

In the

Supreme Court of the United States

UNITED STATES,

Petitioner,

vs.

THOMAS W. MOORE, JR.,

Respondent.

No. 74-759

Washington, D. C.
October 7, 1975

Pages 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

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Washington, D. C.,

Tuesday, October 7, 1975.

The above-entitled matter came on for argument at
10:53 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PAUL L. FRIEDMAN, ESQ., Assistant to the Solicitor
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20530; on behalf of the Petitioner.

RAYMOND W. BERGAN, ESQ., 1000 Hill Building,
Washington, D. C. 20006; on behalf of the Respondent.

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United States Court of Appeals for the District of Columbia
Circuit.

The question is whether a physician's use of a drug
applies to other practitioners, including pharmacists,
registered under the Controlled Substances Act, 21 U.S.C. § 823,
and disposed of for the purpose of medical purposes.
merely because he is a physician. The Court has held that
the section of the Act which prohibits the sale, distribution,
production of controlled substances.

The evidence at trial was undisputed that the
respondent was really no different from any other
drug pusher, and that he engaged in the sale of
of prescriptions for profit, without really caring
type of medical treatment, but his so-called patients
yet the Court of Appeals concluded that the respondent
was a doctor, like respondent, because he was a doctor.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-759, United States against Moore.

Mr. Friedman, you may proceed whenever you're ready.

ORAL ARGUMENT OF PAUL L. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court:

This case is here on a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

The question is whether a physician -- and it also applies to other practitioners, including pharmacies -- registered under the Controlled Substances Act to prescribe and dispense drugs for legitimate medical purposes is immune merely because he is so registered from prosecution under the section of the Act which prohibits the unlawful distribution of controlled substances.

The evidence at trial was overwhelming, that respondent was really no different from any street-corner drug pusher, and that he engaged in the indiscriminate sale of prescriptions for profit, without really providing any type of medical treatment for his so-called patients. And yet the Court of Appeals concluded that Congress intended to exempt someone like respondent, because he was a doctor, from

penalties applicable to other traffickers in narcotic drugs.

In reaching this conclusion, the District of Columbia Circuit stands alone, because the First Circuit, the Fifth Circuit, the Seventh Circuit, the Ninth Circuit and the Tenth Circuit, and we think by implication the Sixth Circuit, have concluded that Congress intended to doctors, pharmacies, hospitals, veterinarians and other practitioners who, after all, have the greatest access to drugs and the greatest opportunity to divert them, were to be treated the same as any other person when they trafficked in narcotics.

Briefly, the facts are that respondent was indicted at first on 639 counts, each involving a sale of a prescription, but he went to trial on 40 counts, 38 were presented to the jury and they convicted him on 22 counts.

The evidence at trial showed that methadone, which is the controlled substance involved in this case, is a synthetic narcotic drug, it's a morphine substitute, and it can be as physically and psychologically addictive as heroin can.

In fact, because it's cheaper and it's often more readily available than heroin, some heroin addicts use it as a substitute for heroin when they can't get heroin.

But, at the same time, under proper supervision and control, it can be very useful in the treatment of addicts, either through detoxification or maintenance.

Detoxification, which is what respondent said he was involved in here, involves giving the addict a large dose of methadone at first, in order to keep him free from withdrawal symptoms, and gradually reducing the dosage until he obtains -- attains abstinence from all drugs.

Maintenance, on the other hand, really substitutes methadone addiction for heroin addiction, a fixed dosage is given for an indefinite period of time.

Now, respondent had run a detoxification program in the District of Columbia in 1969, but he was ultimately arrested for violating the Harrison Narcotics Act, an Act that this Court said may be violated by physicians when they sell prescriptions or drugs indiscriminately and not for a legitimate medical purpose.

He promised at that time that in exchange for the dismissal of charges, he promised the Grand Jury that he would change his ways in the manner in which he conducted his program; that he would obtain medical histories from all of his patients; that he would conduct reasonably thorough physical examinations; that he would abide by the results of urinalysis, which can show whether or not there are narcotics in the bloodstream; that he would record the times and the amounts of the dosages of methadone given; and that he would either give the methadone at his clinic or he would prescribe only so much as necessary for a daily dosage.

At trial in this case he admitted that he did not follow these agreements.

In a five-and-one-half-month period, which is the time involved in the indictment here, from September 1, 1971 to February 11, 1972, it is true that respondent was registered under the Controlled Substances Act to conduct a methadone detoxification program. He did not give physical examinations to his so-called patients; he did not take urine samples under supervision; he ignored the results of his urine samples; and he did not give the methadone at his clinic and he did not prescribe only a daily dosage.

Rather, he sold prescriptions, and he charged, as our brief indicates and as the record clearly shows, depending upon the amount of tablets prescribed. If you got a 50-tablet prescription, you'd pay \$15; if you got a 75-tablet prescription, you'd pay \$25. For a 100-tablet prescription, you'd pay \$35. You could come back as often as you wanted to. Some of the witnesses testified they came back every day or every other day; a few came back on occasion more than once in a single day.

QUESTION: Did he fill the prescriptions himself?

MR. FRIEDMAN: No, what he did was he wrote out the prescription for whatever amount you wanted and you paid for the prescription. You then went to a drug store and had the prescription filled, and paid again for the druggist's fee.

There were three particular drug stores involved here, none of which were charged with any criminal offenses, but the 11,000 prescriptions filled in this period were all filled at these particular drug stores.

QUESTION: So his escalating rate for the difference in numbers in the prescription couldn't be attributed to the filling of the prescription by him.

MR. FRIEDMAN: That's right, it had nothing to do with the cost of the particular tablet. It was the cost of him writing 100 rather than 50 that was involved.

In five and a half months he sold prescriptions for 800,000 dolophine tablets, which is a form of methadone, and he took in over a quarter of a million dollars.

He gave no treatment --

QUESTION: Over what period?

MR. FRIEDMAN: A five-and-one-half-month period, from September of '71 to February of '72 when he was closed down.

QUESTION: How did that relate to the appearance before the Grand Jury?

MR. FRIEDMAN: The appearance before the Grand Jury was back in '69, when he promised to make -- to change his form of treatment, and for a time he apparently did, or at least was not detected if he did not.

And he did have a registration to engage in detoxifi-

cation, but then in '71 it came to the attention of the authorities that he was not following these promises; and, through the use of undercover agents and otherwise, they found that he was not doing any of the things that he promised that he would do. And so he was arrested, closed down, and indicted in these 639 counts.

There was some feeling, I gather, that -- back in '69, that because detoxification could be useful if properly run and supervised and controlled, that Dr. Moore should be given a chance to do it under proper conditions because he could make a contribution to the community, in helping addicts.

But, apparently, as the evidence showed at trial, that was not his desire or intention at all, because, less than two years later, he was --

QUESTION: Mr. Friedman, wasn't all that agreed to in the Court of Appeals?

MR. FRIEDMAN: All these facts? Absolutely, Mr. Justice Marshall.

QUESTION: I was wondering about the time he spent and all.

MR. FRIEDMAN: Well, I think it's important to put this in a proper factual context, and to show, really, how Congress could not possibly have intended that people that engage in this kind of egregious conduct should be exempt from

felony prosecution for distributing or selling narcotics. Congress was well aware of the potential for abuse, the dangers that treatment programs have, the fact that doctors are the largest source, doctors and pharmacies, of diversion of drugs into illicit channels.

And they could not possibly, in light of the opinions of this Court, have intended, without ever saying so, to have exempted physicians, because the law was clear at the time they enacted the Controlled Substances Act that physicians were covered by the old Harrison Narcotics Act, and we don't think that, given what Congress knew, they by their silence intended to exempt physicians.

QUESTION: Well, I gather the Court of Appeals conclusion was, admitting all these things that you say the doctor did, that, nevertheless, he couldn't be prosecuted for violation of this statute but for any, it would have to be for noncompliance with the provisions governing his registration under 822, wasn't that it?

MR. FRIEDMAN: Yes, well, --

QUESTION: I mean, isn't that essentially what the Court --

MR. FRIEDMAN: Essentially what the Court of Appeals said is that, that he could only be prosecuted under 842, or possibly 843, if he did things like -- that were covered by that statute. 842(a)(1) is what the Court of Appeals

particularly referred to, which is a statute which proscribes someone -- which makes it originally a civil penalty, unless you do it knowingly -- to distribute or dispense controlled substances without the prescription of 829.

Now, Judge MacKinnon, in his dissent, said that if you're not prescribing for legitimate medical purpose, then it's not really a prescription, and therefore you could be punished under 842(a)(1).

We're not so sure that it's not a prescription. It still looks like a prescription. A pharmacist sees it. He relies upon it. And he prescribes.

But perhaps more importantly than that, legislative history and the whole statutory scheme makes clear that 842 and to some extent 843 really intends to get at the kinds of technical violations of a registration scheme. And the anomaly is that if he writes a prescription, as Dr. Moore did, he may be punishable under 842(a)(1), but if he gives away drugs indiscriminately, the analogy or the contrast that Judge Lombard used in the Rosenberg case in the Ninth Circuit was if he stands on a street corner giving out drugs, or giving out prescriptions, he can't be prosecuted at all. But if he writes a piece of paper, which may or may not be for a legitimate medical purpose, he can be punished up to one year.

That doesn't make any sense. If he's really selling

drugs, and by selling prescriptions he's selling drugs, he ought to be treated like any other trafficker, like any other narcotics pusher, because he's really no better than that.

And we think that Congress intended that.

Now, very briefly, the way we read the statute, and we think the more logical way to read the statute is not to say that when 21 USC 841(a)(1) says "except as authorized by this subchapter" they intend to wholly exempt a whole class of people. What they are talking about is conduct that may be authorized by the subchapter.

Because they say that it shall be unlawful for any person to distribute or dispense a controlled substance, except as authorized by the subchapter.

Now, the kind of conduct involved is then defined by other provisions of the subchapter, beginning with section 822, which requires a registration. But the registration doesn't authorize a person so registered to do anything he wants to with the controlled substance, but, rather, he is permitted to dispense or distribute only to the extent authorized by his registration and in conformity with other provisions of the subchapter.

Now, the registration which Dr. Moxe had permitted him to dispense for detoxification. The evidence at trial showed that that's not what he was doing. He was not dispensing for any legitimate form of medical treatment.

But we don't rely solely on that, we rely on the "in conformity with other provisions of this subchapter" language, and the other provisions of the subchapter --

QUESTION: Mr. Friedman, you've given up the regulations?

MR. FRIEDMAN: Well, we have not given up the regulations. The way we view the regulations --

QUESTION: I didn't see it in your brief.

MR. FRIEDMAN: Well, it was in our reply brief, because we don't think that he was prosecuted or convicted for violating a regulation. We think that the regulation was used, really, as a helpful means for the prosecutor, on short notice, without any request for a bill of particulars, to explain to the Court exactly what its theory was, because 306.04(a) of the regulation defines a little more fully what is meant by "in the course of professional practice", which is for a legitimate medical purpose.

QUESTION: Then you haven't abandoned that?

MR. FRIEDMAN: We have not abandoned our reliance upon it as a useful way of describing what he did in violating the statute. We do not agree that it was used by the prosecutor to set out the criminal offense.

In other words, Mr. Bergan argues that one of the problems in this case is that respondent was convicted of violating a regulation. We say he wasn't convicted of violating

a regulation, he was convicted of violating a statute which by its terms explained what was authorized. The prosecutor used the regulation before the court, to explain more fully what the statute meant.

To the extent that he referred to 306.04(c), which referred to methadone maintenance, that described what Dr. Moore's particular registration permitted him to do and not to do. He was permitted to detoxify, not to maintain.

But, in point of fact, the theory at trial was that he did not engage in any bona fide medical practice. The experts said he didn't engage in a practice which was acceptable either for detoxification or maintenance. The lay testimony made clear to anybody listening to it that this was not legitimate medical practice for any purpose. And that, we say, is what the jury found, and that's a violation of 841.

QUESTION: Did he not rest his whole defense, or largely on the idea that that's the way he did it and that the statute speaks in terms of his practice, ---

MR. FRIEDMAN: That's exactly right.

QUESTION: --- and he says that's the way he does things, even though no one else does.

MR. FRIEDMAN: That's exactly right. And he relied on two textbooks, one of which he had taken out from the library the morning of the first day of trial, to support

this theory which no one else viewed as a legitimate form of medical practice.

He said at trial, and it's on Appendix page 113, that it was never his intention to maintain patients. "My intent was to detoxify patients and to get them completely off of all drugs. I never wanted to maintain patients on methadone. I wanted to make them completely drug free."

And so, to the extent that we relied on the regulation, there was no inconsistency, no prejudice to respondent, and yet his testimony at trial was what he did was he gave them as much as they wanted, to go out, fill themselves up with methadone, and a new theory of blockading, and then they would come back to him and say, "I am ready now to detoxify." That's the second stage, "I can't take any more methadone, I can't take any more heroin."

But when asked about the second stage, which would obviously be the crucial stage in that kind of so-called treatment, psychological counseling, there was none.

A typical visit lasted from 30 to 60 seconds. On one day he prescribed, he wrote 271 prescriptions, and he was asked how he could do that in a single day, how he could counsel, he said, "I either write very fast, or I talk very fast, and possibly both."

That's the kind of practice that was involved here.

And the statute, we think, by its terms, by its

definition of dispensing limited to a practitioner, by its definition of practitioner, which allows dispensing solely in the course of professional practice, which means for a legitimate medical purpose, Congress intended that this kind of drug trafficker should be covered by the felony provision which makes it unlawful to distribute or to sell.

QUESTION: Aren't you in a little -- aren't we embarking on kind of dubious grounds when we impose criminal, serious criminal liability based upon professional disagreements among physicians? This defendant was a physician, was he not?

MR. FRIEDMAN: Yes, he was.

QUESTION: And isn't it true that historically most, if not all, of the great breakthroughs and advances in medical science have been made by people who didn't follow the conventional way of doing things? They followed their -- a new way: their way.

And most of the conventional physicians of their day would have disagreed with them, that this isn't the way it's always been done. And if that's -- it bothers me that this kind of evidence could send a person to prison for -- how long is this man going -- many, many years. But, in any event, that that's the sort of evidence that is the basis for criminal liability.

This man was a physician, he wasn't a fraud.

MR. FRIEDMAN: No question he was a physician. And no question he was under registration.

QUESTION: And he had a new way of doing this, and he testified what that way was, and it may have been quite wrong, and it might ultimately turn out to be very, a very good way. But the fact that other physicians said that that wasn't their way should hardly make a criminal out of this person.

MR. FRIEDMAN: Well, except that Congress, when it wrote the Controlled Substances Act, was aware of that very kind of problem. There's some language in the legislative history that originally appeared in the Prettyman Commission Report that said that one of the problems with the Harrison Act was that we were allowing federal prosecutors to make judgments as to what is a legitimate medical practice, and that ought not to be.

And so, with the Controlled Substances Act, what Congress said in writing the Controlled Substances Act is "we agree". "But, on the other hand, drug abuse is too significant a problem to allow this kind of experimentation by just any physician. So what we're going to do is we're going to have a provision in this statute which allows the Secretary of Health, Education, and Welfare, rather than the Attorney General, to set out what kinds of things can be done."

If you want to try a new form of treatment, a new form of treatment that you want to experiment with, well, go to the Secretary of HEW and he'll give you special registration to do it under the statute. And he's run it by the Attorney General, but he'll make the judgment.

"Now, we don't like the idea," said Congress, "of having any official in the federal government defining what is and is not permissible, but better it should be the Secretary of HEW than the Attorney general." But it has to be somebody, it can't be left to the individual practitioner, because the potential for abuse is simply too great.

And so, in 21 USC 823(f) there was provision made for new kinds of research. If you went to the Secretary of HEW and said, "I want to try this kind of method instead."

And in the new Act, the Narcotic Addict Treatment Act of 1974, Congress took it upon itself to put some specifics into the law by saying that you could never prescribe for detoxification or maintenance, the implication of the regulation which was passed after the Narcotic Addict Treatment Act of 1974, is that it can only be given out in clinics, it cannot be prescribed to go to pharmacies.

So the Public Health Agency is given the authority under the Controlled Substances Act to set standards. If one complies with those standards, he obviously can't be prosecuted. That solves the problem that the Katzenbach

Commission -- I said the Prettyman Commission, I meant the Katzenbach Commission -- had noted. But --

QUESTION: That doesn't really solve it. That sort of an approach -- under that approach the world would still be flat, if Galileo had to go and get permission.

MR. FRIEDMAN: Well, it seems to us that the statute is talking about a problem of drug abuse and how to control it. It recognized that doctors, pharmacies are the greatest sources of the illegitimate distribution of narcotics. That's amply supported in the legislative history.

How does it deal with it? Does Congress set out what can and cannot be done? Congress said, "in the course of professional practice, for a legitimate medical purpose."

These are terms which this Court had no trouble with under the Harrison Act.

And on the evidence in this case -- and in fact, if you compare the facts of some of the early Harrison cases, Jin Fuey Moy and Webb, as opposed to Linder, which was the later case, and what was involved was four morphine tablets.

We think that under a definition of good-faith effort to treat, legitimate medical purpose, in the course of professional practice, judges and juries can make those kinds of judgments on the evidence before them. And the facts of this case are so blatant, so blatant, that no one could honestly believe that this man was engaged in legitimate

medical practice in the course of his professional practice.

And the fact that Congress has set up a mechanism to define what can and cannot be done, and there are ways to find out what you can and cannot do, helps to solve the problem.

Now, to the extent that it does not -- it may not permit every single kind of experimentation in a clinic program, as opposed to in the laboratory or on an experimental basis, we think it's legitimate for Congress to have made that judgment because of the tremendous potential for abuse and danger, and because of what we see in this case, of the addicts, methadone addicts who came into court and testified as to what Dr. Moore did to them, and how much worse off they were after they went into his program than when they started in his program. And that --

QUESTION: Well, Galileo went to jail, didn't he?

QUESTION: That's right.

MR. FRIEDMAN: I'm afraid --

QUESTION: That was my point.

MR. FRIEDMAN: Well, my history is not as good as it should be, and --

QUESTION: Well, he did.

QUESTION: Well, you know, why shouldn't this guy go to jail?

QUESTION: I never thought -- from subsequent

history -- that it was such a great thing that Galileo had gone to jail.

However, that's --

QUESTION: Galileo is not here.

QUESTION: Galileo is not in this case; he's not a party.

[Laughter.]

QUESTION: And Galileo didn't issue 271 prescriptions for drugs in one day, either.

MR. FRIEDMAN: No, he didn't.

QUESTION: I don't think he helps us very much, one way or the other.

MR. FRIEDMAN: Well, in any event, our position in brief is that Congress intended that people like respondent, who engage in the kind of conduct that respondent has engaged in, are covered by 841. But the technical provisions of the statute are really not enough, and the anomaly of relying solely on the technical provisions, as opposed to the provision for a drug trafficker, makes clear that Congress really intended that, as does the legislative history.

There's no indication in the legislative history, despite an obvious awareness of some of the problems we talked about, despite an awareness of what the law was under the Harrison Act, there's no indication that Congress intended to differentiate between practitioners on the one hand and

other drug traffickers on the other hand.

If they had wanted to change the prior law, we think they would have been much more explicit in doing so.

Indeed, their awareness of physicians being the primary source of diversion of drugs indicates just the contrary.

They intended to get the drug pusher, the drug trafficker, no matter who he was, and the statutory language, the scheme in the legislative history all support that.

We think that the Court of Appeals for the District of Columbia Circuit ignored the plain language of the statute and the legislative history, in concluding as it did. And we ask that its judgment be reversed, and the case remanded to that Court for the sole purpose of considering the problem relating to the sentencing.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Friedman.

Mr. Bergan.

ORAL ARGUMENT OF RAYMOND W. BERGAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BERGAN: Mr. Chief Justice, and may it please the Court:

The Assistant Solicitor General's essentially accurate, if somewhat lurid, account of the record, which was conceded by the respondent in the Court of Appeals, as it is

conceded in this Court, cannot be permitted to deter us from the very narrow scope of the decision of the Court of Appeals for the District of Columbia Circuit.

I'd like to focus on just what that narrow scope was for a moment, and the reason given by the Court of Appeals for its decision.

At the very first page of the prevailing opinion in the court below, Chief Judge Bazelon, writing for the majority of that court, after noting that they found section 841 inapplicable to the appellant, Dr. Moore, and reversed his conviction, wrote as follows:

"Our conclusion is reached by force of the established principle that when a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." And citing Universal C.I.T. and United States vs. Brown, cases from this Court a couple of decades ago.

The court then went on to --

QUESTION: Are you suggesting that he may not have known that the statute wasn't clear enough?

MR. BERGAN: No, I'm not suggesting --

QUESTION: He may not have known he was violating them?

MR. BERGAN: I'm suggesting that the statute itself is not only susceptible of and permits of the interpretation of the court below, but I suggest requires it, Mr. Chief Justice.

QUESTION: Well, do you relate that to how he acted on it? I'm trying to see whether you're relating that in some way to some vagueness.

MR. BERGAN: I'm having difficulty with your word "he". You mean Judge Bazelon or Dr. Moore?

QUESTION: Oh, no, no; Dr. Moore.

MR. BERGAN: First of all, let me preface by saying that I think no one, either the counsel who represented Dr. Moore in the trial court or those of us who represented him on appeal, are going to seek to justify what Dr. Moore did.

QUESTION: Well, all I'm driving at is just --

MR. BERGAN: The question is --

QUESTION: / -- was he misled by the statute? That's the only point. I'm not concerned about --

MR. BERGAN: Dr. Moore was not misled by the statute.

QUESTION: That's all I'm interested in.

MR. BERGAN: I'm not suggesting for a moment that Dr. Moore was misled by the statute. What I am suggesting, Mr. Chief Justice, is that the statute, particularly section 841 and the other provisions of that subchapter, does not

proscribe the conduct of which Dr. Moore was adjudged guilty, as criminal under section 841.

Now, it may proscribe it under section 842 or possibly under section 843. But it does not proscribe it under section 841.

And that is the narrow holding of the Court of Appeals for the District of Columbia Circuit.

QUESTION: Mr. Bergan, I gather there are four other circuits who reached the opposite conclusion, are there not?

MR. BERGAN: Mr. Justice Brennan, I think the number is six.

QUESTION: Oh, is it six now?

Well, I knew the First, Fifth, Tenth and Ninth are -- are there two more?

MR. BERGAN: I believe the Seventh Circuit has recently so held, and I'm unclear about the Sixth, but I believe that's the other one, Mr. Justice Stewart.

QUESTION: So that leaves the District of Columbia Circuit standing alone on this?

MR. BERGAN: The District of Columbia Circuit stands alone with a dissenting opinion from Judge Ely in the Ninth Circuit recently in the Rosenberg case, which was decided, oh, probably about the time that this Court granted certiorari in this case.

QUESTION: But I gather, the question as you see it

is the one you just -- before I asked my question -- whether or not the proscription limits a registered physician to whatever may be the penalties for violation of his registration?

MR. BERGAN: That's right, Mr. Justice Brennan, I think that's the precise issue. What does section 841 -- section 841(a) of the statute mean when it says "except as provided by this subchapter, it shall be unlawful for any person" and then we skip down to subsection (1), "to distribute a controlled substance" in a situation in which we have a licensed physician in the District of Columbia, who is registered by the Bureau of Narcotics and Dangerous Drugs to prescribe controlled substances, in this instance Schedule II narcotic, dolophine or methadone, as it's commonly called.

Judge Bazelon wrote in the court below, and we believe it to be the correct analysis of what the legislative history in this case looks toward, or leads to, that Congress in passing the Controlled Substances Act, aware of the Prettyman Commission and the Katzenbach Commission Reports, aware of the difficulties suggested by some of the cases which this Court had in the 1920's and the 1930's under the Harrison Act, the problems of physicians in allowing a lay prosecutor and a jury of laymen to determine what was, in effect, criminal or civil or proper medical practice, divided the drug universe -- if one may use that expression -- into

two sub-universes, if you wish: those registered to deal in drugs and those not so registered.

And, indeed, the House Committee Report precisely says that, and this is quoted at an early page of our brief in this Court, it's quoted at page 9:

"The bill" -- and that describes the bill which became the Controlled Substances Act -- "The bill provides for control by the Justice Department of problems related to drug abuse through registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain" -- that's doctors, pharmacists, those authorized to deal in narcotics --

QUESTION: Mr. Bergan, before you get to the legislative history, how do you, in the statute itself, discern this division into two universes, as you speak of them?

MR. BERGAN: Primarily, Mr. Justice Rehnquist, in the language of Section 841 --

QUESTION: That's 401 in U. S. Code?

MR. BERGAN: Mr. Justice, I'm sorry, I don't know. My friend says the answer to that is yes, but I'm using the references in the -- that were used in the opinion of the court below, and the ones that we have used in the brief.

The language of section 841, the "except as authorized" language, suggests, it seems to us, that when you read that subchapter, one has to read "except as authorized

by this subchapter" --

QUESTION: "By this title".

MR. BERGAN: Right. "By this title" -- in the original it was subchapter, but as it was codified it becomes that title.

You find in that title, in section 822(b), a provision for registration. Dr. Moore was of course concededly registered with the Bureau of Narcotics and Dangerous Drugs, as the agency was called at that time, at all times through the course of the conduct for which he was prosecuted, convicted, and sentenced.

Section 822(b) provides that "Persons registered by the Attorney General ... to dispense controlled substances" -- and I'm eliding a few words in this quote -- "are authorized to dispense such substances to the extent so authorized", I believe that's the precise language of section 822(b).

Now, he was authorized.

QUESTION: But doesn't 401(a) "except as authorized by this title, it shall be unlawful for any person", and then it proscribes a series of acts, doesn't that suggest that the exception is in terms of acts or conduct rather than in terms of persons?

MR. BERGAN: No, I think not, Mr. Justice Rehnquist. I think not for the reason that those acts -- and I take it you're referring to the provisions of subdivision (1) and

subdivision (2), manufacture, distribute, dispense.

QUESTION: Right. Right.

MR. BERGAN: That particular language.

Those are the acts which are covered by the classes of persons who are permitted to register to do those acts under the preceding sections of the statute. For example, section 822 picks up almost the same language, section 822(a) refers to annual registration: "Every person who manufactures, distributes, or dispenses any controlled substance or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance, shall annually obtain a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him."

QUESTION: Well, look at subsection (2) of 841, where it's made unlawful to "create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

Now, it's your position that doctors are authorized to distribute counterfeit substances?

MR. BERGAN: No, I -- there's no provision that I know of in the statute that would authorize the registration of physicians, or anyone else, pharmacists or manufacturers or whatever, to create, distribute or dispense counterfeit substances.

QUESTION: But they couldn't be prosecuted -- a

doctor couldn't be prosecuted under 841 (2) under your theory, even though he dispenses a counterfeit substance?

MR. BERGAN: No, I suggest that, Mr. Justice Rehnquist, perhaps I've not made my theory clear.

Let me put it this way. A doctor could not, under my theory, under our theory and as I think the Court of Appeals below held, a doctor could not be prosecuted under 841(a)(2), I believe is the precise --

QUESTION: What we're talking about now.

MR. BERGAN: -- the counterfeit substance situation.

QUESTION: Right.

MR. BERGAN: Could not be prosecuted under that for creating, distributing or dispensing a counterfeit substance, if he was authorized by another section of this title so to do. But he could not so be authorized.

QUESTION: But then it's conduct that you're talking about. It's authorization of conduct, not just the fact that the guy has an M.D. license.

MR. BERGAN: It's not the fact that he has an M.D. license, it's the fact that he is authorized by the Bureau of Narcotics and Dangerous Drugs to dispense certain narcotics. As he was in this case, authorized to dispense dolophine or all Schedule II narcotics, from what the record shows. I'm not sure that it shows it one way or the other.

QUESTION: Mr. Bergan, the statute would be more

closer to it if it instead referred to "any person", it referred to "any person other than a registrant", I suppose.

MR. BERGAN: I suggest that if the statute said that, Mr. Justice Blackmun, there would be no ambiguity, and the answer to your suggestion is yes, it would be more helpful to me if I said that. I wish that it said that. It doesn't, unfortunately.

But I believe that the manner in which the statute is written creates an ambiguity which requires a kind of liberalized -- if that's the correct word -- construction placed on it by Judge Bazelon for the reason that the earlier cases from this Court so hold, that before one can say that the Congress intended the more severe of two or more possible alternatives to result, they should have spoken so -- spoken to that with more clarity than they did in this case.

QUESTION: Suppose Dr. Moore, in his office, dispensed methadone at \$25 a shot? Would he be guilty?

Would he be an exception, because he's authorized?

MR. BERGAN: I'm sorry now, I'm not sure I understand your question.

QUESTION: Anybody off the street -- he's got a big sign out, "Methadone for sale", "Chief drug dispenser for this neighborhood, Dr. Moore."

MR. BERGAN: He's got a BNDD registration?

QUESTION: Yes.

MR. BERGAN: I suggest, Mr. Justice Marshall, that as long as that BNDD registration is in effect, the answer is to revoke that registration and then prosecute him if he keeps doing it. Because that is the dichotomy which I suggest that the Congress set up.

QUESTION: You mean Congress deliberately set that up?

MR. BERGAN: I believe that Congress --

QUESTION: Set that up that the doctor is the only one that can violate the law and sell a drug, and not violate this statute.

MR. BERGAN: No. No. It wouldn't -- it would apply to wholesalers, manufacturers, pharmacists, all others who are authorized or who can be authorized by Bureau of Narcotics and Dangerous Drugs registration to deal in narcotics.

QUESTION: You mean a wholesaler can sell a million dollars worth of methadone to the Mafia, and he can't be convicted?

MR. BERGAN: Now, I -- you put a case, Mr. Justice Marshall, that I've never focused on. I would --

QUESTION: Well, I'm only -- well, he sells a quarter of a million, which is what this case is about. You mean he couldn't be touched?

MR. BERGAN: I am not at all sure that I can answer that question. I'm not at all certain that he could be

touched under 841, as long as he had authorization. That authorization can be revoked. It could be revoked at the time. The means of revocation are now more easily set forth in the new Narcotic Addict Treatment Act. It's an annual registration.

QUESTION: So he just takes his quarter of a million and goes to Europe again.

QUESTION: Mr. Bergan, it seems to me that the -- you rest on the provisions of 841, which say "except as authorized"; and then 822(b) is headed "Authorized Activities", so you look for this -- under your theory, even under your theory you'd look to what the scope of the authorized activity was. And 822(b) says "to the extent authorized by their registration".

MR. BERGAN: That's correct.

QUESTION: Now, let's -- it seems to me we must then ask what did the registration authorize them to do? Right in the plain words of 822(b).

You wouldn't suggest that their registration, just on its face, authorized them to sell methadone without a prescription, for example?

MR. BERGAN: Obviously it's not a willy-nilly authorization.

QUESTION: Well, then, it seems to me the "except as authorized" language of 841 doesn't help you at all, if you

do something in selling methadone that isn't authorized by your registration.

MR. BERGAN: But my registration, or Dr. Moore's registration in this case authorized him to dispense methadone. That was the limitation of it, sir.

QUESTION: Oh, it authorized him to dispense methadone. In some way other than by prescription?

MR. BERGAN: Oh, no; by prescription.

Well, I suppose that --

QUESTION: Well, let's take Mr. Justice Marshall's example.

MR. BERGAN: Yes.

QUESTION: Assume he just sold methadone other than by prescription. Now, that was not authorized by his registration, was it?

MR. BERGAN: Assuming his registration was limited to "by prescription", that would not be authorized. He would be outside the authorized chain.

QUESTION: Well, then, he could be prosecuted under 841, even under your theory?

MR. BERGAN: Because he was not authorized to do what he then did.

QUESTION: All right. Then that's the answer to Mr. Justice White is that he just wasn't authorized to do that.

MR. BERGAN: Well, if that's the situation, yes.

It's "to the extent so authorized".

QUESTION: Well, let's take the situation where he gives prescriptions, but he just doesn't purport to act like a doctor.

Now, I suppose his registration assumes that he's going to act like a doctor. He's authorized as a physician to practice medicine and to dispense methadone in connection with his practice of medicine.

MR. BERGAN: One must be a physician to be -- to have the type of authorization which Dr. Moore had. I would assume that --

QUESTION: At least the government is contending, I gather, that he just acted outside the scope of ordinary conduct of a physician.

MR. BERGAN: I think that's the heart and soul of the government's contention.

QUESTION: And therefore is no more covered by the exception in 841 than would be selling without a prescription.

MR. BERGAN: Well, I believe that's what their case comes down to, Mr. Justice White.

QUESTION: But you apparently agree that he could be reached under 841 if he sold without a prescription?

MR. BERGAN: Yes, on the assumption that his -- let's take an easy example, if he went out to the playground at Central High School and sold methadone, then the answer to

your question would be yes. The extent of his registration was to prescribe and dispense controlled substances in that way, and he was then acting outside the scope of his registration, and he doesn't fall within the "except as otherwise authorized" language of section 841.

QUESTION: Mr. Bergan, on this question of what a doctor can do, I suppose, hypothetically, you'd agree that -- or perhaps you wouldn't -- that the old practice of bleeding patients, which was done 150 to 200 years ago, is -- let's assume it's no longer accepted medical practice, I suppose that's so.

MR. BERGAN: I think we can assume that together, I wouldn't take that type of case.

QUESTION: I suppose because I don't know, but suppose a doctor just simply took his, some kind of a knife and cut one of his patients' arteries, and then just went out to play golf and let the patient die on the place where he'd left him, do you suppose that some suggestion that this was his medical practice, his way of treating patients, would help him on a manslaughter case?

MR. BERGAN: I think not at all. I think the case you have put, Mr. Chief Justice, would be a classic manslaughter situation.

QUESTION: Now, undoubtedly, in such a case, the prosecution would bring in physicians who would testify that

that was not accepted practice, presumably -- or let's assume, in defense he'd bring in some kind of textbook material or some expert evidence that this was a new idea, and that it might be coming back again, the bleeding process. And then the jury would decide that question.

How does that differ, in terms of what was submitted to the jury here?

MR. BERGAN: I think it differs markedly, Mr. Chief Justice.

First of all, let me say to you that, as we have developed in the brief, and as was developed at some minor extent by the opinion in the court below, not to any great extent -- because it wasn't necessary to reach that point -- this kind of a situation, the kind of a situation with which we're dealing here, section 841 of the Controlled Substances Act ought not to depend upon conflicting medical opinions as to what is or what is not valid.

A fellow ought not to be -- and I suggest that the statute does not permit a fellow to be -- prosecuted, convicted, sentenced to a long period of incarceration, -- And the answer to your question, Mr. Justice Stewart, is that it was 45 years -- because of conduct which is subject to conflicting views among physicians.

Now, we're dealing in an area, and the Congress has been wrestling with this area for several decades, and

that's the area of narcotics. The Schedule I narcotic, for example, no one would dispute; that's heroin and others which have no real medical value. And the Congress has, in this statute and in others, in effect said: Thou shalt not use it.

The Schedule II, Schedule III and Schedule IV -- and they go down in order of difficulty to handle -- are narcotics as to which all persons would perhaps say, as to some, that there is some legitimate medical value; perhaps fewer persons would say, as to some of them, that there is greater or less legitimate medical value.

That's why I suggest -- and this is laid out at some length in the Prettyman Report; it has troubled this Court from time to time over the last 35 or 40 years, beginning with a case which I regret that I can never pronounce, Jin Fuey Moy, I believe is the case, and leading up to Linder perhaps even more recently. It's laid out in the Prettyman Report and the Katzenbach Report, and that's why I suggest that in this particular statute, as the Congress itself said, as the House Report itself says, the world of the drug universe is divided into those registered to do certain things, and those who are not registered to do certain things.

We deal more harshly with the ones who are not registered to do these things, because they are outside the chain where we can keep an eye on them and see what they do. And revoke their registration, or refuse to re-register them.

Moy
g...

Pardon me, sir?

QUESTION: Even though section 841 refers to "any person"?

MR. BERGAN: Yes. Yes.

QUESTION: So that, in effect, you are saying -- and I guess I am trying to be facetious, but a physician is not "a person" within the meaning of that section.

MR. BERGAN: No. I'm not saying that.

What I am saying is that when that section goes on to say, Mr. Justice Blackmun, "except as authorized by this subchapter" or "by this title", as Mr. Justice Rehnquist indicated, --

QUESTION: Well, Mr. Bergan, even though everything you have said certainly is -- was the subject of congressional concern, so also, was there not, a concern that among the worst abusers in the drug traffic field were physicians.

MR. BERGAN: There was that concern. It was expressed by the Congress in the passage of this very Act. And having so been expressed, the Congress then went on, I suggest, Mr. Justice Brennan, to divide the world of those who deal with drugs into those who do so under the watchful eye of the Bureau of Narcotics and Dangerous Drugs -- or now the Drug Enforcement --

QUESTION: But who do it, I suppose Congress must have thought, consistently with the authorization they have to

do it.

MR. BERGAN: And the authorization, if Your Honor please, in this instance was to dispense, by means of prescription, a Schedule II narcotic.

QUESTION: Do you think there's any significance, Mr. Bergan, in the fact that 841 is entitled "Prohibited Acts"?

MR. BERGAN: No, I don't find any significance in the title. It's been a long time, Mr. Chief Justice, since I dealt with codified statutes, but those titles are normally put in by the codifier, and it's clear that it does in fact deal with -- let me come directly to the question which you're asking, it does deal with prohibited acts.

It does deal with prohibited acts, and if this man was operating beyond his registration, as, for example, going across to the front steps of the Capitol and handing out heroin, the fact that he was registered with the Bureau of Narcotics and Dangerous Drugs to do something else, the fact that he was a physician would not immunize him from prosecution.

In this case, however, because he was registered to do what he did, the remedy was twofold, together or one at a time.

Deregistration or refusal to register on an annual basis, when he came for re-registration, and/or prosecution under 842 or 843 of the statute, for the various things which registrants are precluded from doing.

QUESTION: Well, let me ask you, do you think that he was -- do you think 842 or 843 would proscribe the conduct for which he was prosecuted in this case?

MR. BERGAN: Yes, I think it could, Mr. Justice White.

QUESTION: You think the government is wrong in saying that unless he's liable under 841, he isn't liable at all for the specific conduct that -- for which he was convicted in this case?

MR. BERGAN: Oh, I'm not terribly sure that the government is taking that position. It may be that -- I'm just not sure that that is the position they're taking.

For example, though, section 842 makes it criminal to fail to keep records, and it defines the types of records which were required to be kept.

The evidence in the court below was certainly susceptible of the -- of a finding, if a section 842 charge had been made and submitted to the jury, that adequate records were not kept, one could --

QUESTION: But, Mr. Bergan, he did more than that. He did more than just not keep records.

MR. BERGAN: I quite agree, Mr. Justice Marshall, but he did not do more which the Congress said he could be prosecuted for.

QUESTION: You mean if he had sold, himself, a

quarter of a million dollars' worth of methadone to anybody in the world, in his office, he couldn't be prosecuted?

MR. BERGAN: That's what he was -- if that's what he was authorized by BNDD to do, Mr. Justice Marshall, then I would answer that question: He could not be prosecuted under 841(a).

QUESTION: Well, what statute authorized him to dispense methadone to anybody under any circumstances?

MR. BERGAN: His registration by the Attorney General of the United States, pursuant to section 822(b) of the statute, authorized him to dispense or prescribe methadone without limitation.

Now, that --

QUESTION: In my case it wasn't that he prescribed, he just sold it.

MR. BERGAN: Now, he prescribed methadone.

QUESTION: Well, I said assuming he just sold it. You said it would be the same.

MR. BERGAN: Oh, I'm sorry, I misinterpreted your question, then.

QUESTION: Oh, so if the people come in and he says, "Here, I'll sell you \$35 worth of methadone", he violates the statute. The same doctor, with the same registration. Right?

MR. BERGAN: If he sold it without the prescription, and if his authorization was to prescribe --

QUESTION: No, no. He's got the same authorization he's got now.

MR. BERGAN: All right. And he --

QUESTION: And a man comes in and says, "I'd like to buy some methadone for 35 bucks." And he says, "Okay, here's \$35 worth of methadone."

Did he or did he not violate the statute?

MR. BERGAN: That's a different case than we have, Mr. Justice Marshall, --

QUESTION: Of course it is.

MR. BERGAN: -- but the answer to your question, I think very candidly, is yes, the government would have a better case of prosecuting that particular person --

QUESTION: Would he have a good case -- he could be prosecuted.

MR. BERGAN: The government would have a better case of prosecuting him under section 841. It would depend, sir, --

QUESTION: Well, if the man comes in and says, "I want \$35 worth of methadone", and he says, "I can't give you the methadone, but here's a prescription"; that's it. He's good. He can't be prosecuted.

MR. BERGAN: One would have to examine the particular facts of that case, but, as you put the case, if he is authorized by BNDD so to do, he could not be prosecuted under 841.

Now, it would depend, sir, it would depend upon the precise limits of his authorization. But in this case the authorization --

QUESTION: Well, do doctors have different authorizations? They all have the exact same authorization.

MR. BERGAN: I'm not sure of that, Mr. Justice Marshall; I don't know the answer to that.

I don't know whether authorization -- well, the answer is yes, some of them do differ. For example, there are clinical investigative authorizations, which require that the --

QUESTION: I said a medical doctor.

MR. BERGAN: I'm talking of the medical doctor, sir.

QUESTION: If he practices as a physician, you mean each physician has a different authorization?

MR. BERGAN: No. I don't mean that each has a different authorization.

QUESTION: I hope you don't.

MR. BERGAN: But there are differing types of authorizations. For example, physicians may be authorized to conduct clinical programs in their offices, and that authorization, even back at the time here in question -- frequently --

QUESTION: Mine is the one that Dr. Moore had.

MR. BERGAN: Right. My answer to your question is

the same, sir, that the question that you pose, that doctor who sold, did not prescribe, could be subject to prosecution under 841.

QUESTION: Mr. Bergan, you're not seeking to uphold the reasoning of the Court of Appeals here, are you? Your argument doesn't track that of the Court of Appeals.

MR. BERGAN: Doesn't track it directly, Mr. Justice Rehnquist, I think it parallels it.

But --

QUESTION: Well, the Court of Appeals, in effect, said that if you were a registrant, you couldn't be prosecuted under 841. And you're saying that if you're a registrant, you might be prosecuted under 841, if you exceed the authority conferred by your registration.

MR. BERGAN: If you act outside your registration.

I'm not really sure we're saying anything differently, but that's what I'm saying. If you act beyond your registration.

QUESTION: Well, the Court of Appeals spoke much more broadly than you're speaking.

MR. BERGAN: Well, they painted with a very broad brush. I certainly have to concede that, Mr. Justice White. Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Bergan.

Do you have anything further, Mr. Friedman?

REBUTTAL ARGUMENT OF PAUL L. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FRIEDMAN: Just two quick comments.

Mr. Bergan's main point, I think, was that administrative controls ought to be used instead of criminal prosecution. I think it bears emphasizing, that under 823(f) all doctors must be registered if they are licensed to practice medicine. So it's not that it's a discretionary thing to deny them their registration.

And that there are only three reasons for revoking registrations prior to the Narcotic Addict Treatment Act of 1974; that is, that a registrant has materially falsified an application, that he's been convicted of a felony, and that he's had a State license or registration suspended, revoked or denied.

It seems to --

QUESTION: Well, does the government suggest how prosecutors are to know what registrants may be prosecuted under 841 and what registrants may not?

MR. FRIEDMAN: I'm not sure I understand.

QUESTION: Well, I gather your position here is that this one is so beyond the pale of the registration that clearly he may be prosecuted under 841.

Well now, there must be any number of cases of registrants whose conduct may not go this far.

MR. FRIEDMAN: I'm sure there are.

QUESTION: Well, how is the line to be drawn?

MR. FRIEDMAN: I think you have to look at the evidence of the case, in each case. And if you look at the evidence in the cases that are now pending on cert in this court, the Rosenberg case and the Green case and the P. Mang [?] Lou case, you will find that in each case it's completely blatant, that the undercover agents, where they were --

QUESTION: Well, is that the test, whether it's completely blatant?

MR. FRIEDMAN: Well, there's no legitimate medical purpose is the test. Outside the course of professional practice.

QUESTION: Well, you're not -- but, on your theory of the relationship between 841 and 822, it seems to me that you could just as well argue that any violation of the provisions regulating a registrant would be reachable under 841.

MR. FRIEDMAN: Well, there --

QUESTION: Any one.

But you don't suggest that.

MR. FRIEDMAN: No. There are two --

QUESTION: Did you mean you don't suggest that?

MR. FRIEDMAN: Yes.

QUESTION: You're representing the government does

not suggest that.

MR. FRIEDMAN: Yes.

QUESTION: That for some violations of their registration, they may not be prosecuted under 841.

MR. FRIEDMAN: They are permitted to dispense --

QUESTION: No. My question is whether for some violations registrants may nevertheless not be prosecuted under 841.

MR. FRIEDMAN: It's a technical and formal violation of their registration, they are liable under 842 and 843.

QUESTION: What's a technical and formal violation?

MR. FRIEDMAN: Well, Congress set it out in the legislative history. There are certain things that are technical violations: not using an order form; not using a prescription. In those kinds of things there are lesser penalties. One year --

QUESTION: Not using a prescription?

MR. FRIEDMAN: Let me give the exact language.

QUESTION: Your colleague suggested that if he doesn't dispense with a prescription, he can be reached under 841.

MR. FRIEDMAN: 842(a)(1) says that you are subject to a one-year penalty if you distribute or dispense in violation of 829; and 829 requires that you cannot dispense without

the written prescription.

QUESTION: You would say that is a technical violation. And if you just put out a sign and just started selling --

MR. FRIEDMAN: No. No. Because then it's not for any legitimate medical purpose in the course of professional practice.

QUESTION: That adds another criteria.

MR. FRIEDMAN: Well, it's in the statute.

But that's in the statute.

What we're saying is that the statute has two requirements, that what is authorized under 841 is what is authorized to the extent authorized by your registration. And some registrations permit you to detoxify, some registrations permit you to do other things, some registrations say you can use methadone but you can't use other forms of drugs.

And, secondly, you may only -- the only authorized activities are those which are in conformity with other provisions of the subchapter.

Now, the other provisions of the subchapter use the language, "In the course of professional practice" and "for a legitimate medical purpose".

When what you're doing is not "in the course of professional practice" and "not for a legitimate medical

purpose", then we say you clearly violate 841. And that gets, I think, to Mr. Justice Marshall's hypothetical of someone who sets up a sign and sells methadone and gives no treatment of any kind --

QUESTION: You say this is no worse -- no tougher test on the physicians than just the ordinary law in any kind of practice. He's going to be subject to some kind of liability, unless he uses or conforms to ordinary standards of medical practice.

MR. FRIEDMAN: I think that's right.

QUESTION: Well, civil liability is one thing, and 45 years in the penitentiary is something a little different.

Civil liability for negligence or malpractice --

MR. FRIEDMAN: Yes, but we're not talking about negligence or malpractice.

QUESTION: Well, that's what Justice White, I think, was talking about. Maybe I misunderstood him.

QUESTION: Well, that's the standard you're suggesting, though, in these other provisions, if for no legitimate medical purpose.

MR. FRIEDMAN: That's right. That's what the regulations say, that's what the statute says. And that's what the decisions of this Court say.

But we've been able to distinguish what is legitimate and what is not legitimate and what is within the scope of

legitimacy, and what is so far beyond the pale, that under no interpretation could it be considered legitimate medical practice or in the course of professional practice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bergan, thank you, Mr. Friedman.

The case is submitted.

[Whereupon, at 11:54 o'clock, a.m., the case in the above-entitled matter was submitted.]

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