

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: STACEY C. KOON, Petitioner v. UNITED STATES and  
LAURENCE M. POWELL, Petitioner v. UNITED STATES  
CASE NO: 94-1664, 94-8842  
PLACE: Washington, D.C.  
DATE: Tuesday, February 20, 1996  
PAGES: 1-59

**REVISED COPY**

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'96 SEP 19 P3:48

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   STACEY C. KOON,                   :

4                   Petitioner                   :

5                   v.                   :   No. 94-1664

6   UNITED STATES                   :

7   and                   :

8   LAURENCE M. POWELL,                   :

9                   Petitioner                   :

10                   v.                   :   No. 94-8842

11   UNITED STATES                   :

12   - - - - -X

13                                   Washington, D.C.

14                                   Tuesday, February 20, 1996

15                   The above-entitled matter came on for oral  
16   argument before the Supreme Court of the United States at  
17   1:00 a.m.

18   APPEARANCES:

19   THEODORE B. OLSON ESQ., Washington, D.C.; on behalf of  
20                   Petitioner Koon.

21   WILLIAM J. KOPENY, ESQ., Santa Ana, California; on behalf  
22                   of Petitioner Powell.

23   MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,  
24                   Department of Justice, Washington, D.C.; on behalf of  
25                   the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	THEODORE B. OLSON, ESQ.	
4	On behalf of Petitioner Koon	3
5	ORAL ARGUMENT OF	
6	WILLIAM J. KOPENY, ESQ.	
7	On behalf of Petitioner Powell	16
8	ORAL ARGUMENT OF	
9	MICHAEL R. DREEBEN, ESQ.	
10	On behalf of the Respondent	29
11	REBUTTAL ARGUMENT OF	
12	THEODORE B. OLSON, ESQ.	
13	On behalf of Petitioner Koon	57
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 94-1664, Stacey Koon v. United States, 94-  
5 8842, Laurence Powell v. United States.

6 Mr. Olson.

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF PETITIONER KOON

9 MR. OLSON: Mr. Chief Justice and may it please  
10 the Court:

11 This case involves the kind of fact-intensive  
12 decision that district judges make 40,000 times each year.  
13 It is the type of decision that trial judges are ideally  
14 suited to make, that appellate judges have neither the  
15 institutional competence nor resources to make, and that  
16 Congress and the Sentencing Reform Act explicitly vested  
17 in the district courts, and it is the kind of reasoned  
18 decisionmaking that Congress expected would provide vital  
19 data to the Sentencing Commission's continuous evolution  
20 and refinement of the Sentencing Guidelines.

21 The sentencing judge in this case made his  
22 decision to depart from the Sentencing Guideline range  
23 after presiding over a 7-week trial and a lengthy  
24 sentencing process involving detailed factual submissions  
25 by all of the parties. He explained each aspect of his

1 decision and his reasoning in a 54-page sentencing  
2 memorandum.

3 Each reason for departing from the guidelines  
4 was well documented and based upon the specific, highly  
5 unusual facts of this particular case. Each departure was  
6 predicated on factors that are either encouraged as  
7 departure grounds by the Sentencing Commission or not  
8 forbidden or discouraged by the Sentencing Commission.

9 It is important to state at the outset that  
10 Congress explicitly authorized sentencing judges to depart  
11 from the prescribed sentencing ranges if they find factors  
12 of a kind or to a degree not taken into consideration by  
13 the commission in formulating the guidelines. This,  
14 according to the commission, requires determining whether  
15 a case is unusual, atypical, or outside the heartland of  
16 the guideline range prescribed for this particular  
17 offense.

18 This is a highly fact-bound inquiry. Congress  
19 stated that sentencing judges were to have the flexibility  
20 and were required to impose that -- use that flexibility  
21 to impose individualized sentences when warranted by  
22 aggravating or mitigating factors not taken into account  
23 by the guidelines.

24 Sentencing judges are to be guided by numerous  
25 factors in deciding whether a case is outside the

1 heartland of the case. As explained for the Court in the  
2 Rivera case from the First Circuit, a district judge is  
3 going to use the facts of the case, as found by him, to  
4 which deference must be given unless they're clearly  
5 erroneous, his experience or her experience as a  
6 sentencing judge, the intuition developed over years of  
7 sentencing, other statutes, the guidelines themselves, the  
8 sentencing regime prescribed by the guidelines, and to  
9 bring all that institutional superior feel, as the Rivera  
10 court put it, together to the case to determine whether a  
11 case is unusual or not.

12 QUESTION: Mr. Olson, let me ask about the first  
13 point that you make in your argument, and which I guess  
14 you're coming to now, whether in deciding this question we  
15 use the abuse of discretion standard or we decide de novo  
16 whether the particular factor is allowable under the  
17 guidelines.

18 Does it really make any difference? Does it  
19 really make any difference?

20 MR. OLSON: Well, I --

21 QUESTION: Because what is being contended by  
22 the Government is that certain of these factors are not  
23 lawful factors, that the guidelines do not permit them to  
24 be used.

25 Now, if we reviewed it de novo, we would come to

1 the conclusion, assuming the Government's right, you're  
2 right, the guidelines do not permit them to be used. If  
3 we did it under an abuse of discretion standard, we would  
4 say, well, of course it is always an abuse of discretion  
5 to violate the law, and therefore we have before us the  
6 same question: Does the guidelines permit it to be used?  
7 Whichever standard you use, the appellate court has the  
8 same question before it: Is it lawful to use this  
9 particular factor?

10 I don't see why we --

11 MR. OLSON: What the --

12 QUESTION: -- should bother fighting about what  
13 standard to use.

14 MR. OLSON: The answer to that question is --  
15 indeed, the answer, I can state directly that it does make  
16 a great deal of difference, because it is an experience  
17 that sentencing judges get.

18 What the Sentencing Commission intended to occur  
19 is that, and the Sentencing Commission specifically said  
20 that it is difficult to prescribe a single set of  
21 guidelines that encompasses the vast range of human  
22 conduct potentially relevant to a Sentencing Commission,  
23 so what the Sentencing -- to a sentencing decision. So  
24 what the Sentencing Commission did is elaborate on what  
25 the experience of district judges had been and create a

1 typical sentence for a heartland-type case, but it --

2 QUESTION: I understand, but you're missing my  
3 point. The abuse of discretion standard simply says,  
4 within this broad range of the unlawful on this side and  
5 the unlawful on that side, the court can do whatever it  
6 wants in the middle.

7 Now, when it goes into the unlawful, it  
8 automatically abuses its discretion, and the contention  
9 here is that certain factors cannot lawfully be  
10 considered.

11 MR. OLSON: The answer to the question, if there  
12 is an abuse of discretion, it is unlawful, but it is  
13 important that that abuse of discretion standard take  
14 place. The Congress specifically said --

15 QUESTION: Well, if it makes you feel better I'm  
16 willing to decide it that way, but I'm going to be asking  
17 myself the same question. Is it lawful to consider this  
18 factor?

19 MR. OLSON: Well, the decision itself as to  
20 whether or not a case falls within the guidelines involves  
21 the ascertainment of the facts of a particular case and  
22 deciding whether the facts of that case make it unusual or  
23 atypical in a particular situation. District judges are  
24 better --

25 QUESTION: That's a different question, whether



1 a particular factor that could in some circumstances be  
2 used should have been used in this case, and I will  
3 acknowledge, and I don't think the Government contests  
4 that that is subject to abuse of discretion.

5 But the question of whether the factor is ever  
6 allowable --

7 MR. OLSON: The factor is allowable, according  
8 to the Sentencing Commission, to which the authority to  
9 make those decisions was explicitly delegated by Congress.  
10 According to the Sentencing Commission, unless we  
11 articulate -- and I'm reading from part 1A(4)(b) of the  
12 Sentencing Guidelines, with the specific exceptions of  
13 factors taken off the table by the Sentencing Commission,  
14 the commission does not intend to limit the kind of  
15 factors, whether or not mentioned in the guidelines, that  
16 could constitute grounds for departure.

17 QUESTION: Now you're arguing the merits, and  
18 that's a different question. That's not the standard  
19 question, that's the merits question --

20 MR. OLSON: Well, the -- they're --

21 QUESTION: -- and I'm happy to discuss that.

22 MR. OLSON: We submit that they're tightly  
23 interwoven among one another.

24 QUESTION: I think you're saying that this case  
25 cannot involve a question of lawfulness versus

1       unlawfulness, is that what you're saying?

2               MR. OLSON:   What we're saying is that the  
3       authority to determine whether or not a departure could  
4       exist from the Sentencing Guidelines was delegated by  
5       Congress to the Sentencing Commission.

6               The Sentencing Commission stated that certain  
7       factors were off-limits, the rest of the factors were on-  
8       limits within the sentencing discretion limits, and that  
9       these factors considered in this case were within that  
10      discretion.

11              QUESTION:   And because this is not a case  
12      involving the application of an off-limits consideration,  
13      the issue here cannot be an issue, whether it was lawful  
14      or not.

15              MR. OLSON:   Exactly.

16              QUESTION:   You start with the premise that it  
17      was lawful, and you say, within the realm of lawfulness,  
18      what can it do?

19              MR. OLSON:   That's --

20              QUESTION:   So that -- I mean, your case, then,  
21      is really not so much a case about what the standard ought  
22      to be, it's a case that's going to turn on whether we  
23      agree with you that in fact there can be a lawfulness  
24      versus unlawfulness decision about particular factors or  
25      reasons in this case.

1                   MR. OLSON: As this Court indicated in the  
2 Williams decision --

3                   QUESTION: Couldn't we see the case that way?

4                   MR. OLSON: Well, except to the extent that it  
5 seems to me that that decision is constrained by the  
6 scheme set up by Congress which delegated certain  
7 authorities to make -- authority to make those decisions  
8 to the Sentencing Commission, and the Sentencing  
9 Commission in this case has made those decisions.

10                  QUESTION: Well, the record -- if there's no  
11 difference between the abuse of discretion standard and  
12 the de novo standard, we might as well dismiss this  
13 petition as improperly granted, because that's the only  
14 question raised in the petition.

15                  MR. OLSON: We are not agreeing with that,  
16 Mr. Chief Justice. We're suggesting that the decision  
17 that was made here, which is the application of the  
18 guidelines to the facts of this case, which is an explicit  
19 appellate review standard articulated in the statute  
20 itself, the application of the guidelines to the facts of  
21 the case, which is what the district judge did here, is  
22 subject to a due deference standard specifically adopted  
23 by Congress.

24                  QUESTION: But the reason that this is an -- as  
25 it were, is an easy issue as you see it is that there

1 cannot be an issue of law here. This has got to be viewed  
2 as an issue of discretion.

3 MR. OLSON: In --

4 QUESTION: And I suppose that if we all agree  
5 with you there, there isn't very much left to argue about.

6 MR. OLSON: Well -- well, I think that the case  
7 is that simple, because the -- as Justice Breyer explained  
8 in his article in the Hofstra Law Review in 1988, the  
9 Sentencing Commission explicitly stated that most factors  
10 that might be eligible as departure factors have already  
11 been decided by the commission as eligible for  
12 consideration.

13 The commission has said, we are not deciding  
14 unusual cases. We need the decisionmaking by district  
15 judges to tell us when a case is unusual or not, and the  
16 reason why that decision, the authority for which is  
17 vested directly in the district courts, should be made by  
18 district courts, is because district courts, day in and  
19 day out, are where the rubber meets the road.

20 QUESTION: Yes, but you are also saying that  
21 there can be no unusualness question which raises an issue  
22 of law as distinct from an issue of discretion, and the  
23 reason it cannot raise an issue of law is that the only  
24 issues of law are issues involving whether something has  
25 been explicitly taken off the table or not. Is that a

1 fair --

2 MR. OLSON: I believe that that's a fair  
3 understanding of the guidelines themselves and --

4 QUESTION: But is it understanding of your  
5 argument?

6 MR. OLSON: And -- because we're basing that  
7 argument on the guidelines and this Court's decision in  
8 Williams, I must hasten to say that it's conceivable, I  
9 suppose, although I have not thought of one, where a pure  
10 question of law with respect to a departure factor could  
11 come up.

12 QUESTION: Well, it's obvious that there -- I  
13 mean, that isn't -- you could -- isn't the answer, it  
14 depends? If -- there are certain factors like race, which  
15 a statute says are totally forbidden from departure. It's  
16 a pure question of law whether a particular case, this  
17 falls within that, and the district court has nothing to  
18 do with it.

19 Then there could be other situations where the  
20 reason that this is not unusual has to do with  
21 interpreting another guidelines, e.g., does this kind of  
22 conduct fall within the heartland of the physical abuse  
23 guideline or assault guideline or something else? That's  
24 a pure question of law.

25 Then there's a third kind of question. The



1 third kind of question is, are these circumstances  
2 unusual? In respect to that one, though, it's technically  
3 a question of law. I take it that kind of decision is the  
4 one that you think goes primarily to the district judge.

5 MR. OLSON: Clearly that is the case, except to  
6 the extent that the only argument that I would offer with  
7 respect to that second category is that that -- if it's  
8 purely an interpretation --

9 QUESTION: Yes.

10 MR. OLSON: -- of the guideline it is almost  
11 never going to be purely an interpretation of --

12 QUESTION: Oh, no, it might be in this very  
13 case. For example, one of the reasons that there was  
14 departed here, one of the reasons for the departure is  
15 whether or not two prosecutions, one under a Civil Rights  
16 Act and one under a State law, is a justification for  
17 departure.

18 I would have thought that raises a pure question  
19 of law. I don't see what light the district court's going  
20 to throw on that, in that you'd think that the policies  
21 underlying the civil rights statutes would be relevant  
22 there.

23 MR. OLSON: Well, in fact, the -- as the Court  
24 put it in the Rivera case in the First Circuit, that  
25 requires an examination of the purposes of sentencing.

1 The Court might well consider that the specter of  
2 unfairness under those circumstances would make this case  
3 unusual. That would be an entirely permissible --

4 QUESTION: What the district court knows about  
5 is what's unusual. What the district court doesn't have a  
6 comparative advantage about is the comparative policies  
7 that underlie double jeopardy, different statutes,  
8 different guidelines, et cetera.

9 MR. OLSON: I agree with that, but that makes it  
10 unnecessary for the district court in making that  
11 unusualness decision to consider both the facts and the  
12 policies. That makes it a mixed question of fact and law,  
13 and that's one to which due deference should be given to  
14 the --

15 QUESTION: Well, as a predicate matter, when the  
16 district court addresses this issue, let's take the  
17 hypothetical issue of the twin -- double prosecutions.

18 The district court must ask, must it not,  
19 whether or not the commission considered this in  
20 formulating the guidelines. That's the first thing it  
21 asks.

22 MR. OLSON: That's one, yes.

23 QUESTION: All right. Now, that surely must be  
24 a question of law.

25 MR. OLSON: But that is interrelated. It can

1     only be made in the context of the facts of the particular  
2     case. Did the commission consider this --

3             QUESTION: Well, all law, Mr. Olson, is applied  
4     to the facts of a particular case.

5             MR. OLSON: But just like this case is a  
6     paradigm example of that, the peculiar facts inform the  
7     decision with respect to whether or not the Sentencing  
8     Commission considered that factor.

9             QUESTION: No, no, but can't we have an orderly  
10    process in which we first ask, was this factor taken into  
11    account in considering the guidelines?

12            As to that, and that only, is that not a  
13    question of law?

14            MR. OLSON: In all fact -- the commission says  
15    unless we prohibit those factors, those factors are  
16    something that we want district judges to be able to  
17    consider --

18            QUESTION: Well, then if you're right, then  
19    you'll prevail as a matter of law.

20            MR. OLSON: And then we -- and they should be  
21    considered in the context of the facts of a particular  
22    case.

23            If it please the Court, I would like to reserve  
24    the balance of my time for rebuttal.

25            QUESTION: Very well, Mr. Olson.

1 Mr. Kopeny.

2 ORAL ARGUMENT OF WILLIAM J. KOPENY

3 ON BEHALF OF PETITIONER POWELL

4 MR. KOPENY: Mr. Chief Justice, and may it  
5 please the Court:

6 The question that this Court granted certiorari  
7 as to petitioner Powell included a second question and  
8 that was, what was the correct analysis of the departure  
9 in this case, and I take it that this Court would not  
10 conclude its decision in this case by simply saying what  
11 the name of the standard of review is for reviewing  
12 departures, particularly because it is the -- at the core  
13 of the dispute between the parties in this case is the way  
14 the Ninth Circuit went about applying what it called the  
15 de novo standard and the way that the parties contend the  
16 reviewing court should proceed.

17 The opinion in Rivera as I read it states that  
18 there is an initial pure question of law which is to be  
19 decided, but it's to be decided as I think Justice Souter  
20 pointed out in his dissent in the Burns case, without  
21 regard to the evidence or facts of the case.

22 That is that, as a matter of law, a reviewing  
23 court or a district court can tell whether a particular  
24 factor was either taken into account or adequately taken  
25 into account by the guidelines commission, and that there

1 are, as Justice Breyer said in the Rivera opinion,  
2 questions of interpretation of words or formulas of words  
3 in statutes and guidelines which circuit courts or  
4 reviewing courts are equally competent to determine to  
5 district courts.

6 QUESTION: And as to them, de novo standard.  
7 Easy, right?

8 MR. KOPENY: Your Honor, I think that the words  
9 that Justice Breyer used was plenary standard, but what's  
10 important, I think, is that --

11 QUESTION: Well, isn't that what we're getting  
12 at by de novo here?

13 MR. KOPENY: Well, I hesitate to use the word de  
14 novo, because the Ninth Circuit called what it did in this  
15 case de novo, but reached a conclusion which Justice  
16 O'Connor said in Williams was forbidden to the reviewing  
17 court, and that is to determine whether it was an  
18 appropriate --

19 QUESTION: Maybe they did it wrong, but just as  
20 an abstract matter, I think what you are describing as the  
21 standard is what we normally describe as a de novo  
22 standard.

23 MR. KOPENY: I think so, too.

24 QUESTION: A review of issues of law.

25 MR. KOPENY: I agree with you. However, I am



1 urging the Court not to simply stop at the label.

2 QUESTION: Well, but that's what -- the de novo  
3 standard is the phrase that's used in the petition for  
4 certiorari.

5 MR. KOPENY: Your Honor, I believe that there's  
6 a two-step process, and that clearly any reviewing court  
7 must start, as I think Rivera instructs, with a first step  
8 which is properly called plenary, or de novo.

9 QUESTION: Yes. You don't have to simply devote  
10 your entire argument to de novo versus abuse of  
11 discretion, but those are the words that the Court adopted  
12 from the petition for certiorari to apparently identify a  
13 difference in approach on appeal.

14 MR. KOPENY: Right. Your Honor, my concern is  
15 this, that by calling what the Ninth Circuit did here de  
16 novo, we're either changing the meaning of it or we're not  
17 agreeing on terms, because --

18 QUESTION: Mr. Kopeny, don't waste time on that.  
19 Let's get to the merits of the thing. You've got 20  
20 minutes gone. We've got 10 minutes to talk about the  
21 legal issue.

22 MR. KOPENY: Well, Your Honors, I think the  
23 legal issues with regard to the -- whether these are valid  
24 bases for departure are clearly before this Court as well.  
25 It's the petitioner's position that the Government makes a

1 mistake of law in concluding, for example, that the 5-  
2 level departure in this case was invalid, as a matter of  
3 law, because victim misconduct could not, as a matter of  
4 law apply in this sort of case --

5 QUESTION: Mr. Kopeny may I --

6 MR. KOPENY: -- because the police officers were  
7 the defendants.

8 QUESTION: May I ask a question within that 5,  
9 because there's one thing that struck me. There were 3  
10 points, one for specific factors, and then the largest  
11 factor was the victim's conduct. Is there any guidance  
12 about the number of points that a district judge may  
13 assign to particular factors?

14 MR. KOPENY: Yes, there is, Your Honor. In 18  
15 U.S.C. 3742(e), there is a reasonableness standard, but as  
16 I understand at least Justice Souter's dissent in Burns,  
17 that means an abuse of discretion standard.

18 QUESTION: So if this judge had assigned 6 to  
19 that, or 2 to each of the others, it would just be abuse  
20 of discretion?

21 MR. KOPENY: If, in fact, you could conclude  
22 that there's a range of sentences that would be  
23 appropriate but none was righter than another, then anyone  
24 within that range would be within the discretion of the  
25 district court, according to the --

1 QUESTION: Does the district judge have -- since  
2 he has to justify his departure, does he have an  
3 obligation to explain why it's 5 rather than 1 or 2?

4 MR. KOPENY: I don't know that he has an  
5 obligation to contrast it with other potential departures,  
6 but he does have an obligation to find that it's unusual,  
7 to describe the degree to which it's present, and the  
8 guidelines are very specific in 5K2.10 with the six  
9 factors that he must evaluate, and in this case there was  
10 a very specific sentencing memorandum by Judge Davies, the  
11 district judge, who -- in which he went through chapter  
12 and verse of the findings of which of those factors were  
13 present and to what degree.

14 He talked about the persistence of the  
15 misconduct. He talked about the reasonableness of the  
16 fear, and how it was provocative. He spoke specifically  
17 about how the victim in this case, after being tased and  
18 put to the ground, rose up and charged at my client,  
19 petitioner Powell, and putting him in reasonable fear,  
20 because he was an unsearched felony suspect at that time.

21 He said that these things preceded only by  
22 seconds the offense conduct, which -- and that therefore  
23 there was a relationship of substantially contributing to  
24 provoking the offense conduct, and I urge the Court to  
25 reject again, as a matter of law, the Government's claim

1     that the lack of contemporaneous provocation and offense  
2     conduct means that this was an inappropriate guideline to  
3     use, that is, the encouraged departure downward for  
4     misconduct by the victim.

5             However, there is a point here that I think is  
6     essential to the Court's resolution of this legal  
7     question, and that is this. As I read the basic  
8     philosophy of the guidelines, there is a  
9     compartmentalizing of the various elements.

10            For example, in any police misconduct case,  
11     whether it's conspiracy to violate someone's right to  
12     vote, or whether it's assaulting someone and using  
13     unreasonable force, the guidelines gives a formula for  
14     addressing punishment to that element of the crime. But  
15     there's really a fact-based analysis here which sort of  
16     prevents the Government from drastically changing the  
17     sentence by changing what charges it files, so that the  
18     offense conduct element in this case is 15 elements, 15  
19     levels of sentencing for the aggravated assault.

20            I take it that the Government's argument should  
21     be rejected that in a police misconduct case you can never  
22     give -- you can never find victim misconduct mitigating  
23     because all the judge did was find that the departure  
24     downward for victim misconduct applied to that 15 levels  
25     of aggravated assault.

1           In other words, I think there is a limit on that  
2   discretion, Your Honor, that if Judge Davies had gone 16  
3   or more levels, and cut into the punishment for the  
4   violation of civil rights rather than simply reduced by a  
5   third the element of the punishment in this case that  
6   addressed the aggravated assault, then I think there would  
7   be a fairly strong argument that there was an abuse of  
8   discretion in finding the degree of departure to exceed  
9   that which was the predicate for the departure, that is,  
10  the assault itself.

11           QUESTION: Do we know which portion was  
12  attributable to aggravated assault and which was  
13  attributable to the violation of civil rights?

14           MR. KOPENY: Absolutely, Your Honor. The  
15  guidelines are clear and specific about it. In this case,  
16  if there had been no aggravated assault there would have  
17  been 10 levels attributable to civil rights. However --  
18  to civil rights violation. However, because the resulting  
19  offense level is higher, there were 15 for aggravated  
20  assault and 6 for the civil rights violation, so we know  
21  that the departure of 5 is well within the aggravated  
22  assault component of the sentencing.

23           QUESTION: But we don't know, do we -- we don't  
24  know, of the four different reasons that the district  
25  court gave for departing, how much weigh the gave to each



1 of the reasons?

2 MR. KOPENY: No, we don't, and --

3 QUESTION: So don't we then -- suppose we  
4 thought that in respect to some of the reasons it is a  
5 matter where he has expertise and can decide how unusual,  
6 but as to others, it's purely a question of law. That is,  
7 the court of appeals could decide these in respect to  
8 others, like the double jeopardy type thing. Is -- what  
9 do we do then?

10 MR. KOPENY: Justice Breyer, if you're referring  
11 to the 3-level combination departure and not including the  
12 discussion of the 5 levels for victimless conduct, then  
13 yes, I think Your Honor is right that the analysis of that  
14 would require the Court to have due regard for the facts  
15 and to defer to those aspects, or those factors under the  
16 added punishment departure that were experiential and  
17 related to what a district judge could do.

18 But where there's a pure question of law, then I  
19 think that a circuit court might be able to determine it  
20 was an inappropriate factor.

21 However, I would urge caution in the two that  
22 the Government have made their strongest points on. One  
23 is this lack of recidivism being prohibited, and the other  
24 is the one about the Government making a charging decision  
25 to prosecute these defendants again after they'd been

1 prosecuted in the State court.

2 As I've indicated in, I believe the reply,  
3 petitioner's reply brief, the guidelines do address the  
4 question of when the court thinks its unfair that the  
5 Government has made a particular charging decision and  
6 suggests that that might be addressed by a departure.

7 So even though it's legal, completely legal for  
8 the Government to choose one charge offense over another,  
9 if the Government -- if the court in its experience  
10 detects a specter of unfairness, the guidelines encourages  
11 a district judge to depart downward based on that sense of  
12 unfairness, and I would urge the Court not to reach too  
13 quickly the conclusion that, because double jeopardy is  
14 not violated here, there is no specter of unfairness which  
15 a district judge is uniquely qualified to detect, and  
16 which the guidelines would prohibit, as a matter of law,  
17 the district judge considering in the mix with all the  
18 other combined factors in determining that that unfairness  
19 should be addressed by a departure.

20 QUESTION: But there was no description by, as I  
21 understand it by the judge in this case of any factor  
22 other than the successive prosecution.

23 MR. KOPENY: Oh, to the contrary, Your Honor,  
24 there was a description of the defendants' extreme  
25 vulnerability in prison, there was a description --

1 QUESTION: No, no, no, but that's on a different  
2 point -- a different point.

3 MR. KOPENY: No, it's on the same point, because  
4 there was a single 3-level departure --

5 QUESTION: Didn't -- wait a minute.

6 MR. KOPENY: -- for a combination of factors.

7 QUESTION: Help me in the facts. Didn't the  
8 judge separately consider the successiveness of the  
9 prosecution and the vulnerability to abuse in prison?

10 MR. KOPENY: No, Your Honor. The circuit court  
11 separately considered.

12 QUESTION: Aha. Okay.

13 MR. KOPENY: And that's what Justice  
14 Reinhardt -- Judge Reinhardt said was an improper  
15 divide-and-conquer approach.

16 QUESTION: All right, then would it not be  
17 correct, then, on just the analysis that you gave to  
18 Justice Breyer, to send the thing back and say, well, as a  
19 matter of law, having given no separate reason going  
20 solely to successive prosecution than the fact that there  
21 was a successive prosecution, as a matter of law it was  
22 wrong to consider that --

23 MR. KOPENY: Well, Your Honor --

24 QUESTION: -- but maybe it was not wrong as a  
25 matter of law, and therefore subject to a different

1 standard of review, that these particular defendants would  
2 be especially vulnerable? Wouldn't that be a proper  
3 way -- couldn't that be a proper way to dispose of it?

4 MR. KOPENY: No, it couldn't, and perhaps it's  
5 because -- I misunderstood your former question, but the  
6 judge, the district judge did discuss individually each of  
7 the factors that he said was in the mix that gave rise to  
8 the combination 3-level departure. And he laid on the  
9 record specific reasons why he thought that was unfair and  
10 why he thought there should be a departure in this case.  
11 So it wouldn't be right to remand because he failed to do  
12 what the outline of the guidelines, or the framework says  
13 he must do, which is to give reasons and to make the --  
14 draw the conclusion that it's unusual.

15 QUESTION: But what if we concluded that one or  
16 two or three of the reasons articulated by the district  
17 judge were not factors that he could properly consider?

18 MR. KOPENY: Well, I'm sure, as Your Honor  
19 knows, you've already answered --

20 QUESTION: Then what do you do?

21 MR. KOPENY: You've already answered that  
22 precise question in Williams --

23 QUESTION: Exactly.

24 MR. KOPENY: -- because that was the issue  
25 before the Court, and then I take it there's no dispute

1 about the -- no one's asked this Court to reconsider its  
2 conclusions about the procedure to follow. If Your Honor  
3 concludes that one --

4 QUESTION: Right.

5 MR. KOPENY: -- but not all of the bases for  
6 departure is invalid. However, there is a distinction,  
7 and that is this. Each of these combined factors went  
8 into some -- into a combination or mix factor, and this  
9 Court has never determined that once one valid factor is  
10 considered, that it is inappropriate for the district  
11 judge to be straitjacketed into not considering the whole  
12 of the remainder of the case in determining to what degree  
13 departure is appropriate.

14 In other words, where the judge says, as in  
15 Williams, or for example there's -- this is not a  
16 combination departure, but there's a departure, and here  
17 are the three separate reasons, then I think the remand  
18 might be required, or obviously will be.

19 But where the judge says, I think an additional  
20 3-level departure is appropriate, and these are the  
21 factors that I'm identifying in combination, that it isn't  
22 clear that it would be illegal or, as a matter of law,  
23 invalid for a judge to consider the whole of the case,  
24 even though some of those factors, if articulated  
25 separately, would be prohibited.



1           So I think that there is still some more work to  
2 do in drawing the inference that this case fits under  
3 Williams, because it's different in that regard. And I  
4 think it's also correct to say that when we look at the  
5 other factor, take the question of recidivism, it seems  
6 right that at least in the Ninth Circuit at the time this  
7 case was decided it was the law that if a person is in  
8 category 1 with criminal history, you can't depart  
9 downward because you find that he won't reoffend. It  
10 also -- and therefore the Government argues that's a  
11 prohibited factor.

12           On the other hand, it's not clear that that is  
13 all that Judge Davies was doing in discussing the fact  
14 that as part of the mix, these defendants were not likely  
15 to be a danger to anyone, and that's because in reviewing  
16 the reasonableness of a departure the statute says, 37 --  
17 well, 3742(e)(3) says that it's only in determining  
18 whether the departure is unreasonable that the reviewing  
19 court should look at those purposes of sentencing.

20           And one of the purposes of sentencing is  
21 protection of society, so it's a fair thing for the  
22 district judge to talk about whether or not these  
23 defendants or this defendant would be a danger in  
24 discussing the justification for a particular departure  
25 and the level of it.

1 I think it's a question of how this district  
2 judge's findings are read, but it is not clear that he  
3 used an improper factor, rather, that he included in the  
4 mix something which the guidelines require to be given  
5 regard to, and that is, whether the person is a danger,  
6 because obviously it would be unreasonable to set a  
7 dangerous person loose, whereas it might be more  
8 reasonable to give a person who is totally not dangerous a  
9 lower sentence, so I think it is relevant to whether it's  
10 reasonable.

11 Thank you very much.

12 QUESTION: Thank you, Mr. Kopeny.

13 Mr. Dreeben, we'll hear from you.

14 ORAL ARGUMENT OF MICHAEL R. DREEBEN

15 ON BEHALF OF THE RESPONDENT

16 MR. DREEBEN: Mr. Chief Justice, and may it  
17 please the Court:

18 Our position is that the issue of whether a  
19 particular factor may warrant a departure from the  
20 guidelines is a legal issue that is subject to de novo  
21 review in the court of appeals, and there are two main  
22 reasons for that position.

23 First, a proposed ground for departure raises  
24 recurring issues which are fit for and benefit from  
25 plenary appellate review to establish consistent and

1 coherent standards in the interpretation of the Sentencing  
2 Guidelines, and second --

3 QUESTION: Well, you know, if Congress hadn't  
4 made any provision for the -- what standard to use, that  
5 might be a good policy argument, but it's nothing more  
6 than a policy argument. It doesn't seem to be rooted in  
7 any statutory provision, at least judging from what you've  
8 said so far.

9 MR. DREEBEN: Chief Justice Rehnquist, there  
10 are -- there is a statute that specifically addresses the  
11 standard of review for Sentencing Guidelines --

12 QUESTION: Yes, and it doesn't say anything like  
13 that, as I recall.

14 MR. DREEBEN: Well, the statute that governs  
15 this, which is set out in our brief at page 6a of the  
16 appendix, provides that the court of appeals shall give  
17 due regard to the opportunity of the district court to  
18 judge the credibility of witnesses and shall accept  
19 findings of fact of the district court unless they are  
20 clearly erroneous, which is, of course, the typical  
21 standard of review for findings of fact, and shall give  
22 due deference to the district court's application of the  
23 guidelines to the facts, and there are two significant  
24 points I'd like to make about the last clause.

25 QUESTION: Well, you've left out one provision,

1     which is where your -- where the court of appeals is  
2     supposed to be reviewing a district court's decision to  
3     depart. It says, on appeal, if the court --

4             QUESTION: Where are you reading from?

5             QUESTION: I'm reading from -- well, I'm  
6     embarrassed to say I'm reading from Rivera --

7             (Laughter.)

8             QUESTION: But it is -- I'm reading the  
9     quotation of the statute, which is 18 U.S.C. 3742(f).

10            QUESTION: (f)?

11            QUESTION: Yes, and -- yes, it says on appeal,  
12     if the court of appeals determines the sentence is  
13     unreasonable -- and at least I'd thought that that makes a  
14     difference. That is, it suggests that what the court of  
15     appeals is supposed to do is to decide whether or not the  
16     departure of the district court is unreasonable, which is  
17     different from simply reviewing it de novo all the time.

18            MR. DREEBEN: Well, the Supreme --

19            QUESTION: So I thought that that added some  
20     support to the notion that at least sometimes the court of  
21     appeals is supposed to pay attention to what the district  
22     court says where that's appropriate, where the district  
23     court knows more about it, particularly in respect to  
24     whether or not a particular set of circumstances is  
25     unusual.

1 MR. DREEBEN: Let me, if I may, Justice Breyer,  
2 address the statutory point that you raised and then turn  
3 to the policy consideration of what a district court  
4 should do and what a court of appeals should do.

5 This Court held in Williams v. United States  
6 that the reasonableness determination and the component of  
7 the statute that you read that refers to that goes only to  
8 the second step of whether a resulting sentence is an  
9 unreasonably high or low departure from the guidelines.  
10 It only goes to magnitude.

11 The question of whether a departure is  
12 permissible in the first place raises two antecedent  
13 issues. The first is whether it is a violation of law,  
14 which it would be if, for example, a district court  
15 departed based on an explicitly socioeconomic factor, or a  
16 factor that is so close to a socioeconomic factor as to be  
17 a proxy for it.

18 The second issue of law that is antecedent to  
19 the reasonableness determination is whether there is a  
20 misapplication of the guidelines which could occur, for  
21 example, as the Court made clear again in the Williams  
22 opinion, if the district court relied on a factor that the  
23 Sentencing Commission has explicitly taken into  
24 consideration and has given adequate consideration to.

25 So in those two --



1                   QUESTION: You really think -- I mean, you have  
2   500, 700 district court judges. They have thousands of  
3   different kinds of circumstances.

4                   The basic theory written into the statute is,  
5   judge, if you have a normal case, apply the guidelines,  
6   judge, if you have an unusual case, depart, and you think  
7   that the courts of appeals that don't see those cases are,  
8   no matter what, supposed to decide to every factual  
9   circumstance, whether or not this particular odd factual  
10  circumstance -- you know, the person had a low IQ, or, I  
11  don't know, some very weird thing -- in each instance,  
12  they're the ones that are supposed to decide, ab initio,  
13  whether it's unusual or not unusual, pay no particular  
14  attention to the expertise of the district court.

15                  MR. DREEBEN: Well --

16                  QUESTION: That's your view of it?

17                  MR. DREEBEN: No, I certainly wouldn't say they  
18  should pay no attention whatsoever --

19                  QUESTION: All right, then the question is, what  
20  kind of attention do they pay, and once you say that, you  
21  get into the job of saying -- you get into the idea that  
22  the kind of attention you should pay is the kind of  
23  attention that comes out of their experience. Their  
24  experience is to know when circumstances are unusual, so  
25  when they think they're unusual, we pay some attention to

1     that in the court of appeals, and don't just substitute  
2     our own judgment.

3             MR. DREEBEN: Well, Justice Breyer, I think that  
4     the key factor is what they think is unusual will stem  
5     from the experience that they derive from their courtrooms  
6     hearing the particular cases that come across their  
7     dockets.

8             Where the court of appeals have a distinct  
9     advantage in that respect is the ability to harmonize the  
10    results that are obtained in different district courts  
11    throughout the circuit, which may have very different  
12    circumstances.

13            A family circumstance that a district judge in  
14    Manhattan may think is a ground for departure may be  
15    entirely different from one that a judge sitting in  
16    Hartford, Connecticut would think.

17            QUESTION: So over time you get to understand  
18    that, and over time a common law develops, and over time  
19    it becomes more sensible, and that's either done in the  
20    rubric of use of discretion, where it's the kind of thing  
21    that depends on the expertise of the district court, or  
22    it's done without any deference, or it's the kind of thing  
23    that depends on purely legal interpretations.

24            MR. DREEBEN: I think that the Government has no  
25    quarrel with the general approach you're suggesting of a

1 common law development of unusualness.

2 When the guidelines do not give specific  
3 guidance on how a departure factor is to be applied, and  
4 there is not a statutory prescription or a policy  
5 underlying the sentencing statutes that would preclude  
6 taking the departure --

7 QUESTION: And then once you're there, then they  
8 say at least look at the question of how much violence was  
9 involved in this instance and how much provocation, and  
10 they're saying that that's a paradigm instance of where,  
11 in fact, the district court has some experience as to  
12 whether or not in this kind of case there is a lot, a  
13 little, not too much violence by way of provocation, and  
14 so there should have been deference in respect to that  
15 matter.

16 MR. DREEBEN: I -- well, there are several  
17 reasons why I do not think that there should have been any  
18 deference given in this case. First of all, district  
19 courts happen to see a very, very small sampling of civil  
20 rights cases because there are few of them in the Federal  
21 system, so that the idea that a particular district judge  
22 is going to develop substantial expertise at gauging them  
23 is probably not an experientially correct judgment.

24 QUESTION: But if there are few of them in the  
25 Federal system the courts of appeals would see few also, I

1 would think.

2 MR. DREEBEN: The courts of appeals would have  
3 the ability to do what courts of appeals do best, which is  
4 to evaluate the policies underlying the particular  
5 guideline provisions that were applied, and we think there  
6 are legal issues that govern the victim misconduct issue  
7 in this case, and take the time to go through the body of  
8 reported cases and other sources of law that would help  
9 illuminate the question of what typically is found in  
10 these kinds of cases.

11 QUESTION: What about assault cases? Are there  
12 a lot of assault cases in the district courts?

13 MR. DREEBEN: Yes, there are a lot of assault  
14 cases in the district courts.

15 QUESTION: The factor of provocation was used in  
16 this case to reduce the assault portion of the punishment,  
17 not the civil rights violation portion of the punishment.

18 MR. DREEBEN: Well, I think that in itself was  
19 an error of law, Justice Scalia, because the guidelines  
20 themselves provide that the departure question, whether a  
21 guidelines sentence should be departed from, is the last  
22 step in the process after all of the other factors have  
23 been put into the mix, and in this case the only guideline  
24 that was applicable to determine ultimately what the base  
25 offense level was for these defendants was the civil

1 rights guideline, which refers to another guideline and  
2 incorporates that guideline only for the purpose of  
3 establishing a component. A departure that would be made  
4 solely --

5 QUESTION: Call it a component. It was that  
6 component that was reduced, and certainly unusualness with  
7 regard to assault cases is really what should be relevant  
8 in the case.

9 MR. DREEBEN: Well, first of all, that raises  
10 the legal issue of what should the proper comparison group  
11 of typical cases be?

12 In the Government's view, when your violate --  
13 when you violate 18 U.S.C. 242 through an excessive force  
14 violation and you are sentenced by the -- under the  
15 guideline applicable to that civil rights violation, the  
16 heartland of typical cases must be defined with reference  
17 to that civil rights violation and not assaults that are  
18 committed by private persons which have very different  
19 situations.

20 It was undisputed in the district court that the  
21 kind of pursuit and eventual arrest that occurred in this  
22 case was the sort of thing that police officers typically  
23 encounter every day. Police officers typically encounter  
24 suspects who resist arrest, who use various forms of  
25 violence, who are provocative in the common sense, and



1 police officers are trained to respond to that and to do  
2 so without stepping the line, over the line into excessive  
3 force and constitutional violations which --

4 QUESTION: Mr. Dreeben, what would be an  
5 example, in the Government's view, of the application of  
6 the last portion of the last sentence of section (e),  
7 where it says the courts of appeals shall give due  
8 deference to the district court's application of the  
9 guidelines to the facts?

10 Give me an example of where the district court  
11 has applied the guidelines to the facts, and it's the kind  
12 of application that the court of appeals should give  
13 deference to.

14 MR. DREEBEN: Certainly. There is an adjustment  
15 that applies under the guidelines to the base offense  
16 level depending on what role in the offense the defendant  
17 had. Was he a leader? Was he a manager? Was he a  
18 minimal participant? Was he a minor participant?

19 There are guidelines that address those issues.  
20 There are application notes that give examples of how  
21 those guidelines are to be applied, and when a district  
22 court makes the determination that this defendant was a  
23 minimal participant, this defendant was a minor  
24 participant, those determinations are applications of the  
25 guidelines to the facts.

1 QUESTION: Those are determinations of the  
2 facts, whether he was minor, major, or whatnot. I mean,  
3 to convey that meaning I would have said, and shall give  
4 due deference to the district court's determination of the  
5 facts.

6 MR. DREEBEN: Well, whether --

7 QUESTION: It doesn't say determination of the  
8 facts.

9 QUESTION: Which is in another sentence.

10 MR. DREEBEN: Well --

11 QUESTION: It says, application of the  
12 guidelines to the facts.

13 MR. DREEBEN: But that is an application of the  
14 guidelines, Justice Scalia. There is not a fact that  
15 somebody was a minor participant or minimal participant.  
16 Those are legal labels that are attached to particular  
17 conduct and that provide a basis for a district court to  
18 impose a different sentence.

19 QUESTION: Well, why do you -- okay, you've  
20 given an example. Now, why do you select that example  
21 rather than some others that have been talked about here  
22 as places where the court of appeals shall give due  
23 deference?

24 MR. DREEBEN: Well, the particular context that  
25 we're dealing with here today are departures from the

1 guidelines. Departures were not intended to be the norm.  
2 They are in a sense disfavored. They are to be granted in  
3 unusual cases when the circumstances were not taken into  
4 account by the Sentencing Commission.

5 For almost all of the departure factors that the  
6 district court relied on in this case, there was no  
7 guideline that was applicable that gave him any sort of  
8 guidance on how to adjust a particular sentence, and as a  
9 result, it is only in a technical sense that the district  
10 judge applied the guidelines at all.

11 What he really found was, incorrectly in our  
12 view, that certain factors had not been taken into account  
13 in the guidelines, and that other factors, though, were  
14 not only unusual but that they should result in a  
15 departure from the sentence, such as the fact that the  
16 defendants in this case had been tried in a California  
17 court for assault and acquitted.

18 And the Federal Government then made a  
19 determination that there was probable cause to believe  
20 that they had committed Federal civil rights violations,  
21 and they should therefore be tried for those, and that  
22 kind of a factor is clearly not something that's taken  
23 into account in the guidelines in any sort of explicit  
24 sense, but in our view it's the sort of unusual factor  
25 that it would be contrary to the purposes of sentencing to

1 consider. The fact that the --

2 QUESTION: Why do you say that so positively?  
3 Aren't there varieties of prior proceedings that might  
4 pose -- one impose an extreme burden on a defendant,  
5 another be a very trivial burden? There are differences  
6 among -- within a category like that that might require  
7 some judgment as to whether it should affect the ultimate  
8 sentence.

9 MR. DREEBEN: Yes, Justice --

10 QUESTION: For example, if he had huge expenses,  
11 monetary expenses, might not that bear on the amount of  
12 the fine that should be imposed, or something like that?

13 MR. DREEBEN: Well, our view would be it should  
14 not.

15 QUESTION: It should never bear.

16 MR. DREEBEN: That's correct.

17 QUESTION: It's not in the category of  
18 sometimes. You can say, aw, it was never or sometimes.

19 MR. DREEBEN: That's right.

20 QUESTION: You'd say this was a never factor.

21 MR. DREEBEN: Let me make a distinction with  
22 respect to the way the district court used that factor,  
23 because I think it's important for this case.

24 The district court in this case did not say that  
25 because the defendants had suffered the burdens of a trial

1 in another jurisdiction I believe that they have already  
2 been punished for their offenses in a way that mitigates  
3 the need to punish them here. The district court instead  
4 relied on two other factors, the fact that they would lose  
5 their jobs, and that they might be abused in prison, under  
6 its further punishment rubric.

7 For this factor, the district court made a  
8 categorical qualitative judgment that it raised a specter  
9 of unfairness for the defendants to be tried in two  
10 proceedings, and in our view that raises a pure question  
11 of law.

12 Can a district court say, it is unfair for the  
13 United States to attempt to vindicate Federal civil rights  
14 laws by bringing an independent prosecution?

15 To allow district courts to use such words as, I  
16 think this was unfair, is a wholesale invitation to the  
17 kind of unguided, disparate sentencing that Congress  
18 intended to remedy through the --

19 QUESTION: But the idea -- the idea of the  
20 guidelines, I think, is to get sentences that are fair,  
21 and if the judge, in fact, gives his reasons, isn't --  
22 don't you then turn -- I mean, I'm more interested in the  
23 general principle than in the facts of this case, because  
24 that's what we have to get right.

25 There are thousands and thousands of cases,



1 50,000 a year, so if you look -- isn't the guiding  
2 principle in 3742(e), which says -- I was wrong about (f).  
3 (f) is the same as (e), but it's really (e). It tells us  
4 what to do. It says, we review the record, the court of  
5 appeals should say, is it outside the guideline range?  
6 This is outside the guideline range, right?

7 MR. DREEBEN: Yes.

8 QUESTION: So we have one of those before us,  
9 and then say, is it unreasonable? That's the word they  
10 use, and when the court of appeals decides whether it is  
11 unreasonable, it should have regard for the reasons that  
12 the district court gives as well as the purposes of  
13 punishment.

14 So my belief is, and I want you to respond if  
15 I'm not right, that that is a rather general framework  
16 within which courts of appeals can work out principles  
17 over time on the basis of what is unreasonable, and that  
18 they ought to give particular consideration to the  
19 expertise of the district courts in telling us at least  
20 initially what is unusual and what isn't.

21 MR. DREEBEN: Justice Breyer, I believe that the  
22 most straightforward answer to you is that that is wrong.

23 QUESTION: That's wrong, okay.

24 MR. DREEBEN: It was a prevalent view before  
25 this Court decided Williams v. United States, but at page

1 200 of 503 United States Reports, the Court made clear  
2 that it can be an incorrect application of the guidelines  
3 to rely on a factor -- and I'll quote here -- to depart  
4 from the applicable sentencing range based on a factor  
5 that the commission has already fully considered in  
6 establishing the guidelines range.

7 QUESTION: Yes, right.

8 MR. DREEBEN: And I would submit that the same  
9 is true with respect to a factor --

10 QUESTION: Except at the beginning the  
11 guidelines say, the commission has considered no factor  
12 fully, but for the statutory factors that they're  
13 prohibited from taking into account.

14 MR. DREEBEN: Well --

15 QUESTION: Doesn't it say that right at the  
16 beginning?

17 MR. DREEBEN: Yes, it does, but it's certainly  
18 true that a district court can make a mistake in believing  
19 a case is unusual based on a factor that, in fact, the  
20 commission did consider.

21 But the important point for us here, I think, is  
22 that the court went on to say that the second  
23 determination that a court of appeals must make -- and  
24 I'll quote again. It says, if the court concludes that  
25 the departure is not the result of an error in

1 interpreting the guidelines, it should proceed to the  
2 second step. Is the resulting sentence an unreasonably  
3 high or low departure from the relevant guidelines  
4 sentencing range? If so, a remand is required under  
5 3742(f)(2). That's at page 202.

6 What Williams did was draw a distinction between  
7 errors of law that can infect a departure and the question  
8 of whether it is unreasonable, which the Williams court  
9 made clear is unreasonably high or unreasonably low, and I  
10 would agree with you entirely that once a district court  
11 relies on a permissible factor that is legally within its  
12 ken to consider in departing, that the extent of the  
13 departure is subject to deferential review on appeal under  
14 the reasonableness component of the statute, and it  
15 probably will not be often set aside unless the district  
16 court explicitly regards some form of guidance that the  
17 Sentencing Guidelines themselves give.

18 But it is not the case that simply because a  
19 factor was not given adequate consideration by the  
20 Sentencing Commission that the courts have found that it  
21 thereby licenses district courts to depart. One factor  
22 that is, I think, very clear in this case is the one that  
23 we've been talking about with respect to the specter of  
24 unfairness resulting from dual prosecutions.

25 Certainly, the commission did not consider that,

1 but that does not mean that it justifies a departure, and  
2 the question of whether it does or does not justify a  
3 departure, namely whether we are right or wrong, is  
4 clearly a question of law that should not be within the  
5 bounds of district courts to resolve differently.

6 QUESTION: What do you say about petitioner's  
7 contention that that is no different from the level of  
8 charging offense?

9 Maybe the court shouldn't have used the word  
10 unfair, but where a court departs because it thinks that a  
11 lesser offense should have been charged?

12 MR. DREEBEN: That is --

13 QUESTION: It's perfectly lawful for the  
14 Government to make the higher charge, but in fact the  
15 court thought it was unfair, use whatever word you like.  
16 Why is that any different from this?

17 MR. DREEBEN: We would appeal, and I think we  
18 would prevail, on arguing that it is not the function of  
19 the court of appeals to criticize the Government's  
20 exercise of prosecutorial discretion in determining what  
21 the charge is.

22 We have had cases that are almost exactly like  
23 that, where defendants have claimed, in the District of  
24 Columbia, that the United States Attorney's Office could  
25 have brought this case across the street in the superior

1 court, and if they had done that, the defendant would only  
2 be exposed to the sentence of 2 years.

3 But because the United States Attorney exercised  
4 charging discretion to bring the case in Federal court,  
5 the defendant was subject to a mandatory minimum of 5  
6 years, or 10 years, or what-have-you, and district courts  
7 have departed downwards, and the court of appeals has  
8 reversed that as a matter of law, because it intrudes upon  
9 the discretion of the Government to make a selection as to  
10 what charges it will bring in court.

11 QUESTION: So you simply contest the factual  
12 accuracy of the contention --

13 MR. DREEBEN: I think --

14 QUESTION: -- that a departure is permitted --

15 MR. DREEBEN: That's correct.

16 QUESTION: -- if the court thinks that a  
17 different or lower charge should have been brought.

18 MR. DREEBEN: That is correct, and the Court may  
19 disagree with me on that, but I would suggest that if the  
20 Court does so, it is disagreeing with me on an issue of  
21 law which should be for the Court to resolve de novo and  
22 not for a district court to be able to have the right to  
23 say, in my courtroom, if the jury recommends leniency, I  
24 am automatically going to lower the defendant's sentence,  
25 and for another district judge to say, sentencing is



1 solely my legal responsibility, and it makes no difference  
2 to me whether a jury recommends leniency or not.

3 In our view, those are the kinds of issues that  
4 under a guidelines sentencing system should be resolved  
5 consistently, and those kinds of issues arise with  
6 remarkable frequency. We cite it --

7 QUESTION: They won't be resolved consistently.  
8 I mean, let us not exaggerate the kind of consistency  
9 you're going to get. Even if you decide it's a  
10 permissible factor, you're going to have some judges who  
11 are going to say, in my courtroom -- I know it's  
12 permissible, but in my courtroom I'm not going to use it.

13 MR. DREEBEN: That's correct.

14 QUESTION: You're going to have a great deal of  
15 divergence in the district courts anyway, so I mean, let  
16 us not paint the picture that we're going to get uniform  
17 nationwide sentencing. We certainly aren't.

18 MR. DREEBEN: No, I --

19 QUESTION: Because merely -- merely -- the fact  
20 that we pronounce something to be permissible does not  
21 make it mandatory, and as long as it's permissible but not  
22 mandatory, you're going to get a lot of variation.

23 MR. DREEBEN: I think that is a fair statement.  
24 The Sentencing Guidelines are in a sense a compromise  
25 between competing values.

1           There is a recognition that the district courts  
2   should have discretion imposing sentences within the  
3   sentencing ranges themselves, or one particular district  
4   judge may say, I always sentence drug mules at the bottom  
5   of the range, and another district judge will say, I  
6   always put them at the top of the range, and that was  
7   deemed to be an acceptable amount of disparity, if you  
8   will, between sentences that did not offend the overriding  
9   goal of the Sentencing Guidelines to eliminate wholesale  
10   disparity.

11           But the kind of disparity that I'm talking about  
12   would be the disparity that would result from different  
13   district judges having different beliefs about what the  
14   governing law requires, and there is no reason in the  
15   Federal guideline system to tolerate disagreements between  
16   district judges on what the law permits them to do or what  
17   the law requires them to do.

18           Those are issues that, by providing for a  
19   structure of appellate review, Congress anticipated would  
20   be resolved in the courts of appeals, that the Sentencing  
21   Commission would be able to look at the work product of  
22   the courts of appeals as well as the district courts --

23           QUESTION: The use of permissible factors would  
24   be reviewed under an abuse of discretion standard?

25           MR. DREEBEN: Well, in our view, it may not

1 matter very much what label you attach to it. I think  
2 that that has become clear through some of the questions  
3 from the Court.

4 We think that the proper approach is for a court  
5 of appeals to review departure factors that have been  
6 recognized to be permissible under something close to a de  
7 novo standard.

8 QUESTION: Well then, what on earth does that  
9 language we've talked about before mean? Where the --  
10 After it says the court of appeals shall give due regard  
11 to the district court's judgment credibility, accept  
12 findings of fact that aren't clearly erroneous, and shall  
13 give due deference to the district court's application of  
14 the guidelines to the facts?

15 MR. DREEBEN: Well, when the district court is,  
16 in fact, applying guidelines to the facts and it's doing  
17 so under a correct legal standard --

18 QUESTION: Well, but that already tremendously  
19 circumscribes that statutory language in a way that  
20 there's no indication that it should be.

21 MR. DREEBEN: Well, I think --

22 QUESTION: You can almost define it out of  
23 existence.

24 MR. DREEBEN: I think, in fact, there's quite a  
25 bit of indication that that's exactly what Congress

1 intended.

2 QUESTION: Well --

3 MR. DREEBEN: At pages 26 and 27 of our brief we  
4 set out the legislative history that accompanied --

5 QUESTION: Well, you're saying that the  
6 legislative history overrides the language that Congress  
7 enacted?

8 MR. DREEBEN: No, but I'm saying that in order  
9 to apply a guideline to the facts one must first know  
10 legally what that guideline means, and that raises a  
11 question of law which should be resolved de novo.

12 To take an example in this case, the defendants  
13 contended that they can defend, on appeal, the district  
14 court's determination to depart under the victim  
15 misconduct guideline, 5K2.10, because Rodney King's  
16 misconduct substantially contributed to provoking their  
17 offense conduct. That's their contention.

18 Our reading of the district court's opinion and  
19 the court of appeal's reading of the district court's  
20 opinion is that the district court didn't really find  
21 that. What the district court found is that but for  
22 Rodney King's misconduct in sending the police on a chase  
23 through the streets of Los Angeles and eventually stopping  
24 and acting in a way that led them to believe he was not  
25 submitting to arrest and engaging in an attempt to escape,

1 but for those events, the defendants never would have been  
2 put in the position where they engaged in the  
3 constitutional violation of wilfully using excessive  
4 force, which they ultimately did.

5 Our point of view on that is that but-for  
6 causation is not the kind of provocation that that  
7 guideline contemplates. We could be right about that, we  
8 could be wrong about it, but we believe it's a question of  
9 law.

10 If ultimately, however, a court were to  
11 correctly construe the guideline and to understand that it  
12 did not mean that but-for causation was alone enough, and  
13 it then went through and applied the factors to the  
14 specific facts of the case, that is the kind of  
15 determination that should get some sort of deference on  
16 appeal.

17 So we are not seeking wholly to remove  
18 sentencing discretion from district courts either in the  
19 decision whether to depart from the guidelines when  
20 there's a permissible factor or in the way that they  
21 sentence within the guidelines. But we do think that the  
22 guidelines contemplate a regime under which two things  
23 will happen.

24 One is, the law will be clarified in the court  
25 of appeals, and then the Sentencing Commission can react



1 to it if it so chooses, and can amend the guidelines to  
2 clarify what the proper principles are. And that is a  
3 process that Congress clearly and specifically  
4 contemplated.

5 And second, to provide a common law development  
6 of how the recognized departure factors should be applied  
7 in a particular case, so that a district court sitting in  
8 New York doesn't think that it's unusual family  
9 circumstances if you have one small child under the age of  
10 3 and you've been sentenced to a 10-year drug offense and  
11 it was your first-time offense, while a different district  
12 judge says no, as a matter of law that can't possibly be  
13 unusual.

14 In our view what the courts of appeals should do  
15 is review the decided cases that come to them, which is a  
16 very small fraction of the departures to begin with, and  
17 then attempt to harmonize the cases and make the facts of  
18 the decided cases reconcilable with each other.

19 It may be that in carrying out that task the  
20 courts of appeals will apply limited deference at first  
21 until they gain enough experience. It may also be that  
22 after they chart the particular area by deciding enough  
23 cases, there will be little law left to develop, and in  
24 that --

25 QUESTION: It's very hard to do, though, because

1 as we've established, the court is not going to say to the  
2 district court, you should, much less you must, depart  
3 downward because of the 3-year-old. They're just going to  
4 say, you may if you want, and you're going to have the  
5 same kind of diversity anyway.

6 I don't understand how this common law  
7 consistency is going to build up by this decision of law  
8 that the court of appeals is making.

9 MR. DREEBEN: It will not be perfect  
10 consistency, Justice Scalia, and I doubt seriously that  
11 anyone could come up with a system that would produce  
12 perfect consistency.

13 QUESTION: Far from perfect, there won't be any  
14 consistency at all if they're just saying this is one of  
15 the myriad factors you can use. If you want to use it,  
16 use it, if you don't want to use it, don't use it.

17 MR. DREEBEN: Sentences within the guidelines  
18 are favored under this regime. The very purpose of the  
19 sentencing guideline system was to provide a regime under  
20 which the majority of the cases would fall within the  
21 ranges established by the Sentencing Commission.

22 QUESTION: Mr. Dreeben, on that, do we defer --  
23 does the court of appeals defer to a district judge's  
24 determination that this case is unusual?

25 Ordinarily, I follow the guidelines, but this is

1 not a heartlands case. This case is unusual.

2 Do courts of appeals owe deference to taking the  
3 case out of the usual box and into the special box?

4 MR. DREEBEN: I think that they do not, Justice  
5 Ginsburg, and I can give you examples of why I think they  
6 should not do that.

7 Many of the determinations of what constitutes  
8 the heartland are really determinations about what are the  
9 legal requirements that are applicable to sentencing that  
10 particular defendant, or the class of --

11 QUESTION: Yes, but why doesn't that argue for  
12 the answer that sometimes it does and sometimes it  
13 doesn't, sometimes it reveals a clear issue of law,  
14 sometimes it reveals a mixed issue which would get a more  
15 deferential standard?

16 MR. DREEBEN: Well, I agree with you that there  
17 are two classes of cases, Justice Souter, although for the  
18 reasons I've stated I think that the theory of the  
19 sentencing guideline system requires that appellate courts  
20 make an effort to harmonize the departure --

21 QUESTION: That's true, but I thought the theory  
22 also was that you'd build on the experience of district  
23 judges collecting information about what they consider  
24 significant enough to depart, the commission itself  
25 analyzing that information, and revising the guidelines in

1 light thereof.

2 I mean, how is a court of appeals supposed to  
3 know, as a straight question of law, whether the woman  
4 whose first offense it is with the cocaine has five  
5 children, was trying to earn money for Christmas, had no  
6 one to leave the children with when she goes to prison --  
7 you know, the facts of Rivera.

8 Is a court of appeals supposed to look that up  
9 in a statute book about whether that story, which happens  
10 to be true, let's say, in this instance -- I know some of  
11 them wouldn't be true, but suppose it was in this  
12 instance.

13 Is there a statute book or a law book where you  
14 look up whether that's unusual or not unusual?

15 MR. DREEBEN: Of course the --

16 QUESTION: What is it a judge is supposed to --  
17 you see the problem?

18 MR. DREEBEN: I see the problem, and I think it  
19 would have been a more difficult problem were we not  
20 living with about 8 years of experience under the  
21 Sentencing Guidelines and a fairly vast body of appellate  
22 case law that has defined the permissible parameters of  
23 such departures as family circumstances.

24 Of course, this case is not at all about a  
25 departure like family circumstances. This case is far

1 closer to the kind of example that the Court considered in  
2 Rivera itself.

3 Are typical needs to make restitution, part of  
4 the heartland of embezzlement cases, such that the fact  
5 that the defendant will be put in prison and have more  
6 difficulty making restitution constitutes a ground for  
7 departure?

8 The court of appeals in that case correctly, in  
9 our view, said obviously not, because in the typical  
10 embezzlement case it's fairly clear that you're going to  
11 have the need for some restitution, and it's obvious that  
12 it would be far more difficult to make restitution if  
13 you're in prison, so the question of whether typical  
14 restitution needs are within the heartland was resolved as  
15 one of law.

16 Other courts have taken a look at -- thank you,  
17 Mr. Chief Justice.

18 QUESTION: Thank you, Mr. Dreeben.

19 Mr. Olson, you have a minute remaining.

20 REBUTTAL ARGUMENT OF THEODORE B. OLSON

21 ON BEHALF OF PETITIONER KOON

22 MR. OLSON: Let me address that point, because  
23 in the ad damnum portion of the Rivera case the court  
24 indeed sent that back to the district court and said, if  
25 you find the need for restitution in that case



1 particularly unusual, please explain your reasons.

2 Then the court of appeals would examine that and  
3 give that whatever deference was appropriate because of  
4 the superior feel of the district court with respect to  
5 the facts of that case that made it unusual.

6 The Government is presenting here a sharply  
7 discrete and different view of how the Sentencing  
8 Guidelines, the Sentencing Commission, the district courts  
9 and the appellate courts ought to work.

10 The Sentencing Commission believes that unless  
11 it has -- because it is the delegee of legislative  
12 authority from Congress, unless it has taken factors off  
13 the table, it intends the district courts to look at those  
14 factors, explain them, and then when they're abused, when  
15 there's an abuse of discretion, that can be corrected in a  
16 specific case by an appellate court or it can be corrected  
17 in gross by the Sentencing Commission, which examines and  
18 processes all of those departure decisions and decides  
19 whether it's necessary to amend the guidelines, and it  
20 does that on a yearly basis by sending changes and  
21 amendments to the guidelines to Congress and -- if it's  
22 necessary to do that.

23 Because the Sentencing Commission --

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson.

25 MR. OLSON: Thank you.

1 CHIEF JUSTICE REHNQUIST: The case is submitted.

2 (Whereupon, at 11:00 a.m., the case in the

3 above-entitled matter was submitted.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

STACEY C. KOON, Petitioner v. UNITED STATES and  
LAURENCE M. POWELL, Petitioner v. UNITED STATES  
CASE NO. 94-1664, 94-8842

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Donn Marie Federico

(REPORTER)