**VIII. HOSSEINIPOUR’S TRIAL COUNSEL WAS INEFFECTIVE AND CONSTITUTIONALLY DEFICIENT.**

The plain language of Federal Rule of Criminal Procedure 33(a) 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). Imposing a different standard based on the type of argument (i.e. ineffective assistance) cannot be reconciled with that plain language. The Court should not depart from Rule 33’s language.

In response to Hosseinipour’s motion for 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. (GovBr.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. Indeed, the Supreme Court has rejected the position that ineffective assistance of counsel 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* GovBr.137 *with* R.583;#5489.) The Government should not be permitted to take advantage of errors it invited.

The authority cited by the Government that it is not typical for ineffective assistance claims to be first litigated on direct appeal is inapplicable. Here, Hosseinipour raised the issue before direct appeal. She properly raised the issue in the district court where every opportunity existed to create a more fulsome record. But the Government opposed this, and the court erred by refusing to hold a hearing. Hosseinipour was entitled to litigate her motion for a new trial in district court.

In any event, “governing 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. Thus, they are competent evidence that support reversal and a new trial.

**A. Hosseinipour’s counsel was ineffective at the plea stage.**

The Government does not oppose the merits of Hosseinipour’s argument that her counsel was ineffective at the plea stage. Instead, it only argued that the Court should require her to file a *habeas* petition because the record is incomplete. (GovBr.138.)

But the record established 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 shows that Hosseinipour did not receive that. (R.578-1,#5418;R.578-3.) Counsel’s performance was deficient, and Hosseinipour was prejudiced. “[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.”).

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)(where a beneficial plea agreement would have been available, counsel was ineffective for unreasonably failing to pursue plea). The prejudice 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, a sentence without a term of imprisonment was available. (R.632; R.578-2,#5427.) Sauber’s notes confirm that the Government “left the plea agreement documents with Hosseinipour.” (R.583-1,#5491-92.) The plea agreement included a supplement that the Government would advocate for no prison time. 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 deal for probation, which further supports the deal Hosseinipour would have received. 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 a plea agreement, and he refused. (R.578-1,#5421.) The record demonstrates that with effective counsel, Hosseinipour would have reached a resolution involving probation. The current record supports Hosseinipour’s ineffective assistance claim.

**B. Manning was ineffective at and in preparation for trial.**

Manning’s pretrial performance similarly was 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 to not 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 support Hosseinipour’s defense during the pendency of the trial. (R.683,#8588-89.) His “failure to perform legal research [was] 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 discovery and did not even know that 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. 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 trial, Manning was also ineffective. 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 that was 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 was trying to drive customers to the casino, encouraging others to do the same, letting them know that they would earn money from their efforts, and discussing 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. It was not a strategic choice. Instead, it was deficient performance, 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 did 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. 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.’” (GovBr.136.) But there is evidence regarding the decisions that counsel made. He was driven by the naïve hope that that the Government would dismiss the charges at some point during 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. (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 crossed witnesses, and Manning filed me-too motions to their substantive motions. (R.630,#6164; GovBr.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’ counsel, 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.

Hosseinipour argues in her initial brief 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. This warrants reversal.

At most, the Government argues that the result would not have been different because of certain evidence. Hosseinipour has explained why this evidence is not probative of her knowledge that I2G was a pyramid scheme or of any misrepresentation to a purchaser of an Emperor package. The Government’s brief shows the paucity of evidence against Hosseinipour and actually supports rather than refutes the notion the result would have been different if she had received the counsel guaranteed by the Sixth Amendment.

**C. At a minimum, the court erred by not holding a hearing on the ineffective assistance of counsel issue.**

Alternatively, the failure to hold a hearing was an abuse of discretion. Hosseinipour presented a modicum of evidence, so a hearing was required. *U.S. v. Allen*, 254 F. App’x 475, 478 (6th Cir. 2007)*.* 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. 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 no support. (R.630,#6164.) The Government properly concedes as much. (GovBr.138 fn.5.) Because Hosseinipour and the Government agree that the court’s decision rested on clearly erroneous facts, reversal is required.