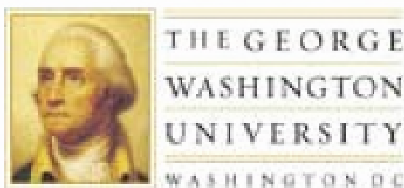
The Burger Court Opinion Writing Database

Dutton v. Evans
400 U.S. 74 (1970)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

December 30, 1969

Re: No. 21 - Dutton v. Evans

Dear Potter:

I join in your opinion. See small points made on printer's proof enclosed.

W.E.B.

Mr. Justice Stewart

cc: The Conference

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

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

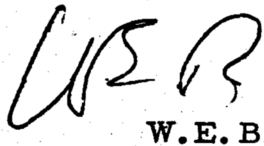
CHAMBERS OF
THE CHIEF JUSTICE

January 7, 1970

Re: No. 20 - Dutton v. Evans

Dear Potter:

Join me in your opinion.



W.E.B.

Mr. Justice Stewart

cc: The Conference

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

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

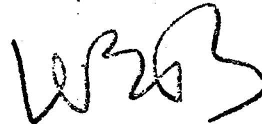
CHAMBERS OF
THE CHIEF JUSTICE

February 14, 1970

Re: No. 21 - Dutton, Warden v. Evans

Dear Potter:

My concurrence stands on your opinion as revised.



W. E. B.

Mr. Justice Stewart

cc: The Conference

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

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

January 28, 1970

Dear Potter:

Re: No. 21 - Dutton, Warden v. Evans

I regret that I can concur only in the result in this case.

Sincerely,

H. L. B.

H. L. B.

Mr. Justice Stewart

cc: Members of the Conference

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

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

January 6, 1970

<u>Re: No. 21 - Dutton v. Evans</u>

Dear Potter:

This is simply to confirm my telephone talk with you while I was in Connecticut to the effect that I intend to write separately in this case. While my present inclination still is to agree with your result, but for different reasons, I want to take a further look at the record before finally coming to rest on reversal rather than affirmance.

Sincerely,

J. M. H.

Mr. Justice Stewart

CC: The Conference

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

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

Circulated: FEB 12 1970

Recirculated: ________

No. 21.—October Term, 1969

A. L. Dutton, Warden, Appellant, v. Alex S. Evans. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[February —, 1970]

Mr. Justice Harlan, in partial concurrence with the result.

If "confrontation" is to be equated with the right to cross-examine, it would transplant the entire mass of ganglia of hearsay rules and their exceptions into the body of constitutional protections. The stultifying effect of such a course upon this aspect of the law of evidence in both state and federal systems need hardly be labored, and it is good that the Court today, as I read its opinion, firmly eschews that course.

I regret to find myself nevertheless unable to join Mr. Justice Stewart's opinion, for it seems to me to collide with the thrust of a line of recent decisions in this Court which, until they are re-examined in the context of a four-square confrontation of the "confrontation" problem, would require affirmance of the Court of Appeals in this case. See *Bruton* v. *United States*, 391 U. S. 123 (1968); *Roberts* v. *Russell*, 392 U. S. 293 (1968); *Pointer* v. *Texas*, 380 U. S. 400 (1965); *Douglas* v. *Alabama*, 380 U. S. 415 (1965); *Brookhart* v. *Janis*, 384 U. S. 1 (1966); *Barber* v. *Page*, 390 U. S. 719 (1968), and *Smith* v. *Illinois*, 390 U. S. 129 (1968). Moreover, with all respect, I think that today's prevailing opinion unwittingly sows seeds of uncertainty and mischief, for I can discern in it no test for determining when in any given instance hearsay evidence is within or beyond the pale of the "confrontation" protection.

January 27, 1970

RE: No. 21 - Dutton v. Evans

Dear Thurgood:

As I told you, I am with you in your dissent in the above. I expressed to you my thought that I'd like to see an express reservation that the view is not that the Confrontation Clause incorporates the entire common law hearsay rule and its exceptions. I think my concern could be taken care of if you would make the following addition at the end of the [illegible]

[illegible]

Sincerely, [illegible]

Mr. Justice Marshall

cc: Mr. Justice [illegible]

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

Dutton v. Evans

Suggested Addition

Add (perhaps at bottom of page 5 or top of page 6-- particularly after the citation of <u>Bruton</u> on page 6) the ~~xxxxxxxx~~ substance of the following:

> I need not go beyond those decisions by considering to what extent, if any, the Confrontation Clause incorporates the common law hearsay rule and its exceptions, since that issue is not presented here. Cf. Bruton v. United States, 391 U.S. ~~125,~~ at 128 n.3 (1968). The incriminatory statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his statement falls within a genuine exception to the hearsay rule.

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

Supreme Court of the United States
Memorandum

December 23, 1969

70-10
69-21
NS Dutton v. Evans

To: The Chief J
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice

From: Stewart,

Circulated: DE

Recirculated:

Dear John,

Footnote 19 was written in the hope that, with it, you might see your way clear to joining the opinion. Otherwise, there cannot be a Court opinion, assuming none of the 3 dissenters changes his mind. It is quite possible,

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ERM, 1969

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)70]

d the opinion of the

34, three police officers ..nnett County, Georgia. Their bodies were found a few hours later, handcuffed together in a pine thicket, each with multiple gunshot wounds in the back of the head. After many months of investigation, Georgia authorities charged the appellee Evans and two other men, Wade Truett and Venson Williams, with the officers' murder. Evans and Williams were indicted by a grand jury; Truett was granted immunity from prosecution in return for his testimony.

Evans pleaded not guilty and exercised his right under Georgia law to be tried separately. After a jury trial, he was convicted of murder and sentenced to death.[1] The judgment of conviction was affirmed by the Supreme Court of Georgia,[2] and this Court denied certiorari.[3] Evans then brought the present habeas corpus proceeding in a federal district court, alleging, among other things, that he had been denied the constitutional right of confrontation at his trial. The District Court denied

[1] The parties agree that this death sentence cannot be carried out. See n. ~~4~~ 20, *infra*.

[2] *Evans* v. *State*, 222 Ga. 392, 150 S. E. 2d 240.

[3] *Evans* v. *Georgia*, 385 U. S. 953.

Supreme Court of the United States
Memorandum

................................, 19.......

Of course, that Hugo or perhaps Byron will insist that the footnote be eliminated in any event.

Merry Christmas!

P.S.

NS

To: Th
Mr
Mr
Mr
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Mr
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Mr

E UNITED STATES From:

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TERM, 1969

Recir

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64, three police officers ...tally murdered in Gwinnett County, Georgia. Their bodies were found a few hours later, handcuffed together in a pine thicket, each with multiple gunshot wounds in the back of the head. After many months of investigation, Georgia authorities charged the appellee Evans and two other men, Wade Truett and Venson Williams, with the officers' murder. Evans and Williams were indicted by a grand jury; Truett was granted immunity from prosecution in return for his testimony.

Evans pleaded not guilty and exercised his right under Georgia law to be tried separately. After a jury trial, he was convicted of murder and sentenced to death.[1] The judgment of conviction was affirmed by the Supreme Court of Georgia,[2] and this Court denied certiorari.[3] Evans then brought the present habeas corpus proceeding in a federal district court, alleging, among other things, that he had been denied the constitutional right of confrontation at his trial. The District Court denied

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[2] *Evans* v. *State*, 222 Ga. 392, 150 S. E. 2d 240.

[3] *Evans* v. *Georgia*, 385 U. S. 953.

No 21
Dutton v Evans

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Circulated: DEC 23 1969

Recirculated:

No. 21.—OCTOBER TERM, 1969

A. L. Dutton, Warden, Appellant, v. Alex S. Evans | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[January —, 1970]

MR. JUSTICE STEWART delivered the opinion of the Court.

Early on an April morning in 1964, three police officers were brutally murdered in Gwinnett County, Georgia, Their bodies were found a few hours later, handcuffed together in a pine thicket, each with multiple gunshot wounds in the back of the head. After many months of investigation, Georgia authorities charged the appellee Evans and two other men, Wade Truett and Venson Williams, with the officers' murder. Evans and Williams were indicted by a grand jury; Truett was granted immunity from prosecution in return for his testimony.

Evans pleaded not guilty and exercised his right under Georgia law to be tried separately. After a jury trial, he was convicted of murder and sentenced to death.[1] The judgment of conviction was affirmed by the Supreme Court of Georgia,[2] and this Court denied certiorari.[3] Evans then brought the present habeas corpus proceeding in a federal district court, alleging, among other things, that he had been denied the constitutional right of confrontation at his trial. The District Court denied

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[2] *Evans* v. *State,* 222 Ga. 392, 150 S. E. 2d 240.

[3] *Evans* v. *Georgia,* 385 U. S. 953.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
~~Mr. Justice Fortas~~
Mr. Justice Marshall

From: Stewart, J.

Circulated: DEC 23 1969

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 21.—October Term, 1969

A. L. Dutton, Warden, Appellant, v. Alex S. Evans | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[January —, 1970]

Mr. Justice Stewart delivered the opinion of the Court.

Early on an April morning in 1964, three police officers were brutally murdered in Gwinnett County, Georgia, Their bodies were found a few hours later, handcuffed together in a pine thicket, each with multiple gunshot wounds in the back of the head. After many months of investigation, Georgia authorities charged the appellee Evans and two other men, Wade Truett and Venson Williams, with the officers' murder. Evans and Williams were indicted by a grand jury; Truett was granted immunity from prosecution in return for his testimony.

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[3] *Evans* v. *Georgia*, 385 U. S. 953.

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

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Fortas

From: Stewart, J.
Circulated: JAN 5 19
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1/19/12

SUPREME COURT OF THE UNITED STATES

No. 21.—October Term, 1969

A. L. Dutton, Warden, Appellant, v. Alex S. Evans

On Appeal from the United States Court of Appeals for the Fifth Circuit.

[January —, 1970]

Mr. Justice Stewart delivered the opinion of the Court.

Early on an April morning in 1964, three police officers were brutally murdered in Gwinnett County, Georgia, Their bodies were found a few hours later, handcuffed together in a pine thicket, each with multiple gunshot wounds in the back of the head. After many months of investigation, Georgia authorities charged the appellee Evans and two other men, Wade Truett and Venson Williams, with the officers' murder. Evans and Williams were indicted by a grand jury; Truett was granted immunity from prosecution in return for his testimony.

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[2] *Evans* v. *State,* 222 Ga. 392, 150 S. E. 2d 240.

[3] *Evans* v. *Georgia,* 385 U. S. 953.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

From: Stewart, J.

Circulated: JAN 16 1970

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 21.—October Term, 1969

A. L. Dutton, Warden, Appellant, v. Alex S. Evans

On Appeal from the United States Court of Appeals for the Fifth Circuit.

[January —, 1970]

Mr. Justice Stewart delivered the opinion of the Court.

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[1] The parties agree that this death sentence cannot be carried out. See n. 19, *infra*.

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[3] *Evans* v. *Georgia*, 385 U. S. 953.

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

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

From: Stewart, J.

Circulated: ______

Recirculated: JAN 19 1970

SUPREME COURT OF THE UNITED STATES

No. 21.—October Term, 1969

A. L. Dutton, Warden, Appellant, v. Alex S. Evans | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[January —, 1970]

Mr. Justice Stewart delivered the opinion of the Court.

Early on an April morning in 1964, three police officers were brutally murdered in Gwinnett County, Georgia, Their bodies were found a few hours later, handcuffed together in a pine thicket, each with multiple gunshot wounds in the back of the head. After many months of investigation, Georgia authorities charged the appellee Evans and two other men, Wade Truett and Venson Williams, with the officers' murder. Evans and Williams were indicted by a grand jury; Truett was granted immunity from prosecution in return for his testimony.

Evans pleaded not guilty and exercised his right under Georgia law to be tried separately. After a jury trial, he was convicted of murder and the judgment of conviction was affirmed by the Supreme Court of Georgia.[1] This Court denied certiorari.[2] Evans then brought the present habeas corpus proceeding in a fedral district court, alleging, among other things, that he had been denied the constitutional right of confrontation at his trial. The District Court denied the writ,[3] but the

[1] *Evans* v. *State,* 222 Ga. 392, 150 S. E. 2d 240.

[2] *Evans* v. *Georgia,* 385 U. S. 953.

[3] The opinion of the District Court is unreported.

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

January 5, 1970

Re: No. 21 - Dutton v. Evans

Dear Potter:

Please join me.

Sincerely,

B.R.W.

Mr. Justice Stewart

cc: Conference

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

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 5, 1970

MEMORANDUM TO THE CONFERENCE

As soon as possible I intend to circulate a dissent in No. 21 - Dutton v. Evans.

T.M.

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

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
~~Mr.~~ Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

From: Marshall, J.

Circulated: JAN 26 1969

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 21.—October Term, 1969

A. L. Dutton, Warden, Appellant, v. Alex S. Evans

On Appeal from the United States Court of Appeals for the Fifth Circuit.

[February —, 1970]

Mr. Justice Marshall, dissenting.

Appellee Evans was convicted of first degree murder after a trial in which a witness named Shaw was allowed to testify over counsel's strenuous objection about a statement he claimed was made to him by Williams, an alleged accomplice who had already been convicted in a separate trial.[1] According to Shaw, the statement, which implicated both Williams and Evans in the crime, was made in a prison conversation immediately after Williams' arraignment. Williams neither testified nor was called as a witness. Nevertheless, the Court today holds that admission of the statement attributed to him did not deny Evans the right "to be confronted by the witnesses against him" guaranteed by the Sixth and Fourteenth Amendments to the Constitution. In so doing, the majority reaches a result completely inconsistent with recent opinions of this Court, especially *Douglas* v. *Alabama,* 380 U. S. 415 (1965), and *Bruton* v. *United States,* 391 U. S. 123 (1968). In my view, those cases fully apply here and establish a clear violation of Evans' constitutional rights.

In *Pointer* v. *Texas,* 380 U. S. 400 (1965), this Court first held that "the Sixth Amendment's right of an

[1] Shaw had been a witness at Williams' trial, and his testimony was fully anticipated and objected to both before and after its admission.

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

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

From: Marshall, J.

Circulated: ______

Recirculated: 1-28-70

SUPREME COURT OF THE UNITED STATES

No. 21.—October Term, 1969

A. L. Dutton, Warden, Appellant,
v.
Alex S. Evans

On Appeal from the United States Court of Appeals for the Fifth Circuit.

[February —, 1970]

Mr. Justice Marshall, dissenting.

Appellee Evans was convicted of first degree murder after a trial in which a witness named Shaw was allowed to testify over counsel's strenuous objection about a statement he claimed was made to him by Williams, an alleged accomplice who had already been convicted in a separate trial.[1] According to Shaw, the statement, which implicated both Williams and Evans in the crime, was made in a prison conversation immediately after Williams' arraignment. Williams neither testified nor was called as a witness. Nevertheless, the Court today holds that admission of the statement attributed to him did not deny Evans the right "to be confronted by the witnesses against him" guaranteed by the Sixth and Fourteenth Amendments to the Constitution. In so doing, the majority reaches a result completely inconsistent with recent opinions of this Court, especially *Douglas* v. *Alabama,* 380 U. S. 415 (1965), and *Bruton* v. *United States,* 391 U. S. 123 (1968). In my view, those cases fully apply here and establish a clear violation of Evans' constitutional rights.

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[1] Shaw had been a witness at Williams' trial, and his testimony was fully anticipated and objected to both before and after its admission.

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1, 2, 3, 5, 6, 7

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

From: Marshall, J.

Circulated: ________

Recirculated: FEB 19 1970

SUPREME COURT OF THE UNITED STATES

No. 21.—October Term, 1969

A. L. Dutton, Warden, Appellant, *v.* Alex S. Evans | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[February —, 1970]

Mr. Justice Marshall, whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting.

Appellee Evans was convicted of first degree murder after a trial in which a witness named Shaw was allowed to testify over counsel's strenuous objection about a statement he claimed was made to him by Williams, an alleged accomplice who had already been convicted in a separate trial.[1] According to Shaw, the statement, which implicated both Williams and Evans in the crime, was made in a prison conversation immediately after Williams' arraignment. Williams neither testified nor was called as a witness. Nevertheless, the Court today holds that admission of the statement attributed to him did not deny Evans the right "to be confronted with the witnesses against him" guaranteed by the Sixth and Fourteenth Amendments to the Constitution. In so doing, the majority reaches a result completely inconsistent with recent opinions of this Court, especially *Douglas* v. *Alabama,* 380 U. S. 415 (1965), and *Bruton* v. *United States,* 391 U. S. 123 (1968). In my view, those cases fully apply here and establish a clear violation of Evans' constitutional rights.

[1] Shaw had been a witness at Williams' trial; his testimony was fully anticipated and was objected to both before and after its admission.

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