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STATE OF FLORIDA, Appellant, v. JOHN ANTHONY RUBIO, SONAI BONILLA GUZMAN, ANAMARIA BONILLA MENDEZ and GUSTAVO ADOLFO FERNANDEZ, Appellees.

No. SC06-157

SUPREME COURT OF FLORIDA

2006 FL S. Ct. Briefs 157; 2006 FL S. Ct. Briefs LEXIS 496

April 27, 2006

On Appeal From the District Court of Appeal, Fifth District of Florida.

JOINT BRIEF OF APPELLEES BONILLA GUZMAN & BONILLA MENDEZ

COUNSEL: [**1] ANTHONY C. VITALE, Esq., ANTHONY C. VITALE, P.A., Brickell Plaza, Suite 700, Miami, FL 33131, Telephone: (305) 358-4500.

G. RICHARD STRAFER, ESQ., G. RICHARD STRAFER, P.A., 2400 S. Dixie Highway, Suite 200, Miami, Florida 33133, Telephone: (305) 857-9090.

[*1] STATEMENT OF THE ISSUES

I. Whether the Fifth District Court of Appeal correctly held that the original *mens rea* standard in the Medicaid Provider Fraud statute, F.S. § 409.920(1)(d), that permitted convictions under a negligence ("should be aware") standard, instead of a willfulness standard as required by the parallel federal Medicaid Fraud statute, violated the Supremacy Clause as construed by the Third District Court of Appeal in *State v. Harden*, 873 So.2d 352 (Fla. 3rd DCA 2004)?

II. Whether the Fifth District Court of Appeal correctly held that the Patient Brokering Statute, F.S. § 817.505, was not a predicate offense for either the Florida RICO Act or the White Collar Crime Victim Protection Act because it does not require proof of "fraud" or "fraudulent intent"?

III. Whether the Fifth District Court of Appeal correctly held that the unit of prosecution for the Patient Brokering Statute, [**10] F.S. § 817.505, was each fee-splitting "arrangement" rather than each financial "transaction" conducted pursuant to any such arrangement?

IV. Whether the Fifth District Court of Appeal erred in overturning the ruling of the Circuit Court, holding that the Patient Brokering Statute, F.S. § 817.505, was facially unconstitutional because it permits convictions without *any mens rea* requirement?

STATEMENT OF THE CASE AND FACTS [*2]

Introduction

Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, establishes a joint federal-state program (commonly known as Medicaid) for providing essential medical and dental services to the poor. States electing to participate in the program must comply with Title XIX's mandates regarding the quality, scope and type of care provided to the enrolled population. *See Public Health Trust of Dade Co. v. Jackson*, 693 So.2d 562, 564 (Fla. 3rd DCA 1996). In return for this compliance, the federal government provides 50% or more of the funds for the program. Florida has elected to participate in the Medicaid program and the federal government currently pays 58.9 [**11] percent of all Florida expenditures for services administered under Title XIX.

Among other things, Title XIX mandates that Medicaid enrolled children be furnished Early and Periodic Screening, Diagnosis and Treatment Services ("EPSDT") -- the primary, preventive, acute and specialty care and services which are necessary to their good health and development, including dental services. *See* 42 U.S.C. § 1396d(k)(3). *See also* 42 U.S.C. § 1396d(a)(10); 42 U.S.C. § 1396a(a)(43). However, according to the State of Florida's own statistics, hundreds of thousands of enrolled Florida children have not been furnished any preventive health care services. In FFY 2004 alone, more than 500,000 Medicaid enrolled Florida children were furnished ***no*** preventive health care services at all. *See* Florida Form 416, Federal Centers for Medicare and Medicaid, attached hereto as **APPENDIX 1**. And between 1999-2004, ***more than 75%*** of Florida's [*3] enrolled children were furnished ***no dental care*** whatsoever, despite their entitlement to such care. *Id*. Indeed, according to a comprehensive [**12] report issued by the Department of Health and Human Services, Office of Inspector General ("OIG"), in 1996, no state in the union provided more than 50 percent of the services required by the Medicaid program and three-quarters of the states provided less than 30 percent. *See* OIG Report No. OEI-09-93-00240, April 1, 1996, attached hereto as **APPENDIX 2**.

The Report found several reasons for the lack of responsibility by the states. Few dentists were willing to accept Medicaid patients due to "inadequate reimbursement" caused by "slow Medicaid payments, arbitrary denials, and prior authorization requirements for routine services." *Id*. at p. 2. Medicaid eligible families also tended to give dentistry care a low priority and were "unwilling to wait for appointments or make necessary travel or child care arrangements which increases the likelihood of missed appointments and failure to seek services." *Id*. at pp. 2, 6. n1 Like many states, the State of Florida, while quite willing to accept federal funds, has a long history of legislative efforts designed to limit its matching responsibilities under the Medicaid Act. *See Pharmaceutical Research and Manufacturers of America v. Meadows*, 304 F.3d 1197, [*4] 1198 (11th Cir. 2002), [**13] (characterizing Florida statute creating a "preferred list" of prescription drugs that would be reimbursed under its Medicaid program as "another chapter in the ongoing efforts of states to hold down their Medicaid drug costs"). Thus, it is not surprising that although both federal and state law require Florida officials operating the Medicaid program in the State of Florida to provide transportation, if necessary, for those eligible for dental services, *see* 42 U.S.C. § 1396a(a)(43)(B); 42 C.F.R. § 441.62; and Fla. Stat. § 409.905(12), the Agency for Health Care Administration ("AHCA") has never complied with these requirements. Indeed, in a direct effort to restrict access

to mandatory dental services, in 1998, the Florida Legislature banned the use of mobile dental units that had previously been providing such services in cooperation with school systems around the state. *See* Fla. Stat. § 409.906(1), (6). Last year, this pattern of conduct resulted in the filing of a class action lawsuit against the AHCA in the U.S. District Court for the Southern District of Florida, accusing the AHCA of systematically violating the civil rights of Florida children [**14] by refusing to provide mandatory EPSDT services, specifically including dental services. n2

n1 Similar problems were found in the Medicaid program by the General Accounting Office in a report issued in September 2000. *See* GAO/HEHS-00-149, *Oral Health: Factors Contributing to Low Use of Dental Services by Low-Income Populations*, at p. 14 ("research has found that dentists fault unique Medicaid claim forms and codes, difficulties with claims handling, preauthorization requirements, slow Medicaid payments, and what they consider to be arbitrary denials of submitted claims"), attached hereto as **APPENDIX 3**.

n2 *See* Docket Sheets and Complaint, *Florida Pediatric Society, et al., v. Alan Levine, et al.*, Case No. 05-23037-Civ-Jordan (S.D. Fla.), **APPENDIX 4**. The Appellees request that the Court take judicial notice of the pendency of the *Levine* case. The Court has the authority to take judicial notice of such public records under Florida Evidence Code, Section 90.202(6) (permitting courts to take judicial notice of the "records ... of any court of record of the United States"). Moreover, "an appellate court is in as good a position as the trial court to ascertain the degree of probability of a judicially noticeable fact." Weinstein & Berger, WEINSTEIN'S EVIDENCE, Vol. 1, at & 201[04]. This is particular true with respect to court records. *See, e.g., The Florida Bar v. Marcus*, 616 So.2d 975 (Fla. 1993) (taking judicial notice of attorney's felony conviction in federal court); *May v. Barthet*, 886 So.2d 324, 325 (Fla. 4th DCA 2004) (taking judicial notice of prior cases, including federal ones, where a *pro se* litigant engaged in abusive conduct). *See also Gorham v. State*, 494 So.2d 211, 212 (Fla. 1986) (taking judicial notice of the court file and briefs filed in another case).

Similar lawsuits have been filed in other states. *See, e.g., Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), *rev'd sub nom. Frew v. Hawkins*, 540 U.S. 431 (2004) (holding Texas consent decree enforceable and rejecting state's sovereign immunity arguments); *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002) (rejecting North Carolina's Eleventh Amendment defense to class action under 42 U.S.C. § 1983 seeking an injunction requiring North Carolina to insure the availability of dental services for minors).

[**15] [*5]

In addition to not providing services, the State of Florida has sought to deter those who have tried to do so by misusing poorly worded criminal statutes to prosecute dentists actively providing EPSDT services to Florida's needy children. One such case has been pending before this Court for some time. In *State v. Harden*, 873 So.2d 352 (Fla. 3rd DCA 2004), the Third District Court of Appeal held that the *mens rea* definition in F.S. § 409.920(1)(d) was unconstitutional in a criminal case similar to this one. The State appealed *Harden* to this Court and oral arguments took place on April 5, 2005. *See State v. Harden*, Case No. SC04-613.

The Criminal Information

On October 28, 2003, the State filed a 130-Count Criminal Information against the Appellees. (R1: 64-200.) Counts 1, 2 and 130 charged them with violating three umbrella offenses, RICO,

RICO conspiracy and the White Collar Crime Victim Protection Act, F.S. [*6] §§ 895.03(3), 895.03(4) and 775.0844, respectively. The remainder of the Counts, as well as the "predicate" crimes for Counts 1, 2 and 130, consisted of multiple alleged violations of two statutes.

Counts 3-55 and [**16] "Predicate Incidents" 1-53 of Counts 1, 2 and 130 alleged that the appellees "knowingly" made (or caused the making of) false statements to the AHCA in alleged violation of F.S. § 409.920(2)(a). Section 409.920(2)(a) makes it unlawful to "knowingly make ... any false statement or false representation of a material fact, by commission or omission, in any claim submitted to the agency or its fiscal agent." At the time of the alleged conduct in this case, § 409.920(1)(d) defined the term "knowingly" as follows: "'Knowingly' means 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." (Emphasis added.) n3 The Information alleged that the appellees violated § 409.920(2)(a) by submitting claims for reimbursement by Medicaid for: (1) [*7] dental x-ray services that were performed by employees who allegedly were not properly licensed; and (2) dental services that allegedly were not provided.

> n3 Responding to the Third District's ruling in *Harden* that the *mens rea* standard in § 409.920(1)(d) was unconstitutional, in 2004 the Florida Legislature amended the definition to eliminate the language highlighted in the text. Section 409.920(1)(d) now provides:
>
> > (d) "Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident. As used in this section, the term "knowingly" also includes the word "willfully" or "willful" which, as used in this section, means that an act was committed voluntarily and purposefully, with the specific intent to do something that the law forbids, and that the act was committed with bad purpose, either to disobey or disregard the law.

[**17]

Counts 56-129 and "Predicate Incidents" 54-127 of Counts 1, 2 and 130 alleged that the appellees violated the Patient Brokering statute, F.S. § 817.505(1)(a), by engaging in an allegedly illegal "split-fee arrangement." Section 817.505 provides, in pertinent part:

> **§ 817.505**. Patient brokering prohibited; penalties
>
> (1) It is unlawful for any person, including any health care provider or health care facility, to:
>
> (a) Offer or pay any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, to induce the referral of patients or patronage from a health care provider or health care facility...
>
> ***
>
> (4) Any person ... who violates any provision of this section commits a felony of the third degree, punishable as provided in s. 775.092, s. 775.083, or s. 775.084.

As the Circuit Court later found (R5: 849) -- a finding adopted by the Court of Appeal not challenged by the State -- these charges were based upon the following factual allegations.

Appellees Guzman, Mendez and Fernandez are dentists who owned and operated a dental practice group, Bonilla Dental [**18] Group, Inc. ("BDG"). (R1: 58-62; R3: 452; R4: 664.) They entered into a contract with a dental management company, Dental Management Corporation ("DMC"), which is owned and operated by Appellee Rubio, to provide BDG with a variety of management services for their Orlando-based dental clinic. (R1: 9; R3: 452-53; R4: 664.) In addition to providing BDG with office space, staffing, [*8] accounting and billing services and patient transportation, DMC allegedly ***solicited and transported Medicaid-eligible children to the clinic for treatment***. (R1: 9-10.) In the 14-month period between July 2001 and August 2002, BDG allegedly billed Medicaid $ 715,378.55 for 1,284 claims. (R1: 62; R3: 453.) In return for the management and marketing services, DMC was allegedly paid 42-43% of BDG's Medicaid reimbursements minus any operating expenses. (R1: 20, 61, 157-185; R4: 664.) Guzman and Mendez, the owners of BDG, then allegedly split the remaining 57-58%. *Id*.

The Information did not allege that the percentage paid to DMC for its professional management services was in any way excessive for the services performed. Nonetheless, the Information charged that the contractual arrangement [**19] between BDG and DMC constituted a "split-fee arrangement" that was prohibited by § 817.505(1)(a). Moreover, while the conduct criminalized by § 817.505(1)(a) is the act of "engaging in" the split-fee "arrangement," the State charged the appellees with 73 counts (Counts 56-129) of violating § 817.505(1)(a) based on the contention that each ***payment*** made pursuant to a single "arrangement" constituted a separate violation of the statute.

The Motions To Dismiss

On April 16, 2004, the appellees filed two distinct motions to dismiss the Information. (R2: 395-400; R3: 401-486.) The first motion sought the dismissal of the charges brought under § 409.920(2)(a), arguing that the diluted *mens rea* definition in § 409.920(1)(d) (permitting convictions under a "should be aware" standard) rendered [*9] § 409.920(2)(a) unconstitutional under Article VI, Clause 2, of the United States Constitution ("the Supremacy Clause"). (R2: 395-400; R3: 401-442.) For this claim, the appellees relied heavily on rulings in *State v. Harden, et al.*, Case No. F00-38785 (11th Jud. Cir., Feb. 5, 2003), *aff'd, State v. Harden*, 873 So.2d 352 (Fla. 3rd DCA 2004), [**20] holding that the negligence standard permitted by § 409.920(1)(d) was unconstitutional as applied to the anti-kickback provision of the Medicaid Provider Fraud statute, § 409.920(2)(e). The appellees argued that the *Harden* opinions were fully applicable to the § 409.920(2)(a) charges at issue in this case because both the anti-kickback and false statement provisions of the federal Medicaid Fraud statute required "willfulness."

In their second motion to dismiss, the appellees argued that § 817.505(1)(a) was unconstitutional under the Due Process Clauses of the 14th Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution, as well as the First Amendment, for criminalizing "any split-fee arrangement" based on strict liability, *i.e.*, without requiring ***any*** form of *mens rea*. (R3: 443-486.) Alternatively, they argued that § 817.505(1)(a) failed to meet either the statutory definition of "racketeering activity" in F.S. § 895.02(1)(a) or the statutory definition of "white collar crime" in F.S. § 775.0844(3)(a). Finally, the appellees argued that the § 817.505(1)(a) counts were multiplicitous and, therefore, in violation [**21] of Fla. R. Crim. P.

3.190(c)(4), F.S. § 775.021(4) and the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and/or Article [*10] 9 of the Florida Constitution, because the proper unit of prosecution was each fee-splitting "arrangement" and not each payment made pursuant thereto.

The State filed a single written opposition to the appellees' motions. (R3: 501-536.) The Circuit Court also gave the parties an expanded opportunity to present their respective positions during a motions hearing, convened on October 29, 2004. (R1: 1-56.) In both its written opposition and during its oral presentation, the State argued that *Harden* was simply wrongly decided or, alternatively, that the preemption analysis employed in *Harden* applied only to the anti-kickback section of § 409.920(2)(e) and not to the "false statement" section of § 409.920(2)(a). (*See* R1: 26-27, 29; R3: 501-509.) With respect to the Patient Brokering statute, the State contended that § 817.505(1)(a) was a type of "public welfare" offense, akin to the possession of unregistered hand grenades or adulterated foods, n4 for which it was constitutional to impose strict liability. [**22] (R1: 25, 29; R3: 513.)

> n4 *See United States v. Freed*, 401 U.S. 601 (1971), and *United States v. Dotterweich*, 320 U.S. 277 (1943).

During the motions hearing, however, the prosecutors were confronted with a Board of Dentistry Rule, F.A.C. 64B5-17.013(4), that expressly permitted a licensed dentist to "enter into an agreement with a non-dentist to receive 'Practice Management Services'" -- *i.e.*, a form of split-fee arrangement. (R1: 20; R4: 624.) Refusing to [*11] acknowledge that the existence of this regulation demonstrated that not all split-fee arrangements were so inherently illegal to permit dispensing with a *mens rea* requirement, the prosecutors instead argued a different point. They contended that, at trial, they would prove that the split-fee arrangement in this case did not result in the payment of "fair market value" for the practice management services provided and, therefore, would not be protected under F.A.C. 64B5-17.013(4). (R1: 20.) However, in response [**23] to pointed questioning by the Circuit Court, the prosecutors eventually conceded that they did not even know what the "market" was:

> THE COURT: Let me ask you this, if it had been flat fee agreement, they're going to pay X per month, and they just happened to have paid the 43%, would that have been legal?
>
> MR. SCHNEIDER: As a percentage of the revenue, Judge?
>
> THE COURT: It if just happened to equal 43% of the revenue; [if it] had been a flat monthly fee, would that have been legal?
>
> MR. SCHNEIDER: I think you need to figure out what reasonable is under the Market. I think that's what this rule suggests. And that more than reasonably -- or a -- or market value would not be reasonable. I don't know what the Market is, Judge. And perhaps, we can have a hearing down the road as to what a reasonable fee should be under these circumstances.

(R1: 21-22.) Moreover, defense counsel proffered that the percentage charged in this case (42-43%) was "in-line and fair market value to be paid to the practice company according to the American Dental Association and the IRS figures." (R1: 9.) [*12]

The State also disagreed with the appellees' arguments concerning [**24] the use of § 817.505(1)(a) violations as predicate acts for RICO and the White Collar Crime Victim Protection Act and as to the appropriate unit of prosecution. (R3: 509-11.)

The Circuit Court's Order

On February 3, 2005, the Circuit Court entered an order granting the appellees' motions. (R4: 663-672.) The Circuit Court began by summarizing the charges and their factual basis, as alleged in pleadings and proffered during the oral argument. The Circuit Court then made two groups of findings. n5

> n5 The Circuit Court accepted defense counsel's proffer concerning the fair market value of the fees charged by the appellees, finding that "the management fees paid are in line with Internal Revenue Service figures for dental associations." (R4: 664.) The State did not challenge that finding before the Fifth District and has not challenged it in its Initial Brief before this Court.

First, the Circuit Court agreed with the rulings in *Harden* that the *mens rea* requirement in § 409.920(1)(d) was [**25] preempted by federal law and, therefore, was unconstitutional under the Supremacy Clause. (R4: 665-669.) Second, the Circuit Court agreed with the appellees that § 817.505(1)(a) was unconstitutional for attempting to criminalize all split-fee arrangements without any *mens rea* requirement. In finding § 817.505(1)(a) unconstitutional, the Circuit Court expressly rejected "the state's contention that fee-splitting constitutes a public welfare offense similar to possessing an unregistered hand grenade or shipping adulterated drugs." (R4: 670, 672.) Alternatively, the Circuit Court agreed with the appellees that § 817.505(1)(a) was not a crime requiring proof of [*13] "fraud" and hence could not constitute "racketeering activity" or a form of "white collar crime," as defined in F.S. §§ 895.02(1) (a) and 775.0844(3)(a), respectively. (R4: 670.) The Circuit Court also agreed with the appellees' construction of the unit of prosecution, holding that § 817.505(1)(a) permitted prosecution of the "arrangement" and not each distinct payment made pursuant thereto. (R4: 670-71.)

The Court of Appeal's Decision

The Fifth District Court of Appeal affirmed the Circuit Court's [**26] application of *Harden* to the false claims portion of § 409.920(2)(a), disagreeing with an intervening decision from the Third District in *State v. Wolland*, 902 So.2d 278 (Fla. 3rd DCA 2005). *See State v. Rubio*, 917 So.2d 383 (Fla. 5th DCA 2005), **APPENDIX 5**. While the Fifth District rejected the appellees' constitutional attack on § 817.505(1)(a), it agreed with the Circuit Court that § 817.505(1)(a) was not a crime requiring proof of "fraud" and hence could not constitute "racketeering activity" or a form of "white collar crime." *Id*. It also agreed with the appellees' construction of the unit of prosecution. *Id*. Hence, the Fifth District's rulings required the dismissal of the Information. The State has appealed these rulings to this Court.

STANDARDS OF REVIEW

The Court reviews *de novo* issues of law, including the constitutionality of statutes and their overall construction. *Execu-Tech Bus. Sys. v. Nwe Oji Paper Co.*, 752 So.2d 582 (Fla. 2000).

TITLE: JOINT BRIEF OF APPELLEES BONILLA GUZMAN & BONILLA MENDEZ

[*14] **SUMMARY OF THE ARGUMENT**

I. The manner and degree in which federal preemption analysis affects the Medicaid Provider [**27] Fraud statute in general, and as applied to the original *mens rea* element in § 409.920(1)(d), was fully briefed and argued to this Court in *Harden*. If the Court affirms Third District's decision in *Harden*, in this case the Court need only decide whether the preemption analysis in *Harden*, holding § 409.920(1)(d) unconstitutional as applied to the anti-kickback provision in § 409.920(2)(e), should be applied to the false statement provision in § 409.920(2)(a). Both the Circuit Court and the Fifth District correctly held that it should because the "negligence" standard permitted by § 409.920(1)(d), as originally drafted, conflicts with both federal false statement and anti-kickback statutes. The Fifth District correctly found that Third District case relied upon by the State, *Wolland*, was wrongly decided and should not be followed by this Court.

II. The Fifth District correctly ruled that § 817.505(a) does not meet the statutory definition of "racketeering activity" in F.S. § 895.02(1)(a) or the statutory definition of "white collar crime" in F.S. § 775.0844(3)(a). Section 817.505(a) does not require proof of "fraud" or "fraudulent intent." Indeed, [**28] it purports to be a strict liability offense. Although the Florida Legislature chose to place the statute within Chapter 817, it did so without manifesting any intent to create a new RICO or white collar crime predicate. [*15] Indeed, RICO was not mentioned at all. Since patient brokering, therefore, does not "relate to fraudulent practices," it cannot serve as a predicate for these more serious, compound crimes. *See State v. Gusow*, 724 So.2d 135 (Fla. 4th DCA 1998) (*per curiam)*; *State v. Kessler*, 626 So.2d 251 (Fla. 4th DCA 1993) (*per curiam), rev. denied*, 634 So.2d 627 (Fla. 1994).

III. The Fifth District also correctly applied the "a/any" test in holding that the proper unit of prosecution for the patient broker statute was the split fee "arrangement" and not each individual payment made pursuant to that arrangement. Contrary to the State, there is nothing in the legislative history of the patient brokering statute that remotely addresses the appropriate unit of prosecution. Nor does the patient brokering statute have a common law history that suggests a departure from the "a/any" test. For both of these reasons, [**29] the State's reliance on the only decision of this Court to depart from the "a/any" test in determining the appropriate unit of prosecution, *Bautista v. State*, 863 So.2d 1180 (Fla. 2003), is misplaced. Moreover, any ambiguity in the unit of prosecution must be construed in the appellees' favor in light of the rule of lenity.

IV. The only mistake the Fifth District made in reviewing the Circuit Court's order was in rejecting the Circuit Court' s view that the Patient Brokering statute was unconstitutional on its face for seeking to create a strict liability offense. Since various types of "split fee" arrangements have been considered legal by both the courts and the Board of Medicine, [*16] such arrangements cannot be deemed so inherently unlawful so as to justify dispensing with a *mens rea* requirement. The Fifth District's approval of strict liability also cannot be squared with Subsection 817.505(3)(a) of the statute, stating that the prohibition does not "apply to ... any payment practice not prohibited by 42

U.S.C. s. 1320a-7b(b) or regulations promulgated thereunder." Under these federal statutes and rules, "patient [**30] brokering" is prohibited but only as a form of "kickback" that, as discussed in the *Harden* litigation, requires proof of "willfulness." Since, on its face, § 817.505(1)(a) prohibits "patient brokering" with no *mens rea* requirement at all, it is both preempted by federal law under *Harden* and internally inconsistent with Subsection 817.505(3)(a). Hence, the Circuit Court was correct in declaring the statute unconstitutional.

ARGUMENT

I. THE LOWER COURTS CORRECTLY FOUND F.S. § 409.920(2)(e) AND F.S. § 409.920(2)(d) UNCONSTITUTIONAL UNDER THE SUPREMACY CLAUSE

A. Introduction

In *Harden*, the State charged the Administrator of businesses providing dental services to Medicaid-eligible children with violating the anti-kick provisions of § 409.902(2)(e) for paying drivers to solicit and transport the children to his dental clinics for treatment that the State of Florida was ***required*** to provide by federal law. The Circuit Court, however, dismissed the Information against Harden and his co-defendants on multiple grounds, including Harden's argument that the *mens rea* requirement in [*17] § 409.920(1)(d) was preempted [**31] by federal law and was thus unconstitutional under the Supremacy Clause. The State appealed the Circuit Court's decision but the Third District Court of Appeal affirmed it. With respect to the *mens rea* issue, the Third District held:

> The federal anti-kickback statute contains a 'knowing and willful" mens rea
>
> requirement. Under federal law, "in order to establish a 'willful' violation of a statute, 'the Government must prove that [each] defendant acted with knowledge that his conduct was unlawful.'" *Bryan v. United States*, 524 U.S. 184, 192, 141 L.Ed.2d 197, 118 S.Ct. 1939 (1998) (citations omitted). In contrast, Florida's anti-kickback statue only requires that the defendant act "knowingly." In turn, "knowingly" is defined 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." *§ 409.920(1)(d), F.S.* (2000). This Florida definition of "knowingly" would include "mere negligence," thereby criminalizing activity that the federal statute intended to protect. *Hanlester Network v. Shalala*, 51 F.3d 1390, 1399 n. 16 (9th Cir. 1995) [**32] ("The legislative history demonstrates that Congress, by use of the phrase 'knowingly and willfully' to describe the type of conduct prohibited under the anti-kickback laws, intended to shield from prosecution only those whose conduct 'while improper, was inadvertent.'"). Again, enforcement of the Florida anti-kickback statute would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Meadows*, 304 F.3d at 1206.

See State v. Harden, 873 So.2d 352, 355 (Fla. 3rd DCA 2004).

As previously noted, the State appealed *Harden* to this Court. The case has been fully briefed by the parties and various *amicus curiae*, and oral arguments were held on April 5, 2005. Despite

having already fully briefed and argued the broader preemption issues to the Court in *Harden*, the State re-argues the same points in its Initial Brief herein. Since a decision in *Harden* will surely occur before this Court can decide the instant case, the appellees decline the State's invitation to re-enter this broader debate and will assume, [*18] for purposes of deciding the constitutionality of § 409.920(1)(d) as applied [**33] to § 409.920(2)(a), that the Third District's analysis in *Harden* will be affirmed.

Assuming *Harden* is affirmed, the only remaining question is whether the preemption analysis employed in *Harden* vis-a-vis the anti-kickback provision in § 409.920(2)(e) should be employed with respect to the false statement provision in § 409.920(2)(a). For the reasons set forth below, there is no principled reason to differentiate between the two. Hence, the Court should affirm the Fifth District's ruling concerning the unconstitutionality of § 409.920(1)(d), as originally drafted.

B. The Federal *Mens Rea* Requirement

In 1972, Congress enacted the original criminal provisions for conduct deemed in violation of federal healthcare programs. The original legislation included ***both*** an "antikickback provision and a "false statement" provision. Both, however, were punished only as misdemeanors. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, § 242(b), (c), 86 Stat. 1419, *quoted in* 42 U.S.C. § 1320a-7b (History, Ancillary Laws and Directives). From its inception, the "false statement" provision required proof of [*19] [**34] "willfulness." *Id*. n6 The "anti-kickback" provision, however, contained no *mens rea* provision. *Id*. n7 In 1977, Congress upgraded the violations to felonies. *See* Medicare-Medicaid Anti-fraud and Abuse Amendments, Pub. L. No. 95-142, 91 Stat. 1175, 1182 (1977). By 1980, Congress began to realize the potential for abusive prosecutions and amended the "anti-kickback" provision to include the same elevated *mens rea* requirement ("knowingly and willfully") as required in the false statement provision. Both provisions are now consolidated into matching subsections (a) and (b) of 42 U.S.C. § 1320a-7b. *See* **APPENDIX 6**.

> n6 The false statement provision of the 1972 Act thus provided: "(a) Whoever ... knowing and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a State plan approved under this title ... shall be guilty of a misdemeanor...."
>
> n7 The anti-kickback provision of the 1972 Act thus provided: "(b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this title and who solicits, offers, or receives any ... kickback or bribe in connection with the furnishing of such items or services ... shall be guilty of a misdemeanor...."

[**35]

C. The State *Mens Rea* Requirement [*20]

The Florida Medicaid Provider Fraud statute, § 409.920(2), like its federal counterpart, prohibits both false statements and kickbacks in separate subsections of the same act. Despite Congress' explicit use of a "willfulness" requirement to curb improper prosecutions, the Florida Legislature in § 409.920(2) only required proof that a defendant act "knowingly" with respect to both types of violations. The Florida Legislature then diluted the federally-mandated "willfulness" requirement

further by defining the term "knowingly" in § 409.920(1)(d) to include negligence ("should be aware"). As the Dade County Circuit Court and the Third District Court of Appeal in *Harden* have held, and as this Court will presumably reiterate before this case is decided, this intentional dilution of the federal *mens rea* requirement is unconsti-tutional under the Supremacy Clause.

D. *Harden* Applies to § 409.920(2)(a)

Contrary to the State, there is no principled basis to hold § 409.920(1)(d) unconstitutional when applied to "kickback" prosecutions but constitutional when applied to "false statement" prosecutions. [**36] As discussed above, the federal counterparts to both state provisions require "willfulness." The "willfulness" require-ment in the false statement portion of the federal statute, 42 U.S.C. § 1320a-7b(a), has been uniformly construed to require the government to prove that a defendant's claim for reimbursement was "false" under ***any*** reasonable interpretation that would make the claim proper. *See United States v. Whiteside*, 285 F.3d 1345, 1351-53 (11th Cir. 2002) (reversing false statement conviction under 42 U.S.C. § 1320a-7(b) where Medicare/Medicaid statutes and [*21] regulations were "silent" and "reasonable people could differ as to whether the debt interest was a reimbursable expense"). *See also United States v. Calhoon*, 97 F.3d 518, 526 (11th Cir. 1996); *United States v. Migliaccio*, 34 F.3d 1517, 1525 (10th Cir. 1994); *United States v. Harris*, 942 F.2d 1125, 1132 (7th Cir. 1991). This deference to providers of medical services is wholly inconsistent with the Florida Legislature's attempt to permit prosecutions of the same conduct on a negligence [**37] theory.

Florida's false statement provision, § 409.920(2)(a), therefore conflicts with federal law just as much, if not more so, than the anti-kickback provision struck down in *Harden*. By permitting a prosecution based on what a provider allegedly "should be aware" of, § 409.920(1)(d) allows convictions to be predicated on conduct that Awhile improper, was inadvertent" -- precisely the opposite of what Congress intended. *See Harden*, 873 So.2d at 355 (citations omitted).

Hence, this Court should affirm the Fifth District's and Circuit Court's rulings and find that the burden of proof provision in § 409.920(1)(d) is invalid under the Supremacy Clause because it is preempted by federal law. *See also Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002) (holding invalid under the Supremacy Clause a city ordinance that required companies suspected of committing hazardous waste contamination to prove by "clear and convincing evidence" that others were responsible for the contamination, rather than by a preponderance of the evidence, as required by federal law, 42 U.S.C. §§ 9601- 9675), *cert. denied*, 538 U.S. 961 (2003); [**38] *Randall v. Lukhard*, [*22] 709 F.2d 257, 267 (4th Cir. 1983) (holding that Virginia's burden of proof provisions in its transfer of assets rule under the Medicaid Act were invalid in light of less restrictive federal requirements), *modified in part*, 779 F.2d 966 (4th Cir. 1984) (en banc) (construing Virginia's burden of proof provision so as not to conflict with federal standard), *cert. denied* 469 U.S. 872 (1984).

The State nonetheless contends that § 409.920(1)(d) is constitutional as applied to the false statement section of the statute. The State bases this argument on Third District's decision in *State v. Wolland*, 902 So.2d 278 (Fla. 3rd DCA 2005). However, The Fifth District below correctly ruled that *Wolland* was wrongly decided.

The court in *Wolland* sought to distinguish the situation in *Harden* from the situation in *Wolland* based, in substantial part, on the fact that the federal anti-kickback statute required an elevated standard of "willfulness," while the federal false claims statute, 18 U.S.C. § 287, required only "knowledge." *See Wolland*, 902 So.2d at 282-84. [**39] The *Wolland* court, however, plainly

focused on the wrong federal statute for its Supremacy Clause/preemption analysis. The federal analogue to § 409.920(2)(a) is ***not*** the federal false ***claims*** statute (18 U.S.C. § 287) but the federal false ***statement*** statute (U.S.C. § 1320a-7b(a)), which, as previously discussed, has ***always*** required 'willfulness" and not mere "knowledge."

Even if this Court could overlook this obvious defect in the Third District's analysis, *Wolland* also incorrectly believed that the original *mens rea* requirement of [*23] § 409.920(1)(d) was constitutional and not in conflict with an actual "knowledge" standard. *See Wolland*, 902 So.2d at 285. Although the *mens rea* definition in § 409.920 has now been amended, the structure of statute remains the same. Section 409.920(1) sets forth a series of definitions that apply across-the-board to the entire statute. Thus, § 409.920(1) begins by stating "for the purposes of this section" and then follows with a series of definitions, including subsection (1)(d), defining the term "knowingly." Section 409.920(2) of the statute [**40] then delineates a series of violations, subsections (2)(a)-(f). Each of these violations uses the term "knowingly" to define the operative *mens rea*.

As originally worded, § 409.920(1)(d) defined the term "knowingly" as follows: "'Knowingly' means 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." (Emphasis added.) n8 The defendants in *Wolland* were charged under the "false statement" component of § 409.920(2)(a), which provides:

> (2) It is unlawful to:
>
> (a) Knowingly make, cause to be made, or aid and abet in the making of any false statement or false representation of a material fact, by commission of omission, in any claim submitted to the agency or its fiscal agent for payment.

n8 As previously discussed, in 2004, the statute was amended to define "knowledge" to include a "willfulness" requirement and eliminating the offending "should be aware" language.

[**41] [*24]

Under original § 409.920(1)(d), "knowingly" could mean ***either*** actual know-ledge -- the standard employed in the federal false claims provision -- ***or*** a type of negligence. That is, a defendant could be guilty of violating § 409.920(2)(a) if he made a statement that the State claimed he "should be aware" was false or even if he omitted something from a statement that he "should" have included. Therefore, the Third District was correct in *Harden* when it concluded that: "This Florida definition of 'knowingly' would include 'mere negligence'...." *Harden*, 873 So.2d at 355.

The Third District in *Wolland*, however, misconstrued the meaning of the original § 490.920(1)(d). In *Wolland*, the Third District claimed that § 490.920(1)(d) did not dilute the actual knowledge requirement of federal law (and, thereby, create a conflict preemption problem) because: "Simply put, one cannot negligently 'knowingly make ... [a] false statement ... in [a] claim submitted to the agency ... for payment." *Wolland*, 902 So.2d at 284-85.

This statement completely misapprehended the potential impact of the "should be aware" [**42] language in the original § 490.920(1)(d). As discussed above, § 490.920(1)(d) defined the term "knowingly" to mean ***either*** actual knowledge ***or*** negligence ("should be aware"). Stated another way, the definition allowed the State to ***substitute*** negligence for actual knowledge. Prosecutions would thus be permitted under the theory that a defendant "should have known" a statement was false. For example, if a Medicaid provider were to bill Medicaid for a service but used the wrong billing code, inflating the cost of the service, [*25] the State could, under § 409.920(1)(d), claim that the submission constituted a criminal false statement in violation of § 409.920(2)(a) because the provider "should have been aware" of the correct billing code. Or, as in this case, if a Medicaid provider billed Medicaid for a service (such as a dental x-ray) performed by an employee who was not properly licensed, the provider would be guilty even if the licensure defect was one of negligence rather than actual knowledge of the licensure requirement.

Accordingly, contrary to the Third District's construction in *Wolland*, § 490.920(1)(d) created a similar preemption [**43] problem to the one in *Harden*. As the court in *Wolland* emphasized, the federal false claim statute requires a showing that the defendant actually "'(knew] at the time he was making such claims that they were, in fact false.'" *Wolland*, 902 So.2d at 284, quoting *United States v. Laughlin*, 26 F.3d 1523, 1525 (10th Cir. 1994). And, the legislative history of the federal false claims statute makes clear that by requiring "knowledge" Congress meant that the statute "would not cover 'errors resulting from mere negligence....'" 132 Cong. Rec. § 986 (Feb. 4, 1986), attached hereto as **APPENDIX 7**. In contrast, § 490.920(1)(d) only required a form of negligence.

In one of the case parentheticals cited by the court in *Wolland*, the Third District implied that the federal actual knowledge requirement could sometimes be satisfied by a defendant's "conscious avoidance." *See Wolland*, 902 So.2d at 283, n. 7, citing *United States v. Nazon*, 940 F.2d 255, 258-60 (7th Cir. 1991). The State makes the same [*26] argument here. *See* Initial Brief of Appellant, at pp. 21-23. Both the *Wolland* court and the State [**44] have mis-construed the "conscious avoidance" doctrine.

Conscious avoidance is ***not*** the same as negligence. Federal law is quite clear that a conscious avoidance or deliberate ignorance instruction cannot be given unless the government first makes two factual showings. First, the evidence must show that the defendant was subjectively aware of a high probability of the existence of the fact in question. Second, the evidence must show that the defendant "***purposely contrived*** to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." *United States v. Perez-Tosta*, 36 F.3d 1552, 1564 (11th Cir. 1994) (emphasis added), *cert denied sub nom. Perez-Aguilera v. United States*, 515 U.S. 1145 (1995). The instruction is proper only "if a party has his suspicions aroused but then ***deliberately*** omits to make further enquiries, because he wishes to remain in ignorance...." *United States v. Rivera*, 944 F.2d 1563, 1570 (11th Cir. 1991) (emphasis added). Indeed, it is this factual predicate requiring intentional conduct that avoids the criminalization of negligent conduct. *See* [**45] *generally Rivera*, 944 F.2d at 1570. The instruction is improper where all the government shows is negligence. *See, e.g., United States v. Garzon*, 688 F.2d 607, 609 (9th Cir. 1982); *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984). *See also United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986) (use of instruction was error). [*27]

Accordingly, the Court should reject the State's reliance on this flawed argument in *Wolland*. The *Wolland* court's conclusion that "Subsection 409.920(2)(a) is ... in harmony with the principles applicable to prosecutions under the federal false claims enactments" is likewise fundamentally inaccurate. *See Wolland*, 902 So.2d at 285. Accordingly, the Court should reject *Wolland*'s flawed

discussion of the *mens rea* requirement of § 409.920(1)(d) and adopt the holdings of the Fifth District and Circuit Court in this case.

II. THE LOWER COURTS CORRECTLY RULED THAT § 817.505(A) NEITHER CONSTITUTES "RACKETEERING ACTIVITY" NOR A "WHITE COLLAR CRIME" BECAUSE IT IS NOT A CRIME "RELATING TO FRAUDULENT PRACTICES"

Both the RICO charges [**46] in Counts 1 and 2 and the alleged violation of the White Collar Crime Victim Protection Act charged in Count 130 relied, in part, on multiple violations of § 817.505(a) as their "Predicate Incidents." However, as both the Fifth District and the Circuit Court correctly held, § 817.505(a) does not meet the statutory definition of "racketeering activity" in F.S. § 895.02(1)(a) or the statutory definition of "white collar crime" in F.S. § 775.0844(3)(a).

Section 895.02(1)(a) defines as "racketeering activity," in pertinent part, as "any crime which is chargeable by indictment or information under the following provisions of the Florida statutes ... Chapter 817, ***relating to fraudulent practices, false pretenses***, ***fraud generally, and credit card crimes.***" (Emphasis added.) Section 775.0844(3) [*28] similarly defines the operative term "white collar crime" as "any felony offense specified in ... Chapter 817, ***relating to fraudulent practices.***" (Emphasis added.)

Chapter 817 literally contains dozens of crimes. The majority of these crimes expressly require proof of "fraud" and/or an intent to "defraud." n9 However, numerous other crimes have been codified [**47] within Chapter 817 which fail to require either fraud or fraudulent intent. *See, e.g.*, F.S. § 817.30 (prohibiting the willful "wearing of the badge or button of the Grand Army of the Republic, the insignia, badge or rosette of the Military Order of the Loyal Legion of the United States, or of the Patrons of Husbandry, or the Benevolent and Protective Order of Elks of the United States of America, or of the Woodmen of the World ... unless entitled" to do so), F.S. § 817.35 (prohibiting the sale or advertisement for sale of "cemetery lots or mausoleum space, upon the guarantee, promise, representation or inducement to the purchaser that the same may be sold or repurchased at a financial profit"); F.S. § 817.36 (prohibiting the sale or resale of "any ticket good for passage or accommodations on any common carrier" at a "price in excess of $ 1 above the retail price charged therefor by the original seller); F.S. § 817.39 (prohibiting the printing of documents "which simulate the seal of the state" or a state agency); F.S. § 817.482(b) (prohibiting the sale, transportation or advertisement of [*29] equipment used to avoid payment of telecommunications services); F.S. § 817.559 [**48] (prohibiting the failure to "correctly" label television picture tubes "to indicate new and used components"); F.S. § 817.5615 (prohibiting the knowing removal or defacing of identification marks on optical discs), F.S. § 817.569 (prohibiting the knowing use of any public record to facilitate the commission of any first degree misdemeanor).

> n9 *See, e.g.*, in F.S. §§ 817.034(4)(a), 817.037, 817.19, 817.22, 817.23, 817.155, 817.233, 817.234, 817.236, 817.2361, 817.24, 817.25, 817.26, 817.28, 817.29, 817.32, 817.33, 817.355, 817.50, 817.51, 817.52, 817.554, 817. 562 and 817.568.

Although the legislative history of § 817.505 may evince a "concern" with fraudulent health care practices, *see* Initial Brief of Appellant, at p. 31, the Florida Legislature nonetheless did not require proof of "fraud" or "fraudulent intent" as an element of the patient brokering offense. Indeed, as discussed in Section IV *infra*, the statute purports to create a strict liability offense requiring no *mens rea* element at [**49] all. Nothing in the legislative history suggests that the

Florida Legislature was even aware that, in creating such an offense, it was also creating a RICO predicate. Since § 817.505(1)(a) is not a crime that, as enacted, requires any proof of "fraud," it does not "relate to fraudulent practices" and, hence, constitutes neither a form of "racketeering activity" nor a type of "white collar crime."

The Fourth District Court of Appeal addressed a closely related issue in *State v. Gusow*, 724 So.2d 135 (Fla. 4th DCA 1998) (*per curiam).* In *Gusow*, the State charged the defendants with RICO using as "predicate incidents" violations of the loan broker fraud statute, F.S. §§ 687.141 and 687.146. Section 895.02(1)(a) defines "racketeering activity," in pertinent part, as "any crime which is chargeable by indictment or [*30] information under the following provisions of the Florida statutes ... Chapter 687, ***relating to interest and usurious practices.***" (Emphasis added.) Most of the crimes codified as part of Chapter 687 involved the crime of usury or unfair interest. The loan broker fraud statutes, however, did not. The trial court thus struck the loan [**50] broker fraud predicates, holding that F.S. §§ 687.141 and 687.146 were not properly charged as RICO predicate incidents since loan broker fraud, though part of Chapter 687, was not a crime that "related to interest and usurious practices." The State appealed the trial court's ruling but the Fourth District affirmed it.

In its Brief, the State does ***not*** contend (nor could it) that § 817.505 requires proof of or relates to "fraud" as defined by the common law and Florida statutes. Nor does it dispute that the Fourth District's decision in *Gusow* supports the appellees' position. The State, however, contends that this Court should disregard the only Florida case on point and, instead, follow what it contends is a conflicting decision from the United States Court of Appeals for the Eleventh Circuit in *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982). *See* State's Brief, at pp. 34-36.

The Court should reject the State's invitation to discredit *Gusow*. The State has lifted its argument from Judge Polen's concurring opinion in *Gusow. See Gusow*, 724 So.2d at 136-37. Judge Polen believed that *Kopituk* should have been followed [**51] but felt bound to follow the majority due to a prior decision by the Fourth District in *State v. Kessler*, 626 So.2d 251 (Fla. 4th DCA 1993) (*per curiam), rev. denied*, 634 So.2d 627 [*31] (Fla. 1994). n10 The majority in *Gusow*, however, rejected Judge Polen's attempted reliance on *Kopituk*. Moreover, the State unsuccessfully sought rehearing before the entire Fourth District, based presumably on Judge Polen's concurrence.

> n10 The Fourth District in *Kessler* affirmed the dismissal of a RICO prosecution where the State claimed that the crime of "lewdness and assignation" under F.S. § 796.07 was a crime "relating to" prostitution in F.S. § 895.01(1)(a)(16).

The Fourth District correctly rejected Judge Polen's attempted reliance on *Kopituk*, and this Court should as well. In *Kopituk*, the defendant was charged with a ***federal*** RICO offense based on predicate violations of the Taft-Hartley Act, 29 U.S.C. § 186. Unlike § 817.505, [**52] which is ***not*** specifically listed as a RICO predicate in Florida's RICO or White Collar statutes, § 186 ***is*** specifically listed as a RICO predicate in the Federal RICO statute. *See* 18 U.S.C. § 1961(1) **8)** (defining the term "racketeering activity" as including "any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations)"). The defendant in *Kopituk* argued that, despite the fact that Section 186 was ***expressly*** included by Congress as "racketeering activity," the clause in the parenthetical ("dealing with restrictions on payments and loans to labor organizations") served to limit the types of Section 186 violations that could be used a RICO predicates. *See Kopituk*, 690 F.2d at 1328, n. 36. The

Eleventh Circuit, however, believed that the language in the parenthetical was merely "included as a means to facilitate identification of 29 U.S.C. § 186 and was not intended to [*32] limit the definition of racketeering activity only to Taft-Hartley charges involving 'restrictions [**53] on payments and loans to labor organizations." *Id*.

Accordingly, *Kopituk* is not, as the State contends, in conflict with *Gasow* or the application of *Gasow* to the instant case. In contrast to the United States Congress, which included § 186 within the statutory definition of racketeering activity, the Florida legislature did ***not*** include § 817.505 within its definitions of either racketeering or white collar crime. Moreover, while § 186 is a single statute, as discussed above, Chapter 817 is not. It is a conglomerate of statutes that includes numerous provisions having nothing to do with traditional concepts of "fraud." Under the State's construction, a defendant could be charged with RICO based on a "pattern" of wearing Elks Club buttons without authorization, *see, e.g.*, F.S. § 817.30, or a "pattern" of advertising cemetery plots for resale, F.S. § 817.35. The Court should strive to avoid a construction of statutes that leads to such absurd consequences. *See generally Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 427 (1989) (Scalia, J., concurring in judgment); *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983); [**54] *State v. Atkinson*, 831 So.2d 172, 174 (Fla. 2002) (citations omitted). The State's construction is also contrary to the rule of lenity. *See generally Scates v. State*, 603 So.2d 504, 505 (Fla. 1992); *Flowers v. State*, 586 So.2d 1058 (Fla. 1991).

Therefore, this Court should hold that *Kopituk* is inapposite, does not conflict with *Gusow* and should not be extended to apply here, since to do so would produce [*33] unreasonable, harsh and absurd consequences. n11 The Fifth District and the Circuit Court in this case correctly struck the patient brokering predicates. Since § 817.505(1)(a) is not a crime that "relates to fraudulent practices," it fails to meet the statutory definitions of "racketeering activity" and "white collar crime."

> n11 Florida courts do not always follow the Eleventh Circuit's construction of the federal RICO statute. *Compare State v. Nishi*, 521 So.2d 252 (Fla. 3rd DCA) (an individual cannot be both the RICO "person" and the "enterprise"), *rev. denied*, 531 So.2d 1355 (Fla. 1988), *with United States v. Hartley*, 678 F.2d 961, 990 (11th Cir. 1982) (a corporation can simultaneously be named as a defendant and as the "enterprise"), *cert. denied*, 459 U.S. 1170 (1983).

[**55]

III. COUNTS 56-129 WERE PROPERLY DISMISSED AS MULTIPLICITOUS

A. The Multiplicity Doctrine

"Multiplicity" is the charging of a single offense in more than one count. *See generally Wallace v. State*, 724 So.2d 1176 (Fla. 1998) (*per curiam); C.S. v. State*, 638 So.2d 181 (Fla. 3rd DCA 1994). Multiple convictions and punishments imposed for single offenses violate the Double Jeopardy Clauses of both the federal and state constitutions. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Wallace v. State*, 724 So.2d 1176 (Fla. 1998) (*per curiam); State v. Parrella*, 736 So.2d 94 (Fla. 4th DCA 1999); *Miles v. State*, 418 So.2d 1071 (Fla. 5th DCA 1982). [*34]

In order to determine whether multiple counts for the same statutory offense may be charged, the Court must determine the appropriate unit of prosecution. *Wallace v. State*, 724 So.2d 1176

(Fla. 1998) (*per curiam)*. In *Wallace*, this Court resolved a conflict within District Courts of Appeal concerning whether F.S. § 843.01, prohibiting the resisting of an arrest with violence, permitted [**56] more than one conviction predicated on a single incident during which a person resists multiple officers attempting to effectuate a single arrest. The Court held that the appropriate unit of prosecution was the "arrest" and not the number of officers involved in the arrest. It reached this conclusion based on several principles which are equally applicable here.

First, the Court noted that the issue of what constituted an appropriate unit of prosecution for a particular offense rested on an examination of the statutory language and not the discretion of the prosecutor. Thus, the Court quoted with approval the following passage from *Watts v. State*, 440 So.2d 505, 511 (Fla. 1st DCA 1983):

> Distinguishing single from multiple units of prosecution is a matter of the legislature, not for adroit prosecutors or for wondering courts. Legislation defining crimes must therefore be read as strictly and as narrowly as reasonably possible, avoiding multiple charges for coterminous conduct unless the legislature's contrary purpose is clear. This skeptical view of multiple prosecutions merely reinforces traditional judicial attitudes toward the construction of criminal [**57] statutes.

Wallace, 724 So.2d at 1179, n. 5.

Second, the Court emphasized that the rule of lenity -- a rule of construction mandated by both the Court and the Florida Legislature, *see* F.S. § 775.021(1) -- applied [*35] when determining the appropriate unit of prosecution. *Wallace*, 724 So.2d at 1180. Indeed, the Court has indicated that when construing the scope of criminal statutes "we begin with [this] principle." *Scates v. State*, 603 So.2d 504, 505 (Fla. 1992).

Third, as a means of determining legislative intent as to the unit of prosecution, Florida courts have uniformly "focused on whether the legislature used the word 'any' or the word 'a' in describing" the prohibited act. *Parrella*, 736 So.2d at 95. "If the latter, the courts have discerned a legislative intent that each item of contraband be the basis for a separate unit of prosecution. If the former, the courts have discerned a legislative intent that all of the contraband be viewed in the episodic sense with only a single unit of prosecution intended." *Id*. (citations omitted). *See, e.g., Wallace*,724 So.2d at 1180-81 [**58] (defendant resisting two officers in one episode subject to single unit of prosecution where statute prohibited resisting "any" officer); *State v. Watts*, 462 So.2d 813 (Fla. 1985) (defendant could be charged with only one count of possession of contraband in a correctional institution where prohibited article was described as "any ... weapon"); *Grappin v. State*, 450 So.2d 480 (Fla. 1984) ("unlawful taking of two or more firearms during the same criminal episode is subject to separate prosecution and punishment because the statute modified the term "firearm" with the article "a" denoting legislative intent to "make each firearm a separate unit of prosecution"); *Parrella*, 736 So.2d at 95 (since child pornography statute, before being amended, prohibited the promotion of "any" obscene motion picture, "the legislature, by the use of the term 'any' to [*36] describe the proscribed items, evinced its intention that possession of several photographs depicting child pornography be treated as a single offense").

For its argument that each "payment" rather than the underlying "arrangement" is the proper unit of prosecution for § 817.505(1)(b), [**59] the State relies on the only Florida case departing

from the "a/any" test, *Bautista v. State*, 863 So.2d 1180 (Fla. 2003). *See* Initial Brief of Appellant, at pp. 26-27. In that case, this Court held that unit of prosecution for DUI manslaughter was each death and not each crash. The Court reached that conclusion due to other indicia of legislative intent and the uniform statutory treatment of manslaughter offenses. *See Bautista*, 863 So.2d at 1182-88. Contrary to the State, no similar legislative history exists for § 817.505(1)(b) that would justify the Court's departure from the "a/any" test. The legislative history relied upon by the State had nothing to do with the appropriate unit of prosecution. *See* State's Brief, at pp. 27-28.

Fourth, this Court in *Wallace* recognized that in weighing the merits of any conflicting views of the proper statutory construction, it was appropriate to consider the full ramifications of a broad construction. The Court thus gave a narrow construction to the resisting arrest statute, in part, because the State's proposed construction would "produce an endless number of counts of resisting simply depending [**60] upon the number of officers present. We do not believe the legislature intended such consequences." *Wallace*, 724 So.2d at 1181. [*37]

Under these principles, the 73 counts and 146 parallel predicate incidents levied by the "adroit prosecutor" in this case were not authorized by the language of § 817.505(1)(a). *Wallace*, 724 So.2d at 1179, n. 5. The legislature's use of the term "any" means that only the overall "arrangement" is prohibited. Since there is no legislative history supporting a different construction, the rule of lenity requires this Court to adopt the defendants' narrow one. *See Grappin*, 427 So.2d at 762 (where the "legislature does not establish the allowable unit of prosecution with clarity, the ambiguity must be resolved in the accused's favor").

IV. SECTION 817.505(1)(a) IS UNCONSTITUTIONAL BECAUSE IT LACKS ANY *MENS REA* ELEMENT

A. Introduction

The Court should also considering affirming the Fifth District's dismissal of the RICO charges based on the alternative argument, rejected by the Fifth District, that § 817.505(1)(a) is unconstitutional. *See generally Dade Co. School Bd. v. Radio Station WQBA*, 731 So.2d 638, 644-45 (Fla. 1999) [**61] (decisions of lower courts will be affirmed on any basis which appears in the record) (citations omitted).

Section 817.505(1)(a) purports to criminalize "any split fee arrangement, in any form whatsoever, to induce the referral of patients or patronage from a health care provider or health care facility." (Emphasis added.) Yet, contrary to the broad language of § 817.505(1)(a), Florida law has long permitted many forms of "split-fee arrangements." Indeed, the statute itself specifically excludes from the otherwise all-inclusive prohibition a [*38] list of specifically described practices. *See* F.S. § 817.505(3). As discussed *infra*, other split-fee arrangements also have been recognized as legal under Florida law. Contrary to the Fifth District's reasoning, the very existence of ***some*** legal "split-fee arrangements" is, standing alone, inherently inconsistent with strict liability. Yet, § 817.505(1)(a) contains no *mens rea* element.

B. The Void-For-Vagueness Doctrine Generally

Due process requires that before a citizen is held to answer for violating a criminal statute, especially one not derived from the common law, the statute itself must [**62] give fair warning of the precise conduct deemed unlawful. *Connally v. General Construction Co.*, 269 U.S. 385 (1926). The degree and specificity of the notice a statute must provide also partly "depends in part on the nature of the enactment." *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). One crucial

distinction is between civil and criminal statutes. Because the "consequences of imprecision are qualitatively less severe" in the civil context, the Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties." *Hoffman*, 455 U.S. at 499. Analyzing an enactment, thus, in terms of the "consequences" of its violation, due process demands greater precision from laws authorizing criminal liability. *Id*. Finally, courts are much more willing to tolerate otherwise vague terminology in criminal statutes where the statutes in question require intent on the part of the violator. *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (citations omitted). [*39]

On its face, § 817.505(1)(a) fails to define the specific "crime" charged in this case with [**63] sufficient precision that "ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The statute provides no guidance for when a management/marketing "arrangement" will be considered a third degree felony. Yet, it is certainly not intuitive that a crime occurs when a group dental practice pays its non-dental management and marketing staff compensation based on productivity. Percentage fees, a form of productivity compensation, are often the fair market value for the services rendered. Percentage fees and productivity compensation are the norm in almost every business today. In such a situation, there is an obvious and real "danger of convicting individuals engaged in apparently innocent activity," *Bryan v. United States*, 524 U.S. 184, 195 (1998), especially when the statute lacks ***any*** form of *mens rea*.

C. The Necessity of a *Mens Rea* Element

In *Screws v. United States*, 325 U.S. 91, 101-102 (1945), the United States Supreme Court recognized that "the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may [**64] otherwise render a vague or indefinite statute invalid." *Accord Deehl v. Knox*, 414 So. 2d 1089, 1093-94 (Fla. 3rd DCA 1982). The converse is also true. The failure to require a sufficient level of intent may render a statute unconstitutional. *Morissette v. United States*, 342 U.S. 246 (1952); *Lambert v. California*, 355 U.S. 225 (1957); *State v. Bradford*, 787 So.2d 811 (Fla. 2001); *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985); *State v. Oxx*, 417 So. 2d [*40] 287 (Fla. 5th DCA 1982). As the United States Supreme Court recognized in *Morissette*, 342 U.S. at 250:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of human will and a consequent ability and duty to the normal individual to choose between good and evil.

Accordingly, criminal statutes which attempt to dispense with an intent requirement have a "generally disfavored status." *Gypsum*, 438 U.S. at 438.

The United [**65] States Supreme Court has approved the complete elimination of a *mens rea* requirement ***only*** in the narrow field of public welfare offenses. In such cases, "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota v. United States*, 471 U.S. 419, 434 (1985). Such conduct, however, is rare. *See, e.g., United States v. Freed*, 401 U.S. 601, 609 (1971) (affirming conviction for possession of unregistered hand grenades absent

requirement that defendant knew they were unregistered, since "one would hardly be surprised to learn that possession of hand grenades is not an innocent act"); *United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (no "consciousness of wrongdoing" necessary to affirm conviction for shipping adulterated or misbranded drugs).

Contrary to the State's arguments below, § 817.505(1)(a) is not such an offense. It seeks to criminalize ***all*** "split-fee arrangements ... in any form whatsoever" without any [*41] *mens rea* requirement. Yet, as the Circuit Court [**66] below correctly observed, the subject matter of the statute -- being a health care provider -- does not involve intrinsically dangerous products, such as adulterated foods or hand grenades. On the contrary, it involves operating a business that, under a variety of other Florida statutes and administrative regulations, is perfectly legal. For example, F.S. § 456.053(5) prohibits patient referrals but, under subsection 456.053(3)(o)(3)(I), excludes most dental services from the definition of "referral":

> 3. The following orders, recommendations, or plans of care shall not constitute a referral by a health care provider: *** I. By a dentist for dental services performed by an employee of or health care provider who is ***an independent contractor*** with the dentist or group practice of which the dentist is a member.

(Emphasis added.)

In contrast, § 817.505(3) excludes from the definition of criminal conduct only "any payment, compensation, or financial arrangement within a group practice as defined in s. 456.053, provided such payment, compensation, or arrangement is not to or from persons who are not ***members of the group practice.***" F.S. § 817.505(3)(b)(emphasis [**67] added). Since an "independent contractor" is, by definition, not a full blown "member" of a group practice, if read broadly, § 817.505(a)(1) would criminalize conduct approved by § 456.053(3)(o)(3)(I). Yet, that is not the law. *See Regional MRI of Orlando, Inc. v. Nationwide Mutual Fire Ins. Co.*, 884 So.2d 1102 (Fla. 5th DCA 2004) (billing of MRI [*42] services provided by both an MRI scanning business and a radiologist hired as an independent contractor by the business not an illegal split fee arrangement).

Section 817.505(1)(a) also conflicts with Board of Dentistry Rule, F.A.C. 64B5-17.013(4). That rule makes it legal for a licensed dentist to "enter into an agreement with a non-dentist to receive 'Practice Management Services,' as defined to include consultation or other services offered by someone other than a Florida licensed dentist" regarding an extensive list of services, including staffing, equipment, inventory, accounting and bookkeeping and "marketing plans or advertising to increase productivity of a dental practice."

It is also not clearly unlawful under Florida law, even in the civil regulatory context, for such services to be paid on a percentage [**68] basis. Although there are no cases construing what constitutes a criminal "split-fee arrangement" under § 817.505(1)(a), decisions from the Second District Court of Appeal have construed an identically worded civil statute authorizing only disciplinary actions against physicians and chiropractors, F.S. § 460.413(1)(k). *See Practice Mgmt. Assoc's, Inc. v. Bitet*, 654 So.2d 966 (Fla. 2nd DCA 1995); *Practice Mgmt. Assoc's, Inc. v. Gulley*, 618 So.2d 259 (Fla. 2nd DCA 1993). In each of these cases, various out-of-state but licensed chiropractors entered into contracts with Practice Management Associates ("PMA"), a Florida corporation. Under the agreement, PMA provided the chiropractors with a variety of management

and marketing services, including "seminars, publications, call-in [*43] counseling, and in-person consultations." *Practice Mgmt. Assoc's, Inc. v. Orman*, 614 So.2d 1135, 1136 (Fla. 2nd DCA 1993). In return for PMA's services, the chiropractors were obligated to pay PMA ten percent of their gross weekly income or a flat fee, whichever was greater. *Id*. Like § 817.505, § 460.413 failed to define "fee splitting." Although [**69] the amount PMA would receive was directly linked to the success of its marketing efforts, n12 the Second District did not consider this arrangement an unlawful "fee splitting" because the agreement between the chiropractors and PMA was not literally based on specific "referrals." *Orman*, 614 So.2d at 1138-39. *Accord Gulley*, 618 So.2d at 261 (since the "plain language of the Florida Statutes clearly prohibits fee splitting ***solely*** for the referral of patients" and PMA's marketing efforts, although generating patients, did not "refer patients" directly to the chiropractors, no violation of § 460.413). "Such an interpretation," the Second District concluded, "recognizes the complexities of marketing and management of professional services in today's competitive business environment without compromising the public policy behind legislation prohibiting or regulating the division of professional fees." *Orman*, 614 So.2d at 1139.

n12 As the Second District recognized in *Bitet*, PMA was to "offer advice, education, and counseling ***to increase the growth and profits of the chiropractic practices.***" *Bitet*, 654 So.2d at 967 (emphasis added).

[**70]

To be sure, the Fourth District Court of Appeal has disagreed with the Second District. Construing the successor statute to § 460.413, F.S. § 458.331(I) -- also only a civil provision -- the Fourth District in *Gold, Vann & White, P.A. v. Friedenstab*, 831 [*44] So.2d 692 (Fla. 4th DCA 2002), found that a management service agreement between a group of physicians and a company that provided facilities, equipment, supplies, support staff and management services was an unlawful "fee-split" because the compensation the management company received was based, in part, on a percentage of the physicians' earnings ***and*** because the services included a "public relations program" that, the Fourth District held, "thus, constituted an indirect method of fees for patient referral. "*Gold*, *Vann & White*, 831 So.2d at 694. The Fourth District chose to disagree with the Second District's more liberal construction of what would constitute an unlawful "split-fee" arrangement based in substantial part on rulings by the Florida Board of Medicine (again, in the civil context) which refused to follow the Second District's reasoning. *See Gold, Vann & White*, 831 So.2d at 694-95. [**71] n13

n13 The Board of Medicine itself has taken different positions over time on what it considers to be an unlawful fee-split. In *In re Lundy*, 9 F.A.L.R. 6289 (1987), the Board ruled that an arrangement in which a management company provided office space, equipment, billing, collection and newspaper, radio and television advertising to a group of family practitioners in return for 40 of the practitioners' collections did ***not*** amount to prohibited fee-splitting. The Board reaffirmed this position three years later in *Dept. of Prof'l Reg. v. Vinger*, 13 F.A.L.R. 153 (1990). Its position did not change until 1997, when it prohibited a similar arrangement in *In re Bakarania*, 20 F.A.L.R. 395 (1997), a decision affirmed in a two sentence *per curiam* opinion by the First District in *PhyMatrix Mgmt. Cov. v. Bakarania*, 737 So.2d 588 (Fla. 1st DCA 1999) (per curiam) (deferring to agency's views as not "clearly erroneous").

In light of this split in authority and waffling views [**72] of the Board of Medicine itself about what, even in a ***civil*** context, constitutes "engaging in any split-fee arrangement in any form whatsoever," this Court must, at the very least, conclude that a "split-fee [*45] arrangement" is not akin to a hand grenade or adulterated food in that its illegality is "obvious" to anyone. Therefore, in order to permit ***criminal*** sanctions to attach to such arrangements, some form of criminal intent is required.

D. Section 817.505(1)(a) Is Unconstitutional Because It Does Not Require "Willfulness"

Florida courts have, on occasion, saved otherwise unconstitutional statutes by reading into them a "knowledge" requirement. For example, in *State v. Gray*, 435 So.2d 816 (Fla. 1983), this Court upheld the constitutionality of one part of Florida's former witness tampering statute, F.S. § 918.14. The provision in question, § 918.14(3)(a)(1), made it "unlawful" to "cause a witness to be placed in fear by force or threats of force." The defendant claimed that the subsection was unconstitutionally overbroad because it failed to require proof of ***specific*** intent. The Court upheld the statute, [**73] however, by construing it to require at least a ***general*** criminal intent. *Gray*, 435 So.2d at 819-20.

This Court cannot similarly save Section 817.505(1)(a) by construing the term "unlawfully" to include a general intent requirement (*i.e.*, "knowledge") because even a "knowledge" requirement would be insufficient. The only *mens rea* that could save § 817.505(1)(a) would be an "intent to defraud," because the undefined terms "split-fee arrangement" and "referral" do not exempt forms of commercial speech, such as solicitation of business through radio, television, print media or other forms of marketing. Absent an "intent to defraud" element, a statute that purports to criminalize such [*46] "commercial speech" violates the First Amendment. *See State v. Bradford*, 787 So.2d 811 (Fla. 2001); *State v. Cronin*, 801 So.2d 94 (Fla. 2001).

Specific intent or "willfulness" is independently required under the rulings in *Harden*. As discussed in Section I *supra, Harden* declared Florida's "anti-kickback" statute, § 409.920(2)(e), unconstitutional under the Supremacy Clause because the "knowledge" requirement of § [**74] 409.920(1)(d) conflicted with the "willfulness" requirement in the federal anti-kickback statute. The *Harden* holding extends to § 817.505(1)(a) through § 817.505(3)(a). Section 817.505(3)(a) provides that whatever else is meant by a "split-fee arrangement ... to induce the referral of patients," it does ***not*** "apply to ... any ... payment practice not prohibited by 42 U.S.C. s. 1320a-7b(b) or regulations promulgated thereunder." Section 1320a-7b(b) includes the anti-kickback provision that *Harden* held required a criminal *mens rea* of "willfulness." The phrase a "split-fee arrangement ... to induce the referral of patients" is nothing more than a form of a "kick-back" that is criminalized by federal law ***only*** where there is proof of "willfulness." In *Harden*, courts resorted to the Supremacy Clause to find § 409.920(2)(e) unconstitutional since it lacked a "willfulness" component. This Court need only strictly apply, under the rule of lenity, the plain meaning of § 817.505(3)(a) to reach the same result.

CONCLUSION

WHEREFORE, the Court should affirm the Circuit Court's ruling in its entirety.

Respectfully [**75] submitted, [*47]

G. RICHARD STRAFER, (Fla. Bar No. 389935), G. RICHARD STRAFER, P.A., 2400 South Dixie Highway, Suite 200, Miami, FL 33133, Telephone: (305) 857-9090.