No. 99-8576

In the Supreme Court of the United States

PAUL L. GLOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel because his lawyer did not argue that his money laundering offenses should be grouped with his labor racketeering offenses to calculate his sentencing range under the Sentencing Guidelines.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes, guidelines and rules—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (J.A. 52-54) is unreported, but the judgment is noted at 182 F.3d 921 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1999. A petition for rehearing was denied on October 7, 1999 (J.A. 55). On December 16, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 5, 2000. The petition was filed on March 6, 2000 (a Monday) and was granted on June 26, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

The relevant provisions of the Sentencing Reform Act of 1984 and the Sentencing Guidelines are set forth in an appendix to this brief.

STATEMENT

1. Petitioner was Vice-President and General Counsel of the Chicago Truck Drivers, Helpers, and Warehouse Workers Union. Petitioner was also Fund Manager of the Union's Health and Welfare Fund and a member of the Fund's Board of Trustees. Although petitioner was responsible for managing the Fund's day-to-day operations, he was not authorized to make investment decisions for the Fund. Those decisions were to be made only by the full Board of Trustees. The Union's Pension Fund was also administered by a Board of Trustees, and Pension Fund investments could be authorized only by a majority vote of the Pension Fund Board. John R. Johnson, Sr., the President of the Union, served as Fund Manager of the Pension Fund, and both he and petitioner were members of the Pension Fund's Board of Trustees. J.A. 130.

Between 1986 and 1992, petitioner and Johnson engaged in several schemes in which they received kickbacks in exchange for causing the Health and Welfare and Pension Funds to make various investments. Petitioner and Johnson improperly steered investments to various investment brokers without the approval of the relevant Boards, and the brokers then paid kickbacks to petitioner and Johnson. Petitioner did not report the kickbacks on his income tax returns, and he cashed some of the checks that he received through a currency exchange, conduct which formed the basis for money laundering charges against him. The laundered money was not used to further the underlying fraud. J.A. 131-135. The improper commissions that the brokers received totaled approximately $1,802,000, and the laundered funds totaled approximately $250,000. J.A. 67.

2. On January 19, 1995, petitioner was indicted in the United States District Court for the Northern District of Illinois on charges of racketeering conspiracy, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18

U.S.C. 1962(d); labor racketeering, in violation of 18 U.S.C. 1954; money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); and filing false tax returns, in violation of 26 U.S.C. 7206. Petitioner's first trial ended in a hung jury. J.A. 136. The jury in petitioner's second trial found him guilty of most of the charges. J.A. 136-137.

The Presentence Investigation Report (PSR) that was prepared for petitioner's sentencing recommended that his labor racketeering, money laundering, and tax offenses all be grouped together under Sentencing Guidelines (Guidelines) § 3D1.2 for purposes of determining his offense level. J.A. 71. The government objected to that recommendation, and the district court considered the issue at the sentencing hearing. See J.A. 88-89. The government pointed out that several courts of appeals had held that money laundering offenses should not be grouped with the offenses that generated the laundered funds. Petitioner's counsel contended that the offenses involved "one joint effort" and all of the offenses were therefore "appropriately grouped" in the PSR. The district court, however, agreed with the government that the money laundering offenses should be grouped separately. J.A. 89.

The district court also decided, over defense counsel's objection, that petitioner's offense level for the racketeering offenses should be adjusted upward two levels for obstruction of justice under Guidelines § 3C1.1 because petitioner had perjured himself at his first trial. Sent. Tr. 6-9; J.A. 84. The government asked the district court to make an additional upward adjustment for petitioner's role in the offense (Sent. Tr. 12-13), but the court agreed with defense counsel's argument (*id.* at 13-14) that an adjustment was not warranted. As a result, the adjusted offense level for the racketeering group of offenses was 26, and the adjusted offense level for the money laundering group of offenses was also 26. The court added two levels under Guidelines § 3D1.4 because it found (in contrast to the PSR) that petitioner's

offenses fell into more than one group of closely related counts. The resulting offense level of 28, combined with petitioner's criminal history category of I, yielded a sentencing range of between 78 and 97 months of imprisonment. Sent. Tr. 15; J.A. 86. The government asked the court to sentence petitioner at the top of the range, Sent. Tr. 17, and petitioner's counsel responded by pointing out a variety of mitigating factors, including petitioner's family responsibilities, his past productive contributions to the community, and his lack of a criminal history (*id.* at 19-20). The district court imposed a sentence of 84 months. *Id.* at 23-24.

3. The same counsel represented petitioner in his direct appeal. In that appeal, petitioner raised two claims, one concerning his convictions and the other his sentence. J.A. 130. Petitioner argued that the district court had erroneously denied his request that nearly all of his testimony at his first trial be admitted in order to clarify the portion of that testimony that had been introduced by the government at the second trial. Petitioner contended that, as a result, his convictions should be overturned. J.A. 138. Petitioner also argued that the two-level enhancement that the district court had imposed on the ground that petitioner had perjured himself at his first trial was not supported by the evidence. J.A. 145. Petitioner did not renew on direct appeal his objection to the district court's refusal to group his money laundering offenses with the offenses that generated the laundered funds for purposes of determining his base offense level. In a published opinion of several pages, the court of appeals considered and rejected each of petitioner's claims and affirmed his convictions and sentence. J.A. 129-147.

4. In a later motion to correct his sentence filed under 28 U.S.C. 2255 (1994 & Supp. IV 1998), petitioner renewed the claim that his money laundering offenses should have been grouped with his conspiracy and labor racketeering offenses under Guidelines § 3D1.2. J.A. 23-34. Petitioner also argued

that his counsel had rendered constitutionally ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984). He claimed that counsel was derelict in failing to press the grouping argument adequately at sentencing and in failing to raise it at all on direct appeal, and that the deficient performance had caused him prejudice. J.A. 34-41. Under a proper application of the Guidelines, petitioner contended, his offense level should have been reduced from level 28 to 26, his Guidelines range should have been 63 to 78 months of imprisonment, and his sentence should accordingly have been between 6 and 21 months lower than the 84 months imposed by the district court. J.A. 43.

The district court denied petitioner's Section 2255 motion. J.A. 42-48. The court did not reach the government's argument, on the first component of the *Strickland* analysis, that "counsel's performance could not have been deficient, at sentencing or on appeal, for failing to raise an issue that had not yet been decided by the Seventh Circuit." J.A. 44.[1] Instead, the court resolved petitioner's ineffective assistance claim on the second component of the *Strickland* analysis, because it found that petitioner had not shown prejudice. J.A. 45. The court explained that circuit precedent required that the potential change in sentence be a "significant" amount in order to constitute prejudice, J.A. 45 (citing *Durrive* v. *United States*, 4 F.3d 548 (7th Cir. 1993), and *Martin* v. *United States*, 109 F.3d 1177 (7th Cir. 1996), cert. denied, 522 U.S. 931 (1997)), and that the increase in sen-

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[1] The district court noted that, at the time of sentencing, the Seventh Circuit had not yet considered the grouping issue that petitioner was seeking to raise, but several other circuits had rejected his position. J.A. 43-44. Only after oral argument in petitioner's appeal and before issuance of the opinion affirming his convictions and sentence did the Seventh Circuit rule in *United States* v. *Wilson*, 98 F.3d 281 (1996), that "the § 1956 money laundering offenses and mail fraud offenses involved in that case should be grouped." J.A. 44.

tence that petitioner alleged (6 to 21 months) was not "significant" enough under that test. J .A. 45-47.[2]

5. The court of appeals affirmed. J.A. 52-54. In a short per curiam opinion, the court endorsed the district court's reasoning:

> Even if we were to assume that [petitioner's] attorneys performed inadequately [under *Strickland*], the second prong, prejudice, is missing here. [Petitioner] argues that his attorneys' failure to argue the correct interpretation of U.S.S.G. § 3D1.2 led to an adjusted offense level two levels higher than it should have been. This court has held 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.

J.A. 53. The court acknowledged petitioner's claim that, if not for his counsel's purported errors, he would have been sentenced within a Guidelines range of 63 to 78 months, which was 6 to 21 months less than his sentence of 84 months of imprisonment. J.A. 53. Relying on *Durrive* and *Martin*, however, the court held that "this potential decrease is not sufficiently significant to be cognizable on collateral attack." J.A. 54.

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[2] The court recognized that in *Martin*, the court of appeals had described its approach to sentencing prejudice as a "rule of proportionality" but had not explicated the meaning of that phrase. J.A. 46 (quoting *Martin*, 109 F.3d at 1178). The district court therefore compared the potential change in petitioner's sentence to the change that the court of appeals in *Durrive* found insufficient to constitute prejudice. In *Durrive*, the sentence reduction would have been between 10 and 18.3% (120 months reduced by 12 to 22 months). J.A. 46-47. Here, the sentence reduction would have been between 7.1 and 25% (84 months reduced by 6 to 21 months). J.A. 47. The court concluded that "[t]he potential sentence reduction in the present case is not large enough to satisfy the significant change requirement of *Durrive* and *Martin*." J.A. 47.

SUMMARY OF ARGUMENT

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court held that a claim of ineffective assistance of counsel in violation of the Sixth Amendment requires two showings: first, the defendant must show that counsel committed sufficiently serious errors that his "representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant must show that the errors resulted in prejudice. Establishing prejudice requires the defendant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Petitioner's claim is that, but for counsel's deficient performance at trial and on appeal, his sentence under the Sentencing Guidelines would have been between 6 and 21 months less than the 84 months of imprisonment he received. The court of appeals held that such a reduction is not "significant" enough to constitute prejudice. In our view, the court of appeals erred in supplementing *Strickland*'s test for prejudice with a "significant" difference inquiry. Nevertheless, a proper application of *Strickland* results in the conclusion that petitioner can show neither deficient performance nor prejudice.

A. *Strickland* itself involved capital sentencing, and the Court reserved whether its two-part test applied to the less formal process and "standardless discretion" in noncapital sentencing. 466 U.S. at 686. Subsequent cases, however, have revealed that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams* v. *Taylor*, 120 S. Ct. 1495, 1512 (2000). It is particularly suited to evaluating counsel's role in sentencing and appeals under the federal Sentencing Guidelines, because the Guidelines provide detailed standards to guide the discretion of the court, they are applied through relatively formal adversary procedures at sentencing and on appeal, and the intricacy of the Guidelines has increased the

need for counsel in order to guarantee the defendant a fair sentencing disposition.

The unique characteristics of Guidelines sentencing should nevertheless inform application of the *Strickland* test. Non-capital sentencing, under the Guidelines as elsewhere, generally involves a wide range of possible outcomes and leaves the court with significant discretion to select a sentence. The benefits of pressing a particular claim, therefore, will often be quite uncertain to counsel; likewise, it will often be difficult for a Section 2255 court to determine the probable effect of counsel's failure to pursue the claim. In addition, Sentencing Guidelines claims are not themselves cognizable on collateral review, because an error in application of the Guidelines will rarely "inherently result[] in a complete miscarriage of justice" or be "inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U.S. 424, 428 (1962). The standard for ineffective assistance of counsel should not be so easy that defendants can routinely circumvent the bar on collateral review of Guidelines claims by recasting them as constitutional ones.

The court of appeals correctly sought to balance these considerations. But it erred in holding that a defendant could show "prejudice" for an ineffective assistance of counsel claim only if, but for counsel's error, the defendant would have received a "significant" sentencing reduction. See *Durrive* v. *United States*, 4 F.3d 548 (7th Cir. 1993). In fashioning that standard, the court of appeals relied on this Court's decision in *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993), which it understood as modifying the *Strickland* prejudice analysis by requiring the defendant to show not only a different outcome (*i.e.*, a longer sentence), but also a fundamentally unfair or unreliable result (*i.e.*, a significantly longer sentence). But this Court recently rejected that understanding of *Lockhart*. As the Court explained in *Williams*, 120 S. Ct. at 1513, *Lockhart* "do[es] not justify a departure from a straightforward application of *Strickland* when the ineffec-

tiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him." In that setting, no "separate inquiry into fundamental fairness" is required. 120 S. Ct. at 1513. The Seventh Circuit's "significant" difference test contradicts this Court's reasoning in *Williams*. The test has also proved unworkable. No clear or principled lines have emerged between sentencing differences that are "significant" and those that are not, and it seems unlikely than any non-arbitrary lines can be drawn. Thus, when it can be shown that additional imprisonment under the Guidelines was imposed solely because of counsel's inadequate representation, collateral relief under *Strickland* is warranted.

The considerations that animated the court of appeals' holding remain important ones. But proper respect for the judgment of trial and appellate lawyers in the performance analysis will weed out many of the claims that the court of appeals correctly recognized do not merit collateral relief. Indeed, in this case, a sound application of *Strickland* yields the conclusion that petitioner's counsel performed adequately. In addition, his alleged mistakes did not prejudice petitioner.

B. The assessment of counsel's performance requires deference to his strategic judgments. Issue selection is critical to effective advocacy, both at trial and on appeal. That proposition applies with special force to the Guidelines. Because of the complexity of the Guidelines, counsel must factor in not only the likelihood of success but also the magnitude of the benefit from raising an issue. He must then weigh how many issues he can raise without impairing his credibility, which remains crucial in light of the sentencing court's substantial and unreviewable discretion to impose sentence once the range is established. On appeal, the need to winnow and focus the issues is even more acute. See *Jones* v. *Barnes*, 463 U.S. 745, 751-752 (1983). Thus, only in the rare case in which an omitted Guidelines issue is

clearly stronger than the legal issues raised—as when there is controlling circuit precedent in the defendant's favor—should counsel's performance be held deficient.

According petitioner's counsel a "strong presumption" that his conduct fell "within the wide range of reasonable professional assistance," and eliminating the distortions of hindsight, *Strickland*, 466 U.S. at 689, petitioner's counsel was not deficient in failing to press more vigorously at sentencing or raise on appeal the grouping issue under Guidelines § 3D1.2. No Seventh Circuit precedent supported petitioner's position at the time of sentencing that money laundering offenses should be grouped with the underlying offenses that generated the laundered proceeds, and much out-of-circuit authority contradicted it. Nor was counsel required to be clairvoyant and foresee that the Seventh Circuit would, after the appeal had been argued, adopt a position on grouping favorable to the defense. Even that holding, moreover, might produce an increase, not a decrease, in petitioner's offense level. In view of the uncertain prospects of the grouping claim at the time of sentencing and appeal, there was no lapse in representation.

C. There was also no prejudice to petitioner from counsel's failure to press the grouping claim. The question whether petitioner was prejudiced turns initially on whether, under the Guidelines, money laundering should be grouped with the offenses that generated the proceeds. Correctly analyzed, the answer is no. And, even if grouping were required under the Seventh Circuit precedent on which petitioner now relies, *United States* v. *Wilson*, 98 F.3d 281 (7th Cir. 1996), application of that decision should lead to an increase in petitioner's sentence. Under those circumstances, petitioner cannot establish prejudice by his counsel's failure to press the grouping claim.

ARGUMENT

COUNSEL'S FAILURE TO ARGUE THAT PETITIONER'S MONEY LAUNDERING AND RACKETEERING OFFENSES SHOULD BE GROUPED UNDER THE SENTENCING GUIDELINES DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE

A. *Strickland* v. *Washington* Governs Claims Of Ineffective Assistance Of Counsel At Noncapital Sentencing And Appeal

1. This Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), announced a general test for claims of ineffective assistance of counsel. The Court held that a claim of ineffective assistance of counsel at trial or capital sentencing has two components. First, the defendant must show that counsel's performance was deficient, in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the defendant must show that "the deficient performance prejudiced the defense" (*ibid.*) in the sense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 694). *Strickland* itself involved a capital sentencing proceeding, which the Court found enough like a trial to make the description of the duties of counsel in the two contexts essentially equivalent. *Id.* at at 686-687. The Court noted, however, that it was not required to consider "the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance." *Id.* at 686.

Since *Strickland*, the Court has applied its two-part test in a variety of contexts besides trial and capital sentencing. The Court has employed *Strickland* to evaluate ineffectiveness claims in the entry of a guilty plea (see *Hill* v. *Lockhart*,

474 U.S. 52, 59 (1985)) and in failing to file pre-trial motions to suppress evidence on Fourth Amendment grounds (see *Kimmelman* v. *Morrison*, 477 U.S. 365, 390-391 (1986)). The Court has also applied *Strickland* to several types of ineffectiveness claims connected with the appeals process. In particular, the Court has used the *Strickland* test to evaluate counsel's failure to raise a capital sentencing claim on appeal (see *Smith* v. *Murray*, 477 U.S. 527, 535-536 (1986)); counsel's failure to file a notice of appeal (see *Roe* v. *Flores-Ortega*, 120 S. Ct. 1029, 1034 (2000)); and counsel's decision to file an *Anders* (or equivalent) brief rather than a full merits brief on appeal (see *Smith* v. *Robbins*, 120 S. Ct. 746, 764 (2000)). Considering the wide range of claims to which the Court has applied *Strickland*, it is not surprising that the Court recently noted that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams* v. *Taylor*, 120 S. Ct. 1495, 1512 (2000).

This case involves the issue of how ineffective assistance claims should be resolved when a defendant claims that his counsel's deficient performance resulted in a longer sentence under the Sentencing Guidelines established by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987. In our view, *Strickland*'s general approach to issues of ineffective assistance of counsel can and should apply to such claims. As this Court has held, sentencing is a critical stage of the criminal prosecution at which the defendant has a right to effective assistance of counsel. See *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967). Moreover, the advent of the Sentencing Guidelines has modified sentencing in the federal system so that the Court's concern in *Strickland* about "informal proceedings and standardless discretion" is of less significance. Although trial courts retain substantial discretion in sentencing under the Guidelines, see *Koon* v. *United States*, 518 U.S. 81 (1996), the Guidelines provide "detailed and comprehensive standards" to direct

the determination of the appropriate sentencing range. *Arredondo* v. *United States*, 178 F.3d 778, 784 (6th Cir. 1999). And the development of the Guidelines was accompanied by the creation of more formal procedures designed to promote "focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." *Burns* v. *United States*, 501 U.S. 129, 137 (1991). Particularly because sentencing rules under the Guidelines are intricate and complex, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963) (quoting *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932)).

Similar considerations apply to appeals raising Guidelines issues. As this Court has recognized, "[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage." *Penson* v. *Ohio*, 488 U.S. 75, 85 (1988). In holding that the right to effective assistance of counsel extends to direct appeal of a conviction, the Court noted that "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985). That reasoning applies equally to appeals raising issues under the Guidelines. In enacting the Sentencing Reform Act of 1984, Congress "provide[d] for limited appellate review of sentences in order to ensure the proper application of the Guidelines." *Williams* v. *United States*, 503 U.S. 193, 196 (1992). Congress thus conceived of appellate review of sentences (in the limited circumstances provided in 18 U.S.C. 3742) as an integral component of the new system to ensure fair and uniform sentencing. See S. Rep. No. 225, 98th Cong., 1st Sess. 151 (1983). In addition, sentencing appeals under the Guidelines system are as

formal as appellate proceedings that relate only to the conviction. And Congress has established clear legal standards for resolution of those appeals. See 18 U.S.C. 3742(e) and (f). Consistent with the above considerations, the courts of appeals have applied the *Strickland* test to ineffective assistance of counsel claims arising from counsel's performance at Guidelines sentencing and appeals, although, like the court of appeals in this case, some courts have modified the prejudice inquiry in order to account for the particular features of noncapital sentencing.[3]

2. Although the *Strickland* test should apply to ineffective assistance claims involving sentencing proceedings and appeals under the Guidelines, the application of the test should take into account the particular characteristics of those proceedings. This Court has previously recognized that the *Strickland* inquiries must be shaped to the particular context in which they are applied. For example, in applying the performance component of the analysis to claims of ineffectiveness on appeal, the Court has recognized that the nature of appellate advocacy and the parameters imposed on the advocate require counsel to select from available claims "in order to maximize the likelihood of success." *Robbins*, 120 S. Ct. at 765; see also *Jones* v. *Barnes*, 463 U.S. 745, 751-752 (1983). Therefore, "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be

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[3] See, *e.g.*, *Arredondo*, 178 F.3d at 783-784; *United States* v. *Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997); *Reece* v. *United States*, 119 F.3d 1462, 1465 (11th Cir. 1997); *Smullen* v. *United States*, 94 F.3d 20, 24 (1st Cir. 1996); *United States* v. *Breckenridge*, 93 F.3d 132, 136 (4th Cir. 1996); *United States* v. *Kissick*, 69 F.3d 1048, 1054 (10th Cir. 1995), cert. denied, 519 U.S. 1138 (1997); *United States* v. *Seyfert*, 67 F.3d 544, 547 (5th Cir. 1995); *Auman* v. *United States*, 67 F.3d 157, 161 (8th Cir. 1995); *United States* v. *Headley*, 923 F.2d 1079, 1083-1084 (3d Cir. 1991); *Janvier* v. *United States*, 793 F.2d 449, 456 (2d Cir. 1986); J.A. 52-54.

overcome." *Robbins*, 120 S. Ct. at 765 (quoting *Gray* v. *Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

The Court has similarly tailored the prejudice inquiry to fit particular contexts. In *Flores-Ortega*, 120 S. Ct. at 1037-1040 (2000), the court considered a claim that counsel was deficient in failing to consult with the defendant about filing an appeal. Because "counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself," *id.* at 1038, the Court determined that the usual prejudice inquiry focusing on the likely outcome of the proceeding was inappropriate. Instead, the Court held, "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient [performance], he would have timely appealed." *Ibid.* Similarly, in *Hill* v. *Lockhart*, 474 U.S. at 52, in which the Court applied the *Strickland* framework to counseled guilty pleas, the Court held that counsel's erroneous advice that a defendant should plead guilty is prejudicial when "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."

When applying *Strickland* to noncapital sentencing and appeals, reviewing courts must proceed with similar sensitivity to the nature of the sentencing process. First, the sentencing determination often involves a wide range of possible outcomes and slight differences among those outcomes. In addition, as this Court observed in *Strickland*, sentencers often exercise virtually "standardless discretion" (466 U.S. at 686) in selecting among sentencing alternatives. Those features of noncapital sentencing are most pronounced in systems that give the sentencer virtually complete discretion to select a sentence from within a wide range set by statutory minimum and maximum terms. But they are also present in systems like the federal system in which discretion is limited by Sentencing Guidelines. The Guidelines

provide a specific and detailed set of standards relating to offense behavior and offender characteristics to govern the determination of the applicable range from which the sentencing judge is to select a sentence. See 28 U.S.C. 994(b)(2); 18 U.S.C. 3553(a)(4) and (b). The judge nevertheless retains significant discretion in applying the Guidelines to the particular facts, selecting a sentence from within the applicable Guidelines range, and deciding whether to depart from the Guidelines. See 18 U.S.C. 3553. Moreover, 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.

Because of these factors, both the prospect of prevailing on a particular claim and the potential sentencing benefit from a successful claim will often be quite uncertain. It will therefore 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. Likewise, it will frequently be difficult or impossible for the reviewing court to determine that the failure to raise a particular claim resulted in a reasonable probability of a different sentencing outcome.

A second consideration that should inform application of the test for ineffective assistance of counsel in the noncapital sentencing context is that most sentencing errors are not cognizable on collateral review. Collateral relief is rarely available for claims that do not assert constitutional or jurisdictional errors. A non-jurisdictional claim based on a statute or rule may be raised on collateral review only if the claim alleges a "fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U.S. 424, 428 (1962); see, *e.g.*, *Reed* v. *Farley*, 512 U.S. 339, 353-354 (1994). "[E]rrors of guideline interpretation or application ordinarily fall short of a

miscarriage of justice." *United States* v. *Mikalajunas*, 186 F.3d 490, 496 (4th Cir. 1999), cert. denied, 120 S. Ct. 1283 (2000).

Errors in the application of the Guidelines do not implicate the determination of guilt or innocence. Moreover, the Constitution and federal statutes provide defendants with a full and fair opportunity to litigate Guidelines claims at sentencing and on direct appeal. See Fed. R. Crim. P. 32; 18 U.S.C. 3742. Permitting routine relitigation of those claims on collateral review would impose unjustified costs on the judicial system and unnecessarily compromise the finality of criminal sentences. Therefore, the vast majority of the courts of appeals have held that, "[b]arring extraordinary circumstances, * * * an error in the application of the Sentencing Guidelines cannot be raised" in a proceeding under 28 U.S.C. 2255 (1994 & Supp. IV 1998). *United States* v. *Pregent*, 190 F.3d 279, 283-284 (4th Cir. 1999).[4] Because of the general preclusion of collateral review for Sentencing Guidelines claims, courts should not adopt a standard for ineffective assistance of counsel that permits defendants routinely to recast Guidelines claims as claims under the Sixth Amendment.

3. In light of those considerations, the Seventh Circuit correctly recognized the need to customize the *Strickland* analysis to the nature of noncapital sentencing. In its effort

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[4] See also *Jones* v. *United States*, 178 F.3d 790, 796 (6th Cir.), cert. denied, 120 S. Ct. 335 (1999); *United States* v. *Talk*, 158 F.3d 1064, 1069-1070 (10th Cir. 1998), cert. denied, 525 U.S. 1164 (1999); *Auman*, 67 F.3d at 161; *United States* v. *Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994); *United States* v. *Segler*, 37 F.3d 1131, 1134 (5th Cir. 1994); *Knight* v. *United States*, 37 F.3d 769, 773-774 (1st Cir. 1994); *Scott* v. *United States*, 997 F.2d 340, 340-341 (7th Cir 1993). But cf. *United States* v. *Essig*, 10 F.3d 968, 979 (3d Cir. 1993) (rejecting Guidelines claim on collateral attack for failure to meet cause and prejudice standard rather than because such claims are not cognizable); *Parks* v. *United States*, 832 F.2d 1244, 1246 (11th Cir. 1987) (same).

to tailor the analysis to that context, however, the court of appeals modified the prejudice inquiry in a manner that is both inconsistent with this Court's cases and unworkable.

The court of appeals' rule is that, in order to establish prejudice, a movant under Section 2255 is required to show not only that his counsel's error resulted in a higher sentence (*i.e.*, that the error had an effect on the outcome) but also that the increase was so significant that the sentence was fundamentally unfair. See J.A. 53 (citing *Martin*, 109 F.3d at 1178, and *Durrive*, 4 F.3d at 551). The court based its conclusion that an effect on the outcome is not enough to satisfy *Strickland* largely on its interpretation of *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993). In *Lockhart*, a defendant claimed ineffective assistance based on his lawyer's failure to invoke a court of appeals' precedent that, at the time, would have invalidated the aggravating circumstance found by his capital sentencing jury, even though, by the time of the ineffectiveness claim, that precedent had been overruled in light of an intervening decision of this Court. *Lockhart* concluded that, in that context, proof of an effect on the outcome was not enough to show "prejudice" under *Strickland*, because such a holding would "grant the defendant a windfall to which the law does not entitle him," 506 U.S. at 370, *i.e.*, reversal even though his sentence was not "unreliable" or the proceeding "fundamentally unfair," *id.* at 372. The *Durrive* court drew from *Lockhart* the principle that a defendant must not only show that his Guidelines sentence would have been lower but for counsel's deficient performance, but that the result must be "unreliable" or "fundamentally unfair." 4 F.3d at 551.[5]

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[5] The court of appeals explained:

> In *Lockhart* v. *Fretwell*, [506 U.S. 364 (1993)], [the Court] * * * rejected the equation between causation and prejudice. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or

This Court, however, recently rejected precisely the reading of *Lockhart* on which the court of appeals based its "significant" difference test. In *Williams* v. *Taylor*, 120 S. Ct. at 1512-1513, the Court examined a state court's view that *Strickland* was not satisfied in a capital sentencing case by the finding that counsel's errors may have affected the outcome of the proceeding; it was also necessary to ask, in light of *Lockhart*, whether the resulting sentence was "fundamentally unfair or unreliable." *Id.* at 1513. The Court held that the state court's reliance on *Lockhart* was error. It explained that *Lockhart*'s conclusion rested on the fact that "the likelihood of a different outcome [was] attributable to an incorrect interpretation of the law," and that such a result would be a " 'windfall' to the defendant rather than the legitimate 'prejudice' contemplated by our opinion in *Strickland*." *Id.* at 1512. In contrast, the Court made clear, *Lockhart* "do[es] not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does*

> unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.* at [369-370]. If an effect on the outcome is not enough, what is? According to *Lockhart*, the defendant must establish that counsel's shortcomings "render[ed] the result . . . unreliable or the proceeding fundamentally unfair." *Id.* at [372]. * * *
>
> Grave errors by judge and counsel might make a sentence under the Guidelines "unreliable or . . . fundamentally unfair." * * * But the difference between 120 months and 108 or even 98 (the middle of the lower range) does not demonstrate that the actual sentence is "unreliable . . . or fundamentally unfair"—is not, in the language of *Spriggs* [v. *Collins*, 993 F.2d 85, 89 n.5 (5th Cir. 1993)], a "significant" difference. * * * Adjusting the offense level by two or three steps is exactly the routine decision that is supposed to be handled at sentencing and on direct appeal. * * * [W]e therefore conclude that Durrive has not established "prejudice" within the meaning of *Strickland*.

Durrive, 4 F.3d at 550-551 (some punctuation altered).

deprive the defendant of a substantive or procedural right to which the law entitles him," *id.* at 1513, and, in that setting, no "separate inquiry into fundamental fairness" is required, *ibid.* The prejudice inquiry adopted by the court of appeals requires just such a separate inquiry, and it therefore cannot be reconciled with this Court's reasoning in *Williams*.[6]

Under *Williams*, there is no need for a separate showing of unfairness, above and beyond a different outcome, because the *Strickland* test itself defines a requirement for a fundamentally fair sentence. The Court has made clear that noncapital sentencing and appeal are critical stages of the criminal prosecution at which effective representation is essential to fundamental fairness. See *Mempa*, 389 U.S. at 134; *Evitts*, 469 U.S. at 396. A defendant may not be sentenced to any term of imprisonment unless he was represented by counsel. *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). And "the prospect of imprisonment for however

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[6] The "significant difference" test that the Seventh Circuit adopted in *Durrive* to implement its reading of *Lockhart* also went farther than the circuit precedent on which it relied, *Spriggs* v. *Collins*, 993 F.2d 85, 88-89 (5th Cir. 1993). *Spriggs* arose on habeas review of a state sentence where the sentencing judge had broad discretion to select any sentence within a wide sentencing range. To avoid the possibility that any slight error by counsel might be said to have resulted in a harsher sentence, "even if only by a year or two," the court required a showing of "a reasonable probability that but for trial counsel's errors the defendant's non–capital sentence would have been *significantly* less harsh." *Id.* at 88-89. But the *Spriggs* court carved out from that rule a "foreseeable exception" for cases in which "a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing * * * which would not have occurred but for counsel's error." *Id.* at 88-89 n.4. In relying on *Spriggs*, the Seventh Circuit did not address that limitation, see *Durrive*, 4 F.3d at 551, which appears to cover specific, demonstrable enhancements under the Guidelines. Indeed, the Fifth Circuit recently concluded that the Seventh Circuit's "significant" difference test, as applied to Sentencing Guidelines claims, "ignored [*Spriggs*'] rationale." *United States* v. *Phillips*, 210 F.3d 345, 351 n.4 (5th Cir. 2000); see also *Martin*, 109 F.3d at 1182 (Rovner, J., dissenting from denial of rehearing en banc).

short a time will seldom be viewed by the accused as a trivial or 'petty' matter." *Ibid.* (quoting *Baldwin* v. *New York*, 399 U.S. 66, 73 (1970)). As a result, when counsel fails to meet minimum competence standards, and the deficient performance deprives the defendant of a legal right thereby causing a demonstrable increase in his sentence, the sentencing proceedings do not meet the standards of fundamental fairness that the *Strickland* test serves to protect.

The court of appeals' test has also proved unworkable. The court has not explained when an increase in a sentence is significant enough to warrant collateral relief. Indeed, there is no apparent objective test for formulating such guidance, nor is there a body of case law that might even arbitrarily establish what sort of potential decreases would be deemed significant. In *Durrive* itself, the difference would have been at least a one-year reduction in a ten-year sentence, and the court found that change not "significant." 4 F.3d at 551. The court suggested that offense level differences of "two or three steps," *ibid.*, would similarly be insignificant, but it did not so hold. In *Martin*, the court described the *Durrive* test as a "rule of proportionality: the sort of increase produced by a few levels' difference in sentencing calculations cannot be raised indirectly on collateral attack by complaining about counsel's work." 109 F.3d at 1178. But, as the district court observed, "'few' is not a precise term and the Seventh Circuit does not indicate how the difference in length of sentence should be considered." J.A. 46.

A two-level change can have vastly different consequences in different sections of the Sentencing Table.[7] At

[7] "The Sentencing Table provides a matrix of sentencing ranges. On the vertical axis of the matrix is the defendant's offense level representing the seriousness of the crime; on the horizontal axis is the defendant's criminal history category. The sentencing range is determined by identifying the intersection of the defendant's offense level and his

the top of the Sentencing Table, a two-level change could result in a difference of nearly 12 years.[8] And at the bottom of the Table, a two-level change could make the difference between a year in prison and probation.[9] The court of appeals did not indicate whether either of these reductions would be "significant," nor has it answered basic questions about how the "significance" standard is to be applied. See, *e.g.*, *Allen* v. *United States*, 175 F.3d 560, 563 (7th Cir.), cert. denied, 120 S. Ct. 432 (1999); *Martin*, 109 F.3d at 1183-1184 (Rovner, J., dissenting from denial of rehearing en banc) ("If an increase of eight or nine years is not 'significant,' what is? Does the 'significance' depend on the overall length of the petitioner's term? In other words, would an increase of a year be 'insignificant' for someone serving a ten-year term, but 'significant' for someone serving a two-year term? *Durrive* leaves such questions unanswered, freeing individual judges and panels to reach their own conclusions.").

Thus, although the Seventh Circuit properly expressed concern that ineffective assistance of counsel claims should not be a vehicle for routinely relitigating questions under the Sentencing Guidelines, its test for prejudice is an incorrect

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criminal history category." *Nichols* v. *United States*, 511 U.S. 738, 740-741 n.3 (1994). See App., *infra*, 17a.

[8] A defendant who is in criminal history category VI and has an offense level of 36 would have a sentencing range of 324 to 405 months of imprisonment. A reduction of two offense levels, however, would yield a sentencing range of 262 to 327 months of imprisonment. The top of the first range (405 months) is 143 months greater than the bottom of second range. Even selecting the midpoint of the two ranges as a basis for comparison yields a potential reduction in sentence of 70 months. See App., *infra*, 17a.

[9] A defendant who is in criminal history category I with an offense level of 10 faces 6-12 months of imprisonment. A reduction of two offense levels, however, would yield a sentencing range of 0 to 6 months of imprisonment and make the defendant eligible for probation. See App., *infra*, 17a; Guidelines § 5B1.1.

application of *Strickland*. Even though Sentencing Guidelines claims are not themselves cognizable on collateral review when the defendant *was* adequately represented, a constitutional claim of ineffective assistance based on counsel's failure to raise a Guidelines claim is cognizable when representation was deficient. Cf. *Kimmelman*, 477 U.S. at 373-383 (holding that ineffective assistance of counsel claims based on incompetent representation with respect to a Fourth Amendment issue are cognizable on collateral review even though collateral relief would not be available for the underlying Fourth Amendment claim). And, because a variety of legal determinations may have a measurable effect on the length of a Guidelines sentence, it may sometimes be possible to show that counsel's lapse has caused actual harm to the defendant. In such a case, collateral relief is warranted.

Of course, courts should scrupulously avoid treating a mere Guidelines error as equivalent to deficient performance by counsel. The nature of noncapital sentencing, even under the Guidelines, means that only in the rare case will a defendant be able to show that his attorney's performance fell outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Indeed, a proper application of the performance inquiry addresses many of the concerns that animated the court of appeals to adopt its heightened test for prejudice. See *Arredondo*, 178 F.3d at 784 (agreeing that "slight failings" by counsel are not enough to establish constitutionally deficient representation but suggesting that the "degree of the attorney's error may better be evaluated directly, under *Strickland*'s performance prong.").

Nevertheless, when a defendant can make the "highly demanding" showing (*Kimmelman*, 477 U.S. at 382) that his "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*Strickland*, 466 U.S. at 687), and his sentence is demonstrably higher than the

correct Guidelines range, he should not be barred from collateral relief on the view that the additional punishment at stake is not "significant." A defendant must show both deficient performance and prejudice to prevail, and a court need not reach both of those interrelated components of a *Strickland* claim if analysis of one will resolve the case. *Strickland*, 466 U.S. at 697. But to elucidate how we part company with the analysis of the court of appeals, it is appropriate to undertake a complete examination of both the performance inquiry and the prejudice inquiry as applied in this case.[10]

B. Counsel's Failure To Argue That Petitioner's Money Laundering And Racketeering Offenses Should Be Grouped Was Not Deficient Performance

Petitioner's complaints about counsel's performance concern counsel's advocacy on the issue whether petitioner's money laundering offenses should have been grouped with

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[10] Petitioner contends (Pet. Br. 9 & n.2) that the performance inquiry is not properly before the Court. That contention misconceives the relationship between the two inquiries, a relationship that petitioner himself recognizes elsewhere in his brief (see *id.* at 29). The performance and prejudice considerations are not independent claims one of which is forfeited if not pressed in a lower court. Rather, they are arguments concerning the unitary claim of ineffective assistance of counsel. And it is well settled that, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1994) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)). In any event, the Court has discretion to consider a claim even though it was not raised in the court of appeals, see, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697-698 (1984), and that course is warranted here. The government made the performance argument in both the district court and our brief in opposition to the petition for certiorari. J.A. 44; Br. in Opp. 7-9. We did not make the performance argument in the court of appeals because the district court's ruling addressed only prejudice, and its analysis was mandated by circuit precedent. See Gov't C.A. Br. 6-19 (collateral review).

his conspiracy and labor racketeering offenses under Guidelines § 3D1.2. In his motion to correct his sentence under 28 U.S.C. 2255 (1994 & Supp. IV 1998), petitioner contended that counsel was ineffective in failing to argue the grouping issue adequately at sentencing and in failing to raise it at all on appeal. J.A. 34-41.

In this Court, petitioner reiterates his belief that counsel performed deficiently by not raising the grouping issue or alerting the court of appeals to *United States* v. *Wilson*, 98 F.3d 281 (7th Cir. 1996), which petitioner considers controlling precedent on the issue, and which was issued after briefing and argument but before petitioner's appeal was decided. Pet. Br. 19. Petitioner contends that, but for counsel's failings, his Guidelines range would have been lower, and he would have received a sentence between 6 and 21 months shorter than the 84 month sentence he actually received. *Ibid.* Such a sentencing disparity, he continues, satisfies the prejudice inquiry set out in *Strickland* (*id.* at 19-20), and the court of appeals erred in departing from the *Strickland* standard by requiring a more "significant" disparity (*id.* at 8-18, 20-34).[11]

Although we agree with petitioner that the court of appeals did not apply the correct prejudice inquiry, we do not believe that petitioner was denied effective assistance of counsel. In the remainder of this section of the brief, we explain why counsel's failure to raise the grouping issue did not constitute deficient performance. In the final section of the brief, we further explain why counsel's failure did not cause petitioner any prejudice cognizable under the *Strickland* standard.

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[11] Although petitioner appears to focus his argument in this Court on counsel's effectiveness on direct appeal, see Pet. i; Br. 19, we have addressed counsel's effectiveness at the sentencing proceeding as well because it is not clear whether petitioner has abandoned his claim that counsel was ineffective at that proceeding.

1. In order to show that his counsel's performance was constitutionally deficient, petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. That requires a demonstration that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 669. Moreover, because "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client," *id* at 690, this Court has stressed that "[j]udicial scrutiny of counsel's performance must be highly deferential," *id.* at 689. Petitioner therefore must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, [petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound * * * strategy.'" *Id.* at 689 (quoting *Michel* v. *Louisiana*, 350 U.S. 91, 100-101 (1955)).

There is a significant danger that an examination of counsel's actions after they have proved unsuccessful will lead a court to second-guess what were at the time quite reasonable decisions. See *Strickland*, 466 U.S. at 689. For that reason, in assessing counsel's performance, the Court must make "every effort * * * to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Ibid.*; see *Murray*, 477 U.S. at 536.

The nature of Guidelines sentencing makes particularly relevant this Court's guidance concerning effective assistance on appeal. An appellate lawyer need not raise every issue available but "may select from among [potential issues] in order to maximize the likelihood of success on appeal." *Robbins*, 120 S. Ct. at 765; *Barnes*, 463 U.S. at 754. Indeed,

this process of "winnowing out" issues and "focusing on one central issue if possible" (*id.* at 751) "is the hallmark of effective appellate advocacy" (*Murray*, 477 U.S. at 536). In challenging the effectiveness of appellate counsel, this Court has said that the defendant cannot prevail if he cannot show that the claim that counsel failed to raise "was clearly stronger than issues that counsel did present." *Robbins*, 120 S. Ct. at 766. Accordingly, although it is "possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim [on appeal]," "it is difficult to demonstrate that counsel was incompetent." *Id.* at 765.

In Guidelines sentencing, issue selection is important not only on appeal but also at the sentencing itself. Under the Guidelines system, a probation officer prepares a presentence investigation report that contains not only information about the defendant and the offenses he committed but also recommendations about the appropriate classification of the offense and the defendant's criminal history under the criteria in the Guidelines, the appropriate Guidelines range, and whether departure is warranted. See Fed. R. Crim. P. 32(b). Just as an appellate tribunal's receptiveness to the suggestion that a lower court has erred "declines as the number of assigned errors increases," *Barnes*, 463 U.S. at 752 (quoting Robert Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951)), the sentencing court's receptiveness to the suggestion that the presentence report overlooked or misapplied Guidelines provisions decreases with the number of suggested errors. Moreover, counsel must continuously bear in mind, in choosing how many claims to present and how forcefully to advance each of them, that the sentencer retains a great deal of unreviewable discretion. How the sentencing court exercises that discretion will often have more impact on the defendant's sentence than how the court resolves a claim concerning the proper offense level or criminal history category.

Issue selection in the Guidelines context is not only especially important but also particularly dependent on the exercise of strategic judgment. Before deciding whether to press a particular claim, counsel must assess both the prospects of prevailing and the magnitude of the possible benefit. As a result of the complexity of the Guidelines, the limited impact of small changes in the offense level or criminal history category, the overlap among sentencing ranges, and the discretion retained by the sentencing judge, those assessments are often fraught with uncertainty. For example, counsel might decide to press a claim that he believes has only a 40% chance of success rather than one with a 60% chance, because the riskier claim, if successful, would have a greater impact on the applicable sentencing range. Or counsel might forego a claim because, depending on how the sentencing judge or the court of appeals resolved an unsettled issue of Guidelines interpretation, the factor could just as likely increase as decrease the applicable sentencing range. Even if there were no danger of unintended adverse consequences, counsel might reject a claim in favor of pressing others because, although the rejected claim would affect the defendant's offense level or criminal history points, the change would not affect the sentencing range. Or counsel might decide that, even if a claim would shift the sentencing range, the shift in the range would not likely affect the defendant's actual sentence because of a substantial overlap between the ranges.[12]

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[12] The Sentencing Commission specifically structured the Sentencing Table with overlapping ranges in order to reduce such litigation. "Each level in the [sentencing] table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes." U.S.S.G. Ch. 1, Pt. A.4(h).

Because of these complexities, a court reviewing counsel's performance must be especially careful that its evaluation is not clouded by the distorting effects of hindsight. A reviewing court will rarely be able to conclude that an attorney performed deficiently in electing to forego an argument that had the prospect of yielding (at most) an insignificant benefit. See *Arredondo*, 178 F.3d at 787 ("A reasonable attorney might choose not to quibble over small discrepancies that ultimately would not affect the client's sentence."). Moreover, because "[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law" (*Lilly* v. *Gilmore*, 988 F.2d 783, 786 (7th Cir.), cert. denied, 510 U.S. 852 (1993)), an attorney does not act unreasonably in failing to raise a claim when there is not case law or a specific Guidelines provision on point. See *United States* v. *Seyfert*, 67 F.3d 544, 547 (5th Cir. 1995). "It will often be the case that even the most informed counsel will fail to anticipate" changes in the law. *Murray*, 477 U.S. at 536. Therefore, unless it was plain, based on "directly controlling precedent," *United States* v. *Phillips*, 210 F.3d 345, 348 (5th Cir. 2000), or clear language in the Guidelines, that a claim would have had an actual positive impact on the defendant's sentence, a reviewing court should not second-guess counsel's decision to forego the claim or not press it strongly at sentencing or to abandon the claim on appeal.

2. a. Under the principles outlined above, petitioner's counsel did not perform deficiently by failing to press the grouping argument more strongly at sentencing. Counsel objected to the failure to group and thereby preserved the issue for appellate review. J.A. 89. Counsel also explained to the district court the reason that counsel believed that grouping was appropriate—petitioner's offenses (in his view) were part of "one joint effort." *Ibid.* Counsel otherwise devoted his efforts to other issues, such as opposing upward adjustments in petitioner's offense level for obstruction of justice and for a leadership role in the offense, as well as

arguing that mitigating factors warranted a sentence at the low end of the applicable range. Indeed, counsel succeeded in convincing the court that an upward adjustment was not warranted for petitioner's role in the offense. See p. 3, *supra*.

Petitioner faults counsel for not arguing the grouping issue more forcefully and points in particular to counsel's failure to respond to the position paper that the government submitted on the issue, which contained out-of-circuit precedent in support of the government's position. See J.A. 37-38. Counsel's decision not to press the argument more strongly at sentencing, however, was not outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. As we explain below (see pp. 39-44, *infra*), the grouping argument lacks merit, and counsel does not act unreasonably in failing to present a meritless claim. Moreover, setting aside the claim's intrinsic lack of merit, the claim had little prospect of success at the time of sentencing. As the government explained in its position paper to the district court, see J.A. 89, at that time, no precedent of this Court or the Seventh Circuit established that petitioner's money laundering and labor racketeering offenses should be grouped together; moreover, the First, Ninth, and Tenth Circuits had all rejected grouping of fraud offenses with money laundering offenses. See *United States* v. *Kunzman*, 54 F.3d 1522, 1530-1531 (10th Cir. 1995); *United States* v. *Lombardi*, 5 F.3d 568, 570-571 (1st Cir. 1993); *United States* v. *Taylor*, 984 F.2d 298, 302-303 (9th Cir. 1993); *United States* v. *Johnson*, 971 F.2d 562, 575-576 (10th Cir. 1992); cf. *United States* v. *Harper*, 972 F.2d 321, 321-323 (11th Cir. 1992) (rejecting grouping of drug trafficking and money laundering); *United States* v. *Porter*, 909 F.2d 789, 792-793 (4th Cir. 1990) (rejecting grouping of gambling and money laundering). The Fifth and Third Circuits had held that grouping was appropriate in some circumstances. See *United States* v. *Leonard*, 61 F.3d 1181, 1185-1186 (5th Cir. 1995); *United States* v. *Cusumano*,

943 F.2d 305, 312-314 (3d Cir. 1991), cert. denied, 502 U.S. 1036 (1992). Those decisions did not necessarily support grouping of petitioner's offenses, however, because they approved grouping when the "money laundering activities of the defendants perpetuate the underlying crimes" and the offenses are therefore a "single, integrated scheme" (*Leonard*, 61 F.3d at 1186), a circumstance not present in petitioner's case (see J.A. 130-135).

Not only was there little likelihood that the grouping claim would prevail, but there was a significant possibility that grouping petitioner's offenses would result in an increase in his sentence. As we explain in more detail below (see pp. 44-48, *infra*), although grouping under Guidelines § 3D1.2(c) (as the PSR had recommended) would have resulted in a reduction in petitioner's offense level and sentencing range, grouping under Guidelines § 3D1.2(d) would have resulted in an increase in the offense level and sentencing range. And the chance that the court (if it grouped the offenses at all) would group them under subsection (d) rather than (c) was not insubstantial: The Fifth Circuit decision approving grouping had done so under subsection (d). See *Leonard*, 61 F.3d at 1185. Moreover, the Seventh Circuit's later decision in *Wilson*, 98 F.3d at 284, on which petitioner relies in asserting that counsel's error prejudiced him (Pet. Br. 19), approved grouping under subsection (d).[13] In light

[13] Indeed, in *Wilson* itself, grouping under subsection (d) increased the offense level and thus should have resulted in a longer sentence. See *United States* v. *Wilson*, 131 F.3d 1250, 1251 (7th Cir. 1997). The court of appeals ultimately concluded, on Wilson's second appeal, that the increased offense level could not be imposed, because of a waiver by the government. *Id.* at 1253-1254. We disagree with the court's waiver analysis, see note 19, *infra*, but the salient point here is that, in 1996, petitioner's counsel could have reasonably concluded that grouping under subsection (d) would leave his client worse off, not better off, and no counsel could have foreseen the Seventh Circuit's waiver holding in the second *Wilson* appeal.

of these considerations, counsel's decision not to press the grouping issue more forcefully at sentencing was not unreasonable.

b. For similar reasons, counsel did not perform deficiently in failing to raise the grouping issue on appeal. The fact that counsel raised the issue at sentencing shows that his decision to bypass the issue on appeal was not the result of ignorance of the factual or legal basis for the claim; rather he made a tactical decision to focus on other claims in order "to maximize the likelihood of success." *Robbins*, 120 S. Ct. at 765. Such "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

Counsel's primary argument on direct appeal was that the district court abused its discretion in admitting into evidence a portion of the transcript of petitioner's testimony from his first trial while denying his request, under Federal Rule of Evidence 106, to admit nearly all of that testimony for the purpose of placing that portion in a proper context. If successful, this claim would have required reversal of petitioner's convictions. The court of appeals rejected the claim on the ground that petitioner had failed to establish the need to introduce nearly all of the testimony from his first trial (J.A. 138-145), despite petitioner's argument that editing the testimony would have created a "choppy montage" devoid of "temporal continuity" and left the jury with an "incomplete impression of the evidence" (Pet. C.A. Br. 19 (direct appeal)). In addition, counsel raised a challenge to petitioner's sentence—that the district court's decision to increase petitioner's base offense level for obstruction of justice (based on the court's finding that petitioner perjured himself at his first trial) lacked an adequate factual basis. J.A. 145. If successful, that contention would have reduced petitioner's offense level by two levels and lowered his sentencing range below the sentence that he had received. The court of appeals considered the two issues that counsel

raised sufficiently substantial to warrant detailed discussion and refutation in a several page published opinion. See J.A. 129-147.

It was not unreasonable for counsel to focus on those other issues rather than grouping. At the time that counsel determined his strategy and prepared his brief in April 1996, there was still no Seventh Circuit precedent on point on the grouping issue. The Eleventh Circuit had weighed in on the side of grouping money laundering with underlying fraud offenses, but that court (like the courts that had approved grouping at the time of petitioner's sentencing) had relied on the fact that the laundered funds were reinvested in the fraudulent scheme. See *United States* v. *Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995), cert. denied, 517 U.S. 1112 (1996).[14] That is not true in petitioner's case. J.A. 130-135. Moreover, the Eleventh Circuit (like the Fifth Circuit in *Leonard*, 61 F.3d at 1185) held that grouping was required under Guidelines § 3D1.2(d), which would have resulted in an increase rather than a decrease in petitioner's sentence. See pp. 44-48, *infra*. Because it was far from certain that raising the grouping issue would have had an actual positive impact on petitioner's sentence, counsel's decision to forego that issue in favor of others that he viewed as more promising was reasonable.

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[14] Since then, two more courts have rejected grouping. See *United States* v. *Napoli*, 179 F.3d 1, 8-12 (2d Cir. 1999), cert. denied, 120 S. Ct. 1176 (2000); *United States* v. *O'Kane*, 155 F.3d 969, 973-974 (8th Cir. 1998); see also *United States* v. *Kneeland*, 148 F.3d 6, 15 (1st Cir. 1998). One additional court has endorsed grouping when the laundered funds are reinvested in the fraudulent scheme, see *United States* v. *Walker*, 112 F.3d 163, 167 (4th Cir. 1997), but no grouping when they are not. See *United States* v. *McMahon*, 133 F.3d 918 (4th Cir. 1997) (Table). Similarly, the Eleventh Circuit has declined to require grouping when the laundered funds are not used to perpetuate the fraud. See *United States* v. *McClendon*, 195 F.3d 598, 602 (1999).

The Seventh Circuit's decision in *United States* v. *Wilson*, 98 F.3d 281 (1996), which was issued one month after oral argument in petitioner's appeal, and which endorsed grouping of money laundering offenses with underlying fraud offenses under Guidelines § 3D1.2(d), does not alter that conclusion. Even if the *Wilson* decision were helpful to petitioner, counsel's failure to anticipate it would not establish that his performance was deficient. Counsel's decisions must be evaluated from his perspective at the time he made them, see *Murray*, 477 U.S. at 536, and it was far from certain at that time that the grouping argument would prevail and result in an actual decrease in petitioner's sentence.

Because *Wilson* was decided before the court of appeals issued its decision in this case (but after briefing and oral argument), petitioner faults counsel for failing to raise the grouping issue in a supplemental filing. Pet. 6; Br. 19. By that time, however, any grouping issue was waived. It is well settled that an appellant waives consideration of a claim advanced for the first time in a reply brief or later filing. See, *e.g.*, *Dunham* v. *Kisak*, 192 F.3d 1104, 1110 (7th Cir. 1999); *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 759 (6th Cir. 1999), cert. denied, 120 S. Ct. 2740 (2000); *Orsini* v. *Wallace*, 913 F.2d 474, 476 n.2 (8th Cir. 1990), cert. denied, 498 U.S. 1128 (1991). It is especially appropriate that an appellant's failure to raise a claim in his initial brief be deemed a waiver where, as here, the availability of the claim was known to him when he prepared the brief, and he made a reasonable tactical decision not to raise it. Accordingly, petitioner's counsel did not provide ineffective representation by declining to raise belatedly a claim that he had previously waived.

C. Petitioner Was Not Prejudiced By Counsel's Failure To Raise The Grouping Claim

1. Counsel's failure to press the grouping claim more strongly at sentencing or to raise the claim on appeal also did not prejudice petitioner. In *Strickland*, the Court held that, in order to show prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Therefore, with respect to his claim of ineffectiveness at sentencing, petitioner must show that there is a reasonable probability that, absent counsel's error, he would have received a shorter sentence. See, *e.g.*, *United States* v. *Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997); *United States* v. *Breckenridge*, 93 F.3d 132, 136 (4th Cir. 1996); *United States* v. *Headley*, 923 F.2d 1079, 1084 (3d Cir. 1991); *United States* v. *Ford*, 918 F.2d 1343, 1350 (8th Cir. 1990). And, as to his claim of ineffectiveness on appeal, petitioner must show that there is a reasonable probability that, but for counsel's error, he would "have prevailed on his appeal." *Robbins*, 120 S. Ct. at 764. *E.g.*, *United States* v. *Mannino*, 212 F.3d 835, 844 (3d Cir. 2000); *United States* v. *Williamson*, 183 F.3d 458, 463-464 (5th Cir. 1999); *United States* v. *Lopez*, 100 F.3d 113, 119-121 (10th Cir. 1996).

The reasonable probability test is "highly demanding." *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 (1986). Because the test is designed to determine whether counsel's error "actually had an adverse effect on the defense," *Roe* v. *Flores-Ortega*, 120 S. Ct. 1029, 1037 (2000) (quoting *Strickland*, 466 U.S. at 693), petitioner must overcome the "strong presumption" that the result of the relevant proceeding was reliable. *Ibid.* (citing *Robbins*, 120 S. Ct. at 765 (citing *Strickland*, 466 U.S. at 696)). It is not sufficient to show that counsel's purported failings had a "conceivable effect on the outcome." *Strickland*, 466 U.S. at 693. Nor is it enough to show a "reasonable *possibility*" of a different outcome. See

Strickler v. *Greene*, 527 U.S. 263, 291 (1999) (applying identical *Brady* prejudice standard).

Sentencing proceeding prejudice. Because of the nature of the Guidelines system, it will often be difficult for a defendant to establish the necessary degree of probability that an omitted legal claim (even if meritorious) would have affected the outcome of the sentencing proceeding. In particular, a defendant who cannot demonstrate that presentation of the omitted claim would have resulted in a reduction in his Guidelines range to a point below the sentence that he received will not be able to make the requisite showing. The reasonable probability test is premised on the existence of "standards that govern the decision," and "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying" those standards. *Strickland*, 466 U.S. at 695. The sentencing court, however, has almost complete discretion to select a sentence from within the applicable Guidelines range. In addition, the prejudice determination "should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Ibid.* Neither the usual sentencing practices of the judge who sentenced the defendant nor evidence of what that particular judge might have done absent counsel's errors may permissibly inform the prejudice determination. See *id.* at 695, 700. Therefore, it will generally be impossible to determine what sentence a court would have selected from within the applicable Guidelines range. As a consequence, when the 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* of a different result." *Strickler*, 527 U.S. at 291. *E.g.*, *United States* v. *Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994).

The same conclusion does not hold, however, for a defendant who can demonstrate that he received a sentence that

exceeded the Guidelines range that would have applied to him if his counsel had not omitted a meritorious claim. Because departures from the applicable range are unusual, see *Koon* v. *United States*, 518 U.S. 81, 98 (1996), a defendant who establishes that, but for his counsel's error, his sentence was outside the correct sentencing range will generally establish a reasonable probability that, but for counsel's error, he would have received a shorter sentence.

Appellate prejudice. When a defendant claims ineffective assistance on appeal, the appropriate focus for assessing prejudice is on the outcome of the appellate proceeding. Therefore, if the defendant shows that counsel unreasonably failed to raise a meritorious legal issue that would have resulted in a remand for resentencing, the defendant has shown prejudice under the applicable standard. See, *e.g.*, *Mannino*, 212 F.3d at 844; *Phillips*, 210 F.3d at 350 ("In the appellate context, the prejudice prong first requires a showing that we would have afforded relief on appeal."). Some courts of appeals have held that a defendant may appeal his sentence on the ground that the district court employed an erroneous sentencing range, even if, because of overlap among ranges, the sentence that the defendant received fell within the range that the defendant contends should have applied. See *United States* v. *Lavoie*, 19 F.3d 1102, 1103 (6th Cir. 1994); *United States* v. *Fuente-Kolbenschlag*, 878 F.2d 1377, 1379 (11th Cir. 1989). Assuming those decisions are correct, a defendant may in some circumstances be able to show prejudice from counsel's purportedly deficient performance on appeal even though the sentence that the defendant received is within the sentencing range that would have applied on remand from the appeal. The defendant will, however, usually be unable to show that counsel's performance was in fact deficient under those circumstances. As we noted in discussing the performance inquiry, a reviewing court will rarely be able to conclude that counsel acted unreasonably in deciding not to press a claim

that would not have had a certain and positive impact on the defendant's sentence. See p. 29, *supra*.

2. Petitioner contends that, if his counsel had competently argued that his money laundering offenses should have been grouped with his labor racketeering offenses, his sentencing range would have been 63 to 78 months, which is below the 84 month sentence that he received. Pet. Br. 19. If petitioner's contention were correct, he would have shown a reasonable probability of a different outcome on appeal because the court of appeals would have remanded for resentencing. And he would have shown a reasonable probability of a different outcome at sentencing because, as we have explained, it is reasonably probable that the district court would have sentenced him within the applicable, lower range.

Petitioner's contention is not correct, however, for two reasons: First, his contention depends on the assumption that the grouping claim has merit. In fact, the claim is not meritorious. Second, even if petitioner were correct that his money laundering and labor racketeering offenses should have been grouped under Guidelines § 3D1.2(d), grouping under subsection (d) should increase rather than decrease the applicable Guidelines range. We address each of these points in turn.

a. When a claim of ineffectiveness is based on counsel's failure to advance (or competently to advance) a particular legal claim, the defendant cannot show a reasonable probability of a different outcome unless he establishes that the claim has merit. See *Kimmelman*, 477 U.S. at 375 (explaining that "in order to demonstrate actual prejudice" from "defense counsel's failure to litigate a Fourth Amendment claim competently, * * * the defendant must * * * prove that his Fourth Amendment claim is meritorious"). Petitioner therefore must show that his grouping claim has merit.

Petitioner cannot make that showing in this Court simply by relying on the Seventh Circuit's holding in *Wilson*, 98 F.3d at 284, that grouping is required by Guidelines § 3D1.2(d). This Court has explained that "the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential 'windfall' to the defendant rather than the legitimate 'prejudice' contemplated by [the Court's] opinion in *Strickland*." *Williams* v. *Taylor*, 120 S. Ct. 1495, 1512 (2000); see *Lockhart* v. *Fretwell*, 506 U.S. 364, 369-372 (1993). Thus, in order to show cognizable prejudice from counsel's performance either at sentencing or on appeal, petitioner must show that he has a "right" to grouping under the Guidelines. *Williams*, 120 S. Ct. at 1513.

Petitioner has no such right. Guidelines § 3D1 provides rules for determining a single offense level that encompasses all of the counts of which a defendant is convicted. See U.S.S.G. Ch. 3, Pt. D, intro. comment. "In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct" (*ibid.*), § 3D1 requires grouping of counts "involving substantially the same harm" (Guidelines § 3D1.2). The principle underlying the grouping rules is that conviction on an additional count should not result in a sentence enhancement unless the additional count "represent[s] additional conduct that is not otherwise accounted for by the guidelines." U.S.S.G. Ch. 3, Pt. D, intro. comment.

Guidelines § 3D1.2 provides that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." The Section then goes on to specify the four circumstances in which that condition is met:

> (a) When counts involve the same victim and the same act or transaction.
>
> (b) When counts involve the same victim and two or more acts or transactions connected by a common

criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Guidelines § 3D1.2. Petitioner's money laundering and labor racketeering offenses fit none of the four circumstances.

Subsection (a). Petitioner acknowledged in his Section 2255 motion that grouping is not appropriate under subsection (a) because his money laundering was a separate act or transaction from his labor racketeering. J.A. 25.

Subsection (b). Grouping is also not appropriate under subsection (b) because petitioner's money laundering and his labor racketeering had separate victims. Petitioner's labor racketeering, which involved his solicitation and receipt of kickbacks in exchange for funneling Union investments to particular brokers, was a crime against the Union. Petitioner's money laundering, by contrast, had no identifiable victim. Rather, money laundering is a crime against society in general. See, *e.g.*, *United States* v. *Napoli*, 179 F.3d 1, 7-8 (2d Cir. 1999), cert. denied, 120 S. Ct. 1176 (2000); *United States* v. *Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995); *United States* v. *Lombardi*, 5 F.3d 568, 570 (1st Cir. 1993); *United States* v. *Harper*, 972 F.2d 321, 322 (11th Cir. 1992). Money laundering "harms society's interest in discovering and deterring criminal conduct, because by laundering the

proceeds of crime, the criminal vests that money with the appearance of legitimacy." *United States* v. *O'Kane*, 155 F.3d 969, 972 (8th Cir. 1998).

The Commentary to the Guidelines makes clear that "[t]he term 'victim' [in Section 3D1.2] is not intended to include indirect or secondary victims. * * * For offenses in which there are no identifiable victims (*e.g.*, drug or immigration offenses, where society at large is the victim), the 'victim' for purposes of subsections (a) and (b) is the societal interest that is harmed." Guidelines § 3D1.2, comment. (n.2). Thus, petitioner's money laundering and labor racketeering offenses had different victims within the meaning of subsection (b) and should not have been grouped under that subsection. See *O'Kane*, 155 F.3d at 972; *Kunzman*, 54 F.3d at 1531; *Lombardi*, 5 F.3d at 570.[15]

Subsection (c). Grouping petitioner's labor racketeering offenses with his money laundering offenses also is not appropriate under subsection (c). That subsection "prevents 'double counting' of offense behavior." Guidelines § 3D1.2, comment. (n.5). It therefore requires grouping when "one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." Guidelines § 3D1.2(c). The conduct involved in money laundering is not treated as a specific offense characteristic in labor racketeering. See Guidelines §§ 2E1.1(a), 2E5.1(b). Nor is the conduct involved in labor racketeering treated as a specific offense characteristic in money laundering. See Guidelines § 2S1.1(b). Moreover, petitioner's labor racketeering offense level was not adjusted upward because of his money launder-

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[15] Some courts have concluded that money laundering has the same victim as the underlying fraud when the laundered money is used to perpetuate the fraudulent scheme. See *Napoli*, 179 F.3d at 8 n. 3 (citing cases and reserving question). In this case, however, petitioner did not reinvest the laundered funds in that manner. See pp. 30-31, 33, *supra*.

ing, and petitioner's money laundering offense level was not adjusted upward because of his labor racketeering. See J.A. 67-69, 84.[16] Punishing petitioner independently for his labor racketeering and his money laundering thus does not involve "double counting" and is not precluded by subsection (c). Cf. *Lombardi*, 5 F.3d at 570-571 (rejecting grouping of wire fraud and money laundering under subsection (c) even when the defendant's money laundering offense level was adjusted upward for knowledge that laundered funds were the proceeds of mail fraud).

Subsection (d). Finally, subsection (d) also does not require grouping of petitioner's money laundering and labor racketeering offenses. As described above, that subsection calls for grouping of offenses when "the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm." Guidelines § 3D1.2(d). At first glance, grouping of money laundering and labor racketeering might seem appropriate under that language because the guidelines for both offenses measure some part of the respective harms in monetary terms. Moreover, subsection (d) contains a list of offenses "to be grouped" under its provisions, and both labor racketeering and money laundering

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[16] Petitioner's offense level for labor racketeering was adjusted upward for obstruction of justice. J.A. 84. The basis for that adjustment, however, was not petitioner's money laundering but his perjury at his first trial. *Ibid*. Petitioner's offense level for labor racketeering was also adjusted upward because he was a fiduciary of the Union that he defrauded. J.A. 66. And petitioner's offense level for money laundering was increased because he abused a position of trust. J.A. 68. The language of subsection (c), however, does not require that two counts be grouped when the offense level for each of the two counts is adjusted upward based on related conduct. That situation does not result in double counting because, even when two counts are not grouped together, only the higher of the two adjusted offense levels is used to calculate the combined offense level. See Guidelines § 3D1.4.

are included on that list. Careful analysis, however, demonstrates that grouping of money laundering and labor racketeering under subsection (d) is not appropriate.

As an initial matter, the fact that money laundering offenses are to be grouped under subsection (d) and labor racketeering offenses are also to be grouped under that subsection does not mean that the two categories of offenses are to be grouped together. See *Napoli*, 179 F.3d at 9 n.4; cf. *Harper*, 972 F.2d at 322 (drug trafficking offenses cannot sensibly be grouped with money laundering offenses even though both categories appear on the list of offenses to be grouped). As the examples in the Commentary to the Guidelines make clear, the primary situation in which grouping occurs under subsection (d) is when a defendant is charged with multiple counts of the same offense or substantially similar offenses. See Guidelines § 3D1.2, comment. (n.6); *O'Kane*, 155 F.3d at 973-974. Another common situation that triggers grouping under subsection (d) is when a defendant is charged both with an underlying offense and with conspiracy, attempt, or solicitation to commit that offense. Guidelines § 3D1.2, comment. (n.6). Thus, petitioner's twelve counts of labor racketeering were grouped together and with his racketeering conspiracy count under subsection (d). See J.A. 85.

Application Note 6 makes clear that different offenses are to be grouped together under subsection (d) only if they are "of the same general type." Guidelines § 3D1.2, comment. (n.6). Several factors indicate that money laundering and labor racketeering do not meet that description. First, they entail different kinds of proscribed conduct that harm different victims. See pp. 40-42, *supra*. Second, although the guidelines for money laundering and labor racketeering both measure the harm from the relevant offense in monetary terms, the guidelines use different values to measure the harm from each. See *United States* v. *Taylor*, 984 F.2d 298, 303 (9th Cir. 1993); *United States* v. *Johnson*, 971 F.2d 562,

576 (10th Cir. 1992). The harm caused by a labor racketeering offense is measured by the amount of the illicit gain—that is, by the value of the prohibited payment or the improper benefit to the payer, whichever is greater. Guidelines § 2E5.1(b)(2). The harm caused by money laundering, on the other hand, is measured by "the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise" (Guidelines § 2S1.1, comment.)—that is, by the value of the laundered funds (Guidelines § 2S1.1(b)(2)). Third, the money laundering guideline and the labor racketeering guideline each translate the monetary values that they consider into specific offense level increases at different rates and using different monetary division points. Compare Guidelines § 2S1.1(b)(2) with §§ 2E5.1(b)(2) and 2F1.1(b)(1). In contrast, the guidelines for the property offenses that are listed in Application Note 6 as examples of offenses of "the same general type" all translate the amount of "losses" involved into offense level increases at exactly the same rate and using exactly the same monetary division points. See Guidelines §§ 2B1.1(b)(1) (larceny and embezzlement), 2F1.1(b)(1) (forgery and fraud); Guidelines § 3D1.2, comment. (n.6) (larceny, embezzlement, forgery and fraud are offenses of "the same general type"); *Napoli*, 179 F.3d at 11-12.

Money laundering and labor racketeering thus "entail different kinds of proscribed conduct, punishable on different scales, which harm distinct and different victims." *O'Kane*, 155 F.3d at 972. As a result, grouping the two sets of offenses is inappropriate not only because the offenses are not "of the same general type" but also because it would not serve the purpose of the grouping rules, which is "to prevent multiple punishment for *substantially identical* offense conduct." U.S.S.G. Ch. 3, Pt. D intro. comment (emphasis added).

b. Even if petitioner's money laundering and labor racketeering offenses should have been grouped together under

subsection (d) (as the Seventh Circuit's decision in *Wilson*, 98 F.3d at 284, suggests), petitioner could not show prejudice from counsel's performance at sentencing because grouping under that subsection (properly applied) would have increased rather than decreased petitioner's sentencing range. To understand why that is so, it is necessary to review how petitioner's sentencing range was calculated and how the calculation would change if the racketeering and money laundering offenses were grouped together under subsection (d).[17]

Petitioner's racketeering offenses were assigned a base level of ten. J.A. 66; Guidelines § 2E5.1(a)(1). That level was adjusted upward by two levels because petitioner was a fiduciary of the Union that was victimized by his racketeering scheme. J.A. 68; Guidelines § 2E5.1(b)(1). The offense level was adjusted upward two additional levels based on the district court's determination at sentencing that petitioner committed perjury at his first trial. J.A. 67, 84; Guidelines § 3C1.1. Finally, the offense level was increased by 12 levels because the total value of the commissions paid as a result of petitioner's racketeering scheme was approximately $1,802,000. J.A. 66-67; Guidelines §§ 2E5.1(b)(2), 2F1.1(b)(1)(M). As a result, the adjusted offense level for the racketeering offenses was 26. J.A. 85.

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[17] Petitioner's sentencing range would in fact have been lower if his offenses had been grouped under subsections (a), (b) or (c). As we have explained, however, grouping is clearly not appropriate under those provisions. See pp. 40-42, *supra*. To our knowledge, no court of appeals has approved grouping of money laundering and underlying fraud or racketeering offenses under subsections (a) or (c), and only one court has done so under subsection (b). In that case, moreover, unlike in this one, the laundered funds were used to further the underlying fraud. See *Cusumano*, 943 F.2d at 307-308, 312-314 (money laundering and kickbacks part of one overall scheme when laundered money was used to bribe Fund administrator to direct Fund business to broker who paid kickbacks to defendant from his commissions).

The base offense level for petitioner's money laundering offenses was 20. J.A. 67; Guidelines § 2S1.1(a)(2). That base offense level was increased by two levels because petitioner abused a position of trust and by an additional two levels because petitioner obstructed justice. J.A. 68-69; Guidelines §§ 3B1.3, 3C1.1. Finally, the offense level was increased by two levels to account for the value of the funds that petitioner laundered—$250,000. J.A. 67; Guidelines § 2S1.1(b)(2)(C). As a result, the adjusted base offense level for the money laundering offenses was also 26. J.A. 85.

Because the racketeering offenses and the money laundering offenses were not grouped, the combined offense level was determined by taking the offense level applicable to the group with the highest offense level (which was 26, since the offense levels of both groups were the same) and adding two levels because there were two groups of equally serious offenses. J.A. 85; Guidelines § 3D1.4. As a result, petitioner's total offense level was 28. J.A. 85. Together with his criminal history category of I, that offense level yielded an applicable sentencing range of 78 to 97 months. J.A. 86. Petitioner was sentenced to 84 months of imprisonment. J.A. 129.

As we have explained, offenses are grouped together under subsection (d) only if the offense level for each of the offenses is determined on the basis of aggregate harm. See pp. 42-44, *supra*. Therefore, when offenses are grouped under subsection (d), the offense level applicable to the group is calculated using the aggregate harm from all the offenses. Guidelines § 3D1.3(b). When the grouped offenses are governed by different guidelines, as money laundering and labor racketeering are, the combined offense level is determined by using the guideline that produces the highest offense level based on that aggregate harm. *Ibid.*

If petitioner's racketeering and money laundering offenses had been grouped, the offense level for the money laundering offenses would have been higher than it was

absent the grouping. Rather than using only the $250,000 in laundered funds to calculate the appropriate adjustment for the harm caused, the court would have been required to use the combined total of the laundered funds and the $1,802,000 in commissions—$2,052,000. Guidelines § 3D1.3(b). See *Napoli*, 179 F.3d at 12; *O'Kane*, 155 F.3d at 973. Therefore, there would have been a six level adjustment to the base offense level for money laundering (rather than the two level adjustment that applied absent grouping). See Guidelines § 2S1.1(b)(2)(G). As a result, petitioner's adjusted offense level for the money laundering offenses would have been 30 (rather than 28, the level it was without grouping). Because the adjusted offense level of 30 for the money laundering offenses would have been higher than the adjusted offense level of 26 for the racketeering offenses,[18] the court would have used the level of 30 to calculate the applicable sentencing range. Guidelines § 3D1.3(b). The offense level of 30, combined with petitioner's criminal history category of I, would have yielded a sentencing range of 97 to 121 months, well above the 78 to 97 month range and 84 month sentence that petitioner received without grouping.[19]

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[18] The offense level for the racketeering offenses would not have changed even if the laundered funds were added to the commissions for purpose of determining the appropriate adjustment to the offense level for the aggregate harm. See Guidelines § 2F1.1(b)(1)(M).

[19] The government has not waived the right to argue for use of the combined total of the racketeering commissions and laundered funds if the racketeering and money laundering counts were to be grouped. At the original sentencing, the government did not urge that the racketeering commissions be included as relevant conduct to the money laundering offenses, see Guidelines § 1B1.3(a)(2), because of its position that the money laundering and racketeering counts should not be grouped. See generally *United States* v. *Watts*, 519 U.S. 148. 152-153 (1997) (per curiam) (discussing relevant conduct provisions). In somewhat comparable circumstances, the Seventh Circuit in *United States* v. *Wilson*, 131 F.3d at 1253-1254, concluded that the government's failure to urge a relevant conduct argument at the original sentencing waived its right to ask that the

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As a review of the Guidelines calculations in this case illustrates, counsel should rarely be found to have rendered deficient performance by failing to anticipate a ruling by a court of appeals interpreting the Guidelines, and this is not such a rare case. Further, a correct application of the Guidelines in this case would not have lowered petitioner's sentence. For both of those reasons, petitioner's counsel did not render ineffective assistance.

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fraud loss be considered in determining the aggregate harm under the money laundering guideline, after the court of appeals had remanded for grouping of the fraud and money laundering offenses under Guidelines § 3D1.2(d) in *United States* v. *Wilson*, 98 F.3d 281 (1996). The Seventh Circuit's waiver holding, however, presupposes that the government could have urged a relevant conduct adjustment to the money laundering counts *without* also urging grouping. 131 F.3d at 1253. That is clearly incorrect. If two offenses are "of a character for which § 3D1.2(d) would require grouping of multiple counts," Guidelines § 1B1.3(a)(2), the government could not have urged that the offenses be treated as relevant conduct without also arguing that the Guidelines required grouping. The court of appeals held to the contrary because it misread Guidelines § 1B1.3(a)(2) as permitting a relevant conduct adjustment without grouping of multiple counts. 131 F.3d at 1253. But a relevant conduct adjustment under subsection 1B1.3(a)(2) is permissible absent grouping only when a defendant is convicted of a single count. When there are multiple counts, as here, groupable counts must be grouped. Guidelines § 3D1.2 ("All counts involving substantially the same harm *shall* be grouped together into a single group.") (emphasis added). Accordingly, after the government's position on grouping was rejected in the first *Wilson* opinion, the government should have been permitted to urge a correct application of the grouping rules, *i.e.*, one that took into account "the combined offense behavior taken as a whole." Guidelines § 3D1.3, comment. (n.3).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

RELEVANT STATUTES AND GUIDELINES PROVISIONS

1. Section 3553 of Title 18, United States Code, provides:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In

the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

2. Section 3742 of Title 18, United States Code, provides:

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release

under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly

unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) APPLICATION TO A SENTENCE BY A MAGISTRATE.—An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

3. Section 1B1.3 of the United States Sentencing Guidelines provides in relevant part:

> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions

described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

4. Section 3D1 of the United States Sentencing Guidelines provides :

§ 3D1.1 Procedure for Determining Offense Level on Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:

(1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in §3D1.2.

(2) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.

(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in § 3D1.4.

(b) Exclude from the application of §§3D1.2-3D1.5 any count for which the statute (1)

specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).

§ 3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§ 2B1.1, 2B1.3, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§ 2C1.1, 2C1.2, 2C1.7;
§§ 2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§ 2E4.1, 2E5.1;
§§ 2F1.1, 2F1.2;
§ 2K2.1;
§§ 2L1.1, 2L2.1;
§ 2N3.1;
§ 2Q2.1;
§ 2R1.1;
§§ 2S1.1, 2S1.2, 2S1.3;
§§ 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A;
§§ 2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§ 2C1.5;
§§ 2D2.1, 2D2.2, 2D2.3;
§§ 2E1.3, 2E1.4, 2E2.1;
§§ 2G1.1, 2G2.1;
§§ 2H1.1, 2H2.1, 2H4.1;
§§ 2L2.2, 2L2.5;
§§ 2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§ 2P1.1, 2P1.2, 2P1.3.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case

determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

§ 3D1.3 Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to § 3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to § 3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply (*e.g.*, theft and fraud), apply the offense guideline that produces the highest offense level.

§ 3D1.4. Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

Number of Units	Increase in Offense Level
1	none
1 1/2	add **1** level
2	add **2** levels
2 1/2 – 3	add **3** levels
3 1/2 – 5	add **4** levels
More than 5	add **5** levels.

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from **1** to **4** levels less serious.

(b) Count as one-half Unit any Group that is **5** to **8** levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is **9** or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

§ 3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

5. Chapter Five, Part A, of the United States Sentencing Guidelines provides:

The Sentencing Table used to determine the guideline range follows:

6. The Introductory Commentary to Chapter Three, Part D, of the United States Sentencing Guidelines provides:

This Part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. The single, "combined" offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.

The rules in this Part seek to provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine how much to increase the offense level. The amount of the additional punishment declines as the number of additional offenses increases.

Some offenses that may be charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range. For example, embezzling money from a bank and falsifying the related records, although legally distinct offenses, represent essentially the same type of wrongful conduct with the same ultimate harm, so that it would be more appropriate to treat them as a single offense for purposes of sentencing. Other offenses, such as an assault causing bodily injury to a teller during a bank robbery, are so closely related to the more serious offense that it would be appropriate to treat them as part of the more serious offense, leaving the sentence enhancement to result from application of a specific offense characteristic.

In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct, this Part provides rules for grouping offenses together. Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.

Some offense guidelines, such as those for theft, fraud and drug offenses, contain provisions that deal with repetitive or ongoing behavior. Other guidelines, such as those for assault and robbery, are oriented more toward single episodes of criminal behavior. Accordingly, different rules are required for dealing with multiple-count convictions involving these two different general classes of offenses. More complex cases involving different types of offenses may require application of one rule to some of the counts and another rule to other counts.

Some offenses, *e.g.*, racketeering and conspiracy, may be "composite" in that they involve a pattern of conduct or scheme involving multiple underlying offenses. The rules in this Part are to be used to determine the offense level for such composite offenses from the offense level for the underlying offenses.

Essentially, the rules in this Part can be summarized as follows: (1) If the offense guidelines in Chapter Two base the offense level primarily on the amount of money or quantity of substance involved (*e.g.*, theft, fraud, drug trafficking, firearms dealing), or otherwise contain provisions dealing with repetitive or ongoing misconduct (*e.g.*, many environmental offenses), add the numerical quantities and apply the

pertinent offense guideline, including any specific offense characteristics for the conduct taken as a whole. (2) When offenses are closely interrelated, group them together for purposes of the multiple-count rules, and use only the offense level for the most serious offense in that group. (3) As to other offenses (*e.g.*, independent instances of assault or robbery), start with the offense level for the most serious count and use the number and severity of additional counts to determine the amount by which to increase that offense level.