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ARGUMENT - GROUND TWO

The Goverment argues that the Appellant's rights under the Sixth Amendment were not violated where he was unable to cross-examine witnesses because the Government did not choose to cal lthem as witnesses and that Appellant could have called on them to testify. That argument wholly misses the mark.

In Counts II - IX of the indictment, the Government alleged that Appellant filed fraudulent billing as to six (6) specific patients and listed those patients (by their initials) on the ondictment counts. However, at trial, what the Goverenment did not do was call five of the six patients named in the indictment to testify. So exactly how did the Government prove the required element for each count where it listed six specific patients, put them on their witness list, and then only called on one to testify (whose testimony did not actually contain anything to find Appellant guilty!).

It is the Government's argument that, "(T)o the extent Tull-Abreu believed the patients could have offered exculpatory or otherwise helpful evidence, he could have called them as witnesses himself." Government's Brief, at 7. It is not a criminal defendant's duty to put on witnesses that are key elements as to a count in an indictment; that is the prosecution's

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duty since it chose to charge that Appellant did an offense based upon its allegation that fraudulent billing was done as to a certain **individual**. It is the Government's duty to put that individual on the witness stand to testify to the jury that a certain bill was fraudulently filed in his/her name as stated in an indictment. Exactly why would a defendant opt to call a witness listed in the indictment to testify in his behalf when the Government needed that witness to prove that count? It is not the Appellant's duty to call an individual named as part of the Government's allegation in an indictment to testify; if the Government made the allegation and did not call that person then that count was unproven. A simple question that on this date there was a biling and is that billing accurate would have cured the issue. Of course after the Government's first witness fizzled out, they took the easy way out, not calling the other five! The Government wholly failed to prove these counts by failing to call the individuals named as part of the element for the allegations.

ARGUMENT - GROUND THREE

The Government finally argues that restitution was only part of the sentencing proceeding and that the amount was not 1.2 million dollars, (taken from Government's Exhibit 12), but $518,775.20. That figure even adds more credence to the Appellant's argument that no crime was committed.

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It is the Government's argument (and that the conviction was based upon) that the Appellant filed thousands or duplicate bills. However, as argued on his brief, the math did not add up to 1.2 million dollars, much less than approximately $518,000. The three secretaries testified that they had patients sign two, three or even five blank billing forms which were later submitted for payment. As noted in his initial brief, if just the minimum 2 forms were done (with the lowest number of patients that the secretaries testified were seen by Appellant), then the loss should be $3,496,248 (and $5,244,372 based on three forms, and an astronomical $$8,748,124 if five forms were billed). If the Government's position is that there was only $518,000 sought for restitution (which was every bill by Appellant), and the Mandatory Victims Restitution Act requires restiution for all losses, then this Court can "infer" that there was only $518,000 in billings which would obviously NOT support the Government's argument as to duplicate billings. Simple math proves the Government's case was extremely faulty as, obviously, Appellant had a legitimate office, saw legitimate patients and billed legitimately the $518,000.

CONCLUSION

WHEREFORE, and in view of the above and foregoing, it is respectfully requested that this Court reverse Counts I through IX of Appellant's conviction.