

**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

**REPLY BRIEF
FOR MOVANT-APPELLANT FREDRICK H. LENOVER**

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I. The Government’s Principal Arguments Are Without Merit.....	2
A. Any Desire For A Plea Without Jail Time Was A Direct Result Of Counsel’s Misadvice	3
B. Lenover’s Affidavit Is Competent Evidence Of Deficient Performance And Prejudice	4
II. The Government’s Other Deficient Performance Arguments Are Without Merit.....	7
III. The Government’s Other Prejudice Arguments Are Without Merit.....	12
IV. An Evidentiary Hearing Is Required In This Case	19
V. Reassignment Of This Case On Remand Would Be Appropriate	22
CONCLUSION.....	22

TABLE OF AUTHORITIES

	Page
CASES	
<i>Aleman v. United States</i> , 878 F.2d 1009 (7th Cir. 1989).....	20
<i>Almonacid v. United States</i> , 476 F.3d 518 (7th Cir. 2007).....	9
<i>Alvarado v. Litscher</i> , 267 F.3d 648 (7th Cir. 2001)	19
<i>Barry v. United States</i> , 528 F.2d 1094 (7th Cir. 1976).....	20
<i>Berkey v. United States</i> , 318 F.3d 768 (7th Cir. 2003)	6, 13
<i>Blackledge v. Allison</i> , 431 U.S. 63 (1977)	6
<i>Boria v. Keane</i> , 99 F.3d 492 (2d Cir. 1996)	11
<i>Bradshaw v. Stumpf</i> , 545 U.S. 175 (2005).....	6
<i>Dalton v. Battaglia</i> , 402 F.3d 729 (7th Cir. 2005).....	5
<i>Engelen v. United States</i> , 68 F.3d 238 (8th Cir. 1995)	14
<i>Gallo-Vasquez v. United States</i> , 402 F.3d 793 (7th Cir. 2005).....	11, 13
<i>Griffin v. United States</i> , 330 F.3d 733 (6th Cir. 2003).....	4, 14
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985).....	13
<i>Johnson v. Duckworth</i> , 793 F.2d 898 (7th Cir. 1986).....	13, 14, 16
<i>Johnson v. Finnan</i> , 467 F.3d 693 (7th Cir. 2006).....	15
<i>Julian v. Bartley</i> , 495 F.3d 487 (7th Cir. 2007).....	1, 5, 6, 10, 12-14
<i>Lalani v. United States</i> , 315 F. App'x 858 (11th Cir. 2009)	17
<i>Manbourne, Inc. v. Conrad</i> , 796 F.2d 884 (7th Cir. 1986)	14
<i>McCleese v. United States</i> , 75 F.3d 1174 (7th Cir. 1996)	6
<i>Nunes v. Mueller</i> , 350 F.3d 1045 (9th Cir. 2003).....	14
<i>Osagiede v. United States</i> , 543 F.3d 399 (7th Cir. 2008).....	16, 17, 21
<i>Paters v. United States</i> , 159 F.3d 1043 (7th Cir. 1998).....	1, 5, 6, 13, 14, 18, 21

TABLE OF AUTHORITIES
(continued)

	Page
<i>Pham v. United States</i> , 317 F.3d 178 (2d Cir. 2003)	4, 14
<i>Purdy v. United States</i> , 208 F.3d 41 (2d Cir. 2000).....	11
<i>Smith v. Singletary</i> , 170 F.3d 1051 (11th Cir. 1999).....	14
<i>Smith v. United States</i> , 348 F.3d 545 (6th Cir. 2003)	21
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	13, 18
<i>Toro v. Fairman</i> , 940 F.2d 1065 (7th Cir. 1991).....	6, 13, 14
<i>United States v. Booth</i> , 432 F.3d 542 (3d Cir. 2005)	4, 21
<i>United States v. Camargo</i> , 908 F.2d 179 (7th Cir. 1990)	8
<i>United States v. Day</i> , 969 F.2d 39 (3d Cir. 1992)	14, 15
<i>United States v. Elst</i> , 579 F.3d 740 (7th Cir. 2009).....	14
<i>United States v. Gaviria</i> , 116 F.3d 1498 (D.C. Cir. 1997).....	14, 17, 21
<i>United States v. Grammas</i> , 376 F.3d 433 (5th Cir. 2004).....	14, 21
<i>United States v. Gray</i> , 410 F.3d 338 (7th Cir. 2005)	8
<i>United States v. Herrera</i> , 412 F.3d 577 (5th Cir. 2005)	11
<i>United States v. Recendiz</i> , 557 F.3d 511 (7th Cir. 2009), <i>cert. denied</i> , 78 U.S.L.W. 3176 (U.S. Oct. 5, 2009) (No. 09-238)	13
<i>United States v. Springs</i> , 988 F.2d 746 (7th Cir. 1993).....	13, 14
<i>Von Moltke v. Gillies</i> , 332 U.S. 708 (1948).....	10, 11
<i>Vukadinovich v. Zentz</i> , 995 F.2d 750 (7th Cir. 1993).....	8
<i>Watson v. Anglin</i> , 560 F.3d 687 (7th Cir. 2009)	4
<i>Williams v. Jones</i> , 571 F.3d 1086 (10th Cir. 2009), <i>reh’g denied</i> , 2009 WL 3284847 (10th Cir. Oct. 14, 2009).....	14
<i>Woolard v. Woolard</i> , 547 F.3d 755 (7th Cir. 2008)	14

TABLE OF AUTHORITIES
(continued)

	Page
<i>Wyatt v. United States</i> , 574 F.3d 455 (7th Cir. 2009).....	6
 STATUTES AND RULES	
21 U.S.C. § 841(b)(1)(A).....	12
28 U.S.C. § 2255(b)	1, 12, 19
7th Cir. R. 36.....	22
 OTHER AUTHORITIES	
Model Rules of Prof'l Conduct R. 1.4.....	10
Model Rules of Prof'l Conduct R. 2.1.....	10
U.S. Sentencing Guidelines Manual § 3E1.1.....	18
U.S. Sentencing Guidelines Manual ch. 5, pt. A	18

INTRODUCTION

The opening brief of Movant-Appellant Fredrick Lenover showed that the district court erroneously denied Lenover's § 2255 motion without holding an evidentiary hearing. As that brief detailed, the record *does not* "conclusively show" that Lenover "is entitled to no relief" on his claim that constitutionally inadequate advice from his criminal trial counsel about the strength of the government's case and other matters led him to reject government plea agreements offering sentences many years shorter than the sentence he received after going to trial. 28 U.S.C. § 2255(b). Therefore, under § 2255(b)'s plain language and this Court's controlling precedents, the district court had no authority to deny Lenover's § 2255 motion without holding an evidentiary hearing.

Sidestepping the ample evidence and law supporting Lenover's claim, the government has responded with a scattershot brief filled with irrelevant facts, inapplicable legal principles, and unsupported speculation about the advice Lenover received and Lenover's reasons for rejecting a plea agreement. The government's brief does not even attempt to distinguish the principal controlling precedents on which Lenover's opening brief relied—*Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007), and *Paters v. United States*, 159 F.3d 1043 (7th Cir. 1998). Instead, the government contends that Lenover would not have accepted any plea agreement requiring jail time, that Lenover's affidavit should be disregarded entirely, and that Lenover otherwise received constitutionally adequate advice and suffered no prejudice from any inadequate advice.

The government's arguments are meritless. Lenover desired a plea agreement without jail time only because he was operating under his counsel's misadvice about the strength of the government's case. Abundant case law holds that when a prisoner's affidavit is corroborated by other evidence—as Lenover's is—it cannot be disregarded. And there is considerable evidence that Lenover received misadvice about the strength of the government's case, the attractiveness of the government plea offers, the relevant conspiracy law principles, and his likely sentence, which caused him to reject favorable plea offers that he would have accepted absent the misadvice. In short, nothing in the government's brief remotely calls into doubt Lenover's showing that the district court erred in denying his § 2255 motion without holding an evidentiary hearing.

ARGUMENT

I. The Government's Principal Arguments Are Without Merit.

The government asserts a hodgepodge of arguments that Lenover has not established his ineffective assistance of counsel claim. But two of those arguments—regarding Lenover's supposed desire to avoid jail time and the supposed need to disregard Lenover's affidavit—are repeated over and over to challenge Lenover's showing on both elements of his claim: deficient performance by his counsel, Richard Ford, in supplying objectively unreasonable advice and resulting prejudice to Lenover from the rejection of plea offers that Lenover would have accepted if properly advised. Because so much of the government's brief turns on those two principal arguments, this reply takes them up first.

A. Any Desire For A Plea Without Jail Time Was A Direct Result Of Counsel's Misadvice.

Throughout its brief, the government asserts that Ford properly advised Lenover to take his chances at trial and that Lenover would not have accepted a plea if differently advised, because Lenover supposedly did not want a plea deal that required jail time and wanted instead to go to trial. Gov't Br. 23, 25-26, 33-35, 38, 42-43, 45-46.¹ But the government bases its claims about Lenover's opposition to a plea agreement entirely on a November 26, 2007 letter from Ford that does not elaborate on why Lenover opposed a plea agreement involving jail time. 11/26/07 Ltr. at 1 (R 8, Ex. 3; SA 80). That information is crucial because Lenover's claim is that his lawyer's misadvice led him to reject the government's plea offers. Lenover Aff. ¶¶ 13, 14 (R 2, Ex. 2; SA 54-55). Lenover's opposition to a plea agreement would not prove what the government asserts, unless the reason for his opposition was something other than Ford's misadvice.

As Lenover's opening brief detailed (at 24-26), all of the evidence shows that Ford's misadvice was the only reason that Lenover ever opposed a plea agreement. Lenover's affidavit says so expressly. Lenover Aff. ¶ 13 (R 2, Ex. 2; SA 54-55). And the other evidence—the overwhelming prosecution case against Lenover, the wide disparity between the sentences offered by the government and his actual sentencing exposure, and the popularity of guilty pleas among his co-defendants—points in the same direction. Against this *evidence*, the government offers only

¹ “Gov't Br.” refers to the government's response brief in this appeal. “Lenover Br.” refers to Lenover's opening brief in this appeal. All other record citations use the abbreviated references described in Lenover's opening brief (at 2 n.1).

unsupported *speculation* that Lenover's age and health drove him to go to trial and that Lenover so desperately wanted to avoid jail that he would have gambled on a trial no matter how strong the evidence against him or how long a sentence he faced. Gov't Br. 22, 25-26, 33-34, 42-43.²

Particularly when the *evidence* is to the contrary, such *speculation* is not grounds for denying a § 2255 motion without holding an evidentiary hearing. *See, e.g., United States v. Booth*, 432 F.3d 542, 548-49 (3d Cir. 2005) (speculation about offense level and reluctance to cooperate did not allow denial without evidentiary hearing); *Griffin v. United States*, 330 F.3d 733, 738-39 (6th Cir. 2003) (speculation regarding cooperativeness with law enforcement and prior protestations of innocence did not allow denial without evidentiary hearing); *Pham v. United States*, 317 F.3d 178, 182-83 (2d Cir. 2003) (speculation about prior protestations of innocence did not allow denial without evidentiary hearing). The government's speculation about Lenover's supposed opposition to a plea agreement requiring jail time thus is not a basis for affirming the district court.

B. Lenover's Affidavit Is Competent Evidence Of Deficient Performance And Prejudice.

The government also repeatedly claims that Lenover's "self-serving" affidavit cannot establish either that Lenover received objectively unreasonable advice from Ford or that Lenover would have accepted a government plea offer absent Ford's

² The government (at 43) cites *Watson v. Anglin*, 560 F.3d 687 (7th Cir. 2009), in support of its claim that Lenover's alleged desire to go to trial precludes any prejudice from Ford's misadvice. But *Watson* is very different from this case. In *Watson*, there had been an evidentiary hearing, the prisoner testified only that he would have *considered* the plea offer if properly advised, and the prisoner's attorney expressly stated that his client was determined to reject any plea offer. *Id.* at 691.

misadvice. Gov't Br. 30-31, 35-36, 39, 40-41. But this Court has been clear that such "self-serving" statements *should not* be disregarded when objective evidence supports the statements. *Julian*, 495 F.3d at 499-500; *Paters*, 159 F.3d at 1047-48; *see also Dalton v. Battaglia*, 402 F.3d 729, 734-35 (7th Cir. 2005) (self-serving affidavit by prisoner is competent evidence in post-conviction proceeding).

Lenover has supplied just such objective evidence. 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 recounting no advice on Lenover's Sentencing Guidelines exposure (11/26/07 Ltr. at 1 (R 8, Ex. 3; SA 80)) both confirm Lenover's affidavit testimony that Ford misadvised him on various aspects of his case. Likewise, Lenover's affidavit testimony that he would have accepted a government plea offer, if properly advised, finds support in the evidence that the government had a very strong case, that the sentences offered by the government were much shorter than his actual sentencing exposure, and that so many of his co-defendants pleaded guilty. Lenover Br. 24-26.

As Lenover's opening brief explained (at 27-28), under *Julian* and *Paters*, this objective evidence is more than sufficient to allow consideration of Lenover's affidavit. The government simply ignores *Julian* and *Paters*, sidestepping the fact that both decisions, based on much less objective evidence than is present here, accepted "self-serving" statements as support for an ineffective assistance claim

that misadvice led a defendant to reject a plea offer. *Julian*, 495 F.3d at 499-500; *Paters*, 159 F.3d at 1047-48.³

None of the decisions that the government cites to justify disregarding Lenover's affidavit gives any reason to cast aside the teachings of *Julian* and *Paters*. In fact, *Blackledge v. Allison*, 431 U.S. 63, 75-76 (1977), refused to allow summary dismissal of a habeas petition that relied principally on the prisoner's self-serving statements. And each of the other cases cited by the government involved completely uncorroborated statements that either were ambiguous or were specifically contradicted by a prior plea colloquy or other evidence. *Bradshaw v. Stumpf*, 545 U.S. 175, 182-86 (2005) (statement contrary to plea colloquy); *Wyatt v. United States*, 574 F.3d 455, 458-59 (7th Cir. 2009) (same); *Berkey v. United States*, 318 F.3d 768, 772-73 (7th Cir. 2003) (same); *McCleese v. United States*, 75 F.3d 1174, 1179-80 (7th Cir. 1996) (statement contradicted by sentencing exposure evidence); *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) (ambiguous statement). Those cases thus do not control here, where Lenover's affidavit testimony is unambiguous, uncontradicted, and corroborated by objective evidence. Under *Julian* and *Paters*, that affidavit testimony is competent evidence that Lenover received objectively unreasonable advice from Ford and would have accepted the government plea offers if he had received appropriate advice.

³ The government also completely ignores the compelling argument against applying any sort of strict "objective evidence" rule, which Lenover's opening brief laid out in detail (at 28-30), citing cases from the Supreme Court, the Seventh Circuit, and other federal courts of appeals.

II. The Government's Other Deficient Performance Arguments Are Without Merit.

The government raises a handful of other arguments that Ford's performance as Lenover's attorney was not constitutionally deficient. But none of those arguments overcomes Lenover's showing that Ford provided objectively unreasonable representation in four ways: (1) incorrectly telling Lenover that the government's case was weak; (2) failing to recommend that Lenover accept the government's plea offers; (3) failing to explain the relevant conspiracy law principles; and (4) failing to inform Lenover of his likely sentence under the Sentencing Guidelines. Lenover Br. 19-23.

1. The government claims that Ford did not advise Lenover that the government's case against him was weak. Characterizing the letter in which Ford tells Lenover that the government has "little more than the cryptic telephone conversations" against him (10/7/02 Ltr. (R 2, Ex. 1; SA 51)) as initial and incomplete advice, the government asserts that Ford ultimately made Lenover aware of the government's evidence. Gov't Br. 23-27, 34.

But that assertion is based on pure speculation. For instance, citing nothing, the government theorizes that "[i]t is not a far reach to conclude that Lenover knew the subject matter of much of the telephone conversations that the government would be introducing" (at 24) and that "Lenover was well aware of the most incriminating evidence against him, namely the wiretap evidence and testimony of his co-conspirators" (at 27). Likewise, the government simply assumes (at 25, 34, 46) that Ford followed through on a promise to discuss with Lenover his analysis of

the case, even though Lenover has attested that no such discussion occurred. *See* Lenover Aff. ¶¶ 4, 6 (R 2, Ex. 2; SA 53).

The only *evidence* regarding what Ford told Lenover about the government's case is Ford's letter reporting that the government had little against Lenover and Lenover's affidavit testimony that Ford never updated or corrected that incorrect assessment. 10/7/02 Ltr. (R 2, Ex. 1; SA 51); Lenover Aff. ¶¶ 4, 6 (R 2, Ex. 2; SA 53). The government's *speculation* to the contrary cannot trump the *evidence* that Ford led Lenover to believe that the government had a weak case.

2. The government claims that it was not unreasonable for Ford to advise Lenover that the government's case was weak. According to the government, Lenover had viable defenses based on the admissibility and content of the wiretap evidence and the bias of testifying co-conspirators. Gov't Br. 26-28.

Neither the district court nor this Court had any trouble rejecting the challenges to the wiretap evidence, with both courts concluding that the affidavit supporting the wiretap application was more than adequate and that the DEA agent who interpreted the code language used in the intercepted calls was well qualified to do so. 4/4/03 Order at 1-7 (SR 68); 5/21/03 Order (SR 91); *United States v. Gray*, 410 F.3d 338, 342-43, 347 (7th Cir. 2005) (SA 11-12, 16). Aside from citing inapposite cases involving taped conversations excluded because of poor sound quality (*United States v. Camargo*, 908 F.2d 179, 183 (7th Cir. 1990), and *Vukadinovich v. Zentz*, 995 F.2d 750, 753 (7th Cir. 1993))—which does not appear to have been the basis for any motion or objection in Lenover's case—the government

does not even try to explain how Lenover's wiretap challenges were viable. In any event, the government's plea offer to Lenover remained open even after the motion to suppress the wiretap evidence was denied on April 4, 2003. Blackington Decl. ¶ 3 (R 7, Ex. A; SA 65) (plea offer open until shortly before trial). Yet Ford still did not revise his assessment of the government's case against Lenover. Lenover Aff. ¶¶ 6-8 (R 2, Ex. 2; SA 53-54).

As for the bias of co-conspirators who testified against Lenover, that defense consisted of 16 lines of lukewarm questioning of one witness and three uninspired lines in Ford's closing argument. Trial Tr. I at 307-08; Trial Tr. VI at 1400. Such a defense could give no hope for an acquittal when a recorded telephone call played for the jury corroborated the testimony of the witness in question and the government introduced a mountain of other incriminating evidence against Lenover (including drugs and tools of the drug trade seized from Lenover's home and a number of recorded telephone calls implicating Lenover). *See* Lenover Br. 9-11. *Contrast Almonacid v. United States*, 476 F.3d 518, 522 (7th Cir. 2007) (co-conspirator bias is viable defense in absence of forensic evidence and non-conspirator witnesses). Given the overwhelming evidence against Lenover—virtually all of which Ford knew about before trial (*see* Lenover Br. 7-8)—the record does not conclusively show that Ford acted reasonably in advising Lenover that the government's case was weak. Lenover Br. 20.

3. The government suggests (at 28) that Lenover's age, health, and sentencing exposure somehow made it reasonable for Ford to convince Lenover to

try to exploit the supposed weakness of the government's case. But those factors could never make it reasonable to tell Lenover that the government's case was weak, when it was actually strong. See Model Rules of Prof'l Conduct R. 1.4 (requiring lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions"); Model Rules of Prof'l Conduct R. 2.1 (requiring lawyer to "render candid advice"). In the plea bargaining context, a "reasonably competent attorney" will "learn all of the facts of the case" and "communicate the result of that analysis" to the defendant. *Julian*, 495 F.3d at 495. Ford did not fulfill that duty in communicating with Lenover about the strength of the government's case. His advice on the subject was therefore objectively unreasonable.

4. The government asserts that Ford acted reasonably in making no recommendation on whether Lenover should have accepted a government plea offer. In its view, defense counsel need only inform the defendant of plea offers and involve the defendant in decisions on those offers. Gov't Br. 36-38.

To be sure, defense counsel does not have a universal duty to make a firm recommendation on every plea offer in every case. But when the evidence against the defendant is overwhelming, there is no realistic chance of an acquittal, and a plea offer promises a materially lower sentence—as in this case—it would be objectively unreasonable for counsel to stand silent while the defendant rejects the plea offer. See *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (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.”); *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).⁴

Standing silent in such circumstances is particularly unreasonable when—as in this case—counsel has previously told the defendant that the case against him is weak. That amounts to advising a client “to reject a plea bargain in the face of overwhelming evidence of guilt and an absence of viable defenses,” a recognized form of objectively unreasonable representation. *Gallo-Vasquez v. United States*, 402 F.3d 793, 798 (7th Cir. 2005). Under *Von Moltke*, *Herrera*, *Boria*, and *Gallo-Vasquez*, there has been no conclusive showing that Ford provided constitutionally adequate performance when he led Lenover to believe that the case against him was weak and then stood silent as Lenover rejected favorable plea offers.

5. The government claims (at 40-41) that Ford did not misadvise Lenover about his sentencing exposure because the evidence suggests that Ford made him aware of the statutory maximum and minimum sentences he faced. But the government simply misunderstands Lenover’s objection to Ford’s sentencing advice.

⁴ Contrary to the government’s claim (at 36 n.4), *Purdy v. United States*, 208 F.3d 41, 46-48 (2d Cir. 2000), expressly recognizes that, in such circumstances, *Boria*’s requirement that counsel recommend a guilty plea remains good law. Moreover, in declining to fault an attorney for failing to recommend a guilty plea, the *Purdy* court repeatedly emphasized that—unlike Ford—the attorney did not truly stand silent but instead forcefully informed the defendant of the formidable evidence against him. *Id.*

As Lenover’s opening brief (at 22-23) made clear, the defect in Ford’s advice was his failure to explain that Lenover faced a 27-year minimum sentence *under the Sentencing Guidelines*, which is seven years more than both the statutory minimum sentence and the longest sentence available under any of the possible plea deals. Sentencing Tr. at 3-4; Blackington Decl. ¶ 3 (R 7, Ex. A; SA 64); 21 U.S.C. § 841(b)(1)(A). That failure to “make an estimate of the likely sentence” and “communicate the result of that analysis” to Lenover constitutes objectively unreasonable representation. *Julian*, 495 F.3d at 495.

* * *

In sum, nothing in the government’s brief comes close to establishing that the papers in this case “conclusively show” that Lenover received objectively reasonable representation from Ford. 28 U.S.C. § 2255(b). Accordingly, the district court erred when it ruled, without holding an evidentiary hearing, that Ford’s performance was not deficient.

III. The Government’s Other Prejudice Arguments Are Without Merit.

The government also raises several additional arguments that Lenover suffered no prejudice from Ford’s advice relating to the plea agreements offered to Lenover. Those arguments, however, do not overcome the substantial evidence that Lenover would have accepted a plea offer if properly advised. Specifically, Lenover’s affidavit testimony, the overwhelming prosecution case against Lenover, the disparity between the offered sentences and his sentencing exposure, and the many guilty pleas of his co-defendants preclude the required conclusive showing that Lenover would have gone to trial absent Ford’s misadvice. *See* Lenover Br. 24-26.

1. The government seemingly tries to suggest that, in order to establish the prejudice required to state an ineffective assistance of counsel claim, Lenover must show that Ford's deficient performance affected the outcome or fairness of his *trial*. Gov't Br. 18-20, 28-29. But that kind of trial-based prejudice standard applies only to claims of ineffective assistance *at trial*, as the cases cited by the government confirm. *Strickland v. Washington*, 466 U.S. 668, 684-87, 691-96, 699-700 (1984) (applying standard to sentencing phase of trial); *United States v. Recendiz*, 557 F.3d 511, 531-33 (7th Cir. 2009) (applying standard to trial), *cert. denied*, 78 U.S.L.W. 3176 (U.S. Oct. 5, 2009) (No. 09-238); *Berkey*, 318 F.3d at 773 (applying different standard to guilty plea).

For claims that misadvice from counsel caused a defendant to reject a plea offer, this Court applies a different prejudice standard. The defendant must show 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; *see also Julian*, 495 F.3d at 498-99; *Gallo-Vasquez*, 402 F.3d at 798; *Toro*, 940 F.2d at 1068.⁵ That standard follows from *Hill v. Lockhart*, 474 U.S. 52, 59 (1985),

⁵ Even *Johnson v. Duckworth*, 793 F.2d 898, 902 n.3 (7th Cir. 1986)—which the government cites (at 28-29) to suggest that Lenover’s exercise of his trial rights somehow cures Ford’s deficient performance in the plea process—holds that prejudice in rejected-plea cases turns on whether the defendant would have accepted the plea offer if properly advised. One outlier decision of this Court—*United States v. Springs*, 988 F.2d 746, 748-49 (7th Cir. 1993)—did look to the fairness and reliability of the proceedings in considering a claim that ineffective assistance of counsel caused a defendant to reject a favorable plea offer. But this Court’s other decisions on such claims—before and after *Springs*—uniformly judge prejudice by asking only whether the defendant would have accepted the plea offer absent the deficient advice of counsel. *Julian*, 495 F.3d at 498-99; *Gallo-Vasquez*,

which held that proving prejudice from misadvice that causes a defendant to plead guilty requires proof that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” And every other federal court of appeals to consider a claim that misadvice caused a defendant to reject a plea offer applies the same prejudice test as the Seventh Circuit.⁶ As the government recognizes elsewhere in its brief (at 30, 42), the relevant prejudice question is whether Lenover would have accepted the government’s plea offers if Ford had properly advised him.

2. The government asserts (at 22, 29, 31-33) that Lenover’s unwillingness to cooperate with prosecutors would have made it impossible for him to obtain a 10- or 15-year plea agreement. But the terms and conditions of the government’s plea offers are hotly contested. The lead prosecutor says that the government never

402 F.3d at 798; *Paters*, 159 F.3d at 1047; *Toro*, 940 F.2d at 1068; *Johnson*, 793 F.2d at 902 n.3. Moreover, the government never even hinted at such an argument in the district court (Gov’t Resp. (R 7; SA 57-62)), it does not develop the fairness/unreliability point in its appellate brief despite citing *Springs* (at 37) for a different proposition, and it consistently analyzes Lenover’s claims under the prejudice standard articulated in *Julian*, *Paters*, and like cases (Gov’t Br. 30-34, 38, 42-43). The government thus has forfeited any argument for a heightened prejudice standard of the sort described in *Springs*. *United States v. Elst*, 579 F.3d 740, 747 (7th Cir. 2009) (“Perfunctory and undeveloped arguments as well as arguments unsupported by pertinent authority are waived.”); *Woolard v. Woolard*, 547 F.3d 755, 760 (7th Cir. 2008) (issue not raised in district court is waived on appeal); *Manbourne, Inc. v. Conrad*, 796 F.2d 884, 887-88 (7th Cir. 1986) (failure to dispute point waives any argument to the contrary).

⁶ See *Pham*, 317 F.3d at 182-83; *United States v. Day*, 969 F.2d 39, 44-47 (3d Cir. 1992); *United States v. Grammas*, 376 F.3d 433, 438 (5th Cir. 2004); *Griffin*, 330 F.3d at 736-39; *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995); *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003); *Williams v. Jones*, 571 F.3d 1086, 1090 n.3 (10th Cir. 2009), *reh’g denied*, 2009 WL 3284847 (10th Cir. Oct. 14, 2009); *Smith v. Singletary*, 170 F.3d 1051, 1053 (11th Cir. 1999); *United States v. Gaviria*, 116 F.3d 1498, 1512 (D.C. Cir. 1997).

offered less than a 20-year sentence for a guilty plea without cooperation. Blackington Decl. ¶ 3 (R 7, Ex. A; SA 64-65). Lenover attests that he was offered a 10-year sentence and a 15-year sentence, without any cooperation required. Lenover Aff. ¶¶ 3, 7 (R 2, Ex. 2; SA 52-53); 2255 Reply at 6-9 (R 8; SA71-74). And Ford corroborates that Lenover was offered a 15-year sentence, but he does not state whether that sentence depended on cooperation. 11/26/07 Ltr. at 1 (R 8, Ex. 3; SA 80). Resolving this factual dispute requires an evidentiary hearing. *See Johnson v. Finnan*, 467 F.3d 693, 694-95 (7th Cir. 2006) (ordering evidentiary hearing to resolve dispute between state's view of the facts and prisoner's affidavit); *United States v. Day*, 969 F.2d 39, 44, 47 (3d Cir. 1992) (ordering remand for further proceedings to resolve dispute over alleged plea offer).

Moreover, even if the prosecutor were right that the government offered Lenover only a 20-year sentence for a guilty plea without cooperation, the evidence still shows that Lenover suffered prejudice from Ford's misadvice. Lenover has attested that Ford's misadvice caused him to reject all government plea offers. Lenover Aff. ¶ 13 (R 2, Ex. 2; SA 54-55). A 20-year offer would not have made the evidence against him any less overwhelming. *See* Lenover Br. 9-11. Lenover would have still received a 7-year discount off of the 27-year minimum Guideline sentence. *See id.* at 25-26. And several of his co-defendants pleaded guilty to get sentences in the 20-year range. *See id.* at 9 n.4, 26.

3. The government claims (at 32) that Lenover's prejudice evidence is rebutted by the fact that Lenover did not state that he wanted to accept a plea deal

during his trial once he heard the government's evidence. But the lead prosecutor has expressly stated that the plea offer to Lenover remained open only "until shortly before the trial." Blackington Decl. ¶ 3 (R 7, Ex. A; SA 65). During trial, there was no plea offer for Lenover to accept. Plus, the record has yet to be developed on what transpired between Lenover and Ford during the course of the trial. *See Osagiede v. United States*, 543 F.3d 399, 408 (7th Cir. 2008) (ineffective assistance claims "generally require an evidentiary hearing . . . if further factual development might demonstrate prejudice"). The fact that Lenover did not announce in the middle of his trial that he wanted to accept an already-withdrawn plea offer thus is not evidence, much less conclusive proof, that he would have gone to trial if Ford had properly advised him.⁷

4. The government asks this Court to ignore the fact that 10 of Lenover's 14 co-defendants pleaded guilty in judging the likelihood that Lenover too would have pleaded guilty if properly advised. According to the government (at 33-34), none of Lenover's co-defendants faced all of his exact circumstances. But the government cites no *evidence* about the particular circumstances of any co-defendant to support that claim. As Lenover's opening brief showed (at 8-9), the available information about his co-defendants actually indicates that several defendants who played a similar or greater role in the alleged conspiracy pleaded guilty and received

⁷ The government cites a statement in *Johnson*, 793 F.2d at 902, about the defendant's failure to state at trial his desire to accept a plea offer, but that case involved a claim that the defendant's attorney (rather than the defendant) decided to reject the plea offer (making it natural for the defendant to voice an objection at trial) and the court doubted that in "the normal situation" such a limited opportunity to object to a trial would "pass constitutional muster."

sentences not greater than 20 years, some without cooperating. The government's *speculation* about the probativeness of the pleas of Lenover's co-defendants thus does not warrant disregarding that evidence, particularly since Lenover has not yet had an opportunity to fully develop it through discovery and an evidentiary hearing. *See Osagiede*, 543 F.3d at 408 (ineffective assistance claims "generally require an evidentiary hearing . . . if further factual development might demonstrate prejudice"); *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 represented)⁸; *United States v. Gaviria*, 116 F.3d 1498, 1513 (D.C. Cir. 1997) (plea deal with co-defendant evidenced reasonable probability that defendant would have also entered guilty plea).

5. The government asserts (at 39-40) that Lenover suffered no prejudice from Ford's failure to explain the principles of co-conspirator liability to Lenover because a guilty plea would not have changed Lenover's "base offense level" of 38 under the Sentencing Guidelines. But that hardly means that Lenover would not have pleaded guilty if Ford had fulfilled his duty to explain that Lenover would be responsible for his co-conspirators' conduct and would face such a base offense level. A guilty plea's supposed lack of impact on Lenover's "base offense level" thus does

⁸ The government tries to distinguish *Lalani*, but it cannot deny that the *Lalani* movants did not pursue a plea agreement because their counsel incompetently overestimated their chances at trial and that, in the Eleventh Circuit's view, a plea agreement "may have been an option for them" because "other co-conspirators entered into plea agreements." 315 F. App'x at 859. Just as in *Lalani*, the plea agreements of Lenover's co-conspirators are circumstantial evidence that a plea agreement may have been an option for Lenover if Ford had provided competent representation.

not refute Lenover's evidence of prejudice. *See* Lenover Br. 24-26; *Paters*, 159 F.3d at 1047 (prejudice turns on whether defendant "would have accepted the government's offer" but for bad advice).

Moreover, the government admits (at 40) that a guilty plea would have made Lenover eligible for at least a two-point reduction in his "total offense level," moving him from a 40 to at most a 38. *See* Sentencing Tr. at 3-4; U.S. Sentencing Guidelines Manual § 3E1.1.⁹ That reduction in total offense level would have shifted Lenover's sentencing range from 324-405 months to at most 262-327 months. U.S. Sentencing Guidelines Manual ch. 5, pt. A. Plus, the government itself claims to have offered Lenover a 20-year sentence for pleading guilty. Blackington Decl. ¶ 3 (R 7, Ex. A; SA 64). Therefore, even if Lenover's "base offense level" would not have changed if he had pleaded guilty, his sentence would have. Thus "the result of the proceeding would have been different," which is all that is required to establish prejudice. *Strickland*, 466 U.S. at 694.

6. The government contends (at 40-43) that Ford's failure to inform Lenover about his likely sentence caused no prejudice because Lenover was aware of the statutory maximum and minimum sentences he faced. As explained above (at 11-12), however, Lenover's claim is that Ford failed to inform him about his likely sentence *under the Sentencing Guidelines*. Lenover Br. 22-23. Knowledge of the statutory sentencing range thus does not obviate the prejudice from Ford's constitutionally inadequate guidance on Lenover's sentencing exposure.

⁹ Depending on the timing of his guilty plea, Lenover may have been eligible for an additional one-point reduction. U.S. Sentencing Guidelines Manual § 3E1.1(b).

In passing, the government also asserts (at 42) that, before this appeal, Lenover never claimed prejudice from Ford's deficient sentencing advice. That is demonstrably false. Lenover's affidavit expressly states: "Had Lenover been correctly . . . 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); *see also id.* ¶¶ 9, 13 (SA 54-55); 2255 Mem. at 11-14 (R 2; SA 44-47). Surely no more is required of a *pro se* litigant. *See Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001) (*pro se* filings construed liberally).

* * *

Put simply, the government's brief does not remotely establish that the papers in this case "conclusively show" that Lenover would have rejected the government plea offers even if Ford had properly advised him. 28 U.S.C. § 2255(b). Thus the district court erred when it ruled, without holding an evidentiary hearing, that Lenover did not suffer prejudice from Ford's misadvice.

IV. An Evidentiary Hearing Is Required In This Case.

The government's response to Lenover's argument for an evidentiary hearing to resolve his ineffective assistance claim is odd. The government begins by acknowledging (at 44) that 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). Then it concedes (at 45) that absent a hearing, "the prisoner's sworn allegations of fact are taken as true" so long as they are not merely conclusory, contrary to the record, or inherently incredible. It follows from those admissions that the district court's

denial of Lenover's § 2255 motion without an evidentiary hearing can be affirmed only if the government conclusively proved that Lenover's factual allegations would not entitle him to relief.

Even though it recognizes the limited grounds for affirmance, the government nevertheless constructs its argument entirely around an (improper and futile) effort to discredit Lenover's factual allegations. Gov't Br. 45. It points to the lead prosecutor's recollection that Lenover was offered only a 20-year plea deal without cooperation, instead of the shorter deals that Lenover (and Ford) recalled. But siding with the prosecutor on that factual dispute is neither fatal to Lenover's claim nor possible without an evidentiary hearing. *See* pp. 14-15, *supra*. It claims that the line in Ford's November 2007 letter about Lenover's opposition to a plea deal requiring jail time means that Lenover would have refused any other plea deal even if he had been properly advised about the government's case and his likely sentence. In reality, the evidence shows that Lenover's opposition to a plea deal was a product of Ford's misadvice. *See* pp. 3-4, *supra*. And it characterizes Lenover's allegations as "unsupported." But that completely ignores the need to take those allegations as true and the ample evidence of both Ford's deficient performance and the resulting prejudice to Lenover. *See* Lenover Br. 19-26.¹⁰

¹⁰ Unlike the cases involving unsupported allegations that the government cites, Lenover has made detailed, factual allegations on matters known to him personally, has offered corroborating objective evidence, has not testified contrary to his affidavit, and does not seek to interrogate high government officials. *See Aleman v. United States*, 878 F.2d 1009, 1012-13 (7th Cir. 1989) (allegations based on conjecture about third parties not personal knowledge); *Barry v. United States*, 528

Tellingly, the government ultimately concludes: “*Although not specifically addressed*, the district court’s order *intimates* that the district court found the statements made by the federal prosecutor and Attorney Ford *more credible* than Lenover’s unsupported allegations.” Gov’t Br. 45 (emphasis added). In other words, the government wants this Court to rule that Lenover is not entitled to an evidentiary hearing because the government speculates that the district court made an implied credibility determination based on disputed statements in a pair of documents without hearing a single witness testify under cross-examination. The law does not permit such a ruling. It would require disbelieving Lenover’s sworn allegations and accepting less than a conclusive showing that Lenover is entitled to no relief.

Indeed—contrary to the government’s makeweight claim (at 44) about the need for speed, economy, and finality in post-conviction proceedings—this Court’s precedents recognize that “[i]neffective assistance claims often require an evidentiary hearing because they frequently allege facts that the record does not fully disclose.” *Osagiede*, 543 F.3d at 408. And that is particularly true for rejected-plea claims like Lenover’s. See, e.g., *Paters*, 159 F.3d at 1048-49; *Booth*, 432 F.3d at 548-49; *United States v. Grammas*, 376 F.3d 433, 436-39 (5th Cir. 2004); *Smith v. United States*, 348 F.3d 545, 550-54 (6th Cir. 2003); *Gaviria*, 116 F.3d at 1512, 1514. This case should be remanded for the evidentiary hearing that the district court erroneously bypassed.

F.2d 1094, 1101-02 (7th Cir. 1976) (deposition of affiant contradicted affidavit and hearing required examination of high government official).

V. Reassignment Of This Case On Remand Would Be Appropriate.

Lenover's opening brief (at 33-34) requested that, pursuant to Circuit Rule 36, this case be assigned to a different district judge on remand in light of Judge McKinney's history with the case and his expressed view that Lenover's claim is a bad faith contrivance. The government asserts that there is no reason to doubt Judge McKinney's impartiality. But it does not address any of the actions that Lenover cited in support of his reassignment request. And it is hard to believe that a judge who has accused Lenover of both "trying to re-write history by contriving a scenario in which he would have received a substantial, but less severe, sentence" (7/8/08 Entry at 3 (R 9; AA 3)) and taking a "bad faith" appeal from the denial of his claim (9/3/08 Entry at 2 (R 17; SA 83)) would view Lenover's claim with an open mind on remand. Indeed, the government itself claims that Judge McKinney has already determined that Lenover is not credible. Gov't Br. 45. Perhaps that is why, in a telling slip, the government's brief states "there is nothing to suggest . . . that [Judge McKinney] would be unable to view any new evidence procured from an evidentiary hearing unfairly." *Id.* at 47.

CONCLUSION

For the foregoing reasons and those stated in his opening brief, 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.

October 30, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Reply Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 6,234 words excluding the parts of the Reply Brief exempted by Rule 32(a)(7)(B)(iii).

2. This Reply 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: October 30, 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 Reply Brief.

Dated: October 30, 2009

Joshua D. Yount

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on October 30, 2009, he caused two copies of this Reply Brief and a CD-ROM containing a digital version of the Reply Brief to be placed with a third-party commercial carrier for overnight delivery to the following:

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