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

2 (10:02 a.m.)

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

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONER

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

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

19 The 20-year mandatory --

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

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

24 JUSTICE KENNEDY: As to sentences? As to  
25 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 which the 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 specially highlights, the  
11 very essence and the core of the rule of lenity derives  
12 from the 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.

24                   CHIEF JUSTICE ROBERTS: Well, but if the  
25 rule 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: 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's  
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, by imprisonment for more  
22 than a year. What would be the reason for adding this  
23 new requirement as you see it, that it be punishable by  
24 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 is 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 language  
9 was to make it clear that those offenses where the  
10 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 in 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 has 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 outlier  
17    states that the government claims got swept in with the  
18    1994 amendments. We cite statutes from States like  
19    Colorado. Perhaps if I used a concrete example. Take  
20    possession of a single ounce of marijuana. That is one  
21    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 passed a conforming amendment  
4     to exclude a couple of outlier States like Arizona, it  
5     was trying to sweep in for the first time into section  
6     841(b)(1)(A) outlier States like Colorado that treat  
7     low-level drug crimes, low-level drug possession crimes,  
8     as misdemeanors that are punishable by more than a year.

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

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

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

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

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

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

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

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

25           JUSTICE SCALIA: You say there are other

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

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

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

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

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

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

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

23                   MR. FISHER: Well --

24                   CHIEF JUSTICE ROBERTS: I don't understand  
25   the point.

1           MR. FISHER: Well, there might be, you know,  
2 a very rigid plain-text argument that might be made.  
3 The point is that Congress used -- defined the term  
4 "debtor's principal residence" without using the term  
5 "debtor" again and defined it somewhere else. My --

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

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

18          JUSTICE SCALIA: And --

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

25          MR. FISHER: I think that's right. And I

1 think one way to --

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

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

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

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

22 JUSTICE GINSBURG: Right.

23 MR. FISHER: -- but that itself just used  
24 the word "felony," which again referred the reader back  
25 to 802(13). So, again, I think there is an agreement

1 between --

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

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

7 JUSTICE GINSBURG: Yes.

8 MR. FISHER: No, because --

9 JUSTICE SCALIA: Where would we find this?

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

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

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

21 MR. FISHER: Right. But I think, again, the  
22 word "felony" as it appears in -- in that provision --  
23 and I think that the government agrees with us on this  
24 -- would have referred the reader back to 802(13) as of  
25 1988 --

1 JUSTICE GINSBURG: Well, what --

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

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

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

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

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

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

20 JUSTICE GINSBURG: Yes.

21 MR. FISHER: As of 1988?

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

25 MR. FISHER: Well, it says "a felony under



1 the law of a State." So I think the classification  
2 requirement -- I don't think it's inconsistent with it.  
3 It might clarify it.

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

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

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

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

21 JUSTICE BREYER: Is the following true, that  
22 if you are right the reason Congress passed this new  
23 definition was it wanted to take those handful of States  
24 which have felonies as a year, the ones Justice Alito is  
25 talking about, and make clear that they are not covered?

1 MR. FISHER: Yes.

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

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

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

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

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

25 Now, if I ask myself which of those is most

1 plausible, I hate to tell you which answer I get.

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

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

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

24 Now, if Congress had wanted to do what the  
25 government is suggesting, which is have the one-year

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

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

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

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

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

22           MR. FISHER: Yes.

23           JUSTICE GINSBURG: Not a statute.

24           MR. FISHER: Yes, I'm quoting the Sentencing  
25 Guideline, although in the Armed Career Criminal Act you

1 can find another place where Congress dealt with this  
2 problem explicitly.

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

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

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

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

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

18 JUSTICE SCALIA: Not at all? Not possibly.

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

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

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

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

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

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

1 felony drug offense, which seems to have a quite clear  
2 definition of punishable by more than one year.

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

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

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

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

24 And the classification of a felony or not a  
25 felony, as this Court knows, has a time-honored import.

1 Things like the right to vote, the right to bear arms,  
2 the right to various civil rights turn on whether  
3 somebody has been convicted of a felony or a  
4 misdemeanor.

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

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



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

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

9 JUSTICE KENNEDY: But he, himself, was  
10 eligible for the --

11 MR. FISHER: Yes. The crime to which he  
12 pled guilty was punishable by two years. But you should  
13 understand that that kind of hypothetical, punishable-by  
14 problem is one I know this Court dealt with a couple of  
15 months ago in the Rodriguez case. And you should  
16 understand that not just what Congress, under the  
17 government's view, had been looking to sweep in outlier  
18 States like Colorado, but if the government prevails in  
19 the Rodriguez case where the term "punishable by" turns  
20 on recidivist enhancements, then the 1994 amendments,  
21 which were termed "conforming amendments," have an even  
22 far more sweeping effect and bring in lots of State-law  
23 misdemeanors that were never covered by the prior act.

24 If there are no more questions, I will  
25 reserve my time.

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

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

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

16 If there are no more questions --

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

19 ORAL ARGUMENT OF NICOLE SAHARSKY

20 ON BEHALF OF THE RESPONDENT

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

23 Congress answered the question presented in  
24 this case when it adopted an express definition for  
25 "felony drug offense." Under that definition, "felony

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

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

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

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

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

24 MS. SAHARSKY: There is a definition of  
25 "drug" at the beginning of the Controlled Substances Act

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And certainly, if Congress had thought in

1 1994 that both the separate definition of felony and the  
2 definition of felony drug offense mattered, that it  
3 would have placed foreign offenses in the definition of  
4 felony, and it didn't do that here.

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

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

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

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

23 There's an example the Petitioner raised,  
24 which is how violent felonies are treated in the Armed  
25 Career Criminal Act, and I think that that -- that

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

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

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

23 MS. SAHARSKY: The government --

24 JUSTICE KENNEDY: After we said in  
25 Granderson the rule of lenity applies without qualifying



1 or modifying it at all.

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

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

21 And again, we don't see this as a rule of  
22 lenity case. Congress picked a particular definition  
23 and it used those terms -- that term "felony drug  
24 offense" to trigger each of the sentencing enhancement  
25 provisions here. We don't think there is any reason to

1 look beyond it.

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

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

7 Mr. Fisher, you have four minutes.

8 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

9 ON BEHALF OF THE PETITIONER

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

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

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

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

1 sovereign immunity or to realign the Federal State  
2 balance. The term "clear statement" and "clear and  
3 definition statement" that is used in the historical  
4 context --

5 JUSTICE SCALIA: How many statutes exist  
6 like that, my goodness? You want the government to be  
7 held in all statutes to a level that is clear enough to  
8 satisfy the clear statement --

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

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

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

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

25 JUSTICE SCALIA: Do our cases reflect what

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

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

13              JUSTICE KENNEDY: That was in a context  
14  where the question was whether or not the conduct was  
15  criminal at all not since.

16              MR. FISHER: That's right. But for the  
17  reason --

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

21              MR. FISHER: Well, I think with due respect  
22  what you're going to do is actually reduce the number of  
23  cases this court hears, because once you have a clear  
24  statement rule, two things are going to happen. The  
25  lower courts are going to find it more -- easier to

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

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

21               So for the reasons we've explained, we think  
22 this Court should go back to the historical  
23 understanding brought forward to the present of the  
24 importance of the rule of lenity, and in this case find  
25 that the statute does not clearly and unambiguously

1     apply to Petitioner.

2                   If there are no further questions, I'll  
3     submit the case.

4                   CHIEF JUSTICE ROBERTS:   Thank you,  
5     Mr. Fisher.   The case is submitted.

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

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