
C. William Ralston
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Communications Law Commons, and the Criminal Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol112/iss3/11

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
AN ACT OF CRIMINAL “SKULLDUGGERY”? : A CRITICAL ANALYSIS OF THE CIRCUIT SPLIT RESOLVED IN UNITED STATES V. ABUELHAWA

I. INTRODUCTION .................................................................................................................................. 1023
II. FOUNDATIONS OF THE CIRCUIT SPLIT .................................................................................. 1025
   A. Circuits Previously Holding § 843(b) was Violated When Drugs Were Purchased for Personal Use .................................................................................................................. 1025
   B. Circuits Previously Holding § 843(b) was Not Violated When Drugs Were Purchased for Personal Use .................................................................................................................. 1029
   C. Uncertainty in the Sixth Circuit ........................................................................................................ 1031
III. THE DECISION ............................................................................................................................... 1032
IV. BACKGROUND FACTORS UTILIZED BY THE SUPREME COURT TO FIND THAT § 843(b) IS NOT VIOLATED BY THE USE OF A COMMUNICATION DEVICE FOR MISDEMEANOR PURCHASES .................................................................................................... 1033
   A. Use of Statutory Interpretation ......................................................................................................... 1033
   B. Congressional Purpose ...................................................................................................................... 1036
V. ANALOGOUS CASES .......................................................................................................................... 1040
VI. IMPORTANCE .................................................................................................................................... 1042
VII. FURTHER POLICY ARGUMENTS AGAINST FINDING FOR THE FOURTH CIRCUIT’S INTERPRETATION OF ABUELHAWA ....................................................................................... 1045
   A. Rehabilitation .................................................................................................................................... 1045
   B. Technological Advances ................................................................................................................... 1046
   C. Federal Prosecutors .......................................................................................................................... 1047
VIII. MODERN TRENDS OF THE COURT WHEN DECIDING DRUG CASES .................................... 1049
IX. CONCLUSION ...................................................................................................................................... 1051

I. INTRODUCTION

Consider the following hypothetical: You have, in disregard of your better judgment, decided to purchase a small quantity of illegal drugs for personal use. To make this purchase you place a call on your cellular phone or send a text message to the local drug dealer. Unfortunately for you, the Federal Bureau of Investigation (“FBI”) has been investigating this particular drug dealer and has, in the course of this investigation, placed a wiretap on the drug dealer’s phone to monitor its communications. Based on information obtained from the cell phone wiretap on the drug dealer’s phone, you are arrested by the FBI. You ultimately concede the purchase, but maintain that the drugs were strictly for personal use. Nevertheless you are charged with a felony-grade violation of 21 U.S.C.A § 843(b). This statute prohibits the knowing or intentional use of “any
communication facility in committing or in causing or facilitating the commis-

sion of” an illegal narcotic distribution in the United States.1 Recalling an expe-

rience of an acquaintance who was charged in California, you know that in that

state the purchase of drugs for personal use, or possession for personal use, con-

stitutes only a misdemeanor and is punishable by a maximum sentence of one

year imprisonment, a minimum $1,000 fine or both.2 However, you have not

been charged in California but rather in Morgantown, West Virginia. Because

you are being charged in a different jurisdiction, your misdemeanor purchase

has been elevated to a felony drug charge which is punishable by up to four

years of incarceration in federal prison, a fine under Title 18, or both.3 Unlike

the Ninth Circuit federal courts in California, the Fourth Circuit courts in West

Virginia had previously held that, pursuant to § 843(b), your intent to limit to

personal use has no bearing on the issue of whether you facilitated the commis-

sion of the illegal narcotic distribution. Merely by purchasing the narcotics with

the aid of a communication facility, you had, according to the Fourth Circuit,

facilitated the sale of the drugs to yourself and were thus guilty of a felony

which carries with it a significantly harsher penalty.

This hypothetical was, in fact, quite real for many who purchased drugs

for personal use across the country until very recently. In the April 2008 case of

United States v. Abuelhawa, the Fourth Circuit held that when persons facilitate

the distribution of a controlled substance to themselves for personal use by us-

ing a communication facility they can be prosecuted for violating § 843(b).4 In

deciding Abuelhawa, the court highlighted a split among the U.S. Circuit Court

of Appeals regarding the interpretation of this statute. While this split had been

developing over the last twenty-five years, with several cases on both sides, the

United States Supreme Court chose not to resolve the disagreement among the

courts until the spring of 2009. After the decision by the Fourth Circuit in

April of 2008, Mr. Abuelhawa applied for a writ of certiorari to the Supreme

Court. Certiorari was granted in November 2008.5 While the Supreme Court

had refused to address this issue several times in the past6, its recent decision

has definitively asserted the Court’s stance on the difference between misde-

meanor and felony drug facilitation.

This Note will examine how this split among the federal circuit courts

regarding the interpretation of whether § 843(b) extends to a defendant’s use of


4 523 F.3d 415, 421 (4th Cir. 2008).

5 Abuelhawa v. United States, 129 S.Ct. 593, 172 L.Ed.2d 452, 77 USLW 3100, 77 USLW


6 See United States v. Phillips, 664 F.2d 971, 1032 (5th Cir. 1981), cert denied, 457 U.S.

1136, 459 U.S. 906 (1982); United States v. Watson, 594 F.2d 1330 (10th Cir. 1979), cert. denied,

a communication facility in causing or facilitating a felony drug distribution when the defendant is purchasing drugs for personal use was resolved. Part II of this Note examines the foundations of the circuit split. Part II. A will present the circuits that have argued that § 843(b) is violated when drugs are purchased for personal use. Part II. B will present the circuits that have argued that the statute is not violated when the drugs are purchased for personal use. Part II. C will examine the circuits that have looked at facilitation and personal use but have not directly ruled on the issue. Part III will detail the decision recently handed down by the Supreme Court. Part IV will look at, by discussing several issues, why the Supreme Court found that § 843(b) is not violated by the use of a communication device when drugs are purchased for personal use. Part A will examine how the Supreme Court has previously interpreted statutory language and how this interpretation aided their decision in Abuelhawa. Part B will explore the stated Congressional purpose of the enacted drug laws and how this intent likely influenced the Court’s decision-making process. Part V will evaluate several analogous Supreme Court cases that, while not mentioned in the decision, shed light on how the Court likely analyzed Abuelhawa. Part VI will examine why the issue was and should be of great importance to prosecutors and defense attorneys alike. Part VII will look at three other policy arguments that likely counseled the Supreme Court against finding for the Fourth Circuit’s interpretation of Abuelhawa. Part VIII will discuss two recently decided cases that may have been considered by the Court and emphasizes their significance. This Note will conclude in Part IX by arguing that the Court made the correct decision in finding that § 843(b) is not violated by the use of a communication device when drugs are purchased for personal use.

II. FOUNDATIONS OF THE CIRCUIT SPLIT

A. Circuits Previously Holding § 843(b) was Violated When Drugs Were Purchased for Personal Use

Prior to the Supreme Court’s ruling, the most recent case to hold that the use of a communication facility to buy drugs for personal use does facilitate the commission of a drug felony in violation of 21 U.S.C.A. § 843(b) was the Fourth Circuit Court of Appeal’s ruling in U.S. v. Abuelhawa. In Abuelhawa, the court affirmed the district court conviction of the defendant, Khade Abuelhawa. Abuelhawa was charged with using a cellular telephone to arrange the purchase of a small amount of drugs for his personal use from a drug dealer, Mohammed Said. Abuelhawa was later found guilty of using his phone to facilitate the commission of a drug “felony.” Despite arguing that § 843(b) was not

---

7 United States v. Abuelhawa, 523 F.3d 415, 423 (4th Cir. 2008).
8 Id. at 417–18.
9 Id. at 421.
violated “when an individual facilitates the purchase of a drug quantity for personal use,” because the purchase of cocaine for personal use is a misdemeanor, not a felony, the court rejected this argument by the defendant.\textsuperscript{10} The court noted that the defendant did not dispute that he had, in fact, “used a communication facility (a cell phone) to arrange the drug transactions.”\textsuperscript{11} Consequently, the court reasoned that the case could be “decided by focusing only on whether Abuelhawa facilitated the commission of a felony.”\textsuperscript{12} Relying on its precedential view of statutory interpretation, the court gave the term “facilitate” its “common meaning,” which was, plainly, “to make easier or less difficult, or to assist or aid.”\textsuperscript{13} Based upon this definition, the court found that Abuelhawa’s “use of his cell phone undoubtedly made Said’s [defendant’s drug dealer] cocaine distribution easier.”\textsuperscript{14} Because Said’s sale of cocaine to Abuelhawa constituted a felony under 21 U.S.C. § 841(a)(1),\textsuperscript{15} the court determined that the defendant’s use of his cell phone to help arrange the distribution fell squarely within the scope of § 843(b).\textsuperscript{16}

In reaching this conclusion, the court of appeals stressed that “the statute does not specify \textit{whose} felony must be at issue, just that ‘a’ felony must be facilitated.”\textsuperscript{17} The court, therefore, found it “simply irrelevant” that the defendant’s possession of cocaine for personal use was “not itself . . . a felony.”\textsuperscript{18} In the court’s view, Congress “may well have had reason” to impose this additional punishment — escalating the punishment from simple misdemeanor possession to felony distribution — upon personal-use defendants who use communication facilities such as cell phones to arrange drug transactions. “[U]se 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.”\textsuperscript{19} Because of this inferred intent, the court found Abuelhawa’s contention failed “to prove that our result is ‘demonstrably at odds,’\textsuperscript{20} with congressional intent, best expressed in the plain language of § 843(b), which references only a ‘felony.’”\textsuperscript{21} In its holding, the court made it quite clear that, in the Fourth Circuit, “status as
buyer or distributor is of no consequence regarding § 843(b); rather [a defendant’s] status as [a] facilitator alone gives rise to criminal liability.”

Even before its analysis in Abuelhawa, the Fourth Circuit had recognized that “our sister circuits are divided on the issue facing us.” While analyzing both sides of the split, the court ultimately sided with the “facilitation camp” circuits that “concluded that distribution for personal use [is] covered by § 843(b).” One of the circuits that supported the Fourth Circuit’s interpretation of § 843(b) was the Seventh Circuit. In United States v. Binkley, the Seventh Circuit held that the use of a telephone to purchase drugs for personal use violated § 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).” The court reasoned that “regardless of what Binkley [the defendant] did with the cocaine after the sale” — i.e., whether he distributed the drugs or used them personally — his telephone conversations with Solomon, the drug dealer, “not only made Solomon’s sale of cocaine (a felony under Title II of the Act) easier, it made the sale possible.” The Seventh Circuit then concluded that the buyer’s “subsequent treatment of the cocaine cannot retroactively diminish [his] previous facilitation of [the seller’s] cocaine sale.” This 2–1 decision of a panel of three judges in Binkley was subsequently reaffirmed by the Seventh Circuit.

Four years after Binkley, the Seventh Circuit in United States v. Kozinski rejected the argument that individuals did not violate § 843(b) “if they were using the telephone to purchase cocaine for their own use.” The court found that “[d]istributing cocaine is [a] felony,” and surmised 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.” Thus, the court reasoned 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.”

22 Id. (quoting U.S. v. Kozinski, 16 F.3d 795, 807 (7th Cir. 1994)).
23 Id. at 420.
24 Id.
25 903 F.2d 1130, 1136 (7th Cir. 1990).
26 Id. at 1135–36.
27 Id. at 1136.
28 Id.
29 Id. at 1137–39 (Cudahy, J., dissenting) (arguing that the majority’s rationale conflicted with a long settled rule that a purchaser of drugs for personal use cannot be convicted of “facilitating distribution to himself or herself”). Judge Cudahy also found that the majority’s theory “makes no sense” because, under its line of reasoning, “actual possession of one gram of cocaine would be a misdemeanor,” while “use of the telephone to obtain the cocaine would be a felony.” Id.
30 United States v. Kozinski, 16 F.3d 795, 807 (7th Cir. 1994).
31 Id.
32 Id.
thus reaffirmed the holding in *Binkley* “that the buyer-seller defense has no effect on 21 U.S.C. § 843(b).”

In addition to reliance upon the Seventh Circuit, the Fourth Circuit *Abuelhawa* court also looked to the Fifth Circuit for guidance. In *United States v. Phillips*, a decision cited throughout *Binkley*, the Fifth Circuit found that in order to prove a violation of § 843(b), “the government must establish that the defendant knowingly and intentionally used a communication facility, e.g., a telephone, to facilitate the commission of a narcotics offense.” Accordingly, “in order to establish the facilitation element, the government must show that the telephone call comes within the common meaning of facilitate — ‘to make easier’ or less difficult.” Thus, “it is sufficient if a defendant’s use of a telephone to facilitate the possession or distribution of a controlled substance facilitates either his own or another person’s possession or distribution.” Seemingly, the Fifth Circuit was persuaded that the focus should not be on whether the defendant bought or sold the cocaine, but rather whether the use of a communication facility functioned to facilitate the distribution. While *Phillips* was not directly on point, as it did not deal with a defendant who claimed that the drugs were only for personal use, the decision did sharpen the issue for the Fourth Circuit court in *Abuelhawa*. Additionally, this decision has been overruled on other grounds unrelated to its discussion of facilitation.

In addition to the Seventh and Fifth circuits, the *Abuelhawa* court also looked to several previous Fourth Circuit decisions dealing with facilitation and distribution to develop its analysis. In *United States v. Lozano*, the court cited *Phillips*’ common meaning of facilitation to find that the defendant’s telephone call to inform his purchaser that he had arrived in Virginia to “handle the problem concerning the tainted cocaine” was sufficient to prove the facilitation component. Similarly, in *United States v. Livas*, the Fourth Circuit again turned to

33 *Id.*
34 664 F.2d 971, 1032 (5th Cir. Unit B 1981) (citing U.S. v. Rey, 641 F.2d 222, 224 n.6 (5th Cir. 1981)).
35 *Id.* (quoting United States v. Watson, 594 F.2d 1330, 1343 (10th Cir. 1979)).
36 *Id.* (citing *Watson*, 594 F.2d at 1342, n.14).
37 *Id.* (overruled on other grounds by United States v. Huntress, 956 F.2d 1309 (5th Cir. 1992)). The decision was overturned on procedural grounds with the court stating, “We emphasize again that district judges should follow Rule 23(b) — that is, they should decide whether to proceed with an 11-person jury or retry the defendant — rather than substitute an alternate juror under the procedure approved of in *United States v. Phillips.*” *Id.* at 1319.
38 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) (finding that decisions by Unit B panels of the Former Fifth Circuit are binding precedent in the Eleventh Circuit).
39 839 F.2d 1020, 1032 (4th Cir. 1988).
the Fifth Circuit’s ruling in Phillips to define the term facilitation and define the components needed to prove a violation of § 843(b). Like these previous cases, the question again came down to whether the defendant’s use of a communication facility did, in fact, facilitate the drug offense. And like those previous cases, the Rivas court found that “a prima facie case need not include proof that the defendant committed the underlying offense, only that [he] facilitated its commission.” While neither Lozano nor Livas dealt with the issue of personal use, both decisions frame the issue in the same way as all of the circuits on the “facilitation” side of the split. With their interpretation of the language of § 843(b), these circuits presumably expected the Supreme Court to place less weight on whether the defendant was guilty of selling narcotics as opposed to merely purchasing narcotics for personal use, and greater, dispositive weight on whether the defendant used a communication facility to facilitate the transaction.

B. Circuits Previously Holding § 843(b) was Not Violated When Drugs Were Purchased for Personal Use

In the lower court Abuelhawa decision, the Fourth Circuit candidly acknowledged that its interpretation of § 843(b) conflicted with the decisions of several other courts of appeals. The Fourth Circuit explained that other circuits favored an interpretation that “a mere customer’s contribution to the business he patronizes does not constitute the facilitation envisioned by Congress.” One of the first circuits to recognize this distinction and place itself in the “personal use camp” was the Ninth Circuit. In United States v. Martin, the Ninth Circuit reversed the conviction of a defendant who had been found guilty of violating § 843(b) based on his purchase of a small amount of cocaine for personal use. The Ninth Circuit rejected the government’s contention that a drug “conspiracy is an ongoing enterprise . . . that buyers encourage and facilitate . . . through their purchases,” and instead agreed with the defendant’s assertion that a “purchaser’s relationship to the distribution conspiracy from which he buys is of such a marginal nature that he cannot be considered a ‘facilitator’ within the meaning of the statute.” Because of this, the court believed “a buyer cannot facilitate the very sale which creates his status.” The court found no precedent in case law to support the “position that the distribution of drugs or an agree-

---

40 867 F.2d 609 (Table) (4th Cir. 1989) (citing Lozano and Phillips).
41 Id. at 3.
42 United States v. Abuelhawa, 523 F.3d 415, 420 (4th Cir. 2008) (quoting United States v. Martin, 599 F.2d 880, 889 (9th Cir. 1979)).
43 599 F.2d 880 (9th Cir. 1979), overruled on other grounds by U.S. v. DeBright, 730 F.2d 1255 (9th Cir. 1984).
44 Id. at 888.
45 Id.
ment to distribute drugs is ‘facilitated’ by a purchaser of the drugs.”\textsuperscript{46} Rather, in each case in which the court had “upheld a conviction of facilitation, the defendant’s role in the distribution of drugs has been far more substantial than that of a buyer for personal consumption.”\textsuperscript{47} Thus, the intent of the defendant and the amount of drugs in question were important considerations for the court in its interpretation.

In explaining its holding, the Ninth Circuit pointed to the legislative history of Congress’s Comprehensive Drug Abuse Prevention and Control Act of 1973 (the “Act”).\textsuperscript{48} In the judgment of the court, the Act illustrated Congress’s intent with federal drug laws “to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties.”\textsuperscript{49} The Ninth Circuit court felt that to hold “persons who merely buy drugs for their personal use . . . on equal footing with distributors by virtue of the facilitation statute would undermine this statutory distinction.”\textsuperscript{50} Subsequent Ninth Circuit decisions have reaffirmed this line of thinking. In \textit{United States v. Brown}, the court stated that “the use of a telephone to order cocaine for personal use is similarly not a lesser-included offense; indeed, it is no offense at all.”\textsuperscript{51} Although “[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.”\textsuperscript{52} Further, in the court’s view, there was “no statute analogous to section 843(b)” that punished “the use of the telephone to commit a misdemeanor,” and, thus, the court would not rule as if there were.\textsuperscript{53}

The Tenth Circuit also aligned itself with the decisions of the Ninth Circuit and concurred that the use of a telephone to purchase drugs for personal use does not violate § 843(b). The court, in \textit{United States v. Baggett}, rejected the government’s assertion that “one who uses a telephone to facilitate their simple possession of a controlled substance transforms the crime into a felony.”\textsuperscript{54} Instead the court found that the government’s assertion did “not comport with the legislative history of the statute” as the statute “clearly places mere ‘customers’

\begin{itemize}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.; see, e.g., Grimes et al. v. United States, 423 U.S. 996 (1975) (conspirator); United States v. Padilla, 525 F.2d 308 (9th Cir. 1975) (conspirator/seller); United States v. Smith, 519 F.2d 516 (9th Cir. 1975) (conspirator); United States v. Turner, 528 F.2d 143 (9th Cir. 1975) \textit{cert. denied sub nom.; United States v. Veon, 474 F.2d 1 (9th Cir. 1973) (sellers).}
\item \textsuperscript{48} \textit{United States v. Martin, 599 F.2d 880, 889 (9th Cir. 1979).}
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} 761 F.2d 1272, 1278 (9th Cir. 1985).
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} 890 F.2d 1095, 1097 (10th Cir. 1989).
\end{itemize}
in the misdemeanor category.”\textsuperscript{55} Thus, “because [the defendant] used the telephone only to order drugs for personal use, a misdemeanor, she cannot be convicted under section 843(b).”\textsuperscript{56} The court further distinguished the differences between customers and sellers in rejecting the prosecution’s reliance on a previous Tenth Circuit case which held that § 843(b) does not distinguish between those who purchase for “further distribution as opposed to a [purchase] for personal consumption.”\textsuperscript{57} The court, finding the reliance on United States v. Watson “misplaced,” distinguished Watson by noting that the result was reached only “after concluding that ‘there was proof that the appellants, as street dealers, were using the telephone to obtain heroin or cocaine for resale.’”\textsuperscript{58} Since Watson involved “defendants whose underlying crime was a felony, not a misdemeanor,” it bore little relation to Baggett and was thus not persuasive authority.\textsuperscript{59} Finally, in United States v. Small, the Tenth Circuit later reaffirmed the holding in Baggett “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.”\textsuperscript{60}

C. \textit{Uncertainty in the Sixth Circuit}

Although prior to the Supreme Court decision, there were at least two circuits solidly situated on each side of the split over the interpretation of § 843(b), there was also one circuit that had addressed the issue but could not be placed squarely in either the facilitation or the personal use camp. In United States v. Van Buren, the Sixth Circuit relied on the Ninth Circuit’s decision in Martin to hold that “evidence of the purchase of cocaine for personal use does not establish use of the telephone to further the [drug distribution] conspiracy.”\textsuperscript{61} The court vacated the defendant’s guilty plea under § 843(b).\textsuperscript{62} In spite of this holding, the Fourth Circuit Abuelhawa court declined to follow Van Buren because the case involved the accusation that the defendant used a telephone to facilitate a \textit{conspiracy} to distribute cocaine, rather than to facilitate the distribution of cocaine itself.\textsuperscript{63} To make this distinction, the Abuelhawa court cited to a previously-decided Sixth Circuit case, United States v. McLernon, which

\textsuperscript{55} Id. at 1097; see 1970 U.S. Code Cong. & Admin. News 4566, 4577 (“illegal possession of controlled drugs by an individual for [her] own use is a \textit{misdemeanor}.”).

\textsuperscript{56} Id. at 1098.

\textsuperscript{57} Id. (quoting United States v. Watson, 594 F.2d 1330 (10th Cir.), cert. denied, 444 U.S. 840, 100 S. Ct. 78, 62 L.Ed.2d 51 (1979)).

\textsuperscript{58} Id. (quoting Watson, 594 F.2d at 1343).

\textsuperscript{59} Id. at 1098.

\textsuperscript{60} 423 F.3d 1164, 1186 (10th Cir 2005).

\textsuperscript{61} 804 F.2d 888, 892 (6th Cir. 1986).

\textsuperscript{62} Id.

\textsuperscript{63} United States v. Abuelhawa, 523 F.3d 415, 420 n.6 (4th Cir. 2008).
adopted the same “common meaning of facilitation — ‘to make easier’” language used in the Fifth and Seventh Circuits.64 In *McLernon*, the Sixth Circuit noted that “[i]t 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.”65 The court then held that § 843(b) applied to the defendant who had used a telephone to facilitate the purchase of 10 kilograms of cocaine.66 However, the *McLernon* court reached this decision in light of the facts that the defendant was acknowledged to be a *drug dealer* who had used the telephone to facilitate the purchase of cocaine for *further distribution.*67 Because these conflicting Sixth Circuit cases are slightly different than the facts in *Abuelhawa*, it was an open question as to how the Sixth Circuit would rule if presented with the applicability of § 843(b) to the purchase of drugs for personal use.

III. THE DECISION

In May 2009, the United States Supreme Court found unanimously that the use of a telephone to make a misdemeanor drug purchase is not the use of a communication facility in causing or “facilitating” another’s commission of the felony of drug distribution in violation of 21 U.S.C. § 843(b).68 Writing for the Court in one of his final opinions, Justice Souter noted several of the arguments listed above in announcing the Court’s decision. First, acknowledging that the Government’s argument was valid “on the literal plane,” Justice Souter found that the Government’s interpretation of “‘facilitate’ sits uncomfortably with common usage” because “a sale necessarily presupposes two parties with specific roles” — the buyer and the seller.69 The “word ‘facilitate’ adds nothing” to such transactions as a buyer does not facilitate a sale any more than a “borrower facilitates a bank loan.”70 Rather, common usage “limits ‘facilitate’ to the efforts of someone other than a primary or necessary actor in the commission of a substantive crime.”71

Next, Justice Souter attacked the Government’s argument that Congress intended § 843 to “ratchet up the culpability of buyers” using cellular phones.72

64 *Id.*
66 *Id.* at 1106–07.
67 *Id.*
69 *Id.*
70 *Id.*
71 *Id.* at 2106.
72 *Id.* at 2105.
Looking to the history and intent of Congress at the time the statute was passed, Justice Souter found that “in these days when everyone over the age of three seems to carry a cell phone, the Government’s interpretation would skew the calibration of penalties very substantially.”\textsuperscript{73} To the Court, Congress’s message was clear: “to treat purchasing drugs for personal use more leniently than the felony of distributing drugs, and to narrow the scope of the communications provision to cover only those who facilitate a drug felony.”\textsuperscript{74} Souter then found that the Government’s argument that “Abuelhawa’s use of a phone in making two small drug purchases would subject him, in fact, to six felony counts and a potential sentence of twenty-four years in prison, even though buying the same drugs minus the phone would have supported only two misdemeanor counts and two years of prison” to be “impossible to believe.”\textsuperscript{75}

Lastly, Justice Souter countered the Government’s final argument that the use of a phone was simply an aggravating factor designed to highlight culpable conduct by noting that although there was “no question that Congress intended § 843(b) to impede illicit drug transactions by penalizing the use of communication devices,” Congress did not intend to do so by exposing first-time buyers to such excessively severe penalties.\textsuperscript{76} Finding the Government’s position “just too unlikely,” Justice Souter found that “Congress used no language spelling out a purpose so improbable, but legislated against a background usage” of certain terms that pointed “in the opposite direction and [in] accords with the CSA’s choice to classify small purchases as misdemeanors.”\textsuperscript{77}

IV. BACKGROUND FACTORS UTILIZED BY THE SUPREME COURT TO FIND THAT § 843(b) IS NOT VIOLATED BY THE USE OF A COMMUNICATION DEVICE FOR MISDEMEANOR PURCHASES

A. Use of Statutory Interpretation

In resolving this split among the circuits, the Supreme Court was charged with determining whether § 843(b) extends to personal use. In its past decisions, the Court has always emphasized that statutory interpretation must “begin with the language of the statute.”\textsuperscript{78} As stated in \textit{Davis v. Michigan Department of Treasury}, “statutory language cannot be construed in a vacuum.”\textsuperscript{79} “It is a fundamental canon of statutory construction,” the Court declared, “that

\textsuperscript{73} Id. at 2106.
\textsuperscript{74} Abuelhawa v. United States, 129 S.Ct. 2102, 2107 (2009).
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{79} 489 U.S. 803, 809 (1989).
the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”80 When there is ambiguity in the statute in question, the analyzing court, as noted in the Abuelhawa decision, must first “determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”81 If the meaning is clear then the “inquiry must cease” because “the statutory language is unambiguous” and ‘the statutory scheme is coherent and consistent.’82 However, if the language of the statute is found by the court to be ambiguous, then the court must follow a different analysis. As stated in United States v. Bass, the court has frequently reaffirmed that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”83 This is required because, “when a 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.”84 This analysis was based upon two factors. First, it is necessary that “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”85 The second factor is that “legislatures and not courts should define criminal activity.”86 These fundamental principles underscore the sound public policy of an “instinctive distaste[s] against men languishing in prison unless the lawmaker has clearly said that they

80 Id.; see United States v. Morton, 467 U.S. 822, 828 (1984) (“We do not, however, construe statutory phrases in isolation; we read statutes as a whole.”).


82 Id. at 419 (citing Robinson, 519 U.S. at 340 (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240 (1989))).


84 404 U.S. at 347 (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952)).

85 Id. at 348 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)); see also United States v. Cardiff, 344 U.S. 174 (1952) (finding in relation to a criminal provision of the Federal Food, Drug and Cosmetic Act that:

The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice.

Id. at 176–77).

86 Id.
should.**87 Thus, where there is ambiguity in a criminal statute, the “tie must go to the defendant” as “the rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”**88

Abuelhawa both highlighted and provided an opportunity for the Supreme Court to resolve a contentious ambiguity in a fair and just manner. Several circuits had ruled on this issue and, through these rulings, had failed to provide clarity and uniformity. Much of the ambiguity centered on the term “facilitate.” Prior to the decision of the Court, the terms of the statute made it unlawful to use a telephone or other communication device to “facilitate” the commission of a drug “felony.”**89 However, in spite of the Fourth Circuit’s definition of facilitation as meaning to make easier, it is equally reasonable and more fundamentally fair to find that a person who uses a telephone to purchase drugs for personal use does not actually “facilitate” a drug “felony.” First, “facilitate”, as it is used in § 843(b), should be interpreted in the context of the traditional rule that a person who buys an illegal product is not guilty of aiding or abetting that sale.**90 This traditional rule has long provided that “a purchaser is not a party to the crime of an illegal sale”**91 and has even been codified in the Model Penal Code definition stating 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 . . . .”**92 Following this line of reasoning, it seems logical that a buyer of drugs cannot be convicted of aiding and abetting his dealer’s sale of drugs to him.**93 As noted by the Abuelhawa court, the terms “aid and abet” and “facilitate” are synonymous with each other. In fact, in its definition of “aid and abet,” Black’s Law Dictionary reads “to assist or facilitate the commission of a crime.”**94 Accordingly, just as a purchaser of narcotics for personal use cannot be convicted of “aiding and abetting” the distribution of the

---

87  *Id.* (quoting H. Friendly, Mr. Justice Frankfurter & the Reading of Statutes, in *BENCHMARKS* 196, 209 (1967)).


90  Gebardi v. United States, 287 U.S. 112, 119 (1932) (purchaser of illegal liquor does not aid or abet that sale).

91  2 WAYNE R. LEFAVe, SUBSTANTIVE CRIMINAL LAW, § 13.3(e) (2d ed. 2003); see United States v. Farrar, 281 U.S. 624 (1930); State v. Cota, 956 P.2d 507 (Ariz. 1998); State v. Celestine, 671 So.2d 896 (La. 1996); State v. Utterback, 485 N.W.2d 760 (Neb. 1992); Robinson v. State, 815 S.W.2d 361 (Tex. 1991) (collecting cases from other jurisdictions); Wilson v. State, 196 S.W. 921 (Ark. 1917); Wakeman v. Chambers, 28 N.W. 498 (Iowa 1886).


93  See United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977) (rejecting the government’s suggestion that the defendant who obtained drugs for personal use “would nevertheless be liable as an aider and abettor of the agent’s distribution to him” because “this would totally undermine the statutory scheme. Its effect would be to write out of the Act the offense of simple possession, since under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his possession.” *Id.* at 451.)

94  BLACK’S LAW DICTIONARY 59 (8th ed. 2004).
narcotics to himself, it stands to reason that he also cannot be convicted of “facilitating” the distribution of narcotics to himself.

B. Congressional Purpose

In addition to examining the construction of the actual language of the statute, it was also necessary, because of the ambiguity in the plain text of the statute, for the Supreme Court to look to the Congressional intent and purpose behind the statute. This includes considering both the entire statute and other statutes surrounding it. The Supreme Court has repeatedly announced that 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.’”95 A court must therefore interpret the statute “as a symmetrical and coherent regulatory scheme”96 and “fit, if possible, all parts into an harmonious whole.”97 As seen in the opinion, it is clear that the Court found that § 843(b) was a smaller part of a comprehensive drug enforcement plan in which Congress “intended to draw a sharp distinction between [drug] distributors and simple possessors . . .”98 Viewed against the backdrop of legislative history and subsequent passage of the Comprehensive Drug Abuse Prevention and Control Act of 1971 (the “Act”), it is apparent that § 843(b) was never intended to affect those who purchase drugs solely for personal use.

Prior to enactment of the Act in 1970, the mere purchase or possession of drugs in small amounts for personal use could result in a felony conviction and severe penalties.99 In this previous version, all categories of drug users were classified in the same category. Thus, petty drug users were not distinguished from large-scale drug distributors, and all were subject to the same harsh punishments. In response to that unreasonable construction, Congress completely rebuilt the U.S. Code dealing with drug control. With the passage of the Act, Congress chose to distinguish between “(1) participation in a continuing enterprise, (2) possession with intent to distribute, and (3) simple possession . . .”100 With these significant changes, Congress implemented the recommendations of President Kennedy’s “Advisory Committee on Narcotic and Drug Abuse . . ., which proposed stringent measures against the evils of drug traffic

97 Id. (quoting FTC v. Mandel Brothers, Inc., 359 U.S. 385, 389 (1959)).
98 United States v. Martin, 599 F.2d 880, 889 (9th Cir. 1979).
100 United States v. Swiderski, 548 F.2d 445, 449 (2d Cir. 1977).
and rehabilitation rather than retribution in the case of personal drug abuse.””\textsuperscript{101} As noted in the House Report on the proposed Act, “[p]ossession of controlled drugs is made a misdemeanor, except where the possession is for the purpose of distribution to others.””\textsuperscript{102} In determining that distribution and trafficking were greater offenses that required harsher penalties, Congress made the distinction that these activities, much more than simple possession, were “such conduct [that] tends to have the dangerous, unwanted effect of drawing additional participants into the web of drug abuse.””\textsuperscript{103} Thus, where “only individual possession and use is concerned . . . , the Act prescribes lesser penalties and emphasizes rehabilitation of the drug abuser.””\textsuperscript{104}

This intent to distinguish between distributor and user is also found in the punishments set forth in the Act. As noted above, the Act makes drug distribution a felony, punishable by a minimum of five to ten years imprisonment with a possible maximum prison sentence of fifteen years.”\textsuperscript{105} Simple possession, however, is a misdemeanor that is punishable by not more than one year imprisonment.”\textsuperscript{106} In reality, however, imprisonment is unlikely as first-time offenders convicted of simple possession may receive punishments of probation and a fine, as well as the possibility of expungement of the sentence.”\textsuperscript{107} This clear difference in punishment reflects an obvious Congressional recognition that drug distribution is a far greater crime that requires far harsher penalties than does simple possession.

With its interpretation of § 843(b) that extends the definition of distribute, the Fourth Circuit 	extit{Abuelhawa} court was at odds with the intent of Congress in passing the Act. By applying § 843(b) to one who purchases drugs for personal use, the court subjected the buyer to potential punishments that were far greater than the maximum one year in prison that Congress intended for “simple possession.” Not only is a violation of § 843(b) punishable by up to four years in prison — four times the maximum penalty for simple possession — but the statute additionally requires that “[e]ach separate use of a communication facility shall be a separate offense under this subsection.””\textsuperscript{108} Thus, using the Fourth Circuit’s logic, a purchaser who makes several telephone calls or sends several text messages to coordinate a single purchase of drugs can be found guilty — not of a single misdemeanor conviction punishable by up to one


\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.}


\textsuperscript{106} 21 U.S.C. § 844.

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} 21 U.S.C. § 843(b).
year in prison — but rather of multiple felonies and potentially multiple sentences of up to four years in prison.\textsuperscript{109}

\textit{Abuelhawa} presented the perfect opportunity for the Supreme Court to eliminate such a harsh and incongruous result. In spite of his insistence that he was not a drug dealer, Mr. Abuelhawa was charged with seven counts of violating § 843(b) for using a telephone to arrange two separate meetings to purchase narcotics.\textsuperscript{110} Under the appropriate interpretation, Mr. Abuelhawa should have faced a maximum of two years imprisonment for two misdemeanor counts of simple possession under § 844.\textsuperscript{111} However, under the Fourth Circuit’s expanded “facilitation camp” definition, Mr. Abuelhawa was instead subject to seven felony convictions that could ultimately lead to a possible twenty-eight years in prison. This type of severe punishment for petty drug users was clearly at odds with the Congressional intent to value and promote rehabilitation over retribution,\textsuperscript{112} and Justice Souter’s opinion reflected that idea, finding such a disparity “impossible to believe.”\textsuperscript{113}

Furthermore, it was unlikely that the Fourth Circuit’s interpretation of § 843(b) could be harmonized with Congress’s intent to limit the statute’s reach to only the facilitation of drug felonies, not the facilitation of drug misdemeanors. When a buyer uses a communication facility to make a drug purchase for personal use, he should be seen, if following the Congressional purpose of the Act, as merely facilitating the simple possession of drugs for personal use — a misdemeanor.\textsuperscript{114} However, under the Fourth Circuit’s analysis, any buyer of drugs for personal use also facilitated the seller’s felony distribution of drugs when he or she facilitated their own misdemeanor purchase of drugs.\textsuperscript{115} This addition of a separate, more serious crime would seem to circumvent and frustrate Congress’s intent to remove drug misdemeanors from the scope of § 843(b).\textsuperscript{116}

\textsuperscript{109} \textit{Id.}
\textsuperscript{110} United States v. Abuelhawa, 523 F.3d 415, 418–19 (4th Cir. 2008).
\textsuperscript{111} 21 U.S.C. § 844.

\begin{quote}
Drug users who violate the law by small purchases or sales should be made to recognize what society demands of them. In these instances, penalties should be applied according to the principles of our present code of justice. When the penalties involve imprisonment, however, the rehabilitation of the individual, rather than retributive punishment should be the major objective.
\end{quote}

\textit{Id.}).
\textsuperscript{113} Abuelhawa v. United States, 129 S.Ct. 2102, 2107 (2009).
\textsuperscript{114} 21 U.S.C. § 844.
\textsuperscript{115} \textit{Abuelhawa}, 523 F.3d at 421.
\textsuperscript{116} See H.R. Rep. No. 1444 at 4570 (concluding:

The bill revises the entire structure of criminal penalties involving controlled drugs by providing a consistent method of treatment of all persons accused of violations. With one exception involving continuing criminal enterprises, hereafter discussed, all mandatory minimum sentences are eliminated. Possession of controlled drugs is made a misdemeanor, except where the possession
As reflected by the evolution of U.S. drug laws, Congress has continually expressed a desire to limit the punishment of personal users to misdemeanor charges while saving felony charges for distributors and traffickers. As noted above, U.S. drug laws prior to the Act, including the previous version of §843(b), did not confine the scope of facilitation to only drug felonies, but rather expanded violations to include an act by the buyer in using a communication facility to facilitate “any act or acts constituting an offense” under the drug laws.117 This law covered all drug crimes, which could include both drug distributors and small-time buyers for personal use, as felonies because all drug “offense[s]” were considered felonies.118

Accordingly, when Congress amended the federal drug laws in the Controlled Substances Act of 1970 (“CSA”), it greatly reduced the scope of this overly-inclusive category.119 As in other areas of the revised drug law, the new regulations drew a firm distinction between drug distributors and drug users through the creation of a new category: the misdemeanor offense of simple possession that carried a lesser punishment for possession of drugs for personal use.120 This considerable modification by the CSA was regarded by one representative as “[o]ne of the most striking features of the new penalty structure.”121 Continuing this trend, Congress also narrowed the scope of the communication facility provision of the CSA by prohibiting facilitation only with the finding of a drug “felony,” not any drug “offense” as previously required.122 The Act thus

is for the purpose of distribution to others. In the case of a first offense of simple possession, the court may place the offender on probation for not more than [one] year.”

Id.).


(a) Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any acts or acts constituting an offense . . . , shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than $5,000. Each separate use of a communication facility shall be a separate offense under this section.

(emphasis added).

118 See id.; see also 26 U.S.C. § 7237, 70 Stat. 7237(a) (repealed) (“Whoever commits an offense, or conspires to commit an offense . . . shall be imprisoned not less than [two] or more than [ten] years.”).

119 Pub. L. No. 91-513, Tit. II, § 404(a) 84 Stat. 1236, 1264.

120 Id. (codified at 21 U.S.C. § 844(a)).


    One of the most striking features of the new penalty structure is that illegal possession of a controlled drug for one’s own use is a misdemeanor . . . . This section on simple possession violations reflects the judgment of most authorities that harsh penalties imposed on the user have little deterrent value and often ruin the life of an individual involved.

122 CSA § 403(b), 84 Stat. at 1263 (codified at 21 U.S.C. § 843 (b)).
reduced possession for personal use to a misdemeanor and made the purchase of drugs with a communication device for personal use outside the reach of § 843(b) as this section only pertains to felonies.\textsuperscript{123} Consequently, the Fourth Circuit’s interpretation of Mr. Abuelhawa’s purchase of drugs for personal use as a felony had the effect of frustrating Congress’s intent to limit the scope of § 843(b) to simply the facilitation of a drug “felony.” In spite of the Fourth Circuit’s claim that Abuelhawa did not “prove that our result is ‘demonstrably at odds’ with congressional intent,”\textsuperscript{124} the Supreme Court correctly found that “Congress meant to treat purchasing drugs for personal use more leniently than felony distribution, and to narrow the scope of the communications provision to cover only those who facilitate a felony.”\textsuperscript{125} To find the opposite, in the opinion of the Court, would mean that Congress “would for all practical purposes simultaneously have graded back up to felony status with the left hand the same offense . . . it had dropped to a misdemeanor with the right.”\textsuperscript{126} This, as Justice Souter rightly found, would be “impossible to believe.”\textsuperscript{127}

V. ANALOGOUS CASES

While not explicitly mentioned in its opinion in United States v. Abuelhawa, the Supreme Court likely looked to several previous analogous decisions of the Court to determine how to interpret the term “facilitate” as it relates to § 843(b). In Rewis v. United States, the Supreme Court considered a case in which the petitioners challenged their convictions under the Travel Act of 1952 (“Travel Act”).\textsuperscript{128} The Travel Act, dealing with illegal gambling, prohibited “interstate travel with intent to ‘promote, manage, establish, carry on or facilitate’ certain kinds of illegal activity.”\textsuperscript{129} In determining whether the customers

\textsuperscript{123} Id.
\textsuperscript{125} Abuelhawa v. United States, 129 S.Ct. 2102, 2103 (2009).
\textsuperscript{126} Id. at 2104.
\textsuperscript{127} Id.
\textsuperscript{128} 401 U.S. 808, 809 (1971).
\textsuperscript{129} Id. at 811 (quoting 18 U.S.C. § 1952 (1964 ed. and Supp. V)), providing:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section (i) ‘unlawful activity’ means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not
of an illegal gambling enterprise “facilitate[d]” that enterprise through mere participation, the Court looked to the statute and Congressional intent.\footnote{Rewis, 401 U.S. at 811–12.} Concluding that the Travel Act was not primarily aimed at the defendants,\footnote{Id. (stating “legislative history of the Act is limited, but does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another.”); see S. REP. No. 644, 87th Cong., 1st Sess., at 2–3, July 27, 1961 (stating: 

The target clearly is organized crime. The travel that would be banned is travel ‘in furtherance of a business enterprise’ which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery. Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.

\textit{Id.}).} the Court held that gamblers at an illegal gambling establishment were not guilty of “facilitating” the establishment merely through participation.\footnote{Rewis v. United States, 401 U.S. 808, 811 (1971).} The Court emphasized that “the ordinary meaning of this language suggests that the traveler’s purpose must involve more than the desire to patronize the illegal activity.”\footnote{Id. at 812.} Because Congress had not intended the Travel Act to “apply to criminal activity solely because that activity is at times patronized by persons,” the Court found that “neither statutory language nor legislative history supports such a broad-ranging interpretation . . . [\textit{134}]”\footnote{United States v. Martin, 599 F.2d 880, 888 (9th Cir. 1979).} Therefore, it stands to reason that, as found by the Ninth Circuit in \textit{Martin}, “a mere customer” cannot “facilitate the business he patronize[s].”\footnote{Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (citing Northcross v. Board of Ed. of Memphis City Schools, 412 U.S. 427, 428 (1973) (per curiam)).}

In addition to the definition of “facilitate” as used in the Travel Act, the Court likely reviewed its previous ruling in \textit{Smith v. City of Jackson} in crafting a definition of the term as it is used in § 843(b). In \textit{City of Jackson}, a case involving issues linking Title VII claims with the Age Discrimination in Employment Act, the Court noted that “when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”\footnote{Id.} As the criminal provisions of the Travel Act can be seen as analogous to the criminal provisions of the federal drug laws, it should make no difference that the two statutes address different crimes. As

---

\textit{Id.}
stated in Martin, “[a] difference in the nature of the illicit business should not change the basic principle enunciated by the Supreme Court . . . that a mere customer’s contribution to the business he patronizes does not constitute the facilitation envisioned by Congress.” 137 Thus, it would have been reasonable for the Court to find that, just as the gambling patrons in Rewis did not “facilitate” an illegal gambling establishment within the meaning of the Travel Act through mere participation, a buyer of illegal drugs for personal use does not “facilitate” his dealer’s drug distribution within the meaning of § 843(b).

VI. IMPORTANCE

The Supreme Court’s review of the Fourth Circuit’s decision in the Abuelhawa case — holding that, although the acquisition of illegal drugs for personal use is commonly a misdemeanor under the federal drug laws, any buyer who uses a “communication facility” to buy the drugs may be charged with a felony for facilitating the seller’s commission of felony distribution — was of vital importance to several areas of the law. 138 Because this definition could have potentially affected countless defendants in criminal drug prosecutions, a definitive interpretation of § 843(b) by the Supreme Court was necessary to resolve the split found in the circuits.

The importance of this decision is also found in its potential impact on individual defendants and the unintended consequences that would have followed those defendants if the Court followed the Fourth Circuit’s interpretation. When Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, it sought to make a “sharp distinction” between drug users and drug distributors. 139 In its decision, the Fourth Circuit Abuelhawa Court ignored an important distinction that was intended by Congress. By elevating personal drug users from misdemeanants to felons simply because of the use of a telephone, text-message, or e-mail — rather than face-to-face contact — the Fourth Circuit elevated form over substance. The severe transformation from simple misdemeanor to felony was unjustifiably penal. As mentioned previously, there was a serious discrepancy in potential punishment, with a felony meriting significantly harsher prison sentences than a misdemeanor; 140 however, there were also several collateral consequences that affect a defendant who is guilty of a felony.

Criminals who are convicted as felons, rather than as misdemeanants, can lose several rights that are extremely important in American society. As a convicted felon, a defendant will most likely lose the right to vote, depending

137  Martin, 599 F.2d at 888-89.
138  United States v. Abuelhawa, 523 F.3d 415 (4th Cir. 2008); see also infra Part VI for areas of importance.
139  Martin, 599 F.2d at 889.
upon where they live.\textsuperscript{141} While disenfranchisement varies depending on how long ago a defendant was convicted, many states still block a felon’s access to the polls even after release from prison and a probationary period. Virtually all states require that felons serving prison sentences forfeit their right to vote.\textsuperscript{142} Convicted felons released from prison and on parole fare slightly better as they are unable to vote in only thirty-two states, “while twenty-nine states disenfranchise those on probation.”\textsuperscript{143} Additionally, fourteen states continue to prevent ex-felons from voting even after they have served their full sentence and have completed any parole or probation period.\textsuperscript{144} This barring of ex-felons from exercising the right to vote effectively disenfranchises these defendants for life, depriving them of one of a citizen’s most fundamental rights.\textsuperscript{145}

Conviction of a felony that is punishable by imprisonment for more than one year would also affect several other rights held dear by citizens. Convicted felons are disqualified from being able to serve on a federal jury for life,\textsuperscript{146} they might be unable enlist in the armed forces,\textsuperscript{147} they can be evicted from public housing,\textsuperscript{148} they can be permanently barred from receiving food stamps and oth-

\textsuperscript{141} See infra notes 142–146 and accompanying text.


\textsuperscript{143} Id.

\textsuperscript{144} Id.; see FELLHER & MAUER, supra note 142, at Part II:

[I]n fourteen states, ex-offenders who have fully served their sentences nonetheless remain disenfranchised. Ten of these states disenfranchise ex-felons for life: Alabama, Delaware, Florida, Iowa, Kentucky, Mississippi, Nevada, New Mexico, Virginia, and Wyoming. Arizona and Maryland disenfranchise permanently those convicted of a second felony; and Tennessee and Washington disenfranchise permanently those convicted prior to 1986 and 1984, respectively. In addition, in Texas, a convicted felon’s right to vote is not restored until two years after discharge from prison, probation or parole.

\textsuperscript{145} Id.

\textsuperscript{146} Id. (citing 28 U.S.C. § 1865(b)(5)).

\textsuperscript{147} Id. (citing 10 U.S.C. § 504(a) (finding: “No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force. However, the Secretary concerned may authorize exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies.”)).

\textsuperscript{148} Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner, supra note 142, at 14 (citing 42 U.S.C. § 1437f(d)(1)(B)(iii), stating:

during the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the
er Social Security benefits, and their property may be subject to forfeiture. In addition, although a convicted felon cannot be excluded from public employment, the felony can be “a factor in determining suitability for it.”

Furthermore, if the defendant is not a citizen, but rather a permanent resident alien, as was the defendant in Abuelhawa, the difference between a misdemeanor and a felony is even more important. For a legal permanent resident, a felony conviction under § 843(b) would be considered an aggravated felony under U.S. immigration law. Conviction of this type of felony would then immediately make the alien subject to deportation from the United States with no opportunity to petition the government for a discretionary cancellation of removal which could stay his deportation. If convicted of a misdemeanor, however, neither of these sanctions would apply to the resident alien. Thus, this transformation of a misdemeanor into a felony would not only have taken away several important rights related to living in the United States, it could have also taken away the ability to remain in the country at all.

premises, or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy . . . .

Id. (citing 21 U.S.C. § 862a).

The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . . All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year’s imprisonment.

Id. at 13.


VII. FURTHER POLICY ARGUMENTS AGAINST FINDING FOR THE FOURTH CIRCUIT’S INTERPRETATION OF ABUELHAWA

A. Rehabilitation

If the Supreme Court would have followed the Fourth Circuit’s decision in Abuelhawa, it would have run counter to Congress’s intent to foster rehabilitation of lesser criminals. In the legislative history of the Act, Congress recited that “rehabilitation is the humanitarian ideal, to be sought whenever possible.”156 In stating its philosophy for rehabilitating drug users, Congress noted that “the individual abuser should be rehabilitated” because “drug users who violate the law by small purchases or sales should be made to recognize what society demands of them.”157 For small-time purchasers this would likely not include long sentences of imprisonment as the “penalties [should] fit offenders as well as offenses” and “should be designed to permit the offender’s rehabilitation wherever possible.”158 Although the proper emphasis should favor treatment rather than punishment, incarceration often prolongs recovery from drug abuse and can exacerbate the pre-existing condition.159 This philosophy has helped many state governments recognize the negative impact of a jail sentence on petty drug purchasers and led at least seventeen states to roll “back mandatory minimum sentences and similar harsh penalties for nonviolent offenders, particularly individuals convicted of drug offenses.”160 Through its conflation of the drug seller and the drug user, reliance on the Fourth Circuit’s decision would

157 Id. at 4575. (General Philosophy of the Commission:

(1) The illegal traffic in drugs should be attacked with the full power of the Federal Government. The price for participation in this traffic should be prohibitive. It should be made too dangerous to be attractive.

(2) The individual abuser should be rehabilitated. Every possible effort should be exerted by all governments — federal, state, and local — and by every community toward this end. Where necessary to protect society, this may have to be done at times against the abuser’s will. Pertinent to all, the causes of drug abuse must be found and eradicated.

(3) Drug users who violate the law by small purchases or sales should be made to recognize what society demands of them. In these instances, penalties should be applied according to the principles of our present code of justice. When the penalties involve imprisonment, however, the rehabilitation of the individual, rather than retributive punishment should be the major objective.

158 Id.
159 Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner, supra note 142, at 14.
have undermined Congress’s intent to reform and rehabilitate the lesser offender. Confining petty drug users “in prison with hardened criminals and drug traffickers for a potentially extended period of time is simply counterproductive where the goal is reformation and reintegration into society.”

But, this is exactly what the Fourth Circuit Abuelhawa court’s interpretation of § 843(b) would have achieved.

B. Technological Advances

Furthermore, the issue of the interpretation of § 843(b) is increasingly important as the use of cellular phones, text messaging, and e-mail continues to rapidly increase throughout the world. Since 2003, the number of mobile wireless telephone subscribers has increased by almost 100 million people. The percentage of e-mail and Internet users is also continually on the rise from year to year as people are spending more and more time connected to the web. The most considerable advancement in the field of communication facilities, however, must be text messaging. Nearly unheard of until the late 1990s, text messaging has exploded in the United States as the preferred method of communication for young Americans. According to the Cellular Telephone Industry Association, “Americans sent 57.2 billion text messages in 2005, and now send more than ten times that amount — about 600.5 billion text messages

———

161 Id.


163 Mary Madden, Internet Penetration and Impact, PEW Internet & American Life Project, Apr. 26, 2006, http://www.pewinternet.org/PPF/r/182/report_display.asp (finding surveys showing that 73% of respondents (about 147 million adults) are Internet users, up from 66% (about 133 million adults) in January 2005 survey).

164 Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner, supra note 142, at 8 n.4 (noting “[o]n average, Americans now spend 26 hours and 26 minutes per month using the Internet.” Gary Holmes, The Nielsen Company, Nielsen Reports TV, Internet and Mobile Usage Among Americans, July 8, 2008, available at http://www.nielsenmedia.com/nf/portal/site/Public/menuitem.55de65b4a7d5adfl3f65936147a062a0/?allRmCB=on&newSearch=yes&vgnextoid=fe63e9769fcfa110VgnVCM100000ac0a260aRCRD&searchBox=la#).

— a year.” Many of these messages are sent and received by people under the age of thirty. This popularity makes it increasingly more likely in this digital age that a petty drug purchaser will not contact a drug distributor in person, but rather through e-mail or text messaging. By utilizing this rapidly growing technology to make the purchase, the buyer would have, under the Fourth Circuit’s interpretation, been committing a felony. It makes little sense why the buyer “who obtains a personal-use quantity of drugs” by inquiring face-to-face with a distributor “should be guilty of a misdemeanor, while the person who texts the same inquiry” is guilty of a felony. This nonsensical distinction would seem to suggest that Congress — in increasing the punishment whenever someone uses a communication facility — somehow sees a lesser offense in buyers who make face-to-face drug transactions in open air markets. As this is obviously not the case, it would have been extremely difficult for the Court to follow a court’s interpretation that, in its practice, would “favor[] street-dealing over electronic communications . . . .”

C. Federal Prosecutors

In addition to affecting defendants charged with purchasing drugs, adherence to the Fourth Circuit’s expansive interpretation would have also affected federal prosecutors who are charged with prosecuting these defendants. As employees of the government, federal prosecutors are subject to the current philosophy and direction of the Attorney General and the United States Department of Justice. At the time of the decision, the Department of Justice instructed prosecutors to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of [a given] case . . . .” This mandate to pursue the greatest possible offense in every case, regardless of Congressional intent, would further promote the felony prosecution of petty drug purchasers. Going against the intent of Congress, an expansive interpretation of § 843(b) would have diverted “prosecutorial resources” from the intended purpose of targeting traffickers and distributors to that of attempting to

167 Id. at 9 n.6 (“As of 2006, 65% of people ages 18–29 used their cell phones for text messaging, compared with 37% of people ages 30–49, 13% of people ages 50–64, and 8% of people 65 and older.” http://www.pewinternet.org/-/media//Files/Reports/2006/PIP_Cell_phone_study.pdf.pdf (last visited March 15, 2010)).
168 Id. at 10.
169 Id. at 18.
170 Id. at 19.
fully prosecute the larger, yet significantly less dangerous petty drug users.\textsuperscript{172} Additionally, given the widespread use of cellular phones and other “communication devices,” it is likely that “virtually every possessor will, in connection with his or her purchase of the drugs (as well in virtually all other aspects of life), use some type of communication facility.”\textsuperscript{173} This would have required prosecutors to bring harsher felony charges under § 843(b) against every participant in the drug sale, petty buyer and distributor alike,\textsuperscript{174} and would have completely “eviscerat[ed] the distinction between such offenders that is embedded in the statute intended by Congress.”\textsuperscript{175}

Moreover, because of this skewed interpretation of § 843(b), prosecutors would have had excessive and unwarranted power in the plea bargaining process.\textsuperscript{176} As it is common for federal criminal charges to be resolved through a guilty plea,\textsuperscript{177} it is important that the system remains fair for both sides to determine the proper punishment.\textsuperscript{178} By requiring the harshest possible penalty, the Fourth Circuit’s interpretation would have placed “the specter of a felony conviction and a substantially lengthier term of incarceration over a drug possessor’s head” and, thus, given “prosecutors an enormous and unwarranted amount of leverage in plea negotiations with defendants charged with possessing drugs” for personal use.\textsuperscript{179} The prosecutor would have been able to fundamentally change the balance of power in the relationship as the defendant would now face the possibility of up to four years imprisonment if convicted at trial for each phone call or text message.\textsuperscript{180} This likely would have led to plea negotiations in which defendants being charged under § 843(b) and forced to plead guilty, when they otherwise may have been acquitted at trial because they are “faced with a 400% harsher punishment upon a loss at trial . . . ”\textsuperscript{181} Although these inequities always exist when a defendant pleads guilty prior to trial, the Fourth Circuit’s interpretation would have had the outcome of rendering “the dramatically higher penalty facing a possessor . . . increases this risk and places a thumb on the scale in favor of a plea.”\textsuperscript{182} Because this inequity would have given federal prosecu-
tors the authority to seek harsher charges and convictions for those unintended by Congress in the enactment of § 843(b), the reasoning of the *Abuelhawa* court was rightly rejected by the Supreme Court.

VIII. MODERN TRENDS OF THE COURT WHEN DECIDING DRUG CASES

Although the Supreme Court, since 2006, has mostly been characterized as a conservative court, several rulings by the 2007 Court hinted that the Court would find the Fourth Circuit’s overly harsh definition of § 843(b) to be unpersuasive. In December 2007, the Court handed down rulings in two cases that gave federal judges greater authority to set sentences for crack cocaine crimes below the range of punishment set by federal guidelines. In *Kimbrough v. U.S.*, the Court ruled 7–2 that the federal sentencing guidelines for cocaine violations were only advisory. The Court found that, although federal judges must always consider the Congressionally-designed guideline scale for a cocaine violation, they may also determine that the guideline’s punishment would be too harsh for the crime committed. This allows trial judges to have some discretion in choosing the appropriate punishment for certain drug purchasers. As stated by Justice Ginsburg, the statute “mandates only maximum and minimum sentences” but “says nothing about appropriate sentences within these brackets, and this Court declines to read any implicit directive into the congressional silence.” This ruling gives judges considerable freedom to disagree with the Federal Sentencing Guidelines’ considerably more severe suggestions of punishments.

A second case decided in 2007, *Gall v. U.S.*, also granted judges considerable discretion in dealing with the Federal Sentencing Guidelines. In this case, the Court found — also by a 7–2 margin — that federal judges could impose sentences below the range specified in the guidelines and still have the punishment regarded as “reasonable.” This decision overruled an Eighth Circuit decision that found that a below-Guidelines sentence would be reasonable only if justified by “extraordinary circumstances.” Finding that while “the Guidelines are the starting point and the initial benchmark,” Justice Stevens wrote that they “are not the only consideration.” “Accordingly, after giving

---

182 *Id.*


185 *Id.*

186 *Id.*

187 *Id.* at 102–03.


189 *Id.* at 41.


191 *Gall*, 552 U.S. at 39.
both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.\textsuperscript{192} If the judge then decides “that an outside Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.”\textsuperscript{193} “Regardless of whether the sentence imposed is inside or outside the Guidelines range,” the Court found, “the appellate court must review the sentence under an abuse-of-discretion standard.”\textsuperscript{194} With this review standard, however, “it is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court’s reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence.”\textsuperscript{195} This case also provides a broader context for how judges in drug cases may alter sentencing as Gall dealt with whether any federal sentence that falls below the Federal Sentencing Guidelines was valid if it was not supported by “extraordinary circumstances.”\textsuperscript{196} This 2007 position that a drug sentence should be “reasoned and reasonable”\textsuperscript{197} depending on certain factors likely cautioned the Supreme Court from endorsing the Fourth Circuit’s interpretation of § 843(b), which would have severely increased punishments for petty drug offenders. The

\textsuperscript{192} Id. at 49–50; see 18 U.S.C. § 3553(a) listing seven factors that a sentencing court must consider. The first factor is a broad command to consider “the nature and circumstances of the offense and the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). The second factor requires the consideration of the general purposes of sentencing, including:

- the need for the sentence imposed —
  - (A) to reflect the seriousness of the offense, to promote respect for the law,
    and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training,
    medical care, or other correctional treatment in the most effective manner.

\textsuperscript{193} Gall v. United States, 552 U.S. 38, 50 (2007).

\textsuperscript{194} Id. at 51.

\textsuperscript{195} Id. at 59–60.

\textsuperscript{196} Id. at 47.

\textsuperscript{197} Id. at 59–60.
Court, through these decisions, has now made it clear that reasonableness must be factored into the equation when interpreting statutes. Like these drug decisions involving the Federal Sentencing Guidelines, the Court’s decision in Abuelhawa also counsels that all drug sentences should be “reasoned and reasonable.”\textsuperscript{198} Any movement against this trend would be in stark contrast to the stated Congressional intent of the statute and “would skew the calibration of penalties very substantially.”\textsuperscript{199}

IX. CONCLUSION

As shown above, the Fourth Circuit’s § 843(b) decision in Abuelhawa that personal drug users who use a communication device to make a purchase have committed a drug felony, rather than a drug misdemeanor, failed to recognize the intent of Congress and the reasoning and public policy values reflected in previous decisions of the Supreme Court. The Supreme Court recognized these facts and made the correct decision in rejecting the Fourth Circuit’s analysis. Although any suggestion of leniency in drug cases can be politically unpopular as neither the Court nor Congress wish to be viewed as soft on drug crimes, Congress has chosen to make a distinction between the types of drug users who should be prosecuted more harshly than others. With this distinction, drug dealers have been determined to be more of a danger to society than personal drug users and, thus, subject to a felony charge rather than a misdemeanor. If the Supreme Court would have followed the Fourth Circuit’s interpretation, this distinction would have evaporated as, in our modern times, nearly all drug purchases are facilitated by a communication device, and, consequently, all personal-use drug buyers can be charged with felonies, rather than misdemeanors. In its decision, the Supreme Court looked to the explicit intent of Congress in the passing of the Comprehensive Drug Abuse Prevention and Control Act and found that the Fourth Circuit’s Abuelhawa interpretation of § 843(b) was overbroad and should not be applied to a person who is only purchasing drugs solely for personal use. To find otherwise, as written by Justice Souter, would be “impossible to believe.”\textsuperscript{200}

\textit{C. William Ralston*}

\textsuperscript{198} Id. at 59–60.
\textsuperscript{199} Abuelhawa v. United States, 129 S.Ct. 2102, 2106 (2009).
\textsuperscript{200} Id. at 2107.

* Research Editor, Volume 112 of the \textit{West Virginia Law Review}; J.D. Candidate, West Virginia College of Law, May 2010; B.A. in History, Davidson College, 2004. The Author would like to thank the members of the \textit{West Virginia Law Review} for their dedication and effort in publishing this Note. The Author would also like to thank his friends and family, especially his parents, for their continual love and encouragement. Finally, the Author would like to thank Padget Rice for her unwavering support and occasional proofreading throughout his law school career.