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

Hosseinipour appeals the denial of her Rule 33 motion. “Rule 33’s ‘interest of justice’ standard allows the grant of a new trial where substantial legal error has occurred.” *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010). “A violation of [defendant’s] Sixth Amendment right to effective assistance of counsel clearly meets this standard.” *Id.* Rule 33’s broad standard does not require reversible error. *Id.* The Sixth Circuit has left open whether a *Strickland* light analysis applies where a defendant appeals a motion for a new trial based on ineffective assistance of counsel. *United States v. Arny*, 831 F.3d 725, 731 (6th Cir. 2016). Habeas relief and Rule 33 motions are different. *Castro v. United States*, 540 U.S. 375, 383 (2003); *Tibbs v. Florida*, 457 U.S. 31, 38 n.12 (1982)(courts interpret Rule 33 standard broadly). The plain language of Rule 33 requires a lighter standard than *Strickland*. *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.’”).

Alternatively, under *Strickland*, “a defendant must show (1) ‘that counsel’s representation fell below an objective standard of reasonableness’ and (2) that ‘counsel’s performance [was] prejudicial to the defense.’” *Munoz*, 605 F.3d at 376 (quoting *Strickland v. Washington*, 466 U.S. 668, 671 (1984)). Defendants are entitled to effective representation of competent counsel at every stage of the proceedings, including plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). To justify reversal, defendant must have suffered prejudice, shown by “a reasonable probability” “sufficient to undermine confidence in the outcome” of the proceeding “that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 671.

The Court may address an ineffective-assistance-of-counsel argument on direct appeal “‘when the existing record is adequate to assess properly the merits of the claim.’” *United States v. Hynes*, 467 F.3d 951, 969 (6th Cir. 2006) (quoting *United States v. Franklin*, 415 F.3d 537, 555-56 (6th Cir. 2005)). Here, the record is adequate, and the court improperly denied Hosseinipour a new trial and an evidentiary hearing on this issue, finding the record did not support her claim.

Trial counsel, Wayne Manning, provided ineffective assistance of counsel requiring reversal. In the court’s first criminal trial with multiple defendants, Hosseinipour was represented by her brother-in-law, a recent graduate of Thomas M. Cooley Law School. (*See, e.g.* R. 678, #8022, 8033; R. 578-2, #5426). Manning had relatively no experience in criminal law and had limited experience in trying a criminal case. (R.578-1, #5427). Despite assuring Hosseinipour that he could represent her and that the Government would never try the case against her, Manning offered her no assistance whatsoever, and the decisions he made often prejudiced her more than they helped her. Against this landscape, Hosseinipour’s conviction must be reversed.

The court specifically held:

On the first day of trial, the court inquired as to pretrial plea negotiations between the United States and Hosseinipour in accordance with *Missouri v. Frye*, 566 U.S. 134 (2012). As with all Defendants, the court confirmed that any plea offer had been communicated to Hosseinipour by her attorney. The court also inquired whether she: (i) had sufficient time to discuss the plea offer with her attorney; (ii) understood the potential penalties if convicted; (iii) comprehended the terms of the plea offer; (iv) knew the differences in any potential penalties between the plea offer and a potential guilty verdict; and (v) had decided to proceed to trial. **Because of her affirmative responses**, the court found that Hosseinipour had knowingly chosen to proceed to trial notwithstanding the potential risks.

(R.630, #6164). However, the court did not pose those questions. (R.630, #6164). And, Hosseinipour naturally did not answer those questions. (R.630, #6164). The court’s denial of Hosseinipour’s argument on ineffective assistance was simply erroneous.

Further, Manning’s representation was constitutionally deficient during plea bargaining when he

1. told Hosseinipour the case against her would not go to trial (R.578-1 ¶ 5, 8, 15);
2. told Hosseinipour she would not be found guilty or go to jail (id. at ¶ 8);
3. did not explain the elements of the charges against Hosseinipour (id. at ¶ 6);
4. did not explain the sentencing guidelines and told Hosseinipour that jail was not a possible penalty (id. at ¶ 7–8, 15);
5. failed to learn and understand the purpose of a proffer agreement so as to properly advise Hosseinipour when she received requests from the prosecution to meet (id. at ¶ 9–13);
6. told Hosseinipour she would commit perjury by pleading guilty (id. at ¶ 15);
7. consulted Hosseinipour’s co-defendants’ counsel about whether she should accept the government’s plea offer, and followed their self-serving advice (id. at ¶ 18–19);
8. failed to tell Hosseinipour the prosecutor asked if she was willing to accept a plea offer after the March Meeting (id. at ¶ 38); and
9. ignored Hosseinipour’s instructions to contact the prosecution regarding a plea deal (*id.* at ¶ 39–40).

These were not tactical decisions by Manning but disregard for duties based on ignorance. *See Strickland v. Washington*, 466 U.S. 668, 688–89 (1984). Manning had no relevant experience (R.578-2, ¶ 10–11, 13), and he failed to adequately counsel because he was naively confident the charges would be dropped and the case would never go to trial (R.578-1, ¶ 3, 5, 8, 15).

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). 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 judgement or a decision based on trial strategy. *United States v. Laird*, 591 F. App’x 332, 337 (6th Cir. 2014) (“O’Briant admitted that she failed to interview any witnesses (including the ones she subpoenaed) or conduct any investigation because she expected the case to result in a plea deal.”).

Leading up to trial, Manning only filed me-too motions and did not do any preparation because he did not believe the Government would try the case. Finally, in his first “substantive” motion, Manning wrote “Hosseinipour notes that she is of Middle Eastern descent, Defendant Anzalone is Italian, Defendant Dvorin is Russian, and Defendant Syn is Korean causing this case to be seen as a possible racial profiling case also.” (R.386-1, #2957). Ignoring the legal issues with Manning’s musing, it is a factually incorrect position as Hosseinipour is Caucasian. (R.578-1, #5421). In that motion, Manning argued that Hosseinipour did not actually make $900,000, but he did not offer any proof at trial to show that Hosseinipour made less money.

Manning’s performance at trial repeatedly demonstrated ineptitude and not conscious tactical decisions. Manning failed to question the defense’s key witness to rebut Keep because he did not tell the court he had questions for the witness. (R.691, #9878). He also failed to ask the other defense expert a question because he thought the court might be annoyed with him, and he had questions for Anzalone the main witness against Hosseinipour that were never asked. (R.691, #9880, 9884). Hosseinipour wrote out 150 questions for Anzalone that Manning did not ask. (R.578-1, #5422). During Agent McClelland’s testimony, Manning asked if this was still the part where he could not object. (R.700, #10606). Manning’s lack of objections were not a strategic decision but because he thought he could not object. The court’s irritation for Manning was that he was not ready when it was his turn, (R.691, #9879) and the court would make *sua sponte* objections when its patience with Manning was running out (R.688, #9091; R.689, #9180). The court called Manning “redundant,” “[u]npolished,” and “disorganized.” (R. 675, #7834). Manning thought he could not argue the statute of limitations defense to the jury, and he had to be told by undersigned counsel that he could. (R.690, #9646). Manning told the court to proceed with testimony; even though, he had not finished reviewing 302s because the Government failed to provide him with them the night before. (R.688, #8965). Manning would just start testifying on cross, so the court felt compelled to say “this actually goes for all the attorneys… what the attorneys say is not evidence, so you need to ask a question.” (R.689, #9173).

Manning abdicated[[1]](#footnote-1) his duties to his client and advocated to the court that “[t]he main thing was I didn’t want it to be brought up where it could be used for reversal of an appeal.” (“R.671, #7425.”). He then doubled down on that position: “It was just a matter of-- it was a matter of I'm trying to do my best to make sure there's no reversal on appeal of anything.” (R.571, #7439). Had the court and Government not agreed that one objection counts for all, Manning would had it his way because he raised almost no objections, leaving very few non-plain-error appealable issues. Manning’s inexperience, ignorance of the law, and basic misunderstanding of trial and evidence principles fell well below an objective standard of reasonableness. *See Washington v. Hofbauer*, 228 F.3d 689, 704–05 (6th Cir. 2000).

While attorneys are entitled to a presumption that their conduct was reasonable, it is well established that “[t]he failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis.” *Byrd v. Skipper*, 940 F.3d 248, 258 (6th Cir. 2019) (quoting *Hill v. Lockhart*, 474 U.S. 52, 62 (1985)); *see also Strickland*, 466 U.S. at 689 (discussing presumption that counsel acted within accepted range of conduct).

An attorney’s failure to provide guidance or correct advice regarding possible sentences a defendant faces has supported a finding of objectively ineffective assistance in the Sixth Circuit. *Smith v. United*

*States*, 348 F.3d 545, 553–54 (6th Cir. 2003) (citing *Moss v. United States*, 323 F.3d 445, 474 (6th Cir. 2003); *Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001); *U.S. v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)).

Like the attorney in *Byrd*, Manning never informed Hosseinipour of the elements of the offenses with which she was charged, nor did he tell Hosseinipour what evidence the government had against her, nor did he analyze the sufficiency of such evidence. (R.578-1, #5418). Also, like *Byrd*, Manning never reviewed the sentencing guidelines with her or discussed concepts like amount of loss, enhancements, departure, variances, or guilty pleas. Specifically, Manning never explained that the government’s amount of loss theory would skew the potential guideline ranges. Nor did Manning explain that a conviction may also result in other guideline enhancements. He also failed to explain that she would lose any potential credit for acceptance of responsibility.

Hosseinipour was entitled to receive this information from her attorney at the outset of their relationship. Instead, and again, much like the attorney in *Byrd*, Manning let Hosseinipour spend years under the false impression that the charges against her would be dropped. He never suggested that trial, a guilty verdict, or jail were possible until trial was imminent, Hosseinipour was without a developed defense, and Manning was scared she would fire him. Then, at that point, yet again mirroring the deficient representation found in *Byrd*, Manning ignored Hosseinipour’s interest in pleading guilty.

Courts also find the “failure to perform legal research to be ineffective performance by an attorney.” *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014); *Howard v. United States*, 743 F.3d 459, 468 (6th Cir. 2014)(“Counsel cannot blunder into court without having performed basic research and preparation.”). Here, Manning did not have access to a paid legal research service and did no legal research. His briefs include no cases except for ones he copied from other briefs. Plagiarism cannot make up for a lack of research and preparation.

After a defendant establishes her counsel failed to meet the objective standard of reasonableness, she must also “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. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. *Id.* “[T]he essential question is whether better lawyering would have produced a better result.” *Ward v. United States*, 995 F.2d 1317, 1321 (6th Cir. 1993). Here, Hosseinipour would have had a different result with experienced, competent, professional counsel.

The prejudice is apparent. Prejudice can be presumed. The Supreme Court permits the presumption of prejudice where there was a “complete denial of counsel.” *Bell v. Cone*, 535 U.S. 685, 695 (2002). Here, Hosseinipour was never advised of the elements of the crimes she was charged, never received sentencing information, was not apprised of the evidence the Government had against her, and was represented by an attorney who did not understand how the plea bargain process worked despite the fact that more than 95% of defendants plead. Additionally, going into trial, counsel for Hosseinipour failed to review the evidence and did not perform legal research regarding the elements of a pyramid scheme. This was a complex case where research was paramount. Conspiracy to commit securities fraud was charged, and Hosseinipour’s counsel did not understand the difference between securities law and secured transactions. (R.691, #9766).

As has been explained, Hosseinipour had no defense because her counsel did provide her one. Hosseinipour’s counsel did not meaningfully subject the Government’s case to an adversarial test. *Bell*, 535 U.S. at 695. Hosseinipour’s counsel focused on charging decisions and brought in extraneous information that was not exculpatory and hurt Hosseinipour more than it helped. This also allows for prejudice to be presumed.

Even if it is not presumed, Hosseinipour was prejudiced. A plea deal that would result in no prison sentence was rejected and the prosecutor’s repeated inquiries about whether Hosseinipour would accept a plea offer were not communicated to her after the March Meeting; Manning also ignored her requests to contact the prosecution about a deal. (R.578-1 ¶¶ 38–40.) Manning’s failure to provide informed legal advice prevented Hosseinipour from accepting a deal without prison time. (R.578-2, ¶ 18.)

In the context of plea bargaining, the second prong of the *Strickland* test requires a defendant show a “reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.” *Lafler v. Cooper*, 566 U.S. 156, 162–64 (2012). An attorney’s failure to provide information about possible sentence exposure supports a finding that a defendant was not able to make an intelligent decision about whether to enter into a plea deal, and thus that the results of the proceeding would have been different but for the ineffective assistance of counsel. *Id.*

Importantly, a defendant’s knowledge of a plea offer, assertions of innocence, and predisposition to reject a plea are not enough to establish that a defendant would not have accepted a plea. *Smith v. United States*, 348 F.3d 545, 551–53 (6th Cir. 2003). Even more, the Sixth Circuit has held that a defendant’s professions of her innocence and desire to be acquitted especially do not support a finding that the defendant would not have pled guilty when the defendant was misinformed by counsel’s “faulty advice,” since the defendant has no reliable metric to assess the possible outcomes of pleading guilty or going to trial. *Byrd v. Skipper*, 940 F.3d 248, 258–59 (6th Cir. 2019). Here, Hosseinipour did not receive the information that her counsel was required to provide her. Instead, she was told she could not plead because that would be perjury. If she had plead guilty, she likely would have receive probation. At minimum, she would have received a shorter sentence. Thus, she was prejudiced.

“The right of a defendant to testify at trial is a constitutional right of fundamental dimension and is subject only to a knowing and voluntary waiver by the defendant.” *United States v. Webber*, 208 F.3d 545, 550 (6th Cir. 2000). “The defense counsel's role is to advise the defendant whether or not the defendant should take the stand, but it is for the defendant, ultimately, to decide.” *Id.*

Here, the court instructed Hosseinipour and her counsel that Hosseinipour’s counsel was “driving the boat” as it relates to whether Hosseinipour would testify. (R.700, #10681). Thus, the court improperly interfered with Hosseinipour’s right to testify and chilled the exercise of that right as Hosseinipour was led to believe that her trial counsel could make the final call.

The court was on notice that Hosseinipour “definitely says she’s testifying… no matter what I tell her, she’s not going to listen to me about it.” (R.700, #10681). Thus, it had an independent duty to inquire about whether Hosseinipour wanted to testify. The court’s failure to confirm whether Hosseinipour wanted to testify after being told that she did further supports reversal. Hosseinipour was deprived the chance to provide exculpatory testimony, and there is a reasonable probability that she would not have been convicted if the jury could have heard from her.

It was the court’s impression that without Anzalone’s testimony, “these convictions might not have happened.” (R.675, #7855). Anzalone was the critical witness. The Government called him “invaluable.” (*Id.* at #7857). The court may no other findings as to the evidence against Hosseinipour. (*See* R. 630, #6167). The Government misused Anzalone’s guilty plea to prove Hosseinipour’s guilt. With effective counsel, Hosseinipour could have prevented the Government from using Anzalone’s guilty plea as substantive evidence and equating Anzalone’s guilt with Hosseinipour’s guilt. Further, Hosseinipour wrote out 150 questions to ask Anzalone, and Manning did not use them. He recognized that there were questions he did not ask. Overall, Anzalone’s testimony was relatively favorable as he said that Hosseinipour did not intend to hurt anyone, and he did not know they were do anything wrong. A better lawyer could have built a defense from his exculpatory statements. Additionally, there were numerous exhibits entered into evidence where only a snippet of audio was played, but the videos had great exculpatory value. Because Manning struggled with the technology and did not have a strategy, he did not use those to prove Hosseinipour’s innocence. (*See* U.S. Exhibit 155, 20:45-21:00; U.S. Exhibit 144, 20:45-21:21:25; US Exhibit 178, 8:40-8:45; US Exhibit 178, 16:21-16:30). Hosseinipour’s counsel did not retain an expert and did not ask any questions to defense’s expert who rebutted Keep because he failed to get the court’s attention. Additionally, Hosseinipour’s counsel forgot he had a copy of Hosseinipour’s statements to Sauber, so he was never able to use them at trial. Hosseinipour’s counsel could have introduced exculpatory statements from Hosseinipour to support her credibility, and he failed to do so because he forgot about it.

Viewed together, the result would have been different if Hosseinipour received effective counsel.

**II. THE COURT ABUSED ITS DISCRETION IN DENYING A HEARING.**

At minimum, the court abused its discretion when it denied a motion for a hearing on Hosseinipour’s ineffective-assistance argument. This Court simply “require[s] a defendant to produce at least a modicum of evidence in support of a request for an evidentiary hearing on a motion for a new trial based on ineffective assistance of counsel.” *United States v. Allen*, 254 F. App’x 475, 478 (6th Cir. 2007).

The court abused its discretion by denying the motion based on this incorrect finding. A defendant is required to produce only a “modicum of evidence in support of a request for an evidentiary hearing on a motion for a new trial based on ineffective assistance of counsel.” *United States v. Allen*, 254 F. App’x 475, 478 (6th Cir. 2007). The three affidavits attached to Hosseinipour’s motion more than meet this hurdle.

Additionally, the court abuses its discretion when it relies on clearly erroneous facts. Here, the court refused to hold a hearing based on its recollection of the trial and the record. (R.630, #6162, fn.1). The court recalled that it had asked Hosseinipour *Frye* questions on the record and that she answered those questions affirmatively.[[2]](#footnote-2) (R.630, #6164). However, the court did not pose those questions. (R.630, #6164). And, Hosseinipour naturally did not answer those questions. (R.630, #6164). Thus, the denial of the hearing was based on an erroneous finding of fact and necessarily warrants reversal. *See United States v. Jones*, 980 F.3d 1098, 1112 (6th Cir. 2020)(“A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”). Not only was the order plainly factually erroneous, it was also legally erroneous. The court relied on the standard of review for habeas petitions of state-court convictions to reject Hosseinipour’s arguments. (*See* R.630, #6363 fn.2).

In addressing the prejudice bar, the court failed to address whether Hosseinipour was prejudice by not having effective counsel regarding whether to plead guilty. Instead, in only addressing whether her counsel’s performance at trial prejudiced her, the court determined that there was substantial evidence of Hosseinipour’s involvement in the scheme, so she could not satisfy the prejudice prong. As with the rest of the court’s order, the reasoning here is similarly faulty. Involvement in the Emperor program is not a crime. Moreover, participation in a scheme to defraud is not a crime. The court’s analysis omits (1) whether the scheme was fraudulent, (2) whether she knowingly participated in the scheme, and (3) whether she did so with the intent to defraud. Finding no prejudice based on this analysis was plainly an abuse of discretion.

Hosseinipour met the burden of offering a modicum of evidence in support of her request for an evidentiary hearing, and the court abused its discretion in denying her request.

1. The use of the word abdicated is not meant to imply that Manning was meeting his duties to his client prior to this colloquy. [↑](#footnote-ref-1)
2. The court’s reliance on facts that simply did not occur to deny Hossineipour’s motion for acquittal and a hearing and then force her to begin serving her sentence while her appeal was pending is deeply troubling. This Court subsequently ordered Hosseinipour released while the appeal is pending. [↑](#footnote-ref-2)