

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SALMAN KHADE ABUELHAWA, :

4 Petitioner :

5 v. : No. 08-192

6 UNITED STATES. :

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8 Washington, D.C.

9 Wednesday, March 4, 2009

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:07 a.m.

14 APPEARANCES:

15 SRI SRINIVASAN, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 ERIC D. MILLER, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the Respondent.

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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 08-192, Abuelhawa v. United States. Mr. Srinivasan.

ORAL ARGUMENT OF SRI SRINIVASAN
ON BEHALF OF THE PETITIONER

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

A person who purchases a small quantity of drugs for his own personal use commits a misdemeanor, not a felony. The language of section 843(b) does not transform that person into a felon if he uses a phone in obtaining his drugs, rather than doing so strictly face to face.

I would like to begin with the text of the statute before turning to the textual history and the statutory context. The language of section 843(b) covers the use of the phone in committing, in facilitating, or in causing a drug felony. That language presupposes someone who is causing, facilitating, or committing a drug felony, and with respect to such a person, it makes them guilty of an additional offense in the nature of an aggravated offense if they use a phone in their committing,

1 facilitating, or causing a drug felony.

2 JUSTICE GINSBURG: Can you be specific about
3 who those persons would be? You say not a misdemeanor
4 drug user. So who would be caught in the 843(b)?

5 MR. SRINIVASAN: It would depend on which
6 prong you're referring to, Justice Ginsburg. The -- the
7 committing prong refers to persons who are committing
8 the underlying drug felony.

9 JUSTICE GINSBURG: Yes.

10 MR. SRINIVASAN: And the facilitating prong
11 would refer to persons who are aiding or abetting the
12 underlying drug felony.

13 JUSTICE KENNEDY: Well, suppose you had the
14 girlfriend phone and say: My boyfriend needs drugs;
15 meet him at the corner of 3rd and Main. What crime does
16 the girlfriend commit? It seems to me that it's pretty
17 clear that she's under 843(b) facilitating.

18 MR. SRINIVASAN: She -- she may --

19 JUSTICE KENNEDY: It seems to me that she
20 may then have committed a felony, and yet it seems to me
21 that her culpability is certainly no -- no greater, if
22 you're talking about your -- the policy of your statute,
23 than the -- than the man that uses the drugs.

24 MR. SRINIVASAN: Well, I think I'm speaking
25 first and foremost about the terms of the statute,

1 Justice Kennedy. And to the extent she fits within the
2 terms of the statute, it would be because she doesn't
3 benefit from the buyer-seller rule. The buyer-seller
4 rule establishes that buyers of drugs aren't aiders and
5 abettors of the distribution of drugs, and equivalently
6 they wouldn't be treated as facilitators of the
7 distribution of drugs. Now --

8 JUSTICE KENNEDY: Maybe Justice Ginsburg
9 would like some further illustration, but I thought that
10 that was one illustration in answer to her question.

11 JUSTICE GINSBURG: Yes, I would like to --
12 who does this target? The girlfriend is -- is a good
13 law school exam type question, but in the real world who
14 is covered?

15 MR. SRINIVASAN: Well, I think the classic
16 case of somebody under the facilitating prong would be
17 the classic aider and abettor, for example a lookout.
18 If there were a lookout on the scene of a drug
19 transaction, and they used a communication facility to
20 communicate with the distributor to let them know that
21 buyers were arriving, or that law enforcement was in the
22 neighborhood and the person ought to refrain from
23 engaging in the transaction for the time being. That
24 would be the sort of person that comes within 18 U.S.C.
25 2 as an aider or abettor of drug distribution and also

1 would come within 843(b) as a facilitator of drug
2 distribution.

3 JUSTICE ALITO: The buyer-seller rule would
4 prohibit the prosecution of a buyer on the theory that
5 the buyer aided and abetted -- aided and abetted the
6 seller. But I don't see why it applies here. This is
7 not a situation like that. This is a different crime,
8 using a communication facility in facilitating the
9 commission of a felony.

10 MR. SRINIVASAN: Well, it deals with use of
11 a communication facility, but it deals with use of a
12 communication facility only with respect to persons that
13 are committing, facilitating, or causing a drug felony.

14 JUSTICE SCALIA: What is -- what I was going
15 to -- what is the purpose of saying "who uses a
16 communications facility"? Is that purely a
17 jurisdictional hook?

18 MR. SRINIVASAN: No, I don't think it's a
19 jurisdictional hook. The -- there would already be
20 Federal jurisdiction by virtue of the underlying felony,
21 and so what Congress was concerned with in penalizing
22 the use of a phone as in the nature of an aggravated
23 offense is that, I think, Congress thought that phones
24 were being used to make detection of drug trafficking
25 more difficult, and in particular at the level of

1 someone who was at the top of the food chain in -- in
2 the architecture of a drug distribution chain. That
3 person was able to avoid detection because they never
4 came into physical contact with drugs and they didn't
5 come into physical contact with the persons who were
6 engaging in the transaction on the street.

7 CHIEF JUSTICE ROBERTS: You keep talking
8 about phones, and you began by saying this covers
9 phones, but this was -- language was added in 1970?

10 MR. SRINIVASAN: Right.

11 CHIEF JUSTICE ROBERTS: Well, there weren't
12 cell phones of the kind you have now. I think this was
13 directed at the beepers, right, when those were around
14 then, or -- or land-based phones or something like that.
15 And the technology has so expanded that the reach of the
16 statute has so expanded in a way that brings in a lot
17 more casual users than was the case before.

18 And I just don't know how that issue of
19 statutory interpretation is supposed to be resolved.
20 Assuming I'm right that the technology has dramatically
21 expanded the reach of the statute, even if you think
22 it's covered by its terms, how is that issue addressed?
23 What's the right answer there? Is it because the terms
24 still cover it, that's -- the breadth has expanded, or
25 because this is something new technologically that the

1 statute shouldn't be construed that broadly?

2 MR. SRINIVASAN: No, I don't -- our argument
3 doesn't depend on assuming that cell phone usage was
4 significant in the 1970s. Even in 1970, the statute
5 would exclude from its sweep buyers of drugs.

6 CHIEF JUSTICE ROBERTS: Well, I know, but
7 let's assume I don't agree -- let's assume I agree with
8 that only in the context of the 1970s technology.

9 MR. SRINIVASAN: Uh-huh.

10 CHIEF JUSTICE ROBERTS: What's the answer
11 then?

12 MR. SRINIVASAN: Well, if you agree with it
13 --

14 CHIEF JUSTICE ROBERTS: It reminds me of
15 these old hypotheticals. You know, before there were
16 automobiles, you had to have someone with a lantern walk
17 in front of your carriage, and they don't change the law
18 and it still turns out to be the law when you're driving
19 your car, and it doesn't make any sense.

20 But, I mean, is there a case of ours that
21 says what to do in that case, in such a situation of
22 statutory construction?

23 MR. SRINIVASAN: I'm not aware of a case
24 that speaks directly to that question, Mr. Chief
25 Justice. But our argument doesn't depend on that logic,

1 because even in 1970, certainly land lines were well in
2 use, and in fact the indications are that that's what
3 Congress was principally concerned with in this statute.
4 And even -- and at that time we would make the argument,
5 just as now, a person who used the telephone in buying
6 drugs for personal use wouldn't come within the ambit of
7 the provision because the text of the provision goes to
8 someone who uses a phone in committing, in facilitating,
9 or in causing the commission of a drug felony. And so
10 if you're not someone who's facilitating the commission
11 of a drug felony in the first place, then you can't be
12 charged as using a phone in facilitating a drug felony.

13 And the reason that a buyer for personal
14 use, whether we're talking about 1970 or now, wouldn't
15 be considered a person who is using a phone in
16 facilitating a drug felony is because of the
17 buyer-seller rule. Buyers aren't aiders and abettors of
18 the felony distribution, and by the same token they
19 shouldn't be considered facilitators of felony
20 distribution.

21 JUSTICE SCALIA: Your argument sort of
22 assumes -- more than sort of assumes; it assumes -- that
23 facilitating is the same as aiding and abetting. If
24 they meant aiding and abetting, it's a -- it's a classic
25 criminal law term, they could have said "aiding and

1 abetting." They didn't. They used a different term,
2 "facilitating." Why -- why should I think
3 "facilitating" means "aiding and abetting"?

4 MR. SRINIVASAN: For several reasons, Your
5 Honor. First, their definitional equivalence. Black's
6 Law Dictionary defines "facilitating" as "an act of
7 aiding or helping or making easier," and it in turn
8 defines "aiding and abetting" as "to facilitate the
9 commission of the crime." So they mean the very same
10 thing.

11 And I don't think there's anything
12 talismanic about the particular formulation "aiding and
13 abetting," and in fact the Court established that in its
14 opinion in Gebardi. That statute dealt with the Mann
15 Act, which barred transporting a woman for purposes of
16 engaging in immoral acts or aiding or assisting in that
17 transportation or causing the transportation. So that
18 statute uses a different formulation.

19 CHIEF JUSTICE ROBERTS: Well, but I mean,
20 it's natural to view the woman in that situation more as
21 a victim than as someone facilitating the crime.

22 MR. SRINIVASAN: Well --

23 CHIEF JUSTICE ROBERTS: I'm not sure that
24 would extend to your case.

25 MR. SRINIVASAN: Well, I don't know -- the

1 opinion doesn't stand on the rationale that the woman
2 would be a victim. It stands on the rationale that
3 Congress, when it defined the primary offense, which is
4 transporting --

5 JUSTICE KENNEDY: Well, but that was the
6 same word. That was "transporting" in both instances.
7 Here you have "purchase," one, "facilitating" with a
8 telephone, two. That's different.

9 MR. SRINIVASAN: Well, it doesn't -- it
10 doesn't use the word "purchase," with respect, Justice
11 Kennedy. It uses the words "commit, facilitate, or
12 cause." Those are the three persons who come within
13 section 843(b). And in precisely parallel fashion,
14 under 18 U.S.C. 2, the general aider or abettor
15 provision, that provision applies to persons who commit
16 the underlying offense, who aid or abet the underlying
17 offense, or who cause the underlying offense. And that
18 precisely parallel structure reinforces that
19 "facilitating" in 843(b) serves the same purpose and
20 means the same thing as "aiding or abetting" and the
21 other words that apply in section --

22 JUSTICE KENNEDY: Well, I'll think about it,
23 but I think your -- Gebardi does involve one statute,
24 one act, transportation. This involves two. The
25 underlying felony is the purchase or possession, and the

1 second statute is use of the telephone. So I don't --
2 I'll think about it, but I don't think Gebardi works.

3 MR. SRINIVASAN: I don't think that's a
4 distinction that ultimately makes a difference, Justice
5 Kennedy, for the following reason: This statute does
6 deal both with someone who is involved in the underlying
7 felony and use of the phone on top of that, but it's in
8 the nature of an aggravated offense. It presupposes
9 somebody who is committing, causing, or facilitating the
10 underlying drug offense, and then it makes them guilty
11 of an aggravated offense if they use a phone in the
12 course of doing so. So the first question you'd have to
13 ask is whether the person is committing, facilitating,
14 or causing the drug felony in the first place.

15 And if I could use one hypothetical statute
16 to illustrate that. If this statute, instead of saying
17 "facilitating," dealt by terms with use of a phone in
18 aiding or abetting a drug felony, you would still have
19 use of the phone in addition to the underlying drug
20 felony. But the first question I think one would ask in
21 looking at that provision is whether the person who's
22 accused of violating the law were aiding or abetting a
23 drug felony.

24 JUSTICE SCALIA: What other -- this statute
25 does not just apply to facilitating a drug offense. It

1 applies to any of the felonies covered by subchapter 2
2 of the relevant chapter. I agree, it seems a little
3 strange to have what is a misdemeanor by a buyer
4 converted into a -- into a felony just by use of the
5 phone. What other situations under other felony
6 provisions would arise that create a similar oddity? Do
7 you have any in mind?

8 MR. SRINIVASAN: I don't know that there are
9 other provisions that would create a similar oddity. I
10 think this one is particularly anomalous, the use of a
11 statute to penalize somebody who otherwise would be a
12 misdemeanor, except that they use a phone in the course
13 of their purchase for personal use.

14 The classic situations in which the statute
15 does apply, which aren't anomalous because they make
16 sense given what Congress had in mind, would be the use
17 of a phone to facilitate drug distribution, if someone
18 were a lookout, again, or if someone were a trafficker
19 and they instructed, for example, retail sellers where
20 to go to pick up stock, a stock house of drugs.

21 CHIEF JUSTICE ROBERTS: This really isn't
22 the transformation of a misdemeanor into a felony. It's
23 a separate -- separate activity and an activity that
24 facilitates the commission of a crime. It's much easier
25 to carry out your drug distribution business if people

1 are calling you on their cell phones than if they have
2 to meet you in person or call from a land line.

3 MR. SRINIVASAN: Well, two steps to respond
4 to that question, Mr. Chief Justice. First, in terms of
5 whether it makes it easier, I think one could say the
6 very same thing in an aiding or abetting prosecution.
7 Aiding or abetting means the same thing as facilitating,
8 and so you could make the argument, I think, that buying
9 drugs and engaging in the sorts of actions that
10 naturally accompany the purchasing enterprise make the
11 sale easier, including directing where the sale is going
12 to occur and things like that. But we know already that
13 buyers of drugs aren't considered aiders and abettors of
14 drugs for purposes of liability under 18 U.S.C. 2. And
15 I think by the same token they shouldn't be considered
16 facilitators of drugs for purposes of section 843(b).

17 JUSTICE ALITO: What if --

18 MR. SRINIVASAN: And with respect -- I'm
19 sorry?

20 JUSTICE ALITO: What if the -- the defendant
21 -- what if the defendant who is a buyer of -- of a
22 quantity for personal use does more than simply purchase
23 the drugs? What if information is communicated in the
24 telephone conversation that makes it easier for the
25 transaction to take place or less likely -- less likely

1 that there is -- that the person is going to be
2 apprehended? Would that person fall within the statute?

3 MR. SRINIVASAN: I don't think so, Justice
4 Alito. I probably would have to know more about exactly
5 what they did, but if it is a -- if what they did is a
6 normal incident of purchasing, then I think it would
7 fall within the buyer-seller rule.

8 Otherwise, I think the government, under an
9 18 U.S.C. 2 prosecution for aider and abettor liability,
10 could make precisely the same sorts of arguments. The
11 government could argue, for example, that this person
12 didn't just buy drugs. They instigated the purchase
13 because they made the first phone call. They didn't
14 accept the first phone call. They made the first phone
15 call, and so that takes them outside the buyer-seller
16 rule.

17 But I don't think that argument would work
18 under 18 U.S.C. 2 because making the first phone call is
19 a normal incident of purchasing. And, of course,
20 someone who purchases drugs for personal use is going to
21 want to take measures to make sure that the purchase
22 goes through. Their ultimate objective is to get their
23 hands on the drugs. And so --

24 JUSTICE GINSBURG: This statute doesn't --
25 it doesn't differentiate between buyer and seller in

1 terms of who makes the call. I gather the purchaser for
2 his or her own use would be just as susceptible to this
3 statute if the dealer called and said: I've got a gram
4 of cocaine; I know you're interested in having it.

5 MR. SRINIVASAN: That's -- that's right,
6 Justice Ginsburg. It would apply equally in that
7 situation, and from our perspective that points up even
8 more of the anomaly in applying it to this factual
9 context. And that would equally be the case under 18
10 U.S.C. 2.

11 One could draw distinctions between who
12 makes the initial phone call and other sorts of normal
13 incidents of the purchasing enterprise. But I don't
14 think, Justice Alito, that because someone engages in
15 drug -- in -- in a transaction in a way that makes it
16 particularly likely that the purchase is going to be
17 successful, that that alone would take you outside the
18 buyer-seller rule.

19 JUSTICE ALITO: What would happen in the
20 situation where the person who buys the drug is guilty
21 of -- of a felony? It's an instance of felony
22 possession. Wouldn't the application of your
23 understanding of the buyer-seller rule in that situation
24 lead to the conclusion that even that person could not
25 be convicted under this statute for facilitating the

1 commission of the felony of sale?

2 MR. SRINIVASAN: No, I don't think so,
3 because the buyer-seller rule deals with the
4 circumstance in which the way the person is -- is
5 associated with a felony is they're associated with the
6 distributor's felony. And so what the buyer-seller rule
7 says is that a buyer isn't an aider and abettor of the
8 seller's distribution, and I think by the same token
9 shouldn't be associated with the seller's facilitation.

10 But in your hypothetical, where the buyer
11 himself is committing a felony because his possession
12 because of certain characteristics associated with it
13 make it a felony, the buyer himself would be committing
14 a felony.

15 JUSTICE ALITO: Well, that may -- that may
16 be true, but the buyer there still could not, under your
17 theory, be convicted of facilitating the seller's felony
18 of selling the drugs.

19 MR. SRINIVASAN: Right, couldn't be
20 convicted of facilitating the seller's felony, but would
21 fall within the ambit of section 843(b) in any event
22 because they would have used a phone in connection with
23 their own felony.

24 CHIEF JUSTICE ROBERTS: Your gloss on this
25 statute makes -- gives rise to some difficult questions

1 of proof. I mean, what if it's -- I don't know -- 10
2 pounds of something, and the guy says, well, I was just
3 buying in bulk for personal use, like a Costco drug
4 dealer.

5 (Laughter.)

6 MR. SRINIVASAN: Well, I -- I don't know
7 about that, but -- but I think what I do know is it
8 doesn't create any greater problems of application than
9 already exist under Federal drug laws. Because the
10 Federal drug laws bar both possession for personal use
11 under the civil possession statute, section 844, and
12 possession with intent to distribute, under 841.

13 And so courts and juries and the government
14 already have to make those sorts of decisions, and I
15 don't know that they've been particularly difficult to
16 make. They have to draw a distinction between the sorts
17 of quantities and other aspects of the offense that
18 bring it within the possession with intent to distribute
19 land or whether the possession is of such a small
20 quantity, and there aren't other associated
21 characteristics of the offense that make it possession
22 for purposes of personal use.

23 That distinction is one that's already
24 embedded in the fabric of the drug laws, and we're just
25 applying the same distinction for purposes of this

1 statute. I don't think we're making it any more
2 complicated than it already is.

3 JUSTICE KENNEDY: If the government were to
4 prevail here, I assume that it would then as a result
5 have a much larger, more expansive discretion in
6 charging and plea bargaining and -- and et cetera.
7 Other than the rule of lenity, is there anything in our
8 cases that indicates that we should be cautious about
9 giving the government that authority so that that's an
10 aid in our interpretation, or is that just all within
11 the rule of lenity?

12 MR. SRINIVASAN: Well, it's -- it's
13 definitely within the rule of lenity, and I think that's
14 the principal place that it's found.

15 JUSTICE KENNEDY: Other than --

16 MR. SRINIVASAN: And I don't -- I don't -- I
17 don't know of any background principle that one would
18 bring to bear on that other than the -- the normal tools
19 of statutory construction that I've already talked about
20 in the first place, which is you look at the text, and
21 you look at the statutory history, and you look at the
22 statutory context.

23 JUSTICE KENNEDY: No background principles
24 either way on granting the prosecutors vast discretion
25 in charging --

1 MR. SRINIVASAN: Well, I think as --

2 JUSTICE KENNEDY: -- as it applies to
3 statutory interpretation?

4 MR. SRINIVASAN: Well, I think as a general
5 rule we ought to be circumspect about doing that. My --
6 my understanding is that circumspection is given voice
7 through the rule of lenity. But a background principle
8 of particular applicability here is -- is the statutory
9 history. It -- it is the statutory history. And I'm
10 speaking now in terms of the enacted statutory text; not
11 legislative history, but the history of the enacted
12 statutory text.

13 And what that bears on is not the word
14 "facilitating," which is what the buyer-seller rule
15 particularly pertains to, but the word "felony," which
16 is another word in the text of the statute. And so
17 Congress could have barred the use of a phone in
18 connection with any drug offense, including a drug
19 misdemeanor, but Congress pointedly didn't do so. It
20 barred the use of a phone in connection only with a drug
21 felony. And because it chose to limit the offense to
22 the use of a phone in connection with a drug felony, the
23 effect is to exclude from the purview of the statute use
24 of a phone in connection with a drug misdemeanor. Now,
25 Petitioners --

1 JUSTICE GINSBURG: That was changed in 1970,
2 wasn't it? Wasn't the text "offense" originally, and
3 then Congress changed it to "felony"?

4 MR. SRINIVASAN: That's right, Justice
5 Ginsburg. Before the Controlled Substances Act, the
6 communication facility provision barred the use of a
7 phone in connection with any drug offense. And in 1970
8 in the Controlled Substances Act, Congress narrowed its
9 reach to encompass only use of a phone in connection
10 with a drug felony.

11 So it excluded use of a phone in connection
12 with a drug misdemeanor, and that's significant in two
13 respects. One is, even without reference to the
14 statutory context of the 1970 Controlled Substances Act,
15 it's significant because Congress excluded use of a
16 phone in connection with a drug misdemeanor.

17 Petitioner used a phone in connection with
18 his misdemeanor, simple possession. But under the
19 government's argument, the very same conduct by the very
20 same person would be brought back into the fold of the
21 statute. Even though Congress excluded it, it would be
22 brought back into the fold of the statute by recasting
23 it as facilitating the dealer's felony.

24 And the mode of analysis the Court used in
25 Gebardi and the mode of analysis that underlies the

1 buyer-seller rule to begin with would -- would lead us
2 not to infer that Congress would have intended that
3 result.

4 But in terms of the history and the
5 statutory context which you were alluding to, Justice
6 Ginsburg, it is significant for that reason, as well,
7 because the context in which Congress narrowed the reach
8 of section 843(b) so that it only encompasses
9 facilitation of a felony and not facilitation of a
10 misdemeanor is one in which Congress, in the 1970 Act,
11 sought to extend leniency and afford a chance at
12 rehabilitation to drug users.

13 And that's manifested not in legislative
14 history but in the statutory text itself, because
15 Congress penalized simple possession for personal use as
16 a misdemeanor; whereas, the receipt of drugs previously
17 was a felony, regardless of the purpose of the
18 possession, whether it was for use or for distribution.

19 But Congress did more than that, because in
20 immediately adjacent provisions to the one in which it
21 narrowed simple possession to a misdemeanor, it also
22 enacted a provision which is now found in 18 U.S.C.
23 3607, which allowed a simple possessor who is a
24 first-time offender to avoid any conviction at all if
25 they successfully complete a period of probation.

1 And Congress went further still because it
2 also enacted, in another adjacent provision, further
3 relief for a first-time simple possessor who is under
4 the age of 21. With respect to that person, it allowed
5 the person to obtain a complete expungement of the
6 criminal records associated with the arrest.

7 CHIEF JUSTICE ROBERTS: So you would have
8 lost this case before 1970 --

9 MR. SRINIVASAN: Yes.

10 CHIEF JUSTICE ROBERTS: -- because the
11 incongruity on which you rely --

12 MR. SRINIVASAN: Well, the basis --

13 CHIEF JUSTICE ROBERTS: -- didn't exist
14 then?

15 MR. SRINIVASAN: Yes. Before 1970 it would
16 have been a very difficult climb because -- not only
17 because the communication facility applied to any drug
18 offense, but because simple possession wasn't a
19 misdemeanor. And --

20 CHIEF JUSTICE ROBERTS: Right. So the scope
21 of this language was changed sub silentio?

22 MR. SRINIVASAN: It -- it wasn't sub
23 silentio. It was explicit.

24 CHIEF JUSTICE ROBERTS: No, but this
25 language: "Facilitating," covered purchasers using a

1 telephone in the period before 1970, but not after 1970,
2 because of the changes in some other sections?

3 MR. SRINIVASAN: No, well, it's in part
4 because of the changes in this section. This section
5 changed from "any offense" to "felony," so it's the text
6 of this section itself. And the buyer-seller rule
7 equally applied in -- before 1970. It's just that
8 before 1970 you wouldn't have had to show that the buyer
9 was associated with the seller's felony, because the
10 buyer was associated with his own offense and that was
11 enough, because at that point the buyer's offense was a
12 felony. And then the law, section 843(b), didn't care
13 whether it was a felony because it applied to any drug
14 offense.

15 It's only after 1970 that this distinction
16 becomes important, because after 1970 it's clear that
17 the buyer for personal use doesn't use a phone in
18 committing a drug felony. What he's committing is a
19 drug misdemeanor. So you have to find some way, if
20 you're the government, to make him associated with the
21 drug felony. And way that arises --

22 CHIEF JUSTICE ROBERTS: Well, no. That
23 question goes to whether or not the distribution was a
24 felony.

25 MR. SRINIVASAN: Right, which is the only

1 avenue available after 1970. There was a different
2 avenue available before 1970, because before 1970 a
3 purchaser of drugs would -- if they used a phone in
4 connection with their purchase, would have used a phone
5 in connection with a drug offense. And now the statute
6 is different in two respects: One, it only covers use
7 of a phone in connection with a drug felony; and, two,
8 in another provision, Congress narrowed the simple
9 possession offense from a mis -- from a felony to a
10 misdemeanor.

11 And Congress did so with respect to the
12 historical context in an immediately adjacent provision.
13 It narrowed 843(b) in an immediately adjacent provision
14 to the one in which it provided that the simple
15 possessor could avoid any conviction at all and the one
16 in which it provided that a youthful offender could
17 obtain a complete expungement of its records. And --

18 JUSTICE GINSBURG: You didn't -- I haven't
19 heard you question so far the government's rationale.
20 The reason Congress did this is it's more difficult to
21 detect a drug deal when it's by telephone than if it
22 were an encounter on the street or in an apartment. You
23 have not questioned that?

24 MR. SRINIVASAN: No, we don't question that,
25 Your Honor, but I'd like to make two points with respect

1 to that: First of all, it may be more difficult -- the
2 use of the telephone may be more difficult, and that may
3 be the animating purpose that Congress sought to address
4 through this provision. But that purpose is
5 substantially served even in the context of this case,
6 because --

7 JUSTICE SCALIA: I don't understand what
8 you're saying. The use of a phone may be more
9 difficult?

10 MR. SRINIVASAN: Use of a phone may make
11 detection more difficult, and that may be the animating
12 purpose -- excuse me. That may have been the animating
13 purpose behind the enactment of this provision. But
14 that purpose is substantially served, even if you accept
15 our understanding of the statute on the facts of this
16 case, because the seller comes squarely within the terms
17 of section 843(b). So because the seller comes within
18 the terms of section 843(b), the statute is already
19 operating against the seller's use of a telephone.

20 The question in our case is whether the
21 buyer also comes within the ambit of section 843(b).
22 And because section 843(b) presupposes someone who is
23 committing, facilitating, or committing a drug felony,
24 the buyer doesn't come within the reach of section
25 843(b) because he's not committing, causing, or

1 facilitating a drug felony in the first place. The
2 seller may be, but the buyer is not. The statutory
3 purposes are still served by virtue of penalizing the
4 seller.

5 If the Court has no further questions, I'd
6 like to reserve the balance of my time for rebuttal.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Miller.

9 ORAL ARGUMENT OF ERIC D. MILLER

10 ON BEHALF OF THE RESPONDENT

11 MR. MILLER: Mr. Chief Justice, and may it
12 please the Court:

13 Section 843(b) prohibits the use of a
14 communication facility in causing or facilitating the
15 commission of any act constituting a felony under the
16 Controlled Substances Act. The court of appeals
17 correctly held that the statute is violated when a
18 person uses a communication facility such as a telephone
19 to purchase controlled substances unlawfully. A call to
20 order drugs both causes and facilitates a felony
21 distribution of drugs.

22 There's no basis in the statute for creating
23 an exemption for people who facilitate or cause felony
24 distributions by purchasing drugs for their own personal
25 use.

1 CHIEF JUSTICE ROBERTS: So two people across
2 the park -- and they know there's a drug dealer on the
3 other side, the one waves and the dealer comes over, the
4 other calls on the cell phone and the dealer comes over;
5 the other gets four more years? The phone user gets
6 four more years?

7 MR. MILLER: The phone -- phone user is
8 exposed to four more years. There's no mandatory
9 minimum --

10 CHIEF JUSTICE ROBERTS: Suppose he calls
11 three times. He's exposed to 12 more years, right?

12 MR. MILLER: That's right. Congress -- I
13 mean, those two cases are different and Congress made
14 the judgment.

15 JUSTICE SCALIA: Not just that, he gets a
16 felony on his record. Before that he would have had
17 just a misdemeanor; right?

18 MR. MILLER: That's right.

19 JUSTICE KENNEDY: And does the call -- does
20 the call have to be completed -- I mean, if he gets an
21 answer saying, "Your call is important to us, but we're
22 serving someone else"?

23 (Laughter.)

24 MR. MILLER: If the call -- the statute
25 requires that the communication facility be used. And

1 if the call doesn't actually go through, it would be
2 difficult to see how you would use the --

3 JUSTICE GINSBURG: But if he leaves a
4 message?

5 MR. MILLER: If he leaves the message and
6 the message in some way causes or facilitates a felony
7 drug distribution, then, yes, he has used the
8 communication facility.

9 JUSTICE GINSBURG: In this case we have two
10 separate episodes, each involving one gram of cocaine?

11 MR. MILLER: That's correct.

12 JUSTICE GINSBURG: And there were a total of
13 seven phone calls?

14 MR. MILLER: There were six. The government
15 dismissed one of the counts. It was six counts that
16 went to trial, six phone calls.

17 JUSTICE GINSBURG: So that would be an
18 exposure --

19 MR. MILLER: Of 24 years.

20 JUSTICE GINSBURG: Twenty-four years for the
21 one gram of cocaine on two occasions.

22 Do you agree that it doesn't make any
23 difference who initiates the call? That is, if the
24 seller says -- seller calls the buyer, and says, I
25 understand that you are in the market for one gram of

1 cocaine, I'll sell it to you. Is the buyer similarly
2 subject to this statute?

3 MR. MILLER: Just getting that call by
4 itself wouldn't subject someone to the statute. But if
5 you get the call and then engage in a conversation --

6 JUDGE GINSBURG: Yes.

7 MR. MILLER: -- with the dealer where you
8 are using the telephone to cause --

9 JUSTICE GINSBURG: Yes, we are assuming the
10 purchase is made in either case.

11 MR. MILLER: Yes.

12 JUSTICE GINSBURG: So what you're saying is
13 it doesn't matter who initiates the call?

14 MR. MILLER: That's right. It --

15 JUSTICE SCALIA: Counsel, what do you do --
16 the case that I find pretty close to what we have here
17 is *Rewis v. United States*, which involved a statute that
18 prohibited interstate travel with the intent to, quote,
19 "promote, manage, establish, carry on, or facilitate"
20 certain kinds of illegal activities, one of which would
21 have been gambling.

22 And we said the ordinary meaning of this
23 language suggests that the traveler's purpose must
24 involve more than the desire to patronize the illegal
25 activity. So it wouldn't have been facilitating a

1 gambling operation simply to be engaging in interstate
2 travel for the purpose of playing the tables.

3 MR. MILLER: I think there are a couple
4 answers to that, Your Honor. First, Rewis, as you say,
5 was construing the Travel Act. It didn't focus on the
6 word "facilitate," and it certainly didn't set out a
7 general --

8 JUSTICE SCALIA: Oh, certainly, it focused
9 on the word "facilitate." That was the whole purpose of
10 that passage. It said -- it quoted "promote, manage,
11 establish, carry on, or facilitate," and the ordinary
12 meaning of this language suggests that the traveler's
13 purpose must involve more than the desire to patronize
14 the illegal activity.

15 MR. MILLER: That's right, and -- and as --
16 as indicated by the passage you've just quoted, the
17 focus of the Court there was on the traveler's purpose.
18 The Travel Act requires intent. Section 843(b) is
19 different in that it's satisfied by knowingly or
20 intentionally using a phone.

21 So the Court in Rewis said, quite
22 reasonably, that someone whose only purpose is to be a
23 customer of an unlawful enterprise doesn't have the
24 intent to facilitate -- and significantly, although the
25 Court's quotation of the statute ends at "facilitate,"

1 it's not just to facilitate any unlawful activity; it's
2 to facilitate the promotion, management --

3 JUSTICE SCALIA: Don't you think that the
4 "knowingly" in this statute also requires that you are
5 knowingly facilitating?

6 MR. MILLER: It does require.

7 JUSTICE SCALIA: Okay. So this is the same
8 thing here.

9 MR. MILLER: But it doesn't have to be -- it
10 doesn't have to be that you have the purpose of
11 facilitating the seller. It's sufficient that you know
12 that the seller's --

13 JUSTICE SCALIA: Well, this didn't
14 mention -- this statute didn't mention purpose, either,
15 did it?

16 MR. MILLER: It -- it said "intent." It
17 does not include the word "knowledge," and the Court in
18 the passage you just read construed that to require --

19 JUSTICE SCALIA: An intent --

20 MR. MILLER: -- an inquiry into the
21 traveler's purpose.

22 And it's also significant that --

23 JUSTICE SCALIA: I find it pretty close, I
24 really do.

25 MR. MILLER: Well, one other difference,

1 then, Your Honor, is that the facilitation that has to
2 take place under the Travel Act is facilitation of the
3 promotion, management, establishment, or carrying on of
4 unlawful activity, which is defined not as a discrete
5 crime but as a business enterprise involving gambling.
6 So you have a statute that's focused on sort of
7 management or direction of an ongoing enterprise;
8 whereas, here under 843(b), it's sufficient to
9 facilitate a discrete act.

10 JUSTICE BREYER: Why are you going through
11 all this sort of parsing? I mean, I'm looking at the
12 legislative history as well as the statute in 1970.
13 What is your answer to the last point that they made,
14 that what Congress wanted to do was to make simple
15 possession a misdemeanor? That's why they changed the
16 word, which -- "offense" to "felony." That's why they
17 changed the word "felony" to "misdemeanor."

18 And I can't imagine why else they amended
19 the statute, and just because I was curious, I looked it
20 up, and that's why they amended it, right? So -- so I
21 mean, the legislative history makes that clear.

22 So what you've done is figure out a way --
23 the government's figured out a way to do the opposite of
24 what they want, to take people who simply possess and
25 transform it into a felony. Now, what justification is

1 there in the law for doing that?

2 MR. MILLER: Well, I think there are a
3 couple of answers to that: First is that section 843(b)
4 doesn't apply to people who simply possess. It applies
5 to people who possess by using a phone to facilitate a
6 felony distribution. And Congress -- I mean, the very
7 existence of the statute demonstrates that Congress
8 thought that the use of a phone is a separate element
9 that introduces a distinct evil that Congress wanted to
10 combat. And as to the change in the felony language --

11 JUSTICE BREYER: As to the first, I said
12 "subset." I didn't say you undermined the entire
13 statute. I said you took a subset of people who simply
14 possessed, and that subset you transformed into felons.
15 Now, your response I guess is just what you said.

16 MR. MILLER: Well, yes --

17 JUSTICE BREYER: And what's the second?

18 MR. MILLER: -- and also that the reason for
19 the -- as you know, the predecessor to 843(b), which was
20 section 1403, referred to causing or facilitating any
21 offense. All of the enumerated offenses were felonies.
22 In 1970, they changed the word "offense" to the word
23 "felony." But that -- part of the reason for that --
24 there is no legislative history specifically addressing
25 the reason for that change. But part of the reason we

1 can infer is that the 1970 statute created a whole host
2 of misdemeanors, of misdemeanor regulatory offenses
3 under the Controlled Substances Act. So one good
4 example is section 829, which prohibits distributing a
5 controlled substance without a prescription, and that's
6 an offense -- that's a misdemeanor, and that could
7 easily be caused or facilitated over the phone, if
8 somebody calls a pharmacist.

9 And so that -- where both parties to the
10 transaction are only engaging in a misdemeanor, that's
11 something that 843(b) would not apply to.

12 JUSTICE GINSBURG: But we do know that --
13 that Congress drew a line it hadn't drawn before between
14 the own-purpose users and people who were in the
15 trafficking business, and it expressed sympathy for
16 the -- or leniency, a policy of leniency.

17 But the difference between the
18 classification felony and misdemeanor is huge in terms
19 of consequences for a person's life. So let's take the
20 defendant in this case. If he becomes a felon, rather
21 than a misdemeanant, even if it's his first time and
22 it's only one gram, he loses a lot of rights, doesn't
23 he?

24 MR. MILLER: Yes. Yes, that's right. But I
25 -- and I think -- but one other change that Congress

1 made to 843(b) in 1970 that's significant is that it
2 eliminated the mandatory minimum. There was under the
3 predecessor --

4 JUSTICE GINSBURG: Yes, but I'm speaking
5 about the post consequences.

6 MR. MILLER: Yes. Yes. It --

7 JUSTICE GINSBURG: Like -- let's take a
8 young person. It has an effect on student loans,
9 government loans?

10 MR. MILLER: Yes.

11 JUSTICE GINSBURG: And it may be that in
12 certain States voting rights are removed, and there is
13 on this person's record forever that he is a felon. It
14 just seems odd that Congress would have at one and the
15 same time, in the same statute, say, we want these -- to
16 give these people a chance, and if they are in a
17 rehabilitation program and they make it, they won't even
18 get any charge, not even a misdemeanor charge, and then
19 say, but a whole group of them are going to be treated
20 just like traffickers if they use a telephone.

21 It's hard -- these two would seem to be
22 working at odds with each other. So mustn't the Court
23 then try to reach some accommodation, some harmonization
24 of these two provisions? And it was suggested that we
25 do that by saying "facilitation" -- "causing" in this

1 context -- means the same thing as "aiding and
2 abetting." Then we have the buyer-seller rule for the
3 aider and abettor, and then we have made these two
4 provisions harmonious.

5 MR. MILLER: I think the buyer-seller
6 principle and the limitation on aiding and abetting and
7 accessory liability, as this Court recognized in
8 *Gebardi*, doesn't apply here, because the principle that
9 the Court set out in that case, and it has been
10 recognized in subsequent cases, is that -- is that when
11 Congress criminalizes or punishes one party to a
12 transaction, that inevitably involves a second party.
13 The second party who is left unpunished by the statute
14 doesn't get swept back in under section 2 as an aider
15 and abettor.

16 That principle doesn't apply here because,
17 although the existence of a purchaser or a receiver of
18 drugs is an inevitable incident of a distribution, the
19 existence of a purchaser who uses a phone is not. The
20 whole point of this statute is that the use of a phone
21 is a separate and distinct element that introduces a
22 different evil and that Congress wanted to combat that.

23 The other -- the other reason that aiding
24 and abetting --

25 JUSTICE SCALIA: Except that the use of a

1 phone in this statute is applied to the seller as well
2 as to the buyer. I mean, it seems to me it is parallel:
3 use of a phone to commit the offense by the seller, and
4 you want us to similarly sweep in the facilitating of
5 the offense by the use of the phone by the buyer. It
6 seems to me pretty parallel to what we've done in the
7 buyer-seller rule.

8 MR. MILLER: The -- the statute -- but by
9 its terms makes clear that the person using the phone
10 and the person committing the felony don't have to be
11 the same person, and I think I understood Petitioner to
12 -- to acknowledge that. The statute doesn't say
13 "knowingly or intentionally use a communication facility
14 in causing or facilitating his or her commission of a
15 felony."

16 JUSTICE BREYER: Is there another example in
17 the law, anywhere in the law, where -- and there may be,
18 I'm asking -- which you've come across, where we have an
19 illegal business and there is a customer; and all the
20 customer does is be a customer; and is there an example
21 where just because he's a customer in a statutory
22 provision that normally has a lesser penalty -- all
23 right; imagine those circumstances -- you still can
24 punish him as if he -- as if he ran the business?

25 MR. MILLER: I'm not aware of any, and I

1 don't think --

2 JUSTICE BREYER: I'm not aware, and why
3 should this be the first?

4 MR. MILLER: But this -- this isn't one,
5 because this isn't a case that punishes people just for
6 being a customer. It's a case -- it's a statute that
7 punishes people for being a customer --

8 JUSTICE BREYER: It's the way they're a
9 customer.

10 MR. MILLER: -- and using a phone --

11 JUSTICE BREYER: The way they're a customer
12 is they use the telephone, and I guess one side thinks
13 that's not a big deal, and the other side thinks that,
14 anyway, in terms of what Congress thought, it's a
15 tremendously big deal because Congress was really
16 worried about telephones. Okay, that's possible.

17 So can you get a parallel that's like that?

18 MR. MILLER: There are -- there's a whole
19 host of statutes that punish --

20 JUSTICE BREYER: What one comes to mind?

21 MR. MILLER: I mean, the wire fraud statute
22 punishes conduct that might not be a Federal offense at
23 all, but for the fact that somebody used --

24 JUSTICE BREYER: That's the jurisdictional
25 hook. What I'm looking for is there's a business and a

1 customer, the statute punishes the business worse than
2 the customer. Now, we get the customer as if he were a
3 business participant. That's what I'm looking for,
4 where it's the way he does it -- i.e., whether he uses a
5 telephone or whether he uses a telegram or semaphore
6 signals or -- where the -- where the means of
7 communication here or something like that suddenly
8 transform him?

9 Anything else that comes to mind? I didn't
10 expect there to be, but I just thought maybe you'd think
11 of an analogy, which would be helpful.

12 MR. MILLER: Well, I mean, if -- as we
13 identified on page 25 of our brief, a number of statutes
14 where the use of a communication facility is an element
15 of the offense, and the conduct that was covered by
16 those statutes in many cases might not be a Federal
17 offense at all.

18 JUSTICE KENNEDY: Carry -- carrying a
19 weapon. A lot of statutes punish more severely for
20 carrying weapons.

21 MR. MILLER: Right. And I think, to be
22 clear, this is not -- this is not a statute that
23 punishes people, punishes customers as if they were
24 distributors or that aggravates an underlying felony.
25 This is a separate offense; it has its own penalty; it

1 put the --

2 JUSTICE KENNEDY: But it -- can you tell me,
3 how does it work? The district -- the United States
4 Attorney in one State, one district, has a case like
5 this where there are four different phone calls; and he
6 doesn't like the looks of the defendant, or for some
7 reason he can charge him, and in the neighboring
8 jurisdiction the United States Attorney does not. Are
9 there guidelines? Does the Department of Justice
10 control this in each case? Is there some manual where
11 we could see what the rules are for charging? Is it all
12 at the discretion of the United States Attorney?

13 MR. MILLER: I mean -- I'm not aware of
14 anything in the U.S. Attorney's Manual that specifically
15 addresses this statute, but of course the Court
16 recognized in Batchelder that prosecutors legitimately
17 have discretion when there are different criminal
18 statutes that cover the conduct, and --

19 JUSTICE GINSBURG: What about the -- the
20 statement that in the manual -- maybe this is
21 incorrect -- but that the charging policy of the
22 Department of Justice instructs prosecutors to charge
23 the most serious offense supported by the facts? And if
24 that's true, then the Assistant U.S. Attorney would have
25 no choice. The most serious offense is not misdemeanor

1 of simple possession, but it is the violation of 843(b).

2 MR. MILLER: That's if they bring charges at
3 all, and of course that policy doesn't require
4 prosecutors to -- to bring charges.

5 JUSTICE GINSBURG: Ordinarily --

6 JUSTICE SOUTER: I think we know from this
7 case they're likely to bring charges.

8 MR. MILLER: Well, I mean --

9 JUSTICE GINSBURG: Is that the policy, first
10 of all? That they're supposed to charge the most
11 serious offense supported by the facts?

12 MR. MILLER: Yes, and -- and a --

13 JUSTICE GINSBURG: So that means in every
14 one of these cases, whether the dealer picks up the
15 phone or the buyer picks up the phone for a transaction
16 for one gram of cocaine, the prosecutor has no choice
17 but to indict under 843(b)?

18 MR. MILLER: Well, again, if -- if there is
19 to be an indictment at all. There's no requirement that
20 --

21 JUSTICE GINSBURG: I'm talking about the
22 choice between misdemeanor, simple possession
23 misdemeanor, or 843 -- adding on this 843(b). The
24 prosecutor -- if what I read is correct -- has no
25 discretion, has to, if he makes the charge -- he cannot

1 make a simple misdemeanor charge. He has to charge the
2 felony.

3 MR. MILLER: That's my understanding of the
4 policy, but, you know, this Court has recognized that,
5 you know, that sort of charging decision is a legitimate
6 aspect of the system as long as it's not exercised for
7 unconstitutional reasons.

8 JUSTICE SOUTER: No, but there's -- there's
9 a difference here, and that is, as these cases
10 illustrate, three phone calls for one trifling sale, two
11 for another, this gives a kind of multiplier effect
12 which it's -- it's hard to find a parallel for in the
13 law. We go from a misdemeanor to 12 years, depending on
14 the fact that there were -- there were a couple of cell
15 phone calls.

16 That is -- maybe -- maybe that is exactly
17 what Congress intended, and maybe that's good law
18 enforcement policy, but those are not sort of two
19 intuitively obvious positions.

20 MR. MILLER: I think the -- the text of the
21 statute and the fact that it covers any act constituting
22 a felony does demonstrate that that's what Congress
23 intended as well --

24 JUSTICE SOUTER: Well, what about the
25 question?

1 JUSTICE SCALIA: Let's feel sorry for this
2 -- for the felon who is selling this stuff, too. I
3 mean, the same thing is true of him, isn't it?

4 MR. MILLER: Yes.

5 JUSTICE SCALIA: Every time he makes another
6 phone call he gets socked with another how many years?

7 MR. MILLER: The -- the statutory maximum is
8 four, but again --

9 JUSTICE SCALIA: Yes, so four times four
10 times four every time he makes a phone call.

11 MR. MILLER: Right, and I think that --

12 JUSTICE SCALIA: We should feel sorry for
13 him, too.

14 JUSTICE SOUTER: -- he knows the difference,
15 that -- he knows that he's committing a felony, and the
16 possessor of a gram or less doesn't.

17 MR. MILLER: The possessor who purchases the
18 drugs using his phone knows that he is causing the
19 felony. The reason he calls the drug dealer is because
20 he wants to cause the dealer to send him drugs.

21 JUSTICE BREYER: Well, what about the
22 legislative history? Because I would read it -- and in
23 fact what it seems to me that you're suggesting, when
24 you read the statute, is using a telephone is -- because
25 Justice Kennedy came up with a good example of what I

1 was thinking of. If the buyer sits there with a gun,
2 well, that's different, he shouldn't have the gun, and
3 it's not surprising that he gets a higher sentence. And
4 you're saying by reading the text you've discovered
5 Congress thinks that cell phones are sort of like guns.
6 Okay. I grant you somebody might have thought that.
7 Justice Souter thinks it's not intuitively obvious, but
8 is there any legislative history that suggests that that
9 indeed is what people in Congress thought when they
10 passed this statute? I'll read it if there is.

11 MR. MILLER: Yes, and it --

12 JUSTICE BREYER: And what should I read?
13 Where -- what exactly --

14 MR. MILLER: I mean, beyond -- first of all,
15 the -- the Congress has a traditional interest in
16 keeping the channels of commerce and communication free
17 from --

18 JUSTICE BREYER: Normally, where that is
19 involved, I've learned, it's called what Justice Scalia
20 called it "a jurisdictional hook." They don't think the
21 underlying behavior is worse, but they believe there has
22 to be a basis and should be a basis for Federal
23 prosecution. I started out where he was. I thought
24 this is just a jurisdictional hook, but now you say no,
25 it isn't; it's much worse than that. It's like carrying

1 a gun, not quite as bad as that, but on that -- in that
2 direction. So I'm asking you what would I read in this
3 history to show that what you're claiming is right?

4 MR. MILLER: The legislative history of the
5 1956 Act, which is the -- where the predecessor statute,
6 1403, was enacted, shows that Congress was concerned
7 with the ability of drug traffickers and people engaging
8 in drug transactions to avoid detection by using the
9 phone --

10 JUSTICE BREYER: And that's what -- you've
11 cited that in the brief so I can find it?

12 MR. MILLER: Yes. And the initial proposal
13 in the initial Senate bill would have allowed
14 wiretapping in connection with drug investigations of
15 certain enumerated offenses that covered both purchasers
16 and sellers. That was replaced with the provision that
17 became 1403, which also -- which applied "causing or
18 facilitating" enumerated offenses, and again applied to
19 both buyers and sellers. And that statute was applied
20 to buyers in a number of reported decisions before 1970,
21 and there is nothing in the 1970 legislative history
22 that Congress intended to change that aspect.

23 JUSTICE GINSBURG: How does it work? I
24 mean, I know your overall rationale about the ease of
25 detection -- easier to detect face to face encounter on

1 the streets. But here, I mean, we know that the
2 government tapped the dealer's phone, and that's how the
3 government got the list of the people who bought from
4 the dealer. How common is it that -- that either the
5 buyer or the seller is the subject of a telephone tap?

6 MR. MILLER: I don't -- I don't know the
7 statistics on that, but certainly a wiretap is only
8 possible when demanding standards under Title III are
9 met, and -- whereas, a face-to-face meeting can be
10 observed by anybody who happens to be there.

11 JUSTICE GINSBURG: But what had -- what had
12 to be met in this case in order to put this tap on the
13 dealer's phone?

14 MR. MILLER: Well, among other things, I
15 believe the statute requires some showing that it's not
16 possible to obtain evidence in some other less intrusive
17 way. So in this case there was a wiretap on the
18 dealer's phone, but in a lot of cases there's not going
19 to be that. And certainly Congress, when it enacted the
20 statute, viewed keeping people from using the phones to
21 conceal their drug transactions as one way of minimizing
22 the need for more intrusive measures like wiretapping.

23 JUSTICE GINSBURG: So, you would interpret
24 Congress -- now we're getting away from '56, when simple
25 possession was a felony, to '70, when simple possession

1 becomes a misdemeanor. And you're saying that Congress
2 meant to relegate the simple possessor to misdemeanor
3 status, but only if the encounter was face to face. So
4 you're reading into the -- what Congress did to sharply
5 distinguish between traffickers and users, and say but
6 that was only taking 843(b) into account. That benefit
7 -- that you're not going to be a felon; you're going to
8 be a misdemeanant -- is only for face-to-face
9 transactions.

10 MR. MILLER: Well, it's -- I mean, it
11 doesn't apply when -- when a communication facility is
12 used. It also doesn't apply, I mean, in a number of
13 other contexts, you know, that Petitioner acknowledges
14 that --

15 JUSTICE GINSBURG: But I'm talking about
16 this context, the purchase of one gram of cocaine on one
17 occasion, nothing more.

18 MR. MILLER: As a first offense. I mean,
19 that --

20 JUSTICE GINSBURG: So Congress's design was
21 we treat as a less grave offender the buyer for his own
22 use, but only if he buys in a face-to-face encounter?
23 That's what -- what you would have to read -- you would
24 have to limit the line Congress drew between
25 traffickers, on the one hand, and possessors for their

1 own use, on the other, and say it applies only to drugs
2 purchased in face-to-face encounters.

3 MR. MILLER: Yes, although I wouldn't
4 describe it as an issue of a less grave offense or a
5 more grave offense in the sense that the use of the
6 phone aggravates the offense of possession.

7 JUSTICE GINSBURG: But I mean, practically
8 --

9 MR. MILLER: But use of a phone is a
10 different --

11 JUSTICE GINSBURG: -- the difference between
12 being labeled a misdemeanor and being labeled a felon
13 is an enormous difference.

14 MR. MILLER: That -- that's right. But
15 Congress, again, did recognize that there could be a
16 range of levels of culpability associated with the
17 843(b) offense, which is part of the reason that it
18 eliminated the mandatory minimum when it amended the
19 statute in 1970, suggesting that there could be
20 different kinds of conduct that would satisfy it.

21 JUSTICE SOUTER: Mr. Miller, in answer to
22 one of Justice Breyer's earlier questions, he indicated
23 that the premise of his question was the effect of the
24 twin amendments from offense to felony and from felony
25 to misdemeanor for possession of small quantities. And

1 he said, well, in effect, is -- is that combination of
2 amendments really being rendered nugatory by the view
3 that you take of the statute? And you said not
4 necessarily, and you said there may be some drug
5 transactions in which it is a misdemeanor on both sides,
6 so that the statute wouldn't apply there.

7 Are there any other -- are there many
8 examples of that? I thought not. And are there any
9 other examples of misdemeanor-misdemeanor cases that the
10 -- that the statute would apply to so that -- so that
11 the anomaly wouldn't be quite so obvious?

12 MR. MILLER: Well, I mean, if you're asking
13 other misdemeanor offenses under the Controlled
14 Substances Act --

15 JUSTICE SOUTER: Yes.

16 MR. MILLER: I mean, there's the --

17 JUSTICE SOUTER: In other words, how
18 important is this? It looks to us -- I mean, I think it
19 was the premise of the question and it was -- it was my
20 assumption coming in that your view of the statute
21 largely renders those two amendments, or the combined
22 effect of those two amendments, virtually nugatory.

23 And you said, well, not necessarily because
24 there may be misdemeanor-misdemeanor cases. And I want
25 to know how many of them there are. Is that really a

1 significant area for the application or nonapplication
2 of this statute?

3 MR. MILLER: I -- I don't know how many
4 prosecutions are brought under those statutes. I
5 imagine that, in part because they are misdemeanors, not
6 a lot of prosecutions.

7 JUSTICE SOUTER: How many separate -- how
8 many misdemeanor-misdemeanor combined offenses are there
9 under the -- under the code?

10 MR. MILLER: 842 -- section 842 enumerates I
11 think it is on the order of a dozen or so, and then we
12 cite a couple of them in our brief. So distributing a
13 -- a controlled -- a prescription drug without a
14 prescription would probably be one of the most common
15 that someone would engage in, and --

16 JUSTICE SOUTER: You -- you don't have any
17 figures on the number of actual prosecutions under --
18 under the -- in the misdemeanor-misdemeanor combination
19 cases?

20 MR. MILLER: No. I mean, again, because --
21 because they're misdemeanors and prosecutorial resources
22 are probably concentrated on the more serious felony
23 violations of the Controlled Substances Act, I suspect
24 there aren't a lot of prosecutions.

25 JUSTICE SOUTER: So -- well, then, I guess

1 that leads to my last question, and that is: Isn't it
2 probably true that if we accept your view of the
3 statute, then the effect of those two combined
4 amendments, offense to -- to felony, felony to
5 misdemeanor for small quantities, the -- the combined
6 effect of -- of those two statutes is, in effect,
7 rendered worthless in -- in most cases? In the
8 substantial number of cases to which the -- the
9 communication facility statute would be applied. It --
10 it would render those -- those two amendments, in
11 effect, worthless?

12 MR. MILLER: Well, I think the -- the
13 relevant inquiry is: What -- what did Congress intend
14 in 1970 when it changed the statute?

15 JUSTICE SOUTER: That may be the relevant
16 inquiry, but what about my irrelevant inquiry?

17 MR. MILLER: Well, I --

18 (Laughter.)

19 JUSTICE SOUTER: It's going to -- your --
20 your view of the statute is going to render those two
21 amendments virtually dead letters.

22 MR. MILLER: I mean I think -- I think from
23 the perspective of -- of Congress, that there was no --
24 they wouldn't have anticipated that the amendment would
25 not have any consequence. I mean, the fact that -- that

1 they created this whole set of misdemeanors, the fact
2 that they aren't violated very often --

3 JUSTICE SOUTER: Yes, but as you said -- as
4 you said, they -- you don't have figures on the number
5 of prosecutions. And the number of prosecutions under
6 those misdemeanors, as distinct from the number of
7 applications of the communications statute to
8 conventional buyer-seller transactions, is probably the
9 difference between a very small set and a very large set
10 of cases. And in the very large set of cases, the two
11 amendments are being rendered, in effect, worthless;
12 isn't that true?

13 MR. MILLER: If I -- if I may answer, my
14 understanding is that the number of prosecutions under
15 843(b) is -- is also relatively small, but I don't have
16 precise figures on -- on the comparative numbers.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 MR. MILLER: Thank you.

19 CHIEF JUSTICE ROBERTS: Four minutes, Mr.
20 Srinivasan.

21 REBUTTAL ARGUMENT OF SRI SRINIVASAN

22 ON BEHALF OF THE PETITIONER

23 MR. SRINIVASAN: Thank you, Mr. Chief
24 Justice.

25 The only point I would make in closing,

1 unless the Court has further questions for us, is that
2 we think the statutory text, the statutory history, and
3 the context all weigh in favor of our reading. But even
4 if there is any ambiguity on the matter, principles of
5 lenity would squarely apply in foreclosing an
6 interpretation that converts someone who is a
7 misdemeanor into someone who is exposed to multiple
8 felony counts carrying substantial criminal consequences
9 --

10 JUSTICE STEVENS: May I ask this question as
11 just a matter of history? Is it perfectly clear? I
12 think you said that the -- the presence of the use of
13 the telephone was not just a jurisdictional hook,
14 because back in 1970 the Federal Government really
15 wasn't in the criminal law business the way it has
16 become in the last 30 or 40 years.

17 At that time, there was a lot of concern --
18 the Travel Act and other statutes -- about exactly what
19 the Federal justification for -- justification for
20 Federal participation existed. And I -- I always had
21 the impression that that was really what was behind the
22 telephone aspect of this statute.

23 MR. SRINIVASAN: I don't think so, Justice
24 Stevens, because as of 1970 there were already
25 underlying drug laws that barred distribution, that

1 barred receipt of drugs, and that barred most of the
2 activities that are now prohibited under the drug laws.
3 And the telephone law presupposes that one of those
4 underlying acts is already going on.

5 And so to the extent that there was
6 jurisdiction over those underlying acts, which
7 presumably there was since the statutes are on the
8 books, the Telephone Act wasn't necessary to create
9 jurisdiction.

10 JUSTICE ALITO: Could I ask you this
11 question? I -- I understand your argument regarding
12 statutory history and the harsh consequences of this.
13 But as far as the buyer-seller rule -- Gebardi and Rewis
14 are concerned, what if the statute said -- made it a
15 crime for -- for a person to use a machine gun in
16 facilitating the commission of a felony? Would you say
17 -- you would have to say that the buyer-seller rule and
18 those authorities would mean that that person could not
19 be prosecuted if they were using the machine gun to
20 facilitate a -- a purchase for personal use; would you
21 not?

22 MR. SRINIVASAN: Well, I think the -- the
23 use of the machine gun wouldn't come within the
24 buyer-seller rule because what the buyer-seller rule
25 deals with is a substantive prohibition on distribution.

1 And the -- the presumption is that when Congress
2 prohibits distribution, it knows that there is also a
3 receiver of the banned substance. And by virtue of
4 excluding that receiver from the distribution
5 prohibition, it wouldn't have wanted to bring that
6 receiver back within the fold of the statute.

7 JUSTICE ALITO: Right, but --

8 MR. SRINIVASAN: That wouldn't apply --

9 JUSTICE ALITO: I'm sorry. Go ahead.

10 MR. SRINIVASAN: I was just going to say I
11 don't think that would apply with somebody who is using
12 a machine gun because the person who is using a machine
13 gun isn't necessarily part of the distribution offense
14 to begin with. And so the buyer-seller principle would
15 apply with respect to the underlying purchase of drugs
16 if that were at issue. But if you tack on use of a
17 machine gun, I don't think the buyer-seller principle
18 would speak directly to that.

19 JUSTICE ALITO: Well, I don't -- I don't see
20 the difference between use of a phone to facilitate --
21 use of a phone in facilitating, use of -- of a firearm
22 in facilitating --

23 MR. SRINIVASAN: Oh --

24 JUSTICE ALITO: -- unless you can say that
25 the -- the use of a communication facility in effecting

1 the purchase is such a -- a virtually indispensable
2 element of the purchase that it -- it -- it's swept up
3 within it.

4 MR. SRINIVASAN: Oh, no, I'm sorry, Justice
5 Alito. If the hypothetical statute barred use of a
6 phone in facilitating a drug felony, if it was precisely
7 parallel to this one, then we'd make the same argument.
8 But it's not because the use of a machine gun falls
9 within the buyer-seller principle. It's because the
10 underlying act of purchasing drugs falls within the
11 buyer-seller principle. And if the prohibition is on
12 use of a machine gun in some underlying act, then you
13 have to look at the underlying act. And the underlying
14 act is governed by the buyer-seller principle, and
15 buyers fall outside of it. And so the use of a machine
16 gun by someone who is already outside of the act
17 wouldn't bring the buyer back into the fold of the
18 statute.

19 JUSTICE ALITO: So the answer is that this
20 -- it would be the same.

21 MR. SRINIVASAN: It would be the same --

22 JUSTICE ALITO: The buyer-seller rule would
23 apply in your view exactly the same way.

24 MR. SRINIVASAN: If the -- if the statute --
25 if I understand your hypothetical correctly, if the

1 statute were use of a phone in facilitating a drug
2 felony, then the --

3 JUSTICE GINSBURG: But it could be a -- a
4 separate crime, the use of a machine gun in facilitating
5 -- in facilitating a crime, any crime. That could be --

6 MR. SRINIVASAN: Sure. If that were the
7 case, then it would be different. My -- if I could just
8 finish for a minute, Mr. Chief Justice.

9 My -- my only point is that if the theory of
10 prosecution were that a person comes within the fold of
11 the statute because they're buying drugs and that buying
12 of drugs facilitates the sale of drugs and, therefore,
13 they are someone who uses a machine gun in facilitating
14 the sale of drugs, well, then the buyer-seller rule
15 would kick in. Because the initial predicate of that
16 theory, which is that the person is facilitating the
17 sale by buying, wouldn't work. They would fall outside
18 of the statute at that stage.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 11:08 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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