

# The Burger Court Opinion Writing Database

## *Brown v. Texas*

443 U.S. 47 (1979)

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



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

From: The Chief Justice

Circulated: MAY 29 1979

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

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-6673

Zackary C. Brown, Appellant, On Appeal from the County  
v. Court at Law Number Two,  
State of Texas. El Paso County, Texas.

[June —, 1979]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal presents the question whether appellant was validly convicted for refusing to comply with a policeman's demand that he identify himself pursuant to a provision of the Texas Penal Code which makes it a crime to refuse such identification on request.

### I

At 12:45 on the afternoon of December 9, 1977, officers Venegas and Sotelo of the El Paso Police Department were cruising in a patrol car. They observed appellant and another man walking in opposite directions away from one another in an alley. Although the two men were a few feet apart when they first were seen, officer Venegas later testified that both officers believed the two had been together or were about to meet until the patrol car appeared.

The car entered the alley, and officer Venegas got out and asked appellant to identify himself and explain what he was doing there. The other man was not questioned or detained. The officer testified that he stopped appellant because the situation "looked suspicious and we had never seen that subject in that area before." The area of El Paso where appellant was stopped has a high incidence of drug traffic. However, the officers did not claim to suspect appellant of any

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 13, 1979

Re: 77-6673 - Brown v. Texas

MEMORANDUM TO THE CONFERENCE:

Herewith are xerox copies of three pages on which I  
propose changes -- none substantive as I see them.

Regards,

A handwritten signature in dark ink, appearing to be 'W H B' with a stylized flourish at the end.

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

CHAMBERS OF  
THE CHIEF JUSTICE

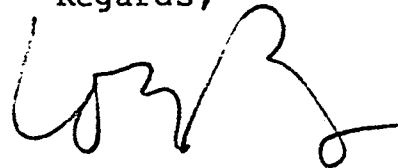
June 13, 1979

Re: 77-6673 - Brown v. Texas

Dear Potter:

Re your memo of today, I have no problem in complying with your request.

Regards,

A handwritten signature in dark ink, appearing to be "WR", written in a cursive, stylized manner.

Mr. Justice Stewart

Copies to the Conference

HAB

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 19, 1979

ONE CASE HELD FOR NO. ~~78~~<sup>77</sup>-6673 - Brown v. Texas

MEMORANDUM TO THE CONFERENCE:

One case has been held for this case:

No. 78-5373 - Washington v. Texas. My recommendation is at the end of this memo. This is an appeal from a conviction for refusal, after a clearly lawful stop, to identify oneself pursuant to Texas Penal Code § 38.02. At about 10:00 p.m. in early summer, two police officers on motor patrol in a high crime area known to be frequented by prostitutes observed appellant at a street corner in front of a hardware store. She was dressed "revealingly" in a manner which the officers associated with prostitutes, seemed nervous, walked back and forth along the sidewalk near the curb, and appeared to observe passing cars. When the officers stopped the patrol car to watch her, she quickly turned and began to walk away around the corner.

Suspecting that appellant was either a prostitute seeking customers or possibly a lookout for a burglary in the hardware store, the officers drove up alongside her and called from the moving car for her to stop and identify herself. She refused and continued walking. The officers then approached her and asked her name three times. She continued to refuse to answer, and was arrested pursuant to § 38.02.

Appellant makes two contentions: (1) her silence in response to the officers' demand that she identify herself constituted "speech" protected by the First Amendment; (2) compelling her to identify herself violates her Fifth Amendment privilege from self-incrimination.

This case is not controlled by Brown v. Texas. There, we are reversing a conviction under § 38.02 because the stop was not a lawful stop based on "reasonable suspicion." Terry v. Ohio. Appellant does not rely on

STYLISTIC CHANGES AS MARKED:

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

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Revised: \_\_\_\_\_  
Recirculated: JUN 20 1977

No. 77-6673

Zackary C. Brown, Appellant, } On Appeal from the County  
v. } Court at Law Number Two,  
State of Texas. } El Paso County, Texas.

[June —, 1979]

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The car entered the alley, and officer Venegas got out and asked appellant to identify himself and explain what he was doing there. The other man was not questioned or detained. The officer testified that he stopped appellant because the situation "looked suspicious and we had never seen that subject in that area before." The area of El Paso where appellant was stopped has a high incidence of drug traffic. However, the officers did not claim to suspect appellant of any

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

September 29, 1978

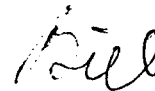


RE: No. 77-6673 Brown v. Texas

Dear Thurgood:

Please join me in the dissenting opinion you have  
prepared in the above.

Sincerely,



Mr. Justice Marshall

cc: The Conference

A

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 11, 1979

RE: No. 77-6673 Brown v. Texas

Dear Chief:

I would like to suggest some changes which I think might be necessary to avoid any inconsistency with Dunaway v. New York which we handed down last week. The suggested changes are noted on the attached copy of your opinion. Could you see your way to adopt them? If you could it would make it easier for me to join.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

The Chief Justice



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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 13, 1979

RE: No. 77-6673 Brown v. Texas

Dear Chief:

Please join me in the above as revised in your  
Memorandum of June 13.

Sincerely, .

The Chief Justice  
cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 13, 1979

Re: No. 77-6673, Brown v. Texas

Dear Chief:

I agree with the result you reach in this case and basically your opinion. My only problem concerns the language in the last part of the penultimate sentence on page 5. If you would be willing to change that wording so as to read "to believe appellant had engaged or was engaging in criminal conduct," I would have no difficulty in joining the opinion.

Sincerely yours,

The Chief Justice

Copies to the Conference

P.S.  
/

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 20, 1979

Re: 77-6673 - Brown v. Texas

Dear Chief:

I am glad to join your opinion for  
the Court.

Sincerely yours,

PS.  
/

The Chief Justice

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 30, 1979

Re: No. 77-6673 - Brown v. State of Texas

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Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

cmc

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

September 29, 1978

Re: No. 77-6673 - Zackary C. Brown v. Texas

Dear Chief:

Would you please relist this case  
for me.

Sincerely,

*T.M.*  
T.M.

The Chief Justice

cc: The Conference

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

From: Mr. Justice Marshall

Circulated: 29 SEP 1978

1st DRAFT

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

**SUPREME COURT OF THE UNITED STATES**

**ZACKARY C. BROWN v. STATE OF TEXAS**

ON APPEAL FROM THE COUNTY COURT AT LAW NUMBER TWO,  
EL PASO COUNTY

No. 77-6673. Decided October —, 1978

MR. JUSTICE MARSHALL, dissenting.

Appellant was convicted by the County Court of El Paso, Tex., of violating § 38.02 of the Texas Penal Code, which prohibits an individual from "intentionally refus[ing] to report or giv[ing] a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information." The court imposed a fine of \$45. Under Art. 4.03 of the Texas Code of Criminal Procedure, review in state court was foreclosed because appellant's fine was less than \$100.

The circumstances leading to appellant's arrest are not in dispute. Shortly after noon on December 9, 1977, two El Paso policemen on patrol saw appellant and another person walking away from each other in an alley. The officers drove into the alley, stopped appellant, and asked him for his name and an explanation of what he was doing in the alley. When appellant refused to identify himself, he was arrested, searched, and taken to the station for booking. The search revealed no weapons or contraband.

According to the officer who testified at trial, appellant was stopped because he was a black male in his mid-twenties whom the officers had not recognized and whose presence in the alley therefore seemed "suspicious." The officer acknowledged that there had been no reports of crime in the area, that he had been unable to tell whether appellant and the other pedestrian had met or spoken to each other in the alley, and that there was nothing in appellant's conduct to suggest that he was armed or had committed a crime. Nor was it unusual, the

Handwritten:

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

From: Mr. Justice Marshall

Circulated: ~~11 OCT 1978~~

Recirculated: 11 OCT 1978

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

ZACKARY C. BROWN v. STATE OF TEXAS

ON APPEAL FROM THE COUNTY COURT AT LAW NUMBER TWO,  
EL PASO COUNTY

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

ZACKARY C. BROWN v. STATE OF TEXAS

ON APPEAL FROM THE COUNTY COURT AT LAW NUMBER TWO,  
EL PASO COUNTY

No. 77-6673. Decided October —, 1978

1 Mr. JUSTICE MARSHALL, with whom Mr. JUSTICE BRENNAN joins, dissenting.

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 19, 1979

Re: No. 77-6673 - Brown v. Texas

Dear Chief:

Please join me.

Sincerely,

*T.M.*

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 14, 1979

Re: No. 77-6673 - Brown v. Texas

Dear Chief:

Please join me.

Sincerely,

A handwritten signature in dark ink, appearing to be 'H.A. Blackmun', written over a horizontal line.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 31, 1979

77-6673 Brown v. Texas

Dear Chief:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lewis".

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 31, 1979

Re: No. 77-6673 - Brown v. Texas

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 30, 1979

Re: 77-6673 - Brown v. State of Texas

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference