UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DARRELL L. BRYANT,	)	JUDGE ALGENON L. MARBLEY
	)	
Petitioner,	)	CRIMINAL CASE NO. 2:17-CR-146
	)	
v.	)	
	)	CIVIL CASE NO. ________________
UNITED STATES,	)	
	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF MOTION TO VACATE AND SET ASIDE JUDGMENT OF CONVICTION AND SENTENCE PURSUANT TO 28 U.S.C. § 2255

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Following a jury trial, Petitioner Darrell L. Bryant was convicted, along with his co-defendant and wife, Gifty Kusi, of three counts of healthcare fraud and one count of conspiracy to commit healthcare fraud. The counts of conviction stemmed from two sets of allegations: first, that Mr. Bryant and Ms. Kusi fraudulently billed Medicaid for counselling sessions provided in conjunction with doctor's office visits; and, second, that they fraudulently billed Medicaid for compounded drugs that were not properly prescribed. Following conviction, Mr. Bryant, a first-time, non-violent offender, was sentenced to 84 months' confinement, to be followed by 3 years of supervised release.

But Mr. Bryant's trial counsel was ineffective in multiple, crucial ways. Trial counsel (1) failed to request a mistrial after the government directly and deliberately commented on Mr. Bryant's silence in violation of the Fifth Amendment; (2) failed to introduce a bevy of evidence showing that Mr. Bryant acted without fraudulent intent with respect to the counselling claims; and (3) failed to adduce evidence and put forth argument showing that the government's proffered loss amount—ultimately adopted by the Court—was grossly exaggerated. For these reasons, fleshed out in greater detail below, Mr. Bryant respectfully asks the Court to vacate and set aside his judgment of conviction and sentence.

I. FACTS AND PROCEDURAL HISTORY

Darrell Bryant and Gifty Kusi operated Health & Wellness Pharmacy ("HWP") as well as Health & Wellness Medical Center ("HWMC"), an opioid addiction treatment center. On July 6, 2017, Darrell and Gifty were indicted on five counts—four counts of healthcare fraud in violation of 18 U.S.C. § 1347 and one count of conspiracy to commit health care fraud. (Indictment, ECF No. 1.) The case went to trial on December 3, 2018. (Trial Tr., ECF No. 103, at 1 (PageID 605).) The government's case was built on allegations that defendants had fraudulently billed Medicaid

and Medicaid managed-care organizations (MCOs)[1] for addiction counselling services on numerous occasions and that they had also fraudulently billed over $2 million for compounded prescription drugs. (*See generally*, Indictment, ECF No. 1; Trial Tr., ECF Nos. 103-111.) Over the course of two weeks, the government called 35 witnesses and introduced thousands of pages of documents into evidence. (*See generally* Trial Tr., ECF Nos. 103-111.) After the government completed its case in chief, Mr. Bryant's counsel declined to put on *any* affirmative case for the defense. (Trial Tr., ECF No. 110, at 1477 (PageID 2081).) Ms. Kusi's counsel did the same. (*Id.*) On December 18, 2018, the jury returned a guilty verdict as to both Mr. Bryant and Ms. Kusi on four of the five counts. (*Id.*, ECF No. 11, at 1637-43 (PageID 2241-47).) The jury acquitted both Mr. Bryant and Ms. Kusi of count two of the indictment, which alleged that they had fraudulently billed Medicaid for compound drugs that were never actually provided to patients. (*Id.*, ECF No. 111, at 1638 (PageID 2242).)

Sentencing did not occur until almost a year later—on November 26, 2019. (Sentencing Tr., ECF No. 154, at 1 (PageID 2541).) The primary issue in dispute at sentencing was loss amount. (*See id.* at 35-97 (PageID 2575-2637).) Due to defense counsel's complete failure to offer any cognizable counterargument (or evidence) for reduction of the government's proffered loss amount, the Court ultimately adopted the government's proposed figure of $3.7 million dollars, resulting in an offense-level enhancement of 18 levels applied to Mr. Bryant. (*See id.* at 97 (PageID 2637) (Court: "I think the investigation disclosed that the defendants . . . defrauded . . . Medicaid of $2,105,682.51 for compound creams. . . . "Further, [they] . . . billed $1,621,445.10 for counselling services[.]"); Bryant PSIR at 9 (adopting 18-level enhancement pursuant to

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[1] Given that the distinction is of no material consequence here, the remainder of this brief refers simply to "Medicaid."

U.S.S.G. § 2B1.1(b)(1)(J)).) This took his Sentencing Guidelines range from 10 to 16 months (offense level 14 in the absence of a significant loss amount) to 121-151 months (offense level 32). (*See* Bryant PSIR at 10; U.S.S.G. Sentencing Table (Ch. 5 Pt. A).)

The Sixth Circuit affirmed Mr. Bryant's sentence and conviction on March 17, 2021. *United States v. Bryant*, 849 F. App'x 565 (2021). At that time, per Supreme Court order, "the deadline to file any petition for a writ of certiorari . . . [was] extended to 150 days from the date of the lower court judgment." Order No. 589, 2020 U.S. LEXIS 1643, at *1 (Mar. 19, 2020). Mr. Bryant did not file a petition for a writ of certiorari, and thus the one-year limitations period applicable to his motion to vacate and set aside judgment of conviction and sentence began to run on August 14, 2021. *See Clay v. United States*, 537 U.S. 522, 532 (2003) ("for federal criminal defendants who do not file a petition for certiorari with this Court on direct review, § 2255's one-year limitation period starts to run when the time for seeking such review expires").

II. STANDARD OF REVIEW

"A motion brought under § 2255 must allege one of three bases as a threshold standard: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001). Criminal defendants have an undoubted constitutional right to the effective assistance of counsel, and thus a showing of ineffective assistance warrants § 2255 relief. *E.g.*, U.S. Const. Amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Rayborn v. United States*, 489 F. App'x 871 (6th Cir. 2012) (granting motion to vacate convictions and sentence pursuant to § 2255 in light of ineffective assistance provided by trial counsel); *Christopher v. United States*, 605 F. App'x 533, 536 (6th

Cir. 2015) ("Ineffective assistance of counsel claims are an appropriate basis for relief under § 2255.").

Whether counsel's performance was constitutionally ineffective is determined by applying the familiar two-part *Strickland* framework: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "In order to demonstrate prejudice as a result of counsel's deficient performance, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Rayborn*, 489 F. App'x at 878 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is defined as 'a probability sufficient to undermine confidence in the outcome'—certainty of a different outcome is not required." *Id.* "Thus, analysis focusing solely on mere outcome determination, without attention to whether the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

III. ARGUMENT

Mr. Bryant's trial counsel performed deficiently and prejudiced Mr. Bryant severely with respect to several crucial issues. First, counsel failed to request a mistrial after the government directly and unconstitutionally commented on Mr. Bryant's silence. Had such a request been made and persuasively argued, it is likely that the Court would have granted a mistrial or, failing such, that the court of appeals would have reversed the denial of mistrial. Second, trial counsel failed to introduce extensive evidence showing that Mr. Bryant acted without fraudulent intent with respect

to the counselling claims submitted to Medicaid. Had counsel introduced this evidence, it is reasonably probable that the jury would have acquitted as to the counselling-related counts of the indictment. Third, trial counsel failed to adduce evidence and make argument showing that the government's proffered loss amount was grossly exaggerated. Had counsel utilized this evidence and made these arguments, the Court very likely would not have adopted the government's proffered loss amount and instead would have adopted a much lower figure, resulting in a smaller offense-level enhancement and a lower Guidelines sentencing range. Thus, in all of these areas, trial counsel provided Mr. Bryant with ineffective assistance. As explained in detail below, his judgment of conviction and sentence should be vacated.

A. Trial Counsel's Failure to Seek a Mistrial Following the Government's Blatant Fifth Amendment Violation Amounted to Constitutionally Ineffective Assistance.

All of Mr. Bryant's convictions should be vacated and his case set for a new trial given the government's egregious violation of his Fifth Amendment rights and his trial counsel's failure to request a mistrial as the appropriate remedy for the same.

1. Counsel's Failure to Seek a Mistrial Constituted Deficient Performance.

The Supreme Court has long "h[e]ld that the Fifth Amendment . . . forbids . . . comment by the prosecution on the accused's silence." *Griffin v. California*, 380 U.S. 609, 615 (1965). Oblique government references to a defendant's silence require a reviewing court to engage in a nuanced analysis of four factors: "(1) whether the prosecutor intended to reflect on the defendant's failure to testify; (2) whether the comment was isolated or extensive; (3) whether the case against the defendant was otherwise overwhelming; and (4) whether curative instructions were given and when." *United States v. Morris*, 533 F. App'x 538, 542 (6th Cir. 2013). But where the prosecutor directly comments on a defendant's silence, the analysis is straightforward: "Cases involving direct comments pose little difficulty as the court must reverse unless the prosecution can

demonstrate that the error was harmless beyond a reasonable doubt." *Raper v. Mintzes*, 706 F.2d 161, 164 (6th Cir. 1983) (emphasis added).

Here, the prosecutor's prejudicial and unconstitutional commentary plainly fell in the latter, direct-reference camp. Just when it mattered most during closing arguments—near the very end of his rebuttal—the prosecutor explicitly directed the jury to Mr. Bryant's silence and asserted that this silence was evidence of guilt: "***Ladies and gentlemen, . . . if he's not telling you what happened, why isn't he? Because he knows, he knows what he was doing was wrong and it was illegal***." (Trial Tr., ECF No. 110, at 1562 (PageID 2166) (emphasis added).)

It is difficult to imagine a more direct violation of *Griffin*. Defense counsel immediately objected, on Fifth Amendment grounds, but the Court summarily overruled the objection in the presence of the jury, thus giving the prosecutor's unconstitutional argument even more authority in the eyes of the jury. (*See id.*)

After the government had finished its rebuttal argument—and outside the presence of the jury—the Court revisited the propriety of the prosecutor's statement, candidly admitting that it had misheard the comment and, upon further review, understood defendants' Fifth Amendment objection. (*See id.* at 1568-69 (PageID 2172-73) (the Court to counsel: "I must confess that I heard [the commentary in question] differently. But having heard it back, I think I heard now the same thing that you heard.").) But defense counsel nevertheless failed to request a mistrial and instead merely asked that a curative instruction be read later in the proceedings. (*Id.* at 1575-76 (PageID 2179-80).) Accordingly, after breaking for lunch—and *more than an hour* after the prosecutor's egregious statement was made and (inadvertently) blessed by the Court—the Court read a curative instruction as part of its jury instructions. Trial counsel failed to object to this too little, too late approach.

This failure to request a mistrial amounted to deficient performance. It is well established that "failure to make . . . an objection can have devastating consequences for an individual defendant" and thus "can amount to ineffective assistance of counsel." *Hodge v. Hurley*, 426 F.3d 368, 377 (6th Cir. 2005). Likewise, failure to request the appropriate form of relief can have similarly devastating consequences. *See Ramchair v. Conway*, 601 F.3d 66, 71 (2d Cir. 2010) ("'failure to request the proper relief'" rendered counsel ineffective (quoting *Ramchair v. Conway*, 671 F. Supp. 2d 365, 370 (E.D.N.Y. 2008)). Such was the case here. While Mr. Bryant's counsel did not fail to object, she did fail to request appropriate relief. The government's Fifth Amendment violation was blatant and direct; it was strategically placed at the end of rebuttal for maximum impact; and its prejudicial effect was heightened by the Court's (inadvertent) approval of the remarks in the presence of the jury.

Given these facts, a curative instruction could not undo the damage done by the government's unconstitutional commentary. Moreover, the inadequacy of the curative instruction—and the fecklessness of trial counsel's decision to request it—is further augmented by the fact that the request was not made until later in the proceedings and the instruction not given until an entirely different phase of the trial began more than an hour after the prosecutor's inexcusable remarks. *See United States v. Solivan*, 937 F.2d 1146, 1157 (6th Cir. 1991) (curative instruction insufficient when given "after a twenty-minute recess which occurred immediately following the prosecutor's improper statements"; this allowed the offending comments "to become etched in granite in the jurors' minds. The admonition given by the district court . . . was given too late to eradicate the prejudice[.]" (internal quotation marks omitted).).

In light of the blatancy of the government's remarks, the Court's (inadvertent) sign-off on them, and the delayed nature of the curative instruction, trial counsel performed deficiently in failing to request a mistrial rather than a mere curative instruction.

2. Trial Counsel's Failure to Seek a Mistrial Severely Prejudiced Mr. Bryant.

Trial counsel's failure to request a mistrial in light of the government's strategically placed and plainly unconstitutional commentary deeply prejudiced Mr. Bryant. To show prejudice, a "'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Rayborn*, 489 F. App'x at 878 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is defined as 'a probability sufficient to undermine confidence in the outcome'—certainty of a different outcome is not required." *Id.* "Thus, analysis focusing solely on mere outcome determination, without attention to whether the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart*, 506 U.S. at 369.

Here, there is a "reasonable probability" that the "result of the proceeding would have been different" had trial counsel requested a mistrial. That is, it is reasonably likely that the Court would have actually granted the mistrial *or* that the court of appeals would have reversed a ruling denying such a mistrial request. Consider *Rachel v. Bordenkircher*, 590 F.2d 200 (6th Cir. 1978). There, the Sixth Circuit reviewed a district court's denial of habeas relief to a state prisoner whose trial-court counsel had failed to object to the following closing argument by the state:

> We don't know what happened to [the victim] in the hour or two hours before he was taken up there and choked to death and dumped over the mountain side. We will never know, these men [*i.e.*, the defendants] won't tell us. The only other man who could tell us is dead and in his grave.

Id. at 202. The Sixth Circuit held that these "comments . . . were highly improper and constituted a flagrant violation of" the Fifth Amendment as interpreted by the Supreme Court in *Griffin*. *Id.*

It reversed the district court and ordered that court "to grant petitioner's release unless the state initiates procedures to retry him." *Id.* at 204. Yet the commentary in *Rachel* was *less* egregious than the government's comments in the case at bar, given that here the prosecutor explicitly asserted that Mr. Bryant's silence showed that he knew he was guilty.

In *Raper v. Mintzes*, 706 F.2d 161 (6th Cir. 1983), the prosecutor's impermissible comments were milder still than those in *Rachel*. There, "[i]n the course of his rebuttal argument, the prosecutor made several references to the uncontradicted nature of the evidence." *Id.* at 163. *See also id.* at 165-66. But the Sixth Circuit nevertheless affirmed the district court's conclusion that these unconstitutional comments entitled Petitioner Raper to habeas relief with respect to his first-degree murder conviction. *Id.* at 167. This was so even though, like in the present case, "the trial court gave a clear and forceful closing instruction to the jury on the petitioner's right not to testify." *Id.* at 166.

These precedents, and the egregious underlying facts, support the finding of a reasonable probability that either this Court or the court of appeals would have responded favorably to a mistrial motion had trial counsel made one. Accordingly, Mr. Bryant was prejudiced by trial counsel's deficient performance, and the appropriate remedy for this failure is vacation of his judgment of conviction and sentence.

B. Trial Counsel Was Constitutionally Ineffective Regarding the Counselling-Related Counts and the Propriety of Billing Under Code 90838.

As discussed in the Facts and Procedural History section above, one of the two core components of the government's case was the allegation that Mr. Bryant and Ms. Kusi fraudulently billed for addiction-counselling services provided at HWMC. All of the at-issue counselling services were billed to Medicaid under Current Procedural Terminology ("CPT") code 90838. (*E.g.*, Trial Tr., ECF No. 104, at 236 (PageID 840) (Government: "the code that defendants billed

is a code called 90838").) Thus, the assertion that Mr. Bryant knowingly and improperly billed counselling sessions under CPT code 90838 was the primary basis for conviction under counts four and five of the indictment—charging healthcare fraud in connection with the provision of counselling services—and was one of the main bases for conviction under count one—conspiracy to commit healthcare fraud—as well. But Mr. Bryant's counsel rendered deficient performance by failing to introduce compelling—indeed, dispositive—evidence refuting the 90838 arguments put forth by the government and its witnesses. Had trial counsel performed proficiently, there is a high likelihood that Mr. Bryant would have been acquitted of healthcare fraud related to the provision of counselling services.

1. Counsel Failed to Introduce Evidence Showing that Billing under CPT Code 90838 Was Not Indicative of Fraud.

Trial counsel rendered deficient performance when she failed to introduce evidence showing that use of the 90838 billing code was *not* fraudulent. That is, it was not done with intent to defraud. *Cf. United States v. Sosa-Baladron*, 800 F. App'x 313, 318 (6th Cir. 2020) (conviction for health-care fraud requires proof "the defendant had the intent to defraud"). The available evidence indicating as much is voluminous. Yet trial counsel neglected it entirely.

First and most fundamentally, for all of the discussion of 90838 at trial, Mr. Bryant's counsel never bothered to introduce the text of the 90838 CPT code itself, a copy of which is attached as Exhibit A.[2] Code 90838 is for 60 minutes of psychotherapy in conjunction with a medical office visit, known in industry parlance as an evaluation-and-management ("E/M"). In other words, as the Court might recall, 90838 is an "add-on" code, meaning that it is billed only in conjunction

[2] Unless noted otherwise, all exhibit references are to the lettered exhibits attached to the Declaration of Emmett E. Robinson, filed concurrently herewith.

with an E/M. At trial, the government contended that HWMC's billings under 90838 were fraudulent because that code required that the same medical professional who performed the E/M office visit also provide the "add-on" counselling services. In fact, the government's summation witness, Special Agent Kelly Morse, testified unequivocally that "90838 specifically states that the 60-minute psychotherapy be conducted *by the same provider* that also conducted the office visit."[3] (Trial Tr., ECF No. 109, at 1393 (PageID 1997) (emphasis added). *See also id.*, ECF No. 104, at 237 (PageID 841) (government asserting in opening that HWMC was not "providing qualified people to perform [90838] service. This is a service that cannot be billed the way they billed it."); *id.* at 323 (PageID 927) (government: "Can CDCAs [*i.e.*, the credential-holders who often provided addiction counselling services at HWMC but could not provide the underlying E/M] provide a 90838? [Witness:] No."); *id.*, ECF No. 110, at 1473 (PageID 2077) (government closing: "Special Agent Morse and Steve Smith testified . . . that code [90838] requires . . . that [counselling] is provided by the same provider who provided the underlying office visit"); *id.* at 1492 (PageID 2096) (government closing: "90838 is . . . only billed if you also have the office visit, and it's in addition, and it's 60 minutes face to face with the patient by the same provider. That means a physician.").) <u>That testimony was false</u>. Far from "specifically stat[ing]" that the psychotherapy and office visit must be provided by the same individual, the text of CPT code 90838 is in fact completely silent on that point.[4] Accordingly, trial counsel's failure to introduce the actual text of CPT code 90838 to refute this crucial (and erroneous) contention was inexcusably

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[3] Trial counsel objected to this testimony on hearsay grounds, but the Court overruled the objection. (Trial Tr., ECF No. 109, at 1393 (PageID 1997).)

[4] The official description of the code is as follows: "Psychotherapy, 60 minutes with patient when performed with an evaluation and management service (List separately in addition to the code for primary procedure)." (Ex. A, CPT Code 90838, at 1.)

deficient. There was nothing to be gained by declining to point to the written authority on the issue to show that this key testimony was wrong.

Second, trial counsel was deficient for failing to retain an expert witness (1) who could refute Agent Morse's baseless contention that code 90838 requires that the psychotherapy services be provided by the same provider who completed the E/M *and* (2) who could also provide testimony showing that HWMC's billing practices with respect to 90838 were legitimate. Attached to this memorandum is the declaration of Glenda Hamilton. Ms. Hamilton is a Certified Professional Coder, Certified Outpatient Coder, Certified Professional Coder—Payer, and Certified Risk Coder. (Hamilton Decl. ¶ 5.[5]) Particularly noteworthy for this case, she is also a Certified Professional Coder—Evaluation and Management Specialist, Certified Professional Coder—Psychiatry, Certified Professional Medical Auditor, and Medical Compliance Specialist—Physician. (*Id.*) She has over 28 years of experience as a professional medical coder, auditor, and consultant, and is currently employed as the Compliance Coding Audit Manager for a large teaching hospital. (*Id.* ¶¶ 5, 6.)

In her declaration, Ms. Hamilton states unequivocally that Agent Morse's testimony above "was false." (*Id.* ¶ 9.) And, also as discussed above, she confirms that "[i]n fact, the [CPT] Coding Manual entry for code 90838 most certainly does not state that the psychotherapy provided under code 90838 has to be provided by the same provider." (*Id.*) Further, as Ms. Hamilton explains, not only was it in line with industry practice and governing guidelines for HWMC to allow different individuals to provide the E/M service, "on the one hand, and the 90838 add-on psychotherapy services, on the other" (*id.* ¶ 10), it was also proper for HWMC to bill *both* services

[5] Mr. Bryant hereby incorporates the entirety of Ms. Hamilton's attached declaration by reference.

"exclusively under the national provider identifier ('NPI') number of the individual who provided the E/M." (*Id.* ¶ 11.) This was so because of the "incident-to" rule found in chapter 15, § 60 of the Medicare Benefit Policy Manual ("Policy Manual").[6] (*Id.* ¶ 12.) Ohio's Medicaid program has explicitly adopted this rule. (*Id.* ¶ 12.)

Under the incident-to rule, a secondary provider's services may be billed under the primary provider's NPI number if four conditions are satisfied: "First, the incident-to service (here, the counselling or 'psychotherapy' service) must be '[a]n integral, although incidental, part of the'" primary provider's professional service. (*Id.* ¶ 13 (quoting Policy Manual, ch. 15, § 60(A)).) As Ms. Hamilton explains, HWMC satisfied this requirement: "Provision of addiction-related psychotherapy services satisfies this requirement where," as here, "the underlying E/M is also for treatment of the at-issue addiction." (*Id.*) Second, the incident-to service must be one that is "'[c]ommonly rendered without charge or included in the physician's bill.'" (*Id.* ¶ 14 (quoting Policy Manual, ch. 15, § 60(A)).) Such was the case here, because "90838 services are commonly included in the physician's bill."[7] (*Id.*) Third, the incident-to service "must be '[o]f a type that are commonly furnished in physician's offices or clinics.'" (*Id.* ¶ 15 (quoting Policy Manual, ch. 15, § 60(A)).) "[P]sychotherapy is commonly furnished in such a setting," and thus this requirement, too, is satisfied here. (*Id.*) Finally, the incident-to service "must be '[f]urnished by the physician or by auxiliary personnel under the physician's direct supervision.'" (*Id.* ¶ 16

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[6] The relevant excerpts of the Policy Manual are attached to Ms. Hamilton's declaration as Exhibit 2.

[7] Also on this point, see the testimony of government witness Steven Smith, who testified that E/M-providing physicians who also directly provide add-on psychotherapy typically bill for that psychotherapy under code 90838: "Q. Who is typically providing a 90838 code? A. A medical provider, the same person who is providing the E&M code." (Trial Tr., ECF No. 104, at 322 (PageID 926).)

(quoting Policy Manual, ch. 15, § 60(A)).) As Ms. Hamilton explains, the Policy Manual explicitly states that "physician" here means "'physician *or other practitioner*.'" (*Id.* (quoting Policy Manual, ch. 15, § 60(A)).) And "direct supervision" "does not mean that the physician [or other practitioner] must be present in the same room." (*Id.* (quoting Policy Manual, ch. 15, § 60.1(B)).) "Rather, the physician or other practitioner need only be 'present in the office suite and immediately available.'" (*Id.* (quoting Policy Manual, ch. 15, § 60.1(B)).)

Thus, Ms. Hamilton's declaration shows not only that Agent Morse's testimony was false, but that in fact HWMC's method of billing counselling services provided by non-physicians under code 90838 was entirely appropriate. But rather than call an expert like Ms. Hamilton to testify at trial—one who could unequivocally testify, based on long industry experience and direct reference to governing guidelines, that Agent Morse's testimony was false and that in fact HWMC was permitted to bill code 90838 as it did pursuant to the incident-to rule—trial counsel did not put on a single expert. In fact, trial counsel put on *no affirmative defense*. With a witness like Ms. Hamilton readily available (*id.* ¶ 18), there could be no strategic benefit to allowing the government to present false evidence, without effective challenge, regarding the requirements for billing code 90838. This failure to retain an expert trial witness was plainly deficient performance.

Third, trial counsel failed to introduce evidence showing that in fact HWMC would have been reimbursed at a *higher* rate had it billed the counselling sessions as stand-alone services under CPT code 90837 rather than as add-on services under 90838. (*See* Ex. A (showing that 90837 applies to standalone psychotherapy services).) Appendix DD to Ohio Administrative Code 5160-1-60 sets forth the reimbursement rates for Medicaid providers like HWMC. The Appendix provides that, since 2013, services billed under code 90838 entitle the provider to a payment of $75.29, while billing under code 90837—the standalone code for 60 minutes of psychotherapy—

entitles the provider to *more* money: $81.99.[8] Ohio Admin. Code 5160-1-60, App'x DD. This fact—never adduced at trial—wreaks havoc on the government's argument that HWMC billed under the 90838 add-on code in order to fraudulently maximize Medicaid payments. In other words, it severely damages the government's case for fraudulent intent. Yet trial counsel never raised it.

Fourth, counsel was deficient in his failure to utilize at trial an email sent to Mr. Bryant and Ms. Kusi by their medical-billing consultant, Laura Dean at IMAX Medical Billing. (*See* Ex. B, Dec. 15, 2015 Email from Laura Dean.) IMAX was the outside contractor that administered HWMC's medical billing. (Trial Tr., ECF No. 106, at 696 (PageID 1300).) Ms. Kusi provided a copy of that email to Mr. Bryant's counsel prior to trial. (*See* Ex. B at 1 (showing email was forwarded to Mr. Bryant's trial counsel, Attorney Laura Perkovic, on November 12, 2018).) The email was sent on December 14, 2015—four days before HWMC accepted its first Medicaid patient. (*Compare id.* (showing send date of Dec. 14, 2015) *with* Gov't Trial Ex. 301 (showing first Medicaid services provided on Dec. 18, 2015).) In the email, Laura Dean plainly advises Mr. Bryant and Ms. Kusi that code 90837 and the other standalone counselling codes "CANNOT be billed with a nursing visit or doctor visit." (Ex. B at 1.) Instead, she advises them to utilize code 90838 when billing "WITH a nurse/doctor code." (*Id.*) This email thus plainly shows that Mr. Bryant and HWMC were following the advice of their outside billing company when they billed

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[8] Appendix DD sets forth payment rates for both facility and non-facility providers. HWMC is a non-facility provider and thus subject to non-facility rates. *See* OAC 5160-1-60(I)(1)-(2) (providing that the facility rate applies to hospitals, skilled nursing facilities, and ambulatory surgery centers, and that the non-facility rate applies "to a service provided at any other site," like HWMC).

counselling sessions under 90838 and thus did not do so with fraudulent intent. But trial counsel inexplicably declined to use the email.

Taken together, this evidence makes clear that Mr. Bryant did *not* possess an intent to defraud when billing under 90838 rather than under a standalone counselling code. There was no benefit to be had from failing to introduce it. These failures constituted deficient performance.

2. Trial Counsel's Deficient Performance with Respect to Code 90838 Severely Prejudiced Mr. Bryant.

Trial counsel's multiple evidentiary errors pertaining to code 90838 were extremely harmful to Mr. Bryant's defense. Had the evidence highlighted above been introduced, the government's argument that counselling services provided under 90838 had to be provided by the same individual who provided the patient's medical office visit—and its related, and more important, assertion that frequent use of code 90838 showed fraudulent intent—would have been seriously, and likely fatally, weakened.

As previously discussed, Special Agent Morse unequivocally testified on behalf of the government that "90838 specifically states that the . . . psychotherapy be conducted by the same provider that also conducted the office visit." (Trial Tr., ECF No. 109, at 1393 (PageID 1997).) There is no question but that that "requirement" was not met at HWMC. And the government seized on the supposedly fraudulent use of code 90838 during its closing not just once, but twice, urging that it was clear-cut evidence of fraud. (Trial Tr., ECF No. 110, at 1473 (PageID 2077) ("Special Agent Morse and Steve Smith testified . . . that code [90838] requires . . . that [counselling] is provided by the same provider who provided the underlying office visit"); *id.* at 1492 (PageID 2096) ("90838 is . . . only billed if you also have the office visit, and it's in addition, and it's 60 minutes face to face with the patient by the same provider. That means a physician.").)

Moreover, the alleged misuse of code 90838 weighed heavily both in this Court's and the Sixth Circuit's subsequent reasoning as well. In rejecting a defense challenge at sentencing, this Court reasoned that "there was testimony from counseling providers who confirmed that qualified supervising physicians should have been present during the sessions provided by chemical dependency counseling assistants, and these individuals confirmed that no supervising physician was present during those sessions." (Sentencing Tr., ECF No. 154, at 19 (PageID 2559).) And in rejecting Mr. Bryant's sufficiency-of-the-evidence challenge on direct appeal, the Sixth Circuit held that the jury could "infer that he knew HWMC was billing Medicaid for physician-led counseling that did not occur." *United States v. Bryant*, 849 F. App'x 565, 570 (6th Cir. 2021).

But as shown above, the text of code 90838 in fact contains no requirement that the counselling be provided by the same individual who conducted the medical office visit and certainly makes no mention of requiring that the counselling be conducted by a physician. And expert testimony confirms that governing regulations and industry practice permit the 90838 billing practices used by HWMC. Moreover, even if that were not the case, there is no dispute but that non-physicians can appropriately bill under code 90837, and Ohio Medicaid regulations show that HWMC would have actually made *more* money billing under that code. Finally, the email Ms. Kusi gave to Mr. Bryant's trial counsel would have provided strong evidence in support of the fact that Mr. Bryant and HWMC billed under code 90838 because their outside billing and coding consultant *told them this was the right code to use*. In short, had trial counsel introduced *any one* of: (1) the text of CPT code 90838; (2) expert testimony that 90838 does *not* require provision of counselling by the medical-office-visit provider and that governing guidelines permit "incident-to" billing in these circumstances; (3) evidence showing that the non-add-on counterpart to 90838 would have actually resulted in *higher* payments to HWMC; or (4) the email showing that the

contractor responsible for HWMC's billing had advised use of code 90838, there is a reasonable probability that the jury would not have convicted on the counselling counts (and that the Sixth Circuit would not have rejected Mr. Bryant's sufficiency-of-the-evidence arguments regarding those counts on appeal). Had trial counsel performed proficiently and introduced *all* of this evidence, the probability of acquittal (or reversal on direct appeal) on these counts would have risen even higher. In light of this deficient performance, his counselling-related convictions and sentence should be vacated.

C. Trial Counsel's Failure to Adduce Evidence—and Make Cognizable Argument—Rebutting the Government's *Prima Facie* Loss Calculation Amounted to Constitutionally Ineffective Assistance.

At sentencing, the government argued that Mr. Bryant should be held accountable for a total loss amount of $3.7 million, including $1.6 million in amounts billed for counselling-related services and $2.1 million billed for compounded drugs. (Sentencing Tr., ECF No. 154, at 74-80 (PageID 2614-20).) That loss amount is significantly overstated, to the tune of more than 50%. First, the $1.6 million figure includes not just charges for code 90838 but also charges for code 99214, despite the fact that there was no evidence showing that the 99214 billings were fraudulent. Second, the government successfully argued for an amount-billed loss metric, but instead an amount-paid metric should have been used with respect to the $1.6 million alleged counselling loss. Third and finally, the $2.1 million compound-drug loss amount includes a nearly $900,000 subset of prescriptions written by the government's key fact witness despite that witness's testimony that those prescriptions were legitimate.

The combined effect of these three errors means that, in the end, the loss amount attributable to Mr. Bryant was at least $1.85 million *lower* than the $3.7 million figure put forward by the government. But that $3.7 million figure won the day nevertheless. Mr. Bryant's trial

counsel failed to adduce evidence—and, with respect to two of the three errors, failed even to make an argument—supporting any of these three reductions. These failures rendered trial counsel ineffective.

1. Trial Counsel Provided Ineffective Assistance When She Failed to Contest Inclusion of Amounts Billed under CPT Code 99214 in the Loss Amount Attributable to Mr. Bryant Despite the Absence of Evidence Showing that 99214 Billings Were Fraudulent.

The $1.6 million counselling-related portion of the loss amount proffered by the government—and adopted by the Court—includes, in addition to amounts billed under code 90838 (*i.e.*, the actual counselling-services code), $669,234.56 billed under code 99214. (Sentencing Tr., ECF No. 154, at 76 (PageID 2616).) Recall that 90838 is an "add-on" code. The government argued at sentencing that CPT code 99214—an E/M code—was the base code to which HWMC's 90838 claims were most often added. (*Id.*) That may well be. But the record evidence was woefully inadequate to show that these 99214 billings were fraudulent. With respect to this E/M code, the government's summation witness merely testified that "[t]hey [HWMC] were billing quite a bit [of] 99214 which is a higher paying, a more moderate complexity" (Trial Tr., ECF No. 109, at 1390(PageID 1994)), and a handful of other witnesses mentioned the code in passing (*e.g.*, *id.*, ECF No. 104, at 321 (PageID 925).). The most extensive discussion of 99214 occurred with Dr. Franklin Demint (*id.*, ECF No. 106, at 766-70 (PageID 1370-74)). During questioning by the government, Dr. Demint testified, in part, as follows:

> Q. When you were at the medical center, did you do 9-9-2-1-4s?
>
> A. I would say I probably did some, yes, but—
>
> Q. How often?
>
> A. Probably oh, gees, probably three or four a day that I would consider a 1-4.

Q. And how many patients again did you see?

A. About 40.

(*Id.* at 770 (PageID 1374).) The government thus presented no evidence showing that Mr. Bryant, or anyone else at HWMC, billed code 99214 fraudulently on any occasion. The record is devoid of evidence that there was even a single instance in which code 99214 was billed without the underlying service being performed. Accordingly, the $669,234.56 in amounts billed under 99214 should *not* have been included in the Court's loss-amount calculation.

Yet Mr. Bryant's trial counsel failed to raise this argument. And it was not for lack of notice or time to prepare: By the time the sentencing hearing rolled around in November 2019, counsel had had access to the trial transcript for *nine months*. (*See* ECF Nos. 103-111 (showing trial transcript was filed on February 18, 2019).) Moreover, Probation had finalized Mr. Bryant's presentence investigation report on May 30, 2019, giving trial counsel months of notice that the government and Probation were on the same page in including billings under 99214 in the loss amount. (Bryant PSIR at 2.)

But at sentencing, trial counsel was caught flat-footed. The government argued, unsurprisingly, that all $669,234.56 was fraudulent and should be included in the loss attributed to Mr. Bryant. The government represented to the Court that "[y]ou can't bill the 90838 without the 99214. And we submitted sufficient evidence to show that it was pervasive in the office." (Sentencing Tr., ECF No. 154, at 76 (PageID 2616).) But that statement is simply false. It is not the case that a 99214 is essential to billing a 90838. The CPT Manual itself clearly states that 90838 can be billed in conjunction with dozens of different codes. (Ex. A at 1 ("use 90838 in conjunction with 99201-99255, 99304-99337, 99341-99350").) And *no* witness testified that 99214 was essential to billing 90838. (*See generally* Trial Tr., ECF Nos. 103-111.) Even more

fundamentally, assuming for the sake of argument (and contrary to the explanation found in part III.B, above) that HWMC consistently submitted fraudulent 90838 counselling billings, it simply does not follow that the physician office visits to which the 90838 counselling sessions were "added-on" were themselves fraudulent. So even if the government had in fact "submitted sufficient evidence to show that" fraudulent billing of 90838 psychotherapy services "was pervasive in the office," that still says *nothing* about the propriety of bills submitted for 99214 E/Ms.[9]

Mr. Bryant's trial counsel failed to point *any* of this out either in Mr. Bryant's sentencing memorandum or at the sentencing hearing, thus effectively conceding the propriety of including the $669,234.56 in 99214 billings in the loss amount. (*See generally* Bryant Sentencing Memo, ECF No. 134; Sentencing Tr., ECF No. 154.) This failure constituted deficient performance.

2. Trial Counsel Was Likewise Ineffective for Failing to Adduce Evidence that Mr. Bryant Never Intended to Receive the Full Amounts Billed.

Mr. Bryant's trial counsel was also ineffective for failing to adduce evidence showing that Mr. Bryant never intended to receive the full amounts billed for services provided under 90838 and 99214 but, rather, knew from the start that Medicaid would only pay claims at the predetermined Medicaid reimbursement rate.

At the sentencing hearing—and consistent with the presentence investigation report and the government's sentencing memorandum—the government argued that the proper loss amount with respect to the 90838 and 99214 claims was the $1.6 million amount billed to Medicaid rather

[9] The government also argued at sentencing that "we had evidence that some of the 99214s were provided by the Defendant Darrell Bryant himself." (Sentencing Tr., ECF No. 154, at 76 (PageID 2616).) But in fact the trial record is devoid of any such evidence. (*See generally* Trial Tr., ECF Nos. 103-111.)

than the $1.1 million amount actually paid by Medicaid in satisfaction of these claims. (Sentencing Tr., ECF No. 154, at 78-80 (PageID 2618-20).) As the government argued and the Court recognized, the law in the Sixth Circuit is clear on this point: Assuming (contrary to the argument in part III.B, above) that all of the 90838 and 99214 billings were in fact fraudulent, then "the total amount fraudulently billed . . . is prima facie evidence of the intended loss." *United States v. Bertram*, 900 F.3d 743, 752 (6th Cir. 2018) (citing U.S.S.G. § 2B1.1 cmt. n. 3(F)(viii)). (*See also* Sentencing Tr., ECF No. 154, at 3, 7, 78, 84 (PageID 2543, 2547, 2618, 2624).) Then, "defendants can rebut the presumption that intended loss is the amount billed with evidence that they never intended to receive that amount." *Id.* Otherwise, the prima facie intended-loss amount is used for purposes of calculating a defendant's loss-amount offense-level enhancement. *Id.*; U.S.S.G. § 2B1.1 cmt. n. 3(A) ("loss is the greater of actual loss or intended loss").

But despite this clear rule, at the sentencing hearing trial counsel failed to present *any* evidence to rebut the government's contention that the amount billed by HWMC constituted the intended loss amount. (*See generally* Sentencing Tr., ECF No. 154.) That is, counsel neither argued that evidence already in the record showed that Mr. Bryant never intended to receive the billed amount nor did she elicit new evidence at the hearing to that effect. As to evidence already in the record, the "Provider Enrollment Application" documents introduced at trial as government exhibits 101, 102, and 103, all contain a copy of the "Ohio Medicaid Provider Agreement," which consisted of eleven very short paragraphs. In all three documents, paragraph 3 explicitly alerts providers that they must "[a]ccept the allowable reimbursement for all covered services *as payment-in-full*." (Gov't Trial Ex. 100 at 9; Gov't Trial Ex. 101 at 5; Gov't Trial Ex. 102 at 4.) All three documents featured prominently in the government's case. (*See, e.g.*, Trial Tr., ECF No. 104, at 257-67 (PageID 861-71).) At sentencing, Mr. Bryant's counsel could easily have pointed

to the plain language of these key documents as evidence that he, being aware of this rule, never intended to actually receive the amount billed but, instead, knew HWMC would receive—and only intended to receive—the Medicaid allowable reimbursement, *i.e.*, the amount paid.

Even more significantly, counsel could have called Mr. Bryant himself to the stand during trial or, at least, during the sentencing hearing. Had he been called, Mr. Bryant would have testified unequivocally that he only ever expected and intended that HWMC be paid at the established Medicaid reimbursement rate, *not* at the billed rate. (*See* Bryant Decl. ¶¶ 4-6.) As he states in his attached declaration, from his prior work as a pharmacist, he was well aware that Medicaid would never pay more than the established reimbursement amount, and he never intended to receive anything in excess of that amount. (*Id.* at ¶ 4.) Moreover, he usually was not even aware what amount was printed on HWMC's bills or whether, or by how much, that amount was in excess of the established reimbursement rate. (*See id.* at ¶ 6.) This is because, though HWMC input the CPT codes to be billed, HWMC's outside billing contractor, IMAX Medical Billing actually devised the amounts to be billed, entered the amounts to be billed, and submitted the bills for payment. (*Id.*) In short, he always intended to receive the established reimbursement amount.

But rather than present this straightforward evidence at the sentencing hearing—the very sort of evidence that the Sixth Circuit said in *Bertram* could be used to rebut the presumption that the amounts billed were the proper measure of loss—Mr. Bryant's trial counsel instead relied on the testimony of consultant Frank Cohen, who contended that the government's loss-amount figures were unreliable because the government failed to use random sampling techniques. (*See* Sentencing Tr., ECF No. 154, at 45-59 (PageID 2585-99).) But this testimony was irrelevant for *Bertram* purposes. Indeed, Mr. Cohen was not even able to counter the government's position by stating what he thought the properly calculated loss amount actually was. (*Id.* at 65-66 (PageID

2605-06) ("Q. Again, what is [the loss amount] in this case? . . . A. I don't know what the amount would be.").)

Indeed, the Court itself concluded that Mr. Cohen's testimony did nothing to move the needle on loss amount in light of *Bertram*. Following Cohen's testimony, the Court stated as follows:

> THE COURT: Ms. Perkovic the Court outlined for you[10] based on the *Bertram* case what the standard is. And as I indicated to you, the Court was clear that for offenses involving government health care programs, the total amount fraudulently billed to the program is *prima facie* evidence of the intended loss. But under the guidelines, you can rebut the presumption that the intended loss is the amount billed *with evidence that the defendants never intended to receive that amount*.
>
> . . . The Court will charitably construe your presentation as an attempt to rebut that presumption, but your attack seems to be simply that the government didn't prove the loss, as opposed to evidence that they never received—that the defendants never intended to receive the amount billed.
>
> . . . *Where is your evidence of what the defendants intended actually to receive?*

(*Id.* at 84 (PageID 2624) (emphasis added).) Ultimately, the Court concluded that the defense presentation was in vain: "I simply have not been presented with any evidence that the defendants did not intend to receive that amount." (*Id.* at 97 (PageID 2637).) Thus the entire amount billed was attributed to Mr. Bryant.

Accordingly, trial counsel had everything to gain, and nothing to lose, by presenting the evidence discussed above to show that Mr. Bryant never intended to receive the full amounts billed for codes 90838 and 99214. *See, e.g.*, *United States v. Brown*, 880 F.3d 399, 403-04 (7th Cir.

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[10] Indeed, the Court had made its views on *Bertram* and the means by which a defendant may rebut the government's prima facie showing of loss amount clear at the very beginning of the sentencing hearing. (Sentencing Tr., ECF No. 154, at 3 (PageID 2543).)

2018) (affirming sentence where trial court concluded defendant should only be responsible for portion of bills "that fell within the reimbursement schedule set by Medicare" given that she pointed to evidence showing that, "as an experienced biller, she would be familiar with Medicare's reimbursement levels"); *United States v. Mirzoyan*, 2017 U.S. Dist. LEXIS 64380, at *56 (S.D.N.Y. Apr. 25, 2017) (defendant satisfactorily showed loss amount should be limited to amounts paid rather than amounts billed where he showed that "because of his familiarity with Medicare billing and reimbursement . . . he did not expect to be paid the amounts billed to Medicare . . . [but] expected to be paid significantly less" (internal quotation marks omitted)); *United States v. Popov*, 742 F.3d 911, 916 (9th Cir. 2014) (vacating and remanding for resentencing to allow trial court to consider "evidence suggesting that [the defendants] may have been aware that Medicare only pays a fixed amount"). Trial counsel's utter failure to present any such evidence at the sentencing hearing was deficient performance.

3. Trial Counsel Was Also Ineffective for Failing to Contest the Majority of the Compound-Based Loss Amount Attributed to Prescriptions by Dr. Rivera.

Trial counsel was also ineffective for failing to dispute the amount of loss attributed to compounded drugs prescribed by Dr. Rivera, the medical director at HWMC and the government's star fact witness. (Trial Tr., ECF No. 106, at 697 (PageID 1301).) At sentencing, over $2.1 million of the $3.7 million loss amount put forth by the government, and ultimately accepted by the Court, consisted of amounts paid for compounded prescriptions that the government contended were fraudulent. (Sentencing Tr., ECF No. 154, at 75 (PageID 2615). *See also* Gov't Tr. Ex. 300 at 1.) Of this $2,105,682.51 amount, the government said that $1,312,026.06 was attributable to fraudulent compound prescriptions written by Dr. Rivera. (Gov't Tr. Ex. 300 at 1; Trial Tr., ECF No. 109, at 1382 (PageID 1986).)

But the evidence adduced at trial shows that this $1.3 million loss amount is grossly exaggerated. Dr. Rivera did indeed testify that, in some circumstances, he had failed to establish a physician-patient relationship with those to whom he prescribed compounded drugs. But he also unequivocally testified that, after his October 27, 2014 meeting with agents from the Ohio Board of Pharmacy, he only prescribed compounds to patients with whom he had a bona fide physician-patient relationship. (*See* Trial Tr., ECF No. 106, at 734 (PageID 1338); *id.*, ECF No. 108, at 1136 (PageID 1740) (establishing meeting with Board of Pharmacy agents occurred on October 27, 2014); *id.*, ECF No. 106, at 686-87 (PageID 1290-91) (Rivera: After the Board of Pharmacy meeting, I told Mr. Bryant and Ms. Kusi that "from now on I won't be able to sign any . . . prescriptions without me establishing a doctor-patient relationship with patients . . . . Q. Okay. Did you continue to sign scripts after that point? [Rivera:] *Not patients that I hadn't seen*." (emphasis added)).) Dr. Rivera also testified that he was responsible for determining the medical necessity of the compounds he prescribed (*id.* at 703 (PageID 1307)) and that he "was impressed with" the compounds:

> I was impressed with it because I've seen a lot of our patients that are still asking for something. "Doc, Suboxone does great for the craving, but I'm still having knee pain, ankle pain, back pain." I thought this was a good shot. I thought it was a good product.

(*Id.* at 639 (PageID 1243).) Thus, Dr. Rivera's own testimony established that he thought the compounds were "a good product," that he was responsible for determining the medical necessity of the compounds he prescribed, and that, after October 27, 2014, he never prescribed compounds without establishing a bona fide doctor-patient relationship. In short, his testimony shows that the compound prescriptions he wrote after that date were *not* fraudulent.

Despite these facts, the government's loss figures—ultimately adopted by the Court—included the amounts paid for all compounds prescribed by Rivera *after* October 27, 2014. The

government's own trial exhibit 300 begins with a headline compound-related loss amount of $2,105,682.51.[11] (Gov't Tr. Ex. 300 at 1.) Of this amount, the government, as just discussed, attributed $1,312,026.06 to compounds prescribed by Rivera. (*Id.*) Beginning on page 16 of that exhibit (numbered "Page 1 of 248"), the exhibit proceeds to list *every* at-issue compound prescription. Review of this data shows that a full $894,865.35 of the compound-prescription "loss" attributed to Mr. Bryant comes from Rivera compound prescriptions written *after* October 27, 2014. (*See* Ex. C at 89; Decl. of Emmett E. Robinson ¶ 4.)

Despite the fact that Dr. Rivera's own testimony shows that these prescriptions were not fraudulent, Mr. Bryant's trial counsel failed to argue that this nearly $900,000 sum should be excluded from the loss amount attributed to him. There was no strategic purpose or benefit to this failure. Rather, as with the other loss-amount errors, this failure plainly constituted deficient performance.

4. Trial Counsel's Failure to Present These Loss-Amount Arguments and Evidence Prejudiced Mr. Bryant.

Trial counsel's failure to present the above arguments and evidence concerning loss amount undeniably prejudiced Mr. Bryant. That is, there is a "reasonable probability that, but for the error, the sentence would have been different." *Molina-Martinez v. United States*, 578 U.S. 189, 206 (2016). The fact that the trial record does not contain evidence to support the notion that HWMC's billing of 99214 was fraudulent makes it extremely likely that, had trial counsel briefed this issue in Mr. Bryant's sentencing memorandum and argued it with citations to the trial transcript at the sentencing hearing, the Court would not have included the $669,234.56 sum in the

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[11] Note the discrepancy between this supposed total compound-related loss amount and the total compound-related loss amount found on numbered page 248 of the government's same exhibit—$2,103,488.70.

loss amount attributed to him. Similarly, had trial counsel pointed to the record evidence—and presented Mr. Bryant's own compelling testimony—indicating that Mr. Bryant did not intend to receive the full billed amounts, then it is also likely that this Court would have concluded that Mr. Bryant had successfully rebutted the prima facie case for counting the entire $1.6 million amount *billed* under 90838 and 99214 and, instead, would have relied on the $1.1 million *actually paid* on claims under those two codes, for a net loss-amount reduction of $500,000.00.[12, 13] And also in the same vein, the roughly $900,000 in compound drugs that Dr. Rivera prescribed after October 27, 2014 very likely would not have been included in the Court's ultimate loss amount had trial counsel raised the issue and pointed to Dr. Rivera's trial testimony that the prescriptions were indeed legitimate.

Any one of these three reductions, by itself, would have reduced Mr. Bryant's loss-amount enhancement from 18 to 16 levels, as any of the three would have taken the total loss amount well below the $3.5 million threshold. *See* U.S.S.G. § 2B1.1(b)(1). And the reduction in Rivera-associated compound-drug loss discussed in part III.C.3, coupled with elimination of the 99214 "loss" for the reasons stated in part III.C.1 and elimination of all 90838 loss for the reasons stated in part III.B, would reduce Mr. Bryant's loss-amount enhancement by an *additional* two levels. *See id.* In other words, trial counsel's errors caused the Court to apply the wrong Guidelines range when sentencing Mr. Bryant. And application of the wrong Guidelines range is per se prejudicial except in the rare case where the court reviewing the sentencing record can "say with complete

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[12] Of course, as explained in part III.B, above, Mr. Bryant contends that the 90838 claims were properly billed, and thus *none* of them should count toward the loss amount attributed to him. Similarly, for reasons just explained, none of the 99214 claims should be included in the loss amount either.

[13] More precisely, the amount would be reduced by $519,636.39. (*See* Gov't Trial Ex. 301 at 1, 2; Bryant PSIR ¶ 25.)

confidence that" the record shows that "the District Court would have imposed the same . . . sentence" had the proper Guidelines range been applied. *United States v. Parks*, 995 F.3d 241, 247 (D.C. Cir. 2021). *See also Molina-Martinez*, 578 U.S. at 206 ("[I]n most cases the guidelines range will affect the sentence. When that is so, a defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range."). Here, nothing in the record indicates that the Court would have imposed the sentence it imposed on Mr. Bryant irrespective of the proper Guidelines range. (*See generally* Sentencing Tr., ECF No. 154.) Therefore, Mr. Bryant was prejudiced by his trial counsel's deficient performance with respect to the proper calculation of loss amount. His sentence should be vacated.

IV. CONCLUSION

For all of these reasons, Petitioner Darrell L. Bryant respectfully asks this Court to vacate and set aside his convictions and sentence. Should the Court be disinclined to grant this motion outright, Mr. Bryant respectfully reminds the Court of the duty to "grant a prompt hearing" at which, among other things, expert testimony may be elicited and argument may be had. 28 U.S.C. § 2255(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2022, this memorandum in support, the declarations and exhibits attached hereto, and the accompanying § 2255 motion to vacate and set aside judgment of conviction and sentence, were all filed via the Court's electronic filing system. Counsel for the government may access these documents via that system.

/s/ Emmett E. Robinson
Emmett E. Robinson

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