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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN JOAQUIN

PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

WILMER ORIGEL,

Defendant.
_____/

No. SF 94494

Motion In Limine No. 6
(Dismiss for Lack of "Fair Warning")

INTRODUCTION

MUA's

The constitutional doctrine of "fair warning[1]" prevents the prosecution from obtaining a holding order on larceny and fraud counts related to Work Hardening/Work Conditioning. The same doctrine bars a holding order on counts related to the practice of medicine without a license

[1]"Fair Warning" as used in this brief refers to the holding in *McBoyle v. U.S.* (1931) 283 U.S. 25.

with respect to Manipulations Under Anesthesia (MUA's).

Work Conditioning

Work Conditioning has the same problems. There is a very vague definition of work conditioning that no one understands. Consider the evidence at the preliminary hearing.

"Work Conditioning" is a practice that is billed by code and report. It is a program rather than a singular event. The prosecution contends that what was billed by defendants as "Work Conditioning" was in fact, something so different that the billing under the "Work Conditioning" code was fraud.

The defense contends that the code was simply a notifying mechanism to allow the insurance carrier to understand that work conditioning was the basis of the billing. The actual services provided were contained in the report and that actual amounts paid varied, depending upon how the insurance carrier viewed the value of the service.

Work conditioning is defined in the "Official Medical Fee Schedule". At the preliminary hearing, prosecution billing expert, Suzanne Honor testified that this schedule is the guide that is used for defining tasks in the Worker's Compensation arena. (2849). While some OMFS items are easy to understand, work conditioning is rather vague and very specific to the needs of the individual patient.

> "Work conditioning is a work related, intensive, goal-oriented treatment program specifically designed to restore an individual's systemic, neuromuscularskeletal strength, endurance, movement, flexibility, and motor control, and cardiopulmonary functions. The objective of the work conditioning program is to restore the client's physical capacity and functions so the injured worker can return to work. Prior authorization is required."

Ms. Honor testified that in most cases, billing is accomplished via the use of a billing code. In general, a task is defined under the OMFS, it is assigned a point value and it is billed by the code. (2851) The CPT codes are the common manner of expressing what work was done (for billing purposes). The CPT code is not a government generated system. It is owned by the American Medical Association. The Worker's Comp system has adopted some of those codes for

its own billing purposes. (2851-2)

If this system were used, the legal question would be whether the services performed reasonably matched the services described by the code. However, the "work conditioning" OFMS definition is quite vague and individualized. Therefore, the simple code system is not used for billings relating to work conditioning.

Billing for "work conditioning" requires submitting the CPT code but in addition, there must be actual documentation of the type of work and scope of work done. This is then evaluated and the bill either is or is not paid, depending upon whether the insurance company believes that the service has been provided. The testimony of Suzanne Honor explained this as follows:

> Q. Okay. In that definition, you read that by report should include a description of the time, effort and equipment needed. What does that -- in your opinion, what is required in that area as far as descriptions, as far as time, what does that mean?
>
> A. The time would indicate how much time was spent on the actual procedure itself, so in the case of work conditioning, how much time the medical practitioner spent working with the patient on the particular treatments that made up the work conditioning package.
>
> Q. Would it also include the duration of the treatment?
>
> A. Yes. But in this case it's the duration of the specific session for this particular report. There's also frequency, so you know you would want to know how often they were coming for this session and how long each session lasted.
>
> Q. And what about effort, what does that entail in that report for work conditioning?
>
> A. My reading of the word effort here is talking about the physician's effort or the medical practitioner's effort. So what kind of work the physician or medical practitioner is putting in to provide these services for the patient as opposed to the patient's effort.
>
> Q. And what about describing equipment, what does that refer to?
>
> A. Whatever equipment the medical practitioner needs to use, so for example, in a work conditioning scenario if they were using exercise equipment or other forms of equipment like diagnostic testing equipment or whatever was necessary to provide the services.
>
> Q. So there should be a report for each patient that's participating in work conditioning that describes all of that; is that correct?

A. Yes.

Q. Oh. Okay, I see. As far as the prior authorization, is it just a general description of what they're seeking approval for work conditioning?

A. Yes, yes.

Q. So when is this by report required to be completed and how is it used?

A. It's required to be completed when the person is submitting their bill, so when you submit the bill, the report needs to come along with it in order to support the justification for the charges being put forth.
(2925:10-2926:14)

Are we to convict someone because they don't understand billing the way expert Suzanne Honor does? Are we to convict someone because a physical therapist (Pat Sinnott) or a paid SCIF hack (Richard Arco) like to fix their patients through different procedures?

FAIR WARNING DOCTRINE

No case has held that MUA's are illegal. The Board of Chiropractic Examiners has held that it is legal. J.C. Weydert has appeared at Board meetings along with other members of the prosecution team and Weydert has vigorously advocated against MUA's. He lost.

The Ursillo letter and the State of California's opinions voiced by the State Board of Chiropractic Examiners are reasonable opinions. Whether they are ultimately correct in defining scope is uknown. What is known is that if these State officers, reasonable people that they are, believed MUA's to be legal, the defendants cannot constitutionally be prosecuted by the same State for the same conduct.

FAIR WARNING

The "Fair Warning" doctrine encompasses various constitutional bars to a criminal prosecution. At their core, each theory bars the criminal prosecution of an individual for conduct where xxx. The various theories that encompass this doctrine include ex post facto[2], the rule of

[2]Ex post facto has been applied to judicial/executive branch conduct via a due process analysis. See: *Bouie v. City of Columbia*, (1964) 378 U.S. 347.

lenity[3] and unconstitutional vagueness.[4]

> "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (Grayned v. City of Rockford (1972) 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222, 227-228.)
> (*People v. Vincelli*, 132 Cal.App.4th 646, 654 (2005, 3rd District)

There is no dispute among appellate districts on these doctrines. The Fifth District has described "fair warning" doctrine in a manner which comprehensively summarizes the above three factors, as follows:

> "There are three related manifestations of the fair warning requirement. First, the **vagueness doctrine** bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. [Citations.] Second, ..., the canon of strict construction of criminal statutes, or **rule of lenity**, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. [Citations.] Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute [citations], **due process** bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope [citations]. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." (United States v. Lanier (1997) 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432.)
> (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 745-746 (Fifth District), emphasis added)

CALIFORNIA CONSTITUTION

Defendant will cite extensively the federal due process clause as the basis for this motion. The cases tend to assume that Article I, section 7, of the California Constitution has the same guarantees as the Fourteenth Amendment to the United States Constitution guarantee that no person shall be deprived of "life, liberty, or property without due process of law." Therefore, the rule of lenity, statutory vagueness and "fair warning" are usually discussed in the context of

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[3] *Rewis v. United States* (1971) 401 U.S. 808.

[4] Kolender v. Lawson (1983) 461 U.S. 352.

United States Supreme Court cases. However, this is no question that the state constitution also provides these same protections.

> Both article I, section 7, of the California Constitution and the Fourteenth Amendment to the United States Constitution declare that no person shall be deprived of life, liberty or property without due process of law. It has been recognized for over 80 years that due process requires inter alia some level of definiteness in criminal statutes. (Note, Due Process Requirements of Definiteness in Statutes (1948) 62 Harv.L.Rev. 77, 77, fn. 2.) (8) Today it is established that due process requires a statute to be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt. (See fn. 15.) (Connally v. General Const. Co. (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 46 S.Ct. 126]; Lanzetta v. New Jersey (1939) 306 U.S. 451, 453 [83 L.Ed. 888, 890, 59 S.Ct. 618]; People v. Mirmirani (1981) 30 Cal.3d 375, 382 [178 Cal.Rptr. 792, 636 P.2d 1130], and cases cited; People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 801 [183 Cal.Rptr. 800, 647 P.2d 76]; Note, The Void-for-Vagueness Doctrine in the Supreme Court (1960) 109 U.Pa.L.Rev. 67-96; Note, Due Process Requirements of Definiteness in Statutes (1948) 62 Harv.L.Rev. 77 passim.) [FN15] (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269)

APPLIED TO MUA's, DUE PROCESS BARS CRIMINAL PROSECUTION

The courts cannot criminalize conduct which is completely legal. Courts cannot criminalize conduct which is so reasonably believed to be legal that the defendant has no "fair warning" that his conduct may lead to criminal consequences.

There are chiropractic scope cases where there is fair notice. For example, the Los Angeles Superior Court in *People v. Fowler*, 32 Cal.App.2d Supp. 737, (Cal.App.Super. Oct 20, 1938) upheld the conviction of a chiropractor who removed a fetus from the womb of a female patient[5]. The First District decided *Tain v. State Bd. of Chiropractic Examiners*, 130 Cal.App.4th 609 on June 22, 2005. This decision held that "...the permissible limits of practice by the holder of a chiropractic license under section 7 of the Chiropractic Act justifiably begins

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[5]"Although it is unclear from the opinion itself, the trial record of Fowler showed that the defendant had removed a fetus from the womb of a female patient." (*Tain v. State Bd. of Chiropractic Examiners*, 130 Cal.App.4th 609 fn. 7

and ends with Fowler and Crees." (*Tain* at 619).

MUA's are not however, the delivery of a child. There is no indication that the State Board of Chiropractic Examiners has asserted that the delivery of babies is within the scope of chiropractic. With MUA's they have stated this explicitly in their submission to the Office of Adminstrative Law in a public document published on their website. The widely distributed Ursillo memorandum was issued by the *sole person* in charge of chiropractic disciplinary evaluations at the Board. It was distributed on Board stationery and never retracted by the Board.

Chiropractor rendered MUA's were paid for as reasonable and necessary by the WCAB judge in the opinion submitted by defense counsel McAllister in his cross-examination of a prosecution expert. The State Board of Chiropractic Examiner's website still publishes the statement that MUA's are legal and within the scope.

Crees v. California State Bd. of Medical Examiners (1963) 213 Cal.App.2d 195 held that the scope of chiropractic was that defined under the enabling initiative and not the broader scope defined by what was taught in chiropractic schools. [6] This makes sense as the schools prepare students for practice in various states. However, *Crees* does not define what the scope of the act is and while in some instances scope definitions are easy to make (e.g. delivering a child as in

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[6]"In Crees, the plaintiff chiropractors sued for declaratory relief to have certain rights, immunities and privileges defined and declared under the 1913 MPA and the Chiropractic Act. (Crees, supra, 213 Cal.App.2d at p. 200, 28 Cal.Rptr. 621.) Among other arguments, the plaintiffs claimed that to establish what is "chiropractic," it was necessary to present extrinsic evidence as to what was, and what had been, taught in chiropractic educational institutions and to consider the practices that had developed in the profession." (*Tain* at 621)

Fowler), there are other instances where the scope is not easily defined.

There is to date, no definitive ruling as to whether MUA's are within or without the scope of chiropractic. The prosecution is now arguing that the law violation in performing MUA's arises because the chirpractor is practicing medicine.[7] While the "Captain of the Ship" doctrine is the catch phrase used to argue this point, it is exactly this point that was made in other terms by the AMA and other groups when Regulation 361 was considered. The Board rejected those arguments as did Dr. Ursillo.

To criminalize the past performance of MUA's is unconscionable. The State of California cannot declare a practice legal and at the same time declare it illegal. This is particularly egregrious when the office of the Attorney General is actively participating in both arenas.

The testimony of Catherine Hayes established that an attorney from the Attorney Generals' office, Jana Tuton, appeared for the Attorney General during her statement under oath. This same attorney was present as "Staff" of the Board at the October 20, 2005 Board meeting where the Ursillo letter was discussed. [8] The discussion was in the context of the OAL rejection of proposed regulation, 361. The minutes reflect:

> Jana Tuton, Deputy Attorney General, explained that the letter for Dr. Ursillo authorizing chiropractors to perform MUA is not a binding document and no employee has the authority to issue a policy statement on behalf of the Board. She suggested to the Board to either address the concerns of OAL or do nothing[9].

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[7]Clearly a chiropractor can refer a patient to an orthopedic surgeon when the patient's condition is refractory to chiropractic care. This position was urged by Dr. Arvin during his testimony. The issue is framed more delicately herein, as to whether the DC can order anesthesia and/or make suggestions to the anesthesiologist during a procedure in which the DC participates.

[8]The defense attaches and asks the Court to take judicial notice of this document.

[9]The minutes list Catherine Hayes as being present.

The above was in the context of a discussion as to whether the Board would resubmit the regulation and how the OAL concerns would be addressed (if at all). The Chairwomen of the Board, Dr. Stanfield "announced that all comments would be taken into consideration that will assist the Board in making a determination to address OAL concerns or withdraw the regulation."

While the Board and the attorney representing the Board and the Attorney General's office were discussing MUA's, MUA regulations and the scope of practice, chiropractors Joseph Ambrose, Richard Saucedo and Pedram Vaezi had been arrested and charged criminally for performing them. (Exhibit xxx). Their arrests took place on August 23, 2005. This was approximately ten months after the Board stated that "The Chiropractic Initiative Act authorizes chiropractors within their scope of practice to perform spinal manipulation, stretching and mobilization procedures. The Act does not imply that these procedures are prohibited under the use of anesthesia." (Final Statement of Reasons, pp. 2, October 21, 2004 hearing date) and two months before the Board considered the rejection of proposed Regulation 361 and agreed to give the matter further consideration. (Board Minutes, October 20, 2005)

Even more ironic is the fact that the proposed regulation, 361[10], was submitted to the California Office of Administrative Law on August 26, 2005, just three days after Ambrose, Saucedo and Vaezi were arrested for performing MUA's.

The Amended Complaint adding the MUA charges in the case at bar, was filed on March 13, 2006. This filing took place more than five months after Ms. Hayes necessarily knew of the Ursillo letter (as she was present at the meeting where Deputy Attorney General and staff attorney, Jana Tuton addressed the letter). That letter remained unretracted and the Board

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[10]The Informative Statement at the beginning of the submission packet states: "Section 302, Practice of Chiropractic allows chiropractors to manipulate and adjust the spinal column and other joints of the human body and there is no prohibition to the use of anesthesia in order to complete these manipulations."

position regarding the legality of MUA's remained posted on the website without any disclaimer.

This means that while the Board was arguing in favor of the legality of MUA's and considering regulation 361 or its successor, the San Joaquin District Attorney's office was causing the arrest and prosecution of chiropractors for violating Regulation 302. While the degree of cooperation in this aspect of the criminal investigation by Catherine Hayes and Deputy Attorney General Jana Tuton is not crystal clear, it is clear that the State of California, through Department of Insurance Investigator Lon Malcolm, Deputy Attorney General Jana Tuton and the State Board of Chiropractic Examiners were both investigating and arresting those who performed while proclaiming the legality of MUA's.

Ex Post Facto Type / Due Process Analysis

A Due Process violation takes place when a court or the executive branch criminalizes conduct without fair notice to the citizens.

The United States Supreme Court has held "that limitations on ex post facto judicial decision making are inherent in the notion of due process." *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). Like classic, Legislative Ex Post Fact, the Due Process analysis in *Rogers* focused on "fair warning" Id. at 457. This Due Process violation takes place in a non-legislative setting when there is a "[d]eprivation of the right to fair warning, . . . [which results] from . . . an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face." Id. (citing *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964)).

In *Bouie*, a state supreme court's expansive construction of a trespassing statute "violated Due Process because "it was so clearly at odds with the statute's plain language and had no support in prior [state court] decisions." *Rogers*, 532 U.S. at 458. In further explanation, *Rogers* cited the *Bowie* for the point that "[i]f a state legislature is barred by the Ex Post Facto Clause from passing ... a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." 378 U.S., at 353-354, 84 S.Ct. 1697.

("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law"); id., at 362, 84 S.Ct. 1697 ("The Due Process Clause compels the same result" as would the constitutional proscription against ex post facto laws "where the State has sought to achieve precisely the same [impermissible] effect by judicial construction of the statute") (*Rogers* at 459-460)

In *Rogers* the court concluded that Id., at 355, 84 S.Ct. 1697 (concluding that "the South Carolina Code did not give [the petitioners] fair warning, at the time of their conduct ..., that the act for which they now stand convicted was rendered criminal by the statute")
(*Rogers* at 460)

The prosecution is attempting to assert that practicing medicine without a license is included in the above conduct. This is "legislation" by the Attorney General and State of California for which they now seek a judicial stamp of approval. They are specifying as criminal the very conduct that the chiropractic board has stated is within the scope of chiropractic practice.

This is a "novel" construction for purposes of "fair warning". The fact that "persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty. [citations] (*Marks v. U.S.* 430 U.S. 188, (1977)) "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"). Rogers v. Tennessee, 532 U.S. 451, 459 (2001)) citing *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

Therefore, federal due process bars the MUA based counts in the present case. State law is in accord and makes no distinctions. The California Constitution has its own separate but identical due process protection. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 746.)[11]

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[11]*People v. Marchand*, 98 Cal.App.4th 1056, (Cal.App. 3 Dist. Jun 05, 2002) elucidated

VAGUE

The concept of unconstitutional vagueness is closely related to the "ex post facto" analysis in this case. This is particular true since executive branch and judicial branch "ex post facto" relies upon a due process analysis. However, the vagueness analysis comes to a due process conclusion by a slightly different route than the "ex post facto" argument.

> There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); accord, Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939).
> (*United States v. Lanier* (1997) 520 U.S. 259, 265)

> If the statute is clear it gives notice as to what conduct is or is not prohibited.

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; Collins v. Kentucky, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510.
> (*Connally v. General Const. Co.*, (1926) 269 U.S. 385, 390 (U.S.Okla. Jan 04, 1926))

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the issue in the context of legislation and whether the penalty imposed is civil in nature. It is an interesting issue as to whether a *civil* action would be barred by the authorities herein. However, it is an important distinction between the present case and *Marchand* that the State of California is seeking a criminal penalty and has not initiated an civil or even administrative action against the defendant. (The release of Dr. Origel's license was in response to a request for such a suspension as a condition of bail [as is allowed by statute]. No administrative action has ever been initiated against him by the Board.)

If MUA's are in fact, illegal, nothing in the present Penal Code or the associated statutory and regulatory schemes give sufficient notice that MUA's are illegal. This must be obvious if the five chiropractors and two public members of the board who are appointed by the Governor didn't recognize the illegality of MUA's under the statute.

The WCAB decision introduced by Attorney McAllister during his cross examination of Dr. Arvin contains a finding that the MUA's were reasonable and necessary for patient care. The Administrative Law Judge had no stated qualms about the procedure. One would reasonably assume that a WCAB judge has great familiarity with the medicine and chiropractic. A member of the board on October 20, 2004 was retired Judge James Duvaras[12]. When MUA's were discussed he does not appear to have asserted that they were illegal.

If there is any interpretation of the statute which supports the prosecution's theory it is not evident by the language of the statute. The Los Angeles Superior Court in *People v. Fowler*, 32 Cal.App.2d Supp. 737, (Cal.App.Super. Oct 20, 1938) thought that it was clear that the chiropractic act did not allow a chiropractor to remove a fetus from the womb of a female patient but no such bright line exists in the present case. The fault may lie in the vagueness of the penal code, in the vagueness of the chiropractic initiative or when the two are combined. However, it is demonstrably true that many intelligent and well meaning people, judges, chiropractors, attorneys, have all believed that the practice of MUA's was legal. Even the insurance carrier opinions presumed the legality of chiropractic MUA's. The insurance carriers denied coverage based upon efficacy concerns alone.

> "[S]tatutes are not automatically invalidated as impermissibly vague simply because difficulty is found in determiningu whether certain marginal offenses fall within their language. [Citation.]" (Findley v. Justice Court (1976) 62 Cal.App.3d 566, 570 [133 Cal.Rptr. 241].) The courts are required to interpret and apply statutes according to the Legislature's intent. (People v. Daniels (1969) 71 Cal.2d 1119, 1127- 1128 [80 Cal.Rptr. 897, 459 P.2d 225, 43 A.L.R.3d 677].) (*People v. Serrano* (1992) 11 Cal.App.4th 1672, 1675-1676, 15 Cal.Rptr.2d 305.)

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[12]Judge Duvaras' "JAMS" cv is attached.

This is a case where MUA's are either legal or if outside the scope, they are barely so, or vaguely so. They are the type of marginal offense that must be excluded on vagueness grounds when the statute as a whole is clear when applied to most offenses.

RULE OF LENITY

Chief Justice Marshall articulated a version of the rule of lenity in in *Wiltberger v. United States*, 18 U.S. (5 Wheat) 76 (1820), it has been clear that the courts cannot fill statutory gaps by judicial legislation.

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.
> (*Wiltberger* at 94)

In the case at bar, the Legislature has limited abilities to control chiropractors because the citizens (for better or worse), enacted a statute defining the scope of practice. There are a variety of mechanisms for enforcing the scope of practice but interpreting ambigous areas via criminal prosecution is not a permissible mechanism. If the State of California through its own Board of Chiropractic Examiners cannot believes that MUA's are legal, it is almost axiomatic that a reasonable chiropractor would come to that same conclusion.

If penal laws are to be construed strictly or even reasonably, conduct that the State of California through its five chiropractors and two civilian Governor appointed board memebers believes legal cannot reasonably be deemed clearly illegal when a different branch of the State deems it so.

From *Wiltberger*, there is a straight line to holdings that criminal statutes must be construed strictly, in favor of the accused, under the principle of lenity. See, e.g., *Kozminski v. United States*, 487 U.S. 931 (1988). The application of the rule has been debated but not its validity. In the end, if the statute has two reasonable applications as it applies to the defendant, lenity requires a finding that the conduct is not criminal.

When language which is susceptible of two [or more] constructions is used in a

> penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute.
> (*People v. Overstreet* (1986) 42 Cal.3d 891, 896)

The rule of lenity applies regardless of whether the reasonable doubt arises due to a pure issue of law, or as in the present case, a mixed issue of law and fact.

> '"[W]hen language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. **The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute**."' (People v. Davis (1981) 29 Cal.3d 814, 828 [176 Cal.Rptr. 521, 633 P.2d 186].)
> (*People v. Garfield*, 40 Cal.3d 192, 200 (Cal. Oct 24, 1985), emphasis added)

Conclusion

The prosecution is not introducing medical evidence. Their physical therapist, chiropractor and state employee (Honor) are giving legal opinions on areas so obscure that it is impossible for anyone to draw up a rule that explains what is or is not legal. That is the fault of the people who defined work conditioning. We have ballots that are translated into Spanish, Chinese and other languages so that people can vote. Such translations must be scrupulously fair and accurate or they are unconstitutional.

In the Origel case, the prosecution is attempting to translate legal gibberish so that a jury thinks they understand it. They are using biased translators. They expect that the defense will then call its own biased translators.

This is not the law. The law requires "fair notice", not fancy translators and a hope that a jury likes the defense translator better than the prosecutions. The case is unconstitutional and cannot go forward with these so called experts defining the law.

The judge must define the law and no one else.

Dated: February 19, 2008

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Daniel Horowitz
Attorney for Wilmer Origel