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Jay E. Grenig

Marquette University Law School, jay.grenig@marquette.edu

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What Constitutes Ineffective Assistance of Counsel at Sentencing?

by Jay E. Grenig

PREVIEW of *United States Supreme Court Cases*, pages 141-144. © 2000 American Bar Association.

Jay E. Grenig is professor of law at Marquette University Law School in Milwaukee, Wisc.; jgrenig@earthlink.net or (414) 288-5377. Prof. Grenig is a co-author of *West's Federal Jury Practice and Instructions* (5th ed.).

ISSUE

Was Paul Glover denied effective assistance of counsel when his lawyers failed to argue that Glover's money-laundering offenses should be grouped with his labor racketeering offenses in calculating his sentence under the federal sentencing guidelines?

FACTS

In June 1995, Paul Glover, the vice-president and general counsel of the Chicago Truck Drivers, Helpers, and Warehouse Workers Union, was convicted in federal court of conspiracy, soliciting and receiving kickbacks, money laundering, and tax evasion. His conviction arose out of his conduct in connection with a series of investments made with money belonging to the pension and health and welfare funds of a Chicago union.

In the Preliminary Presentence Investigation Report ("PPSI"), the United States Probation Office recommended grouping the money-laundering and kickback counts pursuant to the Federal Uniform

Sentencing Guidelines. The United States objected to the PPSI, arguing that the money-laundering and kickback offenses should not be grouped together and that Glover should receive a two-level multiple count adjustment under the guidelines. Glover's counsel did not file a written response. At the sentencing hearing, the court asked Glover's counsel to address the government's objections to the grouping of offenses. He responded that he thought grouping was "appropriate" but did not cite any authority.

The district court ruled for the government and ordered that the money-laundering and kickback offenses be treated separately. The district court determined that Glover's adjusted offense level under the sentencing guidelines was 28 and that his criminal history category was I, resulting in a sentencing range of 78 to 97 months in prison. The court selected a midpoint in the

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GLOVER v. UNITED STATES
DOCKET No. 99-8576

ARGUMENT DATE:
NOVEMBER 27, 2000
FROM: THE SEVENTH CIRCUIT

Case at a Glance

A former union official says he was denied the assistance of effective counsel when his lawyer failed to argue that the trial court should group his money-laundering offenses with his conspiracy and kickback offenses in calculating his sentence. The Seventh Circuit reasoned that even if the attorney did err, his mistake could have added only six to 21 months to the defendant's sentence, an increase that it said was too insignificant to support an ineffective assistance of counsel claim on collateral attack.

range, sentencing Glover to 84 months in prison.

Glover then appealed his conviction. Counsel again did not challenge the district court's refusal to group together the money-laundering and kickback offenses. The Seventh Circuit affirmed the conviction and sentence in December 1996.

In November 1997, Glover filed a motion to vacate, set aside, or correct his sentence on the ground that his lawyer was ineffective in failing to argue that the sentencing court should have grouped his money-laundering offenses with his conspiracy and kickback offenses under the Federal Uniform Sentencing Guidelines. Glover argued that, but for the errors of his counsel, his adjusted offense level would have been 26, resulting in a range of 63–78 months' imprisonment. The district court denied the motion, and Glover appealed to the U.S. Court of Appeals for the Seventh Circuit.

Glover claimed that his attorney's failure to argue the correct interpretation of the sentencing guidelines led to an adjusted offense level two levels higher than it should have been. He argued that the Seventh Circuit's decision in *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996), had held that money-laundering offenses and mail-fraud offenses should be grouped together under the Federal Uniform Sentencing Guidelines.

The Seventh Circuit affirmed the lower court in an unpublished opinion. It explained that in order to successfully claim ineffective assistance, Glover would need to show both that his counsel performed below a constitutional threshold and that the deficient performance prejudiced him. The Seventh Circuit

noted that if Glover was correct about the errors of his counsel, his sentence should have been six to 21 months lower than the 84-month sentence he received. The court concluded, however, that this potential decrease is not sufficiently significant to be cognizable on collateral attack.

The Supreme Court granted Glover's petition for a writ of certiorari and is now reviewing the Seventh Circuit's decision. 120 S.Ct. 2716 (1999).

CASE ANALYSIS

The Sixth Amendment right to assistance of counsel accords a criminal defendant the right "to have the assistance of counsel for his defense." The Supreme Court has recognized that the right to counsel is the right to *effective* assistance of counsel. *McMann v. Richardson*, 397 U.S. 759 (1970). Counsel can deprive a defendant of the right to effective assistance merely by failing to render "adequate legal assistance." *Cuyler v. Sullivan*, 427 U.S. 97, 344 (1976).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court ruled that the proper standard for attorney performance is that of reasonably effective assistance. It stated that the benchmark for judging a claim of ineffectiveness is whether the counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

According to the Supreme Court, there are two components in determining whether counsel's assistance was so defective as to require reversal of conviction: (1) the defendant must show that counsel's performance was deficient, in that the attorney made errors so serious that he or she was not functioning as the

"counsel" guaranteed the defendant by the Sixth Amendment; and (2) the defendant must show that the deficient performance "prejudiced" his defense by showing that counsel's errors were so serious as to deprive him of a fair trial—a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668 (1984).

The Seventh Circuit has taken the position that only a significant increase in the sentence rises to the level of the type of prejudice that will support an ineffective assistance of counsel claim on collateral attack. See *Martin v. United States*, 109 F.3d 1177 (7th Cir. 1996), cert. denied, 522 U.S. 931 (1997); *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993).

Durrive involved a claim of ineffective assistance of counsel relating to the federal sentencing guidelines. Interpreting the Supreme Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the Seventh Circuit ruled that in the absence of "[g]rave errors by judge and counsel," misapplication of the federal sentencing guidelines does not make the sentence "unreliable or ... fundamentally unfair."

Glover argues that *Strickland* does not provide any support for the Seventh Circuit's requirement of "significant" prejudice. He argues that *Strickland* established the clear rule that the prejudice prong is satisfied where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

According to Glover, in adopting its "significant prejudice" requirement, the Seventh Circuit was plainly motivated in part by concerns about the burden that habeas corpus challenges place on the federal judiciary. However, he argues that vindication

of basic constitutional rights should not be denied on the basis that the judicial procedures to enforce them are time-consuming or expensive. Glover suggests that the Seventh Circuit's fears are overblown and that only a limited number of petitioners will be able to identify with specificity a particular sentencing guideline provision that was incorrectly calculated and then make the required showing of a different outcome by a "reasonable probability."

It is Glover's position that the Seventh Circuit's refusal to correct erroneous sentences unless the period of undeserved imprisonment is "sufficiently significant" is bad policy and an anathema to the law. He says that upholding incorrect sentences thwarts the purposes of Congress in enacting the sentencing guidelines by allowing disparities in sentences to flourish and calls into question the judiciary's commitment to fairness.

Glover claims that the six to 21 additional months of imprisonment caused by his counsel's ineffective assistance plainly constitutes the "difference in outcome" required to satisfy the *Strickland* prejudice test. He also argues that the Seventh Circuit's requirement for "significant prejudice" is incompatible with the Supreme Court's most fundamental teachings regarding the protections of the Sixth Amendment. Glover notes that the constitutional right to counsel under the Sixth Amendment is implicated by any term of imprisonment, no matter how short. See *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

The government responds that the failure of Glover's counsel to argue that his money-laundering and racketeering offenses should be grouped under the sentencing guidelines did not constitute ineffective assistance

of counsel. The government agrees that *Strickland* should apply to issues concerning the alleged ineffectiveness of counsel in sentencing proceedings that involve the guidelines. Nonetheless, the government contends that the application of the *Strickland* test to sentencing proceedings under the guidelines should take into account the particular characteristics of those proceedings.

The government notes that the judge retains significant discretion in applying the guidelines to the particular facts before him. The judge must select a sentence from within the applicable guidelines range and must decide whether to depart from the guidelines. Additionally, not every claim relevant to the guidelines criteria will change the applicable guidelines range, and because there is substantial overlap among guidelines ranges, not every change in the guidelines range will have an impact on the defendant's sentence.

Therefore, the government argues, it will usually be difficult, if not impossible, for a reviewing court to assess the reasonableness of counsel's decision to focus on one claim rather than another. Moreover, the government says that it will frequently be difficult or impossible for the reviewing court to determine whether the failure to raise a particular claim resulted in a reasonable probability of a different sentencing outcome.

The government also asserts that collateral relief is rarely available for claims that do not assert constitutional or jurisdictional errors. It stresses that errors in the application of the guidelines do not implicate the determination of guilt or innocence. The government observes that the vast majority of the federal courts of appeals have

held that, barring extraordinary circumstances, an error in the application of the sentencing guidelines cannot be raised in a collateral proceeding. See, e.g., *United States v. Pregent*, 190 F.3d 279 (4th Cir. 1999); *Jones v. United States*, 178 F.3d 790 (6th Cir.), cert. denied, 120 S.Ct. 335 (1999); *United States v. Talk*, 158 F.3d 1064 (10th Cir. 1998), cert. denied, 525 U.S. 1164 (1999).

According to the government, the Seventh Circuit correctly recognized the need to customize the *Strickland* analysis to the nature of noncapital sentencing proceedings. However, the government asserts that, in its effort to tailor the analysis to that context, the Seventh Circuit modified the prejudice inquiry in a manner that is both inconsistent with the Supreme Court's cases and unworkable.

Although it agrees with Glover that the Seventh Circuit did not apply the correct prejudice inquiry, the government contends that the failure of Glover's counsel to argue that his client's money-laundering and racketeering offenses should be grouped did not fall below an objective standard of reasonableness. Contending that the grouping argument lacks merit, the government says that Glover's counsel did not act unreasonably in failing to present a meritless claim. The government also contends that, on appeal, Glover's counsel merely decided to bypass the grouping issue in order to focus on other claims and maximize the likelihood of success.

The government then argues that, in any event, Glover was not prejudiced by his counsel's failure to raise the grouping claim. Because of the nature of the sentencing guidelines system, the government asserts that it will often be difficult

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for a defendant to establish the necessary degree of probability that an omitted legal claim (even if meritorious) would have affected the outcome of a sentencing proceeding. The government observes that when a legal claim that counsel failed to present adequately would not have resulted in a guidelines range below the defendant's sentence, the defendant will be unable to establish a reasonable probability that a more effective attorney would have helped produce a different result. Even if Glover were correct that his money-laundering and labor racketeering offenses should have been grouped, the government says, that grouping would have increased, rather than decreased, the applicable guidelines range.

SIGNIFICANCE

The Federal Uniform Sentencing Guidelines operate by listing a number of offense and offender characteristics and then calculating a defendant's sentence on the basis of these characteristics. As a result, sentencing under the guidelines in federal court is a highly structured, formulaic process. The guidelines are intended to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. 28 U.S.C. § 991(b).

Since *Strickland*, the Supreme Court has evaluated a number of claims of ineffective assistance of counsel by criminal defendants. See *Roe v. Flores-Ortega*, 120 S.Ct. 1029 (2000) (applying *Strickland* to a claim of ineffectiveness based on counsel's failure to file a notice of appeal); *Williams v. Taylor*, 120 S.Ct. 1495 (2000) (applying *Strickland* to a claim of ineffectiveness based on counsel's failure to investigate and present substantial mitigating evidence during capital sentence proceeding); *Smith v. Robbins*, 120 S.Ct. 746 (2000)

(applying *Strickland* to counsel's decision not to file a full merits brief on appeal); *Smith v. Murray*, 477 U.S. 527 (1986) (applying *Strickland* to evaluate counsel's failure to raise a capital sentencing claim on appeal); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (applying *Strickland* to counsel's failure to file a suppression motion); *Darden v. Wainwright*, 477 U.S. 168 (1986) (applying *Strickland* to a claim that trial counsel failed to adequately present mitigating evidence); *Hill v. Lockart*, 474 U.S. 52 (1985) (applying *Strickland* to a claim of ineffective assistance in a noncapital plea context).

The Seventh Circuit's "significant prejudice" requirement is derived from its interpretation of *Lockhart v. Fretwell*, 506 U.S. 364 (1993). The Seventh Circuit understands *Lockhart* as adding to the prejudice prong of *Strickland* a requirement that the result be "fundamentally unfair or unreliable." The Fifth Circuit also applies a "significant prejudice" test. See *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993).

In *Williams v. Taylor*, 120 S.Ct. 1495 (2000), the Supreme Court reviewed a decision by the Fourth Circuit that had denied a defendant's habeas petition despite acknowledging a reasonable probability that counsel's incompetence at the sentencing hearing had resulted in an increased sentence. The Fourth Circuit had interpreted *Lockhart* as requiring that a defendant claiming ineffective assistance of counsel show that the result was "fundamentally unfair or unreliable."

The Supreme Court reversed the Fourth Circuit, holding that the correct standard is the *Strickland* requirement that the defendant show that "but for counsel's unprofessional errors, the result ... would

have been different." 120 S.Ct. at 1502. The Court explained that *Lockhart* provided a narrow exception to the ordinary prejudice rule.

ATTORNEYS FOR THE PARTIES

For Paul L. Glover (Michael L. Waldman (202) 639-7000)

For the United States (Seth P. Waxman, Solicitor General, U.S. Department of Justice (202) 514-2217)