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IN THE SUPREME COURT OF THE UNITED STATES

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PAULA L. BUFORD, :
Petitioner :
v. : No. 99-9073
UNITED STATES :

Washington, D.C.

Monday, January 8, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:03 a.m.

APPEARANCES:

DEAN A. STRANG, ESQ., Federal Defender, Milwaukee,
Wisconsin; on behalf of the Petitioner.
PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 99-9073, Paula Buford v. The United States.
5 Mr. Strang.

6 ORAL ARGUMENT OF DEAN A. STRANG

7 ON BEHALF OF THE PETITIONER

8 MR. STRANG: Mr. Chief Justice, and may it
9 please the Court:

10 Paula Buford's case presents the very type of
11 mixed question well-suited to de novo review, and that's
12 particularly true here because of the overriding, indeed
13 the pervasive importance of uniformity in the current
14 Federal sentencing scheme.

15 Paula Buford serves a prison sentence roughly
16 twice as long as it would have been because of the way in
17 which the district court interpreted and applied
18 guidelines and commentary on relatedness and
19 consolidation. In her view, the Court of Appeals of the
20 Seventh Circuit erred by declining to give independent
21 review to the question of consolidation incorporated into
22 the meaning of relatedness, specifically declined to
23 review de novo whether her prior convictions, her prior
24 cases in fact had been consolidated.

25 I think there are several specific reasons that

1 make this an appropriate case, an appropriate mixed
2 question application of the guidelines --

3 QUESTION: Well, Mr. Strang, isn't there one,
4 perhaps, factor that cuts against your argument the fact
5 that district courts probably see this kind of case --
6 kind of an argument in connection with sentencing, a
7 typical district judge, much more often than a typical
8 judge of a court of appeals?

9 MR. STRANG: It is true, Your -- Mr. Chief
10 Justice that but a fraction of sentences ever are appealed
11 on any ground, but there is no reason to assume that the
12 district judge would be reviewing the act of a State court
13 in his own district or her own district or of any court
14 familiar to that district judge. The fact that the prior
15 convictions here arose in Milwaukee County, the seat of
16 the Eastern District of Wisconsin, I think is fairly
17 described an accident.

18 QUESTION: That's where the Federal judge sits,
19 is it not?

20 MR. STRANG: Yes.

21 QUESTION: In Milwaukee County?

22 MR. STRANG: Yes, and that's an accident of the
23 facts here. There's no reason that Ms. Buford's prior
24 convictions could not have arisen in Tuscaloosa, Alabama,
25 or San Fernando, California --

1 QUESTION: Let me ask you another question. I
2 guess that the guidelines provide that sentences are
3 related where the offenses occurred on the same occasion,
4 or were part of a common scheme or plan, and those
5 questions seem to involve certain factual determinations.
6 Do you think that on appellate review there would be a de
7 novo review?

8 MR. STRANG: Never of historical facts,
9 regardless which path one takes to relatedness. The
10 basic, or what this Court has called historical facts,
11 would be subject only to clear error review.

12 QUESTION: How about mixed questions of fact and
13 law?

14 MR. STRANG: The particular mixed question of
15 consolidation, which is the third prong of the definition
16 here, yes.

17 QUESTION: Well, in the example that I gave you
18 of common scheme or plan there might be mixed questions of
19 fact or law, and would there be de novo review there?

20 MR. STRANG: There may well be mixed questions,
21 and I think the common scheme or plan is the application
22 here that next to consolidation most calls or most invites
23 de novo review. If we look at the question of an
24 intervening arrest, which is the initial screening device
25 in the definition under the application note, I think that

1 one is most factual, that an intervening arrest rarely, if
2 ever, would arise beyond fact, it seems to me.

3 QUESTION: I mean, technically I think you're
4 right in saying the words which come out of an application
5 note in a guideline about, that you could deem a thing
6 consolidated when it's -- what is the exact word? -- when
7 it's functionally consolidated, when it's -- you know,
8 what are the words I'm thinking of, functionally
9 consolidated when the cases -- when sentencing was joined,
10 okay.

11 Now you want to know -- this is somebody writing
12 an application note in the guideline, and logically
13 speaking nobody's disputing the brute facts. They're
14 disputing whether sentencing was joined, those words,
15 sentencing was joined, do or do not apply to this
16 undisputed factual situation in the world, so if you're
17 going to go on a, all legal questions are for the court,
18 and the court of appeals, all factual questions are for
19 the trial judge, and this is a legal question, in that
20 rubric I guess you win.

21 But I would have thought that there were
22 millions of legal questions of this kind that are really
23 for the trial judge, because what they call for is the
24 expertise of the trial judge, and they are so minor that
25 if you start getting court of appeals into all that thing,

1 what you will produce is an unbelievable mess, where the
2 courts of appeals try to figure out every possible
3 ramification of the application of every application note
4 in the guideline. That's what I'm worried about, with
5 accepting --

6 MR. STRANG: Sir, I understand the concern. I
7 think -- first let me note, Justice Breyer, that the
8 functional consolidation term comes only from the Seventh
9 Circuit and some of the other court of appeals, the
10 application on the guideline themselves refers simply
11 to -- well, the application note refers simply to
12 consolidation.

13 It is a question of what type of guideline are
14 we applying here, and clearly if we confine ourselves
15 today to the realm of Federal sentencing, United States
16 sentencing guidelines, I would submit clearly that some
17 guidelines never rise above fact in their application.
18 Others I think are altogether discretionary in their
19 application. Many of the Chapter 5 guidelines would fall
20 into that category.

21 Still others, including the consolidation
22 question here, I think are the sort of mixed question --

23 QUESTION: What I'm thinking is that the words,
24 joint sentencing, are words that every trial judge in the
25 United States would understand reasonably well, and

1 they're words that I as an appellate court judge would
2 have a very crude understanding, and therefore I'd like to
3 know what the trial judge thinks about it rather than what
4 I think about it.

5 MR. STRANG: I don't know that Your Honor's
6 understanding would be any cruder.

7 QUESTION: I haven't done joint sentencing.
8 Every one of them has.

9 MR. STRANG: But the determination is one that I
10 think peculiarly is made here on court documents --
11 transcripts, pleadings, orders, at least in the ordinary
12 case.

13 QUESTION: Well, I suppose you could have a case
14 where the trial judge says, if there are two different
15 attorneys for the State appearing, asking -- at a single
16 sentencing proceeding, that there are two different
17 attorneys for two different offenses and there are two
18 different sentences, that, as a matter of law, is not a
19 consolidated sentencing.

20 I suppose a judge could say that, and if he said
21 that, then I think that you have a fairly strong case that
22 this would be a statement of such generality, that is
23 reviewable de novo.

24 MR. STRANG: And --

25 QUESTION: Is that your point?

1 MR. STRANG: Well, yes, and I --

2 QUESTION: All right. Now, but won't there be
3 some other cases where it's not quite so clear, and where
4 the judge said, well now, you know, I know how these State
5 court judges work, and it's clear to me that the two
6 sentences were related because the length of the drug
7 sentence term must have been calculated by reference to
8 what he gave for the robbery term. That might be a
9 different case, or would it?

10 MR. STRANG: I don't know that it would, because
11 it really turns, I think, on the guideline one is
12 applying, and if anything is true of the scheme that the
13 Sentencing Reform Act established, it is that an exercise
14 of discretion, if that's what Your Honor is describing,
15 must be explained so that it can be assessed for
16 reasonableness.

17 It is also, I think, true here that facts must
18 be found, whether that's the whole of the inquiry or
19 whether that's simply the predicate, then, to applying the
20 legal standard to classify the facts.

21 QUESTION: Do we ask ourselves, does deference
22 mean that two different trial judges could reach different
23 conclusions and both would be accepted?

24 MR. STRANG: That is exactly what I think it
25 means, and to put it in concrete terms, I think what it

1 means here is that if Paula Buford had a twin, John, who
2 had done the very -- who had committed the State court
3 crimes in 1992 with her, also the 1998 Federal crime, but
4 he had been sentenced by the district judge below Judge
5 Stadtmueller and had received a 7-year or 84 to 105-month
6 sentence, whereas Paula for the exact -- in the exact same
7 situation had received nearly 16 years, a court of appeals
8 giving clear error review would be bound to affirm both of
9 those convictions and sentences.

10 QUESTION: I could see that happening if, in the
11 case, I suppose, the Federal judge was trying to ask what
12 the State judge likely did with reference to trying to
13 balance the two sentences. I think you'd have a stronger
14 point if he says, as a matter of construction of this
15 statute, that two attorneys, two offenses, two separate
16 sentences does not mean textually that they're
17 consolidated. They are not consolidated.

18 MR. STRANG: And that, of course, implicitly is
19 what this district judge said, and the relevant, or the
20 most important pages are 21 --

21 QUESTION: I think he came pretty close to that.

22 MR. STRANG: Yes, he did. He took note that,
23 you know, the facts appeared undisputed. He was left to
24 try to apply the guideline and the -- I guess he called it
25 the applicable application notes, and then made comment

1 about there being two separate prosecutors, albeit from
2 the same D.A.'s office, pursuing separate interests.
3 There were two separate pieces of paper entered reflecting
4 judgments.

5 QUESTION: And there was no formal
6 consolidation.

7 MR. STRANG: That is true, there was no formal
8 order of consolidation.

9 QUESTION: And it's possible the court of
10 appeals could say, this is too complicated, unless there's
11 a formal consolidation we won't apply the guideline that
12 way, because that isn't even settled, is it, that this
13 notion of functional qualification doesn't come out of the
14 guideline, doesn't come out of any application note. It's
15 something that some courts made up.

16 MR. STRANG: Yes, in a word --

17 QUESTION: And if there is to be any kind of
18 uniformity infused in this process, why should it come
19 from the court of appeals rather than the Sentencing
20 Commission? I mean, you could see common scheme. You
21 could see crimes that happened simultaneously.

22 But this notion of consolidation, a judge could
23 consolidate just because the guy happened to have
24 committed a number of crimes totally unrelated. It
25 doesn't have the coherence that the other two categories

1 have, so why shouldn't this be something for the
2 Sentencing Commission to straighten out, and then there
3 would be uniformity, to get the uniformity that way rather
4 than sticking the court of appeals into the picture?

5 MR. STRANG: The Sentencing Commission very well
6 can, and is empowered to address questions and to try to
7 advance clarity in that way. That, of course, says
8 nothing about the question on certiorari granted here,
9 which is the standard of review, and the Sentencing
10 Commission cannot tell this Court the standard of review.

11 I think also, if we're talking, then, about the
12 substantive rule of --

13 QUESTION: No, but your argument -- I mean, if
14 this is the point of Justice Ginsburg's question, your
15 argument is that the only way to get uniformity is to have
16 de novo court of appeals review, and the point made in
17 response to that is no, you could achieve substantial
18 uniformity by having more detailed prescription by the
19 Sentencing Commission of what constitutes consolidation
20 and then having the usual deferential review.

21 MR. STRANG: I --

22 QUESTION: So long as the details are
23 significant enough, you know, complete enough, you'll get
24 reversed even on deferential review if you fail to follow
25 them. Why isn't that a more sensible way of achieving the

1 uniformity that you're after here?

2 MR. STRANG: I -- in the world of could, I agree
3 with much of what Your Honor said. Uniformity is advanced
4 by de novo review vis-a-vis deferential review. I mean,
5 so as between courts acting on the question, I think the
6 courts of appeals are better situated to provide
7 uniformity.

8 The Sentencing Commission could -- is a co-
9 actor here, there's no question, but there's also no
10 question that Congress did not mean that the commission
11 would oust the Federal courts of appellate jurisdiction,
12 quite the contrary. This was part of the Sentencing
13 Reform Act -- it included 3742 -- and giving the appellate
14 courts a much more active role in reviewing sentences than
15 ever they had before in this --

16 QUESTION: That's true, but they don't have --
17 I mean, they left to the courts to work out what would be
18 a sensible relationship among trial court, appellate
19 court, and Sentencing Commission, and therefore I would
20 think what Justice Ginsburg said was highly relevant.

21 MR. STRANG: It --

22 QUESTION: That --

23 MR. STRANG: Again, the Sentencing Commission
24 could act. It is also clear -- and this is in the
25 legislative history that we cited. It's clear that

1 Congress had in mind that appellate decisions would assist
2 the Sentencing Commission in determining what it is that
3 needed clarification or revisitation, so I don't think
4 it's an either or --

5 QUESTION: No, it's not either or --

6 MR. STRANG: -- situation.

7 QUESTION: But you can certainly say that when
8 you have the kind of question that trial judges know quite
9 a lot about, where appellate judges know not that much,
10 where it is highly complex and factually related, that one
11 should rely upon the Sentencing Commission to provide the
12 necessary uniformity, and that would be a strong argument
13 in favor of deferential review here.

14 MR. STRANG: Well, I don't know that it would.
15 My problem is that you are then leaving the Sentencing
16 Commission to look at the largely unreported work of
17 district judges in 94 districts, rather than looking at
18 the largely reported work of appellate judges in 12
19 circuits, as I understand it, so I'm not so sure, Your
20 Honor, that de novo review still isn't the better way to
21 interact with the commission.

22 That said, again I want to make clear that the
23 commission has the role that Justice Ginsburg posits, and
24 that it is not every guideline or application of guideline
25 that I suggest is appropriate for de novo review under

1 this Court's teaching. This one, yes, consolidation I
2 think is peculiarly appropriate.

3 QUESTION: And why is it peculiarly suited to de
4 novo review, Mr. Strang?

5 MR. STRANG: One, the overriding importance of
6 uniformity here, which I think elevates the need to
7 clarify and develop.

8 QUESTION: Why is uniformity more important with
9 respect to this guideline than any other?

10 MR. STRANG: Oh, no, the guidelines generally,
11 Mr. Chief Justice, I'm sorry. The guidelines in general,
12 the Sentencing Reform Act of 1984.

13 QUESTION: Well, I thought you were saying that
14 uniformity is important with respect to this particular
15 guideline. You're saying uniformity is important with
16 respect to every single aspect of the guidelines?

17 MR. STRANG: Yes, and I'm sorry, the confusion I
18 created. I am saying in a sense both. Uniformity always
19 here is important in Federal sentencing, but when we're
20 talking about a guideline that has a complex statutory
21 standard, as this one, and is not a matter of purely
22 individualized application such as acceptance of
23 responsibility, or a decision whether to depart upward or
24 downward for some unconsidered fact, then I think
25 uniformity of the rule, clarity of the rule, the meaning

1 of the legal standard is exceptionally important.

2 QUESTION: Why is that more important than, say,
3 the clarity of the rule with respect to, say, acceptance
4 of responsibility?

5 MR. STRANG: Acceptance of responsibility falls
6 closer to the realm of what this Court has called
7 supervision of litigation. It is dependant upon factors
8 that cannot be transmitted by transcript, or are not
9 available to a court of appeals. The defendant's
10 demeanor. The manner in which he interacts with counsel.
11 You know, a variety of issues that may appear only off the
12 record and therefore concern conduct immediately before
13 the district court.

14 I think to follow on my answer to Your Honor's
15 earlier question, a clear rule of decision I think is
16 important here for consolidation, because the potential
17 disparity in otherwise like-placed persons is so great, as
18 the facts of this case demonstrate.

19 QUESTION: One clear rule for appellate courts
20 that recognizes the expertise that district judges have
21 might say, I reject this notion of functional
22 consolidation. Either it's consolidated or it's not, and
23 so if it's consolidated, formally consolidated, that's one
24 thing. If it's not formally consolidated, forget it.
25 That would hardly benefit people in your client's

1 situation.

2 MR. STRANG: That's exactly the path that the
3 First Circuit now has gone, no consolidation unless
4 there's a formal order of consolidation of record, but de
5 novo review of the question of the consolidation question.

6 QUESTION: But wouldn't there be a huge
7 temptation for a court of appeals to take that position,
8 therefore to reduce the number of cases that would come to
9 it?

10 MR. STRANG: I don't know, never having been in
11 that position. The number of cases raising this issue is
12 not overwhelming. It's -- I think it's sufficient to
13 allow some development of the law, but it's certainly not
14 overwhelming, and what the rule of decision would be, I
15 have an opinion about what it ought to be. How it would
16 play out I'm not sure with any confidence I can suggest to
17 Your Honor, and I'm of course here focused on the standard
18 of review. I'm not sure that's a satisfactory answer.

19 QUESTION: You alluded to the number of cases
20 that would be implicated by the decision and you said, you
21 know, it's not an overwhelming number. Well, I suppose
22 it's not so far as the application of the decision to
23 beyond career criminal --

24 MR. STRANG: The career offender?

25 QUESTION: -- the Career Offender Act, but I

1 suppose there would be an application whenever guideline
2 sentences were imposed in consideration of prior offenses,
3 and I suppose the number of those would be enormous.

4 MR. STRANG: Well, certainly the question of
5 relatedness of prior cases can arise in any calculation of
6 criminal --

7 QUESTION: And it -- I mean, it must do so
8 thousands and thousands of times a day in the Federal
9 system, mustn't it?

10 MR. STRANG: Yes. They can arise, the --

11 QUESTION: So if we rule your way, and we say
12 there should be de novo review here, in effect as a matter
13 of law, then I would suppose the courts of appeals are
14 going to be faced with a tremendous number of challenges
15 having nothing to do with the Career Offender Act.

16 MR. STRANG: I think not. I mean, the narrow
17 question here is consolidation as the path to relatedness,
18 and at least --

19 QUESTION: Yes, but I don't see how we could --
20 well, maybe I should ask this question. Is there a basis
21 upon which we could say that the consolidation question
22 should be reviewed de novo, but other questions of
23 relatedness need not be?

24 MR. STRANG: The Court conceivably could do
25 that.

1 QUESTION: Well, conceivably, but I mean --

2 MR. STRANG: Well --

3 QUESTION: -- sensibly?

4 MR. STRANG: Yes.

5 QUESTION: How? Tell me what the rationale is.

6 MR. STRANG: The rationale would be that, as I
7 suggested earlier, the initial screening, the question of
8 an intervening arrest, ordinarily, at least my mind
9 struggles to find a situation in which that would present
10 more than a factual or pure factual issue. Did crimes
11 occur on the same occasion? Ordinarily it seems to me
12 that's a fact-bound, entirely fact-bound inquiry.

13 QUESTION: Right, but that does not exhaust the
14 universe of questions about relatedness.

15 MR. STRANG: That's correct, it does not.

16 QUESTION: And so I come back to my question to
17 you, could we classify consolidation as in effect an issue
18 that should be reviewed as if it were a legal issue and
19 hence de novo, and at the same time on some principle
20 basis say that generally the question of relatedness is
21 not to be treated as if it were a legal issue and subject
22 to de novo? Can we split the baby that way?

23 MR. STRANG: I think the Court could. Whether
24 prudentially it ought is another question, but I think it
25 could because at least as I read this Court's prior

1 decisions on mixed questions it really becomes a matter of
2 deciding, does the balance tip factual or does the balance
3 tip legal? Does it tip toward one class of judges, one
4 level in the hierarchy, or toward the middle?

5 QUESTION: Oh, no, I realize that, but the
6 problem I'm having is simply the fact that there's
7 something peculiar about this issue, because consolidation
8 is simply a subset of relatedness.

9 MR. STRANG: Yes.

10 QUESTION: And it would seem to me to be
11 difficult, as a matter of principle, to say that the
12 consolidation issue gets de novo, whereas relatedness
13 generally does not, and I want to know if there is a
14 principle basis for making that distinction, what that
15 basis is.

16 MR. STRANG: I think it's whether the mixed --
17 the mixture tips factual or tips legal is the best
18 principle I can identify.

19 QUESTION: You're saying the statute has
20 different tests for relatedness, some of -- many of which
21 are mixed questions, and some of those are proper for de
22 novo review, and others not.

23 MR. STRANG: This particular guideline yes, and
24 then the guidelines generally.

25 QUESTION: May I just ask sort of a general

1 question? We're not really construing a statute here.
2 We're construing a note in the guide -- in a particular
3 guideline. To what extent, if there -- there is ambiguity
4 and difficulty in figuring out what the consolidated means
5 or related means. Isn't there something the Sentencing
6 Commission could give greater particularity to in its
7 definition of the relevant terms?

8 MR. STRANG: For the rule of decision, yes, Your
9 Honor, it could.

10 QUESTION: It just sort of strikes me it's sort
11 of a strange issue for us to be wrestling with.

12 MR. STRANG: Well, and of course under Stinson,
13 although this is not a statute it's binding law, so it
14 doesn't merit less time or consideration in that sense, I
15 think, but again I have to acknowledge because of
16 Mistretta we have the Sentencing Commission out there, and
17 when we get to the question of the rule of decision,
18 having first settled the standard of review, yes, the
19 Sentencing Commission can weigh into that.

20 QUESTION: Isn't there something to be said,
21 too, for discouraging rather than encouraging a great
22 number of appeals of sentencing factors to the court of
23 appeals?

24 MR. STRANG: But I think de novo review does
25 that, and it's the point I wanted to make in response to

1 Justice Souter's question as well. At least as I
2 understand the theory, or a theory of de novo review, is
3 that as the law develops clarity through that process
4 lawyers and district judges are more likely to get it
5 right and to know that. The district court is very
6 bright.

7 QUESTION: Well, that's a very optimistic
8 picture of the legal profession.

9 (Laughter.)

10 MR. STRANG: Well, it --

11 QUESTION: You know, I sometimes think we take a
12 case here to decide a question and the opinion we write
13 deciding it creates three new questions for lawyers to
14 argue about, so I don't think certainty is very certain in
15 anyway, but just as a practical matter it seems to me it's
16 better to have these things resolved finally by the
17 district courts in some cases than simply appealed to the
18 court of appeals.

19 MR. STRANG: Well, in the end, Your Honor, where
20 that would take us is back to the persuasion that the
21 district courts are best able to provide uniformity in
22 sentencing and that, indeed, at page 12 of the United
23 States brief, is an assertion it makes, and that's simply
24 at war, I suggest, with the basic congressional findings
25 and purposes of the Sentencing Reform Act, that it was

1 precisely the lack of uniformity with largely unsupervised
2 district judges --

3 QUESTION: It motivated the Sentencing
4 Commission --

5 MR. STRANG: Yes.

6 QUESTION: -- Act, there's no doubt of that, but
7 it's one thing to say that we don't want two people in the
8 same cell block in Leavenworth convicted of the same
9 thing, one serving 1 year and the other is serving 20
10 years, but when we get down to the finer points there may
11 be more to be said for discretion, assuming it's
12 consistent with the guidelines.

13 MR. STRANG: Although this is a situation where
14 the difference -- although not 1 and 20 years, the
15 difference is really quite remarkable.

16 If there are no further questions, I'd like to
17 reserve a few minutes for rebuttal.

18 QUESTION: Very well, Mr. Strang.

19 Mr. Wolfson, we'll hear from you.

20 ORAL ARGUMENT OF PAUL R. Q. WOLFSON

21 ON BEHALF OF THE RESPONDENT

22 MR. WOLFSON: Thank you, Mr. Chief Justice, and
23 may it please the Court:

24 The court of appeals properly applied a
25 deferential standard of review to the district court's

1 decision for two principal reasons. First, the text of
2 the Sentencing Reform Act itself directs the courts of
3 appeals to give due deference to the district court's
4 applications of the guidelines to the facts and, second,
5 institutional considerations also support a deferential
6 standard of review. The district courts are better suited
7 for making the kind of fact-intensive decision that is
8 typically involved in applying the guidelines to a set of
9 facts.

10 QUESTION: Suppose, as in Justice Ginsburg's
11 example, a district court said there is no consolidation,
12 in my view, unless there's a formal order of
13 consolidation. That's it. That seems to me a general
14 proposition, a general and very broad interpretation of
15 the text, which is susceptible of de novo review and which
16 ought not to vary from one court to another.

17 MR. WOLFSON: Justice Kennedy, I think I agree
18 with you. That is, if the district court said, I
19 interpret the guideline to mean that in no case may I
20 conclude that two prior cases were consolidated unless
21 there were a formal order of consolidation, and then
22 that's the rule of law, and then I apply the rule of law
23 to the facts of this case.

24 Now, the court of appeals would be authorized to
25 review that rule of law in a plenary fashion.

1 QUESTION: All right. Now, suppose he says,
2 where there are two offenses and two attorneys and two
3 sentences, that is not consolidation?

4 MR. WOLFSON: If he announces that as a
5 generally applicable rule of law that's -- that is, it
6 doesn't matter what any other fact of the case is, that is
7 the rule of law that applies in every case of this nature
8 that will come before me, that is a rule of law.

9 But if he -- but if, on the other hand, what he
10 is doing is saying, I read what the court -- I read the
11 standard that has been enunciated by the court of appeals,
12 and that is, there may be such a thing as functional
13 consolidation, and now I'm going to determine whether the
14 disparate facts of this case answer to that description,
15 and I see there are 15 salient facts in this case and
16 eight of them tip in one direction but seven in another,
17 and on balance I conclude that it's not functionally
18 consolidated, that is --

19 QUESTION: He didn't do that here. He was a
20 very careful judge. He did say, I'm left to conclude the
21 only inference of consolidation is the fact that the
22 sentences were imposed in two different cases. That's
23 almost a negative formulation of the hypothetical rule I
24 gave you.

25 MR. WOLFSON: Well, he said a lot -- actually,

1 Justice Kennedy, I think he said --

2 QUESTION: He then does go on.

3 MR. WOLFSON: He said more than that. I mean,
4 I'm -- I would point the Court to page 21 of the joint
5 appendix which, without belaboring it too long, he also
6 did go on to say there were guilty -- there were separate
7 guilty pleas entered, there were two separate judges, you
8 know, he found there was no agreement among the parties
9 that the cases would be consolidated, so I think really
10 what he was doing was answering to the other description
11 that I was discussing which he was saying, here's how I
12 think the facts of this case ought to be classified
13 according to a legal standard, and that is the application
14 of the guidelines to the facts, which Congress --

15 QUESTION: Well, do you think this was a mixed
16 question of fact and law here?

17 MR. WOLFSON: I think it's best viewed that way,
18 Your Honor, a mixed question of fact and law. That is,
19 consolidation is -- can be understood as a legal concept
20 and functional consolidation. It's similar to the
21 common -- I think more clearly a mixed question of fact
22 than law is the common scheme or plan idea.

23 If anything, this perhaps seems a little more
24 factual. I think the common scheme or plan notion of
25 relatedness is one that comes up very frequently, and that

1 is, I agree, is a mixed question of fact and law and, like
2 this case, if the Court were to apply that application
3 note to a set of facts, that should be reviewed
4 deferentially on appeal, and it's very --

5 QUESTION: Well, I understand that the necessity
6 for allocating resources of the courts at the different
7 levels in the right way, but it seems to me if you had a
8 twin case to this that it should have come out a different
9 way. I just don't see what discretionary findings, what
10 deference that ought to be given to the trial judge in
11 this very case.

12 I'm not saying that other consolidation cases
13 there wouldn't be some factors, say if the judge, the
14 Federal sentencing judge said, well now, these State
15 judges I'm sure must have balanced the two sentences and
16 that makes them related.

17 MR. WOLFSON: Justice Kennedy, I think what the
18 district court was doing in this case was saying, when I'm
19 asked to consider whether something is functionally
20 consolidated, I'm really considering did the previous
21 State court system treat the two cases as though they were
22 one? Now, there's no order specifically saying that they
23 did, so I have to look at the record of what happened in
24 those two cases and see how the court system treated this
25 case.

1 Now, there isn't a, kind of an immediately
2 obvious answer, so the court had to look at the way that
3 those cases were treated from the complaint stage all the
4 way until the sentencing, and there were various factors
5 that strongly indicated that the two cases were not
6 consolidated. They were charged by separate complaint.
7 They were assigned to two judges. One of the judges said,
8 I'm not going to wait for sentencing in the other judge --
9 in the other case, it's too long, I'm going to go full
10 steam ahead on this case.

11 So I think the evaluation, the district court's
12 determination that the totality of the facts have a
13 certain character is what we view as the application of
14 the guideline to the facts, and that is what is entitled
15 to deference.

16 Now, on the institutional consideration point, I
17 don't think there's any reason to think that that task
18 would be done better if repeated by three appellate
19 judges, or at least that that task isn't -- doesn't --
20 that that function isn't worth the cost to the justice
21 system as a whole.

22 After all, although it's true that the judge did
23 not make credibility determinations in a classic sense, he
24 was required to draw inferences from a historical record
25 to sort of fill in the gaps, try to figure out why the

1 court system treated this case one way rather than
2 another, and that is a very fact-intensive determination,
3 and I also think there's not any particular reason to
4 believe that an agglomeration of appellate case law in
5 this subject would prove particularly useful for this --

6 QUESTION: No, but that's why -- that's why
7 probably really -- I actually think, I guess, is if an
8 appellate court decided to review these things de novo
9 that would be fine. If an appellate court decided to
10 review them with some deference that would be fine. But
11 the people who ought to work it out are the Sentencing
12 Commission, I mean, which they can do, basically.

13 MR. WOLFSON: Yes --

14 QUESTION: So suppose I thought that, I mean, I
15 can't -- I promise you that I can get good reasons both
16 ways what it should be.

17 MR. WOLFSON: Well, the Sentencing Commission,
18 of course, does review every district court sentencing.
19 Now, when one --

20 QUESTION: In other words, the way the
21 Sentencing Commission would work it out is, it would
22 tolerate differences among the circuits in that respect,
23 unless it really began to show up in different sentences
24 being given to different people, at which point all they'd
25 have to do is write a new application note.

1 MR. WOLFSON: Well --

2 QUESTION: They would assign it to a staff
3 person, look into it, write a new note that's clearer, and
4 vote on it, and that's the end of that.

5 MR. WOLFSON: But of course -- well, of course,
6 that's true of many aspects of the administration of the
7 sentencing system. That is --

8 QUESTION: Yes, and normally we don't hear them.
9 Normally we leave --

10 MR. WOLFSON: It's true of permissible bases for
11 departure. It's true of -- I mean, other -- there are
12 other sentencing guidelines applications that are of very
13 similar character, whether somebody is a minimal
14 participant in an offense, whether his crime involved more
15 than minimal planning --

16 QUESTION: Not quite the same, because those
17 usually are very fact-related to the facts of the crime,
18 while this, in fact, is a matter of judicial
19 administration, which we could say judges throughout the
20 system are somewhat more familiar with.

21 MR. WOLFSON: Well --

22 QUESTION: It's unlikely you'll get an odd
23 factual situation with something like consolidation, isn't
24 it? I mean, this is a sort of weird case in that normally
25 it's fairly clear whether the cases were consolidated or

1 not consolidated, isn't it?

2 MR. WOLFSON: It may not be entirely clear
3 whether a case was functionally consolidated, and it may
4 not --

5 QUESTION: That's a concept the courts make.

6 MR. WOLFSON: And it may not be clear whether a
7 case -- it may not be clear whether a case involved a
8 common scheme or plan. Courts can reach whether
9 defendant's prior offenses involved a common scheme or
10 plan. Courts can permissibly reach different conclusions
11 about a set of facts on that case.

12 The point I'm trying to make is that, you know,
13 if a district court on review of a court of appeals, say
14 it were de novo, were to say well, this case is plainly
15 functionally consolidated, or this case is functionally
16 consolidated because this defendant's two prior offenses
17 in Wisconsin State court were consolidated, I don't think
18 that helps the district court decide any later case say
19 well, this defendant's Alabama offenses were -- were
20 functionally consolidated.

21 QUESTION: Mr. Wolfson, by answering as you did,
22 you're sort of accepting this functional consolidation
23 notion. Has the Government taken a position in dealing
24 with these -- this consolidation notion of whether it
25 should be a consolidation order or, we're not going to

1 mess with functional consolidation, or has the Government
2 just not taken a position on that?

3 MR. WOLFSON: Well, we have argued in some lower
4 courts, Your Honor, that consolidation means formal order
5 of consolidation, but the Seventh Circuit has ruled
6 otherwise. Several other courts of appeals have ruled
7 otherwise.

8 We haven't asked those courts to reconsider that
9 rule of law. We're not asking this Court to reexamine
10 this. We accept the concept for this case that there
11 is -- that there is such a thing as functional
12 consolidation, and the more important question to us is
13 how that concept, as with many -- as with the application
14 of many concepts in the sentencing guidelines, how that
15 concept is applied and how that application should be
16 reviewed. It's a more important issue to us in terms of
17 the overall administration of the guidelines system,
18 and --

19 QUESTION: May I ask this question, Mr. Wolfson:
20 if you do not require a formal order of consolidation, as
21 I understand your position, how could this have been more
22 consolidated? One judge, one proceeding, two sentences
23 imposed at the same time to run concurrently. What other
24 possibly could make it consolidated for purposes of
25 sentencing except a formal order?

1 MR. WOLFSON: I think the other things that
2 could have made it more clearly consolidated would have
3 been, one plea bargain would have been a very, a very
4 important factor had that been in the other direction, one
5 district attorney who was there to represent the interests
6 of the State in both cases, and not two district attorneys
7 where one specifically --

8 QUESTION: But they could be --

9 MR. WOLFSON: -- abjured any interest in the
10 other case.

11 QUESTION: But all those things could happen if
12 there were a formal consolidation, too. You could still
13 have two district attorneys.

14 MR. WOLFSON: You could, but I mean -- but I
15 think --

16 QUESTION: You could have no -- you could have
17 two plea bargains, too.

18 MR. WOLFSON: And although there were concurrent
19 sentencing the judge understood the sentences to be
20 different sentences. That is, they were not -- they were
21 not entered in one sentencing order.

22 QUESTION: Well, just on two counts of an
23 indictment you get two different sentences, too. I mean,
24 I have difficulty understanding it because they were
25 concurrent, imposed at the same time by the same judge. I

1 don't know how you'd get more consolidated.

2 MR. WOLFSON: If they had been determined
3 pursuant to a single plea bargain, Justice Stevens --

4 QUESTION: Right, I see.

5 MR. WOLFSON: I think one could reach a more --
6 a better conclusion that they were consolidated, because
7 it indicates that the -- you know, that the executive
8 branch was treating them as though they were inextricably
9 connected, but that's -- that was not what happened in
10 this case.

11 It was really a happenstance that they were
12 sentenced on the same day and it might well have been that
13 they were not. After all, Judge Geske said, I'm not going
14 to wait for the entry of the plea in the other case, I'm
15 going to go ahead with sentencing in my case, and that, I
16 think, is a strong factor that points in the opposite
17 direction.

18 Now, of course, to go back to the standard of
19 appellate review point, I think there isn't any particular
20 reason to think that the court of appeals de novo review
21 would necessarily arrive at a better result, or a more --
22 as a systemic matter more accurate result of these
23 determinations, because the facts are so disparate.

24 There's also the point that surely when the
25 State court is deciding whether to consolidate cases, as

1 the Wisconsin State court said, or whether it's not, it's
2 not thinking, well, in some possible future Federal
3 prosecution --

4 QUESTION: No, but the word consolidated, it's a
5 Federal question as to whether it's consolidated, isn't
6 it?

7 MR. WOLFSON: I think that's right.

8 QUESTION: It's whether it's consolidated --

9 MR. WOLFSON: Yes, right.

10 QUESTION: -- within the meaning of the note.

11 MR. WOLFSON: Right. I think that's right, that
12 it's a Federal term. I would ordinarily expect that if
13 the State court entered a formal order of consolidation
14 under its criminal rules that would be enough, absent some
15 extraordinarily unusual facts, but even so, I mean,
16 surely -- I mean, as the district court, as the district
17 judge pointed out in this case, you know, he did look at
18 the record in the State court.

19 QUESTION: The thing that's interesting to me, I
20 have a lot of sympathy for your basic position, but on the
21 facts of this particular issue it seems a little hard for
22 me to swallow. The thing that's really hard for me to
23 swallow is the district judge came out the other way and
24 said it's not even close. He said they're not even close
25 to being consolidated.

1 MR. WOLFSON: Well, of course --

2 QUESTION: If I remember it correctly.

3 MR. WOLFSON: I mean, the petitioner has not --
4 the petitioner has only argued that de novo review should
5 be applied, and the petitioner has not argued that if a
6 deferential standard of review is applied that the
7 judgment should be reversed, so that's -- you know, I
8 mean, that's the case as we take it.

9 QUESTION: Mr. Wolfson, could the district judge
10 have taken into account that these cases were put together
11 for sentencing but that they could not have been put
12 together for trial?

13 MR. WOLFSON: Well, I think that cuts -- you
14 know, the fact that they could not have been put together
15 for trial may cut in our direction. That is --

16 QUESTION: Yes.

17 MR. WOLFSON: Right.

18 QUESTION: I'm suggesting that.

19 MR. WOLFSON: Right. Right. I think he could
20 have. I'm not sure that the -- I'm hesitant to rely too
21 heavily on that, because I'm not sure that the Wisconsin
22 court rules forbid, flatly forbid consolidation for trial,
23 but they certainly presume that a drug case and a nondrug
24 case will not -- will proceed along separate tracks, and I
25 think that this, as the Seventh Circuit pointed out, you

1 know, that is a factor pointing against functional
2 consolidation in a case like this, because Wisconsin seems
3 to have a policy of not wanting such cases to be tried
4 together.

5 QUESTION: Of course, the irony of that position
6 is that in this particular case the bank robberies and the
7 drug addiction seem to be related.

8 MR. WOLFSON: Seem to be --

9 QUESTION: Related in a realistic sense.

10 MR. WOLFSON: The prior bank robberies?

11 QUESTION: Yes.

12 MR. WOLFSON: Well, I don't think that's true
13 actually, Justice Stevens. After all, although the, you
14 know, the facts -- I don't think that there's a showing
15 that the -- you know, the bank robberies and the drug
16 addiction were, you know, part of a, as we might say, part
17 of a scheme or part of a modus operandi.

18 QUESTION: Well, she was robbing the banks to
19 get the money to feed her drug habit, as I understand it.

20 MR. WOLFSON: Well, that is generally not enough
21 for a court to view cases as related, or even as part of a
22 common scheme or plan, I mean, you know, and the district
23 court was quite clear on that point and the court of
24 appeals agreed, and the petitioner didn't argue otherwise,
25 so I mean, it's a more narrow concept than that when one

1 is asking whether prior cases are related.

2 QUESTION: Is it your position that under this
3 guideline we have to -- it has to be all or nothing de
4 novo review or deferential review, or can we parse it out
5 and say, common scheme and plan are deferential,
6 consolidation is de novo, or do we just make a mess out of
7 the guideline if we do that?

8 MR. WOLFSON: I think that all three subprongs
9 of the relatedness test -- that is, common scheme or plan,
10 same occasion, consolidation, are applied -- are reviewed
11 under a deferential standard of review. That's not to say
12 that there are never any legal questions that may be
13 involved in that, and those, as we discussed earlier,
14 would be reviewed de novo.

15 An example I can think of in this case is, the
16 guideline says that offenses are not deemed to be related
17 if they were separated by an intervening arrest, and so
18 there you might have to, you know, consider whether
19 something was a continuing crime, and the same would be
20 the case -- I'm sorry, I meant with the common, with the
21 same occasion subprong you might have to consider whether
22 the offenses were -- one of the offenses was a continuing
23 crime and that's a legal question.

24 QUESTION: If we don't want to do that, if we
25 want to follow up on this idea, could we do this? Could

1 you say, look, we're not here considering whether -- the
2 word in the guideline is consolidated. Or, no, the word
3 in the application note is consolidated, right?

4 MR. WOLFSON: Right.

5 QUESTION: All right. The word in the
6 application note is consolidated for sentence, and really
7 what we're considering in this case is not whether
8 consolidated for sentencing has to be de novo or
9 deferential.

10 We are considering, in the circumstance where a
11 court of appeals has decided that the words consolidated
12 for sentencing include something called functional
13 consolidation, then can the court of appeals decide that
14 that concept which is a subset of consolidation, namely
15 functional consolidation, maybe should be reviewed de novo
16 or not.

17 We don't have to get into whether the thing of
18 the document, you know, consolidation means when there's
19 an order. That's not before us. We're considering the
20 concept called functional consolidation.

21 MR. WOLFSON: Well, I think the rule does --

22 QUESTION: I'm rather tempted by that, so --

23 MR. WOLFSON: I think the rule that we are
24 proposing does lend itself to a more general
25 applicability, Justice Breyer.

1 I mean, we have -- section 3742(e) does say that
2 the courts of appeals shall give due deference to the
3 district court's applications of the guidelines to the
4 facts, and that is a system-wide directive. It's --

5 QUESTION: My problem with it is that I can
6 think, probably, if you give me a few minutes, which I
7 won't take, of instances in this highly complex set of
8 rules and thousands of words in the guidelines where it
9 just will not turn out to be right always to let the
10 district court have its way when it applies a form of
11 words to a fact situation, but there will be many others
12 where it seems to be just the right thing to do, and
13 therefore a narrow holding might be preferable. That's my
14 thought. I'd like your view on that.

15 MR. WOLFSON: Well, the statute does say due
16 deference, and so it doesn't exclude the possibility that
17 there will be situations where de novo review is
18 appropriate, as when the district court engages in a legal
19 interpretation of a guideline, or where it seems clear
20 that that's what it was doing in that particular case.

21 QUESTION: Well, that's true -- I mean, under
22 deferential review, or you know, abuse of discretion, if
23 the district court comes to a legal conclusion that's
24 wrong it can be reversed on appeal, can it not?

25 MR. WOLFSON: That's correct, but I am thinking

1 of, there are some guidelines where there may be legal
2 conclusions that the court has to engage in.

3 One thing -- one that has come to mind is the
4 definition of aggravated felony in section 2(1), where
5 there are both legal determinations to be made and then
6 applying those determinations to the facts, but I think
7 that one can presume as a general matter that when the
8 issue is a mixed question of fact and law, as the Court
9 described it in Miller v. Fenton, where it falls somewhere
10 between a pristine legal standard and a determination of
11 the raw historical facts, I think that as a general matter
12 where it falls in that category a deferential standard of
13 review will be appropriate.

14 QUESTION: It's hard to -- the reason I find it
15 hard to do it that way is in the statute books you can
16 find questions where all you're doing is applying the
17 legal label to a fact situation, the most important thing
18 in the world, the least important thing, whether a newsboy
19 is an employee, whether a foreman is an employee.

20 The same description applies to what the judges
21 do. The consequences are enormously different. You see,
22 I mean, that's a classical example, but that's what I'm
23 afraid of right here.

24 MR. WOLFSON: Well, one has to look at the, sort
25 of the system as a whole and the institutional

1 considerations and reach a judgment about how Congress
2 intended the system to operate, and I mean, certainly in
3 Koon, you know, the Court was aware that the question of
4 whether a permissible departure one way or another was,
5 had enormous significance not just in the facts of
6 particular cases.

7 It could mean a tremendous difference in the
8 defendant's sentence, and yet the Court concluded as a
9 general matter whether the district court concluded
10 that -- when the district court concluded that it was or
11 was not a permissible -- an appropriate basis for
12 departure, I should say, on the facts of the case was to
13 be reviewed deferentially.

14 Now, that's not to say that the Court couldn't
15 conclude that the answer it reached was wrong. I mean,
16 the Court reached such a conclusion in Koon, as a matter
17 of fact.

18 QUESTION: But under your view the trial courts
19 will not have any guidance from the appellate system even
20 as to what factors ought to be considered in whether there
21 was consolidation.

22 MR. WOLFSON: I don't think that's right,
23 Justice Kennedy. That is, I think -- I mean, deference is
24 not no review.

25 That is, I think a court can't -- if the

1 district court makes a clear error of judgment about
2 whether something was consolidated or was not
3 consolidated, just as if it makes a clear error of
4 judgment as to whether a defendant's prior offenses were
5 part of a common plan --

6 QUESTION: Well, I'm thinking in the context of
7 this case, where we're pretty well agreed on what
8 happened, the two attorneys and the two different offenses
9 but the one hearing.

10 MR. WOLFSON: Well, I mean, this case is -- I
11 can't think in this case, or a case like this, of any
12 facts, say, that would have been so out of bounds for a
13 district court to consider that it -- you know, that it
14 would have been completely erroneous to have considered
15 that fact, but looking at the system more generally and
16 not just consolidated but relatedness and applications of
17 the guidelines, I don't think that one should arrive at
18 the conclusion that due deference means no review at all,
19 just as is the case in departure decisions under,
20 departure decisions under the guidelines.

21 The courts of appeals can give the district
22 court guidance about what is inappropriate, an
23 inappropriate basis for departing in that situation.

24 QUESTION: Isn't it -- maybe you could comment
25 on this. It would seem to me, of course, you're right

1 that deference doesn't mean no review at all, but I would
2 think that it would be more difficult for a court to
3 review in a sensible and critical way a decision about
4 whether consolidation had occurred than it would have been
5 under the old law for a court to review whether a sentence
6 was appropriate when you're asking the question, should
7 the sentence have been 10 years or 20 years.

8 Here, we've got a case in which this question of
9 consolidation is going to make the difference, as I
10 recall, between doubling a sentence or not, and I would
11 suppose that in the absence of some clear rule it would be
12 more difficult to review the consolidation decision under
13 the guidelines than it would under the old law have been
14 to review the sentence itself, as, say, between 10 and 20
15 years, which is a very strange result.

16 Am I seeing things in a -- in the wrong way
17 here?

18 MR. WOLFSON: Well, I think that -- I may not be
19 quite understanding, but I think that one has to assume
20 that the courts of appeals announce interpretations of the
21 guidelines and that the district courts then apply those
22 interpretations in a faithful manner to the facts of
23 cases. Now --

24 QUESTION: Yes, but can you give me an
25 example -- give me an example, keyed to this case,

1 perhaps, of the kind of announcement of a rule governing
2 the meaning of consolidation that would be appropriate and
3 would actually make a practical, critical difference when
4 courts are reviewing consolidation solely for abuse of
5 discretion.

6 MR. WOLFSON: Well, of course, if the district
7 court had -- I mean, assuming it hadn't been settled in
8 the Seventh Circuit, if the district court had said no
9 functional consolidation --

10 QUESTION: No, but we're taking this case in the
11 context that there is something called functional
12 consolidation, and I -- I'm assuming that that really
13 could cover, as you in your argument a moment ago pointed
14 out, a tremendous variety of facts.

15 You said, you know, even if you come down with a
16 rule it would be difficult to review on a de novo basis
17 because of the extraordinary variety of facts, so we're
18 starting with the assumption that you've got functional
19 consolidation, number 2, that functional consolidation
20 covers a tremendous amount of district territory.

21 If you make those assumptions, what kind of a
22 rule on abuse of discretion review could a court announce
23 that would be of any critical help?

24 MR. WOLFSON: Well, of course, if the district
25 court had refined that rule further and had announced

1 what --

2 QUESTION: Ah, but all smart trial judges know
3 that the less they say the better, and smart trial judges
4 who want to keep control of sentencing decisions, which
5 the guidelines have made it very difficult for them to
6 keep control of, are going to keep their mouths relatively
7 shut.

8 MR. WOLFSON: It may be that the functional --
9 that de facto or functional consolidation is sufficiently
10 fluid that, you know, in the ordinary course the district
11 court's determination is going to be controlling. I mean,
12 it's --

13 QUESTION: I thought your response to this was
14 going to be that you don't have to have the court of
15 appeals doing the job, that it should be done by the
16 commission.

17 MR. WOLFSON: Well, that's --

18 QUESTION: That the commission can promulgate
19 more detailed specifications as to what constitutes
20 consolidation if, indeed, more detail is needed, or
21 desired.

22 MR. WOLFSON: Well, I think that's right, the
23 Sentencing Commission is there precisely to continue the
24 process of making the sentencing guidelines more uniform
25 by reviewing the experience of the district court.

1 QUESTION: True enough, but the consequence is
2 now, since the commission has not done any such thing,
3 that it seems to me that the range of unreviewable
4 discretion is greater when a court is determining what is
5 or is not a functional consolidation than the range of
6 unreviewable discretion was under the old law when a court
7 was deciding whether to give 10 years, or 20 years, or 50
8 years.

9 MR. WOLFSON: Justice Souter, one response I
10 would like to say is, I think as the commission and as the
11 courts refine the legal concepts farther and farther down,
12 and as the legal concepts themselves become narrower, I
13 think it's going to be the case that the district court's
14 determination whether any case where the facts of the case
15 fall within those legal concepts is more likely to be
16 upheld.

17 That is, if all we had was two cases, or if two
18 cases are related --

19 QUESTION: Okay, but I think what your argument
20 in fact means is, if the Sentencing Commission decides to
21 get into this with more detailed rules, then the
22 discretion is going to be limited, but if the Sentencing
23 Commission doesn't, then we are left with what seems to me
24 this rather ironic situation of less reviewable
25 discretion --

1 QUESTION: Well, Mr. Wolfson, my understanding
2 of the rule before the sentencing guidelines came into
3 effect was that a majority of the circuits said there was
4 no review of sentencing so long as it was within the
5 limits specified by law.

6 MR. WOLFSON: That's correct, if it was within
7 the statutory limits there was no review at all, but --

8 QUESTION: And didn't some circuits take the
9 position that there was an abuse of discretion review?

10 MR. WOLFSON: Yes, but my point is, it's harder
11 to find, I think, an abuse of discretion inherently as the
12 legal rule that you're applying to a set of facts becomes
13 narrower and narrower.

14 QUESTION: You're --

15 MR. WOLFSON: I mean, as both the Sentencing
16 Commission and the court of appeals, I think that's sort
17 of inevitable.

18 Now, the court of -- if all that were available
19 in this case were the bare guideline that said related,
20 and there were no application notes, then as -- the court
21 of appeals would have then undertaken the task of refining
22 that concept of related, which is at a more general level,
23 and then would have applied it.

24 Thank you.

25 QUESTION: Thank you, Mr. Wolfson.

1 Mr. Strang, you have 3 minutes remaining.

2 REBUTTAL ARGUMENT OF DEAN A. STRANG

3 ON BEHALF OF THE PETITIONER

4 MR. STRANG: Thank you, Mr. Chief Justice. I
5 want to revisit the question of the Sentencing Commission
6 and the interplay with de novo review.

7 This Court in *Mistretta* approved the basic
8 structure and rule of the Sentencing Commission, of
9 course, and my view on that, or anyone else's, no longer
10 matters, but I think we cannot rely here too much on the
11 Sentencing Commission or cede the ground properly in
12 Federal courts.

13 For one, the Sentencing Commission never can fix
14 disparity in a given case, or cure a lack of uniformity in
15 the cases as they come. It can act only to try to reduce
16 or prevent that in the future.

17 QUESTION: Oh, I thought it can act
18 retrospectively.

19 MR. STRANG: I'm sorry.

20 QUESTION: I thought that its rules can be
21 retrospective, that it can, indeed, require resentencing
22 in light of its new rules.

23 MR. STRANG: It can. It can do that. I
24 wouldn't expect it to do that in a situation like this.
25 In its -- its powers really are not so different in its

1 realm than would be Congress' power in the realm of
2 reconsidering what this Court does in the area of an
3 ordinary statute.

4 Congress can act there, too, to alter the rule
5 or even the standard of review, so I think it's clear,
6 3742 certainly makes it clear, I think, that Congress
7 envisioned here a critical role for the courts of appeals.
8 The question then is, well, at what level?

9 I want to note how much de novo and deferential
10 review look the same in terms of the mechanical tasks that
11 judges must undertake. It's only the conclusory act, as I
12 understand it, that differs.

13 That is, the briefs must be read, the relevant
14 portions of the record must be examined, and in the end
15 the difference then is will reasonable, if inconsistent,
16 conclusions be allowed to stand -- well, yes, that's
17 deferential review -- or does a court of appeals simply
18 look for the right answer, de novo.

19 De novo review continues to have its place and
20 it has its place here, just as much, I think, as de novo
21 review admittedly on a case-by-case basis helps us
22 understand reasonable suspicion, or helps us understand
23 probable cause, or helps understand what in custody means
24 for Miranda purposes.

25 So in the end I'm married to the belief that the

1 word do in 37 -- thank you very much.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Strang.

3 The case is submitted.

4 (Whereupon, at 12:03 p.m., the case in the
5 above-entitled matter was submitted.)

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