

No. 08-192

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IN THE  
**Supreme Court of the United States**

SALMAN KHADE ABUELHAWA,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit**

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**BRIEF FOR PETITIONER**

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**QUESTION PRESENTED**

Whether the use of a telephone to buy drugs for personal use “facilitates” the commission of a drug “felony,” in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller’s distribution of the drugs to him (a felony).

**PARTIES TO THE PROCEEDING**

Petitioner is Salman Khade Abuelhawa, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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**BRIEF FOR PETITIONER****OPINION BELOW**

The opinion of the Fourth Circuit is reported at 523 F.3d 415 and reprinted at Pet. App. 1a-18a. The order denying a petition for rehearing en banc is unreported and reprinted at Pet. App. 37a.

**JURISDICTION**

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291. The judgment of the court of appeals was entered on April 25, 2008. Pet. App. 1a. A petition for rehearing en banc was denied on May 23, 2008. Pet. App. 37a. The petition for a writ of certiorari was filed on August 13, 2008 and granted on November 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**STATUTES INVOLVED**

Relevant statutes and Acts of Congress are reproduced in appendices to this brief. App., *infra*, 1a-11a.

**STATEMENT OF THE CASE****A. Statutory Background**

The Narcotic Control Act of 1956 made it a felony, punishable by two to five years of imprisonment, to “use[] any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an *offense*” under various provisions of the federal drug laws. Pub. L. No. 84-728, § 201, 70 Stat. 567, 573 (1956) (codified at former 18 U.S.C. § 1403 (repealed)) (emphasis added). At the time, all of the predicate “offense[s]” covered by that commu-

nication facility provision, including the purchase of drugs for personal use, were felonies. For example, the general narcotics distribution offense imposed felony criminal penalties on any person who “receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug,” knowing that it was imported. *Id.* § 105, 70 Stat. at 570 (codified at former 21 U.S.C. § 174(c) (repealed)). The government could use that offense as the predicate offense under the communication facility provision to charge a drug user with using a phone to purchase a small quantity of drugs for personal use. *See United States v. Butler*, 204 F. Supp. 339, 340-41, 344 (S.D.N.Y. 1962) (defendant charged under former § 1403 with using a telephone in attempting to buy a “half ounce of stuff”).

Fourteen years later, in the Controlled Substances Act of 1970 (CSA), Congress comprehensively revised the federal drug laws. For the first time, Congress drew a sharp distinction between drug trafficking and drug use, carving out a new offense for the “simple possession” of drugs for personal use and making that offense a misdemeanor, not a felony. Pub. L. No. 91-513, Tit. II, Pt. D, § 404(a), 84 Stat. 1236, 1264 (1970) (codified as amended at 21 U.S.C. § 844(a)). In addition, Congress created special probation and dismissal procedures for the new offense of misdemeanor simple possession, allowing first-time offenders to avoid the entry of a conviction altogether by satisfying a term of probation of up to one year. *Id.* § 404(b), 84 Stat. at 1264 (codified as amended at 18 U.S.C. § 3607(a)).

In an immediately adjacent provision of the CSA, Congress simultaneously amended the communication facility statute to restrict its reach. Congress

confined the provision's scope to the facilitation or commission only of a drug "felony," rather than of any drug "offense." The revised communication facility provision, which remains in effect today, makes it "unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a *felony*" under various federal drug laws. CSA § 403(b), 84 Stat. at 1263 (codified at 21 U.S.C. § 843(b)) (emphasis added). Congress also reduced the penalty for the communication facility offense to a sentence of "not more than 4 years" of imprisonment. *Id.* § 403(c), 84 Stat. at 1263-64 (now codified at 21 U.S.C. § 843(d)).

## **B. Factual and Procedural Background**

1. In 2000, the Federal Bureau of Investigation (FBI) began investigating whether Mohammed Said was distributing cocaine in the Skyline area of Virginia, near Washington, D.C. In June 2003, as part of that investigation, the FBI obtained authorization to place a wiretap on Said's cellular phone. Pet. App. 2a-3a; *see* 18 U.S.C. § 2518.

On July 5 and 12, 2003, the wiretap recorded a series of six cellular phone calls between Said and petitioner Salman Khade Abuelhawa. Speaking in Arabic and using code words, petitioner arranged to make two purchases of a small amount of cocaine. Pet. App. 3a-6a & n.2. Both the July 5 and July 12 calls arranged for the purchase of the "100 type," which a government expert witness testified was a reference to a single gram of cocaine, with a street value of \$80-\$120. *Id.* at 4a-5a.

On October 17, 2003, petitioner was arrested. After being advised of his *Miranda* rights, he agreed to

speaking with FBI agents. Petitioner admitted that he was a drug user, and that he had purchased cocaine from Said in the past, usually in “one-half gram amounts.” Pet. App. 6a. Petitioner explained that he normally received the cocaine from Said just outside the Skyline Grill in Falls Church, Virginia. Petitioner, however, made no statements indicating that he had purchased cocaine on July 5 or 12, 2003, and the government recovered no drugs and admitted no drugs into evidence. *Id.* at 6a, 14a.

On January 25, 2007, a federal grand jury charged petitioner with seven counts of using a telephone in committing, causing, and facilitating a drug felony, in violation of 21 U.S.C. § 843(b). Pet. App. 6a-7a. Counts 2-4 concerned the calls made on July 5, 2003, and Counts 5-7 concerned the calls made on July 12, 2003.<sup>1</sup> *Id.* at 7a. Because “[e]ach separate use of a communication facility” constitutes “a separate offense,” 21 U.S.C. § 843(b), a district court may impose separate and consecutive sentences of up to four years of imprisonment for each phone call. Petitioner thus faced a sentence of up to 24 years of imprisonment for using his phone to purchase two grams of cocaine for personal use.

The case proceeded to trial, where the government made no claim—and introduced no evidence—that petitioner was a drug dealer or anything more than a user. The government therefore did not dispute that petitioner’s purchase of cocaine was solely for his own personal use, or that his possession of the cocaine constituted only the misdemeanor of

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<sup>1</sup> Count 1, which concerned a call made on June 29, 2003, was dismissed before trial. Pet. App. 7a.

simple possession, 21 U.S.C. § 844(a). The government nonetheless took the position that petitioner had facilitated a drug “felony” for purposes of the communication facility provision, 21 U.S.C. § 843(b), asserting that petitioner’s use of a phone to obtain drugs for his own personal use had also facilitated *Said*’s felonious distribution of the drugs to petitioner. Pet. App. 26a-27a; *see* 21 U.S.C. § 841(a)(1).

At the close of the government’s case, petitioner moved for a judgment of acquittal on the ground that, by purchasing drugs for personal use, he had facilitated only the misdemeanor offense of simple possession. Pet. App. 20a-25a; *see* 21 U.S.C. § 844(a). The district court denied the motion. It agreed with the government that, although petitioner had purchased the drugs for personal use, his cellular phone calls had facilitated *Said*’s felony offense of cocaine distribution. The court considered Section 843(b) to “apply to a situation like this, because but for the phone conversation, this particular distribution would not have occurred. So it facilitated [the distribution].” Pet. App. 21a.

Defense counsel objected that, because “everybody’s using cell phones,” the court’s interpretation of Section 843(b) would “feloniz[e] a gigantic group of people” and allow “the U.S. Attorney’s Office [to] now come in and say, hey, you’re going to be guilty of a felony, you know, Simple User, unless you roll.” Pet. App. 24a. The court acknowledged that “it may not make sense to ratchet up what would probably be a simple possession case to a felony,” *id.* at 21a, and that, in this case “a misdemeanor might have been a more appropriate charge,” *id.* at 24a. But, noting that the government “for whatever reasons chose to proceed this way,” the court explained that it

“doesn’t get involved” with “charging decisions,” and held that Section 843(b) is applicable in the circumstances. *Id.*

The jury convicted petitioner on all counts, and petitioner renewed his motion for a judgment of acquittal following the verdict. The district court again denied the motion, but acknowledged that petitioner has “a legitimate legal argument which down the road [he] may be successful with that the conduct involved in this case does not amount to a violation of [Section] 843.” Pet. App. 35a. The court sentenced petitioner to 24 months of probation and ordered him to pay a \$2,000 fine. *Id.* at 7a-8a.<sup>2</sup>

2. The court of appeals affirmed. Pet. App. 1a-18a. The court acknowledged that petitioner had obtained drugs solely “for his personal use.” *Id.* at 9a. But it rejected petitioner’s contention that the use of a communication facility to purchase drugs for personal use falls outside the scope of Section 843(b). *Id.* at 8a-13a. While the jury had been permitted to find petitioner guilty of either “facilitating” or “causing” a “felony” under Section 843(b), *see* Pet. App. 26a-27a, 30a, the court of appeals sustained the convictions “by focusing only on whether [petitioner] facilitated the commission of a felony.” *Id.* at 9a.

The court of appeals construed the term “facilitate” to mean, “to make easier or less difficult, or to assist or aid.” Pet. App. 11a (quoting *United States*

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<sup>2</sup> Over the government’s objection, the district court merged petitioners’ counts of conviction such that petitioner ultimately was convicted of one count of violating Section 843(b) in connection with the July 5, 2003, cellular phone calls, and another count in connection with the July 12, 2003, calls. *See* Pet. App. 8a n.4, 34a-35a.

*v. Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988) (internal quotation marks omitted)). It also noted that, although Section 843(b) requires the use of a communication device to facilitate a drug felony, the “statute does not specify whose felony must be at issue, just that ‘a’ felony must be facilitated.” *Id.* In this case, the court reasoned, petitioner’s “use of his cell phone undoubtedly made *Said’s* cocaine distribution easier; in fact, ‘it made the sale possible.’” *Id.* (quoting *United States v. Binkley*, 903 F.2d 1130, 1136 (7th Cir. 1990)).

The court of appeals rejected petitioner’s contention that Congress could not have intended to transform his possession of drugs for personal use from a misdemeanor into a felony simply because he had used a phone in making his purchase, rather than conducting the entire transaction face-to-face. Pet. App. 12a. In the court’s view, “Congress may reasonably have desired to increase criminal penalties for those who use [communication facilities] to evade detection by law enforcement.” *Id.*

The court acknowledged “that [its] sister circuits are divided on the issue,” with some courts of appeals holding that, “when a communication facility is used to facilitate a drug sale for personal use, § 843(b) is not violated.” Pet. App. 9a-10a (citing *United States v. Baggett*, 890 F.2d 1095, 1098 (10th Cir. 1989); *United States v. Martin*, 599 F.2d 880, 888-89 (9th Cir. 1979), *overruled on other grounds by United States v. De Bright*, 730 F.2d 1255 (9th Cir. 1984)). Those courts have concluded that “a mere customer’s contribution to the business he patronizes does not constitute the facilitation envisioned by Congress.” *Id.* at 10a (quoting *Martin*, 599 F.2d at 889). But the court of appeals disagreed with those

courts, holding instead that “persons like [petitioner], who facilitate distribution of a controlled substance to themselves for personal use by using a communication facility, can be prosecuted for violating § 843(b).” *Id.* at 13a.

### SUMMARY OF ARGUMENT

Section 843(b) makes it a felony to use a phone or other communication device in “facilitating” the commission of a drug “felony.” When petitioner used his cellular phone to buy a small quantity of drugs for his own use, he may have “facilitated” his commission of misdemeanor simple possession. The court of appeals concluded that petitioner also “facilitated” his seller’s “felony” distribution of the drugs to him, reasoning that petitioner had made the distribution easier. But that is merely the inevitable incident of facilitating his own misdemeanor. Construing the statutory terms in their overall context, rather than reading them mechanically in isolation, makes evident that the use of a phone to buy drugs for personal use does not “facilitate” the commission of a drug “felony” for purposes of Section 843(b).

As an initial matter, applying Section 843(b) to a person who buys a small quantity of drugs strictly for his own use would render the provision fundamentally inconsistent with the broader statutory treatment of drug users. Congress prescribed the imposition of stiff penalties against drug traffickers, but prescribed rehabilitation—rather than severe punishment—for mere drug users. Congress downgraded the simple possession of drugs for personal use from a felony to a misdemeanor, and enacted associated provisions allowing drug users to avoid conviction altogether by satisfying probationary condi-

tions. Applying Section 843(b) to the purchase of drugs for personal use would transform misdemeanant drug users into federal felons and subject them to severe punishment whenever, as is commonplace, they happen to exchange a phone call (or e-mail or text message) in obtaining drugs rather than conduct the transaction entirely face-to-face. That result cannot be squared with Congress's treatment of drug users elsewhere in the statute.

The statutory history of Section 843(b) confirms its inapplicability when a drug user makes (or receives) a phone call in obtaining a small quantity of drugs strictly for his own personal use. At the same time Congress downgraded possession for personal use to a misdemeanor, it simultaneously—in an immediately adjacent provision—narrowed the communication facility statute so that it no longer reached facilitation of a drug misdemeanor. Those mutually reinforcing changes fortify Congress's intention to exclude the newly created misdemeanant class of simple possessors from Section 843(b)'s reach. Applying Section 843(b) to the use of a phone to buy drugs for personal use, by contrast, would render Congress's narrowing of the provision of no practical effect in cases involving the newly created class of simple possessors.

The court of appeals' reading of Section 843(b) fails to square not only with statutory treatment of drug users and the statutory history of the provision, but also with an established background principle on aider-or-abettor liability directly applicable to Section 843(b). It has long been settled that a person who buys drugs does not thereby aid or abet his seller's unlawful distribution. Because the term "aid or abet" shares the same meaning as the term "facili-

tate,” it follows that a person who buys drugs does not thereby “facilitate” his seller’s “felony” distribution under Section 843(b). Of particular salience, even if a buyer of drugs could be viewed to “aid” his seller’s distribution under a mechanical reading of the term “aid” in isolation, the buyer does not “aid” his seller’s distribution for purposes of “aider or abettor” liability. Likewise, even if the buyer could be viewed to “facilitate” his seller’s distribution under a mechanical reading of the term “facilitate” in isolation, a buyer does not “facilitate” his seller’s “felony” distribution for purposes of Section 843(b).

The court of appeals speculated that Congress might have desired to subject drug users to felony prosecution whenever they use a phone to buy their drugs because of a concern that, by using a phone, drug users could more easily avoid detection. But if Congress in fact were concerned that drug users would avoid detection by using a phone, Congress would not have narrowed Section 843(b)’s reach to exclude the use of a phone to facilitate drug misdemeanors. There is no basis for supposing that Congress made the fundamental policy choice to treat drug users as misdemeanants and provide that they be rehabilitated rather than punished, but nonetheless intended to revert to severe punishment of those users who happen to make a phone call in obtaining their drugs.

There also is no merit to the government’s contentions that excluding purchases for personal use would render Section 843(b) of no practical effect or difficult to administer. The government frequently applies Section 843(b) against drug traffickers in circumstances having nothing to do with the prosecution theory in this case. Section 843(b) serves impor-

tant functions in those situations, including allowing a separate felony charge for each phone call related to a single predicate felony, and giving the government a highly useful tool in plea bargaining. With respect to the provision's administrability, the government contends that it would be difficult to distinguish between possession for personal use and possession for distribution; but the government routinely proves that drugs are possessed for purposes of distribution in directly related contexts.

Finally, the general statutory treatment of drug users, the statutory history of Section 843(b) itself, and the settled background rule concerning aiders-or-abettors, together establish the provision's inapplicability in the circumstances of this case. But insofar as there remains any ambiguity concerning Congress's intentions, the rule of lenity dictates interpreting Section 843(b) to fail to encompass the use of a phone to buy drugs for personal use.

## ARGUMENT

### **A PERSON WHO USES A PHONE TO BUY DRUGS FOR PERSONAL USE DOES NOT "FACILITATE" A DRUG "FELONY" WITHIN THE MEANING OF SECTION 843(b)**

Section 843(b) of Title 21 makes it unlawful for a person to use a phone or other communication device in "facilitating" a drug "felony." A person who makes a phone call to obtain a small quantity of drugs for his own use may "facilitate" the misdemeanor of simple possession for personal use. *See* 21 U.S.C. § 844(a). The court of appeals held that the person not only "facilitates" his own misdemeanor possession, but also "facilitates" his seller's "felony" distribution

of the drugs to him. The court reasoned that the ordinary meaning of “facilitate” is “to make easier,” and that a person who makes a phone call to purchase drugs for personal use “makes easier” his seller’s “felony” distribution. Pet. App. 11a. But that is merely the inevitable incident of “facilitating” the misdemeanor. Under that approach, a drug user’s misdemeanor purchase of drugs for his own use would be transformed into a felony whenever—as is routine—the parties exchange a phone call, e-mail, or text message about the transaction rather than conduct it entirely face-to-face. Treating as “facilitation” of a “felony” in this context the very same conduct that “facilitates” the “misdemeanor” would violate basic principles of statutory construction.

The court of appeals’ interpretation suffers from the fundamental flaws of construing the terms of Section 843(b) in strict isolation, and of assuming that Congress invariably intends the terms of a statute to carry their broadest possible meaning. Under this Court’s decisions, “[t]he definition of words in isolation” is not “necessarily controlling in statutory construction.” *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Nor does the Court assume that Congress intends the terms of a statute to “extend to the outer limits of [their] definitional possibilities.” *Id.* Instead, when assessing the reach of a statutory provision, the Court considers the words “in their context.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989)). As the Court has explained, “[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any prece-

dents or authorities that inform the analysis.” *Dolan*, 546 U.S. at 486.

Three sources of context are of particular significance when construing Section 843(b). First, the Court examines the “words of a statute . . . with a view to their place in the overall statutory scheme,” *Davis*, 489 U.S. at 809, and “fit[s], if possible, all parts into an harmonious whole,” *FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959). Second, the Court considers the significance of “statutory history,” including statutory amendments that materially alter the terms of the provision at issue. *Booth v. Churner*, 532 U.S. 731, 739-41 (2001); see *Burgess v. United States*, 128 S. Ct. 1572, 1579-80 (2008). And third, when interpreting criminal statutes, the Court “assume[s] Congress acted against certain background understandings set forth in judicial decisions.” *Dixon v. United States*, 548 U.S. 1, 17 (2006) (Kennedy, J., concurring); see *United States v. Jimenez Recio*, 537 U.S. 270, 274-76 (2003).

Those contextual considerations establish that the court of appeals fundamentally erred in its interpretation of Section 843(b). In particular, (i) the court’s interpretation undermines Congress’s considered decision to treat a drug user’s simple possession as a “misdemeanor” rather than a “felony”; (ii) it cannot be reconciled with Congress’s narrowing of the reach of Section 843(b) from facilitation of any drug “offense” to facilitation only of a drug “felony”; and (iii) it is inconsistent with the long-settled background understanding that a person who buys drugs does not thereby aid or abet his seller’s distribution of the drugs to him. Those three considerations together establish that Section 843(b) fails to reach a person’s use of a phone to obtain drugs for his own

personal use. Such a person may use a phone in “facilitating” a “misdemeanor,” but not in “facilitating” a “felony.”<sup>3</sup>

**A. Interpreting Section 843(b) To Reach Persons Who Buy Drugs For Personal Use Would Be Fundamentally Inconsistent With Congress’s Treatment Of Simple Possession As A Misdemeanor**

1. a. Before 1970, the federal drug laws drew no salient distinction between drug traffickers and drug users. The drug laws instead contained general prohibitions imposing substantial penalties on both traffickers and users, treating both as felons. *See, e.g.*, 21 U.S.C. § 174 (1964) (repealed) (making it a felony to “receive[],” “buy[], sell[], or in any manner facilitate[] the . . . sale of” narcotic drugs known to be imported, and providing that “possession of the narcotic drug” constitutes “sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury”); *id.* (prescribing sentence of 5 to 20 years of imprisonment for first offense of selling or receiving any quantity of narcotics); *id.* § 176a (1964) (repealed) (same, for marijuana).

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<sup>3</sup> In certain situations involving aggravating circumstances explicitly set forth in the simple possession statute (*viz.*, when the person has a prior drug conviction or the drug possessed is cocaine base or flunitrazepam), possession for personal use constitutes a felony rather than a misdemeanor. *See* 21 U.S.C. § 844(a). Because the predicate offense in such situations would be a felony, the use of a phone to facilitate it may fall within the reach of Section 843(b). *See United States v. Williams*, 176 F.3d 714, 717 & n.3 (3d Cir. 1999) (Alito, J.). Statements in this brief to the effect that possession of drugs for personal use is a misdemeanor should be understood to refer to situations not involving those aggravating circumstances.

b. In its comprehensive revisions to the federal drug laws in the Controlled Substances Act of 1970 (CSA), Pub. L. No. 91-513, Tit. II, 84 Stat. 1236 (1970), Congress radically changed its approach by drawing a fundamental distinction between drug traffickers and drug users. With respect to traffickers, Congress made it a felony to manufacture, distribute, or dispense, or possess with intent to distribute, manufacture or dispense, a controlled substance, 21 U.S.C. § 841(a)(1), and prescribed progressively steeper penalties for those offenses based on the nature and quantity of the drugs involved, *see* 21 U.S.C. § 841(b). With respect to drug users, in stark contrast, Congress established a new offense, simple possession of a controlled substance—*i.e.*, possession solely for personal use rather than for distribution—and defined that offense as a misdemeanor subject to a term of imprisonment of no more than one year for first-time offenders. CSA § 404(a) (codified at 21 U.S.C. § 844(a)); *see* H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4577 (under the CSA, illegal possession “by an individual for his own use is a misdemeanor”).

Consequently, whereas Congress had previously treated possession for personal use no differently from possession for distribution, and as a felony subject to stiff penalties, Congress in the CSA singled out possession for personal use for markedly favorable treatment as a misdemeanor. The decision to make “the illegal possession of a controlled drug for one’s own use . . . a misdemeanor” rather than a felony was considered “[o]ne of the most striking features of the new penalty structure” established by the CSA. 116 Cong. Rec. 33,316 (1970) (statement of Rep. Boland).

Congress devoted considerable attention to the contours of the new misdemeanor offense of simple possession, and reinforced its intention to afford lenient treatment to users who possess drugs solely for their own use. Congress enabled persons with no prior drug convictions who are found guilty of simple possession to avoid a judgment of conviction altogether and gain a dismissal of the proceedings upon successfully completing a probationary term of up to one year. CSA § 404(b)(1), 84 Stat. at 1264 (codified as amended at 18 U.S.C. § 3607(a)). Congress also afforded any such person under the age of 21 an opportunity to obtain an order expunging all official records of his arrest, indictment, or trial, in order “to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment.” *Id.* § 404(b)(2), 84 Stat. at 1264 (codified as amended at 18 U.S.C. § 3607(c)). Those provisions “reflect[ed] the judgment of most authorities that harsh penalties imposed on the user have little deterrent value and often ruin the life of an individual involved.” 116 Cong. Rec. 33,316 (1970) (statement of Rep. Boland).

By treating simple possession as a misdemeanor and affording first-time offenders the opportunity to avoid any judgment of conviction by satisfying probation conditions, Congress manifested its judgment that a drug user not only commits an offense far less serious than a drug trafficker, but also should be afforded a chance for rehabilitation. The upshot of Congress’s sharp distinction between drug trafficking and drug use therefore is a conclusion that “[t]he illegal traffic in drugs should be attacked with the full power of the federal government” and the “price for participation in this traffic should be prohibitive.”

H.R. Rep. No. 91-1444, *supra*, reprinted in 1970 U.S.C.C.A.N. at 4575. At the same time, “[t]he individual user should be rehabilitated,” so much so that, even when he receives a sentence of imprisonment, “the rehabilitation of the individual, rather than retributive punishment, should be the major objective.” *Id.*

c. The terms of the newly enacted provisions governing drug traffickers and drug users themselves make clear Congress’s intention to punish traffickers but to rehabilitate users. That understanding is reinforced by the legislative record of the 1970 amendments. That record is replete with statements by the legislation’s proponents confirming the intent to impose stiff penalties on drug traffickers while emphasizing rehabilitation of drug users.

One Senator, for example, described the legislation as marking “a clear distinction between those who use drugs and those abominable bloodsuckers who traffic in them.” 116 Cong. Rec. 1011 (1970) (statement of Sen. Young). He further observed that the “tough sentences for mere users have made rehabilitation difficult.” *Id.* Another Senator stated that, “[i]n the past we have often imposed severe punishment on the victim of the drug traffic, while the criminal trafficker has remained beyond our reach.” *Id.* at 995 (statement of Sen. Dodd). In contrast, “[t]he new law will impose severe punishment for the professional criminal in the drug trade, but provide more flexible penalties for the less serious drug offenders.” *Id.* And another Senator explained that, “for those who are users but not pushers . . . the emphasis should be prevention and rehabilitation, not simply throwing them in jail.” *Id.* at 35,478 (1970) (statement of Sen. Kennedy).

Supporters in the House echoed those sentiments. One Representative, for instance, observed that the legislation establishes “a distinction between the unfortunate user or addict of narcotics and . . . [t]he dealer or pusher who reaps huge financial benefits from the misery of the user.” 116 Cong. Rec. 33,647 (1970) (statement of Rep. Sisk). Making “possession of controlled drugs by an individual for his personal use a misdemeanor” thus “reflects humane and knowledgeable assessment of the problem,” in that “harsh penalties for the user or addict present no deterrent whatsoever and do little to solve the overall problem.” *Id.* Another Representative explained that the legislation punishes offenders guilty of the “manufacture, distribution, and sale of dangerous drugs” with “stiff sentences,” but “recognizes that the mere use of dangerous drugs is more of a sickness” and that those who “merely use or possess drugs for their own use, and who are caught, should not have their futures ruined.” 116 Cong. Rec. 33,307 (1970). (statement of Rep. Robison).

2. Because the Court interprets Section 843(b) as part of an “overall statutory scheme,” *Davis*, 489 U.S. at 809, it should construe the provision’s reach against the backdrop of Congress’s considered determination in the CSA to draw a fundamental distinction between drug traffickers and drug users. When interpreted in light of Congress’s judgment to treat drug users as misdemeanants and promote their rehabilitation, Section 843(b) cannot be construed to apply to persons who buy drugs solely for their own personal use. Section 843(b) constitutes a felony offense carrying a sentence of up to four years of imprisonment for each conviction. Moreover, “[e]ach separate use of a communication facility”

constitutes “a separate offense,” even if all uses relate to a single underlying transaction. 21 U.S.C. 843(b). Accordingly, if a person is party to four phone conversations, e-mails, or text messages in connection with a single purchase of drugs for his own personal use, he would face a sentence of up to 16 years of imprisonment, no matter how minimal the quantity of drugs involved in the transaction.

Applying the harsh consequences of Section 843(b) against drug *traffickers* coheres with Congress’s objective in the CSA to visit stringent penalties on those who benefit financially from the distribution of drugs. But applying Section 843(b) against drug *users* who seek drugs solely for their own use would substantially undermine Congress’s decision to draw a fundamental distinction between traffickers and users, and to emphasize rehabilitation rather than punishment of the latter. Instead of facing a maximum sentence of one year of imprisonment with the possibility of avoiding any judgment of conviction at all by completing probation, a buyer of drugs solely for his own use would face the prospect of four years of imprisonment simply because he exchanged a phone call, e-mail, or text message in arranging the purchase. And if he happened to exchange multiple phone calls or messages to complete the purchase, he would face an additional four years of imprisonment for each one. It defies common sense to suppose that Congress would intend that an addicted user—let alone a first-time youthful experimenter—face 8 years of imprisonment because he made two phone calls to arrange a drug purchase, particularly when the same person would face only a misdemeanor conviction (or probation with no con-

viction at all) if he made exactly the same purchase face-to-face.

Even if drug users regularly obtained drugs in unplanned, face-to-face interactions without any prior phone or electronic communication, Congress could not be considered to have cast aside its basic objective to minimize drug users' sentences and promote their rehabilitation merely because they use a phone in arranging the transaction. In fact, moreover, "the use of a telephone by those engaged in narcotics transactions" has long been "very common." *United States v. Dotson*, 871 F.2d 1318, 1326 (6th Cir. 1989) (Guy, J., concurring), *amended on other grounds* by 895 F.2d 263 (6th Cir. 1990). And the use of communication devices in drug transactions has become all the more prevalent with the ever-growing reliance on cellular telephones, e-mail devices, and text messaging in everyday interactions. For any drug addict or teenage experimenter who exchanges a cellular phone call or electronic message when obtaining drugs for personal use—as would be utterly commonplace—the court of appeals' interpretation would override Congress's considered decision elsewhere in the statute to minimize the user's sentence and promote his rehabilitation, and would instead expose him to harsh sentences aimed at deterrence and retributive punishment.

That interpretation fails to construe Section 843(b) as part of "a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), that "fit[s], if possible, all parts into an harmonious whole," *Mandel Bros.*, 359 U.S. at 389. The court of appeals' interpretation instead would transform Section 843(b) into a statutory anomaly that works at cross purposes with the re-

mainder of the statutory scheme. “To hold that persons who merely buy drugs for their personal use are on equal footing with distributors by virtue of the facilitation statute would undermine” Congress’s “statutory distinction” between drug traffickers and drug users. *Martin*, 599 F.3d at 889. And to say that Congress sought to make “actual possession of one gram of cocaine” a misdemeanor, but “use of the phone to obtain the cocaine” a felony, simply “makes no sense.” *Binkley*, 903 F.2d at 1138 (Cudahy, J., dissenting).

The discord between the court of appeals’ interpretation of Section 843(b) and Congress’s objectives in the overall statutory scheme becomes especially pronounced upon recognition that both the person who initiates a telephone call and the person who answers it “use” a telephone. Consequently, the purchaser of a small quantity of drugs for personal use could be charged with a felony if he *received* a call offering him the drugs, even if he at no point initiated any call affirmatively seeking drugs. Indeed, the government could itself convert the purchaser’s misdemeanor offense into a felony under Section 843(b) by placing an undercover call offering him drugs. *See, e.g., United States v. McLernon*, 746 F.2d 1098, 1107 (6th Cir. 1984) (“A violation of § 843(b) may be found . . . even when the defendant does not initiate the calls.”); *United States v. Cordero*, 668 F.2d 32, 43 n.16 (1st Cir. 1981) (Breyer, J.) (“We are aware of no authority which suggests the term ‘use’ in the statute refers solely to ‘placing’ calls and leaves unpunished use of the telephone by the receiver of a call.”); *United States v. Arias-Villanueva*, 998 F.2d 1491, 1509 (9th Cir. 1993) (“‘Use’ of a telephone to facilitate the commission of a crime occurs

at both ends of the line.”), *abrogated in part on other grounds by United States v. Gaudin*, 515 U.S. 506 (1995).

This case illustrates that the court of appeals’ interpretation of Section 843(b) stands fundamentally at odds with Congress’s basic objectives in the federal drugs laws. There is no suggestion that petitioner has ever engaged in drug trafficking or has been anything more than a drug user. Congress in that situation sought to emphasize rehabilitation rather than retribution. Yet the government charged petitioner with six felony counts of violating Section 843(b) and exposed him to a lengthy term of imprisonment, and the court of appeals upheld multiple felony convictions against him, because he used a phone in obtaining 2 grams of cocaine for his own personal use. The better approach, and the one more in keeping with the overall statutory scheme, would entail holding that petitioner’s use of a phone at most facilitated his misdemeanor possession for personal use, and did not also facilitate his seller’s felony distribution of the drugs to him.

**B. By Narrowing Section 843(b)’s Scope From Facilitation Of Drug “Offenses” To Facilitation Only Of Drug “Felonies,” Congress Excluded Misdemeanor Purchasers For Personal Use From The Provision’s Reach**

When Congress enacted the CSA in 1970, it did more than distinguish between drug traffickers and users in a way that compels excluding the purchase of drugs for personal use from the reach of Section 843(b). It also narrowed the scope of Section 843(b) itself from facilitation of any drug “offense” to facili-

tation of a drug “felony.” That “statutory history” confirms Congress’s intention to treat the purchase of drugs for personal use as facilitating only the buyer’s own misdemeanor possession, not the seller’s felony distribution. *See Booth v. Churner*, 532 U.S. 731, 739-41 (2001); *Burgess v. United States*, 128 S. Ct. 1572, 1579-80 (2008).

1. The original version of Section 843(b) prohibited the use of a communication facility in facilitating “any act or acts constituting an *offense*” punishable under certain provisions of the drug laws. Narcotic Control Act of 1956 § 201, 70 Stat. at 573 (codified at former 18 U.S.C. § 1403 (repealed)) (emphasis added). At that time, all such “offenses”—including buying, selling, and receiving imported marijuana or narcotics—constituted felonies. *See id.* §§ 103, 105-08, 70 Stat. at 568, 570-71 (codified at former 21 U.S.C. §§ 174 (repealed), 184a (repealed); 26 U.S.C. § 7237 (repealed)).

Because any receipt of drugs constituted an offense, a person who used a phone to purchase drugs for personal use was guilty of using the phone in facilitating or committing his own receipt offense. Consistent with that understanding, the government could use the original communication facility statute to prosecute drug users who made telephone calls to arrange the purchase of small quantities of drugs for personal use. *See United States v. Butler*, 204 F. Supp. 339, 340-41, 344 (S.D.N.Y. 1962).

2. When Congress enacted the CSA in 1970, it did more than downgrade drug possession for personal use from a felony to a misdemeanor through the new offense of simple possession. In an immediately adjacent provision of the CSA, Congress also

simultaneously—and correspondingly—confined the reach of Section 843(b). Whereas the provision previously encompassed use of a communication device in facilitating any drug “offense,” Congress restricted it to reach use of a communication device in facilitating only a drug “felony.” CSA § 403(b), 84 Stat. at 1263 (codified at 21 U.S.C. § 843(b)). Thus, in immediately neighboring provisions, Congress simultaneously (i) downgraded possession for personal use from a felony to a misdemeanor, (ii) decriminalized simple possession altogether if the user successfully completes a probationary period, and (iii) narrowed the facilitation statute from a prohibition against using a phone in facilitating an “offense” to a prohibition against using a phone in facilitating a “felony.” See CSA §§ 403(b), 404(a), (b), 84 Stat. at 1263, 1264-65.

The coordinated nature of those changes demonstrates that Congress narrowed Section 843(b) from facilitating an “offense” to facilitating a “felony” in order to exclude the newly created class of misdemeanor simple possessors from Section 843(b)’s reach. Had Congress not made the change from “offense” to “felony,” persons who use a phone to purchase drugs for personal use could be prosecuted for using a phone in facilitating their own misdemeanor “offense” of simple possession, just as such persons had been subject to prosecution under the previous version of Section 843(b). By changing “offense” to “felony,” Congress eliminated that possibility. When a person uses a phone to commit his own offense of simple possession, he facilitates at most a “misdemeanor,” not a “felony,” and he therefore falls outside the reach of the new version of Section 843(b).

The court of appeals' contrary interpretation rests on the view that, whenever a person facilitates his own misdemeanor possession of drugs for personal use, he necessarily also facilitates the dealer's "felony" distribution of the drugs to him. But that interpretation would render Congress's deliberate change from facilitating an "offense" to facilitating a "felony" of no practical effect in the very class of cases that was foremost in Congress's mind—*i.e.*, cases in which a drug user possesses drugs solely for his own personal use. *See* pp. 14-18, *supra*. That interpretation therefore must be rejected.

**C. The Principle That A Buyer Of Drugs Does Not Aid Or Abet His Seller's Distribution Applies To Section 843(b)**

Congress is assumed to have enacted Section 843(b) against "background understandings set forth in judicial decisions," *Dixon*, 548 U.S. at 17 (Kennedy, J., concurring); *see Jimenez Recio*, 437 U.S. at 274-76, and one such understanding of particular relevance holds that a buyer of contraband does not aid or abet his dealer's unlawful sale. Because the term "facilitat[e]" in Section 843(b) is equivalent to the term "aid or abet," that settled principle applies to Section 843(b). A buyer of drugs for personal use thus neither "aids or abets" nor "facilitates" his dealer's "felony" distribution.

1. It has long been settled that a buyer of contraband cannot be prosecuted as "a party to the crime of illegal sale." 2 Wayne R. LaFare, *Substantive Criminal Law* § 13.3(e), at 371 (2d ed. 2003). That principle appears to have originated as a response to Prohibition-era efforts by prosecutors to charge buyers of liquor as aiders or abettors of their sellers' illegal

sales. Courts uniformly held that buyers could not be charged with that offense. *See Lott v. United States*, 205 F. 28, 29-31 (9th Cir. 1913) (citing 15 decisions to that effect).

Some courts reasoned that charging buyers with aiding or abetting would circumvent the legislature's intent to punish the seller, but not the buyer. *E.g.*, *Lott*, 205 F. at 29-30 (citing *Wakeman v. Chambers*, 28 N.W. 498, 499 (Iowa 1886)). Others reasoned that an aider or abettor "must stand in the same relation to the crime as the criminal—approach it from the same direction." *Id.* at 30 (quoting *State v. Teahan*, 50 Conn. 92, 101 (1882)). And still others asserted simply, "[t]hat such a prosecution is unprecedented in this State shows very strongly what has been understood to be the law upon the subject." *Id.* at 30 (quoting *State v. Rand*, 51 N.H. 361, 367 (1871) (internal quotation marks omitted)). Whatever its precise rationale, the principle that a buyer does not aid or abet a seller's unlawful sale became—and remains—firmly entrenched.

This Court relied on that principle in *Gebardi v. United States*, 287 U.S. 112 (1932). The statute at issue in *Gebardi* subjected to criminal punishment a person who transported a woman for the purpose of prostitution. The Court concluded that a woman could not be convicted of aiding or abetting the person who transported her because the statute singled out the transporter for punishment; and a woman's assistance, the Court reasoned, was a common incident of the transporter's offense. *Id.* at 119. The Court drew support for its conclusion from the established rule that a purchaser of liquor could not be prosecuted as an aider or abettor of an illegal sale. Specifically, the Court reasoned that a woman who is

transported for the purpose of prostitution could no more be prosecuted under “general language punishing those who aid and assist the transporter,” than a “purchaser of “liquor” could be prosecuted “as an abettor of the illegal sale.” *Id.*

Consistent with that established buyer-seller principle, federal courts have held that a buyer of drugs for personal use cannot be convicted of aiding or abetting his dealer’s distribution under 18 U.S.C. § 2, the general aiding and abetting statute. In *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977), the Second Circuit expressly “reject[ed] the government’s suggestion” that a person “who receives the drug for personal use” is “liable as an aider and abettor of the agent’s distribution to him.” The court explained that, “under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his possession.” *Id.* Similarly, in *United States v. Harold*, 531 F.2d 704, 705 (5th Cir. 1976), the Fifth Circuit “reject[ed] out of hand the government’s contention that because Harold went to the airport ‘for a fix’ he is guilty as a recipient of aiding and abetting the distribution of heroin.” Numerous state courts have applied the same principle in interpreting their own drug laws.<sup>4</sup>

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<sup>4</sup> See *Brown v. State*, 203 So. 2d 700, 702 (Ala. Ct. App. 1967); *Howard v. State*, 496 P.2d 657, 660 (Alaska 1972); *State v. Cota*, 956 P.2d 507, 509-10 (Ariz. 1998); *Sweatt v. State*, 473 S.W.2d 913, 914-15 (Ark. 1971); *People v. Mimms*, 110 Cal. App. 2d 310, 314 (1952); *State v. Ford*, 1996 WL 190783, at \*3 (Del. Super. Ct. 1996); *Sobrino v. State*, 471 So. 2d 1333, 1335 (Fla. Dist. Ct. App. 1985); *Gamble v. State*, 62 S.E. 544 (Ga. Ct. App. 1908); *State v. Payton*, 45 Idaho 668, 670-71 (1928); *Wakeman v. Chambers*, 28 N.W. 498, 499 (Iowa 1886); *Dunaway v. Commonwealth*, 39 S.W.2d 242, 242 (Ky. Ct. App. 1931); *State v. Celestine*, 671 So. 2d 896, 897-98 (La. 1996);

These decisions reflect a consensus that “the act of purchasing a controlled substance does not make the buyer an accessory to the crime of distribution.” 28 C.J.S. *Drugs and Narcotics* § 298 (2008); Joshua Dressler, *Understanding Criminal Law* § 30.09[D], at 461 (2d ed. 1995) (“[A] purchaser of narcotics is not an accomplice in the commission of a sale of the controlled substance.”). The federal government appears to have acquiesced in that consensus. After the decisions in *Swiderski* and *Harold* rejected any suggestion that a purchaser of drugs aids or abets his seller’s distribution, the government appears to have refrained from bringing any further prosecutions based on that theory.

2. That background understanding concerning aider-or-abettor liability applies to Section 843(b). Section 843(b) uses the term “facilitat[e],” and that term is synonymous with “aid or abet.” For example, Black’s Law Dictionary defines “aid and abet” as to

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*Commonwealth v. Willard*, 39 Mass. 476, 477-79 (1839); *State v. Tremont*, 200 N.W. 93, 94 (Minn. 1924); *State v. Wolfskill*, 421 S.W.2d 193, 197 (Mo. 1967); *State v. Lyons*, 838 P.2d 397, 399-401 (Mont. 1992); *State v. Utterback*, 485 N.W.2d 760, 770 (Neb. 1992), *overruled on other grounds by State v. Johnson*, 589 N.W.2d 108 (Neb. 1999); *Tellis v. State*, 445 P.2d 938, 940 (Nev. 1968); *State v. Pinson*, 895 P.2d 274, 276 (N.M. Ct. App. 1995); *People v. Ricci*, 298 N.Y.S.2d 637, 641 (County Ct. 1969); *State v. Burchfield*, 63 S.E. 89, 89 (N.C. 1908); *State v. Dwyer*, 172 N.W.2d 591, 596 (N.D. 1969); *State v. Morales*, 1986 WL 2679, at \*5 (Ohio Ct. App. 1986); *Leigh v. State*, 246 P. 667, 667 (Okla. Crim. App. 1926); *State v. Nasholm*, 467 P.2d 647, 648 (Or. Ct. App. 1970); *State v. Fox*, 313 N.W.2d 38, 40 (S.D. 1981); *Brown v. State*, 557 S.W.2d 926, 926 (Tenn. Crim. App. 1977); *Robinson v. State*, 815 S.W.2d 361, 363-64 (Tex. App. 1991); *State v. Berg*, 613 P.2d 1125, 1126 (Utah 1980); *State v. Morris*, 896 P.2d 81, 84-85 (Wash. Ct. App. 1995); *Wheeler v. State*, 691 P.2d 599, 601-02 (Wyo. 1984).

“facilitate the commission of a crime.” *Black’s Law Dictionary* 76 (8th ed. 2004). And it in turn defines “facilitation” as the “act or an instance of aiding or helping; . . . the act of making it easier for another person to commit a crime.” *Id.* at 627. The same essential definitions governed at the time of the original enactment of the communication facility provision in 1956 and of its amendment in the CSA in 1970. *See Black’s Law Dictionary* 91 (4th ed. 1951) (defining “aid and abet” as “[h]elp, assist, or facilitate the commission of a crime”); *Black’s Law Dictionary* 91 (rev. 4th ed. 1968) (same).

In accordance with their definitional equivalence, courts have equated “facilitate[e]” in Section 843(b) with “aiding or abetting” when applying the Sentencing Guidelines. For example, the career offender sentencing enhancement applies to felony convictions for controlled substance offenses, and initially, it expressly encompassed convictions for “aiding and abetting” a controlled substance offense but did not address whether it also encompassed Section 843(b) convictions for “facilitating” a controlled substance offense, U.S.S.G. §§ 4B1.1, 4B1.2 & app. note 1 (1996). Courts addressing the issue concluded that “using the telephone system in facilitating the distribution of narcotics *is equivalent to aiding and abetting that distribution.*” *United States v. Walton*, 56 F.3d 551, 556 (4th Cir. 1995) (emphasis added); *United States v. Mueller*, 112 F.3d 277, 282 (7th Cir. 1997) (“[A] defendant cannot be convicted of using a telephone to facilitate a drug offense unless the defendant also aids or abets, or attempts to commit, the drug offense itself.”).<sup>5</sup> Courts have applied the

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<sup>5</sup> The Sentencing Commission amended the career offender provision in 1997 to expressly encompass Section 843(b) convic-

same reasoning in holding that the sentencing enhancement in illegal reentry cases for a prior drug trafficking offense, U.S.S.G. § 2L1.2(b)(1)(A) (2008), encompasses Section 843(b) convictions for “facilitating” a drug trafficking offense. *See United States v. Jimenez*, 533 F.3d 1110, 1114 (9th Cir. 2008) (“[F]acilitation’ for purposes of § 843(b) amounts to the same thing as ‘aiding and abetting.’”); *United States v. Orihuela*, 320 F.3d 1302, 1304 (11th Cir. 2003) (“[B]y facilitating that underlying offense, the accused aided and abetted that offense.”).<sup>6</sup>

Because “aid or abet” and “facilitate” are definitional equivalents, the background principle that a buyer of drugs does not aid or abet his dealer’s distribution directly applies here. Just as a buyer of drugs for personal use is not guilty of “aiding or abetting” his dealer’s distribution for purposes of the aiding and abetting statute, 18 U.S.C. § 2(a), he also is not guilty of “facilitating” his dealer’s distribution “felony” for purposes of Section 843(b). *See Binkley*, 903 F.2d at 1138 (Cudahy, J., dissenting). And because a buyer for personal use does not “facilitat[e]” his seller’s “felony” distribution, his use of a phone to buy the drugs cannot constitute use of a communication device “in facilitating” his seller’s drug “felony.”

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tions. *See United States v. Jimenez*, 533 F.3d 1110, 1113 (9th Cir. 2008).

<sup>6</sup> In one other respect, the Sentencing Guidelines confirm the equivalence between “facilitation” in Section 843(b) and “aiding or abetting.” Just as the base offense level for aiding or abetting an offense is the offense level for the underlying offense, *see* U.S.S.G. § 2X2.1 (2008), the base offense level for using a telephone in facilitating a drug felony is “the offense level applicable to the underlying offense,” *see id.* § 2D1.6 (2008).

It bears emphasis in this regard that, even if a buyer of drugs could be conceived literally to “aid” his seller’s illegal sale by making it possible, that literal possibility fails to govern the construction of 18 U.S.C. § 2(a). Instead, it gives way to the background understanding that a buyer of drugs does not aid or abet his seller’s unlawful distribution. By the same token, even if a drug buyer could be conceived literally to “facilitate” his seller’s “felony” distribution by making it easier—as the court of appeals assumed, Pet. App. 11a—the same background understanding dictates rejecting that literal possibility in favor of the rule that a buyer of drugs does not aid or abet (or, equivalently, facilitate) his seller’s distribution. The settled rule for aider-or-abettor liability thus affords a strong foundation for concluding that the use of a phone to buy drugs for personal use may “facilitate” the buyer’s misdemeanor possession, but not the seller’s “felony” distribution.

3. In *Rewis v. United States*, 401 U.S. 808 (1971), the Court interpreted the term “facilitate” in a similar statutory context and reached a similar conclusion about its meaning. The statute at issue in *Rewis* prohibited “interstate travel with the intent to ‘promote, manage, establish, carry on, or facilitate certain kinds of illegal activity,’ including gambling enterprises. *Id.* at 811 (quoting 18 U.S.C. § 1952) (emphasis added). The court of appeals held that patrons of an illegal gambling establishment were not guilty of “facilitating” the establishment, and this Court agreed. *Id.* The Court explained that “the ordinary meaning of this language suggests that the traveler’s purpose must involve more than the desire to patronize the illegal activity.” *Id.*

When “Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.” *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). That principle applies here because the Travel Act and the facilitation statute share the common purpose of prohibiting conduct that facilitates an illegal enterprise. Consequently, just as the customers in *Rewis* did not “facilitate” an illegal gambling establishment within the meaning of the Travel Act, a customer of drugs does not “facilitate” his dealer’s drug distribution within the meaning of Section 843(b). *See Martin*, 599 F.2d at 888-89 (“A difference in the nature of the illicit business should not change the basic principle enunciated by the Supreme Court [in *Rewis*] . . . that a mere customer’s contribution to the business he patronizes does not constitute the facilitation envisioned by Congress.”).<sup>7</sup>

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<sup>7</sup> The government acknowledges that *Rewis* interpreted the term “facilitate” in the Travel Act not to reach a customer of the gambling enterprise. The government contends, however, that other language preceding that term in the statute clarified that “facilitate” in that provision excludes mere customers. Br. in Opp. 7-8 n.2. That argument acknowledges that the term “facilitate” in a statute need not encompass any person who literally makes a transaction “easier,” and that context determines whether the term encompasses a mere customer. Here, as with the Travel Act, the context demonstrates that a mere drug customer falls outside the reach of Section 843(b). *See pp. 14-32, supra.*

**D. The Remaining Arguments Of The Court Of Appeals And Government Fail To Withstand Scrutiny**

1. In attempting to explain why Congress would have intended the use of a phone to transform a misdemeanor purchase for personal use into a felony, the court of appeals speculated that Congress might have been concerned that use of a phone helps drug users avoid detection. Pet. App. 12a. The court's speculation, however, cannot account for Congress's decision to narrow Section 843(b) to reach facilitation only of a drug "felony." If Congress in fact sought to impose increased penalties for use of the phone by drug users because of general concerns about their ability to avoid detection, Congress would have retained Section 843(b)'s prohibition against use of a phone to facilitate any drug "offense," rather than restrict it to prohibit facilitation only of a drug "felony." But with Congress having narrowed Section 843(b)'s reach to exclude facilitation of drug misdemeanors, the court of appeals' speculation about ease of detection affords no rationale for continuing to apply the provision to drug users who buy drugs solely for their own use.

Moreover, there is no evidence of a concern on the part of Congress that drug users would more readily evade detection by using a phone to purchase drugs, much less any indication of a belief that any such risk should be met with severe punishment of the kind allowed by Section 843(b). Congress in the CSA fundamentally shifted its approach and sharply distinguished between drug users and traffickers, seeking to rehabilitate users rather than to punish them. There is no basis for attributing to Congress a desire to revert to severe punishment of those drug users

who happen to use a phone because those users might thereby more easily avoid detection. That is particularly true because, when Congress created the misdemeanor offense of simple possession, it plainly would have understood that persons would commonly use a phone in committing that offense. Because there is “no [plausible] explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime,” *United States v. Santos*, 128 S. Ct. 2020, 2027 (2008) (plurality opinion); *see id.* at 2033 (Stevens, J., concurring in the judgment), the court of appeals’ interpretation should be rejected.

Finally, the legislative record demonstrates that Congress’s animating concern, when originally enacting the communication facility provision, had nothing to do with drug users. Instead, Congress was concerned that major drug traffickers used telephones to orchestrate substantial drug deals without coming into contact with drug pushers, drug users, or the drugs themselves. In that way, major traffickers minimized the risk of their detection. *See* S. Rep. No. 84-1997, at 9 (1956) (describing “the covert nature of the narcotic traffic wherein the big supplier avoids all possible contact with the ultimate buyer and with the petty pusher or peddler”); *id.* (“[B]ig-time traffickers are seldom caught and convicted, because they . . . avoid all direct contact with the peddlers and ultimate buyers,” and “[t]heir operations are almost entirely limited to the telephone.”); *id.* at 10 (the “big operator[s] . . . use the telephone extensively, and it helps to conceal their identity”); 102 Cong. Rec. S9043 (May 25, 1956)

(statement of Sen. Daniel) (“[T]he big racketeers never touch the drugs. They place their orders . . . by telephone, and they deal with certain henchmen who handle the drug . . .”). Congress’s concerns about the use of a telephone by drug traffickers affords no grounds for construing Section 843(b) to reach the use of a phone by mere drug users, especially in view of Congress’s efforts in the CSA to establish fundamentally distinct treatment of drug traffickers and drug users.

2. The government argues that excluding personal use purchases from Section 843(b) would denude the provision of any practical effect (Br. in Opp. 8), and would render the provision difficult to administer (*id.* at 9). Neither contention has merit.

a. Section 843(b) serves substantial governmental purposes that have nothing to do with the government’s anomalous effort to apply the provision against drug users who use a phone in buying drugs for their own use. Because the provision is of substantial use to the government in other applications, there is no need to extend Section 843(b) to encompass the misdemeanor drug users whom Congress sought to exclude from the statute’s reach.

The best evidence of the provision’s practical significance to the government is the frequency with which the government uses it against drug traffickers. The government routinely seeks Section 843(b) convictions of drug traffickers based on a variety of underlying drug felonies. It prosecutes traffickers for using a phone in facilitating distribution of drugs;<sup>8</sup> in facilitating possession with intent to dis-

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<sup>8</sup> *E.g.*, *United States v. McFadden*, 523 F.3d 839, 840 (8th Cir. 2008) (per curiam); *United States v. Davis*, 929 F.2d 554,

tribute drugs;<sup>9</sup> and in facilitating conspiracies to distribute drugs, or to possess drugs with intent to distribute, manufacture, or import them.<sup>10</sup> The government also uses Section 843(b) violations as predicate crimes for continuing criminal enterprise offenses.<sup>11</sup>

Section 843(b) serves at least three important practical purposes in aid of the government's prosecution of drug traffickers. First, it enables the government to charge multiple felony counts in connection with a single predicate offense of distribution. As previously discussed, Section 843(b) prescribes

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556 (10th Cir. 1991); *United States v. Dotson*, 871 F.2d at 1320.

<sup>9</sup> *E.g.*, *United States v. Whitmore*, 24 F.3d 32, 34 (9th Cir. 1994); *Dotson*, 871 F.2d at 1320; *United States v. Rey*, 641 F.2d 222, 223 (5th Cir. 1981); *United States v. Jones*, 612 F.2d 453, 454, 457 (9th Cir. 1979); *United States v. Phillips*, 664 F.2d 971, 1032 (5th Cir. 1981).

<sup>10</sup> *E.g.*, *United States v. Turner*, 528 F.2d 143, 149 n.1 (9th Cir. 1975) (per curiam); *United States v. Johnston*, 146 F.3d 785, 791 (10th Cir. 1998); *United States v. Reed*, 1 F.3d 1105, 1108-09 (10th Cir. 1993); *United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991); *United States v. Smith*, 924 F.2d 889, 894 (9th Cir. 1991); *United States v. Briscoe*, 896 F.2d 1476, 1485 (7th Cir. 1990); *United States v. Thomas*, 586 F.2d 123, 129 (9th Cir. 1978); *United States v. Steinberg*, 525 F.2d 1126, 1128 (2d Cir. 1975); *United States v. Rodgers*, 755 F.2d 533, 538 (7th Cir. 1985); *United States v. Ward*, 696 F.2d 1315, 1319 & n.4 (11th Cir. 1983); *United States v. Barnes*, 681 F.2d 717, 719 (11th Cir. 1982); *United States v. Cordero*, 668 F.2d 32, 35 (1st Cir. 1981) (Breyer, J.); *United States v. Pool*, 660 F.2d 547, 561 (5th Cir. 1981); *United States v. Jones*, 839 F.2d 1041, 1046 (5th Cir. 1988).

<sup>11</sup> *E.g.*, *United States v. Zavala*, 839 F.2d 523, 527 (9th Cir. 1988) (per curiam); *United States v. Possick*, 849 F.2d 332, 334 (8th Cir. 1988); *United States v. Young*, 745 F.2d 733, 755 (2d Cir. 1984).

that each distinct communication constitutes “a separate offense,” even if the communications relate to the same underlying offense. 21 U.S.C. § 843(b). Accordingly, if a drug trafficker makes three calls in connection with one predicate distribution, the government is free to charge three separate counts of facilitation, with each count carrying a penalty of up to four years of imprisonment. The government frequently takes advantage of this option and charges multiple phone facilitation counts in connection with a single predicate distribution.<sup>12</sup>

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<sup>12</sup> *E.g.*, *United States v. de la Cruz Paulino*, 61 F.3d 986, 990-91 (1st Cir. 1995) (six facilitation counts for one distribution); *United States v. Serrano*, 57 Fed. Appx. 12, 15-16 (2d Cir. 2002) (per curiam) (two facilitation counts for one distribution); *United States v. Roberts*, 881 F.2d 95, 97-98, 102 (4th Cir. 1989) (seven 843(b) counts for one proposed transaction); *United States v. Goldman*, 750 F.2d 1221, 1222-23 (4th Cir. 1984) (seven facilitation counts for one distribution); *United States v. Medina*, 992 F.2d 573, 577-78, 588 (6th Cir. 1993) (five facilitation counts for one distribution); *United States v. Estrada*, 829 F.2d 1127, at \*2, \*5-\*6 (6th Cir. 1987) (per curiam) (table) (two facilitation counts for one distribution); *United States v. Meyer*, 803 F.2d 246, 247 (6th Cir. 1986) (three facilitation counts for one distribution); *United States v. McLernon*, 746 F.2d 1098, 1104, 1106-07 (6th Cir. 1984) (twelve facilitation counts for one distribution); *United States v. Feekes*, 929 F.2d 334, 335, 337 (7th Cir. 1991) (five 843(b) counts for one distribution); *Binkley*, 903 F.2d at 1131-32, 1134-35 (two facilitation counts for one transaction); *United States v. Rollins*, 862 F.2d 1282, 1285-86 (7th Cir. 1988) (four facilitation counts for two distributions); *Andrews v. United States*, 817 F.2d 1277, 1278, 1281 (7th Cir. 1987) (three facilitation counts for one distribution); *United States v. McGuire*, 808 F.2d 694, 695 (8th Cir. 1987) (per curiam) (three facilitation counts for two distributions); *United States v. Tisor*, 96 F.3d 370, 373 (9th Cir. 1996) (five 843(b) counts for two distributions); *Johnston*, 146 F.3d at 788-89, 791 (10th Cir. 1998) (three facilitation counts for one conspiracy); *United States v. Davis*, 929 F.2d 554, 556-57, 559 (10th Cir.

Second, Section 843(b) gives the government a powerful plea bargaining tool. The government can offer a defendant who could be charged with conspiracy, distribution, or possession with intent to distribute, the opportunity instead to plead guilty to a Section 843(b) count. Because Section 843(b) carries a lower statutory maximum than the other offenses, a defendant in that position has a substantial incentive to accept the government's offer.

A number of commentators—including federal judges—have noted the government's reliance on Section 843(b) in the context of plea bargaining. *See* Hon. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Me. L. Rev. 569, 571-72 (2005) (observing that “the same conduct might be characterized as the sale of drugs, a serious charge, or the more innocuous charge of use of a phone in a drug transaction” (citing § 843(b))); John C. Jeffries, Jr. & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095, 1122 (1995) (“The prosecutor can . . . control sentencing by charge bargaining. A major narcotics trafficker, for example, could be charged with only a four-year ‘telephone count’—using a telephone to facilitate a drug deal.”); Frank O. Bowman III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentencing Including Data From the District Level*, 87 Iowa L. Rev. 477, 523 (2002) (describing various

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1991) (two facilitation counts for one distribution); *United States v. Budd*, 23 F.3d 442, 443-44 (D.C. Cir. 1994) (two facilitation counts for one distribution); *United States v. Whoie*, 925 F.2d 1481, 1481-82 (D.C. Cir. 1991) (Thomas, J.) (six facilitation counts for three distributions).

kinds of charge bargaining in federal drug cases, including “substituting for substantive drug offenses a plea to use of a communication facility to carry out a drug trafficking offense under 21 U.S.C. § 843(b)”); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 Am. Crim. L. Rev. 87, 121 & n.159 (2003) (noting that a Section 843(b) charge “is often used in cases in which a very favorable plea is offered to resolve a more serious drug charge”); Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1121-22 (2001) (“any defendant who pleads guilty only to a phone count is likely to have received an immense break because the statutory maximum sentence for this offense is four years, a term that will often be years less than the guideline sentence to which the defendant would be subject if charged with a trafficking crime”).

Finally, by bringing a Section 843(b) charge, the government affords the jury an additional option to return a finding of guilt in circumstances in which it may be reluctant to find the defendant guilty of the predicate offenses. This Court’s decision in *United States v. Powell*, 469 U.S. 57 (1984), involved precisely such a situation. There, the jury acquitted the defendant of conspiracy to possess with intent to distribute and possession with intent to distribute cocaine, but nonetheless convicted him of multiple counts of using a phone in facilitating those felonies. *Id.* at 60. This Court held that the convictions on the phone facilitation counts could stand even though the verdicts were inconsistent. *Id.* at 69.

b. Section 843(b) also is readily administrable when applied in the manner intended by Congress. Under a proper construction of Section 843(b), a jury would have to determine whether a defendant used a phone in purchasing drugs for personal use, or instead used a phone in purchasing drugs with the intent to distribute them. That inquiry is readily administrable.

In fact, the drug laws already draw a basic distinction between possession for personal use, *see* 21 U.S.C. § 844(a), and possession with intent to distribute, *see* 21 U.S.C. § 841(a), entirely without regard to Section 843(b). The government therefore routinely must prove that a defendant possessed drugs with the intent to distribute rather than for personal use whenever it charges possession with intent to distribute; and juries readily make that determination based on considerations such as the quantity of drugs and the defendant's statements. *See Swiderski*, 548 F.2d at 450. When deciding whether a defendant has used a phone in *facilitating* possession with intent to distribute, the jury would undertake precisely the same inquiry. The numerous Section 843(b) convictions obtained by the government for using a telephone to facilitate possession with intent to distribute demonstrate that the inquiry poses no obstacle to the government's legitimate enforcement interests.

**E. Under The Rule Of Lenity, Any Ambiguity Concerning The Reach Of Section 843(b) Is Resolved In Favor Of Excluding Persons Who Purchase Drugs For Personal Use**

To the extent there is any ambiguity concerning the applicability of Section 843(b) to persons who purchase drugs solely for their own personal use, the rule of lenity requires construing the provision to exclude such persons. See *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion); *id.* at 2033-34 (Stevens, J., concurring in the judgment); *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347-48 (1971). Under that rule, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Rewis*, 401 U.S. at 812. “Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time honored interpretive guideline when the congressional purpose is unclear.” *Liparota*, 471 U.S. at 427.

Here, consideration of all relevant factors demonstrates that Congress did not intend to include buyers for personal use within the ambit of Section 843(b). To the extent that “congressional purpose is unclear,” however, the resulting “ambiguity” must be resolved in favor of construing Section 843(b) not to reach persons who use a phone to purchase drugs for personal use. *Liparota*, 471 U.S. at 427.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: December 29, 2008

## APPENDIX A

### RELEVANT STATUTORY PROVISIONS

1. Section 841(a) of Title 21 of the United States Code provides in relevant part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

2. Section 843(b) of Title 21 of the United States Code provides in relevant part:

(b) Communication facility

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals,

pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

\* \* \* \* \*

(d) Penalties

(1) Except as provided in paragraph (2) [which provides for greater penalties in cases involving manufacture of methamphetamine], any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine under title 18, United States Code, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine under title 18, United States Code, or both.

3. Section 844 of Title 21 of the United States Code provides in relevant part:

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance

was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. \* \* \* Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of \$2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of \$5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, if the conviction is a

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first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams \* \* \* . Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both.

4. Section 3607 of Title 18 of the United States Code provides:

(a) Pre-judgment probation.--

If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)--

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the

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person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

(b) Record of disposition.--

A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

(c) Expungement of record of disposition.--

If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expunge-

ment order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

## APPENDIX B

### RELEVANT ACTS OF CONGRESS

1. The Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567 (July 18, 1956), provided in relevant part:

Sec. 105. Importation, Etc., of Narcotic Drugs.

Section 2(c) of the Narcotic Drugs Import and Export Act, amended (U.S.C., title 21, sec. 174), is amended to read as follows:

“(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

“Whenever on trial for a violation of this subsection the defendant is shown to have

or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.[”]

\* \* \* \* \*

Sec. 201. Addition of New Chapter—Narcotics.

Part I of title 18 of the United States Code is amended by inserting after chapter 67 the following new chapter:

“Chapter 68—Narcotics

\* \* \* \* \*

“§ 1403. Use of communications facilities—penalties.

“(a) Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in—

“(1) subsection (a) or (b) of section 7237 of the Internal Revenue Code of 1954

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. sec. 174), or

“(3) the Act of July 11, 1941, as amended (21 U.S.C. sec. 184(a),

shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than \$5,000. Each separate use of a communication facility shall be a separate offense under this section.

“(b) For purposes of this section, the term ‘communication facility’ means any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures and sounds of all kinds by mail, telephone, wire, radio or other means of communication.

2. The Controlled Substances Act of 1970, Pub. L. No. 91-513, Tit. II, 84 Stat. 1236 (Oct. 27, 1970), provided in relevant part:

PROHIBITED ACTS C—PENALTIES

Sec. 403. \* \* \*

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this title or title III. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term “communication facility” means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures or sounds of all kinds and includes, mail,

telephone, wire, radio and all other means of communication.

(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than \$30,000 or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana or depressant or stimulant substances, have become final such persons shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than \$60,000 or both.

PENALTY FOR SIMPLE POSSESSION; CONFIDENTIAL DISCHARGE AND EXPUNGING OF RECORDS FOR FIRST OFFENSE

Sec. 404. (a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than \$5,000, or both, except that if he commits such offense after a prior conviction or convictions under this sub-

section have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than \$10,000, or both.

(b)(1) If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this title or title III, or any other law of the United States relating to narcotic drugs, marihuana or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. \* \* \*