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.	)	

AMENDED MOTION TO DECLARE 18 U.S.C. 1374; 18 U.S.C. 1341 and 2; 18 U.S.C. 982(a)(7); 18 U.S.C. 981(a)(1)(c); AND 28 U.S.C. 2461 UNCONSTITUTIONALLY VAGUE AS APPLIED TO DEFENDANTS AND TO DISMISS THE INDICTMENT

Come now Defendants by and through their respective attorneys, John D. Stobbs, II and J. William Lucco and for their Motion to Declare 18 U.S.C. 1374; 18 U.S.C. 1341 and 2; 18 U.S.C. 982(a)(7); 18 U.S.C. 981(a)(1)(c); and 28 U.S.C. 2461 Unconstitutionally Vague as Applied to Defendants and to Dismiss Indictment state:

I. Introduction

Defendants are charged with Health Care and Mail Fraud.[1] The Health Care Fraud Statute 18 U.S.C. § 1347 (Counts I & II) makes it a crime if someone:

> Knowingly and willfully executes, or attempts to execute, a scheme or artifice—
> (1) to defraud any health care benefit program; or
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both.

[1] All arguments relating to Health Care and Mail Fraud are equally applicable to the Criminal Forfeiture Count in that there can be no criminal forfeiture if there is no underlying "crime."

The Mail Fraud Statute 18 U.S.C. § 1341 and 2 (Count III) makes it a crime to:

> . . . devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

And

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined under this title or imprisoned not more than five years, or both.

The facial constitutionality of these well-worn statutes is not in dispute. It is the application of these codes to Defendants in the present Indictment that is unconstitutional.

In sum, the present Indictment (using as a pretext the above federal statutes) attempts to charge Defendants with a federal crime by the fact that they allegedly mis-billed the federal government (through the Medicare program) for certain medical procedures through the improper use of certain "CPT" codes. In a nutshell, the government claims that if a medical provider performs procedure "A" then they must use a certain CPT code that

corresponds to procedure "A" on the Medicare billing form.[2] The form is then submitted to Medicare and a check is generated to the medical provider based on the CPT code on the Medicare billing form. If procedure "A" is not properly performed pursuant to the parameters of the American Medical Association (AMA) then a medical provider cannot "put that code" on the Medicare billing form and receive payment. It is at this point that the present controversy begins in that the CPT codes are unclear as to the specific parameters that a medical provider must abide by in performing medical services. For instance, this is not a case that concerns a CPT code that corresponds to "providing an aspirin to a patient" but a CPT code that sets out vague and ill-defined guidelines on how a medical provider is to provide certain types of nebulously defined treatments.

In this regard, the CPT codes that form the basis for the present Indictment illustrate this inescapable fact:

> TRIKHA and TRX billed Medicare and Medicaid with CPT code 90807 for individual psychotherapy services which he did not render. The AMA described 90807 as the following:
>
> 90807 – Individual psychotherapy, insight oriented, behavior modifying and/or supportive, in the office or outpatient facility, ***approximately*** 45 to 50 minutes face-to-face with the patient; with medical evaluation and management services.
>
> TRIKHA and TRX billed for code 90807 when TRIKHA spent little or no time with the patient rather than the required approximately 45 to 50 minutes face-to-face with the patient.

¶ 12 of the Indictment (emphasis added).

> TRIKHA and TRX billed Medicare with CPT code 90853 for group therapy services which he did not render. The AMA described 90853 as the following:

[2] For the purposes of brevity and clarity the term "Medicare" should be interpreted to encompass "Medicaid."

90853-Group psychotherapy (other than of a multiple-family group) by a physician, with continuing medical diagnostic evaluation and drug management when indicated.
In its program instructions, WPS, the Medicare carrier responsible for Illinois, required that "the group size should be of a size that can be ***successfully led (i.e., maximum of 12 people)***." WPS Local Medical Review Policy PSYCH-014. TRIKHA and TRX regularly billed for code 90853 when the group size far exceeded 12 people.

¶ 13 of the Indictment. (emphasis added).

TRIKHA and TRX billed Medicare and Medicaid with CPT code 90862 for pharmacologic services which he did not render. The AMA described 90862 as the following:

90862 – Pharmacologic management, including prescription, use, and review of medication with no more than ***minimal*** medical psychotherapy.
TRIKHA and TRX regularly billed for code 90862 without meeting with the patient, claiming an in-office visit when the patient was not present.

¶ 14 of the Indictment (emphasis added).

TRIKHA and TRX billed Medicare and Medicaid with CPT codes 90817 and 90819 for in-nursing home individual psychotherapy services which he did not render. The AMA described 90817 and 90819 as the following:

90817 – Individual psychotherapy, insight oriented, behavior modifying and/or supportive, in an inpatient hospital, partial hospital or residential care setting, ***approximately*** 20 to 30 minutes face-to-face with the patient; with medical evaluation and management services.

90819 – Individual psychotherapy, insight oriented, behavior modifying and/or supportive, in an inpatient hospital, partial hospital or residential care setting, ***approximately*** 20 to 30 minutes face-to-face with the patient; with medical evaluation and management services.

TRIKHA and TRX regularly submitted claims with these codes when spending little or no time with the patient rather than the approximately 20 to 30 minutes face-to-face with the patient as required by 90817, or approximately 45 to 50 minutes fact-to-face with the patient as required by 90819.

¶ Paragraph 15 of the Indictment (emphasis added).

As is apparent, none of the CPT codes at issue proscribe a bright line rule that regulates how a medical provider is to precisely treat a patient in order to bill for a specific code. Instead the CPT codes provide (literally) *approximate* advisory guidelines to medical providers (like Defendants) as to how they should treat their patients. For instance, when a CPT code states that Defendants should see a patient for approximately 20 to 30 minutes, should this be interpreted to mean that if a medical provider were to see a patient for 29 minutes he could be indicted and found to be a convicted felon. Certainly, this should not be the case. Furthermore, what if instead of a group of 12 people in "group therapy" a medical provider leads a group of 13 people? Again should they be indicted? This question answers itself – of course not. Finally, the remaining code at issue, 90862, only gives as guidance that the medical provider provide Pharmacologic management . . . with *minimal* medical psychotherapy and leaves it to the provider to determine and interpret the term "minimal."

II. Argument

Federal Rule of Criminal Procedure 12(b)(2) provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." When considering a motion to dismiss under Rule 12(b)(2), **"**a court assumes all facts in the indictment are true and must 'view all facts in the light most favorable to the government.'" *United States v. Segal*, 229 F.Supp.2d 840, 844 (N.D.Ill. 2004)(quoting *United States v. Yashar*, 166 F.3d 873, 880(7th Cir. 1999)). When viewed in that light, an indictment is sufficient if it satisfies three, constitutionally-mandated requirements. *United States v. Anderson*, 280 F.3d 1121, 1124 (7th Cir. 2002). "First, [an indictment] must adequately state all of the elements of the crime charged; second, it must inform the defendant of the nature of the charges so that he may prepare a defense; and finally, the indictment must allow the defendant to plead the judgment as a bar to any future prosecution for the same offense." Id. (citing *United States v. Smith*, 230 F.3d 300, 305(7th

Cir.2000); further noting that "[t]he Fifth Amendment guarantees the right to an indictment by grand jury and serves as a bar to double jeopardy, while the Sixth Amendment guarantees that a defendant be informed of the charges against him."). In this regard, "[i]ndictments need not exhaustively recount the facts surrounding the crime's commission," *United States v. Agostino*, 132 F.3d. 1183, 1189 (7th Cir.1997), rather "when determining the sufficiency of an indictment, [a court] look[s] at the contents of the subject indictment 'on a practical basis and in [its] entirety, rather than in a hypertechnical manner.'" *United States v. Mcleczynsky*, 296 F.3d. 634, 636(7th Cir.2002) (quoting *Smith*, 230 F.3d at 305). In addition, "[a]n indictment, or a portion thereof, may be dismissed if it is otherwise defective or subject to a defense that may be decided solely on issues of law." *United States v. Labs of Virginia Inc.*, 272 F.Supp.2d 764, 768 (N.D.Ill. 2003); see also *United States v. Flores*, 404 F.3d 320, 324 (5th Cir.2005) ("[t]he propriety of granting a motion to dismiss an indictment under [FED.R.CRIM.P.] 12 by pretrial motion is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact. If a question of law is involved, then consideration of the motion is generally proper." (citation omitted)). See *United States v. Black*, 469 F.Supp.2d 513, 518 (N.D.Ill 2006).

"The void for vagueness doctrine rests on the basic principle of due process that a law is unconstitutional 'if its prohibitions are not clearly defined.' "*Karlin v. Foust*, 188 F.3d 446, 458 (7th Cir.1999)(quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222(1972). "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 understand 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)); *Grayned*, 408 U.S. at 108-09, 92 S.Ct. at 2298-99 (by failing to clearly define prohibited conduct "[v]ague laws may trap the innocent by not providing fair warning [and may] … impermissibly delegate . . . basic policy matters

to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"). *United States v. Black*, 469 F.Supp.2d 513, 530 (N.D.Ill 2006).

A party may raise a vagueness challenge by arguing either that a statute is vague as applied to the facts at hand, or that a statute is void on its face. As to facial vagueness challenges, a court, generally speaking, "must uphold a facial challenge 'only if the enactment is impermissibly vague in all of its applications.' "*Fuller v. Decatur Public School Bd. of Educ. School Dist. 61*, 251 F.3d 662, 667 (7th Cir. 2001)(quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191, 71 L.Ed.2d. 362 (1982)). An "as applied" challenge, in contrast, asks whether the defendant "receive[d] fair warning of the criminality of his own conduct from the statue in question" because "[o]ne whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974); *See United States v. Black*, 469 F.Supp.2d 513, 518 (N.D.Ill 2006). As stated above, Defendants are making an "as applied" challenge to the constitutionality of the statutory scheme and asking that the Indictment be dismissed.

Defendants in this case are in a quandary regarding the application of the CPT codes to the facts at bar. For example, a medical provider must ascertain how to interpret a CPT code that provides that he should spend *approximately* a certain amount of time with a patient. This of course leaves the medical provider wondering how much time exactly must be spent with the patient to ensure compliance with federal statutes -- just as the farmers in Wabash were left pondering how much "drift" is acceptable. If the Indictment mandates that Defendants should spend *approximately* 20 minutes with a patient, could he be prosecuted if he spends 19 minutes with a patient? If not what if he only spends 18 minutes with a patient? Clearly, this hypothetical demonstrates the vagueness of the statutory scheme in question. 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. In this vein, if all the goals of an individual psychotherapy session are accomplished in a 30 minute time frame, must the medical provider stay in the room and "stare at the walls" to fulfill the admonishment that the time spent with the patient should be 45 minutes "face to face." Just as a farmer should be not indicted because he misunderstood the term "drift", a medical provider should not be prosecuted based on an interpretation of vague phrases such as "approximately."

With so many variables in play it is simply impossible for a medical professional to determine what conduct can be considered criminal in nature. For instance, maybe the goals of psychotherapy can be accomplished in 20 minutes instead of 30 and maybe a group can be "successfully led" with 13 people. No where is a medical provider put on reasonable notice that he can be indicted because he violated the above two precepts. This is the same way that telling drivers not to drive too fast does not really tell them anything. Furthermore, the standards in the Indictment are so vague that it encourages arbitrary enforcement of its provisions in that certainly the federal government is not indicting every medical provider who has one too many people in a group therapy session. Instead the government is presumably selecting these "CPT code cases" for prosecution on an ad hoc basis premised on hidden "DOJ" guidelines. *See United States v. Black*, 469 F.Supp.2d 513, 530 (N.D.Ill 2006).

A review of other "CPT code" cases is instructive on this issue in that the defendants in such cases all raised the "void for vagueness defense" as a potential bar to federal prosecution. While the court in some of these case ruled that the statutes were not void for vagueness, it did so because the defendants in those cases failed to provide *any* services to its patients but billed a "CPT" code as if they did provide such service. *See United States v. Markoll*, WL 1737763 (D.Conn. 2001). In *Markoll*, the defendants raised the void for vagueness doctrine as a defense, but in *Markoll* the defendant simply provided one type of service (EMIT device treatments) but billed the government for ultrasound "treatments" that

are distinctly different from "EMIT" device treatments. *See Markoll* at 5 (stating "Defendants are charged with concealing the fact that their services were performed with an investigational device (the EMIT device), by billing Medicare for ultrasound and electrical stimulation treatments that the Government alleges were not actually performed"). Another defendant in a "CPT code" case again raised the void for vague defense. *See United States v. Singh*, 390 F.3d 168 (2nd Cir. 2004). In *Singh* the doctor was indicted for submitting fraudulent CPT codes. In *Singh* the allegation was that Dr. Singh's nurse performed a certain procedure and then utilized a certain CPT code that clearly indicated that the procedure was performed by Dr. Singh.[3] In essence, Singh billed for services he never performed. See *Singh*, 390 F.3d at 188 ("Indeed, the AMA Billing Manual requires that '[t]he physician must be readily available' to justify a billing under code 99211, the lowest code. Yet, Singh was billing at the higher codes for services rendered when no physicians were readily available in the office suite.").

Fortunately for Defendants in the present case, the "CPT billing Code Cases" take a different turn when the basis of the indictment is *not* that a defendant never performed service "X" but that a defendant allegedly failed to perform a service up to the ambiguous guidelines established by the American Medical Association (AMA). For instance, the case of *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) is instructive. In *Siddiqi* an oncologist was convicted of fraudulently billing for chemotherapy treatments actually administered by hospital staff, but presented evidence that he had arranged for another physician to be on call when he was out of the country. See id. at 1170-71. The billing code in that case, 96500, provided that a physician could seek reimbursement for "chemotherapy injection, intravenous, single premixed agent, administered by qualified assistant under the supervision by physician." The court in *Siddiqi* held that the physician had not fraudulently

[3] The specific facts in *Singh* and *Markoll* are somewhat convoluted and Counsel has "boiled down" the basic facts and allegations for the sake of brevity and clarity.

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.

The present case presents a factual situation similar to that in *Siddiqi*. Just as the term "supervision" in *Siddiqi* was vague and ill-defined, Defendants in this case are being Indicted and prosecuted premised on interpretations of three ambiguous words utilized in the billing codes at issue (i.e., "approximately", "successfully" and "minimal[ly]"). The Indictment utilizes "approximately" to proclaim that Defendants' therapy should last "approximately" a certain time period. ¶¶ 12 & 15 of the Indictment. The ill-defined nature of the term "approximately" is axiomatic as discussed above. Further, Defendants are being prosecuted premised on the allegation that their group therapy sessions were of a size that could not be "successfully led (i.e., maximum of 12 people)." ¶ 13. Again, who is to decide what size can be successfully led? Perhaps a group can be successfully led with 13 people. The Indictment and the codes provide no clear guidance on this issue except to state as an example "i.e. maximum of 12 people." While this provides an example of "12 people," it never actually prohibits medical providers from say leading a group therapy session with 13 people or 14 people. Finally, the government's last line of attack in the Indictment again centers on an ambiguous term "minimal." ¶ 14. This section the Indictment claims to allow "pharmacologic management" with an admonishment of "no more than minimal psychotherapy." Again, the Indictment gives no guidance (of course) on how a medical provider is to gauge what is "minimal" psychotherapy. The Indictment does claim that the patient was not present for the "office visit" but it is certainly reasonable and possible that "minimal psychotherapy" was conducted over the phone. Perhaps, because the code states "no more than minimal psychotherapy" that a reasonable person would interpret this as an

admonishment that he or she should "treat" the patient in the most minimal and less time consuming manner possible.

As illustrated above the Indictment is unconstitutionally vague in that it clearly fails to provide the kind of ordinary notice that will enable ordinary people to understand what conduct it prohibits; secondly, it authorizes and even encourage arbitrary and discriminatory enforcement. The statutory scheme in the present case encourages arbitrary enforcement in that it allows the federal prosecutors to prosecute certain 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 doctors office as a roving commissioner determining how a doctor should practice medicine. Surely, this cannot pass constitutional muster.

The distinction between the present case and the *Markoll* and *Singh* cases is that in *Markoll* and *Singh* the medical providers ***never*** performed the service in question. The medical providers in *Markoll* and *Singh* essentially billed for a service they "flat out" never even attempted to perform. In the present case, Defendants performed the services in question, they simply did not *allegedly* follow the proper arbitrary "guidelines" established by the American Medical Association.[4] This critical issue is brought to light in the language of *Siddiqi*:

> We emphasize that this is not a civil billing case; it is a criminal fraud case. Each of the Mecca counts required proof that Siddqi used code 96500 with a dishonest intent. Based on the present record, inference of such intent cannot be drawn from use of the code. As noted, code 96500 allows billing for

[4] Defendants contend that if they were charged in the Indictment with never performing any service to the patients (i.e. never even meeting, talking or communicating with the patients in any fashion for one second) that the Indictment may arguably pass constitutional muster. Instead, under the present Indictment Defendants can be convicted of a federal crime because they failed to perform a medical service in conformity with vague and amphorous American Medical Association Guidelines.

> supervision a term that on the record is unclear . . .Professionals, including lawyers, sometimes bill for simply being available if needed. One may disagree with the practice . . . However, billing is nevertheless arguably appropriate because to be available, the professional must forego the opportunity to go fishing or worship in Mecca . . . [billing in that manner] is at worst an attempt to bill at the outer limits permitted, not fraud.

This language is equally applicable to the present facts in that *if* Defendants misinterpreted the words "approximately," "successfully led" and "minimal" Defendants' conduct is at worst a civil matter between itself and Medicare, not a criminal case. There cannot be implied any criminal intent because Defendants had 13 people instead of 12 in a group or only saw a patient for 19 minutes as opposed to 20 or Defendants talked on the phone with a patient instead of an in-office visit.

III. Conclusion

For the foregoing reasons, the present Indictment should be dismissed as unconstitutionally vague as applied to Defendants.

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2007 a copy of the attached *Amended Motion to Declare 18 U.S.C. 1374; 18 U.S.C. 1341 and 2; 18 U.S.C. 982(a)(7); 18 U.S.C. 981(a)(1)(c); and 28 U.S.C. 2461 Unconstitutionally Vague as Applied to Defendants and to Dismiss 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:

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