

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 in Opposition to Motion by the Government Concerning the
Amicus Curiae Brief by the
Association of American Physicians & Surgeons, Inc. (AAPS)

ANDREW SCHLAFLY
AAPS General Counsel
939 Old Chester Rd.
Far Hills, NJ 07931
(908) 719-8608
Attorney for Amicus Curiae

MOTION IN OPPOSITION TO THE MOTION BY THE GOVERNMENT CONCERNING THE *AMICUS CURIAE* BRIEF BY THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS

The Association of American Physicians & Surgeons, Inc. (“AAPS”) hereby moves to correct numerous important inaccuracies and false innuendos in the government’s Motion in Opposition to Motion for Leave to File Amicus Curiae Brief by AAPS.

AAPS, a nonprofit organization founded in 1943, filed a motion on March 13th for leave to file an *amicus curiae* brief in this case. The government responded with an opposing motion, docketed on March 25th (cited as “Govt. Mot. at __”). The government’s motion contained several key errors that require correction.

First, the government falsely claimed that defendants “are challenging their convictions for Medicaid and Medicare fraud.” Govt. Mot. at 1. There are no Medicare convictions against either defendant. In fact, defendants complied with Medicare law and their only convictions are based on a novel interpretation of Medicaid requirements at odds with Medicare practices. The government’s false assertion here typifies the distortions that permeated the case below.

Second, the government falsely suggests that AAPS may have funded a portion of the defendants’ defense. Govt. Mot. at 7. This is baseless

innuendo. AAPS has not funded the defense costs of either defendant at any time.

Third, the government distorts the law. It repeatedly cites an opinion by a single judge as though it were a binding panel decision by this court. The government relies heavily on “*Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062 (7th Cir. 1997)” – without designating it as a single judge’s chambers opinion rather than a panel decision. Govt. Mot. at 4, 5, and 7. The government only cites one panel decision in its entire motion, and that case actually welcomed *amicus curiae* briefs by several organizations. *National Organization for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).

Fourth, the government claims that “AAPS’s brief merely parrots four of the arguments already made at length in the amply-proportioned defendants’ briefs on appeal.” Govt. Mot. at 5. This is also completely baseless. AAPS cites 49 cases in its brief. Defendant DeVore cites only two out of those 49 cases – an overlap of merely 4%. Defendant DeVore’s arguments are widely different also: three out of her four arguments are thoroughly foreign to AAPS’s brief, and the remaining one has minimal overlap. Defendant Mitrione cites only one out of AAPS’s 49 cases, an overlap of merely 2%. Two out of his three arguments are totally foreign to

AAPS's brief, and the other one only has minimal overlap. The government's claim of duplication is utterly without merit.

Finally, the government insists that AAPS's brief constitutes a circumvention of the page limitations on parties. Govt. Mot. at 7. But the parties remain comfortably below the page limitations even if the word total in AAPS's brief were allocated to the parties. Defendant DeVore's brief was 4266 words below her limit, and defendant Mitrione's brief was 2634 words below his limit, for a total of 6900 words to spare. AAPS's brief contains only 5960 words.

WHEREFORE, AAPS requests that the government's Motion in Opposition to Motion for Leave to File Amicus Curiae Brief by the Association of American Physicians & Surgeons, Inc. be denied.

Respectfully submitted,

Andrew L. Schlafly
AAPS General Counsel
939 Old Chester Rd.
Far Hills, NJ 07931
(908) 719-8608 (phone)
(212) 214-0354 (fax)
aschlafly@aol.com

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
) Court for the Central District of
) Illinois
) Case No. 00-CR-30021
) The Honorable Judge Jeanne E. Scott
Plaintiff-Appellee)

ROBERT T. MITRIONE, M.D.)
AND MARLA A. DEVORE,)
)
Defendants-Appellants)

I hereby certify that on March 31, 2003, 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:

Linda L. Mullen
OFFICE OF THE UNITED STATES ATTORNEY
1830 Second Avenue, Third Floor
Rock Island, IL 61201

Cathy Ann Pilkington, Esq.
Law Offices of Cathy A. Pilkington
20 North Clark Street, Suite 1725
Chicago, IL 60602

Thomas M. Dawson
2300 S. Fourth Street
Leavenworth, KS 66048

Andrew L. Schlafly, Esq.