UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DARRELL L. BRYANT,	)	
	)	JUDGE ALGENON L. MARBLEY
Petitioner,	)	
	)	
v.	)	CRIMINAL CASE NO. 2:17-CR-146
	)	
UNITED STATES,	)	CIVIL CASE NO. 2:22-CV-3114
	)	
Respondent.	)	

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

During the rebuttal portion of his closing argument, counsel for the government commented directly on Mr. Bryant's decision not to testify at trial and told the jury it was indicative of guilt. (*See* Opening Br., ECF No. 188-1, at 5-8 (PageID 3133-36).) This was a blatant violation of the right against self-incrimination enshrined in the Fifth Amendment. (*See id.*) Defense counsel objected to the unconstitutional argument but failed to move for a mistrial. (*Id.* at 6 (PageID 3134).) The Court initially overruled the objection, having at first misheard the statement, but, upon further review, reversed position and gave a curative instruction during a later phase of the trial in an attempt to blunt the prejudice caused by the unconstitutional commentary. (*Id.*) This was too little too late, and trial counsel's failure to move for a mistrial prejudiced Mr. Bryant, as it was reasonably likely that the Court would have granted such a motion *or* that the Sixth Circuit would have reversed a ruling denying a mistrial request. (*Id.* at 8-9 (PageID 3136-37).) Indeed, Sixth Circuit precedent shows that courts frequently grant new-trial motions in cases involving Fifth Amendment breaches *less* egregious than this one. (*Id.*)

The government, of course, disagrees. It makes two arguments. First, it argues that the prosecutor's unconstitutional commentary did not refer to Mr. Bryant's silence at trial. But to reiterate, this is what the prosecutor said about Mr. Bryant: "**And 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).) Thus, the prosecutor commented directly on Mr. Bryant's silence and stated explicitly that this silence was evidence of guilt.

The government argues, instead, that the prosecutor's unconstitutional commentary was not a discussion of Mr. Bryant's silence at trial but rather a reference to statements Mr. Bryant made "to a pharmacy board investigator" years earlier. (Gov't Br., ECF No. 189, at 13 (PageID 3291).) In supposed support of this argument, the government excerpts a six-paragraph section of the prosecutor's closing rebuttal argument. (*Id.* at 13-14 (PageID 3291-92).) But all this extended quotation does is show that the government mentioned the pharmacy investigator's years-earlier conversation with Mr. Bryant five paragraphs—and about 400 words—before discussing Mr. Bryant's silence at trial. (*See id.*) The government offers no logical argument or other explanation as to why the Court should disregard the obvious meaning of counsel's unconstitutional comments and artificially link this earlier comment with the direct commentary on Mr. Bryant's silence.

Similarly, the words used in the unconstitutional comments belie the assertion that those comments were directed at the interview recorded years earlier. The prosecutor asked the jury, "if [Mr. Bryant'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).) As the government implicitly recognizes in its brief (Gov't Br., ECF No. 189, at 15 (PageID 3293)), given that this statement was addressed to the jury, the second-person pronoun "you" plainly refers to the members of the jury, not to some absent, third-party pharmacy investigator who is never even mentioned in the government's six-paragraph excerpt. This is further confirmed by the fact that the paragraph containing the unconstitutional commentary begins with the phrase, "Ladies and gentlemen." (Trial Tr., ECF No. 110, at 1562 (PageID 2166).) The ladies and gentlemen of the jury are, of course, the "you" to whom the prosecutor refers.

Moreover, the unconstitutional comments are in the present and present progressive tenses: "he's not telling you"; "why isn't he?"; "he knows." (*Id.*) The government's counsel certainly

knew the import of these tenses and quickly switched to past tenses when appropriate: "he knows what he *was doing was* wrong and it *was* illegal." (*Id.* (emphasis added).) All told, contorting the statement to say what the government now asserts it meant to say would require no fewer than *five* changes to the straightforward language of the statement: "if he~~'s not telling~~ [**didn't tell]** ~~you~~ [**the investigator**] what happened, why ~~isn't~~ [**didn't**] he? Because he ~~knows~~ [**knew**], he ~~knows~~ [**knew**] . . . ." Thus, context, pronoun choice, tense, and common sense all show that the government's *ex post* attempt to explain away its unconstitutional comments is implausible.

Second, the government argues that, before granting relief for a Fifth Amendment violation like this one, "a reviewing court must undertake a probing analysis of the context of the comment." (Gov't Br., ECF No. 189, at 16 (PageID 3294) (quoting *Byrd v. Collins*, 209 F.3d 486, 533 (6th Cir. 2000)[1].) This review, the government says, involves a four-factor analysis. (*Id.*) By the government's lights, those factors all weigh against a finding of material infringement of Mr. Bryant's Fifth Amendment rights. (*Id.* at 17 (PageID 3295).)

But the government cherry-picks from *Byrd* and neglects to mention what that precedent (like many others) states just two sentences earlier: This "probing," four-factor analysis applies only when reviewing "indirect references [to] the failure to testify." *Byrd*, 209 F.3d at 533. As just discussed, the comments at issue here were not some subtle, indirect allusion to Mr. Bryant's "failure" to testify but rather a direct discussion of the same coupled with a direct assertion that this silence was indicative of guilt. "And if [Mr. Bryant's] not telling you what happened, why isn't he? Because he knows, <u>he knows what he was doing was wrong and it was illegal</u>." (Trial Tr., ECF No. 110, at 1562 (PageID 2166) (emphasis added).) Per *Byrd*—and a host of other Sixth

[1] The wording of the *Byrd* quotation in the government's brief is slightly off, but that minor variance is inconsequential.

Circuit decisions—such a "direct reference to a criminal defendant's failure to testify is a violation of that defendant's Fifth Amendment privilege against compelled self-incrimination."[2] *Byrd*, 209 F.3d at 533. No multi-factored analysis is needed.[3]

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

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

Trial counsel's evidentiary failures with respect to the alleged fraudulent billing of counseling code 90838 were multifaceted. Each source of evidence neglected by counsel by itself could have caused the jury to change its decision on fraudulent intent. And the compounded effect of these failures combined makes the prejudice analysis easy—had trial counsel not failed to introduce this compelling, varied evidence, it is reasonably probable that the jury would have found fraudulent intent lacking with respect to the billing of counselling under code 90838.

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[2] The distinction between direct and oblique commentary on a defendant's silence is further discussed in Mr. Bryant's opening brief. (Opening Br., ECF 188-1, at 5-6 (PageID 3133-34).)

[3] Even if the government had been correct in asserting that *Byrd* requires application of four-factor analysis in cases of direct comment on a defendant's silence, still Mr. Bryant should prevail. First, the prosecutor's unconstitutional comments were "'manifestly intended' to reflect the accused's silence" for the reasons stated in-text above. *Byrd*, 209 F.3d at 533. A bald contention of some other supposed subjective intent does not change this analysis. Second, while the remarks were "isolated" to one paragraph of the record, *id.* at 534, they were made at a pivotal moment in the case—just as the prosecutor was concluding the rebuttal portion of his closing argument. And the Court's (inadvertent) denial of defense counsel's objection only served to add more weight to the comments. Third, "evidence of guilt" was not "otherwise overwhelming," for the various reasons discussed in Mr. Bryant's opening brief. *Id.* Fourth, though the Court gave a curative instruction, it did not give the instruction until more than an hour after the offending remarks were made, during an entirely different portion of the trial. (Opening Br., ECF No. 188-1, at 7 (PageID 3135).) *Cf. 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).)

As discussed in Mr. Bryant's opening brief, at trial the government focused heavily on the false assertion that HWMC's billing of 90838 was fraudulent because use of that code supposedly requires that the same medical professional who performed the underlying E/M office visit also provide the "add-on" counselling services. (*E.g.*, Opening Br., ECF No. 188-1, at 10-11 (PageID 3138-39).) The government stubbornly sticks to this line in its brief opposing Mr. Bryant's § 2255 motion. (Gov't Br., ECF No. 189, at 7 (PageID 3285) (90838 applies when counseling "is provided by a physician or other medical professional . . . who is also billing for a visit for evaluation and management on the same day").) And it argues that Mr. Bryant's trial counsel was not ineffective for failing to bring forth the voluminous evidence showing that this crucial government evidence and argument was false. Its arguments fail.

First, recall that the government's summation witness, Agent Morse, unequivocally testified 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) (emphasis added).) That testimony was blatantly false. As pointed out in Mr. Bryant's opening brief, CPT code 90838 contains *no such statement*. (Opening Br., ECF No. 188-1, at 10-12 (PageID 3138-40).) Yet trial counsel failed to introduce the actual text of CPT code 90838 at trial, which would have directly proved the objective falsity of Morse's testimony. (*Id.*) Tellingly, the government's brief *doesn't address this issue at all*—an issue which by itself is enough to establish ineffective assistance.

Second, trial counsel was deficient for failing to retain an expert witness (1) who could refute Agent Morse's (and the prosecutor'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. Mr. Bryant attached the declaration of expert coder, biller, and auditor Glenda Hamilton to his opening brief. As set forth in detail there, Ms. Hamilton stated unequivocally that the assertion of Morse (and the government's counsel) at trial that 90838 requires that the same individual provide both the office visit and counselling, is "false." (Hamilton Decl., ECF No. 188-4, at ¶ 9 (PageID 3263).) Ms. Hamilton explained that it was permissible—pursuant to 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.) She likewise explained how the "incident-to" rule—set forth in the Medicare Benefit Policy Manual and explicitly adopted by Ohio's Medicaid program—also meant that it was proper for HWMC to bill *both* services "exclusively under the national provider identifier ('NPI') number of the individual who provided the E/M." (*Id.* ¶ 11.)

But rather than call an expert like Ms. Hamilton—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—counsel chose not to call a single expert at trial. This was ineffective assistance. (Opening Br., ECF No. 188-1, at 12-14 (PageID 3140-42).)

The government argues this blatant failure did not amount to ineffective assistance because "trial counsel did call an expert, Frank Cohen, at sentencing who corroborated the testimony of the government's experts." (Gov't Br., ECF No. 189, at 19 (PageID 3297).) But as that very statement admits, Mr. Cohen was *not* called during trial and thus had no occasion to opine on matters related to guilt or innocence. Even more fundamentally, Mr. Cohen was not qualified to testify regarding medical billing or any other core matter. He was a healthcare statistician called

to testify (irrelevantly, it turned out (*see* Opening Br., ECF NO. 188-1, at 23-24 (PageID 3151-52)) about the quantum of damages.[4] (*See* Sentencing Tr., ECF 154, at 36-37 (PageID 2576-77).)

The government also contends that trial counsel was not ineffective because Mr. Bryant has "fail[ed] to overcome the presumption that trial counsel's decision not to call an expert . . . was . . . not strategic." (Gov't Br., ECF No. 189, at 19 (PageID 3297).) But the government simply makes this naked assertion without fleshing the argument out. That is, the government doesn't posit a single "strategic" benefit to *not* calling an expert like Ms. Hamilton. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Dillery v. City of Sandusky*, 398 F.3d 562, 569 (6th Cir. 2005) (citation omitted).

Next, the government says trial counsel wasn't ineffective for failing to call an expert like Ms. Hamilton because "[a]lthough Ms. Hamilton's statements differ from Mr. Smith's and Ms. Morse's testimony, Petitioner Bryant fails to adequately demonstrate that Ms. Hamilton's declarations are correct." (Gov't Br., ECF No. 189, at 19 (PageID 3297).) The government knocks Ms. Hamilton for "[m]erely reviewing 'a portion of the trial transcript'" and touts Mr. Smith as being "well qualified to opine on this matter." (*Id.* at 19, 20 (PageID 3297, 3298).) But the government is too modest in asserting that Ms. Hamilton's statements "differ" from Ms. Morse's. In fact, they are diametrically opposed. Ms. Hamilton's declaration shows that every government

[4] Moreover, the "corroboration" the government speaks of was hardly compelling. Cohen testified, "I'm pretty familiar with most of the codes, but I'm not certified as a . . . coder or anything like that." (Sentencing Tr., ECF No. 154, at 63 (PageID 2603).) When asked the aggressively leading question, "So you know only certain individuals can provide a 90838?" he responded, "Yes, ma'am." (*Id.*) And then when the government followed up with, "And that provider must be the same provider who provides the E&M code, correct?" he tentatively (and wrongly) answered, "I believe so." (*Id.*)

statement—whether by witness or counsel—that 90838 could only be provided by the physician or other professional who provided the underlying E/M was simply false.

And of course Ms. Hamilton only reviewed "a portion" of the trial transcript. It would have been an utter waste for her to review, for example, the jury voir dire, jury instructions, or other sections of the trial unrelated to her assessment of the 90838 issue. Further, the government's assertion that Mr. Bryant has not "adequately demonstrate[d] that Ms. Hamilton's declarations are correct" is awash in unintended irony. Ms. Hamilton's statements are supported by the plain text of CPT code 90838 itself as well as by the clear language of the Medicare Policy Manual excerpts quoted and cited in her declaration. (*See* Hamilton Decl., ECF No. 188-4, ¶¶ 9-16 (PageID 3263-65).) It is the *government's* bald, false assertions concerning 90838 that are bereft of any support. Ms. Morse's key assertion—that "90838 specifically states that the 60-minute psychotherapy be conducted *by the same provider* that also conducted the office visit" (Trial Tr., ECF No. 109, at 1393 (PageID 1997) (emphasis added))—was baseless.

Along similar lines, the government's attempts to bolster the credibility of another of its witnesses—Steve Smith—are unavailing. The government points out that Mr. Smith had worked as a "chemical dependency counselor" and had "overs[een] the day-to-day operations at an opioid treatment center." (Gov't Br., ECF No. 189, at 20 (PageID 3298).) He had also "received" some "in-person training" on medical billing. (*Id.*) Ms. Hamilton, by contrast, has been teaching people like Mr. Smith for decades. Unlike Mr. Smith, she hasn't just heard about the proper way to bill services like 90838. She consults on it, codes for a living, and oversees medical coding at a large teaching hospital. (*See* Hamilton Decl., ECF No. 188-4, ¶¶ 4-6 (PageID 3262); Ex. 1, Hamilton, Decl, ECF No. 188-4 (PageID 3268-72).) And even if Mr. Smith's medical-billing credentials didn't pale in comparison to Ms. Hamilton's—that is, even if Ms. Hamilton and Mr. Smith had

been evenly matched on paper—still the government's attempt to use Mr. Smith's testimony to refute the notion that trial counsel was ineffective for failing to call a witness like Ms. Hamilton gets it nowhere. First, the Smith testimony the government cites is relatively innocuous.[5] Second, the government fails to explain how leaving (false) government testimony unanswered could possibly be better than calling even an evenly matched or weakly credentialed expert to refute that testimony. In short, the government's arguments regarding trial counsel's failure to call an expert like Ms. Hamilton fail.

Third, trial counsel was ineffective for failing to introduce clear evidence showing that HWMC would have been reimbursed at a *higher* rate had it billed counselling as a standalone service under code 90837 rather than as an add-on under 90838. (Opening Br., ECF No. 188-1, at 14-15 (PageID 3142-43).) As pointed out in Mr. Bryant's opening brief, 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. (*Id.*) The government responds, asserting that the fact HWMC could have received *more* money had it not billed counseling as an add-on "in no way negates defendants' fraudulent intent for billing 90838." (Gov't Br., ECF No. 189, at 23 (PageID 3301).) But the government misses the point. As shown in Mr. Bryant's opening brief, at trial the government theorized that Mr. Bryant committed fraud by deliberately billing counselling services as an add-on (that supposedly had to be provided by the physician who

[5] The government cites a portion of Mr. Smith's testimony where, when asked "who is typically providing a 908[3]8 code?," he responds "the same person who is providing the E&M code." (Gov't Br., ECF 189, at 19 n.3 (PageID 3297) (quoting Trial Tr., ECF No. 104, at 322 (PageID 926).) It may well be the case that, in his own personal experience, "typically" the same provider provided both. That does not mean that the governing regulations ban provision of 90838 services by a different provider. As Ms. Hamilton's declaration, and the authorities she cites therein, make clear, contrary to the government's repeated representations at trial, there certainly is no such ban.

provided the E/M) rather than as standalone services provided by a counselor independently of any E/M services. But had HWMC billed the services as standalone under 90837, it would have received *larger* reimbursements. This does indeed provide a strong counter to the assertion that Mr. Bryant and HWMC knowingly used an add-on code to commit fraud.

The government also baldly asserts that "it was arguably much easier . . . to conceal the fraud using 90838, which requires a nursing or physician visit, th[a]n with 90837[,] which cannot be billed with a nursing or physician visit . . . ." (Gov't Br., ECF No. 189, at 23 (PageID 3301).) But the government doesn't explain how billing counselling as standalone rather than as an add-on would be a more "obvious" fraud. Note that, though the government and its witnesses repeatedly asserted (falsely) that it was improper to bill counselling services not administered directly by the E/M provider under 90838, the government never asserted (and still does not assert, as it cannot credibly do so) that counselling cannot be properly billed as a standalone service. Mr. Bryant's point here is that, had counselling been billed as a standalone under 90837—the apparently legitimate approach according to the government at trial—HWMC would have received *more* money, not less.

Fourth, trial counsel was ineffective for failing to use the email sent to Mr. Bryant by HWMC's outside billing consultant advising HWMC to use code 90838 and stating that 90837 could *not* be billed "with a nursing visit or doctor visit." (Opening Br., ECF No. 188-1, at 15-16 (PageID 3143-44).) The government responds by engaging in rank speculation, asserting that "it is certainly reasonable, and even probable, that trial counsel was aware of the circumstances under which the email exchange occurred and strategically determined it was not favorable . . . ." (Gov't Br., ECF No. 189, at 24 (PageID 3302).) The government then complains that it "has no duty to attempt to prove that defense counsel's strategy was actually reasonable." (*Id.*) These

"arguments" implicitly recognize that, in light of the content of the email, trial counsel's failure to take advantage of it certainly *appears* deficient and prejudicial. Otherwise, the government wouldn't be opining on its non-duty "to attempt to prove that defense counsel's strategy was . . . reasonable." Perhaps, as the government says, "trial counsel was aware of the circumstances under which the email exchange occurred and strategically determined it was not favorable." But the evidence actually in the record shows that trial counsel provided ineffective assistance, and baseless speculation by the government is insufficient to refute that conclusion. At the very least, Mr. Bryant is entitled to a hearing at which he can ask trial counsel if indeed there was a strategic purpose—by no means evidenced by the facts in the record—behind neglecting the email. *See* 28 U.S.C. § 255(b) (court must "grant a prompt hearing" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief").

2. The Government's Attempts to Undermine Mr. Bryant's Prejudice Argument Concerning Trial Counsel's 90838 Failures Fall Flat.

The government also argues that this Court should deny Mr. Bryant's § 2255 motion because, in the government's view, even assuming deficient performance with respect to all of the issues in part B.1, above, still the jury could have reached its decision to convict Mr. Bryant via an alternative route. Specifically, the government argues that other evidence shows (1) that the counselors at HWMC were not properly supervised and (2) that, in fact, no counselling actually occurred there. The government contends that this other evidence means that Mr. Bryant is unable to show that trial counsel's multiple deficiencies prejudiced him. (*See* Gov't Br., ECF No. 189, at 23 (PageID 3301) ("because no counseling services were provided, . . . Petitioner Bryant was not prejudiced").)

But the government vastly overstates the strength of this evidence. And even if that were not the case, still its arguments would fail because it misapplies the prejudice prong of *Strickland*.

First, as to the supervision argument, the government contends that, "even i[f] Ms. Hamilton's assertion[s] are correct and counseling services could have been provided by auxiliary personnel under . . . direct supervision, such supervision never occurred at HWMC." (Gov't Br., ECF No. 189, at 20 (PageID 3298).) As evidence in supposed support of this argument, the government cites one counsellor's testimony for the proposition that he never received direct supervision. (*Id.*) But what he actually said was that in his new job at another facility he has "a clinical supervisor who is an LPC/CCS . . . . I don't really recall anything like that at [HWMC] that I was able to receive direct supervision from . . . ." (Trial Tr., ECF No. 204, at 824 (PageID 1428).)

There was no evidence in the record suggesting that this particular supervisory model was required. That's because it wasn't. In fact, as government witness Mr. Smith correctly testified, during this time period "direct observation" "was not one of the requirements" under governing law. (Trial Tr., ECF No. 104, at 324 (PageID 928).) *See also* Ohio Admin. Code § 4758-6-15(B) (requiring 1 hour of live supervision for every 40 hours work; requirement *effective March 29, 2018*). The government also cites another counselor who supposedly testified she did not "consult with [HWMC's] physicians regarding counselling."[6] (Gov't Br., ECF No. 189, at 20 (PageID 3298).) But again, no evidence was put forth showing that "consultation" was required. (*See generally* Trial Tr.) And remember, under the governing incident-to rule set forth in the Medicare Benefit Policy Manual, "direct supervision" means only that the "'physician or other practitioner'"

[6] What this counsellor actually testified was that she did not consult with physicians "*when counselling*." (Trial Tr., ECF No. 105, at 525 (PageID 1129) (emphasis added).) But again, direct observation was not required.

must be "'present in the office suite and immediately available.'" (Hamilton Decl., ECF No. 188-4, ¶ 16 (PageID 3264-65) (quoting Medicare Benefit Policy Manual, Ch. 15 §§ 60(A), 60.1(B)).)

Regarding this same "no supervision" argument, the government claims fraud because "HWMC regularly claimed that an individual physician provided more than 24 hours of care within a single day." (Gov't Br., ECF No. 189, at 20 (PageID 3298).) But that isn't true. HWMC did not "claim[] that an individual physician provided more than 24 hours of care within a single day." Rather, it submitted claims for services billed under a single physician's NPI number that, when the typical amounts of time allotted to those services were added up, sometimes exceeded 24 hours. That is a big difference. And the latter is kosher under governing rules. In other words, the argument that such billing is indicative of fraud completely ignores the incident-to rule. As set forth in detail in Ms. Hamilton's declaration (and further discussed in Mr. Bryant's opening brief), that rule permits services provided by someone other than the billing physician to be billed under the physician's NPI number so long as the services are provided "incident-to" the physician's own services. (*E.g.*, Hamilton Decl., ECF No. 188-4, ¶¶ 11-16 (PageID 3263-65).) So long as the incident-to requirements are met, services provided by others may be billed as though provided by the physician. Given this arrangement, *of course* it is the case that, on many occasions, the amount of time billed under a given physician's NPI number will far exceed the amount of time that that single physician could actually spend with patients in a day.[7] This argument gets the government

[7] Consider also the absence of any evidence showing that, in this age of computerized billing and payment, either Medicaid or any of the Medicaid managed care organizations billed by HWMC ever flagged or refused payment on any claim on the grounds that the NPI number under which the claim was submitted exceeded 24 hours of services in one calendar day. Such an arrangement would be utterly unworkable, given that the incident-to rule means that providers frequently bill in excess of the quantum of services that a single individual might be able to personally provide, and such billing is not indicative of something amiss.

nowhere.[8]

Second, the government asserts that "there was no counseling at HWMC." (Gov't Br., ECF No. 189, at 21 (PageID 3299) (emphasis in original).) But that is an absurdity. HWMC employed a number of counselors, some of whom testified at trial. The notion that they did nothing at their jobs—that there was *no* counselling at HWMC—defies reason. And also defies the record.[9] Even the government's own cherry-picked citations by and large show not that there was no counselling but rather that the counselling program was often haphazard and disorganized. (*See id.*) The government cites to testimony: that "[i]t wasn't like any other counseling that I had ever been to"; that it "was almost impossible to hold what I would . . . consider now a group counseling session"; and that "we did what was—I guess was supposed to be counseling, if that's what you want to call it." (*Id.* at 21-22 (quoting from Trial Tr.).) This testimony belies the notion that there were "no" counselling services provided at HWMC. *See also* note 9, *infra*. Instead, it suggests

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[8] The government also argues that Mr. Bryant cannot show prejudice because the Court found, at sentencing, that HWMC did not comply with governing supervision requirements. (Gov't Br., ECF No. 189, at 21 (PageID 3299).) At sentencing, the Court stated that "'there was testimony from counseling providers who confirmed that qualified supervis[ing] 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.'" (*Id.* (quoting Sentencing Tr., ECF No. 154, at 19 (PageID 2559)).) But this observation by the Court supports *Mr. Bryant*'s position. At sentencing, thanks to trial counsel's ineffective assistance and the false testimony proffered by the government, the Court was under the erroneous impression that a physician had to be present for the counselling sessions. As shown above and in Mr. Bryant's opening brief, that was false.

[9] Various patients called as government witnesses testified that counselling *was* provided at HWMC. (*E.g.*, Trial Tr., ECF No. 105, at 402 (PageID 1006) (patient received "one-on-one counseling" "if needed"; in group counseling, "[a]bout four or five people would meet with one counselor and they'd have a topic, and that's what we would talk about for the hour"); *id.* at 410 (PageID 1014) ("Q. And how many people would be in the counseling room? A. Just one. Just me and the counselor."); *id.* at 477 (PageID 1081); *id.* at 490 ("Q. And what type of counseling was it? What did you do in counseling? A. . . . [I]f we had anything we needed to talk about, we could do that. And a lot of times the counselors might come up with . . . a topic . . . . [I]f you needed to talk more after or something, you could.").)

that the counselling program was at times very poorly, even embarrassingly, run. (*See, e.g.*, Trial Tr., ECF No. 104, at 489 (PageID 1093) ("I think once [counselling] moved up to the second floor, it started getting more into a routine, like a better thing.").) But negligence or incompetence does not equate to fraud.

More fundamentally, in making both the "no supervision" and "no counseling" arguments, the government strays far from *Strickland*'s standard by arguing that, if there is a plausible route to conviction notwithstanding trial counsel's deficient performance, then Mr. Bryant has not been prejudiced and thus is not entitled to relief. But *Strickland* prejudice does *not* mean that Mr. Bryant must show that there is no way he could have been convicted in the absence of the errors. Far from it. In fact, *Strickland* makes clear that Mr. Bryant need not even show that it is more likely than not that he would have been acquitted without the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (a defendant claiming ineffective assistance is not required to "show[] by a preponderance of the evidence" that counsel's errors changed the outcome); *Matthews v. Abramajtys*, 319 F.3d 780, 790 (6th Cir. 2003) (defendant need not show "preponderant likelihood" of different outcome in order to establish prejudice). Rather, Mr. Bryant need only show that there is a "*reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added).

In other words, for Mr. Bryant to be entitled to relief, the Court need only conclude that there is a reasonable probability that the jury would not have convicted had it been told the truth about the requirements for billing under 90838 (or about the fact that HWMC would have received *more* money had it billed counselling as a standalone service under 90837 rather than as an add-on under 90838). Stated positively, "the prejudice inquiry . . . focuses . . . on whether a petitioner's

claims *could have supported a different outcome*." *Kada v. Barr*, 946 F.3d 960, 965 (6th Cir. 2020) (internal quotation marks omitted) (emphasis added). That is, had trial counsel put on all of the evidence and made all of the arguments that were deficiently omitted, is there a reasonable probability that Mr. Bryant would have been acquitted. The answer to that inquiry is a resounding "yes." Certainly there is at minimum a "reasonable" minority chance that, had the jury been told the truth—that 90838 does not require that the E/M and the counselling be provided by a single provider, that HWMC's billing practices for 90838 were in line with governing regulations, that HWMC's outside billing consultant had advised using code 90838, and that HWMC would have made *more* money billing under standalone 90837 than under add-on 90838—the jury would have acquitted on the counselling-related counts. The government's prejudice arguments fail.

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 loss amount attributed to Mr. Bryant—$3.7 million—was overstated by 50% because trial counsel failed to put forth evidence and argument showing that several components of that purported loss amount were not supported by the record. These failures rendered trial counsel ineffective. The government, of course, argues otherwise. But its arguments as to all three categories of purported loss ultimately fail.

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

The record, as detailed in Mr. Bryant's opening brief, was woefully inadequate to show that HWMC's billing of E/M code 99214 was fraudulent. (Opening Br., ECF No. 188-1, at 19-21 (PageID 3147-49).) And the government's representation to the Court at sentencing that "[y]ou can't bill the 90838 without the 99214" was blatantly false. (*Id.* at 20 (PageID 3148 (quoting

Sentencing Tr., ECF No. 154, at 76 (PageID 2616).) In failing to contest inclusion of payments for 99214 services as part of the loss amount attributed to Mr. Bryant, trial counsel provided ineffective assistance.

The government's limited arguments to the contrary do not move the needle. The government mentions only a single piece of evidence in support of its assertion that it did in fact prove that all of HWMC's 99214 billings were fraudulent: Dr. Franklin Demint's trial testimony—highlighted in Mr. Bryant's opening brief—in which he gives an off-the-cuff estimate that he did "oh, gees, probably three or four" office visits a day that he "would consider a [9-9-2-]1-4." (Trial Tr., ECF No. 106, at 770 (PageID 1374).) He guessed that he saw a total of "about 40" patients per day. (*Id.*) The government posits that this means 90% of all HWMC 99214 billings were improper. (Gov't Br., ECF No. 189, at 27 (PageID 3305).)

Dr. Demint's testimony simply does not bear this out. First, the government's assertion is a non sequitur. The government argues that Dr. Demint's testimony suggesting that he would categorize roughly 10% of his patients visits under 99214 means that 90% of his 99214 bills were improper. But that assumes that Dr. Demint coded every one of his office visits as a 99214. There is **no** evidence in the record to support that assumption. To the contrary, even government-created exhibits attempting to paint HWMC in as negative a light as possible show that 99214s constituted nowhere near 90% of the office visits at HWMC. (*E.g.*, Gov't Tr. Ex. 301 at 2.[10]) Additionally, as the quotations above show, Dr. Demint was clearly spit-balling with his estimates. They were not the result of careful deliberation. Much more importantly, Dr. Demint was only one of many physicians who worked at HWMC (*see generally* Trial Tr. (cataloguing at least nine different

[10] Note that this exhibit does not even show how many (less complex and typically shorter) 99211 and 99212 E/Ms HWMC billed during the time period in question.

physicians who worked at HWMC)), and among this group of doctors, he was one of the most insignificant, as he worked at HWMC for only "three months"—and part-time, at that (Trial Tr., ECF No. 106, at 770, 763 (PageID 1374, 1367)). In short, his testimony is woefully insufficient to support a finding that fraud pervaded the provision of 99214 E/Ms at HWMC. Trial counsel was ineffective for failing to properly raise and prosecute the 99214 issue at sentencing.[11]

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

In his opening brief, Mr. Bryant explained in detail why trial counsel's failure to adduce evidence that Mr. Bryant never intended to receive the full amounts billed under codes 90838 and 99214 amounted to deficient performance. As discussed there, Sixth Circuit precedent makes clear that the "'total amount fraudulently billed . . . is prima facie evidence of the intended loss.'"[12] (Opening Br., ECF No. 188-1, at 22 (PageID 3150) (quoting *United States v. Bertram*, 900 F.3d 743, 752 (6th Cir. 2018)).) Then, "'defendants can rebut the presumption that intended loss is the amount billed with evidence that they never intended to receive that amount.'" (*Id.*) But Mr. Bryant's trial counsel failed to put on any evidence that Mr. Bryant did not intend to receive the entire amounts billed but rather intended only to receive the amounts paid (*i.e.*, the non-negotiable, preset reimbursement amounts established by regulation and contract). Such evidence included

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[11] The government also includes in this section of its brief a multi-paragraph excerpt from the Sixth Circuit's decision on direct appeal. (Gov't Br., ECF No. 189, at 27-28 (PageID 3305-06).) Two sentences in that lengthy quotation mention 99214. (*Id.*) But the Sixth Circuit language was merely part of a narrative found in the "Background" section of that opinion. *See United States v. Bryant*, 849 F. App'x 565, 568 (6th Cir. 2021). And the government's contention that this mention of 99214 in the non-dispositive portion of the Sixth Circuit's opinion somehow remedies trial counsel's failure to argue that 99214 billings should not be included in the loss amount attributed to Mr. Bryant has no support in law or logic.

[12] Of course, for the reasons stated in his opening brief and elsewhere in this reply, Mr. Bryant contends that other evidence that should have been put forth at trial belies the contention that the 90838 and 99214 billings were fraudulent in the first place.

three documents that explicitly stated that HWMC would "[a]ccept the allowable reimbursement for all covered services *as payment-in-full*." (Gov't Ex. 100 at 9; Gov't Ex. 101 at 5; Gov't Ex. 102 at 4.) All three documents were featured prominently in the government's case in chief (for other reasons, of course). And Mr. Bryant signed all three.[13] Even more significantly, trial counsel failed to call Mr. Bryant to testify at the sentencing hearing. His affidavit submitted with his § 2255 motion shows he would have testified that he never intended to receive the entire billed amounts and would have backed that testimony up with additional compelling facts. (Bryant Decl., ECF No. 188-3, ¶¶ 3-6 (PageID 3259-60).) But instead of adducing this evidence, trial counsel put on an expert witness whose testimony—precedent and the Court agreed—was useless to Mr. Bryant's cause. (*See* Opening Br., ECF No. 188-1, at 23-24 (PageID 3151-52).) This constituted plainly deficient performance.

In its opposition, the government does not disagree. That is, the government never argues that this failure was not deficient, and thus it concedes the issue. (*See* Gov't Br., ECF No. 189, at 32-33 (PageID 3310-11).) Rather, the government only asserts that Mr. Bryant was not prejudiced by this deficient performance. (*Id.*) This is so, the government says, because proficient performance by trial counsel here would have "only" resulted in a reduction of the loss amount by $500,000 and a concomitant "two-level decrease in . . . Petitioner Bryant's" Guidelines offense level. (*Id.* at 33 (PageID 3311).) The government points out that Mr. Bryant was sentenced below the Guidelines range anyway and posits that this means that reduction of the loss amount by half-a-million dollars "would not have reduced the [C]ourt's sentence for Petitioner Bryant." (*Id.*)

[13] He signed two by hand and one electronically. (*See* Gov't Ex. 100 at 10; Gov't Ex. 101 at 6; Gov't Ex. 102 at 5.)

But the government's attempt at judicial mindreading is an exercise in futility. The government ignores the caselaw cited in Mr. Bryant's opening brief for the proposition that application of the wrong Guidelines range is per se prejudicial except in the rare case in which one can "say with complete 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). "Where . . . the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights." *Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016). This is so "whether or not the defendant's ultimate sentence falls within the correct range." *Id.* at 198. Whether the sentence is inside or outside that range, "the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id.* The government does not point to any record evidence clearly showing that the Court would have imposed the same sentence upon Mr. Bryant regardless of the correct Guidelines range. Its lack-of-prejudice argument, unsupported by citation to any authority, therefore fails.

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

At trial, the government's star fact witness, Dr. Jornel Rivera, testified that he established a bona fide physician-patient relationship with every individual to whom he prescribed a compound cream after October 27, 2014, and also testified that he "was impressed with" the compound creams. (Opening Br., ECF No. 188-1, at 26 (PageID 3154) (quoting Trial Tr., ECF No. 106, at 639 (PageID 1243)).) This *government* evidence plainly shows that the $894,865.35 in compound creams prescribed by Dr. Rivera after October 27, 2014, were not fraudulent and

therefore should not have been included in the loss amount attributed to Mr. Bryant. Trial counsel was ineffective for failing to raise this issue at sentencing.[14]

The government argues otherwise, but both of its arguments miss the point. First and primarily, the government spills considerable ink recounting evidence that it says supports a finding of widespread fraud with respect to the provision of compound creams by HWP. (Gov't Br., ECF No. 189, at 28-31 (PageID 3306-09).) And it contends that the law permits a trial court "to include the entire billed amount as the intended loss amount" in this sort of situation. (*Id.* at 31 (PageID 3309).) But Mr. Bryant's argument is not that the *Court* erred in including—in light of the evidence and argument before it—that this sum should be included in the loss attributed to Mr. Bryant. Rather, his argument is that *trial counsel* was *ineffective* for failing to argue (and point to evidence showing) that the nearly $900,000 in compound creams prescribed by Dr. Rivera post-October 27, 2014, should have been excluded from the loss amount. Whether or not the *Court* had the right to lump this sum into the loss amount in the absence of effective defense argument to the contrary is beside the point.

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[14] The government asserts that Dr. Rivera elsewhere testified that he had likely seen "less than five percent" of the patients for whom he signed compound-cream prescriptions. (Gov't Br., ECF No. 189, at 30 (PageID 3308) (quoting Trial Tr., ECF No. 106, at 696 (PageID 1300).) But that is a mischaracterization of his testimony. Review of the transcript shows that Rivera's five-percent answer was in response to the question "How many of *these* patients had you seen?" (Trial Tr., ECF No. 106, at 695 (PageID 1299) (emphasis added).) "[T]hese patients," the transcript makes clear, refers to the list of patients found on pages 3 through 5 of government exhibit 720. (*See id.* at 694-95 (PageID 1298-99).) That list of prescriptions is composed *entirely* of scripts written well before October 27, 2014—the date after which Dr. Rivera testified that he did not write any compound-cream prescriptions without establishing a bona fide physician-patient relationship. (*See* Gov't Ex. 720 at 3-5.) Thus, the "less than five percent" reference referred not to the entire universe of patients to whom Dr. Rivera prescribed compound creams but rather only to those found on the three-page, early-2014 list. Moreover, even if, counterfactually, Dr. Rivera had testified that he had only seen roughly 5% of *all* patients for who he had prescribed creams, still it would have been deficient performance for trial counsel to fail to point to his contradicting testimony showing that the post-October 27, 2014 scripts were legitimate.

Second, the government argues that trial counsel *did* in fact raise this issue at sentencing. But that is not true. The government points to the fact that, as discussed in Mr. Bryant's opening brief, trial counsel argued at sentencing—and presented expert testimony to the effect—that the "cherry-picked sample of trial witnes[ses] [testifying that their compound-cream prescriptions were fraudulent] cannot serve as a valid statistical sample from which to extrapolate a 100% loss." (Gov't Br., ECF No. 189, at 31 (PageID 3309) (internal quotation marks omitted).) That argument and testimony was futile, as discussed in Mr. Bryant's opening brief and as found by this Court at sentencing. (Opening Br., ECF No. 188-1, at 23-24 (PageID 3151-52).)

Mr. Bryant's ineffective-assistance argument with respect to the compound creams is much different and has nothing to do with the rejected statistical-sampling argument. And, as stated just above, it has nothing to do with whether the Court properly found that it was entitled on the record before it to count the whole compound-cream amount as loss attributable to Mr. Bryant. Thus, the notion that trial counsel previously raised this argument regarding Dr. Rivera's post-October 27, 2014 prescriptions is completely unsupported by the record.

II. CONCLUSION

For these reasons and those stated in his opening brief, Petitioner Darrell L. Bryant respectfully asks this Court to vacate and set aside his convictions and sentence. Should the Court be disinclined to grant his motion outright, Mr. Bryant respectfully reminds the Court of the duty to "grant a prompt hearing." 28 U.S.C. § 2255(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 15, 2022, this reply in support of defendant-petitioner's § 2255 motion to vacate and set aside judgment of conviction and sentence was filed via the Court's electronic filing system. Counsel for the government will receive notice of and may access the filing via that system.

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