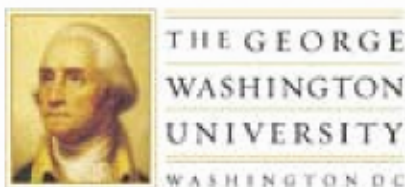


The Burger Court Opinion Writing Database

Hurtado v. United States

410 U.S. 578 (1973)

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



4

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

CHAMBERS OF
THE CHIEF JUSTICE

January 22, 1973

Re: No. 71-6742 - Hurtado v. U. S.

Dear Bill:

I voted to remand along with the majority. I think it was almost unanimous, if not so. However, the assignment to Potter is fine and I "ratify".

Regards,

WBJ

Mr. Justice Douglas

cc: Mr. Justice Stewart

wo

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

CHAMBERS OF
THE CHIEF JUSTICE

March 1, 1973

Re: No. 71-6742 - Hurtado v. U. S.

Dear Potter:

Please join me.

Regards,

W.S.B.

Mr. Justice Stewart

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B
Jy

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 10, 1973

Dear Potter:

I will write a dissent in due
course in No. 71-6742 - Hurtado v. U. S.

W. O. D.

Mr. Justice Stewart

cc: Conference

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U. S. DEPARTMENT OF JUSTICE

W. O. P.
Cir.
2-26-73

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6742

Felipe Juarez Hurtado et al., Petitioners, v. United States.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
---	---	---

[February —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

In my view, petitioners, all indigents, have been subject to discrimination "so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U. S. 497.

Petitioners, citizens of Mexico allegedly brought into the United States illegally, belong to that class of persons who as material witnesses can be subpoenaed to testify. Each must suffer at least limited invasion of his personal liberty to fulfill his public obligation to provide evidence. See *United States v. Bryan*, 339 U. S. 323, 331; *Blair v. United States*, 250 U. S. 273, 281. Petitioners, however, also belong to a discrete subclass—those whose presence it might be impractical to secure by subpoena and thus are subject to detention pursuant to Rule 46 (b) ¹ if they cannot post bail. The depriva-

¹ Rule 46 (b) reads:

"Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceedings in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail."

20

1
3
You joined 2, 3

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

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

No. 71-6742

From: Douglas, J.

Circulated: _____

Felipe Juarez Hurtado et al.,
Petitioners,
v.
United States. } On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

Re-circulated: 3-1

[February —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

In my view, petitioners, all indigents, have been subject to discrimination "so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U. S. 497.

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4-10-73 joined P8

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

1st DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 3/1/73

No. 71-6742

Recirculated:

Felipe Juarez Hurtado et al., } On Writ of Certiorari to
Petitioners, } the United States Court
v. } of Appeals for the Fifth
United States. } Circuit.

[March —, 1973]

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

I am in full agreement with much of the majority's opinion. Construing 28 U. S. C. § 1821, which authorizes compensation at the rate of \$20 per day to "[a] witness attending in any court of the United States . . .," the Court holds today that a person held in jail as a material witness¹ is "attending in" court each day that the pertinent judicial proceeding is underway, even if the witness is not physically present in the courtroom. But the majority also holds that a jailed witness is not "attending in" court prior to the inception of the judicial proceeding, even though he is held in custody for no other purpose than to insure his appearance to give testimony at trial. I reject that conclusion because, in my view, it works an obvious and severe hardship on an incarcerated witness, because it is compelled neither by the language nor the purposes of the statute, and because the statute so construed would be unconstitutional under the Due Process Clause of the Fifth Amendment.

¹ Fed. Rule Crim. Proc. 46 (b) provides that where a witness' testimony is "material" in any criminal proceeding and where it may become impracticable to secure the presence of the witness by subpoena, the court may require the witness to give bail for his appearance. If the witness fails to give bail the court may order his incarceration pending final disposition of the proceeding in which his testimony is needed.

3
—
Don't join me
MF

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

2nd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

FEB 8 1973

No. 71-6742

Recirculated: _____

Felipe Juarez Hurtado et al.,
Petitioners,
v.
United States. } On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[February —, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners, citizens of Mexico, entered the United States illegally. To assure their presence as material witnesses at the federal criminal trials of those accused of illegally bringing them into this country, they were required to post bond pursuant to Rule 46 (b) of the Federal Rules of Criminal Procedure. Unable to make bail, they were incarcerated.¹

The petitioners instituted the present class action in the United States District Court for the Western District of Texas on behalf of themselves and others similarly incarcerated as material witnesses. Their complaint alleged that they, and the other members of their class,

¹ Rule 46 (b) of the Federal Rules of Criminal Procedure provides: "(b) Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail."

12
joined 2/8

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

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Circulated: _____

No. 71-6742

Recirculated: MAR 5 1973

Felipe Juarez Hurtado et al.,
Petitioners,
v.
United States. } On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[March 5, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners, citizens of Mexico, entered the United States illegally. To assure their presence as material witnesses at the federal criminal trials of those accused of illegally bringing them into this country, they were required to post bond pursuant to Rule 46 (b) of the Federal Rules of Criminal Procedure. Unable to make bail, they were incarcerated.¹

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115-4

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

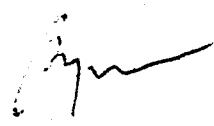
February 13, 1973

Re: No. 71-6742 - Hurtado v. United States

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 8, 1973

Re: No. 71-6742 - Hurtado v. U. S.

Dear Potter:

Please join me.

Sincerely,


T.M.

Mr. Justice Stewart

cc: Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 9, 1973

Re: No. 71-6742 - Hurtado v. United States

Dear Potter:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Stewart

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SECRETARY OF THE SUPREME COURT

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 8, 1973

Re: No. 71-6742 Hurtado v. United States

Dear Potter:

Please join me.

Sincerely,

Lewis

Mr. Justice Stewart

cc: The Conference

wp

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 12, 1973

Re: No. 71-6742 -- Hurtado v. United States

Dear Potter:

Please join me in your proposed opinion.

Sincerely,

WHR

Mr. Justice Stewart

cc: The Conference

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