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Assisted-Suicide Ruling May Affect Painkiller Cases

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By Marc Kaufman
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Doctors who specialize in pain management and their advocates are hoping that last week's Supreme Court decision upholding Oregon's assisted-suicide law will boost their efforts to defend colleagues accused by the government of illegally prescribing narcotic painkillers to their patients.

With dozens of doctors, pharmacists and patients now in jail or awaiting imprisonment after being convicted of drug trafficking, the specialists and their attorneys say the Oregon ruling supports their contention that prosecutors have reached improperly into the state-regulated practice of medicine.

"The prosecutors have been making a policy argument in court against the treatment of chronic pain as it's being practiced, and this Supreme Court decision makes clear that is not their role," said Eli Stutsman, an Oregon attorney who represented a doctor and pharmacist in the assisted-suicide case. He is now arguing appeals for several convicted pain doctors.

"Before I was just a lawyer with a legal analysis before the courts, but now I have a decision of the highest court of the land," he said.

Whether the Supreme Court decision will have any actual impact on how prosecutors or judges view the actions of doctors who regularly prescribe the powerful painkillers remains to be seen, and some doubt that much will change. Prosecutors have won convictions against many doctors accused of prescribing narcotic painkillers for no legitimate medical reason.

Radley Balko, a policy analyst with the Cato Institute, a conservative Washington think tank, believes the government is being overly aggressive in prosecuting doctors, but he said he does not see the Supreme Court decision as a threat to the government's initiative against what it considers illegal prescribing.

"The justices carved out this little sphere of individual rights with the Oregon ruling, and I would hope that would migrate into the pain medication sphere," he said. "But I'm not all that optimistic because of other decisions they've made."

In particular, he noted, the court allowed the federal government authority to overrule state laws permitting the use of medical marijuana.

But John Flannery, attorney for a South Carolina doctor convicted in 2004 of illegally writing a handful of pain medication prescriptions after working at a pain center for only three months, said the decision has encouraged

him about the prospects of an upcoming Supreme Court appeal of the case.

"The U.S. Supreme Court sent the Justice Department a powerful message, told them to back off, and to stop meddling in medical care in the states -- as it was none of their business," he said. "We can only hope that the courts don't stop with yesterday's decision, as there's more that the department's doing wrong -- terribly wrong."

Justice Department spokesman John Nowacki declined to address whether there is a linkage between the Oregon case and the prosecutions. He said that "the department is committed to enforcing our nation's laws, and we will apply those laws to ensure that drugs are not diverted to unlawful uses."

In the prosecutions of pain doctors and some pharmacists who dispensed large amounts of narcotic painkillers, Nowacki added that "the government has brought criminal charges . . . and it has been claimed that there was no legitimate medical purpose for the distribution of controlled substances."

The Justice Department and the Drug Enforcement Administration stepped up investigations and prosecutions of pain specialists after doctors began prescribing larger dosages of narcotic painkillers and the powerful new painkiller OxyContin became widely abused in the 1990s.

The prosecutions have become increasingly controversial as the number of health professionals targeted has grown. Pain specialists say doctors have become reluctant to write medically appropriate prescriptions of controlled drugs for patients in pain for fear of being investigated and arrested.

According to Stutsman, the attorney, the direct legal connection between the Oregon assisted-suicide case and the prosecutions is the Justice Department's use of the standard of "legitimate medical practice." In both contexts, the government has argued that it has the right to set that standard, and in many prosecutions it has persuaded juries that the pain specialists violated it.

In his decision in the Oregon case, Justice Anthony M. Kennedy wrote that it is the right of the state, and not the federal government, to regulate the practice of medicine and define the standard. Stutsman said that finding was logically applicable to prosecutions where the government was also determining what is a "legitimate medical purpose."

Will Rowe, executive director of the American Pain Foundation, which represents pain sufferers, was also heartened by the ruling.

"It's a decision that is on the correct side of the ledger, allowing states to define medical practice and to determine acceptable medical practice," he said. "I think that there definitely would have been more prosecutions than now if the decision went the other way."

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