

## COURT OF APPEALS OF NEW YORK

### Wooley v. New York State Department of Correctional Services<sup>1</sup> (decided July 1, 2010)

Robert Wooley was incarcerated in the New York State Department of Correctional Services (DOCS) since the late 1980s.<sup>2</sup> He was diagnosed with hepatitis C sometime prior to 2001.<sup>3</sup> After Wooley's grievance requesting maintenance therapy for his hepatitis C was denied by the New York State Department of Correctional Services ("DOCS"), he commenced a New York Civil Practice Laws and Rules ("CPLR") article 78 proceeding.<sup>4</sup> He alleged, among other issues, that the denial of the requested treatment violated his constitutional right to be free from cruel and unusual punishment under the Eighth Amendment<sup>5</sup> to the United States Constitution.<sup>6</sup> The Supreme Court, Albany County, dismissed the proceeding, stating "that DOCS's determination to deny the requested treatment was rational and did not" violate his Eighth Amendment rights.<sup>7</sup> Wooley appealed to the Appellate Division, Third Department, which affirmed the dismissal.<sup>8</sup> The Court of Appeals of New York affirmed, holding that the denial of the maintenance therapy was not "deliberately indif-

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<sup>1</sup> 934 N.E.2d 310 (N.Y. 2010).

<sup>2</sup> *Id.* at 312.

<sup>3</sup> *Id.* Hepatitis C is a "viral infection which increases the risk of liver cancer and often leads to cirrhosis of the liver, which can cause liver failure and, ultimately, death." *Id.*

<sup>4</sup> *Id.* at 313. The purpose of a CPLR article 78 proceeding is to challenge a determination, in this case the denial of Wooley's grievance, made by an administrative body, such as a committee or agency. *See* N.Y. CIV. PRAC. LAW § 7801 (McKinney 2011). In a CPLR article 78 proceeding, the court examines whether the action taken has a rational basis. *Wooley*, 934 N.E.2d at 314.

<sup>5</sup> The Eighth Amendment to the United States Constitution states, in pertinent part: "nor cruel and unusual punishments inflicted." *See also* N.Y. CONST. art. I, § 5.

<sup>6</sup> *Wooley*, 934 N.E.2d at 313-14. Wooley's claim that DOC's denial of his requested medical treatment was arbitrary and capricious was dismissed by the lower court, which was affirmed by the New York Court of Appeals in this decision. *Id.* at 314.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

ferent to [Wooley's] medical needs in violation of the Eighth Amendment."<sup>9</sup>

During 2001, a DOCS physician prescribed Wooley two drugs, interferon and ribavirin, for forty-eight weeks.<sup>10</sup> Wooley "responded well to the medication," and at the end of the treatment, his "hepatitis C viral load was so low as to be undetectable."<sup>11</sup> Near the end of treatment, Wooley wrote to "Dr. Lester Wright, the Chief Medical Officer for DOCS, . . . requesting six additional months of [] treatment . . . because his hepatitis C fell within the 'hard to treat' category."<sup>12</sup> Dr. Wright did not respond to Wooley.<sup>13</sup>

In October 2002, Wooley had a relapse and "wrote to Dr. Marc Stern, a DOCS Regional Medical Director[,] requesting the continuation of the treatment with the use of pegylated interferon rather than the standard interferon because it was more effective."<sup>14</sup> DOCS rejected his request because "the Food and Drug Administration (FDA) had not approved the use of pegylated interferon for retreatment after a course of standard interferon/ribavirin," and such use of the drug is considered to be off-label.<sup>15</sup> After the refusal, Wooley was examined by a consulting physician who "recommended retreatment with pegylated interferon and ribavirin" for forty-eight weeks and sought Dr. Wright's approval, which was granted.<sup>16</sup>

As Wooley approached the completion of his retreatment, his

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<sup>9</sup> *Id.* at 316.

<sup>10</sup> *Wooley*, 934 N.E.2d at 312. Interferon is a type of protein produced by the human body to defeat viruses, and causes symptoms such as "fever, nausea, achy and sore muscles, joint pain and fatigue[,] known as the antiviral effect. See *Understanding Hepatitis C Interferon Therapy*, HEPITATIS-CENTRAL.COM, July 31, 2006, [http://www.hepatitis-central.com/mt/archives/2006/07/understanding\\_h.html](http://www.hepatitis-central.com/mt/archives/2006/07/understanding_h.html). The interferon used in treating hepatitis C, such as Intron A, manufactured by Schering, is slightly different from the interferon the body produces, which "helps the body distinguish between cells that are affected by the virus and non-infected cells, targeting infected cells for destruction." *Id.* See also *Managing the Hepatitis C Virus*, HEPITATIS-CENTRAL.COM, <http://www.hepatitis-central.com/hcv/ifn/manage.html> (last visited Mar. 1, 2011). Ribavirin, the generic name for drugs such as Virazole, performs a similar function to interferon, but at a slower rate. *Id.*

<sup>11</sup> *Wooley*, 934 N.E.2d at 312.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 312-13. Pegylated interferon, a newly developed drug, "is interferon with an additional side chain of polyethylene glycol," which allows for fewer injections than interferon. *Id.* at 313 n.1.

<sup>15</sup> *Wooley*, 934 N.E.2d at 313. "The term 'off-label' refers to the use of a medication or medical device other than that for which the FDA approved it." *Id.* at 313 n.2.

<sup>16</sup> *Id.* at 313.

physician recommended to Dr. Wright that Wooley continue his treatment on a low-dose maintenance pegylated interferon.<sup>17</sup> Dr. Wright rejected the retreatment because it “was not supported by published studies,” and although “a ‘large study [was] ongoing to determine whether it [was] of value,’ ” the “use would be experimental.”<sup>18</sup> In February 2005, a physician examined Wooley and “noted that [his] blood test revealed an increased viral load, and . . . that a ‘maintenance dose of pegylated interferon would be a reasonable strategy to stave off progression to . . . cirrhosis[,] . . . an approach that has support in literature though [is] by no means proved.’ ”<sup>19</sup> In addition, “a new liver biopsy revealed mild inflammation and fibrosis in [Wooley’s] liver, but no cirrhosis.”<sup>20</sup>

An infectious disease specialist examined Wooley in April 2006 and suggested that the maintenance therapy of pegylated interferon be considered, “noting that ‘[t]here is evidence in published literature for this approach although [it is] not FDA approved or proven in long[-]term studies.’ ”<sup>21</sup> Even with all of the recommendations from different physicians, Dr. Wright again refused to treat Wooley with a low-dose therapy of pegylated interferon.<sup>22</sup> In response to Dr. Wright’s refusal, Wooley “file[d] a grievance, which DOCS denied.”<sup>23</sup>

In its majority opinion,<sup>24</sup> the Court of Appeals held that DOCS’ denial of Wooley’s requested treatment did not constitute deliberate indifference.<sup>25</sup> The court determined that withholding the requested treatment “was neither objectively unreasonable nor made

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Wooley*, 934 N.E.2d at 313. “Cirrhosis is a slowly progressing disease in which healthy liver tissue is replaced with scar tissue, eventually preventing the liver from functioning properly.” See *Digestive Disorders Health Center*, WEBMD.COM, <http://www.webmd.com/digestive-disorders/cirrhosis-liver> (last visited Mar. 1, 2011).

<sup>20</sup> *Wooley*, 934 N.E.2d at 313.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 317. Judges Graffeo, Read and Pigott concurred with Judge Ciparick. Judge Smith dissented in a separate opinion in which Chief Judge Lippman and Judge Jones concurred. The dissent did not discuss whether there was a violation of the plaintiff’s Eighth Amendment rights. Since the dissent stated that the denial was arbitrary and capricious, it did not go further into the analysis of the constitutional question. *Wooley*, 934 N.E.2d at 316.

<sup>25</sup> *Id.*

with subjective recklessness.”<sup>26</sup> The basis of the decision was derived from the application of the deliberate indifference standard set forth by the United States Supreme Court, also known as the *Estelle* test.<sup>27</sup> “This ‘deliberate indifference’ standard is comprised of an objective component and a subjective component.”<sup>28</sup> The objective component “examines whether the deprivation of medical care was sufficiently serious[,]”<sup>29</sup> by utilizing two factors: “ ‘whether the prisoner was actually deprived of adequate medical care . . . [and] whether the inadequacy in medical care is sufficiently serious.’ ”<sup>30</sup> Essentially, it asks whether the response by prison officials to Wooley’s “medical needs was objectively reasonable under the circumstances.”<sup>31</sup> The subjective component “inquires whether ‘the charged official . . . act[ed] with a sufficiently culpable state of mind.’ ”<sup>32</sup> The state of mind required for deliberate indifference is “ ‘equivalent to subjective recklessness,’ ” in which an “ ‘official acts or fails to act while actually aware of a substantial risk’ ” that an inmate will be seriously harmed.<sup>33</sup> The official does not need to have knowledge or have purposely inflicted the harm.<sup>34</sup>

This Article will examine relevant case law surrounding the Eighth Amendment and the New York State Constitution with regard to medical treatment to prisoners and how the law was applied to the *Wooley* case. To fully understand the Court of Appeals’ reasoning in applying the deliberate indifference standard, it is imperative to examine federal court decisions to uncover the development of the theory of deliberate indifference and to be knowledgeable about the components of the test.

In *Estelle v. Gamble*,<sup>35</sup> the plaintiff, an inmate of the Texas Department of Corrections, was injured “while performing a prison work assignment.”<sup>36</sup> He was checked for a hernia during his first trip

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<sup>26</sup> *Id.*

<sup>27</sup> *See Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>28</sup> *Wooley*, 934 N.E.2d at 315 (internal citations omitted).

<sup>29</sup> *Id.* (citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal quotations omitted)).

<sup>30</sup> *Id.* (quoting *Salahuddin v. Goord*, 467 F.3d 263, 279-80 (2006)).

<sup>31</sup> *Id.* (citing *Salahuddin*, 467 F.3d at 279-80).

<sup>32</sup> *Id.* (quoting *Salahuddin*, 467 F.3d at 280).

<sup>33</sup> *Wooley*, 934 N.E.2d at 315 (quoting *Salahuddin*, 467 F.3d at 280).

<sup>34</sup> *Id.*

<sup>35</sup> 429 U.S. 97 (1976).

<sup>36</sup> *Id.* at 98. The defendant was injured when a bale of cotton, weighing 600 pounds, “fell

to the hospital, but within two hours of returning to his cell, he experienced intense pain and returned to the hospital.<sup>37</sup> The plaintiff was diagnosed with having a lower back strain.<sup>38</sup> The doctor prescribed a pain reliever and a muscle relaxer “and placed [him] on ‘cell-pass, cell-feed’ status for two days.”<sup>39</sup> The following week, the plaintiff was re-examined and was placed on cell-pass for a week.<sup>40</sup> After a follow up examination, the doctor kept him on the pain reliever but “took him off cell-pass, [] certifying him to be capable of light work,” even though the plaintiff claimed his back still hurt.<sup>41</sup> Due to the pain, the plaintiff refused to work and as a result, he was moved to administrative segregation.<sup>42</sup> A few days later, he was taken before the prison disciplinary committee, which directed that he be examined by another doctor for his back pain and high blood pressure.<sup>43</sup> The new doctor prescribed high blood pressure medication and continued the pain reliever.<sup>44</sup>

Within the next few weeks, the plaintiff went to the hospital on numerous occasions for examinations, and was prescribed a different type of muscle relaxer and pain reliever during his first visit.<sup>45</sup> During this time, the plaintiff again refused to work because of his pain and was placed in solitary confinement.<sup>46</sup> One day while in solitary confinement, he experienced chest pains and blackouts, but was not examined by a medical assistant until later that night, who ordered him to be hospitalized.<sup>47</sup> Another doctor performed an electrocardiogram and prescribed medication to treat his irregular cardiac rhythm, and he was moved back to administrative segregation.<sup>48</sup> The

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on him while he was unloading a truck.” *Id.* at 99.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Estelle*, 429 U.S. at 99. A “ ‘cell-pass, cell-feed’ ” status allows an inmate “to remain in his cell at all times except for showers.” *Id.*

<sup>40</sup> *Id.* A cell-pass status allows an inmate “to remain in his cell except for meals and showers.” *Id.*

<sup>41</sup> *Id.* at 100.

<sup>42</sup> *Estelle*, 429 U.S. at 100. The defendant’s complaint did not define “administrative segregation,” but has been interpreted by the Court as an equivalent of solitary confinement. *Id.* at 100 n.5.

<sup>43</sup> *Id.* at 100.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 100-01.

<sup>46</sup> *Estelle*, 429 U.S. at 101.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

pain did not subside, and he was only allowed to see a doctor after his third request.<sup>49</sup>

The plaintiff brought a claim against the Texas Department of Corrections for “subject[ing] him to cruel and unusual punishment in violation of the Eighth Amendment.”<sup>50</sup> “The District Court, sua sponte, dismissed the complaint,” but “[t]he Court of Appeals reversed and remanded with instructions to reinstate the complaint.”<sup>51</sup> The United States Supreme Court “reverse[d] the judgment as to the medical director” and the doctors under him, and remanded the rest of the case to the Court of Appeals to determine whether there was a valid cause of action against the other prison officials.<sup>52</sup> In reaching its decision, the Supreme Court first examined the principles behind the Eighth Amendment. The Court stated “that the [Eighth] Amendment proscribes more than physical barbarous punishments,”<sup>53</sup> and it “ha[s] held repugnant . . . punishments . . . which ‘involve the unnecessary and wanton infliction of pain.’ ”<sup>54</sup>

From these underlying principles, the Supreme Court established that the government has an obligation to provide medical care to those who are incarcerated.<sup>55</sup> Inmates must rely on prison officials to treat their medical needs, as it is their only available means of obtaining treatment.<sup>56</sup> Failure to provide treatment may “produce physical ‘torture or a lingering death.’ ”<sup>57</sup> This led the Court to conclude that deliberate indifference to serious medical needs constitutes “‘unnecessary and wanton infliction of pain,’ ” and allows for a cause of action under the Eighth Amendment.<sup>58</sup> However, the Court’s conclusion does not mean that every claim for “[in]adequate medical treatment [is] a violation of the Eighth Amendment.”<sup>59</sup> For example, claims that involve an accident, the “inadvertent failure to

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Estelle*, 429 U.S. at 98.

<sup>52</sup> *Id.* at 108.

<sup>53</sup> *Id.* at 102.

<sup>54</sup> *Id.* at 102-03 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)) (internal quotations omitted).

<sup>55</sup> *Id.* at 103.

<sup>56</sup> *Estelle*, 429 U.S. at 103.

<sup>57</sup> *Id.* (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).

<sup>58</sup> *Id.* at 104. (quoting *Gregg*, 428 U.S. at 173).

<sup>59</sup> *Id.* at 105.

provide adequate medical care,” or a physician’s negligence in diagnosis or treatment do not provide for a valid claim.<sup>60</sup> The claim “must allege acts or omissions [that have] sufficiently harm[ed]” the inmate in order to be considered as evidence for “deliberate indifference to serious medical needs.”<sup>61</sup>

The plaintiff’s claims in *Estelle* against the medical director and the doctors did not rise to the level of an Eighth Amendment violation. He was seen by several medical personnel in a span of three months who “treated his back injury, high blood pressure, and heart problems.”<sup>62</sup> Other methods of treatment may have been useful in assisting in the diagnosis of the back pain, such as an x-ray, but the decision not to obtain an x-ray was a matter of medical judgment, not an intentional wanton infliction of pain by the medical director.<sup>63</sup> Therefore, the Supreme Court established a threshold for what constitutes deliberate indifference that violates the Eighth Amendment.

After the manifestation of the theory of deliberate indifference, federal courts have used the *Estelle* holding as a standard when confronted with Eighth Amendment claims involving inadequate medical care, or in the case of *Wilson v. Seiter*,<sup>64</sup> inadequate confinement conditions. In *Wilson*, the plaintiff brought a suit against the director of the Ohio Department of Rehabilitation and Correction and the warden of Hocking Correctional Facility, alleging that they failed to take remedial action in response to overcrowding and other inadequate conditions in the prison.<sup>65</sup> “The District Court granted summary judgment for” the defendants, and “[t]he Court of Appeals for the Sixth Circuit affirmed.”<sup>66</sup>

In vacating the Court of Appeals’ judgment, the Supreme

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<sup>60</sup> *Id.* at 105-06.

<sup>61</sup> *Estelle*, 429 U.S. at 106.

<sup>62</sup> *Id.* at 107. “Gamble was seen by medical personnel on seventeen occasions . . . .” *Id.*

<sup>63</sup> *Id.* The plaintiff’s claim against the doctors may have been more suited as a medical malpractice claim. *Id.*

<sup>64</sup> 501 U.S. 294 (1991). See also *Farmer*, 511 U.S. at 847 (holding that “a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it”).

<sup>65</sup> *Wilson*, 501 U.S. at 296. The other inadequate conditions the complaint mentioned include: “excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates.” *Id.*

<sup>66</sup> *Id.*

Court stated that there was “no significant distinction between claims alleging inadequate medical care and those alleging inadequate ‘conditions of confinement.’ ”<sup>67</sup> Thus, the standard established in *Estelle* for inadequate medical care was applied to the claims of inadequate conditions of confinement.<sup>68</sup> As previously noted, this standard is composed of objective and subjective components, both of which need to be satisfied in order to have a violation of the Eighth Amendment.<sup>69</sup> With this in mind, the Court stated that “mere negligence would [not] satisfy . . . the mere lenient ‘deliberate indifference’ standard.”<sup>70</sup> Thus, the Court of Appeals should have given further thought to its findings that the conditions were “[a]t best . . . negligence.”<sup>71</sup> If the conditions were more than mere negligence, the deliberate indifference standard may be satisfied.<sup>72</sup> Therefore, the Court remanded the case for reconsideration under the deliberate indifference standard to determine whether there was a cause of action for the plaintiff’s claims.<sup>73</sup>

The federal courts have further expanded the deliberate indifference standard. In *Brock v. Wright*,<sup>74</sup> the plaintiff “suffered a serious knife wound to his right cheek” while incarcerated in the New York DOCS.<sup>75</sup> After the injury was treated by a local hospital, the plaintiff visited an outside dermatologist who noted that the wound was healing very well, that he “had a history of ‘keloid formation’ ” and to follow up with a steroid injection if the laceration began to

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<sup>67</sup> *Id.* at 303 (internal quotations omitted).

<sup>68</sup> *Id.* “Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the “deliberate indifference” standard . . . .” *Wilson*, 501 U.S. at 303 (quoting *LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987)).

<sup>69</sup> *Id.* at 304. In some instances, a combination of conditions that “produces the deprivation of a single, identifiable human need” may lead to satisfying the objective component, while the high subjective state of mind standard prescribed by *Whitley v. Albers* does not apply to prison condition cases and that there is no justification for a more demanding standard than the deliberate indifference standard established in *Estelle*. *Id.* at 302-04. See *Whitley v. Albers*, 475 U.S. 312, 319 (1987) (stating that “[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause”).

<sup>70</sup> *Wilson*, 501 U.S. at 305.

<sup>71</sup> *Id.* at 305-06.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 306.

<sup>74</sup> 315 F.3d 158 (2d Cir. 2002).

<sup>75</sup> *Id.* at 161.

form keloids.<sup>76</sup> Soon after his visit, the plaintiff's scar began to form keloids, causing him pain, anxiety, and limited use of his mouth.<sup>77</sup> After several attempts to inform the prison medical staff that he was experiencing pain, a nurse, followed by a doctor, examined the plaintiff and recommended a referral "for an outside consultation with a dermatologist."<sup>78</sup> "The Regional Medical Director . . . denied the request for a referral, [stating] that the nature of the request[] was 'cosmetic.'"<sup>79</sup> The referring doctor did not appeal the decision, because he felt there "were no 'collateral symptoms' to justify the appeal in light of the DOCS policy, [which was] promulgated by" the defendant.<sup>80</sup> The plaintiff responded by filing a grievance, which was originally accepted, but then overturned by the Superintendent of the Collins Correctional Facility " 'who deferred to the Regional Medical Director's decision since this [wa]s an issue within his medical opinion and field of expertise.' "<sup>81</sup>

With no other options, the plaintiff brought suit in the District Court of the Western District of New York for inadequate medical treatment in violation of the Eighth Amendment, which granted summary judgment for the defendant.<sup>82</sup> On a pro se appeal by the plaintiff, the Court of Appeals vacated the judgment of the District Court.<sup>83</sup> When the court applied the deliberate indifference standard, it concluded that the defendant was not entitled to summary judgment because the plaintiff's medical condition, viewed objectively, is serious.<sup>84</sup> The court set forth a set of factors to consider when applying the objective component of the deliberate indifference standard, including: "[W]hether a reasonable doctor or patient would perceive the medical need in question as 'important and worthy of comment or treatment,' [] whether the medical condition significantly affects dai-

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<sup>76</sup> *Id.* "Keloids are abnormal overgrowths of fibrous tissue that, when triggered by a skin injury, typically extend beyond the location of the original wound." *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Brock*, 315 F.3d at 161.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 161-62. Section 1.43 of the DOCS policy considers keloids "to be among the '[c]onditions and services which, absent the existence of *collateral symptoms*, are considered prima facie medically unnecessary.'" *Id.* at 165 (emphasis in original).

<sup>81</sup> *Id.* at 162.

<sup>82</sup> *Brock*, 315 F.3d at 160.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 162.

ly activities, and [] ‘the existence of chronic and substantial pain.’”<sup>85</sup> The plaintiff provided a supporting affidavit from a doctor stating that the plaintiff’s scar caused “chronic pain that interfer[ed] with his ability to” perform daily tasks.<sup>86</sup> Other doctors felt it was worthy to comment that the plaintiff needed steroid injections if the scar began to form keloids and recommended that the plaintiff see outside dermatologists.<sup>87</sup> The court went on further to state that it does not “require an inmate to demonstrate that he or she experiences pain that is at the limit of human ability to bear.”<sup>88</sup>

Although the objective component of the deliberate indifference standard was satisfied, the court held that the plaintiff failed to show that the defendant satisfied the subjective component.<sup>89</sup> The court reasoned that the defendant may be found “liable if a jury could reasonably find that” the unconstitutional acts of others were the result of a policy that created a deliberate indifference to the plaintiff’s medical needs.<sup>90</sup> Certain facts established were in the record that could enable a reasonable jury to conclude that there was deliberate indifference.<sup>91</sup> Therefore, the court remanded the case to the district court because the objective component was met, and there was a possibility that the subjective component would also be met, resulting in a violation of the Eighth Amendment.<sup>92</sup>

In *Salahuddin v. Goord*,<sup>93</sup> the plaintiff brought a claim for violation of his Eighth Amendment rights, in which summary judgment was granted to the defendants by the District Court for the Southern District of New York.<sup>94</sup> The plaintiff was diagnosed with hepatitis C and to determine the correct treatment, a liver biopsy was required.<sup>95</sup> The liver biopsy “was delayed for several months [because] of a series of events,” which included him being placed in disciplinary

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<sup>85</sup> *Id.* (quoting *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998)).

<sup>86</sup> *Id.* at 163.

<sup>87</sup> *Brock*, 315 F.3d at 163.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 164.

<sup>90</sup> *Id.* at 165.

<sup>91</sup> *Id.* at 166. These facts include the defendant having a vague understanding of the policy and giving examples for when treatment would be allowed. *Brock*, 315 F.3d at 166.

<sup>92</sup> *Id.*

<sup>93</sup> 467 F.3d 263 (2006).

<sup>94</sup> *Id.* at 269.

<sup>95</sup> *Id.* at 270.

keeplock and two transfers to other correctional facilities.<sup>96</sup> Then, Dr. Piazza, a correction facility physician, canceled the biopsy because he misinterpreted the DOCS policy.<sup>97</sup> Subsequently, the biopsy was approved, which the plaintiff received a few months later.<sup>98</sup> During the time between his diagnosis and the receipt of medication after the biopsy, the plaintiff complained to several prison officials and medical personnel about pain and other health problems.<sup>99</sup>

In affirming the lower court's holding, the Court of Appeals applied the deliberate indifference standard.<sup>100</sup> The court stated that there are two inquiries for the objective component: whether the plaintiff was actually deprived of adequate medical care, if the prison officials did not provide reasonable care, and whether the inadequacy in medical care was sufficiently serious, by applying the factors used in *Brock*.<sup>101</sup> The court discussed how the defendant's actions seemed to satisfy the objective component since it was "[not] reasonable for a prison official to postpone for five months a course of treatment . . . because of the possibility of [the plaintiff's] parole without an individualized assessment of [his] actual chances of parole."<sup>102</sup> In addition, the plaintiff was in serious pain during the delay, and when viewed objectively, it caused sufficiently serious harm.<sup>103</sup>

However, the plaintiff's claim did not defeat summary judgment because the subjective component was not satisfied.<sup>104</sup> The prison official's "belief that his conduct pose[d] no risk of serious harm . . . need not be sound so long as it is sincere."<sup>105</sup> In delaying the biopsy, Dr. Piazza believed that the plaintiff was not in immediate danger because cirrhosis develops over twenty to thirty years; thus there was no urgency for the biopsy.<sup>106</sup> "This may have been an unsound conclusion," but the defendant must be aware of a substantial

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<sup>96</sup> *Id.* at 271.

<sup>97</sup> *Id.* The policy mandated that "[h]epatitis C treatment will not proceed unless an inmate has 'anticipated incarceration of at least [twelve] months.'" *Salahuddin*, 467 F.3d at 271.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 279-80 (citing *Farmer*, 511 U.S. at 834).

<sup>101</sup> See *supra* note 85 and accompanying text.

<sup>102</sup> *Salahuddin*, 467 F.3d at 281.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 281.

<sup>106</sup> *Id.* at 282.

risk of serious harm from delaying the biopsy to satisfy the subjective state of mind inquiry.<sup>107</sup> Furthermore, “there is no record evidence that any physician ever informed [Dr.] Piazza that it would be harmful [to the plaintiff] to [delay] the scheduled liver biopsy.”<sup>108</sup> Therefore, because the subjective component was not satisfied, the defendant did not violate the Eighth Amendment and summary judgment in his favor was justified.<sup>109</sup>

The New York Courts have dealt with similar issues. While the *Wooley* court failed to mention them, these cases support the court’s holding. In *Ronson v. Commissioner of Correction*,<sup>110</sup> the plaintiff brought suit against the Green Haven Correctional Facility for violation of his Eighth Amendment right because of inadequate medical treatment of his diabetes and other ailments.<sup>111</sup> The plaintiff developed these ailments when the defendants “failed to provide him with his special diet or with increased insulin to compensate for his improper diet.”<sup>112</sup> In addition, the plaintiff relied on a wheelchair for mobility that “ha[d] allegedly been taken by a correction employee.”<sup>113</sup> The Appellate Division, Third Department, affirmed the lower court’s holding that the defendants did not violate the plaintiff’s Eighth Amendment rights.<sup>114</sup> The record showed that the plaintiff “received almost daily medical supervision and treatment” for his diabetes, as well as medical treatment for his other ailments which included receiving aspirin for his arthritis, eyeglasses for his diabetic retinopathy, and ointment for a rash.<sup>115</sup> With this much treatment provided, there was no deliberate indifference to the plaintiff’s medical needs.<sup>116</sup>

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<sup>107</sup> *Salahuddin*, 467 F.3d at 282.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> 491 N.Y.S.2d 209 (App. Div. 3d Dep’t 1985)

<sup>111</sup> *Id.* at 210. The other ailments include high blood pressure, arthritis, a rash, and a blood clot in his leg. *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Ronson*, 491 N.Y.S.2d at 211.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* If the defendants failed to provide the plaintiff with “a proper diabetic diet [or] deprived [him] of a medically prescribed wheelchair[,]” these actions would constitute a deliberate indifference to the plaintiff’s medical needs and violate his Eighth Amendment rights. *Id.*

In *Mays v. City of Middletown*,<sup>117</sup> “the plaintiff was arrested by police . . . [during] a fight which occurred in a crowded parking lot when local bars were closing for the night.”<sup>118</sup> While handcuffed, the plaintiff was struck in the face with a beer bottle by a member of the crowd, causing a deep laceration that required eighty-seven stitches.<sup>119</sup> Two police officers alleged “that they offered the plaintiff first aid, although two other officers [stated] that a bystander offered aid.”<sup>120</sup> “An ambulance arrived [at the scene] within three to five minutes.”<sup>121</sup> The plaintiff brought a suit to recover damages for violation of the Eighth Amendment, in which the Supreme Court, Orange County, granted summary judgment for the defendants.<sup>122</sup> The Appellate Division, Second Department affirmed the lower court’s decision, holding that “the defendants made a prima facie showing that the police officers were adequately trained.”<sup>123</sup> For a claim to be actionable against a municipality under the Eighth Amendment, the plaintiff must show “that the police exhibited ‘deliberate indifference to [his or her] serious . . . injury’ by providing inadequate treatment, ‘intentionally denying or delaying access to medical care, or intentionally interfering with the treatment once prescribed.’ ”<sup>124</sup> The plaintiff did not establish a deliberate indifference because he failed to indicate that the delay in the arrival of the ambulance “had any ill effect on [his] injury, or caused him any pain that he would not otherwise have suffered.”<sup>125</sup> Furthermore, “there is no indication that the police [caused the] delay[] or interfered with emergency personnel when they arrived.”<sup>126</sup>

The *Wooley* court, when applying the deliberate indifference standard, concluded that the medical treatment provided by DOCS to

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<sup>117</sup> 895 N.Y.S.2d 179 (App. Div. 2d Dep’t 2010).

<sup>118</sup> *Id.* at 181.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 182.

<sup>121</sup> *Id.*

<sup>122</sup> *Mays*, 895 N.Y.S.2d at 182.

<sup>123</sup> *Id.* at 183. “To establish a prima facie case . . . a plaintiff must show that ‘(1) the challenged conduct was attributable at least in part to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed under the Constitution . . . .’ ” *Id.* at 182-83 (quoting *Snider v. Dylag*, 188 F.3d 51, 53 (2d Cir. 1999)).

<sup>124</sup> *Id.* at 183 (quoting *Estelle*, 429 U.S. at 104-05).

<sup>125</sup> *Id.* at 183-84.

<sup>126</sup> *Mays*, 895 N.Y.S.2d at 184.

Wooley was constitutionally adequate.<sup>127</sup> The first factor of the objective component analyzed whether Wooley was actually deprived of adequate medical care.<sup>128</sup> Wooley had a disease that without adequate medical care, could lead to death.<sup>129</sup> The medical treatment did not have to be exactly what he requested, but had to satisfy his medical needs under the circumstances, which the court concluded was done here.<sup>130</sup> For example, he received two forty-eight week courses of treatment and had been “referred to and examined by several specialists.”<sup>131</sup> In addition, DOCS promised to continue to monitor Wooley’s condition and was willing to consider further treatments if they became medically accepted.<sup>132</sup> DOCS provided treatment to the best of its ability, with consideration of the restraints imposed by the FDA for unproved treatments.<sup>133</sup> Because Wooley was not deprived of adequate medical treatment, the second factor of the objective component did not need to be analyzed, and it can be concluded that Wooley failed to show that DOCS satisfied the objective component of the test.

While the New York State Court of Appeals found the deliberate indifference standard to be an appropriate test to determine whether a prison official violated an inmate’s Eighth Amendment right in regard to medical treatment, this standard does not go without its fair share of criticism.<sup>134</sup> One commentator notes that the standard has its deficiencies.<sup>135</sup> For an inmate to prove that the objective component is satisfied, the standard “almost universally require[s] that [inmates] be very seriously hurt before they can receive redress.”<sup>136</sup> There is no provision in the standard to account for “the inevitability of harm” resulting from the reoccurring exposure to in-

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<sup>127</sup> *Wooley*, 934 N.E.2d at 316.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Wooley*, 934 N.E.2d at 316.

<sup>133</sup> *See id.*

<sup>134</sup> *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 890 (2009) (stating that the “meaningful application of the Eighth Amendment requires a determination of when prison conditions are cruel”).

<sup>135</sup> *See* Catherine M. Bradley, *Old Remedies are New Again: Deliberate Indifference and the Receivership in Plata v. Schwarzenegger*, 62 N.Y.U. ANN. SURV. AM. L. 703, 712-14 (2007).

<sup>136</sup> *Id.* at 712.

adequate medical treatment.<sup>137</sup> Since “medical facilities in some prisons are so poor[,] [i]t should be clear that if they are used by prisoners, [they] have a significant chance of being hurt by them.”<sup>138</sup> Furthermore, the standard does not account for the potential public health threats arising from inadequate medical treatment.<sup>139</sup> The standard only addresses the harm to one particular inmate, but the inadequate medical treatment received by the inmate may have an impact on other inmates or the public.<sup>140</sup> These problems are also attributed to the subjective component. Because the standard is currently tailored to “narrowly focus” on the harms of the inmate and whether the harm was intentionally inflicted, it does not account for the effect on either the rest of the inmate population or the general population.<sup>141</sup>

In conclusion, the New York Court of Appeals correctly applied the deliberate indifference standard to determine that Wooley’s Eighth Amendment right was not violated by DOCS. The court should, however, take into consideration the criticisms of the standard and modify it to address several problems that the Supreme Court has not. This may be a leap of faith to stray from the dense precedent already set forth by the Court, but in order to fully protect an inmate’s Eighth Amendment rights and to adapt to present day problems, change is necessary.

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* An example used to reinforce this statement was from *Plata v. Schwarzenegger* in which there was no sterilization equipment in rooms designated for treating inmates, and the use of these instruments could “result in serious infection or additional injury.” *Id.*

<sup>139</sup> Bradley, *supra* note 135, at 712.

<sup>140</sup> *Id.* The commentator states that it is “objectively unreasonable” for a prison not to “test incoming or transferred inmates for HIV,” even though no inmate specifically was harmed because of “the possible public health threats.” *Id.*

<sup>141</sup> *Id.* at 714-15. The commentator is concerned that the current standard will not hold anyone accountable if, for example, unsterilized equipment harmed someone, especially as “prison infrastructure deteriorates and the prison population grows.” *Id.* at 714-15.

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