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SUPREME COURT OF THE UNITED STATES

In the Matter of:)

QUINCY WEST,)

Petitioner,)

v.)

SAMUEL ATKINS.)

No. 87-5096

Pages: 1 through 45

Place: Washington DC

Date: March 28, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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 QUINCY WEST, :
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 Petitioner, :
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 v. : No. 87-5096
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 SAMUEL ATKINS :
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Washington, D.C.
Monday, March 28, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

ADAM STEIN, ESQ., Chapel Hill, North Carolina; on behalf of the petitioner.

JACOB L. SAFRON, ESQ., Special Deputy Attorney General of North Carolina, Raleigh, North Carolina; on behalf of the respondent.

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P R O C E E D I N G S

(1:00 P.M.)

CHIEF JUSTICE REHNQUIST: We will hear argument now in Number 87-5096, Quincy West versus Samuel Atkins.

Mr. Stein, you may proceed whenever you are ready.

ORAL ARGUMENT OF ADAM STEIN, ESQUIRE

ON BEHALF OF THE PETITIONER

MR. STEIN: Mr. Chief Justice, and may it please the Court, the respondent in this case, Dr. Samuel Atkins, was the physician responsible for orthopedic services for some 17,000 prisoners in the North Carolina prison system. The petitioner, Quincy West, was a North Carolina prisoner. The United States District Court for the Eastern District of North Carolina granted the respondent summary judgment and a majority of the United States Court of Appeals for the Fourth Circuit sitting en banc affirmed, holding that the respondent did not act under color of law when he was managing the health services of the petitioner.

Petitioner's lawsuit brought under 1983 in the Federal District Court was, of course, based on this Court's decision in Estelle against Gamble, where the Court had held that the deliberate denial of serious medical services constituted -- by a prison authority constituted the infliction of cruel and unusual punishment.

And of course, the reason for that is that the

1 prisoner is himself helpless to have medical services unless
2 the state provides it, and in North Carolina that is true.
3 A prisoner such as petitioner cannot obtain medical services
4 except for the services given to him by the state. Even if
5 he could afford to hire a doctor, he is not allowed to do so
6 according to North Carolina law.

7 This then, the case that was brought then was
8 exactly the sort of case that the Court indicated was
9 actionable under 1983 in Estelle. There were allegations
10 that there was abuse of power by an authority by denying
11 needed medical services, and that it was done by somebody
12 with authority granted by the state to so act.

13 QUESTION: Mr. Stein, do you take the position that
14 any physician performing services and paid by the state would
15 be liable, in your view, and would constitute state action?

16 MR. STEIN: Justice O'Connor, I would take that
17 position, but that isn't this case. It seems to me --

18 QUESTION: I mean, even a physician serving as a
19 consultant in his own office on a special medical problem?
20 Just so long as he is paid by the state, then it is state
21 action?

22 MR. STEIN: Well, the argument there would be that
23 under Estelle there is an Eighth Amendment obligation on the
24 state to provide medical services to the prisoner, and that
25 if the state has then selected this physician, that person is

1 doing the state's work, but it seems to me that Your Honor
2 has described a fact situation on a spectrum of the least
3 involvement of the state presumably up to the position of
4 a medical director who is a regular employee.

5 QUESTION: I am just wondering what kind of
6 line-drawing we could have legitimately if we adopted your
7 view of the liability here.

8 MR. STEIN: Well, my view is that there is no
9 line to be drawn, that indeed the provision of medical
10 services is a state responsibility, but that isn't my case,
11 and I would like to suggest that the facts in the record
12 show that Dr. Atkins in this case was much more like the
13 person who is in charge of the whole medical system, is a
14 regular employee and always has been.

15 QUESTION: What if the North Carolina law were
16 changed, Mr. Stein, and North Carolina allowed prisoners to
17 contract out and find their own doctors if they had a par-
18 ticular kind of case, and the state said, we will just pay
19 for it?

20 MR. STEIN: Well, Your Honor, in that circumstance,
21 if the prisoner himself had the choice and the state would
22 pay for all of them, it seems to me that would be a very
23 different case from what we have here. If the prisoner could
24 choose the best orthopedic physician in the state of North
25 Carolina and he chose that person rather than the state, it

1 seems to me the state's payment would not be so significant.

2 QUESTION: Mr. Stein, you said he is doing the
3 state's work. He is doing the state's work, but is he
4 doing the state's punishment? I mean, this is a cause of
5 action for cruel and unusual punishment. Don't you have to
6 identify someone in the state system who is responsible for
7 the carrying out of the punishment, just as in the
8 municipal cases you have to identify somebody who is
9 responsible for the municipal policy.

10 MR. STEIN: It is our position that the state
11 has assigned to Dr. Atkins the responsibility for deciding
12 what, if any, orthopedic services are to be provided to
13 any of its prisoners.

14 QUESTION: But that is in no sense the punishment
15 that the state is imposing. They don't sentence you to
16 medical treatment.

17 MR. STEIN: Well, the punishment is when the
18 doctor, instead of exercising medical judgment, instead takes
19 an action to prevent the prisoner from getting the medical
20 services that he needs.

21 QUESTION: Well, that is malpractice, but I don't
22 see how it is punishment.

23 MR. STEIN: Your Honor, I submit that it is a good
24 deal more than malpractice. The distinction in Estelle,
25 Estelle doesn't reach ordinary malpractice. If a doctor is

1 simply exercising professional judgment and does it
2 negligently, that is not an Eighth Amendment violation under
3 Estelle and that is not the understanding. It is my under-
4 standing and what the courts have held is that one must show
5 an action beyond medical judgment.

6 Indeed, it is our position in this case what
7 happened was that Dr. Atkins in his last examination of the
8 petitioner five months after he had first seen him, saw him
9 in his office, said, your achilles tendon has not yet healed,
10 you may need an operation, but you certainly need continuing,
11 regular orthopedic care from me, and that was the medical
12 judgment he entered, and then immediately upon the petitioner
13 leaving the office he wrote on that day in the medical
14 records, I discharged this man from further orthopedic
15 services, and in fact that order was obeyed, despite other
16 prison people trying to get this man to Dr. Atkins.

17 QUESTION: I see that that goes beyond
18 negligence, but it is not enough to go beyond negligence.
19 You have to go all the way to punishment, and I don't see
20 how this individual had any responsibility for the
21 administering of the state's punishment.

22 MR. STEIN: Well, he was given the power to
23 decide whether or not this person would have treatment, just
24 as the guards who are identified in lots of the cases and were
25 identified in the Estelle case, seeing a man needing medical

1 treatment and saying, I am not going to allow you to see
2 the physician, that is an infliction of punishment because
3 that's the only access to the medical care there is.

4 QUESTION: It's an infliction of harm, but I don't
5 know that anyone would call it an infliction of punishment
6 unless that individual had the responsibility for carrying
7 out the state's sentence. What about the janitor who wipes
8 up the floors in the prison? If he is a particularly
9 spiteful fellow and leaves them soaped so that people will --
10 intentionally so that people will slip on them, would you
11 say that is part of -- he is administering is cruel and
12 unusual punishment?

13 MR. STEIN: Justice, I don't know about that
14 case but we are dealing here with medical care which is
15 one of the core functions within the prison system -- there
16 are only a few that the Court has identified that must be
17 satisfied to satisfy the Eighth Amendment in maintaining the
18 system. One is some minimal degree of medical care, I
19 suppose food and clothing and shelter. And if those aren't
20 provided at a minimal level, then there is a -- it violates
21 contemporary standards of decency and is an Eighth Amendment
22 violation.

23 QUESTION: The person who's responsible for
24 administering the state sentence, if he is knowingly
25 responsible for that, you certainly have him under 1983, but

1 don't you have to reach somebody who is responsible for
2 executing the sentence upon the individual somehow, someone
3 who is in charge of administering the punishment.

4 MR. STEIN: Well, it is my understanding it is the
5 fact of incarceration which is the punishment, and that
6 everybody who is within the prison system is -- and is a
7 prison official is connected with administering the punishment
8 by maintaining the incarceration and by feeding people and so
9 on.

10 QUESTION: You don't say in the municipal area
11 that every agent of the city is the city for purposes of
12 municipal liability. We try to reach somebody who establishes
13 policy for the city. Why shouldn't it be the same for the
14 prison?

15 MR. STEIN: This is not a municipal case or a
16 Minnell case. We aren't seeking to seek the state or anyone
17 other than this person who himself committed the act of
18 which we complain. We say he is like the police officer in
19 Griffin against Maryland who was in fact a private security
20 guard employed by Glen Echo but had been deputized by the
21 County of Maryland to effect arrests, and when he did that
22 arrest, although Maryland had never paid him or trained him
23 or anything, that was found to be state action because he
24 was acting with the authority that was given.

25 In this instance, if it had been a private doctor

1 with a private person discharging the person from care would
2 have no effect. You go down the street and see Dr. Jones.
3 But when Dr. Atkins spoke and said, my patient won't have
4 any more orthopedic care because it was in the prison
5 context that was the end of orthopedic care and indeed
6 although nurses and other health care people and guards and
7 so on sought to have Mr. West cared for by Atkins, Atkins was
8 able to enforce the order and never saw him again, and the
9 suit then followed. A few --

10 QUESTION: The case has never been tried out on
11 its facts, has it?

12 MR. STEIN: No, it hasn't.

13 QUESTION: The District Court granted summary
14 judgment.

15 MR. STEIN: Just summary judgment.

16 QUESTION: And what were your allegations,
17 deliberate indifference?

18 MR. STEIN: Yes, sir. The allegations were, this
19 was a pro se complaint. The allegations were that Dr. Atkins
20 was deliberately indifferent to the medical needs of
21 petitioner Quincy West, who had torn his achilles tendon,
22 and it sent on for a period of five months, ending up with
23 the appointment with the examination I described on February
24 14th, where he had begun by saying, you need an operation
25 but I'm going to experiment on you by putting a cast on your

1 leg, had then seen him, and the experiment seemed to have
2 failed. Each time West would come in, he would ask for
3 some treatment for his pain. He never received that. And
4 then finally he was discharged at a time the doctor himself
5 was saying, your achilles tendon hasn't healed, you need
6 further treatment, and we say that is being deliberately
7 indifferent, purposefully withholding the care that he said
8 was needed. And that is the basis of the claim.

9 In the -- briefly, the prison system in North
10 Carolina, medical care is provided. There are some 80 units
11 out there. There are local doctors at each unit who are
12 responsible for primary care and then also to refer for
13 specialty care. The referrals are then made to Central
14 Prison Hospital, where the state employs specialists to run
15 12 different specialties, and clinics are held there on
16 Tuesdays and Thursdays. People are bused in. If
17 medically able, they are bused out after their appointments,
18 or they are put in the hospital there at Central Prison
19 Hospital.

20 Dr. Atkins was the person responsible for
21 running the two Tuesday and Thursday orthopedic clinics. He
22 was also responsible for doing all the orthopedic operations
23 at the Central Prison Hospital. He was responsible for being
24 on call 24 hours a day. He was responsible for making rounds
25 at the hospital as often as necessary to see his surgery

1 patients or his other orthopedic patients. He would do this,
2 of course, in the prison facility. He'd go through the gates,
3 into Central Prison, into the hospital, would conduct the
4 clinics with clinic supplies, assisted by hospital people, not
5 people of his employ, and the same thing would be true for
6 surgeries and in the hospital. He had a great deal of
7 responsibility and authority, and would in conducting his
8 business supervise other personnel in carrying out his work
9 at the clinic --

10 QUESTION: Supervise personnel who were employed
11 by the prison?

12 MR. STEIN: Well, the record is not altogether
13 clear on that. The record is limited to the materials put
14 in by Dr. Atkins on motion for summary judgment. That is
15 my understanding, and I am taking some inferences on that
16 based on what a doctor would do who --

17 QUESTION: But my question was, were these
18 people he supervised employees of the prison, and you say --
19 when you say that's my understanding, do you mean yes, they
20 were employees of the prison, or that you really don't know?

21 MR. STEIN: Well, I think that we do know that
22 some of them had to have been. Some of the orders are --
23 would be directed to transporting people back and forth,
24 and the prison provides regular bus transportation among its
25 units back and forth.

1 We know that there are prison employees who
2 provide medical care at the various units, and they obey
3 the orders of the specialists when the person comes back with
4 the medical records. We know that he is responsible for
5 directing the care as his patients are there in the hospital.

6 We submit that a person such as this is like the
7 private policeman in Griffin against Maryland, that this --
8 that his actions are fairly attributable to the state. He
9 plays an important role within the total health care system
10 and exercises the power to decide what, if any, treatment
11 orthopedic treatment a prisoner will receive, and we see that
12 the facts in this case show that he had the power to deny
13 treatment since after the circumstance where he was telling
14 his patient that you need further care, no further care was
15 forthcoming, and others would repeatedly -- Nurse Earp
16 and the physician's assistants on the cellblock, and those
17 are people who are prison employees, would seek to set up
18 appointments, and then it was discovered that an order had
19 been entered, and he never saw him.

20 Finally, the prisoner filed a formal complaint
21 with the grievance commission there at Central Prison
22 complaining that he wasn't receiving treatment from Atkins,
23 he wasn't able to see him, that he continued to be in pain,
24 and that his leg was swelling, and that seemed to be resolved
25 by establishing an appointment for him with Atkins on June

1 21st, 1984. June 21st came and went without him being taken
2 to see Dr. Atkins, and a week later he was, in his words,
3 abruptly transferred to the Caledonia Prison Unit some 75
4 miles away. This suit followed a few months later, him never
5 having seen Dr. Atkins again or, the record shows, no further
6 orthopedic care.

7 QUESTION: Why the -- this is a 1983 suit?

8 MR. STEIN: Yes, sir.

9 QUESTION: Why that suit instead of an ordinary
10 negligence suit?

11 MR. STEIN: Well, a negligence suit would have been
12 easier probably, Your Honor, but he chose his forum, and he
13 acted for himself and filed a pro se complaint, and I suppose
14 being in the custody of the State of North Carolina he was
15 looking to the federal court for the vindication of his
16 federal rights, but that was his decision, and that is what
17 he did.

18 QUESTION: But there would have been -- a negli-
19 gence suit wasn't barred, was it?

20 MR. STEIN: My understanding of North Carolina
21 law is that he could have filed a negligence suit in state
22 court.

23 QUESTION: Who could he have sued?

24 MR. STEIN: Well, he could have sued the doctor.

25 QUESTION: How about the prison? Anybody in

1 the prison?

2 MR. STEIN: Well, he could have sought to bring
3 an action under the State Tort Claims Act, which is a
4 procedure that is administered by the Industrial Commission,
5 and it is heard before a deputy commissioner. However, once
6 the Fourth Circuit's decision in Calvert against Sharp came
7 down the state started taking the position in the Industrial
8 Commission that doctors such as Dr. Atkins weren't state
9 employees, and therefore you couldn't proceed there.

10 QUESTION: I see. Do you understand the Court
11 of Appeals to have held that there is no state action even
12 if a doctor is an employee of the prison?

13 MR. STEIN: That is my understanding.

14 QUESTION: It covers any doctor in or out of the
15 prison system.

16 MR. STEIN: That's my reading of this --

17 QUESTION: Would not be exercising any state
18 action.

19 MR. STEIN: And of course it based its decision
20 on its reading of this Court's rulings in Polk County against
21 Dodson, where there was language in there and some discussion
22 of a public defender's professional obligations which would
23 cause that public defender to be independent, and --

24 QUESTION: Mr. Stein, I can understand your
25 response to Justice White, but is the Fourth Circuit theory

1 really so apparent? One can argue that they relied on the
2 Calvert case, and the Calvert case had to do largely with
3 part-time performance, didn't it?

4 MR. STEIN: Well, it did, but the language in
5 this case, and emphasized a couple times, is that whenever
6 a professional is acting within the bounds of his professional
7 discretion, he does not act under color of state law.

8 QUESTION: That certainly is in the opinion, but
9 also the great emphasis on Calvert makes me wonder really
10 what their basic theory was. I don't get consistency in
11 argument by the Fourth Circuit.

12 MR. STEIN: Well, we have seen recently some
13 unpublished opinions from the Fourth Circuit where we find
14 that if a doctor, a prison doctor is named in the suit, he
15 is -- it is -- the broad language is cited, and the case is
16 dismissed. I think that is the understanding of that court.

17 QUESTION: On that basis there would never be
18 a recovery.

19 MR. STEIN: There would never be a recovery
20 against the doctor.

21 QUESTION: Against the person.

22 MR. STEIN: Against the person.

23 QUESTION: Under federal law.

24 MR. STEIN: Under federal law. That's right. And
25 we submit, of course, that the Fourth Circuit got the

1 language of professionalism in Polk County wrong, that what
2 was important in the Polk County case in terms of the
3 professional obligations of the public defender was her
4 professional obligation to be not only independent but to be
5 adversarial to the state.

6 In fact, the Dodson case, it was litigation where
7 the plaintiff was the State of Iowa, State of Iowa against
8 Dodson, and one looks at that and sees that the police have
9 investigated and preferred charges in the state through its
10 state's attorney. The district attorney is prosecuting it.
11 And then look on the defendant's side of the table and see
12 it's against Mr. Dodson, and there is his counsel. And in
13 those circumstances, and I think that the court said in the
14 peculiar circumstances of the case the state employee was not
15 said to be acting under color of state law.

16 I would point out that even in that courtroom or
17 in the context of that the lawyer representing the state was
18 a state actor. Nothing has disturbed the court's rulings
19 on that. So was the judge, or the judges. I think it was
20 then before the State Supreme Court.

21 After Polk County against Dodson, we have the
22 Glover case, where a public defender was sued, and he was
23 found to be acting under color of state law because of his
24 acting in concert and conspiracy with the prosecutor and the
25 judge and other state officials, so that the professionalism

1 of the judge and the professionalism of the prosecutor
2 didn't cause them not to be state actors. It seems to me that
3 the Polk County case is very limited and peculiar, and
4 I would note that when a public defender acts in a case
5 of a criminal defense lawyer, he is always acting before the
6 courts, and judges have a responsibility if they see something
7 wrong going on to act. Criminal defendants with some
8 frequency complain about their lawyers, and if the complaint
9 has some merit, the judges will act. That is not true --

10 QUESTION: Well, the lawyer can certainly advise
11 the criminal defendant outside of the courtroom, you know,
12 go to the prison. That isn't conducted in the presence of
13 any judge.

14 MR. STEIN: No. That's right, Your Honor, but
15 the case is pending in a court which would receive a
16 complaint from a prisoner. It is certainly my experience
17 that when judges receive that, if it looks like there is
18 any merit in it, where there is -- in a criminal defense
19 situation, that they will make some inquiry.

20 And indeed, the rule that was involved in Polk
21 County against Dodson, it was the filing of the Anders
22 brief which was complained about, and the rule there said
23 that the lawyer had to tell the client, I am going to file
24 a no merit brief, and then the person, Mr. Dodson then had
25 the opportunity to tell the Court, I think this is wrong,

1 and please examine it closely. It just doesn't have its
2 counterpart in the prison system short of litigation.

3 I would also emphasize in terms of the
4 professionalism idea that there are lots of cases from this
5 Court where professionals have been found to be acting
6 under color of state law. We cited the Youngberg case, where
7 the act of exercising a professional judgment was found
8 itself to be the state action, and if the actor exceeded the
9 bounds of accepted professional judgment in that instance
10 of providing certain care to a mentally retarded person
11 incarcerated in a state institution, that would be actionable
12 under 1983.

13 I would mention briefly the Blum case, which was
14 the case involving concededly private physicians and con-
15 cededly private nursing homes in New York, which is very
16 much in contrast with the setting we have, which is in the
17 Central Prison, behind walls, a core -- medical care being
18 a core function of the responsibilities of the state in
19 providing prison services.

20 And I would like also to mention that we are here
21 construing the Civil Rights Act of 1871 that this Court has
22 often told us was intended to provide remedies as broad as
23 the 14th Amendment, and I certainly do submit that on the
24 facts of this case it seems inconceivable to me that Congress
25 couldn't draw a statute to allow petitioner to bring a

1 lawsuit against this doctor for the things that he said
2 were done.

3 And finally, I would say to the Court that
4 Estelle and the cases that have followed it have identified
5 in the prison system serious problems in medical care in
6 prisons, reaching constitutional dimensions, but the course
7 of that litigation has substantially improved health care
8 in the prison systems, and the two fine amicus briefs that
9 were filed in this case by the ACLU and the American Public
10 Health Association show that, and I submit that the Court of
11 Appeals decision here in effect cuts Estelle in half, takes
12 the doctors out as potential litigants, and would damage
13 substantially the progress that has been made and turn us
14 in the wrong direction.

15 If there are no further questions, I will reserve
16 my remaining time.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stein.

18 We will hear now from you, Mr. Safron.

19 ORAL ARGUMENT OF JACOB L. SAFRON, ESQUIRE

20 ON BEHALF OF THE RESPONDENT

21 MR. SAFRON: Mr. Chief Justice, and may it please
22 the Court, we are not here to argue Estelle versus Gamble,
23 nor are we here to deny the fact that an inmate may sue a
24 doctor in state court under conventional tort liability.

25 What we are arguing is that a physician in a

1 situation such as Dr. Atkins in this case does not function
2 under color of state law so as to satisfy the jurisdictional
3 requirement of the Civil Rights Act.

4 Now, in this particular case, Mr. West was playing
5 volleyball on July 30th, 1983, at the Odom Correctional
6 Institution. He injured his left leg while playing volleyball,
7 saw the physician at the unit, and was referred to the
8 orthopedic clinic at Central Prison Hospital, where on
9 August the 9th, 1983, he was presented to Dr. Atkins, who was
10 the orthopedic surgeon conducting that particular clinic.

11 There are a number of clinics at Central Prison
12 Hospital. We also have another hospital, McCain Hospital.
13 There are 130 physicians under contract with the State of
14 North Carolina excluding dentists and psychiatrists.

15 For the fiscal year ending June 30th, 1987, the
16 State of North Carolina spent \$23,345,000 in providing
17 medical care to inmates.

18 QUESTION: Mr. Safron, let me ask the converse
19 of Justice O'Connor's question of your opponent. Do you
20 conceive of any factual situation where a physician is liable?

21 MR. SAFRON: Under Estelle, if we have an admini-
22 strator, but we would deny that under these facts that
23 Dr. Atkins was an administrator. Although he may have given
24 medical orders to medical staff, we deny that he is an
25 administrator. He is not responsible for running the prison.

1 He may give orders to a nurse. Now, in this situation --

2 QUESTION: So even if he is employed full-time
3 and exclusively by the state to render medical care to the
4 prisoners, you take the position no liability.

5 MR. SAFRON: I would take the same position that
6 the en banc opinion of the Fourth Circuit did, Justice
7 O'Connor, that if he is a doctor, performing medicine, and
8 is not an administrator, that he is not functioning under
9 color of state law merely because he is a physician employed
10 by the state to provide medical services.

11 QUESTION: Well, what if the prison hired on a
12 contract basis prison guards, all of whom are licensed under
13 some state licensing scheme to make them professionals?

14 MR. SAFRON: If Your Honor please --

15 QUESTION: No liability? Not state actors.

16 MR. SAFRON: I am not going to say that,
17 Your Honor. I'd say this. We have the case cited by
18 counsel involving private guards who were given arrest powers.
19 Only the state can arrest, except of course, there is
20 citizen's arrest, but custodial authority -- and that is not
21 the case before us, but custodial authority is state action.
22 Providing medical care, I would submit, is not state action.

23 QUESTION: That is a little difficult to argue in
24 the face of Estelle, isn't it?

25 MR. SAFRON: Estelle, Your Honor, establishes

1 deliberate indifference. The defendant doctor in Estelle was
2 the medical administrator of the facility. He was an
3 administrator. He was in a supervisory capacity. Dr.
4 Atkins was not in a supervisory capacity.

5 Now, I would like to show what happened here.
6 Mr. West shows up --

7 QUESTION: Excuse me. Before you go through
8 that, I don't -- from what you've said I don't understand
9 whether you've abandoned the professional requirement or not.

10 MR. SAFRON: No, not at all, Your Honor.

11 QUESTION: You are sticking by the -- so --

12 MR. SAFRON: Oh, yes, I certainly am. What I
13 am saying is this.

14 QUESTION: So the janitor who soaps the floor would
15 indeed be liable?

16 MR. SAFRON: Well, no.

17 QUESTION: No? He is not a professional, I
18 don't think.

19 MR. SAFRON: Let me present these example. The
20 state obviously has a responsibility to provide medical
21 care. I am certainly not denying that. The state also has
22 responsibility to provide food. If you had some company
23 contracting in the commissary and that company somehow served
24 tainted food, now, that is not state action. The same way
25 the state has responsibility to keep the state prison heated.

1 QUESTION: Excuse me. So you are abandoning the
2 professional requirement, unless you consider serving food
3 to be a profession.

4 MR. SAFRON: No, certainly not. Under the facts
5 of this case there is the professional requirement, but if we
6 are moving from that, I would say that color of state law is
7 what is coming into play, and that color of state law could
8 in fact be really unavailable in other situations, serving
9 food, providing heat.

10 QUESTION: Mr. Stein, getting back to Justice
11 O'Connor's question, you kind of left off between the guard
12 and the doctor as to the difference under the color of state
13 law. What is the difference under color of state law?

14 MR. SAFRON: Justice Marshall, I would say this.
15 A doctor is a doctor because he is licensed by a medical
16 authority. A guard can only be a guard in a prison because
17 he is hired to be a guard. One is not licensed --

18 QUESTION: What is the doctor hired to be?

19 MR. SAFRON: The doctor is hired to provide the
20 very service he provides. In this case Dr. Atkins had his
21 own practice a half-dozen blocks away from the prison,
22 providing medical services.

23 QUESTION: But that's not what this case is about.
24 This case is about what he did as a prison doctor. That is
25 different from a private doctor, right?

1 MR. SAFRON: Your Honor, this case is about
2 what he did as a physician.

3 QUESTION: What's the difference between a
4 prison doctor and a guard?

5 MR. SAFRON: I would submit there is a world
6 of difference, Your Honor.

7 QUESTION: Start on it.

8 (General laughter.)

9 MR. SAFRON: A doctor is a doctor, and he has -- he
10 is licensed by the state. He is responsible to his
11 Hippocratic Oath. He is responsible to the standards estab-
12 lished by the American Medical Association and the North
13 Carolina Medical Association in this case, and should he be
14 negligent he would be responsible under tort law using the
15 normal negligence theories in our state court.

16 QUESTION: And not responsible to the prisoner
17 at all?

18 MR. SAFRON: I didn't say not responsible. I said
19 responsible under normal theories.

20 QUESTION: So the only difference is that a doctor
21 is a doctor and a prison guard is a prison guard. They are
22 both hired by the state, aren't they?

23 MR. SAFRON: They are both hired by the state and
24 that I will not disagree with, but --

25 QUESTION: And was the guard doing what he was

1 supposed to do, and was the doctor doing what he was
2 supposed to do under the state law?

3 MR. SAFRON: Well, in this case I would argue,
4 and we haven't gotten to the facts --

5 QUESTION: Was the doctor operating under color
6 of state law?

7 MR. SAFRON: No, Your Honor, he was operating
8 under his license.

9 QUESTION: Was he operating under the state law?

10 MR. SAFRON: He was hired by the state to provide
11 medical services, Your Honor.

12 QUESTION: He's paid by the state.

13 MR. SAFRON: Oh, yes.

14 QUESTION: To provide medical services.

15 MR. SAFRON: Yes, he was.

16 QUESTION: Which allegedly he did wrongly.

17 MR. SAFRON: Allegedly he did wrongly, and
18 therefore --

19 QUESTION: And therefore the state is not
20 responsible?

21 MR. SAFRON: He would be liable, as would any
22 other doctor be liable for negligence.

23 QUESTION: But this wasn't under color of state
24 law?

25 MR. SAFRON: No, it wasn't.

1 QUESTION: Who else was he hired by at the time
2 he acted in this case? Who else was he hired by?

3 MR. SAFRON: He was paid by the state to provide
4 medical services to the inmates presented --

5 QUESTION: The complaint is --

6 MR. SAFRON: Yes, Your Honor.

7 QUESTION: -- that in doing that he did wrong,
8 and you say the state has no responsibility.

9 MR. SAFRON: This -- obviously, Your Honor, even
10 under Section 1983, an individual is responsible. This is
11 not a case involving whether or not the state is responsible.
12 The state provided the physician. The physician tended his
13 patient, and the complaints presented to the physician, the
14 doctor provided the medical care under his medical license,
15 the same medical care that he would provide outside in his
16 office a few blocks away. Now, in this case --

17 QUESTION: May I just clarify one thing in my
18 mind? In your view of the case it makes no difference whether
19 the doctor is an independent contractor or a full-time
20 employee. Is that correct?

21 MR. SAFRON: I don't believe it would, but of
22 course under the facts of this case he is a contractor who
23 provided two clients per week.

24 QUESTION: You rely just on the fact that he's a
25 doctor and doctors are different because they have this

1 professional status. If it were a food service, you gave
2 an example -- supposing they hired a caterer to bring in
3 the -- whatever you call these food companies that bring
4 in food from outside, and say they deliberately planned a
5 diet that was not -- didn't give the minimum nutritional
6 needs to the prisoners. They gave them just some stuff that
7 wouldn't be fit to eat, deliberately. They knew the prisoners
8 would all suffer in their health, and so forth and so on.
9 Would anybody be liable under Section 1983 in that situation,
10 do you think?

11 MR. SAFRON: I just submit that is a particular
12 scenario I have never given consideration to.

13 QUESTION: How is that different from this? If this
14 doctor deliberately mistreated a prisoner, knowing -- just
15 assume. I know these facts are in dispute, of course. But
16 if you had a doctor who suddenly just decided, I'm going
17 to make some money out of this but I don't want to spend any
18 time on it, give him aspirin, and don't care what the trouble
19 is with him. Just pay no attention. Tells the staff to do
20 that. No liability? Why is that different than the --

21 MR. SAFRON: You are presenting a difficult
22 case.

23 QUESTION: He is not acting as a professional
24 should act, obviously. If he lives up to the Hippocratic
25 Oath and performs to all the medical standards, nobody is

1 going to be liable for anything. But you hypothesize a
2 case in which you have a doctor who is deliberately
3 indifferent to the needs of the prisoners who were sent to
4 him for their care, and is there any liability under 1983 in
5 those cases?

6 MR. SAFRON: I would still argue against liability
7 but that is not to say there is no liability in state --

8 QUESTION: But why is that different from the food
9 service company?

10 MR. SAFRON: I really don't know if the food
11 service company would in fact be liable under Section 1983.

12 QUESTION: Even though they are paid by the state,
13 and they carry out -- supposing instead of having a prison
14 you contracted out the prison. You got a hotel chain or
15 something with private security guards, and you put all your
16 prisoners in custody there and had an independent contractor
17 run the prisons on behalf of the state, and they just
18 figure, we're going to make as much money out of this as we
19 possibly can. They didn't feed them, they didn't give them
20 bathing facilities or athletic -- anything like that, just
21 warehoused them. Would the state, would anybody be liable
22 if they did that, because if they are not, I suppose that
23 would be quite a convenient way for the state to avoid any
24 legal responsibility for these things.

25 MR. SAFRON: Justice Stevens, I would first of all

1 submit that behind this case, I believe, is the very
2 question you are asking. The question of privatization --

3 QUESTION: Right.

4 MR. SAFRON: -- is really the spectre that is the
5 subscript of the arguments being made.

6 QUESTION: The question is whether that would
7 mean they could avoid any constitutional responsibilities
8 to these --

9 MR. SAFRON: It would appear to me, and that is
10 not the case in front of us, that there are certain basic
11 obligations that if a private company assumes certain basic
12 obligations and with the intent --

13 QUESTION: That would otherwise be state
14 obligations.

15 MR. SAFRON: That would otherwise be state, but
16 state obligations are still private obligations under
17 Section 1983. The State of North Carolina or any other state
18 is not a proper defendant in a 1983 --

19 QUESTION: But here we have an individual.

20 MR. SAFRON: But still --

21 QUESTION: We have the independent contractor,
22 like my private prison service. We operate very
23 inexpensively, and we are really rather rough, but are we
24 liable?

25 MR. SAFRON: In that particular instance it would

1 appear to me that the officials in the state, any state
2 have an obligation to review what services are being provided
3 in that regard, and injunctive relief would certainly be
4 available through the state administrators.

5 QUESTION: Well, but how about the people
6 furnishing the services? That's what I thought was being
7 asked about.

8 QUESTION: Mr. Safron, couldn't you draw a line
9 between whether the services being provided are the services
10 of administering the penalty, of administering the punishment,
11 of taking charge of the custody of the individual, which is
12 indeed the sentence that the state has imposed --

13 MR. SAFRON: That's what I --

14 QUESTION: As opposed to those who are doctors
15 and food servers or whatever else?

16 MR. SAFRON: That's what I --

17 QUESTION: Isn't that a fairly discernible line?

18 MR. SAFRON: That was the line I had attempted to
19 start with, Justice.

20 QUESTION: I know. I thought maybe you forgot it.

21 (General laughter.)

22 MR. SAFRON: That there is a difference between
23 being a prison guard and providing security and providing
24 many of the services, medical, food, clothing, laundry --
25 there's a plethora of obvious responsibilities, but which are

1 separate and apart from punishment and providing the
2 security. Being a guard, you can only be a guard under
3 color of state law. You can run a laundry. You can run
4 a commissary. You can provide medical services. You can
5 be a heating contractor.

6 QUESTION: So your line doesn't depend on whether
7 he is an agent or an independent contractor. That is just
8 a kind of service. But medical services are immune, even
9 if provided by full-time employees of the hospital. That
10 would be Justice Scalia's line, I suppose.

11 MR. SAFRON: Yes, Your Honor.

12 QUESTION: Because they are not in the business
13 of punishing people.

14 MR. SAFRON: Yes, Justice --

15 QUESTION: Even if they are deliberately
16 indifferent under the Estelle against Campbell rationale.

17 MR. SAFRON: The point I am really trying to
18 make is, there is still liability under normal standards of
19 tort law which is much less than the civil rights standard.

20 QUESTION: That doesn't (inaudible) does it?

21 MR. SAFRON: Not really, Your Honor. No, it
22 doesn't. It has to do with if it's punishment, if it's
23 security --

24 QUESTION: What you are saying is, we don't need
25 Section 1983. There are lots of good state remedies out

1 there.

2 MR. SAFRON: Yes, Your Honor, there are. Now, in
3 this particular case, the situation we have is that on
4 August the 9th, 1983, Mr. West is presented to Dr. Atkins
5 with a complaint of a torn achilles tendon. Dr. Atkins
6 provided what in fact is the conservative treatment. I
7 have run through the computer and found a case and I would
8 like to leave -- I mean article I would like to leave with
9 the clerk.

10 QUESTION: But that (inaudible).

11 MR. SAFRON: No, but what I'm trying to say is
12 this. He provided a conservative treatment, put on a long
13 leg cast on August 9th --

14 QUESTION: I know, but you would say if he didn't
15 give him any service at all he couldn't be sued under 1983.
16 Say he gave the most radical treatment.

17 MR. SAFRON: I'd like to get back to the facts.
18 That's it here. He provided the most conservative treatment.
19 He was paid for his clinic. In fact, he would have been
20 paid extra for surgery. At his own election he provided the
21 conservative treatment, put on a long legged cast, ordered
22 Mr. West to return in three weeks, and when he returned in
23 three weeks the cast was broken off at the ankle, permitting --

24 QUESTION: Now, Mr. Safron, we granted certiorari
25 on two questions involving whether prison doctors are state

1 actors under these circumstances. Now, you could argue for
2 affirmance on an alternate rationale, but since it was
3 summary judgment it seems to me you've got to take the facts
4 as resolved against you.

5 MR. SAFRON: If Your Honor please, we of course
6 are arguing in light of Calvert versus Sharp, which was
7 decided by the Fourth Circuit Court of Appeals several weeks
8 before the complaint in this case was served. Based on
9 Calvert versus Sharp, the response in this case adopted
10 Calvert versus Sharp. The lack of state action under Polk
11 County versus Dodson, under Blum versus Yaretsky, and the
12 medical record was not developed because obviously we wanted
13 to see if we could trust the Calvert-Sharp rationale.

14 QUESTION: Yes, and that is what the case is here
15 now for. The place to develop the medical record or argue
16 about a conservative technique was applied was somewhere
17 back in the trial court if this Court should reverse on the
18 state actor.

19 MR. SAFRON: We are arguing that this is not state
20 action. We are going back to some of the very recent cases
21 of this Court, the Whitley versus Albers decision involving
22 the shooting, in which this Court held that unless there
23 is wantonness there is no Eighth Amendment violation.

24 We are supporting -- we are going back to the
25 Daniels versus Williams case, the trip and fall in the

1 Richmond County Jail, that mere negligence is not a civil
2 rights violation. The Davidson versus Cannon last term
3 in which --

4 QUESTION: That is not the way the court below
5 decided the case. They didn't say there was insufficient
6 allegation of deliberate indifference. They said this fellow
7 was not a state actor.

8 MR. SAFRON: And that is -- and we are relying,
9 of course, on the en banc opinion of the Fourth Circuit that
10 under Polk County versus Dodson, the same way that a full-
11 time public defender is not a state actor, we are submitting
12 that a doctor has his responsibilities under the appropriate
13 standards of medicine the way the attorney who is the
14 public defender has his responsibilities under the appro-
15 priate canons of ethics, and that regardless of the fact that
16 one is a full-time employee, that does not turn one into
17 someone who functions under color of state law so as to
18 subject him or her to 1983 jurisdiction, because unless there
19 is in fact jurisdiction over the individual, unless a person
20 is a state actor, there -- this is an inappropriate forum
21 under Section 1983.

22 And, of course, taking Blum versus Yaretsky, we
23 would submit in light of Blum that providing medical care
24 is not the exclusive prerogative of any state. Doctors
25 provide medical care to patients in and out of prison.

1 Orthopedic surgeons provide medical care, and this is not
2 the exclusive prerogative so as to give rise to the color
3 of state action, which gives rise to 1983 jurisdiction, and
4 basically that is the argument we are presenting, and that
5 is the argument we are relying on, one which the Fourth
6 Circuit en banc found sufficient, just as false imprisonment
7 does not become a Section 1983 violation, which this Court
8 held in Baker versus McCollam, just as in Paul versus Davis
9 defamation does not become a 1983 violation, doesn't rise to
10 a constitutional violation. We are submitting that an
11 allegation of malpractice, as this Court stated in Estelle
12 versus Gamble also does not convert allegations of malpractice
13 into a civil rights violation under Section 1983, subjecting
14 that physician to federal court jurisdiction and requiring
15 him to respond in yet another form, and a form which is out-
16 side malpractice policies, and as a result --

17 QUESTION: Well, you take the position, though,
18 I gather, that even if the allegation is that this doctor,
19 simply didn't like the prisoner, thought he was a bad actor,
20 and thought he would get back at him by making him
21 physically suffer and withdrawing and denying medical care,
22 that there can be no liability as a state actor. I under-
23 stand that is your argument, right?

24 MR. SAFRON: At that point, Your Honor, we're
25 getting into language of wantonness that this Court used in

1 Whitley versus Albers.

2 QUESTION: Make it as bad as you want. Paint the
3 worst picture possible. It's a prison doctor. He's a
4 professional. He is hired not as a full-time employee, on
5 a contract basis. But that's what he does. He wants to make
6 that prisoner suffer, and he does.

7 MR. SAFRON: I would still argue, Your Honor,
8 that there is a forum, and because there was a forum, which
9 is the state courts, under a much reduced standard than under
10 Section 1983, that the inmate has a forum available to him,
11 and with the forum available to him --

12 QUESTION: Well, why is he not a state actor?
13 Just refresh my recollection. Under those circumstances.

14 MR. SAFRON: He is not a state actor because he
15 is not functioning under color of state law. He is
16 functioning under his medical license and under the --

17 QUESTION: You fall back under the professional
18 argument now? It is just not clear to me, Your Honor.

19 MR. SAFRON: Under the facts you are presenting,
20 Your Honor, there is no question that that particular doctor
21 would be violating his Hippocratic Oath, would be violating
22 the standards established --

23 QUESTION: We are talking about whether he is a
24 state actor or not. Now, what rationale do you rely upon to
25 say he is not a state actor?

1 MR. SAFRON: The rationale is that he has his
2 medical license, and that --

3 QUESTION: Falling back on the professional.

4 MR. SAFRON: -- that he is a professional.

5 QUESTION: All right. I thought in response to
6 Justice Scalia you had backed off that, but now we're back
7 to that.

8 MR. SAFRON: I would argue that he is still the
9 professional, and as the professional his obligations under
10 his medical license, his obligations to the state medical --
11 to the state medical standards, American medical standards,
12 that if he acts in this fashion there is recourse, recourse
13 at a much lower level than under the Federal Civil Rights
14 Act.

15 Negligence requires much less than civil rights
16 violation.

17 QUESTION: Mr. Safron, I had thought --

18 QUESTION: Is the point that he -- go ahead.

19 QUESTION: I had thought your point was that he
20 was a state actor but was not a state actor for the purpose
21 of imposing punishment, and that's all that the Eighth
22 Amendment covers, and therefore he can't be a state actor.
23 He may be a state actor for purposes of some other 1983
24 violations, but not for the cruel and unusual punishment
25 unless he is a state actor for the purpose of executing the

1 sentence of the state, and doctors are not.

2 MR. SAFRON: Obviously, doctors don't execute
3 sentences, Your Honor. That's obvious.

4 QUESTION: Nor are food service people, so really
5 it doesn't depend on the professional thing at all.

6 MR. SAFRON: Whether or not punishment is being
7 imposed is, I think, the crux. Whether or not --

8 QUESTION: Well, it is surely being imposed. The
9 issue is that this person has to be one responsible for --

10 MR. SAFRON: Well, obviously, but I meant by
11 the particular individual who is asserted to be the state
12 actor.

13 QUESTION: You want us to say as a matter of state
14 law a doctor can never impose punishment?

15 MR. SAFRON: It would seem to me, Your Honor, that
16 if the doctor is functioning as a physician --

17 QUESTION: Now you are back to the physician
18 analogy, and that means the more control the person has over
19 the prisoner, the less obligation he has to the law?

20 MR. SAFRON: No, Your Honor, control, I think,
21 is the substance, and control over an inmate in terms of
22 imposing the security, imposing the punishment --

23 QUESTION: You say the more professionalism, the
24 more learning the doctor has, the less control he has over
25 the prisoner?

1 MR. SAFRON: In terms of the normal requirements,
2 that -- he has -- he is practicing medicine. He is not
3 maintaining the security of the institution. He is not a
4 guard who maintains security.

5 QUESTION: Was he a prisoner when he was treating
6 him?

7 MR. SAFRON: Mr. West was a prisoner when Dr.
8 Atkins was treating him.

9 QUESTION: And he was under guard just the same
10 as in the middle of the jailhouse, right?

11 MR. SAFRON: I am sure there were guards present.

12 QUESTION: Well, it was a prison hospital. It
13 wasn't a private hospital. Is that right?

14 MR. SAFRON: Obviously, and I am sure --

15 QUESTION: So he was still under restraint,
16 subject to the Eighth Amendment.

17 MR. SAFRON: But not Dr. Atkins' restraint.

18 QUESTION: Well, he was there. We are not
19 complaining -- we are complaining about what he did while
20 this man was under restraint as a prisoner. And is there any
21 difference between the hospital and the prison as to that?

22 MR. SAFRON: Yes, Your Honor.

23 QUESTION: And what is the difference?

24 MR. SAFRON: The doctor is present practicing his
25 profession. There may be a guard present maintaining the

1 security of the institution.

2 QUESTION: Suppose he had been in the prison
3 treating him. Would he still be exempt?

4 MR. SAFRON: He is not an individual imposing
5 security of the institution, Your Honor.

6 QUESTION: If he was treating him inside of the
7 prison, would he still be exempt under your theory?

8 MR. SAFRON: Justice Marshall, yes, because he
9 is not imposing the security of the institution, he is merely
10 providing the medical care. There may be a guard present,
11 maintaining the security, but that is not Dr. Atkins' or any
12 other physician's responsibility or mission.

13 QUESTION: Mr. Safron, if this litigation proceeds
14 to a judgment against Dr. Atkins, will the state indemnify
15 him?

16 MR. SAFRON: No, well, the reason we are here
17 is because the statutes were amended permitting the attorney
18 general to represent medical professionals when claims of
19 civil rights violations arose.

20 QUESTION: The very fact that you are here
21 out of the State Attorney General's Office on a special
22 assignment perhaps almost indicates, doesn't it, a
23 concession of state action under cover of state law?

24 MR. SAFRON: No, Your Honor. What happened, the
25 statutes were amended. In this particular instance, the

1 state does not provide representation in the normal mal-
2 practice situation, but a civil rights situation, being
3 outside the medical malpractice policy, in order to hire
4 physicians we were permitted to come in on the civil rights
5 aspects, provide representation, because otherwise the
6 recruiting --

7 QUESTION: Well, why doesn't the doctor have his
8 own counsel here instead of relying on the state? I am just
9 saying the overtones are that the state's almost conceding
10 that he acted under color of state law.

11 MR. SAFRON: No, Your Honor, we are just making
12 sure that we can recruit physicians because when they are
13 sued under color of state law they are on their own.

14 QUESTION: Let me ask one irrelevant question
15 before you sit down. I see your red light is on. There has
16 been a lot of talk about the Hippocratic Oath. In North
17 Carolina are physicians required to take the Hippocratic
18 Oath?

19 MR. SAFRON: I, in seeing films of graduations of
20 the University of North Carolina School of Medicine, I have
21 seen it being given.

22 QUESTION: I have, too, but I might say also that
23 in many medical graduations the Hippocratic Oath is not
24 administered.

25 MR. SAFRON: I can't speak nationally, Your Honor.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Safron.
2 Mr. Stein, you have three minutes remaining.

3 ORAL ARGUMENT OF ADAM STEIN, ESQUIRE
4 ON BEHALF OF THE PETITIONER - REBUTTAL

5 MR. STEIN: Thank you, Chief Justice.

6 Two points about Estelle. The first is that the
7 doctor in Estelle was sued for what he did as a physician,
8 not what he did as an administrator. And it is our reading
9 of Estelle that the failure to provide medical care that
10 results in unnecessary suffering is punishment, and this --

11 QUESTION: Mr. Stein, you can't mean that.

12 Suppose a state adopts a state Medicare system that all
13 medical services will be provided to the general population
14 at state expense, and you get a physician who does what this
15 physician is alleged to have done here, intentionally
16 withholds care. Would that be an Eighth Amendment claim for
17 cruel and unusual punishment?

18 MR. STEIN: No, because -- for several reasons.
19 The general citizenry aren't incarcerated.

20 QUESTION: All right, so you don't mean that
21 simply the denial of medical care is in itself cruel and
22 unusual punishment.

23 MR. STEIN: In the prison.

24 QUESTION: Ah, in the prison context.

25 MR. STEIN: Where the prison doctor has the power,

1 as in this case, by withholding, by denying it himself, he
2 is denying it altogether, which is not true in the free world.

3 QUESTION: So in the example I just gave you,
4 if a doctor treated somebody in the general population and
5 intentionally withheld care, that would not be an Eighth
6 Amendment violation, but under the same general state Medicare
7 scheme, if he treated a prisoner, that would be an Eighth
8 Amendment violation, in the same office, the prisoner is
9 brought to his office, he treats the same individual. He
10 doesn't even know who are prisoners, who are not prisoners.
11 In one case he is guilty of acting under color of state law
12 and inflicting cruel and unusual punishment, in the other
13 case not.

14 MR. STEIN: Well, that is not this case but --

15 QUESTION: I know that.

16 MR. STEIN: -- I would say that it was if it's
17 in a circumstance where the prisoner has no choice and no
18 access to anyone else.

19 QUESTION: Of course, we are not concerned here
20 with the underlying constitutional Eighth Amendment issue,
21 are we? We are concerned with the statutory issue of 1983.

22 MR. STEIN: And whether the doctor acted under
23 color of law, and that's what I understood.

24 QUESTION: Yes, and is it not our usual approach
25 to treat the statutory issue first rather than the

1 constitutional issue?

2 MR. STEIN: It is.

3 If there are no further questions, I will conclude.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stein.

5 The case is submitted.

6 (Whereupon, at 1:58 o'clock p.m., the case in
7 the above-entitled matter was submitted.)

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REPORTERS' CERTIFICATE

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5 HEARING DATE: March 28, 1988
6 LOCATION: Washington, D.C.

7
8 I hereby certify that the proceedings and evidence
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11 United States Supreme Court.
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