

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PAUL L. GLOVER, :

4 Petitioner :

5 v. : No. 99-8576

6 UNITED STATES :

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8 Washington, D.C.

9 Monday, November 27, 2000

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:05 a.m.

13 APPEARANCES:

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

15 the Petitioner.

16 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

17 Department of Justice, Washington, D.C.; on behalf of

18 the Respondent.

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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

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

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

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

1 points?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 QUESTION: And so how much is the Government

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

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

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

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

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

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

1 decisions below to dismiss Mr. Glover's petition.

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

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

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

1 Here in particular, the Sentencing Commission
2 has announced that as one of its priorities this year it
3 will be examining the guidelines interpretation of section
4 3(d)1.2, which is the very section which the Government is
5 asking the Court to review.

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

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

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

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

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

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

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

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

4 MR. WALDMAN: Retained counsel, Your Honor.

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

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

17 QUESTION: Very well, Mr. Waldman.

18 ORAL ARGUMENT OF MICHAEL R. DREEBEN

19 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

1 believes that he should have raised.

2 The Seventh Circuit --

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

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

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

1 what was or what was not inadequate performance.

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

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

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

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

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

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

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

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

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

25 I could understand it if you were presenting to

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

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

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

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

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

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

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

24 MR. DREEBEN: Correct, Mr. Chief Justice.

25 (Laughter.)

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

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

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

17 (Laughter.)

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

20 (Laughter.)

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

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

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

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

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

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

4 (Laughter.)

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

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

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

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

25 MR. DREEBEN: I think --

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

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

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

8 (Laughter.)

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

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

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

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

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

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

3 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 If the Court has no further questions --

13 QUESTION: Thank you, Mr. Dreeben.

14 Mr. Waldman, you have 16 minutes left.

15 REBUTTAL ARGUMENT OF MICHAEL L. WALDMAN

16 ON BEHALF OF THE PETITIONER

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

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

25 This Court -- there are reasons for those

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

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

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

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

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

8 Thank you, Your Honor.

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

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

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