

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: POSTERS 'N' THINGS, LTD., ET AL., Petitioners v.
UNITED STATES

CASE NO: 92-903

PLACE: Washington, D.C.

DATE: Tuesday, October 5, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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POSTERS 'N' THINGS, LTD., ET AL., :
Petitioners :
v. : No. 92-903
UNITED STATES :
- - - - -X

Washington, D.C.
Tuesday, October 5, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:01 a.m.

APPEARANCES:

ALFREDO PARRISH, ESQ., Des Moines, Iowa; on behalf of the
Petitioners.
WILLIAM C. BRYSON, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on
behalf of the Respondent.

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1 PROCEEDINGS

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 92-903, Posters 'N' Things,
5 Limited v. the United States.

6 Mr. Parrish.

7 ORAL ARGUMENT OF ALFREDO PARRISH

8 ON BEHALF OF THE PETITIONERS

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

11 We're here today discussing 21 U.S.C. 857, which
12 is referred to and I will refer to it as the drug
13 paraphernalia statute. The question is whether or not it
14 contains a subjective scienter, and when the trial judge
15 applied 857 without a subjective scienter in his
16 instructions 37 and 39, did he deny the petitioner her due
17 process rights?

18 The court, we believe, erroneously applied 857,
19 because when it instructed the jury it instructed the jury
20 without any intent requirement. On the other hand, if
21 this statute does not contain any intent requirement, as
22 the trial judge found and the Eighth Circuit affirmed,
23 then the statute is unconstitutional and the conviction
24 cannot stand.

25 QUESTION: What is your authority for that

1 latter proposition, Mr. Parrish?

2 MR. PARRISH: That is cannot stand?

3 QUESTION: That it's unconstitutional.

4 MR. PARRISH: If it's un -- it's based upon the
5 concept that a mens rea requirement is read into a
6 statute. If it's not read into a statute, then you have
7 to look at the legislative history to try to find it.

8 QUESTION: But I thought you said if there's no
9 mens rea requirement it's unconstitutional, and I asked
10 you what your authority is for that proposition.

11 MR. PARRISH: The authority that we have for
12 that proposition is the Morissette v. -- the Morissette
13 case is what we use for that.

14 QUESTION: I reread the Morissette case because
15 you cite it in your brief, and I didn't read that as
16 saying anything about a lack of intent making a statute
17 unconstitutional.

18 MR. PARRISH: Well, the Morissette case dealt
19 with the fact of whether or not you should look to other
20 instances to determine whether or not a statute should be
21 declared unconstitutional. If no mens rea statute is in
22 it, if no mens rea requirement is in it, then we believe
23 you have to look at the intent of the legislature.

24 QUESTION: Well, how does that get you to any
25 constitutional proposition?

1 MR. PARRISH: We don't believe you have to reach
2 the constitutional proposition in order to remand this
3 case to the Eighth Circuit.

4 QUESTION: Well, then your principal -- the
5 principal authority on which you rely for the proposition
6 that if the statute does not have an intent requirement,
7 it is unconstitutional, is Morissette.

8 MR. PARRISH: The Morissette case. Also it
9 seems to be indicated in the Hoffman's Estates case also,
10 because in that decision the Court indicates that -- in
11 their questioning to counsel and also in the decision,
12 that some intent must be found in the statute to save its
13 vagueness.

14 So we talk about that over and over again in the
15 line of cases that follow the Hoffman Estates case. You
16 look for some intent. However, those were preenforcement
17 cases and in preenforcement challenges to the facial
18 constitutionality of the statute, the Court seems to save
19 it solely because there is some intent requirement in the
20 statute.

21 QUESTION: Are you referring to this Court or
22 other courts?

23 MR. PARRISH: This Court.

24 QUESTION: You take the position that the
25 instructions didn't require proof of any mental element.

1 What do you make of the language of the charge that the
2 jury must find that the Government had proven that the
3 defendants understood they -- or knew the nature and
4 character of the items?

5 MR. PARRISH: Well, in their approach on that
6 issue, that's not the case that was tried by the district
7 court judge. The judge tried a purely objective --

8 QUESTION: You mean he didn't give the -- excuse
9 me.

10 MR. PARRISH: I'm sorry.

11 QUESTION: That he didn't give the instruction
12 that the Government says he gave?

13 MR. PARRISH: He did not give the exact
14 instruction. I will refer you to page 19 of --

15 QUESTION: Well, Mr. Parrish, if you look at
16 page 22 on the Joint Appendix, the charge is: "That the
17 defendant whose case you are considering knew the nature
18 and character of the items."

19 MR. PARRISH: Then you go to instruction on page
20 31 of the Joint Appendix, to instruction 39, where the
21 term "primarily intended" -- which is the vehicle that
22 most of the courts have used to determine where the intent
23 is in this case -- as used in these instructions does not
24 relate --

25 QUESTION: Well, but the point --

1 MR. PARRISH: -- To the knowledge of the --

2 QUESTION: The point is you're saying that there
3 was no scienter required.

4 MR. PARRISH: That's correct.

5 QUESTION: And instruction 21, subparagraph 2,
6 says you have you find that the defendant knew the nature
7 and character of the item. Now that's a mens rea
8 component, is it not?

9 MR. PARRISH: It is a mens rea component.

10 QUESTION: And so the defendant had to know the
11 nature and character of the item. Now, it's true that in
12 the later instructions they said that there's no intent of
13 any person that's required, but that simply means that the
14 item itself is what the court and the jury should focus
15 on.

16 MR. PARRISH: But that's the flaw in the
17 instruction. The jury was never given an opportunity to
18 determine the primary intent of the person who was, in
19 fact, selling the item, the petitioner in this case. The
20 jury could have gone back and deliberated anything.

21 QUESTION: Well, Mr. Parrish, I -- the statute
22 seems to speak in terms of drug paraphernalia, and that
23 term is defined as items either designed for or intended
24 for us in connection with drug use. Now, is it not
25 possible that the statute makes unlawful the sale of

1 certain items that are designed for drug use and that have
2 little other purpose? And if they're designed for that
3 and someone knows what the object is, as the instructions
4 require, that that's sufficient.

5 MR. PARRISH: It's not sufficient because these
6 statutes have -- these items have dual purposes.

7 QUESTION: Well, I thought there were an array
8 of items here, some of them being such things as are
9 defined by the statute itself as being designed for drug
10 use. I don't know the names for all these things, but
11 bongos and other items that apparently have little other
12 purpose.

13 MR. PARRISH: Well, designed for use goes to the
14 intent of the manufacturer. If you're talking about
15 primarily intended, it goes to the person who uses the
16 item. The seller, in this case, has nothing.

17 QUESTION: Well, we may have two separate
18 categories of items here.

19 MR. PARRISH: That's correct.

20 QUESTION: Is that possible?

21 MR. PARRISH: You can have two separate
22 categories of items.

23 QUESTION: Okay.

24 MR. PARRISH: However in this case you have --

25 QUESTION: Well, as far as items designed for

1 use as drug paraphernalia is concerned, how are the
2 instructions deficient?

3 MR. PARRISH: In designed for use it goes to the
4 manufacturer. She was not the designer, so consequently
5 she can't be held liable or the jury find her intent based
6 upon who designed it. If you go to primary intent --

7 QUESTION: Well if the item is designed for that
8 use and no other and the statute says if you sell such
9 items you're guilty of this offense, why isn't that
10 sufficient?

11 MR. PARRISH: You're convicting the item. It
12 would be insufficient because the jury has no idea on
13 dual-purpose items unless you tell them that it goes to
14 the intent of the person who does, in fact, use the item.

15 QUESTION: Well I'm not going to belabor it, but
16 it seems to me there are two types of items. Some are not
17 dual purpose at all.

18 MR. PARRISH: Some are not, that is correct.

19 QUESTION: Maybe some are.

20 MR. PARRISH: But you can't tell by the way the
21 court instructed the jury in 37 and 39. You can't tell
22 that because he tells them, per se, these list of 15 items
23 are in fact, per se, drug paraphernalia. Then he gave the
24 jury no option. He gave them a directed verdict. And
25 giving a jury -- the jury a directed verdict, the

1 Government had the benefit and the defendant had no
2 opportunity at all to make any determination as to whether
3 or not the jury could determine whether or not they were
4 dual-purpose items.

5 And that's the problem with statutes like this,
6 because you have dual-purpose items and you don't tell the
7 jury --

8 QUESTION: Mr. Parrish, the judge in his charge
9 three times told the jury that the defendant whose case
10 the jury was considering had to know the nature and
11 character of the items. So you say even though that was
12 repeated in instruction 21, 22, and was it 18?

13 MR. PARRISH: That's correct.

14 QUESTION: You say that although he repeated
15 that the defendant must know the nature and character of
16 the items, that that's wiped out?

17 MR. PARRISH: Well, your understanding the -- in
18 this case the jury was, in fact, instructed that her
19 intent was not related to any knowledge. So the jury was
20 confused. You don't know why a jury reached a particular
21 decision on a matter. Clearly enough, they did give the
22 knowledge instructions on some other factors.

23 But the drug paraphernalia case was only a
24 predicate offense for the money laundering charge and the
25 aiding and abetting charge, so clearly the jury could be

1 confused on this point and the jury never knew that the
2 subjective scienter had to apply to the defendant in this
3 case. It was clearly an objective law of the case that
4 was given in this -- by this trial court.

5 QUESTION: You're not disputing, are you, that
6 the Government did prove that the defendant knew the
7 nature and character of the items that were sold in her
8 shop, that she knew that they were primarily designed for
9 use -- that their primary use was in connection with
10 illegal drugs?

11 MR. PARRISH: If you consider proof what the
12 jury reached a verdict on without proper instructions, you
13 would have to say yes, they did prove it.

14 QUESTION: Proof is what is adequate to go to
15 the jury, not what the jury finds. Was there sufficient
16 proof for the jury to find that the defendant knew that
17 the primary use of these items was in connection with
18 illegal drugs?

19 MR. PARRISH: We don't agree with that. We
20 think the evidence was conflicting. All of the expert
21 witnesses who testified in the record on this case all
22 indicated that all of these items had dual purposes. So
23 consequently when they had dual purposes, the court had to
24 direct the jury someplace to find the subjective intent of
25 the person. So where did they direct them? They have to

1 direct them to primarily intended.

2 As a matter of fact, Congressman Levine, the
3 principal author of this statute, indicated --

4 QUESTION: I'm not sure I understand your
5 question -- your response. Some of these items were
6 specifically enumerated in the statute.

7 MR. PARRISH: That's correct.

8 QUESTION: Justice O'Connor mentioned those.
9 Are you saying that the Government did not prove, so that
10 a jury could not find the defendant knew the primary use
11 of bongs and roach clips was in connection with illegal
12 drugs?

13 MR. PARRISH: We believe that the Government did
14 not prove that; that there was not substantial evidence,
15 due to the conflicting nature of it without some
16 indication to this jury that the subjective intent, what
17 Ms. Acty intended that these items go for, was given to
18 the jury.

19 The jury had no direction with regard to that.
20 Sure enough, the Government now wants to come back and
21 claim a knowledge standard, but that's after the fact, the
22 knowledge standard. In their knowledge standard argument
23 to the Court -- we believe a fatal flaw exists in their
24 argument, if you'll turn to page 19 of their brief.

25 In their argument they say: "Consistent with

1 this view, the district court instructed the jury that the
2 term primarily intended was not limited to the intent of
3 the defendant or any particular person or persons." If
4 they had given that instruction, we wouldn't be here
5 today.

6 They didn't give that instruction. They didn't
7 say it was not limited to. If you go to the actual
8 instruction that was given, the court said on page 31 of
9 the Joint Appendix: "The term primarily intended, as used
10 in these instructions, does not relate to the knowledge or
11 intent of any particular person or persons."

12 So consequently --

13 QUESTION: Well, if that is correct do you lose
14 the case?

15 MR. PARRISH: If that is correct it has to be
16 remanded.

17 QUESTION: I'm saying if that was a correct
18 statement of law, do you lose?

19 MR. PARRISH: Which one, that the Government
20 argued in its brief?

21 QUESTION: That primarily intended does not go
22 to the state of mind of the seller who was, in fact, the
23 defendant or the defendants in this case.

24 MR. PARRISH: Maybe I'm not understanding. If
25 the --

1 QUESTION: Well, I thought you had just told me
2 that the judge's instruction was that the so-called
3 element of primarily intended for use was not a -- was not
4 meant to refer to the state of mind of the seller of the
5 paraphernalia. Is that correct?

6 MR. PARRISH: The state of mind of the
7 defendant, the petitioner in this case.

8 QUESTION: The defendant, yes.

9 MR. PARRISH: That's correct.

10 QUESTION: And the petitioners were sellers.

11 MR. PARRISH: That's correct.

12 QUESTION: Corporate individuals. If that
13 statement, contrary to what you say, is correct, that
14 primarily intended does not go to the state of mind of the
15 seller, do you lose this case?

16 MR. PARRISH: We win.

17 QUESTION: You win if you are incorrect in --

18 MR. PARRISH: Because the court did not give
19 that instruction.

20 QUESTION: Let me approach it from a different
21 direction. Your position, as I understand it, is that the
22 Government must prove that the seller in this case
23 primarily intended the items sold to be used in the
24 manufacture and/or ingestion of drugs. Is that correct?

25 MR. PARRISH: That's correct.

1 QUESTION: All right. All right. If you're
2 wrong on that, do you lose the case?

3 MR. PARRISH: Well, we don't lose the case
4 because the Government argues a knowledge instruction.
5 However, the court never gave a sufficient knowledge
6 instruction to alert the jury to the difficulty that
7 existed when they went back into the jury room to
8 deliberate.

9 QUESTION: Well, you don't deny, as Justice
10 Ginsburg pointed out, do you, that on three separate
11 occasions the judge gave this understanding of nature and
12 character instruction? You don't deny that.

13 MR. PARRISH: But nature and character --

14 QUESTION: Well, do you?

15 MR. PARRISH: I don't deny that.

16 QUESTION: Okay. So that your argument is, I
17 take it, that the jury instruction was confusing and that
18 even though there was a mens rea element required, in the
19 context of the whole instruction the jury wouldn't have
20 understood it. Is that your argument?

21 MR. PARRISH: That's correct. But also our
22 argument is that when you're talking about -- we're maybe
23 arguing over general and specific intent. We're talking
24 about a punishment here where an individual is going to
25 prison up to 20 years and facing a \$500,000 fine. So when

1 you're talking about that, you don't talk about using the
2 same standards as we've used here for public welfare-type
3 crimes or the crimes where knowledge has just been the
4 type of thing that we allow people to be convicted on.

5 QUESTION: You --

6 MR. PARRISH: We're talking about sending people
7 away for a long time.

8 QUESTION: You then are -- and I didn't get this
9 from your brief, but are you arguing that instead of
10 knowledge, which the Government concedes must -- knowledge
11 in the sense the Government described it must be proven,
12 that this must be a purposeful crime?

13 MR. PARRISH: It should be purposeful, based
14 upon -- and getting back to Mr. Chief Justice Rehnquist's
15 question of the standard that has been utilized, this
16 Court has never actually confronted the mens rea standard
17 at the constitutional level.

18 QUESTION: Is that true with respect to both
19 kinds of items? We have here the listed items, the items
20 set forth in the statute, and then the catchall
21 classification of items.

22 MR. PARRISH: Well --

23 QUESTION: And is your answer the same with
24 respect to both aspects of this case? Let's assume for
25 the moment that the only thing before us were a prosecution

1 based on listed items, bongs and things like that. Would
2 your argument be precisely the same as you've been making
3 to us?

4 MR. PARRISH: It would be precisely the same
5 because in applying the objective standard or the strict
6 liability standard, the other items, Mannitol, Procaine,
7 and Inositol, were items that were included. But the
8 court told the jury they to had, again, look at the
9 objective standard.

10 QUESTION: No, no. I want you to assume that
11 the only thing before us --

12 MR. PARRISH: Okay.

13 QUESTION: Are the listed items and the jury was
14 instructed, as they were here, that you have to know the
15 nature of the item. Would your argument still be
16 precisely the same as you've made to us?

17 MR. PARRISH: It would be precisely the same
18 with one caveat, that we still would want to know which
19 item did the jury find only had one purpose and which
20 items had dual purposes. They were never told.

21 QUESTION: Even as to the statutory items?

22 MR. PARRISH: Even as to the --

23 QUESTION: Even as to the statutorily described
24 items.

25 MR. PARRISH: Of course. Because even in the

1 legislative history of the items, they talk about these
2 items having dual purposes. And every Federal district
3 court and appellate court that has confronted this issue,
4 they constantly talk about the dual purpose of these
5 items. And consequently they've ended up with tests all
6 over the place on this question.

7 QUESTION: Mr. Parrish, there are all sorts of
8 items that have dual purposes but the Government can
9 nevertheless prohibit their sale. Say switchblade knives,
10 for example. You could say dual purpose, but couldn't
11 they say it's illegal to sell switchblade knives?

12 MR. PARRISH: If they say it's -- they can. And
13 if they say it's illegal, make it illegal per se, put it
14 in the statute, and then you have the Morissette tight
15 fact situation that you have to confront it in.

16 QUESTION: Is it your position that the
17 Government must prove that the retailer knew what his
18 customer was going to do with the item?

19 MR. PARRISH: A must by some standard higher
20 than just a simple knowledge or a low threshold knowledge
21 standard, no, that's correct, Your Honor.

22 QUESTION: He has to know what his customer
23 knew. What other statute requires that kind of knowledge,
24 where you make it illegal to sell things such as drugs
25 themselves, you don't have to --

1 MR. PARRISH: Well, drugs themselves. Cocaine,
2 possession with intent to deliver cocaine, or having a
3 weapon.

4 QUESTION: But you don't have to know what --
5 you don't have to know what your customer is going to do
6 with it if you're indicted for selling cocaine.

7 MR. PARRISH: You do not know --

8 QUESTION: Maybe he's just going to, you know,
9 put it in his cake or something.

10 QUESTION: Maybe he's a physician and he's going
11 to use it to treat somebody.

12 MR. PARRISH: But then he has to get a license
13 for it, and if you have to get a license for it you create
14 a whole new standard. So you can't compare it to that
15 type of situation. We're talking about a situation where
16 a citizen has a dual-purpose item that's available at
17 Walgreen's, any other store.

18 QUESTION: Well, it's a dual-purpose item but
19 the statute requires that it's -- that it was designed
20 primarily for use with illegal drugs.

21 MR. PARRISH: If you're talking about design,
22 Your Honor, you have to go the manufacturer. That's what
23 they -- that's what they indicated.

24 QUESTION: That's right. And the -- but the
25 retailer has to know that that's what this item is

1 primarily used for.

2 MR. PARRISH: And you establish a standard
3 that's acceptable for high-threshold punishment. And a
4 high-threshold punishment is a punishment where a person
5 is going to spend a substantial number of years in prison.

6 QUESTION: Mr. Parrish, are you saying that if
7 we had no confusion in the charge whatever, the charge is
8 very clear that the Government must prove this defendant
9 knew that the primary use -- not the exclusive use, the
10 primary use of this substance is in connection with
11 illegal drugs, that that would be unconstitutional as a
12 construction of the statute?

13 The statute -- now we have -- we're eliminating
14 entirely the element of confusion. The charge says jury,
15 the requirement is that the defendant must know that the
16 primary use of this item is in connection with unlawful
17 drugs. No confusion, is that permissible, is that
18 constitutional?

19 MR. PARRISH: We believe it's constitutional if
20 you set the standard as to how you establish the knowing.
21 If that was the case and if the judge had given that
22 instruction, we wouldn't be here today, Justice Ginsburg.

23 QUESTION: How you establish the knowing is, for
24 one thing, you look at the list that Justice Kennedy
25 mentioned.

1 MR. PARRISH: That's correct.

2 QUESTION: That's clear notice that these items
3 constitute drug paraphernalia, their principal use is in
4 connection with unlawful drugs. So you have the statutory
5 list and the clear instruction and that would meet the
6 constitutional requirement?

7 MR. PARRISH: It would. However, the statutory
8 list admits the fact that these items have other purposes.
9 But the judge, in giving these instructions, said this
10 list constitute drug paraphernalia, and over the objection
11 of trial counsel in this case the judge proceeded to give
12 this instruction, because it was an all-inclusive list and
13 the items had dual purposes. Some of these items you can
14 go to a hardware store and buy. And that's the problem
15 with the statute. You are enforcing and not giving the
16 jury any options once they get into a jury room.

17 QUESTION: They can -- even though they have
18 dual purpose, they can still be drug paraphernalia, can't
19 they?

20 MR. PARRISH: Of course they can be. That's
21 why --

22 QUESTION: Okay.

23 MR. PARRISH: I'm sorry.

24 QUESTION: And didn't the instruction require
25 that the defendant know the nature of these items?

1 MR. PARRISH: It said it did not know the
2 nature. And if you go again to instruction 31, it says
3 "primarily intended, as used in these instructions" -- on
4 page 31 of the Joint Appendix -- "as used in these
5 instructions does not relate to the knowledge or intent of
6 any particular person or persons."

7 Contrary to what the Government argued that it
8 was primarily -- it was not limited to the intent. If it
9 had not been limited to her intent, there were other
10 factors that this jury could have considered.

11 QUESTION: You're assuming that that is the
12 intent provision of the statute, but that is not the
13 intent provision of the statute.

14 MR. PARRISH: That is correct. I am assuming
15 that based upon --

16 QUESTION: It isn't the intent in the design
17 that's crucial, it's the intent in the sale that's
18 crucial. That's the mens rea that you insist upon --

19 MR. PARRISH: But there --

20 QUESTION: -- Not the mens rea of the designer,
21 but of the seller. And don't the instructions clearly
22 require that the seller know the nature and purpose of the
23 items?

24 MR. PARRISH: The instructions do not.

25 QUESTION: Dual or not.

1 MR. PARRISH: The instructions do not. They do
2 not come close to outlining that to a jury. When you're
3 down trying cases, a jury has no idea. They want to
4 follow the judge's instructions, and in this case this
5 jury had to be confused when they had per se instructions
6 on the items themselves. They had to be confused because
7 there's no clear direction and no consistency with the
8 instructions.

9 QUESTION: You -- the instructions clearly say,
10 ladies and gentlemen you have to find, one, that the items
11 in question constitute drug paraphernalia; two, that the
12 defendant, whose case you are considering, the seller
13 here, knew the nature and character of the items. I don't
14 see how you can be much clearer than that?

15 MR. PARRISH: But they go back again to 39 and
16 it says it does not relate to the knowledge and intent of
17 that person.

18 QUESTION: 39 relates to something else, to the
19 designer, and that's not the intent we're concerned about
20 here.

21 MR. PARRISH: But the problem -- the Federal
22 courts have confronted this issue. They've come up with
23 several tests. They've come up with an objective test.
24 They've come up with a subjective objective test.

25 QUESTION: You're not saying -- that's what I

1 wanted to clarify. You're not arguing that the only
2 constitutional standard is this subjective one. That is,
3 that the defendant must want the purchaser to use it in
4 connection with drugs.

5 MR. PARRISH: That's correct.

6 QUESTION: So you're saying that there can be a
7 knowledge standard.

8 MR. PARRISH: Oh, it can be a knowledge
9 standard. We will accept a knowledge standard. We don't
10 accept --

11 QUESTION: And that there is under this statute.
12 Not just that there can constitutionally be, but you
13 acknowledge that that would be enough knowledge under this
14 statute.

15 MR. PARRISH: We would acknowledge it's not
16 enough knowledge as proposed in the instruction by the
17 Solicitor General.

18 QUESTION: I don't want to get into that.

19 MR. PARRISH: Within the statute -- okay.

20 QUESTION: But you agree that if it had been
21 made clear.

22 MR. PARRISH: Absolutely.

23 QUESTION: If it had been made clear that all
24 this seller has to know is that these are drug
25 paraphernalia -- which is to say they are primarily

1 intended primarily for uses as drug paraphernalia, even
2 though they may have other uses. If that had been made
3 clear, that would comply with the Constitution and with
4 the statute.

5 MR. PARRISH: Absolutely.

6 QUESTION: Okay.

7 QUESTION: Well, Mr. Parrish, none of the four
8 questions presented in your petition for certiorari deal
9 with the instructions given by the trial court. We don't
10 ordinarily sit here to debate whether a particular
11 instruction was confusing or not.

12 MR. PARRISH: We did address that, Judge -- Your
13 Honor, when we outlined that all of the particular items
14 whereof, including instruction 37 and 39. That's
15 addressed in our petition and also addressed in our
16 petition in our brief.

17 QUESTION: Well what's -- under what question is
18 that question presented, is that subsumed?

19 MR. PARRISH: On the subjective scienter
20 question, as to whether or not the judge accepted a fully
21 objective standard in this case --

22 QUESTION: Well --

23 MR. PARRISH: -- And a strict liability
24 standard.

25 QUESTION: Your question two deals with the

1 standard imposed by the statute, not what instruction was
2 given.

3 MR. PARRISH: That's the standard that the judge
4 adopted in this case, Mr. Chief Justice Rehnquist, and
5 that was the one that was not in the statute. It was the
6 primarily intended which was, in fact, in the statute.
7 And that's the way the courts have been finding the
8 vehicle for intent. As a matter of fact, it's based upon
9 the legislative history of --

10 QUESTION: I suggest that you don't devote any
11 more of your argument to the particular instructions given
12 in this case, because I don't think -- and I think that
13 probably the bench agrees with me, that that's fairly
14 raised in the petition.

15 MR. PARRISH: I'm sorry. Oh, I thought you said
16 something else.

17 QUESTION: Incidentally, Mr. Parrish, you and
18 this case and I come from the Eighth Circuit. Who was the
19 district judge?

20 MR. PARRISH: Judge Rawley was the district
21 judge in this case. However, I didn't try it in the
22 lower court, but he was the district court judge.

23 In determining how to find legislative intent,
24 as I was indicating, several of the district courts and
25 appellate courts, when confronted with this issue, have

1 been confused and have been in some conflict and have, to
2 some extent, been inconsistent in their application of
3 this standard.

4 Some have arrived at a standard of a subjective
5 test. Some have arrived, as the Sixth Circuit has found,
6 at an objective subjective test. And some have, in fact,
7 found a purely subjective test with regard to this. And I
8 think the confusions in the circuits have come from the
9 fact that they don't know where to find primarily intended
10 and where it applies in this particular instance.

11 And we believe we have to look at what the
12 Congressman Levine indicated when he was saying where in
13 the statute is the intent. He indicated in the statute
14 the intent was found in primarily intended. And we
15 believe the court, by not addressing this issue and
16 applying an objective standard as the law of the case,
17 deprived Ms. Acty of her constitutional rights; did not,
18 in fact, get into any issue with the jury as to these
19 dual-purpose items and get into her intent. And
20 consequently, we believe this case ought to be remanded.

21 Thank you.

22 QUESTION: Thank you, Mr. Parrish.

23 Mr. Bryson, we'll hear from you.

24 ORAL ARGUMENT OF WILLIAM C. BRYSON

25 ON BEHALF OF THE RESPONDENT

1 MR. BRYSON: Thank you, Mr. Chief Justice, and
2 may it please the Court:

3 A great deal of the discussion this morning has
4 been over the instructions. And while I recognize that
5 isn't the principal issue that the Court has before it, I
6 would very briefly, just as a predicate to my argument,
7 like to review the portions of the instructions that did
8 specifically address the question.

9 QUESTION: And, of course, I suppose you're
10 doing it because the Government changed its theory while
11 the case -- after the case was granted, didn't it?

12 MR. BRYSON: Well, Your Honor, the -- in the
13 lower courts.

14 QUESTION: There's nothing wrong with that,
15 but --

16 MR. BRYSON: Well, I think we certainly changed
17 our approach to the case in this respect, in that in the
18 lower courts the thrust of the argument being made by the
19 defendants was that a subjective intent was required.
20 That is -- and this was the basis for the objections that
21 were made in the district court -- that the defendant
22 herself had to have designed or intended the drug use.
23 And we said that was not so, and the district judge agreed
24 with us.

25 So the question of where the intent, where the

1 knowledge lay, and so forth, was really not the focus of
2 the district court proceeding. In the court of appeals,
3 the argument was made -- the principal argument made by
4 the defendants was that this statute has no scienter
5 requirement at all and therefore is unconstitutional. So,
6 again, as the court of appeals pointed out, they did not
7 argue for a particular scienter requirement. They didn't
8 press the issue of knowledge. They were looking for a
9 constitutional ruling based on an assumption of no
10 scienter.

11 So we are addressing the case as it now comes to
12 the Court, and addressing in particular the question
13 that's raised in the petition.

14 QUESTION: Didn't they also argue in the court
15 of appeals that if one does not read into it the
16 subjective intent requirement that they contend for,
17 that -- I mean that if it -- it would be unconstitutional
18 if you did not read it in, and therefore you should read
19 it in, and therefore the proper instruction was not given
20 and therefore there should be new trial. Didn't they make
21 that argument?

22 MR. BRYSON: They did. That was their backup
23 argument. But, again, the instruction they were talking
24 about was the instruction that they'd argued for in the
25 district court.

1 QUESTION: I understand.

2 MR. BRYSON: Which was the purely subjective
3 intent instruction. Which is the -- again, the -- this
4 defendant has to have designed, or this defendant has to
5 have intended that the drugs be used, not --

6 QUESTION: Mr. Bryson, during the course of your
7 review -- and you're going to turn to the instructions,
8 which I hope you do, can you clarify for me the
9 Government's position as to whether or not instructions
10 should be precisely the same in trial A, which consists
11 just of a trial for having sold the listed items, and
12 trial B, assuming that there are only unlisted items
13 involved. Are the instructions in each case to be
14 precisely the same?

15 MR. BRYSON: Well, I --

16 QUESTION: If you could address that during the
17 course of your argument, I'd appreciate it.

18 MR. BRYSON: Well, certainly. Well, let me
19 address it right now. I think that the instructions can
20 be different because I think designed and intended are
21 different terms. Designed, I think, is a much simpler
22 concept. That simply means that the manufacturer made the
23 thing in a way that makes it suitable only for a
24 particular use, absent some kind of very bizarre use.
25 Intended for obviously is a more complicated concept. But

1 in both cases the idea of scienter would be the same, we
2 submit, which is that the defendant has to know the
3 primary use of the substance is for drugs.

4 QUESTION: Well, but intended and designed
5 applies both to the listed items and to all other items,
6 does it not?

7 MR. BRYSON: Your Honor, we think the listed
8 items are -- with exception perhaps. But we think that
9 basically the listed items are all design items. I mean
10 the one exception is there's a reference to roach clips,
11 which are items which, by virtue of the way they're
12 intended, the way they're marketed and so forth, would be
13 either drug paraphernalia or not drug paraphernalia.

14 QUESTION: Well the statute doesn't make that
15 distinction in its language. The statute, in its listing
16 of the 15 items, says that these items are intended and
17 designed.

18 MR. BRYSON: They say -- that's right. But
19 it's --

20 QUESTION: So there's no distinction between the
21 two classifications of cases.

22 MR. BRYSON: That's clear. But I think it would
23 be our position that each of those items is, in fact, an
24 item that is designed, because they are specifically
25 identified because they have exclusively drug purposes.

1 QUESTION: Mr. Bryson, to cut to the chase here,
2 what is the Government's position as to the nature of the
3 scienter? Is it that the defendant must know either that
4 the item was designed for that purpose or that the item
5 was intended for that purpose by the manufacturer?

6 MR. BRYSON: Yes. And what that --

7 QUESTION: So he's --

8 MR. BRYSON: Well, not necessarily intended by
9 the manufacturer, but intended by the retailer --

10 QUESTION: Well, the intended provision --

11 MR. BRYSON: Or someone in the chain of
12 distribution who may use it.

13 QUESTION: Oh, okay, someone --

14 MR. BRYSON: Who may display it in a particular
15 way. In other words, that you may have a manufacturer
16 making something. Again, let's take roach clips.

17 QUESTION: Right.

18 MR. BRYSON: Which may not by their design
19 necessarily commit themselves to drug use.

20 QUESTION: Right.

21 MR. BRYSON: But -- excuse me.

22 QUESTION: So he has to know somebody else's
23 state of mind, essentially.

24 MR. BRYSON: It isn't a state of mind. He has
25 to know what the goods are used for, what they --

1 QUESTION: No, it doesn't say use, is says
2 designed -- designed.

3 MR. BRYSON: That's right. And designed, I
4 think, means --

5 QUESTION: You design something for a purpose if
6 it's your intent to make them for that purpose, no?

7 MR. BRYSON: Well, that is true. But the -- an
8 item can be designed for a purpose -- you can objectively
9 view an item and say this item is designed -- a car is
10 designed for transportation. Now, it is true that
11 somebody back at the plant --

12 QUESTION: Even if nobody designed it for that
13 purpose? I mean you --

14 MR. BRYSON: Well, somebody obviously --

15 QUESTION: It seems to me you can say it seems
16 to be designed for that purpose.

17 MR. BRYSON: Somebody obviously will design it
18 for that purpose. But what you're really concerned with,
19 and what this statute is designed or intended to reach is
20 identification of an item. It isn't intended to -- a drug
21 paraphernalia definition is not intended to reach a
22 question of somebody else's intent, or for that matter the
23 defendant's intent. It's intended to identify something
24 about the item.

25 QUESTION: I really don't know how you can avoid

1 that. From the language, I don't know how you can -- I
2 don't know that it's such a terrible thing, either. I
3 mean, why is it so hard to tell whether it was, you know,
4 designed for that purpose?

5 MR. BRYSON: Well, what --

6 QUESTION: Do you think it's hard to tell
7 whether a car was designed for transportation without
8 talking to the fellow who built it?

9 MR. BRYSON: No, it isn't hard to tell. And if
10 you would -- if you like, you can say well, yes, we're
11 looking at the question of the intent of the designer or
12 the intent of the retailer. But I think what -- when a
13 jury looks at this and they're told you are to try to
14 ascertain what the design or intent of the -- the intended
15 use of this good is. They can look at the good, they can
16 look at the setting, they can look at the retail display
17 of the good, and they can make a determination that that
18 good is committed to -- intended to be committed to use
19 with drugs.

20 QUESTION: Well, Mr. Bryson.

21 MR. BRYSON: Excuse me.

22 QUESTION: Suppose the items are something like
23 razor blades.

24 MR. BRYSON: Yes.

25 QUESTION: Now, they're not on the list of

1 things that apparently are to be considered design for use
2 as drug paraphernalia.

3 MR. BRYSON: Uh-hum.

4 QUESTION: What is the proper standard in
5 instruction, then, for the jury for a retailer of razor
6 blades?

7 MR. BRYSON: The standard would be if in the
8 setting in which this particular item is being marketed it
9 appears that it was intended to be used with drugs.

10 QUESTION: Well --

11 MR. BRYSON: And let me give you an example that
12 goes to exactly that case.

13 QUESTION: Yeah, I mean should -- is it -- must
14 the jury be told and is the standard that the retailer
15 must intend that they be used for drug use?

16 MR. BRYSON: Well, typically it will be the
17 retailer in a dual-use item, but it doesn't have to be.
18 In other words, your wholesaler could package -- and this
19 is exactly a case that's presented by this case. The
20 wholesaler packages a little item called a cocaine
21 executive kit which contains, among other things, a razor
22 blade. Now, when the wholesaler puts that kit together it
23 contains a razor blade, a vial with a little spoon on it,
24 and a mirror and a straw and a grinder.

25 This little kit, when the retailer -- when the

1 wholesaler sends it to the retailer, has a razor blade in
2 it which is surely intended for use with cocaine. Now, it
3 wasn't designed that way. It may have been made by
4 Gillette and wholesaler may have put it into the kit and
5 converted it into something which is intended for use with
6 cocaine.

7 Now, the retailer may do nothing other than put
8 it down on the counter, and therefore the retailer may not
9 have either designed it or even specifically intended to
10 create an item that is directed to this market. But the
11 retailer, we submit, has to know that this kit is being
12 used for -- primarily with drugs, and that satisfies the
13 scienter requirement.

14 Now, let me turn --

15 QUESTION: But how does that square with
16 instruction 39, which says that the term primarily
17 intended "does not relate to the knowledge or intent of
18 any particular person or persons?"

19 MR. BRYSON: Well, that instruction is intended
20 to answer the suggestion that the defendant has to be
21 person who primarily intends that drugs be used with this
22 product, or primarily has designed the product.

23 QUESTION: Well, if I were a juror I would say
24 that the knowledge of the drug -- this in the case of the
25 razor blade hypothetical -- is irrelevant under

1 instruction 39. Would you submit instruction 39 in a case
2 where a druggist is being sold for selling a razor blade,
3 the proof being that the buyer said I need a razor blade
4 to cut my cocaine?

5 MR. BRYSON: Well, instruction 39, we could have
6 done without instruction 39. Instruction 39 is really --

7 QUESTION: Instruction 39 would be inappropriate
8 in the case that I put, would it not?

9 MR. BRYSON: I don't think so, because I
10 think --

11 QUESTION: Well, you've said that the intent of
12 the seller is relevant.

13 MR. BRYSON: Well, no, I don't think so, Your
14 Honor. I think it -- in determining what is drug
15 paraphernalia, you look at the item. And the question of
16 whether it happens to have been the druggist or it happens
17 to have been the wholesaler or somebody else that put the
18 item together and converted it into something that really
19 one can judge objectively is intended for drug use, or is
20 likely to be used with drugs, it's irrelevant whether that
21 was the intent of the druggist or any particular person.
22 And that's the language of the instruction.

23 You don't -- you're not concerned to say did the
24 druggist intend to put this item together, intend to try
25 to market it in this particular way, as long as you have

1 knowledge on the part of the defendant that that is what
2 the item is, that the item is being primarily used with
3 drugs.

4 QUESTION: But --

5 MR. BRYSON: In the knowledge --

6 QUESTION: You go ahead.

7 QUESTION: It's really not very accurately put.
8 I mean, you have to read it as does not relate to the
9 knowledge of any particular -- you really have to jump on
10 particular. You wouldn't have framed it that way, Mr.
11 Bryson, I'm sure, if you were -- if you had written it to
12 begin with.

13 MR. BRYSON: Well --

14 QUESTION: I mean, what -- obviously it has to
15 relate to the intent of some particular person or persons.
16 You don't have an intent just floating around in the air,
17 right?

18 MR. BRYSON: Well I think you have to -- Your
19 Honor.

20 QUESTION: So, I mean, it could be the intent of
21 the seller, it could be the intent of the manufacturer.
22 It has to be the intent of some person, but no particular
23 person.

24 MR. BRYSON: That's right.

25 QUESTION: That's the meaning of it.

1 MR. BRYSON: I think that's the gist of it. And
2 in that --

3 QUESTION: Do you think the jury understood it
4 that way?

5 MR. BRYSON: Well, I think so. Because the jury
6 was fully apprised of the fact that the goods had to be
7 designed or intended for use with drugs, and that the
8 defendant had to know that, had to know of the nature and
9 character and use of the goods.

10 QUESTION: You were candid in acknowledging in
11 your brief that the formulas used by the circuits were not
12 entirely satisfactory.

13 MR. BRYSON: That's correct.

14 QUESTION: And that this charge wasn't entirely
15 satisfactory. If you were to put in words what the proper
16 charge should be to convey your understanding of the state
17 of mind requirement to convict, what would that -- what
18 would those words be?

19 MR. BRYSON: I think I would say, Your Honor,
20 that the defendant must know that the goods are -- the
21 goods in question are primarily used with drugs.

22 QUESTION: Mr. Bryson.

23 MR. BRYSON: And that the drugs must also be
24 drug paraphernalia, as defined in section (d). I think
25 that's the most efficient way to express the thought. One

1 might be able to be more precise about it, but I think
2 that that is the formula that would be most readily
3 understood by a jury and would capture the essence of what
4 the mens rea requirements are.

5 QUESTION: Mr. Bryson, supposing someone went
6 into a supermarket/hardware/drug store and said he wanted
7 to buy a cocaine executive kit which would include a
8 razor, a spoon, four or five items each of which is a
9 dual-purpose item. Went through the -- with the salesman,
10 went through the store and picked out the several items
11 until he got the whole kit. And they said what are you
12 going to use it for? I'm going to -- I like to smoke
13 cocaine. Would the salesman be guilty of a crime?

14 MR. BRYSON: Well, Your Honor, I think that is
15 the hardest case that's presented by the statute, because
16 what you have there is an item that hasn't -- or a series
17 of items. Let's just suppose, to make it even harder --

18 QUESTION: Just stick with my example.

19 MR. BRYSON: Okay, I'll stick with yours.

20 It is -- I think it's a very hard case because,
21 yes, when you put all the items together the --
22 presumably -- well, let's -- let's assume knowledge on the
23 part of the seller.

24 QUESTION: The customer told him --

25 MR. BRYSON: The customer tells him.

1 QUESTION: -- What I'm going to do with it.

2 MR. BRYSON: By the time you get to that point,
3 the salesman knows that he is selling something which, in
4 the aggregate, is intended to be used with drugs. So I
5 would say I think that would satisfy the statute.

6 On the other hand, it doesn't fit within the --
7 what is ordinarily understood under the statute to be
8 something which is designed or intended for drug use,
9 because it was not until he got to the counter --

10 QUESTION: But it clearly was in this case.

11 MR. BRYSON: -- That it became something that
12 was intended for drug use. So it was very late in the day
13 that it became narcotics paraphernalia, when he walked up
14 to the counter and had them all together or when he
15 explained what the use was that he was going to make of
16 them.

17 QUESTION: He needed the salesman to help him
18 find each of these items.

19 MR. BRYSON: Yes.

20 QUESTION: To go through this big store.

21 MR. BRYSON: Yes, I would say -- and you could
22 take an example that -- if I could just --

23 QUESTION: Change the example.

24 MR. BRYSON: Change the hypothetical. But my
25 answer to you is I think that would qualify.

1 QUESTION: Well, I think it violates the statute
2 under your interpretation.

3 MR. BRYSON: But I think it would be a very
4 difficult case.

5 QUESTION: Yeah.

6 MR. BRYSON: And it's close to the line.

7 QUESTION: Yeah.

8 MR. BRYSON: And there is some fuzziness at the
9 edge, I think, in the statute.

10 QUESTION: But you don't want us to decide this
11 case based on the instructions, do you?

12 MR. BRYSON: Your Honor, I --

13 QUESTION: Didn't we take this case to decide
14 what element the statute requires?

15 MR. BRYSON: Yes.

16 QUESTION: We didn't take this case to review
17 the instructions.

18 MR. BRYSON: That's right. But there's been, of
19 course, a lot of concern expressed about the instructions,
20 and I would like to reassure the Court --

21 QUESTION: Oh, look, I'm one of the -- I'm one
22 of the culprits and I recognize that.

23 MR. BRYSON: Well --

24 QUESTION: But, I mean, when it comes down to
25 deciding the case and writing the opinion, it's not the

1 Government's position that we ought to affirm on the basis
2 of the instructions. I take it we can assume that?

3 MR. BRYSON: That's correct. It's not our
4 position that that ought to be the Court's principal
5 concern. But it is also our position that these
6 instructions are adequate under the Government's theory of
7 this case.

8 And, now, let me go through the instructions to
9 try to explain why it seems to me that these instructions
10 do satisfy the mens rea requirement, which we find in
11 section 857(a) of the statute. And there are really not
12 just three, but I think five different places in the
13 instructions that the reference to nature and character or
14 nature and character and use -- nature, character, and use
15 of the goods is explained as the basis for the knowledge
16 requirement.

17 First in instruction 17, where the court is
18 describing the use of a particular item. The court -- the
19 use of, excuse me, particular evidence in the case. The
20 court explains that knowledge refers -- knowledge is a
21 necessary element, that you must find with respect to each
22 of the charge offenses that knowledge has been proved as
23 to each defendant during the time periods, and that
24 knowledge -- and then the court explains, and this is at
25 Joint Appendix 18 -- refers to the "nature, character, and

1 use of the items being sold or offered for sale at the
2 store."

3 Again, instruction 18, where the court is
4 discussing the evidence which has been offered on the good
5 faith defense, the court says that you can consider the
6 good faith if it's "inconsistent with the elements in the
7 charges of the indictment concerning the alleged knowledge
8 of the defendants as to the nature, character, and use of
9 the items being sold or offered for sale at the store."
10 That's at page 20 of the Joint Appendix.

11 Then in the two instructions on counts 20 --
12 excuse me, on counts 1 and 2 at pages 21 and 22 of the
13 Joint Appendix, the court not only instructs that the
14 defendant whose case you are considering must know the
15 nature and character of the items, but also adds that
16 there must be proof that the use of the interstate
17 conveyance was, quote, part of a scheme to sell drug
18 paraphernalia.

19 Now, we think that the term "scheme" there is
20 important, not only in establishing a mens rea requirement
21 in section 857(a), but also in informing the jury that
22 this is something that they had to know was --

23 QUESTION: Mr. Bryson, it was my understanding
24 that in the revision the word "scheme" was dropped.

25 MR. BRYSON: Yes.

1 QUESTION: So you don't want to -- even though
2 it was in effect at the time of this trial, it seems by
3 putting any heavy weight on that you're making this an
4 extremely narrow case.

5 MR. BRYSON: Your Honor, we don't think the
6 existence of the word "scheme" in the 857 -- the prior
7 statute is critical, but we think it's illuminating,
8 particularly because there's no indication that when the
9 1990 change was made in the statute and the word "scheme"
10 was dropped in the course of jumbling up the section (a),
11 that there was any -- there's no indication there was any
12 intention to remove a mens rea requirement.

13 So what we make of the word "scheme" in section
14 857(a) is that it reflects a congressional understanding
15 that there would be a knowledge requirement, that there
16 would be awareness on the part of the defendant that the
17 defendant was doing something unlawful, and that there was
18 no indication in 1990 that that fundamental change --
19 excuse me -- change in the statute was intended.

20 So, yes, we don't put principal weight on the
21 word "scheme," but we certainly think it's illuminating in
22 telling us what Congress had in mind. Particularly in
23 light of the fact that we're dealing here with what
24 amounts to a presumption in the construction of Federal
25 statutes that you find mens rea unless there's some clear

1 indication to the contrary, or unless you're in an area
2 involving particular kinds of products. Now, in this area
3 we think that assumption, that rule of construction
4 applies. And the word "scheme" is a further indication
5 that that rule is applicable here.

6 QUESTION: Mr. Bryson, can I just ask, is your
7 acceptance of the view that there is some knowledge
8 requirement in the statute based on your view that this is
9 a strong canon of presumption under the canons of
10 statutory construction, or are you of the view that if you
11 didn't do that it might be a serious constitutional
12 question?

13 Well, maybe that's also a presumption. Why do
14 you make the concession is what I'm asking you?

15 MR. BRYSON: Well, we make the concession
16 because we think that -- I would say it's the first,
17 principally, of your -- of the two options. We think that
18 if you read the Court's cases such as Gypsum, Bailey,
19 Liparota, and Morissette, what you find is there is this
20 canon of construction.

21 And in a sense it's just like the rule that this
22 court has recognized, that you read into Federal statutes
23 the defense of entrapment. There's no statutory defense
24 of entrapment, but we understand Congress to legislate
25 against a background in which Federal criminal statutes

1 all have, unless otherwise negated, a defense of
2 entrapment or duress or necessity. This is just one of
3 the ingredients that is assumed to be present in Federal
4 statutes, unless the statute falls into one of those rare
5 cases in which it can be either assumed that there is no
6 such requirement or in which Congress indicates to the
7 contrary.

8 Now, one of the reasons for that, of course, is
9 that there are constitutional concerns with statutes that
10 have absolutely no mens rea except where certain kinds of
11 items are at issue, and the International Minerals case
12 discusses that concern. But I think the basic point is --
13 and my basic answer to you is it's the rule of
14 construction.

15 Now, if I can just very quickly get back to
16 the --

17 QUESTION: Right, give us the last couple and
18 then I have a question for you. Just tell us quickly
19 where they are so I can mark them.

20 MR. BRYSON: Okay. The last one is really -- is
21 the least, also, which is that in the course of the
22 monetary crimes instruction on money laundering, the court
23 instructed that the defendant had to know that the
24 money -- the monetary instruments represented the proceeds
25 of an unlawful activity.

1 QUESTION: Where is that, which instruction?

2 MR. BRYSON: That's on page 28 of the Joint
3 Appendix. And that the defendant intended the financial
4 transactions to promote the sale of drug paraphernalia.
5 Again, clearly indicating to the jury -- and the jury
6 convicted on the count. Clearly the jury concluded that
7 the defendant did know that these defendants -- the
8 defendant did know that these items were drug
9 paraphernalia.

10 QUESTION: Mr. Bryson, this may be just
11 repeating what Justice Stevens was asking, but I take it
12 it is your position that the statute is covered if all
13 that the seller knows is that the individual to whom he's
14 selling the dual-purpose item in fact intends to use it
15 for one of the prohibited purposes?

16 So that if -- you know, if I'm a clerk in a drug
17 store and I have a friend who I know is a drug addict and
18 he comes in -- and I know that he doesn't use this type of
19 razor when he shaves, and he comes in and asks for a pack
20 of razors and I just give him a pack over the counter. I
21 know very well what he's going to use them for. That
22 would violate the statute.

23 MR. BRYSON: Your Honor, I have to give you the
24 same answer I gave to Justice Stevens. Both that I think
25 that is right at the edge of what the statute covers and

1 that, yes, I think it probably would cover that.

2 QUESTION: And that's why we have prosecutorial
3 discretion, is what you're saying.

4 MR. BRYSON: Well, Your Honor, I'm always
5 worried to give the answer trust us, we won't prosecute
6 those kinds of cases, because I find that those cases show
7 up in my office when I get back.

8 QUESTION: Well, Mr. Bryson, I don't mean to --
9 (Laughter.)

10 QUESTION: My example was the kit where you
11 don't assemble all the items except for that purpose. But
12 I'm not sure if you have a dual-purpose item, the primary
13 intent of which is taking it and shaving yourself, the
14 fact that a particular individual uses it for a drug
15 purpose would make it covered by the statute.

16 MR. BRYSON: It might not, Your Honor. But my
17 argument -- my analysis of that point would be as follows,
18 that if you have a primary use for razor blades, being to
19 use them to shave as you obviously do, but in your
20 particular store you put a display out on the counter
21 which says these razor blades are really well suited for
22 cocaine use -- let's just make it easy.

23 And there's -- let's assume there isn't even
24 anything all that special about these, but you've
25 advertised them for cocaine use and you say these are

1 great cocaine razors, and you put a little picture on
2 them, on the display to indicate that that's what they're
3 intended for, then I think you have defined a little
4 subgroup of the market of razor blades --

5 QUESTION: No, but if I come in and say I'm sure
6 they are, indeed, suitable for that purpose, but I want to
7 be clean shaven, please sell me a package, there's no
8 violation of the statute in that sale, is there?

9 MR. BRYSON: Well, actually, I think there would
10 be, Your Honor. Because what you would be doing -- I
11 would be doing as a clerk is that I would be selling
12 something which is intended for -- primarily intended for
13 use with cocaine --

14 QUESTION: Intended by whom?

15 MR. BRYSON: To somebody who just happens not to
16 have intended to use it for that purpose.

17 QUESTION: Not by me, not by me?

18 MR. BRYSON: But that doesn't exonerate me. And
19 let me give you the example that seems to me to
20 demonstrate that. Suppose you're an undercover officer
21 and you come in -- and I know you're not going to use this
22 for drug purposes, I happen to know you're an undercover
23 officer. If I sell you a bong or even something that I've
24 advertised as a roach clip, I'm guilty even though you
25 personally may not be intending to use it for that

1 purpose.

2 QUESTION: Then, your -- and I -- this is
3 implicit in what you said before -- your reference to
4 the -- to the intent in primarily intended must be
5 primarily intended by the customer to whom you address
6 your offer.

7 MR. BRYSON: No, no, Your Honor. It's the --

8 QUESTION: I mean to the class of customers to
9 whom you address your offer.

10 MR. BRYSON: Yes, that's correct. That, in
11 other words, the intent may be reflected in the way the
12 product is marketed.

13 QUESTION: Uh-hum.

14 MR. BRYSON: That's right.

15 QUESTION: I thought you said -- I thought you
16 agreed with the instruction that it doesn't have to be the
17 intent of any particular person. It seems to me it can be
18 the manufacturer's intent, it can be the seller's intent,
19 it can be the purchaser's intent.

20 MR. BRYSON: Exactly.

21 QUESTION: So that if I come -- that's why you
22 had trouble with my hypothetical. I come up to somebody
23 who's just a druggist and I say sell me a -- sell me some
24 razor blades because I want to use it to cut drugs. And
25 that would be the necessary intent, wouldn't it, on the

1 part of the purchaser?

2 MR. BRYSON: Well, the argument you would have
3 to make to bring that example within the coverage of the
4 statute, I think, is that the good becomes intended to be
5 used with drugs at the point at which you walk in, pick it
6 up, and announce that you intend to use it for that
7 purpose. I think that's stretching what the statute was
8 designed to reach, but I think it does come within the
9 plain language of the statute.

10 If there are no further questions, I have
11 nothing further.

12 QUESTION: Thank you, Mr. Bryson.

13 Mr. Parrish, you have 4 minutes remaining.

14 REBUTTAL ARGUMENT OF ALFREDO PARRISH

15 ON BEHALF OF THE PETITIONERS

16 MR. PARRISH: I don't intend to take my 4
17 minutes. I have some specific points I want to rebut.

18 QUESTION: What do you mean by intent, Mr.
19 Parrish?

20 (Laughter.)

21 MR. PARRISH: As defined in the statute, Justice
22 Scalia.

23 But my point would be that the proposed
24 instructions that were proposed by the Government would
25 have been acceptable, and it would be an instruction that

1 we would, in fact, have accepted in this trial.
2 Unfortunately, it was not the instruction that was given.

3 Now, I realize -- with all due respect to Mr.
4 Chief Justice, he indicates that we shouldn't get tied up
5 in instructions. However, when you are facing 20 years in
6 prison and a half million dollar fine, and it is, in fact,
7 imposed and you are deprived of your constitutional rights
8 simply because the court did not apply the proper
9 instruction on the statute, that is a serious
10 constitutional problem to Ms. Acty, and in this case Ms.
11 Acty did not receive her constitutional rights when the
12 statute was applied in this case. The --

13 QUESTION: Mr. Parrish, I just want to confirm
14 my understanding of what you just said. Mr. Bryson told
15 us that his model charge would be that it must be drug
16 paraphernalia as defined in subsection (d), that's (1).
17 And that the defendant must know that the goods are
18 primarily used -- not necessarily this customer, but
19 primarily used with drugs, period. If that's what had
20 been said, as simple as that, the defendant must know
21 these goods are primarily used with drugs, you would have
22 no objection.

23 MR. PARRISH: And instruction 39 was taken out,
24 where it says that it does not relate to any -- the
25 knowledge or intent of any particular person or persons,

1 that's correct.

2 QUESTION: I know that's your -- your view is
3 that that confuses things, but I just wanted to know that
4 you are in agreement with Mr. Bryson that the model charge
5 would be that the defendant knows the goods are primarily
6 used with drugs.

7 MR. PARRISH: That's correct, Your Honor.

8 Thank you, Justice.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Parrish.

11 The case is submitted.

12 (Whereupon, at 10:55 a.m., the case in the
13 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Posters 'N' Things, Ltd. v. United States

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BY Ann Marie Federico

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