IN THE
SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Appellant,	)	
v.	)	**Case No: SC06-157**
	)	
JOHN ANTHONY RUBIO,	)	
SONIA BONILLA GUZMAN,	)	
ANAMARIA BONILLA MENDEZ,	)	
ILIANA MARTIN-FERNANDEZ,	)	
and GUSTAVO ADOLFO FERNANDEZ,	)	
	)	
Appellees.	)	
_____	)	

REPLY BRIEF OF APPELLANT, STATE OF FLORIDA

On Appeal From The District Court of Appeal,
Fifth District of Florida

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHRISTOPHER M. KISE
Solicitor General
Florida Bar No. 0855545

LOUIS F. HUBENER
Chief Deputy Solicitor General
Florida Bar No. 0140084

JAMES A. MCKEE
Deputy Solicitor General
Florida Bar No. 638218

OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3681
Counsel for Appellant, State of

Florida

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA STATUTES

FEDERAL STATUTES

RULES OF CRIMINAL PROCEDURE

OTHER AUTHORITIES

REPLY TO APPELLEES' STATEMENT OF THE CASE AND FACTS

This case is about whether defendants Guzman and Mendez submitted false Medicaid claims to the state of Florida and unlawfully split Medicaid payments with defendants Rubio and Fernandez who furnished them a dental office and bussed in Medicaid patients. It is not about the adequacy of Florida's Medicaid dental services. As demonstrated in the State's briefs filed in State v. Harden, Case No. SC04-613, there is no requirement under federal or state law that a state furnish transportation to every Medicaid-eligible patient regardless of need.

Defendants contend they established that their fee-splitting arrangements reflect a management fee in line with IRS figures for dental associations. Ans. Br. at 12-13. Defendants' counsel made this representation orally at the hearing on defendants' motions to dismiss; it was not set forth in defendants' motions, neither of which was sworn and neither of which required a traverse or demurrer. See Rule 3.190(c) and (d), Florida Rules of Criminal Procedure. The hearing on the motions to dismiss was not evidentiary. The State pointed out the absence of evidence, including the absence of any management contract. R1:19, 42-44. The motion

hearing established nothing conclusive about defendants' financial arrangements, a point the trial court acknowledged on the first page of its final order. R5:834.

REPLY ARGUMENT

I. SECTION 409.920(2)(a), FLORIDA STATUTES READ IN CONJUNCTION WITH SECTION 409.920(1)(d), FLORIDA STATUTES (2003), IS NOT PREEMPTED BY FEDERAL LAW.

The defendants in this case make the same argument made in State v. Harden: the "should be aware" language of section 409.920(1)(d), Florida Statutes, allows prosecution of "mere negligence." According to defendants, prosecution for mere negligence in submitting a false Medicaid claim is inconsistent with federal law, and therefore subsections 409.920(1)(d) and (2)(a), Florida Statutes (2003), are preempted.

This argument fails for reasons of substance and procedure. As pointed out in the initial brief, p. 19, defendants were not charged with negligently submitting false claims and therefore lack standing to raise this argument. See Sieniarecki v. State, 756 So. 2d 68, 74 (Fla. 2000); State v. Hogan, 387 So. 2d 943 (Fla. 1980). Further, state law is preempted only to the extent of actual conflict with federal law. Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996) Thus, even under their own assessment defendants' argument fails if the State can prove that repeated billing for Medicaid dental services they never

performed was not a matter of mere negligence.

Even assuming the "should be aware" language is at issue in this case, it is clearly consistent with federal practice under the conscious avoidance doctrine. United States v. Nazon, 940 F.2d 255 (7th Cir. 1991), discussed in the initial brief, is not an isolated case. The federal government often prosecutes Medicare/Medicaid false claims under the conscious avoidance doctrine. See United States v. Lennartz, 948 F.2d 363, 369 (7th Cir. 1991); United States v. Erickson, 75 F.3d 470, 481 (9th Cir. 1996); United States v. Custodio, 39 F.3d 1121, 1125 (10th Cir. 1994). As these cases make clear, a person may not simply shut his eyes for fear of what he may learn. See, e.g., Lennartz, 948 F.2d at 369.

When section 409.920(1)(d) is construed as incorporating the conscious avoidance doctrine, prosecutions would not constitute an obstacle to fulfillment of Congress' objectives and an unconstitutional result would be averted. This Court plainly has the authority to so limit the reach of the "should be aware" language. See State v. Jefferson, 758 So. 2d 661, 664 (Fla. 2000) ("Wherever possible, statutes should be construed in such a manner as to avoid an unconstitutional result.").

Defendants also misapprehend the decision in State v.

Wolland, 902 So. 2d 278 (Fla. 3d DCA 2005), when they contend that the "should be aware" language of section 409.920(1)(d) could still apply to permit prosecution of negligence. Answer Brief at 25-26. In Wolland the court held that "[b]y its terms subsection 409.920(2)(a) proscribes presentation of a claim with knowledge that the claim is false and thereby precludes prosecution for unintended violations." Thus the court concluded section 409.920(1)(d) would not apply to permit prosecution for a negligent submission.

Moreover, it matters not for preemption analysis whether the Wolland court relied on the federal false claims statute, 18 U.S.C. § 287, or the Medicare/Medicaid false statement statute, 42 U.S.C. § 1320a-7b(a). The question for purposes of preemption analysis is whether state law stands as an obstacle to the accomplishment of Congress' purpose and objectives -- to combat fraud. The Wolland court's interpretation of section 409.920(2)(a) cannot be said to thwart Congress' purpose, nor do defendants advance such a claim.

The State does not take issue with the fact that when prosecuting fraud and proving "willfulness" under federal law, the United States bears the burden to prove a defendant's statement is not true under a reasonable interpretation of the

law. See United States v. Whiteside, 285 F.3d 1345, 1351-52 (11th Cir. 2002). This adds nothing to defendants' preemption argument. They do not explain what reasonable construction of the Medicaid law or regulations would permit them to bill repeatedly for services not performed and for radiation administered by unlicensed persons.

II. VIOLATIONS OF SECTION 817.505(1), FLORIDA STATUTES, QUALIFY AS PREDICATE ACTS PURSUANT TO SECTION 895.02(1)(a)29., FLORIDA STATUTES, AND CONSTITUTE WHITE COLLAR CRIME PURSUANT TO SECTION 775.0844(3)(a), FLORIDA STATUTES.

A. RICO Predicate Acts.

Florida's RICO statute, section 895.02(1)(a) 1.-44., Florida Statutes, defines racketeering activity as, in essence, committing, attempting to commit, or conspiring to commit any crime chargeable under any of approximately 70 different provisions of the Florida Statutes. If only the numerical references to the statutes were listed, a prosecutor would have to commit all of these unrelated provisions to memory, or else search through five volumes of the statutes before locating the offense he or she intended to charge. As a matter of common sense, the "relating to. . ." language is employed to facilitate identification of the offense to be

charged. That is precisely the logic of the Eleventh Circuit in interpreting the even longer federal RICO statute, 18 U.S.C. § 1961. See United States v. Kopituk, 690 F.2d 1289, 1328 n. 36 (11th Cir. 1982).

As against this plain meaning construction, defendants offer only a strained interpretation of the statutes and speculation as to the legislature's intent. Defendants first insist that chapter 817's title, "Fraudulent Practices," requires some formulaic proof of common law fraud, and then contend that section 817.505(1)(a)-(c) has nothing to do with fraud or fraudulent practices. But that is not what chapter 817's title or any provision of chapter 817 says. In any case, as shown in the State's initial brief, pp. 31-32, the term "fraud" or "fraudulent practice" has no formulaic definition. Such terms embrace numerous forms of dishonest conduct.[1] Moreover, subsections 817.505(1)(a) and (b)

[1] Defendants contend that section 817.505 does not require proof of "common law fraud" but do not specify exactly what that term means. Black's Law Dictionary defines "fraud" as:

> Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture. A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and

prohibit the same fraudulent conduct prohibited by section 409.920, Florida Statutes, entitled "Medicaid Provider Fraud." (Emphasis added.)[2]

Defendants' reliance on the decision in State v. Gusow, 724 So. 2d 135 (Fla. 4th DCA 1998), is also misplaced as that case can be readily distinguished. At issue in Gusow was the reference in section 895.02(1)(a)11., Florida Statutes (1993), to "Chapter 687, relating to interest and usurious practices." This language did not refer to chapter 687's title, which was "Lending Practices." It is therefore understandable that the court held the loan broker fraud statute in that chapter was not a predicate offense because it did not relate to the interest and usurious practices. In contrast, the "relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes" language in section 895.02(1)(a)29. following the reference to chapter 817 is a verbatim

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> includes all surprise, trick cunning, dissembling, and any unfair way by which another is cheated. "Bad faith" and "fraud" are synonymous, and also synonyms of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc.

Black's Law Dictionary (6th ed. 1990) (internal citations omitted).

[2] Defendants were charged with violation of section 817.505 rather than section 409.920 because of the decision of the Third District Court of Appeal in State v. Harden, 817 So. 2d 352 (Fla. 3d DCA 2004).

recitation of the title and first two parts of chapter 817. Engaging in a split fee arrangement is a form of fraud.

Defendants further contend that some statutes in chapter 817 have nothing to do with fraud, citing sections 817.30, 817.35, 817.36, etc. See Answer Brief at 30-31, 35. Almost all of these statutes prohibit dishonest conduct that aims to achieve financial gain through various misrepresentations.

B. White Collar Crime

Defendants' only argument with respect to section 775.0844(3)(a)4., is that since section 817.505(1)(a) requires no proof of fraud, it does not "relate to fraudulent practices" and hence is not a type of white collar crime. Answer Brief at 31. The State relies on the argument set forth above and in its initial brief.

III. THE ALLEGED VIOLATIONS OF SECTION 817.505(1)(b) AND (c), FLORIDA STATUTES, DID NOT CHARGE A SINGLE OFFENSE IN MORE THAN ONE COUNT.

Section 817.505(1)(b), Florida Statutes, prohibits, inter alia, "engag[ing] in any split-fee arrangement in any form whatsoever in return for referring patients or patronage to a health care provider. . . ." In this case, as pointed out in the initial brief, there was no evidence as to the exact agreement among the defendants. They are charged, however,

with referring patients, submitting Medicaid claims, and splitting the Medicaid fees received on thirty-seven different occasions.

Defendants' attempt to define the unit of prosecution defies logic. They argue that no matter how many patients are referred, no matter over how many months or years the referrals are made, and no matter how many fee payments are split, there can be only one violation of section 817.505(1)(b) because of the use of the word "any" in "any split fee arrangement." In support of this argument, defendants cite cases involving possession of contraband articles or resisting arrest when several officers are attempting to make the arrest. These cases shed no light at all on section 817.505(1)(b).

Defendants' reading of section 817.505(1)(b) ignores the "common sense" approach to interpretation that Bautista v. State, 863 So. 2d 1180 (Fla. 2003), commands. As Bautista makes clear, the "a/any" test is only one possible guide to discerning legislative intent and is not employed to reach an absurd result. Id. at 1188. A construction of section 817.505(1)(b) that allows endless patients to be referred over endless time with endless fees split, all constituting but one violation, would be just that--absurd. The phrase "engage in

any split-fee arrangement" contemplates exactly that -- an engagement in which patients are referred, claims submitted and fees split. Each such engagement requires foresight, planning and execution. That occurred on thirty-seven separate occasions according to the information, and hence, subject to proof, there were thirty-seven violations of the statute.

In Bautista, the common sense approach dictated that the DUI manslaughter statute applied to each death caused in a single fatal collision notwithstanding the statutory reference to "the death of any human being." Bautista, 863 So. 2d at 1182 (citing to section 316.193(3)(c)3., Florida (2002)). Five deaths are not the same as one. The same common sense construction applied to section 817.505(1)(b) tells us that "engaging in any split-fee arrangement" does not mean that thirty-seven episodes, each involving planning and execution, are one. Accordingly, each engagement may be charged.

IV. SECTION 817.505(1)(b), FLORIDA STATUTES, IS CONSTITUTIONAL.[3]

[3] For reasons not explained, defendants' brief addresses

Defendants argue section 817.505(1)(a) is vague because it fails to provide guidance as to which specific split-fee arrangements are prohibited, and therefore, without a mens rea or guilty knowledge requirement, the statute is unconstitutional. In fact, defendants contend the only acceptable mens rea is "intent to defraud." This argument is without merit.

A. The Vagueness Doctrine

"A statute will withstand constitutional scrutiny under a void-for-vagueness challenge if it is specific enough to give persons of common intelligence and understanding adequate warning of the proscribed conduct." Sanicola v. State, 384 So. 2d 152, 152 (Fla. 1980); see also Sieniarecki v. State, 756 So. 2d 68, 74 (Fla. 2000). It is a court's obligation to uphold a statute against a vagueness challenge if the application of ordinary logic and common understanding would permit. State v Little, 400 So. 2d 197 (Fla. 5th DCA 1981). Further, if a defendant has engaged in conduct clearly

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subsection 817.505(1)(a). The trial court held, without explanation, that section 817.505(1)(b) was unconstitutional. R5: 843. The Fifth District reversed, holding that section 817.505(1)(b) was not vague and noting that section 817.505(1)(a) was not at issue. Slip Op. at 13 n. 5. Only defendant Rubio was charged with violation of section 817.505(1)(a) in Predicate Incidents 54-90 of Count 1. Rubio filed no brief in the appeal before the Fifth District, nor

proscribed by the plain and ordinary meaning of the statute, he may not complain of its vagueness as applied to the hypothetical conduct of others. Sieniarecki, 756 So. 2d at 75; see also State v. Brake, 796 So. 2d 522, 526-527 (Fla. 2001).

In addressing a vagueness challenge, the court must review the record to determine if the conduct alleged is clearly proscribed by the challenged statute. Hoffman Estates v. Flipside, 455 U.S. 489, 495 (1982) (a court should examine the complainant's conduct before analyzing other hypothetical applications of the law).

B. The Conduct Alleged In this Case Is Clearly Proscribed by Section 817.505(1)(b).

The record demonstrates that defendant Rubio solicited Medicaid-eligible children at public housing areas and transported them to a dental office where defendants Guzman and Mendez performed or claim to have performed dental services, which were billed to the State. R1: 59,61. In exchange for soliciting and transporting the Medicaid-eligible children to the dental office, Rubio received approximately half of the fee billed to Medicaid by Guzman and Mendez. R1: 61.

In rejecting defendants' vagueness challenge, the Fifth

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has he filed one in this Court.

District held:

> The requirement that the split-fee arrangement be for the purpose of inducing or in return for the referral of patients distinguishes this arrangement from lawful arrangements and provides sufficient notice of the type of arrangement that is prohibited.

Slip Op. at 14 (emphasis added).

Defendants' arguments do not refute this finding. Their reliance on Board of Dentistry Rule 64B5-17.013(4) is wholly misplaced in view of section (5)(f) of that rule which provides that practice management agreements shall not "[d]irectly or indirectly condition the payment or the amount of the management fee on the referral of patients. . . ." Likewise, the Second District's decisions in Practice Management Assoc., Inc. v. Bitet, 654 So. 2d 966 (Fla. 2d DCA 1995), Practice Management Assoc., Inc. v. Gulley, 618 So. 2d 259 (Fla. 2d DCA 1993), and the Fourth District's decision in Gold, Vann & White, P.A., v. Friedenstab, 831 So. 2d 691 (Fla. 4th DCA 2002), expressly note that the referral of patients in exchange for fee splits is prohibited. The Fifth District rejected defendants' arguments for precisely these reasons. Slip op. at 16-17.[4]

[4] For similar reasons, defendants' reliance on section 456.053(3)(o)3.i., Florida Statutes, as permitting referrals which might be made criminal under section 817.505(1), notwithstanding section 817.505(3)(b), is inapposite. Section

Contrary to what defendants' argument suggests, the absence of a specific intent requirement is not unconstitutional outside the field of "public welfare" offenses. The cases defendants cite involved statutory construction; they were not decided on constitutional principles.[5] This Court has held that the State may punish conduct without regard to the mental attitude of the offender:

> It is within the power of the legislature to declare conduct criminal without requiring specific criminal intent to achieve a certain result; that is, the legislature may punish conduct without regard to the mental attitude of the offender, so that the general intent of the accused to do the act is deemed to give rise to a presumption of intent to achieve the criminal result. The legislature may also dispense with a requirement that the actor be aware of the facts making his conduct criminal.

State v. Gray, 435 So. 2d 816, 820 (Fla. 1983) (emphasis added). See also State v. Bussey, 463 So. 2d 1141, 1143 (Fla. 1985)("It is within the authority of the legislature to dispense with specific intent when defining crimes."); State v. Oxx, 417 So. 2d 287, 288-289 (Fla. 5th DCA 1982)("Although the legislature may punish an act without regard to any

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456.053(3)(o)3.i. concerns referrals among health care providers as defined by section 456.053(3)(i). Defendants Rubio and Fernandez were not health care providers. Their function was to deliver patients in return for a split of the Medicaid payment.

[5] Morissette v. United States, 342 U.S. 246 (1952); Liparota v. United States, 471 U.S. 419 (1985); United States v. Freed, 401 U.S. 601 (1971).

particular (specific) intent, the State must still prove general intent, that is, that the defendant intended to do the act prohibited."). Specific intent is not constitutionally required. Reynolds v. State, 842 So. 2d 46, 47-48 (Fla. 2002).

The constitutional limitation on this legislative power is that the State not

> place the accused on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. . . . But where the punishment is imposed only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of the law.

Screws v. United States, 325 U.S. 91, 101-102 (1945).

Subsections (a) and (b) of section 817.505(1) could not be more clear. They prohibit any person to "engage in any split-fee arrangement in any form whatsoever" to induce the referral of patients or in return for referring patients. One could not engage in a split fee arrangement without knowing that was exactly what one was doing. Thus, in accordance with the decisions in Gray, Bussey, and Oxx, supra, the State need prove no more than a defendant's general intent, i.e., an intent to do the act prohibited, which here is to engage in a split-fee arrangement. The intent to achieve a criminal

result may be presumed from the doing of the act and there is no reason to require that section 817.505(1) embody a specific intent to defraud.

The decision below adequately addresses defendants' fleeting First Amendment claim and their assertion that specific intent is required under the Third District's Harden decision. See Answer Brief at 49-50 and slip op. at 17-19. Section 817.505(1)(b) does not inhibit a person's right to solicit business. The Third District's decision erred in finding Florida law preempted.

CONCLUSION

Except for the ruling that section 817.505(1)(b) is constitutional, the decision below should be reversed and this case remanded for further proceedings.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHRISTOPHER M. KISE
Solicitor General
Florida Bar No. 0855545

LOUIS F. HUBENER
Chief Deputy Solicitor General
Florida Bar No. 0140084

JAMES A. MCKEE
Deputy Solicitor General
Florida Bar No. 638218

OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3681
Counsel for Appellant, State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by **U.S. Mail,** postage prepaid, to ROBERT TARG, Esquire, 7600 Red Road, Suite 200, South Miami, Florida 33143-5408, counsel for John Rubio; JOSE M. QUINON, Esquire, 1401 Brickell Ave., Suite 1000, Miami, Florida 33131-3504, counsel for Sonia Bonilla Guzman; ANTHONY C. VITALE, Esquire, 799 Brickell Plaza, Suite 700, Miami, Florida 33131-2805, counsel for Anamaria Bonilla Mendez; G. RICHARD STRAFER, Esquire, 2400 South Dixie Hwy., Suite 200, Miami, Florida 33133-3153, counsel for Gustavo Adolfo Fernandez; and JUAN D. GONZALEZ, Esquire, 6547 Coral Way, Miami, Florida 33155-1843, counsel for Gustavo Adolfo Fernandez; this 31st day of May, 2006.

_____
LOUIS F. HUBENER
Chief Deputy Solicitor General

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I certify that this computer-generated brief is prepared in Courier New 12-point font and complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure.

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LOUIS F. HUBENER
Chief Deputy Solicitor General