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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 on the maximum terms of imprisonment for those offenses. The question presented in this case is whether the relevant maximum term of imprisonment for a prior drug offense who was already a repeat offender is the maximum to which repeat offenders were subject for 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 repeat

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 of 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 ten 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 recidivist
16 enhancement constitutes a stiffened penalty for the
17 underlying offense. Now, if the Court --

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 a 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 R.L.C. I
17 believe it's 18 U.S.C. 5037(c)(1)(B), which provided
18 at 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 could 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 non-recidivist 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 naturally accommodates that possibility.

25 JUSTICE SCALIA: So it would be easy, of

1 course, if recidivism were an element of the crime,
2 wouldn't it?

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

5 JUSTICE SCALIA: If you get a higher
6 sentence for a crime which includes the act plus the
7 recidivism?

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

1 certainly we believe --

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

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

1 applicable maximum sentence has to be submitted to the
2 jury.

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

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

23 JUSTICE GINSBURG: Does it matter what was
24 the sentence actually imposed in the State court? That
25 is, suppose it is a second offense, but the prosecutor

1 chooses not to charge as a second offender and so,
2 although it is in fact the second offense, he is
3 sentenced in the State court as a first offender. Would
4 it count under your reading of the Federal statute that
5 it was a second offense?

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

20 JUSTICE STEVENS: May I ask this question?
21 Supposing there's a dispute between the prosecutor and
22 the defendant as to whether in fact he was a recidivist
23 or not. Is the fact that there was just an argument that
24 he would be a recidivist enough or does the record have
25 to establish that he was a recidivist?

1 MR. SHANMUGAM: Well, if there were such a
2 dispute, certainly we believe, first of all, that ACCA
3 courts would be perfectly competent to resolve those
4 disputes. They are no different in kind from the sorts
5 of legal and factual issues --

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

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

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

1 course were dealing with a quite different concern, the
2 concern of how to define the prior offense, and I would
3 submit that the factual disputes that the Court was
4 concerned about in Shepard are quite different from
5 disputes about the applicability of a recidivism
6 enhancement. Those were disputes about the actual
7 underlying facts of the underlying substantive offense
8 itself. And the Court suggested in the plurality
9 portion of Justice Souter's opinion that resolving those
10 sorts of factual disputes might raise constitutional
11 concerns.

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

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

25 MR. SHANMUGAM: Yes. That issue would

1 arise, of course, only under the definition of "violent
2 felony," which sets a one-year trigger rather than the
3 10-year trigger that is contained in the definition of
4 "serious drug offense."

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

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

1 MR. SHANMUGAM: That's absolutely correct,
2 Justice Souter, and I believe that that was actually the
3 fact pattern that was presented in the ACCA case that
4 this Court heard earlier this term, Logan.

5 JUSTICE SOUTER: Yes.

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

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

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

25 That having been said, we are unaware of any

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

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

25 CHIEF JUSTICE ROBERTS: Surely not,

1 Mr. Shanmugam. You were talking about broad categories
2 earlier. It would seem that the broad category in the
3 situation you posit would be the normal offender rather
4 than the recidivist, and that's the one we ought to look
5 at.

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

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

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

1 maximum --

2 CHIEF JUSTICE ROBERTS: But you don't accept
3 that approach when we're talking about enhancements
4 under State guidelines. You know, if the normal
5 sentence is whatever it is, ten years, and you get an
6 extra 2 years if you're the ringleader, you say no, you
7 don't look at that; you just look at the ten years.

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

1 JUSTICE SCALIA: Mr. Shanmugam, would you
2 explain to me again why -- why you treat the enhancement
3 in a State guideline system differently?

4 MR. SHANMUGAM: It is --

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

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

19 JUSTICE SCALIA: You don't think
20 "ringleader" is a broad tier?

21 MR. SHANMUGAM: Well, in a sentencing
22 guidelines system where being a ringleader may be the
23 basis for an enhancement, as it is in the Federal
24 system, the fact remains that an enhancement under a
25 guidelines system is merely one of many factors that

1 ultimately determines the offender's guideline sentence.
2 A guideline sentence is, of course, an individualized
3 determination made after a court evaluates a panoply of
4 offender- and offense-specific factors.

5 JUSTICE STEVENS: How would you treat an
6 enhancement in Apprendi itself?

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

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

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

20 JUSTICE STEVENS: Apprendi was not a
21 guidelines case.

22 MR. SHANMUGAM: Right. Well, that's
23 correct, and so in Apprendi, of course, I think it was
24 the fact that the defendant had acted with a biased
25 purpose, and that form of structuring of statutes was

1 not unheard of prior to this Court's decision in
2 Apprendi. And essentially what New Jersey did, as I
3 recall, in Apprendi was to say that if you unlawfully
4 possess a firearm your maximum is ten years.

5 JUSTICE STEVENS: No, I understand, but my
6 point is I don't think your proposal just has two
7 categories. There -- it seems to me there could be
8 multiple kinds of enhancements that would fit your
9 general description.

10 MR. SHANMUGAM: And the relevant question,
11 Justice Stevens --

12 JUSTICE STEVENS: It's not just recidivist
13 versus non-recidivist.

14 MR. SHANMUGAM: We certainly don't want to
15 foreclose that possibility, though of course, this case
16 does not present that issue; and, in light of the
17 history and practice of imposing heightened penalties
18 on recidivists, an essentially universal practice as
19 far as we're aware in the drug-trafficking context, we
20 certainly don't believe that the Court has to address
21 that issue.

22 And, in any event, after this Court's
23 decision in Apprendi, it is certainly true that States
24 have made modifications to the structure of their
25 offenses and their sentencing systems such that, with

1 regard to factors other than recidivism, it may very
2 well be that as a prospective matter that issue would
3 not arise very frequently. And --

4 JUSTICE SCALIA: Well, some of them have
5 simply said, we're going to let the jury decide. We're
6 going to let the jury make these determinations that
7 Apprendi says have to be made by the jury. But they're
8 still -- they're still referred to as sentencing
9 factors.

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

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

24 JUSTICE KENNEDY: It seems to me your
25 argument might be slightly better if the statutory term

1 was "authorized," not "prescribed." I don't say
2 "prescribed" could never be used in the sense you mean,
3 but when you have alternates we usually would use the
4 word -- alternate possibilities -- usually you'd use the
5 word "authorize" rather than "prescribe." "Prescribe"
6 indicates one rule.

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

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

18 And, notably, the Ninth Circuit in a case
19 that we cite in our opening brief, *United States v.*
20 *Parry*, construed that phrase in exactly that manner in
21 actually holding that, notwithstanding its rule in this
22 case, the applicable maximum for a defendant sentenced
23 under a mandatory guidelines system cannot be the
24 applicable guidelines maximum; it has to be the maximum
25 for the offense. We believe that the Ninth Circuit

1 erred only insofar as it thought that that maximum is
2 the maximum to which first-time offenders were subject,
3 even for a repeat offender.

4 Mr. Chief Justice, I'd like to reserve the
5 balance of my time.

6 JUSTICE SOUTER: May I ask you one question
7 before you sit down? You mentioned a moment ago what
8 you saw as the anomaly in the counterargument, the
9 anomaly being that someone with the recidivism
10 enhancement could end up with a 10-year sentence when
11 the maximum for the offense is five years. But isn't --
12 isn't the answer to that just as -- as the answer that
13 you gave to Justice Scalia a moment ago, and that is
14 simply that the statute speaks in terms of "offense" so
15 that there is -- there is no anomaly in getting a
16 10-year sentence for something which for this purpose
17 carries a maximum of five?

18 MR. SHANMUGAM: Justice Souter, an enhanced
19 penalty for repeat offenders is every bit as much a
20 penalty for the offense as the lower penalty for
21 first-time offenders.

22 JUSTICE SOUTER: Well, that's the question
23 in the case.

24 MR. SHANMUGAM: Well, and that is a question
25 that this Court has answered in a variety of different

1 contexts dating back almost a hundred years to *Graham v.*
2 *West Virginia*. And we would submit that that principle
3 is certainly equally applicable here, and a penalty for
4 a recidivist, while in some sense holding a recidivist
5 more responsible by virtue of his or her recidivist
6 status, is every bit as much a penalty for the offense.
7 And under our alternative maximums approach that can be
8 the maximum for the underlying offense.

9 I'd like to reserve the balance of my time.
10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Mr. Rothfeld.

12 ORAL ARGUMENT OF CHARLES A. ROTHFELD
13 ON BEHALF OF THE RESPONDENT

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

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

23 Congress enacted ACCA to target particular
24 categories of serious offenses. Whether the defendant
25 is a repeat offender says nothing at all about the

1 seriousness of the offense that he committed and
2 therefore tells us nothing about whether that offense
3 should be treated as an ACCA --

4 JUSTICE ALITO: Suppose a State has two
5 statutes: Possession of drugs, maximum penalty five
6 years; possession of drugs by a convicted felon, maximum
7 -- convicted drug felon, maximum penalty ten years. And
8 a defendant is convicted under the latter provision.
9 What would be the maximum penalty for ACCA purposes?

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

17 JUSTICE ALITO: It could be or it
18 would be?

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

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

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

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

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

23 But I think in figuring what Congress had in
24 mind when it used the term defining "ACCA serious drug
25 offense" as "an offense for which a maximum penalty of

1 ten years is prescribed by law," we have to figure out
2 what is the offense and what is the penalty prescribed
3 by law for that.

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

12 MR. ROTHFELD: It is a familiar example,
13 Your Honor.

14 (Laughter.)

15 MR. ROTHFELD: And -- and it is absolutely
16 right.

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

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

1 JUSTICE BREYER: Because their behavior is
2 worse.

3 MR. ROTHFELD: Well, but I think there is a
4 distinction between whether the offense itself is a more
5 serious offense. I mean, the ACCA statutory language
6 uses the term "serious drug offense." That's part of
7 the definition that's used in the statutory text.

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

13 JUSTICE SCALIA: It's not a more serious
14 offense when she does it the second time; it's just a
15 more culpable offender.

16 MR. ROTHFELD: That is precisely right.

17 JUSTICE SCALIA: The offense is exactly the
18 same.

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

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

23 JUSTICE BREYER: Well, does the word
24 "offense" -- I haven't come across it, but does the word
25 "offense" have some kind of special technical meaning

1 that doesn't just mean the behavior which calls into
2 play all kinds of circumstances?

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

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

19 CHIEF JUSTICE ROBERTS: Isn't it pertinent,
20 Mr. Rothfeld, that in trying to decide whether a maximum
21 term of imprisonment encompasses recidivists, we're
22 dealing with a statute that itself is directed to
23 recidivism. They're asking -- you've had three previous
24 convictions and then you get a particularly harsh
25 sentence. If recidivism is what you're trying to

1 address, it would seem to me in deciding what a maximum
2 term is that it would be natural to assume that they
3 would take recidivism into consideration in that context
4 as well.

5 MR. ROTHFELD: Well, I think not, Your
6 Honor, because ACCA is a particular kind of recidivism
7 statute. There are recidivism statutes common in the
8 States now, with the three strikes regime becoming
9 ubiquitous, in which all that matters is basically the
10 number of offenses that were committed. The States
11 expressly disavow the seriousness of the offenses that
12 constitute the predicates in those kinds of regimes.

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

21 But Congress was quite clear, and the
22 statutory language reflects this expressly, that the
23 predicates have to themselves be serious offenses.
24 Congress was concerned with what people did.

25 CHIEF JUSTICE ROBERTS: Well, but it just

1 seems to me that if you have Congress addressing what
2 they regarded as a very serious problem of recidivism,
3 they would think that that's a problem that should be
4 taken into account in determining what maximum sentences
5 you're subject to under State law.

6 MR. ROTHFELD: Well, they could have done
7 that. They could -- and that would have been the
8 statute the government is discussing, one which ties
9 recidivism into the particular category of the offender
10 and the penalties to which they are subject.

11 But Congress did not do that. Congress
12 focused specifically on the seriousness of each of the
13 individual predicate offenses. And it had in mind what
14 people actually did, whether the kinds of offenses they
15 were committing were serious, destructive types of
16 offenses.

17 JUSTICE GINSBURG: But it did use the
18 language "a maximum term," not "the maximum term," which
19 would support the government's view that the statute
20 contemplates more than one maximum.

21 MR. ROTHFELD: With respect, Your Honor, I
22 would suggest that's one of the government's odder
23 arguments. I think that reading any significance to the
24 use of "the" rather than "a" in this context is quite
25 peculiar. I would think if a judge, for example, is

1 pronouncing sentence, he or she is likely to say "I
2 sentence you to a term of ten years," not "I sentence you
3 to the term of ten years."

4 Certainly the use of "I sentence you to a
5 term of ten years" doesn't suggest some contemplation of
6 multiple alternative regimes of punishment. So I think
7 the government, I give them kudos for creativity there,
8 but I think it's very difficult to read any conscious
9 choice by Congress in the use of the different article.

10 CHIEF JUSTICE ROBERTS: Counsel, you --

11 JUSTICE GINSBURG: What about the
12 defendant's own understanding? In connection with one
13 of these offenses the defendant acknowledged in court,
14 the crime with which I am charged carries a maximum
15 sentence of ten years.

16 MR. ROTHFELD: I think that there are two
17 things to say about that, Your Honor. First of all, I
18 question how seriously anyone took that statement in the
19 sentencing declaration, because what really mattered in
20 Washington State was the binding determinant sentencing
21 guidelines, which set a maximum term of 57 months, which
22 everyone agrees was the highest penalty this defendant
23 could receive. In fact, it's quite clear that, absent
24 aggravating circumstances, which are not present in this
25 case, no one convicted of this defendant's crime could

1 receive a punishment, recidivist or not, of ten years,
2 enough to trigger the ACCA predicate.

3 So, I question again whether or not anyone
4 took that terribly seriously. But I think even if one
5 did, it doesn't answer the question here. There is no
6 question that there was a recidivism provision which, at
7 least in some theoretical sense, made the maximum
8 penalty ten years. There is also a statutory provision
9 which defined the crime. And in that -- in that
10 statutory provision the Washington legislature
11 specifically associated with conviction of that offense
12 a five-year maximum penalty. And I think it sort of --
13 it sort of begs the question to say, as the government
14 does, well, the fact that there is some possibility out
15 there of an enhancement that increases the penalty above
16 ten years, even if that were true, which is not, again
17 because of the sentencing guidelines in this case, that
18 sort of begs the question of what is the relevant
19 offense? Is the relevant offense what we might call
20 the generic categorical offense of distribution of
21 Schedule III, IV, or V drugs. The sentence to which
22 anyone convicted of that crime, anyone who engaged in
23 the elements of that offense and is found guilty in
24 Washington State could have been sentenced to, and that
25 is five years.

1 JUSTICE SCALIA: The government is correct,
2 though, that when a recidivist is sentenced he is being
3 punished for the crime, not for his recidivism. So
4 you -- you can say that the punishment for that defined
5 crime is ten years when, when the person who committed
6 the act is a recidivist, but the act he's being punished
7 for is the same crime.

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

20 So yes, the defendant here committed the
21 offense. He's being punished for having committed this
22 offense. But that doesn't answer the question of what
23 Congress had in mind.

24 JUSTICE BREYER: That's the part I'm not
25 getting. I mean, that's why it doesn't help your

1 client. In general, if you did read the word "offense"
2 as applying just to the act of selling drugs, let's say,
3 then you go on and it says, "for which a maximum term of
4 ten years or more is prescribed," you'd say, well what is
5 the maximum term prescribed for the offense of selling
6 drugs? And the answer would be ten years. Now, how do
7 you get out of that?

8 MR. ROTHFELD: Well --

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

12 MR. ROTHFELD: No, no, absolutely not, Your
13 Honor.

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

17 MR. ROTHFELD: I look at it from the
18 perspective that we think Congress looked at it when it
19 wrote the statutory language here. Congress had in
20 mind -- as I said to Chief Justice Roberts -- Congress
21 had in mind people who engaged in serious offenses.
22 Congress had in mind what people actually did. It was
23 not passing a generic -- I think it's quite clear from
24 the statutory language, it was not passing a generic
25 three strikes statute. It was focusing on the

1 seriousness of what people did and what people actually
2 did, what they were actually convicted of doing.

3 And I think for that purpose, again the sort
4 of what you might call the generic or categorical
5 offense, the offense unrelated to recidivism
6 enhancements, is what's relevant because that is what
7 the person actually did. And once you bring recidivism
8 into the picture, once when the three strikes brings
9 recidivism into the picture, every drug distribution,
10 every drug distribution offense, will become a serious
11 offense within the meaning of ACCA.

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

21 MR. ROTHFELD: Well, there is no question
22 that recidivism is regarded as -- as, you know, a bad
23 thing for a variety of reasons. And that is why
24 recidivism enhancements have been -- are so common. And
25 no one, no one disputes that.

1 The question is when Congress wrote this
2 statutory language and wrote this particular kind of
3 recidivism offense in ACCA, it was focusing on what the
4 defendants actually did. The recidivism enhancement is
5 entirely unrelated to that.

6 CHIEF JUSTICE ROBERTS: Well, we know it was
7 focusing on the particular problem of recidivism.
8 That's what the overarching Federal statute is directed
9 to.

10 MR. ROTHFELD: But --

11 CHIEF JUSTICE ROBERTS: And I would think,
12 following up on Justice Kennedy's question, that you
13 would assume that this Congress thought that recidivists
14 presented particular problems that were different from
15 the one particular offense.

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

1 ACCA is not like that. ACCA specifically
2 targets serious predicate offenses. The -- the
3 statutory text defines two categories of predicate
4 offenses: violent felonies, which -- which are a set of
5 especially dangerous, threatening offenses; and serious
6 drug offenses, using the term "serious" in the text. It
7 is clear from that Congress had in mind people who were
8 engaged in acts that are themselves harmful,
9 destructive, serious acts. Under the government's
10 application of a recidivism approach, virtually anything
11 that someone is convicted of having to do with drug
12 distribution -- handing a single marijuana cigarette to
13 a friend -- that is a drug distribution offense. In
14 most States that is punishable by two years, five years
15 maximum. Under the government's approach that is now,
16 because it could through application of a recidivism
17 policy lead to a 10-year or lifetime --

18 CHIEF JUSTICE ROBERTS: Well, but the flip
19 side of that hypothetical is somebody selling a ton of
20 marijuana. It's the same offense as somebody who's done
21 it and been convicted of it three different times. I
22 mean, I don't think your hypothetical helps advance the
23 argument.

24 MR. ROTHFELD: Well, if -- if the crime in
25 which the individual engaged, selling a ton of

1 marijuana, is going to be punished by ten years, in
2 virtually every jurisdiction -- I would suggest in every
3 jurisdiction -- therefore it's going to be a serious
4 drug offense within the meaning of ACCA and it's going
5 to trigger ACCA as a predicate.

6 JUSTICE STEVENS: Of course, the recidivist
7 doesn't necessarily be a recidivist because he committed
8 the same crime three times. He might have done two very
9 different things under the California three-strike law.
10 Sometimes very minor crimes push the person over to
11 qualify as a recidivist.

12 MR. ROTHFELD: No, that's absolutely --
13 absolutely correct.

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

1 offense --

2 MR. ROTHFELD: Well, I --

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

5 MR. ROTHFELD: Well, I -- I think that
6 that's right and it is reflective of something that --
7 discussing earlier with Justice Breyer. The offense
8 itself is not regarded as a more serious offense when
9 it's committed by a recidivist. It's because the
10 recidivist's character as a repeat offender is what
11 triggers the higher penalty; and in the ACCA context
12 where Congress was focusing on whether or not this
13 person is engaging in particular kinds of crimes,
14 particular kinds of serious crimes, that makes all the
15 difference.

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

24 JUSTICE KENNEDY: Well, I'm not sure the
25 offense is the same. I think the injury to the State is

1 compounded by the repetition.

2 MR. ROTHFELD: Well, I --

3 JUSTICE KENNEDY: It affects the tone of the
4 community, the number of law enforcement officers we
5 have to have, the cost of incarceration,
6 rehabilitation, et cetera.

7 MR. ROTHFELD: Well, I think -- again, I
8 don't disagree with any of that, as to a consequence
9 of a repeat offense. My question is whether Congress,
10 when it used the term "serious offense," whether it
11 thought the offense itself was more serious, as distinct
12 from punishment that might -- that might be imposed upon
13 the offender.

14 JUSTICE KENNEDY: But that's what I'm
15 addressing. It could be more serious when it's the
16 second time.

17 MR. ROTHFELD: Well, I --

18 JUSTICE KENNEDY: The offense in and of
19 itself.

20 MR. ROTHFELD: I think it's -- it's
21 instructive to look at the statute in the LaBonte case
22 which was -- which discussed during Mr. Shanmugam's
23 argument, in which --

24 JUSTICE STEVENS: Then for double jeopardy
25 purposes you must look at the second offense as the

1 offense, not the offender. I mean, the prior conduct is
2 -- is not being punished as a matter of constitutional
3 law.

4 MR. ROTHFELD: No. I -- I think that it's
5 quite clear in the cases that are -- and we agree with
6 the cases that are cited by the government for this
7 proposition -- that when you are sentenced as a recidivist
8 to a higher penalty you are being punished for the most
9 recent offense that you were -- that you were --

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

18 MR. ROTHFELD: Well, I would say that
19 because you are a recidivist the maximum you are facing
20 is 15 years. But I would not say that the offense that
21 you committed is a more serious offense because you are
22 a repeat offender. And-- and the LaBonte statute I think
23 illustrates this very nicely. In the -- in the statute
24 the Court construed in LaBonte it referred to the
25 maximum term of imprisonment for specified categories of

1 defendants; and the Court found that language was
2 crucial because it showed that Congress contemplated
3 that there would be different terms of imprisonment for
4 defendants falling into different categories for the
5 same offense.

6 JUSTICE SOUTER: Mr. Rothfeld, let's assume
7 we get into conference and we are having exactly the
8 same discussion that's been going on for the last 40
9 minutes here. There is one way to read it; there is
10 another way to read it; there are various reasons to
11 read it one way, various ways to read it the other way.
12 What do we do?

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

17 JUSTICE SOUTER: But you don't have to win
18 this argument?

19 MR. ROTHFELD: We do not. I think one way
20 to consider the case is that there in fact are three
21 statutes which bear on the question of penalty. There
22 is the statute that created the crime of conviction,
23 which created the -- the offense of a distribution of
24 -- Schedule of III, IV, or V drugs, and in that statute
25 specifically associated with the offense is the five-year

1 penalty. There is the 10-year, potential 10-year
2 penalty which is focused -- the focus of the
3 government's case. There is the Washington State
4 sentencing guidelines, which were binding, determinate
5 guidelines, every bit as much part of Washington
6 statutory law as the recidivism statute --

7 CHIEF JUSTICE ROBERTS: Counsel, the
8 government of course responds to your rule-of-lenity
9 argument by saying it loses a lot of its force when we
10 are talking about how -- the degree of sentencing rather
11 than whether conduct is subject to a criminal sanction
12 in the first place.

13 MR. ROTHFELD: They do say that, Your Honor,
14 and I think that's simply not so. I mean, the Court has
15 said repeatedly and has applied repeatedly the doctrine
16 that the rule of lenity applies when the only question
17 is the length of the sentence; and indeed the R.L.C.
18 case which the government has been discussing was a case
19 which involved only the question of length of the
20 sentence and --

21 CHIEF JUSTICE ROBERTS: But someone who is,
22 you know, we are trying to decide whether he is subject
23 to 20 years in jail or 30 years in jail, invoking the
24 rule of lenity is a little bit -- it's not the same as
25 somebody who comes in and says I didn't know this was a

1 crime at all, because it's so vaguely written.

2 MR. ROTHFELD: I think the Court has said
3 consistently that one of the elements supporting the
4 rule of lenity is the idea that if someone's liberty is
5 going to be taken away, that Congress should have
6 spoken, to some degree --

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

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

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

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

24 CHIEF JUSTICE ROBERTS: It is -- it is a
25 fundamental verbal embarrassment for your argument that

1 you would say in a particular case that the maximum to
2 which someone is subject is say, five years, and that
3 person is in fact sentenced to 15 years. It's just the
4 -- the words don't fit together under that argument.

5 MR. ROTHFELD: Well, I -- I am not
6 embarrassed by that, Your Honor. Perhaps I -- I'm too
7 resistant to embarrassment. But I --

8 (Laughter.)

9 MR. ROTHFELD: -- I think it's -- it's
10 entirely a question of how you take the congressional
11 meaning of the term "punishment prescribed for the
12 offense."

13 JUSTICE SOUTER: No, but I thought your
14 position was that the -- the defendant is not, this
15 defendant is not subject to a maximum of five years, but
16 gets 10. I thought your position was that the offense
17 within the meaning of the statute should be an offense
18 which carries a maximum of five years, but that this
19 defendant is in fact subject to a maximum of 10.

20 MR. ROTHFELD: I --

21 JUSTICE SOUTER: In other words, you can --
22 throughout your argument you make, I think properly, the
23 offense/offender distinction, and isn't that the answer
24 to the conundrum?

25 MR. ROTHFELD: That -- that is exactly

1 right. We think that what Congress had in mind when it
2 referred to "the punishment prescribed by law for the
3 offense," it was referring to the offense, the offense
4 of conviction; and it never --

5 JUSTICE ALITO: The offense never -- the
6 offense always disregards offender characteristics, or
7 only those offender characteristics that are not
8 elements of the offense?

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

11 JUSTICE ALITO: I'm still not sure what the
12 line is there.

13 MR. ROTHFELD: I -- I think if it is an
14 element of the offense, then you have been convicted of
15 an offense which carried in its weight recidivism, and
16 so I would say yes, in that circumstance that would be
17 a different situation than what we have here.

18 JUSTICE ALITO: It all depends whether it's
19 labeled as an element of the offense by the State
20 legislature?

21 MR. ROTHFELD: Well, I think whether it
22 actually is an element of the offence -- I mean, in this
23 case there is no question; everyone agrees it's not in
24 the offense; the government concedes that it's not an
25 element to the offense.

1 JUSTICE BREYER: So it's bank robbery --
2 bank robbery, force or threat of force guidelines. If
3 you have a gun, eight years. If you brandish it, four
4 more years. If you take, you know, \$10 as opposed to
5 \$50, two years, eight years, six years. The statute, by
6 the way, says a max of 20 years. Now, what's the --
7 what's -- does this fall within it? Doesn't it? Does
8 it depend on whether he brandished it? What does it
9 depend on, in your view?

10 MR. ROTHFELD: Well, I'm glad you bring up
11 the guidelines, Your Honor, because I think that that is
12 an element that we really haven't discussed at some
13 length. The government's test is what is the penalty
14 that the defendant actually faced. I mean that's
15 their --

16 JUSTICE BREYER: Or what he actually faced
17 -- that, I agree with you, that won't work because of
18 the guidelines, if they were mandatory. But what
19 they're saying here is it's right in the statute. You
20 just look at the statute that has the definition of what
21 the offense is.

22 MR. ROTHFELD: Aha, but it's not the
23 definition of the offense. This statute -- the
24 definition of the offense is --

25 JUSTICE BREYER: No, I'm back to the same

1 question then. I mean which one do we pick?

2 MR. ROTHFELD: I -- I guess there are two
3 points here -- the first on the question of the
4 guidelines. To the extent that the government believes
5 in its test, which is what is the sentence that the
6 defendant actually faced, there is no question that the
7 sentence the defendant actually faced here was 57
8 months, well below the 10-year ACCA trigger. And the
9 government does not offer any explanation that I can
10 understand as to why, if their test applies, one takes
11 recidivism enhancements into effect, but does not take
12 guidelines reductions into effect.

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

21 MR. ROTHFELD: Well, the way -- the way we
22 resolve that, Justice Breyer, is what was suggested by
23 Justice Souter's question. What Congress had in mind
24 was the offense without the overlay of a recidivism
25 enhancement, which is not an element of this offense.

1 One looks at the offense, one looks at the commission of
2 the elements, if you commit the elements, what does that
3 subject -- what kind of punishment does that subject you
4 to? If it's less than ten years, ACCA does not apply.
5 If you have to call into the mix enhancements that are
6 unrelated, that are offender-specific and not
7 offense-specific, that falls out of it because that's
8 not what Congress had in mind when it referred to
9 "punishment prescribed by law for the offense."
10 Again, Congress had in mind a limited series of serious
11 offenses. It was looking at what people did, whether
12 they engaged in the kind of serious, harmful,
13 destructive conduct that was sufficiently bad to trigger
14 the mandatory 15-year sentence, and if they did not, the
15 fact that some additional overlay could be used to
16 enhance their sentence is not what Congress was
17 concerned about when it listed ACCA predicates.

18 And, again, I don't want to fall away from
19 the sentencing guidelines point because, as I understood
20 Mr. Shanmugam's explanation to Justice Scalia as to why
21 the guidelines should not apply if enhancement does is
22 because, well, this is an offender-specific -- an
23 offense-specific crime, and Congress at the time that it
24 enacted ACCA had in mind that guidelines in the
25 statutory regime were different.

1 But so far as the -- the offense has been
2 defined by the -- by the statute, the relevant offense
3 here is the five-year penalty associated with that
4 offense. And so, I think that if one is going to go
5 beyond that and say we are going to look for things that
6 are outside of the offense, not in the elements of the
7 offense, to increase the sentence, as the government
8 does with the recidivism statute, there is no reason
9 why, if we are prepared to go outside of the offense
10 elements, that one wouldn't go to the guidelines as
11 well, which have precisely the same effect in the other
12 way. I mean the government ultimately is asking for --
13 a one-way ratchet that if it increases the offense
14 level, that's okay, but if it decreases the punishment
15 for some reason, that doesn't apply. And we just don't
16 see any principled basis for that.

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

21 MR. ROTHFELD: Well, I think, in terms of
22 discussion of the guidelines, they suggest that what
23 matters is whether it is an element of the offense. I
24 thought that's what Mr. Shanmugam's response was. And
25 it is not an element of the offense here. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. ROTHFELD: Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Mr. Shanmugam, you
4 have three minutes remaining.

5 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

6 ON BEHALF OF THE PETITIONER

7 MR. SHANMUGAM: Thank you, Mr. Chief
8 Justice.

9 There are just two points that I'd like to
10 make in rebuttal:

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

1 believe that the fact that the text does not permit
2 Respondent's interpretation is the end of the inquiry.

3 The other point that I would just make is
4 that if this Court were to adopt Respondent's
5 interpretation, it would have pernicious consequences,
6 not only for the ACCA, but likely also for a number of
7 other critically important Federal statutes as well.
8 With regard to the ACCA itself, both the definition of
9 "serious drug offense" and the definition of "violent
10 felony" are framed in terms of the maximum term of
11 imprisonment for the offense, and at least 28 States and
12 the Federal government have drug-trafficking offenses
13 that would qualify as ACCA predicates for repeat
14 offenders under the government's interpretation but not
15 under Respondent's. And with regard to other statutes,
16 similar language appears --

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

20 MR. SHANMUGAM: Well --

21 JUSTICE SCALIA: It's good to put more
22 people in jail? That isn't necessarily what
23 we're after. We're --

24 MR. SHANMUGAM: I mean only to highlight the
25 practical significance of this issue, Justice Scalia,

1 and again, certainly in enacting a statute that itself
2 deals with the problem of recidivism, we believe that
3 Congress would not have wanted to be insensitive to an
4 offender's past recidivism.

5 But with regard to other statutes, I want to
6 note that similar language also appears in the Federal
7 three-strikes law and in the Controlled Substances Act,
8 which along with the ACCA, are among the most important
9 Federal statutes dealing with a problem of recidivism.
10 And similar language also appears in a number of general
11 Federal criminal statutes, including RICO and the very
12 substantive statute at issue here, the
13 felon-in-possession statute. And if this Court were to
14 adopt the Ninth Circuit's interpretation, it could
15 potentially lead to the narrowing of all of those
16 statutes as well. The Ninth Circuit, alone among
17 the circuits, has adopted this view that the relevant
18 maximum for an offense must be the maximum that
19 first-time offenders receive. We believe that that is
20 erroneous and that the judgment of the Ninth Circuit
21 should be reversed.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Shanmugam. The case is submitted.

25 (Whereupon, at 11:07 a.m., the case in the

1 above-entitled matter was submitted.)

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