

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KEITH LAVON BURGESS, :

4 Petitioner :

5 v. : No. 06-11429

6 UNITED STATES. :

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8 Washington, D.C.

9 Monday, March 24, 2008

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11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 10:02 a.m.

14 APPEARANCES:

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16 of the Petitioner.

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18 General, Department of Justice, Washington, D.C.; on  
19 behalf the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 06-11429, Burgess versus United States.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

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

The rule of lenity requires that any penal statute the government seeks to enforce against an individual must clearly and unambiguously apply to him and, as the government acknowledges its brief in this case, this Court has applied the rule of lenity in numerous recent cases involving mandatory sentencing provisions. A reaffirmation of that time-honored principle is all that is necessary to decide this case.

The 20-year mandatory --

JUSTICE KENNEDY: Is it time-honored since Granderson? Was that the first time we did it?

MR. FISHER: Well, the rule of lenity has been --

JUSTICE KENNEDY: As to sentences? As to sentences?

1           MR. FISHER: As to sentencing? No, in the  
2 mid-20th century, Justice Kennedy, in the Bell decision  
3 written by Justice Frankfurter and in Ladner, both  
4 involved the degree of punishment to which a defendant  
5 would receive. There are other cases: In 1980 the  
6 Simpson case, and Bifulco around the same time. So this  
7 Court has a history of applying the rule of lenity with  
8 equal force to sentencing provisions as it does to  
9 statutes demarcating criminal conduct or not. And of  
10 course, as the green brief especially highlights, the  
11 very essence and the core of the rule of lenity derives  
12 from English common law, which is -- which was  
13 designed to invoke the rule of lenity to avoid mandatory  
14 punishment, not -- not so much whether conduct was  
15 criminal or not.

16           So we think that applying that rule in a  
17 straightforward manner to this case requires a reversal.  
18 The 20-year mandatory minimum in section 841(b)(1)(A)  
19 applies only to defendants who have a prior conviction  
20 for a, quote, "felony drug offense." Now, a sensible  
21 reading of that provision is that a State-law  
22 misdemeanor simply does not constitute a felony drug  
23 offense. But at the very --

24           CHIEF JUSTICE ROBERTS: Well, the rule  
25 of lenity depends upon of course some ambiguity in

1 the term, the definition says "'felony drug offense'  
2 means an offense that is punishable by imprisonment for  
3 more than 1 year." It doesn't say anything about State  
4 classification.

5 MR. FISHER: Well, that's right, Mr. Chief  
6 Justice, and if that's all you had on the statute books  
7 this might be an easier case. But as you know, I think,  
8 above section 44 and section 13 the term "felony" is  
9 described and defined as "a crime that is classified as  
10 a felony under Federal or State law." And so when you  
11 start with section 841(b)(1)(A), which uses the term  
12 "felony drug offense," and you go to the definitional  
13 section, the first thing you come to is the definition  
14 of "felony," which says a crime classified as such. And  
15 then, as you say, in section 44 you reach another  
16 definition. So we think that at the very least you have  
17 an ambiguity here in which Congress has given two  
18 facially applicable definitions to the operative  
19 provision of the statute.

20 CHIEF JUSTICE ROBERTS: Well, obviously one  
21 is a definition of "felony" and the other is the  
22 definition of "felony drug offense" and the term that is  
23 at issue here is "felony drug offense."

24 MR. FISHER: Well, in a sense it's our  
25 position that both are at issue here. The term

1 "felony," which is within the term "felony drug  
2 offense," is also at issue here. And as we've pointed  
3 out in pages 11 and 12, 11 and 12 of our yellow brief,  
4 it's not uncommon for Congress to have two separate  
5 definitions, one of which is a single term within a  
6 broader term in a statute. And so the mere fact, as the  
7 government would argue, that the word "felony" is not  
8 repeated in the definition of subsection 44 does not  
9 mean that Congress meant that to be the sole definition.

10 We've given three examples on pages 11 and  
11 12 where the sensible reading of the statute is that  
12 Congress attempted to nest the definition of a single  
13 term within the definition of a broader term.

14 JUSTICE ALITO: Could I -- could I ask you  
15 what you think Congress might have been trying to do  
16 with the 1994 amendment under -- under your reading?  
17 Before 1994 the offense had to be classified as a  
18 felony. Then they added this definition of "felony drug  
19 offense," and as I understand it your reading is that  
20 now the offense must be classified as a felony and it  
21 must be punishable by more than -- by imprisonment for  
22 more than a year. What would be the reason for adding  
23 this new requirement as you see it, that it be punishable  
24 by more than a year, if there were not offenses that were  
25 classified by States as felonies but were punishable by

1 less than a year? I can't see the point unless the  
2 point was to rule those out.

3 And you haven't cited any State statute in  
4 your brief that involved an offense that was classified  
5 as a felony and was punishable by less than a year. You  
6 cited a couple that were punishable by exactly a year,  
7 not more than a year but exactly a year. So is it your  
8 -- your theory that the reason for adding this new  
9 language was to make it clear that those offenses where  
10 the maximum was 12 months, as opposed to 12 months and a  
11 day, would not be counted?

12 MR. FISHER: I think there is an agreement  
13 between us and the government on this point. We cite in  
14 our blue brief statutes from Arizona as well as a couple  
15 of other States where there are crimes that are  
16 classified as felonies but punishable by less than a  
17 year. And in those cases we agree with the government  
18 that that is the effect of the 1994 conforming  
19 amendments, is to exclude those outlier States that take  
20 low-level crimes and nonetheless classify them as  
21 felonies. What this case is about --

22 JUSTICE ALITO: But if I could just come  
23 back to that. I looked at those. You cite Ohio, North  
24 Carolina, and Arizona and those are all punishable by --  
25 they all have a maximum term of 12 months, not less

1 than. So the difference is between 12 months and 12  
2 months and a day?

3 MR. FISHER: Well, that works on the  
4 language of the statute, Justice Alito.

5 JUSTICE ALITO: But is it plausible that's  
6 the reason why Congress added this language? They  
7 didn't want -- they wanted to make sure that these  
8 felonies that were punishable by just 12 months would  
9 not be counted?

10 MR. FISHER: Well, I think it is quite  
11 plausible that the language that Congress added had very  
12 little practical effect. And that flows from the fact  
13 that Congress called these nothing more than conforming  
14 amendments, so Congress apparently wasn't trying to  
15 accomplish any dramatic change here and I think it might  
16 help to understand by looking at the other kind of  
17 outlier States that the government claims got swept in  
18 with the 1994 amendment. We cite statutes from States  
19 like Colorado. Perhaps if I used a concrete example.  
20 Take possession of a single ounce of marijuana. That is  
21 one of the crimes in Arizona that we were just talking  
22 about, that is a felony punishable by no more than a  
23 year. There are a few other States who are outliers in  
24 a different sense, in which they call these crimes  
25 misdemeanors, like the vast majority of States, but make



1 them punishable by 18 months or more.

2           And so what the government's position is is  
3 that in 1994 when Congress was passing conforming  
4 amendments to exclude a couple of outlier States like  
5 Arizona, it was trying to sweep in for the first time  
6 into section 841(b)(1)(A) outlier States like Colorado  
7 that treat low-level drug crimes, low-level drug  
8 possession crimes, as misdemeanors that are punishable  
9 by more than a year.

10           So we think, for the very reasons the  
11 government explains, that Congress was trying to avoid  
12 disuniformity and happenstance according to how a few  
13 local jurisdictions might treat certain drug crimes,  
14 that it makes sense to read the '94 conforming  
15 amendments as requiring both the one-year punishment  
16 rule and the felony classification requirement.

17           And if you have any doubt on that, we submit  
18 it really makes sense to remember that what we're what  
19 talking about here is a mandatory minimum. And so --

20           JUSTICE ALITO: What would you do with  
21 someone who was convicted -- had a prior conviction of  
22 -- for importing 10 tons of heroin in New Jersey, for  
23 example, where there are no felonies? What would you do  
24 with that, a very serious drug offense in a State that  
25 doesn't use the term "felony" at all or a foreign

1 conviction?

2 MR. FISHER: Well, we've cited a case in our  
3 brief in the Second Circuit that deals with that exact  
4 problem, at least with the New Jersey problem. And what  
5 the courts did and what they have done in other  
6 circumstances where there's a felony classification  
7 requirement is they simply take the crime in New Jersey  
8 and analogize it to a comparable Federal or local State  
9 crime, and if it was -- if it would be classified as a  
10 felony in that local jurisdiction, then courts -- and  
11 this is even before the 1994 amendments -- courts have  
12 treated that as a felony.

13 JUSTICE ALITO: But what they did -- what  
14 they did in the Second Circuit case was to say this is  
15 punishable -- this offense is punishable by more than a  
16 year in New Jersey and therefore it's a felony.

17 MR. FISHER: I believe, Justice Alito, this  
18 was a case before 1994, so that's --

19 JUSTICE ALITO: I know. And that's how they  
20 analogized it to a felony.

21 MR. FISHER: Right, because that is the  
22 Federal definition of a felony, and so that was the  
23 analogy that the Second Circuit was able to draw here  
24 and reach what we think is a commonsense way to deal  
25 with the unusual problem of New Jersey. Another --

1 JUSTICE SCALIA: You say there are other  
2 examples where a -- a noun that is nested in another  
3 definition is separately defined and the two are read  
4 together. How are those phrased? I mean, I could  
5 understand what you say if this provision here read:  
6 "The term 'felony drug offense' means a felony that is  
7 punishable by imprisonment for more than one year."  
8 Then I'd go back to the "felony" definition for what a  
9 felony means, but it doesn't repeat the "felony." "The  
10 term 'felony drug offense' means an offense that is  
11 punishable by imprisonment for" -- do any of the  
12 examples of nesting that you -- that you bring forward  
13 read this way?

14 MR. FISHER: All three of them do, Justice  
15 Scalia.

16 JUSTICE SCALIA: Which ones are they? Where  
17 are they --

18 MR. FISHER: They're pages 11 and 12 of the  
19 yellow brief. And so the first place to start is  
20 looking at the bottom of page 11, where the term  
21 "employee" is defined in one provision of the Federal --  
22 of the Federal statutory code. And then the terms  
23 "employee of the Capitol Police," "employee of the House  
24 of Representatives" are also defined, and they're  
25 defined -- and those broader definitions are in the

1 footnote at the bottom of page 12. And so you see that  
2 there, after having defined the term "employee," the  
3 word "employee" is not repeated in those definitions.  
4 They talk about "a member" or "an officer" or "an  
5 individual." And so it's much like the circumstance  
6 here, where a more generic term is used in the broader  
7 definition, but it makes sense to read in the original  
8 definition.

9           The same thing I think you can see in the  
10 middle of page 12 with the part of the Bankruptcy Code  
11 that we've given this Court. The word "debtor" is  
12 defined in a certain way, and then later on in the  
13 definitional provision, the term "debtor's principal  
14 residence" is defined as "a residential structure" and  
15 such and such. Again the word "debtor" is not repeated  
16 in the broader definition, but we think the only way to  
17 make sense of it is to import the definition of the  
18 single term into the broader term. If Congress had  
19 wanted --

20           CHIEF JUSTICE ROBERTS: Just on that -- just  
21 on that last one, are you saying that if it doesn't say  
22 "debtor's residential structure," you'd think it was  
23 somebody else's residential structure?

24           MR. FISHER: Well --

25           CHIEF JUSTICE ROBERTS: I don't understand

1 the point.

2 MR. FISHER: Well, there might be, you know,  
3 a very rigid plain-text argument that might be made.

4 The point is that Congress used -- defined the term  
5 "debtor's principal residence" without using the term  
6 "debtor" again and defined it somewhere else, much as --

7 CHIEF JUSTICE ROBERTS: Well, in a provision  
8 of the Bankruptcy Code that deals with debtors I don't  
9 think there's any question about whose residential  
10 structure they would be talking about, even though they  
11 don't repeat "debtor." It strikes me as quite different  
12 than the provision we have before us today.

13 MR. FISHER: Well, then I think I'd refer  
14 you back to the "employee" example. I mean, no example  
15 is going to be exactly on all fours. I'm happy to  
16 acknowledge that. The idea that I'm trying to get  
17 across is it's not unusual for Congress to define single  
18 terms that are nested within larger terms.

19 JUSTICE SCALIA: I -- I want one that's --

20 JUSTICE KENNEDY: And also I think your  
21 "debtor" example, it doesn't quite work because it does  
22 not supersede the term "debtor" that was used earlier.  
23 In the government's submission at least in this case,  
24 "felony drug offense" supersedes the earlier provision  
25 in section 13.

1           MR. FISHER: I think that's right. And I  
2 think one way to --

3           JUSTICE KENNEDY: So it seems to me they're  
4 not comparable in that sense.

5           MR. FISHER: Okay. I think one way to  
6 understand how this statute -- if Congress had wanted to  
7 do what the government says it wanted to do, how  
8 Congress could have made it absolutely clear -- while we  
9 have the yellow brief open, we can look at page 13.

10          JUSTICE GINSBURG: May I ask you a question  
11 before going on with this line? You say that both the  
12 802(13) definition has to be satisfied and the (44)  
13 definition, right? But was 802(13) ever applicable to  
14 this situation? What was the law prior to the 1994  
15 amendment? There was a section, wasn't there, that  
16 defined "felony drug offense"?

17          MR. FISHER: For a time, yes, Justice  
18 Ginsburg, but -- so when the statute was originally  
19 passed, 802(13) was the sole definition of "felony," and  
20 then somewhere along the line between the original  
21 enactment and the '94 amendments, a definition of  
22 "felony drug offense" was put into 841(b)(1)(A) --

23          JUSTICE GINSBURG: Right.

24          MR. FISHER: -- but that itself just used  
25 the word "felony," which again referred the reader back

1 to 802(13). So, again, I think it's an agreement  
2 between --

3 JUSTICE GINSBURG: Would you take a look at  
4 that provision that was in 841(b)(1)? Because it seems  
5 that it would be duplicative of 802(13).

6 MR. FISHER: Are you looking, Justice  
7 Ginsburg, at the 1988 version of the statute?

8 JUSTICE GINSBURG: Yes.

9 MR. FISHER: No, because --

10 JUSTICE SCALIA: Where would we find this?

11 MR. FISHER: Oh, this is at 13a of the blue  
12 brief, Justice Scalia.

13 So, at page 13a it says, "For purposes of  
14 this subparagraph, the term 'felony drug offense' means  
15 an offense that is a felony under any provision of this  
16 subchapter, under any Federal law." Now, the word  
17 "felony" again would have referred the reader back to  
18 802(13). If I understand --

19 JUSTICE GINSBURG: But read -- read the end  
20 of it. Read on where it says, "or a felony under any  
21 law of a State or foreign country," et cetera.

22 MR. FISHER: Right. But I think, again, the  
23 word "felony" as it appears in -- in that provision --  
24 and I think that the government agrees with us on this  
25 -- would have referred the reader back to 802(13) as of

1 1988 --

2 JUSTICE GINSBURG: Well, what --

3 MR. FISHER: -- because there isn't the  
4 explicit classification requirement.

5 JUSTICE GINSBURG: But it defines what the  
6 felony is: "A felony under any law of a State or  
7 foreign country that prohibits or restricts conduct  
8 relating to narcotic drugs, marijuana," et cetera.

9 MR. FISHER: Well, I think the latter  
10 language, Justice Ginsburg, is defining --

11 JUSTICE GINSBURG: Why would you need to  
12 look --

13 MR. FISHER: -- "drug offense," whereas the  
14 word "felony" I think is not a self-defining term in  
15 that statute as it's written. And to understand whether  
16 we're talking about something like a one-year rule or a  
17 classification requirement, the reader needs to go back  
18 to the definitional section.

19 JUSTICE SCALIA: I don't -- the definitional  
20 section contradicts -- contradicts what's in (b)(1)(A).

21 JUSTICE GINSBURG: Yes.

22 MR. FISHER: As of 1988?

23 JUSTICE SCALIA: Yes. It contradicts it  
24 because the "felony" definition is classified as felony  
25 by Federal or State law.



1           MR. FISHER: Well, it says "a felony under  
2 the law of a State." So I think the classification  
3 requirement -- I don't think it's inconsistent with it.  
4 It might clarify it.

5           JUSTICE SCALIA: It says "under any  
6 provision of this subchapter or any other Federal law  
7 that prohibits or restricts." And then in the last  
8 part, "under any law of a" -- of "State" -- it picks up  
9 "State" -- "or a foreign country." "Foreign country" is  
10 not included in 802(13).

11           MR. FISHER: That's right, Justice Scalia.

12           JUSTICE SCALIA: So you have to say that  
13 there "felony" stands on its own, right?

14           MR. FISHER: Well, I guess you could, but  
15 then you wouldn't have a definition; then you'd have to  
16 figure out how to define "felony," whether it was a  
17 classification or a one-year rule or something else. I  
18 think the natural reading, again, would be a  
19 classification requirement to the extent to which you  
20 couldn't look further than that provision of the  
21 statute. But one thing --

22           JUSTICE BREYER: Is the following true, that  
23 if you are right the reason Congress passed this new  
24 definition was it wanted to take those handful of States  
25 which have felonies as a year, the ones Justice Alito is

1 talking about, and make clear that they are not covered?

2 MR. FISHER: Yes.

3 JUSTICE BREYER: All right. But if the  
4 government's right, then the reason Congress did this is  
5 that it recognized what I think is the truth, that  
6 felonies and misdemeanors are defined differently in  
7 many different ways under the laws of many different  
8 States and, in a matter where so much prison time turns  
9 on it, wished to create a single, uniform definition.

10 Now, if that's right, I'm asking myself  
11 which is a more plausible purpose.

12 MR. FISHER: Well, we don't disagree with  
13 the government that the one-year rule does serve the  
14 purpose of helping iron out --

15 JUSTICE BREYER: No, it doesn't, because if  
16 you're right, then you first have to look to the  
17 patchwork quilt of laws in all the different States to  
18 see whether those different States define the conduct as  
19 misdemeanors or felonies. And then, having solved the  
20 patchwork problem, we add on the requirement of one  
21 year. And so the bite of the new definition would be  
22 what Justice Alito said and nothing else.

23 Now, that's -- and, yet, on the government's  
24 interpretation, the bite is to create a single, readily  
25 applied, uniform rule.

1                   Now, if I ask myself which of those is most  
2 plausible, I hate to tell you which answer I get.

3                   MR. FISHER: Well, I think, Justice Breyer,  
4 with due respect, if you look at the way different  
5 States treat drug crimes --

6                   JUSTICE BREYER: Am I right? Am I right? I  
7 mean, I put that out to give you a chance to say. I'm  
8 not sure I am right.

9                   MR. FISHER: That's what I'm trying to  
10 respond -- different States treat drug crimes  
11 dramatically different, and this is so -- I think it's  
12 common sense that States treat different crimes -- treat  
13 -- different States punish the same crime differently.  
14 And that's nowhere more true than in drug crime, because  
15 there's a great amount of experimentation that goes on  
16 in the States. And one of the things that certain  
17 States do, like Colorado, is take very low-level drug  
18 crimes and punish them by more than a year, in part so  
19 they can give treatment and keep people in -- in prison  
20 long enough to have treatment take hold, whereas some  
21 other States treat drug crimes very differently. So you  
22 have a patchwork whether you look to the classification  
23 or whether you look to the one-year rule. That's why we  
24 think it makes sense to use both.

25                   Now, if Congress had wanted to do what the

1 government is suggesting, which is have the one-year  
2 rule be the sole and exclusive way of determining  
3 whether you have a felony before you, it could have very  
4 easily said so. And there's an example -- and this is  
5 at page 13 of the yellow brief -- of what -- of what the  
6 Federal Sentencing Guidelines do.

7           They define -- in a "career-offender  
8 provision" there is a definition of "felony" there that  
9 is quite explicit. They say a "felony" is "an offense  
10 punishable by more than a year, regardless of whether  
11 such an offense is specifically designated as a  
12 'felony.'"

13           So there are other provisions where Congress  
14 could have looked and it would have been well aware of  
15 how to make absolutely plain what it was trying to  
16 accomplish in the statute.

17           Now, we don't think that the government's  
18 reading is implausible, Justice Breyer, for the reason  
19 you say --

20           JUSTICE GINSBURG: Mr. Fisher, could I just  
21 go back to what you quoted. Are you quoting -- you're  
22 quoting a Sentencing Guideline, right?

23           MR. FISHER: Yes.

24           JUSTICE GINSBURG: Not a statute.

25           MR. FISHER: Yes, I'm quoting the Sentencing

1 Guideline, although in the Armed Career Criminal Act you  
2 can find another place where Congress dealt with this  
3 problem explicitly.

4 It said that felonies are crimes punishable  
5 by more than a year; however, if a State classifies the  
6 crime as a misdemeanor, it has to be punishable by more  
7 than two years.

8 JUSTICE SCALIA: And you think -- you think  
9 it would mean something different if you just left out  
10 the "regardless of" clause?

11 MR. FISHER: Well, Justice Scalia, with the  
12 problem --

13 JUSTICE SCALIA: The "prior adult Federal or  
14 State conviction for an offense punishable by death or  
15 imprisonment for a term exceeding one year," you think  
16 it means something different without the "regardless"?

17 MR. FISHER: Not necessarily, but leaving  
18 that clause --

19 JUSTICE SCALIA: Not at all? Not possibly.

20 MR. FISHER: Well, our position is, Justice  
21 Scalia, that, standing alone, I will grant you; but the  
22 problem as we see it in this case is that that is left  
23 out. In a very common problem, how to define a felony,  
24 they leave out that explicit statement of whether  
25 classification is important. And what is more, in the

1 same definitional provision --

2 JUSTICE SCALIA: I would say that  
3 "regardless" clause is extraordinary and I would not  
4 want to have to deal with such prolix statutes on a  
5 regular basis.

6 MR. FISHER: Well, I think there's a good  
7 reason why Congress put it in, and that's because it is  
8 a continually vexing problem, how to define what is a  
9 felony. That's why Congress did it explicitly in the  
10 Armed Career Criminal Act. That's why the Sentencing  
11 Guidelines are explicit here. And leaving that out, and  
12 against the backdrop of a statute where the  
13 classification rule was the controlling rule for over a  
14 decade, and where they leave that classification rule in  
15 the very same definitional provision of the statute, we  
16 think, gives rise to an ambiguity.

17 CHIEF JUSTICE ROBERTS: If it's such a  
18 vexing problem, why would Congress have incorporated the  
19 problem into the definition of "felony drug offense"?

20 MR. FISHER: Well, I'm not sure I follow the  
21 question.

22 CHIEF JUSTICE ROBERTS: Well, you seem to  
23 suggest that it's a vexing problem that "felony" is  
24 defined differently in different States. And, yet, you  
25 say that the term "felony," which relies on how it's

1 defined by different States, was incorporated in the  
2 "felony drug offense," which seems to have a quite clear  
3 definition of punishable by more than one year.

4 If they don't want to repeat the problem  
5 that "felony" is defined differently in different  
6 States, they would not do what you're suggesting, which  
7 is incorporate it wholesale into the latter definition.

8 MR. FISHER: Well, with all due respect,  
9 what Congress did is they left 802(13) on the books,  
10 which does turn on classifications. And it's not --  
11 even though it is a -- it is something of a patchwork,  
12 it is not unusual at all to have very serious  
13 consequences turn on whether something is classified as  
14 a "felony" or not.

15 JUSTICE GINSBURG: But, of course, they had  
16 to leave it on the books because they need a definition  
17 of "felony." "Felony" has to be defined in many places,  
18 but this is a definition of "felony drug offense." So  
19 --

20 MR. FISHER: Well, again, Justice Ginsburg,  
21 I think that is right. But then what Congress could  
22 have done is use the language that the Federal  
23 Sentencing Guidelines use, or something comparable to  
24 make clear its intent.

25 And the classification of a felony or not a

1 felony, as this Court knows, has a time-honored import.  
2 Things like the right to vote, the right to bear arms,  
3 the right to various civil rights turn on whether  
4 somebody has been convicted of a felony or a  
5 misdemeanor.

6           And, again, this brings us in a sense back  
7 to the rule of lenity because one of the principal  
8 reasons for the rule of lenity is fair notice. Now,  
9 this Court, as early as the McBoyle decision recognized  
10 that we're dealing with something of a fiction when we  
11 imagine an offender looking at the statutory books to  
12 decide whether certain conduct is prohibited or not.

13           But in the context of recidivist  
14 enhancements that lead to mandatory minimums, we're  
15 talking about very real and serious notice problems.  
16 Imagine the conscientious public defender advising  
17 someone like Mr. Burgess as to whether he should plead  
18 guilty to a misdemeanor or a felony. This happens in  
19 States across the country that have three-strikes  
20 provisions, that have very serious immigration  
21 consequences turning on "felony" or "misdemeanor." That  
22 lawyer might have concluded, as the District of Columbia  
23 Circuit did, that pleading to a misdemeanor here would  
24 not expose Mr. Burgess in the event he was convicted of  
25 a later crime to such a serious punishment as the



1 20-year mandatory minimum in this case.

2 JUSTICE KENNEDY: Can you tell me what  
3 happened in South Carolina? Could he on those facts and  
4 under the charges have been sentenced to more than a  
5 year? It was just that the judge gave him less than a  
6 year?

7 MR. FISHER: Mr. Burgess's crime, possession  
8 of cocaine, was punishable by up to two years. So, yes,  
9 he received a sentence far less than that.

10 JUSTICE KENNEDY: He was -- he himself was  
11 eligible for the --

12 MR. FISHER: Yes. The crime to which he  
13 pled guilty was punishable by two years. But you should  
14 understand that that kind of a hypothetical, punishable-  
15 by problem is one I know this Court dealt with a couple  
16 of months ago in the Rodriguez case. And you should  
17 understand that not just what Congress, under the  
18 government's view, had been looking to sweep in outlier  
19 States like Colorado, but if the government prevails in  
20 the Rodriguez case where the term "punishable by" turns  
21 on recidivist enhancements, then the '94 amendments,  
22 which were termed "conforming amendments," have an even  
23 far more sweeping effect and bring in lots of State-law  
24 misdemeanors that were never covered by the prior act.

25 If there are no more questions, I will

1 reserve my time.

2 JUSTICE GINSBURG: Just one. You said that  
3 in most States what Burgess did, his crime, simple  
4 possession, would not encounter a sentence of upward of  
5 one year. Did you do a survey? Did you document that  
6 in your brief?

7 MR. FISHER: No. But I said earlier,  
8 Justice Ginsburg, giving the example of possession of  
9 one ounce of marijuana, that the vast majority of States  
10 punished that as a misdemeanor by less than a year.

11 Mr. Burgess's crime was a misdemeanor  
12 punishable by less than a year under Federal law,  
13 but different States treat that crime differently.  
14 And I think a majority of those, a majority of States,  
15 would treat that as a crime punishable by more than a  
16 year and classified as a felony.

17 If there are no more questions --

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
19 Ms. Saharsky.

20 ORAL ARGUMENT OF NICOLE A. SAHARSKY

21 ON BEHALF OF THE RESPONDENT

22 MS. SAHARSKY: Mr. Chief Justice, and may it  
23 please the Court:

24 Congress answered the question presented in  
25 this case when it adopted an express definition for

1 "felony drug offense." Under that definition, "felony  
2 drug offense" means an offense punishable by more than  
3 one year of imprisonment under certain State, Federal,  
4 or foreign drug laws.

5 There is no textual basis for going beyond  
6 that definition to also require that an offense be  
7 classified as a "felony." The enhancement trigger in  
8 the sentence-enhancement provision is a felony drug  
9 offense, and the way that the definition works is that  
10 you take the definition Congress provided for "felony  
11 drug offense."

12 CHIEF JUSTICE ROBERTS: Is "drug" a nested  
13 term in that? It doesn't really define "drug." Do they  
14 look somewhere else for that definition?

15 MS. SAHARSKY: Well, the term "felony drug  
16 offense," the "drug" component we understand to be the  
17 component that says "an offense that prohibits" --  
18 "under a law that prohibits or restricts conduct related  
19 to narcotic drugs, marijuana, anabolic steroids" --

20 CHIEF JUSTICE ROBERTS: Is there a place you  
21 would -- is that a place you would look if you didn't  
22 know what they meant by "drug"? If an issue arose  
23 whether, you know, a natural narcotic, I mean is that a  
24 drug or not?

25 MS. SAHARSKY: There is a definition of

1 "drug" at the beginning of the Controlled Substances Act  
2 in section 802. It refers back to the general  
3 definition of "drug," I believe in section 321 of the  
4 Controlled --

5 CHIEF JUSTICE ROBERTS: So that is nested in  
6 this definition, "felony drug offense"?

7 MS. SAHARSKY: The term "felony drug  
8 offense" has only the meaning that Congress gave to it.  
9 In the words it shows that it be punishable by more than  
10 one year under State, Federal or foreign law relating to  
11 those particular drugs.

12 In fact, the question that you asked shows  
13 why Petitioner's reading of the statute cannot be  
14 correct, that you can't use both the definition of  
15 "felony drug offense" that Congress provided and try to  
16 import in separate definitions for "felony" and separate  
17 definitions for "drug," because the definition of "drug"  
18 in the Controlled Substances Act is very broad and  
19 applies to many different kinds of drugs, whereas the  
20 definition of "felony drug offense" only refers to  
21 offenses that involve narcotic drugs, anabolic steroids,  
22 marijuana or depressant or stimulant substances.

23 In the same way, this shows why Petitioner  
24 cannot be correct that the definition of "felony" also  
25 must be brought into "felony drug offense," because

1 Congress chose that the measure of seriousness in  
2 "felony drug offense" is an offense punishable by more  
3 than one year. And it actually took out of the statute  
4 the measure of seriousness which is classification as a  
5 felony. So to bring that requirement back in would undo  
6 the change that Congress made in 1994.

7 That's the language, Justice Ginsburg, that  
8 we were looking at at the bottom -- at the back  
9 of the blue brief. In 1988 it said "'Felony drug  
10 offense' means an offense which is a felony." And that  
11 language was taken out and Congress replaced it with  
12 this new language, which says "punishable by more than  
13 one year of imprisonment."

14 CHIEF JUSTICE ROBERTS: What do you do with  
15 your friend's argument that the classification -- or the  
16 term, more than one year or less than one year, doesn't  
17 always have to do with how serious they view the  
18 offense, but they may impose a sentence of more than one  
19 year to allow time for a rehabilitation program?

20 MS. SAHARSKY: Congress chose the words that  
21 it did, "punishable by more than one year," because it  
22 believed it to be a good measure of seriousness. This  
23 Court has recognized in cases like Blanton versus City  
24 of North Las Vegas that the term of imprisonment that a  
25 legislature chooses is a good measure of the seriousness

1 of the offense. There may be offenses that a State  
2 classifies as more or less serious based on punishment,  
3 but Congress wanted to do its best to get uniformity in  
4 provision -- in this provision. So what it did here was  
5 to take out this requirement that would look to varying  
6 State and foreign laws and instead have one that was  
7 just based on term of imprisonment.

8 And actually this -- this raises a very  
9 serious problem with Petitioner's reading of the  
10 statute, which is with respect to foreign offenses. The  
11 "felony drug offense" definition allows an enhancement  
12 based on State, Federal or foreign offenses, and the  
13 definition of "felony" unadorned and standing by itself  
14 doesn't refer to foreign offenses at all, which means  
15 that there is a serious ambiguity if both applied as to  
16 what would be done in the case of trying to enhance  
17 based on a foreign offense.

18 JUSTICE GINSBURG: Well, I suppose it might  
19 for countries that use that classification, for common  
20 law countries.

21 MS. SAHARSKY: There are countries that do  
22 use the felony/misdemeanor distinction. There are some  
23 that do not. But we understand in 1994 that Congress --  
24 the change Congress made to be one that eliminates those  
25 kinds of ambiguities.

1           And certainly, if Congress had thought in  
2 1994 that both the separate definition of "felony" and  
3 the definition of felony drug offense mattered, that it  
4 would have placed foreign offenses in the definition of  
5 "felony," and it didn't do that here.

6           JUSTICE GINSBURG: The -- the information we  
7 have in the brief says that there are two States that  
8 have dropped those labels. Are there more than New  
9 Jersey and Maine?

10           MS. SAHARSKY: New Jersey and Maine are the  
11 only ones that I'm aware of.

12           Certainly, as this Court discussed in some  
13 previous questions, there may be ways in which courts  
14 could try to work around ambiguities that, for example,  
15 existed in the statute 1990 -- prior to 1994, to figure  
16 out how offenses in New Jersey should be treated. But  
17 the fact that Congress made the change in 1994 to pick  
18 clear language that would just turn on the authorized  
19 term of imprisonment shows that that's what should be  
20 used, that choice should be given effect.

21           The fact that courts might be able to deal  
22 with an ambiguous statute certainly does not give  
23 license to create one where it doesn't otherwise exist.

24           There's an example the Petitioner raised,  
25 which is how "violent felonies" are treated in the Armed

1 Career Criminal Act, and I think that that -- that  
2 illustrates how Congress could have done what Petitioner  
3 wanted if that was, in fact, its intent. In the ACCA, a  
4 "violent felony," which could be the basis for a sentence  
5 enhancement, is defined as various violent offenses that  
6 are punishable by imprisonment exceeding one year. But  
7 then Congress specifically decided that it wanted to  
8 exempt state misdemeanor offenses that it didn't  
9 consider serious enough to qualify as violent felonies.  
10 So it exempted State offenses that are classified as  
11 misdemeanors and punishable by less than two years. And  
12 we think that the Congress's treatment in the ACCA  
13 exempting specific State offenses shows that if Congress  
14 had wanted to exempt offenses classified as misdemeanors  
15 in the way that Petitioner suggests, that it would have  
16 done so in that way.

17 Congress chose a meaning here for "felony  
18 drug offense" and we think that it needs to be given  
19 effect.

20 JUSTICE KENNEDY: Could you tell us just a  
21 little bit about the rule of lenity? You want us to  
22 apply sort of a watered down discount rule of lenity in  
23 sentencing cases? And do you have authority for that?

24 MS. SAHARSKY: The government --

25 JUSTICE KENNEDY: After we said in



1 Granderson the rule of lenity applies without qualifying  
2 or modifying it --

3 MS. SAHARSKY: The government's position is  
4 that the rule of lenity operates in the same manner in  
5 both the defining-the-offense context and in the  
6 sentencing context. The point that we were making in  
7 our brief is that the purposes behind the rule of lenity  
8 are really implicated to a lesser extent when we're  
9 talking about sentencing, and particularly with respect  
10 to mandatory minimums, because there's not a question  
11 about whether the offense conduct at issue is illegal,  
12 and there's not a question about the maximum offense, the  
13 maximum term of imprisonment that the person could be  
14 subject to.

15 So, our brief should be best understood as a  
16 response to Petitioner's extensive historical discussion  
17 of the rule of lenity and a suggestion that it applies  
18 with even more vigor in the context of mandatory  
19 minimums. We don't think that that's the case, but at  
20 the same time we are not suggesting there is a new  
21 different rule of lenity in this context.

22 And again, we don't see this as a rule-of-  
23 lenity case. Congress picked a particular definition  
24 and it used those terms -- that term "felony drug  
25 offense" to trigger each of the sentence-enhancement

1 provisions here. We don't think there is any reason to  
2 look beyond it.

3 If the Court has no further questions,  
4 government submits the judgment below should be  
5 affirmed.

6 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
7 Saharsky.

8 Mr. Fisher, you have four minutes.

9 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

10 ON BEHALF OF THE PETITIONER

11 MR. FISHER: Thank you, Mr. Chief Justice.

12 If I might pick up where Justice Kennedy  
13 left off with the rule of lenity, because we don't want  
14 this Court to lose sight of the importance of the rule  
15 of lenity in this case. It's not our position that the  
16 government's reading is unreasonable. It is simply our  
17 position that our reading of the statute is a possible  
18 one and that Congress may have been --

19 JUSTICE KENNEDY: Well, but there has to be  
20 a real ambiguity. I mean, if there is a plausible  
21 defendant-friendly interpretation, that doesn't trigger  
22 the rule of lenity, does it or doesn't it?

23 MR. FISHER: I think, Justice Kennedy, a  
24 fair way to ask yourself the question is, would the  
25 statute here rise to the level of a plain statement of

1 the kind that is required to, for example, abrogate  
2 sovereign immunity or to realign the Federal-State  
3 balance. The term "clear statement" and "clear and  
4 definite statement" that is used in the historical  
5 context --

6 JUSTICE SCALIA: How many statutes exist  
7 like that? My goodness. You want the government to be  
8 held in all criminal statutes to a statement that is  
9 clear enough to satisfy the clear-statement requirement?

10 MR. FISHER: With due respect, Justice  
11 Scalia, that's what the historical cases say.

12 JUSTICE SCALIA: That's what the rule of  
13 lenity means.

14 MR. FISHER: Yes. With all due respect. If  
15 you look at the examples in Blackstone, that the green  
16 brief cites, if you look at this Court's earliest  
17 cases, Chief Justice Marshall wrote for the Court in  
18 Wiltberger that even though it's extremely improbable  
19 that Congress wanted the result that the defendant  
20 presses, the Court is nevertheless going to insist on  
21 it, because it is not unambiguously clear this was  
22 Congress's intent.

23 And so, it's easy to forget given the modern  
24 proliferation of Federal criminal statutes how rare  
25 criminal cases used to be in this Court.

1 JUSTICE SCALIA: Do our cases reflect what  
2 you're saying? I thought our cases on the rule of  
3 lenity say that where there is an ambiguity you give the  
4 tie to the defendant.

5 MR. FISHER: Well, I think this is very  
6 important, Justice Scalia, your cases, especially the  
7 historical cases and the modern ones, I think, waffle in  
8 different directions, but there are plenty of cases from  
9 this Court that are much more than a tie-breaker in the  
10 sense of the rule of lenity and say, we require clear  
11 and definite terms, that's the phrase Justice  
12 Frankfurter used to repeat. Justice Holmes said the  
13 statute must be clear. Even up to Granderson, it says  
14 the government's --

15 JUSTICE KENNEDY: But, again, that was in a  
16 context where the question was whether or not the conduct  
17 was criminal at all, not sentencing.

18 MR. FISHER: That's right. But for the  
19 reason --

20 JUSTICE KENNEDY: If you apply clear  
21 statement rule to the sentencing code, I don't think we  
22 are going to be able to get beyond the second sentence.

23 MR. FISHER: Well, I think with due respect  
24 what you're going to do is actually reduce the number of  
25 cases this Court hears, because once you have a clear

1 statement rule, two things are going to happen. The  
2 lower courts are going to find it more -- easier to  
3 resolve these kinds of cases because just like in the  
4 sovereign immunity and Federalism context, it's much  
5 easier to look for a clear statement. And even more  
6 importantly, Congress will know that when it legislates  
7 in the realm of criminal sentencing, that it needs to be  
8 clear, and it will solve this case -- this Court the  
9 problem, perhaps, of having four or five cases on its  
10 docket every term involving circuit splits and how to  
11 apply mandatory minimums in the vast labyrinth of  
12 Federal criminal sentencing provisions.

13           So we think this Court can rest assured, of  
14 course, that if it rules for the Petitioner in this case  
15 and Congress doesn't like the result, that it is well  
16 and able and ready to step in to solve that problem.  
17 The problem is, is that if this Court accepts broad  
18 readings of the government, from the government of  
19 criminal statutes, that the institutional forces that  
20 drive legislation are -- make it much less likely that  
21 Congress can step in to solve that problem in favor of  
22 criminal defendants.

23           So for the reasons we've explained, we think  
24 this Court should go back to the historical  
25 understanding brought forward to the present of the

1 importance of the rule of lenity, and in this case find  
2 that the statute does not clearly and unambiguously  
3 apply to Petitioner.

4                   If there are no further questions, I'll  
5 submit the case.

6                   CHIEF JUSTICE ROBERTS: Thank you,  
7 Mr. Fisher. The case is submitted.

8                   (Whereupon, at 10:40 a.m., the case in the  
9 above-entitled matter was submitted.)

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