

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Cases of:	)	
	)	
Gilbert Ross, M.D., and	)	Date: June 16, 1997
Deborah Williams, M.D.,	)	
	)	
Petitioners,	)	
	)	
- v. -	)	Docket Nos. C-94-368
	)	C-94-369
	)	Decision No. CR478
The Inspector General.	)	
	)	

DECISION

I sustain the determinations of the Inspector General (I.G.) to exclude Petitioners Gilbert Ross, M.D. (Petitioner Ross) and Deborah Williams, M.D. (Petitioner Williams) from participating in Medicare and other federally funded health care programs, including State Medicaid plans. I find that the I.G. is mandated to exclude each Petitioner, because each Petitioner was convicted, within the meaning of section 1128(a)(1) of the Social Security Act (Act), of a criminal offense related to the delivery of an item or service under the New York State Medicaid program. I find to be reasonable the exclusions imposed by the I.G., of 10 years in the case of Petitioner Ross, and 15 years in the case of Petitioner Williams.

**I. Background**

On June 10, 1994, the I.G. notified each Petitioner that she was excluding that Petitioner pursuant to section 1128(a)(1) of the Act. The I.G. advised Petitioner Ross that he was being excluded for a period of 10 years. She advised Petitioner Williams that she was being excluded for a period of 15 years. The I.G. advised each Petitioner that the length of that Petitioner's exclusion was based on factors in that Petitioner's case which the I.G. determined to be aggravating.

Each Petitioner requested a hearing, and each Petitioner's case was assigned to me for a hearing and a decision. I agreed to stay each Petitioner's case pending the outcome of the appeal of each Petitioner's conviction. Eventually, the Petitioners advised me that the appeals had been decided and that their cases

were ready to be heard. The parties agreed that the cases should be consolidated for hearing and decision. I agreed to consolidate the cases, in light of the parties' requests, and also in light of the facts that the cases share.

The parties agreed that the cases should be heard based on written submissions. The I.G. submitted a brief and a reply brief, and six proposed exhibits, I.G. Ex. 1 - 6. Petitioners jointly submitted a brief. Petitioner Ross submitted a supplemental brief. Petitioners also submitted a joint reply brief. Petitioners submitted three proposed exhibits, P. Ex. 1 - 3.

Petitioners objected to the I.G.'s reliance on the indictment (I.G. Ex. 1) as evidence, asserting that the indictment is not evidence. Although the indictment would not be evidence if Petitioners were acquitted, it does represent an accurate depiction of the particulars of the criminal offenses of which Petitioners were convicted. Therefore, I receive into evidence I.G. Ex. 1 - 6. The I.G. objected to all or part of P. Ex. 1 - 3 on the grounds of relevancy. I agree with the I.G. that substantial parts of Petitioners' exhibits are irrelevant, and where pertinent, I set forth my reasoning below. However, admission of Petitioners' exhibits is not prejudicial to the I.G., and, in order to complete the record, I receive into evidence P. Ex. 1 - 3. I base my decisions in these cases on the governing law, the evidence, and the parties' arguments.

## **II. Issues, findings of fact and conclusions of law**

The issues in these cases are: (1) whether the I.G. is required to exclude Petitioner Ross or Petitioner Williams pursuant to section 1128(a)(1) of the Act; and (2) whether the length of the exclusions — 10 years in the case of Petitioner Ross and 15 years in the case of Petitioner Williams — is reasonable. I make findings of fact and conclusions of law (Findings) to support my decision that the I.G. is required to exclude each Petitioner and that the exclusion of each Petitioner is reasonable. I discuss each of my Findings in detail, below.

1. Section 1128(a)(1) of the Act mandates the I.G. to exclude any individual who is convicted of a criminal offense related to delivery of an item or service under Medicare or under a State Medicaid program.

2. The I.G. is required to exclude for a minimum of five years any individual who is convicted of a criminal offense as defined by section 1128(a)(1) of the Act.

3. The I.G. may exclude an individual who is convicted of a criminal offense as defined by section 1128(a)(1) for more than five years where there exists evidence of a factor or factors defined by the regulation to be aggravating, which is not offset by evidence of any factor or factors defined by the regulation to be mitigating.

4. Petitioners are physicians.

5. On November 23, 1992, Petitioners were indicted, along with other individuals, in the United States District Court for the Southern District of New York.

6. On November 10, 1993, a judgment of conviction was entered against Petitioner Ross. Petitioner Ross was found guilty of the following counts of the indictment: 1 (participating in a racketeering enterprise); 2 (violation and pattern of racketeering activity); 77 - 86 (mail fraud); and 131 (criminal forfeiture).

7. On November 10, 1993, a judgment of conviction was entered against Petitioner Williams. Petitioner Williams was found guilty of the following counts of the indictment: 1 (conspiracy to participate in a racketeering enterprise); 2 (participating in the affairs of an enterprise through a pattern of racketeering activity); 31 - 50 (mail fraud); and 102 - 110 (money laundering).

8. Petitioners were associated with medical clinics in a criminal conspiracy and scheme to commit mail fraud.

9. Petitioners engaged in a criminal enterprise through a pattern of racketeering activity.

10. The target of the criminal conspiracy and scheme in which Petitioners participated was the New York Medicaid program.

11. Petitioners engaged in specific acts of mail fraud by billing the New York Medicaid program for medically unnecessary examinations, procedures, and drugs.

12. Additionally, Petitioner Williams engaged in money laundering in furtherance of the conspiracy and scheme to defraud the New York Medicaid program.

13. The amount of money paid by the New York Medicaid program to Petitioner Ross as a consequence of the mail fraud of which Petitioner Ross was convicted was \$85,137.25.

14. The amount of money paid by the New York Medicaid program to Petitioner Williams as a consequence of the mail fraud of which Petitioner Williams was convicted was \$134,516.25.

15. On November 10, 1993, Petitioner Ross was sentenced to pay restitution in the amount of \$612,855.

16. On November 10, 1993, Petitioner Williams was sentenced to pay restitution in the amount of \$1,814,896.

17. On November 14, 1995, an amended judgment of conviction was entered against Petitioner Ross. In the amended judgment, Petitioner Ross was found guilty of the same counts of which he had been found guilty previously: counts 1, 2, 77 - 86, and 131. Petitioner Ross was sentenced to a term of imprisonment of 46 months. The amount of restitution that Petitioner Ross was ordered to pay was reduced to \$85,137.25.

18. On September 19, 1995, an amended judgment of conviction was entered against Petitioner Williams. In the amended judgment, Petitioner Williams was found guilty of the same counts of which she had been found guilty previously: counts 1, 2, 31 - 50, and 102 - 110. Petitioner Williams was sentenced to a term of imprisonment of 41 months. The amount of restitution that Petitioner Williams was ordered to pay was reduced to \$30,000.

19. A criminal conspiracy to defraud a State Medicaid program is a criminal offense within the meaning of section 1128(a)(1) of the Act.

20. Mail fraud directed against a State Medicaid program is a criminal offense within the meaning of section 1128(a)(1) of the Act.

21. The I.G. proved that Petitioner Ross was convicted of criminal offenses within the meaning of section 1128(a)(1) of the Act.

22. The I.G. proved that Petitioner Williams was convicted of criminal offenses within the meaning of section 1128(a)(1) of the Act.

23. A crime that satisfies the definition of a criminal offense stated by section 1128(a)(1) of the Act is a criminal offense within the meaning of section 1128(a)(1), even if it also might fall within the definition of some other offense stated in one of the other parts of section 1128 of the Act.

24. The I.G. proved the existence of an aggravating factor in the case of Petitioner Ross, in that his crimes caused a loss to the New York Medicaid program of more than \$1,500.

25. The I.G. proved the existence of a second aggravating factor in the case of Petitioner Ross, in that Petitioner Ross was sentenced to a period of incarceration for his crimes.

26. The I.G. proved the presence of a third aggravating factor in the case of Petitioner Ross, in that Petitioner Ross was overpaid more than \$1,500 by the New York Medicaid program as the result of improper billings.

27. Petitioner Ross did not prove the existence of any mitigating factors.

28. The I.G. proved the existence of an aggravating factor in the case of Petitioner Williams, in that her crimes caused a loss to the New York Medicaid program of more than \$1,500.

29. The I.G. proved the existence of a second aggravating factor in the case of Petitioner Williams, in that Petitioner Williams was sentenced to a period of incarceration for her crimes.

30. The I.G. proved the presence of a third aggravating factor in the case of Petitioner Williams, in that Petitioner Williams was overpaid more than \$1,500 by the New York Medicaid program as the result of improper billings.

31. Petitioner Williams did not prove the presence of any mitigating factors.

32. The evidence which relates to the aggravating factors established in the case of Petitioner Williams proves Petitioner Williams to be a highly untrustworthy individual.

33. A 15-year exclusion of Petitioner Williams is reasonable.

34. The evidence which relates to the aggravating factors established in the case of Petitioner Ross proves Petitioner Ross to be a highly untrustworthy individual.

35. A 10-year exclusion of Petitioner Ross is reasonable.

### III. Discussion

#### A. Governing law (Findings 1 - 3)

##### 1. Section 1128(a)(1) of the Act (Finding 1 - 2)

The I.G. excluded Petitioners pursuant to section 1128(a)(1) of the Act. This section mandates the I.G. to exclude any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or under a State health care program, including a State Medicaid program.

An individual who is found to have committed a crime within the meaning of section 1128(a)(1) must be excluded. The minimum period of exclusion for such an individual is five years. Act, section 1128(c)(3)(B). The Act permits the I.G. to exclude for more than five years an individual who is convicted of a section 1128(a)(1) offense where the circumstances of that individual's case warrant an exclusion of more than five years.

Section 1128 of the Act, of which section 1128(a)(1) is a part, is a remedial statute. Its purpose is not to punish individuals, but to protect federally funded health care programs and their beneficiaries and recipients from individuals who are established to be untrustworthy. An exclusion that is imposed under section 1128 or any of its parts is reasonable if it relates reasonably to the Act's legislative purpose. Congress concluded that an individual who is convicted of a program-related offense within the meaning of section 1128(a)(1) has established by his or her criminal misconduct that he or she is so untrustworthy as to necessitate an exclusion of at least five years. But, Congress also recognized the possibility that such an individual may be so untrustworthy as to require an exclusion of more than five years.

##### 2. The criteria for deciding the length of an exclusion that is imposed under section 1128(a)(1) of the Act (Finding 3)

The Secretary of the United States Department of Health and Human Services (the Secretary) has published regulations which establish the criteria for evaluating the trustworthiness of those individuals who are excluded under any of the parts of section 1128 of the Act, including section 1128(a)(1). These regulations are contained in 42 C.F.R. Part 1001. The regulation which specifically applies to exclusions imposed under section 1128(a)(1) is 42 C.F.R. §1001.102.

This regulation establishes the exclusive criteria which may be used to evaluate the trustworthiness of an individual who is excluded pursuant to section 1128(a)(1). The regulation provides that, under section 1128(a)(1), an exclusion of more than five

years may be reasonable if there exists evidence in an individual's case establishing the presence of any factors defined by the regulation to be aggravating, which is not offset by evidence of any factors defined by the regulation to be mitigating. 42 C.F.R. § 1001.102(b)(1) - (6), (c)(1) - (3).

I may not consider evidence which does not relate to one of the defined aggravating or mitigating factors in deciding whether an exclusion imposed pursuant to section 1128(a)(1) is reasonable. In effect, what is contained in 42 C.F.R. § 1001.102 are the Secretary's rules of evidence on the issue of the trustworthiness of an individual excluded pursuant to section 1128(a)(1) of the Act.

Evidence which establishes the presence of aggravating or mitigating factors in a case is only the starting point in deciding whether an exclusion imposed pursuant to section 1128(a)(1) is reasonable. The regulation authorizes an exclusion of more than five years where there exist aggravating factors that are not offset by mitigating factors. It does not direct that an exclusion of more than five years, or of any particular length of more than five years, be imposed in such a case. The decision of what is reasonable is left to the judgment of the administrative law judge in a hearing concerning an exclusion of more than five years imposed pursuant to section 1128(a)(1) of the Act.

In order to evaluate the reasonableness of an exclusion imposed pursuant to section 1128(a)(1), I must decide how any evidence that relates to an aggravating or mitigating factor defines the trustworthiness of an excluded individual. Evidence that establishes one of the aggravating or mitigating factors may show that an individual is relatively trustworthy or untrustworthy.

For example, an aggravating factor is established pursuant to 42 C.F.R. § 1001.102(b)(1), if the I.G. proves that the acts resulting in an individual's conviction of a program-related offense, or similar acts, resulted in financial loss to Medicare or to a State health care program of \$1,500 or more. Assuming that such evidence exists, I would look at it as a gauge of the excluded individual's trustworthiness to provide care. Proof that an individual caused a financial loss greatly in excess of \$1,500 would be a basis to find that the individual is highly untrustworthy. On the other hand, proof that an individual caused a financial loss of only \$1,500 or slightly more than \$1,500, while establishing the presence of an aggravating factor, might not by itself prove the excluded individual to be so untrustworthy as to require more than the five-year minimum exclusion.

Petitioners assert that 42 C.F.R. § 1001.102 on its face deprives them of due process. According to Petitioners, the regulation is impermissibly ambiguous because it lacks precise standards which would direct the length of exclusions based on the presence of aggravating or mitigating factors. I do not have authority to hear and decide challenges to regulations. 42 C.F.R. § 1005.4(c)(1). Therefore, I may not decide Petitioners' argument that 42 C.F.R. § 1001.102 deprives them of due process.

Having said that, however, I do not find the regulation to be imprecise or vague. The plain purpose of the regulation is twofold: to define the criteria that the Secretary considers to be relevant in deciding the trustworthiness of an excluded individual; and, to allow the adjudicator discretion to apply these criteria on a case-by-case basis. In order to comport with the requirements of the Act, the regulation must allow for a case-by-case evaluation of an individual's trustworthiness to provide care.

**B. The relevant facts (Findings 4 - 18)**

Petitioners are physicians. I.G. Ex. 1 at 9 - 10. On November 23, 1992, Petitioners were indicted, along with other named individuals, in the United States District Court for the Southern District of New York. I.G. Ex. 1. The indictment charges that Petitioners, along with the other named defendants, conspired to defraud the New York Medicaid program by causing fraudulent claims for Medicaid services to be submitted to that program. Id. at 1 - 7. It charges additionally, that, in furtherance of the scheme to defraud the New York Medicaid program, Petitioners and other defendants combined and conspired to engage in a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act. Id. at 13 - 17. The indictment charges Petitioners also with committing specific acts of mail fraud and money laundering, in furtherance of their scheme to defraud the New York Medicaid program. Id. at 17 - 29.

Judgments of conviction were entered against Petitioners on November 10, 1993. Petitioner Ross was found guilty of: the scheme and conspiracy described in count 1 of the indictment; engaging in a pattern of racketeering activity, as described in count 2; 10 specific acts of mail fraud, as described in counts 77 - 86; and criminal forfeiture, as described in count 131. I.G. Ex. 3 at 1. Petitioner Williams was found guilty of: the scheme and conspiracy described in count 1 of the indictment; engaging in a pattern of racketeering activity, as described in count 2, 20 specific acts of mail fraud, as described in counts 31 - 50; and nine counts of money laundering, as described in counts 102 - 110 of the indictment. I.G. Ex. 2 at 1.

Petitioners were convicted of participating in an elaborate conspiracy to defraud the New York Medicaid program.<sup>1</sup> The conspiracy involved the formation and operation of clinics which were ostensibly intended to treat recipients of the New York Medicaid program. I.G. Ex. 1 at 2. Petitioner Ross was employed at one of these clinics. Id. at 5. Petitioner Williams also was employed at that clinic, and at another clinic that was part of the conspiracy. Id.

The clinics that were operated by the conspiracy were sham clinics that generally did not provide legitimate Medicaid items or services. The primary purpose of these clinics was to manufacture fraudulent Medicaid reimbursement claims. The patients that these clinics saw were Medicaid recipients who were usually men between the ages of 25 and 45. United States v. Jamshaid Khan et als., 53 F.3d 507, 512 (2d Cir. 1995). These men, often, were homeless individuals and drug addicts. Id. The patients seen by the clinics generally did not include women or children, notwithstanding the fact that such recipients resided in the neighborhoods where the clinics were located. Id. The clinics never identified emergency cases or referred patients to hospitals. Id. In order to maximize profits, the clinics engaged in practices that were medically indefensible. Id. These indefensible practices included turning away Medicaid recipients after their first visit to a clinic, in order to avoid devoting clinic time to less-lucrative follow-up visits by recipients. Id. The clinics lacked substantial medical equipment and were very dirty and unsanitary. Id.

The inducement that the clinics offered Medicaid recipients to consent to be patients of the clinics was to issue the recipients prescriptions for unnecessary drugs. Id. These prescriptions could be converted into cash by the Medicaid recipients, by their selling the drugs they obtained from the prescriptions on the street, to street-level drug diverters. Id.

In return for receiving prescriptions, the Medicaid recipients who were enlisted as patients provided the clinics with their Medicaid recipient numbers. Id. That enabled the conspirators to generate fraudulent Medicaid claims on behalf of the

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<sup>1</sup> One of the co-conspirators named in the indictment is Rosaly Saba Khalil, M.D. I.G. Ex. 1 at 1. The I.G. excluded Dr. Khalil for a period of 15 years pursuant to section 1128(a)(1). I heard Dr. Khalil's request for a hearing from that exclusion and concluded that the 15-year exclusion imposed by the I.G. comports with the Act's remedial purposes. Rosaly Saba Khalil, M.D., DAB CR353 (1995). Many of the facts of Dr. Khalil's case, including the indictment which underlies her conviction, are the same as those which are at issue here. I am not basing my decision in these cases on any of those facts, however. I base my decision here only on the evidence which I have admitted in these cases.

recipients. The recipients also participated in unnecessary medical tests and procedures, so that the conspiracy could make money by fraudulently ordering the tests and procedures, and by billing the New York Medicaid program for them, along with claims for unnecessary office visits. Id.

Petitioners were necessary actors in the conspiracy. Id. In order to be able to submit fraudulent Medicaid reimbursement claims, the conspiracy needed the cooperation of physicians who were authorized by the New York Medicaid program to claim reimbursement from it for items or services provided to Medicaid recipients. Id. Petitioners were authorized by the New York Medicaid program to claim reimbursement from it for items or services provided to Medicaid recipients. I.G. Ex. 1 at 5. Petitioners facilitated the conspiracy by claiming reimbursement from the New York Medicaid program for medically unnecessary services and diagnostic tests. I.G. Ex. 1 at 9 - 10. Additionally, Petitioners authorized physicians' assistants, who were nominally under the supervision of Petitioners, to write prescriptions for prescription drugs which were medically unnecessary. Id.

Each Petitioner perpetrated fraud and related criminal activities which caused the New York Medicaid program to incur very substantial financial losses. Petitioner Ross was convicted of engaging in specific acts of mail fraud which resulted in payments by the New York Medicaid program totaling \$85,137.25. I.G. Ex. 1 at 17 - 29, 33; I.G. Ex. 3 at 1. Petitioner Williams was convicted of engaging in specific acts of mail fraud which resulted in payments by the New York Medicaid program totaling \$134,516.25. I.G. Ex. 1 at 17 - 29, 32; I.G. Ex. 2 at 1.

The quantum of each Petitioner's mail fraud significantly understates the amount of financial loss that each Petitioner caused to the New York Medicaid program. A fair estimate of the quantum of damages caused by each Petitioner may be found in the amount of restitution that each Petitioner originally was sentenced to pay. Petitioner Ross originally was sentenced to pay restitution to the New York Department of Social Services in the amount of \$612,855. I.G. Ex. 3 at 3, 4. Petitioner Williams originally was sentenced to pay restitution to the New York Department of Social Services in the amount of \$1,814,896. I.G. Ex. 2 at 3, 4.

Subsequent to appeals of their convictions, Petitioners were resentenced to pay substantially less restitution than the restitution which they originally were sentenced to pay. Petitioner Williams was sentenced to pay a reduced restitution of \$30,000. I.G. Ex. 6 at 3, 4. Petitioner Ross was sentenced to pay a reduced restitution of \$85,137.25. I.G. Ex. 5 at 3, 4. In each case, the reduced sentence of restitution reflects the

decision of the United States Court of Appeals for the Second Circuit that the initial restitution sentences did not consider adequately the Petitioners' ability to pay restitution. 53 F.3d at 519. However, in remanding the Petitioners' cases for reconsideration of the restitution amounts, the Second Circuit found that the amount of restitution that the District Court judge sentenced each Petitioner to originally, was equivalent to the amount of loss caused to the New York Medicaid program by that Petitioner. Id.

Each Petitioner was sentenced to a term of imprisonment as a result of his or her conviction. Petitioner Ross was sentenced to a prison term of 46 months. I.G. Ex. 5 at 2. Petitioner Williams was sentenced to a prison term of 41 months. I.G. Ex. 6 at 2.

### **C. Evaluation of the Evidence (Findings 19 - 35)**

#### **1. The I.G.'s authority to exclude Petitioners (Findings 19 - 23)**

The evidence establishes that Petitioner Ross and Petitioner Williams were each convicted of criminal offenses related to the delivery of an item or service under the New York Medicaid plan. Consequently, their exclusion is mandated by section 1128(a)(1) of the Act. Petitioner Ross and Petitioner Williams were each convicted of a criminal conspiracy to defraud the New York Medicaid program. Petitioner Ross and Petitioner Williams were each convicted of numerous, specific counts of mail fraud, directed against the New York Medicaid program.

The essence of Petitioners' crimes was to make fraudulent claims for Medicaid items or services resemble claims for legitimate Medicaid items or services. The crimes in this case involved Medicaid recipients who are entitled to receive items and services from the New York Medicaid program. Petitioners could not have committed any of the crimes of which they were convicted unless they had access to Medicaid recipients who were entitled to receive items or services from the New York Medicaid program. The manufacture and submission of fraudulent Medicaid claims, and the misuse of Medicaid recipients by Petitioners Ross and Williams, is sufficient basis to find Petitioners' crimes to be related to Medicaid items or services within the meaning of section 1128(a)(1) of the Act.

Petitioners argue that their case is not subject to the exclusion requirements of section 1128(a)(1) because they were convicted, essentially, of making fraudulent reimbursement claims, and were not convicted of any offense that is directly related to a legitimate Medicaid item or service. Petitioners would have the phrase "related to the delivery of an item or service" in section

1128(a)(1) interpreted to mean that a crime must relate directly to a legitimate Medicare item or service in order to fall within the purview of the section. Petitioners reason that a crime against Medicare or a State Medicaid program that constitutes fraud or theft against such a program is not "related to" the delivery of an actual item or service under Medicare or a State Medicaid program, inasmuch as the items or services that are claimed fraudulently are either fictitious or are not legitimately reimbursable, and thus, do not "relate to" actual Medicare or Medicaid items or services.

This argument was made in other cases by individuals who were excluded pursuant to section 1128(a)(1). Both the Departmental Appeals Board and a United States District Court rejected the argument. Jack W. Greene, DAB 1078 (1989), aff'd, Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990).

A legitimate Medicare or Medicaid item or service need not be the object of a crime in order for that crime to relate to a Medicare or Medicaid item or service. A crime is a crime within the meaning of section 1128(a)(1) if it relates even indirectly to a legitimate Medicare or Medicaid item or service. For example, a crime will be found to be related to a Medicaid item or service where the crime constitutes a false claim for Medicaid reimbursement made on behalf of a Medicaid recipient on whose behalf reimbursement will be made by a State Medicaid program for legitimately reimbursable items or services. Such a crime relates indirectly to legitimate Medicaid items or services.

The essence of the fraud in such a case is to make a false claim appear to be reimbursable by emulating a legitimate claim for a Medicaid item or service made on behalf of a Medicaid recipient. The items or services to which the crime relates are the legitimate Medicaid items or services that the perpetrator emulates fraudulently. The fraud against the State Medicaid program would not be possible but for the fact that the program will reimburse for legitimate Medicaid items or services that are delivered to the recipient. Absent the entitlement for legitimate Medicaid items or services, there is nothing for the perpetrator to emulate in a fraudulent reimbursement claim.

Both a conspiracy to defraud a State Medicaid program, or an act of mail fraud directed against such a program, consisting of submitting a fraudulent claim, constitute crimes that fall within the meaning of section 1128(a)(1). Both crimes relate to items or services that are legitimate Medicaid items or services. Both crimes are predicated on making fraudulent reimbursement claims look like legitimate reimbursement claims. An essential element of both crimes is the witting or unwitting involvement of a Medicaid recipient, on whose behalf legitimate claims for reimbursement for Medicaid items or services may be made.

Petitioners' argument concerning the allegedly limited scope of section 1128(a)(1), if accepted, would emasculate section 1128(a)(1). The section was written to address precisely the type of program-related fraud that is at issue in this case. However, as Petitioners would have the section read, it would not reach any of that fraud.

Petitioners argue that the crimes at issue here are remediable under the Act, but should be considered under the permissive exclusion provisions of section 1128(b)(1), rather than under the mandatory exclusion requirements of section 1128(a)(1). That argument, too, was considered and rejected in the Greene case. Put simply, a crime that falls within the more stringent requirements of section 1128(a)(1) must be remedied pursuant to that section, even if, arguably, it also could be considered under the permissive exclusion requirements of section 1128(b)(1).

I note that, in 1996, Congress amended the Act so that felonies which formerly fell within the purview of section 1128(b)(1), but not section 1128(a)(1), now fall within a new section, section 1128(a)(3). That section, like section 1128(a)(1), now mandates an exclusion. I am not considering this case under the 1996 amendments, inasmuch as the crimes at issue here transpired years prior to the enactment of these amendments.

**2. The presence of aggravating factors and the absence of mitigating factors (Findings 24 - 31)**

The I.G. proved the presence of three aggravating factors in the cases of Petitioners Ross and Williams. In each case, the I.G. proved that the acts resulting in the Petitioner's conviction, or similar acts, resulted in financial loss to the New York Medicaid program of more than \$1,500. 42 C.F.R. § 1001.102(b)(1). In the case of Petitioner Ross, the losses caused by him approximated \$612,855, the amount of restitution he was sentenced to pay originally. 53 F.3d at 519. In no event were these losses less than \$85,137.25, the dollar amount of the mail fraud of which he was convicted. In the case of Petitioner Williams, the losses caused by her approximated \$1,814,896, the amount of restitution she was sentenced to pay originally. 53 F.3d at 519. In no event were these losses less than \$134,516.25, the dollar amount of the mail fraud of which she was convicted.

Second, the I.G. proved that each Petitioner was sentenced to incarceration for his or her crimes. 42 C.F.R. § 1001.102(b)(4). Petitioner Ross was sentenced to a term of imprisonment of 46 months and Petitioner Williams was sentenced to a term of imprisonment of 41 months.

Third, the I.G. proved that each Petitioner was the recipient of overpayments from the New York Medicaid program, in excess of \$1,500, caused by improper billings to the program. 42 C.F.R. § 1001.102(b)(6). The amount of these overpayments equals the dollar amount of the mail fraud of which each Petitioner was convicted. In the case of Petitioner Ross, that amount is \$85,137.25. In the case of Petitioner Williams, that amount is \$134,516.25.

Petitioners argue that the evidence in these cases is insufficient proof of the presence of aggravation. In particular, Petitioners assert that the evidence does not establish that either of them caused significant losses to the New York Medicaid program. They make the following arguments to support this assertion.

- The restitution that each Petitioner was sentenced to pay is not, in and of itself, an aggravating factor under 42 C.F.R. § 1001.102.
- Even if the restitution that each Petitioner was sentenced to pay is relevant in establishing the damages they caused, that restitution was ultimately reduced, indicating that each Petitioner is less culpable than was initially found to be the case.
- In assessing the amount of damages caused by the Petitioners, the United States District Court judge who presided over Petitioners' case made findings as to the extent of Petitioners' participation in the conspiracy that are not supported by the evidentiary record of Petitioners' trial. In fact, Petitioners' involvement was considerably less than that found by the judge.

I do not find that these arguments, either individually or in combination, blunt the force of the evidence offered by the I.G., which establishes the amount of damages caused by Petitioners. First, the I.G. did not argue that the sentence that Petitioners pay restitution is, in and of itself, an aggravating factor. The I.G. offered the restitution sentences and amounts as evidence of the quantum of losses to the New York Medicaid program caused by Petitioners. The evidence relating to restitution is highly relevant to the issue of the quantum of losses caused by Petitioners.

Second, the reduction of restitution that ultimately was ordered in each Petitioner's case had nothing to do with that Petitioner's culpability, or with the amount of losses to the New York Medicaid program caused by that Petitioner. The reduced restitution was predicated on the ability of each Petitioner to

pay restitution, and not on any findings of diminished culpability. 53 F.3d at 519.

Finally, I am not persuaded by Petitioners' assertions that the District Court judge failed to assess accurately the extent to which each Petitioner caused damages to the New York Medicaid program. In its review of the Petitioners' appeals, the United States Court of Appeals found that the amount of restitution that the District Court judge ordered initially was equal to the amount of damages that each Petitioner caused to the New York Medicaid program. 53 F.3d at 519.

Moreover, each Petitioner was convicted of perpetrating a specific dollar amount of mail fraud. While the dollar amount of mail fraud perpetrated by each Petitioner is significantly less than the amount of restitution that each Petitioner was sentenced to pay originally, it is nonetheless very substantial. Thus, even if the District Court judge was to be found to have overstated the amount of losses caused by each Petitioner, there nevertheless remains irrefutable proof that each Petitioner caused massive losses to the New York Medicaid program.

Neither Petitioner proved the presence of any mitigating factors which might offset the aggravating factors proved by the I.G. Petitioner Williams offered several documents which include attestations as to her character, her attainments, and her dedication to her profession. P. Ex. 3. Although I received these into evidence, they do not relate to any of the possible mitigating factors identified in 42 C.F.R. § 1001.102(c). Petitioner Ross pointed out in his supplemental brief that the State licensing board treated him favorably. Again, even if I were to accept this as true, it does not relate to any of the mitigating factors identified in the regulation.

### **3. The length of the exclusions (Findings 32 - 35)**

The evidence in each of these cases establishes Petitioner Ross and Petitioner Williams each to be a highly untrustworthy individual who must be excluded for a lengthy period in order to protect federally funded health care programs and the beneficiaries and recipients of these programs from that Petitioner's propensity to engage in dishonest conduct. The evidence of aggravation in each case is ample basis to justify a lengthy exclusion in that case. In each case, the evidence establishes that the Petitioner knowingly participated in the operation of sham clinics whose only real purpose was to generate fraudulent Medicaid claims. Each Petitioner's involvement was necessary to the conspiracy. Each Petitioner caused substantial financial damages to be incurred by the New York Medicaid program.

In the case of Petitioner Williams, the evidence proves her to be a highly untrustworthy individual. In light of this strong evidence of lack of trustworthiness, I conclude that a 15-year exclusion of Petitioner Williams is reasonable.

The evidence which relates to the aggravating factors stated at 42 C.F.R. §§ 1001.102(b)(1) proves that Petitioner Williams' involvement in the conspiracy caused damages to the New York Medicaid program of more than \$1,800,000. The very large losses that Petitioner Williams caused the New York Medicare program to suffer are, in and of themselves, strong evidence that Petitioner Williams is a highly untrustworthy individual.

My conclusion that Petitioner Williams is highly untrustworthy is reinforced by the evidence of the lengthy prison sentence which was imposed on Petitioner Williams. The sentence reflects a finding by the District Court judge that Petitioner Williams committed serious crimes for which she has a high degree of culpability. The District Court judge concluded that the factors to be considered in determining Petitioner Williams' sentence should be enhanced, based on his conclusion that her participation in the conspiracy involved more than minimal planning and involved an abuse of trust. 53 F.3d at 517.

The evidence in the case of Petitioner Ross proves also that he is a highly untrustworthy individual. A 10-year exclusion of Petitioner Ross is reasonable in view of his high degree of untrustworthiness.

As with Petitioner Williams, Petitioner Ross was a central participant in the conspiracy. The evidence which relates to the aggravating factors stated at 42 C.F.R. §§ 1001.102(b)(1) establishes that his involvement in the conspiracy caused the New York Medicaid program to incur losses in excess of \$600,000. This degree of involvement is strong evidence that Petitioner Ross is highly untrustworthy.

The evidence of Petitioner Ross' lack of trustworthiness is reinforced by the lengthy prison sentence that was imposed against him. As was the case with Petitioner Williams, the factors that were considered in determining Petitioner Ross' sentence were enhanced based on the conclusion by the District Court judge that Petitioner Ross' involvement with the conspiracy involved more than minimal planning, and involved an abuse of trust. 53 F.3d at 517. Indeed, the prison sentence that was imposed on Petitioner Ross was greater than that which was imposed on Petitioner Williams, because the District Court judge concluded that Petitioner Ross had obstructed justice by perjuring himself at his trial. Id.

Petitioner Ross is excluded for 10 years, whereas Petitioner Williams is excluded for 15 years. Strictly speaking, the fact that one Petitioner is excluded for a longer period than is the other Petitioner is irrelevant in deciding the merits of each Petitioner's case. An exclusion should be found to be reasonable or unreasonable based on the facts that are unique to a case, and not by comparing that exclusion with exclusions imposed in other cases.

However, I have considered whether it makes sense to exclude Petitioners Ross and Williams for different periods, in light of the fact that they are co-conspirators, and also in light of the fact that their involvement in the conspiracy seems generally to be of about the equivalent degree. Given that, the disparity between the exclusions imposed on the Petitioners seems somewhat jarring. It seems particularly so in light of the fact that the evidence which relates to Petitioner Ross may, in some respects, suggest that his level of untrustworthiness is at least as high as, and possibly higher than, that of Petitioner Williams.

Petitioner Ross was sentenced to a longer prison term than was Petitioner Williams. The longer sentence in Petitioner Ross' case was predicated on his dishonest testimony at his trial. The basis for Petitioner Ross' sentence suggests that he may, in fact, be less honest than, and more untrustworthy than, Petitioner Williams.

My conclusion that Petitioner Ross may manifest an even higher degree of dishonesty than is manifested by Petitioner Williams suggests that, perhaps, the I.G. excluded Petitioner Ross for too short a period of time. However, I make no findings in the case of Petitioner Ross that a lengthier exclusion than the 10-year exclusion imposed by the I.G. should be imposed against Petitioner Ross. While I have authority, pursuant to 42 C.F.R. § 1005.20(b), to increase the length of an exclusion in the appropriate case, I do not consider it appropriate to exercise such authority on my own motion. The I.G. has not moved that I increase the exclusion of Petitioner Ross.

I do not find that the arguably higher degree of Petitioner Ross' dishonesty, when compared with that of Petitioner Williams, suggests that the exclusion of Petitioner Williams is unreasonable. As I discuss above, the merits of Petitioner Williams' case, standing alone, justify a 15-year exclusion of Petitioner Williams.

**IV. Conclusion**

I conclude that the I.G. is required, pursuant to section 1128(a)(1) of the Act, to exclude Petitioner Ross and Petitioner Williams. I conclude that the 10-year exclusion of Petitioner Ross is reasonable. I conclude that the 15-year exclusion of Petitioner Williams is reasonable.

/s/

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Steven T. Kessel  
Administrative Law Judge