No. 14-12373

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

PETER E. CLAY, et al.,
Appellants.

Appeal from the United States District Court
for the Middle District of Florida
No. 8:11-cr-00115-JSM-MAP
The Honorable James S. Moody, Jr.

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, REASON FOUNDATION AND FIVE CRIMINAL AND HEALTH LAW SCHOLARS IN SUPPORT OF DEFENDANTS-APPELLANTS URGING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Association of Criminal Defense Lawyers states that it is a corporation organized under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation or any stock owned by a public company.

Pursuant to Federal Rule of Appellate Procedure 26.1, the Reason Foundation states that it is a corporation organized under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation or any stock owned by a public company.

Pursuant to Eleventh Circuit Rule 26.1-1, the *amici* identify themselves and their counsel as persons interested in the outcome of this case:

National Association of Criminal Defense Lawyers (*amicus curiae*)

Reason Foundation (*amicus curiae*)

Dr. Joseph Antos (*amicus curiae*)

Professor John Hasnas (*amicus curiae*)

Professor Jeffrey Parker (*amicus curiae*)

Professor Stephen Saltzburg (*amicus curiae*)

Professor Stephen Smith (*amicus curiae*)

Matthew G. Kaiser (counsel for *amici curiae*)

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The briefs already filed in this matter have identified all of the remaining persons so interested.

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INTERESTS OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. A professional bar association founded in 1958, the NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The NACDL is recognized by the American Bar Association as an affiliated organization, and has full representation in the ABA's House of Delegates.

The NACDL files numerous *amicus curiae* briefs each year in the U.S. Supreme Court, the federal courts of appeals, the highest courts of numerous states, and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. The NACDL has a particular interest in this case because of the importance of protecting from criminal prosecution persons who follow an objectively reasonable

interpretation of a statute in the absence of any regulatory guidance as to the statute's meaning. The NACDL is also concerned about the use of the criminal law as an enforcement mechanism in what would otherwise be a contract dispute subject to state civil and/or administrative adjudication.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.org, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

Joseph Antos is the Wilson H. Taylor Scholar in Health Care and Retirement Policy at the American Enterprise Institute. Dr. Antos recently completed seven years of service as a member of the Panel of Health Advisers for the Congressional Budget Office. He previously served two terms as a commissioner of the Maryland Health Services Cost Review Commission, which regulates payment rates and oversees the financial performance of all hospitals in the state. His research focuses on the

economics of health policy, including Medicare reform and health care financing. Dr. Antos is concerned about Florida's lack of regulations implementing the statutory provision at issue in this case.

John Hasnas is Associate Professor of Ethics at Georgetown University's McDonough School of Business, Associate Professor of Law (by courtesy) at the Georgetown University Law Center, and Executive Director of the Georgetown Institute for the Study of Markets and Ethics. Professor Hasnas conducts research and publishes in the area of corporate criminal liability.

Jeffrey Parker is a Professor of Law at George Mason University School of Law. He teaches in the fields of criminal law and sentencing and has published on the topics of corporate criminal liability and sentencing. Professor Parker formerly served as Deputy Chief Counsel and Consulting Counsel to the United States Sentencing Commission.

Stephen Saltzburg is the Wallace and Beverley Woodbury University Professor of Law at The George Washington University Law School. He was Chair of the Criminal Justice Section of the American Bar Association from 2007-2008 and has previously served as a reporter for, and a member of, the Advisory Committee on the Federal Rules of Criminal Procedure.

Professor Saltzburg has authored numerous textbooks and articles on criminal law and procedure.

Stephen Smith is a professor of law at the University of Notre Dame Law School. Professor Smith came to Notre Dame Law School in 2009 from the University of Virginia where he was the John V. Ray Research Professor. Professor Smith's area of research is criminal law and procedure. He teaches courses on criminal law, criminal adjudication, and federal criminal law.

All parties in this case have consented to the filing of this brief.

STATEMENT ON AUTHORSHIP AND FINANCIAL SUPPORT

Counsel for no party to this appeal authored any part of this brief. No person who is not an *amicus*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUE

1. Whether Appellants' convictions should be vacated under *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002), given that there exists a reasonable interpretation of the governing legal authorities under which no statements they made to Florida's Agency for Health Care Administration (AHCA) would be knowingly false.

STATEMENT OF FACTS[1]

Two managed-care plans (the "Plans") of WellCare Health Plans, Inc. ("WellCare") contracted with the Florida agency tasked with overseeing state Medicaid payments, the Florida Agency for Health Care Administration ("AHCA"), to provide behavioral health services, among other services, to Florida Medicaid recipients. *See* Behrens Brief at 10-11. A Florida statute enacted in 2002 dictated that those contracts contain a term requiring each Plan to spend 80% of its behavioral health premiums on the provision of behavioral health services or refund the difference to the State:

> [A]ll contracts issued pursuant to this paragraph must require 80 percent of the capitation paid to the managed care plan, including health maintenance organizations, to be expended for the provision of behavioral health care services. In the event the managed care plan expends less than 80 percent of the capitation . . . for the provision of behavioral health care services, the difference shall be returned to the agency.

Fla. Stat. § 409.912(4)(b) (hereafter the "80/20 statute" or "80/20 provision"). During the time period at issue in this case, the AHCA had failed to authoritatively clarify the kinds of payments that qualify as reportable expenses "for the provision of behavioral health care services."

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[1] The *amici* adopt the Statement of Facts at pages 8-44 of the Brief for Defendant-Appellant Paul J. Behrens ("Behrens Brief"). They recite here only those facts necessary as background for their arguments in this brief.

Nonetheless, the contracts between the Plans and the ACHA reiterated this undefined phrase and stated that:

> [E]ighty percent (80%) of the Capitation Rate paid to the Health Plan by the Agency shall be expended for the provision of community behavioral health services. In the event the Health Plan expends less than eighty percent (80%) of the Capitation Rate, the Health Plan shall return the difference to the Agency no later than May 1 of each year.

Behrens Brief at 11.

Three of the Appellants, Todd Farha, Paul Behrens, and Peter Clay were executives at WellCare responsible for the Plans. In 2003 WellCare established Harmony, a wholly-owned subsidiary. Dr. William Kale, the fourth Appellant, was a Vice President of Harmony. Harmony interfaced directly with WellCare's Medicaid patients and the Plans paid Harmony a specified amount for providing those services. The Plans reported their payments to Harmony as "subcapitation" payments that qualified as expenditures "for the provision of behavioral health care services" under the 80/20 statute. At trial, the prosecution's attorney witnesses testified that this was a reasonable interpretation of the statute, but a lay jury disagreed and convicted the WellCare executives. They now appeal their convictions.

SUMMARY OF ARGUMENT

At its core, this case is based on a disagreement about the interpretation of a state Medicaid statute. WellCare, the company where the Defendants-Appellants were executives, took an informed, reasonable position on what that statute meant. But the federal government, after the fact, thought it found a better interpretation of the statute and brought this case based on its view that its interpretation rendered the Plans' contract compliance, and certain statements made by WellCare, criminally false.

This Court held in *United States v. Whiteside*, 285 F.3d 1345, 1351 (11th Cir. 2002), that a false statement charge cannot succeed when the statement is true under an objectively reasonable interpretation of the law. Under *Whiteside*, a statement is knowingly false only when its falsity is clear. In an age where many statutes are deliberately vague pending implementation by an administrative agency, that rule makes eminent sense and should be strictly enforced. The holding in *Whiteside* is an important doctrine to deter illegitimate prosecutions based on legal interpretations that, though disfavored by a prosecutor, are nonetheless reasonable. Without it, much ordinary business conduct is at risk of potential criminalization, with little notice of what conduct is criminal. That risk is amply demonstrated by this case, where WellCare executives were essentially convicted for

unintentionally breaching a contract—even though *intentionally* breaching a contract is not a crime. *See U.S. v. Blankenship*, 382 F.3d 1110, 1133-34 (11th Cir. 2004). The convictions of the Defendants-Appellants cannot be squared with *Whiteside*.

The troubling result in this case extends far beyond these executives, however. The district court dramatically weakened *Whiteside* by submitting the complicated question of how to interpret an ambiguous technical statute to the jury—in effect, treating the legal determination at the core of the *Whiteside* analysis as a purely factual question. The district court punted on the legal question—whether WellCare's interpretation of this statute was reasonable—and called upon a lay jury to resolve that complicated question of law. This is clearly not an appropriate function for a jury. Moreover, deferring such legal questions to a jury creates an untenable amount of uncertainty about the appropriate scope and operation of the criminal law. The *amici* are gravely concerned about these effects of the district court's application of *Whiteside*.

ARGUMENT

"It will be of little avail to the people," James Madison famously wrote, "if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood[.]" FEDERALIST No. 62. One wonders what Madison would think of the federal criminal code today. It contains, according to one analysis, more than 4,400 statutory provisions, *see* Brian Walsh & Tiffany Joslyn, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 6 (2010), including 215 pertaining to false statements alone, *see* Julie O'Sullivan, *The Federal Criminal "Code" is a National Disgrace: Obstruction Statutes as Case Study*, J. CRIM. L. & CRIMINOLOGY 643, 654 (2006). And it is buttressed, in one former Attorney General's estimate, by approximately 300,000 regulations that may trigger criminal sanctions. *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (testimony of Richard Thornburgh). Criminal law now intrudes on areas where civil mechanisms of enforcement have already proven adequate. *See* Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J. L. ECON. & POL'Y 657, 660-61 (2011). And as one well-known judge has postulated,

only half tongue-in-cheek, "most Americans are criminals and don't even know it." Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE 43, 44-45 (Timothy Lynch ed., 2009). The inexorable march of federal criminal law has drawn widespread criticism, and cries for reform, from groups as diverse as the American Civil Liberties Union and the Heritage Foundation. *See* Zach Dillon, *Forward: Symposium on Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 525, 525 (2013).[2]

No less troubling than the scope of the modern federal criminal code is the lack of clarity with which its provisions (or, as here, underlying state provisions on which it depends) are often drawn. Sometimes deliberately so: "Fuzzy . . . legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty." *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J. dissenting).[3] To be sure, fuzzy legislation at

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[2] *See also* Brief for Eighteen Criminal Law Professors as Amici Curiae in Support of Petitioner at 11-14, *Yates v. United States*, No. 13-7451, 2014 WL 3101373 (hereinafter "Brief for Eighteen Criminal Law Professors") (arguing that "[t]he sheer quantity of federal crimes has created an overbroad and largely redundant 'code'").

[3] For a fuller discussion, see Brief for Eighteen Criminal Law Professors at 15-18 (explaining how the "incoherence of the federal [criminal] code" and a "distorted incentive structure" encourage Congress to create "open-ended crimes that permit—or encourage—novel and expansive application").

times proves useful, when it means the details will be crafted by an administrative agency with technical expertise. But unless and until an agency steps in and issues clarifying regulations, the result in both instances is the same: prosecutions based on laws whose scope is unclear and whose meaning is uncertain. And prosecutions of that nature raise serious constitutional concerns. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[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."); *United States v. Chandler*, 388 F.3d 796, 805 (11th Cir. 2004) (no criminal liability where "Defendants' conduct was not 'plainly and unmistakably proscribed'" by statute).

This Court's decision in *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002), is effective medicine for some of the pathologies of the modern criminal code. *Whiteside* acknowledges the practical reality that modern statutes are often susceptible of more than one reasonable interpretation, and creates a rule that protects against the spread of the criminal law in ways unintended by legislatures and unsuspected by the law-abiding people confronted with such statutes. Its application here counsels reversal of Appellants' convictions.

I. *WHITESIDE* IS AN IMPORTANT PROTECTION AGAINST INAPPROPRIATE PROSECUTIONS.

In *Whiteside*, this Court held that "[i]n a case where the truth or falsity of a statement centers on an interpretive question of law, the government bears the burden of proving beyond a reasonable doubt that the defendant's statement is not true under a reasonable interpretation of the law." 285 F.3d at 1351. Other circuits have adopted the same common-sense principle. *See, e.g.*, *United States v. Rowe,* 144 F.3d 15, 21–23 (1st Cir.1998) (government bore burden of negating reasonable interpretations because a reasonable interpretation of the underlying disclosure requirement would render the defendant's statement true); *United States v. Migliaccio*, 34 F.3d 1517, 1525 (10th Cir. 1994) (under statute criminalizing false statements to government agency, "government bears the burden to negate any reasonable interpretations that would make a defendant's statement factually correct where reporting requirements are ambiguous"); *United States v. Adler*, 623 F.2d 1287, 1289 (8th Cir. 1980) (government had burden to allege and prove that statements were false under any reasonable interpretation). As the First Circuit has explained, this rule is "rooted in the due process-based 'fair warning requirement,'" a bedrock principle of American criminal law which requires that criminally punishable conduct be clearly demarcated as such. *United States v. Prigmore*, 243 F.3d 1, 17-18 (1st Cir. 2001) (citing *Lanier,*

520 U.S. at 265–67); *see also Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[T]he 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."). A person cannot and should not be prosecuted for making a false statement if the statement that the person made is not clearly false.

Whiteside, of course, contains a reasonable limitation. It does not mean that any interpretation of a statute, no matter how stretched, can save a defendant from conviction. *Cf. United States v. Parker*, 364 F.3d 934, 945 (8th Cir. 2004) (refusing to apply rule to defendant's "stretched interpretations" of statute). It simply means that where, as here, there exists an objectively *reasonable* interpretation of a statute, according to which a person's statements are not false, no jury could find beyond a reasonable doubt that false statements were made.

The *Whiteside* rule is particularly important, and requires reversal in this case, for three reasons.

A. *Whiteside* prevents governmental overreaching in uncertain regulatory environments.

The *Whiteside* rule is especially appropriate where, as here, a criminal prosecution is based on the violation of a technical statute that is susceptible of multiple reasonable interpretations and is overseen by an agency that has

not authoritatively selected one of those interpretations. Too often, the requirements of the regulations that apply to actors in the business community are opaque. Corporations have to make decisions about how to comply with uncertain regulatory frameworks on a daily basis, and they must do so while trying to maximize value to their shareholders. *Whiteside* holds that an executive whose actions are based on a reasonable interpretation of a legal requirement—even if that interpretation is later rejected—cannot be prosecuted for relying on that interpretation.

Because modern statutes are typically susceptible of a range of reasonable interpretations before a regulatory authority acts, the *Whiteside* rule is critical to ensuring that innocent corporate behavior is not criminally punished. A defendant convicted based on a reasonable reading of a statute that a jury or a court simply decided was not its preferred one can languish in jail for conduct he could not have known was criminal. *Whiteside* ensures that, at least until an agency formally determines which reasonable reading of a statute to adopt, none can serve as the basis for criminal liability.[4]

[4] For the reasons stated in the Behrens Brief, the *amici* agree that the cover letters sent by the AHCA cannot, under Florida law, govern the 80/20 provision's meaning. *See* Behrens Brief at 72 n. 37. As a practical matter, the *amici* add that an agency's informal views that can be issued so easily as via a cover letter can be changed just as easily, and therefore provide little assurance they will remain the agency's views for very long.

In that sense, *Whiteside* acts as a complement to the well-established "rule of lenity" in a context where statutes are routinely ambiguous. "[W]hen there are two rational readings of a criminal statute, one harsher than the other, the rule of lenity dictates that we are to choose the harsher one only when Congress has spoken 'in language that is clear and definite.'" *United States v. Inclema*, 363 F.3d 1177, 1182 (11th Cir. 2004) (quoting *United States v. Bass,* 404 U.S. 336, 347 (1971)).[5] Before an agency promulgates a formal view, there is no way to know which of two or more reasonable interpretations of a statute it will adopt, and therefore which will be the harsh one(s) that give rise to criminal liability. When the law is so uncertain, defendants are entitled to the application of whichever reasonable interpretation avoids criminal liability. *See Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850) ("In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent."); *U.S. v. Santos,* 553 U.S. 507, 513-14

[5] It is irrelevant to the analysis that the 80/20 statute is not a criminal statute. When civil statutes form the basis of criminal liability, they are to be interpreted according to the rule of lenity as well. *See, e.g., U.S. v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-518 (1992) (plurality opinion) (applying the rule of lenity when interpreting a tax statute in a civil setting because the statute had criminal applications when read in conjunction with another provision of the federal code).

(2008). *Whiteside* accomplishes a similar end by mandating application of any reasonable interpretation of a civil statute that avoids criminal liability.

Similar to the rule of lenity, failing to apply *Whiteside* to statutes like the 80/20 provision raises serious constitutional concerns. Criminalizing reasonable interpretations of the 80/20 statute makes it "impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). By "attaching criminal sanctions to violations of . . . vague and unintelligible regulatory standards," the government has "offen[ded] . . . well established due process principles and . . . engender[ed] a lack of due respect for the rule of law." George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417, 1417-18 (2007). *Whiteside* prevents that constitutional infirmity by refusing to allow convictions for conduct consistent with any reasonable interpretation of the 80/20 provision.

Whiteside also helps ensure that administrative agencies, rather than federal prosecutors, will be the ones deciding how to implement technical statutory schemes. *Whiteside* allows that, before an administrative agency authoritatively adopts one reasonable interpretation of a statute, all

reasonable interpretations of its meaning can be relied upon by those who need to act pursuant to it. Federal prosecutions, on the other hand, advocate one particular interpretation of a statute over others, effectively making prosecutors a statute's primary implementers, and in a piecemeal, rather than systematic, fashion. *See* Terwilliger III, *Under-Breaded Shrimp and Other High Crimes,* 44 AM. CRIM. L. REV. at 1417 (noting that prosecutors, "in the exercise of their broad discretion," can "set—as a practical matter—regulatory parameters"). That is especially deplorable where, as here, federal prosecutors seek to implement a *state* statute, which forms part of a body of law with which they may have little familiarity.

Whiteside therefore plays an important role in the shaping of consistent and coherent regulatory frameworks, providing individuals and businesses clear notice of what is and is not required of them. And it ensures that, until those frameworks are in place, corporations and their executives will not be subjected to criminal prosecution for acting in accordance with a reasonable interpretation of a statute that happens not to be the preferred interpretation of the prosecutor. It is meant to protect people like the

Appellants, who followed an objectively reasonable interpretation of a statute in the absence of any formal regulatory guidance as to its meaning.[6]

B. *Whiteside* curbs inappropriate prosecutions based on breach of contract.

The *Whiteside* rule also helps ensure that the federal government does not veer into the business of prosecuting run-of-the-mill breach of contract actions. The Plans had contracts with the AHCA, and the 80/20 statute was a part of that contract. Indeed, the 80/20 statute's effect came by virtue of those contracts with the AHCA. In essence, the Appellants were convicted of breaching contracts with the AHCA that incorporated the statutory 80/20 provision. But as a general matter, "breach of contract is not a crime." *U.S. v. Berheide*, 421 F.3d 538, 540 (7th Cir. 2005); *see also Windsor Sec., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 664 (3d Cir. 1993); *Parke-Chapley Const. Co. v. Cherrington*, 86-C-10159, 1987 WL 18329, at *5 (N.D. Ill. Oct. 8, 1987). This Court, in a case overturning a "false statement" conviction based on a breach of contract, explained why:

> It is not illegal for a party to breach a contract; a contract gives a party two equally viable options (perform or pay

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[6] Florida's lack of formal guidance contrasts sharply with the extensive formal guidance issued by the federal government regarding the computation of similar "medical loss ratios." *See, e.g.,* http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Medical%20Loss%20Ratio (scroll down to the heading "Medical Loss Ratio" approximately three-fourths of the way down the center of the page).

> compensation), between which it is generally at liberty to choose. A "promise" contained in a contract is not a certification that the promisor will actually perform the specified acts, or presently intends to perform those acts, but is instead a grant of a legal right to the other party to either enjoy performance or receive damages. Indeed, the whole notion of "efficient breach" is that a party should abrogate its contractual responsibilities if a more profitable opportunity comes along.

Blankenship, 382 F.3d at 1133-34.

If an intentional breach of contract is not a basis for criminal liability, a potential breach based on a reasonable interpretation of the contract should not be either. *Whiteside* reinforces that principle by ensuring that, so long as one's performance under a contract can be squared with a reasonable interpretation of the contract, no criminal false statement liability will lie. That is because contract interpretation, like statutory interpretation, is a legal question. *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1477 (11th Cir. 1992). And contracts, like statutes, are often susceptible of more than one reasonable interpretation. Contracts therefore give rise to the types of legal questions that, under *Whiteside*, can form the basis of a false statements prosecution only if every reasonable construction of the contract results in a finding of breach. Particularly given that their interpretation of the contract was objectively reasonable, the Appellants' alleged failure to satisfy the contractual term involving the 80/20 provision should not be a basis for their criminal prosecution. *See Blankenship*, 382

F.3d at 1135 ("there is no evidence that Congress intended [18 U.S.C.] § 1001 to be a national 'false contract' law, occupying an area that has been a cornerstone of the common law for the better part of a millennium"); *Parke-Chapley Const. Co.*, 1987 WL 18329 at *5 ("these types of violations are redressable in state court").

Moreover, the cover letters provided by the AHCA do not unilaterally modify the contract: "[A] party cannot modify a contract unilaterally. All the parties whose rights or responsibilities the modification affects must consent." *St. Joe Corp. v. McIver*, 875 So. 2d 375, 382 (Fla. 2004). That some employees of the AHCA took a different view of what WellCare's obligations were under the contract does not establish a breach of contract, let alone that WellCare's interpretation of that contract was objectively unreasonable. If any party to a contract were allowed to create criminal liability for the counterparty by virtue of a cover letter, this Court would create a perilous business environment indeed. Of course such a result is absurd; the Court should read *Whiteside* as it is meant to be read—to preclude a prosecution where an objectively reasonable interpretation of a contract has been followed, even if one party to that contract interpreted the language differently.

C. *Whiteside* protects against arbitrary and inconsistent enforcement, as occurred here.

This case is a good example of how vague statutes can give rise to arbitrary and inconsistent criminal enforcement. WellCare was not the only healthcare provider which interpreted the 80/20 statute to allow for reimbursement of subcapitation payments to affiliated service providers; at least two other health care providers in Florida had done the same. *See* Behrens Brief at 17. In fact, Florida Health Partners ("FHP")—a Prepaid Mental Health Plan subject to the same 80/20 statute—continued using this methodology until the AHCA finally objected in August 2011, sought a refund related to FHP's 2006 filing, and ultimately settled with FHP for no liability. *See* Defendants' Consolidated Opposition to the Government's Three Motions in Limine Seeking to Exclude Evidence and Defenses at 20–21 & Ex. 36, Docket No. 358, United States v. Farha, No. 8:11-cr-00115-T-30-MAP (M.D. Fla. Dec. 17, 2012) (hereafter "Defendants' Consolidated Opposition"). Yet the executives at WellCare—and they alone—were criminally prosecuted for violation of the 80/20 statute.

WellCare was raided by 200 FBI agents in a highly publicized raid. *See* Behrens Brief at 32. The government invested massive law enforcement resources into this case. After sinking significant resources into a criminal investigation, the federal government pushed forward with a criminal

prosecution against WellCare's executives, eschewing a civil action by the AHCA or a negotiated resolution from the agency. Solely because a federal prosecutor became interested in this case, the WellCare executives now face prison and fines, and they have been forever branded felons—while the executives at other companies that engaged in the same conduct have faced no punishment. *See* Sentencing Memorandum by Todd S. Farha, Docket No. 862 at 53-54, United States v. Farha, No. 8:11-cr-00115-T-30-MAP (M.D. Fla. May 13, 2014) ("[T]here were many other similarly situated CEOs of health plans in Florida whose companies did not comply with the purported 80/20 reporting limitations but Mr. Farha is the only CEO criminally charged. Instead of criminal prosecution, all of the other Plans were allowed to amend their 2006 Behavioral Health Expenditure Reports."). This disparity is offensive to the integrity of our system of criminal justice.

A proper application of *Whiteside* would have protected the WellCare executives in this case from prosecution for normal business practices. By giving each defendant the benefit of every reasonable interpretation of a statute, *Whiteside* would have left the resolution of any contractual dispute between WellCare and the AHCA to the state civil and administrative venues that are the appropriate forums for those disputes.

II. THE *WHITESIDE* QUESTION SHOULD HAVE BEEN RESOLVED BY THE DISTRICT COURT, AND THIS COURT SHOULD CONDUCT THE *WHITESIDE* ANALYSIS *DE NOVO*.

The district court here did not resolve whether WellCare's interpretation of the 80/20 statute (or any interpretation, for that matter) was reasonable on Appellants' Rule 29 motion. Instead, it declined to meaningfully tackle the *Whiteside* question and gave a generic *Whiteside* instruction to the jury, leaving the jury on its own to divine whether WellCare's interpretation was objectively reasonable. The district court's decision to punt this question to the jury, rather than determine the law that applies to this case and instruct the jury accordingly, is not the correct way to resolve *Whiteside* questions.

Though couched partly in the language of "reasonable doubt," the analysis required by *Whiteside* is one that the district court should have resolved on a Rule 29 motion and that this Court should review *de novo*. At bottom, the *Whiteside* issue is a legal question: whether there is any reasonable interpretation of the 80/20 statute under which WellCare could have treated the Plans' payments to Harmony as costs related to the provision of behavioral health services. That is a clear-cut question of both statutory and contractual interpretation, both of which are classic legal questions. *See United States v. Harden*, 37 F.3d 595, 600 (11th Cir. 1994)

(statutory interpretation); *BankAtlantic*, 955 F.2d at 1477 (contract interpretation).

Legal questions are fundamentally questions for the Court and not for the jury:

> In our judicial system the court instructs the jury on the applicable law, and directs the jury to determine the facts from the evidence and to apply the law as given by the court to those facts. The law is neither introduced as evidence nor presented through witnesses at trial. * * * To permit a witness to testify in the presence of the jury on the proper interpretation of the law would impermissibly infringe on the function of the court and would risk serious confusion of the jury.

United States v. Garber, 589 F.2d 843, 849 (5th Cir. 1979) (citations omitted). If asking juries to determine the law with expert assistance "infringe[s] on the function of the court" and risks "serious confusion," asking them to do so *without* expert assistance, as the district court asked the jury to do here, does so all the more.

The district court's interpretation of its job and the function of the jury are at odds with basic American judicial procedure. And these problems are particularly acute here. The proper interpretation of the 80/20 statute and the Medicaid contracts requires the kind of complex legal analysis that no sensible system of justice would ask a lay person to resolve. Indeed, many lawyers would be unqualified to resolve an issue as complex and specialized as how to interpret the legal questions at the heart of this case. *See, e.g.*,

Defendants' Consolidated Opposition at Ex. 10 (letter from Florida Association of Health Plans to AHCA noting that proper interpretation of the 80/20 provision turned on the language of the statute, "ordinary accounting and actuarial principles" and the "spirit of the Medicaid HMO contract"). WellCare itself retained the former head of Florida's Medicaid division to offer it legal advice on the statute. And highly experienced health care lawyers—called as witnesses by the government—testified that the Plans' interpretation of the statute and the related contract provisions was reasonable. The *Whiteside* question should never have been submitted to the jury.

The district court's failure to resolve the *Whiteside* issue at the heart of this case further muddies the appropriate task of this Court. Legal questions are reviewed *de novo*. *See Harden*, 37 F.3d at 600 ("Statutory interpretation is a question of law subject to *de novo* review."); *BankAtlantic*, 955 F.2d at 1477 ("Contract interpretation is a legal question subject to *de novo* review by this Court."). And when the legal portion of a mixed question of fact and law is conceptually severable from the rest, it is likewise reviewed *de novo*. *See United States v. McDowell*, 250 F.3d 1354, 1361 (11th Cir. 2001); *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1328 (11th Cir. 2002). A necessary corollary of those principles, as explained by the

First Circuit in applying its version of the *Whiteside* rule, is that "if the evidence at trial gives rise to a genuine and material dispute as to the reasonableness of a defendant's asserted understanding of applicable law, the judge, and not the jury, must resolve the dispute." *Prigmore,* 243 F.3d at 18. The same, of course, would be true when evidence comes to light *before* trial that likewise shows a defendant's statements to be true under a reasonable reading of the statute.

This Court therefore owes no deference to the jury's determination that the Plans' statements were false under every reasonable reading of the 80/20 statute. This Court should consider the reasonableness of the Plans' interpretation with no thumb on the scale. And in a case like this one, where a statute had not been implemented by its governing agency and the experts on both sides agreed that the Appellants' interpretation of the statute was a reasonable one, the *amici* submit that the only proper outcome of the *Whiteside* analysis is dismissal of the indictment as a matter of law.

CONCLUSION

For the foregoing reasons, the *amici* urge this Court to reverse the Appellants' convictions on the basis of this Court's well-reasoned decision in *United States v. Whiteside*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because this brief contains 5,755 words.

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 29(c) and 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font. □

September 26, 2014

/s/ William N. Shepherd
William N. Shepherd

CERTIFICATE OF SERVICE

I certify that today, September 26, 2014, I electronically filed the foregoing Brief for *Amici Curiae* National Association of Criminal Defense Lawyers, Reason Foundation and Five Criminal and Health Law Scholars with the Clerk of the Court using the appellate CM/ECF system. Counsel of record for all parties will be served by the appellate CM/ECF system.

I further certify that today, September 26, 2014, I caused seven paper copies of the foregoing to be dispatched to the clerk by Federal Express for delivery within three days.

September 26, 2014

/s/ William N. Shepherd
William N. Shepherd