

No. 08-3269

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

FREDRICK H. LENOVER,
Movant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Indiana
Case No. 2:07-cv-369-LJM-JMS
The Honorable Larry J. McKinney

**BRIEF AND CIRCUIT RULE 30(a) APPENDIX
FOR MOVANT-APPELLANT FREDRICK H. LENOVER**

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Appellate Court No: 08-3269

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STATEMENT CONCERNING ORAL ARGUMENT

Movant-Appellant Fredrick Lenover, by undersigned counsel, respectfully requests oral argument. In this case, the district court mischaracterized Lenover's claim of ineffective assistance of counsel and then erroneously denied his § 2255 motion raising that claim without holding an evidentiary hearing. Lenover alleges, and has offered substantial evidence, that misadvice from his criminal trial counsel about the strength of the government's case and other important matters led him to reject government plea agreements offering sentences many years shorter than the sentence he received after going to trial. That showing warrants an evidentiary hearing on Lenover's ineffective assistance claim. Lenover and his counsel in this appeal believe oral argument would assist the Court in reviewing the district court's erroneous decision.

JURISDICTIONAL STATEMENT

Fredrick Lenover filed this suit under 28 U.S.C. § 2255 in order to collaterally attack the sentence he received after being convicted of conspiring to distribute, and to possess with the intent to distribute, a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 846. The district court therefore had subject matter jurisdiction over this case under 28 U.S.C. § 1331, which grants district courts original jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." *See Harris v. Warden*, 425 F.3d 386, 388 (7th Cir. 2005).

In this appeal from the denial of Lenover's § 2255 motion, this Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the order denying the § 2255

motion is a final decision of a United States district court. The district court entered a Judgment dismissing Lenover's § 2255 motion on July 8, 2008. Judgment (R 10; AA 4).¹ Lenover timely filed a Notice of Appeal and a Motion for a Certificate of Appealability on August 25, 2008. Notice of Appeal (R 11); S.D. Ind. Mot. for CoA (R 13); *see* Fed. R. App. P. 4(a)(1)(B), 5(a)(2). The district court denied the Motion for a Certificate of Appealability on September 3, 2008. 9/3/08 Entry (R 17; SA 82-83). In the Seventh Circuit, Lenover filed another Motion for Certificate of Appealability on October 24, 2008. 7th Cir. Mot. for CoA (Doc. 7). This Court granted a certificate of appealability on January 9, 2009, allowing Lenover to pursue his appeal under 28 U.S.C. § 2253(c)(1)(B). 1/9/09 Order (Doc. 8; SA 84).

STATEMENT OF THE ISSUE PRESENTED

Did the district court correctly deny Lenover's § 2255 motion without holding an evidentiary hearing even though substantial evidence supports Lenover's claim that he received ineffective assistance of counsel when his criminal trial counsel caused him to reject favorable plea agreement offers by misadvising him about the strength of the government's case and other important matters?

¹ In record citations, "R __" refers by document number to documents in the one volume of pleadings from the § 2255 proceedings. "SR __" refers by document number to documents in the two volumes of pleadings from the underlying criminal proceedings. "Trial Tr. __ at __" refers by volume and page number to the transcript of the trial in the underlying criminal proceedings. "Sentencing Tr. at __" refers by page number to the transcript of Lenover's sentencing hearing in the underlying criminal proceedings. All referenced documents from the underlying criminal proceedings have been made a supplemental record in this appeal. "Doc. __" refers by document number to documents filed or entered in this appeal. "AA __" refers by page number to the Appendix attached to this brief. "SA __" refers by page number to the Separate Appendix that accompanies this brief.

STATEMENT OF THE CASE

In June 2002, a federal grand jury in the Southern District of Indiana indicted Fredrick Lenover, charging that he conspired with five co-defendants and others to distribute, and to possess with the intent to distribute, more than 500 grams of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846. Indict. (SR 1). Through a pair of subsequent superseding indictments, the government added nine more defendant co-conspirators and otherwise supplemented its allegations. Superseding Indict. (SR 19); 2d Superseding Indict. (SR 36). On May 16, 2003, the United States Attorney filed an Information pursuant to 21 U.S.C. § 851(a)(1) against Lenover alleging that he committed the charged conspiracy after having been convicted of a prior felony offense related to controlled substances, making him subject to a minimum sentence of 20 years under 21 U.S.C. § 841(b)(1)(A). Information (SR 89).

Trial commenced three days later, on May 19, 2003, before then-Chief District Judge Larry J. McKinney. 5/19/03 Courtroom Minutes (SR 94). As a result of guilty pleas by most of the defendants, the government proceeded to trial only against Lenover and four other defendants. *Id.* On June 3, 2003, the jury returned guilty verdicts against Lenover and his four co-defendants. Verdict (SR 104). At an August 14, 2003 sentencing hearing, the district court announced a sentence of 29 years and two months of imprisonment and 10 years of supervised release for Lenover. Sentencing Tr. at 9-10. On August 27, 2003, the district court entered judgment on the conviction and sentence. Judgment (SR 109). The district court

amended the judgment on September 4, 2003 to correct a clerical mistake. Am. Judgment (SR 112; SA 1-6).

Lenover separately appealed both judgments to the Seventh Circuit, where the Court consolidated his appeals (Nos. 03-3347 & 03-3532) with appeals by the four defendants tried alongside Lenover and one defendant who had pleaded guilty. On May 23, 2005, this Court affirmed Lenover's conviction (and the convictions of his co-defendants), but directed a limited remand on sentencing issues pursuant to *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005). *United States v. Gray*, 410 F.3d 338, 349 (7th Cir. 2005) (SA 18). On remand, the district court stated that it would have imposed the same sentence on Lenover if it had treated the Sentencing Guidelines as merely advisory. 8/30/05 Order (SR 130; SA 19). Because the district court did not explain its decision to leave the sentences given to Lenover and three other defendants unchanged, this Court directed another limited remand. *United States v. Lenover*, 157 F. App'x 917, 920 (7th Cir. 2005) (SA 23). The district court responded with another, more detailed order confirming that it would give Lenover the same sentence under the now-advisory Sentencing Guidelines. 3/17/06 Order (SR 133; SA 24-26). This Court then affirmed Lenover's sentence on May 30, 2006, after receiving no objection to the district court's order. *United States v. Lenover*, 182 F. App'x 563, 566 (7th Cir. 2006) (SA 30).

Lenover filed a *pro se* petition for a writ of certiorari challenging his conviction on August 25, 2006. The Supreme Court denied the petition on January 8, 2007. *Lenover v. United States*, 549 U.S. 1153 (2007) (SA 33).

On December 20, 2007, Lenover timely filed a *pro se* motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. 2255 Mot. (R 1). Lenover alleged that he received ineffective assistance of counsel, in violation of the Sixth Amendment, when his attorney caused him to reject two plea offers by misadvising him about the strength of the government’s case and other important matters. 2255 Mem. at 2 (R 2; SA 35). The district court, Judge McKinney presiding, ordered the government to answer the motion. 1/10/08 Entry (R 3). After the government did so and Lenover replied, the district court—without conducting an evidentiary hearing—denied the § 2255 motion on July 8, 2008. 7/8/08 Entry (R 9; AA 1-3).

Lenover filed a notice of appeal and a motion for a certificate of appealability on August 25, 2008. Notice of Appeal (R 11); S.D. Ind. Mot. for CoA (R 13). The district court denied the motion for a certificate of appealability on September 3, 2008. 9/3/08 Entry (R 17; SA 82-83). Lenover then filed a motion for a certificate of appealability in the Seventh Circuit. 7th Cir. Mot. for CoA (Doc. 7). On January 9, 2009, this Court granted a certificate of appealability on the issue of “whether counsel provided ineffective assistance during plea negotiations.” 1/9/09 Order (Doc. 8; SA 84). On appeal, Lenover asks that this Court vacate the district court’s decision and remand his Sixth Amendment claim for an evidentiary hearing.

STATEMENT OF FACTS

A. Lenover's Legal Representation In Pretrial Proceedings And Plea Negotiations.

In the immediate wake of the June 2002 Indictment, an attorney by the name of James O. Hanner represented Lenover in the criminal proceedings. Appearance (SR 10). When the government filed the first Superseding Indictment, however, Hanner withdrew, citing a conflict arising from his representation of a newly named co-defendant. Mot. to Withdraw (SR 23). On or about September 13, 2002, the district court granted the motion to withdraw and, after finding Lenover financially unable to retain counsel, appointed Richard L. Ford as successor counsel. 9/13/02 Entry (SR 27). At about the same time, Ford obtained a waiver of arraignment from Lenover and said he would meet with Lenover again after he retrieved the case files from Hanner. Lenover Aff. ¶ 2 (R 2, Ex. 2; SA 52).

When Ford and Lenover subsequently met on or about September 17, 2002, Ford reported that the government appeared to have little more against Lenover than "cryptic telephone conversations" recorded through various wiretaps. *Id.* ¶ 4 (SA 53). Also, according to Lenover, Ford told Lenover that the government was offering him a 10-year prison sentence in exchange for a guilty plea. *Id.* ¶ 3 (SA 52-53). Based on Ford's suggestion that the government's case against him was weak, Lenover rejected the 10-year plea offer. *Id.* ¶ 4 (SA 53).

In an October 7, 2002 letter to Lenover, Ford reiterated his view that the government had little evidence against Lenover. 10/7/02 Ltr. (R 2, Ex. 1; SA 51). He wrote:

I have almost completed reviewing the discovery and information provided by the United States Government in this case. As soon as I complete my review, I will be over to meet with you to discuss my findings and my analysis of this case. At least initially it appears that the government has little more than the cryptic telephone conversations you and I discussed during my last visit.

In any event, I will keep you advised of any further developments and I should be over to visit with you shortly assuming I can negotiate the Covered Bridge Festival traffic.

Id.

Ford did not meet with Lenover again until December 2002. Lenover Aff. ¶ 6 (R 2, Ex. 2; SA 53). At that meeting, Ford simply obtained a waiver of arraignment on the Second Superseding Indictment. *Id.* Ford did not update Lenover on the government's case. *Id.*

After that meeting, Lenover did not see Ford again until a May 8, 2003 pretrial hearing. *Id.* ¶ 7 (SA 53); 11/26/07 Ltr. at 1 (R 8, Ex. 3; SA 80); 2255 Reply at 8 (R 8; SA 73). When they met, Ford told Lenover that the government was offering a 15-year sentence in exchange for a guilty plea. Lenover Aff. ¶ 7 (R 2, Ex. 2; SA 53); 11/26/07 Ltr. at 1 (R 8, Ex. 3; SA 80).² But neither at that meeting, nor at any time after their initial meeting, did Ford tell Lenover that the government's case was far from weak and consisted of much more than cryptic telephone conversations. Lenover Aff. ¶¶ 9, 11 (R 2, Ex. 2; SA 54). By May 8, 2003, Ford knew (or should have known) from the Second Superseding Indictment and various pre-trial filings by the government that: (a) the government intended to put on an

² While the prosecutor admits that he offered Lenover a plea bargain, he claims that he offered only a 20-year sentence. Blackington Decl. ¶ 3 (R 7, Ex. A; SA 64-65). Lenover and Ford agree that the offer was for a 15-year sentence. Lenover Aff. ¶ 7 (R 2, Ex. 2; SA 53); 11/26/07 Ltr. at 1 (R 8, Ex. 3; SA 80).

expert who would decode the supposedly cryptic telephone conversations and testify that the calls described the efforts of Lenover and other alleged conspirators to arrange for the distribution of methamphetamine (4/8/03 Notice at 2-4 (SR 70)); (b) the government had discovered methamphetamine, firearms, and other tools of the drug trade at Lenover's residence (2d Superseding Indict. at 5 (SR 36); 4/8/03 Notice at 6-7 (SR 70)); and (c) the government planned to have cooperating co-conspirators testify against Lenover and other defendants at trial (*e.g.*, 4/1/03 Resp. at 2 (SR 66); 4/9/03 Proffer at 6-8 (SR 71)).

Ford also never explained how principles of conspiracy liability would allow the government to hold Lenover responsible for the conduct of his alleged co-conspirators. Lenover Aff. ¶ 11 (R 2, Ex. 2; SA 54). According to Lenover, moreover, Ford did not advise him about his potential sentence following a conviction at trial. *Id.* ¶ 9 (SA 54); 2255 Reply at 6 (R 8; SA 71).³ And Ford never offered Lenover any advice on whether he should reject or accept any plea bargain offer. 2255 Reply at 10 (R 8; SA 75). Based entirely on Ford's uncorrected and inadequate advice, Lenover rejected the 15-year plea offer. Lenover Aff. ¶ 8 (R 2, Ex. 2; SA 54).

By contrast, the large majority of Lenover's co-defendants accepted plea agreements or simply pleaded guilty. Of his 14 co-defendants, 10 pleaded guilty.

³ To be sure, there is some evidence that Lenover was informed of the statutory maximum and minimum sentences he might face. 11/26/07 Ltr. at 1 (R 8, Ex. 3; SA 80); Notice of Penalties (SR 9); 1/8/03 Waiver (SR 45). But that evidence is disputed. 2255 Reply at 4-6 (R 8). And the evidence suggests that neither Ford nor anyone else ever advised Lenover regarding the sentence he could expect under the Sentencing Guidelines.

And none of those 10 received a sentence of more than 20 years.⁴ Yet several of the 10 pleading defendants (Hargrove, Kollar, Cheshire, and DuRegger) played a similar or greater role in the alleged conspiracy. 2d Superseding Indict. at 2-4 (SR 36). And a less-than-20-year sentence was available to those defendants even absent cooperation with the government. Cheshire and DuRegger, two defendants higher up the alleged distribution chain than Lenover, received sentences of 19 years and 17-and-a-half years, respectively, without supplying any cooperation. *Id.*; Gov't Sentencing Mem. at 7 (SR 128); Trial Tr. I at 18-19.

After Lenover rejected the May 8 plea offer and three days before trial, the government filed a previously withheld Information against Lenover. Information (SR 89). Pursuant to 21 U.S.C. § 851, the Information alleged that Lenover had a prior felony conviction related to controlled substances that made him subject to a minimum sentence of 20 years if convicted of the charged conspiracy. *Id.*

B. Trial, Sentencing, And Direct Appeal.

At trial, the evidence against Lenover was overwhelming. *See* Trial Tr. VI at 1370-71. The government proved that Lenover and other alleged conspirators were associated through the Diablos Motorcycle Club, of which Lenover was the Terre Haute chapter president, and paid their Club dues by selling methamphetamine.

⁴ According to docket sheets for the cases against the pleading defendants, which are available on the district court's website (<http://www.insd.uscourts.gov/>) and are subject to judicial notice (*Opoka v. INS*, 94 F.3d 392, 394-95 (7th Cir. 1996)), Samuel Hargrove received 12 years and seven months, Daniel Cheshire received 19 years, Marlene Manfreda received 6 years, Walter DuRegger, Jr. received 17-and-a-half years, Carol Benskin received 10 years, Vickie Nees received five years and three months, Charles Wright received 10 years, Kenneth Crynes received 10 years, Michael Kollar received 20 years, and John Durnin received five years.

Trial Tr. I at 262-64; Trial Tr. III at 709-13; Trial Tr. VI at 1345-46. Photographs and contact lists confirmed the connections among the conspirators. Trial Tr. II at 524; Trial Tr. III at 585, 696-703, 705-09, 826-27, 834; Trial Tr. IV at 907; Trial Tr. VI at 1347. One cooperating conspirator, Don Osborn, testified that he witnessed Lenover receive large quantities of methamphetamine and distribute that methamphetamine to others. Trial Tr. I at 275-76, 279; Trial Tr. VI at 1353. Indeed, Osborn expressly testified that Lenover supplied him with two pounds of methamphetamine on one occasion. Trial Tr. I at 283-86; Trial Tr. VI at 1354. And a recorded telephone conversation between Lenover and another conspirator, decoded by Osborn and the government's expert witness, corroborated Lenover's role in supplying Osborn on that occasion. Trial Tr. I at 283-85; Trial Tr. II at 372-74; Trial Tr. VI at 1357.

Other recorded telephone conversations proved that, on several other occasions, Lenover was charged with checking on shipments of methamphetamine to Indiana. Trial Tr. II at 361-63, 379, 389-92; Trial Tr. V at 1227-28; Trial Tr. VI at 1356, 1358-59. Still other recorded calls have Lenover arranging for the distribution of methamphetamine. Trial Tr. II at 367-68, 390-92; Trial Tr. VI at 1356-57. And on one recorded call, Cheshire enlists Lenover's help in finding a place to hide from authorities after telling Lenover that the police seized 11 pounds of methamphetamine that Cheshire had been carrying. Trial Tr. II at 396-99; Trial Tr. VI at 1360.

The government also introduced incriminating evidence found in a search of Lenover's residence. That evidence included 11.9 grams of methamphetamine and a pound of a substance used to dilute methamphetamine for distribution. Trial Tr. III at 670-82, 739, 766-71; Trial Tr. VI at 1349, 1370-71. Scales suitable for weighing large and small quantities of methamphetamine, a list of confidential informants and undercover law enforcement officers, and approximately 10 firearms were also found at Lenover's home and presented at trial. Trial Tr. III at 682-95, 703-05; Trial Tr. VI at 1349, 1370-71.

Against this formidable evidence, Ford was able to mount virtually no defense of Lenover. Ford's cross-examinations were ineffective. *See, e.g.*, Trial Tr. I at 301-08; Trial Tr. II 428-35; Trial Tr. III at 716-23; Trial Tr. V at 1243-46. Lenover did not testify. And Ford put on no witnesses. Trial Tr. V at 1289. Lenover never had a chance of acquittal. Indeed, it took the jury a mere four hours and 41 minutes to find Lenover and all of his co-defendants guilty. 6/3/03 Courtroom Minutes (SR 103).

Sentencing likewise was a *pro forma* affair. Ford made no objection to the proposed offense level (40), criminal history category (II), or sentencing range (27 to 33-and-three-quarters years) under the Sentencing Guidelines. Sentencing Tr. at 3-4.⁵ He suggested only that Lenover's advanced age (54 at the time) argued for a

⁵ The offense level of 40 resulted from a base level of 38—due to a determination that the conspirators trafficked approximately 640 pounds (290 kilograms) of methamphetamine during the course of the conspiracy—and a two level increase for possession of firearms. U.S. Sentencing Guidelines Manual § 2D1.1(b)(1), (c)(1). The criminal history category II resulted from three criminal history points due to

sentence on the low end of the range. *Id.* at 4. Because of the seriousness of Lenover’s offense and the strong evidence against him, the district court rejected Ford’s suggestion. *Id.* at 9. Instead, the district court sentenced Lenover to 29 years and two months in prison—at least 9 years (and perhaps as many as 19 years) more than the sentence offered to Lenover in exchange for a guilty plea. *Id.* at 10.

On appeal, this Court had little trouble affirming Lenover’s conviction. *Gray*, 410 F.3d at 344-47 (SA 13-16). Indeed, the Court rejected a claim that admission of wiretap orders was plain error because “[t]here was much more dramatic evidence of the guilt of the defendants.” *Id.* at 346 (SA 15). The Court did order a limited *Paladino* remand on sentencing issues (*id.* at 349 (SA 18)), but the district court easily concluded that the evidence against Lenover made his sentence appropriate under the now-advisory Sentencing Guidelines. 3/17/06 Order (SR 133; SA 24-26). Lenover did not object to that conclusion. *Lenover*, 182 F. App’x at 566 (SA 30).

C. Collateral Attack Proceedings.

Having realized that Ford misled him about the strength of the government’s case and otherwise misadvised him, Lenover filed a *pro se* § 2255 motion to vacate, set aside, or correct his sentence. 2255 Mot. (R 1). He alleged that his sentence violated the Sixth Amendment because Ford “rendered ineffective assistance during plea negotiations when he misadvised Lenover about the formidable nature of the government’s case against him, the desirability of two plea offers, and failed to warn him about the jeopardy to sentencing exposure should Lenover be convicted on the

Lenover’s prior felony conviction, for which he was sentenced to more than 13 months in prison. *Id.* § 4A1.1(a); *id.* ch. 5, pt. A.

Conspiracy Count of the Indictment after a jury trial.” 2255 Mem. at 2 (R 2; SA 35). As relief, Lenover requested an evidentiary hearing and the opportunity to accept either of the plea offers made to him. *Id.* at 14-15 (SA 47-48).

In support of his motion, Lenover submitted the October 7, 2002 letter in which Ford represented that “the government has little more than the cryptic telephone conversations you and I discussed.” 10/7/02 Ltr. (R 2, Ex. 1; SA 51). He also submitted a detailed and specific affidavit. Lenover Aff. (R 2, Ex. 2; SA 52-56). The affidavit recounts that Ford presented Lenover with 10- and 15-year plea offers from the government. *Id.* ¶¶ 3, 7 (SA 52-53). It also states that Ford indicated that the government’s case against Lenover was weak and that Ford never corrected that assessment. *Id.* ¶¶ 4, 6 (SA 53). The affidavit further explains that Ford never advised Lenover regarding his sentencing exposure or how the government could prove the conspiracy charge against him with the recorded conversations and hold him responsible for the conduct of his co-defendants. *Id.* ¶¶ 9, 11 (SA 54). Finally, the affidavit states that Ford’s misadvice and related omissions were “the only reason Lenover outright rejected the plea offers from the government” and that, had Ford correctly and adequately advised him, “he would have relinquished his right to trial and accepted either plea offer from the government.” *Id.* ¶¶ 13-14 (SA 54-55).

In its response to Lenover’s § 2255 motion, the government recharacterized Lenover’s claim as a complaint that Ford had failed to negotiate a satisfactory plea agreement or had failed to advise Lenover to accept a plea agreement. 2255 Resp. at 3 (R 7; SA 59). The government also denied that it ever offered a 10- or 15-year

plea agreement. *Id.* at 4 (SA 60). In support of its response, the government offered a declaration from the lead prosecutor. Blackington Decl. (R 7, Ex. A; SA 64-65). That declaration admits that the government offered Lenover a plea agreement, but maintains that the offer was for a 20-year sentence unless Lenover was willing to cooperate (which he was not). *Id.* ¶ 3 (SA 64-65).

Lenover's verified reply tried to undo the government's mischaracterization of his § 2255 motion, making clear that Ford had not advised Lenover to reject or accept the plea offers and that the quality of the plea offers is not the problem. 2255 Reply at 1, 10 (R 8; SA 66, 75). With his reply, Lenover also submitted a November 26, 2007 letter from Ford. 11/26/07 Ltr. (R 8, Ex. 3; SA 80-81). In that letter, Ford stated that, on May 8, 2003, the government made plea offers to all defendants in an effort to avoid a trial. *Id.* at 1 (SA 80). Significantly, Ford also wrote, "I believe your recollection that the offer made to you was for 15 years is correct." *Id.* Based on that letter and his other evidence, Lenover reiterated his request for at least an evidentiary hearing. 2255 Reply at 13 (R 8; SA 78).

Without even mentioning, much less granting, Lenover's request for an evidentiary hearing, the district court denied Lenover's § 2255 motion. 7/8/08 Entry (R 9; AA 1-3). The court first adopted the government's mischaracterization of Lenover's claim, writing that Lenover contended "that his attorney was ineffective in failing to discuss in a meaningful manner with Lenover a plea agreement satisfactory to Lenover." *Id.* at 2 (AA 2). Then—ignoring the November 26 letter from Ford confirming a 15-year plea offer—the court asserted that "[t]he plea

Lenover describes in his § 2255 motion was never made.” *Id.* at 3 (AA 3). Not grasping that Lenover rejected the plea offers because Ford misadvised him about the strength of the government’s case, the district court placed weight on the evidence that Ford conveyed and Lenover rejected “*whatever* offer was made” and that (according to Ford’s November 26 letter) Lenover was “opposed to a plea which would result in jail time.” *Id.* The court also mistakenly opined that “cooperation would have been a condition of any [plea] agreement,” contrary to the lead prosecutor’s own declaration. *Id.* Based on this analysis, the court concluded that “Lenover has shown neither deficient performance nor prejudice from his attorney’s failure to convey and discuss with him a non-existent plea offer from the United States.” *Id.*

Lenover appealed and filed a motion for a certificate of appealability, pointing out the many factual and legal errors in the district court’s § 2255 ruling. Notice of Appeal (R 11); S.D. Ind. Mot. for CoA (R 13). The district court refused to grant a certificate of appealability for the reasons stated in its § 2255 ruling. 9/3/08 Entry at 1 (R 17; SA 82). The district court also ruled that Lenover could not proceed *in forma pauperis* on appeal because, in the court’s view, Lenover was appealing in “bad faith.” *Id.* at 2 (SA 83). To the court, there was “no objectively reasonable argument which the movant could present to argue that the disposition of this action was erroneous.” *Id.* at 1-2 (SA 82-83).

Disagreeing with that assessment, this Court granted Lenover a certificate of appealability (and allowed him to proceed *in forma pauperis*). 1/9/09 Order (Doc. 8; SA 84). The Court's order states:

We find that Lenover has made a substantial showing of the denial of a constitutional right as to whether counsel provided ineffective assistance during plea negotiations. In addition to any other issues identified by counsel, the parties should address the district court's interpretation of trial counsel's letter of November 26, 2007.

Id. (citation omitted).

SUMMARY OF ARGUMENT

A district court may not deny a § 2255 motion without holding an evidentiary hearing unless the papers “conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). Yet the district court denied Lenover's § 2255 motion without holding an evidentiary hearing, despite the fact that Lenover offered ample evidence that his trial attorney rendered ineffective assistance of counsel, in violation of the Sixth Amendment.

Lenover made the necessary showing that his trial attorney performed deficiently. Lenover's attorney did not fulfill at least four crucial duties. He did not accurately apprise Lenover of the strength of the government's case. He did not advise Lenover on the attractiveness of the government's plea offers. He did not inform Lenover of the relevant conspiracy law principles. And he did not accurately estimate a likely sentence after conviction.

Lenover also made the necessary showing that his trial attorney's deficient performance prejudiced him. Lenover expressly attested that, but for his attorney's misadvice, he would have accepted the government's plea offers. And his sworn

statement is corroborated by three types of objective evidence: (1) the overwhelming evidence against Lenover in the criminal proceedings, (2) the significant disparity between his actual sentencing exposure and any exposure about which Lenover may have known or any sentence available under the government's plea offers, and (3) the fact that most of Lenover's co-defendants accepted plea agreements or simply pleaded guilty.

Because that evidence precludes a conclusive showing that Lenover is not entitled to relief, the district court should have conducted an evidentiary hearing instead of denying Lenover's § 2255 motion. This Court should therefore vacate the denial of Lenover's § 2255 motion and remand for an evidentiary hearing. Lenover also asks that the Court reassign the case on remand, in light of the district judge's history with this case.

STANDARD OF REVIEW

"When a district court denies a § 2255 motion," this Court reviews "findings of fact for clear error and rulings of law de novo." *Corral v. United States*, 498 F.3d 470, 473 (7th Cir. 2007). The "denial of an evidentiary hearing" is reviewed "for abuse of discretion" (*Osagiede v. United States*, 543 F.3d 399, 408 (7th Cir. 2008)), something that occurs any time a district court commits a legal error (*United States v. Ligas*, 549 F.3d 497, 501 (7th Cir. 2008)).

ARGUMENT

Section 2255 is explicit that a district court may not deny a § 2255 motion without holding an evidentiary hearing "[u]nless the motion and the files and

records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b); *see also Fontaine v. United States*, 411 U.S. 213 (1973) (applying § 2255(b) to vacate pre-evidentiary-hearing denial of § 2255 motion). The district court failed to demand such a showing. And no such showing was made. To the contrary, there is substantial evidence that Lenover’s trial attorney, Richard Ford, supplied ineffective assistance in advising Lenover regarding the government’s plea offers, in violation of the Sixth Amendment. Accordingly, the district court erred by denying Lenover’s § 2255 motion without conducting an evidentiary hearing, that decision should be vacated, and this case should be remanded for an evidentiary hearing.

I. There Is Substantial Evidence That Lenover Received Ineffective Assistance Of Counsel In Plea Negotiations.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”); *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). That right fully applies to the plea bargaining process. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985); *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). A defendant claiming (as Lenover does) that counsel’s ineffective assistance led him to mistakenly reject a plea offer must show two things to establish a Sixth Amendment violation. First, the defendant must show deficient performance—that “counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688; *see also Hill*, 474 U.S. at 58-59; *Julian v. Bartley*, 495 F.3d 487, 494-95 (7th Cir. 2007). Second,

the defendant must show prejudice—that “there is a reasonable probability that, but for counsel’s inadequate performance, he would have accepted the government’s offer.” *Paters v. United States*, 159 F.3d 1043, 1047 (7th Cir. 1998); *see also Hill*, 474 U.S. at 59. Lenover made a sufficient showing on both elements to avoid a denial of his § 2255 motion before an evidentiary hearing.

A. Trial Counsel’s Representation Was Objectively Unreasonable.

The representation of a criminal defendant falls below an objective standard of reasonableness when counsel gives advice that is “not within the range of competence demanded of attorneys in criminal cases.” *Julian*, 495 F.3d at 495. This Court has made clear that, in the plea bargaining context, “[a] reasonably competent attorney will attempt to learn all of the facts of the case, make an estimate of the likely sentence, and communicate the result of that analysis” before allowing his client to decide on a plea offer. *Id.*; *see also Smith v. United States*, 348 F.3d 545, 553 (6th Cir. 2003) (“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.”). Indeed, “[p]rior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.” *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion). The district court thus erred as a matter of law in ruling

that Ford did all that is required by merely conveying the government's plea offers to Lenover. 7/8/08 Entry at 3 (R 9; AA 3).

In reality, Ford failed to fulfill at least four basic duties in representing Lenover. First, Ford misadvised Lenover on the strength of the government's case. Ford told Lenover that the government had "little more than the cryptic telephone conversations" against him. Lenover Aff. ¶ 4 (R 2, Ex. 2; SA 53); 10/7/02 Ltr. (R 2, Ex. 1; SA 51). By the time Lenover rejected the government's final plea offer, it was obvious from government filings that the government had much more against Lenover than "cryptic telephone conversations"—including an expert to decode those conversations, testimony from cooperating conspirators, and methamphetamine and tools of the drug trade found at Lenover's home. *See* pp. 9-11, *supra*. Yet Ford never corrected his original assessment of the government's case or otherwise informed Lenover that the evidence against him was actually overwhelming. Lenover Aff. ¶¶ 9, 11 (R 2, Ex. 2; SA 54). He did not perform his duty to "learn all of the facts of the case" and "communicate the result of that analysis" to Lenover. *Julian*, 495 F.3d at 495. Instead, he gave Lenover advice that "was clearly wrong and therefore objectively unreasonable." *Id.*

Second, Ford made no recommendation at all on whether Lenover should accept or reject the government's plea offers. 2255 Reply at 10 (R 8; SA 75). Particularly given the overwhelming evidence against Lenover, Ford's failure to make any plea recommendation, by itself, amounts to objectively unreasonable representation. *See Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996) (ineffective

assistance where lawyer failed to recommend guilty plea in face of overwhelming evidence). “A defense lawyer in a criminal case has the duty to advise his client fully on *whether a particular plea to a charge appears to be desirable.*” *Id.* at 496 (quoting Model Code of Prof'l Responsibility EC 7-7 (1992)); *see also Von Moltke*, 332 U.S. at 721 (plurality opinion) (“an accused is entitled to rely upon his counsel . . . to offer his informed opinion as to what plea should be entered”); *United States v. Herrera*, 412 F.3d 577, 580 (5th Cir. 2005) (“One of the most important duties of an attorney representing a criminal defendant is advising the defendant about whether he should plead guilty.”). Moreover, by telling Lenover that the government’s case was weak, Ford led Lenover to believe that there was no reason to enter a plea agreement. 2255 Mem. at 6 (R 2; SA 39); 2255 Reply at 10 (R 8; SA 75). That conduct, too, falls outside the range of competent representation. Advising a client “to reject a plea bargain in the face of overwhelming evidence of guilt and an absence of viable defenses” can support an ineffective assistance claim. *Gallo-Vasquez v. United States*, 402 F.3d 793, 798 (7th Cir. 2005).

Third, Ford never informed Lenover that, under conspiracy law, Lenover could be held responsible for the conduct of his alleged co-conspirators. Lenover Aff. ¶ 11 (R 2, Ex. 2; SA 54). Conspiracy and like theories of vicarious liability are a source of confusion for criminal defendants. *See Von Moltke*, 332 U.S. at 721 (plurality opinion); *id.* at 728 (Frankfurter, J.); *Pham v. United States*, 317 F.3d 178, 183 (2d Cir. 2003). It is therefore particularly important for an attorney representing a client charged with conspiracy to fulfill his duty “to inform his client

of the relevant law” (*Finch v. Vaughn*, 67 F.3d 909, 916 (11th Cir. 1995) (quoting *Hill*, 474 U.S. at 62 (White, J., concurring))) and “explain[] the elements necessary for the government to secure a conviction” (*Smith*, 348 F.3d at 553). Ford did not fulfill that duty. His failure to inform Lenover of the relevant conspiracy law principles thus “clearly satisfies” the deficient performance element of an ineffective assistance claim. *Finch*, 67 F.3d at 916 (quoting *Hill*, 474 U.S. at 62 (White, J., concurring)).

Finally, Ford failed to adequately advise Lenover about the sentence he would likely receive if he went to trial and was convicted. Lenover Aff. ¶ 9 (R 2, Ex. 2; SA 54). Even if Lenover was informed of the statutory minimum and maximum sentences, there is no evidence that Ford (or anyone else) explained to Lenover the type of sentence he could expect under the Sentencing Guidelines. Indeed, in recounting the sentencing information he supposedly provided to Lenover, Ford makes no mention of the Sentencing Guidelines. 11/26/07 Ltr. at 1 (R 8, Ex. 3; SA 80). Lenover’s sentencing range under the Guidelines started at 27 years—seven years more than the statutory minimum—which makes a 10-, 15-, or even 20-year sentence much more appealing. Sentencing Tr. at 3-4. Precisely because the Sentencing Guidelines can so greatly influence a defendant’s expected sentence, “[a]pprising a defendant about his exposure under the sentencing guidelines is necessarily part” of advising a defendant about whether to plead guilty. *Herrera*, 412 F.3d at 580; *see also Smith*, 348 F.3d at 553 (“In a system dominated by sentencing guidelines, we do not see how sentence exposure can be fully explained

without completely exploring the ranges of penalties under likely guideline scoring scenarios”). By not informing Lenover of his exposure under the Sentencing Guidelines, Ford failed to fulfill his duty to “make an estimate of the likely sentence” and “communicate the result of that analysis” to his client. *Julian*, 495 F.3d at 495. Ford thus again provided objectively unreasonable representation.

Any one of Ford’s failures to provide Lenover with competent representation could support an ineffective assistance of counsel claim. Together, Ford’s various misadvice and material omissions offer compelling evidence of constitutionally deficient performance. And nothing in the files and records in this case contradicts that evidence, much less conclusively shows that Ford represented Lenover in an entirely competent fashion. The district court thus erred by denying Lenover’s § 2255 motion before holding an evidentiary hearing on the competence of Ford’s representation.

B. But For Trial Counsel’s Misadvice, Lenover Would Have Accepted The Plea Agreements Offered By The Government.

To succeed on his ineffective assistance claim, Lenover must show not just that Ford provided objectively unreasonable representation, but also that “there is a reasonable probability that, but for counsel’s inadequate performance, he would have accepted the government’s offer.” *Paters*, 159 F.3d at 1047. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “[A] defendant need not show that counsel’s deficient conduct more likely than not altered the outcome.” *Id.* at 693. Rather “[t]he chances of prejudice need be only better than negligible.” *Julian*, 495 F.3d at 498.

The Ample Evidence of Prejudice. Given the minimal prejudice showing needed to prevent a denial of a § 2255 motion prior to an evidentiary hearing, the record contains more than sufficient evidence that Lenover would have accepted one of the government's plea offers, if properly advised. First, Lenover's affidavit specifically states:

Had Lenover been correctly advised about the formidable nature of the government's case against Lenover, the desirability of the plea offers, and informed of the jeopardy to sentencing exposure, he would have relinquished his right to trial and accepted either plea offer from the government.

Lenover Aff. ¶ 14 (R 2, Ex. 2; SA 55). Even if such statements from a defendant do not conclusively prove prejudice, they are competent and relevant evidence that a defendant would indeed have accepted a plea if properly advised. *Julian*, 495 F.3d at 499 (testimony from defendant supported claim that he would have accepted plea); *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998) (defendant's "statement concerning his intentions" supported prejudice finding); *Magana v. Hofbauer*, 263 F.3d 542, 551 (6th Cir. 2001) ("defendant's own declarations" help prove reasonable probability that defendant would have accepted plea offer); see also *Dalton v. Battaglia*, 402 F.3d 729, 735 (7th Cir. 2005) (self-serving affidavit by prisoner is competent evidence in post-conviction proceeding).

Second, the evidence against Lenover was truly overwhelming. See pp. 9-11, *supra*. There is no reason to think that, if Ford had told Lenover about the true strength of the government's case and advised him to accept a plea agreement, Lenover would have irrationally insisted on being convicted at trial. Indeed, because misadvice on the strength of the government's case and the desirability of a

plea agreement grossly misstates the risk of going to trial, it is precisely “the type of mis-information likely to impact a plea.” *Julian*, 495 F.3d at 499. Accordingly, prejudice can be inferred from such misadvice. *Boria*, 99 F.3d at 497 (had lawyer advised defendant that acquittal was almost impossible, “there would have been more than a ‘reasonable probability’” that defendant would have accepted plea bargain).

Third, the 27-year minimum sentence Lenover actually faced under the Sentencing Guidelines is at least 7 years longer than any statutory minimum about which Lenover may have been informed or any plea offer the government made. *Compare* Sentencing Tr. at 3, *with* Notice of Penalties (SR 9), Lenover Aff. ¶¶ 3, 7 (R 2, Ex. 2; SA 52-53), *and* Blackington Decl. ¶ 3 (R 7, Ex. A; SA 64-65).⁶ Those kinds of disparities are evidence that, if properly advised about the strength of the government’s case and his sentencing exposure, Lenover would have accepted a plea bargain. *Julian*, 495 F.3d at 498-99 (disparity between exposure advice and actual exposure showed prejudice); *Smith*, 348 F.3d at 552 (“disparity between the plea offer and the potential sentence exposure” is “strong evidence of a reasonable probability that a properly advised defendant would have accepted a guilty plea

⁶ The sentence that Lenover could have obtained by entering a plea agreement is hotly contested. The lead prosecutor has averred that the government offered only a 20-year sentence. Blackington Decl. ¶ 3 (R 7, Ex. A; SA 64-65). Lenover has attested that he was offered a 10-year sentence and a 15-year sentence. Lenover Aff. ¶¶ 3, 7 (R 2, Ex. 2; SA 52-53). Ford has corroborated that Lenover was offered a 15-year sentence. 11/26/07 Ltr. at 1 (R 8, Ex. 3; SA 80). Even if the lead prosecutor were correct—something that could be decided only after an evidentiary hearing—a significant 7-year disparity would still exist between the plea offer and Lenover’s sentencing range. *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) (“any amount of actual jail time has Sixth Amendment significance”).

offer”); *Pham*, 317 F.3d at 183 (disparity between plea offer and actual sentence showed prejudice); *Gordon*, 156 F.3d at 381 (disparity between exposure advice and actual exposure under Sentencing Guidelines showed prejudice).

Finally, the large majority of Lenover’s co-defendants—10 of 14—accepted plea agreements or simply pleaded guilty, several on terms similar to those offered to Lenover. *See* p. 9, *supra*. That fact suggests that if Lenover had been as competently advised as the pleading defendants presumably were, he would have accepted a plea agreement. *Lalani v. United States*, 315 F. App’x 858, 859 (11th Cir. 2009) (per curiam) (fact that co-defendants pleaded guilty suggested that movants may have pleaded guilty if properly advised).

The Objective Evidence Rule. Of course, some Seventh Circuit decisions state that a defendant must offer “objective evidence” of prejudice to prove an ineffective assistance of counsel claim in the plea bargaining context. *E.g.*, *Paters*, 159 F.3d at 1046-47; *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991). But Lenover surely has cleared that hurdle. This brief just detailed how objective evidence—namely, evidence (a) that the government’s case against Lenover was overwhelming, (b) that Lenover’s actual sentencing exposure was much longer than what he was told and offered, and (c) that most of Lenover’s co-defendants pleaded guilty—corroborates Lenover’s uncontradicted affidavit testimony that he would have accepted the government’s plea offers had he received adequate advice. *See* pp. 25-26, *supra*.

This Court's decisions in *Julian* and *Paters* confirm that Lenover has come forward with enough "objective evidence" of prejudice to preclude denial of his § 2255 motion on the papers alone. In *Julian*, this Court granted the habeas corpus petition of a state prisoner who raised an ineffective assistance claim similar to Lenover's. 495 F.3d at 500. In finding a better-than-negligible chance that the defendant would have accepted a plea if properly advised as to his sentencing exposure, the Court pointed to three pieces of evidence: (1) Julian's testimony that "he would not have gone to trial but for the misinformation"; (2) Julian's decision to reject an offered plea after being misinformed by his attorney; and (3) the fact that the attorney's sentencing advice "grossly misstated the risk of going to trial." *Id.* at 499-500. Lenover's decision to go to trial may not have been as last minute as Julian's (because Lenover was misadvised from the outset), but the evidence in this case includes all of the other evidence in *Julian*, plus overwhelming evidence of Lenover's guilt and guilty pleas by most of Lenover's co-defendants.

In *Paters*, this Court remanded a § 2255 case involving another ineffective assistance claim similar to Lenover's for an evidentiary hearing. 159 F.3d at 1048-49. Excluding Paters's own declarations that he would have accepted a plea offer had his attorney not misadvised him that he could do no worse by going to trial, the Court found sufficient objective evidence of prejudice in (1) affidavits from Paters's parents stating that Paters's attorney gave that misadvice and (2) the government's concession that such misadvice was given. *Id.* at 1047-48. In other words, *Paters* accepted objective evidence of *deficient performance* as sufficient corroboration of

Paters's statement that he was prejudiced. Thus, even if Lenover's objective evidence of prejudice (*see pp. 25-26, supra*) were somehow inadequate, the objective evidence of Ford's deficient performance—namely, Ford's letter grossly understating the strength of the government's case (10/7/02 Ltr. (R 2, Ex. 1; SA 51)) and Ford's letter suggesting Lenover received no advice on his Sentencing Guidelines exposure (11/26/07 Ltr. at 1 (R 8, Ex. 3; SA 80))—would satisfy any “objective evidence” requirement. In short, under *Julian* and *Paters*, Lenover has offered enough “objective evidence” that he would have accepted the government's plea offers, if properly advised, in order to avoid denial of his § 2255 motion prior to an evidentiary hearing. *See also Pham*, 317 F.3d at 182; *United States v. Day*, 969 F.2d 39, 45-47 (3d Cir. 1992); *Griffin v. United States*, 330 F.3d 733, 738-39 (6th Cir. 2003).

Requiring any more evidence of prejudice—“objective” or otherwise—would contradict the express instruction of § 2255 that a motion may not be denied without an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). Setting a higher evidentiary bar is also at odds with the Supreme Court's *Strickland* decision, which rejected a more-likely-than-not standard in favor of a less demanding reasonable-probability standard. 466 U.S. at 693-94. Indeed, as Judge Rovner explained in her *Paters* concurrence, the basis for any “objective evidence” rule is weak. 159 F.3d at 1049-50. Neither *Strickland*, nor *Hill*, nor any other Supreme Court decision demands objective evidence to prove the prejudice

element of an ineffective assistance claim. And in contexts other than plea bargaining, this Court does not require “objective evidence” to prove prejudice. *Paters*, 159 F.3d at 1049 (Rovner, J., concurring); *see also Johnson v. Finnan*, 467 F.3d 693, 694 (7th Cir. 2006) (prisoner’s affidavit sufficient to force evidentiary hearing in prison discipline case); *Dalton*, 402 F.3d at 735 (prisoner’s self-serving affidavit is competent evidence in habeas case).

What is more, there is unlikely to be direct objective evidence regarding what a defendant would have done if he had been advised differently—only a defendant has such knowledge, and it is highly unlikely that he would memorialize his reaction to advice he did not receive when rejecting a plea offer. *Paters*, 159 F.3d at 1050 (Rovner, J., concurring). Plus, before an evidentiary hearing, a defendant likely will have little access to whatever corroborating evidence does exist. *Day*, 969 F.2d at 45-46. For precisely these reasons, the Sixth Circuit has rejected any “objective evidence” rule, the Third Circuit has declined to apply such a rule before an evidentiary hearing, the Ninth Circuit has criticized the rule, and the Second Circuit appears to have walked away from the rule. *Griffin*, 330 F.3d at 737-38 (“we in [the sixth] circuit have declined to adopt such a requirement”); *Day*, 969 F.2d at 45-46 (declining to impose, in Third Circuit, additional evidence requirement when defendant had not had chance to make full record); *Nunes v. Mueller*, 350 F.3d 1045, 1054 n.6 (9th Cir. 2003) (criticizing objective evidence rule); *Purdy v. Zeldes*, 337 F.3d 253, 259-60 (2d Cir. 2003) (rejecting idea that Second Circuit adopted “strict objective evidence rule”); *Cullen v. United States*, 194 F.3d

401, 407 (2d Cir. 1999) (claim that defendant would have accepted plea “ought not to be rejected” just because it is self-serving).

The District Court’s Ruling. In ruling that Lenover suffered no prejudice from Ford’s misadvice, the district court did not reference *Julian, Paters*, or any of the other decisions from this circuit and others that have considered ineffective assistance claims like Lenover’s. Nor did the district court appear to recognize that Lenover needed to show only a better-than-negligible chance of prejudice (*Julian*, 495 F.3d at 498) and that denying Lenover’s § 2255 motion without holding an evidentiary hearing requires proof conclusively refuting Lenover’s claim (28 U.S.C. § 2255(b)). Furthermore, the district court completely ignored not just Lenover’s affidavit testimony that, if properly advised, he would have accepted the offered plea agreements, but also the objective evidence corroborating that testimony. *See pp. 24-26, supra.*

Instead, the district court suggested that Lenover suffered no prejudice because he rejected the plea offers made to him and because, according to Ford’s November 26, 2007 letter, he did not want to enter a plea agreement that required jail time. 7/8/08 Entry at 3 (R 9; AA 3). However, as Lenover’s affidavit attests without contradiction, Lenover was opposed to a plea agreement only because he believed Ford’s representation that the government’s case was weak. Lenover Aff. ¶ 13 (R 2, Ex. 2; SA 54-55). His opposition to a plea agreement therefore is not proof that, had he been properly advised, he would have rejected the offered plea agreements. The district court simply misinterpreted Ford’s November 26, 2007

letter by failing to recognize that Lenover's reaction to the idea of a plea agreement was the product of Ford's misadvice.

The district court also suggested that Lenover suffered no prejudice because no plea agreement would have been possible unless Lenover cooperated with the government, which he was unwilling to do. 7/8/08 Entry at 3 (R 9; AA 3). The district court was mistaken. The lead prosecutor's declaration expressly admits that Lenover did not have to cooperate to enter a plea agreement—cooperation was required only if Lenover wanted less than 20 years in prison. Blackington Decl. ¶ 3 (R 7, Ex. A; SA 64-65).

In short, the district court erred in ruling that Lenover suffered no prejudice. The records and files simply do not conclusively show no reasonable probability that Lenover would have accepted a plea agreement, if properly advised by Ford. The district court therefore should not have denied Lenover's § 2255 motion without holding an evidentiary hearing on whether Lenover suffered prejudice from Ford's misadvice.

II. An Evidentiary Hearing Is Required In This Case.

As this brief has already noted, a district court must hold an evidentiary hearing on a § 2255 motion “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b); *see also Fontaine*, 411 U.S. 213. That means “[a] § 2255 petitioner is entitled to an evidentiary hearing on his claims, when he alleges facts that, if proven, would entitle him to relief.” *Hall v. United States*, 371 F.3d 969, 972 (7th Cir. 2004). Moreover, “[i]neffective assistance claims often require an evidentiary hearing

because they frequently allege facts that the record does not fully disclose.” *Osagiede v. United States*, 543 F.3d 399, 408 (7th Cir. 2008). And such claims “generally require an evidentiary hearing if the record contains insufficient facts to explain counsel’s actions as tactical or if further factual development might demonstrate prejudice.” *Id.* (citation omitted).

There can be little doubt of the need for an evidentiary hearing in this case. Part I of this brief explains in detail how Lenover alleged facts that, if proven, would entitle him to relief and how the files and records in this case do not conclusively refute his right to relief. Indeed, there is substantial evidence that Lenover’s attorney, Ford, supplied objectively unreasonable advice and that, but for Ford’s misadvice, Lenover would have accepted the government’s plea offers. Even if that evidence does not conclusively prove that Lenover received ineffective assistance of counsel, “[h]e has certainly put forth all someone in his position could without the benefit of an evidentiary hearing.” *Hall*, 371 F.3d at 975. And resolution of the disputed elements of Lenover’s claim depends entirely on facts about Ford’s advice and the government’s plea offers “that the record does not fully disclose” and that “often require an evidentiary hearing” to develop. *Osagiede*, 543 F.3d at 408. It is not surprising, therefore, that in cases raising ineffective assistance claims like the one Lenover asserts, this Court and others have ordered evidentiary hearings based on showings of deficient performance and prejudice no greater than Lenover’s showing here. *E.g.*, *Paters*, 159 F.3d at 1048-49; *United*

States v. Booth, 432 F.3d 542, 548-49 (3d Cir. 2005); *United States v. Grammas*, 376 F.3d 433, 436-39 (5th Cir. 2004); *Smith*, 348 F.3d at 550-54.

In denying Lenover's § 2255 motion, the district court did not even mention Lenover's request for an evidentiary hearing, much less recognize his entitlement to an evidentiary hearing under § 2255(b) and this Court's precedents. 7/8/08 Entry (R 9; AA 1-3). Failing to conduct an evidentiary hearing was an error of law under those authorities. Accordingly, this case should be remanded for an evidentiary hearing.

III. Reassignment Of This Case Under Circuit Rule 36 Would Be Appropriate.

The district judge in this case—the same judge who presided over Lenover's criminal trial and sentenced him to nearly 30 years in prison—did not issue a simple denial of Lenover's § 2255 motion supported by a thorough discussion of Lenover's claim. Instead, the district judge first mischaracterized Lenover's claim as alleging a failure “to discuss in a meaningful manner with Lenover a plea agreement satisfactory to Lenover.” 7/8/08 Entry at 2 (R 9; AA 2). Then he accused Lenover of “trying to re-write history by contriving a scenario in which he would have received a substantial, but less severe, sentence.” *Id.* at 3 (AA 3). Furthermore, the district judge's order ignores the affidavit and other evidence supporting Lenover's actual claim that his attorney misadvised him about the strength of the government's case and other matters. *See* pp. 20-23, 24-26, *supra*. The order also does not reference any of the authorities that consider claims like Lenover's, even though Lenover cited several of them (including *Paters*). *See* 2255

Mem. at 6-14 (R 2; SA 39-47). Finally, when Lenover requested *in forma pauperis* status on appeal, the district judge wrote that Lenover's claim was so meritless that Lenover was appealing in "bad faith." 9/3/08 Entry at 2 (R 17; SA 83).

Given the district judge's history with this case and his expressed view that Lenover's claim is a bad faith contrivance, Lenover respectfully asks that the Court assign this case to a different district judge on remand, pursuant to Circuit Rule 36. *See Nichols v. United States*, 75 F.3d 1137, 1145-46 (7th Cir. 1996) (remanding § 2255 ineffective assistance of counsel claim to different judge under Circuit Rule 36); *Kusay v. United States*, 62 F.3d 192, 196 (7th Cir. 1995) (same); *Cullen*, 194 F.3d at 408 (same under Second Circuit precedent).

CONCLUSION

For the foregoing reasons, Lenover respectfully asks that this Court vacate the judgment of the district court, remand the case for an evidentiary hearing, and apply Circuit Rule 36.

Respectfully submitted.

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July 27, 2009

CIRCUIT RULE 30(a) APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

FREDRICK H. LENOVER,)	
)	
Movant,)	
)	
vs.)	No. TH 02-18-CR-06-M/L
)	2:07-cv-369-LJM-JMS
UNITED STATES OF AMERICA)	

Entry Discussing Motion for Relief Pursuant to 28 U.S.C. § 2255

A motion pursuant to 28 U.S.C. § 2255 is the presumptive means by which a federal prisoner can challenge his conviction or sentence. See *Davis v. United States*, 417 U.S. 333, 343 (1974). Fredrick Lenover seeks such relief with respect to his conviction in No. TH 02-18-CR-M/L. Having considered the pleadings, the expanded record, and the parties' arguments, the court finds that Lenover has failed to show that he is entitled to the relief he seeks and that his motion for that relief must therefore be **denied**. This conclusion is based on the following facts and circumstances:

1. Lenover was convicted after trial by jury of conspiracy to possess with intent to distribute and to distribute in excess of 500 grams of a mixture or substance containing a detectable amount of methamphetamine. This violates 21 U.S.C. §§ 841(a)(1) and 846. He was sentenced based both on that conviction and on an Information the United States had filed pursuant to 21 U.S.C. § 851 alleging that he had a prior felony drug conviction. His conviction was affirmed on appeal, *United States v. Gray*, 410 F. 3d 338 (7th Cir. 2005), and after two remands his sentence was also affirmed. *United States v. Lenover*, 182 Fed. Appx. 563 (7th Cir. 2006) (unpublished), *cert. denied*, 127 S. Ct. 1030 (Jan. 8, 2007).

2. Lenover now seeks relief pursuant to 28 U.S.C. § 2255. A court may grant relief from a federal conviction or sentence pursuant to 28 U.S.C. § 2255 "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was

in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255. The scope of relief available under § 2255 is narrow.

Section 2255 is not a way to advance arguments that could have been presented earlier-especially not when the arguments rest entirely on a statute. See *Reed v. Farley*, 512 U.S. 339, 114 S. Ct. 2291, 129 L.Ed.2d 277 (1994). Although § 2255 ¶ 1 permits a collateral attack on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States," only a small portion of statutory claims demonstrate that the sentence or conviction is itself a violation of law. The error must be so fundamental that a "complete miscarriage of justice" has occurred. *Reed*, 512 U.S. at 348, quoting from *Hill v. United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L.Ed.2d 417 (1962). Other "non-constitutional errors which could have been raised on appeal but were not, are barred on collateral review-regardless of cause and prejudice." *Bontkowski v. United States*, 850 F.2d 306, 313 (7th Cir. 1988).

Young v. United States, 124 F.3d 794, 796 (7th Cir. 1997). Thus, relief pursuant to § 2255 is limited to "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Borre v. United States*, 940 F.2d 215, 217 (7th Cir. 1991) (internal citations omitted).

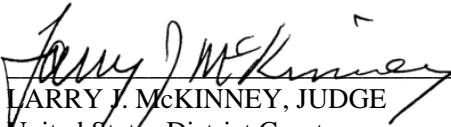
3. Lenover's claim is that he was denied the effective assistance of counsel. His specific contention is that his attorney was ineffective in failing to discuss in a meaningful manner with Lenover a plea agreement satisfactory to Lenover and which, he asserts, he would have accepted if he had been properly advised.

- a. For a petitioner to establish that "counsel's assistance was so defective as to require reversal" of a conviction or a sentence, he must make two showings: (1) deficient performance that (2) prejudiced his defense. *Strickland*, 466 U.S. at 687. With respect to the first prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). In addition, the performance of counsel under *Strickland* should be evaluated from counsel's perspective at that time, making every effort to "eliminate the distorting effects of hindsight." *Id.* at 523 (quoting 466 U.S. at 688); see also *Kokoraleis v. Gilmore*, 131 F.3d 692, 696 (7th Cir. 1997).
- b. With respect to the prejudice requirement, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; see also *Benefiel v. Davis*, 357 F.3d 655, 661 (7th Cir. 2004).

- c. Lenover had the right to the effective assistance of counsel in the plea negotiation process. *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985). The expanded record shows that a plea offer was made by the Government, that Lenover was informed of the offer, and that Lenover rejected the offer. The plea Lenover describes in his § 2255 motion was never made. Lenover's claim is based on wishful thinking, not the facts. Lenover's attorney at the time makes note that Lenover's position was that he "did not wish to enter a plea that required any jail time and that [he] wished to go to trial." Even the significant nuances of any plea which might have been offered to Lenover have no effect here; Lenover was opposed to a plea which would result in jail time and wished to go to trial. The United States is correct that Lenover is trying to re-write history by contriving a scenario in which he would have received a substantial, but less severe, sentence. He has not been prejudiced by the actions of his attorney, who conveyed the offer which was made—and there is no contention that his attorney failed to convey *whatever* offer was made and that Lenover rejected it. Lenover's argument is further undercut by the fact that he had relayed to Government counsel (through his own attorney) that he would not agree to cooperate with the United States in the prosecution, yet such cooperation would have been a condition of any agreement.
- d. Lenover has shown neither deficient performance nor prejudice from his attorney's failure to convey and discuss with him a non-existent plea offer from the United States. Lenover was aware of the penalties he faced, which is shown through the proceedings when he was advised of the charges against him and the possible penalties associated with those charges.
4. For the reasons explained above, therefore, Lenover's motion for relief pursuant to 28 U.S.C. § 2255 must be **denied**. Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

Date: 07/08/2008


LARRY J. MCKINNEY, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA


FREDRICK H. LENOVER,)	
Movant,)	
)	
vs.)	No. TH 02-18-CR-06-M/L
)	2:07-cv-369-LJM-JMS
UNITED STATES OF AMERICA)	

J U D G M E N T

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that the movant take nothing by his motion for relief pursuant to 28 U.S.C. § 2255, and the civil action docketed as No. 2:07-cv-369-LJM-JMS is **dismissed with prejudice**.

Date: 07/08/2008


 LARRY J. MCKINNEY, JUDGE
 United States District Court
 Southern District of Indiana

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 9,278 words excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

2. This Brief complies with typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6) and Circuit Rule 32(b) because it was prepared in a proportionally spaced typeface using Microsoft Word 2003 in 12-point Century Schoolbook for both the text and footnotes.

Dated: July 27, 2009

Joshua D. Yount

CIRCUIT RULE 30(d) CERTIFICATION

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rule 30(a) are included in the Appendix attached to this Brief and all materials required by Circuit Rule 30(b) are included in the Separate Appendix that accompanies this brief.

Dated: July 27, 2009

Joshua D. Yount

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned attorney certifies that he has furnished to the Court and opposing counsel, pursuant to Circuit Rule 31(e), a digital version of this Brief, the attached Appendix, and the portions of the Separate Appendix available in a searchable, non-scanned PDF format. The portions of the Separate Appendix not so furnished are not available in a searchable, non-scanned PDF format.

Dated: July 27, 2009

Joshua D. Yount

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on July 27, 2009, he caused two copies of this Brief and the attached Appendix, one copy of the Separate Appendix, and a CD-ROM containing a digital version of the Brief, the attached Appendix, and portions of the Separate Appendix to be placed with a third-party commercial carrier for overnight delivery to the following:

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