IN THE SUPREME COURT OF THE UNITED STATES

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PAUL L. GLOVER, :

Petitioner :

v. : No. 99-8576

UNITED STATES :

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Washington, D.C.

Monday, November 27, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

MICHAEL L. WALDMAN, ESQ., Washington, D.C.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 99-8576, Paul Glover v. United States.

Mr. Waldman. Mr. Waldman, after reading the briefs it seems to me that the Government has pretty well conceded the question presented here, and is asking for affirmance on alternate grounds. Now, we don't decide cases on the basis of concessions, but you might be well advised to save a good deal of time for rebuttal.

MR. WALDMAN: Thank you, Your Honor.

ORAL ARGUMENT OF MICHAEL L. WALDMAN

ON BEHALF OF THE PETITIONER

MR. WALDMAN: Mr. Chief Justice, and may it please the Court:

In this case, the district court and then the court of appeals concluded that an additional 6 to 21 months in prison caused by counsel's deficient performance was not sufficiently significant to satisfy the prejudice prong of the ineffective assistance of counsel standard. We believe the lower court's attempt to transform this Court's prejudice analysis under Strickland into a requirement that defendant show a significant increase in their term of imprisonment is misplaced. This Court should reject a significant prejudice test as inconsistent

with Strickland and this Court's prior treatment of the prejudice test, as inconsistent with this Court's prior holding in Argesinger v. Hamlin that the right to counsel applies where any term of imprisonment is imposed, and because a significant prejudice test is unworkable and unfair.

Also in this case, as Mr. Chief Justice has noted, the Government agrees with Glover on the basic issue that the Seventh Circuit's significant prejudice test is incorrect. The Government, however, raises a host of alternative grounds for affirmance in its brief on the merits. Because these new Government arguments were not raised by the Government in the court of appeals, not addressed by any lower court, not encompassed within the question presented in the petition for certiorari, and not persuasive even when examined on their own merits, this Court should not reach these new arguments, but should leave them to the lower courts to be addressed on remand.

QUESTION: Would it also be open to the lower court on remand to reassess its initial position on Glover's leadership role if it knew what it knows now about the -- that the Seventh Circuit's test is incorrect? Could the sentencing court then say, but we didn't give extra points for leadership last time around, now we want to reassess that and give him the extra

points?

MR. WALDMAN: Your Honor, I think the issues as to what arguments have been waived, what arguments -- by the Government or by Mr. Glover, whether to do a recalculation is something that would have to be sorted out by the Seventh Circuit, and I think that is one of the very reasons why remand to the lower court is appropriate in this case.

In Strickland v. Washington, this Court established the prejudice prong for demonstrating ineffective assistance of counsel. It stated that a defendant must show that but for counsel's unprofessional errors the results of the proceeding would have been different. In numerous decisions since Strickland, this Court has quoted and adhered to this difference in result language from Strickland.

The court of appeals erroneously derived the significant prejudice test by misreading this Court's decision in Lockhart v. Fretwell. The circuit court misinterpreted Lockhart v. Fretwell as modifying the normal Strickland test by purportedly adding a new, more rigorous prejudice requirement. Last term, in Williams v. Taylor, this Court rejected the proposition that Lockhart has announced a new higher standard for showing prejudice. This Court in Williams reiterated that Strickland's

difference-in-result test remained the standard to be applied in virtually all cases. Williams emphasized that, in its own words, a mere difference in outcome was sufficient to satisfy the prejudice prong. Here, Mr. Glover's counsel's ineffective performance led Mr. Glover to receive an additional 6 to 21 months in prison, clearly a difference in outcome.

We also believe that this Court should be guided by its decision in Argesinger v. Hamlin. There, the Court held that any term of imprisonment, no matter how short, implicates the constitutional right to counsel. Consistent with Argesinger and its progeny, this Court should not tolerate 6 to 21 months of undeserved imprisonment caused by the ineffective performance of counsel.

Furthermore, as the Government itself notes in its brief, a significant prejudice test is unworkable. One sees this problem in the decision of the district court below, where the district court struggled to figure out whether 6 to 21 months in prison was sufficiently significant. Although the court of appeals has employed the significant prejudice test for a number of years, it remains unclear whether the significant increase in sentence refers to some percentage change, some absolute number of months, or some other factor.

For example, if significance is measured in offense levels, as some courts have stated, the two offense levels such as occurred in Mr. Glover's case, a two-offense-level change can be as much as 8 or 9 additional years in prison in some cases, depending on the crime and the characteristics of the offense.

QUESTION: Mr. Waldman, is your client still incarcerated? Does this case affect his actual incarceration?

MR. WALDMAN: Yes, Your Honor. He has served approximately 5 years of his term, but he has another 13 months remaining, so a favorable result on a section 2255 motion would allow him to be released.

We don't believe that one can seriously argue that 8 or 9 additional years imprisonment which are undeserved, and caused only by counsel's errors, can ever be considered insignificant. Moreover, we would make the more basic point, the point which we believe lies at the core of Argesinger, of Strickland, and the right to counsel cases, which is that any term of imprisonment which is undeserved and resulted from a lack of effective counsel cannot be permitted to stand.

Turning to the new arguments in the Government's brief on the merits, although now agreeing with Mr. Glover that the lower courts erred in applying a significant

prejudice test, the Government goes on on its brief on the merits to raise a variety of new grounds for affirmance. The Government argues that Mr. Glover's counsel did not perform deficiently at all. The Government now argues that the Wilson case requiring grouping offenses such as Mr. Glover's, that that case was wrongly decided by the court of appeals and should be overruled by this Court.

Finally, the Government now argues that correctly recalculated under Wilson, in its view, Mr. Glover's sentence would actually be increased. However, these alternative grounds were not properly raised previously in this case, and should not be addressed by this Court in the first instance. First, these various Government arguments were never presented to the court of appeals. The Government argued only one issue in the court below, that 6 to 21 additional months in prison did not satisfy the significant prejudice test established by the Seventh Circuit, and we attach, in our -- as Appendix A to our reply brief, the Government's brief to the court of appeals.

QUESTION: Well, the Government -- you, of course, were appealing against the decision of the district court, were you not?

MR. WALDMAN: That's correct, Your Honor.

QUESTION: And so how much is the Government

expected -- as an appellee, how many of these things do you expect it to raise, when you're appealing?

MR. WALDMAN: Well, Your Honor, they obviously had the right to raise whatever arguments they wanted to affirm the district court below, alternative grounds for affirmance at that court. Our position is not that they were -- it was -- they were required to raise these arguments, but in failing to raise them to the court of appeals and now raise them to this Court, that it's not appropriate for this Court under its rules of procedures to address them in the first instance.

QUESTION: That's all you're saying. You're not saying that they were waived. You're saying that's a decision for the Seventh Circuit to make on remand.

MR. WALDMAN: That's correct, Your Honor.

Second, neither the district court nor the court of appeals ever addressed any of these various new Government arguments. The lower courts relied on only one ground, that petitioner could not satisfy the significant prejudice test of the Seventh Circuit.

Third, these Government arguments are very different from the issue that we presented for review by this Court in our petition. The question presented by petitioner focused exclusively on the validity of the significant prejudice test which was relied on in the

decisions below to dismiss Mr. Glover's petition.

In these circumstances, this Court should not reach out to address the alternative grounds for affirmance now raised in the Government's brief on the merits. This rule's -- this Court's rules of procedure, as well as the numerous cases that we cite at pages 7 and 8 of our reply brief, make clear that the practice of this Court is not to address issues which appear for the first time in the merits brief to this Court.

There are no extraordinary circumstances here which demand that this Court diverge from its usual practice. The Government's arguments do not raise pressing issues of constitutional significance, or issues of great national import. Rather, the Government's new arguments involve complicated and detailed applications of the sentencing guidelines and lower court procedures and decisions. These are precisely the types of issues which this Court should not be addressing.

As this Court noted in Braxton v. United States, this Court should be, in its own words, restrained and circumspect in resolving sentencing guidelines interpretation issues, since Congress expressly provided the Sentencing Commission with the power to resolve issues involving conflicts in interpretation of the sentencing guidelines.

Here in particular, the Sentencing Commission has announced that as one of its priorities this year it will be examining the guidelines interpretation of section 3(d)1.2, which is the very section which the Government is asking the Court to review.

This Court will also occasionally resolve issues which were not raised below, where there is an obvious plain error which this Court can quickly and easily dispose of. That also is not the case here. As we demonstrate at pages 12 through 20 of our reply brief, not only are these issues not easily resolved, but the Government's new arguments at the end of the day are simply without merit.

The Government argues that there was no deficient performance by Glover's counsel, yet Glover's counsel on appeal never raised the issue of grouping the kickback and money laundering offenses. The probation officer's report had recommended grouping, and at least three circuits had ruled in favor of such grouping.

This was a pure legal issue. It was a strong viable claim that his appellate counsel should have raised, and which, as the Wilson case shows us, would have prevailed. This grouping issue was far superior to the two claims which were raised by Mr. Glover's counsel on appeal. These two claims involve challenges on

evidentiary and fact-findings by the district judge where the standard of review required Glover's counsel to make his case by clear error.

Ultimately the court of appeals found that these two claims raised by Glover's counsel were wholly unfounded, in its words, involved no error whatsoever, let alone clear error, and also again in the opinion it says it was not a -- these are not a close call. Comparing the grouping claim with those claims which he did assert, we submit that Glover's appellate counsel clearly acted outside the scope of a reasonably competent attorney in not raising this grouping issue on appeal.

We also believe that it was clearly deficient performance to not bring the Wilson case, a -- the Seventh Circuit's new case which controlled this issue and was directly on point, to not bring it to the attention of the panel in Mr. Glover's case, even though that case was still pending when Wilson was decided.

As to the Government's other elaborate challenges to the sentencing guidelines calculation, we believe that the Seventh Circuit's decisions in Wilson I and Wilson II are controlling and correct. The Government has offered no compelling justification for this Court to review these decisions, or to overrule their sound reasoning.

QUESTION: Was Glover's counsel on the first appeal, was it retained counsel or furnished by the Government?

MR. WALDMAN: Retained counsel, Your Honor.

In summary, the Government's various new arguments are inappropriate for this Court to address in the first instance. They involve complicated fact-specific and detailed issues which are best sorted out by the lower courts. The issue which this Court accepted for review was whether 6 to 21 additional months in prison due to counsel's ineffective performance constitute prejudice under the Strickland test. This Court's precedent and elemental fairness requires that this Court reject the significant prejudice test applied by the Court below.

If the Court has no further questions, I'll reserve the remainder of my time.

QUESTION: Very well, Mr. Waldman.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

MR. DREEBEN: Mr. Chief Justice, and may it please the Court:

We agree with petitioner that the Seventh Circuit erred in adopting a significant difference test for measuring the prejudice inquiry under Strickland v. Washington. We believe, however, that the judgment in

this case is correct, because petitioner's counsel at trial and direct appeal neither rendered deficient performance nor gave rise to prejudice.

QUESTION: Mr. Dreeben, why didn't the Government tell us this in the response to the petition for certiorari?

MR. DREEBEN: Justice O'Connor, at the stage when we responded to the petition, we told the Court that we thought the judgment was correct. We did not defend the rationale of the Seventh Circuit and, in fact, indicated that the Seventh Circuit might wish to reconsider it in light of this Court's intervening decision in Williams v. Taylor and a Fifth Circuit decision that had criticized it, but we had not formally concluded our analysis of whether at the end of the day we would or would not defend the approach that the Seventh Circuit adopted at the time we filed our response to the certiorari position.

After we told the Court not to grant the case, and the Court disagreed and granted it, we then undertook a complete analytical review of the Seventh Circuit's approach and concluded that we could not submit that this Court could affirm that approach consistent with its own cases and principles governing the ineffective assistance analysis, but we continued to believe that the judgment in

this case as rendered by the Seventh Circuit was correct on alternative bases.

QUESTION: But those grounds would be hard for us, really, to address here for the first time, at least on the grouping question. There's a five to five split below, and the Sentencing Commission is considering a change, particularly hard for us to deal with.

MR. DREEBEN: I agree, Justice O'Connor, that the sentencing guidelines question and the intricacies related to whether money laundering should be grouped with the underlying offense are both complicated and the kind of issue that this Court would ordinarily properly leave to the Sentencing Commission to resolve, particularly since the Sentencing Commission is aware of it.

We presented that analysis on the prejudice prong of the case in order to illustrate how very complicated the guidelines decisions that counsel faces are when deciding whether to raise a particular claim or not to raise a particular claim. These are intricate matters that are quite complex in Federal criminal law, and more complex than most decisions that counsel has to make, and it is therefore highly relevant to what this Court says, if anything, about the proper analysis and performance when counsel is charged with having failed to raise a sentencing guidelines claim that the client later

believes that he should have raised.

The Seventh Circuit --

QUESTION: That would come up, Mr. Dreeben, only if we dealt on the merits with your effort to affirm on an alternate ground.

MR. DREEBEN: That's correct, Mr. Chief Justice. The fundamental point that the Seventh Circuit was trying to make in adopting its significant difference test was that there are a multitude of guidelines questions that confront counsel who is handling a sentence or a sentencing guidelines question on appeal, and that if it were the case that any guidelines error could support collateral relief, the defendant would often get the chance for two full bites at the apple at sentencing questions, first at trial and on direct appeal, and second on collateral review, and --

QUESTION: That may be, but it's hard to say that's what the Seventh Circuit was talking about. They say Glover, to win on ineffective assistance he'd have to show his counsel performed below a constitutional threshold and that the deficient performance prejudiced him. Even if we were to assume that Glover's attorneys performed inadequately, the second prong, prejudice, is missing here, and then they go on to discuss that, so it seems to me they didn't say one single word about was,

what was or what was not inadequate performance.

MR. DREEBEN: I quite agree, Justice Breyer, and my point is that the considerations that drove the Seventh Circuit to adopt its rule on prejudice are actually far more pertinent to analyzing the performance prong.

Sentencing guidelines claims, as the Court knows, are not only complex but can have unpredictable outcomes, and can --

QUESTION: But Mr. Dreeben, may I just stop you there to confirm that you recognize the Second Circuit did not pass on the adequacy of the performance. It said, we will assume, for purposes of this decision, that the performance was inadequate. Even so, there was no prejudice.

So we don't even have an answer in the first instance on the deficiency of the performance from the Seventh Circuit. Why should we handle such a question as a matter of first view?

MR. DREEBEN: I think, Justice Ginsburg, the reason why it is relevant for the Court to say something about the performance issue, which was not addressed squarely by the Seventh Circuit -- we did argue it in the district court and the district court didn't address it either, so it has not been resolved by the courts below, but it is highly interrelated with the prejudice inquiry

in a sentencing guidelines ineffective assistance collateral attack, and the point that the Seventh Circuit was trying to make was to give courts a way to weed out these collateral attacks in an efficient way.

QUESTION: Well, why not let the Seventh Circuit make it, because looking at its current decision, all it said is, we're going to assume for purposes of this decision that counsel's performance was inadequate.

MR. DREEBEN: I agree that the Seventh Circuit hasn't resolved it, but this Court is going to announce a decision that will be influential in the way that the lower courts address comparable sentencing guidelines ineffective assistance of counsel cases, and I think that it would be useful for the lower courts to have some guidance from this Court as to some of the relevant considerations and factors that ought to be brought to bear on the performance inquiry.

QUESTION: There's really nothing novel about the points you make concerning adequacy of counsel's performance. You say, you know, these are complex issues, you can't raise too many either at the trial level or especially on appeal, you have to pick your good targets, this wasn't a good target -- I mean, it's all standard analysis, it seems to me.

I could understand it if you were presenting to

this Court some novel new theory of counsel inadequacy that we have to signal to the lower courts, but there's really nothing bizarre about the arguments you're making. They're standard adequacy-of-counsel arguments, aren't they, and can't we leave them to the Second -- Seventh Circuit to figure out?

MR. DREEBEN: Well, I hope they're not bizarre, but I do think that the arguments that we've made have gone a little bit beyond what you, Justice Scalia, have just accurately described as where this Court has thus far gone in analyzing the performance inquiry.

Clearly, counsel has to be selective in raising the issues that it chooses to present to an appellate court especially, and clearly, as this Court stated in Smith v. Robbins last term, just because a claim might look good in hindsight doesn't mean that it's the kind of claim that counsel should be deemed obligated to have raised.

But there is a unique feature to the sentencing guidelines claims, as well as a generally relevant point to appellate advocacy that I think the Court could do well to clarify. In these sentencing guidelines claims, there can often be ambiguity about whether a particular claim will indeed help the defendant when it is raised on appeal and prevails and, if so, by how much.

In this case, most starkly, our view is that if petitioner got the grouping that he asked for, his offense level should actually go up, not down, because the grouping would have required that all of the financial harm that he inflicted on the various victims be aggregated into one group, so a counsel who was looking at a sentencing guidelines claim, unlike claims that would simply result in a reversal of a conviction, has to be cognizant that there can be unintended adverse effects.

In addition, and this was the insight that I think the Seventh Circuit was most concerned with, sentencing guidelines claims can produce sometimes only very modest benefits, and the length of the benefit that would be produced is a relevant factor in considering whether reasonable counsel would elect to raise a relatively long-shot claim, or a claim that's not established.

QUESTION: Well, Mr. Dreeben, I take it we have three choices here. We could say something on this issue that helps the Government. We could say nothing. We could say something that hurts the Government. You would rather us have us say nothing than say something that hurts the Government, I take it.

MR. DREEBEN: Correct, Mr. Chief Justice.

(Laughter.)

MR. DREEBEN: I'm here seeking to affirm the judgment, and if I can't affirm the judgment, at least get some guidance that would be useful to the lower courts that have been grappling with this problem.

Now, petitioner has, of course, pointed out that it is unusual for the Court to go beyond the scope of the question presented and address grounds that were not decided below and the Government, of course, fully agrees with that. We recognize that it's unusual. It's certainly not unprecedented for the Court to decide a case on grounds that weren't decided by the lower court or that were not fully addressed.

QUESTION: If I understand you correctly, you're asking us either to affirm on grounds not relied on below or, alternatively, to write an advisory opinion on the general subject matter.

(Laughter.)

MR. DREEBEN: I would call it giving guidance, Mr. Justice Stevens.

(Laughter.)

MR. DREEBEN: The Court similarly believed that it was appropriate to give guidance to the lower courts by showing how the rule of law applies to the particular facts in Brook Group v. Brown & Williamson, a 1993 decision where the Court took a novel antitrust principle

and then applied it to the very intricate and specific facts of that case.

In Siegert v. Gilley, a 1991 decision, the Court actually affirmed the judgment on a ground that the lower court had not reached at all. There, the lower court had said there was a heightened pleading requirement for qualified immunity. This Court decided the case on the grounds that there was no underlying constitutional right that was asserted in the Bivens action at all, and in that case not only was that not the question presented, but the parties hadn't even briefed it or addressed it. So --

QUESTION: There's -- on occasion -- I -- it seems to me that case -- opinion perhaps represents a decision that a particular claim is logically antecedent to another one, and it seems to me you have a hard time saying that here.

MR. DREEBEN: I do have a hard time saying it's logically antecedent, but the third case that I would refer the Court to involves the elaboration of the additional implications of a claim that the court decided. That is Colstad v. American Dental Association, which was decided in 1999, and there the Court elaborated a standard for punitive damages in Title VII actions and then went on to give guidance to the lower courts about how agency principles apply, but then remanded --

QUESTION: And some members of the Court were rather critical of that particular development, I would say.

(Laughter.)

MR. DREEBEN: I am relying on the majority's disposition in the case.

QUESTION: Your brief was very effective on the points you're raising.

MR. DREEBEN: The Seventh Circuit obviously could resolve these issues, and if this Court chooses to give the guidance that we think is appropriate, it will help the overall administration of the judicial system, because we believe, on the one hand, that when a defendant has not had adequate assistance of counsel, constitutionally effective assistance of counsel in litigating the sentencing guidelines claims, and he can show a reasonable probability of a different outcome, then he has satisfied the elements of a constitutional claim.

QUESTION: Okay, so what you want us to say is, we assume for argument's sake that the present defendant's present interpretation of how this all works, the multiple count thing is correct. We'd have to say that, otherwise we'd have to get into who's right and who's wrong about multiple counts, wouldn't we?

MR. DREEBEN: I think --

QUESTION: We'd have to say, we assume they're right, I think.

MR. DREEBEN: I think that the Court could --

QUESTION: Or do you want us to get into multiple counts, which is -- I know multiple counts. It's like Hagel on his death bed. He said, only one person has ever understood me, and even he didn't understand me.

(Laughter.)

MR. DREEBEN: That's perhaps why the Sentencing Commission is going to clarify this.

I think it's also perhaps why counsel should not be quickly branded ineffective.

QUESTION: All right, so you want us to say, we assume for argument's sake that they're right on the merits of multiple counts, a thing you don't really believe, but you want us to say that they're right, for assumption.

MR. DREEBEN: No. I actually would like the Court to say that the Seventh Circuit applied the incorrect test for prejudice, but a properly analyzed performance and prejudice inquiry would produce the conclusion that petitioner's counsel is wrong. That would be my first choice.

My second choice is for the Court to do no harm to the arguments that I'm making about ineffective

assistance, and that those are really the only two choices that I'd like to submit to the Court at present.

(Laughter.)

QUESTION: Is there any difference in the legal standard applied to a performance by retained counsel as opposed to appointed counsel for ineffective assistance of counsel purposes?

MR. DREEBEN: No, Mr. Chief Justice. There is a constitutional floor that applies regardless of whether counsel is retained or appointed. The only place where there's a different standard is where counsel is waived altogether and the defendant represents himself. He can then not charge himself with ineffective assistance of counsel.

There is one legal point that has not been clarified in this Court's cases regarding appellate assistance by counsel that could also be usefully clarified, and that is that we think the proper inquiry would look to the state of the law facing appellate counsel, rather than having an evidentiary hearing that would analyze in great depth how much legal research the particular counsel did in anticipation of filing his appellate brief.

The inquiries here are essentially whether the defendant's lawyer did not present a claim that was

sufficiently strong that it was ineffective for him not to present it. We think that that is an objective inquiry that should be measured by the state of the law that was confronting the appellate counsel at the time, and should be resolved based on the legal precedents that are in existence.

QUESTION: But isn't the suggestion here that sometime between the oral argument in the Seventh Circuit and the Seventh Circuit's decision this intervening decision in Wilson came down, so that any competent counsel would have said to the Seventh Circuit, may I file a supplement including this decision, which bears very much on a case that is sub judica before you.

MR. DREEBEN: Well, I think the answer is no, for several reasons, Justice Ginsburg. First of all there's no authority that I know of that says that competent counsel is required to continue to survey the developing law on issues that he decided not to raise to appeal to an appellate court to determine whether there has been some change of law on an issue that he abandoned. I don't think that competent counsel is required to stay abreast of the law in that fashion.

Second, as we have pointed out, competent counsel may well conclude that, rather than risking the ire of the court of appeals by raising a claim that he had

previously abandoned and is now exploiting only because some other defendant had successfully raised it might cost him credibility with the court of appeals and is therefore not appropriately done.

There was no authority in the Seventh Circuit at the time, as there is today, that says that counsel has a right to present new issues that are based on intervening law.

QUESTION: Do we know what the Seventh Circuit practice is? Does it generally receive such supplemental briefs based on intervening changes in the law?

MR. DREEBEN: I have spoken to the U.S. Attorney's Office about that question and I have not received a clear answer, because it doesn't come up all that often, but I will say that the Seventh Circuit is a procedurally strict circuit and it does make every effort to ensure that parties get review only on those issues that they've elected to raise in their opening brief.

Now, there is one piece of stray dictum in a Seventh Circuit case that suggests that, of course, if the law changes, maybe parties can raise new issues. Other circuits are divided on that issue, so it's hardly something that I think competent counsel should be presumed required to do in order to meet the minimal constitutional standard of adequacy.

And the final reason why in this case I don't think competent counsel was deficient even if he knew about Wilson and didn't raise it to the court of appeals is because Wilson, under its grouping analysis, produces this strange anomaly of requiring more financial harm to be included in each of the offenses that is grouped, and for reasons that as Justice Breyer has pointed out, very few people understand but we've attempted to lay out in our brief, the offense level would actually go up, and it would have a counterintuitive result.

This actually happened in the Wilson case. The judge on remand from Wilson I, the case that petitioner says should have been cited to the panel, resentenced the defendant to a higher sentence, faithfully applying the guidelines as he understood them. The court of appeals then reversed, saying, well, the Government had waived its right to argue the increased offense level in that manner.

We don't agree with the Seventh Circuit's waiver analysis, but the more salient point here is that no counsel could have foreseen that the Seventh Circuit would later apply a waiver analysis, and thus, if counsel had actually read the Seventh Circuit's decision and said grouping is required under subsection (d) of the sentencing guidelines, section 3(d)1.2, and had asked for that, the sentence could go up, and that lawyer would not

be assured that there would be any purpose served by raising that kind of an argument only to his client's ultimate detriment.

So taking into account the complexities of the guidelines, the potential for adverse results that can occur, and the state of the law which hardly suggested that this was, as Judge Easterbrook has called in another context, a dead-bang winner on appeal, we don't think that there was any deficient performance by petitioner's counsel that would merit ineffective assistance relief on collateral review.

If the Court has no further questions --

QUESTION: Thank you, Mr. Dreeben.

Mr. Waldman, you have 16 minutes left.

REBUTTAL ARGUMENT OF MICHAEL L. WALDMAN

ON BEHALF OF THE PETITIONER

MR. WALDMAN: Thank you, Your Honor. I will be brief.

The Government has said that it wants this Court to issue guidance. I wrote down, an advisory opinion would be useful to clarify some points. This Court has procedures as to when it will take cases in the first instance. It says that it will only do so in extraordinary, rare circumstances.

This Court -- there are reasons for those

procedures of this Court, and the cases that we cite at page 7 and 8 of our reply brief. This Court benefits from the thinking of the lower court. It benefits from the refinement and sharpening of issues by the lower courts. None of that occurred here, and the Government has not identified any issue that is so pressing, that is so -- such an issue of concern for the lower courts that guidance by this Court is essential. It hasn't reached that extraordinary circumstance requirement which this Court has set for dealing with issues at the first instance.

There is nothing at core -- as Justice Scalia said, this is standard analysis. There is nothing unusual about these arguments being made by the Government here concerning the sentencing guidelines. They are complicated arguments. They are detailed arguments. They are arguments which are best sorted out by the lower courts here.

As to whether the Seventh Circuit would accept the Wilson case if offered after briefing and oral argument, we cite a number of cases in footnote 14 indicating that we believe they would, but that's an issue which the Seventh Circuit is in the best situation to resolve, not this Court in the first instance.

We would also note, again, this Court's decision

in Braxton v. United States, that it should restrained and circumspect in dealing with sentencing guidelines issues. This sentencing guideline issue in particular is in front of the Sentencing Commission, and we don't see any reason for this Court to engage in advisory opinions or clarifying issues that have not been addressed and dealt with by the lower courts.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waldman. The case is submitted.

(Whereupon, at 11:42 a.m., the case in the above-entitled matter was submitted.)