IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 06-CR-30098-DRH
	)	
AJIT TRIKHA, and	)	
TRX HEALTH SYSTEMS, P.C.	)	
Defendants.	)	

REPLY TO THE GOVERNMENT'S RESPONSE TO DEFENDANTS' AMENDED MOTION TO DISMISS THE INDICTMENT

The thrust of the Government's argument is that "[t]here is no constitutional defect in [the Indictment in] that the claimed services were not performed as required ***at all***." (emphasis added). While the Government makes this argument in its Response, the operative pleading in this case -- the Indictment -- takes a different turn. Pursuant to the Indictment, Defendants can be convicted even though they did perform *some service* to their patients. The deficiency in the present Indictment is that the Government is following two distinct theories and "rolling" these allegations into a single scheme:

> 1) that Defendants did provide some services to justify submitting certain CPT codes for billing but failed to provide such services pursuant to the AMA guidelines (i.e. that Defendants did actually meet and treat the patient; but not for the requisite time period); and
> 2) that Defendants never met with or treated the patients *at all* (i.e. Defendants billed for treating the patient but never saw or talked to the patient for a single second).

If the Government intends to convict Defendants based on evidence that no services were performed (as it alludes to in its Response) the Indictment should clearly say so.

Instead, the Indictment allows a jury to convict Defendants of a crime when they failed to perform a medical service in conformity with vague and amphoras AMA Guidelines and as a "fall back" allows the Government to argue that no services were ever performed

under any standard. This "shifting of legal theories" has been strongly disfavored in an analogous case. *See United States v. Siddiqi*, 98 F.3d 1427 (2nd Cir. 1996)(holding that "the conviction would not have occurred but for the Government's shifting of theories that impaired both *Siddiqi's* defense and our consideration and disposition of this matter" and "[t]he shifting nature of the Government's case which we criticized in our first opinion materially impeded the effective presentation of a defense during the trial by misleading defense counsel as to the Government's theory of guilty." *Id*. at 1438 & 40.

Likewise in the present case, the Government is attempting to offer "shifting theories" of guilt. In the Government's recently filed Response it argues in essence that the services that were required to be performed "were not performed as required at all." The Government even makes it a point to use the phrase services "were not performed as required at all" four times in its Response in an apparent attempt to highlight that allegedly Defendants performed no services to justify their billings. However, pursuant to the four corners of the Indictment, Defendants can be convicted even if they provided some services to the patients based on the argument that they did not comply with the amphoras AMA guidelines in providing such services. For instance, pursuant to the Indictment, Defendants can be convicted because they did not "meet" with the patient for the "approximate" amount of time suggested by the AMA guidelines.

At the outset, while the Government quotes at length the *Markoll* case and mentions the *Singh* case (which Defendants admitted in its Motion were distinguishable, Defendants' Motion, p. 9), the Government fails to even address Defendants' argument with respect to *United States v. Siddiqi*, 959 F.2d 1167 (2d Cir. 1992)(direct appeal) and *Siddiqi v. United States*, 98 F.3d 1427 (2nd Cir. 1996)(habeas appeal). In *Siddiqi* the court held that the physician had not fraudulently billed for chemotherapy treatments (even though he was out of the country at the time) in that "absent some affirmative reason to believe that use of code 96500 does not cover being available, billing under that code is at worst an attempt to bill at the outer limits permitted, not fraud." 98 F.3d at 1439. The court noted that the term

"supervision" in *Siddiqi* was susceptible to varying interpretations and the term was ambiguous and considerable confusion existed over how to bill for chemotherapy. *Id.* Just as there were considerable interpretations of the term "supervision" in *Siddiqi*, there are likewise considerable interpretations of the terms "i.e.," "approximately," "successfully led," and "minimal" in that such adjectives by their very nature lack a bright line definition. ***Unfortunately, for Dr. Ajit Trikha, his very freedom is dependent upon the interpretations of the above adjectives.***

A similar issue was addressed by the Supreme Court in *Kolender v. Lawson* outside of the context of a CPT code case.[1] In *Kolender v. Lawson*, the Supreme Court found a California loitering statute which required those who loiter to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a "Terry" stop unconstitutionally vague on its face. 461 U.S. at 353, 103 S. Ct. 1855. This holding was based on the statute's failure to clarify the meaning of "credible and reliable" identification. *Id*. at 354, 103 S. Ct. 1855. Because federal courts must consider any limiting construction of a law by the state courts or enforcement agencies when they are asked to determine the facial validity of state laws, the Court considered the interpretation given to "credible and reliable" by the state courts: "identification carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id*. at 355 & 357, 103 S. Ct. 1855 (internal quotation and citation omitted). After considering the statute as limited by this and other constructions, the Court was convinced that it was virtually without any standards. *Id*. at 358, 103 S. Ct. 1855. The lack of meaningful guidance to authorities left enforcement of this provision to the whim of the police; the statute "furnishe[d] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure and confer[ed] on police

[1] Counsel has made a diligent search of all federal precedents concerning CPT code cases. However, there is very little in the way of reported "CPT code cases" and as such Counsel brings forth the factually analogous case of *Kolender v. Lawson* in support of its position.

a virtually unrestrained power to arrest and charge persons with a violation." *Id*. at 360, 103 S. Ct. 1855 (internal quotations and citations omitted).

The same issues in *Kolender* appear in the present case. While the Government claimed that Defendants failed to "address and grapple with the actual allegations in the Superceding Indictment," because of the "vagueness" of the Indictment, it is somewhat difficult for any person (and certainly a jury) to understand precisely what Defendants are being charged with and precisely what conduct can be considered illegal. Just as it is nearly impossible to determine what is "credible and reliable" identifying information (in *Kolender*), it is likewise impossible to prosecute defendants because they did not spend "approximately" the correct amount of time with a patient, or that a doctor did not lead a group psychotherapy session that could be "successfully led," or finally that the doctor did not provide enough "minimal" treatment to the patients. This type of intrusion and arbitrary enforcement essentially takes the prosecutor "out of the courtroom" and puts him or her inside the doctor's office as a roving commissioner determining how a doctor should practice medicine.

In sum, the Government should not be allowed to advocate shifting theories of guilt. It is in this manner that the Indictment is unconstitutionally vague because it puts Defendants in a position of being forced to defend a position without an understanding of the precise nature of their "crimes." *See United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983) and *Bell v. United States*, 349 U.S. 81, 83-84, 75 S.Ct. 620, 622 (1955)(rule of lenity requires resolving ambiguity in a criminal statute in favor of defendant).

Further, a statute can be void for vagueness if it authorizes and encourages arbitrary and discriminatory enforcement.[2] The present Indictment in addition to failing to provide "ordinary notice" to Defendants as to what conduct is prohibited also encourages the type

[2] "Vagueness may invalidate a criminal law for either of two *independent reasons*. First it may fail to provide the kind of ordinary notice that will enable ordinary people to under stand what conduct it prohibits; *second* it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999)(citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983))(emphasis added).

of arbitrary enforcement that has been harshly rebuked by the United States Supreme Court in *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) and *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). In both such cases the Court struck down statutes as unconstitutionally vague in that the statutory scheme gave police and prosecutors unbridled discretion in prosecuting certain defendants.

Defendants are being prosecuted based on the Government's interpretations of the terms "i.e.," "approximately," "successfully led," and "minimally." The statutory scheme in the present case encourages arbitrary enforcement. It is somewhat surprising that the Government claimed that it is somehow improper for Defendants to "pose hypotheticals" to demonstrate the vagueness of the indictment, because hypotheticals are the rubric under which such statutes are evaluated. In *U.S.A. v. Wabash*, Judge Gilbert posed wonderful hypotheticals to show that the statutes involved in that case were vague. When this Honorable Court has oral arguments it routinely uses hypotheticals. Here, the hypotheticals that scream to be answered are—if the Indictment mandates that Defendants should spend *approximately* 20 minutes with a patient, could they be prosecuted for spending 19 minutes with a patient? If not, what if only 18 minutes were spent with a patient? Furthermore, what if Defendants could successfully "lead" a group of 13 people in a psychotherapy session? Should Defendants tell one person to leave (because paragraph 13 of the Indictment provides that "the group size should be of a size that can be successfully led (i.e. maximum of 12 people)) or risk federal prosecution? And, what does "i.e." mean in the context of the maximum number of people that make up a group?

The simple fact is that the Indictment herein is muddled by the nebulous terms "i.e.," "approximately," "successfully led" and "minimally" and as such it is impermissibly vague in that it encourages arbitrary enforcement based on presumably hidden DOJ guidelines as mentioned in Defendant's Motion to Dismiss.

For the foregoing reasons the Indictment herein should be dismissed.

AJIT TRIKHA

STOBBS LAW OFFICES

BY: /s/ John D. Stobbs, II

John D. Stobbs II, NO. 06206358
Attorney for Defendant
307 Henry St. Suite 211
Alton, Illinois 62002
Telephone: (618)462-8484
FAX: (618)462-8585
Email: stobbsjohn@hotmail.com

LUCCO, BROWN THRELKELD & DAWSON

BY: /s/J. William Lucco (with consent)

J. William Lucco, No. 01701835
Attorney for Defendant
224 St. Louis Street, P.O. Box 539
Edwardsville, Illinois 62025
Telephone: (618) 656-2321
FAX: (618) 656-2363
Email: Blucco@lbmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2007 a copy of the attached ***Reply to the Government's Response to Defendants' Amended Motion to Dismiss the Indictment*** was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

Mr. Michael Quinley
Assistant U.S. Attorney
Nine Executive Drive
Fairview Heights, Illinois 62208

STOBBS LAW OFFICES

/s/John D. Stobbs, II
307 Henry St. Suite 211
Alton, Illinois 62002