

# The Burger Court Opinion Writing Database

## *Whiteley v. Warden, Wyoming State Penitentiary*

401 U.S. 560 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 26, 1971

Re: No. 136 - Whiteley v. Warden

Dear Hugo:

Please join me in your dissent.

Regards,

*WEB*

Mr. Justice Black

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HUGO L. BLACK

February 8, 1971

MEMORANDUM FOR THE CONFERENCE

Re: No. 136- Whiteley v. Warden.

In due course I shall circulate a dissent  
in this case.

Sincerely,

*ALB*  
H. L. B.

To: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Harlan  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

From: Black, J.

Circulated: **MAR 8 1971**

Recirculated: \_\_\_\_\_

No. 136.—OCTOBER TERM, 1970

Harold Whiteley, Petitioner,	} On Writ of Certiorari to	
v.		the United States Court
Warden of Wyoming State Penitentiary.		of Appeals for the Tenth Circuit.

[March —, 1971]

MR. JUSTICE BLACK, dissenting.

With all respect to my Brethren who agree to the judgment and opinion of the Court, I am constrained to say that I believe the decision here is a gross and wholly indefensible miscarriage of justice. For this reason it may well be classified as one of those calculated to make many good people believe our Court actually enjoys frustrating justice by unnecessarily turning professional criminals loose to prey upon society with impunity. Here is what this record shows:

~~On the night of November 23, 1963, several establishments, including a bar and hardware store were broken into at the village of Saratoga, Wyoming. Some old coins and other items were taken from the hardware store. Some people saw petitioner and his companion that night in Saratoga. The next morning the sheriff, who lived at Rawlins, the county seat, another village in sparsely settled Carbon County,<sup>1</sup> investigated the burglaries. In addition to viewing the scene of the crimes, the sheriff received a rather detailed description of the car, including a portion of the license plate number, said to have been used by the burglars. The sheriff also received a tip that persuaded him that petitioner and his companion, Jack Daley, were probably guilty of the bur-~~

or near

<sup>1</sup> The population of Carbon County according to the 1970 census is about 13,000 persons.

27376

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

From: Black, J.

No. 136.—OCTOBER TERM, 1970

Circulated: \_\_\_\_\_  
Recirculated: \_\_\_\_\_ MAR 26 1971

Harold Whiteley, Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.
v.		
Warden of Wyoming State		
Penitentiary.		

[March 29, 1971]

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, dissenting.

With all respect to my Brethren who agree to the judgment and opinion of the Court, I am constrained to say that I believe the decision here is a gross and wholly indefensible miscarriage of justice. For this reason it may well be classified as one of those calculated to make many good people believe our Court actually enjoys frustrating justice by unnecessarily turning professional criminals loose to prey upon society with impunity. Here is what this record shows:

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<sup>1</sup> The population of Carbon County according to the 1970 census is about 13,000 persons.

February 4, 1971

Dear John:

In No. 136 - Whiteley v. Warden,  
please join me in your opinion.\*

W. O. D.

\*I passed at Conference, but my further  
work on this case confirms your position.

Mr. Justice Harlan

WD  
Adm 1487

January 19, 1971

Re: No. 136 - Whitely v. Warden, etc.

Dear Chief:

By way of working off the fine that is hanging over my head in this case, I write to let you know that I am assigning the opinion to myself.

Sincerely,

JMH

The Chief Justice

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

1st DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Speculated: FEB 4 1971

Recirculated: \_\_\_\_\_

No. 136.—OCTOBER TERM, 1970

Harold Whiteley, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
Warden of Wyoming State } of Appeals for the Tenth  
Penitentiary. } Circuit.

[February —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner Whiteley, in 1965, was convicted in the District Court of the Second Judicial District of the State of Wyoming on charges of breaking and entering and being an habitual criminal.<sup>1</sup> Both at his arraignment and at trial Whiteley challenged the constitutionality of the use of evidence seized during a search incident to an arrest which he claimed was illegal. The trial court overruled petitioner's motion to suppress, and on appeal the Supreme Court of Wyoming affirmed. *Whiteley v. State*, 418 P. 2d 164 (1966). This proceeding commenced with a petition for habeas corpus in the United States District Court for the District of Wyoming, which was denied on November 25, 1968.<sup>2</sup> *Whiteley v. Wyoming*, 293 F. Supp. 381. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed. *Whiteley v. Meacham*, 416 F. 2d 36 (CA10 1969). We granted certiorari, limit-

<sup>1</sup> He was given concurrent sentences on the breaking and entering charges of one to 10 years and, in consequence of the recidivist charge, imprisonment for life.

<sup>2</sup> Prior to commencing federal habeas corpus proceedings, Whiteley had filed a petition for post-conviction relief pursuant to the Wyoming statutes. No appeal was taken from the denial of that petition.

5, 7, 10 +  
stylistic changes

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

3rd DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_  
Recirculated: **MAR 9 1971**

No. 136.—OCTOBER TERM, 1970

Harold Whiteley, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
Warden of Wyoming State } of Appeals for the Tenth  
Penitentiary. } Circuit.

[March —, 1971]

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<sup>1</sup> He was given concurrent sentences on the breaking and entering charges of one to 10 years and, in consequence of the recidivist charge, imprisonment for life.

<sup>2</sup> Prior to commencing federal habeas corpus proceedings, Whiteley had filed a petition for post-conviction relief pursuant to the Wyoming statutes. No appeal was taken from the denial of that petition.

STYLISTIC CHANGES THROUGHOUT.  
~~SEE PAGES.~~

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

Circulated: \_\_\_\_\_  
Recirculated: \_\_\_\_\_

# SUPREME COURT OF THE UNITED STATES

MAR 27 1971

No. 136.—OCTOBER TERM, 1970

Harold Whiteley, Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.
v.		
Warden of Wyoming State		
Penitentiary.		

[March 29, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

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<sup>1</sup> He was given concurrent sentences on the breaking and entering charges of one to 10 years and, in consequence of the recidivist charge, imprisonment for life.

<sup>2</sup> Prior to commencing federal habeas corpus proceedings, Whiteley had filed a petition for post-conviction relief pursuant to the Wyoming statutes. No appeal was taken from the denial of that petition.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 4, 1971

RE: No. 136 - Whiteley v. Warden

Dear John:

I think the opinion here is just fine  
and I am very happy to join.

Sincerely,

  
W.J.B. Jr.

Mr. Justice Harlan

cc:The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 10, 1971

No. 136 - Whiteley v. Warden

Dear John,

I am glad to join your opinion for  
the Court in this case.

Sincerely yours,

P.S.  
✓

Mr. Justice Harlan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 10, 1971

Re: No. 136 - Whiteley v. Warden  
of Wyoming State Peni-  
tentiary

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Dear John:

Please join me.

Sincerely,



Mr. Justice Harlan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 8, 1971

Re: No. 136 - Whiteley v. Warden of  
Wyoming State Penitentiary

Dear John:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Harlan

cc: The Conference

February 10, 1971

Re: No. 136 - Whiteley v. Warden

Dear John:

I shall withhold my vote until Mr. Justice Black's forthcoming dissent is circulated. I shall probably join him in that dissent.

Sincerely,

H. A. B.

Mr. Justice Harlan

cc: The Conference

March 9, 1971

Re: No. 136 - Whiteley v. Warden

Dear Hugo:

You will appreciate the fact that I am in no position to join footnote 2 in your proposed dissent. Would you, however, add the following at the end of your opinion:

"Mr. Justice Blackmun agrees with much that is said by Mr. Justice Black and also dissents from the opinion and judgment of the Court."

Sincerely,

H.A.B.

Mr. Justice Black

cc: The Conference