**Ineffective Assistance**

The rule's plain language and Supreme Court precedent provide that the standard for a new trial is if the interest of justice so requires. Eberhart v. U.S., 546 U.S. 12, 13 (2005)(“Federal Rule of Criminal Procedure 33(a) allows a district court to ‘vacate any judgment and grant a new trial if the interest of justice so requires.’”); Fed.R.Crim.P.33 (“Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.”). Imposing a different standard based on the type of argument (i.e., ineffective assistance) is a legal fiction that cannot be reconciled with the plain language of Rule 33(a) or Eberhart. As Hosseinipour correctly argued in her opening brief, whether a Rule 33(a) or Strickland standard should apply to a motion for a new trial based on ineffective assistance remains an open question in the Sixth Circuit. In response, the government argues that other courts should apply Strickland instead of using the new trial standard on motions for a new trial. However, that argument fails to support a meaningful departure from the Rule’s language.

In response to Hosseinipour’s motion for acquittal and a new trial, the Government argued that the court should not hold a hearing on her claims of ineffective assistance of counsel. (R.583, #5489.) To this Court, the Government now argues that a hearing is necessary but should be dealt with in a habeas petition. (Br.137.) The Government had the opportunity to oppose the sworn statements in the record or offer evidence to oppose such claims but chose not to do so. (See R.583.) The Government offers no support for the theory that the Court should not grant a new trial based on a properly supported motion. (See generally Br.) Indeed, the Supreme Court has refused to require ineffective assistance claims “must be reserved for collateral review.” Massaro v. U.S., 538 U.S. 500, 508 (2003). Instead, the Government seeks to benefit from its strategic decision to oppose an evidentiary hearing and now argues that one is necessary. (Compare Br.137 with R.583;#5489.) At the same time, the Government argues that defendants cannot take advantage of errors they invited. (Br.114.) The Court should apply the same standard to the Government.

“[G]overning precedent holding that a ‘self-serving’ affidavit is not inherently incredible.” Martin v. United States, 889 F.3d 827, 833 (6th Cir. 2018); Pola v. United States, 778 F.3d 525, 535 (6th Cir. 2015)(“an affidavit is not incredible just because the asserted facts favor the affiant.”). The sworn affidavits remain uncontroverted, and the Government does not take specific issue with any of the facts in the affidavit. (See generally Br.) Thus, they are competent evidence that supports reversal and a new trial.

In her brief, Hosseinipour argued that her counsel was ineffective at the plea stage, and based on her counsel’s ineffective assistance, her conviction should be reversed. (See Hosseinipour Br.68-72.) The Government properly did not oppose the merits of her argument, which was in accordance with its duties to justice. (See Br.133-42.) Instead, it only argued that the Court should require her to file a habeas petition because the record is incomplete. (Br.138.)

However the record provides the information to show that her counsel was ineffective. The uncontroverted record provides that Hosseinipour’s counsel (1) did not explain the elements of the charges, (2) did not explain sentencing guidelines or that jail was possible, (3) did not advise about the proffer process, and (4) did not contact the Government about a plea after his client instructed him to do so. (R.578-1.) It also shows that Hosseinipour was advised that the Government would not try the case against her, that she would not go to prison, and that she could not plead guilty because it would be perjury. (Id.)

The Constitution requires effective assistance at the plea stage: “‘[W]hen the Government chooses to enter into plea negotiations, the Constitution requires that defendants receive effective assistance in navigating that crucial process.’” Gilbert v. U.S., 64 F.4th 763, 771 (6th Cir. 2023)(quoting Rodriguez-Penton v. U.S., 905 F.3d 481, 489 (6th Cir. 2018)). “That means accurate advice regarding sentence exposure.” Gilbert v. U.S., 64 F.4th 763, 771 (6th Cir. 2023). “A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available.” Smith v. U.S., 348 F.3d 545, 552-53 (6th Cir. 2003). The record uncontrovertibly shows that Hosseinipour did not receive that. (R.578-1,#5418;R.578-3.) Counsel’s performance was deficient, and Hosseinipour was prejudiced by not pleading guilty. “[A] defendant may be prejudiced when his counsel’s errors deprived him of the opportunity to make a fully informed choice during the plea process.” Rodriguez-Penton v. U.S., 905 F.3d 481, 488 (6th Cir. 2018); Gilbert v. U.S., 64 F.4th 763, 771 (6th Cir. 2023)(“prejudice may lie where a petitioner demonstrates that counsel’s deficient performance infected his decisionmaking process, and thus undermine[d] confidence in the outcome of the plea process.”).

Like Byrd, Hosseinipour’s case is also “cut-and-dried.” Byrd v. Skipper, 940 F.3d 248, 259-60 (6th Cir. 2019); U.S. v. Pender, 514 F. App’x 359, 361 (4th Cir. 2013)(a similar case where the prosecution conceded a beneficial plea agreement would have been available and holding that counsel was ineffective for unreasonably failing to pursue plea). The prejudicial component just requires that Hosseinipour show that it is likely that she could have obtained a more favorable outcome but for her counsel’s errors. Byrd, 940 F.3d at 259. The record shows that but for her counsel’s ineffective assistance, Hosseinipour could have pleaded guilty, and the Government would have recommended no jail time. (R.632; R.578-2,#5427.). The Government “tried very hard to get Ms. Hosseinipour in the same position as Mr. Anzalone, and that is, to be testifying at trial.” (R.675,#7856.) The Government would have “advocated very strongly for a sentence of probation for Mr. Anzalone.” (Id. at #7856-57.) Thus, Anzalone, a more culpable defendant, received a probation deal, further supporting the deal Hosseinipour would have received. Sewell discussed allowing Hosseinipour to plead guilty, and in exchange, the Government would advocate for no jail time. (R.578-2.) The court has accepted the Government’s sentencing recommendations on guilty pleas in this case, including the recommendation of probation for Jason Syn, who, as a participant, profited the most from I2G. (R.796; R.802; see also R.784,#11756; R.789.) Hosseinipour asked her counsel to approach the Government about pleading guilty, and he refused. (R.578-1,#5421.) The record demonstrates that with effective counsel, Hosseinipour could have pleaded guilty; the Government would have recommended probation, and the court would have accepted the recommendation. The current record supports Hosseinipour’s claim of ineffective assistance.

Manning’s pretrial performance was similarly ineffective. Manning did not prepare for trial because he thought the charges would be dismissed. An attorney’s decision to “avoid preparing a defense that might ultimately prove unnecessary” is not reasonably effective representation, serving only the attorney’s interest not to work. Pavel v. Hollins, 261 F.3d 210, 216 (2d Cir. 2001). His failure to investigate and interview witnesses because he thought the charges would be dismissed, caused Hosseinipour to be unable to mount a defense. A defense counsel’s failure to investigate and provide adequate assistance because the counsel did not expect the case to go to trial, is not the result of reasoned professional judgment or a decision based on trial strategy. U.S. v. Laird, 591 F. App’x 332, 337 (6th Cir. 2014). Given the unclear line that divides pyramid schemes and MLMs, expert testimony was critical, but Manning did not retain an expert to testify as a defense witness. Indeed, he did not even subscribe to a platform for him to perform legal research despite the complex legal issues at play. (R.578-1,#5418.) This left Manning without any cases to cite during the pendency of the trial. (R.683,#8588-89.) His failure to perform legal research constitutes ineffective assistance: “failure to perform legal research to be an ineffective performance by an attorney.” U.S. v. Lopez-Chavez, 757 F.3d 1033, 1041 (9th Cir. 2014); Howard v. U.S., 743 F.3d 459, 468 (6th Cir. 2014)(“Counsel cannot blunder into court without having performed basic research and preparation.”). Further, Manning failed to review the discovery and did not even know he had a copy of Hosseinipour’s 302. Taken together, Manning’s failure to understand the charges, research the legal issues, investigate the facts, interview witnesses, and review discovery left Hosseinipour without a complete defense. His performance was deficient, and the prejudice cannot be understated. As explained earlier, the Government’s proof against Hosseinipour was razor thin (if that). With a competent attorney, Hosseinipour would have had a trial strategy, and that trial strategy would have led to her acquittal.

During the trial, Manning was ineffective as well. Manning called I2G a pyramid and an investment. (R.511,#4841,4854; R.683,#8656.) Manning assumed if the Government called I2G a pyramid scheme that, it was conclusive, and the jury would find a pyramid scheme. (R.692,9967.) Manning did not understand the difference between securities and secured transactions. (R.691,#9766.) Manning could not even come up with thoughts about whether an Emperor package was a security because he did not “have a lot to say about this as far as it being a security or not.” (R.683,#8589.) Manning’s inability to use courtroom technology prevented him from presenting the video evidence critical to Hosseinipour’s case. (See R.690,9414; R.692,#9879; R.701,#10951.) The prejudice from this deficiency was extreme. Manning had contemporaneous statements from Hosseinipour where she tried to drive customers to the casino, encouraged others to do the same, let them know that they would earn money from their efforts, and discussed the I2G Touch. (10/27/2023CD, US Ex.144, 20:32-21:27, 12:40-12:45; 10/27/2023CD, US Ex.152, 41:40-44:45, 11:30-13:35; 10/27/2023CD US Ex.151, 24:42-26:18; 10/27/2023CD, US Ex.144, 31:30-34:28, 34:28-38:30; 10/27/2023CD, US Ex.178, 16:21-16:30.) Without putting Hosseinipour on the stand, Manning had the ability to use his client’s own statements to show her innocence, and he failed to do so because he could not work the courtroom technology. That was not a strategic choice. That was deficient, and it caused Hosseinipour’s contemporaneous statements that showed she did think the sale of Emperor packages was a pyramid scheme not to be played to the jury, which was the key issue to her defense.

Manning’s deficient and prejudicial performance does not stop there. Manning’s lack of understanding of how objections worked permitted inadmissible evidence to be introduced. “And are we still into this where I can’t object because it has nothing to do with Ms. Hosseinipour?” (R.700, #10606.) Manning was unaware that he could argue that the claim was barred by the statute of limitations. (R.690,#9646.) Manning also did not know how to cross-examine witnesses. (R.689, #9173). Manning did not want to create appealable issues. (R.671,#7425, 39.)

Time and time again, the record shows that Manning did not know what to do. It conclusively shows that he did not know what a security is or how that differs from secured transactions. This was one of two charges against his client, and he did not understand it. Manning did not even question Warren, the defense’s rebuttal expert on securities law. The failure to ask questions was not strategic; instead, it was caused by Manning’s failure to get the Court’s attention that he had not questioned the witness. (R.578-1,#5422.) There was no attempt at a defense. The Government argues that the record is insufficient because it “does not provide information why [Manning] ‘chose to take the actions [he] took.’” (Br.136.) But there is evidence regarding the decisions that counsel made. He was driven by the naïve hope that the Government would dismiss the charges at some point in the trial. But that is not a strategic decision; it is simply ineffective assistance. This falls well below the performance guaranteed by the Constitution, and it plainly led to Hosseinipour’s conviction. Hosseinipour even alerted the Court’s staff of the issues, but no steps were taken to develop the record. Instead, Hosseinipour was instructed to work it out with Manning. (R.578-1,#5423.) Manning then told her that she could not take it to the Court and that it would be a terrible thing to do. (R.578-3,#5430.)

The Government contends, and the court accepted that Hosseinipour’s Sixth Amendment right was not violated because counsel for the co-defendants effectively crossed witnesses, and Manning filed me-too motions to their substantive motions. (R.630,#6164; Br.140.) However, “[t]he essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant.” Wheat v. U.S., 486 U.S. 153, 159 (1988)(emphasis added). Neither Barnes’ nor Maike’s counsel were advocating on Hosseinipour’s behalf. Instead, they were only representing their respective clients at the trial. The defenses put on for other defendants cannot cure the lack of a defense provided by Hosseinipour’s counsel. U.S. v. Hall, 200 F.3d 962, 967 (6th Cir. 2000)(Sixth Amendment guarantees undivided loyalty). At trial, Hosseinipour did not make any knowing waiver of her right to counsel and did not agree that she would only receive the defense that was being presented by counsel for Barnes and Maike.

Strikingly, in her brief, Hosseinipour argued that Manning’s performance was prejudicial and deficient because he failed to investigate the facts, perform legal research, prepare for trial, review discovery, file a motion to sever, ask Warren questions, know he had his client’s MOI, allow his client to testify (in addition to the court’s improper statement that Manning was driving the boat on the decision), and alert the court that he had been fired by Hosseinipour. The Government made no response to these arguments. (See Br.)

At most, the Government argues that the result would not have been different because of certain evidence. Specifically, the Government argued that Anzalone post hoc knowledge that the casino did not continue to increase its profits showed that Hosseinipour knew Emperors could not receive $5,000 from the casino. That testimony does not support her conviction. (See \_\_\_.) This was common in the industry. (Cite). Reynolds confirmed that it did not matter where an individual was in the tree, and Anzalone did the same. (Cite.) Moreover, open customer spots are irrelevant to knowledge of a pyramid scheme. Based on Hosseinipour’s experience, the casino profits were increasing monthly. Nothing was fraudulent about that statement, and it does not tie to knowledge that the sale of Emperor packages was a pyramid scheme. Hosseinipour’s discussion of the sales of fantasy sports was accurate and reflected Maike’s update. Speculative comments from third parties who did not have access to I2G’s information could not have put Hosseinipour on notice that the sale of Emperor packages was a pyramid scheme. This is especially true because she sent them to Koerner, I2G’s attorney and compliance officer, who was handling them. The Government’s brief shows the paucity of evidence against Hosseinipour and supports rather than refutes the notion that the result would have been different if she had received the counsel guaranteed by the Sixth Amendment.

Alternatively, the failure to hold a hearing is an abuse of discretion. Abuse of discretion is the standard for reversal. U.S. v. Allen, 254 F. App’x 475, 478 (6th Cir. 2007). Hosseinipour presented a modicum of evidence, so a hearing was required. Id. A hearing “is required unless the record conclusively shows that the petitioner is entitled to no relief.” Campbell v. U.S., 686 F.3d 353, 357 (6th Cir. 2012). The Government does not offer any support for the notion that a district court can deny an evidentiary hearing where a defendant files a properly supported motion. (See Br.137.) Thus, a hearing was required.

Further, a court abuses its discretion when it relies on clearly erroneous facts. U.S. v. Kilpatrick, 798 F.3d 365, 378 (6th Cir. 2015). Here, the court’s factual findings have not support. (R.630,#6164.) The Government properly concedes as much. (Br.138 fn.5.) Because Hosseinipour and the Government agree that the court’s decision rested on clearly erroneous facts, reversal is required.