The Burger Court Opinion Writing Database

United States v. Vuitch

402 U.S. 62 (1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 24, 1971

No. 84 - United States v. Vuitch

Dear Hugo:

Your opinion in the above case accords with my vote and view and I join.

I follow a policy of mentioning the name of a Judge when he is affirmed but discreetly referring to "the District Judge" when he is not.

Gesell is a very superior Judge and he will be unhappy enough about reversal without being given unwanted "immortality" in the U.S. Reports!

Regards,

WEB

Mr. Justice Black

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Black, J.

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, *v.* Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[February —, 1971]

Mr. Justice Black delivered the opinion of the Court.

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, District Judge Gesell granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, requesting the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction, that the statute is not unconstitutionally vague, and we reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the District of Columbia. That Act[1] gives us jurisdiction

[1] The Act states:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[February —, 1971]

Mr. Justice Black delivered the opinion of the Court.

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, District Judge Gesell granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the District of Columbia. That Act [1] gives us jurisdiction

[1] The Act states in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision

P 8, 9

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 84.—October Term, 1970

Recirculated: FEB 1971

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[March —, 1971]

Mr. Justice Black delivered the opinion of the Court.

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, District Judge Gesell granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the District of Columbia. That Act [1] gives us jurisdiction

[1] The Act states in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[March —, 1971]

Mr. Justice Black delivered the opinion of the Court.

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, the district judge granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the District of Columbia. That Act[1] gives us jurisdiction

[1] The Act states in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Black, J.

Circulated:

Recirculated: MAR 31 1971

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Black delivered the opinion of the Court.

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, the district judge granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the District of Columbia. That Act[1] gives us jurisdiction

[1] The Act states in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision

To: The Chief Justice
Mr. Justice
Mr. Justice
Mr. J
Mr. J

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

APR 14 1971

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Black announced the judgment of the Court and delivered an opinion in which The Chief Justice and Mr. Justice White join.

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, the district judge granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We would hold that we have jurisdiction and that the statute is not unconstitutionally vague. Therefore, we would reverse. Mr. Justice Douglas and Mr. Justice Stewart agree with us on the jurisdictional issue, and therefore it is the decision of the Court that we have jurisdiction over this appeal. Given this decision on jurisdiction, Mr. Justice Harlan and Mr. Justice Blackmun agree that the statute is not unconstitutionally vague. Therefore it is the judgment of the Court that the decision below is reversed.

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Black delivered the opinion of the Court.

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, the district judge granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the District of Columbia. That Act [1] gives us jurisdiction

[1] The Act states in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision

P 1 and
minor stylistic
changes

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

8th DRAFT From: Black, J.

Circulated:

Recirculated: APR 16 1971

SUPREME COURT OF THE UNITED STATES

No. 84.—OCTOBER TERM, 1970

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

MR. JUSTICE BLACK delivered the opinion of the Court.*

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, the district judge granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DCDC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the

*THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join in Part I of this opinion. THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN join in Part II of this opinion.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

From: Douglas, J.

2/19/71

Circulated: _____

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[February —, 1971]

Mr. Justice Douglas, dissenting in part.

While I agree that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physcian to perform an abortion "unless the same were done as necessary for the preservation of the mother's life or health." 22 D. C. Code 201.

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. Yet once the physician has made his decision, what will the jury say? The prejudices of jurors are customarily taken care of by challenges for cause and by preemptory challenges. But vagueness of criminal statutes introduces another element that is uncontrollable. Are the concepts so vague that possible offenders have no

Rehnquist
No. 4
2-12

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[February —, 1971]

Mr. Justice Douglas, dissenting in part.

While I agree that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physcian to perform an abortion "unless the same were done as necessary for the preservation of the mother's life or health." 22 D. C. Code 201.

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. Yet once the physician has made his decision, what will the jury say? The prejudices of jurors are customarily taken care of by challenges for cause and by preemptory challenges. But vagueness of criminal statutes introduces another element that is uncontrollable. Are the concepts so vague that possible offenders have no

WD

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

4th DRAFT

From: Douglas, J.

Circulated: _____

Recirculated: 2-22

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[February —, 1971]

Mr. Justice Douglas, dissenting in part.

While I agree that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physcian to perform an abortion "unless the same were done as necessary for the preservation of the mother's life or health." 22 D. C. Code 201.

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. Yet once the physician has made his decision, what will the jury say? The prejudices of jurors are customarily taken care of by challenges for cause and by preemptory challenges. But vagueness of criminal statutes introduces another element that is uncontrollable. Are the concepts so vague that possible offenders have no

3-5

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

2/23/71

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[March —, 1971]

Mr. Justice Douglas, dissenting in part.

While I agree that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physcian to perform an abortion "unless the same were done as necessary for the preservation of the mother's life or health." 22 D. C. Code 201.

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. Yet once the physician has made his decision, what will the jury say? The prejudices of jurors are customarily taken care of by challenges for cause and by preemptory challenges. But vagueness of criminal stat-

Changes throughout

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

6th DRAFT

From: Douglas, J.

Circulated: 3/10/71

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[March —, 1971]

Mr. Justice Douglas, dissenting in part.

While I agree that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physcian to perform an abortion "unless the same were done as necessary for the preservation of the mother's life or health." 22 D. C. Code 201.

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. If we could read the Act as making that determination conclusive, not subject to review by judge and by jury, the case would be simple, as Mr. Justice Stewart points out. But that does such violence to the statutory

1/5/6

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

7th DRAFT

From: Douglas, J.

Circulated: 4/13/71

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Douglas, dissenting in part.

While I agree that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physcian to perform an abortion "unless the same were done as necessary for the preservation of the mother's life or health." 22 D. C. Code 201.

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. If we could read the Act as making that determination conclusive, not subject to review by judge and by jury, the case would be simple, as Mr. Justice Stewart points out. But that does such violence to the statutory

April 15, 1971

Dear Hugo:

In No. 84 - U. S. v. Vuitch, the first line of my opinion says "While I agree that we have jurisdiction over this appeal" etc. Your most recent circulation indicates that you have only a judgment of the Court. But to help you get an opinion of the Court, I am changing my first sentence to read "While I agree with Part I of the Court's opinion that we have jurisdiction over this appeal" etc.

The fact that you have one group on your side on Part I and another group on your side on Part II does not mean that you do not have an opinion of the Court. Anyway, if the phraseology in my earlier draft was bothersome, this clears it up.

William O. Douglas

Mr. Justice Black

WD admin

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

Circulated: JAN 14 1971

Recirculated:

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[January —, 1971]

Memorandum of Mr. Justice Harlan.

I have tentatively come to the conclusion that we lack jurisdiction over this direct appeal for the reason that a local D. C. statute cannot be said to qualify as a "statute" within the meaning of 18 U. S. C. § 3731, in light of the purpose of the latter enactment. The Government could have appealed the dismissal of the indictment to the Court of Appeals of the District of Columbia under 23 D. C. Code § 105. The latter statute was passed in 1901, prior to the enactment of the Criminal Appeals Act in 1907. The purpose of the Criminal Appeals Act was to establish for the Government—within the substantive category of cases listed in the statute—the right of appeal that previously existed within the District of Columbia. See the Government's Brief, at 11; *Carroll* v. *United States,* 354 U. S. 394, 411 (1957). That purpose can be fully served by construing the term "statute" as used in the Act of 1907 as excluding statutes for which Congress had already provided a perfectly adequate appellate route.

This process of construction is not foreclosed by *Shapiro* v. *Thompson,* 394 U. S. 618, 625 n. 4 (1969). In the latter case we opted for a literal reading of the language "any Act of Congress" as including local D. C. statutes. In doing so, however, the Court expressly said, "We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia." In the context of

February 18, 1971

MEMORANDUM TO THE CONFERENCE

Re: No. 84 - U.S. v. Vuitch

Dear Brethren:

In due course, I intend to circulate an opinion expressing the view that this case should be dismissed for want of jurisdiction.

Sincerely,

J. M. H.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: MAR 26 1971

No. 84.—October Term, 1970

Recirculated: _____

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[March —, 1971]

Mr. Justice Harlan, dissenting.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of 22 D. C. Code 201, the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U. S. C. § 3731, relying on the provision allowing direct appeal "from a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded." [1] It is not contested that, but for this pro-

[1] The text of 18 U. S. C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 84.—October Term, 1970

Recirculated: MAR 29 1971

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Harlan, with whom Mr. Justice Blackmun joins, dissenting.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of 22 D. C. Code 201, the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U. S. C. § 3731, relying on the provision allowing direct appeal "from a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."[1] It is not contested that, but for this pro-

[1] The text of 18 U. S. C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

No. 84.—October Term, 1970

Circulated: MAR 30 1971

Recirculated:

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Harlan, with whom Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun join, dissenting.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of 22 D. C. Code 201, the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U. S. C. § 3731, relying on the provision allowing direct appeal "from a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."[1] It is not contested that, but for this pro-

[1] The text of 18 U. S. C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States

8, 14-15

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

4th DRAFT

From: Harlan, J.

Circulated: _____

Recirculated: APR 5 1971

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, *v.* Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Harlan, with whom Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun join, dissenting.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of 22 D. C. Code 201, the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U. S. C. § 3731, relying on the provision allowing direct appeal "from a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."[1] It is not contested that, but for this provision of the Criminal Appeals Act, the Government would have a right of appeal to the Court of Appeals for

[1] The text of 18 U. S. C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based

April 14, 1971

Re: No. 84 - United States v. Vuitch

Dear Hugo:

Having read Brother Blackmun's separate opinion in which he reaches the merits despite his agreement with my view that the Court lacks jurisdiction over this direct appeal, I have decided to follow the same course. To that end I propose to add a part VI to my opinion reading as follows:

VI

> Notwithstanding the views on jurisdiction expressed above, and speaking only for myself, and not for those of my Brethren who agree with my discussion of the jurisdictional issue in this case, I have concluded, substantially for the reasons set forth in Mr. Justice Blackmun's separate opinion, that I should also reach the merits. Accordingly, I concur in part II of the Court's opinion and the judgment of the Court.

However, I do have one trouble with part II of your opinion. This concerns the first sentence and the last two sentences in footnote 7, which seem to me to intimate a view on the merits of the so-called Griswold issue, which in the text of your opinion you expressly do not decide. If you will omit these three sentences of the footnote, I would be prepared to join your opinion as indicated in my new part VI. Otherwise I would feel obliged to revise my part VI so as simply to concur in the judgment.

Sincerely,

J.M.H.

Mr. Justice Black
CC: The Conference

14, 16

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

5th DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: APR 15 1971

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Harlan, with whom Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun join, dissenting.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of 22 D. C. Code 201, the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U. S. C. § 3731, relying on the provision allowing direct appeal "from a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded." [1] It is not contested that, but for this provision of the Criminal Appeals Act, the Government would have a right of appeal to the Court of Appeals for

[1] The text of 18 U. S. C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based

14
5th list c

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Harlan, with whom Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun join, dissenting as to jurisdiction.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of 22 D. C. Code 201, the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U. S. C. § 3731, relying on the provision allowing direct appeal "[f]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded." [1] It is not contested that, but for this provision of the Criminal Appeals Act, the Government would have a right of appeal to the Court of

[1] The text of 18 U. S. C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 29, 1971

RE: No. 84 - United States v. Vuitch

Dear John:

Please join me in your dissenting opinion in the above.

Sincerely,

W. J. B. Jr.

Mr. Justice Harlan

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Stewart, J.

Circulated: MAR 8 1971

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[March —, 1971]

Mr. Justice Stewart, dissenting in part.

Agreeing that we have jurisdiction of this appeal, I share at least some of the constitutional doubts about the abortion statute expressed by the District Court. But, as this Court today correctly points out, "statutes should be construed whenever possible so as to uphold their constitutionality." The statute before us can be so construed, I think, simply by extending the reasoning of the Court's opinion to its logical conclusion.

The statute legalizes any abortion performed "under the direction of a competent licensed practitioner of medicine" if "necessary for the preservation of the mother's life or health." Under the statute, therefore, the legal practice of medicine in the District of Columbia includes the performing of abortions. For the practice of medicine consists of doing those things which, in the judgment of a physician, are necessary to preserve a patient's life or health. As the Court says, "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."

It follows, I think, that when a physician has exercised his judgment in favor of performing an abortion, he has, by hypothesis, not violated the statute. To put it another way, I think the question of whether the performance of an abortion is "necessary for the mother's life

p. 1

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

From: Stewart, J.

Circulated:

Recirculated: MAR 31 19

United States, Appellant,
v.
Milan Vuitch.

On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Stewart, dissenting in part.

I agree that we have jurisdiction of this appeal for the reasons stated in Part I of the Court's opinion.

As to the merits of this controversy, I share at least some of the constitutional doubts about the abortion statute expressed by the District Court. But, as this Court today correctly points out, "statutes should be construed whenever possible so as to uphold their constitutionality." The statute before us can be so construed, I think, simply by extending the reasoning of the Court's opinion to its logical conclusion.

The statute legalizes any abortion performed "under the direction of a competent licensed practitioner of medicine" if "necessary for the preservation of the mother's life or health." Under the statute, therefore, the legal practice of medicine in the District of Columbia includes the performing of abortions. For the practice of medicine consists of doing those things which, in the judgment of a physician, are necessary to preserve a patient's life or health. As the Court says, "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."

It follows, I think, that when a physician has exercised his judgment in favor of performing an abortion, he has, by hypothesis, not violated the statute. To put it an-

WO

Supreme Court of the United States

Memorandum

1970, 19

1970
#84

Hugo -

I dissent in

Vnitch

P. S.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: White, J.

Circulated: 3-25-71

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for The District of Columbia.

[March —, 1971]

Mr. Justice White, concurring.

I join the Court's opinion and judgment. As to the facial vagueness argument, I have these few additional words. This case comes to us unilluminated by facts or record. The District Court's holding that the District of Columbia statute is unconstitutionally vague on its face because it proscribes all abortions except those necessary for the preservation of the mother's life or health was a judgment that the average person could not understand which abortions were permitted and which were prohibited. But surely the statute puts everyone on adequate notice that the health of the mother, whatever that phrase means, was the governing standard. It should also be absolutely clear that a doctor is not free to perform abortions on request without considering whether the patient's health required it. No one of average intelligence could believe that under this statute abortions not dictated by health considerations are legal. Thus even if the "health" standard were unconstitutionally vague, which I agree is not the case, the statute is not void on its face since it reaches a class of cases in which the meaning of "health" is irrelevant and no possible vagueness problem could arise. We do not, of course, know whether this is one of those cases. Until we do facial vagueness claims must fail. Cf. *United States* v. *National Dairy Corp.*, 372 U. S. 29 (1963).

(3)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 25, 1971

Re: No. 84 - United States v. Vuitch

Dear Hugo:

Please join me.

Sincerely,

T.M.

Mr. Justice Black

cc: The Conference

TM

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 29, 1971

No. 84 - United States - v. Vuitch

Dear John:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Harlan

cc: The Conference

February 26, 1971

Re: No. 84 - United States v. Vuitch

Dear Hugo:

The jurisdictional issue bothers me somewhat, and I would like to defer my vote in this matter until I have seen the opinion which Mr. Justice Harlan is preparing. On the merits, I am in full agreement with your conclusion.

I still feel that the vagueness aspect of this statute is in the reverse because it is in the "unless" clause. Usually the situation is the other way.

Sometime you might enlighten me as to the significance of the word "competent" when the statute speaks of a "competent licensed practitioner of medicine." I would have assumed that if a physician is licensed, he is, at least presumably, competent, and, therefore, that the word "competent" is redundant here. If he proves to be incompetent, that, it seems to me, has no bearing on the abortion problem. It would, of course, be important where malpractice is alleged.

Sincerely,

H.A.B.

Mr. Justice Black

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 29, 1971

Re: No. 84 - United States v. Vuitch

Dear John:

On page 7, third line, of your opinion, is a reference to the "Circuit Court of Appeals." I may be confused here, but I wonder if, in 1907, the District's appellate court had the word "circuit" in its title.

Sincerely,

Harry

Mr. Justice Harlan

March 29, 1971

Re: No. 84 - United States v. Vuitch

Dear John:

Please join me in your dissent proposed for this case.

Sincerely,

H. A. B.

Mr. Justice Harlan

cc: The Conference

March 30, 1971

Re: No. 84 - United States v. Vuitch

Dear Hugo:

It now appears that the votes are all in, but with a curious result. Five conclude that the Court has jurisdiction of the appeal, but of those five only four would reverse and remand for further proceedings.

As I indicated to you in my letter of February 26, I am, on the merits, in full agreement with your conclusion. I reaffirm this statement so that the case may be moved along. If you wish me to write something to this effect, I shall be glad to do so, but the other jurisdictional issue dissenters may wish to make their wishes known too.

Sincerely,

H. A. B.

Mr. Justice Black

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 13, 1971

Dear Hugo:

I am still troubled about the disposition of No. 84 - United States v. Vuitch. My letter to you of March 30 has prompted no reaction among the Justices thus far.

I therefore have tried my hand at a short statement on my part. If, instead of this, you prefer to add at the end of your opinion a brief comment to the effect that inasmuch as the majority conclude that the Court does have jurisdiction of the direct appeal, I join Part II of your opinion, please feel free to do so.

Sincerely,

Harry

Mr. Justice Black

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 4/13/71

No. 84.—October Term, 1970

Recirculated: _____

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Blackmun.

Although I join Mr. Justice Harlan in his conclusion that this case is not properly here by direct appeal under 18 U. S. C. § 3731, a majority, and thus the Court, holds otherwise. The case is therefore here and requires decision.

The five Justices constituting the majority, however, are divided on the merits. One feels that 22 D. C. Code § 201 lacks the requirements of procedural due process and would affirm the dismissal of the indictment. One would hold that a licensed physician is immune from charge under the statute. Three would hold that, properly construed, the statute is not unconstitutionally vague and that the dismissal of the indictment on that ground was error.

Because of the inability of the jurisdictional-issue majority to agree upon the disposition of the case, I feel obligated not to remain silent as to the merits. See *United States* v. *Jorn*, 400 U. S. 470, 487–488 (1971) (statement of Black and Brennan, JJ.); *Mills* v. *Alabama*, 384 U. S. 214, 222–223 (1966) (separate opinion of Harlan, J.); *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 175, 179 (dissenting opinion of Warren, C. J.). Assuming, as I must in the light of the Court's decision, that the Court does have jurisdiction of the appeal, I join Part II of Mr. Justice Black's opinion.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

No. 84.—October Term, 1970

Circulated: _____

Recirculated: 4/14/71

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[April —, 1971]

Mr. Justice Blackmun.

Although I join Mr. Justice Harlan in his conclusion that this case is not properly here by direct appeal under 18 U. S. C. § 3731, a majority, and thus the Court, holds otherwise. The case is therefore here and requires decision.

The five Justices constituting the majority, however, are divided on the merits. One feels that 22 D. C. Code § 201 lacks the requirements of procedural due process and would affirm the dismissal of the indictment. One would hold that a licensed physician is immune from charge under the statute. Three would hold that, properly construed, the statute is not unconstitutionally vague and that the dismissal of the indictment on that ground was error.

Because of the inability of the jurisdictional-issue majority to agree upon the disposition of the case, I feel obligated not to remain silent as to the merits. See *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (addendum by Mr. Justice Rutledge); *United States* v. *Jorn*, 400 U. S. 470, 487–488 (1971) (statement of Black and Brennan, JJ.); *Mills* v. *Alabama*, 384 U. S. 214, 222–223 (1966) (separate opinion of Harlan, J.); *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 174, 179 (concurring opinion of Stewart, J., and dissenting opinion of Warren, C. J.). Assuming, as I must in the light of the Court's decision, that the Court does have jurisdiction of the appeal, I join Part II of Mr. Justice Black's opinion and the judgment of the Court.