

PROFESSION

Ruling may ease DEA pressure on pain prescribers

■ Some advocates for pain specialists say the U.S. Supreme Court's decision on Oregon's assisted-suicide law might help doctors charged with overprescribing controlled substances.

By KEVIN B. O'REILLY ([HTTP://WWW.AMEDNEWS.COM/APPS/PBCS.DLL/PERSONALIA?ID=KOREILLY](http://www.amednews.com/apps/pbcs.dll/personalia?id=koreilly)) amednews staff — Posted Feb. 13, 2006

The U.S. Supreme Court's 6-3 ruling in *Gonzales v. Oregon* didn't just keep intact the essence of the nation's only physician-assisted suicide law, it also gave hope to pain medicine physicians, patients and advocates who believe the decision might chasten the Drug Enforcement Administration and provide a useful weapon in ongoing legal battles.

"This opinion should have a huge impact," said Eli Stutsman, who represented a physician and patient in the *Gonzales* case and is working on the appeals for two other physicians convicted of overprescribing pain medicines.

"The expansive reading of the attorney general's authority that was thoroughly rebuked in the Supreme Court's opinion is the same expansive reading of 'legitimate medical purpose' that's being used to prosecute pain physicians," he said.

A 1971 Dept. of Justice rule interpreted the Controlled Substances Act to forbid prosecuting any physician who prescribes controlled substances for a "legitimate medical purpose."

In *Gonzales*, the federal government argued physician-assisted suicide was not a legitimate medical purpose for which schedule II controlled substances such as barbiturates could be prescribed.

The court rejected that reasoning, ruling that to follow it would grant the attorney general unrestrained authority to regulate medical practice.

Geoffrey Michael, a lawyer who filed a pro-Oregon *amicus* brief on behalf of a coalition of medical organizations in *Gonzales*, said he hopes the decision will cause the DEA "to be more careful" in its use of the Controlled Substances Act to only pursue drug abuse and drug trafficking, "rather than trying to intrude upon state medical standards, whether this be in the context of pain physicians or any other physicians."

Many of the hundreds of cases brought against pain medicine physicians for prescribing opioids since 2001 have featured differences in expert opinion about proper medical practice in the complex area of chronic pain management. Court trials often turn on the amount of testing done, length of time in exam rooms and charting procedures, Stutsman said.

"That's not the attorney general's role," he said. "His role is to prove a drug crime, not malpractice or that better medicine could have happened. ... He's a law enforcement officer, not a medical standards board."

Defense lawyer John Flannery, who at press time was set to argue the Feb. 7 appeal of a pain patient in the Florida 2nd District Court of Appeal, intends to cite the *Gonzales* ruling.

"The Oregon ruling made one critical point, which is that we have to be careful that the medical treatment the government thinks is proper does not become a standard for criminal prosecution," Flannery said. "Oregon pushed that back."

Not everyone is as optimistic about *Gonzales'* effect on prosecutions of good-faith pain medicine and palliative care physicians.

"A ruling the other way would have made a physician who was a little hesitant about prescribing pain medicines even more hesitant," said Timothy Quill, MD, director of the palliative care program at the University of Rochester, N.Y., Medical Center.

"I don't think it will change the playing field very substantially otherwise," Dr. Quill said.

But Paul Arshagouni, MD, director of the health law program at the Michigan State University College of Law, said the *Gonzales* ruling might not apply in pain cases because the DEA typically doesn't deny pain control is a legitimate medical purpose.

"Rather," Dr. Arshagouni said, "the physician exceeds the usual volume of such drug use, raising the question of whether the drugs are being used for pain control (legitimate) or drug abuse (illegitimate)."

A Justice Dept. spokesman declined to comment specifically on how *Gonzales* might affect ongoing or future pain medicine prosecutions.

He pointed to a statement declaring that the agency remains committed to "ensuring that drugs are not diverted to unlawful uses."

The American Medical Association supports a principle of balance between access to necessary pain medication and preventing drug abuse and diversion.

Fifty million Americans live with persistent pain, and 10 million experience constant, severe pain, according to the American Pain Foundation, an advocacy group for pain patients.