

# The Burger Court Opinion Writing Database

## *Hooper v. Barnett*

439 U.S. 1041 (1978)

Paul J. Wahlbeck, George Washington University  
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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

October 30, 1978

Re: No. 77-477 - Hopper v. Barnett; and No. 77-6248 -  
Hunter v. Dean

Dear John:

I agree with the suggestion contained in your dissenting opinion in this case circulated October 30th that the state should at least be given an opportunity to address the mootness question in Hopper v. Barnett. For the present I do not join the entire dissenting opinion because of the feeling, flushed out by discussions after our Conference vote in Hunter, that whether the "federal question" is "properly presented" depends largely on what one's view of the "federal question" is. And this view, in turn, will affect one's judgment as to whether, as you say, the "Court's action in Hunter [to dismiss the writ as improvidently granted] is arguably supported by the fact that the record is somewhat unclear". Ante, page 2.

I am presently satisfied that neither the facts presented to us in Hunter, nor any reasonably close variation of them, represent a denial of any right secured to Hunter by the United States Constitution. If this were simply a "sport", I would not be unhappy with the disposition to dismiss as improvidently granted. But in view of the conflict between the Supreme Court of Georgia's decision in Hunter, and the decision of the Court of Appeals for the Fifth Circuit in Hopper, we are guaranteed not only that these cases will recur but that there will be

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constant conflicts. Hunter in her brief, page 4, at the same time as she filed a notice of appeal in the state courts from the denial of state habeas filed for federal habeas. The United States District Court ordered her released pendente lite on her personal reconnaissance so that she could exhaust her state appellate remedy without fear of mootness.

I now change my vote from "dismiss as improvidently granted" to "affirm".

Sincerely,

A handwritten signature in dark ink, appearing to be 'Wm' or similar, written in a cursive style.

Mr. Justice Stevens

Copies to the Conference

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

77-477 - Hopper v. Barnett

77-6248 - Hunter v. Dean

From: Mr. Justice Stevens  
OCT 30 1978

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MR. JUSTICE STEVENS, dissenting.

In each of these cases a convicted person was placed on probation conditioned upon the payment of a fine. In each, the defendant was unable to pay the fine and a prison sentence was therefore imposed. In each, the defendant challenges the constitutionality of incarceration based solely on the inability to pay a fine.

In Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977), the Georgia Supreme Court rejected the petitioner's constitutional challenge. In Barnett v. Hopper, 548 F.2d 550 (1970), the United States Court of Appeals for the Fifth Circuit held the Georgia practice unconstitutional. We granted certiorari in Hunter to resolve this conflict, and we held the certiorari petition in Barnett pending decision in Hunter. The Hunter case has been fully briefed and argued orally.

Today the Court dismisses the writ in Hunter as improvidently granted and remands the petition in Barnett to the Fifth Circuit to consider whether the case is moot.