

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA

CRIMINAL DIVISION: "U"
CASE NO.: 2016CF010364AXXXMB

v.

JAMES FRANCIS KIGAR,
Defendant.

**ORDER DENYING THE STATE'S MOTION IN LIMINE TO
PROHIBIT DEFENDANT FROM ASSERTING ADVICE-OF-COUNSEL DEFENSE**

THIS CAUSE came before the Court on the State's Motion in Limine ("Motion"), filed on August 7, 2018. The Court carefully considered the State's Motion and supporting Memorandum of Law; Defendant's "Memorandum of Law in Opposition to State's Motion in Limine #1," filed on September 27, 2018; Defendant's "Supplement to Defendant's Response to the State's MIL #1," filed on October 4, 2018; the State's "Reply to Defendant's Memorandum and Supplement in Opposition to State's Motion in Limine #1," filed on October 17, 2018; argument of counsel; the court file; and applicable law.

I. STATEMENT OF THE CASE AND FACTS

Defendant James Kigar ("Defendant") was charged by Information on December 14, 2016, with eighty-two (82) counts of Aiding or Abetting Patient Brokering. (D.E. 19.) An Amended Information was filed on July 7, 2017, charging Defendant with 147 counts of Patient Brokering in violation of section 817.505, Florida Statutes (2016). (D.E. 448.) On August 7, 2018, the State filed a Motion in Limine and a supporting Memorandum of Law requesting that the Court enter

an order prohibiting Defendant from asserting an advice-of-counsel defense.¹ (D.E. 1130 & 1131.) Defendant filed a “Memorandum of Law in Opposition to State’s Motion in Limine #1” on September 27, 2018, and “Supplement to Defendant’s Response to the State’s MIL #1” on October 4, 2018. (D.E. 1166 & 1177.) On October 17, 2018, the State filed a “Reply to Defendant’s Memorandum and Supplement in Opposition to State’s Motion in Limine #1.” (D.E. 1180.) On October 19, 2018, following a hearing at which argument was heard, the Court reserved ruling on the State’s Motion in Limine. Thus, presently pending is the State’s Motion.

II. B. LEGAL ANALYSIS AND RULINGS

A. Preemption

In its Motion, the State argues that Defendant should be prohibited from asserting the advice-of-counsel defense because Patient Brokering under section 817.505, Florida Statutes (2016) (“Florida Patient Brokering statute”) is a general intent crime, and the advice-of-counsel defense is only available for specific intent crimes. Advice of counsel can constitute a valid defense to certain crimes. *State v. Franchi*, 746 So. 2d 1126, 1127 (Fla. 4th DCA 1999). However, Florida law is clear that the advice of counsel defense applies only to a specific intent crime. *Id.*; *see also Aversano v. State*, 966 So. 2d 493, 495 (Fla. 4th DCA 2007). Therefore, to determine whether the advice-of-counsel defense is available to a defendant charged with violations of section 817.505, Florida Statutes, this Court must first determine whether Patient Brokering under the Florida Patient Brokering statute is a general or specific intent crime.

Under section 817.505(1)(a), Fla. Stat. (2016), it is unlawful for any person to “offer or pay a commission, benefit, 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 a

¹ The Motion also requests the Court prohibit defense counsel from referencing a list of things at trial, which the Court declines to address in this order as it will be addressed at trial.

patient or patronage to or from a health care provider or health care facility.” Looking to the plain language of the statute, the Florida Patient Brokering statute does not require a heightened or particularized intent beyond the mere intent to commit the act itself. Therefore, on its face, the Florida Patient Brokering statute appears to be a general, rather than specific, intent statute.

However, Defendant argues that under the Supremacy Clause of the United States Constitution, the Florida Patient Brokering statute is preempted by 42 U.S.C. § 1320a-7b(b) (2000) (“federal anti-kickback statute”), which requires a “knowingly and willfully” mens rea. Under the Supremacy Clause, a federal law may expressly or impliedly preempt state law. *State v. Harden*, 938 So. 2d 480, 485–86 (Fla. 2006). “Federal preemption of a state law is ‘strong medicine,’ and is ‘not casually to be dispensed.’” *State v. Harden*, at 486 (citations omitted). In any preemption case, the court’s “ultimate task...is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole.” *Id.* (citations omitted). “Defendants must be able to show that any impediment to the purpose and objectives of the federal statute caused by the state statute must be ‘severe’ and not merely ‘modest.’” *State v. Rubio*, 967 So. 2d 768, 773–74 (Fla. 2007), as revised on denial of reh’g (Oct. 18, 2007) (quoting *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 665 (2003)). “This impediment must ‘seriously compromise important federal interests.’” *Id.* (citing *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 389 (1983)).

In *State v. Rubio*, the Florida Supreme Court addressed the constitutionality of the Florida Patient Brokering statute, finding it to be constitutional and adopting the Fifth District Court of Appeal’s reasoning on the issue. *State v. Rubio*, 967 So. 2d 776 (Fla. 2007), as revised on denial of reh’g (Oct. 18, 2007). The Fifth District Court of Appeal reasoned that because of the safe harbor provision contained in section 817.505(3)(a), the Florida Patient Brokering statute presents

no obstacle to the accomplishment of the purposes of the federal law. *State v. Rubio*, 917 So. 2d 383, 396 (Fla. 5th DCA 2005), *aff'd in part, rev'd in part*, 967 So. 2d 768 (Fla. 2007), as revised on denial of reh'g (Oct. 18, 2007). For this and other reasons, the Fifth District Court of Appeal held the Florida Patient Brokering statute to be constitutional and not preempted by federal law. *State v. Rubio*, 917 So. 2d at 396. Thus, in accordance with the Florida Supreme Court's ruling in *Rubio*, this Court finds the Florida Patient Brokering statute is not preempted by the federal anti-kickback statute.

B. Incorporation by Reference

Although not preempted by the federal anti-kickback statute, because the safe harbor provision of section 817.505(3)(a) explicitly exempts practices "not prohibited by 42 U.S.C. § 1320a-7b(b)," the Florida Patient Brokering statute effectively incorporates by reference the federal anti-kickback statute. The Florida Supreme Court has held that "the Legislature may approve and adopt provisions of federal statutes and administrative rules made by federal administrative bodies, which provisions are in existence and in effect at the time the Legislature acts." *State v. Rodriguez*, 365 So. 2d 157, 160 (Fla. 1978) (citing *Freimuth v. State*, 272 So.2d 473 (Fla. 1972)).

The Florida Patient Brokering statute, including the subsection containing the safe harbor provision, was first enacted in 1996, while the modern version of the federal anti-kickback statute was first enacted in 1972. Congress amended the federal anti-kickback statute multiple times both before and after the enactment of the Florida Patient Brokering statute. The federal anti-kickback statute in effect when the Legislature enacted the Florida Patient Brokering statute provided that

(1) whoever *knowingly and willfully* solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person--

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

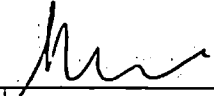
shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$100,000 or imprisoned for not more than 10 years, or both.

42 U.S.C. § 1320a-7b(b) (1994) (emphasis added). The “knowingly and willfully” requirement in the federal anti-kickback statute requires proof that “the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful.” *Harden*, at 491 (quoting *United States v. Starks*, 157 F.3d 833, 838 (11th Cir. 1998)). Thus, the “knowingly and willfully” mens rea element of the federal statute is incorporated by reference into the Florida Patient Brokering statute. Further, because the Florida Patient Brokering statute contains a “willfully and knowingly” mens rea as incorporated by reference, Patient Brokering is a specific intent crime. As such, a defendant may assert the advice of counsel defense when charged with violations of the Florida Patient Brokering statute.

Accordingly, it is hereby

ORDERED that the State's Motion in Limine is **DENIED**.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida
this 31 day of Jan, 2019.



LAURA JOHNSON
Circuit Judge

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