

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   PAULA L. BUFORD,                   :  
4                   Petitioner                   :  
5               v.                   :   No. 99-9073  
6   UNITED STATES                   :  
7   - - - - -X  
8                                   Washington, D.C.  
9                                   Monday, January 8, 2001  
10               The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:03 a.m.  
13   APPEARANCES:  
14   DEAN A. STRANG, ESQ., Federal Defender, Milwaukee,  
15       Wisconsin; on behalf of the Petitioner.  
16   PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor  
17       General, Department of Justice, Washington, D.C.; on  
18       behalf of the Respondent.  
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P R O C E E D I N G S

(11:03 a.m.)

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

ORAL ARGUMENT OF DEAN A. STRANG  
ON BEHALF OF THE PETITIONER

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

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

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

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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