required by the mail fraud and false claims statutes. A false representation cannot be proven merely by proffering expert testimony; there must be an actual false statement. There simply is not one here. *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). Compliance with federal law requires dismissal of the mail fraud and false claims counts.

The government insisted that defendants falsely represented that therapist Walter Woods had certain credentials, when in fact defendants made no such false representations. Vol. 39, at 2577 (Sept. 12, 2001). The applicable federal regulations expressly mandate that the physician has the discretion to determine the appropriate credentialing for his assistants:

> 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). There was no false representation by defendants in connection with the credentials of Walter Woods, the essence of the remaining counts.

Amicus AAPS also protests the use of expert testimony to demonstrate false representations. To attempt to show falsity, the government and the court below pointed to testimony by Dr. Richard K. Baer, who is the 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 claimed that Walter Woods was not adequately qualified under Medicaid. *Id.* at 478. That witness 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 hardly constitutes an adequate basis for a conviction under mail fraud. This failed to satisfy this Court's standard even for expert testimony. *See Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997). This was woefully inadequate to prove a false representation by defendants. *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."); *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 various appellate precedents).

Amicus AAPS has members often faced with conflicting federal and state rules under the Byzantine, incomprehensible Medicaid system. When physicians certify compliance with federal law – as defendants did here – they cannot then be convicted for such representation. Federal law, after all, preempts state law to the contrary. *See Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (*per curiam*) (applying Supremacy Clause against State); *Rose v. Arkansas State Police*, 479 U. S. 1 (1986) (federal law invalidates conflicting state law); *Philpott v. Essex County Welfare Board*, 409 U. S. 413 (1973) (barring State from attaching Social Security benefits). *See also Evanston Hosp. v. Hauck* 1 F.3d 540 (7th Cir.1993), *cert. denied*, 510 U.S. 1091 (1994) (state regulations must be construed to conform with federal Medicaid requirements).

C. **The Legal Uncertainty Also Requires Vacating the Convictions.**

Amicus AAPS also protests the use of vague, ambiguous, and conflicting legal requirements to convict physicians. As this Court recently emphasized, **criminal penalties require a "high level of clarity**." *Gresham v. Peterson*, 225 F.3d 899, 908 (7th Cir. 2000) (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 an Illinois policy in conflict with federal law. Defendants' convictions run afoul of the Seventh Circuit holdings in *Gresham* and *Brierton*, and the Supreme Court precedents following *Harriss.*

Amicus AAPS objects to prosecutorial "gotcha" at the heart of this case, which is contrary to well-established precedents. *See, e.g., United States v. Harris*, 942 F.2d at 1132 ("If the obligation to pay … is sufficiently in doubt, willfulness is impossible as a matter of law, and the 'defendant's actual intent is irrelevant.'") (citing *United States v. Garber*, 607 F.2d 92, 98 (5th Cir. 1979) (en banc), 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 good practitioners out of Medicaid. *See, e.g., 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.").

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

It is indisputable that defendants provided lawful medical services to their patients. There is no basis for the sentencing enhancements for vulnerable victims and abuse of trust with respect to patients who received lawful medical services. The sentencing judge personally disapproved of defendants' use of the therapist Walter Woods, but her own views about the practice of medicine should not have resulted in these sharp increases in defendants' sentences. The judge arbitrarily insisted that patients with a history of sexual abuse should receive special designation and care, when the medical profession itself does not segregate sexual abuse issues.

The condemnation by the court below was based on Woods lack of higher education and formal qualifications, which are not required under state law. The court held that "when 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) (emphasis added). This highly pejorative description of lawful medical services reflected a personal disapproval, when in fact the services were lawfully

provided. The prejudice distorted the loss calculations also, as the court had already found that there were no more overcharges than undercharges, yet inexplicably added the tainted overcharges to the loss calculation anyway. *Compare* Vol. 21, at 15, 17-18 (Aug 23, 2002) *with* Vol. 24, at 153 (Oct. 31, 2002).

Amicus AAPS is familiar with this unjustified conversion of a billing dispute into a fictional exploitation of patients. Where, as here, the only issue is whether the State must pay for lawful services, there is no exploitation of patients. Yet the prosecutor was allowed to put patients with sexual abuse histories onto the witness stand below to present highly emotional, prejudicial testimony. This was irrelevant to the billing dispute between defendants and the State of Illinois, and ultimately distorted sentencing as well as the verdict. The enhancements for vulnerable victims and abuse of trust, in an economic dispute between defendants and the State of Illinois, 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 "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).

Conclusion

For the reasons stated herein, *Amicus* AAPS requests leave to file the accompanying brief to reverse the decision below.

Respectfully submitted,

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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 3 copies of this Motion to the above Court and on the same day also served via overnight delivery a copy of this Motion on all of the parties as follows:

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