

PETITION APPENDIX

TABLE OF APPENDICES

Appendix A:	Opinion by the United States Court of Appeals for the Eleventh Circuit (July 10, 2023).....	1A
Appendix B:	Opinion by the United States District Court for the Southern District of Florida (April 30, 2020).....	31A

APPENDIX A

Miller v. United States

United States Court of Appeals for the Eleventh Circuit

July 10, 2023, Filed

No. 20-11988

Reporter

2023 U.S. App. LEXIS 17227 *; 2023 WL 4418113

DAISY MILLER, Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE* RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from the United States District Court for the Southern District of Florida. D.C. Docket Nos. 1:16-cv-21090-JEM, 1:12-cr-20757-JEM-2.

[Kallen-Zury v. United States, 2020 U.S. Dist. LEXIS 77277 \(S.D. Fla., Apr. 30, 2020\)](#)

[United States v. Kallen-Zury, 2013 U.S. Dist. LEXIS 190407 \(S.D. Fla., Sept. 12, 2013\)](#)

Disposition: AFFIRMED.

Counsel: For DAISY MILLER, Petitioner - Appellant: Gennaro Cariglio Jr., Law Office of Gennaro Cariglio Jr., MIAMI, FL; Daisy Miller, FCI Coleman Low - Inmate Legal Mail, COLEMAN, FL.

For UNITED STATES OF AMERICA, Respondent - Appellee: Jeremy Raymond Sanders, U.S. Department of Justice, WASHINGTON, DC; Emily M. Smachetti, MIAMI, FL; U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, MIAMI, FL.

Judges: Before WILSON, NEWSOM, and LAGOA, Circuit Judges.

Opinion by: LAGOA

Opinion

LAGOA, Circuit Judge:

After a five-week trial, a jury found Daisy Miller guilty on various counts relating to Medicare fraud. During the trial, the jury heard from many witnesses and was

presented with many documents corroborating the government's theory of the case and discrediting Miller's testimony. Following our affirmance of her conviction in [United States v. Kallen-Zury \(Kallen-Zury I\), 629 F. App'x 894 \(11th Cir. 2015\)](#), Miller moved to vacate her conviction under [28 U.S.C. § 2255](#). The district court denied the motion, and Miller now appeals that denial. On appeal, she argues that her trial counsel should have called several witnesses in her defense, that counsel's [*2] failure to do so constituted ineffective assistance of counsel, and that we should vacate her conviction and grant her a new trial.

For the reasons explained below, and with the benefit of oral argument, we conclude that trial counsel's decision not to call these witnesses did not prejudice Miller or constitute deficient performance. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Criminal Case

This is the second time Miller has come before this Court regarding her trial. We outlined the facts of this case in our previous decision affirming Miller and her co-defendants' convictions in their direct appeal, see [Kallen-Zury I, 629 F. App'x 894](#), as well as in our decision affirming the district court's denial of Karen Kallen-Zury's—Miller's co-defendant—motion for a new trial, see [United States v. Kallen-Zury \(Kallen-Zury II\), 710 F. App'x 365 \(11th Cir. 2017\)](#).

On October 2, 2012, a federal grand jury in the Southern District of Florida returned an indictment charging Miller with the following offenses: conspiracy to commit health care fraud and wire fraud, in violation of [18 U.S.C. § 1349](#) (Count 1); wire fraud, in violation of [18 U.S.C. §§ 1343](#) and [2](#) (Counts 2 to 6); health care fraud, in violation of [18 U.S.C. §§ 1347](#) and [2](#) (Counts 7 and 8); and conspiracy to defraud the United States and to pay and receive health care kickbacks, [*3] in violation of [18 U.S.C. § 371](#) (Count 9). The indictment also

charged her co-defendants Karen Kallen-Zury, Christian Coloma, Michele Petrie, and Gloria Himmons with the same or related conspiracy, fraud, and kickback offenses. On November 2, 2012, Omar Malone was appointed pursuant to the Criminal Justice Act (the "CJA") to represent Miller, who elected to proceed to trial.

At trial, the government established that Hollywood Pavilion ("HP") is "a mental health facility that included both inpatient and outpatient treatment programs." *Kallen-Zury I*, 629 F. App'x at 897. Miller was a licensed clinical social worker who began working for HP in 2002. At all relevant times, she was the clinical director for HP's inpatient facility and ran its day-to-day operations. *Id.* Miller worked closely with Chris Gabel, HP's Chief Operating Officer, and Dr. Alan Gumer, HP's psychiatric medical director. *Id.*

During Miller's tenure at HP, the facility paid recruiters to recruit patients on its behalf and received Medicare reimbursements for those patients. *Id.* This practice, however, is illegal. The government's theory of the case was that Miller and her co-defendants conspired to defraud the United States by creating a health care kickback scheme through Medicare reimbursements and [*4] that Miller participated in the scheme in order to keep her job, title, salary, and status.

"The backbone of the government's case was the testimony of several patient recruiters"—Keith Humes, Jean Luc Veraguas, Mathis Moore, Curtis Gates, and Gloria Himmons—"who pleaded guilty to Medicare fraud related to HP and other facilities." *Id.* "These recruiters would find patients from as far away as Maryland and would pay to have the patients ride buses down to HP in Hollywood, Florida." *Kallen-Zury II*, 710 F. App'x at 367. "Most of the[se] patients were drug addicts who did not need the psychiatric services offered at HP." *Id.* Therefore, "the conspirators often falsified the patients' records to reflect serious psychiatric problems or told the patients to claim psychiatric issues upon admission" to HP. *Id.* HP would then pay the recruiter for each patient the recruiter sent to its facility. See *id. at 367-68*. Additionally, HP only admitted "patients who had enough days on their Medicare plans to have their treatment periods paid for by the government." *Kallen-Zury I*, 629 F. App'x at 897. When the Medicare money ran out for a patient, the facility would stop treatment and discharge the patient. *Id.* "Some . . . recruiters also ran halfway houses and made extra money when [*5] HP referred discharged patients to those facilities." *Id.*

"At trial, the recruiters explained that HP had them enter into contracts that stated they were providing either 'case management' or 'marketing' services." *Kallen-Zury II*, 710 F. App'x at 367-68. "HP also asked the recruiters to submit reports documenting their purported performance of these services." *Id. at 368*. "The recruiters' reports, however, were false," as the recruiters "were never asked to and never did provide these other services." *Id.* Instead, the recruiters "were paid solely to refer patients." *Id.* The government also produced various documents at trial, including a "patient register" that tracked which patients were referred by which recruiters. *Id. at 370*.

Several recruiters, each of whom testified under a grant of immunity, claimed to have discussed with Miller how HP would pay them to recruit patients and how HP would admit the recruited patients. For instance, Humes testified that when he had trouble admitting one of his recruited patients to HP, he called Miller, and she arranged for his patient to be admitted to HP. Himmons testified that, at first, she worked for Humes to recruit patients for HP, and Miller later asked her to send patients to HP through Veraguas. [*6] Eventually, Miller and Kallen-Zury hired Himmons to continue recruiting patients as a "marketer." Miller also instructed Himmons to submit false monthly reports detailing her nonexistent marketing services. Moore testified that he met with Miller multiple times to get paid to recruit patients for HP and that she instructed him to have his patients falsely claim that they were suicidal and off their medication to be admitted to HP. Miller also agreed to pay Moore through his non-profit company to make his payments appear legitimate. Veraguas similarly testified that he called Miller to get paid to recruit patients for HP.

The government also presented the testimony of Dr. Gumer to explain that most of the patients admitted to HP did not need psychiatric treatment, either because they only had substance abuse issues or because they were homeless. *Kallen-Zury v. United States (Kallen-Zury IV)*, No. 20-12385, 2023 U.S. App. LEXIS 717, 2023 WL 164065, at *2 (11th Cir. Jan. 12, 2023). Dr. Marci Kagan and Marcia Starkman also testified for the government. Dr. Kagan, a psychotherapist at HP, testified that Miller told her to "stress the negative" in her patient files because, otherwise "the patient wouldn't have criteria to be in the hospital." Starkman, an HP employee, testified that she once learned patient files were being [*7] fabricated at HP and notified Miller about an incident where a doctor falsified a note and then tried to have the note shredded. Miller, however,

never addressed the issue, and when Starkman tried to raise the issue in an administrative meeting, Miller jammed her elbow in Starkman's side, signaling that Starkman should keep quiet.

After the government rested its case, the defendants, including Miller, argued that "they acted in good faith and believed the recruiters were providing lawful 'marketing' services." [Kallen-Zury I, 629 F. App'x at 897.](#) They also argued that "HP's lawyers drafted the contracts with the recruiters and instructed HP's management [on] how to ensure that their agreements with the recruiters fell within statutory and regulatory 'safe harbor' provisions." [Id. at 897-98.](#)

Miller's trial counsel, Malone, called Miller to testify in her own defense. Miller denied all the charges in the indictment. She testified that she never asked anyone to increase the severity of their notes to justify the patients' continued stays at HP. She knew that HP paid some halfway-house owners for marketing services but did not believe that HP was paying these owners to send patients to HP. According to Miller, Veraguas and Humes "provided [*8] a lot of case management," and Himmons "did business development" for HP. Miller also testified that she did not determine how long patients stayed in HP's inpatient facility and that HP's psychiatrists decided when to admit and discharge patients. Miller disputed the testimony of all of the government's witnesses regarding their interactions with her. Malone called no other witnesses.

As an important side note, the government did not receive patient files for the two patients listed in Counts 7 and 8. See [Kallen-Zury IV, 2023, 2023 U.S. App. LEXIS 717, 2023 WL 164065, at *6 n.4.](#) The government raised a [Federal Rule of Criminal Procedure 16](#) objection to the use of the two patient files, which the defense expert, Dr. Jeffrey Danziger, had reviewed. *Id.* The district court sustained the objection and preemptively excluded any testimony on the two patients, such that Dr. Danziger could not testify on those two patients if he were called as a witness. *Id.* That said, Dr. Danziger was not called as a witness by Malone.

The jury found Miller guilty of all the charges. [Kallen-Zury I, 629 F. App'x at 898.](#) The judge sentenced Miller to fifteen years in prison. After her conviction, Miller filed a direct appeal, and we affirmed her conviction. See *id.*

B. Motion to Vacate

On March 25, 2016, Miller moved to vacate her convictions under [28 U.S.C. § 2255](#), asserting [*9] that Malone provided ineffective assistance under [Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 \(1984\)](#). Of relevance to this appeal, Miller claimed that Malone failed to conduct an adequate investigation, consult and present an expert witness, and subpoena potential witnesses for trial. In support of her motion, Miller attached the following: affidavits from herself and her husband, Dale Miller; a twenty-nine-page summary of HP employees and their potential testimony; interview reports of prospective witnesses from Malone's investigator; and many emails from Malone, Miller, and other individuals. Miller's motion referenced a separate list of prospective trial witnesses that she provided Malone after he was appointed to represent her. Miller also filed affidavits from potential trial witnesses who were not called at trial.

The district court referred Miller's motion to a magistrate judge. The magistrate judge then held an evidentiary hearing on Miller's motion. The following testimony was elicited at the evidentiary hearing.

First, Robin Smith, HP's utilization review coordinator and psychotherapist, stated that, if called as a witness, she would have testified that in her role as a coordinator, she reviewed patient files, and she did [*10] not notice any inconsistencies among entries by psychiatrists, therapists, and others. According to Smith, Miller supervised the therapists but did not supervise HP's psychiatrists, medical doctors, or nurses. Smith stated that patients were not admitted to HP if they did not have the appropriate psychiatric criteria for admission. She was unaware of any policy to keep patients at HP for the duration of their Medicare coverage, regardless of their psychiatric needs, or to discharge them when their Medicare coverage ended. On cross-examination, Smith conceded that she was not responsible for billing or marketing decisions. She did not know if HP's "marketers" were recruiters who were paid to bring patients to HP. She was also not present for any meetings that Miller had with Moore, Humes, or Himmons.

Manuel Llano is a healthcare CEO who supervised Miller at Sunrise Regional Medical Center ("Sunrise") from 1999 through 2001, before she started working at HP. Llano testified that he offered Miller a job at least twice after she left Sunrise, but she declined those

offers because she enjoyed working at HP. No one contacted Llano before the trial about testifying on Miller's behalf. On cross-examination, [*11] Llano conceded that he was not present at the meetings between Miller and HP's recruiters, never saw Miller interact with patients at HP, never reviewed any of HP's patient charts, and was unaware of any instructions HP gave its employees about completing patient charts.

Dr. Michael Piercy is the director of a medical facility that tests new medications and was the Chairman and CEO of Sunrise when Miller worked there. Dr. Piercy testified that he was impressed by Miller's intelligence, energy, and ethics, and would "be delighted to have [Miller] work with [him] again[,] . . . assuming she were available and interested." Dr. Piercy was not contacted before the trial. On cross-examination, Piercy conceded that he was unfamiliar with HP's admissions process, did not know whether HP paid recruiters to recruit patients, and did not know what Miller told Dr. Gumer and other HP employees.

Rita Sordellini worked as a part-time psychotherapist for HP. Whenever Sordellini reviewed patient files at HP, she never noticed inconsistencies among the notes entered by different individuals. She did not recall therapists raising concerns about inconsistencies at the weekly treatment team meetings [*12] that Miller facilitated. Sordellini never saw evidence of Miller instructing therapists to stress a patient's negative symptoms to ensure that Medicare would reimburse HP. Miller never told her that particular patients needed to be discharged because they were out of Medicare days nor instructed her to keep patients longer because they had Medicare days remaining. Sordellini only had a "very quick" conversation with Malone or his investigator before trial and volunteered to testify for Miller, but she was not contacted afterward. On cross-examination, Sordellini conceded that Malone emailed her asking her to contact him about "anything or anyone that would be helpful to [Miller's] cause." Sordellini acknowledged that she was not responsible for discharge, insurance, or marketing decisions at HP and would not be aware if HP hired "marketers" to recruit patients. She also conceded that she was not present at any meetings between Miller and the recruiters.

Melvin Hunter oversaw the Admissions Department at HP, and he testified that patients who arrived at HP were usually "precleared" through an interview process and that doctors at HP ultimately made the final admission decision. He also [*13] testified that HP

admitted patients even though there was no chance HP would be paid on "quite a few" occasions. As for his willingness to testify in Miller's case, Hunter explained that he had declined to testify before the grand jury because his attorney was not permitted to accompany him into the grand jury room. Hunter, however, stated that he would have testified at Miller's trial, even if his attorney advised him not to testify, because he believed that the allegations against HP and its staff were false. Hunter did not know if anyone contacted his attorney about testifying at Miller's trial or if his counsel invoked his *Fifth Amendment* rights. On cross-examination, Hunter acknowledged that he did not know what happened to the patient files after the admissions process was completed or if they were falsified after he saw them. Hunter also conceded that he was not privy to all the conversations between Miller and Dr. Gumer, other staff members, or the recruiters.

Michael Calabria provided an affidavit but did not testify at Miller's hearing. According to his affidavit, he worked with Miller as a psychotherapist at Sunrise and HP and presently works at HP's successor facility. Calabria stated [*14] that Miller was a "great supervisor" and a "great mental health professional." Calabria also stated that the quality of care at HP was "very good" and that the doctors were responsible for admitting and discharging patients. Miller never told him to write anything specific in his patients' charts. Finally, he stated that no one contacted him about testifying at Miller's trial.

Sandra Novak also provided an affidavit but did not testify at Miller's hearing. Novak worked with Miller as a therapist at Sunrise and HP. In Novak's opinion, Miller would not have jeopardized her career, family, and future to participate in the charged offenses. No one contacted her about testifying at Miller's trial.

Additionally, Roy Rindom provided an affidavit but did not testify at Miller's hearing. Rindom worked with Miller as a psychotherapist at HP from 2004 to 2007. Rindom's job was to conduct patient evaluations, including psychosocial interviews for admitted patients. Rindom stated that Miller never asked him to do anything unethical and that there were "no shenanigans" in connection with admissions, discharges, or treatment of patients. However, Rindom acknowledged that he was "engrossed in [his] [*15] daily duties and . . . was not aware of what Daisy Miller was doing at any given moment of the work day." Rindom was also not involved in insurance-based

decisions at HP. Finally, according to Rindom, no one contacted him about testifying at Miller's trial.¹

Karen Bryan provided an affidavit but did not testify at Miller's hearing. She monitored patients, took vital signs, and assisted with the intake process. Bryan acknowledged that she had little interaction with Miller but thought Miller was "amazing." However, she knew nothing about HP's billing process. No one contacted her about testifying at Miller's trial.

Miller also testified at the evidentiary hearing. After she was indicted, she prepared a list of witnesses she believed would help her defense and provided it to Malone. Miller was aware that Malone agreed to a joint defense agreement with her co-defendants, and they attended the weekly joint defense meetings together. But as the trial grew closer, Miller concluded that Malone's loyalty was to the joint defense theme rather than to her individual defense. When Miller told Malone that she wanted a medical expert to testify on her behalf and suggested several psychiatrists, Malone [*16] told her that Kallen-Zury's attorney, Michael Pasano, had retained an expert, Dr. Danziger, who would testify about the clinical issues. Malone never discussed with Miller the reason why Dr. Danziger did not testify.

On cross-examination, Miller conceded that she did not include Calabria, Hunter, Llano, Piercey, Sordellini, and Bryan as potential witnesses in the twenty-nine-page memorandum she prepared for Malone before trial. Miller also acknowledged that, contrary to Rindom's affidavit, Malone had interviewed him before the trial. Miller also conceded that Malone contacted other witnesses on her behalf, sent her interview reports, and gave her periodic updates. Finally, she conceded that none of her witnesses at the evidentiary hearing interacted with HP's recruiters, with the possible exceptions of Humes and Veraguas.

Malone testified on behalf of the government. Malone is an experienced criminal defense attorney who has tried between fifty and sixty jury trials to verdict. Malone testified that, for this case, he conducted an extensive pretrial investigation, which entailed reviewing discovery at the government's warehouse, examining patient files and other documents, hiring an [*17] investigator to obtain witness statements, meeting and sharing information with attorneys for Miller's co-defendants,

and identifying and interviewing potential witnesses. As for the joint defense agreement, Malone testified that he entered into the agreement in order to pool resources, jointly attack the government's charges, identify who the government's witnesses might be, and take advantage of the work that the other defense attorneys had already done. As to his strategy for Miller's defense, Malone testified that he intended to present Miller to the jury as "an upstanding citizen of this community who took her work very seriously" and "looked out for the well-being of [HP] patients." He believed that Miller would be an excellent witness in this regard, and he decided not to call other witnesses so that the government would be unable to repeat, through cross-examination, the negative information it had presented in its case-in-chief. As to the allegations about Miller's participation in recruiting patients, Malone testified that he did not have any evidence to refute them other than Miller's general denial.

Next, as to his investigation of potential witnesses, Malone remembered [*18] speaking with Llano, could not recall who Dr. Piercey was, could not recall if he spoke with Smith, and recalled interviewing Sordellini but could not recall any details about their conversation. With respect to Hunter, Malone testified that he could not contact him directly because he was represented by counsel and that Hunter's counsel would not let him testify at Miller's trial. As for Dr. Danziger, Malone determined that Dr. Danziger could not have explained why so many out-of-state patients were admitted when they could have gotten the same services much closer to home. Malone noted that Dr. Danziger admitted that the out-of-state patients were "a problem." Malone was also concerned that Dr. Danziger would be cross-examined about how his opinion assumed that the patient files were not fabricated when Dr. Gumer had already testified that the patient files were fabricated.

The magistrate judge also took judicial notice of Dr. Danziger's testimony from the hearing on Kallen-Zury's § 2255 motion. Kallen-Zury retained Dr. Danziger in May 2012 to review a sample of HP patient files. Over a one-year period, Dr. Danziger reviewed thirty-six charts of nineteen different patients to determine [*19] whether there were reasonable grounds for the patients' admissions. At Kallen-Zury's § 2255 hearing, Dr. Danziger testified that all nineteen patients met Medicare's standards for admission to HP. As for suspicions of document fabrication, Dr. Danziger testified that it was unlikely that the charts he reviewed were fabricated because the entries were made by

¹ Miller concedes, however, that contrary to Rindom's affidavit, Malone interviewed Rindom before the trial.

multiple practitioners and internally consistent, and "it would stretch credibility that everyone was faking." Still, Dr. Danziger conceded that he could not determine whether the notes he reviewed were truthful and could only determine that they were consistent across multiple medical practitioners. Finally, Dr. Danziger testified that he did not remember speaking with Malone. But contrary to his testimony at Kallen-Zury's [§ 2255](#) hearing, Dr. Danziger's declaration filed here states that on June 15, 2013, he spoke with Malone about his proposed trial testimony.

Finally, the magistrate judge took judicial notice of Pasano's testimony from Kallen-Zury's [§ 2255](#) hearing. Pasano's trial strategy was to build a case around Kallen-Zury's good faith in operating HP. Pasano testified that an important part of his defense strategy was to have Kallen-Zury [*20] testify and that he made a tactical decision not to call other witnesses once she completed her testimony. He had reservations about the limited nature of Dr. Danziger's testimony because Dr. Danziger only reviewed a few patient files. He also feared that, in cross-examining Dr. Danziger, the government could highlight its contention that the patient records had been falsified, rendering Dr. Danziger's opinion incorrect for having assumed the veracity of the patient files.

On May 24, 2019, after the evidentiary hearing, the magistrate judge issued a 110-page report and recommendation, recommending that the district court deny Miller's motion because Miller had not satisfied the performance prong or the prejudice prong under [Strickland](#) and also recommending that the district court issue a certificate of appealability ("COA") regarding Malone's failure to call additional witnesses.

As for the performance prong of [Strickland](#), the magistrate judge explained that Malone's decision not to call additional witnesses, "made after balancing the potential risks against the possible benefits," was "logical, rational, and understandable" and therefore "reasonable." The magistrate judge noted that Malone had spent about [*21] 1,200 hours defending Miller and that, in reviewing counsel's performance, a court must avoid using "the distorting effects of hindsight" and instead must evaluate the reasonableness of Malone's performance from his perspective at the time. And the magistrate judge emphasized that Pasano had made exactly the same decision as Malone in not calling additional witnesses.

As to the prejudice prong of [Strickland](#), the magistrate judge concluded that "there is no reasonable probability that [Miller's] prosecution would have had a different outcome had Malone called" witnesses other than Miller at trial. Most of the witnesses could only offer impermissible character evidence about Miller, which the trial court had already excluded. Other witnesses were not "smoking gun" type witnesses. Several witnesses never worked at HP in the first place, so they could not testify about what Miller did or did not do at HP or what she did or did not know about the fraud at HP. Other witnesses did work at HP during the years at issue, but they did not know the inner workings of HP's finance, marketing, insurance, and admissions departments. Still other witnesses were not at HP every day, were unaware of what Miller [*22] did every day, or were not privy to the conversations that Miller had with those involved in the fraud.

On April 30, 2020, the district court adopted the "thorough, exhaustive, and persuasive" report and recommendation and denied Miller's motion. The district court then issued a COA only as to Miller's claim "that her former trial counsel was ineffective for failing to call any witnesses at trial other than [Miller] herself."

This appeal ensued.

II. STANDARD OF REVIEW

In a [§ 2255](#) proceeding, we review the district court's legal conclusions *de novo* and the underlying factual findings for clear error. [Lynn v. United States, 365 F.3d 1225, 1232 \(11th Cir. 2004\)](#). "We allot 'substantial deference to the factfinder . . . in reaching credibility determinations with respect to witness testimony.'" [Devine v. United States, 520 F.3d 1286, 1287 \(11th Cir. 2008\)](#) (quoting [United States v. McPhee, 336 F.3d 1269, 1275 \(11th Cir. 2003\)](#)).

III. ANALYSIS

A. Scope of Appeal

Before reaching the merits of this case, we must address a procedural issue. The report and recommendation, which the district court adopted, states that "[t]rial counsel's decisions, particularly about whether to call certain witnesses and introduce

documents, are entitled to great deference, and there is a presumption that trial counsel's decisions are reasonable." However, Miller argues that Malone's decisions should not [*23] be entitled to deference because they were based on an inadequate investigation and were thus not informed, strategic decisions. Thus, according to Miller, our inquiry must include an analysis of whether Malone's investigation "was itself reasonable." That is, even though the COA specifies that the only issue on appeal is whether Malone "was ineffective for failing to call any witnesses at trial other than [Miller] herself," Miller argues that the Court should address a subsidiary claim that Malone failed to conduct an adequate investigation of potential witnesses and documents. The government agrees that addressing the issue on appeal necessarily encompasses the subsidiary claim of whether Malone conducted an adequate investigation of other potential witnesses. However, to the extent that Miller argues that Malone failed to properly review the government's discovery and investigate potential documents—rather than potential witnesses—the government contends that such arguments are beyond the scope of the COA and that we should not address those issues.

Although appellate review is limited to issues specified in the COA, *Turner v. Sec'y, Dep't of Corr.*, 991 F.3d 1208, 1211 n.1 (11th Cir. 2021) (quoting *Murray v. United States*, 145 F.3d 1249, 1250-51 (11th Cir. 1998)), we conclude that Malone's decision to call witnesses [*24] could have been elucidated by a reasonable investigation of the government's discovery and documentary evidence. Thus, our inquiry will include an analysis of whether Malone's investigation of the documentary evidence, as well the potential witnesses, was reasonable to determine whether Malone's decisions at issue are entitled to deference.

With this procedural matter resolved, we now turn to the merits of Miller's ineffective assistance claim.

B. Prejudice

To prevail on an ineffective assistance of counsel claim, a petitioner must "demonstrate both that (1) 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.'" *United States v. Webb*, 655 F.3d 1238, 1258 (11th Cir. 2011) (quoting *Strickland*, 466 U.S. at 687). "We may consider the prongs of the *Strickland* test in either order, and the defendant must show that both prongs are satisfied in

order to demonstrate a *Sixth Amendment* violation." *Id.* This standard is necessarily a fact-intensive one, requiring a court to "consider[] all the circumstances" when evaluating counsel's performance. *Strickland*, 466 U.S. at 688. If a defendant makes an insufficient showing on one of the requisite prongs, we need not address the other prong. *Id. at 697*. Determining whether there is prejudice under *Strickland* is a mixed question of law and fact, making our review [*25] plenary. See, e.g., *Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1300 (11th Cir. 2013). Underlying factual determinations, however, are subject to clear error review. See *Devine*, 520 F.3d at 1287.

To establish prejudice under the second prong of *Strickland*, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In other words, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id. at 693*. The petitioner instead must show that counsel's deficient representation rendered the result of the trial unfair. See *id. at 697*. The prejudice component of the *Strickland* standard thus reflects "[t]he purpose of the *Sixth Amendment* guarantee of counsel," which is to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id. at 691-92*. We have recognized that, given the principles and presumptions associated with ineffective assistance claims, "the cases in which habeas petitioners can properly prevail are few and far between." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc) (omission adopted) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc)).

Here, we conclude that the district court did not err in [*26] determining Miller did not suffer prejudice by Malone's decision not to call additional witnesses. The magistrate judge found that Miller's proposed witnesses were either not credible or credible but could not offer material testimony, meaning their testimony would not have changed the outcome of the trial. After a review of the record, we conclude that the magistrate judge's factual findings about the potential witnesses are not clearly erroneous, especially given the substantial deference we afford to the factfinder as to credibility determinations. We discuss each proposed witness in turn.

First, Dr. Danziger's testimony would have been of little value to Miller's defense. As we noted previously in *Kallen-Zury IV*, because Dr. Danziger analyzed only nineteen of the thousands of patients at HP during the period in question, his conclusions were not based on a significant sample to hold much weight at trial. See [2023 U.S. App. LEXIS 717, 2023 WL 164065, at *9](#).

"Additionally, his analysis assumed the veracity of the treatment forms, even though he had no corroboration for such an assumption." *Id.* Dr. Danziger conceded that, while the files were internally consistent, he could not determine whether the files were truthful, raising [*27] the possibility that the files were consistently falsified. Even if the jury believed Dr. Danziger's claim that it was unlikely that everyone had falsified their part of the patient files in an internally consistent manner, he could not explain the out-of-state patients, which he described as a "problem." In addition, Dr. Danziger could not rebut the recruiters' testimony and documentary evidence about Miller's participation in hiring recruiters and preparing the recruiters' false monthly reports. So even if he could convince the jury that the recruited patients were properly admitted, he would not have been able to refute the evidence that HP was not permitted to pay recruiters to bring patients but did so anyway. Being unable to address that aspect of the criminal scheme and Miller's participation in that scheme, there is no reasonable probability that Dr. Danziger's testimony would have led to a different outcome here.

Next, Smith was not responsible for billing and marketing and did not know if the recruiters were paid to recruit patients. She testified that she did not attend any meetings that Miller had with Moore, Humes, or Himmons. Therefore, like Dr. Danziger, she would have [*28] not refuted Miller's involvement in the recruiting scheme. She would have merely testified that she did not know of any fraud at HP. Her lack of knowledge, however, would not have overturned the verdict. Indeed, it is unsurprising that those participating in a fraudulent scheme would not inform all of their employees of the fraud. Thus, the jury could have reasonably concluded that Miller and her co-defendants took affirmative steps to keep knowledge of the fraud from Smith and other non-participating employees.

Similarly, Sordellini's potential testimony that the patients were properly admitted would not have overturned the verdict. As a part-time employee at HP, Sordellini conceded that she was not responsible for discharge, insurance, or marketing decisions at HP, and

she was unaware if HP hired "marketers" to recruit patients. And Sordellini conceded that she was not present at any meetings with Miller and the recruiters. It is therefore unlikely that the jury would have rejected the government's evidence of fraud and Miller's participation in the fraud based on a part-time employee's testimony that she was unaware of the scheme. Instead, it is more likely that the jury would have [*29] concluded that, as a part-time employee, Sordellini was simply not privy to the criminal scheme. Thus, like Dr. Danziger and Smith, she would not have refuted the government's evidence of Miller's involvement.

As for Hunter, we already concluded in *Kallen-Zury IV*, that his testimony would not have impacted the outcome of the trial with respect to Kallen-Zury. See [2023 U.S. App. LEXIS 717, 2023 WL 164065, at *8](#). The same conclusion applies to the outcome of the trial with respect to Miller. Hunter conceded that he was unaware if Miller instructed Dr. Gumer to falsify records to ensure that patient files reflected severe symptoms. Similar to the previous witnesses, the fact that he was unaware does not mean that the jury would have rejected the government witnesses' testimonies. Being unaware of the fraud does not establish that the alleged conduct did not happen; it merely suggests that Hunter did not know whether the conduct happened. Furthermore, similar to the magistrate judge in *Kallen-Zury IV, 2023 U.S. App. LEXIS 717, 2023 WL 164065, at *8*, the magistrate judge here did not find Hunter's testimony to be credible. We agree that Hunter's claim that he would have testified at Miller's trial is not credible because he invoked his *Fifth Amendment* rights before the grand jury. In sum, Hunter lacked credibility [*30] and was not privy to the criminal scheme to have made a difference in Miller's trial.

As for Llano and Dr. Piercy, because they never worked at HP, they too could not credibly testify about the fraud at HP. To the extent that they could have undercut the government's theory that Miller engaged in criminal conduct to keep her job by testifying that she had other job prospects, their testimony about her motive, or the lack thereof, would not have overwhelmed other documentary and testimonial evidence of her criminal conduct. The government presented significant evidence over the five-week trial, and Llano and Dr. Piercy's ancillary arguments related to motive would have been insignificant in comparison. Thus, even if their testimonies were admitted, it is unlikely that they would have made a difference.

The affiants, Calabria, Novak, Rindom, and Bryan, would not have made a difference either. Even if the affiants testified that they were unaware of the criminal scheme, that does not exclude the possibility that Miller asked other employees to participate in the scheme without the affiants' knowledge. In addition, Novak and Bryan would have merely provided character evidence that Miller [*31] was honest, which would not have overturned the outcome of the trial.

In sum, the testimony from these witnesses—taken together or separately—would not have created a reasonable probability that Miller's trial would have resulted in a different outcome. See [Devine, 520 F.3d at 1287](#). None of the potential witnesses could rebut the government's evidence that Miller participated in a kickback scheme with the recruiters because they were not privy to the pertinent conversations between Miller and the recruiters. Thus, and considering the weight of the evidence presented against Miller during the five-week trial, we conclude that Miller cannot show that she was prejudiced by Malone's failure to call these witnesses at trial and cannot satisfy the second [Strickland](#) prong.

C. Deficient Performance

Because Miller has failed to show that she was prejudiced by counsel's failure to call witnesses at trial, we need not consider the first prong of [Strickland](#). However, even if we were to assume that Miller were prejudiced and met the second [Strickland](#) prong, Miller still cannot prevail because Malone's decision not to call additional witnesses did not amount to deficient performance.

"The standard for counsel's performance is 'reasonableness under prevailing [*32] professional norms.'" [Chandler, 218 F.3d at 1313](#) (quoting [Strickland, 466 U.S. at 688](#)). There is a strong presumption that counsel rendered reasonable professional assistance and thus Miller has the burden to overcome this presumption. See [Dingle v. Sec'y for Dep't of Corr., 480 F.3d 1092, 1099 \(11th Cir. 2007\)](#). We generally afford great deference to counsel's strategic decision not to call witnesses. [Conklin v. Schofield, 366 F.3d 1191, 1204 \(11th Cir. 2004\)](#); [Chandler, 218 F.3d at 1313](#). Further, "[o]ur strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel." [Provenzano v. Singletary, 148 F.3d 1327](#).

[1332 \(11th Cir. 1998\)](#). And "[e]ven if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" [Dingle, 480 F.3d at 1099](#) (quoting [Adams v. Wainwright, 709 F.2d 1443, 1445 \(11th Cir. 1983\)](#)).

As noted above, we must first determine whether Malone's investigation was adequate before giving great deference to his decision not to call witnesses. See [Wiggins, 539 U.S. at 521-23](#). Turning to Malone's investigative efforts, the magistrate judge found that Malone, an experienced criminal defense attorney, spent about 1,200 hours defending Miller.

Although Malone did not speak to Dr. Danziger until after Miller's trial began, Malone testified that he knew what Dr. Danziger would have discussed at trial beyond "best practices," indicating [*33] that he was sufficiently apprised of Dr. Danziger's testimony through the work of the joint defense team. Malone's decision not to have another medical expert review additional files reflected Malone's reasonable investigation of the documents and Malone's understanding that a second medical expert would not have been able to rebut any allegations about Miller's supervision of the recruiters from the patient files, thereby making any additional investigation into patient files unnecessary and unproductive in defending Miller. And as for the remaining witnesses who testified that Malone did not contact them or only made a brief call, we have explained that counsel "need not interview every conceivable witness" to satisfy [Strickland](#). [Morrow v. Warden, 886 F.3d 1138, 1148 \(11th Cir. 2018\)](#); see also [Chandler, 218 F.3d at 1317](#) ("[N]o absolute duty exists to investigate particular facts or a certain line of defense."). Malone realized that none of those witnesses could rebut the critical evidence about the recruiters based on the detailed list of witnesses that Miller provided Malone. Finally, with regard to Hunter, he was represented by counsel, and Malone cannot be faulted for not contacting him directly or his counsel given that Malone does not have to pursue all leads, especially [*34] not a witness who had previously invoked his [Fifth Amendment](#) rights. Cf. [Davis v. Lafler, 658 F.3d 525, 537 \(6th Cir. 2011\)](#) (en banc) (concluding that counsel's decision not to call a witness was a strategic choice based in part on the concern that witness "would exercise his [Fifth Amendment](#) right to remain silent if called").

Even if it is otherwise unclear how Malone spent the

1,200 hours, whether he effectively used that time reviewing documents and interviewing additional witnesses, and why he did not discover that the government did not have certain patient files during that time, Malone's inability to recollect the specifics of his investigation six-and-a-half years after the fact is not a sufficient ground to conclude that his investigation was inadequate. *Blankenship v. Hall*, 542 F.3d 1253, 1274 (11th Cir. 2008) ("[W]hen the evidence is unclear or counsel cannot recall specifics about his actions due to the passage of time and faded memory, we presume counsel performed reasonably and exercised reasonable professional judgment."); *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1245 (11th Cir. 2011) (similar). As we stated previously, attorneys are entitled to the presumption that their conduct was reasonable, and "[a]n ambiguous or silent record is not sufficient to disprove the strong and continuing presumption." *Chandler*, 218 F.3d at 1314 n.15.

We thus conclude that Malone sufficiently investigated the witnesses [*35] and documents. Thus, his decision not to call additional witnesses was a strategic choice made after an adequate investigation, which makes his decision "virtually unchallengeable." *Strickland*, 466 U.S. at 690; accord *Conklin*, 366 F.3d at 1204 ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." (quoting *Waters*, 46 F.3d at 1511)).

With this deferential standard in mind, we turn to whether Malone's explanations for not calling witnesses were reasonable. Malone, an experienced criminal defense attorney, testified that he did not call Dr. Danziger because Dr. Danziger would have faced damaging cross-examination. Dr. Danziger reviewed only a few patient files and assumed the veracity of the patient files, which would have been revealed through cross-examination. And, as stated before, the government's theory was not that Miller was only involved in the patient side of HP. The government's theory was that Miller directed recruiters, which goes beyond patient care, and Dr. Danziger would not have been able to credibly testify about this allegation based on his limited review of patient files. In addition, Dr. Danziger would not have been able to provide a satisfactory [*36] explanation for out-of-state patients coming to HP, but for the work of Miller's recruiters. Thus, Malone's decision not to call Dr. Danziger was reasonable.

As for Malone's decision not to call other witnesses, all of the potential witnesses would have similarly been unable to refute critical aspects of the government's case and, as a result, would have been subject to damaging cross-examination. See *Chandler*, 218 F.3d at 1321 ("[A] lawyer reasonably could also fear that character evidence might, in fact, be counterproductive: it might provoke harmful cross-examination and rebuttal witnesses. Misgivings about hurtful cross-examination and rebuttal witnesses have been decisive to the Supreme Court when it determined that counsel was effective." (footnote omitted)). Thus, we conclude that Malone's decision not to call additional witnesses was reasonable, and that Miller has not adequately demonstrated that Malone was deficient in his representation.

IV. CONCLUSION

For all these reasons, we affirm the district court's denial of Miller's § 2255 motion to vacate her conviction.

AFFIRMED.

End of Document

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 16-21090-CIV-MARTINEZ-GOODMAN
Case No. 12-20757-CR-JEM

DAISY MILLER,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

/

**OMNIBUS ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION, DENYING MOTION FOR RELEASE PENDING A
RESOLUTION TO THE § 2255 MOTION, AND DENYING
EMERGENCY MOTION FOR RELEASE OR TRANSFER TO HOME CONFINEMENT**

Movant has filed a Motion for Relief Pursuant to 28 U.S.C. § 2255. [ECF No. 1]. After reviewing several submissions from both sides and conducting a two-day evidentiary hearing, [ECF Nos. 9, 12, 17, 21, 22, 33, 47, 57, 58], Magistrate Judge Jonathan Goodman filed a Report and Recommendation. [ECF No. 59]. Judge Goodman recommends that the Court deny Movant's § 2255 petition but issue a certificate of appealability on one issue: Movant's former counsel's failure to call any trial witnesses in the underlying criminal trial other than Movant herself.

The United States and Movant both timely filed objections to the Magistrate Judge's Report and Recommendation. [ECF Nos. 60, 61]. The United States objects to the issuance of a certificate of appealability, and Movant objects to the rest of the report.

Movant has also filed a motion to be released pending the determination of her § 2255 petition and for release or transfer to home confinement, on an emergency basis, given the Coronavirus Disease-2019 pandemic. [ECF Nos. 67, 68].

Regarding Judge Goodman's report, the Court has reviewed the entire file and record, has made a *de novo* review of the issues that Movant and the United States objects to from the report, and is otherwise fully advised in the premises. Judge Goodman's report is thorough, exhaustive, and persuasive, and sufficiently addresses why the parties' objections lack merit.

Regarding Movant's emergency motion, the Court is without jurisdiction to order home confinement for Movant, and the Court declines to order compassionate release because Movant has failed to exhaust her administrative remedies. Beginning with the issue of home confinement, when the Court sentenced a person to a term of imprisonment, she is "committed to the custody of the Bureau of Prisons." 18 U.S.C. § 3621(a). The BOP, in its sole discretion, "designate[s] the place of the prisoner's imprisonment. . . ." § 3621(b). The Second Chance Act then gives the BOP the authority, "to the extent practicable, [to] place prisoners with lower risk levels and lower needs on home confinement for [a certain] maximum amount of time. . ." 18 U.S.C. § 3624(c)(2). But the Second Chance Act emphasizes that "[n]othing in this subsection shall be construed to limit or restrict the authority of the Director of the Bureau of Prisons under section 3621." § 3624(c)(4).

In March 2020, the President of the United States declared a national emergency because of COVID-19. In response, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), P.L. 116-136, § 12003(b)(2), which, relevant to this case, allows the BOP to extend the time of home confinement for longer than the limits in § 3624(c). Also, in March and April of this year, Attorney General William Barr wrote two memos to the BOP, describing who should be prioritized for home confinement and how placement should happen, and directing the BOP to review every prisoner with COVID-19 risk factors.

The Court appreciates the dangers of COVID-19, particularly within the prison population and for those who are older and have preexisting conditions. The Court, however, is without power

to order the BOP to place Movant in home confinement. “The decision whether to place a prisoner in home confinement is solely within the discretion of the BOP and the Attorney General.” *United States v. Phillips*, No. 13-CR-80230, 2020 WL 1033400, at *2 (S.D. Fla. Mar. 2, 2020); *see also United States v. Ramdeo*, 705 F. App’x 839, 840 (11th Cir. 2017) (explaining that “the BOP is afforded wide discretion in classifying and housing prisoners, and our review of those decisions is limited”). The BOP should be given the opportunity to evaluate Movant’s potential COVID-19 risk factors and assess whether home confinement is justified.

Regarding compassionate release, Movant has failed to exhaust her administrative remedies. Movant says in her motion that she has requested, directly and through her attorney, home confinement from the Warden at FCI Coleman-Low, where she is housed, but neither the Warden nor the BOP have responded. The BOP has 30 days to consider the request and bring a motion on her behalf under § 3582(c)(1)(A)—Movant does not say when she or her attorney made the requests, but her argument suggests that 30 days have not elapsed. Movant argues that the extraordinary circumstances caused by COVID-19 warrant dispensing with the 30-day requirement.

The Court disagrees. These are unprecedeted times, to be sure. But as shown above, the Attorney General has issued guidance to the BOP, which, as the Court has learned from other cases where defendants have asked for the same relief, has taken meaningful steps to mitigate the spread of this infectious disease. The Court agrees with the Third Circuit Court of Appeal’s recent assessment that “[g]iven BOP’s shared desire for a safe and healthy prison environment, . . . strict compliance with § 3582(c)(1)(A)’s exhaustion requirement takes on added—and critical—importance.” *United States v. Raia*, No. 20-1033, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020).

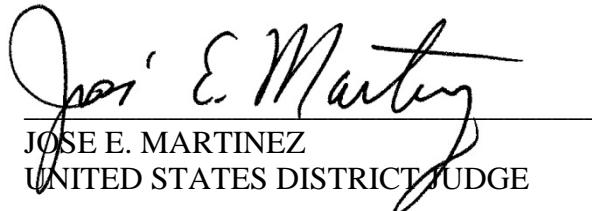
Accordingly, after careful consideration, it is:

ORDERED AND ADJUDGED as follows:

1. The Magistrate Judge's Report and Recommendation, [ECF No. 59], is **AFFIRMED** and **ADOPTED**.
2. Movant's Motion for Relief Pursuant to 28 U.S.C. § 2255, [ECF No. 1], is **DENIED**.
3. A certificate of appealability **SHALL ISSUE** as to Movant's claim that her former trial counsel was ineffective for failing to call any witnesses at trial other than Movant herself.
4. Movant's Motion for Release Pending a Resolution to her § 2255 Motion, [ECF No. 67], is **DENIED AS MOOT**.
5. Movant's Emergency Motion for Release or Transfer to Home Confinement, [ECF No. 68], is **DENIED**.

6. This case is **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of April, 2020.



JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Goodman
All Counsel of Record