

## CHAPTER THREE – THE CONCRETE

The concrete aspects of Supreme Court decisions provide the opportunity for theory and practice to meet and generate public policy (Rohr, 1989, p. 81). The principles learned in the classroom and the regime values we articulate may collide with the practicalities associated with the administration of public programs. As noted in the last chapter, the Court has historically exercised considerable discretion in the exercise of its responsibilities to protect basic human values and vulnerable populations. This chapter describes the courts' grappling with Eighth Amendment protection of prison inmates and the needs of the states to administer correctional facilities effectively and efficiently. In it I will describe the progress of one inmate's efforts to obtain redress for withheld medical treatment as his case progressed through the federal courts system. This progress will be illustrated by an examination of the decisions of the courts during the progress of the case, the details of the inmate's complaint, the substance of briefs submitted, including *amicus curiae* briefs submitted by the American Public Health Association and the American Civil Liberties Union, and the questions raised and addressed during oral arguments.

### Quincy West

Quinzeaton "Quincy" West was born on August 8, 1946 in Cumberland County North Carolina and died in the mid-1990s. His death in Missouri was reported to his former attorney by Theresa Riley, the mother of West's son, when she called to inquire about his Supreme Court case in 1996. West was released from a North Carolina prison January 16, 1991 after serving a large part of his adult life in the prison system. His first incarceration was in 1973 following his 1972 sentencing, in Cumberland County, North Carolina, to 24 to 30 years for robbery with a dangerous weapon. On a separate charge he was sentenced to five years for breaking and entering. The latter sentence ran concurrently with the armed robbery charge. In addition, West was convicted of larceny and receiving stolen goods and received a sentence of two additional consecutive years to follow the completion of his five year sentence (North Carolina Department of Correction, 2002). At the time of these sentences, the North Carolina prison system shortened sentences on a day for day basis for "good time."

Reportedly a large man, standing over six feet in height and weighing 235 pounds, Quincy West, was not a model prisoner. In October 1975 he attempted to escape. As a result, an additional 12 consecutive months were added to his sentence. His record shows a subsequent “conviction” while in prison of two years for a misdemeanor assault with a deadly weapon—possibly something to do with another prisoner. This later “conviction” may have been a prison disciplinary action (North Carolina Department of Correction, 2002).

### **Central Prison Hospital**

In the 1980s Central Prison Hospital, located in Raleigh, North Carolina, was a 97-bed acute care facility providing medical inpatient services for the North Carolina Department of Correction’s 17,500 inmates. One full time staff physician was employed by the facility and the remaining dozen or so physicians on staff were part-time contractors. One of those contractors was Dr. Samuel Atkins, an orthopædic surgeon (Giroux & Stein, 1987).

### **Dr. Samuel Atkins**

Dr. Atkins’ duties as detailed in his contract were: to hold two orthopædic clinics per week; to consult on orthopædic and neurological cases upon referral; to conduct rounds as necessary for his orthopædic and surgical patients; to coordinate with physical therapy staff; to request neurosurgical consultations on spinal surgical patients; and, to be available for emergency on-call orthopædic services 24 hours a day. He was paid \$495 per clinic and additional amounts for surgeries (Contract for Professional Services, 1987).<sup>1</sup>

In another lawsuit occurring at the same time, Dr. Atkins testified at deposition that his earnings from his work at Central Prison substantially exceeded the income from his private practice and that “he made as much as \$30,000 annually at Central Prison for performing surgeries above the \$50,000 he earned for conducting the clinics.” Atkins also testified that his prison work occupied considerably more of his professional time than his private practice and “that by the

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<sup>1</sup> The text of this contract appears in Appendix B.

time of this action, his surgical privileges at the Raleigh area hospitals had been withdrawn” (Giroux & Stein, 1987, p. 3 citing *Hammond v. Woodard, Atkins, et al.*, filed July 27, 1984)

The term of the contract executed on October 16, 1981 between Atkins and the State of North Carolina was for five years service. The start date of Atkins’ “employment” was September 1, 1981. The agreement contained provisions for termination by either party upon thirty days written notice and allowed the state to terminate the agreement without notice due to lack of funds. Dr. Atkins’ contract was terminated effective March 20, 1985 (Contract for Professional Services, 1987; Giroux, 1985).

### **Injury, Pain, Frustration, and Complaint**

West’s description of the events leading up to his filing suit in federal district court is contained in his *pro se* complaint to that court.<sup>2</sup> West reported that “on July 30, 1983, while playing volley-ball at odom [sic] prison, at Jackson N.C. ... [he] suffered a torn Achilles tendon on his left leg above his heel string.” Following the injury he was taken to Woodland, North Carolina where he was “examined by a Dr. Stanley who were [sic] under contract with the odom [sic] prison unit. Dr. Stanley’s examination confirmed that ... [his] injury were [sic] a torn Achilles tendon. Dr. Stanley directed that ... [he] be transferred to central prison.” On August 9, 1983, West was transferred to Central Prison and examined by an orthopædic surgeon: Dr. Samuel Atkins (West, 1987a).

West recounted that Dr. Atkins stated that he should schedule West for surgery to repair the tendon, but that first he *wanted to experiment* to see if the torn tendon would grow together on its own. A cast was placed on the leg. West contended that the doctor “maintained a hostile attitude ... and refused to prescribe at plaintiff [sic] urgent request the necessary pain killer for relief, and plaintiff were [sic] returned to odom [sic] prison” (West, 1987a). In addition, West’s brief held that he was “forced [as a result of the pain] to consume dangerous dosage of aspirin [sic] and [he] plaintiff purchased various pain medication from other inmates” (West, 1987a).

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<sup>2</sup> The complete *pro se* complaint may be found in Appendix C.

In August 1983 West's cast "disintegrated" and he was returned to Central Prison where Atkins placed a heavier cast on the leg. This second cast was removed in September. Later that month, West, "while in segregation went on a hunger strike in protest of administrative brutality and the lack of any medication for pain." Returned to Odom Prison, he was seen by Dr. Stanley who provided medication that failed to reduce his pain. West contended that "on October 14, 1983 the Director's Subcommittee Recommended that [he] plaintiff be demoted in custody and placed on intensive management." West went on another hunger strike and was subsequently transferred to Central Prison in Raleigh on November 8, 1983. Upon arrival at Central Prison, West's pain medication and medication for a sinus condition were confiscated. On November 10, West wrote to the warden pleading for pain and sinus medication. On November 11, he wrote to Dr. Atkins asking to be seen for help with pain and swelling in the leg. He reported discussing the pain and swelling with the cell block nurses each morning. Finally, on or about November 15, he was seen by the prison psychiatrist who promised to contact Dr. Atkins about pain medication or hospitalization for the inmate (West, 1987a).

West held that he was not contacted by Dr. Atkins, but was finally informed by a nurse that he was scheduled to see Dr. Atkins on December 7. West does not recall if he was seen on that date. However, on January 10, 1984 West was carried to the orthopaedic clinic and was examined by Atkins. West's recitation of the events of that meeting stated that he had a five minute examination and that Atkins told him that the leg wound had not closed and that he wanted to see West again in a month. West told the doctor that he could not walk and asked for pain medication. He reported that "Adkins [sic] stated that plaintiff should be able to handle the pain for a while because the injury would soon be closed up." The doctor wrote a prescription for high-top tennis shoes. However, West did not receive the shoes (West, 1987a).

The following day West wrote to Rae McNamara, Director of the North Carolina Department of Corrections, and Governor James Hunt asking that they intervene on his behalf and stating that, "Atkins had a bad reputation among the inmate class for his primitive form of surgery and the denial of adequate treatment." The letters to Director McNamara were followed up by a lieutenant from the prison who questioned West about his complaints. However, beyond the questioning, the inmate was unaware of any other follow up (West, 1987a).

West reported that he was again carried to the clinic and seen by Atkins on or about February 15. He contended that the leg wound had not closed and that it had deteriorated. He stated that Atkins gave him a demonstration of how he should walk, but that he “could not possibly walk as instructed due to the stiffness, soreness, and swelling in the leg.” Upon leaving, “*Adkins [sic] said that he would see plaintiff on a regular basis ... and that he may have to perform surgery and pull the tendon together*” (West, 1987a) [emphasis in the original].

West alleged that he was in continuous pain and the swelling in the leg increased. The physician assistant reported that he (or she) would schedule an appointment for West with Dr. Atkins, but he was not seen. At the end of March he was told by “Nurse Earp” that he needed to see Dr. Atkins. West again signed up for the orthopædic clinic. Nurse Earp informed West that he had checked his record and that Dr. Atkins had released West from his care and would not be seeing him again (West, 1987a).

During the months of March, April, and May, West requested treatment from another orthopædic surgeon, and wrote to prison officials. Finally, on June 1, he filed an administrative grievance against Atkins. That grievance stated:

Dr. Adkins [sic] were treating me for a torn (achilles [sic] tendon) heel string. He has not saw [sic] me since 2/14/84. My heel string has not grown back. I suffer constant pain, and Dr. Adkins [sic] has not saw [sic] me since in spite of the Nurse, Mr. Earp referring me to Dr. Adkins [sic] and several letters” (West, 1987a)

The prison response to the grievance was: “Inmate is scheduled to see Dr. Adkins on 6-21-84. No further action recommended.” However, West was not seen for treatment on that date and was transferred from Central Prison to Caledonia Prison at the end of June (West, 1987a).

West’s November 23, 1984 complaint stated that his “foot and leg has [sic] been swollen and painful continuously since his injury and at no time since has ... [he] progressed medically.” He

reported that he had “a terrible limp in his walk” and that he “is unable to run, jump, squat and his entire foot and leg now has [sic] poor blood circulation.” He alleged that “the absence of proper medical treatment has caused plaintiff [sic] leg to partially wither and weaken. All of which has caused ... [him] to suffer great pain and mental anguish in violation of his constitutional rights” (West, 1987a).

### **The District Court**

West’s *pro se* complaint was filed in district court on November 29, 1984. Using a form provided for prisoners in filing complaints under the Civil Rights Act, 42, U.S.C. § 1983, West checked the “No” box after the question “Have you begun other lawsuits in federal court dealing with the same facts involved in this action.” His reported place of confinement was the Caledonia Correctional Facility, Tillery, North Carolina. His complaint was as summarized above and named as defendants Dr. Samuel Atkins, Governor James B. Hunt and Department of Corrections Director Rae McNamara. West requested a jury trial and asked for compensatory and punitive damages totaling \$2.5 million (West, 1987a).

Responding quickly, on December 13, 1984, Terrence W. Boyle, Judge of the U.S. District Court for the Eastern District of North Carolina, dismissed the charges against Hunt and McNamara holding the complaints frivolous because the two officials had no personal involvement in the plaintiff’s alleged deprivation of his constitutional rights (Order of December 1984).

On April 22, 1985, the State of North Carolina, represented by State Attorney General Lacy H. Thornburg, and Special Deputy Attorney General Jacob L. Safron, filed a motion to dismiss the complaint and requested summary judgment from the court. It was their position that the federal court lacked jurisdiction over the subject matter, that West had failed to state a claim upon which the relief sought could be granted, that the contentions contained in the complaint were “captious, frivolous and utterly without merit” (Thornburg & Safron, 1985). On that same date a second motion to dismiss and request for summary judgment was filed. This second motion, filed on behalf of Dr. Atkins, argued that *West v. Atkins* was identical to *Calvert v. Sharp* (4<sup>th</sup> Cir. 1984) and that the Fourth Circuit had held that the doctor “neither acted under color of state law

nor did he perform a ‘public function’”(Thornburg & Safron, 1985). The motion also referenced an April 2, 1985 decision of the Fourth Circuit Court of Appeals in the case of *Cannon v. Beane* (4<sup>th</sup> Cir. 1985). In that similar case, a Virginia inmate incarcerated in the Henrico County Jail sued a Richmond dentist “contending that Beane [the dentist] did not conduct himself in a professional manner and caused an infection in Cannon’s throat.” The Fourth Circuit judges hearing the case<sup>3</sup> held, in a *per curiam*<sup>4</sup> decision, that the dentist was not acting under color of the state, and affirmed the earlier magistrate’s dismissal of Cannon’s action for “failure to state a claim cognizable under § 1983” (Joint Appendix, pp. 20-21) (Thornburg & Safron, 1985).

In an affidavit, filed May 6, 1985, Dr. Atkins, emphasized the independent judgment of physicians and his contractual relationship to the state:

... I contracted with the North Carolina Department of Correction, Division of Prisons, to provide health care services for the Central Prison Hospital in Raleigh, North Carolina. According to my contract, my services began on September 1, 1981. Up until my termination effective March 20, 1985, I acted as an orthopedic physician for the Central Prison Hospital as provided in this contract. ... When I served as the physician providing medical services for inmates at Central Prison Hospital I had no custodial or supervisory duties in relation to the inmates. I exercised my own judgment. I made my own medical decisions according to standards established by the American Medical Association, and not those established by the North Carolina Department of Correction (Affidavit of Samuel Atkins, 1987).

In support of Dr. Atkins’ affidavit and emphasizing the independent nature of the medical judgment of contract physicians, Frank J. Nuzum, Director of Health Services for the

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<sup>3</sup> The 4<sup>th</sup> Circuit judges hearing *Cannon* were Ervin, Chapman and Wilkinson.

<sup>4</sup> *Per curiam* literally means “by the court”(Black, 1990). In this instance, it denotes a brief announcement of the disposition of a case and is not accompanied by a written opinion. Such *per curiam* decisions are rarely published. However, this decision was reprinted in the Joint Appendix to *West v. Atkins* that was submitted to the U.S. Supreme Court for its October 1987 term.

Department of Correction, testified that the Department of Corrections had many contract medical providers and that all such contracts contained a clause providing for termination, by either party, with 30-day notice. He continued, stating that such contractors were not state employees and that they received no retirement benefits, workers' compensation, insurance, and so forth. Additionally, they had no Personnel Act rights, and no Social Security, federal taxes, or state taxes were withheld (Affidavit of Frank J. Nuzum, 1987).

Nuzum conceded that, "[i]t is true that these medical services providers are under the authority of the respective warden or Unit Superintendent, but only administratively, as he is in command of the prison unit." Stressing that the Superintendent had no authority to make medical judgments and no authority to delegate any medical/clinical decisions, Nuzum insisted that contract medical services providers exercised independent professional judgment and were responsible for their own clinical decisions with "no interference by custodial personnel" (Affidavit of Frank J. Nuzum, 1987).

In summary, Nuzum insisted that, "The only 'regulations' as such to which these contractual medical services providers are subject are 'standing orders' and 'protocols' outlined in the Departmental Health Care Manual ...." However, he conceded that, "contractual medical services providers are subject to regulations of the North Carolina board of Medical Examiners, the North Carolina Medical Association, the North Carolina Board of Nursing and other similar medical associations ..." (Affidavit of Frank J. Nuzum, 1987).

On May 31, 1985, Quincy West's *pro se* response to the affidavits filed and motions to dismiss was filed.<sup>5</sup> West cited *Rendell-Baker v. Kohn*,<sup>6</sup> a 1982 case in which the question raised was: "Is the alleged infringement of federal rights fairly attributable to the State?" (*Rendell-Baker*, 1982, at 837-838). The question was pertinent to West's plea. However, the *Rendell-Baker* Court's answer to the question was "No." West claimed that in his instance "the facts are cut

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<sup>5</sup> West's response to the affidavits may be found in Appendix D.

<sup>6</sup> *Rendell-Baker* (1982) was cited by the 4<sup>th</sup> Circuit in their decision in *Calvert*, as was *Polk County v. Dodson* (1981). Richard Giroux of NCPLS would argue in his *amicus* brief upon appeal of *West* that reliance upon *Polk County* and *Rendell-Baker* was misplaced.

and dry that the defendants action [sic] were carried out under color of state law” (Appendix, 1987, pp. 30-31)(West, 1987b).

Although ungrammatically presented, West’s response contained a cogent argument and several acute observations about the state’s request to dismiss. He noted that the North Carolina Attorney General’s office was defending Atkins and ascribed meaning to that representation, i.e., that Atkins was more closely tied to the state than either party would admit. He also pointed out significant differences between his own case and *Calvert v. Sharp* (4<sup>th</sup> Cir. 1984), i.e., that Dr. Sharp, as an employee of a private medical group, was not as reliant on the state for funds as Dr. Atkins, and that he was one step further removed in a contractual relationship with the state. Writing to that point, West stated that, “[b]ased on these facts one do [sic] not need be a Harvard Law School Graduate to distinguish the vast differences between the Activities of Dr. Sharp and defendant Adkins [sic] ...” (West, 1987b). In conclusion, West cut to the heart of the matter, insisting that the merits of the case were in his favor and that Atkins was attempting to escape the charges by claiming that the court did not have jurisdiction:

There are [sic] 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 [sic] deny there charges, rather he attempts to escape Justice by contending that the Court donot [sic] have the Jurisdiction to determine the case on its merits. Plaintiff donot [sic] have any problem understanding why defendant seeks to escape [sic] answering the case on the merits . . . . but the facts of Jurisdiction and the merits are against the defendant (West, 1987b).

West had developed a compelling argument. While his claim was made *pro se*, it is unclear whether he developed it himself or if he was coached by a seasoned attorney. On June 6, 1985, the district court issued a summary judgment in favor of Defendant Atkins. West appealed.

## North Carolina Prisoner Legal Services, Inc.

North Carolina Prisoner Legal Services (NCPLS) was established in 1978 as a non-profit public service organization. Its Board of Directors includes representatives of the North Carolina Bar Association, the North Carolina Association of Black Lawyers, the North Carolina Association of Women Attorneys, and deans at the law schools of the University of North Carolina, Duke, Wake Forest, and Campbell University. In 1986 the North Carolina Department of Correction contracted with NCPLS to provide legal services to inmates. At the time that it intervened in *West*, the organization's funding was from Legal Services of North Carolina. Following the enactment of the Prison Legal Reform Act of 1996 the Department of Corrections continued the contract, although no longer legally compelled to do so.

NCPLS intervened in the *West* complaint following the district court's summary judgment. The intervention occurred at the request of the inmate and was further motivated by previous complaints that NCPLS had received about the medical care provided by Dr. Atkins. NCPLS applied to the Fourth Circuit Court of Appeals to file an *amicus curiae* brief on behalf of appellant Quincy West. Jacob L. Safron, the attorney for the defendants, notified NCPLS that he did not object to the filing. However, he declined to give written consent.<sup>7</sup>

NCPLS was specifically interested in the issues raised by *Calvert v. Sharp* (1984) and was involved in two other cases in which *Calvert* issues had been raised. In the first of these, *Farrow v. Ms. Moore, et al.* (No.83-473-CRT), a nurse in a prison unit had moved for dismissal citing *Calvert*. The decision was a complicated one, balancing the four *Calvert* factors,<sup>8</sup> but the court held that Ms. Moore had acted under color of state law within the meaning of § 1983.

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<sup>7</sup> The Federal Rules of Appellate Procedure (United States, 1988-2001) require that *amicus curiae* briefs be filed with the written consent of both parties—or by the consent or request of the court (Black, 1990, p. 82).

<sup>8</sup> *Calvert* was discussed in Chapter 2. The factors were: (1) Was there a “sufficiently close nexus” between the state and the medical professional’s performance on his or her duties for the prison system, so that his or her conduct in these duties must be treated as that of the state itself? (2) In providing the medical services, was the medical professional performing a function “traditionally the exclusive prerogative of the state?” (3) In providing the medical services, was the medical professional exercising his or her independent medical judgment without regard to state interests or deference to state authorities? (4) Was the medical professional performing any custodial or supervisory duties for the state prison system?

In the second case, *Hammond v. Woodward, et al.* (No. 84-844-CRT, filed July 27, 1984) the circumstances were similar to the West case and NCPLS was representing an inmate who was suing Dr. Samuel Atkins. The charges were deliberate indifference to the medical needs of the inmates. At the time of the NCPLS submission requesting permission to file their *amicus* brief, the district court had not yet ruled on the motions in that case.

NCPLS believed that *Calvert* was wrongly decided and that they could distinguish between Dr. Atkins' relationship to the state and Dr. Sharp's circumstances. Dr. Sharp, as the employee of a medical group, was one further step removed from the State of Maryland than Dr. Atkins, as a direct contractor, was from the State of North Carolina. As NCPLS pointed out to the court,

The issue ... is sure to arise in other cases as well. ... [A]t a time when state prisons systems are giving more and more consideration to contracting with private agencies for the operation of medical services, individual prison units, and even entire prison systems, the *Calvert v. Sharp* (4<sup>th</sup> Cir. 1984) decision becomes even more significant. A possible extension of *Calvert* would provide the states with a way to abdicate their responsibility to the federal courts for violations of prisoners' constitutional rights by contracting with private entities for the provision of various prison services and facilities (Request of Sept. 18, 1985, pp. 3-4).

### **The Circuit Court of Appeals**

NCPLS simultaneously submitted their motion to file an *amicus curiae* brief on behalf of Quincy West and the brief itself to the U.S. Court of Appeals for the Fourth Circuit. The court appointed Richard E. Giroux of NCPLS to represent West in the action. Co-appellees<sup>9</sup> in the case were:

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<sup>9</sup> When one is the subject of an action in federal district court, they are referred to as the "defendant." At the appeals court level the party against whom the appeal is brought is referred to as the "appellee;" and, at the Supreme Court level the party against whom the action is brought is referred to as the "respondent." Similarly, the individual bringing the action is referred to in federal district court as the "plaintiff," in circuit court the individual bringing the action is referred to as the "appellant;" and, at the Supreme Court level the party bringing the action to the Court is

Rae McNamara who served as Director of the Division of Prisons within the North Carolina Department of Correction from August 1, 1981 to March 15, 1985; and, James B. Hunt, Jr., Governor of North Carolina from January 5, 1973 to January 4, 1985.

### **Brief for the Appellant**

In his amicus submitted to the court, Giroux argued that reliance on *Polk County* (1981) and *Rendell-Baker* (1982) was not appropriate. He reasoned that in *Polk County* “the public defender’s *function* was determinative in resolving whether she acted under color of state law” and that the Supreme Court considered, as a basic fact, that in the performance of a public defender’s traditional function, “he or she is the State’s adversary.” Giroux found that the most significant distinction between the public defender and the prison physician was that the public defender opposes the state in an adversarial process; and, that “medical ethics requires a prison physician to cooperate, and coordinate his actions, with the state.” He also pointed out that “a criminal defendant dissatisfied with an attorney, appointed or retained, enjoys the option of dismissing his attorney ...” (Giroux, 1985). West did not enjoy a similar option to dismiss his physician and engage the services of another.

Giroux found the use of *Rendell-Baker* in the court’s reasoning in *Calvert* to be inappropriate because it was an action against private citizens working in a private school. *Calvert*, on the other hand, was a case against a physician working in a public institution. He argued that the Fourth Circuit should have used *Burton v. Wilmington Parking Authority* (1961) in its *Calvert* decision. In *Burton* a portion of a state-owned parking facility was leased by a private party for the operation of a restaurant. Giroux stated that the court held in *Burton* that “when a state leases public property in this manner, compliance with the proscriptions of the 14<sup>th</sup> Amendment is necessary. The dispositive factor<sup>10</sup> was the extent and nature of the overall relationship between the state agency and the private enterprise” (Giroux, 1985, p. 7).

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called the “petitioner.” Because either party to an action may appeal to a circuit court or the Supreme Court, one may not assume that the defendant in an action is the same as the respondent or plaintiff at another level of jurisprudence.

Attacking the contract relationship argument, Giroux reasoned that there was no meaningful difference between the responsibilities and characteristics of a “regular” prison staff physician and Dr. Atkins. He also noted that the Division of Prisons placed administrative controls on Dr. Atkins through the vehicle of a contract “just as the employment contract places such controls on any staff physician at Central Prison Hospital” (Giroux, 1985, p. 12).

Giroux found decisions of several other circuit courts to be in conflict with the Fourth Circuit’s decision in *Calvert*:

*Chalfant v. Wilmington Institute* (3<sup>rd</sup> Cir., 1978): ... The *Chalfant* court’s analysis distinguishes the test applied where the defendant is a private enterprise, from where the defendant acts on behalf of a state instrumentality (Giroux, 1985, p. 8).

*Robinson v. Bergstrom* (7<sup>th</sup> Cir., 1978): ... [T]he status of the individual actor is irrelevant if the institution on whose behalf he acted is found, upon examination of all the relevant factors, to be an instrumentality of a state or local Government (Giroux, 1985, pp. 8-9 quoting 579 F.2d 401 at 407).

*Robinson v. Jordan* (5<sup>th</sup> Cir., 1974): ... A county health officer, a doctor, was sued as the result of medical treatment of a prisoner in the county jail. The court held that because the plaintiff had no option to choose another doctor because of his incarceration pending trial, the doctor acted under color of state law for purposes of § 1983. The court made this holding despite the fact that the state did not interfere directly with the doctor’s exercise of professional judgment (Giroux, 1985, p. 9).

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<sup>10</sup> *Black’s Law Dictionary* (6<sup>th</sup> ed) defines “dispositive facts” as “Jural facts, or those acts or events that create, modify or extinguish jural relationships...” In this instance, the dispositive factor was a factor that altered jurisprudential reasoning or a relationship created by jurisprudence.

Citing several additional circuit decisions which were in conflict with the Fourth Circuit's *Calvert* decision,<sup>11</sup> Giroux pointed to "the faulty analogy between the doctor/patient and public defender/state relationships" that resulted when the court used *Polk County* as an analog. He noted that *Calvert* was "the *only* reported circuit decision holding that a physician who administered medical treatment to inmates pursuant to a contract with the State, does not act under color of state law" (Giroux, 1985, p.14) [emphasis added].

Discussing policy issues raised by *West*, Giroux pointed out that in *Flagg Brothers, Inc. v. Brooks* (1978), the Supreme Court had enumerated some of the areas that are exclusively within the purview of the state: "elections which in practice produce the 'uncontested choice of public officials'",<sup>12</sup> "municipal functions of a town";<sup>13</sup> "education; fire and police protection; and tax collection."<sup>14</sup> Conceding that while a constitutional responsibility for the care for inmates was not enumerated in *Flagg Brothers*, Giroux held that the Supreme Court had made such a responsibility clear in *Estelle v. Gamble* (1976):

These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met ... "[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself" (*Estelle*, 1976 quoting *Spicer v. Williamson*, 1926)

Giroux argued that, if the state can avoid constitutional scrutiny of its obligation by contracting for medical care for prisons, prisoners' rights to be free from deliberate indifference to their serious medical needs "would be rendered meaningless." He pointed out that a prisoner who

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<sup>11</sup> *Byrd v. Wilson* (6<sup>th</sup> Cir., 1983); *Daniels v. Gilbreath* (10<sup>th</sup> Cir., 1982); *Duncan v. Duckworth* (7<sup>th</sup> Cir., 1981); *Broughton v. Cutter Laboratories* (9<sup>th</sup> Cir., 1980); *Ferranti v. Moran* (1<sup>st</sup> Cir., 1980); *Murrell v. Bennett* (5<sup>th</sup> Cir., 1980); *Hall v. Ashley* (8<sup>th</sup> Cir., 1979); *Norris v. Frame* (3<sup>rd</sup> Cir., 1978); and, *Todaro v. Ward* (2<sup>nd</sup> Cir., 1977).

<sup>12</sup> *Terry v. Adams*, 345 U.S. 461, at 484 (1953).

<sup>13</sup> *Marsh v. Alabama*, 326 U.S. 501(1946).

<sup>14</sup> *Flagg Brothers*, 436 U.S. at 158-59, 163 (1978).

experienced disregard of his medical needs by a state employee could assert an Eighth Amendment claim while a fellow inmate treated by a “private” physician under contract with the state would be unable to seek similar redress. At the time this argument was being formulated by Giroux, the states and federal government were delegating various prison services to private providers. If *Calvert* were to hold, he foresaw this trend as a mechanism to obviate the federal courts’ ability to review conditions in state penal institutions. Contractors and their employees would not be held to federal constitutional standards. Prophetically, Giroux reasoned that,

The door would be open to the wholesale evasion of fourteenth amendment rights; the state could hire private corporations to administer prison units, or even the entire prison system, and thereby avoid liability under § 1983 for any violations of inmates’ constitutional rights (Giroux, 1985, p. 18).

### **Brief for the Appellees**

The brief submitted by Jacob L Safron, Special Deputy Attorney General for the State of North Carolina, argued that *West* was identical to *Calvert* (1984). Safron’s brief quoted the Fourth Circuit’s *Calvert* decision at length and cited *Rendell-Baker* in which the court stated that “Acts of ... private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts” (*Rendell-Baker*, 1982). He pointed to a Sixth Circuit opinion that “where a prisoner has received some medical attention and a dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law” (*Westlake v. Lucas*, 6<sup>th</sup> Cir, 1976).

Safron emphasized the independent nature of medical decisions and insisted that “... [a] private physician is not, and by the nature of his function cannot be the servant of an administrative superior.” In support of this argument he cited: (1) The American Medical Association’s *Standards for Health Services in Prisons* (1979) (Standard 102 states: “Matters of medical ... judgment are the *sole* province of the responsible physician.”); (2) “The American Medical

Association Principles of Medical Ethics;”<sup>15</sup> (3) the ethical obligations of physicians dating back to the time of the ancient Greeks (The Hippocratic Oath). And, he also cited the Court’s holding in *Blum v. Yaretsky* (1982): “... Private physicians exercise their own judgment and make their own medical decisions according to standards not established by the state” (Brief of the Attorney General of North Carolina, 1986)

Safron drew a careful distinction between custodial functions and medical care. In essence, the argument was that custodial functions may be attributable to the state, but medical care and medical decisions are within the professional purview of physicians; and, that because of the independence of professional medical judgments, they cannot be attributable to the state. This latter perspective is reflected in the organizational bifurcation of hospitals into “administrative” and “medical” areas of responsibility with dual hierarchies. Consistent with this argument, Atkins’ affidavit, filed May 6, 1985, declared that he had no custodial or supervisory duties in relation to the inmates. “... I made my own medical decisions according to the standards established by the American Medical Association, and not those established by the North Carolina Department of Corrections” (Joint Appendix, 1987, p. 22-23). This position was supported by the affidavit of Frank Nuzum, Ph.D., Director of Health Services employed by the North Carolina Department of Corrections, Division of Prisons. Nuzum stated that while contract providers are under the authority of wardens or Unit Supervisors, that such authority is only administrative, and that “[t]he superintendent has no authority to exercise any medical judgment or to delegate any medical or clinical decisions. The medical services providers exercise their independent medical judgment and make their own medical clinical decisions, with no interference by custodial personnel” (Joint Appendix, 1987, pp. 27-29). Safron and the State of North Carolina relied on this distinction and the support that *Calvert* offered to the distinction. Nevertheless, Safron *did* address West’s Eight Amendment claim.

Safron pointed out that, in order to prevail in a claim of inadequate medical care under 42 U.S.C. § 1983, “the mistreatment or nontreatment must be capable of characterization as cruel and

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<sup>15</sup> The AMA adopted revised Principles of Medical Ethics based on the recommendations of its Council on Ethical and Judicial Affairs in 1980 (American Medical Association, 1998 p. xiv; Veatch, 2000, p. 171).

unusual punishment.” The threshold for such a claim is a standard referred to as “deliberate indifference.”

Justice Thurgood Marshall writing for the Court in *Estelle v. Gamble* (1976)<sup>16</sup> articulated that standard:

... [D]eliberate indifference to serious medical needs of prisoners constitutes the “unnecessary and wanton infliction of pain,” *Gregg v. Georgia, supra*, at 173 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs<sup>17</sup> or by prison guards in intentionally denying or delaying access to medical care<sup>18</sup> or intentionally interfering with the treatment once prescribed.<sup>19</sup> Regardless of how evidenced, deliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983 (*Estelle*, 1976, 429 U.S. 97 at 104-105).

Safron contended that West’s complaint did not meet this standard—a standard that exceeds mere “negligence” (Brief of the Attorney General of North Carolina, 1986).

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<sup>16</sup> *Estelle* (1976) was discussed earlier in this chapter and in the previous chapter.

<sup>17</sup> The Court here referenced: *Williams v. Vincent* (CA2 1974), “doctor’s choosing the ‘easier and less efficacious treatment’ of throwing away the prisoner’s ear and stitching the stump may be attributable to “deliberate indifference... rather than an exercise of professional judgment”; *Thomas v. Cannon* (1974), “injection of penicillin with knowledge that prisoner was allergic, and refusal of doctor to treat allergic reaction”; *Jones v. Lockhart* (CA8 1973), “refusal of paramedic to provide treatment”; and *Martinez v. Mancusi* (1971), “prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon.”

<sup>18</sup> The Court here referenced: *Westlake v. Lucas* (CA6 1976); *Thomas v. Pate, supra*, at 158-159; *Fitzke v. Shappell* (CA6 1972); *Hutchens v. Alabama* (CA5 1972); *Riley v. Rhay* (CA9 1969); *Edwards v. Duncan* (CA4 1966); and *Hughes v. Noble* (CA5 1961).

<sup>19</sup> The Court here referenced: *Willbron v. Hutto* (CA8 1975); *Campbell v. Beto* (CA5 1972); *Martinez v. Mancusi, supra*; *Tolbert v. Eyman* (CA9 1970); and *Edwards v. Duncan, supra*.

### **The Fourth Circuit Court of Appeals Panel**

Three judges<sup>20</sup> of the Fourth Circuit heard West's case on April 11, 1986 and on September 3 of the same year they vacated the district court's grants of summary judgment to Atkins and McNamara. However, the appeals court remanded the case for a determination of whether or not Atkins' conduct met the deliberate indifference standard of *Estelle* (1976). The court did not rush "to address the question of whether action under color of state law could, on the record, be found to exist..." That question would follow and be based on the district court's findings regarding whether the case could be distinguished from *Calvert*.

### **The Fourth Circuit Court of Appeals *En Banc***

A request to rehear the case *en banc* was requested by the state and entertained by the court. Seven judges voted in favor of vacating the decision of the three judge panel and rehearing the case *en banc*. The four judges opposed to the rehearing included Chief Judge Winter and Judges Murnaghan and Ervin who had conducted the first hearing. West was reheard by the full panel of the appeals court on December 8, 1986 and decided on April 9, 1987.

Judge Chapman delivered the opinion of the court. The majority of the court found the Giroux argument that *West* differed from *Calvert* to be unpersuasive and held that Dr. Atkins was not acting under color of state law for purposes of § 1983 when he allegedly provided inadequate medical care to West. Relying on *Polk County v. Dodson* (1981), the court chose not to address whether the nature of the doctor-patient relationship was or could be adverse to the interest of the state, but held that "[w]here the professional action is within the bounds of professional discretion and obligation, his independence from administrative direction is assured." Based on the lack of evidence that McNamara and Hunt had the authority to overrule Atkins, they found no "personal involvement" on their parts and affirmed the district court's dismissal of the claims against the two.

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<sup>20</sup> The judges hearing the case were Chief Judge Winter and Circuit Judges Murnaghan and Ervin.

The court agreed with Giroux's argument that the *Dodson* rule followed in *Calvert* limited the protections provided to individuals subjected to *Estelle* actions. Declining to overturn *Calvert v. Sharp*, the majority found this limitation to be "entirely consonant with the requirements of § 1983" and felt that it was not their role to "tamper with the limitation of § 1983 liability established in *Dodson*."

### **A Dissenting Opinion**

Chief Judge Winter, concurring in part and dissenting in part, filed an opinion in which Judges Phillips and Ervin joined. The concurrence was with the dismissal of the claims against McNamara and Hunt. Winters pointed out that appellants must allege personal involvement in the deprivation of constitutional rights because respondeat superior<sup>21</sup> is not available for § 1983 actions.

Dissenting, Winters pointed out that an *en banc* court possesses greater authority than a panel and is free to re-examine and/or overrule its precedents "if it determines that they were incorrectly decided." Winter declared that he was of the view that *Calvert* was an aberration which should be overruled. Failing that, he felt that it should be confined to its facts which were sufficiently different from *West* to render it inapplicable (*West*, 4<sup>th</sup> Cir. 1987 at 997).

Winters argued that prison physicians are state actors subject to § 1983 liability. *Calvert* had conceded that a physician in an employee relationship with a state and with "custodial and supervisory duties" acts "under color of state law." The question he raised was whether the absence of either the employee relationship or custodial or supervisory duties would require a different conclusion. Pointing out that all employment relationships are contractual arrangements, being a contract physician should not strip Atkins of the essentially governmental nature of his services. Arguing that in *Calvert* the court had misapplied *Polk*, Winters contended that, "*Estelle* did not turn on the supervisory role of the doctor there; the complaint was premised solely on the medical treatment given." And, he stated that he thought "... it clear that *Polk*

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<sup>21</sup> "Respondeat superior" essentially means "let the master answer." That is, "a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent" (Black, 1990).

turned on the inherently adversarial relationship between public defenders and the state.” In a footnote, Winters observed that “[a]lthough *Calvert* asserts that ‘[t]he loyalty owed by Dr. Sharp was potentially adverse to the interests of the state,’ ... no basis for this speculation is offered, nor does one readily spring to mind” (*West*, 4<sup>th</sup> Cir. 1987 at 997).

Clearly persuaded by Giroux’s brief and expanding on the above, Winters reasoned that, even though Dr. Sharp was one administrative step removed from the state, that both Atkins and Sharp “worked under contract with the state, received payment from state funds, were subject to regulation by state and professional review boards, and performed services that the state is obliged to provide to prison inmates” (*West*, 4<sup>th</sup> Cir. 1987 at 998).

Winters found unsupported in the record the majority’s assertion that where a “professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured.” The Chief Judge found that this assertion disregarded the *AMA Standards for Health Services in Prisons* (1979)—a document that prescribed the relationship between medical personnel and other prison officials as one of “close cooperation and coordination” and a “joint effort.” Additionally, Winters pointed out that the rationale used by the majority would “preclude a § 1983 action against any medical professional [treating] a prison inmate since, by virtue of the exercise of their ‘independent professional’ judgment, they could never be considered state actors—notwithstanding the holding in *Estelle v. Gamble*” (*West*, 4<sup>th</sup> Cir. 1987 at 998).

Winters challenged the appellees’ argument regarding the “independence” of medical services contractors limiting § 1983 liability. He found it intolerable that,

... if this is the basis for delimiting § 1983 liability, the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to “private” actors, when they have been denied (*West*, 4<sup>th</sup> Cir. 1987 at 998).

Addressing the “public function” rationale, Winters referenced *Blum v. Yaretsky* (1982) in which the Supreme Court held that “when an otherwise private party performs a function that has been “traditionally the exclusive prerogative of the State”, that action would be found to be under color of state law. Winters reasoned that “[t]he incarceration of convicted criminals surely falls within that category” (*West*, 4<sup>th</sup> Cir. 1987 at 998).

While the *Calvert* majority had held that medical care is not the exclusive responsibility of the state, Winters argued that *in the prison context* that observation is incorrect. The state has complete control over that individual and over “the circumstances and sources of a prisoner’s medical treatment.” An additional difference between *Calvert*’s and *West*’s prison status was that *Calvert*, by virtue of state statute, was allowed to go outside of the prison system for medical care. *West*, because of the level of his confinement (close custody), did not have this option<sup>22</sup> (*West*, 4<sup>th</sup> Cir. 1987 at 1000).

Covering the various perspectives available, Winters argued that *even if* the court would not reject *Calvert*, that decision should not control *West* because of the differing capacities of the two inmates to go outside of the prison system for medical care. *West* had no choice of providers and was totally dependent upon the state for medical care. That meant Atkins—a physician “chosen by North Carolina to fulfill the state’s constitutional obligation to provide inmates like *West* with adequate medical care.” Winters reasoned that “North Carolina should not be permitted to plead a lack of responsibility because it delegated the task to a ‘private’ party” (*West*, 4<sup>th</sup> Cir. 1987, at 1000).

As well as noting that inmates *West* and *Calvert* differed in their capacities to obtain medical care, Winters agreed with *West*’s argument<sup>23</sup> and found a significant difference in the positions of Drs. Atkins and Sharp. Dr. Sharp was engaged in a medical practice with “abundant non-state resources” and provided services at various private clinics in Maryland. Dr. Atkins was “heavily

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<sup>22</sup> Inmates in *minimum* custody in the North Carolina Prison system could obtain health care services from outside of the Division of Prisons at the time of *West*’s injury—if able to pay for such services from private health insurance or family funds. This option was not available to inmates held in medium, close, or maximum custody.

<sup>23</sup> The argument was offer by *West* in his May 31, 1985 traverse in opposition to a motion to dismiss.

dependent on state funds” as his private practice outside of the prison system was more limited than Sharp’s (*West*, 4<sup>th</sup> Cir. 1987, at 1000).

Winters, agreeing with West and Giroux, found that the absence of an intermediary made Atkins’ relationship to the state significantly different from that of Sharp. He found that the intermediary served to insulate Dr. Sharp from the influence of state administrative pressures and that such a buffer was absent in the case of Dr. Atkins who was “employed directly by the state, much as any other state employee ...” (*West*, 4<sup>th</sup> Cir. 1987, at 1000).

### **The Supreme Court Grants Certiorari**

Heartened by Chief Judge Winters’ dissent, NCPLS forwarded a petition for a writ of certiorari<sup>24</sup> to the U.S. Supreme Court. This request for certiorari was filed on July 8, 1987 and granted on October 19, 1987. *West v. Atkins* was entered into the Court’s calendar as No. 87-5096. West was represented by Adam Stein who would present the oral argument and again by Richard Giroux, the principal author of the brief. Special Deputy Attorney General for North Carolina, Jacob L. Safron continued his representation of Dr. Atkins, with Lacy H. Thornburg, Attorney General of North Carolina, also listed on the brief. Oral arguments were presented on March 28, 1988 and the Court announced its decision on June 20, 1988.

### **Brief for the Respondent**

The brief for respondent Atkins outlined a different sequence of events from that presented by West. In the scenario presented by Safron, West tore his left Achilles tendon while playing volleyball on July 30, 1983. He was transferred to Central Prison Hospital and was seen by Atkins who placed a long cast on his leg on August 9, 1983. West returned on August 30 with the cast broken. It was removed and a new long leg cast was put on. That cast was removed on September 20, 1983 and the inmate was seen again by Atkins on October 4, October 18, and

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<sup>24</sup> The U.S. Supreme Court uses the mechanism of the writ of certiorari to select its cases. Of common law origin, the writ is issued by a superior to an inferior court and requires the latter to provide a certified record of a case tried by that inferior court. The Supreme Court denies more cases than it hears. “Cert den.” appearing at the end of a case citation means that the Court has declined to hear it (Black, 1990).

January 12, 1984, and was discharged on February 14, 1984. According to Safron's account West injured his right leg playing basketball on April 30, 1984. There were no reports of medical attention associated with the second injury.

As in earlier briefs, Safron relied on *Calvert v. Sharp* (4<sup>th</sup> Cir. 1984) and *Polk County v. Dodson* (1981)—joined by the Fourth Circuit's April 9, 1987 decision in *West*. Safron continued to claim that the federal courts lacked jurisdiction in *West* and that “[e]ven if the district court had jurisdiction over Dr. Atkins, ... West failed to state an Eighth Amendment claim ... West's complaint, at best, sets forth a negligence based claim against Dr. Atkins and negligence is not actionable under § 1983” (Thornberg & Safron, 1987, p. 6). Safron argued that “[t]he relationship between doctor and patient does not change because the state pays for the doctor” (Thornberg & Safron, 1987, p. 15). His point was that the doctor's duty to his patient does not change based on who is paying for his professional services. This point would be challenged later by justices during argument.

### **Brief for the Petitioner**

The Stein and Giroux brief argued that the use of *Polk County v. Dodson* (1981) was inappropriate in that in contrast to a public defender, a prison physician's professional obligations did not place him in an adversarial position to the state. The petitioner's attorneys quoted the *North Carolina Division of Prisons Health Care Manual* (1980):

“[I]nstitutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve.” *Id.* A prison doctor serves within the prison together with its whole staff to “provide medical care for those whom [the state] ... is punishing by incarceration,” *Estelle*, 429 U.S. at 103, an activity mandated both by the Eighth Amendment and by North Carolina law. N.C. Gen. Stat. § 148-49 (1983) .... These are services provided to North Carolina prisoners only by the state. The inmate may neither employ nor elect to see a different doctor of his choice.

The brief focused on the issue of state action, included substantial sections from the Winters dissent at the appeals court level, and was buttressed by the briefs submitted by the American Public Health Association and the American Civil Liberties Union.

### **Friend of the Court: The American Public Health Association**

On December 10, 1987, the American Public Health Association (APHA) filed a request for the Court's approval to file an *amicus curiae* brief in support of the petitioner. They provided the written approval of the petitioner. However, again counsel provided for the respondent by the State of North Carolina consented to submission of the brief, but declined to provide that consent in writing. The Rules of the Supreme Court of the United States require that an *amicus curiae* brief be "accompanied by the written consent of all parties" [Rule 37.3 (a)] or, in instances where consent has been withheld, "a motion for leave to file an *amicus curiae* brief may be presented to the Court." When the latter course is followed, as in the case of the APHA brief, the motion must appear as part of the brief submitted and "indicate which party or parties ... have withheld consent and state the nature of the movant's interest" [Rule 37.3(b)].

Established in 1872, APHA's purpose was the improvement of the quality of public health. In 1987, it was the largest public health association in the world, with approximately 50,000 members. APHA had a special interest in assuring adequate health care for underserved segments of society and, in the early 1970s, considering prison inmates to be an underserved population in the area of health care, it set out to devise standards for the provision of health care in prisons and jails. The product of that effort was the 1976 publication of *Standards for Health Care in Correctional Institutions*.<sup>25</sup>

Prepared under the direction of William J. Rold, Esq., the APHA brief contained 64 pages of discussion, cited 59 cases, nine federal statutes and rules, and ten state statutes, regulations and rules. Other authorities cited, in the form of books, reports, and journals dealing with health care standards and/or prison health care, numbered 49. The APHA arguments focused on three areas:

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<sup>25</sup> A second edition of the *Standards for Health Care in Correctional Institutions* was published in 1986 and a third edition was released in 2003.

(1) a contention that prisons and jails, as highly bureaucratized structures, influence the professional independence of physicians providing care; (2) an argument that litigation of prison medical care results in public health benefits and protects professional medical judgments; and, that the courts should not move to unduly obstruct litigation of Eighth Amendment claims; and, (3) an argument that health care practitioners regularly providing care to inmates in correctional institutions should be considered by the Court to be acting “under color of state law.”

The discussions of the bureaucratic nature of health care services in penal institutions added a more generalized perspective of such institutions. The APHA brief argued *West* should not be governed by *Polk County v. Dodson* (1981) and that the work of prison medical practitioners should be differentiated from the adversarial relationship that public defenders representing clients in a criminal process have with the state. It argued that the circuit court had ignored the “realities of the correctional setting and the substantial body of literature showing that medical professionals in institutions, and in prisons particularly, have limited independence and often become entangled in non-health concerns” (APHA, 1987, p. 7). Citing several authorities,<sup>26</sup> the brief held that, “Bureaucracies ‘subjugat[e] ... professional standards to administrative consideration in the decision-making process,’ fostering in professionals a ‘lack [of] autonomy which is vital for successful performance’” (APHA, 1987, p. 8). It was pointed out that “[p]risons and jails are inherently coercive institutions that for security reasons must exercise nearly total control over their residents’ lives and the activities within their confines” (APHA, 1987, p. 10) and that patient needs were often weighed against the burden placed on the institution when ordering such items as “special clothing, a special diet, an extra shower, a permit for a cane, or more frequent access to exercise equipment” (APHA, 1987, pp. 11-12). Inmates can neither treat minor ailments such as headaches, upset stomachs, or colds, nor stay in bed when ill. Common items such as aspirin or dental floss must be obtained from prison medical staff (APHA, 1987, p. 13).

The brief’s authors cited a 1984 correctional health journal article recommending the use of a “‘briefing sheet’ for [medical] consultants that detail[ed] ‘which procedures or medicines can

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<sup>26</sup> (Blau, 1973; Engel, 1969; Hall, 1968; Lichtenstein, 1981).

and cannot be done or given at the institution” (APHA, 1987, pp.16-17). The article offered the following advice to medical practitioners:

- Keep a therapeutic regimen as simple as possible
- Avoid prescribing “exotic” medications or “non-essential diets.
- Specify follow-up care that is within the capability of the institutional staff.
- Do not reveal future medical appointment dates to the patient.<sup>27</sup>
- Recognize the “enormous amount of time and resources” involved in movement of a prisoner when scheduling return visits.
- Understand that security must be considered “an integral part of any consultative effort.”
- Remember that “a sign of an escaper can be a request for a repeat visit to a consultant.”
- Do not “berate prior care from the institution” in front of the patient.
- Be “certain and positive” lest uncertainty lead to litigation (Lessenger & Bader, (1984).

The brief’s authors argued that “prison rules, adopted for non-medical administrative reasons, greatly enlarge the demands on medical staff, fostering a tendency to characterize patients as exaggerators or malingers” (APHA, 1987, p. 15). In support of this contention, the APHA document referenced a 1985 “Guest Editorial” in the *Journal of Prison & Jail Health* that emphasized that, “the danger of minimizing the complaints of prisoner-patients is very real: The death records maintained in prisons throughout this country provide eloquent, if mute, evidence of malingerers whose fabricated complaints proved to be fatal” (Nathan, 1985). Establishing the credibility of the author, it was noted that Nathan had “served as a special master for federal district judges in Ohio, Georgia, Texas, and New Mexico” (APHA, 1987, p. 15 n. 16).

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<sup>27</sup> Movement of prisoners from place to place creates challenges to security and potential opportunities for escape attempts. Note the seventh recommendation that suggests that a request for an appointment may be interpreted as a “sign of an escaper.” Knowledge of future appointments was seen as providing an opportunity for advance planning and coordination with possible accomplices.

The APHA also pointed out that medical staff in correctional institutions assist the institution in a variety of ways that are adverse to their patients' interests, such as conducting body cavity searches, documenting the effects of the use of force by staff, authorizing placement of inmates in restraints or solitary confinement and "rendering an opinion as to the competency of a prisoner for execution" (APHA, 1987, pp. 21-22). The authors went on to state that "[t]his involvement of medical staff in custodial and disciplinary functions, although condemned by national standards,<sup>28</sup> is widespread in the experience of APHA" (pp. 22-23).

The APHA agreed that genuine professional discretion was not and should not be actionable under § 1983, but argued that in the prison setting professional independence was illusory. However, they viewed the previous 15 years of prison health care litigation as benefiting both the general public and a traditionally underserved population: inmates. They cited several "informed" sources<sup>29</sup> which agreed that the Court's 1976 decision in *Estelle v. Gamble* had vastly improved health care provided to prisoners in the United States (APHA, 1987, pp. 36-37). The authors contended that "... prison cases are replete with accounts of inadequate and inhumane health care systems that have been elevated to constitutional acceptability through federal court litigation" (APHA, 1987, pp.37-38).

### **Friend of the Court: The American Civil Liberties Union**

The American Civil Liberties Union's (ACLU) *amicus curiae* brief listed several authors: Elizabeth Alexander (counsel of record), Edward I. Koren, and Alvin J. Bronstein of the National Prison Project of the ACLU; John Powell of the ACLU Foundation; and Norman Smith of the North Carolina Civil Liberties Union Legal Foundation. Alvin J. Bronstein remains with and now heads the ACLU National Prison Project (NPP).

The ACLU brief focused on five areas: (1) an argument that medical care in prisons has traditionally been distinct from and inferior to community health care; (2) an argument that the Court's state action doctrine must be construed in light of the unique relationship between

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<sup>28</sup> *APHA Standards* (1986), n.1, Part 13, Standard D.

<sup>29</sup> (Harris & Spiller, 1986; Jacobs, 1983; Nathan, 1985; Resnik & Shaw, 1987; Wishart & Dubler, 1983).

inmates and the state; (3) an argument that prison medical care is a public function; (4) an argument that the nexus between the state and Dr. Atkins was so close that West's treatment constituted actions of the state; and, (5) a conclusion that policy concerns support the Court's finding of state action in *West* (ACLU, 1987, pp. ii-iii).

As part of their argument that medical care in prisons has traditionally been distinct from and inferior to community health care, the authors discussed a November 1986 report commissioned by the Maryland Legislature and prepared by NKC Management: Evaluation of the State of Maryland's Medical Services Program for Inmates. The ACLU cited the study's finding that,

The State [of Maryland] by contracting with a private provider intended to shift its responsibilities for the delivery of health services and apparently also sought to avoid federal court intervention and the liability for injuries suffered as the result of inadequate treatment and care (ACLU, 1987, p, 14).

At the time of the study virtually all of the medical care provided to Maryland inmates was by contract physicians rather than state employees (ACLU, 1987, p. 14, n. 11). And, the state was not monitoring the quality of the care provided. ACLU quoted the study: "... there was certainly the implication that since the delivery of health care was 'turned over' to the contractor, DOC was relieving itself of at least this area of responsibility. This attitude was manifest[ed] by gross management inattention" (ACLU, 1987, p. 15 quoting NKC Management, 1986, p. 19). These practices had proved successful when the Fourth Circuit decided *Calvert v. Sharp* in 1984, and likely were reinforced by that decision. The ACLU found the *Calvert* decision and the state's practices were intended to deprive Maryland prisoners of "any obvious possibility of constitutional protection from systemically deficient medical care" (ACLU 1987, p. 16).

Discussing the relationship between prisoners and the state, the ACLU cited *U.S. v. Classic* (1941, at 326) and contended that,

This unique relationship removes the ordinary checks against the misuses of power possessed by virtue of state law. It is, of course, this misuse of power

made possible because the wrongdoer is clothed with the authority of state law that justifies a finding of state action (ACLU, 1987, p. 17).

Referencing the well-known *Carolene Products* footnote four,<sup>30</sup> the brief's authors contended that, "prisoners are the paradigmatic example of a 'discrete and insular' minority that is hampered by the kind of public prejudice that 'tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities'" (ACLU 1987, p. 18). This point was followed by a second and third factor that the ACLU brief's authors believed to affect the reach of the state action doctrine in the context of prison medical care. The second point was that prisons are not, by their nature open institutions; and that the closed nature of correctional institutions is a factor which has led to the inferior quality of medical care provided to inmates. The third point was that prisoners rarely have choices regarding the medical care available to them.

The brief then reminded the Court of the state obligation that they recognized in *Estelle*:

These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must

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<sup>30</sup> In 1938, when the Supreme Court was backing away from its earlier scrutiny of economic regulations, Justice Stone pointed out that the Court had a special duty to certain particularly vulnerable minorities which the Court characterized as "discrete and insular." This reasoning would later evolve into "strict scrutiny" used by the Court to protect fundamental rights.

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its fact to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. ...

It is unnecessary to consider whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation [*restrictions upon the right to vote, to disseminate information, and interferences with political organizations and peaceable assembly*].

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious ... or national ... or racial minorities ...; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry. ... (*U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (Fisher, 2001))

rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met (429 U.S. at 103) (ACLU, 1987, 22).

The ACLU argued that the Court of Appeals had erred when it examined medical care from a general perspective and determined that it was not an exclusively public function. The brief contended that the lower court should have looked at *prison* medical care—not medical care in general—to make their determination. In contrast to the appellate court’s decision, the ACLU pointed out that the “North Carolina courts have specifically held that the State does have a duty to provide medical care for prisoners” (ACLU 1987, p. 27) (see *Spicer v. Williamson*, 1926) and cited a survey that they had conducted which found that “virtually all states deny prisoners the option to choose medical care of their own choice” (ACLU 1987, pp. 28-29).

In their discussion of the nexus between the state and Dr. Atkins, the brief referenced the two-part test from *Lugar* (1982):

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a person for whom the State is responsible ... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. (*Lugar v. Edmondson Oil., Inc.*, 1982) (ACLU 1987, p. 30).

The ACLU brief pointed out that the *North Carolina Department of Correction Health Care Procedures Manual* (1980) stated that “The provision of health care is a joint effort of correctional administrators and health care providers, and can be achieved only through cooperation.” In addition, the authors pointed out that West’s medications had been seized by the nurse when he was transferred to a new prison and to his understanding that Dr. Atkins would write a prescription for non-prison issue shoes. Other examples given of the blurring of custodial and medical roles included body cavity searches and x-rays performed by medical staff for institutional security purposes.

Agreeing with Giroux, the ACLU also argued that affirming the Fourth Circuit's decision would overturn *Burton v. Wilmington Parking Authority*—a decision that they identified as “a central case in the modern development of state action law”(ACLU 1987, p. 41). In *Burton*, the restaurant alleged that they would lose profits if not allowed to discriminate against blacks; and, the parking authority profited from the restaurant's operation. It was contended that the restaurant's discriminatory policies were an indispensable element in the success of the parking authority. Similar elements were held to exist in the relationship between the prison and physicians providing medical care in the facility. The authors argued that, “the State [has] a financial interest in the deliberate under provision of medical services” (ACLU 1987, p. 44).

The brief, addressing policy concerns, suggested that the Fourth Circuit's decisions showed a reluctance to find state action and to subject the actions of medical doctors to federal court review. They argued that this concern would be appropriate if a malpractice action were convertible into a constitutional tort by a finding of state action; and, “*Estelle* ... already disposed of this concern with its holding that the proper standard is one of deliberate indifference; mere negligence or malpractice will not suffice”(ACLU 1987, p. 46-47).

Addressing concerns that a finding of state action would have a chilling effect on contractual medical relationships, the ACLU stated that a decision in favor of appellant West would not have a chilling effect on contracting for medical services “when otherwise in the State's interests.” Citing the North Carolina Attorney General's representation of Atkins in *West* as an ironic example, the authors continued, “The State can indemnify contract practitioners for constitutional liability, and it can also provide for representation for medical providers in federal court” (ACLU 1987, p. 49). The argument continued that, the Court should not hesitate to find state action in *West* “[b]ecause a decision finding state action will not discourage contractual medical relationships, *except contractual medical arrangements solely designed to avoid constitutional mandates*” [emphasis added] (ACLU 1987, p. 49-50).

## The Hearing

Stein and Giroux held a dress rehearsal in their hotel room prior to the presentation of their argument. Special Deputy Attorney General of North Carolina Safron, apparently confident, declined an invitation to participate. Each party would be allotted 30 minutes for its presentation. When members of the Court asked questions, the question—and the answer—were counted as part of the allotted time. The hearing was to be an eventful one.

The clerk of the court expressed irritability because the covers of the brief submitted by the State of North Carolina had been attached incorrectly.<sup>31</sup> Richard Giroux made careful notes of the questions asked by the members of the Court during oral arguments. Those questions are included in the following because they suggest the flavor of the hearing and direction that the Court was leaning during the arguments. In addition, Giroux's notes have been expanded with material from the official transcript of the Court.<sup>32</sup> The following description of the Court's hearing of oral arguments and questions asked by the Justices is intended to give the reader the flavor of the proceedings and show how several of the justices focused on particular issues. It is also limited by the nature of the transcripts (see footnote 32, below).

The proceedings started promptly at 1:00 p.m. on Monday, March 28, 1988. Adam Stein, on behalf of Petitioner West, presented first. Justice Sandra Day O'Connor interrupted his presentation and asked if the actions of any physician would be state action, even if the services were provided in the physician's own office. Building on O'Connor's question, Chief Justice William H. Rehnquist asked what if the North Carolina law was changed to allow prisoners to choose their own doctors and the state pay for the services.

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<sup>31</sup> Upside down.

<sup>32</sup> Transcript materials are referenced as "Heritage, 1988, [page]." Unfortunately the transcript materials do not indicate which justice is speaking when questions are asked. For that reason, the summary of the narrative above has been developed from Mr. Giroux's notes in conjunction with the official transcript of the oral arguments.

Justice Scalia asked, "... He [Atkins] is doing the state's work, but is he doing the state's *punishment*? ... Don't you have to identify someone in the state system who is responsible for the carrying out of the punishment ...?"

The discussion that ensued from this line of questioning pointed out that a physician could, instead of exercising medical judgment, prevent an inmate from getting needed medical care. That explanation raised the question whether the issue at hand was malpractice rather than punishment. Pushing on the malpractice issue, Justice Scalia probed for a clear line between negligence and punishment and sought clarification regarding how a physician could be "responsible" for punishment.

Chief Justice Rehnquist asked if the case had ever been "tried out on its facts," and about the nature of the allegations in the complaint. Stein responded that the district court had not examined the facts and allegations of the case, but had granted summary judgment. Implied by this response was that the lower court had not examined the facts and allegations because it believed that Dr. Atkins was not engaged in state action and not reachable by § 1983. Stein provided the chief justice with a summary of the circumstances and the allegations of deliberate indifference. The chief justice interrupted Stein's summary to focus on Dr. Atkins' independence and asked if the people Atkins supervised were employees of the prison. Stein responded that "some of them had to have been" and that "[w]e know that he is responsible for directing the care as his patients are there in the hospital" (Heritage, 1988, pp. 9-13).

Justice Byron R. White pursued the issue of why West had filed in federal court rather than file a negligence claim in state courts. In response, Stein explained that, while West was not barred from filing a medical negligence claim in state courts, he had chosen his own forum and filed a *pro se* complaint. Generally such actions were brought under the State Tort Claims Act. However, following the Fourth Circuit's decision in *Calvert v. Sharp*, the state's position was that physicians, such as Atkins, were not state employees and could not be sued under that act. At that point Justice White addressed the issue of state action and asked if the court of appeals held that "there is no state action even if a doctor is an employee of the prison", i.e., did the

decision cover “any doctor in or out of the prison system?” Mr. Stein replied that was his understanding (Heritage, 1988, p. 14).

Justice Blackmun asked if the court of appeals had really just followed *Calvert*, and, on that basis, if there could *ever* be a claim against a doctor. In response, Mr. Stein explained that “we have seen ... some [recent] unpublished opinions from the Fourth Circuit where we find that if a doctor, a prison doctor is named in the suit, ... the broad language is cited, and the case is dismissed (Heritage, 1988, p. 15).

Stein argued that the Fourth Circuit “got the language of professionalism in *Polk County* wrong” and that “what was important in the *Polk County* case in terms of the professional obligations of the public defender was her professional obligation to be not only independent but *to be adversarial to the state*” (Heritage, 1988, p.17) [emphasis added]. In response to a question by Chief Justice Rehnquist, Stein continued to clarify the petitioner’s challenges to the Fourth Circuit’s reliance on professionalism as the sole responsibility of physicians providing medical services in correctional facilities and pointed out that the provision of medical services is a core responsibility of the state providing prison services. Stein also pointed out that the Civil Rights Act of 1871 was intended to provide remedies as broad as the 14<sup>th</sup> Amendment and that the Court of Appeals’ *Calvert* decision had, in effect, cut *Estelle* in half, removing physicians as potential litigants and damaging the progress made in prison litigation by the Court’s earlier *Estelle* decision (Heritage, 1988, pp17-19).

The Court’s questions suggested the direction of their reasoning and the panel was more brusque and irritable in their questions of Mr. Safron, counsel for Dr. Atkins. At the beginning of his presentation, mention was made that North Carolina prisons contract with 130 physicians and spent \$23,345,000 in FY 1986-87 on medical care for inmates.

The first question posed to Safron was, “Do you conceive of any factual situation where a physician is liable?” (Heritage, 1988, p. 20). Safron responded, “... if we have an administrator, but we would deny that under these facts that Dr. Atkins was an administrator. Although he may have given medical orders to medical staff, we deny that he is an administrator.” Probing

further, the justice asked about a situation in which the doctor is “employed full-time and exclusively by the state to render medical care to the prisoners ....” Safron held fast to his position and that of the Fourth Circuit that, “if he is a doctor, performing medicine, and is not an administrator, that he is not functioning under color of state law merely because he is a physician employed by the state to provide medical services” (Heritage, 1988, pp. 20-21).

Posing a hypothetical question, Justice O’Connor asked, “What if the prison hired on a contract basis prison guards, all of whom are licensed under some state licensing scheme to make them professionals? ... No liability? Not state actors?” (Heritage, 1988, p. 21).

Safron responded that they had cited in their brief a case involving private guards with arrest powers. However, he differentiated between custodial authority which he held to be state action and medical care which he held was not (Heritage, 1988, p. 21).

Justice O’Connor replied, “That’s a little difficult to argue on the face of *Estelle*, isn’t it” (Heritage, 1988, p. 21). Justice O’Connor was referencing *Estelle v. Gamble* (1976) in which the Court provided a standard for the determination of “deliberate indifference” to prisoners’ medical needs. That earlier Court held that,

... deliberate indifference to a prisoner’s serious medical needs constituted cruel and unusual punishment under the Eighth Amendment and gave rise to a civil rights cause of action under 42 USCS 1983, regardless of whether the indifference was manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed (*Gamble*, 1976, 104-105 & nn.10 & 11).

Justice Scalia interrupted Safron, who was “dodging and weaving” with the Court’s questions, and asked if he was abandoning the professional requirement. The exchange between the justice and Safron continued on the topic of the liability and professional or non-professional status of prison guards, janitors, and food service contractors. In a challenging exchange, the justice

pointed out that the case was about a prison doctor and asked, “That is different from a private doctor, right?” (Heritage, 1988, p. 23).

Justice Thurgood Marshall, joining the exchange, asked, “What’s the difference between a prison doctor and a guard?” (Heritage, 1988, p. 24).

Safron, responding that there was a “world of difference,” was told sharply by Justice Marshall to “Start on it!” The exchange brought general laughter from those present. Safron’s presentation about the differing levels of accountability was frequently interrupted by questions from the Court. Starting with “[a] doctor is a doctor ...” the clearly besieged counsel for Dr. Atkins held that a physician’s responsibility is to the Hippocratic Oath and standards established by the AMA and, in this case, the North Carolina Medical Association and that, if negligent, “he would be responsible under tort law using the normal negligence theories in our state” (Heritage, 1988, p. 24). Safron did not directly respond to the question of whether the doctor was at all responsible to the prisoner. The justices pursued this avenue. However, counsel held firmly to the assertion that the doctor was “operating under his license” and not under color of state law. The justices led Safron through admissions that Atkins was paid by the state to provide medical services which allegedly he did wrongly and to an agreement that he would be liable, “as would any other doctor be liable for negligence.” However, Safron held that such negligence, if present, would not be under color of state law.

Justice John Paul Stevens, cutting to the heart of the matter, asked if contracting out services was a convenient way for the state to avoid constitutional responsibility. Safron responded that behind the case was the question of privatization. Justice Stevens replied, “Right.” Safron’s following evasive responses comparing the services provided by a medical services contractor to a prison guard, heating contractor, or food service worker and rambling discussion of medical care and punishment were interrupted on several occasions by the justice who attempted to return to the question at hand and finally by general laughter (Heritage, 1988, pp. 28-30).

Justice White, following Justice Steven's line of questioning, asked if a doctor could be sued under § 1983 if he provided the most radical treatment. The question forced Safron to attempt to retreat to the facts of the case (Heritage, 1988, p. 32).

Chief Justice Rehnquist interrupted Safron's reiteration of the facts:

Now, Mr. Safron, we granted certiorari on two questions involving whether prison doctors are state actors under these circumstances. Now, you could argue for affirmance [sic.] on an alternative rationale, but since it was summary judgment it seems to me you've got to take the facts as resolved against you. ... [T]hat is what the case is here now for. The place to develop the medical record or argue about [whether] a conservative technique was applied was somewhere back in the trial court if this Court should reverse on the state actor (Heritage, 1988, pp. 32-33).

Following the chief justice's admonishment, Safron returned to a lengthy discussion of precedent which was interrupted by Justice O'Connor, who, pressing Safron, asked, "You take the position that even if it's as bad as possible, there can be no state action?" At that point Safron fell back on the professional argument and Justice O'Connor commented that he had previously retreated from that argument with Justice Scalia.

Focusing on the state action issue and the role of the physician, Justice Anthony Kennedy asked, "[y]ou want us to say as a matter of law that a doctor can *never* impose punishment? ... [T]he more control the person has over the prisoner, the less obligation he has to the law?" (Heritage, 1988, p. 38).

Replying, Safron appeared to sputter, "[n]o, Your Honor, control, I think, is the substance, and control over an inmate in terms of imposing the security, imposing the punishment—" However, his explanation was interrupted by the next question from Justice Kennedy. (Heritage, 1988, p. 38).

Justice Kennedy: “You say the more professionalism, the more learning the doctor has, the less control he has over the prisoner?” (Heritage, 1988, p. 38).

Justice Marshall followed with a series of questions, the first of which was whether West was a *prisoner* when Atkins was treating him. This was followed by queries about whether West was under guard, whether it was a prison hospital or a private hospital, and whether West was under restraint. (Heritage, 1988, p. 39).

Justice Blackmun, in an exchange reminiscent of the reasoning of inmate West stated that, “The very fact that *you* are here out of the State Attorney General’s Office on a special assignment perhaps almost indicates, doesn’t it, a concession of state action under cover of state law?” Following a response by Mr. Saffron in which he indicated that he was present because state statutes were amended to permit the state to represent physicians because the potential for suits inhibited the state’s ability to recruit physicians, Justice Blackmun continued his line of questioning and asked why Atkins did not have his own counsel. “... I am just saying the overtones are that the state’s almost conceding that he [Atkins] acted under color of state law.” (Heritage, 1988, pp. 40-41).

During a brief final summary Mr. Stein was asked a hypothetical question by one of the justices.<sup>33</sup>

“... Suppose a state adopts a state Medicare system that all medical services will be provided to the general population at state expense, and you get a physician who does what this physician [Atkins] is alleged to have done here, intentionally withholds care. Would that be an Eighth Amendment claim for cruel and unusual punishment?” (Heritage, 1988, p. 42).

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<sup>33</sup> As noted earlier, the hearing transcript did not identify the individual justices’ questions and, in this instance, Mr. Giroux’s notes did not provide information about which justice raised this question.

The ensuing discussion clarified the point that it was the Court’s usual approach to treat a statutory issue first rather than a constitutional one, and the Court’s concern in was the statutory issue, i.e., section 1983.

Oral arguments were concluded at 1:58 p.m.

### **The Decision<sup>34</sup>**

On June 20, 1988, Justice Blackmun delivered the opinion of the Court and was joined by the Chief Justice and Justices Brennan, White, Marshall, Stevens, O’Connor and Kennedy. There were three principal elements to the Court’s decision.

Referencing *Lugar v. Edmondson Oil Co.* (1982)<sup>35</sup>, “the Court made clear that if a defendant’s conduct satisfies the state-action requirement of the Fourteenth Amendment, ‘that conduct [is] also action under color of state law and will support a suit under § 1983.’” Continuing, Blackmun asserted that, “In such circumstances, the defendant’s alleged infringement of the plaintiff’s federal rights is ‘fairly attributable to the State’” (*West*, 1988, at 49).

Second, the Court was not persuaded by the Fourth Circuit Court of Appeals’ comparison between Dr. Atkins and the public defender in *Polk County* and held that the lower court erred when it concluded that professionals, when acting in accordance with professional discretion and judgment, no longer act under the purview of § 1983—except when exercising custodial or supervisory authority. Referencing the North Carolina Division of Prisons Health Care Manual (1980)<sup>36</sup> and the American Medical Association Standards for Health Services in Prisons (1979), the Court found that, in contrast to a public defender, Dr. Atkins “professional obligations did not set him in conflict with the State and other prison authorities” (*West*, 1988, at 51).

Third, using *West* to clarify the Court’s decision in *Estelle*, Blackmun wrote,

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<sup>34</sup> The complete text of the Supreme Court’s decision may be found in Appendix E.

<sup>35</sup> *Lugar* at 935 and accordance in *Rendell-Baker v. Kohn* (1982) at 838, and *U.S. v. Price* (at 794, n. 7).

<sup>36</sup> Quoted above from the appellant’s brief.

We now make explicit what was implicit in our holding in *Estelle*: Respondent, as a physician employed by North Carolina to provide medical services to state prison inmates, acted under color of state law for purposes of § 1983 when undertaking his duties in treating petitioner's injury. Such conduct is fairly attributable to the State.

Because an inmate must rely upon the state to care for his medical needs, "the state has a constitutional obligation, under the Eighth Amendment, to provide adequate medical care to those whom it has incarcerated" (*Estelle*, 1976, at 104). The state delegated that function to Dr. Atkins and deferred to his professional judgment. Dr. Atkins status as a professional services contractor did not affect the Court's analysis. "It is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State" (*West*, 1988, at 55-56).

Holding that Dr. Atkins, a part-time contract physician, was engaged in state action and acted under color of state law for the purposes of § 1983 when he treated inmate West, the Court reversed the decision of the Circuit Court of Appeals and remanded the case "for further proceedings consistent with this opinion" (*West*, 1988, at 58). Those "further proceedings" would mean a return to the district court for examination of the facts of the case.

Justice Scalia, concurring in part and concurring in the Court's judgment, expressed doubt that a "doctor who lacks supervisory or other penological duties can inflict 'punishment' within the meaning of that term in the Eighth Amendment." However, noting that West's "*pro se* complaint merely claimed a violation of his rights, and it ... [was] the courts that specified which constitutional provisions ... [conferred] those rights," Scalia was of the opinion that,

... a physician who acts on behalf of the State to provide needed medical attention to a person involuntarily in state custody (in prison or elsewhere) and prevented from otherwise obtaining it, and who causes physical harm to such a person by

deliberate indifference, violates the Fourteenth Amendment's protection against the deprivation of liberty without due process (*West*, 1988, at 58).

### **The Final Chapter in West's Saga**

While winning on the legal issue in the highest court in the land, Quincy West was, in the final analysis, unsuccessful in his claim at the district court level where a determination was made based on the facts of his complaint. At no time was the quality of medical care provided to inmates or to West defended by the state. Following remand by the Supreme Court and based on review along with the recommendations of a magistrate, Judge Boyle of the District Court for the Eastern District of North Carolina granted Defendant Atkins' motion for summary judgment on September 11, 1989. On February 27, 1990 the Fourth Circuit Court of Appeals affirmed. Subsequently, West, filed a *pro se* motion for leave to file a petition out of time and petitioned for rehearing, suggesting rehearing *en banc*. The motion for leave to file a petition out of time was granted. However, members of the panel were of the opinion that West's petition for rehearing should be denied and no member of the court requested a poll on the suggestion for rehearing *en banc*. Therefore, the court, at the direction of Judge Murnaghan and with the concurrence of Judge Wilkinson, denied West's request for rehearing on April 25, 1990.

Rich Giroux conceded in a telephone conversation with this writer that West's claim of deliberate indifference was a "loser." However, NCPLS had been representing several inmates in suits against Dr. Atkins and Giroux had taken on the case because of the involvement of the physician. Had West pursued a medical malpractice claim the standard required, negligence, would have been easier to meet. Having chosen to pursue a constitutional tort in federal courts, the higher standard of deliberate indifference was substantially more difficult to prove. According to Judge Boyle of the United States District Court for the Eastern District of North Carolina, that standard was not met by West.

## Release

Quincy West was released from prison on January 16, 1991 after serving 18 years and six months.

## Summary

It was argued by the State of North Carolina that the care provided to West did not meet the 1976 *Estelle* standard of deliberate indifference. Why did West pursue a constitutional tort in federal courts rather than a medical malpractice suit in state courts? The answer to this question is a matter of conjecture. However, the ability of inmates incarcerated in North Carolina to file malpractice suits was somewhat limited by the state during the 1980s and West, as well as other inmates, may have believed that they would find a more receptive hearing in federal courts. The possible reluctance by inmates to sue the state or state employees in state courts is understandable. However, based on representation by Giroux and North Carolina Prisoner Legal Services of a number of prisoners in suits similar to *West*, both Giroux and NCPLS were motivated to overturn the Fourth Circuit's decision in *Calvert v. Sharp* (4<sup>th</sup> Cir. 1984) and thus open the door for other inmate suits.

The *Calvert v. Sharp* (4<sup>th</sup> Cir. 1984) decision and the State of North Carolina's briefs were based on the assumption that the distance provided by a contractual relationship shielded contract physicians providing health care in penal institutions from the level of constitutional liability faced by physicians providing similar services, but employed by the state. The apparent implications of this position were: (1) that contract physicians would not be held to the same standard as employee physicians; and, (2) that the state could avoid constitutional scrutiny by contracting for such services.

The state attorney general's office had, however, carried this rationale a step further before the Supreme Court when arguing that no physician, unless operating in an administrative capacity, could be performing state action.

Counsels for the appellant, the ACLU, and the APHA were in agreement that *Calvert. v. Sharp*, the basis of the appeals court decision in *West*, was an aberration and inconsistent with the decisions of other courts of appeal—as well as with decisions by the Supreme Court itself. They concurred as well that, *if* the Court had upheld the *Calvert* decision and the Fourth Circuit’s decision in *West*, the results would have been devastating to inmate rights.

The Court’s decision that *it was the function not the relationship* that determined whether the actions were taken “under color of state law” was a major step in clarifying its position on state action.

The intent of this chapter has been to provide the details of Quincy West’s complaint and the issues that his complaint raised in the courts. It has also illustrated tensions between the state’s efforts to recruit and retain physicians in a challenging, litigious environment in circumstances where those physicians have to deal with the competing interest of the state to maintain the security of the facility and the physicians’ professional responsibilities to provide an acceptable standard of healthcare to their incarcerated patients. In addition, it has illustrated the difference between legal reasoning and the “horse sense” of the common man—represented by Quincy West.

The following chapter, “The Dialectic,” will expand on conflicting opinions, values and attitudes about medical care for inmates and highlight the healthcare perspective on the topic. In addition, I will visit the bioethical implications of the *West* case, public attitudes about healthcare and punishment, and additional policy implications of the *West* decision.