

The Burger Court Opinion Writing Database

United States v. Hasting

461 U.S. 499 (1983)

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



To: Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: **APR 22 1983**

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*I am not the dissent
H*

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1463

UNITED STATES, PETITIONER *v.*
KELVIN HASTINGS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[April —, 1983]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

We granted certiorari to review the reversal of respondents' convictions because of prosecutorial allusion to their failure to rebut the Government's evidence.

I

On October 20, 1979, in the vicinity of East St. Louis, Ill., three young women were riding in an automobile driven by Randy Newcomb when a turquoise Cadillac forced them off the road. The occupants of the car, later identified as Napoleon Stewart, Gregory Williams, Gable Gibson, Kevin Anderson, and Kelvin Hastings, respondents here, forcibly removed the women from Newcomb's car; in Newcomb's presence, Stewart and Gibson immediately raped one of them and forced her to perform acts of sodomy. Newcomb was left behind while the three women were then taken in the Cadillac to a vacant garage in St. Louis, Mo.; there they were raped and forced to perform deviant sexual acts. Two of the women were then taken to Stewart's home where Stewart and Williams took turns raping and sodomizing them. The third victim was taken in a separate car to another garage where the other respondents repeatedly raped her and compelled her to perform acts of sodomy.

THE SUPREME COURT OF THE UNITED STATES
THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
THE CHIEF JUSTICE

April 28, 1983

Re: No. 81-1463, United States v. Kelvin Hastings

Dear Lewis:

I have no problem with your memo of April 27. I had assumed it was implicit that the prosecution must prove that the error was harmless beyond a reasonable doubt. However, I have changed the opinion to make this clear at p.10, in the first sentence of the first full paragraph (by inserting "beyond a reasonable doubt" before the period) and at p.11, first sentence of the first full paragraph (by changing the language after "victims," to read "is it clear beyond a reasonable doubt that the jury would have returned a verdict of not guilty?").

Regards,

WRB

Justice Powell

Copies to the Conference

Changes on 3, 4, 5, 6, 10, 11

To: Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: _____

Recirculated: April 25, 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1463

UNITED STATES, PETITIONER v.
KELVIN HASTINGS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[May —, 1983]

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Changes: 1, 2, 6, 7, 11, 12 and running head

To: Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: May 13, 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1463

UNITED STATES, PETITIONER *v.*
KELVIN HASTING ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[May —, 1983]

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Court.

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OFFICE OF THE CLERK OF THE SUPREME COURT OF THE UNITED STATES
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Changes 11, 12, 13

To: Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: _____

MAY 17 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1463

UNITED STATES, PETITIONER *v.*
KELVIN HASTING ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[May —, 1983]

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Court.

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 22, 1982

RE: No. 81-1463 United States v. Hastings

Dear Thurgood:

You and I were in dissent in the above. I plan
to try my hand at a dissenting opinion.

Sincerely,

Bill

Justice Marshall

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 5/2/83

Recirculated: _____

WJB
Please put me in your
direct

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1463

UNITED STATES, PETITIONER *v.*
KELVIN HASTING ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[May —, 1983]

JUSTICE BRENNAN, concurring in part and dissenting in part.

In this case the Court of Appeals issued a *per curiam* opinion reversing the convictions of the respondents. App. to Pet. for Cert. A-1. Most of the opinion consists of a discussion of the facts. *Id.*, at A-1-A-3. In its brief legal analysis, the court relied on its decision in *United States v. Buege*, 578 F. 2d 187 (CA7 1978), to find that the prosecutor had violated the respondents' Fifth Amendment rights by commenting on their failure to testify. *Id.*, at A-4. The court declined to apply the harmless error doctrine to this violation. The Court stated that an application of the doctrine "would impermissibly compromise the clear constitutional violation of [respondents'] Fifth Amendment rights." *Id.*, at A-5.

On its face, the Court of Appeals' opinion adopts a rule of automatic reversal for improper prosecutorial comment on a defendant's failure to testify. Such a rule was rejected by this Court in *Chapman v. California*, 386 U. S. 18, 22 (1967). The respondents argue that the Court of Appeals decision to disregard *Chapman* was justified as an exercise of the court's supervisory powers. Brief for Respondents 15-36. I would reject this argument on the ground that the Court of Appeals did not invoke its supervisory powers or provide any explanation of why this might be an appropriate case for the ex-

Jan 77

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To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

Changes at: 1, 2, 4, 5

From: Justice Brennan

Circulated: 5/16/83

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1463

UNITED STATES, PETITIONER *v.*
KELVIN HASTING ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[May —, 1983]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,
concurring in part and dissenting in part.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 28, 1983

Re: 81-1463 - United States v. Hastings

Dear Chief,

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

cpm

THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 25, 1983

Re: No. 81-1463-U.S. v. Hastings

Dear Chief:

I await the dissent.

Sincerely,

JM.

T.M.

The Chief Justice

cc: The Conference

MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 3, 1983

Re: No. 81-1463-United States v. Hasting

Dear Bill:

Please join me in your dissent.

Sincerely,

J.M.

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 16, 1983

Re: No. 81-1463 - United States v. Hasting

Dear Chief:

At the conclusion of your opinion, or wherever else it might be appropriate, will you please insert the following:

"JUSTICE BLACKMUN would vacate the judgment of the Court of Appeals and remand the case for consideration by that court of the issue whether the Fifth Amendment violation it perceived to exist was harmless error within the measure of Chapman v. California, 386 U.S. 18 (1967)."

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

April 27, 1983

81-1463 United States v. Hastings

Dear Chief:

I am happy to join your opinion. It is right on target.

It does seem to me that the first sentence in the first full paragraph on page 11 omits reference to the necessary phrase "beyond a reasonable doubt". I assume, therefore, that this change will be made to conform the statement on page 11 with the concluding sentence in the middle paragraph on page 12 where you do use the language required by Chapman.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 27, 1983

81-1463 United States v. Hastings

Dear Chief:

Please join me.

Sincerely,

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

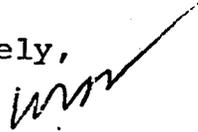
April 27, 1983

Re: No. 81-1463 United States v. Hastings

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1463

UNITED STATES, PETITIONER *v.*
KELVIN HASTINGS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[May —, 1983]

JUSTICE STEVENS, concurring in the judgment.

In my opinion the prosecutor's closing argument was free of constitutional error. It is therefore unnecessary for this Court to consider the scope of the supervisory power of the federal appellate courts,¹ and it is unjustifiable for the Court to decree that, upon examination of the record in this case, the error was harmless beyond a reasonable doubt.

Although the Government does not expressly challenge the Court of Appeals' conclusion that the prosecutor's comments were unconstitutional, both its petition and its brief on the merits question the correctness of that conclusion.² Although not conceding that the issue is properly before this Court, respondents devote several pages of their brief to the Fifth Amendment issue.³ That issue was raised and decided below and is clearly presented in the record. Further, both

¹The Court of Appeals' opinion, as JUSTICE BRENNAN's concurring opinion observes, does not expressly refer to the supervisory power, nor does it explain any of the factors that might have justified its exercise of that power. Under these circumstances, I agree with JUSTICE BRENNAN that it is improper for this Court to reach out to enunciate general principles about the limits on the supervisory power of the federal courts.

²See Pet. for Writ of Cert. 12, n. 10; Brief for the United States 22-24, and n. 19.

³Joint Brief for Respondents 37-40.

pp. 1, 2, 3, 4, 6, 7

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1463

UNITED STATES, PETITIONER v.
KELVIN HASTING ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 2, 1983

No. 81-1463 United States v. Hastings

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference