APPENDIX D

Quincy West's Traverse in Opposition to Defendants Motion to Dismiss, and Plaintiff's Memorandum of Legal Points and Authorities in Support of Motion for Summary Judgment, and That Defendant's Motion be Dismissed as Sham, filed May 31, 1985
(From the Joint Appendix of *West v. Atkins* [1988], pp. 30-36.
Spelling, punctuation, and grammar are as close to the original as reasonably possible)

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLIINA
AT RALEIGH, N.C.

_____

(Title Omitted in Printing)

_____

TRAVERSE IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS, AND PLAINTIFF MEMORANDUM
OF LEGAL POINTS AND AUTHORITIES IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT, AND THAT
DEFENDANT'S MOTION BE DISMISSED AS SHAM

Filed May 31, 1985

TO: The Honorable (s) Judge or Magistrate Presiding over the District Court of the United States for the Eastern District of North Carolina . . . . . at Raleigh, Greetings;

Now respectfully come the prose plaintiff, Quincy West, and move this Honorable Court to dismiss the paper writing of the defendant, and to accept jurisdiction in the case under those statutes together establishing original federal Court jurisdiction in state Civil Rights Cases.

The Plaintiff disputes defendant's contention that this federal Court donot have jurisdiction. The plaintiff shows herein that this federal Court is the only Court that has jurisdiction to hear this case as shown more fully herein.

Jurisdiction (federal) is Proper

Clearly the ultimate issue in determining if a person is subjected to suit under section 1983 is whether the allege infringement of federal rights is fairly attributable to the state, 42 U.S.C.A. 1983. See: *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S. Ct. 2764, 2770, 73 L. Ed. 2d 418 (1982) and here the facts are cut and dry that the defendants action were carried out under color of state law, and this is a fact-bound inquiry issue. *Lugar v. Edmondson Oil Co.* 457 U.S. 922, 939, 102 S.Ct. 2744, 2755, 73 L. Ed. 2d 482 (1982).

Defendant Adkins signed a valid contract with the state of North Carolina to provide Orthopedic care for inmates in the North Carolina Dept. of Correction. His contract were signed and approved by Mrs. Rae McNamara, former state prison Director, who this Court released as a co-defendant of defendant Adkins on December 10, 1984. Defendant Adkins signed the same type of contract as all prison employees and Adkins is surely as much an employee under color of state law when treating prisoners as any other prison employee who signed contracts to perform service. Adkins signed a contract to perform medical services while others agreed to perform services in the areas of custody, food service, prison enterprise, etc. The fact that defendant Adkins contend that he has another private Job is immaterial to the fact that on the Job at Central Prison, if only for a moment, that defendant Adkins is acting under color of state law by virtue of the nature of his contract. And since the defendant has raised a 12 (B) (1) Motion to Dismiss, plaintiff ask this Court to examine closely *defendant's Contract* and other evidence submitted in the record in determining whether suvject matter Jurisdiction do-not or do exist. It is proper for this Court to make a distinction between defendant's contract even from other evidence handed down by the fourth Circuit Court of Appeals. *Adams v. Bain*, 697 f. 2d. 1213, 1219 (4th Cir. 1982).

The defendant obviously felt that he were acting under color of state law when he negligently subjected plaintiff to permanent injury because plaintiff notices that the N.C. Attorney General's office is defending Dr. Adkins. Adkins and his counsel has approached this case as if jurisdiction were the only issue lost on them is the serious injuries which defendant Adkins has caused plaintiff to suffer.

> Defendant Adkins donot even attempt to deny the allegations against him, but seek to deny the allegations against him, but seek to delay Justice by contesting the Jurisdiction of this Court.

Surely the defendant should not be rewarded by such a mockery as a matter of law. Normally when there is a *factual question* common to the *merit* as well as to Jurisdiction, a resulting dismissal should be on the merits and not evasive tactics. *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed 939 (1946)

> Defendant evidence and precedent Memorandum are misleading and false.

plaintiff West says that his case against Dr. Adkins is not like the case of *Calvert v. Sharp*, 748 f. 2d 861 (4th Cir. 1984) which the defendant now wraps himself in, nor is plaintiff case compatible in principle or theory to *Polk County* or *cannon* to clarify what the defendant are attempting to do by raising *Calvert v. Sharp*, 748 2d 861 (4th Cir. 1984) the plaintiff will show this Court that the cases which defendant rely on for a dismissal is simply trite and feckless and another reason why this Court should dismiss the defendant's Motion and Conduct a hearing on the merits of the case.

The case raised by defendant Adkins is *Calvert v. Sharp*, 748 f. 2d 861 (4th Cir. 1984) the defendant and the fourth Circuit is right. Dr. Sharp did not act under color of state law. *But Dr. Sharp's actions are not even close to those of defendant Adkins*.

(1) Dr. Sharp was not dependant upon the state of Maryland for funds. (2) Dr. Sharp did not draw a monthly check from the department of corrections or from the state, as defendant Adkins did. (3) Dr. Sharp did not sign a contract with the department of Corrections as

defendant did, and (4) Dr. Sharp did consider himself to be employed by the department of Correction even part-time as defendant Adkins did.

Dr. Sharp was physician employed by a *private medical group* known as the (CPPA) Chesapeake Physicians, PA Dr. Sharp was not dependant upon the state for funds because he worked for (CPPA) the Chesapeake Physician medical group and not the state of Maryland. Furthermore, the (CPPA) Chesapeake Physicians PA. itself was not dependant upon the state for funds. This case is hardly the same as the complaint filed against defendant Adkins. Adkins signed a contract with the N.C. dept. of Corrections and drew a salary as a result of that contract and services rendered. Dr. Sharp worked for a third party sub-contractor, and by statute. *Md Code Ann. Art 27 698 (1982)* Maryland has enacted provisions where medical services performed is not within the exclusive prerogative of the state.

Based on these facts one do not need be a Harvard Law School Graduate to distinguish the vast differences between the Activities of Dr Sharp and *defendant Adkins*. Again these fact disprove defendant contention and support the plaintiff's that *defendant Adkins can be properly sued under color of state Law by virtue of his strange contract for services. Adams v. Bain*, 697 f. 2d. 1213, 219 (4th Cir. 1982)

This Court has pendent Jurisdiction to hear Plaintiff's Complaint.

Originally the plaintiff had sued Mrs. Rae McNamara, prison Director, and Gov. James hunt as co-defendants of defendant Adkins. On December 10, 1984, Judge Boyle dismissed defendants Hunt and McNamara from the Complaint.

Plaintiff West immediately filed an interlocutory appeal to the Fourth Circuit in order to preserve McNamara and Hunt as defendants. On April 13, 1985, the Fourth Circuit informed plaintiff West that the Court would review a final Judgment under 28 U.S.C. 1291 and consider the dismissal of Hunt and McNamara as defendants at that time. Defendant Adkins is a legitimate subordinate of Mr. McNamara and she had knowledge of defendant Adkins act because plaintiff had wrote her several letters regarding defendant Adkins conduct which made her liable under the Fourth Circuit decision of *Bennett v. Gravell*, 323 f. Supp. 203 (D. Md.) aff'd 451 f. 2d 1011 (4th Cir. 1971)

Plaintiff filed the interlocutory appeal to continue Mrs. McNamara as a defendant for the purpose of continuing this Courts pendent Jurisdiction to hear this case.

Pendent Jurisdiction as defined by the United States Supreme Court in *Hagens v. Lavine*, 415 U.S. 528, 545-57, 94 S. Ct. 1372 (1974) Allows a federal Court to decide claims alleging violation of the states Common Law. Regulations, Statutes, or Constitution that or not of a federal Constitutional nature, as long as plaintiff have a non-frivolous federal law claim as well arising from the same facts.

Plaintiff now believe that this Court retain pendent Jurisdiction even though Mrs. McNamara was dismissed as a defendant.

Plaintiff belief that this court still retain pendent jurisdiction is on the basis of *Rosado v. Wyman*, 90 S. Ct. 1207, 1212-1214, 397 U.S. 307, 402-402, 25 L. Ed. 2d 442 (1970) where the United Stated Supreme Court held that a federal Court has discretion to decide a claim within its Pendent Jurisdiction after the claim that give it Jurisdiction has become moot, in that case the Court said that Pendent Jurisdiction is based on "the commonsense policy" of the

conservation of Judicial energy and the avoidance of multiplicity of litigation 90 S. Ct. at 1214 397 U.S. at 405.

Cases in which Jurisdiction of pendent claims was retained although the federal claim was dismissed without trial are cited in 13 *Wrightmiller and Cooper federal Practice and Procedure, Jurisdiction*: 3567 N-35

Plaintiff thinks that this Court has Jurisdiction to hear his claims against defendant Adkins and only pray for *Pendent Jurisdiction* as an alternative.

There are nothing mysterious nor fancy about this case at all. The plaintiff has sued defendant Adkins for negligence resulting in permanent damages to plaintiff. Defendant donot deny these charges, rather he attempts to escape Justice by contending that the Court donot have the Jurisdiction to determine the case on its merits. Plaintiff donot have any problem understanding why defendant seeks to escape answering the case on the merits . . . . but the facts of Jurisdiction and the merits are against the defendant.

The U.S. Supreme Court has advanced a number of other factors to determine if a private act is done under color of state law. The dependence of the actor on the State for funds, which Adkins surely is. *Rendell-Baker*, 457 U.S. at 840-41 102 S. Ct. at 2771-72 (1982) and the performance by the actor of a Public function. Id. At 842 102 S. Ct. at 2772.

Even more important is the fact that the Fourth Circuit held that a federal Court should also examine the evidence submitted in the record in determining that subject matter Jurisdiction do or don't exist. Adams v. Bain, 697 f. 2d 1213, 1219 (4th Cir. 1982). The defendant submitted a copy of his contract as part of his Motion and plaintiff contend that the contract alone will flush out the fact that defendant Adkins acted under color of state law as a matter of fact, in violation of plaintiff constitutional rights pursuant to *Estelle v. Gamble*, _____ U.S. _____. 45 USLW 4023 (Nov. 30, 1976). Estelle establishes that the deliberate indifference by a state to the serious medical needs of an inmate is a violation of the 8th amendment and can support a 1983 action. Although a plaintiff must establish still that the defendant acted under color of state law. Polk Co. 454 U.S. at 315 162 S. Ct. at 448. Whether the Physician acted under a color of state law was not at issue in Estelle. Because Estelle was a physician who was the medical Director of the Texas dept. of Corrections.

Accordingly, this court have Jurisdiction to hear plaintiff's complaint under 28 U.S.C. 1983, which together establish original federal Jurisdiction under *Monroe v. Pape*, 365 U.S. 167 (1961) with an alternative being a prayer for Pendent Jurisdiction under *Rosado v. Wyman*, Supra. based on the evidence plaintiff has submitted. The plaintiff's expectation of a federal forum is inextricably woven into its doctrine of Judicial Principles and law thereby protected by the first, Eighth, Ninth, and (14th) fourteenth amendments to the federal constitution.

Respectfully Urged

/s/ Quincy West
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