No. 08-___

IN THE
Supreme Court of the United States

SALMAN KHADE ABUELHAWA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 523 F.3d 415 (4th Cir. 2008). The order denying a petition for rehearing en banc (App. C) is unreported. The decisions of the district court (App. B) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2008. App., *infra*, 1a. A petition for rehearing en banc was denied on May 23, 2008. *Id.* at 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 843 of Title 21 of the United States Code provides in pertinent part as follows:

> (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.

STATEMENT OF THE CASE

The court of appeals' decision in this case deepens an acknowledged conflict among the circuits concerning the proper interpretation of 21 U.S.C. § 843(b). Section 843(b) makes it unlawful to use a communications facility to "facilitat[e] the commission of any act or acts constituting a felony" under the federal drug laws. 21 U.S.C. § 843(b). Petitioner Salman

Khade Abuelhawa used a cellular phone to arrange the purchase of a small amount of drugs for his own personal use, and was convicted of using a phone to facilitate the commission of a drug "felony" in violation of Section 843(b). The Fourth Circuit affirmed, reasoning that the crime facilitated by petitioner's use of his cellular phone was not the purchase of drugs for personal use (a misdemeanor), but was the *seller*'s distribution of the drugs (a felony).

Three courts of appeals hold that Section 843(b) does not reach the use of a telephone to purchase drugs for personal use, while two courts of appeals—including the court of appeals in this case—have now reached the opposite conclusion. The interpretation of Section 843(b) adopted by the court of appeals in this case cannot be squared with the terms of the provision or with its statutory context and history. And because the court of appeals' approach would transform any misdemeanor purchase of drugs for personal use into a felony whenever—as is routine—a cellular phone or other communications device is used in the transaction, the decision has profound implications for the proper administration of the federal drug laws. This Court's review is warranted.

1. In June 2003, as part of an investigation into drug distribution by Mohammed Said, the government obtained authorization to wiretap Said's cell phone. On July 5 and 12, 2003, the wiretap recorded several cellular phone calls between Said and petitioner. At trial, the government presented evidence that Said and petitioner had discussed, in code, petitioner's purchase of small amounts of cocaine for his personal use. Petitioner was arrested on October 17, 2003. He admitted to the arresting agents that he had purchased small amounts of cocaine from Said

in the past, but he made no statements indicating that he had purchased cocaine on July 5 or 12, 2003. The government, moreover, never recovered any drugs from the transactions alleged to have taken place on those days. *See* App., *infra*, 2a-6a.

Petitioner was charged with violating 21 U.S.C. § 843(b) in connection with the July 5 and 12, 2003, cell phone calls. App., *infra*, 6a-7a.[1] Section 843(b) 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 any provision of" the federal drug laws. The government made no claim—and introduced no evidence—suggesting 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 and thus constituted only the misdemeanor of simple possession. *See* 21 U.S.C. § 844(a). The government nonetheless took the position that petitioner had facilitated a drug "felony" under Section 843(b) on the theory that his use of a cellular phone to buy drugs from Said had facilitated *Said*'s sale of drugs to petitioner. *See* App., *infra*, 26a; C.A. App. 21-23, 106. Throughout the proceedings, the sole drug felony alleged by the government to have been facilitated by petitioner's use of a cellular phone is *Said*'s drug distribution.

Petitioner moved for a judgment of acquittal at the close of the government's case, *see* App., *infra*,

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[1] Petitioner was also charged with violating Section 843(b) in connection with a phone call made on June 29, 2003, but that count was dismissed before trial. App., *infra*, 7a.

7a, arguing that he had facilitated only the misdemeanor crime of purchasing drugs for personal use and therefore could not be guilty of facilitating a drug "felony" in violation of Section 843(b). *Id.* at 20a-25a; *see also* C.A. App. 80-85. The district court denied the motion. 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]." App, *infra*, 21a. The court acknowledged that "several circuits have found that that's not an appropriate reading of the statute," *id.* at 21a-22a, and that "it may not make sense to ratchet up what would probably be a simple possession case to a felony," *id.* at 21a. The court further observed that "a misdemeanor might have been a more appropriate charge" against petitioner but that the "government for whatever reasons chose to proceed this way." *Id.* at 24a. The court explained, however, that it ultimately "doesn't get involved" with "charging decisions," *id.*, and it believed that the language of Section 843(b) encompasses this case, *id.* at 23a-24a.

The jury found petitioner guilty of violating Section 843(b). Petitioner, who had renewed his motion for a judgment of acquittal at the close of all the evidence, C.A. App. 213, again moved for a judgment of acquittal after the jury's verdict, *id.* at 274-79. The district court again denied the motion, but acknowledged once more that "there's a split among the circuits" on the issue. App., *infra*, 33a. The court also stated 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." *Id.* at 35a. The court sentenced petitioner to 24 months of pro-

bation and ordered him to pay a $2,000 fine. *Id.* at 7a-8a.[2]

2. The court of appeals affirmed. App., *infra*, 1a-18a. The court acknowledged at the outset that petitioner had obtained drugs solely "for his personal use." *Id.* at 9a. The court rejected petitioner's contention that the use of a communications device to purchase drugs for personal use falls outside the scope of Section 843(b). *Id.* at 8a-13a.

The court "beg[a]n with the recognition that [its] sister circuits are divided on the issue." App., *infra*, 9a. Some circuits, the court explained, "find that when a communication facility is used to facilitate a drug sale for personal use, § 843(b) is not violated." *Id.* at 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*, *United States v. DeBright*, 730 F.2d 1255 (9th Cir. 1984)). "In contrast," the court of appeals explained, "other circuits have concluded that distributions for personal use are covered by § 843(b)." *Id.* at 10a (citing, *inter alia*, *United States v. Binkley*, 903 F.2d 1130, 1135-36 (7th Cir. 1990)). Now "[f]aced directly with the issue confronted in those cases," the court of appeals concluded that the latter view constitutes "the better of the argument as to whether § 843(b) applies to facilitation of a drug distribution for personal use." *Id.* at 11a.

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[2] The 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, cell phone calls, and another count in connection with the July 12, 2003, calls. *See* App., *infra*, 8a n.4, 34a-35a.

The court reasoned that, while Section 843(b) requires the use of a communications device to facilitate a drug felony, the "statute does not specify *whose* felony must be at issue, just that 'a' felony must be facilitated." App., *infra*, 11a. Here, the court believed, petitioner's "use of a cell phone undoubtedly made *Said's* cocaine distribution easier; in fact, 'it made the sale possible.'" *Id.* (quoting *Binkley*, 903 F.2d at 1136). In the court's view, therefore, the "fact that [petitioner's] possession of cocaine for personal use may not itself be a felony is simply irrelevant under § 843(b)." *Id.* at 11a-12a (citation omitted). The court agreed with the Seventh Circuit that a defendant who, "by [his] use of the telephone," makes "the distribution of . . . cocaine easier" has "facilitated it and violated the statute." *Id.* at 12a (quoting *United States v. Kozinski*, 16 F.3d 795, 807 (7th Cir. 1994)). "What [he does] with the cocaine after it is distributed is irrelevant to whether [he] facilitated the distribution." *Id.* (quoting *Kozinski*, 16 F.3d at 807). The court accordingly held 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.[3]

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[3] The court of appeals also rejected petitioner's contention that the evidence was insufficient to show that the alleged drug sales that formed the basis of the Section 843(b) convictions had in fact taken place. App., *infra*, 13a-18a. While petitioner does not renew that claim in this Court, the insubstantiality of the evidence of completed sales only bolsters the case for granting review of petitioner's convictions. The government recovered no drugs and admitted no drugs into evidence, it presented no witness who saw any drugs or any part of the alleged transactions, and it introduced no statements affirmatively indicating that the transactions had taken place.

REASONS FOR GRANTING THE WRIT

There is an acknowledged conflict among the courts of appeals on whether Section 843(b) applies to the purchase of drugs for personal use, with three courts of appeals concluding that Section 843(b) fails to encompass that situation and two courts of appeals reaching the opposite conclusion. The issue also has far-reaching consequences for the administration of the federal drug laws, and this case squarely raises the issue and presents a highly suitable vehicle for resolving it. In addition, the court of appeals' decision cannot be squared with Section 843(b)'s terms or with the statutory context and history. This Court therefore should grant review.

A. There Is An Acknowledged Conflict Among The Courts Of Appeals On Whether Section 843(b) Applies To The Purchase Of Drugs For Personal Use

1. The court of appeals recognized that the "circuits are divided" on whether Section 843(b) bars the use of a communications device to facilitate a purchase of drugs for personal use. App., *infra*, 9a. In concluding that Section 843(b) applies in that situation, the court of appeals reasoned that the "statute does not specify *whose* felony must be at issue, just that 'a' felony must be facilitated." *Id.* at 11a. In the court's view, petitioner facilitated not only his own misdemeanor purchase of drugs, but also the seller's felony sale of the drugs. *Id.* The court therefore considered it "simply irrelevant" that petitioner's "possession of cocaine for personal use may not itself be a felony." *Id.* at 11a-12a.

The court of appeals' interpretation of Section 843(b) is consistent with that of the Seventh Circuit.

App., *infra*, 13a. Indeed, the Fourth Circuit below quoted extensively from the Seventh Circuit's decisions and echoed that court's reasoning. *See id.* at 12a-13a. In particular, in *United States v. Binkley*, 903 F.2d 1130 (7th Cir. 1990), the Seventh Circuit held that the use of a telephone to purchase drugs for personal use violates Section 843(b). In the court's view, "it is not necessary to determine what a defendant does with the cocaine he purchased in order to determine whether that defendant violated § 843(b)." *Id.* at 1135-36. That is because, "regardless of what [the defendant] did with the cocaine after the sale"—*i.e.,* regardless of whether he personally used the drugs or distributed them—his telephone conversations with the seller "not only made [the seller's] sale of cocaine (a felony . . .) easier, it made the sale possible." *Id.* at 1136. The Seventh Circuit concluded that the buyer's "subsequent treatment of the cocaine cannot retroactively diminish [his] previous facilitation of [the seller's] cocaine sale." *Id.*[4]

The Seventh Circuit has since "reaffirmed [its] holding in *Binkley*." *United States v. Kozinski*, 16 F.3d 795, 807 (7th Cir. 2004). In *Kozinski*, the Seventh Circuit rejected the defendants' argument that they could not violate Section 843(b) "if they were using the telephone to purchase cocaine for their

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[4] Judge Cudahy dissented. *Binkley*, 903 F.2d at 1137-39. He observed that the majority's rationale conflicted with the long settled rule that a purchaser of drugs for personal use cannot be convicted of aiding and abetting the sale of drugs to himself. *Id.* at 1138. Judge Cudahy also explained that the majority's theory "makes no sense" because, under that theory, "actual possession of one gram of cocaine would be a misdemeanor," whereas "use of the telephone to obtain the cocaine would be a felony." *Id.*

own use." *Id.* The court noted that "[d]istributing cocaine is [a] felony," and reasoned that if, "by their use of the telephone, the [defendants] have made the distribution of the cocaine easier, they have facilitated it and violated the statute." *Id.* The court believed that "a person who uses a telephone to assist the distribution of cocaine, and then consumes the cocaine is as culpable as the one who uses the telephone to assist the distribution, and then gives the cocaine to another to consume." *Id.*

2. The Seventh Circuit, like the Fourth Circuit below, explicitly acknowledges that its interpretation of Section 843(b) conflicts with the decisions of other courts of appeals. *See Binkley*, 903 F.2d at 1135. To begin with, in *United States v. Martin*, 599 F.2d 880 (9th Cir. 1979), the Ninth Circuit reversed the conviction of a defendant who had been found guilty of violating Section 843(b) based on his purchase of a small amount of cocaine for personal use. The Ninth Circuit rejected the government's argument that the defendant had facilitated a conspiracy to distribute drugs, and instead accepted the defendants' argument that "a buyer cannot facilitate the very sale which creates his status." *Id.* at 888. The court determined that none of its decisions supported the "position that the distribution of drugs or an agreement to distribute drugs is 'facilitated' by a purchaser of the drugs." *Id.* Rather, in each of its decisions upholding "a conviction for facilitation, the defendant's role in the distribution of the drugs has been far more substantial than that of a buyer for personal consumption." *Id.*

The Ninth Circuit explained that its holding was consistent with Congress's intention in the federal drug laws "to draw a sharp distinction between dis-

tributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties." *Martin*, 599 F.2d at 889. "To hold that persons who merely buy drugs for their personal use are on an equal footing with distributors by virtue of the facilitation statute would undermine this statutory distinction." *Id.* The Ninth Circuit has subsequently reiterated that "the use of a telephone to order cocaine for personal use . . . is no offense at all," because while "[s]ection 843(b) condemns the use of a telephone in facilitating the commission of certain felonies," the "[p]ossession of cocaine for personal use is only a misdemeanor." *United States v. Brown*, 761 F.2d 1272, 1278 (9th Cir. 1985).

The Tenth Circuit, explicitly relying on the Ninth Circuit's decisions in *Martin* and *Brown*, has likewise held that the use of a telephone to purchase drugs for personal use does not violate Section 843(b). *United States v. Baggett*, 890 F.2d 1095, 1097-98 (10th Cir. 1989). The Tenth Circuit in *Baggett* rejected the government's argument that "one who uses a telephone to facilitate their simple possession of a controlled substance transforms the crime into a felony." *Id.* at 1097. The court instead concluded that the statute "clearly places mere 'customers' in the misdemeanor category." *Id.* And "because [the defendant] used the telephone only to order drugs for personal use, a misdemeanor," the court held, "she cannot be convicted under section 843(b)." *Id.* at 1098. The Tenth Circuit has subsequently reiterated *Baggett*'s holding "that § 843(b) is not violated when the drug distribution facilitated with the use of a telephone is solely for the purpose of personal consumption." *United States v. Small*, 423 F.3d 1164, 1186 (10th Cir. 2005); *see id.* ("Be-

cause the simple possession at issue in *Baggett* was only a misdemeanor, it could not be said that the defendant's use of a telephone in that case facilitated a felony.").

Finally, the Sixth Circuit, in *United States v. Van Buren*, 804 F.2d 888 (6th Cir. 1986) (per curiam), relied on the Ninth Circuit's decision in *Martin* in holding that "evidence of the purchase of cocaine for personal use does not establish use of the telephone to further [a drug distribution] conspiracy." *Id.* at 892. The court therefore vacated the defendant's plea of guilty under Section 843(b). While *Van Buren* involved a charge that the defendant used a telephone to facilitate a conspiracy to distribute cocaine, rather than to facilitate the distribution of cocaine itself, there is no basis for distinguishing between the two when assessing the applicability of Section 843(b). *See Martin*, 599 F.2d at 888 (rejecting the "government's position that the distribution of drugs *or an agreement* to distribute drugs is 'facilitated' by a purchaser of the drugs") (emphasis added). In *Baggett*, accordingly, the Tenth Circuit relied on and expressly "agree[d] with" the Sixth Circuit's decision in *Van Buren*, even though *Baggett* involved allegations that the defendant had used a telephone to facilitate the distribution of heroin rather than to facilitate a conspiracy to distribute heroin. *Baggett*, 890 F.2d at 1097-98.[5]

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[5] The court of appeals below mistakenly believed that the Sixth Circuit had held in its pre-*Van Buren* decision in *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984), that the use of a communications device to purchase drugs for personal use violates Section 843(b). *See* App., *infra*, at 10a, 11a. In *McLernon*, the Sixth Circuit held that Section 843(b) applied to a drug *dealer* who had used a telephone to facilitate the purchase

3. The courts of appeals thus acknowledge their longstanding disagreement on the scope of Section 843(b), and courts on both sides of the conflict have reaffirmed their respective positions. In addition, the five courts of appeals to have addressed the issue account for roughly half of all federal drug prosecutions. *See* Administrative Office of the U.S. Courts, 2007 Annual Report of the Director, Judicial Business of the U.S. Courts tbl. D-3 (2007). There is no justification for prolonging the resulting disparity in treatment under the federal drug laws depending solely on where a defendant happens to reside—with defendants who use a phone to purchase a small quantity of drugs for personal use treated as misdemeanants in three circuits, and identically situated defendants treated as felons in two other circuits. This Court should grant review to resolve the disagreement and eliminate that disparity.

B. Determining The Proper Reach Of Section 843(b) Is Highly Significant To The Administration Of The Federal Drug Laws, And This Case Presents An Ideal Vehicle For Resolving The Issue

1. a. The court of appeals' interpretation of Section 843(b) dramatically expands the reach of the provision and substantially affects the administration of the federal drug laws. The purchase of drugs for personal use is a misdemeanor. *See* 21 U.S.C. § 844(a). Under the court of appeals' (and the Seventh Circuit's) understanding of Section 843(b), how-

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of 10 kilograms of cocaine for further *distribution*. 746 F.2d at 1106-07. The Sixth Circuit therefore had no occasion in that case to address the applicability of Section 843(b) to the purchase of drugs for personal use.

ever, any misdemeanor purchase of drugs for personal use may be prosecuted as a felony whenever a phone or other communications device is used in the purchase. And because "the use of a telephone by those engaged in narcotics transactions is 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), the court of appeals' approach would enable the government routinely to transform misdemeanor purchases of drugs into felonies. *See United States v. de la Paz*, 43 F. Supp. 2d 370, 376 (S.D.N.Y. 1999) (observing that a "cellular telephone" is "a common tool of the drug trade").

The implications of the court of appeals' approach are particularly far-reaching because 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 the drugs, even if he did not initiate any call seeking drugs. Indeed, the government could itself convert the purchaser's misdemeanor into a felony by placing an undercover call offering the sale. *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) ("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.").

The district court below understood that, "in a case like this, it may not make sense to ratchet up what could probably be a simple possession case to a

felony," and that "a misdemeanor might have been a more appropriate charge" against petitioner. App, *infra*, 21a, 24a. But the court felt compelled to sustain the "prosecution decision that the U.S. Attorney's Office has made" based on its reading of Section 843(b), which the court of appeals later endorsed. *Id.* The court of appeals' interpretation of Section 843(b) not only allows the government to bring a felony prosecution against the buyer of a personal-use quantity of drugs whenever the buyer uses a telephone, *see, e.g., United States v. Lewis*, 387 F. Supp. 2d 573, 575 (E.D. Va. 2005), but the court's interpretation is of substantial practical significance in another respect as well: it allows the government to use the prospect of a felony charge in such circumstances as a powerful tool in plea negotiations in an effort to induce a defendant to plead guilty to a lesser charge such as simple possession. There is no warrant for enabling the government to use the prospect of a felony charge to gain leverage in plea negotiations when the charging theory is deficient as a matter of law, as is the case here.

b. The prospect of a felony charge and conviction under Section 843(b) is of serious consequence to a defendant. First, while the purchase of a personal-use quantity of drugs is a misdemeanor carrying a maximum sentence of one year of imprisonment, 21 U.S.C. § 844(a), a felony conviction under Section 843(b) carries a sentence of up to four years of imprisonment, 21 U.S.C. § 843(d). Moreover, whereas misdemeanor drug possession does not constitute a predicate crime for purposes of certain recidivism-based sentencing enhancements, a felony conviction under Section 843(b) is a predicate crime for those purposes. *See, e.g.,* 21 U.S.C. § 841(b)(1)(A) (increas-

ing sentence for offense committed "after a prior conviction for a felony drug offense has become final"). And because Section 843(b) renders "each separate use of a communication facility . . . a separate offense," a one-time buyer of a small quantity of drugs could conceivably face multiple felony convictions if several "separate" telephone conversations facilitated the purchase. 21 U.S.C. § 843(b).

A felony drug conviction under Section 843(b) also is of substantial significance to a permanent resident alien like petitioner. *See* C.A. App. 328. That is because a conviction under Section 843(b) constitutes an aggravated felony for purposes of the immigration laws, rendering the alien subject to removal from the country and ineligible for discretionary cancellation of removal. *See Lopez v. Gonzales*, 127 S. Ct. 625, 627-28; 8 U.S.C. §§ 1101(a)(43)(B) (defining "aggravated felony"), 1227(a)(2)(A)(iii) (subject to removal), 1229b(a)(3) (ineligibility for cancellation of removal).[6]

2. This case presents a highly suitable vehicle for resolving whether Section 843(b) extends to the use of a communications facility to purchase drugs for personal use. Throughout the proceedings, petitioner has preserved the claim that Section 843(b) fails to reach his purchase of drugs for personal use. *See* App., *infra*, 20a-25a, 33a-34a; Pet. C.A. Br. 8-14; C.A. App. 274-79. This case squarely raises the issue, moreover, because it is undisputed that petitioner purchased drugs solely for his own personal

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[6] Conviction of a drug felony also can render a defendant ineligible, *inter alia*, to: receive various federal benefits, *see* 21 U.S.C. § 862a(a); vote in elections, *see Richardson v. Ramirez*, 418 U.S. 24 (1974); serve on a federal jury, *see* 28 U.S.C. § 1865(b)(5); and enlist in the armed forces, *see* 10 U.S.C. § 504.

use rather than for distribution. The court of appeals accordingly explained that it was "[f]aced directly with the issue" of "whether § 843(b) applies to facilitation of a drug distribution for personal use." App., *infra*, 11a. The court also framed its holding in terms of personal use, "concluding 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.

Because petitioner purchased drugs only for his own personal use, a misdemeanor, the government at no point has argued or suggested that petitioner used a cell phone to facilitate his own commission of a drug "felony" for purposes of Section 843(b). Rather, the sole prosecution theory advanced by the government and put to the jury was that petitioner facilitated *Said*'s commission of a drug felony—*viz.*, the distribution of drugs to petitioner. *See* Gov't C.A. Br. 16-29; App., *infra*, 26a (government stating in closing argument that element of facilitation concerns whether petitioner's use of a cell phone was "intended to facilitate . . . the distribution of cocaine by Mohammed Said to the defendant"); *id.* at 30a (jury instruction requiring jurors to determine whether petitioner used his telephone "to facilitate the commission of a drug offense, in this case, the cocaine distribution" by Said). The court of appeals thus applied Section 843(b) to petitioner on the explicit understanding that his conduct would otherwise constitute a misdemeanor, declaring "simply irrelevant" the "fact that [petitioner's] possession of cocaine for personal use may not itself be a felony." App., *infra*, 11a-12a.

C. The Court Of Appeals Erred In Interpreting Section 843(b) To Reach The Purchase Of Drugs For Personal Use

The Court should grant certiorari because the court of appeals erred in applying Section 843(b) to petitioner's purchase of drugs for personal use. The terms of the provision make it unlawful to use a telephone or other communications device to "facilitate" the commission of a drug "felony." 21 U.S.C. § 843(b). For several reasons, a person who uses a telephone to purchase drugs for personal use does not "facilitate" a drug "felony."

1. a. The term "facilitate" in Section 843(b) must be interpreted against the backdrop of the firmly established rule that a person who buys a product whose sale is unlawful is not guilty of aiding or abetting the sale. It has long been settled that "a purchaser is not a party to the crime of illegal sale." 2 Wayne R. LaFave, Substantive Criminal Law § 13.3(e), at 371 (2d ed. 2003); *see Gebardi v. United States*, 287 U.S. 112, 119 (1932) (purchaser of liquor does not aid or abet the illegal sale); *United States v. Farrar*, 281 U.S. 624, 633-34 (1930) (same). That rule reflects the general understanding that "a person is not an accomplice in an offense committed by another person if . . . the offense is so defined that his conduct is inevitably incident to its commission." Model Penal Code § 2.06(6). Under those principles, a buyer of drugs cannot be convicted of aiding and abetting his dealer's sale of the drugs to him. *See United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977) ("reject[ing] government's suggestion" that principal "who receives the drug for personal use" is "liable as an aider and abettor of the agent's distribution to him," because "under such a theory every

drug abuser would be liable for aiding and abetting the distribution which led to his possession").

The term "aid and abet" is synonymous with the term "facilitate" in Section 843(b). Indeed, Black's Law Dictionary defines "aid and abet" as "to facilitate the commission of a crime." Black's Law Dictionary 76 (8th ed. 2004). Consequently, if a purchaser of drugs cannot be convicted of aiding and abetting the sale of the drugs to himself for purposes of establishing his guilt as an accomplice, the purchaser also cannot be guilty of "facilitating" the sale of the drugs to himself for purposes of establishing his guilt under Section 843(b). *See Binkley*, 903 F.2d at 1138 (Cudahy, J., dissenting).[7]

b. The court of appeals' interpretation of the term "facilitate" in Section 843(b) also stands at odds with this Court's understanding of the same term in an analogous statute in *Rewis v. United States*, 401 U.S. 808 (1971). In *Rewis*, the Court considered whether the customers of an illegal gambling enterprise "facilitate" that enterprise within the meaning of the Travel Act, 18 U.S.C. § 1952. The court of appeals had held that the patrons of an illegal gambling establishment were not guilty of "facilitating" the establishment, and this Court agreed with that holding. *Rewis*, 401 U.S. at 811. The Court explained that "the ordinary meaning of this language

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[7] The United States Sentencing Guidelines provisions governing Section 843(b) reinforce that the term "facilitate" in that provision should be read consistently with principles governing aider-and-abettor liability. 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 (2007), the base offense level for using a telephone to facilitate a drug felony is "the offense level applicable to the underlying offense," *see id.* § 2D1.6.

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," as with the term "facilitate" in the Travel Act and Section 843(b), "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). 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.").

c. The court of appeals' interpretation of "facilitate" also cannot be squared with Congress's use of that term in other drug laws. As part of the Narcotics Control Act of 1956, which first created the communication facility offense, Congress imposed felony criminal penalties on any person who "receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any [imported] narcotic drug." Pub. L. No. 84-728, § 105, 70 Stat. 567, 570 (codified at former 21 U.S.C. § 174(c) (repealed)). That provision expressly differentiated between "buy[ing]" drugs and "facilitat[ing] the . . . sale" of drugs. If, as the court of appeals reasoned, every purchase of drugs necessarily "facilitates" a corresponding sale by "ma[king] the sale possible,"

App., *infra*, 11a (internal quotation marks omitted), then the term "buys" in the Narcotics Control Act was mere surplusage. As this Court has explained, however, "[j]udges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994).

2. The court of appeals' interpretation of Section 843(b) disregards the fundamental distinction in the federal drug laws between drug distribution and drug possession for personal use. "Congress intended to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties." *Martin*, 599 F.2d at 889; *see Swiderski*, 548 F.2d at 499-50. In particular, Congress aimed to impose "severe penalties for commercial trafficking in and distribution of narcotics," but to emphasize "rehabilitation rather than retribution in the case of personal drug use." *Id.* at 499; *see* H.R. Rep. No. 1444, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4575. Accordingly, distribution is almost always a felony, with progressively steeper penalties depending on the schedule and quantity of drugs distributed, *see* 21 U.S.C. § 841, while possession for personal use is a misdemeanor, 21 U.S.C. § 844(a). Indeed, a person found guilty of misdemeanor possession for personal use may be allowed to avoid any judgment of conviction at all upon successful completion of a probationary period. *See* 18 U.S.C. § 3607.

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the

overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). But by interpreting Section 843(b) such that it would routinely transform misdemeanor possession of drugs for personal use into a felony, the court of appeals' approach would undermine the sharp distinction in the federal drug laws between misdemeanor possession for personal use and felony distribution. *See Martin*, 599 F.2d at 889 ("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 this statutory distinction."). Under that interpretation of Section 843(b), "actual possession of one gram of cocaine would be a misdemeanor, though use of the telephone to obtain the cocaine would be a felony. This makes no sense." *Binkley*, 903 F.2d at 1138 (Cudahy, J., dissenting).

This case manifests the discord between the court of appeals' interpretation of Section 843(b) and the basic objectives of the federal drugs laws. There is no suggestion that petitioner ever took part in the distribution of drugs or was anything more than a drug user. Congress in that situation sought to emphasize rehabilitation rather than retribution, *see Swidersky*, 548 F.2d at 499-50; and petitioner has passed every drug test administered to him after his indictment. C.A. App. 331, 360, 362. Yet the court of appeals' understanding of Section 843(b) upholds felony convictions against him and exposes him to the prospect of removal from the country and ineligibility for relief from removal that would enable him to remain here with his wife and children. That result is inconsistent with Congress's fundamental objectives in the federal drug laws.

3. The court of appeals' interpretation of Section 843(b) also cannot be squared with Congress's restriction of the provision's reach to facilitation of a drug "felony." 21 U.S.C. § 843(b). Congress elected to refrain from extending Section 843(b) to reach the use of a telephone to facilitate a drug "misdemeanor." When a person uses a telephone to arrange his purchase of drugs for personal use, he facilitates the misdemeanor of possessing drugs for personal use—*i.e.*, conduct Congress elected to exclude from Section 843(b). Under the court of appeals' approach, however, any person who facilitates his own misdemeanor purchase of drugs would also facilitate the seller's felony distribution of drugs, thereby undercutting Congress's exclusion of drug misdemeanors from Section 843(b).

Section 843(b)'s statutory history is instructive on this score. The predecessor provision to Section 843(b) was not confined to facilitation of a drug "felony," but instead encompassed use of a communication facility to facilitate "any act or acts constituting an *offense*" punishable under the drug laws. Narcotics Control Act § 201, 70 Stat. at 573 (emphasis added) (codified at former 18 U.S.C. § 1403 (repealed)). Because the federal drug laws at that time treated both drug distribution and the purchase of drugs for personal use as felonies, all drug "offense[s]" covered by the original communication facility provision were felonies. *See id.* §§ 103, 105-08, 70 Stat. at 568-72 (codified at former 21 U.S.C. §§ 174, 184a (repealed); 26 U.S.C. § 7237 (repealed)).

When Congress comprehensively revised the federal drug laws in the Controlled Substances Act of 1970 (CSA), it drew a sharp distinction between drug distribution and drug use, reducing the penalty

for possession of drugs for personal use by creating a new misdemeanor offense of simple possession. Pub. L. No. 91-513, Tit. II, § 404(a) 84 Stat. 1236, 1264 (codified at 12 U.S.C. § 844(a)). That change—*viz.*, rendering "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. H33316 (daily ed. Sept. 23, 1970) (statement of Rep. Boland); *see also* H.R. Rep. No. 1444, *supra*, 1970 U.S.C.C.A.N. at 4577 (under the CSA, illegal possession "by an individual for his own use is a misdemeanor").

In the immediately preceding section of the CSA, Congress narrowed the communication facility provision to reach the facilitation only of a drug "felony," rather than a drug "offense." CSA § 403(b), 84 Stat. at 1263 (codified at 21 U.S.C. § 843(b)). Congress thus simultaneously downgraded simple possession to a misdemeanor and decriminalized the facilitation of drug misdemeanors altogether. Congress's evident purpose was to exclude from Section 843(b)'s reach the use of a communication device to facilitate the newly created misdemeanor offense of simple possession. The court of appeals' interpretation of Section 843(b) thus would have the effect of undermining Congress's decision to restrict the scope of the provision to facilitation of a drug "felony."

4. To the extent there is any ambiguity concerning the applicability of Section 843(b) to the purchase of drugs for personal use, the rule of lenity would require construing the provision in petitioner's favor. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion); *id.* at 2033-34 (Stevens, J., concurring); *Liparota v. United States*,

471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347-48 (1971). Under that rule, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Bass*, 404 U.S. at 347 (internal quotation marks omitted).

Here, Congress failed to establish "in language that is clear and definite" that Section 843(b) encompasses the use of a telephone to purchase drugs for personal use. *Bass*, 404 U.S. at 347. For that reason as well, the court of appeals erred in upholding the application of Section 843(b) to petitioner.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 13, 2008

APPENDIX A
COURT OF APPEALS OPINION

United States Court of Appeals,
Fourth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

Salman Khade ABUELHAWA, Defendant-Appellant.

No. 07-4639

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(1:07-cr-00018-LMB)

Argued: March 19, 2008

Decided: April 25, 2008

Before WILLIAMS, Chief Judge, SHEDD, Circuit Judge, and William L. OSTEEN, Jr., United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Chief Judge Williams wrote the opinion, in which Judge Shedd and Judge Osteen joined.

COUNSEL

ARGUED: Timothy Joseph McEvoy, ODIN, FELDMAN & PITTLEMAN, P.C., Fairfax, Virginia, for Appellant. David Brian Goodhand, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Chuck Rosenberg, United States Attorney, Julie Warren, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

OPINION

WILLIAMS, Chief Judge:

Salman Khade Abuelhawa appeals his conviction and sentence for violating 21 U.S.C.A. § 843(b) (West 1999), which prohibits knowingly or intentionally using a communication facility in committing, causing, or facilitating the commission of certain felonies, including drug distribution. Abuelhawa argues that he cannot be convicted of violating § 843(b) because the drug distribution in question was his purchase of cocaine for personal use, a misdemeanor, *see* 21 U.S.C.A. § 844(a)(1) (West 1999 & Supp. 2007). He also contests the sufficiency of the evidence supporting his conviction under § 843(b). Disagreeing with Abuelhawa on both counts, we affirm.

I.

In early 2000, the Federal Bureau of Investigation ("FBI") began an investigation into possible cocaine distribution by Mohammed Said in the Skyline area of Virginia, just outside of Washington, D.C. During the course of this

investigation, in June 2003, the FBI applied for, and was granted, a Title III warrant to wiretap Said's cell phone.[1] In this case, the wiretap captures "both phone numbers, . . . the time of the phone call, the date of the phone call, [and] the duration of the phone call," anytime a call, either incoming or outgoing, occurs between the wiretapped phone and another phone. (J.A. at 125.) Agents are also able to "intercept the conversation that occurs" between the two phones. (J.A. at 125.) The FBI can then subpoena a telephone company to identify the subscribers of telephones used to make contact with the wiretapped phone.

In July 2003, FBI agents monitoring the wiretap of Said's cell phone issued a subpoena in an effort to identify the subscriber with the cell phone number 703-969-8743. From this subpoena, the FBI learned that the number belonged to Abuelhawa. Thereafter, the FBI monitored a series of calls between Said and Abuelhawa that form the basis of this appeal.

The wiretap recorded a total of eight calls between Abuelhawa and Said in early July 2003: the two men spoke twice on July 2, 2003, three times on July 5, and three times on July 12.[2] On July 2, at approximately 10:12 p.m., Abuelhawa called Said

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[1] The term Title III refers to the federal wiretapping statute (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510 *et seq.* (West 2000 & Supp. 2006)), which permits wiretapping by federal agents upon a showing of necessity. 18 U.S.C.A. § 2518 (West 2000).

[2] These conversations took place primarily in Arabic and were translated by a Government Arabic language specialist prior to trial. Neither party contests the accuracy of the translations.

and instructed: "Bring me the half by the Hilton or do you want me to come to you?" (J.A. at 318.) An FBI agent as well as an expert witness testified that Abuelhawa's reference to "the half," was to a half gram of cocaine. Said called Abuelhawa back at 10:20 p.m. Said asked Abuelhawa, "Where are you?," to which Abuelhawa replied, "I am coming to you." (J.A. at 319.) The call ended with Abuelhawa saying "I have seen you." (J.A. at 319.)

On July 5, 2003, the wiretap intercepted three additional calls between Abuelhawa and Said, beginning at 10:12 p.m. In the first call, Abuelhawa asked for "[o]ne of the small, 100 type," continuing, "[l]ike, like that time when you and I, when I saw As'ad."[3] (J.A. at 320.) Said answered, "Ah. Ok." (J.A. at 320.) Abuelhawa continued, "But please for God's sake, fix it well. May God keep you." (J.A. at 320.) Said responded, "Alright. Alright. Where?" (J.A. at 320.) Abuelhawa reported that he was still at home, and Said instructed Abuelhawa to "[w]ait for me in Skyline until I come back [from picking up my sister]." (J.A. at 320.) The Government's expert witness testified that the reference to the "100 type" was a reference to one gram of cocaine, which has a retail value between $80-$120.

At 11:17 p.m., Said called Abuelhawa to ask his whereabouts. Abuelhawa responded that he was "almost in the neighborhood" and asked to meet "[b]y the Eleven." (J.A. at 322.) Said responded, "No. No. Meet me out on the street that is after it. . . . In front of the street from where you are talking to me." (J.A. at 322.) Abuelhawa responded, "Fine. Ok." (J.A. at

[3] As'ad was the name of Mohammed Said's father.

322.) Four minutes later, at 11:21 p.m., Said again called Abuelhawa and asked, "Have your excellency arrived?" (J.A. at 323.) Abuelhawa responded, "I have arrived man. . . . but there are two people at that . . . so I drove down a little further." (J.A. at 323.) Said and Abuelhawa discussed this latest development for a moment, with Said instructing Abuelhawa to "go further down" because "[i]t is better." (J.A. at 323.) Abuelhawa responded, "Fine. Ok," and Said said, "Alright." (J.A. at 323.) No further phone calls were intercepted on July 5.

Finally, on July 12, the FBI intercepted three calls between Said and Abuelhawa. First, at 8:30 p.m., Abuelhawa called Said and asked, "Where did the free stuff go? Is it gone?" (J.A. at 324.) Said responded in the affirmative, and Abuelhawa said, "We should celebrate that it is gone. It was good." (J.A. at 324.) Abuelhawa continued, "May God give you health. So will I see you after an hour?" (J.A. at 324.) Said said, "[A]lright," and then he asked, "How much do you need?" (J.A. at 324.) Abuelhawa responded, "A half." (J.A. at 324.)

At 9:18 p.m., Abuelhawa called Said again, and said, "Ok. Listen. Make it one of the big ones. The 100 type." (J.A. at 326.) Said assented and asked Abuelhawa when he would arrive; Abuelhawa responded, "I am, I am on my way. I am leaving home." (J.A. at 326.) The two men then agreed to meet at Said's "store." (J.A. at 326.) At 9:47 p.m., another call occurred between Said and Abuelhawa. (J.A. at 327.) Said asked where Abuelhawa was; Abuelhawa responded, "Right here. I am, I am coming to you in two minutes." (J.A. at 327.) Said expressed his desire to leave the shop, stating, "I

really want to leave this place." (J.A. at 327.) Abuelhawa pleaded, "I am coming to you man. One minute." (J.A. at 327.) Said relented and told Abuelhawa, "Come. Meet me at the grill. Ok. Bye." (J.A. at 327.) At trial, testimony from the Government established that Said's father owned the Skyline butcher shop and a restaurant called the Skyline Grill, which were located next door to each other. An FBI agent further testified that the Skyline Grill "is a location where Mohammed Said distribute[d] cocaine." (J.A. at 148.)

Based upon these intercepted telephone calls, Abuelhawa was placed under arrest at his home on October 17, 2003. After being advised of his *Miranda* rights, Abuelhawa agreed to speak with the FBI agents who arrested him and admitted that he purchased cocaine from Said and a dealer named Issam Khatib. Abuelhawa told the agents that he originally purchased cocaine, usually in one-half gram amounts, from Khatib and that Said became his dealer after Khatib left the business and Said assumed control of Khatib's customer base. Abuelhawa further told the agents that he used his cell phone to call Said's cell phone in order to buy cocaine in one-half gram amounts and that he and Said would usually meet outside of the Skyline Grill to complete the drug transactions. Said would hand the cocaine, in a tin-foil package, to Abuelhawa through Abuelhawa's car window. Abuelhawa gave no statements indicating that he purchased cocaine on the specific dates of July 5 and July 12.

On January 25, 2007, a federal grand jury sitting in the Eastern District of Virginia charged Abuelhawa in a seven-count indictment with

violating 21 U.S.C.A. § 843(b) and 18 U.S.C.A. § 2 (West 2000). The indictment charged Abuelhawa with unlawfully, knowingly, and intentionally using a communications facility—a telephone—in committing, causing, and facilitating the commission of a violation of 21 U.S.C.A. § 841(a)(1) (West 1999), distribution of cocaine. Counts Two through Four alleged violations of § 843(b) based upon the three July 5th phone calls, while Counts Five through Seven focused on the three July 12th calls. Count One, which was dismissed prior to trial for reasons not relevant to the appeal, focused on a phone call made on June 29, 2003.

Following the close of the Government's case-in-chief, Abuelhawa moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. The district court denied the motion, explaining:

> You may be right on the July 5 incidents. If that's all the government had, if they only had one set of conversations, I think I'd be granting your motion, but you have a week later a second round of conversations, and it seems to me it's not an unreasonable inference to draw the conclusion that if the first set of transactions had been unsuccessful, you'd have either heard some complaints or something in the second round.

(J.A. at 201-02.)

The jury thereafter convicted Abuelhawa on all six of the remaining counts in the indictment. Abuelhawa followed his oral Rule 29 motion with a later written one, which the district court denied prior to sentencing. The district court sentenced

Abuelhawa to 24 months probation and a $2,000 fine.[4] Abuelhawa timely noted an appeal, and we possess jurisdiction under 28 U.S.C.A. § 1291 (West 2006) and 18 U.S.C.A. § 3742(a) (West 2000).

II.

Abuelhawa pursues two arguments on appeal regarding his conviction. First, Abuelhawa contends that § 843(b) is not violated when an individual facilitates the purchase of a drug quantity for personal use. Second, Abuelhawa contends that, even assuming § 843(b) criminalizes such conduct, the Government produced insufficient evidence to show that a drug distribution occurred on either July 5 or July 12. We address each contention in turn.

A.

Whether § 843(b) extends to personal-use distributions is a question of statutory interpretation, which we review *de novo*, *see United States v. Nelson*, 484 F.3d 257, 260 (4th Cir. 2007), and we "begin with the language of the statute," *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). We first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Robinson*, 519 U.S. at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)).

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[4] At that time, the district court also merged the convictions for Counts 3 and 4 into Count 2, and the convictions for Counts 6 and 7 into Count 5.

"The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Ron Pair Enters.*, 489 U.S. at 242 (internal quotation marks omitted).

Section 843(b) 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 any provision of this subchapter or subchapter II of this chapter." 21 U.S.C.A. § 843(b). Abuelhawa was convicted of committing, causing or facilitating the commission of a violation of 21 U.S.C.A. § 841(a)(1), which criminalizes distribution of controlled substances.[5] This distribution, Abuelhawa notes, was for his personal use.

Because there is no dispute that Abuelhawa used a communication facility (a cell phone) to arrange the drug transactions, we believe this case can be decided by focusing only on whether Abuelhawa facilitated the commission of a felony. We begin with the recognition that our sister circuits are divided on the issue facing us; some find that when a communication facility is used to facilitate a drug sale for personal use, § 843(b) is not violated. *See United States v. Baggett*, 890 F.2d 1095, 1098 (10th Cir. 1990); *United States v. Martin*, 599 F.2d 880, 888-89 (9th Cir. 1979) *overruled on other grounds by United States v. DeBright*, 730 F.2d 1255 (9th Cir.

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[5] Cocaine is a Schedule II controlled substance, covered by 21 U.S.C.A. § 841(a)(1) (West 1999).

1984).[6] These circuits take the position that "a mere customer's contribution to the business he patronizes does not constitute the facilitation envisioned by Congress." *Martin*, 599 F.2d at 889. In contrast, other circuits have concluded that distributions for personal use are covered by § 843(b). *See United States v. Binkley*, 903 F.2d 1130, 1135-36 (7th Cir. 1990); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984); *United States v. Phillips*, 664 F.2d 971, 1032 (5th Cir. Unit B Dec. 1981) *overruled on other grounds by United States v. Huntress*, 956 F.2d 1309 (5th Cir. 1992).[7] The Seventh Circuit, in

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[6] Abuelhawa also cites to *United States v. Van Buren*, 804 F.2d 888, 892 (6th Cir. 1986) in support of his position. In *Van Buren*, however, the Sixth Circuit addressed whether use of a telephone to purchase drugs for personal use furthered a drug *conspiracy*, not whether 21 U.S.C.A. § 843(b) (West 1999) extends to personal use distributions. Instead, it appears that the Sixth Circuit does not agree with Abuelhawa. *See United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984) ("To prove 'facilitation,' the government must show that the 'telephone call comes within the common meaning of facilitate- 'to make easier' or less difficult, or to assist or aid. It is sufficient if a defendant's use of a telephone to facilitate the possession or distribution of controlled substances facilitates either his own or another person's possession or distribution." (quoting *United States v. Phillips*, 664 F.2d 971, 1032 (5th Cir. Unit B. Dec. 1981))).

[7] *United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B Dec. 1981) is binding precedent in both the Fifth and Eleventh Circuits. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1422 n.8 (5th Cir. 1996) (noting that all cases decided by Unit B panels of the Former Fifth Circuit are binding precedent in the Fifth Circuit); *Stein v. Reynolds Sec. Inc.*, 667 F.2d 33, 34 (11th Cir. 1982) (noting that decisions by Unit B panels of the Former Fifth Circuit are binding precedent in the Eleventh Circuit).

Binkley, noted the term "facilitate" "should be given its ordinary meaning, which is, simply, 'to make easier.'" *Binkley*, 990 F.2d at 1135 (quoting *Phillips*, 664 F.2d at 1032). *See also McLernon*, 746 F.2d at 1106 (same). And, by placing the focus on the *use* of a communications device to make a distribution easier, a defendant's "subsequent treatment of the cocaine cannot retroactively diminish [the defendant's] previous facilitation of . . . [a] cocaine sale." *Binkley*, 990 F.2d at 1136.

Although we have not adopted either position, we have previously indicated our agreement with *Phillips*, *McLernon*, and *Binkley* that, for purposes of § 843(b), "facilitate" should be given its "common meaning—to make easier or less difficult, or to assist or aid." *United States v. Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988) (internal quotation marks omitted). Faced directly with the issue confronted in those cases, we believe those circuits also have the better of the argument as to whether § 843(b) applies to facilitation of a drug distribution for personal use.

Section 843(b) has as its essential elements knowing or intentional use of a communication facility to commit, cause, or facilitate certain enumerated felonies. The statute does not specify *whose* felony must be at issue, just that "a" felony must be facilitated. Cocaine distribution is a felony, 21 U.S.C.A. § 841(a)(1), and Abuelhawa's use of his cell phone undoubtedly made *Said*'s cocaine distribution easier; in fact, "it made the sale possible."[8] *Binkley*, 903 F.2d at 1136. The fact that

[8] As one of our district courts has stated, "the decisions of the Fifth and Seventh Circuit appropriately focus on the

Abuelhawa's possession of cocaine for personal use may not itself be a felony, 21 U.S.C.A. § 844(a)(1), is simply irrelevant under § 843(b). As the Seventh Circuit explained,

> If, by their use of the telephone, the appellants have made the distribution of the cocaine easier, they have facilitated it and violated the statute. What they do with the cocaine after it is distributed is irrelevant to whether they facilitated the distribution; the crime is complete long before they either use or dispose of the cocaine.

United States v. Kozinski, 16 F.3d 795, 807 (7th Cir. 1994) (internal citations omitted).

Abuelhawa believes this result is nonsensical because, if he had simply approached Said on the street and purchased one-half gram of cocaine, his conduct would be punishable only as a misdemeanor. Abuelhawa thus argues it is beyond logic that his use of a cell phone to contact Said transforms his possession offense into a felony. Congress, however, may well have had reason for such a result: use of communication facilities makes it easier for criminals to engage in their skullduggery, and Congress may reasonably have desired to increase criminal penalties for those who use such means to evade detection by law enforcement. At any rate, Abuelhawa's contention certainly fails to prove that

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defendant's use of a communication facility in the 'making easier' of the completion of any felony under the Controlled Substances Act." *United States v. Lewis*, 387 F. Supp. 2d 573, 584 (E.D. Va. 2005).

our result is "demonstrably at odds," *Ron Pair Enters.*, 489 U.S. at 242 (internal quotation marks omitted), with congressional intent, best expressed in the plain language of § 843(b), which references only "a felony." 18 U.S.C.A. § 843(b).

We thus join the Fifth, Sixth, Seventh, and Eleventh Circuits in concluding that persons like Abuelhawa, who facilitate distribution of a controlled substance to themselves for personal use by using a communication facility, can be prosecuted for violating § 843(b). Quite simply, "status as buyer[ ] or distributor[ ] is of no consequence regarding section 843(b); rather, [a defendant's] status as [a] facilitator[ ] alone gives rise to criminal liability." *Kozinski*, 16 F.3d at 807.

B.

In the alternative, Abuelhawa contends that the Government failed to prove a violation of § 843(b) in this case because it failed to show the occurrence of an actual drug distribution on either July 5 or July 12. Abuelhawa bears a "heavy burden" in contesting the sufficiency of the evidence supporting a jury verdict. *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997) (internal quotation marks omitted). His conviction must be affirmed if, reviewing the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Burgos*, 94 F.3d 849, 862-63 (4th Cir. 1996) (en banc). The Government receives the benefit of "all reasonable inferences from the facts proven to those sought to

be established." *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982) (citations omitted).

In contesting the sufficiency of the evidence, Abuelhawa focuses upon what he categorizes as lacking in the Government's case: the actual drugs, the absence of witness testimony or objective evidence that Abuelhawa and Said ever met on July 5 or July 12, and the lack of admissions from Abuelhawa that he purchased cocaine from Said on either July 5 or July 12. Abuelhawa points us to *Baggett*, in which the Tenth Circuit required the Government, in a prosecution for narcotics *possession*, to "put forth some evidence to show that [a defendant] actually possessed heroin on the day in question." *Baggett*, 890 F.2d at 1096.

In *Baggett*, the defendant was charged with possession of heroin on November 29, 1987. *Id.* The Government put forth evidence that the female defendant Baggett made three calls to a drug dealer on that day to purchase heroin and cocaine at a set location, that a female emerging from a car registered to Baggett was seen at that set location entering the drug dealer's car twice on November 29, and that in March 1988 Baggett gave statements to the police that she used heroin during the month of November 1987. *Id.* In reversing Baggett's conviction, the Tenth Circuit proceeded, based upon our opinion in *United States v. Dolan*, 544 F.2d 1219 (4th Cir. 1976), to list several means by which the Government could prove actual *possession*.[9] *Baggett*,

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[9] The Tenth Circuit quoted from the following passage from *United States v. Dolan*, 544 F.2d 1219 (4th Cir. 1976):

890 F.2d at 1096. In *Dolan*, however, we addressed examples of evidence the Government could use to prove the *identity* of a substance in lieu of expert testimony. *Dolan*, 544 F.2d at 1221.

The Tenth Circuit read *Dolan* for the broader proposition that "[i]f the prosecution is not going to present direct evidence of drug possession, its circumstantial evidence must include some testimony linking defendant to an observed substance that a jury can infer to be a narcotic." *Baggett*, 890 F.2d at 1097. *See also United States v. Hall*, 473 F.3d 1295 (10th Cir. 2007) ("While other courts have not gone so far as to require that evidence include an 'observed substance that a jury can infer to be a narcotic,' there is little doubt that a defendant's own inculpatory statements captured on wiretaps must be corroborated by other circumstantial evidence of possession such that a

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> [L]ay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the identi[t]y of the substance involved in an alleged narcotics transaction. Such circumstantial proof may include evidence of the physical appearance of the substance involved in the transaction, evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug, evidence that the substance was used in the same manner as the illicit drug, testimony that a high price was paid in cash for the substance, evidence that transactions involving the substance were carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence[.]

Id. at 1221 (internal citations omitted).

jury may properly infer the specific drug was actually possessed.").

While the Tenth Circuit may have extended *Dolan*'s inexhaustive list for proving a substance's identity into a rigid proof requirement for all charges of narcotics possession, we decline to do so. We have never placed such a burden on the Government, and "we decline to give a checklist or formula for sufficiency." *United States v. Bryce*, 208 F.3d 346, 353 (2d. Cir. 2000).

Instead, when "we look at what facts *did* exist in this case," *United States v. McCoy*, 513 F.3d 405, 412 (4th Cir. 2008), we conclude the Government produced sufficient evidence of a completed distribution on both July 5 and July 12. To prove these offenses, the Government put forth three phone calls on both July 5 and July 12 orchestrating drug transactions between Abuelhawa and Said. All three calls took place in short time frames, setting up the exact details of the transaction. No calls were made indicating the transactions failed, and the July 12 phone calls make no mention that the July 5 transaction was not consummated. Expert testimony explained that Abuelhawa used "code words" during the calls indicating his desire to purchase one-half gram and one gram amounts of cocaine. Abuelhawa told investigators that he normally purchased cocaine in one-half gram amounts from the Skyline Grill, the business mentioned in the final call on July 12. We think from this evidence, including the confirmatory statements from Abuelhawa that he purchased cocaine from Said, a reasonable jury could infer that

Said completed a distribution on both July 5 and July 12.

In particular, a reasonable jury could infer that had Said not in fact distributed cocaine to Abuelhawa on July 5 after indicating that he was on the very street where he and Said were scheduled to meet, one of them might have mentioned the failed transaction in the July 12 calls. As to July 12, the final call concludes with Abuelhawa stating that he is "[o]ne minute" away from Said, (J.A. at 327), and Said agreeing to meet Abuelhawa at the Skyline Grill, where Abuelhawa later admitted was his normal destination for cocaine purchases. Again, viewing this evidence in the light most favorable to the Government, and drawing all reasonable inferences in its favor, we believe a reasonable jury could certainly have found Abuelhawa guilty of violating § 843(b) for facilitating Said's cocaine distribution on July 12 as well. Given the immediacy of the final call between Abuelhawa and Said, a reasonable jury could conclude that, if the transaction was not consummated, a further call would have been made.

Much of Abuelhawa's argument focuses on the Government's presentation of only circumstantial evidence to support its case. We have explained that "as a general proposition, circumstantial evidence may be sufficient to support a guilty verdict even though it does not exclude every reasonable hypothesis consistent with innocence." *United States v. Osborne*, 514 F.3d 377, 387 (4th Cir. 2008) (alteration and quotation marks omitted). With this proposition in mind, and under our deferential standard of review, we conclude that the

Government provided sufficient evidence to support the jury's verdict.

III.

Because we hold that § 843(b) criminalizes facilitation of drug distributions for personal use, and that the Government adduced sufficient evidence that Abuelhawa violated § 843(b) on July 5 and July 12, Abuelhawa's conviction and sentence must be and is

AFFIRMED.

APPENDIX B

TRANSCRIPT OF DISTRICT COURT JURY TRIAL AND SENTENCING

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

v.

Salman Khade ABUELHAWA, Defendant

Criminal No. 1:07cr18

Alexandria, Virginia
March 29, 2007
10:17 a.m.

EXCERPT

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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MR. McEVOY: The other argument, which was raised in the trial briefs, is that this simply isn't a crime. I mean, we don't have any—what we have is testimony that there was cocaine involved or purchased by my client, viewing it in the light most favorable to the government, that weighed somewhere between the weight of a U.S. dime and a U.S. nickel.

There is no contention that this is a dealing case. Mohammed Said according to the government was the dealer, not my client. And under the case law that I presented and a Supreme Court case that we contend applies by analogy, three circuits and Judge Cudahy in the Seventh Circuit in dissent in a case

that goes the other way, three circuits to two circuits say this just isn't a crime.

THE COURT: And the Fourth Circuit hasn't said anything.

MR. McEVOY: Hasn't said anything, that's right, but—

THE COURT: Well, I understand that, but, I mean, if one literally reads the statute, a distribution is a distribution. It can be a tenth of a gram. It still is a person—if from person A to person B, person A gives a minuscule but detectable amount of cocaine to a second person, that's a distribution. You know that from the law.

MR. McEVOY: But—

THE COURT: And if the distribution is in any way facilitated—I'm just reading the straight words of the statute. While I understand in a case like this, it may not make sense to ratchet up what would probably be a simple possession case to a felony, but that's a prosecution decision that the U.S. Attorney's Office has made, that's an issue to be considered down the road, depending upon what happens, but in terms of just a literal reading of the statute, I don't think it's at all straining the language to find that it would apply to a situation like this, because but for the phone conversation, this particular distribution would not have occurred. So it facilitated.

MR. McEVOY: Well, I mean, obviously, Your Honor knows we strongly disagree.

THE COURT: I mean, I respect your argument, you know, and obviously, several circuits have found

that that's not an appropriate reading of the statute, but I don't see anything in the language of the statute that would suggest to the contrary.

MR. McEVOY: Except, Your Honor, that the—it talks about causing, committing, or facilitating. Causing—I may have the words wrong, but two of the words are clearly birds of a feather, if you will.

Should I—

THE COURT: Committing, causing, or facilitating the commission.

MR. McEVOY: Right.

THE COURT: All right. So it's committing the commission, causing the commission, or facilitating. In other words, "facilitate" means to make easier, but causing, if I call you to order something and you then deliver it to me, haven't I caused the delivery?

MR. McEVOY: I don't think that simply presenting an opportunity causes anyone to do anything. That's like saying that because I opened the doors of a bank one day, that I caused the guy to come in and rob it. I mean, I don't cause anybody to do anything. I may make it—you know, I may open the door, but that's not, that's not causing.

And I think the use of the word "facilitating," I don't think that Congress had in mind, you know, by using sort of a separate word, "buyers," and saying that you can facilitate your own deals.

THE COURT: Well, I mean, the problem is there are different—I really don't have a problem in finding that at least a cause prong is met when a purchaser calls. If I call L. L. Bean and order a shirt,

I have caused through that telephone call, I caused L. L. Bean to ship a shirt to me. That's a distribution of the shirt. If it were drugs, that would be the same thing.

So I don't see a problem just reading the language of the statute in finding that if you, if you order drugs by telephone, you have caused—and they're distributed, you have caused a distribution.

MR. McEVOY: May I—not to tax the Court's patience, but—

THE COURT: You're not. This is an interesting discussion.

MR. McEVOY: But I think the additional—but I think, Your Honor, what the *Ruiz* Supreme Court case, which talked about facilitate in terms of the Travel Act, in that case, there were four people prosecuted, two people in Florida who ran a gambling ring, two people in Georgia who crossed state lines to place bets, and the Supreme Court said, look, we are not going to allow bettors who place bets to be prosecuted.

That's not facilitation that we think Congress ever intended to punish—

THE COURT: But this statute has more than facilitate—and you know yourself any one of those verbs alone, I mean, the statute charges three different actions: committing, causing, or facilitating, any one of them, it doesn't have to be all three, and in this case, it really is, I think, a cause, the causing.

MR. McEVOY: I think, Your Honor, though, that the trouble that I have with it and the trouble that I—why I believe Congress couldn't have ever

intended for it to apply to people like my client is that especially now, you know, just the Court trying these types of cases knows everybody's using cell phones, and what a gigantic net, you know, felonizing a gigantic group of people that, you know, in some circuits, it's not a crime, and I guess, you know, maybe here the U.S. Attorney's Office can now come in and say, hey, you're going to be guilty of a felony, you know, Simple User, unless you roll, and I just don't think that—

THE COURT: Well, as you know, I mean, we all know there's a history to this particular case, and I don't know because I didn't study the old part of the case whether your client's alleged involvement in the conspiracy, which is what he was originally going to plead guilty to, was higher than just being a small-time buyer. I don't know what else, if anything, he was doing with Said or the other people.

The government for whatever reasons chose to proceed this way. They could clearly—if all your client was involved with was buying an occasional half-gram of cocaine to feed a habit, if that's it, you know, a misdemeanor might have been a more appropriate charge, but you know the Court doesn't get involved with that.

We are where we are today because of charging decisions they've made, and that's the case you're defending.

MR. McEVOY: Well, just for whatever it's worth, I believe that if it were all hashed out, what you see is what you get. I don't believe that there's more—I don't believe that the government could have ever convicted him at trial of being possessing with intent

or, you know, such crime, but anyway, that's—it's not before us. I understand the Court's position. We respectfully disagree.

* * * * *

CLOSING ARGUMENT

BY MR. LEISER:

Ladies and gentlemen, thank you for your time and attention to this point in the proceedings. It's my responsibility as a representative of the United States to sum up for you what I believe the evidence is in this case. This is a short case. This shouldn't take very long. It should be all fresh in your minds.

Obviously, whatever I say is not evidence. As the Court instructed you earlier, it's your recollection of the evidence. If I say something that's inconsistent with your recollection, your recollection must control. I'm going to try to do the best I can to be consistent with your recollection.

At this point in the proceedings, having heard all of the evidence, I hope you're convinced of the guilt of this defendant. I don't know whether you are or you're not, so if I insult you by going on and going over some of these facts, that's my job, and I don't mean to do that.

There's a statute in this particular point—or case that's pretty clear. Any person who knowingly or intentionally uses any communication facility in committing or causing or facilitating the commission of any act or acts constituting a felony, here the distribution of cocaine, shall be guilty of an offense

against the United States. It doesn't matter whether it's a millimeter of cocaine or 18 kilograms of cocaine. It doesn't matter.

Now, the elements of the offense are pretty straightforward: Did the defendant knowingly and intentionally use a cell phone. Is there any doubt in your mind that he knowingly—nobody put a gun to his head to have him get on the phone and order up the cocaine.

When he didn't think anybody was listening, he picked up the phone of his own free will on the three dates that you have evidence on of him doing this and ordered cocaine from his supplier, Mr. Mohammed Said, who was his second supplier. He told the agent, Agent Ashooh, when he was arrested and Mirandized that Mr. Khatib was his original supplier and he used to buy his cocaine through him, but same methodology, calling up on the phone talking in coded language, and that they'd make the deliveries. So there shouldn't be any problem in resolving the first element of his using the telephone facility.

If you look at the second element, which is was that use by him of the telephone, was it intended to facilitate or to cause the distribution of cocaine by Mohammed Said to the defendant, just ask yourselves a simple question: But for the use of that

telephone, would the transaction have taken place? If they didn't get on the phone and if he didn't order the cocaine and if he didn't after he ordered it, reordered it, or arranged for the meeting place and they're fine-tuning the meeting in those three conversations that you have to be concerned with on the two dates, July 5 and July 12, he places the order in the first conversation, then they fine-tune where they're going to meet, how they're going to meet, and then finally they meet, and obviously, as a result of their planning and plotting, there's a distribution.

With regard to the intent of the parties here, you have the conversations. Unfortunately, they're in Arabic, so you can't listen to them, but you can read what was said, and I suggest to you when you look at those conversations, you can only conclude that there was an intent to, A, use the phone; B, to facilitate the distribution of cocaine; and finally, the acts that they intended to do obviously occurred.

* * * * *

THE COURT: We are going to do the jury instructions now then.

All right, ladies and gentlemen, these instructions or what I am about to say to you are being tape-recorded so that if you should need to refresh yourselves about anything I've said, you let us know, and we'll give you the tape. You will not be getting written instructions.

Now that you have heard all of the evidence to be received in this trial and each of the arguments of counsel, it becomes my duty to give you the final instructions of the Court as to the law that is applicable to this case and which will guide you in your decisions.

* * * * *

And I'm now going to give you a synopsis of the charges. Counts 2, 3, and 4 each relate to the date of July 5, 2003. Count 2 relates to a phone conversation at 10:12 p.m. that date; Count—I'm sorry, that's Count 2. Count 3 relates to a phone call at 11:17 p.m. on July 5, 2003, and Count 4 relates to a phone call at 11:21 p.m. on July 5, 2003.

And Counts 2, 3, and 4 each allege on July 5, 2003, at the respective times I've indicated, that the defendant did unlawfully, knowingly, and intentionally use a communication facility, that is, a telephone, in committing, causing, and facilitating the commission of a violation of Title 21 of the United States Code, section 841(a)(1), that is, the distribution of cocaine, which is a Schedule II controlled substance.

Counts 5, 6, and 7 charge the exact same offense, that is, using a communication facility, a telephone, in committing, causing, and facilitating the commission of a violation of Title 21, that is, distribution of cocaine, but the date involved in these three counts is July 12, 2003, and the times of the

alleged use of a phone are 8:30 p.m. as to Count 5, 9:26 p.m. as to Count 6, and 9:47 p.m. as to Count 7.

Now, all six counts therefore involve the same statute, and the statute is numbered as section 843(b) of Title 21 of the United States Code, and that law provides in part as follows:

"[A]ny person [who] knowingly or intentionally . . . use[s] 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"—blank, blank, blank—"shall be guilty of an offense against the United States."

Now, for every crime, there are what we call essential elements. These are sort of the necessary components to make up a criminal act, and you should think about—I sometimes tell jurors to think about the essential elements like ingredients in a recipe. If you've got a recipe for a cake and it calls for eggs and butter and sugar and you don't have eggs, butter, and sugar, you're going to have a mess. You're not going to have that cake.

Well, essential elements work the same way. Every crime has a different set of them. The 843(b) statute, that is, the statute that's at issue in all counts of this case, has three essential elements. Now, it is the burden of the government to prove each and every essential element beyond a reasonable doubt in order for the jury to find the defendant guilty of that offense.

Let's say that there's an offense that has four essential elements and the jury were satisfied beyond a reasonable doubt that the government's evidence established three of the elements but not

the fourth. The jury could not convict the person of the crime, because the government had not met its burden.

So the three essential elements that the government must prove for each of these six counts are the following:

First, that the defendant used a communication facility, which all parties agree in this case was a telephone; second, that the defendant used the communication facility, that is, that the defendant used the telephone, to cause or facilitate the commission of a drug offense, in this case, the cocaine distribution; and three, that the defendant did so knowingly and intentionally.

So the three elements for a, what we call sometimes a wire count violation are, No. 1, use of the communication facility; two, that the facility was used to cause or facilitate the commission of a drug offense, which specifically in this case is the distribution of cocaine; and three, that the defendant did so knowingly and intentionally.

Now, the second element, that is, that the defendant used the communication facility, the telephone, to cause or facilitate the commission of a drug offense, that is, cocaine distribution, requires that the government prove the commission of the underlying substantive drug offense, and the distribution of cocaine is an act constituting a felony under Title 21 of the United States Code.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

v.

Salman Khade ABUELHAWA, Defendant

Criminal No. 1:07cr18

Alexandria, Virginia
March 29, 2007
10:17 a.m.

EXCERPT

TRANSCRIPT OF SENTENCING
BEFORE THE
HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Pages 1 - 21)

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PROCEEDINGS

(Defendant not present.)

THE CLERK: Criminal Case No. 07-18, United States of America v. Salman Khade Abuelhawa. Will counsel please note your appearances for the record.

MR. LEISER: Good morning, Your Honor. Lawrence Leiser on behalf of the United States.

MR. McEVOY: Good morning, Your Honor. Tim McEvoy for the defendant.

THE COURT: All right. And the defendant is here.

(Defendant present.)

THE COURT: All right, Mr. McEvoy, we have first of all your motion for a judgment of acquittal, and within that motion is a motion to merge counts of conviction.

MR. McEVOY: Yes, Your Honor.

THE COURT: All right. I have fully reviewed your motion. It is definitely an interesting issue that you raise, and it's an issue that really has not been resolved by the Fourth Circuit. Some circuits have looked at the issue, and as you recognize, there are—there's a split among the circuits.

I have in particular looked at the decision of Judge Friedman in United States v. Lewis, at 387 F. Supp. 2d 573. It's a 2005 decision in which Judge Friedman very thoroughly went over the existing law at that point, and he concluded that the Fourth Circuit would likely agree with the decisions of the Fifth and Seventh Circuits, which does go against your position.

I think his opinion is extremely well reasoned, and I articulated for you during the trial my view on some of these issues as to whether a person who orders drugs using a wire facility causes or facilitates the distribution. I am for the reasons stated by Judge Friedman in his opinion as well as what the Court articulated during the trial going to deny the motion for a judgment of acquittal as a matter of law on your legal argument.

To the extent you've argued that there was insufficient evidence to support the convictions of your client, I'm also going to deny that motion. As you know, a jury is expected to use reasonable common sense and is permitted and the jury

instructions so instruct to draw reasonable inferences from the evidence presented during the trial, and although you are correct that there was no direct evidence of an actually consummated drug distribution, the combination of among other things the Title III wiretaps and the admissions your client made at the time of arrest plus the other evidence in the case would allow in my view a reasonable jury to come to the conclusions that it did in convicting your client, and so for those reasons, the motion will be denied and is denied.

However, as I indicated during the trial, this is a case where the government could easily have chosen different ways of charging the case, and what we had here was on two different dates, the date of July 5 and the date of July 12, on each day, three phone calls. On July 5, the phone calls were between 10:12 and 11:55 p.m., basically over an hour, three very short phone calls concerning one distribution of cocaine, and three similarly closely related phone calls between 8:30 and 9:47 p.m. on July 12.

The government charged each of those six phone calls as a separate standalone count, and the jury received the case in that posture, but I agree with you that I think that that's overkill, that it was one event. Three phone calls in one event in that close a time period in my opinion are sufficient to be merged, and it's appropriate to merge them.

So I'm going to merge the convictions on Counts 1, 2, and 3 into just one conviction, and for the purpose of recordkeeping, we'll call it Count 1, so I'm merging 2 and 3 into Count 1, and I'm merging 5 and 6 into Count 4, and the judgment order will therefore

reflect—I'm not going to dismiss them. I mean, they should have been, in my view, charged as one event occurring on those respective dates, but the record will reflect a conviction of Counts 1 and 3, with the other counts merged into them.

And I know the government doesn't agree with that view, but that's going to be the decision of the Court in that respect, all right?

MR. McEVOY: Yes, Your Honor. Before we move off that, just so there's no confusion, I think the government moved to dismiss the original Count 1.

THE COURT: I'm sorry, you're right. Count 1 was dismissed, so I'm sorry, so it's Counts 2, 3, and 4, and 5, 6, and 7 were the ones which went to trial, thank you. So the defendant will have Counts 3 and 4 merged into 2 and 6 and 7 merged into 5.

* * * * *

[THE COURT:] Your client has not walked away from the admission that he is a cocaine user.

MR. McEVOY: That's correct.

THE COURT: And the essence of his involvement in this case was he was calling his supplier to order drugs. He had a legitimate legal argument which down the road you may be successful with that the conduct involved in this case does not amount to a violation of 843.

A defendant has a right to maintain an appropriate legal argument, and this one clearly is. There's a split among the circuits, as I've acknowledged earlier, and the Fourth Circuit has

not addressed this issue, but he has not walked away from his involvement with drugs, and I think that is a sufficient acceptance of responsibility, so I am going to reduce the offense level to a level 10.

With a criminal history I, that is going to establish a zone B sentence range of six to twelve months on both counts. The fine range would be 2,000 to 20,000 dollars.

The period of supervised release that would be available in this case does not change from what was included in the original guideline calculations, which would be—hold on a second—two to three years per count of conviction. Probation is available, and there would be up to $100 of special—I'm sorry, there would be a $100 special assessment per count of conviction, two counts of conviction.

So those are the guidelines that the Court is going to be using, the advisory guidelines the Court is going to be using.

All right, Mr. Leiser, let me hear you first as to the government's position on sentence in this case.

* * * * *

APPENDIX C

ORDER DENYING REHEARING EN BANC

FILED: May 23, 2008

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 07-4639

(1:07-cr-00018-LMB)

UNITED STATES OF AMERICA, Plaintiff - Appellee

v.

SALMAN KHADE ABUELHAWA, Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk