

# The Burger Court Opinion Writing Database

## *Hicks v. Miranda*

422 U.S. 332 (1975)

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



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

CHAMBERS OF  
THE CHIEF JUSTICE

May 21, 1975

Re: 74-156 - Hicks v. Miranda

MEMORANDUM FOR: Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

I agree with much of what you say in your memo, but I wonder whether we should try to resolve this case by squarely holding dismissals for want of a substantial federal question are binding decisions on the merits. As you note in the opinion, and in the memo, this is a Younger case and can be decided on that ground without dealing with the DFWSFQ matter. Moreover, your memo shows the difficulty we thrust on other federal courts in trying to decide what our summary dismissals mean. Litigants who are not favored with careful state court opinions will be left to poring over jurisdictional statements and responses if they can get them to discern what we meant by the dismissal -- an unprofitable and time-consuming enterprise!

The District Court committed plainly reversible error when it failed to dismiss on Younger grounds. That error long preceded any further error over the meaning of Miller II, and I wonder if the way to resolve this case is not simply to reverse on Younger grounds and save the DF<sup>SW</sup>FQ issue for another day. See slip Op. at 16 n. 22. I will await other news.

Regards,

*WRB*

✓

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

✓

CHAMBERS OF  
THE CHIEF JUSTICE

June 9, 1975

Re: 74-156 - Hicks v. Miranda

Dear Byron:

I join you but will be adding a small "snapper"  
on the three-judge court and the word "shall."

Regards,

WSB

Mr. Justice White

Copies to the Conference

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U.S. SUPREME COURT RECORDS

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

CHAMBERS OF  
THE CHIEF JUSTICE

151-8  
June 16, 1975

Re: No. 74-156 - Hicks v. Miranda

Dear Byron:

I join your opinion but add a brief concurrence about as follows:

"I join the opinion of the Court but I add a word about the composition of the three-judge district court and the circumstances under which it was convened. Under 28 USC § 2284(1) the district judge to whom the application for relief is presented, and who notifies the Chief Judge of the need to convene the three-judge court, 'shall constitute one member of such court.' It is well settled that 'shall' means 'must,' cf. Merced Rosa v. Herrero, 423 F.2d 591, 593 n.2 (CA 1, 1970), yet the judge who called for the three-judge court here was not named to the panel. However, appellants made no timely objection to the composition of the court. Obviously occasions can arise rendering it impossible for the district judge who initiates the convening of such a court under § 2284(1) to serve on the court, but, in light of the unqualified mandatory language of the statute, when that occurs the court has an obligation to see to it that the record reveals, at the very least, a statement of the circumstances accounting for the substitution."

Regards,  
LJB

Mr. Justice White

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OFFICE OF THE CLERK OF THE SUPREME COURT

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 20, 1975

Re: 74-156 - Hicks v. Miranda

Dear Potter:

Please join me in your dissenting opinion.

Sincerely,

William O. Douglas

Mr. Justice Stewart

cc: The Conference

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THE MANUSCRIPT DIVISION

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

✓

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 27, 1975

RE: No. 74-156 Hicks v. Miranda

Dear Potter:

Please join me in your dissent in the above.

Sincerely,

*Bill*

Mr. Justice Stewart

cc: The Conference

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OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT

✓

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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 22, 1975

No. 74-156 - Hicks v. Miranda

Dear Byron,

I shall shortly circulate a dissenting opinion in this case.

Sincerely yours,

P.S.  
/

Mr. Justice White

Copies to the Conference

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THE MANUSCRIPT DIVISION

U.S. SUPREME COURT LIBRARY

✓

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: MAY 22 1975

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-156

Cecil Hicks, District Attorney  
of the County of Orange,  
State of California,  
et al., Appellants,  
v.

Vincent Miranda, dba Wal-  
nut Properties, et al.

On Appeal from the United  
States District Court for  
the Central District of  
California.

[May —, 1975]

MR. JUSTICE STEWART, dissenting.

There are many aspects of the Court's opinion that seem to me open to serious challenge. This dissent, however, is directed only to Part III of the opinion, which holds that "[t]he District Court committed error in reaching the merits of this case despite the State's insistence that it be dismissed under *Younger v. Harris* and *Samuels v. Mackell*."

In *Steffel v. Thompson*, 415 U. S. 452, the Court unanimously held that the principles of equity, comity, and federalism embodied in *Younger v. Harris*, 401 U. S. 37, and *Samuels v. Mackell*, 401 U. S. 66, do not preclude a federal district court from entertaining an action to declare unconstitutional a state criminal statute when a state criminal prosecution is threatened but not pending at the time the federal complaint is filed. Today the Court holds that the *Steffel* decision is inoperative if a state criminal charge is filed at any point after the commencement of the federal action "before any proceedings of substance on the merits have taken place in the federal court." *Ante*, at —. Any other rule, says the Court, would "trivialize" the principles of *Younger v.*



To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: White, J.

Circulated: 5-7-75

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

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-156

Cecil Hicks, District Attorney  
of the County of Orange,  
State of California,  
et al., Appellants,

v.

Vincent Miranda, dba Wal-  
nut Properties, et al.

On Appeal from the United  
States District Court for  
the Central District of  
California.

[May —, 1975]

MR. JUSTICE WHITE delivered the opinion of the  
Court.

This case poses issues under *Younger v. Harris*, 401 U. S. 37 (1971), *Samuels v. Mackell*, 401 U. S. 66 (1971), and related cases, as well as the question whether a three-judge District Court's decision on the merits of an issue before it is controlled by this Court's prior dismissal "for want of a substantial federal question" of an appeal in another case raising the same issue.

### I

On November 23 and 24, 1973, pursuant to four separate warrants issued seriatim, the police seized four copies of the film "Deep Throat," each of which had been shown at the Pussycat Theatre in Buena Park, Orange County, California.<sup>1</sup> On November 26 an eight-count

<sup>1</sup> The first warrant was issued following a viewing of the film by an Orange County Municipal Court judge. The same judge also issued the other three warrants, the third one after a viewing of the version of the film then showing. The other two warrants were issued on affidavits of police officers who had witnessed exhibition

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 6, 10, 11

Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
☒ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: White, J.

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

Recirculated: 5-9-75

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-156

Cecil Hicks, District Attorney  
of the County of Orange,  
State of California,  
et al., Appellants,  
v.

Vincent Miranda, dba Wal-  
nut Properties, et al.

On Appeal from the United  
States District Court for  
the Central District of  
California.

[May —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case poses issues under *Younger v. Harris*, 401 U. S. 37 (1971), *Samuels v. Mackell*, 401 U. S. 66 (1971), and related cases, as well as the question whether a three-judge District Court's decision on the merits of an issue before it is controlled by this Court's prior dismissal "for want of a substantial federal question" of an appeal in another case raising the same issue.

### I

On November 23 and 24, 1973, pursuant to four separate warrants issued seriatim, the police seized four copies of the film "Deep Throat," each of which had been shown at the Pussycat Theatre in Buena Park, Orange County, California.<sup>1</sup> On November 26 an eight-count

<sup>1</sup> The first warrant was issued following a viewing of the film by an Orange County Municipal Court judge. The same judge also issued the other three warrants, the third one after a viewing of the version of the film then showing. The other two warrants were issued on affidavits of police officers who had witnessed exhibition

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 20, 1975

MEMORANDUM FOR: The Chief Justice  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

Re: No. 74-156 - Hicks v. Miranda

It is possible that a jurisdictional issue in addition to anything raised by the parties, lurks in the Hicks case and will be surfaced. The argument might run like this: If the dismissal of Miller II for want of a substantial federal question was binding on the District Court, as I assert it was, no constitutional issue of substance remained to be decided; the three-judge court, although properly convened originally, should therefore have been dissolved, the case dismissed and any appeal taken to the Court of Appeals.

I propose to meet this issue as part of the jurisdictional discussion in Part II of the opinion. The premise for this particular jurisdictional argument, with which I agree, is that the summary dismissal of Miller II was binding on the District Court; thus, what is now Part IV of the opinion will be incorporated in Part II. The overall thrust of this addition to Part II will be (1) that although the District Court was bound by the dismissal of Miller II, there nevertheless remained a substantial question which the three-judge court had jurisdiction to decide and (2) that we therefore have jurisdiction here. The major purpose of this memorandum is to outline why I think this is so.

In the first place, the appellees here, who were plaintiffs in the District Court, not only challenged the enforcement of the obscenity statutes but also sought to

June 4, 1975

MEMORANDUM FOR THE CONFERENCE

Re: No. 74-156 - Hicks v. Miranda

You will see that this circulation drops Part IV of the previous draft but includes in Part II which deals with jurisdictional issues the question whether summary dismissals in general are binding on District Courts. Part II does not, however, as Part IV previously did, purport to say what the consequence of a summary dismissal is with respect to three-judge court jurisdiction, nor does it purport to say what it was that Miller II held.

I continue to think it is an important item of federal business to let the courts know that summary dismissals cannot be brushed aside. But if those on this side of the case prefer to await another day, the matter can be dropped entirely.

  
B.R.W.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: White, J.

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

Recirculated: 6-7-75

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 74-156

Cecil Hicks, District Attorney  
of the County of Orange,  
State of California,  
et al., Appellants,  
v.  
Vincent Miranda, dba Wal-  
nut Properties, et al.

On Appeal from the United  
States District Court for  
the Central District of  
California.

[May —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case poses issues under *Younger v. Harris*, 401 U. S. 37 (1971), *Samuels v. Mackell*, 401 U. S. 66 (1971), and related cases, as well as the question whether a three-judge District Court's decision on the merits of an issue before it is controlled by this Court's prior dismissal "for want of a substantial federal question" of an appeal in another case raising the same issue.

I

On November 23 and 24, 1973, pursuant to four separate warrants issued seriatim, the police seized four copies of the film "Deep Throat," each of which had been shown at the Pussycat Theatre in Buena Park, Orange County, California.<sup>1</sup> On November 26 an eight-count

<sup>1</sup> The first warrant was issued following a viewing of the film by an Orange County Municipal Court judge. The same judge also issued the other three warrants, the third one after a viewing of the version of the film then showing. The other two warrants were issued on affidavits of police officers who had witnessed exhibition

✓  
B'  
To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: White, J.

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Recirculated: 6/18/75

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-156

Cecil Hicks, District Attorney  
of the County of Orange,  
State of California,  
et al., Appellants,  
v.

Vincent Miranda, dba Wal-  
nut Properties, et al.

On Appeal from the United  
States District Court for  
the Central District of  
California.

[May —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case poses issues under *Younger v. Harris*, 401 U. S. 37 (1971), *Samuels v. Mackell*, 401 U. S. 66 (1971), and related cases, as well as the preliminary questions as to our jurisdiction of this direct appeal from a judgment of a three-judge District Court.

### I

On November 23 and 24, 1973, pursuant to four separate warrants issued seriatim, the police seized four copies of the film "Deep Throat," each of which had been shown at the Pussycat Theatre in Buena Park, Orange County, California.<sup>1</sup> On November 26 an eight-count

<sup>1</sup> The first warrant was issued following a viewing of the film by an Orange County Municipal Court judge. The same judge also issued the other three warrants, the third one after a viewing of the version of the film then showing. The other two warrants were issued on affidavits of police officers who had witnessed exhibition of the film. Each of the warrant affidavits other than the first one

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U. S. DEPARTMENT OF JUSTICE

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 18, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 74-572 - Antico v. California

This case was held for No. 74-156, Hicks v. Miranda, but I am not sure why. There is no challenge to the California obscenity statute, no federal court is involved, and nothing else in Hicks appears relevant. I would deny.

  
B.R.W.

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 4, 10, 11

To: The Chief Justice ✓  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: White, J.

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

Recirculated: 6-23-75

5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-156

Cecil Hicks, District Attorney  
of the County of Orange,  
State of California,  
et al., Appellants,

v.

Vincent Miranda, dba Wal-  
nut Properties, et al.

On Appeal from the United  
States District Court for  
the Central District of  
California.

[June 24, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case poses issues under *Younger v. Harris*, 401 U. S. 37 (1971), *Samuels v. Mackell*, 401 U. S. 66 (1971), and related cases, as well as the preliminary question as to our jurisdiction of this direct appeal from a judgment of a three-judge District Court.

### I

On November 23 and 24, 1973, pursuant to four separate warrants issued seriatim, the police seized four copies of the film "Deep Throat," each of which had been shown at the Pussycat Theatre in Buena Park, Orange County, California.<sup>1</sup> On November 26 an eight-count

<sup>1</sup> The first warrant was issued following a viewing of the film by an Orange County Municipal Court judge. The same judge also issued the other three warrants, the third one after a viewing of the version of the film then showing. The other two warrants were issued on affidavits of police officers who had witnessed exhibition of the film. Each of the warrant affidavits other than the first one



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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

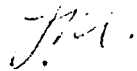
May 28, 1975

Re: No. 74-156 -- Cecil Hicks v. Vincent Miranda

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

cc: The Conference

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OF THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

✓

May 28, 1975

Re: No. 74-156 - Hicks v. Miranda

Dear Byron:

I suspect you will be recasting your opinion in the light of Potter's dissent circulated May 22 after your memorandum of May 20 to the four of us had gone out.

Generally, I am in accord with what you have said in your memorandum of May 20, but I probably shall go along with whatever is agreed upon by a majority of those who voted with you. My present "hunch" is that there may be some merit in not saying everything in this case that is covered by your memorandum. This, however, is only a general reaction.

Sincerely,

*Harry*

Mr. Justice White

cc: The Chief Justice  
Mr. Justice Powell  
Mr. Justice Rehnquist

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 5, 1975

Re: No. 74-156 - Hicks v. Miranda

Dear Byron:

I am with you on your circulation of June 4.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 16, 1975

No. 74-156 Hicks v. Miranda

Dear Byron:

Please join me.

Sincerely,

*Lewis*

Mr. Justice White

lfp/ss

cc: The Conference

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IN THE MANUSCRIPT DIVISION

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 27, 1975

Re: No. 74-156 - Hicks v. Miranda

Dear Byron:

This is a reply to your memorandum of May 20th.

I would not want to establish a precedent to the effect that in all of the appeals from three-judge District Courts which ultimately are determined here on the basis of Younger principles this Court must nonetheless satisfy itself that the federal question tendered in the complaint in the District Court was sufficiently substantial to withstand dismissal as frivolous under Bell v. Hood, 327 U.S. 678, or as warranting the convening of a three-judge court under Goosby v. Osser, 409 U.S. 512. I would want to see the way left open to us to treat only the Younger issue on such an appeal, and to that extent the Chief's suggestion in his memorandum of May 21st has much in it that commends itself to me.

I understand one of your reasons for wanting to discuss the "jurisdictional issue" is so that the three-judge District Court can be disabused of its notion that our dismissals for want of a substantial federal question are not "binding" upon it. I agree with you that they are binding, and would have no objection to saying so in the proper case.

The only thing that leads me to think that this may not be the proper case is the necessity of getting into a full

discussion of the significance of a dismissal such as that in Miller II in connection with an admonition that such dismissals are "binding". I agree with you that, in consideration of the search warrant issues and the state of the law as it existed before Miller II, when the determination was made in this case to convene a three-judge District Court, that determination was certainly proper. If Miller II had come down at the time that the appellees' complaint was originally filed in this case, I would have to study the complaint more thoroughly than I have to know whether I think it would have been proper to convene a three-judge District Court. I have no doubt whatever that if the complaint had tendered only those issues which were resolved in favor of the constitutionality of the California statute by the California court in Miller II, a three-judge court would not have been warranted. On the other hand, if the issues had been somewhat different, I would agree that such a court should have been convened. I am not presently willing to agree with the suggestion in your draft of May 20th that there is a "presumption" of some sort that a blind per curiam dismissing an appeal from a judgment contrary to that sought by the plaintiffs from the three-judge District Court is not controlling.

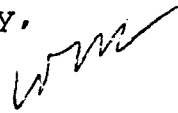
I would think that since Miller II did not come down until long after the three-judge District Court had been convened, this issue need not be faced in this case. In the chronology of this case, Miller II was of importance only in the determination of the three-judge court on the constitutional merits of the appellees' claim. Since we are saying that the three-judge court should not have reached the merits because of Younger, I agree with you that we should likewise not reach the merits.

Should a majority of those who voted with you at Conference opt for one of the other choices contained in

- 3 -

your memorandum of May 20th, I would in all probability go along with it.

Sincerely,

A handwritten signature in dark ink, appearing to be 'W. M. White', written in a cursive style.

Mr. Justice White

Copies to: The Chief Justice  
Mr. Justice Blackmun  
Mr. Justice Powell

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 6, 1975

Re: No. 74-156 - Hicks v. Miranda

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

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U.S. SUPREME COURT