

# The Burger Court Opinion Writing Database

*United States v. Moore*  
423 U.S. 122 (1975)

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



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

CHAMBERS OF  
THE CHIEF JUSTICE

November 28, 1975

Re: No. 74-759 - United States v. Moore

Dear Lewis:

I join your November 25 circulation.

Regards,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 20, 1975

RE: No. 74-759 United States v. Moore

Dear Lewis:

I passed at conference, you will recall, but I am completely persuaded. Please join me.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

November 20, 1975

Re: No. 74-759, United States v. Moore

Dear Lewis,

I still have some lingering doubts, but shall  
acquiesce.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 21, 1975

Re: No. 74-759 - United States v. Moore

Dear Lewis:

I agree.

Sincerely,



Mr. Justice Powell

Copies to Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 20, 1975

Re: No. 74-759 -- U.S. v. Moore

Dear Lewis:

Please join me.

Sincerely,

*JM*,  
T. M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

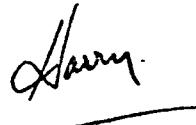
November 24, 1975

Re: No. 74-759 - United States v. Moore

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

From: Powell, J.

Circulated: NOV 19 1975

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-759

United States,  
 Petitioner,  
 v.  
 Thomas W. Moore, Jr. } On Writ of Certiorari to the  
 } United States Court of Ap-  
 } peals for the District of  
 } Columbia Circuit.

[December —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether persons who are registered under the Controlled Substances Act (CSA), 21 U. S. C. § 801 *et seq.* (1970), can be prosecuted under § 841 for dispensing or distributing controlled substances. The United States Court of Appeals for the District of Columbia reversed the conviction of respondent, a licensed physician registered under the Act, on the ground that he was exempted from prosecution under § 841 by virtue of his status as a registrant. We reverse and hold that registered physicians can be prosecuted under § 841 when their activities fall outside the usual course of professional practice.

### I

Dr. Moore was charged, in a 639-count indictment, with the knowing and unlawful distribution and dispensation of methadone (dolophine), a Schedule II controlled substance,<sup>1</sup> in violation of 21 U. S. C. § 841 (a)(1). That subsection provides:

“(a) Except as authorized by this subchapter, it

<sup>1</sup> A substance listed in Schedule II has “a high potential for abuse,” “a currently accepted medical use in treatment in the

✓ 2, 3, 4, 8, 9, 20, 22

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

From: Powell, J.

Circulated: \_\_\_\_\_

Recirculated **NOV 25 1975**

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-759

United States, Petitioner,  
v.  
Thomas W. Moore, Jr. } On Writ of Certiorari to the  
United States Court of Appeals for the District of  
Columbia Circuit.

[December —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether persons who are registered under the Controlled Substances Act (CSA), 21 U. S. C. § 801 *et seq.* (1970), can be prosecuted under § 841 for dispensing or distributing controlled substances. The United States Court of Appeals for the District of Columbia reversed the conviction of respondent, a licensed physician registered under the Act, on the ground that he was exempted from prosecution under § 841 by virtue of his status as a registrant. We reverse and hold that registered physicians can be prosecuted under § 841 when their activities fall outside the usual course of professional practice.

### I

Dr. Moore was charged, in a 639-count indictment, with the knowing and unlawful distribution and dispensation of methadone (dolophine), a Schedule II controlled substance,<sup>1</sup> in violation of 21 U. S. C. § 841 (a)(1). That subsection provides:

"(a) Except as authorized by this subchapter, it

<sup>1</sup> A substance listed in Schedule II has "a high potential for abuse," "a currently accepted medical use in treatment in the

December 10, 1975

CASES HELD FOR No. 74-759 UNITED STATES v. MOORE

MEMORANDUM TO THE CONFERENCE:

1. No. 74-5865 Jorgensen v. United States.

Petitioner, a registered osteopath, was convicted under 21 U.S.C. § 841(a)(1) for distributing controlled substances. He did not raise the contention rejected in Moore, but the case was held because his conviction was necessarily predicated on his lack of immunity from prosecution under § 841 by virtue of his registrant status. Moore disposes of any doubts on that matter.

Petitioner's primary contention is that the government failed to show that he was acting otherwise than in the course of his practice. He had prescribed controlled substances to undercover agents on four occasions, without inquiring into the agents' medical history or conducting a medical examination. One of the agents informed petitioner that he resold the drugs at a profit but he continued to receive prescriptions. There was also testimony that petitioner instructed the agents on how to act when they were filling the prescriptions. CA10 rejected petitioner's contention, concluding, inter alia, that the government had introduced sufficient evidence to send the case to the jury.

Petitioner raises two other issues. He contends (1) that he was not "dispensing" to an "ultimate user" because he sold the drugs to agents who did not intend to use them, and (2) that the use of hearsay testimony in the preliminary hearing and the grand jury proceedings was improper.

I will vote to Deny.

2. No. 74-1233 Green v. United States.

Petitioners (a doctor, a pharmacist, and the owner of the building in which the doctor and the pharmacist maintained their offices) were convicted of conspiracy to violate § 841(a)(1). Two of petitioners' contentions - (1) that the doctor and the pharmacist are exempt by their status, and (2) that distribution for an illegitimate medical purpose is within the exemption for registrants from § 841 - are disposed of by Moore.

Petitioner pharmacist also contends that he should be treated differently than a doctor. The SG points out that there was clear evidence that the pharmacist knew of and subscribed to the illicit purpose. Under these circumstances, his claim is for a per se exemption based on "status" of the sort rejected in Moore.

The final contention, made by the owner, is that there was insufficient evidence that he had knowledge of the scheme.

I will vote to Deny.

3. No. 74-1367 Rosenberg v. United States.

Petitioner is a physician convicted on 27 counts of violating § 841(a)(1). His primary contention, that he is exempted by his registrant status, was rejected in Moore, as was the contention that the phrase "in the usual course of professional practice" is impermissibly vague. A third claim, that 21 C.F.R. § 1306.04(a) (which limits immunity of registrants to prescriptions issued "for a legitimate medical purpose" and "in the usual course of his professional practice") violates the doctrine of separation of powers, is frivolous.

Petitioner's final claim is that, as a registrant he can be charged only for illegal "dispensing," not for illegal "distributing." This contention was neither raised nor addressed in Moore. There is a conflict among the circuits. The Fifth Circuit has held that an indictment must charge a physician with "dispensing," rather than "distributing." United States v. Leigh, 487 F.2d 206 (1973). The First and Ninth Circuits have held that an indictment should charge "distributing" when the defendant is a registrant. United States v. Badia, 490 F.2d 296 (1st Cir. 1973); United States

v. Black, 512 F.2d 864 (9th Cir. 1975).

I do not consider this issue to be certworthy. Under § 802(20) of the Act a "practitioner" is one "registered . . . to distribute [or] dispense . . . in the course of professional practice." The significant question - as we held in Moore - is whether the conduct with which the defendant is charged goes beyond "the course of professional practice."

I will vote to Deny.

4. No. 74-1461 Pay Ming Leu v. United States.

This is another case of a licensed physician convicted under § 841(a)(1), this time on 19 counts of attempting to dispense controlled substances. His principle contention, of absolute immunity, was rejected in Moore.

Petitioner raises four other issues, none of which I think certworthy: (1) he did not "dispense" because the prescriptions were issued to agents who never filled them; (2) acquittal on 11 substantive counts precluded conviction on the attempting counts (according to SG the latter involved entirely different occasions); (3) the district court erred in including a definition of Schedule I drugs in its instructions; and (4) he was denied a fair trial by adverse publicity (news stories concerning another doctor convicted for similar crimes).

I will vote to Deny.

L.F.P., Jr.

ss

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 20, 1975

Re: No. 74-759 - United States v. Moore

Dear Lewis:

Your opinion has obviously persuaded the doubters in Conference, and I intend to join it. I have a question about two sentences on page 20, which in the present version read as follows:

"We are mindful, of course, that the drug laws should not infringe on legitimate scientific research and the development of new treatments. Physicians and researchers must be allowed substantial ~~discretion~~ discretion in treating patients and testing new theories."

As a legislator I would have no quarrel whatever with this statement, but I do have some question as to whether such a declaration of policy should come directly from this Court. You are much more familiar with the legislative history than I am, but if it supports the proposition which you advance, would you have any objection to rephrasing the sentences to state that it was Congress that was "mindful" that legitimate scientific research should not be infringed

- 2 -

and physicians should be allowed discretion in treating patients?

Sincerely,

*Bill*

Mr. Justice Powell

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 25, 1975

Re: No. 74-759 - United States v. Moore

Dear Lewis:

Please join me.

Sincerely,

*WR*

Mr. Justice Powell

Copies to the Conference