

In the
Supreme Court of the United States

FLYNN NOYE HICKS,

PETITIONER,

v.

OKLAHOMA,

RESPONDENT.

No. 78-6885

Washington, D. C.
March 26, 1980

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 78-6885, Hicks v. Oklahoma.

Mr. Ebel.

ORAL ARGUMENT OF DAVID M. EBEL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. EBEL: Mr. Chief Justice, and may it please the Court:

This is a sentencing procedures case and it raises important constitutional questions about the procedures that need to be followed in sentencing defendants.

This is not a case that challenges inherently habitual sentencing statutes, and it is not a case that challenges the excessiveness of a 40-year sentence for a person who commits the kind of crimes that the defendants Hicks has committed.

Rather, it is a case that challenges the method of imposing that sentence on him. Hicks is a young black man. He was 28 years old at the time of the trial. He and his codefendant were convicted by a jury in Oklahoma of a single sale of heroin worth \$50.

Now, Oklahoma has a peculiar statute which says that a defendant in Oklahoma has a right to be sentenced by a jury, and the Oklahoma Court of Criminal Appeals has said that that is a sacred right that may not be lost

except by express waiver.

Now, because neither defendant here waived that right, the jury was reconvened to sentence these two defendants. Hicks' codefendant received the minimum sentence possible under the heroin statute, that is five years. Hicks, on the other hand, was charged under the habitual criminal statute in Oklahoma. And I should pause for a minute to tell you that Oklahoma has two habitual criminal statutes, 51(A) and 51(B). 51(B) is a mandatory statute and it says that if you have been convicted of two prior felonies, you must be sentenced to the maximum term permissible under the third offense plus an additional 20 years, and that formula here would calculate to a 40-year sentence for Hicks.

Now, the other statute is 51(A) and that is a discretionary statute. That statute says that if you committed one or more prior offenses, that the jury may sentence you to anything it wishes between ten years and life.

Well, at Hicks trial the jury was given evidence of two prior felony convictions. Hicks did not challenge that evidence, so the judge instructed the jury that if you find Hicks as guilty of the two prior felonies, you must find him guilty under 51(B) and you must sentence him to 40 years in jail.

The jury listened to those instructions carefully and it followed them and it returned a 40-year mandatory habitual criminal sentence against him.

Now, while that case was pending on appeal, the Oklahoma Court of Criminal Appeals decided a second case that was called Thigpen v. State, and in that case the Oklahoma court held that 51(B) was unconstitutional.

QUESTION: Do you think Thigpen rested on state constitutional grounds or federal constitutional grounds?

MR. EBEL: Your Honor, I think it rested on federal constitutional grounds, although it doesn't say so in the opinion, and my opinion that it rests on federal grounds rests on the fact that the appendix attached to the opinion is premised upon federal grounds, and it appears to have been cited with approval by the majority opinion.

QUESTION: The District Court of Oklahoma?

MR. EBEL: That's correct.

QUESTION: So when you said a little while ago that Oklahoma has two statutes, you really mean now it has only one?

MR. EBEL: That's correct, Your Honor, now it has one.

QUESTION: Well, what if we were to conclude that Thigpen was incorrectly decided as a matter of

federal constitutional law?

MR. EBEL: Well, I think, Your Honor, that that issue isn't directly before this Court because Thigpen was not appealed here. At least when Hicks was sentenced at the Court of Criminal Appeals, I think that Thigpen represented the law as interpreted by Oklahoma, and so for the case at least of Hicks we can assume that 51(B) was improper.

QUESTION: Well, there is a certain abstraction about the whole thing perhaps on both sides. The Oklahoma legislature passes a statute, the Oklahoma Court of Criminal Appeals says it is unconstitutional on federal grounds. Say this Court now were in this particular proceeding to conclude that that conclusion was wrong. The statute is still in existence, it is just two courts have expressed two different opinions as to whether or not it is constitutional.

MR. EBEL: No, I don't think the statute is in existence any more because it has been declared unconstitutional by a final decision by the state's highest court before this case ever came up here.

QUESTION: Your view is that unless the state took an appeal to this Court on the assumption that there was a federal question involved, they have acquiesced in that matter?

MR. EBEL: That's correct. I think it might be said to be bad law today.

QUESTION: Let me ask you this: Supposing that after Thigpen had been decided and after this case had been decided one way or the other, this Court were to come down with a square ruling that indicated that made clear that Thigpen was wrongly decided if it rested on federal constitutional grounds, would you then say that Oklahoma legislature had to enact a new statute rather than simply having the old one revived?

MR. EBEL: Oh, absolutely, Your Honor. I think that once Thigpen is final and not appealed, that that statute is invalidated because the law changes, it doesn't spring back, all the legislation around the country that might have been stricken under one interpretation of the law. I think the legislature would clearly have to re-enact the statute.

QUESTION: What is your authority for that?

MR. EBEL: I don't have any to cite to you at this time, Your Honor, but I believe that to be the law.

We cite in this case both due process and equal protection and Eighth Amendment arguments. Because of the shortness of time, I am going to argue primarily the due process case issues here, as I think it is primarily a procedural case.

Our first due process argument is that Hicks was denied due process when he was sentenced in violation of the state's own laws. Now, there is no doubt that Oklahoma has created a right to be sentenced by a jury. The Oklahoma statute 926 explicitly says so. The Oklahoma Court of Criminal Appeals has explicitly said that there is such a right and it is sacred.

The state in its responsive brief at page 24 acknowledges this fact when it says, "Although the United States Constitution does not mandate the imposition of punishment by a jury, the State of Oklahoma has statutorily created such a right."

QUESTION: When Thigpen was decided during the pendency of this appeal, could the state have gone back to the process of new sentencing? You would have to reconstitute the original jury, would you, if you were to try that?

MR. EBEL: I don't think you need to reconstitute the original jury, Your Honor. I think that the statute simply requires a jury sentencing. It doesn't say that it has to be the same jury, so I think it could be a new jury.

QUESTION: If we hypothetically agreed with you now, would Oklahoma assemble a jury and go through the sentencing process under the surviving statute?

MR. EBEL: Yes, I believe so, Your Honor.

QUESTION: And he might get 40 years or he might not get 40 years.

MR. EBEL: That's correct, Your Honor.

QUESTION: It is mandatory under 51(B) but permissive under 51(A), is that correct?

MR. EBEL: That's correct, and 51(B) is what has been thrown out and which we think is now a final decision in the State of Oklahoma. So unless it were re-enacted, 51(A) is the statute under which they would have to proceed.

QUESTION: You probably can't tell us, but was there any indication that you are aware of that the state considered that possibility?

MR. EBEL: Of reenacting 51(B)?

QUESTION: No, of a new sentencing, remanding.

MR. EBEL: Your Honor, there appears to be no indication that the Court of Criminal Appeals considered that. They just simply said we are going to impose a new sentence under 51(A) because it is not going to prejudice you, since we are going to issue the same length of sentence as before.

QUESTION: And you say that when the Supreme Court did that, they were usurping the jury's function.

MR. EBEL: Absolutely.

QUESTION: Perhaps the state will tell us about that a little later.

MR. EBEL: All right.

Your Honor, there is no doubt that the sentence here was issued by the Court of Criminal Appeals rather than the jury because the defendant Hicks does come before this Court sentenced only under 51(A) and the jury never purported to issue any sentence under 51(A) itself, only the Court of Appeals presumed to do that.

Further, 51(A) requires the exercise of discretion and the jury never presumed to exercise discretion. In fact, it was instructed that it could not exercise discretion. Only the Court of Appeals --

QUESTION: I want to be sure I understand your position. I did not read the Court of Appeals opinion as imposing a new sentence. I thought they affirmed the sentence that had been imposed mandatorily before. They said we must -- all they said, in one sentence, we must find, however, that the defendant was not prejudiced by the use of this statute in that the sentence imposed is within the range of punishment authorized by 51(A). Does that say they have imposed the sentence themselves?

MR. EBEL: Your Honor, they didn't impose a new length of sentence, they incorporated the old length but they based the sentence upon a different statute.

And under *Brown v. State* in Oklahoma, and another case that we also cite in our briefs, as well as the Lang case decided by this Court, a sentence under an unconstitutional statute is void, is gone, there is nothing to it. Oklahoma law says that. And they have said that 51(B) was unconstitutional, so under Oklahoma's own law the sentence under 51(B) has disappeared.

QUESTION: Well, they don't say that.

MR. EBEL: Well, the Oklahoma --

QUESTION: You may be right as a matter of Oklahoma law, but that is not what their opinion says.

MR. EBEL: Well, I think, Your Honor, it in essence does say that because it says that we are going to sentence under 51(A), it is a different statutory --

QUESTION: It does not say that. That is my very point, it does not say we are going to sentence under 51(A). It simply says that the defendant was not prejudiced by the use of this statute in that the sentence imposed -- and they are referring to the one imposed by the jury, as I read it -- is within the range authorized by 51(A). That doesn't say we're imposing a sentence under 51(A) as I read it anyway.

MR. EBEL: Your Honor --

QUESTION: I don't know if it makes any difference, but I just raise this question.

QUESTION: I understand your point to be that the jury was instructed that it had to return a 40-year sentence, is that it?

MR. EBEL: If the jury was instructed it had to return a 40-year sentence if it found that Hicks had two prior felony convictions.

QUESTION: And there is no dispute that he had two prior felonies?

MR. EBEL: No dispute.

QUESTION: So I take it your argument is now that the court was exercising a discretion which under 51(A) could only be exercised by a jury which might have given only a ten-year bonus instead of a twenty-year bonus.

MR. EBEL: That's correct.

QUESTION: But Justice Stevens is quite right, the court didn't say this flatly.

MR. EBEL: Well, the court may not have used the word "resentenced," but the court has said everything but that. The Oklahoma law, as I said, which isn't disputed, I don't believe, that the sentence under 51(B) is void, either there is a new sentence imposed on Hicks or he stands today with no sentence at all, and I am sure the state isn't going to say he stands with no sentence at all. And if he doesn't stand under a sentence that

was valid under the jury, somebody has had to put a new sentence on him and that somebody has to have been the Court of Criminal Appeals.

QUESTION: I'm not sure you are making your strongest argument.

MR. EBEL: Well, if that is true, then several things have happened that have violated Hicks' due process rights. First, this sentence was imposed by somebody other than the jury, and we think that that violates one of Oklahoma's sacred rights.

QUESTION: Well, that doesn't involve a federal question, does it?

MR. EBEL: Oh, I think it does, Your Honor. The way we read the due process clause, a state has to follow its own procedures when substantive and substantial rights are involved, and if it deviates from its own procedures in forms of substantive rights, that is a violation of the due process clause.

QUESTION: You mean if a -- do you think it is unconstitutional for an appellate court to sentence?

MR. EBEL: No, Your Honor, I --

QUESTION: I mean a state appellate court to sentence.

MR. EBEL: I think if the laws permit it and if the appellate court gives the defendant notice and a

hearing, then an appellate court may impose sentence.

QUESTION: Well, if an Oklahoma appellate court from time to time says it is not inconsistent with Oklahoma law in any way, every now and then we will just sentence ourselves when we think the defendant deserves it, the state statute may say something but we will just sentence him ourselves. Does that violate some federal constitutional ---

MR. EBEL: I think so. I think the due process clause says that the law and order applies to the state, to the court as well as to the citizens, and if the state and the courts decide that every now and then we are just not going to follow our law because it is more convenient for us not to, the due process clause doesn't permit that.

QUESTION: But isn't the state court's reading of its own law the final version of it so far as we are concerned?

MR. EBEL: Well, the state court here never interpreted 926 as having been abrogated by any abilities that it had. It never said that its rights to modify sentences could be used to cut off a jury right. The state court never interpreted the law in that regard and this Court in the retention doctrine has said that when there is a clear state statute it can rely on that state statute without looking to any requirement that

the state's highest court interpret that statute.

QUESTION: But isn't there a presumption of validity to a conviction coming from a state court that the state has at least insofar as its own laws are concerned read those laws as they had to be read because it is the final interpreter of them?

MR. EBEL: I don't know of any presumption of validity, Your Honor. I think that the due process clause doesn't have such a presumption, and this Court can look at the procedures and see if the court has followed the law. I don't know of any law here that gives a greater presumption to a court that may not be following its own state law than it does of any other state official that may not be following state law.

QUESTION: That just assumes that it isn't following its own law. Brother Rehnquist says and suggests to you that the Oklahoma law is what the Oklahoma court says it is, and if the Oklahoma statute says jury sentencing but the Oklahoma Supreme Court says, well, from time to time we can sentence ourselves in the right circumstances and that this is not inconsistent with Oklahoma law, how does that violate the Constitution?

MR. EBEL: Well, the Oklahoma court didn't say that what it was doing was not inconsistent with Oklahoma law. It didn't say this is not inconsistent with your

jury rights. It says simply this doesn't prejudice you, and I am saying it does prejudice Hicks. They are not saying that Oklahoma law doesn't give Hicks a jury right. They are saying we can do this because we don't think it is prejudicial to you, and I think it was prejudicial to Hicks.

QUESTION: There is nothing implicit in that. Isn't there a holding also that it is not a contravention of their own state constitution?

MR. EBEL: Well, if there is such an implicit holding, then I think state courts are virtually immune from any challenge that they are not following their own laws.

QUESTION: It has to be implicit. You don't think they said to themselves, oh, we are going to do this but we think it violates the federal Constitution.

MR. EBEL: I don't --

QUESTION: They must have implicitly thought that it didn't.

MR. EBEL: I think what they said was this may not comply with all the procedural safeguards we have, but we don't think it is prejudicing Hicks and so why does he care, because we are going to give him the same length of sentence.

QUESTION: The question here is whether there

is some federal constitutional right. You said that you thought that federal constitutional rights were violated in several respects.

MR. EBEL: That's correct, Your Honor.

QUESTION: You have given us one. Do you have another one?

MR. EBEL: Yes, Your Honor. The other one is we think that the federal Constitution requires notice and hearing before you can impose a sentence and that --

QUESTION: Before the Supreme Court of the state could impose the sentence?

MR. EBEL: Before anyone can impose a sentence.

QUESTION: But the only one that --

QUESTION: The court didn't say that. The court said that we think the sentence is all right, but they didn't impose it.

MR. EBEL: Well, Your Honor --

QUESTION: Where did the Court of Appeals say we sentence you to blank years?

MR. EBEL: Your Honor --

QUESTION: They didn't say that, did they?

MR. EBEL: Well, the strongest syllogism I can argue on that is that --

QUESTION: I am not asking for syllogism, I am asking for facts.

MR. EBEL: Well, they said that we are sentencing you -- they said you were sentenced under 51(B), that is an unconstitutional statute, but we don't think you are prejudiced if we affirm a 40-year sentence under 51(A).

QUESTION: Well, isn't affirming different from sentencing?

MR. EBEL: Well, I think it is a different word but I think it means the same thing.

QUESTION: I see.

QUESTION: Well, they said we agree with you, Mr. Hicks, that the statute under which you were sentenced is unconstitutional. It would then follow, I suppose, that he was not sentenced at all.

MR. EBEL: That's correct.

QUESTION: It was a void or invalid sentence.

MR. EBEL: That is what Oklahoma law says.

QUESTION: Therefore, if he is under any sentence at all, it has to be as a result of his sentence imposed by the Supreme Court of Oklahoma.

MR. EBEL: That's right, Your Honor.

QUESTION: And you say the Supreme Court has no authority to fix it at this 20 extra years.

MR. EBEL: What I would argue on the second point, Your Honor, is that we think the U.S. Constitution requires the defendant to have an opportunity for notice

and a hearing before a sentence can be imposed, and we think that Hicks here did not have such an opportunity to present any evidence on his behalf under 51(A), and that that violates the United States Constitution quite apart from any of your readings of the Oklahoma law.

QUESTION: And you think the only remedy available by the time the appeal was argued in the state Supreme Court was to send it back to the trial court for a new sentencing procedure under 51(A)?

MR. EBEL: That's correct, Your Honor.

QUESTION: Because, as Mr. Justice Stewart suggested, at the time of the oral argument in that court, the Supreme Court, there was no valid sentence outstanding.

MR. EBEL: Right, and the Oklahoma court cases are absolutely explicit on that point, the Brown case and the other one that I cite in my brief. When the Oklahoma Court of Criminal Appeals faced Hicks and said that 51(B) was unconstitutional, Hicks stood before them without a valid sentence at all.

QUESTION: I understood you to say before that you would be quite satisfied if the -- even if your client were not, as a matter of law you would be quite satisfied if this Court were to have the case go back down through the Supreme Court to the trial court for resentencing under the procedure of 51(A).

MR. EBEL: That's correct, Your Honor.

QUESTION: And you might --

MR. EBEL: Your Honor, not necessarily under 51(A), because our third argument is that we think 51(A) itself is unconstitutional on its face, but at least we would be satisfied if he were resentenced and we think the sentence ought to be conducted under the basic heroin statute rather than 51(A), but at least to be sentenced.

QUESTION: That would avoid the enhancement of the sentence?

MR. EBEL: That's correct, and it would entitle him to be punished somewhere between five years and twenty which is the spread permitted under the --

QUESTION: Then my first assumption has fallen apart, hasn't it, that you would be satisfied if it went back for resentencing. I thought you had told me earlier that you wanted to be resentenced under 51(A) in my prior questions to you.

MR. EBEL: Your Honor, what I meant to say was that we would be satisfied with resentencing. We are not asking to reopen the guilt phase of this trial, and we think that resentencing could be under a newly constituted jury and would not need to be under the old jury.

If I said that we would be satisfied with resentencing under 51(A), I misspoke because our third due

process argument is that 51(A) is unconstitutional on its face because it is excessively broad and gives no standards and direction for the jury in the sentencing process, and we think therefore the proper sentence would be under the heroin statute.

QUESTION: That never having been decided in the Oklahoma court, it would be no question for us to reach here, would it?

MR. EBEL: Well, it was not presented before the Oklahoma court, Your Honor. I think, however, that under a variety of doctrines that this Court has articulated in the past, which you are very familiar with, it could be reached by this Court for judicial economy, that is --

QUESTION: Are you talking about the state court, when the issue hasn't been raised and passed on by the state court?

MR. EBEL: Well, I think that that would be --

QUESTION: Isn't that a jurisdictional question here?

MR. EBEL: Well, I think if this Court remands for sentencing under 51(A) and Hicks gets his sentence under 51(A) --

QUESTION: Well, we wouldn't necessarily remand for sentence under 51(A), we would just remand.

MR. EBEL: Well, if Hicks then is resentenced under --

QUESTION: For resentencing.

MR. EBEL: I would say if Hicks is sentenced under 51(A), then we would have to come back before this Court to challenge --

QUESTION: That is old hat, if this particular federal constitutional issue were not raised in the state court, if the validity of that statute wasn't raised and passed on, I don't think we can reach it here.

QUESTION: Isn't it true generally, Mr. Ebel, that in Oklahoma juries are given wide latitude in imposing sentences? You have told us already --

MR. EBEL: Yes.

QUESTION: -- that a defendant has a right to be sentenced by the jury in most cases --

MR. EBEL: Right.

QUESTION: -- without any standards, and that 51(A) which provides for repeat offenders, gives the jury discretion to impose any sentence between ten years and life, if I am not mistaken.

MR. EBEL: That's correct.

QUESTION: That is quite typical of Oklahoma sentencing procedures?

MR. EBEL: I would --

QUESTION: It is longer than most, but typical in giving the jury no standards, and allowing the jury wide discretion.

MR. EBEL: I think that the typical statute in Oklahoma does not set any standards for the jury, but most of the statutes are like the heroin statute with a narrow range of five years to twenty, which we think is permissible. And the only statute that I know of in Oklahoma that allows --

QUESTION: Well, that range may seem narrow to you or me, but I don't know if it would be for the person sentenced. There is quite a difference between five years and twenty.

MR. EBEL: Right.

QUESTION: When it is out of your own life.

QUESTION: You raise Eighth Amendment questions, too, I take it?

MR. EBEL: Yes, Your Honor.

QUESTION: And equal protection?

MR. EBEL: Yes, Your Honor.

QUESTION: Are you just submitting them in your brief or --

MR. EBEL: Your Honor, I think probably I don't have the time to go into those in care. The equal protection argument that I would assert primarily is that the

state has treated two categories of people differently, those that were originally sentenced under 51(A) and those like Hicks who were originally sentenced under 51(B) and then resentenced under 51(A).

QUESTION: How many of these issues that you are relying on here did you assert as constitutional federal issues in the Oklahoma Court of Criminal Appeals?

MR. EBEL: The only two that clearly were not raised below were our third and fourth due process arguments, that is the lack of standards in the sentence and the failure of the court to give any reasons for its sentence. Beyond that, it is a little hard to tell exactly what was raised because the constitutional arguments asserted below just broadly speak about violation of the United States Constitution and they did not articulate due process, equal amendment or Eighth Amendment.

QUESTION: You didn't argue the case then in the Court of Appeals?

MR. EBEL: No. I am court appointed by this Court to represent Hicks here on certiorari. He was represented by the public defender below to the decision of the Court of Criminal Appeals, and when the Court of Criminal Appeals sentenced him under 51(A), he carried the case on then pro se himself and filed his petition for certiorari in this Court pro se and was granted pro se.

QUESTION: Mr. Ebel, one of your due process arguments, as I understand it, is that whoever fixes the sentence, there should have been notice and an opportunity on behalf of the defendant to argue what the sentence should be.

MR. EBEL: That's correct.

QUESTION: But he did not receive that in the trial court because the jury was instructed that there was a mandatory requirement of forty years, and he didn't receive it in the Court of Appeals because the Court of Appeals imposed the sentence.

Now, if we should accept that argument, would it not be the appropriate relief simply to send it back to the Oklahoma Court without any instructions about jury sentencing, because presumably as far as the federal Constitution is concerned the Court of Appeals can do its own sentencing, as long as they gave you a fair opportunity to say that what the sentence should be before they simply affirm on the basis of an invalid trial court action.

MR. EBEL: Well, unless it is accepted by this Court that there is a right to be sentenced by a jury in Oklahoma and the failure to observe that right is itself a due process violation.

QUESTION: Well, we could send it back to the Court of Appeals and they could decide whether there is

such a right in Oklahoma which they would be much better able to decide than we would. Presumably, if they thought there was they would follow their own law, I think we have to presume that.

MR. EBEL: Well, we think, Your Honor, that the Oklahoma law is already clear on that, and this Court can decide that on the basis presented by the Court of Criminal Appeals which was that Hicks wasn't prejudiced. And I think this Court could say that it was, he was and it needs to be sent back for a jury to sentence.

Your Honor, I see that my light light is thrown on and I would like to reserve a few moments for rebuttal, so I will rest. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Cox.

ORAL ARGUMENT OF JANET L. COX, ESQ.,

PRO HAC VICE

MS. COX: Mr. Chief Justice, and may it please the Court:

Opposing counsel and myself do not differ on the basic premise that the sentencing stage of a trial proceeding is protected by the due process clause of the 14th Amendment. The difference between my position and the position of my opposing counsel is that there is a determination that needs to be made as to what process is

due.

The petitioner argues that the failure of the Oklahoma Court of Criminal Appeals to remand this cause for jury sentencing deprived him of a procedural right under section 926 of the Oklahoma Constitution.

The petitioner has gone through the facts adequately, but I think it is important for this Court to understand exactly what the Court of Criminal Appeals did in *Thigpen v. State* when it invalidated section 51(B) which was the sentencing provision under which petitioner in this case was sentenced.

The court made a determination and an interpretation upon the basis of the intent of the legislature in this case to provide the progressively greater punishment for the habitual offender. Under 51(B), the punishment was restricted and there was a classification that a second subsequent offender would receive, as in this case, forty years. Had Mr. Hicks been tried under 51(A) he could have received a possible sentence of life.

Based upon that premise, the Court of Criminal Appeals did not invalidate the sentencing statute on the basis of a constitutional issue, especially on the basis of due process, but merely that it did not comport with the intent of the legislature to provide for progressively greater punishment.

Now, the petitioner's entire argument is predicated on the fact that the invalidation of 51(B) completely voided his sentence, and this is not true. So long as the sentencing statute contains the severability clause, which in this case it did -- and I must remind this Court that we are not talking about two statutes, we are talking about one that merely said divided two classes of individuals, that being habitual offenders.

QUESTION: Ms. Cox, may I just be sure I understand you. Are you saying that the Oklahoma Supreme Court or Court of Criminal Appeals, whichever it was, in Thigpen did not hold 51(B) unconstitutional?

MS. COX: I am saying that they held it to be vague and illusory and because it --

QUESTION: I understand. Did they hold it to be unconstitutional?

MS. COX: Yes, they did hold it unconstitutional but not on the basis of the federal constitutional issue, that it denied due process.

QUESTION: So we must accept that as a matter of state law that statute is unconstitutional, is that true?

MS. COX: That is correct, and we are not trying to litigate the constitutionality of 51(B) but only as to what the court tried to do when it invalidated the

statute.

QUESTION: Then you disagree with your opposing counsel that Thigpen was based on federal constitutional grounds?

MS. COX: Yes, Your Honor, I do. I believe it was an interpretation of a state statute based upon state law and procedure.

QUESTION: For purposes of this case, it probably doesn't make any difference, does it?

MS. COX: No, it really doesn't except that he has predicated the invalidation of section 51(B) on the fact that it voided the petitioner's sentence and therefore the Court of Criminal Appeals in effect resentenced the petitioner. And what I am trying to say ---

QUESTION: That would be true regardless of the basis for declaring 51(B) unconstitutional.

MS. COX: That's true.

QUESTION: Hypothetically, if this case went back, have you suggested that the new jury could give a life sentence in the exercise of its discretion?

MS. COX: Yes, I have, Your Honor. Unfortunately, the state of Oklahoma does not have any procedural device which would reempanel a new jury. I am also arguing that the Court of Criminal Appeals exercised its authority under section 1066 to either modify, affirm,

remand or otherwise reverse a case.

QUESTION: Now, Ms. Cox, you are emphasizing that and you have argued that and it is very clear from the statute that the Oklahoma Court of Criminal Appeals does have that revisory authority. May I ask you this: Do you know of any case where the Court of Criminal Appeals has increased a jury-imposed sentence in the exercise of that authority?

MS. COX: No, Your Honor. In fact, I believe that they would be prohibited from increasing a sentence.

QUESTION: If they have acted at all, they have only decreased one?

MS. COX: Yes, that's correct, either the same sentence or decrease it, which they have done under the decisions following Thigpen where the defendants were sentenced under section 51(B). In some cases they have modified and in some cases they have affirmed them.

QUESTION: But when you modify, it is only to decrease?

MS. COX: Decrease, yes.

QUESTION: You know of no case and in fact you doubt the power of the court to increase a sentence imposed by a jury.

MS. COX: I think it would be highly improper and an exercise of --

QUESTION: In any event, you know of no case where that was done?

MS. COX: No, Your Honor, there has been none.

QUESTION: In fact, isn't that what was done here? If there was no jury sentence and they imposed a forty-year sentence, didn't they increase it by forty years? And if so, haven't you acknowledged that the action was improper?

MS. COX: If you buy the premise that the sentence was void. What I am trying to distinguish from here is the right to resentence by jury under 926 and the asserted right of petitioner to be resentenced following appellate review.

QUESTION: Well, is it your view -- let me just be sure I understand your theory. Is it your view that what the Court of Appeals in effect did was affirm the sentence imposed by the jury?

MS. COX: That is correct.

QUESTION: Then where did the defendant get his opportunity to have somebody decide how long he should be in jail?

MS. COX: Because at the trial court level he was given an opportunity during the second stage of the proceedings to be represented by counsel to attack the underlying convictions. That was all that due process

requires in this case. We are talking about two separate levels.

QUESTION: You said a moment ago that due process applies to the sentencing procedure.

MS. COX: It does in the sense that the trial court level, and that is what we are talking about in this case.

QUESTION: Well, what due process was there if he had a right to have the jury decide between ten and forty and the judge said to the jury, you must give him forty?

MS. COX: Because the sentencing statute, 51(B), required a mandatory imposition of 40 years. This Court has already held that that type of an instruction, in *Rummel v. Estelle* last week, is not improper.

QUESTION: Except it was simply invalid in this case.

MS. COX: That is what petitioner argues, it was simply invalid.

QUESTION: Maybe not improper if there had been a valid statute authorizing it, but there wasn't.

MS. COX: I would --

QUESTION: Do you think if they went back and did it all over again, the judge could give the same instruction?

MS. COX: Well, section 51(B) has been reenacted, and that portion which would provide for the maximum under the underlying felony has been deleted from the statute. I am not saying that he would be resentenced under 51(B), but the same ---

QUESTION: So your answer is that the same instruction could not be given.

MS. COX: That's correct, because the statute has been amended.

MS. COX: Then how can you defend the procedure in the trial court that was followed? I don't understand your argument.

MS. COX: Because due process only affords the right for him to be represented by counsel to attack the underlying convictions. The petitioner in this case relies upon the case of Klimas and in that case the Eighth Circuit Court of Appeals was presented with a problem similar to this case only they did not determine that the underlying statute was invalid. What they determined was that the defendant had been prejudiced because during the second stage certain convictions had been improperly admitted upon which the jury was considering the punishment. They felt that this afforded him substantial prejudice and reversed it and sent it back for resentencing.

We don't have that problem in this case. The same evidence would be admitted at the trial court level on a second hearing in this case as in the first one, even though the mandatory punishment statute could not be given as an instruction.

QUESTION: Suppose he was resentenced before another jury under different instructions, could he say anything to the jury? The jury would have the sentencing power, couldn't he say anything to the jury about sentencing?

MS. COX: Oklahoma does not prohibit a defendant from coming before the jury to present mitigating circumstances during the second stage. In this particular instance, the defendant chose to stand mute as a procedural trial tactic.

QUESTION: But what good would it have done to present mitigating circumstances when the jury is told by the judge you've got to give him forty years?

MS. COX: That is correct, but this Court has upheld --

QUESTION: He still waives his right to do it, you say.

MS. COX: That's correct.

QUESTION: When does the judge instruct the jury in Oklahoma?

MS. COX: Following the presentation of the evidence and closing arguments by counsel, then he instructs the jury.

QUESTION: So he is the last -- does counsel know what the instructions are going to be before they argue?

MS. COX: Yes. In fact, in this case there was in the opinion --

QUESTION: So they had been absolutely told what his instruction was going to be?

MS. COX: That's correct.

QUESTION: The jury was going to be instructed that --

MS. COX: In other words --

QUESTION: Well, that isn't much of a hearing then on sentencing, is it?

MS. COX: Well, the information put him on notice, put the petitioner on notice when the charges were originally filed. He knew what his sentence was going to be. He knew what he had to defend against. This is the essence of due process.

QUESTION: Could he have been sentenced under 51(A)?

MS. COX: No, he did not qualify under that class. 51(A) is --

QUESTION: How can anyone be sentenced under --- as I understand it, the Court of Criminal Appeals said that the jury could have sentenced him under 51(A). The court said that the defendant was not prejudiced by the rules of this statute in that the sentence imposed is within the range of punishment authorized by the provisions of 51(A).

MS. COX: What the court did when it invalidated 51(B) was take away that class of individuals and lumped them all to 51(A). That is where the court came with the --- in Thigpen they were trying to protect those ---

QUESTION: Isn't that shifting the rules?

MS. COX: I don't know what type of rules you are talking about.

QUESTION: Well, you said when he was originally tried, he couldn't have been sentenced under 51(A), but the Court of Criminal Appeals said he could have.

MS. COX: No, they merely affirmed the punishment as being within the limits of ---

QUESTION: They affirmed 51(B)? They said they couldn't affirm 51(B) so they affirmed 51(A).

MS. COX: No, they merely said that the sentence was in the range of punishment that the legislature provided for the enhancement of habitual offenders.

QUESTION: So if you have a death penalty for

first degree murder and five years for manslaughter, if they sentence you to the death penalty to life imprisonment for manslaughter, that is all right because they could have sent you to death.

MS. COX: Not if that --

QUESTION: There is something wrong with that.

MS. COX: No, that creates -- let's talk about the death penalty cases in Furman where a number of states had numerous individuals on death row. This Court invalidated, especially in Woodson, the death penalty. The Oklahoma Court of Criminal Appeals invalidated those sentences and commuted them to life, and it is the same analogy that we have in this case.

QUESTION: Well, they didn't commute this sentence, they affirmed it.

MS. COX: No, but it is the same type of theory because they have the authority to affirm the sentence of the jury if they find that there is no --

QUESTION: They could affirm an unconstitutional sentence?

MS. COX: As they --

QUESTION: They could affirm an unconstitutional sentence?

MS. COX: This Court has to look to Thigpen as to why the court declared it unconstitutional. It was

because its practical application resulted in --

QUESTION: Well, do you think that this case reversed Thigpen?

MS. COX: No, no, it definitely does not reverse Thigpen at all.

QUESTION: Then how can you affirm? They didn't, that is why they used 51(A), because they couldn't affirm it on 51(B) because they had just decided Thigpen.

MS. COX: If anything, the court could have remanded the cause.

QUESTION: It is interesting, yes.

MS. COX: It is an interesting question, but the court --

QUESTION: It sure is.

MS. COX: The only remedy the court had --

QUESTION: But this man got forty years. It is not interesting to him, he has got forty years.

MS. COX: What they were saying is that in terms of due process he was afforded his hearing, his notice and simply because he was sentenced under a statute which was subsequently found to be unconstitutional, and I think we have to look at the intent of the legislature -- the intent of the Court of Criminal Appeals. They did not ask that their decision apply retroactively.

QUESTION: The Court of Appeals reaffirmed that this statute was unconstitutional.

MS. COX: They merely acknowledged --

QUESTION: They merely said it was unconstitutional.

MS. COX: They concede in their opinion and we agree.

QUESTION: From the way I read it, it was unconstitutional before Thigpen, according to what the court said. The court said and it was laid to rest in Thigpen, which meant it had been dead before.

MS. COX: Thigpen was decided after the petitioner in this case was sentenced.

QUESTION: I am talking about what the Court of Criminal Appeals said. Didn't it say that?

MS. COX: Your Honor, I would say that is what they said.

QUESTION: Ms. Cox, I suppose in any case where the legislature has validly provided for a mandatory sentence upon conviction or habitual offenders or that sort of thing, the right of allocution, the right of the defendant to get up and speak before the jury if there is jury sentencing or before the judge if there is judicial sentencing, really is a fantasm almost if the sentence has to be mandatory.

MS. COX: I would have to agree with that statement, that what good would it do for the defendant to get on the stand unless he were taking the underlying conviction upon which the enhancement was laid, that for him to be presenting the mitigating circumstances, it would not affect the range of punishment because the jury had been instructed to return a mandatory sentence.

QUESTION: If that is constitutional, to give a lot of arguments why you shouldn't be given a mandatory sentence that is required, it isn't going to do him any good.

MS. COX: I'm sorry, I missed your question.

QUESTION: For the defendant to give the jury or the judge a lot of reasons why a less than mandatory sentence shouldn't be imposed on him isn't going to do the defendant any good if the legislature has said constitutionally that this mandatory sentence shall be imposed.

MS. COX: That's correct. Of course, the petitioner argues that he should be, if he was in fact sentenced under 51(A), that the legislation should contain minimum standards in order to determine within the range of punishment that he is to have. Of course, I really feel that the analogy in this case does not apply simply because if you have sentencing standards, as in

the death penalty case, you are really looking toward the individual, and when you have discretionary sentence the jury is looking not only towards the offense but the individual offender, and the only thing that the standards and guidelines would provide in a discretionary sentence would facilitate appellate review.

QUESTION: Did you argue this case in the Court of Criminal Appeals?

MS. COX: No, I did not.

QUESTION: So you don't know any more than Mr. Ebel, I take it, except from briefs what were raised as federal constitutional issues?

MS. COX: That's correct, I did not argue it at the trial court level.

QUESTION: Do I understand correctly that you have agreed with your friend that the Court of Appeals of Oklahoma could have remanded that case for resentencing by a new jury?

MS. COX: No. The only thing that the Court of Criminal Appeals could do is reverse the entire case and start completely over. They could have remanded it.

QUESTION: If the Court of Appeals could not do it, then can this Court, could this Court remand it for resentencing?

MS. COX: I know of no procedure whereby the

State of Oklahoma could reempanel the jury. I'm sure this Court could, but how could the State of Oklahoma facilitate that request. It would require legislation or a violation of this Court's order.

QUESTION: You say every time a judge misinstructs the jury as to the range of sentencing, where there is jury sentencing and he just makes a mistake, a Court of Appeals decides that he was erroneously sentenced, properly found guilty but erroneously sentenced, there must be a new trial?

MS. COX: That's correct. I know of no instance in the State of Oklahoma where a case has been remanded specifically resentencing except in those cases where the defendant is sentenced by a trial judge without the necessity of a jury.

QUESTION: It almost follows from the fact you have jury sentencing in your state. In many states you do not have jury sentencing.

MS. COX: Oklahoma is unique in that, yes, and I didn't realize it until this particular case, but we do afford the defendant an opportunity to have his sentence determined by a jury.

Basically, all the state is saying is that basic due process requires a hearing on the trial court level, which was given in this case. On the appellant

level, where the court -- where the state of Oklahoma has granted a lot of review, the only thing that is required in that instance under due process is the right -- in this case the petitioner was entitled to an attorney at public expense, the right to a public transcript. He was entitled to brief his cause and to present errors and his only expectation in the Court of Criminal Appeals was that the court would render a fair and impartial review of his sentence and look for fundamental errors. That is all due process requires.

QUESTION: If we remanded and the Court of Criminal Appeals decided as a matter of state law that contrary to your view of the matter a new jury could be drawn for the sentencing only, even though that you say has not been done before, would that action of the Court of Appeals be reviewable here?

MS. COX: I would think so, yes.

QUESTION: What would be the federal question?

MS. COX: Well, there wouldn't be unless the defendant raised one if he was -- if in fact he went back and was resentenced and got a greater punishment, life, surely he would contest that it was a denial of due process possibly to send him back for resentencing.

QUESTION: Well, you said before he could get a life sentence.

MS. COX: Possibly if he were resentenced.

QUESTION: He didn't get a life sentence if he got the same sentence he has now, then would there be any federal question?

MS. COX: I know of none off the top of my head.

QUESTION: Assuming that the Court rejected your brother's attacks on 51(A), he presents federal questions in asserting that 51(A) itself is constitutionally invalid.

MS. COX: Yes, and that that legislation should contain minimum sentencing standards. I believe that is a due process question.

In conclusion, the respondents, as I said before, submit that the petitioner in this case has been afforded the full panoply of the due process requirements and procedures which the laws of the State of Oklahoma create. The Constitution of this country does not provide for a defendant to be resentenced anew. It is not a part of the due process clause and is not protected by the due process clause.

There can be no possible conceivable relationship between the notice requirements at the trial court level and applying them to the appellate level other than what has been create by state statute.

The state would submit that there has been

notice in all due process. The petitioner also raises questions of equal protection, but this Court in Rummel last week indicated that the state has a right to create classes of individuals under the Habitual Criminal Act. I don't feel that there is any suspect classification or any reason -- there is no procedure for anyone sentenced under 51(A) or 51(B) which would violate the procedures of the State of Oklahoma.

For that reason, the State of Oklahoma asks this Court to affirm the judgment and sentence of the Court of Criminal Appeals. Thank you.

MR. CHIEF JUSTICE BURGER: You have about three minutes remaining.

ORAL ARGUMENT OF DAVID M. EBEL, ESQ.,

ON BEHALF OF PETITIONER -- REBUTTAL

MR. EBEL: Thank you, Your Honor. Just three quick comments.

I think, although we could leave it to the Court of Criminal Appeals to decide whether they could remand this to a jury or not, I think there is precedent for that. It is a case we cite in our brief, the Epperson v. State case, where I think the Court of Criminal Appeals did just that.

QUESTION: Well, if we agree with you, counsel, presumably what we would do is be to vacate the judgment

of the Court of Criminal Appeals and remand the case to that court and let it decide what it wants to do about it.

MR. EBEL: Yes, sir. The second point is our discussion about the power of the Court of Criminal Appeals to modify sentences. That has always been interpreted under the Oklahoma law as the power to modify the length of the sentence when it is excessive. Obviously, they didn't feel this sentence here was excessive. To my knowledge, that statute has never authorized the Court of Criminal Appeals to modify the basis for which the sentence was issued, to modify the statute under which he was tried, to change the statutory basis entirely.

Finally, in response to Justice Rehnquist's question, if Mr. Justice Rehnquist will review again the petition for rehearing, the petitioner here, specifically in the petition for rehearing, Your Honor, did complain about being sentenced under federal constitutional grounds by the Court of Criminal Appeals and did ask to have that matter remanded for sentencing in accordance with state law.

QUESTION: What did the Court of Criminal Appeals do?

MR. EBEL: They denied the petition for rehearing.

QUESTION: So there is no way of knowing whether they considered it or not?

MR. EBEL: No, but it couldn't have been raised until the petitioner for rehearing because that is the frustration that Hicks faces here, until the Court of Criminal Appeals decided that he was to be sentenced under this new statute, the error hadn't occurred. This is unlike the case where the error occurs at the trial level, and then you can raise it at the Court of Appeals. This error didn't even occur until the Court of Appeals handed down its final decision. He couldn't raise --

QUESTION: You say that was the first opportunity.

MR. EBEL: That was the first opportunity, because we are not claiming error at the trial, we are claiming it at the appellate level. So there was no chance to raise it except here.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.
The case is submitted.

(Whereupon, at 11:27 o'clock a.m., the case in the above-entitled matter was submitted.)

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