

The Burger Court Opinion Writing Database

Whitley v. Albers

475 U.S. 312 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

ES:QA 8-937 25
January 29, 1986

Re: No. 84-1077 - Harold Whitley v. Gerald Albers

Dear Sandra:

I join.

Regards,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 26, 1986

No. 84-1077

Whitley v. Albers

Dear Thurgood,

Please join me in your dissent in
the above case.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

Justice Marshall

Copies to the Conference

JR LEB SR V6:35



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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 10, 1986

84-1077 - Whitley v. Albers

Dear Sandra,

Please join me.

Sincerely yours,

Justice O'Connor

Copies to the Conference

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To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Marshall**

Circulated: **FEB 14 1986**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1077

HAROL WHITLEY, INDIVIDUALLY AND AS ASSISTANT
 SUPERINTENDENT, OREGON STATE PENITEN-
 TIARY, ET AL., PETITIONERS *v.* GERALD ALBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT

[February —, 1986]

JUSTICE MARSHALL, dissenting.

I share the majority's concern that prison officials be permitted to respond reasonably to inmate disturbances without unwarranted fear of liability. I agree that the threshold for establishing a constitutional violation under these circumstances is high. I do not agree, however, that the contested existence of a "riot" in the prison lessens the constraints imposed on prison authorities by the Eighth Amendment.

The majority has erred, I believe, both in developing its legal analysis and in employing it. First, the especially onerous standard the Court has devised for determining whether a prisoner injured during a prison disturbance has been subjected to cruel and unusual punishment is incorrect and not justified by precedent. That standard is particularly inappropriate because courts deciding whether to apply it must resolve a preliminary issue of fact that will often be disputed and properly left to the jury. Finally, the Court has applied its test improperly to the facts of this case. For these reasons, I must respectfully dissent.

I

The Court properly begins by acknowledging that, for a prisoner attempting to prove a violation of the Eighth Amendment, "[a]n express intent to inflict unnecessary pain

PP. 2, 3, 4, 5

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Marshall**

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Recirculated: **FEB 20 1986**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1077

HAROL WHITLEY, INDIVIDUALLY AND AS ASSISTANT
 SUPERINTENDENT, OREGON STATE PENITEN-
 TIARY, ET AL., PETITIONERS *v.* GERALD ALBERS

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 APPEALS FOR THE NINTH CIRCUIT

[February —, 1986]

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STYLISTIC CHANGES THROUGHOUT

+ PP. 6, 7

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: _____

Recirculated: FEB 28 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1077

HAROL WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL., PETITIONERS *v.* GERALD ALBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March —, 1986]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

I share the majority's concern that prison officials be permitted to respond reasonably to inmate disturbances without unwarranted fear of liability. I agree that the threshold for establishing a constitutional violation under these circumstances is high. I do not agree, however, that the contested existence of a "riot" in the prison lessens the constraints imposed on prison authorities by the Eighth Amendment.

The majority has erred, I believe, both in developing its legal analysis and in employing it. First, the especially onerous standard the Court has devised for determining whether a prisoner injured during a prison disturbance has been subjected to cruel and unusual punishment is incorrect and not justified by precedent. That standard is particularly inappropriate because courts deciding whether to apply it must resolve a preliminary issue of fact that will often be disputed and properly left to the jury. Finally, the Court has applied its test improperly to the facts of this case. For these reasons, I must respectfully dissent.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 25, 1986

Re: No. 84-1077, Whitley v. Albers

Dear Thurgood:

Please join me in your dissenting opinion in this case.

Sincerely,



Justice Marshall

cc: The Conference

m

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 23, 1986

84-1077 Whitley v. Albers

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 10, 1986

Re: No. 84-1077 Whitley v. Albers

Dear Sandra,

Please join me.

Sincerely,
WHR

Justice O'Connor

cc: The Conference

82 JAN 10 63:15

RECEIVED
JAN 10 1986
U.S. SUPREME COURT

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1986

Re: 84-1077 - Whitley v. Albers

Dear Sandra:

As you may recall, I voted to remand in this case because I believed that CA9's standard was unclear and that CA9, rather than this Court, should decide the directed verdict question. Thurgood's dissent convinces me that CA9 applied the correct standard and appropriately determined that the case should go to the jury. Accordingly, I now plan to join his dissent.

Respectfully,



Justice O'Connor

Copies to the Conference

JR FEB 21 1986

205
205

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1986

Re: 84-1077 - Whitley v. Albers

Dear Thurgood:

You have written a persuasive dissent. I believe I agree with everything you say except for the footnote on the last page. Would it be acceptable to show me as joining you, but then add a sentence to that footnote stating that I do not join it?

Respectfully,

Jh

Justice Marshall

Check with HAB

OR MAR 31 1986

20543

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: Justice O'Connor

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1077

HAROL WHITLEY, INDIVIDUALLY AND AS ASSISTANT
 SUPERINTENDENT, OREGON STATE PENITEN-
 TIARY, ET AL., PETITIONERS v. GERALD ALBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT

[January —, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide what standard governs a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot.

I

At the time he was injured, respondent Gerald Albers was confined in cellblock "A" of the Oregon State Penitentiary. Cellblock "A" consists of two tiers of barred cells housing some 200 inmates. The two tiers are connected by a stairway that offers the only practical way to move from one tier to another.

At about 8:30 on the evening of June 27, 1980, several inmates were found intoxicated at the prison annex. Prison guards attempted to move the intoxicated prisoners, some of whom resisted, to the penitentiary's isolation and segregation facility. This incident could be seen from the cell windows in cellblock "A", and some of the onlookers became agitated because they thought that the guards were using unnecessary force. Acting on instructions from their superiors, Officers Kemper and Fitts, who were on duty in cellblock "A", ordered the prisoners to return to their cells. The order was not obeyed. Several inmates confronted the two

1/4
John
Walt

pp. 3, 7, 10-13

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: **Justice O'Connor**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1077

HAROL WHITLEY, INDIVIDUALLY AND AS ASSISTANT
 SUPERINTENDENT, OREGON STATE PENITEN-
 TIARY, ET AL., PETITIONERS *v.* GERALD ALBERS

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