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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 06-1646, United States v. Rodriguez. Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM
ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

The Armed Career Criminal Act is one of the Federal Government's most important tools for incapacitating serial offenders who commit serious crimes, and, like other Federal recidivism statutes, the ACCA defines the prior offenses that trigger its application based partly upon the maximum terms of imprisonment for those offenses. The question presented in this case is whether the relevant maximum term of imprisonment for an offender who was already a repeat offender is the maximum to which repeat offenders were subject to that offense.

Alone among the circuits, the Ninth Circuit held that the relevant maximum for a repeat offender is instead the maximum to which first-time offenders were subject, even though that purported maximum would sometimes be lower than the term that a repeated

1 offender would actually receive. Because the ACCA
2 cannot support that counterintuitive and counterfactual
3 approach, the judgment of the Ninth Circuit should be
4 reversed.

5 JUSTICE SCALIA: Mr. Shanmugam, what is the
6 government's position as to a person who is not a repeat
7 offender? He commits the crime for the first-time. Now
8 the government says there are alternative maximums and
9 you have to pick whichever maximum is the higher. Why
10 wouldn't that maximum apply to the person who commits
11 the crime the first-time?

12 MR. SHANMUGAM: That is because, Justice
13 Scalia, we believe that the text of the ACCA naturally
14 accommodates the possibility that there may be
15 alternative maximum terms of imprisonment for a given
16 offense. The provision the ACCA at issue, Section
17 924(e)(2)(A)(ii), defines a serious drug offense as "a
18 State drug trafficking offense for which a maximum term
19 of imprisonment of 10 years or more is prescribed by
20 law," and we believe that that language is susceptible
21 to the interpretation that the maximum for a repeat
22 offender is the maximum to which repeat offenders were
23 subject and the maximum for a first-time offender is the
24 maximum to which first-time offenders were subject. And
25 that is particularly true because Congress --

1 JUSTICE SCALIA: You're adding something to
2 the elements of the crime and in all of our cases in
3 this field we look to the elements of the crime.

4 MR. SHANMUGAM: Well, to be sure, Justice --

5 JUSTICE SCALIA: And as far as the elements
6 are concerned, the maximum sentence for those elements
7 you say is the sentence that would be imposed upon a
8 repeat offender.

9 MR. SHANMUGAM: To be sure, Justice Scalia,
10 the ACCA speaks of the maximum term of imprisonment for
11 the offense. But a higher sentence for repeat offenders
12 is no less a maximum for the offense than the lower
13 sentence for first-time offenders. This Court's cases
14 involving challenges to recidivism statutes make that
15 clear because they have uniformly held that a recidivism
16 enhancement constitutes a stiffened penalty for an
17 underlying offense.

18 CHIEF JUSTICE ROBERTS: You seem to -- you
19 seem to flinch from the natural consequences of your
20 position in not looking at the maximum for a particular
21 offender. For example, you know, under some guidelines,
22 if he was the ringleader his sentence can be enhanced
23 beyond what would otherwise be the maximum for a
24 first-time offender, but you say you don't take that
25 into consideration.

1 MR. SHANMUGAM: I don't that we're flinching
2 from those consequences, Mr. Chief Justice. I think
3 that it is simply a consequence of the fact that the
4 statute does speak of the maximum term of imprisonment
5 for the offense, not for the offender. And, while we
6 believe --

7 CHIEF JUSTICE ROBERTS: How is that
8 different from your position here, where it is the fact
9 that the individual is a recidivist that causes you to
10 look to a different maximum?

11 MR. SHANMUGAM: It is because, Mr. Chief
12 Justice, that we believe that the language of the
13 statute can be susceptible to the interpretation that
14 there can be alternative maximum terms of imprisonment
15 for broad categories of offenders, such as recidivists
16 and non-recidivists. But we don't think that it can --

17 CHIEF JUSTICE ROBERTS: So that's the reason
18 you sort of pull back from a more aggressive reading,
19 because it's not as broad a category?

20 MR. SHANMUGAM: Well, it would lead to harsh
21 results for first-time offenders and we certainly think
22 that Congress --

23 CHIEF JUSTICE ROBERTS: Well, but only if
24 they're subject -- only if they have some characteristic
25 that had caused the State legislature to give the higher

1 maximum, such as being the ringleader or some other
2 enhancement.

3 MR. SHANMUGAM: Well, that's correct. But
4 with regard to the text of the statute, we simply
5 believe that the text of the statute cannot be stretched
6 to accommodate the possibility of individualized maximum
7 terms of imprisonment for every offender based on the
8 potentially infinite combinations of facts that may
9 determine an offender's guidelines range. And I think
10 it's important to --

11 JUSTICE KENNEDY: Are there any statutes
12 which talk about offender as opposed to "offense" in
13 this area, do you know?

14 MR. SHANMUGAM: Well, I think probably the
15 closest analog in the criminal code, Justice Kennedy,
16 would be the statute that was at issue in RLC. I
17 believe it's 18 U.S.C. 5037(c)(1)(b), which provided at
18 the time that the court was construing it that the
19 maximum -- that the sentence that a juvenile should
20 receive should be no higher than the maximum that an
21 adult offender should receive. And the court did
22 construe that statute to refer to the maximum that an
23 adult could receive under the guidelines.

24 JUSTICE SCALIA: Well, there was also the
25 statute involved in the LaBonte case, where -- where the

1 statute said the Sentencing Commission "shall assure
2 that the sentencing guidelines specify a sentence to a
3 term of imprisonment at or near the maximum term
4 authorized for categories of defendants who have certain
5 types of prior convictions."

6 MR. SHANMUGAM: Yes.

7 JUSTICE SCALIA: And that did focus on the
8 -- on the nature of the defendant and not on the element
9 of the crime.

10 MR. SHANMUGAM: It focused on categories of
11 offenders and there Congress's concern was obviously
12 with career offenders. But I think critically in the
13 LaBonte opinion itself, written by Justice Thomas for
14 the Court, the Court recognized the possibility that a
15 statute could establish alternative maximum terms of
16 imprisonment for recidivist and nonrecidivist offenders.
17 The Court specifically discussed the Controlled
18 Substances Act, which does exactly that. Now, to be
19 sure the language of that statute was somewhat
20 different, but in our view the critical lesson of
21 LaBonte is simply that it is possible for a statute to
22 establish alternative maximums and the statute at issue
23 here no less than the statute at issue in LaBonte
24 accommodates that possibility.

25 JUSTICE SCALIA: So it would be easy, of

1 course, if recidivism were an element of the crime --

2 MR. SHANMUGAM: Well, it would be easier to
3 accept that if a State --

4 JUSTICE SCALIA: -- for a crime which
5 includes the act plus the recidivism?

6 MR. SHANMUGAM: If a State, Justice Scalia
7 were to essentially define a new crime of drug
8 trafficking by a recidivist, then to be sure by
9 definition the maximum sentence for that offense would
10 be the maximum to which repeat offenders were subject.
11 But to say one more thing in response to the Chief
12 Justice's question about guidelines maximums, I do think
13 that it is critical to remember that Congress enacted
14 the ACCA in its present form in 1986, well before this
15 Court's Apprendi jurisprudence took root, and at that
16 time Congress surely would have conceived of the
17 relevant maximum as the offense-specific statutory
18 maximum, and we know that Congress viewed that maximum
19 as a discrete creature from the relevant guidelines
20 maximum because in passing the Sentencing Reform Act 2
21 years earlier, the statute that gave rise to the Federal
22 guidelines, Congress spoke specifically about statutory
23 maximums as distinct from guidelines maximums. And
24 certainly we believe --

25 JUSTICE ALITO: In light of Apprendi and the

1 later cases, do you think it's feasible any longer to
2 draw a distinction between, between statutes that make
3 recidivism an element of the offense and statutes that
4 originally conceived of recidivism as a sentencing
5 factor but now provide for that to be proven to a jury?

6 MR. SHANMUGAM: One of the virtues of our
7 approach, Justice Alito, is that the answer is in some
8 sense the same whether a legislature defines drug
9 trafficking by a recidivist as a distinct offense or
10 whether recidivism is simply a sentencing factor that
11 gives rise to an alternative maximum term of
12 imprisonment for the underlying offense of drug
13 trafficking. And our fundamental submission with regard
14 to the Court's Apprendi line of cases is simply that it
15 alters nothing with regard to how the ACCA should be
16 interpreted because, again, Congress was defining
17 "offense" in 1986 in its colloquial sense as essentially
18 what the legislature defines the offense to be. And to
19 be sure, it is a prerequisite for a fact to be an
20 offense element that it be submitted to the jury, but
21 all this court did in Apprendi line of cases was
22 effectively to state a procedural constitutional rule
23 under which a sentencing factor that raises the
24 applicable maximum sentence has to be submitted to the
25 jury.

1 JUSTICE SCALIA: Mr. Shanmugam, I didn't
2 understand what you said about Congress's intent with
3 regard to the guidelines when it passed ACCA. You're
4 saying Congress did not have an eye to the guidelines,
5 but simply had an eye to the maximum sentence within
6 which the guidelines were applicable?

7 MR. SHANMUGAM: Yes, that's correct. In the
8 Federal system, that would of course be the statutory
9 maximum. In some State systems, of course, the
10 guidelines are themselves statutory and for that reason
11 we refer to them in our brief as offense-specific
12 maximums. But the critical point with regard to the
13 Sentencing Reform Act is that Congress did believe that
14 there was such a thing as the maximum for the offense,
15 and indeed in Section 994(r) of Title 28, one of the
16 provisions of the Sentencing Reform Act, Congress
17 actually asked the Sentencing Commission to come back
18 with recommendations to alter those offense-specific
19 maximums, which we believe is certainly evidence that
20 Congress viewed that as something distinct.

21 JUSTICE GINSBURG: Does it matter what was
22 the sentence actually imposed in the State court? That
23 is, suppose it is a second offense, but the prosecutor
24 chooses not to charge as a second offender and so,
25 although it is in fact the second offense, he is

1 sentenced in the State court as a first offender. Would
2 it count under your reading of the Federal statute that
3 it was a second offense?

4 MR. SHANMUGAM: Our position, Justice
5 Ginsburg, is that it would count because the relevant
6 inquiry is whether the offender was potentially eligible
7 for an enhanced maximum sentence as a repeat offender as
8 a substantive matter. That having been said, we
9 certainly believe that in the mine run of cases a court
10 applying the ACCA will merely need to resort to the
11 judgments of conviction or other judicial records in
12 order to determine the maximum to which the defendant
13 was actually subject. And this case of course presents
14 a perfect example of that because the judgments for each
15 of Respondent's prior convictions made clear that he was
16 in fact subject to a 10-year maximum sentence as a
17 repeat offender.

18 JUSTICE STEVENS: I take it -- supposing
19 there's a dispute between the prosecutor and the
20 defendant as to whether in fact he was a recidivist or
21 not. Is the fact that there was just an argument that
22 he would be a recidivist enough or does the record have
23 to establish that he was a recidivist?

24 MR. SHANMUGAM: Well, if there were such a
25 dispute, certainly we believe, first of all, that ACCA

1 courts would be perfectly competent to resolve those
2 disputes. They are no different in kind from the sorts
3 of legal and factual issues --

4 JUSTICE STEVENS: Shouldn't the mere
5 existence of a dispute be enough, because then at least
6 he's potentially subject to being treated as a
7 recidivist.

8 MR. SHANMUGAM: Well, our view, Justice
9 Stevens, is that once the government comes forward, for
10 example, with a judgment of conviction that indicates
11 that the defendant was subject to a 10-year maximum, it
12 would then be incumbent on the defendant to come forward
13 with evidence suggesting that that was erroneous to the
14 extent that a defendant would be permitted to
15 collaterally challenge that prior sentence at all. But
16 we do believe that courts can resolve those disputes.

17 Now, if the Court were to disagree and to
18 conclude that, for comparable reasons to the reasons
19 that the Court articulated in Shepard, it would be
20 difficult for courts to resolve those determinations,
21 then I suppose that we could live with a rule that said
22 that the government is limited to judicial records like
23 a judgment of conviction. But Taylor and Shepard of
24 course were dealing with a quite different concern, the
25 concern of how to define the prior offense, and I would

1 submit that the factual disputes that the Court was
2 concerned about in Shepard are quite different from
3 disputes about the applicability of a recidivism
4 enhancement. Those were disputes about the actual
5 underlying facts of the underlying substantive offense
6 itself. And the Court suggested in the plurality
7 portion of Justice Souter's opinion that resolving those
8 sorts of factual disputes might raise constitutional
9 concerns.

10 But we certainly believe that by virtue of
11 the rule of Almendarez-Torres, at a minimum the
12 resolution of factual disputes ancillary to the fact of
13 a prior conviction fall within the scope of the
14 Almendarez-Torres rule and present no constitutional
15 difficulties.

16 JUSTICE SOUTER: Mr. Shanmugam, I take it
17 that your response to Justice Ginsburg's question would
18 basically be your response to the argument that the
19 other side makes, that on your theory a State
20 misdemeanor can be treated for purposes of the act as --
21 or a conviction for a State misdemeanor can, with the
22 recidivism enhancement, be treated as a felony?

23 MR. SHANMUGAM: Yes. That issue would
24 arise, of course, only under the definition of "violent
25 felony," which sets a one-year trigger rather than the

1 ten-year trigger that is contained in the definition of
2 "serious drug offense."

3 I think that the only point that I would
4 note is that, with regard to an offense that remains a
5 misdemeanor, even when it is committed by a repeat
6 offender, there is a distinct statutory provision which
7 we cite in our reply brief, 18 U.S.C. 921(a)(20), which
8 tinkers with the definition of what constitutes a
9 qualifying offense for purposes of the definition of
10 "violent felony." It says that if it's a misdemeanor,
11 the sentence, the applicable sentence, actually has to
12 be two years or more. But where a State actually says
13 that when you commit an offense and it becomes a felony
14 when you are a recidivist, then certainly we think that
15 there is no problem with treating such an offense as an
16 ACCA predicate for purposes of the triggering maximum
17 term of imprisonment.

18 JUSTICE SOUTER: But if they continue to use
19 just the State terminology such that they continue to
20 use the word "misdemeanor" with respect to an offense,
21 which with the enhancement carries more than a one-year
22 penalty, then the two-year provision, the two-year
23 threshold provision, kicks in?

24 MR. SHANMUGAM: That's absolutely correct,
25 Justice Souter, and I believe that that was actually the

1 fact pattern that was presented in the ACCA case that
2 this Court heard earlier this term, Logan.

3 JUSTICE SOUTER: Yes.

4 MR. SHANMUGAM: And in a footnote in its
5 opinion, the Court noted this very peculiarity of how
6 ACCA operates and how you need to have a two-year
7 maximum rather than a one-year maximum if the State
8 still treats the offense as a misdemeanor.

9 JUSTICE GINSBURG: Do all States treat first
10 convictions from other States -- do they all count for
11 recidivism qualification if the prior offense was
12 committed and the conviction was in another State?

13 MR. SHANMUGAM: States do have somewhat
14 different rules, Justice Ginsburg, as Respondent
15 correctly points out, though I would note that many of
16 the sort of factual and legal issues that would arise
17 under those different rules arise outside the
18 drug-trafficking context. Most States' drug-trafficking
19 recidivism provisions, as least those States that have
20 adopted the Uniform Controlled Substances Act provision,
21 operate in a quite straightforward manner because they
22 essentially sweep in all prior drug offenses.

23 That having been said, we are unaware of any
24 ACCA cases that have presented those sorts of
25 difficulties. And typically what one would find, if one

1 looked at Respondent's cases, is that most States by now
2 have fairly clearly defined rules for determining when
3 an out-of-State conviction qualifies. And so at most,
4 if it were unclear from the judgment of the prior
5 conviction whether the prior sentencing court had
6 determined whether the defendant was subject to the
7 enhanced maximum as a recidivist, it would be a
8 relatively easy task for a Federal ACCA court to apply
9 those largely settled rules in order to make that
10 determination.

11 I do want to say one more thing about the
12 text of the ACCA more generally, and that is that if the
13 Court, as Justice Scalia had suggested at the outset,
14 were to conclude that the statute is susceptible to the
15 interpretation that there can be only a single maximum
16 term of imprisonment for a given offense, we believe
17 that it would not necessarily follow that Respondent's
18 interpretation is correct, and indeed that the more
19 natural consequence of that interpretation would be that
20 the relevant maximum is the maximum that any offender
21 could receive, rather than the maximum that a first-time
22 offender could receive, and that is because --

23 CHIEF JUSTICE ROBERTS: Surely not,
24 Mr. Shanmugam. You were talking about broad categories
25 earlier. It seemed that the broad category in the

1 situation you posit would be the normal offender rather
2 than the recidivist, and that's the one we ought to look
3 at.

4 MR. SHANMUGAM: Well, that might be true as
5 a numerical matter, though, you know, I suspect that
6 there are probably more recidivist offenders than one
7 might think. But I think that the fundamental
8 difficulty with Respondent's interpretation is the
9 anomaly that I identified at the outset, namely that
10 even an offender who actually received a term of
11 imprisonment of 10 years could be said to have a maximum
12 of 5 years. And while it is true that --

13 CHIEF JUSTICE ROBERTS: Well, I know, but
14 you began your discussion by saying we had to choose one
15 maximum. You were accepting that requirement. It seems
16 to me, if that's the case, it's clear that we ought to
17 pick the maximum for the particular offense without
18 considering additional enhancements.

19 MR. SHANMUGAM: Well, with respect,
20 Mr. Chief Justice, I would disagree. I would submit
21 that if the Court has to choose a single maximum it has
22 to be the maximum that the worst offender could receive.
23 As a matter of common sense, when one thinks about the
24 maximum --

25 CHIEF JUSTICE ROBERTS: But you don't accept

1 that approach when we're talking about enhancements
2 under State guidelines. You know, if the normal
3 sentence is whatever it is, 10 years, and you get an
4 extra 2 years if you're the ringleader, you say no, you
5 don't look at that; you just look at the 10 years.

6 MR. SHANMUGAM: That's correct, and that's
7 because of the statute's reference to the offense and
8 not the offender. But my submission is simply that if
9 the Court thinks that the statute is susceptible to the
10 interpretation that there has to be one maximum and
11 indeed if the Court thinks that that interpretation is
12 compelled, then we would submit that all offenders who
13 commit an offense for which some offenders could receive
14 a 10-year sentence would be subject to the ACCA. But we
15 of course primarily submit that the statute is not only
16 susceptible to the interpretation that we advance here,
17 but that it is the better interpretation, namely that a
18 statute can have alternative maximums. And we certainly
19 believe that that interpretation is consistent with the
20 long history and widespread practice of imposing
21 enhanced penalties on repeat offenders, a practice that
22 Congress surely was aware of when it enacted this
23 statute dealing with the problem of recidivism.

24 JUSTICE SCALIA: Mr. Shanmugam, would you
25 explain to me again why -- why you treat the enhancement

1 in a State guideline system differently?

2 MR. SHANMUGAM: It is --

3 JUSTICE SCALIA: It seems to me that if you
4 get an enhancement as a ringleader it's the same thing
5 as if you get an enhancement because you're a
6 recidivist. What's the difference?

7 MR. SHANMUGAM: The difference, Justice
8 Scalia, is that the statute does speak of maximum terms
9 of imprisonment for the offense and not the offender,
10 and, while we certainly believe that the language of the
11 statute with its reference to "a maximum term of
12 imprisonment" can naturally accommodate the possibility
13 of alternative maximums for broad tiers of offenders
14 such as recidivists and nonrecidivists, we really don't
15 believe that it can accommodate the possibility of
16 individualized maximums for every offender.

17 JUSTICE SCALIA: You don't think
18 "ringleader" is a broad tier.

19 MR. SHANMUGAM: Well, in a sentencing
20 guidelines system where being a ringleader may be the
21 basis for an enhancement, as it is in the Federal
22 system, the fact remains that an enhancement under a
23 guidelines system is merely one of many factors that
24 ultimately determine the offender's guideline sentence.
25 A guideline sentence is, of course, an individualized

1 determination made after a court evaluates a panoply of
2 offender- and offense-specific factors.

3 JUSTICE STEVENS: How would you treat an
4 enhancement --

5 MR. SHANMUGAM: Well, we believe that such
6 an enhancement could be subject to our alternative
7 maximums approach as well, to the extent that the
8 standard was --

9 JUSTICE STEVENS: So it's not just
10 recidivist and non-recidivist. It's some enhancements,
11 but not all enhancements?

12 MR. SHANMUGAM: Well, if a statute is as a
13 formal matter structured in such a way as to create
14 broad tiers of punishment for categories of offenders,
15 then certainly that would seem to be an alternative
16 maximum term of imprisonment. The guideline systems, of
17 course, are not structured in that way.

18 JUSTICE STEVENS: You're depending upon the
19 guidelines.

20 MR. SHANMUGAM: Right. Well, that's
21 correct, and so in Apprendi, of course, I think it was
22 the fact that the defendant had acted with a biased
23 purpose, and that form of structuring of statutes was
24 not unheard of prior to this Court's decision in
25 Apprendi. And essentially what New Jersey did, as I

1 recall, in Apprendi was to say that if you unlawfully
2 possess a firearm your maximum is 10 years.

3 JUSTICE STEVENS: Well, I understand, but my
4 point is I don't think your proposal just has two
5 categories. There -- it seems there could be multiple
6 kinds of enhancements that would fit your general
7 description.

8 MR. SHANMUGAM: And the relevant question,
9 Justice Stevens --

10 JUSTICE STEVENS: It's not just recidivist
11 versus nonrecidivist.

12 MR. SHANMUGAM: This case does not present
13 that issue; and, in light of the history and practice of
14 imposing heightened penalties on recidivists, an
15 essentially universal practice as far as we're aware in
16 the drug-trafficking context, we certainly don't believe
17 that the Court has to address that issue.

18 And, in any event, after this Court's
19 decision in Apprendi, it is certainly true that States
20 have made modifications to the structure of their
21 offenses and their sentencing systems such that, with
22 regard to factors other than recidivism, it may very
23 well be that as a prospective matter that issue would
24 not arise very frequently. And --

25 JUSTICE SCALIA: Well, some of them have

1 simply said, we're going to let the jury decide. We're
2 going to let the jury make these determinations that
3 Apprendi says have to be made by the jury. But they're
4 still -- they're still referred to as sentencing
5 factors.

6 MR. SHANMUGAM: That's correct, Justice
7 Scalia. And, with regard to a State that does that as
8 Washington, indeed, has done in the wake of this Court's
9 decision in Blakely, we believe that the relevant
10 offense and the relevant maximum term of imprisonment
11 actually remains the same.

12 And that is simply because where all a State
13 does is to say that sentencing factors must be submitted
14 to the jury in order to comply with the constitutional
15 rule of Apprendi and Blakely, the fact remains that the
16 State has not redefined the offense. In our view, a
17 sentencing factor can remain a sentencing factor even if
18 it is the functional equivalent of an offense element
19 for Apprendi purposes.

20 JUSTICE KENNEDY: It seems to me your
21 argument might be slightly better if the statutory term
22 was "authorized," not "prescribed." I don't say
23 "prescribed" could never be used in the sense you mean,
24 but when you have alternates we usually would use the
25 word -- alternate possibilities -- usually you'd use the

1 word "authorize" rather than "prescribe." "Prescribe"
2 indicates one rule.

3 MR. SHANMUGAM: I suppose that may be true,
4 Justice Kennedy, though again the statute spoke about
5 the maximum term of imprisonment for the offense, which
6 I think presupposes, at least to some extent, that the
7 maximum may be higher than the maximum to which a
8 particular offender is subject.

9 I think the only thing I would say with
10 regard to the reference to "prescribed by law" in the
11 ACCA is that one could naturally understand that phrase
12 being used by a Congress that was acting in 1986 as
13 referring to the prescribed statutory maximum.

14 And, notably, the Ninth Circuit in a case
15 that we cite in our opening brief, *United States v.*
16 *Parry*, construed that phrase in exactly that manner in
17 actually holding that, notwithstanding its rule in this
18 case, the applicable maximum for a defendant sentenced
19 under a mandatory guidelines system cannot be the
20 applicable guidelines maximum; It has to be the maximum
21 for the offense. We believe that the Ninth Circuit
22 erred only insofar as it thought that that maximum is
23 the maximum to which first-time offenders were subject,
24 even for a repeat offender.

25 Mr. Chief Justice, I'd like to reserve the

1 balance of my time.

2 JUSTICE SOUTER: May I ask you one question
3 before you sit down? You mentioned a moment ago what
4 you saw as the anomaly in the counter-argument, the
5 anomaly being that someone with the recidivism
6 enhancement could end up with a ten-year sentence when
7 the maximum for the offense is five years. But isn't --
8 isn't the answer to that just as -- as the answer that
9 you gave to Justice Scalia a moment ago, and that is
10 simply that the statute speaks in terms of "offense" so
11 that there is -- there is no anomaly in getting a
12 ten-year sentence for something which for this purpose
13 carries a maximum of five?

14 MR. SHANMUGAM: Justice Souter, an enhanced
15 penalty for repeat offenders is every bit as much a
16 penalty for the offense as the lower penalty for
17 first-time offenders.

18 JUSTICE SCALIA: Well, that's the question
19 in the case.

20 MR. SHANMUGAM: Well, and that is a question
21 that this Court has answered in a variety of different
22 contexts dating back almost a hundred years to *Graham v.*
23 *West Virginia*. And we would submit that that principle
24 is certainly equally applicable here, and a penalty for
25 a recidivist, while in some sense holding a recidivist

1 more responsible by virtue of his or her recidivist
2 status, is every bit as much a penalty for the offense.
3 And under our alternative maximums approach that can be
4 the maximum for the underlying offense.

5 I'd like to reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Rothfeld.

8 ORAL ARGUMENT OF CHARLES A. ROTHFELD

9 ON BEHALF OF THE RESPONDENT

10 MR. ROTHFELD: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 There are a number of serious problems with
13 the government's theory in this case, and I'll start
14 with this one. It is inconsistent with the statutory
15 language of ACCA, as is suggested by the R.L.C. and
16 LaBonte decisions that have been discussed already; and
17 it cannot be reconciled with the fundamental purpose of
18 ACCA, which is reflected in that statutory language.

19 Congress enacted ACCA to target particular
20 categories of serious offenses. Whether the defendant
21 is a repeat offender says nothing at all about the
22 seriousness of the offense that he committed and
23 therefore tells us nothing about whether that offense
24 should be treated as an ACCA --

25 JUSTICE ALITO: Suppose the State has two

1 statutes: Possession of drugs, maximum penalty five
2 years; possession of drugs by a convicted felon, maximum
3 -- convicted drug felon, maximum penalty ten years. And
4 a defendant is convicted under the latter provision.
5 What would be the maximum penalty for ACCA purposes?

6 MR. ROTHFELD: Well, if that latter
7 provision includes as an element of the offense that
8 recidivism, that could be a different situation than we
9 have here, because the statutory language of ACCA, as
10 Mr. Shanmugam said, focuses on "offense." Congress said
11 that an ACCA predicate in the drug context is an offense
12 for which a maximum penalty of ten years or more is --

13 JUSTICE ALITO: Well, it could be or it
14 would be?

15 MR. ROTHFELD: I think that's a difficult
16 question, Your Honor, which is not the question here. I
17 suppose I would say the language would suggest that it
18 would be; that if it is an element to the offense the
19 defendant has been convicted of an offense that includes
20 recidivism as an element, that statutory language would
21 lead us in that direction.

22 JUSTICE ALITO: Well, if the maximum penalty
23 there would be ten years, then what if in this case the
24 recidivist element had been submitted to a jury and
25 found by a jury. Would it matter?

1 MR. ROTHFELD: I would suggest, again, it
2 depends upon what the element defined by the State
3 legislature is in creating the offense, because that
4 follows from the ACCA term of the offense, the
5 punishment prescribed by law for the offense. That is,
6 of course, not the question here. And it's --

7 JUSTICE ALITO: Why should the label matter?
8 Maybe as to statutes that were passed before Apprendi
9 and Booker, that at that time it made a difference.
10 But, going forward, what difference does it make whether
11 it's labelled as an element of the offense or a
12 sentencing enhancement that's proven to a jury?

13 MR. ROTHFELD: Well, I think in the
14 post-Blakely context one could say something that has to
15 be proven to a jury is in fact an element of the
16 offense. The offence may essentially be defined in
17 terms of the sentencing guidelines elements at that
18 point.

19 But I think in figuring what Congress had in
20 mind when it used the term defining "ACCA serious drug
21 offense" as "an offense for which a maximum penalty of
22 ten years is prescribed by law, we have to figure out
23 what is the offense and what is the penalty prescribed
24 by law for that.

25 JUSTICE BREYER: Well, going back to what

1 you first said, suppose with your own children: I told
2 you half an hour ago not to interrupt your sister when
3 she is doing her homework. This is the second time
4 you've done it. Wouldn't you, with your own child -- I
5 would with mine -- think that the second time he did it
6 was worse behavior than the first time? I just told him
7 not to.

8 MR. ROTHFELD: It is a familiar example,
9 Your Honor.

10 (Laughter.)

11 MR. ROTHFELD: And -- and it's absolutely
12 right.

13 JUSTICE BREYER: Well, if it's absolutely
14 right I don't see why we hold Congress to some kind of
15 weird -- not weird, but more picky standard than we do
16 with our own children.

17 MR. ROTHFELD: But the reason for that, Your
18 Honor, in this context is the language that Congress
19 chose. It is certainly correct that, generally
20 speaking, it is thought that repeat offenders should be
21 subject to a higher punishment, and that there is a --

22 JUSTICE BREYER: Because their behavior is
23 worse.

24 MR. ROTHFELD: Well, but I think there is a
25 distinction between whether the offense itself is a more

1 serious offense. I mean, the ACCA statutory language
2 uses the term "serious drug offense." That's part of
3 the definition That's used in the statutory text.

4 Congress had in mind punishing through the
5 ACCA process offenses that have a certain level of
6 seriousness. And when Congress did that it was
7 reflecting on what people actually did. That's the
8 whole context of this Court's --

9 JUSTICE SCALIA: It's not a more serious
10 offense when she does it the second time; it's just a
11 more culpable offender.

12 MR. ROTHFELD: That is precisely right.

13 JUSTICE BREYER: That isn't what I tell my
14 child. I say you behaved worse.

15 MR. ROTHFELD: Well, I can't disagree with
16 that, Your Honor. But this is -- this is --

17 JUSTICE BREYER: Well, does the word
18 "offense" -- I haven't come across it, but does the word
19 "offense" have some kind of special technical meaning
20 that doesn't just mean the behavior which calls into
21 play all kinds of circumstances?

22 MR. ROTHFELD: Well, I think the Court has
23 -- has repeatedly recognized the distinction suggested
24 by Justice Scalia's latest question, which is that there
25 is a difference between the offense and the offender.

1 As Mr. Shanmugam said -- and we agree
2 completely -- ACCA is an offense-specific provision. It
3 does not focus on the offender. The government would
4 like to read ACCA as though it made a distinction based
5 upon different categories of defendants. And it's
6 interesting that the way in which the question is
7 presented in their brief and in their question presented
8 in the petition for certiorari is not in terms of the
9 ACCA statutory language. It does not ask: What is the
10 penalty prescribed by law for this offense? It asks:
11 Could repeat offenders be subjected to an enhanced
12 penalty of ten years?

13 CHIEF JUSTICE ROBERTS: Isn't it pertinent,
14 Mr. Rothfeld, that in trying to decide whether a maximum
15 term of imprisonment encompasses recidivists, we're
16 dealing with a statute that itself is directed to
17 recidivism. You're asking -- you've got three previous
18 convictions and then you get a particularly harsh
19 sentence. If recidivism is what you're trying to
20 address, it would seem to me in deciding what a maximum
21 term is that it would be natural to assume that they
22 would take recidivism into consideration in that context
23 as well.

24 MR. ROTHFELD: Well, I think not, Your
25 Honor, because ACCA is a particular kind of recidivism

1 statute. There are recidivism statutes common in the
2 States now, with the three strikes regime becoming
3 ubiquitous, in which all that matters is basically the
4 number of offenses that were committed. The States
5 expressly disavow the seriousness of the offenses that
6 constitute the predicates in those kind of regime.

7 ACCA is different kind of statute. ACCA was
8 motivated because Congress was concerned that there was
9 a small cohort of offenders who are engaging repeatedly
10 in serious offenses, and Congress had in mind that
11 people who engaged repeatedly in these especially
12 threatening, dangerous, harmful offenses, very
13 destructive to society, they should be segregated for 15
14 years through the ACCA mandatory minimum.

15 But Congress was quite clear, and the
16 statutory language reflects this expressly, that the
17 predicates have to themselves be serious offenses.
18 Congress was concerned with what people did.

19 CHIEF JUSTICE ROBERTS: Well, but it just
20 seems to me that if you have Congress addressing what
21 they regarded as a very serious problem of recidivism,
22 they would think that that's a problem that should be
23 taken into account in determining what maximum sentences
24 you're subject to under State law.

25 MR. ROTHFELD: Well, they could have done

1 that. They could -- and that would have been the
2 statute the government is discussing, one which ties
3 recidivism into the particular category of the offender
4 and the penalties to which they are subject.

5 But Congress did not do that. Congress
6 focused specifically on the seriousness of each of the
7 individual predicate offenses. And it had in mind what
8 people actually did, whether the kinds of offenses they
9 were committing were serious destructive types of
10 offenses.

11 JUSTICE GINSBURG: But it did use the
12 language "a maximum term," not "the maximum term," which
13 would support the government's view that the statute
14 contemplates more than one maximum.

15 MR. ROTHFELD: With respect, Your Honor, I
16 would suggest that's one of the government's odder
17 arguments. I think that reading any significance to the
18 use of "the" rather than "a" in this context is quite
19 peculiar. I would think if a judge, for example, is
20 pronouncing sentencing he or she is likely to say "I
21 sentence you to a term of 10 years," not "I sentence you
22 to the term of 10 years."

23 Certainly the use of "I sentence you to a
24 term of 10 years" doesn't suggest some contemplation of
25 multiple alternative regimes of punishment. So I think

1 the government, I give them kudos for creativity there,
2 but I think it's very difficult to read any conscious
3 choice by Congress in the use of the different article.

4 CHIEF JUSTICE ROBERTS: Counsel, you --

5 JUSTICE GINSBURG: What about the
6 defendant's own understanding? In connection with one
7 of these offenses the defendant acknowledged in court,
8 the crime with which I am charged carries a maximum
9 sentence of 10 years.

10 MR. ROTHFELD: I think that there are two
11 things to say about that, Your Honor. First of all, I
12 question how seriously anyone took that statement in the
13 sentencing declaration, because what really mattered in
14 Washington State was the binding determinant sentencing
15 guideline, which set a maximum term of 57 months, which
16 everyone agrees was the highest penalty this defendant
17 could receive. In fact, it's quite clear that, absent
18 aggravating circumstances, which are not present in this
19 case, no one convicted of this defendant's crime could
20 receive a punishment, recidivist or not, of 10 years,
21 enough to trigger the ACCA predicate.

22 So, I question again whether or not anyone
23 took that terribly seriously. But I think even if one
24 did, it doesn't answer the question here. There is no
25 question that there was a recidivism provision which, at

1 least in some theoretical sense, made the maximum
2 penalty 10 years. There is also a statutory provision
3 which defined the crime. And in that -- in that
4 statutory provision the Washington legislature
5 specifically associated with conviction of that offense
6 a five-year maximum penalty. And I think it sort of --
7 it sort of begs the question to say, as the government
8 does, well, the fact that there is some possibility out
9 there of an enhancement that increases the penalty above
10 10 years, even if that were true, which is not, again
11 because of the sentencing guidelines in this case, that
12 sort of begs the question of what is the relevant
13 offense? Is the relevant offense what you might call
14 the generic categorical offense of distribution of
15 Schedule 3, 4, or 5 drugs, the sentence to which anyone
16 convicted of that crime, anyone who engaged in the
17 elements of that offense and is found guilty in
18 Washington State could have been sentenced to, and that
19 is 5 years.

20 JUSTICE SCALIA: The government is correct,
21 though, that when a recidivist is sentenced he is being
22 punished for the crime, not for his recidivism. So
23 you -- you can say that the punishment for that defined
24 crime is 10 years when, when the person who committed
25 the act is a recidivist, but the act he's being punished

1 for is the same crime.

2 MR. ROTHFELD: Well, there is no doubt about
3 that. The defendant here committed this offense and he
4 is being punished for it, for that offense. But again,
5 I think that begs the question here: When Congress uses
6 the term "the punishment prescribed by law for the
7 offense," what did it have in mind? Did it mean sort of
8 the generic sense of the offense in the sense of the
9 offense that anyone commits who is guilty or who commits
10 the elements of the offense, which is someone who is not
11 a recidivist. It's entirely -- recidivism is unrelated
12 to that because recidivism is not an element of this
13 offense.

14 So yes, the defendant here committed the
15 offense. He's being punished for having committed this
16 offense. But that doesn't answer the question of what
17 Congress had in mind.

18 JUSTICE BREYER: That's the part I'm not
19 getting. I mean, that's why it doesn't help your
20 client. In general, if you did read the word "offense"
21 as applying just to the act of selling drugs, let's say,
22 then you go on and it says, for which a maximum term of
23 10 years or more is prescribed, you'd say, well what is
24 the maximum term prescribed for the offense of selling
25 drugs? And the answer would be 10 years. Now, how do

1 you get out of that?

2 MR. ROTHFELD: Well --

3 JUSTICE BREYER: You're saying because --
4 because fewer people are likely to get the 10-year
5 sentence than get the five-year sentence?

6 MR. ROTHFELD: No, no, absolutely not, Your
7 Honor.

8 JUSTICE BREYER: What is -- what is the
9 distinguishing -- how do you get out of it? I know
10 you're trying to say this and I'm just not getting it.

11 MR. ROTHFELD: I look at it from the
12 perspective that I think Congress looked at it when it
13 wrote the statutory language here. Congress had in
14 mind -- as I said to Chief Justice Roberts, Congress had
15 in mind people who engage in serious offenses. Congress
16 had in mind what people actually did. It was not
17 passing a generic -- I think it's quite clear from the
18 statutory language, it was not passing a generic three
19 strikes statute. It was focusing on the seriousness of
20 what people did and what people actually did, what they
21 were actually convicted of doing.

22 And I think for that purpose, again the sort
23 of what you might call the generic or categorical
24 offense, the offense unrelated to recidivism
25 enhancements, is what's relevant because that is what

1 the person actually did. And once you bring recidivism
2 into the picture, once when the three strikes brings
3 recidivism into the picture, every drug distribution,
4 every drug distribution offense, will become a serious
5 offense within the meaning of that --

6 JUSTICE KENNEDY: I guess what you're saying
7 is that if it's a victimless crime, that the second
8 offense is no more injurious to the State than the first
9 was. I'm not sure that's the case. The fact that the
10 State sees multiple offenders, repeat offenders, in its
11 community means that they have to spend extra resources
12 to prevent -- to incarcerate them because they have a
13 network of distributors, et cetera. They are more
14 experienced, so they are more dangerous to the State.

15 MR. ROTHFELD: Well, there is no question
16 that recidivism is regarded as -- as, you know, a bad
17 thing for a variety of reasons. And that is why
18 recidivism enhancements have been -- are so common. And
19 no one, no one disputes that.

20 The question is when Congress wrote this
21 statutory language and wrote this particular kind of
22 recidivism offense in ACCA, it was focusing on what the
23 defendants actually did. The recidivism enhancement is
24 entirely unrelated to that.

25 CHIEF JUSTICE ROBERTS: Well, we know it was

1 focusing on the particular problem of recidivism.
2 That's what the overarching Federal statute is directed
3 to.

4 MR. ROTHFELD: But --

5 CHIEF JUSTICE ROBERTS: And I think,
6 following up on Justice Kennedy's question, that you
7 would assume that this Congress thought that recidivists
8 presented particular problems that were different from
9 the one particular offense.

10 MR. ROTHFELD: It is that recidivism
11 statute, but it is -- again it's a particular kind of
12 recidivism statute different in character from the
13 three-strikes kind of statute, different in character
14 from the -- the drug recidivism statute in Washington
15 State, which is -- which is to be a player. Those
16 statutes do not care whether the predicate acts that --
17 that trigger their application were serious offenses or
18 not. They simply ask is this -- is this defendant
19 someone who has been convicted of offenses in the past.

20 ACCA is not like that. ACCA specifically
21 targets serious predicate offenses. The -- the
22 statutory text defines two categories of predicate
23 offenses: violent felonies, which -- which are a set of
24 especially dangerous, threatening offenses; and serious
25 drug offenses, using the term "serious in the text. It

1 is clear from that Congress had in mind people who were
2 engaged in acts that are themselves harmful,
3 destructive, serious acts. Under the government's
4 application of a recidivism approach, virtually anything
5 that someone is convicted of having to do with drug
6 distribution -- handing a single marijuana cigarette to
7 a friend -- that is a drug distribution offense. In
8 most States that is punishable by two years, five years
9 maximum. Under the government's approach that is now,
10 because it could through the recidivism policy lead to a
11 10-year --

12 CHIEF JUSTICE ROBERTS: Well, but the flip
13 side of that hypothetical is somebody selling a ton of
14 marijuana. It's the same offense as somebody who's done
15 it and been convicted of it three different times. I
16 mean, I don't think your hypothetical helps advance the
17 argument.

18 MR. ROTHFELD: Well, if -- if the crime in
19 which the individual engaged, selling a ton of
20 marijuana, is going to be punished by ten years, in
21 virtually every jurisdiction -- I would suggest in every
22 jurisdiction -- therefore it's going to be a serious
23 drug offense within the meaning of ACCA and it's going
24 to trigger ACCA as a predicate.

25 JUSTICE STEVENS: Of course, the recidivist

1 doesn't necessarily be a recidivist because he committed
2 the same crime three times. He might have done two very
3 different things under the California three-strike law.
4 Sometimes very minor crimes push the person over to
5 qualify as a recidivist.

6 MR. ROTHFELD: No, that's absolutely --
7 absolutely correct.

8 JUSTICE SOUTER: Mr. Rothfeld, apropos of
9 your answers to Justice -- first to Justice Scalia and
10 Justice Breyer -- you said that when the -- when the
11 recidivist is being sentenced he is being sentenced for
12 the offense of the -- of the drug crime. Isn't it
13 equally fair or wouldn't it be equally fair to say that
14 he is being sentenced for two things? He is being
15 sentenced for the drug crime which is the necessary
16 condition of the sentence; and he is also being
17 sentenced for the fact that he is repeating that crime.
18 Isn't -- isn't it fair to -- to sort of distinguish
19 between the two, in effect the two factors in the
20 offense?

21 MR. ROTHFELD: Well, I --

22 JUSTICE SOUTER: -- each one of which is
23 necessary for the -- for the ultimate sentence itself?

24 MR. ROTHFELD: Well, I -- I think that
25 that's right and it is reflective of something that --

1 discussing earlier with Justice Breyer. The offense
2 itself is not regarded as a more serious offense when
3 it's committed by a recidivist. It's because the
4 recidivist's character as a repeat offender is what
5 triggers the higher penalty; and in the ACCA context
6 where Congress was focusing on whether or not this
7 person was engaging in particular kinds of crimes,
8 particular kinds of serious crimes, that makes all the
9 difference.

10 I -- I return to cases that some members of
11 the Court were discussing with Mr. Shanmugam, the
12 LaBonte case. The Government would like to focus on the
13 status of this defendant as a repeat offender. That's
14 what triggers in their view the application of ACCA;
15 because he is a repeat offender he is in a class of
16 defendants who are subject to higher punishment,
17 therefore 10-year ACCA trigger.

18 JUSTICE KENNEDY: Well, I'm not sure the
19 offense is the same. I think the injury to the State is
20 compounded by the repetition.

21 MR. ROTHFELD: Well, I --

22 JUSTICE KENNEDY: It affects the tone of the
23 community, the number of law enforcement officers we
24 have to have, the cost of reincarceration,
25 rehabilitation, etcetera.

1 MR. ROTHFELD: Well, I think -- again, I
2 don't disagree with any of that, as to the consequence
3 of a repeat offense. My question is whether Congress,
4 when it used the term serious offense, whether it
5 thought the offense itself was more serious, as distinct
6 from punishment that might -- that might be imposed upon
7 the offender.

8 JUSTICE KENNEDY: But that's what I'm
9 addressing. It could be more serious when it's the
10 second time.

11 MR. ROTHFELD: Well, I --

12 JUSTICE KENNEDY: The offense in and of
13 itself.

14 MR. ROTHFELD: I think it's -- it's
15 instructive to look at the statute in the LaBonte case
16 which was -- which discussed during Mr. Shanmugam's
17 argument, in which --

18 JUSTICE STEVENS: Then for double jeopardy
19 purposes you must look at the second offense as the
20 offense, not the offender. I mean, the prior conduct is
21 -- is not being punished as a matter of constitutional
22 law.

23 MR. ROTHFELD: No. I -- I think that it's
24 quite clear in the cases that are -- and we agree by
25 cases cited by the Government for this proposition --

1 that when you are sentenced as a recidivist to a higher
2 penalty you are being punished for the most recent
3 offense that you were -- that you were --

4 CHIEF JUSTICE ROBERTS: Counsel, if you were
5 representing a -- a defendant who has two prior
6 convictions for something that has a sentence of 8
7 years, and on the third one he is subject to a sentence
8 of 15 years; and your initial meeting, the first thing
9 he wants to know is what's the maximum that I'm facing?
10 Would you tell him it's 8 years or would you tell him
11 it's 15 years?

12 MR. ROTHFELD: Well, I would say that
13 because you are a recidivist the maximum you are facing
14 is 15 years. But I would not say that the offense that
15 you committed is a more serious offense because you are
16 a repeat offender. And and the LaBonte statute I think
17 illustrates this very nicely. In the -- in the statute
18 the Court construed in LaBonte it referred to the
19 maximum term of imprisonment for specified categories of
20 defendants; and the Court found that language was
21 crucial because it showed that Congress contemplated
22 that there would be different terms of imprisonment for
23 defendants falling into different categories for the
24 same offense.

25 JUSTICE SOUTER: Mr. Rothfeld, let's assume

1 we get into conference and we are having exactly the
2 same discussion that's been going on for 40 minutes
3 there. There is one way to read it; there is another
4 way to read it; there are various reasons to read it one
5 way, various ways to read it the other way. What do we
6 do?

7 MR. ROTHFELD: Well, I -- I would suggest
8 that this Court need go no further at that point,
9 because the rule of lenity would dictate ruling for us.
10 Absolutely. It's --

11 JUSTICE SOUTER: But you don't have to win
12 this argument?

13 MR. ROTHFELD: We do not. I think one way
14 to consider the case is that there in fact are three
15 statutes which bear on the question of penalty. There
16 is the statute that created the crime of conviction,
17 which created the -- the offense of a distribution of a
18 schedule of 3, 4, or 5 drugs, and in that statute
19 specifically associated with the offense is the 5-year
20 penalty. There is the 10-year, potential 10-year
21 penalty which is focused -- focus of the Government's
22 case. There is the Washington State sentencing
23 guidelines, which were binding, determinate guidelines,
24 every bit as much part of Washington statutory law as
25 the recidivism statute --

1 CHIEF JUSTICE ROBERTS: Counsel, the
2 Government of course responds to your rule of lenity
3 argument by saying it loses a lot of its force when we
4 are talking about how -- the degree of sentencing rather
5 than whether conduct is subject to a criminal sanction
6 in the first place.

7 MR. ROTHFELD: They do say that, Your Honor,
8 and I think that's simply not so. I mean, the Court has
9 said repeatedly and has applied repeatedly the doctrine
10 that the rule of lenity applies when the only question
11 is the length of the sentence; and indeed the R.L.C.
12 case which the Government has been discussing was a case
13 which involved only a question of length of the sentence
14 and --

15 CHIEF JUSTICE ROBERTS: But someone who is,
16 you know, we are trying to decide whether he is subject
17 to 20 years in jail or 30 years in jail, invoking the
18 rule of lenity is a little bit -- it's not the same as
19 somebody who comes in and says I didn't know this was a
20 crime at all, because it's so vaguely written.

21 MR. ROTHFELD: I think the Court has said
22 consistently that one of the elements supporting the
23 rule of lenity is the idea that somebody's liberty is
24 going to be taken away, that Congress should have
25 spoken, to some degree --

1 CHIEF JUSTICE ROBERTS: Well, we know -- we
2 know that someone's liberty is going to be taken away in
3 a case like this; it's just a question of for how long.

4 MR. ROTHFELD: Well, but -- but it's a
5 profound difference. I mean, a the conviction of a
6 felony possession of a gun, the variations in penalty
7 can be zero. Absent ACCA, you could be sentenced to
8 probation, maximum of 10 years, as opposed to the
9 mandatory minimum 15-year sentence under ACCA. That's a
10 profound deprivation of liberty based upon how -- what
11 reading you give to these words. So -- and again --

12 JUSTICE SCALIA: I think we have applied the
13 rule of lenity to sentencing in the past, haven't we?

14 MR. ROTHFELD: Absolutely. Again we cite a
15 number of cases in our briefs, the Bifulco case -- but
16 the R.L.C. case, which both parties have discussed at
17 some length, is a prime element in which --

18 CHIEF JUSTICE ROBERTS: It is -- it is a
19 fundamental verbal embarrassment for your argument that
20 you would say in a particular case that the maximum to
21 which someone is subject is say, 5 years, and that
22 person is in fact sentenced to 15 years. It's just the
23 -- the words don't fit together under that argument.

24 MR. ROTHFELD: Well, I -- I am not
25 embarrassed by that, Your Honor. Perhaps I, I'm too

1 resistant to embarrassment. But I --

2 (Laughter.)

3 MR. ROTHFELD: -- I think it's -- it's
4 entirely a question of how you take the congressional
5 meaning of the term punishment prescribed for the
6 offense.

7 JUSTICE SOUTER: No, but I thought your
8 position was that the -- the defendant is not, this
9 defendant is not subject to a maximum of 5 years, but
10 gets 10. I thought your position was that the offense
11 within the meaning of the statute should be an offense
12 which carries a maximum of 5 years, but that this
13 defendant is in fact subject to a maximum of 10.

14 MR. ROTHFELD: I --

15 JUSTICE SOUTER: In other words, you can --
16 throughout your argument you make, I think properly, the
17 offense/offender distinction, and isn't that the answer
18 to the conundrum?

19 MR. ROTHFELD: That -- that is exactly
20 right. We think that what Congress had in mind when it
21 referred to the punishment prescribed by law for the
22 offense it was referring to the offense, the offense of
23 conviction; and it never --

24 JUSTICE ALITO: The offense never -- the
25 offense also disregards offender characteristics, or

1 only those offender characteristics that are not
2 elements of the offense?

3 MR. ROTHFELD: Well again, that's -- that's
4 where we started, Justice Alito.

5 JUSTICE ALITO: I'm still not sure what the
6 line is there.

7 MR. ROTHFELD: I -- I think if it is an
8 element of the offense then you would be convicted of an
9 offense which carried in its weight recidivism, and so I
10 would say yes, in that circumstance that would be a
11 different situation than what we have here.

12 JUSTICE ALITO: It all depends whether it's
13 labelled an element of the offense by the State
14 legislature?

15 MR. ROTHFELD: Well, I think that whether it
16 actually is an element of the offence -- I mean, in this
17 case there is no question; everyone agrees it's not in
18 the offense; the Government concedes that it's not an
19 element to the offense.

20 JUSTICE BREYER: So it's bank robbery --
21 bank robbery, force or threat of force guidelines. If
22 you have a gun, eight years. If you brandish it, four
23 more years. If you take, you know, \$10 as opposed to
24 \$50, two years, eight years, six years. The statute, by
25 the way, says a max of 20 years. Now, what's the --

1 what's -- does this fall within it? Doesn't it? Does
2 it depend on whether he brandished it? What does it
3 depend on, in your view?

4 MR. ROTHFELD: Well, I'm glad you bring up
5 the guidelines, Your Honor, because I think that that is
6 an element that we haven't discussed at some length.
7 The government's test is what is the penalty that the
8 defendant actually faced. I mean that's their --

9 JUSTICE BREYER: Or what he actually faced
10 -- that, I agree with you, that won't work because of
11 the guidelines, if they were mandatory. But what
12 they're saying here is it's right in the statute. You
13 just look at the statute that has the definition of what
14 the offense is.

15 MR. ROTHFELD: Aha, but it's not the
16 definition of the offense. This statute -- the
17 definition of the offense is --

18 JUSTICE BREYER: No, I'm back to the same
19 question then. I mean which one do we pick?

20 MR. ROTHFELD: I -- I guess there are two
21 points here -- the first on the question of the
22 guidelines. To the extent that the government believes
23 in its test, which is what is the sentence that the
24 defendant actually faced, there is no question that the
25 sentence the defendant actually faced here was 57

1 months, well below the 10-year ACCA trigger. And the
2 government does not offer any explanation that I can
3 understand as to why, if their test applies, one takes
4 recidivism enhancements into effect, but does not take
5 guidelines reductions into effect.

6 JUSTICE BREYER: You see that my question is
7 going in the exact opposite way. What I am finding hard
8 is once you distinguish offender and offense
9 characteristics in the way you do, why not jump to the
10 max for the offense? And so I'm asking you, how is it
11 you get out of that? Which is the same question I had
12 before. I'm not so worried about your case as I am
13 other cases.

14 MR. ROTHFELD: Well, the way -- the way we
15 resolve that, Justice Breyer, is what was suggested by
16 Justice Souter's question. What Congress had in mind
17 was the offense without the overlay of a recidivism
18 enhancement, which is not an element of this offense.
19 One looks at the offense, one looks at the commission of
20 the elements, if you commit the elements, what does that
21 subject -- what kind of punishment does that subject you
22 to? If it's less than 10 years, ACCA does not apply.
23 If you have to call into the mix enhancements that are
24 unrelated, that are offender-specific and not
25 offense-specific, that's falls out because that's not

1 what Congress had in mind when it referred to
2 "punishment prescribed by law for the offense."
3 Again, Congress had in mind a limited series of serious
4 offenses. It was looking at what people did, whether
5 they engaged in the kind of serious, harmful,
6 destructive conduct that was sufficiently bad to trigger
7 the mandatory 15-year sentence, and if they did not, the
8 fact that some additional overlay could be used to
9 enhance their sentence is not what Congress was
10 concerned about when it listed ACCA predicates.

11 And, again, I don't want to fall away from
12 the Sentencing Guidelines point because, as I understood
13 Mr. Shanmugam's explanation to Justice Scalia as to why
14 the Guidelines should not apply if enhancement does is
15 because, well, this is an offender-specific -- an
16 offense-specific crime, and Congress at the time that it
17 enacted ACCA had in mind that guidelines in the
18 statutory regime were different.

19 But so far as the -- the offense has been
20 defined by the -- by the statute, the relevant offense
21 here is the five-year penalty associated with that
22 offense. And so I think that if one is going to go
23 beyond that and say we are going to look for things that
24 are outside of the offense, not in the elements of the
25 offense, to increase the sentence, as the government

1 does with the recidivism statute, there is no reason
2 why, if we are prepared to go outside of the offense
3 elements, that one wouldn't go to the Guidelines as
4 well, which have precisely the same effect in the other
5 way. I mean the government ultimately is asking for --
6 a one-way ratchet that if it increases the offense
7 level, that's okay, but if it decreases the punishment
8 for some reason, that doesn't apply. And we just don't
9 see any principled basis for that.

10 CHIEF JUSTICE ROBERTS: Well, no, I thought
11 their argument was you look at broad categories rather
12 than individual characteristics. It's not a one-way
13 ratchet at all.

14 MR. ROTHFELD: Well, I think, in terms of
15 discussion of the Guidelines, they suggest that what
16 matters is whether it is an element of the offense. I
17 thought that's what Mr. Shanmugam's response was. And
18 it is not an element of the offense here. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 MR. ROTHFELD: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Shanmugam, you
22 have three minutes remaining.

23 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

24 ON BEHALF OF THE PETITIONER

25 MR. SHANMUGAM: Thank you, Mr. Chief

1 Justice.

2 There are just two points that I'd like to
3 make in rebuttal:

4 The first is that the government believes
5 that the rule of lenity is inapplicable here for the
6 simple reason that we believe that the text of the
7 statute is not susceptible to Respondent's
8 interpretation. And if the Court concludes that the
9 statute does permit the interpretation that a given
10 offense can have only a single maximum term of
11 imprisonment, we believe that the only logical
12 conclusion is that that maximum is the maximum that any
13 offender could receive, not that the maximum -- not that
14 it is the maximum that some better-positioned subset of
15 offenders could receive. And while we do believe that
16 the considerations that underlie the rule of lenity have
17 less force in this context, and the Court has never
18 applied the rule of lenity to the ACCA, we ultimately
19 believe that the fact that the text does not permit
20 Respondent's interpretation is the end of the inquiry.

21 The other point that I would just make is
22 that if this Court were to adopt Respondent's
23 interpretation, it would have pernicious consequences,
24 not only for the ACCA, but likely also for a number of
25 other critically important Federal statutes as well.

1 With regard to the ACCA itself, both the definition of
2 "serious drug offense" and the definition of "violent
3 felony" are framed in terms of the maximum term of
4 imprisonment for the offense, and at least 28 States and
5 the Federal Government have drug-trafficking offenses
6 that would qualify as ACCA predicates for repeat
7 offenders under the government's interpretation but not
8 under Respondent's. And with regard to other statutes
9 similar language appears --

10 JUSTICE SCALIA: That's good or bad,
11 depending upon whether -- whether your interpretation of
12 the statute is right or the other side's.

13 MR. SHANMUGAM: Well --

14 JUSTICE SCALIA: It's good to put more
15 people in jail? I mean, that isn't necessarily what
16 we're after. We're --

17 MR. SHANMUGAM: I mean only to highlight the
18 practical significance of this issue, Justice Scalia,
19 and again, certainly in enacting a statute that itself
20 deals with the problem of recidivism, we believe that
21 Congress would not have wanted to be insensitive to an
22 offender's past recidivism.

23 But with regard to other statutes, I want to
24 note that similar language also appears in the Federal
25 three-strikes law and in the Controlled Substances Act,

1 which along with the ACCA, are among the most important
2 Federal statutes dealing with a problem of recidivism.
3 And similar language also appears in a number of general
4 Federal criminal statutes, including RICO and the very
5 substantive statute at issue here, the felony possession
6 statute. And if this Court were to adopt the Ninth
7 Circuit's interpretation, it could potentially lead to
8 the narrowing of all of those statutes as well. The
9 Ninth Circuit, alone among the circuits, has adopted
10 this view that the relevant maximum for an offense must
11 be the maximum that first-time offenders receive. We
12 believe that that is erroneous and that the judgment of
13 the Ninth Circuit should be reversed.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Shanmugam. The case is submitted.

17 (Whereupon, at 11:07 a.m., the case in the
18 above-entitled matter was submitted.)

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A	<p>adding 5:1 additional 18:18 52:8 address 22:17 31:20 addressing 32:20 43:9 adopt 54:22 56:6 adopted 16:20 56:9 adult 7:21,23 advance 19:16 40:16 aggravating 34:18 aggressive 6:18 ago 25:3,9 29:2 agree 31:1 43:24 50:10 agrees 34:16 49:17 Aha 50:15 Alito 9:25 10:7 26:25 27:13,22 28:7 48:24 49:4,5,12 Almendarez-... 14:11,14 alter 11:18 alternate 23:25 alternates 23:24 alternative 4:8 4:15 6:14 8:15 8:22 10:11 19:18 20:13 21:6,15 26:3 33:25 alters 10:15 analog 7:15 ancillary 14:12 anomaly 18:9 25:4,5,11 answer 10:7 25:8,8 34:24 36:16,25 48:17 answered 25:21</p>	<p>answers 41:9 APPEARAN... 1:14 appears 55:9,24 56:3 applicability 14:3 applicable 10:24 11:6 15:11 24:18,20 25:24 application 3:15 39:17 40:4 42:14 applied 46:9 47:12 54:18 applies 46:10 51:3 apply 4:10 17:8 51:22 52:14 53:8 applying 12:10 36:21 Apprendi 9:15 9:25 10:14,21 21:21,25 22:1 22:19 23:3,15 23:19 28:8 approach 4:3 10:7 19:1 21:7 26:3 40:4,9 apropos 41:8 area 7:13 argument 1:12 2:2,7 3:3,6 12:21 14:18 23:21 26:8 40:17 43:17 45:12 46:3 47:19,23 48:16 53:11,23 arguments 33:17 Armed 3:10 article 34:3 articulated 13:19 asked 11:17</p>	<p>asking 31:17 51:10 53:5 asks 31:10 Assistant 1:15 associated 35:5 45:19 52:21 assume 31:21 39:7 44:25 assure 8:1 authorize 24:1 authorized 8:4 23:22 aware 19:22 22:15 a.m 1:13 3:2 56:17</p>	<p>17:16 19:19 20:10,15 21:5 22:16 23:9 24:21 54:6,11 54:15,19 55:20 56:12 believes 50:22 54:4 better 19:17 23:21 better-positio... 54:14 beyond 5:23 52:23 biased 21:22 Bifulco 47:15 binding 34:14 45:23 bit 25:15 26:2 45:24 46:18 Blakely 23:9,15 Booker 28:9 brandish 49:22 brandished 50:2 Breyer 28:25 29:13,22 30:13 30:17 36:18 37:3,8 41:10 42:1 49:20 50:9,18 51:6 51:15 brief 11:11 15:7 24:15 31:7 briefs 47:15 bring 38:1 50:4 brings 38:2 broad 6:15,19 17:24,25 20:13 20:18 21:14 53:11</p>
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