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IN THE SUPREME COURT OF THE UNITED STATES

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STEPHEN DOMINICK McFADDEN, :

Petitioner : No. 14-378

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Tuesday, April 21, 2015

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

APPEARANCES:

KEVIN K. RUSSELL, ESQ., Bethesda, Md.; on behalf of Petitioner.

SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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

2 (10:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 14-378, McFadden v.
5 United States.

6 Mr. Russell.

7 ORAL ARGUMENT OF KEVIN K. RUSSELL

8 ON BEHALF OF THE PETITIONER

9 MR. RUSSELL: Mr. Chief Justice, and may it
10 please the Court:

11 The briefing in this Court has narrowed
12 considerably the disagreement among the parties. We now
13 all agree that the Fourth Circuit misconstrued the mens
14 rea element for a -- a criminal offense under the
15 Controlled Substance Analogue Act, and we further agree
16 that the jury instructions actually given in this case
17 were erroneous.

18 Instead, we and the government now agree
19 that to prove an offense, the government must show that
20 the defendant knowingly distributed an analogue. And we
21 further agree that the government may do that by showing
22 that the defendant knew that the substance in question
23 had the characteristics that made it an analogue under
24 the statute.

25 Where we may disagree is over the

1 government's alternative theory that it can instead show
2 that the defendant knew that the substance was illegal
3 or regulated. If all the government means by that is
4 illegal or regulated under the statute of conviction,
5 the Controlled Substances Act itself, we would agree,
6 but the government would simply lose because, as it's
7 acknowledged, the evidence in this case tended to show
8 that my client did not believe that his conduct violated
9 the CSA itself.

10 JUSTICE KAGAN: But just to make sure I
11 understand all that you're agreeing on, you do agree
12 that if the defendant knew that the substance was
13 illegal under the Controlled Substances Act or the
14 Analogue Act, even though the defendant didn't know the
15 chemical structure or the particular effects -- say that
16 the dealer had handed him a box and said this is our new
17 analogue which is illegal under this -- under the
18 Analogue Act, you -- you agree that that is sufficient
19 for a conviction.

20 MR. RUSSELL: We do agree with that. And I
21 think that that is simply a special application of the
22 general rule that the defendant has to know the facts
23 that make his conduct unlawful because he knows in that
24 circumstance the only fact he needs to know in order to
25 know that what he's doing is illegal.

1 JUSTICE KENNEDY: And that -- that sounds
2 sensible to me. What about the expert testimony from
3 chemists? Is that still put on in the trial? Does the
4 government still have to show -- put on an expert to
5 say, well, this is chemically modified, but it's
6 substantially similar and the jury sits there knowing
7 that it doesn't have to listen to this? I mean, how
8 does that work?

9 MR. RUSSELL: No. They do have to show that
10 because the government still has to prove that it is, in
11 fact, an analogue. So they have to both show that the
12 defendant --

13 JUSTICE KENNEDY: Well, but does a jury have
14 to understand the chemical testimony?

15 MR. RUSSELL: They've -- they've got to make
16 the determination that it is, in fact, chemically
17 substantially similar. I acknowledge that that's a lot
18 to ask of a jury. It's a lot to ask of a -- of a
19 defendant to understand that.

20 JUSTICE GINSBURG: But it is the
21 government's burden to show both the composition in
22 relation to the controlled substance, and the -- the
23 effect of the drug. Those -- those the government must
24 prove. But what we have out of the way is that the
25 defendant now doesn't have to know -- you agree the

1 defendant doesn't have to understand the chemical
2 structure?

3 MR. RUSSELL: He doesn't have to understand
4 the chemical structure if the government can prove that
5 the defendant knew that the substance was illegal under
6 the Controlled Substances Act itself.

7 CHIEF JUSTICE ROBERTS: Well, the government
8 has given up a lot getting to this point and I think
9 you've just given up a lot.

10 I would have thought your -- your position
11 that you have to know that it's regulated under the
12 chemical substances or Controlled Substances Act, it
13 seems to me is -- is contrary to the proposition that
14 ignorance of the law is no excuse. If you didn't
15 know -- I didn't know this was regulated, you would say
16 he's -- he's innocent because he didn't know the law.

17 I thought your position was that you do have
18 to know, as in all the other cases in the mens rea area,
19 the -- the facts that make your conduct illegal. You
20 don't have to know that it's illegal.

21 MR. RUSSELL: That -- that is certainly our
22 principal position. We are willing to say, however,
23 that either -- whether you consider it a special
24 exception to that rule or a special application to that
25 rule, if the government can show that the defendant

1 knows that the substance is illegal under the statute of
2 conviction, that serves the basic purpose of the
3 knowledge of fact requirement, which is something --

4 CHIEF JUSTICE ROBERTS: And if he doesn't
5 know, he's innocent.

6 MR. RUSSELL: If he does not --

7 CHIEF JUSTICE ROBERTS: If he's ignorant of
8 that law, he's not guilty.

9 MR. RUSSELL: Well, he's not guilty unless
10 the government can show that he knows that the substance
11 has the characteristics of -- of an analogue, in which
12 case his ignorance of the law is not an excuse.

13 So the government has two options: It can
14 prove the facts, the factual knowledge in the way that
15 this Court described in Staples and has applied in other
16 cases involving prohibited items. But we're willing to
17 acknowledge that if they can, instead of that, show that
18 he knew that this is illegal under the statute, that's
19 good enough because --

20 JUSTICE KAGAN: And -- and I take it that's
21 the same as under the Controlled Substances Act itself;
22 is that right? That's the analogy, is that you can
23 either show the person knew it was heroin or you can
24 show, well, the person didn't know it was heroin, but
25 the person did know that it was some drug that was on

1 Schedule I of the -- of -- of -- and so a controlled
2 substance.

3 MR. RUSSELL: That's right. And where we
4 disagree with the government is that it construes some
5 of the lower court cases that say that as saying the
6 broader thing, which is --

7 JUSTICE SOTOMAYOR: I'm sorry. You keep
8 saying "knowing that it's illegal under the Act." He
9 doesn't have to know the Act. He just has to know it's
10 illegal, that some law regulates it; otherwise, he's not
11 going to know what the number of the law is or the
12 Controlled Substance Act.

13 MR. RUSSELL: Well, let me be clear. When I
14 say --

15 JUSTICE SOTOMAYOR: I mean, criminals don't
16 care. They just know that this is -- they may think
17 it's something. They just know it's a controlled
18 substance.

19 MR. RUSSELL: No. I -- I would disagree
20 with that. And I think that's the principal
21 disagreement we have with the government here, is that
22 it's not enough to show that the defendant thinks that
23 it's illegal generally or that it's unlawful under an
24 import statute or State law.

25 JUSTICE SCALIA: All right. The -- the

1 government would say if he's selling it without paying
2 the sales tax, he knows that that's illegal, that's
3 enough to convict him under the Controlled Substances
4 Act.

5 MR. RUSSELL: Potentially, I -- I think
6 that that may be their argument, you know. So we give
7 the example in our brief of somebody who knows he's
8 selling Cuban cigars in violation of the import ban. He
9 knows in that case that it's an illegal or controlled
10 substance, but that knowledge doesn't equate -- you
11 wouldn't say that somebody in that case knows he's
12 selling a controlled substance, simply because it turns
13 out, unbeknownst to him, that the cigars have marijuana
14 in them.

15 That's not the way that you use the English
16 language. You wouldn't say that he knowingly sold
17 marijuana or even that he knowingly controlled a -- sold
18 a controlled substance.

19 JUSTICE ALITO: Let's take the -- a
20 case involving a drug that isn't an analogue, a drug
21 that's actually listed. And let's say that the facts
22 are these: The distributor gives it to the person who's
23 going to make the distribution and says this is an
24 illegal drug, go distribute it. And the person then
25 goes and distributes it and tries to evade law

1 enforcement and so forth, is caught.

2 Now, is it -- is that sufficient -- is that
3 evidence sufficient to take the case to the jury so the
4 jury can find -- the jury can decide whether there's
5 circumstantial evidence that the person who distributed
6 the drugs knew that it was a controlled substance under
7 Federal law as opposed to one of the few things that is
8 illegal under State law, but not under Federal law?

9 MR. RUSSELL: Yes, I think that's sufficient
10 evidence to go to the jury. The jury then has to decide
11 whether to make that inference. And in a case like this
12 where the defendant puts on countervailing evidence that
13 he, in fact, didn't believe it violated Federal law, or
14 when -- or if the defendant is able to explain, yeah, I
15 thought it was illegal because I thought it was in
16 violation of an import statute, then it's up to jury to
17 decide whether to believe that. But if it does, then it
18 ought to conclude that mens rea wasn't established
19 unless the government can show that the defendant knew
20 the characteristics of the substance that made it an
21 analogue.

22 JUSTICE GINSBURG: Suppose the supplier
23 tells the dealer this substance produces exactly the
24 same effect as cocaine. Would that be enough to satisfy
25 the mens rea requirement?

1 MR. RUSSELL: It wouldn't be enough to
2 satisfy it. It would may be evidence from which the jury
3 could draw an inference that the defendant knew that it
4 was a controlled substance under Federal law. I don't
5 think that they -- they should. I think it's -- it's
6 only partial evidence.

7 JUSTICE SCALIA: You -- you say he has to
8 know the -- the chemical makeup that causes it to be an
9 analogue. Right?

10 MR. RUSSELL: He either has to know that or
11 he has to know that it violates the CSA.

12 JUSTICE SCALIA: I understand. Let's assume
13 that he doesn't know that it violates the law. He also
14 doesn't know that it -- what the chemical makeup is.
15 But he knows what it is. It is MVD-3. That's all he
16 knows.

17 Now, under the Controlled Substances Act,
18 that would be enough. He wouldn't have to know the
19 makeup of it. He would just have to know it's one of
20 the named controlled substances. If indeed MD-3 is --
21 is an analogue, why isn't that enough that he just knows
22 what it was and what it was is an analogue?

23 MR. RUSSELL: Right. I think that's
24 parallel to somebody knowing that he has an AR-15 rifle,
25 which is, in fact, a machine gun. In Staples, this

1 Court said that's not enough. You need to know the
2 facts about the gun that make it an analogue, which
3 isn't its name -- or which make it a machine gun, which
4 isn't its name. Here it's not the name --

5 JUSTICE SCALIA: Well, this isn't a rifle.
6 This is, in fact, an analogue of a controlled substance.
7 I mean, it's -- it's not a proper comparison.

8 MR. RUSSELL: With respect --

9 JUSTICE SCALIA: He knows that it is -- he
10 knows the identity of it. And -- and that chemical
11 is -- has, in fact, the characteristics that make it an
12 analogue.

13 MR. RUSSELL: He knows -- knowing simply the
14 name of it doesn't tell you whether it's an analogue or
15 not. You don't know that it's an analogue simply
16 because you know the name. And the way that you
17 would --

18 JUSTICE SCALIA: That's true. And -- and
19 knowing that it's cocaine doesn't prove that you know
20 it's a controlled substance.

21 MR. RUSSELL: It -- it does though, because
22 the only fact that you need to know about cocaine for it
23 to be a controlled substance is that it is cocaine.
24 Because that's the fact that makes it illegal. It's
25 listed on the Controlled Substance Act and the

1 controlled substance schedules. So if it's cocaine, you
2 know everything you need to know, based on the
3 presumption that you know the law, to know that what
4 you're doing is illegal, and that's not true --

5 JUSTICE ALITO: Suppose -- suppose the
6 distributor gives it to the person who's going to
7 distribute it and says, here, distribute this and
8 there's the actual chemical formula on the container and
9 it's the chemical formula, excuse me, for PCP, whatever
10 that is, C-something H-something and -- so that's all a
11 person knows. He knows exactly what it is, the chemical
12 formula. Is that -- has he not committed a -- a crime
13 then?

14 MR. RUSSELL: Under the ordinary
15 Controlled --

16 JUSTICE ALITO: Yes.

17 MR. RUSSELL: -- Substances Act?

18 I don't know. I mean, it depends, I think,
19 on how it's listed in the schedule. I think the
20 schedule might, in fact, list the chemical name, but
21 if --

22 JUSTICE ALITO: It does list the chemical
23 name.

24 MR. RUSSELL: So then I think you do know
25 the fact that that makes the conduct unlawful.

1 JUSTICE ALITO: But you don't know -- the
2 person has just arrived, excuse me, from -- from Mars
3 and has no idea what -- you know, whether -- whether
4 it's legal or not.

5 MR. RUSSELL: I think the basic assumption
6 is that people know what the law is. They know what's
7 in the -- the schedules. And if you know what's in the
8 schedule and if you know the fact, that's enough, I
9 think, to convict.

10 JUSTICE GINSBURG: What -- what do you do
11 with the actual facts of this case? That is, the
12 defendant gave names to what he was peddling. He called
13 it speed, Nu-Up, a replacement for the listed -- now
14 listed MPPD. He -- these were supposed to be bath
15 salts, but there's no bath salts in the world that cost
16 what those packets cost.

17 So what -- what do we make of what he was
18 advertising this to be, Speed-Up, and selling it at a
19 price that fits a controlled substance?

20 MR. RUSSELL: I think what it reflects --
21 what a jury certainly could find it to reflect, and I
22 think what the truth of the matter is, is that it shows
23 that Petitioner thought he'd found a loophole to the
24 Federal drug laws; that so long as something was not
25 on the schedules, even if it had drug-like

1 effects, he could sell it and he could sell it at
2 whatever price the market would bear.

3 You know, certainly, the government can
4 point to that kind of evidence to suggest that he knew
5 that his conduct violated the Controlled Substances Act.
6 But here, of course --

7 JUSTICE KAGAN: I -- I thought you said that
8 that kind of evidence was enough to get you to a jury,
9 right?

10 MR. RUSSELL: Yes.

11 JUSTICE KAGAN: That the defendant acted
12 furtively or that he sold these for incredibly inflated
13 prices, that all of that, it's not -- it's not the thing
14 itself, but it's evidence of the thing that the
15 government is trying to prove.

16 MR. RUSSELL: That's right. And I think it
17 gets to the jury, but it doesn't prove what the
18 government has to prove here, which is harmless error
19 beyond a reasonable doubt.

20 JUSTICE KAGAN: But then if I can just
21 understand. I mean, I think -- tell me if I'm wrong --
22 that the only thing that's possibly separating you and
23 the government -- we'll see if it is separating you and
24 the government -- is this question of what happens if
25 the defendant knew it was illegal under something other

1 than the CSA or the Analogue Act, right? And that's the
2 only point of potential difference between you and the
3 government?

4 MR. RUSSELL: I think that's true with
5 respect to our legal interpretation. I will say we also
6 think that you ought not to reach that because this
7 entire regulated status theory was raised for the first
8 time in the government's brief on the merits in this
9 Court --

10 JUSTICE SCALIA: Wait -- wait a minute. I
11 mean, yes, you do differ with the government on that.

12 MR. RUSSELL: Yes.

13 JUSTICE SCALIA: But -- but assuming that --
14 that the government cannot prove any belief in
15 illegality, the government would not say it therefore
16 must prove that you knew the chemical composition of
17 what you were selling. And you say, you have to know
18 the chemical composition.

19 MR. RUSSELL: Right. I -- I think we're all
20 on the same page. So just to be clear about our
21 position, I think that the only disagreement about the
22 meaning of the law between the government and us now is
23 this question of whether it's sufficient as a matter of
24 law for the government to show that the defendant
25 believed that the substance was unlawful under some law

1 other than the CSA. They think that's sufficient; we
2 think it's not sufficient.

3 JUSTICE SCALIA: Okay. So --

4 MR. RUSSELL: Beyond that though --

5 JUSTICE KAGAN: And this is for --

6 JUSTICE SCALIA: Assuming it's not
7 sufficient, what -- what else does the government have
8 to prove? I think you differ on that.

9 MR. RUSSELL: I don't think so. I think the
10 government agrees that one way to prove the mens rea in
11 this case is to show that the defendant knew the
12 characteristics of the substance that made it an
13 analogue. They agree that they can do it that way.

14 JUSTICE SCALIA: Which means the chemical
15 composition?

16 MR. RUSSELL: Yes. Yes. I understand that
17 to be --

18 JUSTICE SCALIA: Okay. We'll see.

19 MR. RUSSELL: -- their position.

20 JUSTICE GINSBURG: And who would that reach
21 other than the -- the chemist? The underground chemist
22 would be in a position to know that, but an ordinary
23 person would not.

24 MR. RUSSELL: I -- I acknowledge that giving
25 the statute what I think is a pretty straightforward

1 and -- and traditional reading does have the effect of
2 making it substantially harder for the government to
3 prove that mens rea for an ordinary layperson, but --

4 JUSTICE SCALIA: Well, my -- my under --
5 well, the government will tell you, but my understanding
6 of the government is it would be enough if the defendant
7 knew the name -- the name of the drug, that it's blue
8 fly --

9 MR. RUSSELL: Now, if --

10 JUSTICE SCALIA: -- or whatever else. And
11 if, indeed, that drug has the chemical composition.

12 MR. RUSSELL: I won't spend the Court's time
13 looking it up. I'm pretty confident that's not their
14 position.

15 JUSTICE SCALIA: Okay.

16 MR. RUSSELL: That they've said the opposite.

17 JUSTICE KENNEDY: Suppose the court
18 instructs the jury that it's -- it suffices if the
19 defendant knows that this is an illegal drug because of
20 its hallucinogenic effect.

21 MR. RUSSELL: I don't think -- it -- again,
22 the critical question is illegal drug. If it -- by that
23 you mean illegal drug under the CSA.

24 JUSTICE KENNEDY: No. It's an illegal drug
25 because of its hallucinogenic effect. Maybe that's

1 incorrect because it has to be chemically the same, so
2 that's incomplete. But it seems to me that should
3 suffice for mens rea.

4 MR. RUSSELL: Just to be clear. I think a
5 court --

6 JUSTICE KENNEDY: And, excuse me, and
7 then -- and then it's -- it's shown that this is
8 chemically similar.

9 MR. RUSSELL: Right. I think the Court
10 would have to tell the jury that you can take into
11 account the defendant's knowledge of its hallucinogenic
12 effect in deciding whether he knew it was illegal under
13 the Controlled Substances Act itself.

14 And so what I'm quibbling with is just the
15 unadorned word "illegal." I don't think it would be
16 sufficient if a jury was convinced that the defendant
17 thought it's a hallucinogenic effect and it's illegal
18 under State law. That's why I was acting furtively.

19 I don't think that a jury could, if it
20 believed that, find the mens rea established unless, of
21 course, it went under this factual knowledge prong.
22 That's -- that's the ordinary way in which knowledge of
23 unlawful possession of a prohibited item is proven.

24 JUSTICE KENNEDY: The -- the instructions at
25 page 14 of your brief -- the brief in footnote 9 -- can

1 you say that by adding just a sentence or two to the
2 first paragraph?

3 MR. RUSSELL: No. Because --

4 JUSTICE KENNEDY: Or -- or is it beyond hope
5 or what?

6 MR. RUSSELL: No. I -- I think -- recall
7 that this is setting forth the elements. And so I think
8 the element is that the defendant has to know that he's
9 distributing an analogue. And then there's questions
10 about ways in which to prove that. And I think the
11 jury -- the -- the court could give an instruction of
12 the sort that we proposed, which said that the defendant
13 has to know that -- that this is an analogue within the
14 meaning. It has the characteristics that make it an
15 analogue within the meaning of the statute.

16 Had the government asked for an instruction,
17 it could have also given instructions that -- or the
18 government can show that the defendant knew the conduct
19 was unlawful generally. And you can make that -- or
20 unlawful under the CSA itself. And you can reach that
21 conclusion based on circumstantial evidence, including
22 evidence concerning the defendant's knowledge about the
23 drug's effect.

24 But there's a world of difference between
25 saying that this is relevant circumstantial evidence

1 about whether the defendant knew that he was violating
2 the statute of conviction and what the government's
3 position is, which is once you prove that the defendant
4 knows that it's illegal at all, you're done. And the
5 jury is compelled to conclude that mens rea is
6 established. And I think that that's simply wrong.

7 CHIEF JUSTICE ROBERTS: I'm sorry to put you
8 through this again, but it's important, I think for me
9 anyway, to get it right. I understand your -- your
10 understanding that the SG -- it's a big difference. The
11 SG says you have to know it's illegal under any law.
12 You say, no, under the CSA.

13 Now, what was the other way in which you
14 disagree with the government?

15 MR. RUSSELL: I think that's the only way in
16 which we disagree about the meaning of the statute.

17 CHIEF JUSTICE ROBERTS: No. But I thought
18 that you were disagreeing about names and
19 characteristics.

20 MR. RUSSELL: Well, I was disagreeing with
21 Justice Scalia. I don't think we're actually
22 disagreeing with the government about that because I
23 think they have said in their brief under the knowledge
24 of identity approach, they have to show that the
25 defendant knows the chemical structure and effects of

1 the analogue because it's not enough to simply know its
2 name. And so I don't think that we disagree with each
3 other on that.

4 JUSTICE KAGAN: Can I ask, Mr. Russell,
5 about your difference as to whether it's under this
6 statute or under any statute?

7 If you look at some of the instructions that
8 are given just under the CSA, not analogues, that some
9 of the instructions just say that you need to find that
10 the defendant knew that he was distributing some kind of
11 prohibited drug. And they don't say a drug prohibited
12 under the CSA. So if we use that as the analogy here,
13 that would suggest that -- that the -- the jury wouldn't
14 need to find the -- the analogue prohibited under the
15 CSA and the Analogue Act, but just that they knew it was
16 prohibited by something.

17 MR. RUSSELL: Right. I think there is an
18 ambiguity in those instructions, whether it's referring
19 to unlawfulness generally, or unlawfulness under the
20 CSA. I think courts -- what they really mean is under
21 the CSA. And in the cases where the defendant has come
22 forward and said, actually, I thought it was illegal
23 under some other statute, in Hassan and again in
24 Hussein, and -- and, I believe, the case of Morales.
25 Three of the seven cases the government cites for this

1 proposition, the Court has said, no, that's not good
2 enough. And those are -- and that makes complete sense.

3 Now, it -- it could be that in a lot of
4 cases the government is going to present evidence that
5 the defendant just thinks it's -- it's a controlled
6 substance generally. And we agree that a jury can
7 infer, absent other evidence, that he thought it was
8 illegal under the CSA itself. But you have to leave
9 open the possibility that the jury can, in a case like
10 this, say, actually, no, he -- the evidence doesn't show
11 that he believed it was lawful -- unlawful under the CSA
12 because he looked at the schedules, and he quite
13 reasonably believed that if they weren't on the
14 schedules, they weren't illegal.

15 I mean, I will acknowledge, the only reason
16 that they are illegal if they're not on the schedule is
17 the existence of the Analogue Act. And I'll acknowledge
18 that prior to this case, I didn't know about the
19 Analogue Act, and I think a lot of people didn't.

20 And in the community where -- where my
21 client was selling these things, these things were being
22 sold openly in delis and gas stations that were being
23 advertised in local newspapers and magazines. And
24 that's, I think, consistent with the -- the fact that
25 lots of people entertain the incorrect notion that if

1 something's not on -- on the schedules, then it's legal
2 to sell. And somebody who is ignorant to that --

3 JUSTICE SCALIA: Well, and you don't defend
4 that, right? I mean, ignorance of the law is no excuse.

5 MR. RUSSEL: It's no excuse.

6 JUSTICE SCALIA: You would agree that, even
7 though you're totally ignorant that it's on the Analogue
8 Act, if you know the chemical composition and it happens
9 to be on the analogue -- covered by the Analogue Act,
10 they got you; right?

11 MR. RUSSELL: No. I -- let me try to make
12 clear my position.

13 We agree that if the government can prove
14 that you had the factual knowledge that the chemical has
15 the characteristics that make it -- it an analogue,
16 ignorance of the law is no excuse.

17 JUSTICE SCALIA: Well, wait. Wait. Wait.
18 Wait.

19 MR. RUSSELL: We do not --

20 JUSTICE SCALIA: What -- what does that
21 mean?

22 MR. RUSSELL: So --

23 JUSTICE SCALIA: I know all of the chemical
24 characteristics. Okay? I have to, in addition, know
25 that those characteristics make it an analogue?

1 MR. RUSSELL: No.

2 JUSTICE SCALIA: Okay.

3 MR. RUSSELL: So there -- there are three
4 options.

5 The one is that you proposed, they know the
6 name of the -- of the substance.

7 JUSTICE SCALIA: Right. You -- you reject
8 that.

9 MR. RUSSELL: We don't think -- we don't
10 think that's enough.

11 JUSTICE SCALIA: Right.

12 MR. RUSSELL: If they know that the -- the
13 substance is chemically substantially similar to a
14 controlled substance, then they know the fact that makes
15 its possession unlawful under that realm. They have to
16 know, as well, that it's substantially similar and
17 represented actual fact.

18 JUSTICE SCALIA: Well, suppose -- I mean,
19 I'm not a chemist. I don't know that it's substantially
20 similar, but I do know what the chemical composition is.
21 I have to, in addition, know that that chemical
22 composition is substantially similar?

23 MR. RUSSELL: Yes.

24 JUSTICE SCALIA: I don't think so. I think
25 if I know the chemical composition and, in fact, that is

1 substantially similar --

2 MR. RUSSELL: Well.

3 JUSTICE SCALIA: -- they got you.

4 MR. RUSSELL: I think -- I think we disagree
5 about that. But if you take that view, we still win
6 this case because there's no evidence that Petitioner
7 knew anything about the chemical structure of -- of what
8 he was selling here.

9 JUSTICE BREYER: I assume your argument is
10 simply that it's a kind of coincidence. You have to
11 know that this substance is an analogue, and there are
12 two ways you could know that. One way you could know it
13 is you could know what the chemical composition of this
14 is and what the chemical composition of, say, cocaine
15 is. That would be one way. Very few people other than
16 chemists know that.

17 Then there is a second way you could know.
18 The second way you could know is that you know that it
19 is forbidden by a law which has the title forbidding
20 analogues. And if you happen to know that it falls
21 within that, of course you know it's an analogue because
22 you know it falls within it. And those are the two
23 ways.

24 MR. RUSSELL: Yes.

25 JUSTICE BREYER: And no one's been able to

1 think of a third.

2 And ignorance of the law is no excuse has
3 nothing to do with this case. This is just a
4 coincidence that those are the two ways you could know
5 it was an analogue.

6 MR. RUSSELL: Well, I certainly agree that
7 those are the two ways that you can know that it is an
8 analogue. And I don't think that -- that the government
9 can even argue that it satisfied that burden in this
10 case, much less that the jury would have been compelled
11 to find that harmless beyond a reasonable doubt.

12 JUSTICE SCALIA: But -- but you say that the
13 government has to prove knowledge of two chemical
14 compositions: The chemical composition of what is being
15 sold, but also, the chemical composition of one of the
16 items on the -- on the list of controlled substances.

17 MR. RUSSELL: Yes. Yes. That is -- that is
18 our position. And that --

19 JUSTICE KAGAN: But only if that's the
20 government's theory. Only if the government goes that
21 route rather than the route of just saying you knew it
22 was an analogue.

23 MR. RUSSELL: That is correct. And, you
24 know, I will acknowledge that going the knowledge of
25 identity route in an analogue case is going to be

1 different -- difficult for nonchemists.

2 But I think it's difficult for reasons that
3 should not give the Court pause, which is simply that
4 it's difficult for somebody to know, even if they know
5 what the law is, whether what they're doing is illegal
6 or not. And so, you know, our theory has the benefit of
7 avoiding entirely the vagueness problems that we think
8 are inherent in this statute.

9 JUSTICE KENNEDY: Was there enough evidence
10 in this case to go to the jury under the instruction
11 that you want?

12 MR. RUSSELL: Yes. I will agree that there
13 was.

14 And so the only question here is whether
15 there should be a new trial under which we can have
16 another discussion with the -- with the district court
17 about what the proper instructions are -- I don't think
18 we will have a lot of disagreement about that -- or
19 whether the court should instead hold that the error is
20 harmless.

21 And it would be exceedingly unfair to do
22 that in this case on the ground that Petitioner didn't
23 prevent -- present sufficient evidence to rebut a theory
24 the government wasn't making at trial. That's why we
25 have and why we enforce forfeiture rules.

1 And this Court could, I think, quite easily
2 resolve this case by saying, as Justice Breyer did, here
3 is the legal rule, here are the two ways in which this
4 can be proven, but the government in this case, to the
5 extent it has some special new theory about illegal
6 under some other law has waived that argument by failing
7 to preserve it.

8 If I could reserve the remainder of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Ms. Harrington.

11 ORAL ARGUMENT OF SARAH E. HARRINGTON

12 ON BEHALF OF THE RESPONDENT

13 MS. HARRINGTON: Thank you, Mr. Chief

14 Justice, and may it please the Court:

15 My friend, Mr. Russell, is almost correct
16 about the extent of the disagreement that's left in this
17 case. Our position is not that we can prevail if we can
18 prove that the defendant believed that his conduct was
19 illegal under some law other than the CSA or the
20 Analogue Act. Our position is that we can prevail if we
21 can prove that a defendant knowingly distributed a drug
22 and that he believed that his conduct, that his
23 distribution of the drug was illegal, generally.

24 As Justice Sotomayor has --

25 JUSTICE BREYER: My question is -- that I

1 posed to him is really for you.

2 MS. HARRINGTON: Would you mind repeating
3 it?

4 JUSTICE BREYER: Well, I'll try.

5 Suppose you have to show, and I think you
6 do, that the defendant did know it is an analogue, say
7 to cocaine. There are two ways you could do that. The
8 first way is you could show that this defendant, being a
9 graduate in chemistry, knows what the chemical
10 composition of cocaine is, knows what the chemical
11 composition of this other substance is, and knows they
12 are the same. You're not going to be able to do that
13 very often.

14 MS. HARRINGTON: Right.

15 JUSTICE BREYER: Another possibility is you
16 could show that he knows that this particular substance
17 is banned by a law that is called the -- the Analogue
18 Act, because obviously if he knows that it is banned by
19 the Act that bans analogues, it must be an analogue.
20 Those are two ways you could prove knowledge.

21 To prove that it is banned by the
22 Anti-Turkey Shoot Act proves nothing about his knowledge
23 that this is an analogue. And, therefore, once you say,
24 as you are trying to say, I think, that some other
25 illegality is enough to convict, I no longer understand

1 the argument.

2 MS. HARRINGTON: Well, the argument, as
3 Justice Sotomayor pointed out, in the real world,
4 defendants don't tend to know specific provisions of
5 Federal law or State law, but they do tend to know
6 whether what they're doing is illegal or not. And so
7 our view is that the knowing or intentional standard in
8 Section 841(a) describes a culpable state of mind. And
9 one way to prove that culpable state of mind is to prove
10 that the defendant knowingly or intentionally engaged in
11 the act --

12 JUSTICE BREYER: Yes, but then you're not --
13 then you are saying the defendant does not have to know
14 it is an analogue, and that, I think, you don't want to
15 say.

16 MS. HARRINGTON: Well, what we're saying --

17 JUSTICE BREYER: Because you could think it
18 was banned by some other act, and that would make you
19 know that it is that thing that the other act bans. It
20 doesn't tend to show it's an analogue.

21 MS. HARRINGTON: Right. Well, what I'm
22 saying is defendants tend to believe that what they're
23 doing is illegal, not under any particular provision,
24 but just generally they believe it's illegal. And we --

25 JUSTICE SCALIA: That's not what the statute

1 says. The statute doesn't say knowingly be a bad guy.
2 It says knowingly manufacture, distribute, or dispense a
3 controlled substance.

4 MS. HARRINGTON: Yes, and it --

5 JUSTICE SCALIA: That's what the knowingly
6 applies to. So you have to know that it violates that
7 law, not just know that you're -- you're a bad guy.
8 That doesn't -- that's not what it says.

9 MS. HARRINGTON: Well, in almost every
10 context, the easiest way to prove knowledge of -- of
11 this kind of statute is to prove that the defendant knew
12 the facts that made his conduct illegal.

13 JUSTICE SCALIA: Right.

14 MS. HARRINGTON: But what the knowing --

15 JUSTICE SCALIA: Under the statute.

16 MS. HARRINGTON: But just to prove the
17 facts. He doesn't have to have any awareness of the
18 statute, but if he knows all the facts, which in this
19 case would include knowledge of the chemical structure
20 and pharmacological effects, that's usually, in other
21 contexts, the easiest way to prove knowledge under this
22 kind of statute.

23 In this context, that's not the easiest way,
24 and we think there is another way. We think the knowing
25 or intentional standard describe the culpable mental

1 state, and this Court has said that that's -- that to
2 prove knowledge, you don't always have to prove that the
3 defendant knew all the -- the critical facts.

4 JUSTICE GINSBURG: How do you answer the --
5 the Cuban cigar that turns out to be filled with
6 marijuana?

7 MS. HARRINGTON: Well, I guess our primary
8 submission is that it's sufficient if the government
9 proves that a defendant distributed a drug and that he
10 believed that doing so was illegal under some drug law;
11 that he knew it was some kind of illegal drug. We think
12 it would be --

13 JUSTICE SCALIA: Well, it has to be under
14 some drug law.

15 MS. HARRINGTON: Well, we think --

16 JUSTICE SCALIA: You didn't say this before,
17 and I don't think your brief said it. It has to be
18 illegal under some other drug law.

19 MS. HARRINGTON: Well, just -- let me just
20 point out the reason there's maybe not as much
21 explication in the briefs is because there's a
22 fundamental disagreement that became clear in the reply
23 brief that -- that we disagree with Petitioner about
24 what the courts of appeals have done in the CSA context.
25 And I can get to that in a second.

1 But we think certainly it's sufficient if a
2 defendant believes that what he's doing is illegal under
3 a drug law, that he's distributing an illegal drug. We
4 think it would be consistent with sort of broader
5 principles if the Court held more broadly than that,
6 that he believed that his conduct was illegal generally.
7 You don't need to go that far in this case. The breadth
8 of that hasn't fully been briefed in this case.

9 CHIEF JUSTICE ROBERTS: But the problem -- I
10 mean, that highlights what I think is the practical
11 difference here. You've got a defendant who is
12 obviously -- knows something's out there. He's trying
13 not to do something, whether it's not to violate the CSA
14 or whether it's not to violate anything. And you just
15 want to be able to show to the jury, look, something is
16 bothering him. He knows that something's afoot, and --
17 and that's all you want to be -- have to prove, as
18 opposed to he knows he's violating either the CSA or a
19 drug law.

20 MS. HARRINGTON: Well, we --

21 CHIEF JUSTICE ROBERTS: And I just don't
22 know how that works. I understand how that works in
23 this case, because you just say to the jury, look,
24 he's -- he's checking the schedule every day, he's doing
25 this, he's doing that. But I'm a little concerned about

1 extending that as a general matter, where it doesn't
2 have to be the law in -- one, because I think usually
3 it's not a question whether you know anything about the
4 law at all, it's simply whether you know a question
5 about the facts, and whether that happens to bring it
6 under the law.

7 But then I don't know how broad the
8 principle is that you just have to know what you're
9 doing is -- would raise a doubt in the jury's mind about
10 whether you knew it was legal or not.

11 MS. HARRINGTON: Well, so I -- I have two
12 types of responses, which I'll just point out so that I
13 can come back to them in case I don't get through them
14 all. The first is a doctrinal point. And second, I can
15 give you sort of a real world example of how this works
16 in the CSA context.

17 The doctrinal point is that this Court has
18 held that there are other ways to prove knowledge other
19 than that a defendant actually knew a critical fact.
20 For example, the government can prove willful blindness.
21 And the Court has explained, as recently as the
22 Global-Tech case, that the reason you allow willful
23 blindness to substitute for knowledge is not because
24 being willfully blind to a fact is the same as knowing
25 the fact. It's because a person who is willfully blind

1 to a fact has the same culpable state of mind as the
2 person who knows the fact.

3 And so we would submit that a person who
4 engages in an act intentionally and correctly believes
5 that doing that is illegal is at least as culpable, if
6 not more culpable, than the person who knows all the
7 facts that make his conduct illegal.

8 And so the real world --

9 JUSTICE SCALIA: He thought he was violating
10 a sales tax law, and you're going to send him up the
11 river for 15 years.

12 MS. HARRINGTON: Well, again, we believe
13 that --

14 JUSTICE SCALIA: You think he's just as
15 culpable?

16 MS. HARRINGTON: We don't think the Court
17 needs to hold that in this case. We think certainly
18 it's sufficient if the government can prove that a
19 defendant knowingly distributed a drug believing it to
20 be illegal to do so, whether or not he knew what
21 provision of law --

22 JUSTICE BREYER: It's illegal because, in
23 fact, it's bad for animals, and the law involved --
24 prevents veterinarians from using this kind of drug for
25 animal treatment. That's all he knows. That's all he

1 thinks.

2 Now, he's guilty of this statute? That
3 doesn't tend to show at all that knowledge that he knows
4 it's an analogue. But in your view, because he feels
5 guilty, as perhaps he should, he's guilty of violating
6 this law.

7 MS. HARRINGTON: Well, we do believe that
8 that would establish the necessary culpable state of
9 mind. But again, the Court doesn't really need --

10 JUSTICE BREYER: Well, why? Can you give me
11 any authority for that? I mean, your example of willful
12 blindness is an example of where, in fact, in respect to
13 this law, he knows there is a risk he is violating doing
14 the conduct that it -- that it permits, he knows there
15 is a serious risk, and he pays no attention to that at
16 all.

17 MS. HARRINGTON: Well, we do think it's
18 fine --

19 JUSTICE BREYER: That's not a very strong
20 analogy, I don't think.

21 MS. HARRINGTON: Well, but I think what it
22 shows is that you don't have to prove actual knowledge
23 of a fact to satisfy a knowledge standard in a statute.
24 And again, we think it would be perfectly sufficient for
25 the Court to hold in this case that when the government

1 proved the defendant is distributing an illicit drug for
2 human consumption and he believes that what he's doing
3 is illegal, and he is correct about that, then that is
4 enough to -- to satisfy the CSA or the Analogue Act.

5 JUSTICE SOTOMAYOR: Well, it might be except
6 that there is some evidence in this case different than
7 what you're saying. He checked, according to his
8 brother, the Controlled Substance Act; didn't see this
9 listed. And also when he was told something was
10 illegal, he flushed it down the toilet.

11 So why isn't -- why don't we leave this to
12 the court below to figure out whether the error was
13 harmless or not, given the evidence in the case?

14 MS. HARRINGTON: I certainly acknowledge
15 that that is the Court's usual practice, to remand for
16 application of a harmless error standard, and we
17 wouldn't have any problem with the Court doing that
18 here.

19 We do think the evidence that you point
20 tends to show that he may not have believed he was
21 violating the CSA specifically, but he -- there is
22 plenty of evidence to show that he knew and correctly
23 believed that what he was doing was illegal. He sold
24 his products in little baggies and vials --

25 JUSTICE SOTOMAYOR: I'm sorry. He has to

1 know that it's a controlled substance?

2 MS. HARRINGTON: He has to know that it's a
3 controlled substance analogue. Where we differ is how
4 you prove that --

5 JUSTICE SOTOMAYOR: Not even an analogue,
6 because plenty of people sell things thinking it's maybe
7 cocaine, but in fact, it's crack, or they sell something
8 else thinking that it's a different drug, they just know
9 it's a drug.

10 MS. HARRINGTON: We totally -- we are
11 100 percent on the same page as you. I think Petitioner
12 believes --

13 JUSTICE SOTOMAYOR: Yeah, but you keep
14 saying has to know it's an analogue. I think that's
15 wrong. He just has to know it's a controlled substance.

16 MS. HARRINGTON: Right. But I mean -- but
17 by controlled substance, what we don't mean -- this is
18 where we differ with Petitioner -- we don't mean that he
19 has to know that it's illegal under Control Substances
20 Act. That's Petitioner's position. That's not our
21 position.

22 JUSTICE ALITO: Is this a real world
23 problem? This sounds to me like the most artificial
24 distinction that I've heard in a long time. Is there --
25 does Virginia have an Analogue Act? This is from

1 Virginia, right?

2 MS. HARRINGTON: Yes.

3 JUSTICE ALITO: Does Virginia have an
4 Analogue Act that's different from the Federal Analogue
5 Act?

6 MS. HARRINGTON: I do not know that -- the
7 answer to that question. Let --

8 JUSTICE ALITO: Do the States typically have
9 Analogue Acts, period, or do they have Analogue Acts
10 that are different from the State Analogue Acts? You
11 know, all of these cases -- unless this case involves a
12 chemist, your proof that a person knew the thing was an
13 analogue is going to be that this person engaged in all
14 kinds of furtive conduct to try to hide it from -- from
15 law enforcement.

16 And so it's going to be for the -- for the
17 jury to -- to determine, based on circumstantial
18 evidence, whether the person knew that this thing was
19 illegal under some law. And if it's not the Federal
20 Controlled Substances Act, I don't know what act it's
21 going to be. The defense is going to be, well, you
22 know, I knew that it was illegal, but I thought it was
23 illegal under the State Analogue Act, it wasn't illegal
24 under the Federal Controlled Substances Act. Is that
25 what we're worrying about here?

1 MS. HARRINGTON: I think that sort of gets
2 to the point, I mean, the way you sort of characterize
3 what might be the right instruction, that you have to
4 prove that the defendant knew it was -- or believed it
5 was illegal under some drug law, we're fine with that.
6 I think Petitioner would like the instruction to be that
7 you have to -- the government has to prove that the
8 defendant knew it was illegal under the Controlled
9 Substances Act or under the Analogue Act.

10 JUSTICE ALITO: Yeah, and the question I'm
11 asking, a practical question is, we've got the Federal
12 Controlled Substances Act, the Analogue provision. What
13 is this other -- what is this other body of law that
14 might come into play here?

15 MS. HARRINGTON: Well, I'm not sure there is
16 one, but I think our point is that the defendant -- most
17 defendants don't -- aren't aware of any body of law,
18 right? They just know that what they're doing is
19 illegal, and so we shouldn't have to prove that he had a
20 specific -- a specific statute of conviction in his
21 mind --

22 JUSTICE KAGAN: Ms. Harrington, I mean, I
23 take your points that this is going to have a very small
24 practical effect in terms of what either the prosecutor
25 or the defense attorney is -- is putting on at trial.

1 But it actually seems to me to be a real theoretical
2 difference, which has implications far beyond this case.

3 Then what Mr. Russell has suggested is two
4 ways of showing that a defendant knew a fact. That the
5 fact that he was distributing an analogue, and you might
6 know it because you know the chemical structure and all
7 its properties, or you might know it because you know --
8 you know, somebody has given you a box and said, this is
9 an analogue prohibited under the Analogue Act, and so
10 you know that it's an analogue.

11 So those are two ways of knowing a fact.
12 But you're saying that in addition to knowing a fact,
13 the mens rea is satisfied if you can just show that the
14 defendant knew he was acting culpably in violation of
15 some law. And that, it seems to me, is a theory that
16 could be put on to any law. That in addition to knowing
17 all the facts that a statute says you have to know, the
18 government has an alternative way of proving its case,
19 which is just to say, oh, look at -- look, you were
20 acting culpably. You knew you were doing something
21 wrong.

22 MS. HARRINGTON: Yes, and again, you know,
23 we would embrace a narrower articulation in this case of
24 what your knowledge of illegality has to be. If you
25 know you're violating a U.S. drug law or you know you

1 are distributing an illegal drug, we think that's
2 sufficient --

3 JUSTICE KENNEDY: Suppose he thought that
4 there was a labeling law and he was violating the
5 labeling law. He's wrong, there is no labeling law,
6 but it violates the Analogue Act. Guilty?

7 MS. HARRINGTON: Under our view, that would
8 be sufficient. We don't think the Court needs to reach
9 that in this case because there's no suggestion that
10 he -- that his belief in illegality was that he was
11 doing anything other than distributing an illicit drug,
12 that he was violating some U.S. drug law.

13 JUSTICE GINSBURG: So you -- so you -- just
14 to clarify, you -- you are saying it's not just any
15 illegality, it has to be an -- a drug law that's --
16 that's a qualification.

17 MS. HARRINGTON: We're saying at least for
18 the purposes of this case, that is sufficient.

19 JUSTICE GINSBURG: What do you mean by "for
20 purposes of this case"? What is the law generally?
21 Must it be a drug law or could it be any law?

22 MS. HARRINGTON: Well, we think it's --

23 JUSTICE SCALIA: Why don't you give it up,
24 Ms. Harrington? I mean --

25 MS. HARRINGTON: Let me just try one more

1 time.

2 (Laughter.)

3 MS. HARRINGTON: We think it would be
4 sufficient -- it would be consistent with the way this
5 Court has treated other mens rea issues such as, you
6 know, willful standard.

7 JUSTICE BREYER: We've got the willful. I
8 don't think the problem is with your articulation.

9 MS. HARRINGTON: Well, let me --

10 JUSTICE BREYER: I think the problem is
11 we're sitting here thinking of examples like, you know,
12 there's an anti-bird hunting statute, and it says you
13 cannot hunt green-eyed turkey's, you know, and the guy
14 has never heard of that, and you say, okay, I don't know
15 if this is a green-eyed turkey, and I don't know if it
16 violates the green-eyed turkey statute, but maybe it
17 violates something. You know, and that sounds like an
18 odd principle, even if you limit to all laws concerning
19 birds. And -- do you see the problem?

20 MS. HARRINGTON: I -- I understand the
21 Court's concern.

22 JUSTICE BREYER: And I suddenly worry the
23 government's going to start -- he's skulking around in
24 the bushes, you see.

25 (Laughter.)

1 MS. HARRINGTON: Well, I think --

2 JUSTICE BREYER: We can go on like this, but
3 I think I better not.

4 MS. HARRINGTON: So I think that has not
5 turned out to be a real world problem, and I
6 certainly understand the Court's concern, and I'm not
7 trying to sort of blow it off or avoid answering it. I
8 do think in the willful context, that that has -- the
9 Court in Bryan said that's sufficient if -- if the --
10 the defendant correctly believes that what he's doing is
11 illegal, he doesn't have to have any sense of what law
12 he's violating.

13 Now, willfulness is generally thought to be
14 a much higher mens rea standard than knowing or
15 intentional, and although this Court has never addressed
16 this precise question, both the model penal code and the
17 Brown Commission Report have embraced the idea that when
18 you satisfy a higher mens rea standard, you necessarily
19 satisfy all the lower ones. Having said that, I
20 understand the Court's concern -- I don't mean to
21 interrupt you, Mr. Chief Justice -- but -- and so we are
22 embracing a narrower articulation for the purposes of
23 this case.

24 CHIEF JUSTICE ROBERTS: Well, but you say
25 you're embracing the narrower articulation, but it seems

1 to me that's just a case-specific one, and Justice Alito
2 is right, it's hard to see how that would make a
3 difference here. But I think it could make a world of
4 difference when you expand that to the other cases
5 involving mens rea. And when you get to that point, it
6 is sort of an ignorance of the law question. I mean, in
7 all the cases involving mens rea, we do not ask whether
8 you have any idea whether it violates the law or not.

9 MS. HARRINGTON: Well, in the --

10 CHIEF JUSTICE ROBERTS: And -- and we --
11 your position makes it much easier to convict people
12 because you don't have to show that they even knew the
13 facts that made their conduct illegal. All you have to
14 do is say that -- under -- illegal under the law that
15 they're being charged. All you have to do is say, they
16 did something that makes it look like they knew that --
17 they did something that makes it look that they were
18 suspicious. And if we can find any law in the
19 United States Code that makes what they did illegal, we
20 can prosecute them for what we want to prosecute them
21 for, even though they didn't know that the facts fell
22 under that provision.

23 MS. HARRINGTON: Well, you have to prosecute
24 them for the -- for the -- for the actions they actually
25 took that broke the law, I mean --

1 CHIEF JUSTICE ROBERTS: Yes, and part of
2 that prosecution is you must show that they had the
3 requisite mens rea.

4 MS. HARRINGTON: Yes.

5 CHIEF JUSTICE ROBERTS: And what you're
6 saying is, we can show that simply by showing the jury
7 that they were acting suspiciously.

8 MS. HARRINGTON: I mean, I don't think
9 that's quite correct. We have to convince the jury that
10 the defendant in any case believed that what he was
11 doing -- that the relevant conduct, which is in this
12 case would be distributing the drug, violated the law,
13 was illegal. You have to prove that beyond a reasonable
14 doubt. And so just merely suggesting to the jury that a
15 defendant was acting suspiciously, I think is not going
16 to get the job done in most cases.

17 And I do think in most contexts it is easier
18 to prove that a defendant knows the facts that make his
19 conduct illegal than it is to prove that he knew what he
20 was doing was illegal --

21 JUSTICE KENNEDY: What's the best case you
22 can give us to help? In *Morissette*, the defendant
23 didn't know that the surplus shell casings belonged to
24 the government. And he was exonerated because he had to
25 have an intent. Suppose that he -- he didn't know they

1 belonged to the government, but he thought that it was
2 an illegal casing because it was dangerous. And he was
3 wrong about that. But it did wrong -- could he be
4 prosecuted then?

5 MS. HARRINGTON: We think he -- we think he
6 could be. I mean, I think all of the cases that -- in
7 that line, the Morissette, Staples, all of those cases
8 involved defendants who claimed that they genuinely --
9 genuinely believed what they were doing was innocent.
10 And so the problem for this Court was to try to figure
11 out a way to construe the statute so that it didn't
12 sweep in people who really were innocent. Now, this is
13 a case where --

14 JUSTICE KENNEDY: What -- what -- is there a
15 case you have for us?

16 MS. HARRINGTON: So -- so -- the easier
17 cases where the defendant really truly believes that
18 what he's doing is illegal, and those cases tend not to
19 come to this Court. There are some statements in the
20 opinion in Bryan. Now, Bryan was principally a case
21 about the willful standard, but there was also a
22 discussion of a knowledge standard. And in Bryan, the
23 Court said the government doesn't necessarily have to
24 prove that a defendant knew what he was doing was
25 illegal, and I think the use of necessarily there

1 suggests -- at least leaves open the possibility that if
2 the government did prove that, then it would be
3 sufficient. The Court also said --

4 JUSTICE SCALIA: That's the best you have?

5 MS. HARRINGTON: The Court -- the Court also
6 said in Bryan that the defendant -- that the government
7 merely needs to prove knowledge of the facts that make
8 his conduct illegal, suggesting that that's an easier
9 standard for the government to meet.

10 JUSTICE SCALIA: Just --

11 CHIEF JUSTICE ROBERTS: Just to follow
12 up -- I'm sorry, just to follow up quickly on Justice
13 Kennedy's hypothetical, what if he knew he was
14 trespassing when he went on to the government property
15 and -- and took the casings? You have to show he knew
16 what he was doing was illegal, he was trespassing. The
17 sign said government property. And so we can convict
18 him for taking the shell casings.

19 MS. HARRINGTON: Well, we would we would tie
20 it more directly to the conduct that actually violates
21 the law. And so if -- if he needs to know that the
22 taking of the shell casings is illegal, not that some
23 ancillary conduct that, you know, brought him to the
24 shell casings was illegal. And so here we would say,
25 again, he needs -- the defendant needs to know that the

1 distribution of the drug is what's illegal. And we
2 think, you know, if you look at the -- I think we're on
3 the same page with Petitioner in suggesting that the
4 same standard should govern both CSA cases and analogue
5 cases. We just disagree about how the courts of appeals
6 have applied this in the CSA context.

7 JUSTICE ALITO: Let me try this out.

8 Start with a drug that is on the list. All
9 right. The defendant knows the chemical composition of
10 the drug that's on the list. The defendant has no idea
11 that this is on the list, knows nothing about the
12 Federal drug laws. This person distributes it
13 intentionally, knowingly.

14 That person has violated the law. The
15 person's ignorance of the fact that this is a controlled
16 substance is irrelevant. Are you -- am I right so far?

17 MS. HARRINGTON: Yes, because he knows the
18 identity of the drug.

19 JUSTICE ALITO: He knows -- he knows what it
20 is.

21 MS. HARRINGTON: Yes.

22 JUST ALITO: So he knows the chemical
23 composition. He knows the name. All right.

24 Now, let's assume that we have a list of
25 analogues. It's the same thing. If the defendant knows

1 that the thing is on the list, knows the chemical
2 composition of it, and it turns out that this is an
3 analogue, that is sufficient. That's not going to be
4 the proof in most cases.

5 And I think maybe the confusion is that the
6 defendant -- a defendant's knowledge of the illegality
7 of what he or she is doing is not something that has to
8 be proven. It is circumstantial evidence that the
9 person knows that the thing that is being distributed is
10 something that is on the list.

11 MS. HARRINGTON: Right. And, again, there's
12 no list in the analogue context. It's --

13 JUSTICE ALITO: I understand that.

14 MS. HARRINGTON: Okay.

15 JUSTICE ALITO: But it makes it easier to
16 understand --

17 MS. HARRINGTON: Yes.

18 JUSTICE ALITO: -- if we imagine that there
19 is.

20 MS. HARRINGTON: Yes. So, no, we agree.

21 Our position is that if we can prove that a
22 defendant knew what he was doing was illegal, that's a
23 way of proving that he knew he was distributing a
24 controlled substance analogue or a controlled substance.

25 JUSTICE ALITO: But it's not something that

1 you have to prove. You don't have to prove that he knew
2 that it was illegal under Federal law, or under State
3 law, or under any other law.

4 You have to prove that he knew that it was a
5 substance that constitutes -- that, in fact, constitutes
6 an analogue.

7 But the fact that he knows that it's illegal
8 under Federal law is circumstantial evidence that he
9 knew that it was something that fell within that
10 definition.

11 MS. HARRINGTON: Yes. And it might help if
12 I could give you sort of a real world example of how
13 this has worked in the courts of appeals under the CSA.

14 There's a number of -- of cases in the -- in
15 the courts of appeals dealing with a substance called
16 khat, which is K-H-A-T. Khat is a plant that's grown in
17 the Horn of Africa, generally, and if you pick the
18 leaves off the plant and chew them, it gives a stimulant
19 effect. And the reason it gives a stimulant effect is
20 because fresh leaves of khat contain a substance called
21 cathinone, which is a Schedule I substance illegal under
22 the CSA. It sort of produces amphetamine-like effects.

23 So khat is legal in many places in the
24 world. It's illegal to distribute it in this country
25 because, again, it contains -- when freshly picked,

1 contains a Schedule I controlled substance.

2 So there are a number of cases where the
3 government has prosecuted people under the CSA for
4 distributing cathinone in the form of distributing khat.
5 And defendants in those cases have said, Look, I didn't
6 know it had cathinone, I was distributing khat. It's
7 legal where I come from, I have no what the chemical is
8 in this -- in this plant. And the courts of appeals
9 have generally upheld those convictions based on
10 proof -- or when there is proof that the defendant knew
11 that distributing the khat was illegal, even if he
12 didn't know why it was illegal. Even if he didn't --

13 JUSTICE BREYER: Wait. The light is dawning
14 slightly, maybe. Don't say I'm restating your argument
15 correctly if I'm not.

16 MS. HARRINGTON: Okay.

17 JUSTICE BREYER: All right. Please. The --
18 you're -- you're saying, first, he doesn't know the
19 chemistry. So he doesn't -- he has to know it's an
20 analogue, but he doesn't know the chemistry.

21 Now, you're saying, of course, if he knows
22 that it is illegal under the Analogue Act, that's good
23 enough because he knows it's an analogue.

24 MS. HARRINGTON: Yes.

25 JUSTICE BREYER: Now you're saying if he

1 knows it's illegal generally under the drug laws, that
2 should be evidence of the fact that he knows it's an
3 analogue because let's ask him why do you think it's
4 illegal under the analogue -- I mean, why do you think
5 it's illegal under the drug laws? I'm going to tell you
6 its not a listed substance. Why could it be? And he'd
7 sort of be stuck there because he doesn't want to say,
8 hmm, because it's a lot like cocaine.

9 MS. HARRINGTON: Right.

10 JUSTICE BREYER: Because once he says
11 because it's a lot like cocaine, he knows it's an
12 analogue. And if say, using my, you know, far out
13 examples, it's not because he thinks it's a veterinarian
14 law.

15 So what it should be -- is this right -- if
16 I follow your argument, you'd say the fact that he knows
17 it's illegal under the drug laws, is, itself, evidence
18 that he knows it's an analogue, but he's free to come up
19 if he wants with some kind of basis for saying that even
20 though he thought it was illegal under the drug laws, he
21 thought it was illegal under some other law that had to
22 do with postage stamps or something. That -- that
23 should be, if the jury believes that, get him off.

24 Have I got it basically right?

25 MS. HARRINGTON: That's a correct

1 characterization of our narrower argument, yes, that
2 if -- right. If we can prove that the defendant
3 believed what he was doing violated some drug law,
4 that's enough to prove that he knowingly distributed an
5 analogue.

6 JUSTICE GINSBURG: What would "some drug
7 law" be other than the CSA and the Analogue Act?

8 MS. HARRINGTON: Right. In the Federal
9 context, there wouldn't be, but, again, our point is
10 really that the defendant, generally, does not have a
11 specific law in mind. He just knows that what he's
12 doing is breaking the law.

13 And so when Petitioner says we have to prove
14 that he knew he was violating the -- the statute of
15 conviction, we think that's a -- much too high a burden.
16 The only time you have to do that is when you have a
17 willful standard in the tax evasion context; right?

18 This is certainly not that context. We
19 think just general knowledge of illegality and intention
20 to engage in the prohibited act is sufficient.

21 JUSTICE GINSBURG: But -- but the illegality
22 must relate to drugs.

23 MS. HARRINGTON: Pardon me?

24 JUSTICE GINSBURG: The illegality must
25 relate to drugs.

1 MS. HARRINGTON: We think that's -- it's
2 certainly sufficient when the government proves that,
3 that the illegality relates to drugs.

4 JUSTICE KAGAN: And -- and sufficient. It's
5 not just evidence that he knew it was an analogue; it's
6 conclusive evidence.

7 MS. HARRINGTON: We think that's correct.
8 Yes. And, you know, to -- Petitioner suggests that the
9 courts --

10 JUSTICE KAGAN: So even if he comes back and
11 says, Yes, I thought that what I was doing was wrong,
12 but -- but it wasn't because I thought this was an
13 analogue, it was for some other reason.

14 MS. HARRINGTON: Well, we think if he came
15 back, for example, and said, Well, I thought it violated
16 the Virginia Controlled Substances Act -- and because
17 not -- some States control more drugs than the
18 Federal -- than the Federal schedules include -- but I
19 didn't know it violated a Federal drug law, we think
20 that would not be a defense. Right? That some
21 knowledge that you're violating a drug law is
22 sufficient.

23 You know, and we think in this case there is
24 actually --

25 JUSTICE GINSBURG: You said sufficient. How

1 about necessary? Is it necessary? Is the drug -- is
2 the law that he thinks he's violating, be a drug law, is
3 that necessary?

4 MS. HARRINGTON: So, again, we think that
5 there is -- that a broader view would be correct. But
6 we are perfectly happy with a ruling in this case that
7 it -- that it would be sufficient that the government --
8 we don't think that there is necessarily a basis for
9 limiting the knowledge of illegality specifically to
10 drug laws. As long as you tie the conducts to the
11 belief in illegality, we think that's enough.

12 But we think it's definitely sufficient for
13 this case to hold that when the government proves a
14 belief that -- that he is violating a drug law, that
15 that's enough.

16 JUSTICE KENNEDY: So -- so the conduct is
17 related to the genus of illegality.

18 MS. HARRINGTON: Right.

19 CHIEF JUSTICE ROBERTS: I think -- I think
20 there are areas where criminal defendants do try to
21 tailor their conduct to fall within, if they're captured
22 or caught, particular laws but not others. I recall
23 cases where that's true.

24 I mean, hypothetically, let's say they know
25 that this much marijuana or cocaine is a misdemeanor.

1 If they got up to this much, you know, it's 15 years
2 mandatory minimum, so they structure their activities to
3 fall within the lower level.

4 You would be able to prosecute them,
5 according to your theory, for the big 15-year mandatory
6 whatever, if they happen to go beyond the misdemeanor
7 amount.

8 MS. HARRINGTON: Certainly, yes. You know,
9 if a defendant believed that he was distributing 1 pound
10 of cocaine and it turned out -- and that's probably,
11 it's, you know, I don't know what the right numbers are,
12 but say he believed he was distributing 1 pound of
13 cocaine. Turned out, he was distributing 5 pounds of
14 cocaine and there's different sentence that applies for
15 5 pounds. If we can prove he actually distributed 5
16 pounds of cocaine, then I think that would be sufficient
17 under the Controlled Substance Act.

18 CHIEF JUSTICE ROBERTS: Well, what does that
19 do to your theory that they have to -- what they have to
20 know is that it's illegal under the drug laws.

21 What -- what was illegal -- what they knew
22 was the misdemeanor amount. And you're saying, well,
23 that doesn't -- it doesn't matter that they -- doesn't
24 matter that they didn't know they were distributing the
25 larger amount.

1 MS. HARRINGTON: So I took your hypothetical
2 to be that he knew what he was doing was illegal. He
3 just --

4 CHIEF JUSTICE ROBERTS: He knew what he was
5 doing was an -- was a misdemeanor.

6 MS. HARRINGTON: Okay.

7 CHIEF JUSTICE ROBERTS: Because of the
8 amount. He didn't know it was a going to be a felony
9 because he didn't know he had that much of the drug.

10 MS. HARRINGTON: Well, under our view, if he
11 knew what he was doing violated a drug law, which I
12 think would be the case in your hypothetical, then
13 that's sufficient.

14 Now, of course, if he thought what he was
15 distribute -- what he was distributing was oregano and
16 it turned out to be marijuana, then we think that
17 wouldn't be sufficient because he would have believed
18 what he was doing was innocent, and he wouldn't have
19 known the facts that made his conduct illegal.

20 In this case, there are -- there are plenty
21 of facts to show that Petitioner really believed that
22 what he was doing was illegal, and it turned out that he
23 was correct. Again, he sold his products in little
24 baggies and vials instead of having sort of more
25 traditional commercial packaging. He charged \$450 an

1 ounce for these products, which sort of undercuts his
2 belief that he thought that they were aromatherapy
3 products or things that you would actually pour into a
4 bathtub. He named --

5 JUSTICE SCALIA: Well, you know, you charge
6 what the market will bear. And if it has the same
7 effect -- if it has the same effect as cocaine, even if
8 it's perfectly legal, you should charge 400. Don't you
9 believe in the free market?

10 (Laughter.)

11 MS. HARRINGTON: Not in the illegal drug --
12 I mean, you know, the free market works in the illegal
13 drug context the same way it works everywhere else.

14 But I think it's certainly evidence that he
15 knew what he was selling was a drug, and it was an
16 illicit drug. And he named the analogues after --

17 JUSTICE SCALIA: All it shows is that he
18 knew it would give you a high. That's all. And -- and
19 so he was charging what people are willing to pay for
20 that.

21 MS. HARRINGTON: He also acted furtively.
22 You know, he sort of hid his products on his website.
23 He wouldn't answer direct questions from his customers
24 about which high, you know, was most like for the
25 controlled substances.

1 And so we think there is certainly
2 sufficient evidence to show that Petitioner in this case
3 believed that --

4 JUSTICE KENNEDY: Well, the Petitioner's
5 counsel agrees that there is sufficient evidence to
6 convict under a proper instruction.

7 MS. HARRINGTON: Yes. I mean, I think he
8 has a different view of what a proper instruction is.

9 And so, again, I understand that the Court
10 generally remands for application of harmless error. We
11 think that would be appropriate in this case,
12 particularly, because the government didn't ask for this
13 instruction because it was following circuit precedent
14 below, and then defending a harsher instruction that was
15 actually given in the case.

16 JUSTICE GINSBURG: How can we -- when a jury
17 is told that human ingestion is enough, he has to -- he
18 has to intend that this -- these bath salts are not to
19 put in the bathtub, but to ingest, that's all that he --
20 that was the only mens rea that was charged. Isn't that
21 so?

22 MS. HARRINGTON: It was not the only mens
23 rea that was charged, Justice Ginsburg. That was the
24 mens rea instruction that the government requested
25 because that was what circuit precedent had said was

1 enough. But the instruction that was actually given,
2 told the jury it had to find that he knowingly
3 distributed a controlled substance -- a substance that
4 had the same pharmacological effects as a controlled
5 substance.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Russell, you have four minutes left.

9 REBUTTAL ARGUMENT OF KEVIN K. RUSSELL

10 ON BEHALF OF THE PETITIONER

11 MR. RUSSELL: Let me start with the
12 instruction.

13 Justice Ginsburg, even under the
14 government's interpretation of the jury instructions as
15 requiring the jury to find that the defendant knew about
16 the similarity in effect, the government acknowledges it
17 didn't require any knowledge about the similarity
18 instruction. So the government has acknowledged that
19 this -- the instruction here was inadequate, even under
20 the government's new view of the law. And so the
21 question here is simply whether or not they're entitled
22 to take advantage of that, and to make a harmless error
23 argument, based on a theory that they only developed in
24 this Court.

25 But let me -- with respect to the general

1 legal questions, let me start with -- with addressing
2 their broad "any law will do" position. And that is
3 simply, as I understand them now, premised on their
4 thought that all the statute requires is culpable state
5 of mind, but that's not what the statute says. It
6 doesn't say distribute an analogue culpably, it says
7 distribute knowingly.

8 And this Court has repeatedly said that
9 knowing distribution of a prohibited item requires
10 knowledge of the facts. And there may be a -- an
11 exception that we've discussed that you can meet that by
12 showing that there's knowledge under the law of
13 conviction itself, but there is no precedent from this
14 Court that gives the court -- gives prosecutors the
15 option of either proving the facts, the defendant knew
16 the facts that made the conduct unlawful, or simply that
17 he acted culpably or that he knew that the conduct was
18 unlawful under some law.

19 Now, with respect to their fallback
20 position, that it has to be illegal under a drug law,
21 we're getting closer. We would agree, if they were to
22 say, as some courts have said, including Hussein, which
23 is a case they feature prominently in their brief, that
24 it has to be a Federal anti-drug abuse law. Now, the
25 truth of the matter is there's only one of those, but

1 the -- the value in that articulation is that it makes
2 clear that the defendant doesn't have to know the name
3 of the statute.

4 But if the government's position is that
5 it's enough that it be under State drug abuse laws, and
6 Justice Alito, there are lots of State Analogue Acts,
7 and there are lots of States that have been ahead of the
8 government in putting on their schedules things that are
9 analogues, including some of the substances in this
10 case.

11 That's clearly not what this Court has ever
12 had in mind in interpreting the word "knowingly" in a
13 statute. And it's up to Congress to decide what is
14 culpable enough. And when it uses the word "knowingly,"
15 it is entitled to know that that word is going to get
16 the same interpretation that it has in the past. The
17 government points to cases like Bryan in which the Court
18 has said, in addition to knowing the facts, we must also
19 know something about the law. And it says that, you
20 know, willfulness is enough to establish knowing --
21 knowing distribution. But of course, in those cases,
22 it's not simply that they have some general knowledge of
23 unlawfulness, they also know the facts that make the
24 conduct unlawful.

25 JUSTICE ALITO: A defendant who knowingly

1 distributes heroin, knows that it's heroin, doesn't have
2 any idea that it's illegal, nevertheless has violated
3 the law. Now, I don't see why the rule should be any
4 different with respect to an analogue.

5 MR. RUSSELL: I -- I don't say that it is.
6 I think they have -- they can either --

7 JUSTICE ALITO: So then the defendant
8 doesn't have to know the legal status of -- of the drug.

9 MR. RUSSELL: Again, we're talking about the
10 government's alternative theory. The government always
11 has the option --

12 JUSTICE SOTOMAYOR: Sorry. If a State law
13 calls it an analogue, he knows he's violating the State
14 law, he knows this is an analogue.

15 MR. RUSSELL: Well, if -- if he knew that he
16 was violating a State Analogue Act that had the same
17 definition under Federal law, I think you could then ask
18 the jury to infer that he knew that he was violating the
19 Federal law. But most of the time, as my colleague
20 said, the government's evidence is simply going to be
21 that the defendant knew that the conduct was unlawful
22 somehow. And the jury is entitled --

23 JUSTICE KENNEDY: I -- I'm not sure that you
24 answered Justice Alito's question fully.

25 MR. RUSSELL: I'm sorry.

1 JUSTICE KENNEDY: He --

2 MR. RUSSELL: So --

3 JUSTICE KENNEDY: Go ahead.

4 MR. RUSSELL: So, Justice Alito, the
5 government never has to prove the defendant's knowledge
6 about the law at all, if it proves that he knows the
7 facts that make the conduct unlawful. And so what we're
8 objecting to is the government's alternative route to
9 showing mens rea. And we agree with them up to the
10 point of the fact that they think that it's enough to
11 show that the defendant knew it was violating some State
12 law or perhaps some provision of the FDA which regulates
13 substances independent of the Controlled Substances Act.

14 As a practical matter, in most cases, what
15 the government -- the proof is going to be what the
16 government described, which is simply that the defendant
17 engaged in some furtive conduct that suggests that he
18 knows that the substance is illegal.

19 And unless the -- the defendant comes
20 forward with some reason for the jury to think that, in
21 fact, he had in mind that it violated some other law, or
22 in fact, that he looked and -- and came to the
23 conclusion it doesn't violate this Controlled Substances
24 Act, then the jury is very likely to find mens rea
25 established, and we don't have any problem with that.

1 In this -- just to finally address the facts
2 of this case. The fact that my client was distributing
3 things in baggies rather than vials shows that he was
4 doing this from his home business. The fact that he was
5 charging large prices shows that he thought he had found
6 a loophole in the Federal drug laws. There is no reason
7 in the world why he would have -- if I could finish this
8 sentence -- why he would have flushed his product down
9 the toilet when he discovered that it contained a
10 substance that was on the schedules if, in fact, he knew
11 that the other products also were illegal and didn't
12 care.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.

15 (Whereupon, at 11:13 a.m., the case in the
16 above-entitled matter was submitted.)

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