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The Failure of the Deliberate Indifference Standard: How Marbury v. Warden Gives Prison Officials More Justification to Devalue Life

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THE FAILURE OF THE DELIBERATE INDIFFERENCE STANDARD: HOW *MARBURY V. WARDEN* GIVES PRISON OFFICIALS MORE JUSTIFICATION TO DEVALUE LIFE

BY bex kolins*

INTRODUCTION

"We do not sentence people to be stabbed and beaten. But we might as well, if the Majority Opinion is correct."[396] The quotation that opens this note is part of Justice Robin Stacie Rosenbaum's dissent in *Marbury v. Warden* that indicates the deadly consequences of the court's Majority Opinion. The Majority Opinion reinforces the power dynamics that exist between people in prison and prison officials, which exacerbate the second-class status of those incarcerated. Even though protection from cruel and unusual punishment under the Eighth Amendment is afforded to prisoners[397] in the United States, officials fail to adequately ensure that safety. Within the United States, Alabama's prisons—where *Marbury v. Warden* was decided—are notorious for being overcrowded, under resourced, and understaffed.[398] The result is a significantly higher rate of prisoner-on-prisoner violence, violence from prison officials, incidents of sexual assaults, and overall poorer and less adequate prison conditions for those incarcerated.[399]

Several months before the opinion in *Marbury,* the United States Department of Justice (DOJ) issued an extensive report describing the extent to which Alabama prisons were inadequate and violated prisoners' Eighth Amendment rights.[400] In the court's decision in *Marbury*, the court found that the plaintiff failed to present sufficient evidence of the defendants' deliberate indifference to a substantial risk of serious harm.[401] Despite

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396. Marbury v. Warden, 936 F.3d 1227, 1238 (11th Cir. 2019) (Rosenbaum, R., dissenting).

397. This note will use the term "prisoner" to refer to people incarcerated in prison, because it aligns with the history of the Prisoner Rights Movement, of which the author of this paper aligns themselves. When Prisoner Rights organization Black and Pink conducted a survey asking people in prison what term they would prefer to be used to identify themselves, "most respondents wrote in their name or simply, 'my name.' Given that there was no general agreement on terminology from respondents, [Black and Pink] use the word "prisoner" as an identifying term for all incarcerated individuals." *See* Coming out of Concrete Closets: A Report on Black and Pink's National LGBTQ Survey, *Black and Pink*, 13 (Oct. 21, 2015).

398. *See* Katie Benner & Shaila Dewan, *Alabama's Gruesome Prisons: Report Finds Rape and Murder at All Hours*, NEW YORK TIMES, (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/us/alabama-prisons-doj-investigation.html; Andrew J. Yawn, *350 Weapons Were Seized in an Alabama Prison. A Week Later Stabbings Continued*, USA TODAY, (Apr. 30, 2019), https://www.usatoday.com/story/news/nation/2019/04/30/week-after-weapons-seized-holman-3-inmates-stabbed/3627973002/.

399. *Id.*

400. *See* U.S. Dep't of Justice, *Investigation of Alabama's State Prisons for Men*, 1-2 (Apr. 2, 2019), https://www.justice.gov/crt/case-document/file/1149971/download.

401. Marbury, 936 F.3d at 1238.

Mitchell Marbury's many attempts to report the threat he faced, the prison officials failed to act, and he was ultimately stabbed repeatedly.[402] This note will explore how the deliberate indifference elements were satisfied sufficiently to survive a motion for summary judgment both from the record Marbury provided and from the independent DOJ report issued months prior. Additionally, this note will discuss the possible long-reaching ramifications this case may have on other prison condition cases, both in Alabama and beyond.

THE CASE

On April 23, 2016, Mitchell Marbury was stabbed and hit multiple times in the face while incarcerated at Alabama's St. Clair Correctional Facility (St. Clair).[403] This incident occurred after Marbury made numerous requests to be transferred to a different dormitory or to protective custody.[404] Marbury's repeated requests were made between February and April of 2016.[405] On February 12, 2016, Marbury sent a written request to Warden Dewayne Estes noting that he had witnessed more than fifteen stabbings, and he requested to be assigned to a more "sociable" living area for his safety.[406] Warden Estes ignored the written request sent on February 12th and two others sent on April 5th and April 19th.[407]

Marbury also made in-person requests to Officer Beverly Warren.[408] Marbury later asserted in a signed affidavit that Officer Warren taunted him and expressed that she would ensure his requests were denied.[409] In Marbury's last request to Estes and Warren asking to be placed in isolation, Marbury specifically noted that a friend told him to watch his back because someone planned to harm him.[410] Prison staff noted that they were unable to identify the person who attacked Marbury on April 23, 2016—a factor important in the Majority's Opinion.[411]

Marbury filed a pro se § 1983 complaint alleging that Warden Estes and Officer Warren failed to protect him from unsafe conditions, were deliberately indifferent to those conditions, and retaliated against him for exercising his constitutionally protected rights.[412] The magistrate judge granted the defendants' motion for summary judgment.[413] Marbury objected

402. *Id.* at 1232.
403. *Id.*
404. *Id.* at 1231.
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.* at 1232.
411. *Id.*
412. *Id.*
413. *Id.*

only on the deliberate indifference issue, which was overruled by the district court that adopted the report and recommendation from the magistrate.[414]

The issue before the Eleventh Circuit was whether a jury could find that Marbury's reported claim that an unnamed prisoner intended to harm him was sufficient to make the defendants aware of a substantial risk of serious harm, as required by the Eighth Amendment deliberate indifference standard.[415] Ultimately, the court affirmed the lower court's decision to grant summary judgment, emphasizing that the record presented by Marbury failed to rise to the necessary level to show deliberate indifference to a substantial risk of serious harm.[416] The court further provided that while Officer Warren may have been put on notice of some risk that Marbury faced, she was not aware of the type of substantial risk of serious harm necessary to establish a deliberate indifference case.[417] The court's determination that there was a lack of a substantial risk or threat was compounded by Marbury's failure to provide the identity of the person threatening him; while the court emphasized that a general threat of violence is typically insufficient to satisfy the deliberate indifference qualifiers, the prisoner is required to provide sufficient facts to "bolster an otherwise insufficient unspecific threat of harm."[418] The court found that because Marbury failed to show that "serious [prisoner-on-prisoner] violence was the norm or something close to it,"[419] he failed to show more than a generalized awareness of risk.

Justice Robin Stacie Rosenbaum's dissent lists three errors the Majority Opinion makes in reaching its decision.[420] The three reasons she provides are that the Majority Opinion: (1) fails to view the facts in light most favorable to the non-moving party, Marbury; (2) does not account for important facts in its analysis; and (3) evaluates the evidentiary components of Marbury's claim separately rather than holistically.[421] She concludes that while Marbury's allegations may not convince a jury that the facts are what he claims, they are to be taken in the light most favorable to him, and therefore the court erred in granting summary judgment.[422]

BACKGROUND

Prisoners are protected against cruel and unusual punishment under the Eighth Amendment. In order for a prisoner to successfully argue that a prison official violated the Eighth Amendment, the prisoner must show that the

414. *Id.*
415. *Id.* at 1236.
416. *Id.* at 1238.
417. *Id.*
418. *Id.* at 1237.
419. *Id.* at 1234 (quoting Purcell ex rel. Estate of Morgan v. Toombs Cty., 400 F.3d 1313, 1322 (11th Cir. 2005)).
420. *Id.* at 1239.
421. *Id.*
422. *Id.* at 1241.

official was deliberately indifferent to a substantial risk of serious harm.[423] As indicated through case law, deliberate indifference is a state of mind that is more blameworthy than negligence, but less than acts of omissions or acts with the intent to cause harm.[424] The deliberate indifference standard used for prison condition cases differs from the standard required for claims of excessive force by prison officials. In instances of excessive force, the prisoner must establish that the official applied force maliciously or for the purpose of causing harm.[425] In instances of prisoner-on-prisoner violence, officials are not constitutionally liable for every injury a prisoner suffers at the hands of another prisoner.[426] Rather, in order for a prisoner to establish a § 1983 claim for deliberate indifference, the prisoner must show "(1) a substantial risk of serious harm; (2) the defendant's deliberate indifference to that risk; and (3) causation."[427]

The first element—whether there was a substantial risk of harm—requires the plaintiff to show "conditions that were extreme and posed an unreasonable risk of serious injury to [their] future health or safety."[428] The second element—whether the defendant was deliberately indifferent to that risk—requires both subjectivity and objectivity. The official must subjectively be aware of facts from which an inference could be drawn that a substantial risk of serious harm exists.[429] Additionally, the official must have objectively responded to that known risk in an unreasonable manner.[430] An unreasonable manner requires the official to knowingly or recklessly decline to act, despite knowing of ways to reduce the harm.[431] The last element—causation—requires the failure of the official to have been responsible for the harm or injury suffered by the prisoner.[432]

The DOJ released a memorandum regarding an investigation of Alabama prisons and the Alabama Department of Corrections (ADOC) on April 2, 2019, months before the opinion at hand.[433] The investigation concluded that there was reasonable cause to find that Alabama's prison conditions violated prisoners' Eighth Amendment rights.[434] The investigation specifically yielded that Alabama routinely violates the constitutional rights of prisoners housed in Alabama's prisons "by failing to

423. Farmer v. Brennan, 511 U.S. 825, 828 (1994); *See* Lane v. Philbin, 835 F.3d 1302, 1307 (11th Cir. 2016).

424. Farmer, at 835.

425. *Id.* at 835-36; *See* Hudson v. McMillian, 503 U.S. 1, 7 (1992); *See also* Whitley v. Albers, 475 U.S. 312, 320 (1986).

426. Carter v. Galloway, 352 F.3d 1346, 1349 (11th Cir. 2003) (per curiam) (quoting Farmer, 511 U.S. at 834).

427. Marbury, 936 F.3d at 1233 (quoting Lane, 835 F.3d at 1307 (quoting Hale v. Tallapoosa Cty., 50 F.3d 1579, 1582 (11th Cir. 1995))).

428. *Id.*

429. *Id.*; *See* Rodriguez v. Sec'y for the Dep't of Corr., 508 F.3d 611, 617 (11th Cir. 2007).

430. *Id.*; *See* Rodriguez, 508 F.3d. at 620.

431. *Id.*; *See* Rodriguez, 508 F.3d. at 620.

432. *Id.*

433. U.S. Dep't of Justice, *supra* note 5, at 1-2.

434. *Id.*

protect them from [prisoner-on-prisoner] violence ... and by failing to provide safe conditions."[435]

The report further provided that ADOC officials were aware of the conditions within its prisons, and specifically that these conditions presented an objectively substantial risk to those incarcerated.[436] According to the report, this knowledge dates back to 1975,[437] when a federal court enjoined ADOC from accepting new prisoners until the prison population was reduced to the capacity of the corresponding prison.[438] Then, again in 2011, the same court found that ADOC facilities were still understaffed, overcrowded, and therefore posed a threat to prisoners.[439] The DOJ's inquiry into ADOC facilities demonstrates that ADOC was aware of the issues that existed at the time of the DOJ's report.[440] As it relates to the case at hand "several years before [the DOJ] initiated [their] investigation, ADOC was ... aware of extensive problems at St. Clair. In 2014 alone, there were at least three publicly reported prisoner on prisoner homicides."[441] Prison officials at St. Clair had access to this report, which explicitly provided them with knowledge of the substantial risk of harm.

Additionally, with the assistance of the Equal Justice Initiative,[442] a group of prisoners filed a class action lawsuit against St. Clair alleging a high rate of violence, including six homicides in 2014 alone. [443] In November 2017, the plaintiffs of the class action reached a settlement; yet, many of the reforms ADOC committed to were not satisfied by 2018 when the parties went back into mediation.[444] The report emphatically notes that "ADOC management is acutely aware of the substantial risk of harm caused by its critically dangerous understaffing."[445] The prison officials had copious evidence, both from the DOJ report and the class action suit brought two years prior, of the substantial risk of generalized harm that every prisoner at St. Clair faced from understaffing and overcrowding..

ANALYSIS

The deliberate indifference standard to Eighth Amendment violations theoretically provides an avenue to ensure the rights of prisoners. As previously mentioned, this standard, while higher than negligence, does not

435. *Id.*

436. *Id.* at 47-48.

437. Though arguably even earlier because of the use of convict-leasing and other methods of incarceration where staff and officials were deliberately indifferent to the substantial risk of harm. *See* Jennifer Roback, Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?, 51 U. CHI. L. REV. 1161, 1163-64 (1984).

438. U.S. Dep't of Justice, *supra* note 5, at 48.

439. *Id.* at 47-48.

440. *See Id.* at 48.

441. *Id.* at 47.

442. The Equal Justice Initiative (EJI) is a law firm based out of Montgomery, Alabama. *See* EQUAL JUSTICE INITIATIVE, https://eji.org.

443. U.S. Dep't of Justice, *supra* note 5, at 49.

444. *Id.*

445. *Id.*

require the highest standard of establishing intent. The deliberate indifference standard allows an opening for generalized risk of prisoner-on-prisoner violence and requires more specific threats to safety. This generalized risk is often created by substandard prison conditions and the normalcy of violence. In *Marbury*, the court highlighted that the record failed to provide sufficient evidence to establish a general risk of prisoner-on-prisoner violence that rose to the necessary deliberate indifference standard required by law.[446] Additionally, the court noted that despite Marbury's many pleas to Warden Estes and Officer Warren, they objectively and subjectively lacked knowledge of a substantial risk of harm to Marbury because Marbury failed to provide the attacker's identity.[447]

Justice Rosenbaum's dissent thoroughly discusses why the motion for summary judgment should have been denied. She provides sufficient evidence to establish that Warden Estes and Officer Warren violated Marbury's Eighth Amendment right to be free from cruel and unusual punishment.[448] If the Majority Opinion in *Marbury* is now the precedent to establish a deliberate indifference claim, what is required of prisoners to establish a violation of their Eighth Amendment right to protection against cruel and unusual punishment? According to Justice Rosenbaum, if the circumstances surrounding this case do not rise to the level of deliberate indifference, "it is difficult to imagine what would."[449] As a result of the court's holding on the defendants' deliberate indifference to both Marbury's generalized violence and specific threat claim, prison officials may continue to refuse to protect prisoners in the face of known threats and in violation of their Eighth Amendment rights.

I. DELIBERATE INDIFFERENCE AS IT RELATES TO A GENERAL LACK OF SAFETY.

The potential ramifications of this decision, some of which Justice Rosenbaum's dissent discussed, are quite chilling. Throughout the Majority Opinion, the court emphasized the problems with Marbury's claims of generality.[450] Even if Marbury provided sufficient evidence of a risk, the court argued, he did not make sufficient allegations regarding the specific features of St. Clair that made it particularly violent.[451] Marbury asserted in his claim, which was in the record before the court, that because of the lack of security staff, St. Clair was open to lawlessness, and prisoners frequently assaulted each other with knives.[452] These instances of lawlessness and a normalcy of violence corroborates Marbury's assertion of the known danger he and the rest of the prisoners at St. Clair faced. Yet, despite access to the

446. Marbury, 936 F.3d at 1234-35.
447. *Id.* at 1237-38.
448. *Id.* at 1240.
449. *Id.* at 1244.
450. *Id.* at 1234.
451. *Id.* at 1235.
452. *Id.* at 1241.

DOJ Report, which Justice Rosenbaum mentioned in a note during her dissent,[453] the court was still unmoved. If a report released by a government-agency that explicitly notes the rampant violence and violations of prisoners' Eighth Amendment rights is insufficient evidence of the violence at St. Clair, then what is sufficient to ensure protection of other prisoners?

The Majority Opinion also chose to interpret Marbury's allegation of witnessing over fifteen prisoner-on-prisoner stabbings as having transpired over six years, as opposed to the six and a half months that he likely intended.[454] Justice Rosenbaum's dissent more thoroughly discussed the court not following the summary judgment standard in making all reasonable inferences in Marbury's favor. Again, the question arises, what would be a more shocking number to the court? How many stabbings would Marbury need to have witnessed in order to satisfy this suddenly high summary judgment standard? Additionally, the Majority failed to give a sufficient justification for its assumption that Marbury intended his statement that he was at St. Clair for a "short time" to correlate with the time he was previously housed at St. Clair, from 2002-2007, instead of the most recent six and a half months before he filed the complaint. The evidence seems clear that Marbury intended his statement to suggest the past six and a half months, an exceedingly short time to have witnessed fifteen stabbings.

In looking at both Marbury's allegations and the DOJ Report, it is clear that there was generalized violence commonplace at St. Clair. Marbury's requests for protection certainly provided both defendants with knowledge of a substantial risk of harm. Yet, the Eleventh Circuit's ruling evidences that despite the DOJ naming constitutional violations rampant at St. Clair, and fifteen stabbings having occurred in the past six and a half months, there was still not enough of a substantial risk present to protect Marbury.

II. DELIBERATE INDIFFERENCE AS IT RELATES TO A SPECIFIC THREAT OF DANGER.

The Majority Opinion also failed to find that the defendants were deliberately indifferent to the specific threat Marbury warned them about in April 2016.[455] While noting the difficulty in deciding the question of a deliberate indifference to a specific threat, the Majority found that because threats between prisoners are common, they could not therefore impute actual knowledge of a substantial risk of harm onto the defendants.[456] Yet, its precedent in *Farmer* makes clear that prison officials may not escape liability for deliberate indifference by showing that the official did not know the specific prisoner who was going to commit the act of violence.[457]

453. *Id.* at 1241 n. 2.
454. *See* Marbury, 936 F.3d at 1241 (Rosenbaum, R., dissenting).
455. Marbury, 936 F.3d at 1235.
456. *Id.* at 1236.
457. *Farmer*, 511 U.S. at 842.

Although the Majority does recognize that the plaintiff need not have provided the name or identifying criteria of the specific prisoner who attacked him, the brief analysis seems to suggest that the court did not give it the significance it deserved. Marbury made multiple complaints over a period of months, all of which were ignored.[458] After he made his last complaint, where he heard from a friend that he would be attacked, Officer Warren laughed in his face.[459] Perhaps Marbury did not know the identity of the person who threatened him. Alternatively, the danger of providing the identity to the prison official may have been too high.

Marbury provided sufficient evidence to establish a substantial risk. He, instead, failed to provide the name of the specific person putting him at risk. What this decision suggests, then, is that in order to satisfy the deliberate indifference standard for a specific threat, it is not enough that there was sufficient evidence of a substantial risk of serious harm. Instead, this decision suggests a new trend in requiring prisoners to specifically identify the person who threatens them, regardless of the new danger that could create.

CONCLUSION

The decision in *Marbury* has devastating consequences for prisoners across the state of Alabama and jurisdictions that look to Alabama. Marbury provided sufficient evidence to support, at least beyond the summary judgment standard, that he was in a substantial risk of serious harm, and that both defendants were deliberately indifferent to that harm. As a result of their deliberate indifference, Marbury was stabbed, in clear violation of his Eighth Amendment right to be free from cruel and unusual punishment. With this decision, we are left wondering what is required to satisfy the deliberate indifference standard when a report by the DOJ and numerous reprimands from the government for Eighth Amendment violations fail to rise to that level. Ultimately, this case tells prisoners that despite what the Constitution says, they will continue to remain second-class citizens whose lives are not worth the time to ensure safety.

458. Marbury, 936 F.3d at 1231.

459. The dissent importantly notes that this may not be true, but for the purposes of summary judgment, the court is required to take the facts in the light most favorable to the non-moving party *Id.* at 1245.