SUPREME COURT OF THE UNITED STATES

No. 92–903

POSTERS `N' THINGS, LTD., ET AL., PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 23, 1994]

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

I agree with the Court that the sale of items likely to be used for drug purposes, with knowledge of such likely use, violates former 21 U. S. C §857; and that a subjective intent on the part of the defendant that the items sold be used for drug purposes is not necessary for conviction. That is all the scienter analysis necessary to decide the present case. The Court goes further, however, and says, *ante*, at 6–9, that such a subjective intent is not only not necessary for conviction but is not sufficient for conviction — *i.e.*, that the sale of an item with the *intent* that it be used for drug purposes, does not constitute a violation. I disagree. In my view, the statutory language "primarily intended . . . for use" causes a sale to be a sale of drug paraphernalia where the seller intends the item to be used for drug purposes. A rejection of that view, if consistently applied, would cause "primarily intended or designed for use" to mean nothing more than "designed for use." While redundancy is not unheard of in statutory draftsmanship, neither is it favored in statutory interpretation. *Kungys* v. *United States*, 485 U. S. 759, 778 (1988).

Some of the provisions of §857(e), which describes factors that may be considered in determining whether an item constitutes drug paraphernalia, clearly suggest that what is *not* covered paraphernalia by nature can be *made* such by the

seller's intent.[1] Section 857(e)(1) lists as one of the relevant factors "instructions, oral or written, provided with the item concerning its use." This envisions, I think, that a drugstore owner who instructs the purchaser how to use the purchased drinking straw or razor blade in the ingestion of drugs converts what would otherwise be a lawful sale into a sale of drug paraphernalia. Section 857(e)(4) lists as a relevant factor "the manner in which the item is displayed for sale." That would surely not change the nature of the item, but it would cast light upon the use intended by the person who is selling and displaying it. And §857(e)(5) lists as a relevant factor "whether the owner . . . is a legitimate supplier of like or related items." Again, that casts light upon nothing but the seller's intent regarding use.

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[1]For purposes of the present case, all we need decide is that the seller's intent will qualify. It would also seem true, however (since the statute contains no limitation on whose intent—manufacturer's, seller's or buyer's—can qualify), that the *buyer*'s intended use will cause an otherwise harmless item to be drug paraphernalia. To convict a seller on such a basis, of course, the scienter requirement of the statute would require that the seller have *known* of such intended use.

On first glance, the Court's claim that "primarily intended" does not refer to the defendant's state of mind seems to be supported by §857(f)(2), which exempts from the entire section the sale, "in the normal lawful course of business," of items "traditionally intended for use with tobacco products." This might be thought to suggest that the section applies only to categories of items, and not at all to items sold with a particular intent. On further consideration, however, it is apparent that §857(f)(2) militates against, rather than in favor, of the Court's view. Unless unlawful intent could have produced liability, there would have been no *need* for the exception. Tobacco pipes are tobacco pipes, and cigarette paper is cigarette paper; neither could possibly meet the Court's test of being "items . . . likely to be used with illegal drugs," *ante*, at 12. Only the criminalizing effect of an unlawful *intent* to sell for drug use puts tobacconists at risk. Because of the ready (though not ordinary) use of items such as cigarette paper and tobacco pipes for drug purposes, tobacconists would have been in constant danger of being accused of having an unlawful intent in their sales—so Congress gave them what amounts to a career exception.

Through most of the Court's opinion, an item's "likely use" seems to refer to the objective features of the item that render it usable for one purpose or another. At the very end of the relevant discussion, however, in apparent response to the difficulties presented by the factors listed in §857(e), one finds, in a footnote, the following:

> "Although we describe the definition of `primarily intended' as `objective,' we note that it is a relatively particularized definition, reaching beyond the category of items that are likely to be used with drugs by virtue of their objective features. . . . Thus, while scales or razor blades as a general class may not be designed specifically

> for use with drugs, a subset of those items in a particular store may be `primarily intended' for use with drugs by virtue of the circumstances of their display and sale." *Ante*, at 9, n. 11.

If by the "circumstances of . . . sale" the Court means to include the circumstance that the seller says, "You will find these scales terrific for weighing drugs," or that the buyer asks, "Do you have any scales suitable for weighing drugs?"—then there is really very little if any difference between the Court's position and mine. Intent can only be known, of course, *through* objective manifestations. If what the Court means by "a relatively particularized objective definition" is that all objective manifestations of the seller's intent are to be considered part of the "circumstances of sale," then there is no difference whatever between us (though I persist in thinking it would be simpler to say that "intended for sale" means "intended for sale" than to invent the concept of "a relatively particularized objective intent"). If, on the other hand, only some and not all objective manifestations of the seller's intent are to be considered part of the "circumstances of sale" (manner of display, for example, but not manner of oral promotion), then the Court ought to provide some description of those that do and those that don't, and (if possible) some reason for the distinction.

Finally, I cannot avoid noting that the only available legislative history—statements by the very Congressman who introduced the text in question, see *ante*, at 9, n. 12—unambiguously supports my view. I point that out, not because I think those statements are pertinent to our analysis, but because it displays once again that our acceptance of the supposed teachings of legislative history is more sporadic than our professions of allegiance to it. See *Thunder Basin Coal Co.* v. *Reich*, 503 U. S. ___, ___ (1993) (slip op., at 1) (SCALIA, J., concurring in part and concurring in judgment); *Wisconsin Public*

Intervenor v. *Mortier*, 501 U. S. 597, 617 (1991) (SCALIA, J., concurring in judgment).