IN THE SUPREME COURT OF FLORIDA

Case No. SC04-613

LT No. 3DO3-521

STATE OF FLORIDA,

Plaintiff/Appellant,

vs.

GABRIEL HARDEN, et al.,

Defendants/Appellees.

APPELLEE POLSKY'S ANSWER BRIEF

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INTRODUCTION

This Answer Brief is filed on behalf of one of the Appellees, EDWARD S. POLSKY. Appellee POLSKY specifically adopts the Answer Initial Brief and arguments set out by the co-appellees and, in particular, the arguments of Appellee GABRIEL HARDEN, whose counsel, G. RICHARD STRAFER, has been stellar. The purpose of this Answer Brief is to highlight certain aspects of this case that are significant to Appellee POLSKY.

STATEMENT OF THE CASE AND FACTS

This case arises out of a nine-count information against ten (10) named defendants, including EDWARD S. POLSKY, EDWARD POLSKY is a licensed dentist. (R.1-21)[1] He was employed by one of the three corporate entities to provide dental services – which included Medicaid patients.

The State should concede that DR. POLSKY was paid *per diem* to render dental care; was paid only for dental services actually rendered; did not solicit any Medicaid patient; and had no financial interest or involvement in the running of any of the corporate entities. Despite that non-involvement, DR. POLSKY was snared into this present prosecution by simply "being there" and rendering dental treatment. He has been charged with racketeering, conspiracy and fraud. The direct and consequential impact on DR. POLSKY of just being prosecuted cannot be overstated.

Each count of the information is based on similar predicate acts. (R.1-21) The ten defendants, allegedly while employed or associated with the three dental facilities, did:

> "...unlawfully solicit, offer, pay or receive any remuneration, directly or indirectly, overtly or

[1]R = Record on appeal

> covertly, in cash or in kind in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation or Medicaid recipient[s] to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent for payment, in violation of Florida Statutes 409.920(2)(e) and 777.011."

Each of the predicate acts were identical except for the dates and names of the putative drivers. All counts arise out of an alleged violation of Florida Statute 409.920(2)(e), Florida's Anti-Kickback Statute.

CIRCUIT COURT PROCEEDINGS

Appellant HARDEN, joined in by the co-defendants, moved the Circuit Court of Dade County, Florida for an Order dismissing the information. (R.61-158)

Actually, HARDEN filed two motions. The initial motion challenged Florida Statute 409.920(2)(e) as unconstitutional on its face. The gravamen of the motion was the apparent clash between the Florida Statute and the comparable Federal Anti-Kickback Statute, 42 U.S.C. § 1320 a-7b(b)(3), with the federal statute preempting the state statute. It was noted that the state statute was lacking for several reasons, most notably the absence of any of the "safe harbor" provision found in 42 C.F.R., § 1001.952(1), and a lower *mens rea* requirement under the Florida statute. Under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, it was argued, the state statute improperly impeded upon the federal statute – rendering the state statute unconstitutional.

The motion in the Circuit Court also contended that the Florida Statute offended the First Amendment (commercial speech and advertising) and Fourteenth Amendment (due process) of the United States Constitution.

Appellee HARDEN filed a separate "sworn" motion to dismiss, pursuant to Florida Rules of Criminal Procedure 3.190(c)(4). The ostensible purpose of the motion was to establish that the drivers were *bona fide* "employees" rather than "independent contractors". Although the State filed a "Traverse/Demurrer" (R.159-169) to HARDEN's sworn motion, the State did <u>not</u> specifically deny that the drivers were "employees" and not "independent contractors". The State maintained during

oral argument on HARDEN's motions to dismiss that it was immaterial whether the drivers were *bona fide* employees or not – it was the method of payment that was controlling. (R.240-241, 243, 253, 256)

The Circuit Court granted Defendant HARDEN's motion to dismiss the information. In a 20-page well-crafted Order, Judge DAVID MILLER declared Florida's Anti-Kickback Statute 409.920(2)(e) unconstitutional. (R.170-190) The court opined that Florida statutory scheme clashed with and was preempted by the federal statute and "safe harbor" regulations promulgated under the federal statute. Specifically, the court found that F.S. 409.920(2)(e) stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", citing Gade v. National Solid Waste Management, 505 U.S. 88, 112 S.Ct. 2374 (1982) and O'Loughlin v. Pinchback, 579 So.2d 788 (Fla. 1991) – specifically, Florida's Statutory Scheme failed to recognize the "safe harbor" provisions of 42 U.S.C. 1320a-7b(b)(3)(B) and C.F.R. § 1001.952(I); and the State's *mens rea* requirement was preempted by the federal law requirement of a "willful" violation of the law, rather than the State's lower threshold of merely knowing or negligence "should have known" standard. Further, the court ruled that the State violated the First Amendment rights of free speech, was impermissibly vague and thus offended the constitutional guarantee of the due process of law.

THE COURT OF APPEAL

In a unanimous decision, the Third District Court affirmed the lower court's dismissal of the information and declaration that the Florida Medicaid Provider Fraud Statute was unconstitutional. The District Court noted that both the Florida and Federal statutes appeared to be similar; however, upon closer examination there were two significant differences between the Federal Anti-Kickback Statute and the Florida Anti-Kickback Statute. The first was that the state's statute failed to recognize the "safe harbor" provisions of the federal statute.

The second was that the *mens rea* requirement differed. The federal statute required a "willful" violation of the statute. The District Court pointed out that under federal law the Government must prove that the "defendant acted with knowledge that his conduct was unlawful", citing Bryan v. United States, 524 U.S. 184 (1998), and that the state statute's requirement that just "knowing" (which, by statutory definition would include "mere negligence") would criminalize activity that was specifically legal under federal law, but criminalized under state law.

The District Court had no difficulty in finding these differences to be fatal – rendering the state statute an obstacle to the goals and purpose of Congress and therefore unconstitutional.

The State has appealed.

SUMMARY OF ARGUMENT

Both the Circuit Court and the District Court's reasoning and logic were legally sound and should be upheld.

Florida's Statutory Scheme 409.920(2)(e) is in serious conflict with its federal counterpart, 42 U.S.C. 1320a-7b (2000) in several significant respects. The federal statute contains both statutory and administrative "safe harbor" provisions that the Florida statute does not. The Florida statute, as it existed at the time of this prosecution, had a *mens rea* requirement which was at variance with the federal statute. The federal statute required a "willful" violation, while the state statute permitted a mere "negligent" culpability.

The "safe harbor"provisions and the heightened *mens rea* requirements were enacted by Congress to clarify what business practices were legal under the Medicaid program and as a check against uncertain rules to thwart over-regulation, as well as a bulwark against overzealous prosecutions.

On its face, the state statute created a real obstacle to the execution and accomplishment of the objective and purpose of a congressional enactment. The Florida Anti-Kickback Statute created an "implied conflict preemption". Under the Supremacy Clause, the Florida statute crossed an impermissible border, and is unconstitutional. *See*, Gade v. National Solid Waste Mgmt., 505 U.S. 88, 112 S.Ct.

2374 (1992); Pharmaceutical Research and Mfrs. of America v. Meadows, 304 F.3d 1197, 1206 (11th Cir. 2002).

The lower court's decisions should be upheld.

POINT I

(Response to State's Initial Brief, pp. 13-27)

The Federal Medicaid Anti-Kickback Statute with its safe harbor provisions and heightened culpable mental requirements preempt the paralleled, but flawed, Florida Statute 490.920(2)(e).

As Justice HOLMES quipped:

> "... a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S.Ct. 506, 507 (1921).

THE FEDERAL ANTI-KICKBACK STATUTE

In 1972, Congress amended the Social Security Act and enacted the first version of what is now known as the "Anti-Kickback" Statute. Pub.L. No. 92-603, § 1877(b), s 2, 42(b), 86 Stat. 1329, 1419 (current version codified at 42 U.S.C. 1320(a)-7(b) (1994). The 1972 legislation made it a misdemeanor to solicit, to offer payment, or to accept a kickback or bribe in connection with the furnishing of services paid for by Medicare and Medicaid.

In 1977 the statute was amended with the enactment of the "Medicare-Medicaid Anti-fraud and Abuse Amendments Pub.L. No. 95-142, § 1877, s 4(a), 91 Stat. 1175, 1179-81 (1977). Congress expanded the prohibited payments under the law from kickback, bribes and rebates to "any remuneration" that was solicited, received, offered, or paid "directly or indirectly, overtly or covertly, in cash or in kind". The Amendment also prohibited the offer or payment of such remuneration to induce referrals and upped violation of the statute to a felony.

Three years later in 1980, Congress further revised the statute to require that the prohibited act be done "knowingly and willfully". *See*, Omnibus Reconciliation Act of 1980, Pub.L. No. 499, § 1877(b)(1), 1877(b)(2), 1909(b), s 917, 94 Stat. 2599, 2625.

In 1987, Congress enacted the Medicare and Medicaid Patient and

Program Protection Act of 1987, Pub.L. No. 100-93, § 1128, s 2 101 Stat. 1987. The 1987 Act modified the anti-kickback statute in several ways. As related to this appeal, Congress was concerned about the vagueness of the anti-kickback provision. This lead to uncertainty as to what business practices were legal and what was Illegal. This uncertainty had a chilling effect on health care providers who were reluctant to enter into the Medicaid and/or Medicare Programs. *See*, S. Rep. No. 109, 100 Cong., 1st Sess. 27 (1987). Over-regulation was harming the programs.

The 1987 congressional revision attempted to eliminate the uncertainty facing health care providers, and directed the Secretary of the Department of Health and Human Services to issue regulations setting forth certain "safe harbor" areas which would not be construed as criminal or administrative violations. The Act codified these exceptions in the statute itself. *See*, 42 U.S.C. § 1320(a)-7(b)(3)(B). Specifically exempt from the anti-kickback provisions was:

> "...any amount paid by an employer to an employee (who has a *bona fide* employment relationship with such employer) for employment in the provision of covered items or services."

See, also, administratively-created "safe harbors" under 42 C.F.R. § 1001.952(I). These "regs" cover the gamut of business practices from "investment interests" to "ambulance replenishing", and currently cover about twenty pages in the Federal Code of Regulations.

It is worth emphasizing that the 1987 congressional revisions and the ever-changing "safe harbor" provisions were designed to prevent over-regulation, which was discouraging healthcare providers from entering the Medicare and Medicaid system. It is the State of Florida's failure to recognize these "safe harbors" that render the two statutes in conflict.

As one commentator noted – the safe harbor regulations "provide an area wherein people can act in total safety from prosecution under the anti-kickback statute", Richard P. Kusserow, *The Medicare and Medicaid Anti-Kickback Statute and the Safe Harbor Regulations – What's Next?; 2 Health Matrix* 49, 52 (1992) (Case Western Reserve University School of Law).

STATE'S ARGUMENT

The Main argument advanced by the State is that Florida is free to enforce its own fraud laws and 409.920(2)(e) is a mere implementation of that mandate. *(See*, pp. 16-20, Appellant's Brief)

The fallacy of the State's argument, that Florida can have... "a more stringent fraud law", is that the state law criminalizes certain business practices, which Congress specifically says is not illegal.

In 1987, Congress specifically created certain "safe harbor" business practices. This was done to make clear to the health care business community what were accepted business practices and what were not. The safe harbor provision created stability and eliminated uncertainty, and was supposed to be a check upon over-regulation and overzealous prosecutions. The Florida Statute simply fails to recognize these protected zones.

The District Court was eminently correct in finding the two statutes incompatible. The absence of the "safe harbor" provision in the Florida Statutory Scheme "criminalizes certain activity that is protected under the federal anti-kickback statute, and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", citing Pharmaceutical Research and Manufacturers of America v. Meadows, 304 F.3d 1197, 1206 (11th Cir. 2002).

DR. POLSKY, the Appellee herein, submits, "how could it be otherwise?". Does not the state law criminalize what the federal law specifically permits? The State's reliance on Commonwealth of Pennsylvania v. Morris, 575 A.2d 582 (Pa. Super. 1990), *aff'd*. 601 A.2d 806 (Pa. 1992), cited by the State (p. 17,

Appellant's Brief), is misplaced and actually illustrates the weakness of its position. Morris recognized that a state may impose a harsher penalty for a violation of its fraud statute, then imposed by the federal government – in that particular case, the Social Security laws. This is not a startling proposition, and we are all familiar with such dichotomies.[2] Morris, however, did not involve the criminalization of a fraudulent practice that was declared legal under the Federal Social Security Act. There is the critical difference.

This Appellee does not suggest that Florida cannot enforce its own fraud laws – rather, it is Florida's attempt to criminalize specific conduct which the federal government says is not criminal – which is unconstitutional. Under our system of federalism, the states must stand back and restrain themselves. So says the United States Constitution, Article VI, CL-2.

THE STATE AND FEDERAL STATUTES MENS REA

REQUIREMENTS ARE FATALLYAT ODDS

[2]For example, both the state and federal governments criminalize the possession of controlled substances, and the penalties vary greatly from state to state and to the federal government. No one has difficulty accepting these varying penalties. However, if the Congress specifically allowed the use of marijuana for medical purposes, no state could then criminalize the medical use of marijuana. The federal statute "trumps" a contrary state law under the Supremacy Clause.

In 1980, Congress amended the anti-kickback statute to require that before one could be prosecuted for a violation of the statute the prohibited conduct be done "knowingly or willfully". The term "willfully" has taken on a very discreet meaning under Bryan v. United States, 524 U.S. 184, 192, 118 S.Ct. 1939 (1998), and its progeny. Since 1980, before one could be convicted under the federal anti-kickback statute, the government must prove that a defendant acted with knowledge that his conduct was "unlawful".

The Florida statute, in turn, only requires that one act "knowingly". "Knowingly" was specifically defined in 409.920(l)(d) as "done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result". The "should be aware" is a negligence standard which is a lesser threshold than the federal requirements of "knowingly and willfully". The District Court adopted this view, citing Hanlester Network v. Shalala, 51 F.3d 1390, 1399 n.16 (5th Cir. 1995).

This lowered culpable mental state is no mere academic exercise for DR. POLSKY. The federal safe harbor statute and regulations and heightened *mens rea* requirement were fashioned to prevent the very prosecution now before this Court. DR. POLSKY, and dare say other dentists, will think long and hard before ever working again for a Medicaid provider. Clearly, the State does not contend that DR.

POLSKY was other than a dentist rendering actual dental services to indigent patients, and was paid *per diem* for those services. As a *bona fide* employee, was he not entitled to take such a position without the fear of being prosecuted, tried, jailed and de-licensed?

The State makes the most audacious argument that the Defendants were not charged with negligent or inadvertent conduct. This is simply not correct. This assertion flies in the face of the State's own charging document. The information alleges a violation of Florida Statute 409.920(2)(e). By definition, one is guilty of 409.920(2)(e) by "knowingly" conduct. "*Knowingly*" was defined by 409.920(1)(d) to include "should have known" conduct. This is a negligence standard. *See*, Hanlester Network v. Shalala, 51 F.3d 1390, 1399, N. 16 (9th Cir. 1999). The information herein does not forego a conviction by a lesser *mens rea* requirement. This is especially critical to this Defendant – EDWARD POLSKY.

The theory of prosecution against DR. POLSKY remains cloudy and an enigma. DR. POLSKY had no involvement in solicitation of patients. His only *nexus* to the clinic was as a practicing dentist. It is surmised that the State's theory will be that DR POLSKY "should have known" what was going on and, therefore, his "conduct" (or, rather, his presence) was felonious. The only other possible theory is that DR. POLSKY benefitted "indirectly" from the allegedly prohibited recruiting

practices. This theory is equally as attenuated as the former theory, as DR. POLSKY no more "benefitted" than the power company, the telephone company, dental suppliers, or the State of Florida itself, receiving taxes from the corporation.

In an apparent attempt to "fix" the statute, the legislature amended 409.901 and deleted the "knowingly" definition from 409.901 Laws 2004.c 2004-365 – effective July 1, 2004, and inserted a new definition into 409.920, which echoes the *mens rea* requirement word-for-word from the Bryan decision, 2004.c 2004, 344, § 8, effective July 1, 2004. This legislative "admission" should in and of itself have the State admit the infirmities of the prior statute.

It is suggested that the lower *mens rea* requirement was the only way the State could possibly even have attempted to proceed against DR. POLSKY, and clearly highlights the invidiousness of the statute's grasp and the fatal conflict with its federal counterpart. Florida Statute 409.920 is unconstitutional.

CONCLUSION

THE DECISIONS OF THE CIRCUIT AND DISTRICT COURTS WERE CORRECT AND SHOULD NOT BE DISTURBED.

Respectfully submitted,

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I hereby certify that this Answer Brief complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure, and has been prepared in 14-point Times New Roman.

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