

# The Burger Court Opinion Writing Database

## *Hicks v. Oklahoma*

447 U.S. 343 (1980)

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

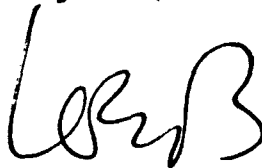
June 4, 1980

RE: 78-6885 - Hicks v. Oklahoma

Dear Potter:

I join.

Regards,



Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

October 30, 1979

RE: No. 78-6885 Hicks v. Oklahoma

Dear Potter:

I agree with the Per Curiam you have prepared  
in the above.

Sincerely,

*Bren*

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 28, 1980

RE: No. 78-6885 Hicks v. Oklahoma

Dear Potter:

I agree.

Sincerely,

*Bul*

Mr. Justice Stewart

cc: The Conference

Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
X Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

*I'll join this dissent  
(But I'm not  
inclined to grant)  
This opinion G, V, & Kennedy  
1st DRAFT*

From: Mr. Justice Stewart  
11 OCT 1979  
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## SUPREME COURT OF THE UNITED STATES

FLYNN NOYE HICKS v. STATE OF OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF  
CRIMINAL APPEALS OF OKLAHOMA

No. 78-6885. Decided October —, 1979

MR. JUSTICE STEWART, dissenting.

The petitioner was brought to trial in an Oklahoma court on a charge of unlawfully distributing heroin. Since he had been convicted of felony offenses twice within the preceding 10 years, the members of the jury were instructed, in accordance with the habitual offender statute then in effect in Oklahoma,<sup>1</sup> that, if they found the petitioner guilty, they "shall assess [the] punishment at forty (40) years imprisonment." The jury returned a verdict of guilt and imposed the mandatory 40-year prison term.

Subsequent to the petitioner's conviction, the provision of the habitual offender statute under which the mandatory 40-year prison term had been imposed was in another case declared unconstitutional by the Oklahoma Court of Criminal Appeals. *Thigpen v. State*, 571 P. 2d 467, 471 (1977). On his appeal, the petitioner sought to have his 40-year sentence set aside in view of the unconstitutionality of this statutory provision. The Court of Criminal Appeals acknowledged that the provision was unconstitutional, but nonetheless affirmed the petitioner's conviction and sentence, reasoning that the petitioner was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event.

I think that the petitioner was deprived of due process of law guaranteed to him by the Fourteenth Amendment. By statute in Oklahoma, a convicted defendant is entitled to have

<sup>1</sup> See 1976 Okla. Sess. Laws, ch. 94, § 1; amended 1978 Okla. Sess. Laws, ch. 281, § 1 (codified as 21 Okla. Stat. 51 (B) (1978 Supp.)).

*I would join. I think that your opinion in Greenholty supports the position that the pet's has a due process right, and I think that fairness requires that each stage of the proceeding be conducted in accordance with state law. For O/D/P.*

*I'm refusing  
to resentence  
after the  
habitual  
offender  
statute  
was  
invalidated,  
~~the~~  
the Okla  
Court  
denied  
Pet's the  
possibility  
of a sentence  
as few as  
10 yrs. rather  
than the 40  
to which he  
had been*

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

From: Mr. Justice Stewart

Circulated:            OCT 1979

1st DRAFT

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## SUPREME COURT OF THE UNITED STATES

FLYNN NOYE HICKS v. STATE OF OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF  
CRIMINAL APPEALS OF OKLAHOMA

No. 78-6885. Decided October —, 1979

PER CURIAM.

The petitioner was brought to trial in an Oklahoma court on a charge of unlawfully distributing heroin. Since he had been convicted of felony offenses twice within the preceding 10 years, the members of the jury were instructed, in accordance with the habitual offender statute then in effect in Oklahoma,<sup>1</sup> that, if they found the petitioner guilty, they "shall assess [the] punishment at forty (40) years imprisonment." The jury returned a verdict of guilt and imposed the mandatory 40-year prison term.

Subsequent to the petitioner's conviction, the provision of the habitual offender statute under which the mandatory 40-year prison term had been imposed was in another case declared unconstitutional by the Oklahoma Court of Criminal Appeals. *Thigpen v. State*, 571 P. 2d 467, 471 (1977). On his appeal, the petitioner sought to have his 40-year sentence set aside in view of the unconstitutionality of this statutory provision. The Court of Criminal Appeals acknowledged that the provision was unconstitutional, but nonetheless affirmed the petitioner's conviction and sentence, reasoning that the petitioner was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event.<sup>2</sup>

We conclude that the petitioner was deprived of due process

<sup>1</sup> See 1976 Okla. Sess. Laws, ch. 94, § 1; amended 1978 Okla. Sess. Laws, ch. 281, § 1 (codified as 21 Okla. Stat. 51 (B) (1978 Supp.)).

<sup>2</sup> The decision of the Oklahoma Court of Criminal Appeals is unreported. *Hicks v. State of Oklahoma*, No. F-77-751 (March 8, 1979). A petition for rehearing was denied April 6, 1979.

*Join*  
*hfp*  
*10/29*

*I would join. Only a few words have been changed between the draft and the earlier proposed dissent. /pc*

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

1st DRAFT

From: Mr. Justice Stewart

SUPREME COURT OF THE UNITED STATES

Filed: 28 MAY 1980

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

No. 78-6885

Flynn Noye Hicks, Petitioner, } On Writ of Certiorari to the  
v. } Court of Criminal Appeals  
State of Oklahoma. } of Oklahoma.

[June —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was brought to trial in an Oklahoma court on a charge of unlawfully distributing heroin. Since he had been convicted of felony offenses twice within the preceding 10 years, the members of the jury were instructed, in accordance with the habitual offender statute then in effect in Oklahoma,<sup>1</sup>

<sup>1</sup> See 1976 Okla. Sess. Laws, ch. 94, § 1, codified as 21 Okla. Stat. § 51 (B) (1978 Supp.). The text of § 51 provided:

“(A) Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:

“1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term of not less than ten (10) years.

“2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.

“3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years.

“(B). Every person who, having been twice convicted of felony offenses, commits a third or thereafter, felony offenses within ten (10) years of

11AB

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 17, 1980

MEMORANDUM TO THE CONFERENCE

Re: CASES HELD FOR NO. 78-6885, Hicks v. Oklahoma

Three cases have been held pending decision of Hicks v. Oklahoma.

No. 79-622, Mabry v. Klimas. The petitioner was convicted by a jury in an Arkansas court of burglary and grand larceny. At the sentencing hearing, the jury was instructed that if it found that he had been convicted of three prior felonies, they could impose a sentence of between 21 and 31 1/2 years for each of the present offenses. The State introduced evidence of seven past Missouri convictions and of six from Arkansas. The jury found that the petitioner had been convicted of three prior offenses, and set his punishment at 31 1/2 years for each of the present offenses, which the trial court ordered would run consecutively. On appeal to the Arkansas Supreme Court, the petitioner contended that the seven Missouri convictions were inadmissible, since it did not appear whether he had had assistance of counsel at the trial of those cases. The court reversed the conviction on this ground and remanded for a new trial unless the State would agree to a sentence reduced to three years, which was the minimum that the petitioner could have received for the burglary and larceny offenses. On rehearing, the court revised the sentence to 42 years. It reasoned that the jury had been required to consider the six Arkansas felony convictions, whose existence and validity the petitioner had not disputed at the sentencing hearing. Accordingly, the court authorized the minimum sentence that he could have received for the present offenses when enhanced by three prior felonies.

The petitioner then brought an action for a writ of habeas corpus in the federal District Court, which dismissed the suit for want of jurisdiction. The Court of Appeals reversed, concluding that jurisdiction existed and that the petitioner was denied due process of law by the State when it failed to accord him a jury sentence as provided by statute in Arkansas. The Court of Appeals acknowledged that standing alone, the

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 8, 1979

Re: No. 78-6885 - Hicks v. Oklahoma

---

Dear Harry,

Please join me in your dissent in  
this case.

Sincerely yours,



Mr. Justice Blackmun

Copies to the Conference

cmc

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 28, 1980

Re: 78-6885 - Hicks v. Oklahoma

---

Dear Potter,

Please join me.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference

cmc

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 8, 1979

Re: No. 78-6885 - Hicks v. Oklahoma

Dear Potter:

Please join me in your per curiam opinion.

Sincerely,

*T.M.*  
T.M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 28, 1980

Re: No. 78-6885 - Hicks v. Oklahoma

Dear Potter:

Please join me.

Sincerely,

*Jm.*

T.M.

Mr. Justice Stewart

cc: The Conference

1c

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

From: Mr. Justice Blackmun

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*gnd joined P.S.*

No. 78-6885 - Hicks v. Oklahoma

MR. JUSTICE BLACKMUN, dissenting.

It seems to me that the Court's per curiam opinion vacating the judgment of the Court of Criminal Appeals of Oklahoma, and the dissenting opinion of Mr. Justice Rehnquist, post p. \_\_\_\_, together demonstrate that the issue the Court perceives ought to be given something better than the summary treatment it receives today. We are, to be sure, short of space on our calendar, and it is always tempting to get a case behind us with a minimum of effort. But the summary disposition should

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

From: Mr. Justice Blackmun

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

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

FLYNN NOYE HICKS *v.* STATE OF OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF  
CRIMINAL APPEALS OF OKLAHOMA

No. 78-6885. Decided November —, 1979

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE  
joins, dissenting.

It seems to me that the Court's *per curiam* opinion vacating the judgment of the Court of Criminal Appeals of Oklahoma, and the dissenting opinion of MR. JUSTICE REHNQUIST, *post*, p. —, together demonstrate that the issue the Court perceives ought to be given something better than the summary treatment it receives today. We are, to be sure, short of space on our calendar, and it is always tempting to get a case behind us with a minimum of effort. But the summary disposition should be reserved for the clear case; it should not be extended to a case such as this, where the proper solution is not readily apparent. With the views expressed so opposed, we should seek the comfort that full briefing and argument afford.

I therefore would grant certiorari and give the case plenary and careful consideration. I dissent from the Court's summary disposition.

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 28, 1980

Re: No. 78-6885 - Hicks v. Oklahoma

Dear Potter:

Please join me.

Sincerely,

*HAB*  
—

Mr. Justice Stewart

cc: The Conference

October 18, 1979

78-6885 Hicks v. Oklahoma

Dear Potter:

Please add my name to your dissent in the above case.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

LFP/lab

2  
October 30, 1979

78-6885 Hicks v. Oklahoma

Dear Potter:

I agree with your Per Curiam in the above case.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 28, 1980

78-6885 Hicks v. Oklahoma

Dear Potter:

Please join me.

Sincerely,

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

Mr. Justice Stewart

lfp/ss

cc: 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 Stevens

From: Mr. Justice Rehnquist

Circulated: **B1** OCT 1979

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

FLYNN NOYE HICKS v. STATE OF OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF  
CRIMINAL APPEALS OF OKLAHOMA

No. 78-6885. Decided November —, 1979

Court Mr. JUSTICE REHNQUIST, dissenting.

The ~~majority~~ concludes that the Oklahoma Court of Criminal Appeals denied petitioner due process of law by refusing to vacate the sentence imposed at his trial for unlawful distribution of heroin. That conclusion, in turn, depends on the Court's assertion that petitioner was impermissibly denied his state-created right to be sentenced by a jury. Because I believe that the Court either mischaracterizes the right conferred by state law or erroneously assumes a deprivation of that right, I dissent.

The Court is undoubtedly correct that Oklahoma law does confer a right to have a sentence imposed by a jury. 22 Okla. Stat. § 927. But it is equally true that petitioner was sentenced by a jury. The question is whether that sentence was validly imposed, either as a matter of state or federal law. The Oklahoma court found that petitioner was not properly sentenced. If this conclusion rested on an interpretation of state law, or a *correct* interpretation of federal law, then I would have less difficulty agreeing with the Court that petitioner was entitled to a new jury sentencing under principles of due process. But the Court fails to inquire into the basis of the Oklahoma court's conclusion that petitioner was improperly sentenced in the first instance. That question is central to the resolution of the due process issue presented by the case. The Court simply assumes that the Oklahoma court found that petitioner had not been sentenced in conformity with state law. This is an assumption, however, that cannot be divined from the available state cases. Those cases in fact suggest rather strongly that the decision of the

It is true, as Mr. Justice Rehnquist, argues that Thigpen is not a model of judicial clarity. But, as he notes, it may be based on state law. Even if it is not, the issue in this case is not the correctness of Thigpen, but the constitutionality of the state court action assuming that Thigpen is controlling precedent. There is

no doubt in my mind that had Hicks raised his claim at trial a jury would have had to discretion to sentence him to 10 years or more. I think he has the same state right even though Thigpen was not handed down until after his trial ended.  
You

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

From: Mr. Justice Rehnquist

Circulated: 10 JUN 1980

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6885

Flynn Noye Hicks, Petitioner, } On Writ of Certiorari to the  
v. } Court of Criminal Appeals  
State of Oklahoma. } of Oklahoma.

[June —, 1980]

MR. JUSTICE REHNQUIST, dissenting.

The Court concludes that the Oklahoma Court of Criminal Appeals denied petitioner due process of law by refusing to vacate the sentence imposed at his trial for unlawful distribution of heroin. That conclusion, in turn, depends on the Court's assertion that petitioner was impermissibly denied his state-created right to be sentenced by a jury. Because I believe that the Court either mischaracterizes the right conferred by state law or erroneously assumes a deprivation of that right, I dissent.

The Court is undoubtedly correct that Oklahoma law does confer a right to have a sentence imposed by a jury. 22 Okla. Stat. § 927. But it is equally true that petitioner was sentenced by a jury. The question is whether that sentence was validly imposed, either as a matter of state or federal law. For if the petitioner was constitutionally sentenced by his jury in the first instance, he has been afforded the process the State guaranteed him. The Oklahoma court found that petitioner was not properly sentenced. If this conclusion rested on an interpretation of state law, or a *correct* interpretation of federal law, then I would have less difficulty agreeing with the Court that petitioner was entitled to a new jury sentencing under principles of due process. But the Court fails to inquire into the basis of the Oklahoma court's conclusion that petitioner was improperly sentenced in the first instance. That question is central to the resolution of the due process issue presented by the case. The Court simply assumes that the

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

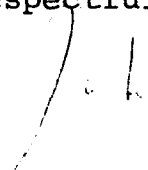
CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

October 30, 1979

Re: 78-6885 - Hicks v. Oklahoma

Dear Potter:

Please join me.

Respectfully,  


Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 28, 1980

Re: No. 78-6885 HICKS v. OKLAHOMA

Dear Potter:

Please join me.

Respectfully,

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

Mr. Justice Stewart  
Copies to Conference