The Burger Court Opinion Writing Database

Dutton v. Evans

400 U.S. 74 (December 15, 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

November 3, 1970

Re: No. 10 - Dutton v. Evans

Dear Harry:

Put me down as joining you in the above. I have leaned to a "harmless error" disposition and would prefer this ground if it could muster five votes.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

November 3, 1970

Dear Potter,

Re: No. 10 - Dutton v. Evans.

I shall be with you this time unless persuaded otherwise by other writing, but I am reasonably sure that John's dissent will not change me.

Sincerely,

H. L. B.

Mr. Justice Stewart

cc: Members of the Conference

October 30, 1970

Re: No. 10 - Dutton v. Evans

Dear Potter:

I regret to say that I still find myself unable to join your revised opinion in this difficult case. I will in due course circulate a concurring opinion, somewhat changed from the one that I circulated last Term.

Sincerely,

J.M.H.

Mr. Justice Stewart

CC: The Conference

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1970

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

[November —, 1970]

Mr. Justice Harlan, concurring in the result.

Not surprisingly the difficult constitutional issue presented by this case has produced multiple opinions. The Court finds Shaw's testimony admissible because it is "wholly unreal" to suggest that cross-examination would have weakened the effect of Williams' statement on the jury's mind. Mr. Justice Blackmun, while concurring in this view, finds admission of the statement to be harmless, seemingly because he deems Shaw's testimony so obviously fabricated that no normal jury would have given it credence. Mr. Justice Marshall answers both suggestions to my satisfaction, but he then adopts a position which I cannot accept. He apparently would prevent the prosecution from introducing any out-of-court statement of an accomplice unless there is an opportunity for cross-examination, and this regardless of the circumstances in which the statement was made and regardless of whether it is even hearsay.

The difficulty of this case arises from the assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule. I believe this assumption to be wrong. Contrary to things as they appeared to me last Term when I wrote in *California* v. *Green,* 399 U. S.

pp. 2-7

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

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

No. 10.—October Term, 1970

Circulated: _____

Recirculated: DEC 2 1970

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

[December —, 1970]

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P.7

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

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

No. 10.—October Term, 1970

Circulated:

Recirculated: DEC 8 1970

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

[December —, 1970]

Mr. Justice Harlan, concurring in the result.

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P.4

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

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

No. 10.—October Term, 1970

Circulated:

Recirculated: DEC 8 1970

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

[December —, 1970]

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1,4,7

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

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

Circulated:

Recirculated: DEC 10 1970

No. 10.—October Term, 1970

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

[December —, 1970]

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SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1970

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

[November —, 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

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

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

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

pp 6, 13

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

2

From: Stewart, J.

Circulated: _____

Recirculated: NOV 19 1970

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1970

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

[November —, 1970]

Mr. Justice Stewart delivered the opinion of the Court.

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SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1970

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

[November —, 1970]

Mr. Justice Stewart announced the judgment of the Court and an opinion in which The Chief Justice, Mr. Justice White, and Mr. Justice Blackmun join.

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.

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 6, 1971

MEMORANDUM TO THE CONFERENCE

Several cases listed on page 16 of the Conference List for January 8, 1971, have been held for Dutton v. Evans, No. 10, O. T. 1970. I am of the view that none of these cases presents a certworthy confrontation issue or a need for remand in light of Dutton. I have not undertaken to express my views on the other issues raised by these petitions, including the issue whether the decisions in the federal cases are correct as a matter of the federal law of evidence.

No. 93, Littman v. United States. One of the victims of a confidence game was allowed, subject to connection as to petitioner, to testify that he heard a co-conspirator tell his wife, "[Petitioner] is the only swindler in our gang that has a law degree and I need him for the legal end of our scheme." Subsequently the district judge ruled that the statement had not been made in furtherance of the conspiracy and instructed the jury that the statement was not admissible against petitioner. The majority below did not purport to extend the federal co-conspirator hearsay exception. Judge Hays held that the curative instruction was not inadequate under Bruton. Judge Anderson concurred with the additional ground that the statement was admissible under the co-conspirator exception.

No. 417, Santos v. United States. This case was held for Dutton because the Court of Appeals and the Solicitor General relied on the federal co-conspirator hearsay exception. Dutton does not question the validity of the federal exception.

No. 5046, Mason v. United States. This case was held for Dutton because the Solicitor General argued that the right to confrontation had not been violated inasmuch as the declarant was unavailable. The Government introduced testimony from a former trial at which petitioner had cross-examined the declarant. Therefore, the confrontation claim is disposed of by California v. Green, 399 U.S. 149.

No. 5123, Baker v. California. In this case the California Supreme Court held that certain statements were admissible under the co-conspirator exception to the hearsay rule. The opinion states: "No claim is made that . . . the conspiracy was not in existence when the statements were made, and the recited evidence is sufficient to show that it existed at that time. Nor is any claim made that Brawley's statements were not made in furtherance of the conspiracy." Therefore, the co-conspirator hearsay exception applied below did not extend beyond the federal exception. Dutton does not question the validity of the federal exception.

Nos. 5250 (Bostic), 5418 (Ethridge), 5427 (Beard), 5428 (Cole), and 5437 (Ethridge). The Court of Appeals held that various statements were admissible either as dying declarations or under the federal co-conspirator hearsay exception. With regard to a statement admissible as to only one defendant, the Court of Appeals held that the district judge's limiting instruction was adequate. All petitioners were convicted on Count 1 charging conspiracy to rob a federally insured bank and to commit murder to avoid apprehension. It is argued that it was error to treat the conspiracy charged in Count 1 as a single conspiracy and to allow hearsay evidence admissible to show a conspiracy to murder to be used as evidence to establish criminal liability for the bank robbery. In view of the rationale below, a remand would serve no useful purpose. The petitions do not assert a denial of the right to confrontation, and I am inclined to think that these cases do not present a certworthy confrontation issue.

P.S.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 10, 1970

Re: No. 10 - Dutton v. Evans

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1970

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

[November —, 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 extrajudicial statement attributed to an alleged partner in crime 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.

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1970

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

[November —, 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 extrajudicial statement attributed to an alleged partner in crime 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.

pp 9, 10, 11

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

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

No. 10.—October Term, 1970

Circulated:

Recirculated: DEC 2 1970

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

[November —, 1970]

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

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Minor Changes
pp. 9, 11

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

From: Marshall, J.

Circulated: DEC 11 1970

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1970

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

[December —, 1970]

Mr. Justice Marshall, whom Mr. Justice Black, 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 extrajudicial statement attributed to an alleged partner in crime 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.

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SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1970

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

[November —, 1970]

Mr. Justice Blackmun, concurring.

The single sentence attributed in testimony by Shaw to Williams about Evans, and which now prolongs this ancient litigation, is, in my view and in the light of the entire record, harmless error if it was error at all. In addition, the claimed circumstances of its utterance are so incredible that the testimony must have harmed, rather than helped, the prosecution's case. On this ground alone, I could be persuaded to reverse and remand.

Shaw testified that Williams made the remark at issue when Shaw "went to his room in the hospital" and asked Williams how he made out at a court hearing on the preceding day. On cross-examination, Shaw stated that he was then in custody at the federal penitentiary in Atlanta; that he worked as a clerk in the prison hospital; that Williams was lying on the bed in his room and facing the wall; that he, Shaw, was in the hall and not in the room when he spoke with Williams; that the door to the room "was closed"; that he spoke through an opening about 10 inches square; that the opening "has a piece of plate glass, window glass, just ordinary window glass, and a piece of steel mesh"; that this does not impede talking through the door; and that one talks in a normal voice when he talks through that door. Shaw conceded that when he had testified at Williams'

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1970

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

[November —, 1970]

Mr. Justice Blackmun, whom The Chief Justice joins, concurring.

I join the opinion of the Court. For me, however, there is an additional reason for the result.

The single sentence attributed in testimony by Shaw to Williams about Evans, and which has prolonged this litigation, was, in my view and in the light of the entire record, harmless error if it was error at all. Furthermore, the claimed circumstances of its utterance are so incredible that the testimony must have hurt, rather than helped, the prosecution's case. On this ground alone, I could be persuaded to reverse and remand.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 24, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 10 - Dutton v. Evans

I spent some time this last weekend in a careful reading of the transcript of the state trial. This serves to buttress my feeling that the remark by Shaw was harmless error, and also serves to convince me that there was corroboration of Evans' role wholly apart from Shaw's remark. Accordingly, I have expanded on my concurrence and submit it herewith.

I may be presumptuous, with these addenda, in retaining the observation that the Chief Justice joins. He should, of course, feel free to withdraw his joinder if he so wishes.

H. A. B.

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

2, 3, 4

SUPREME COURT OF THE UNITED STATES

Mr. Justice Blackmun, J.

No. 10.—October Term, 1970

Circulated: _____

Recirculated: 11/24/70

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

[November —, 1970]

Mr. Justice Blackmun, whom The Chief Justice joins, concurring.

I join the opinion of the Court. For me, however, there is an additional reason for the result.

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

SUPREME COURT OF THE UNITED STATES

Mr. Justice Blackmun, J.

No. 10.—October Term, 1970

Circulated: _____

Recirculated: 12/4/70

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

[December —, 1970]

Mr. Justice Blackmun, whom The Chief Justice joins, concurring.

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

SUPREME COURT OF THE UNITED STATES

Blackmun, J.

No. 10.—October Term, 1970

Circulated: _____

Recirculated: 12/8/70

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

[December —, 1970]

Mr. Justice Blackmun, whom The Chief Justice joins, concurring.

I join Mr. Justice Stewart's opinion. For me, however, there is an additional reason for the result.

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