

# The Burger Court Opinion Writing Database

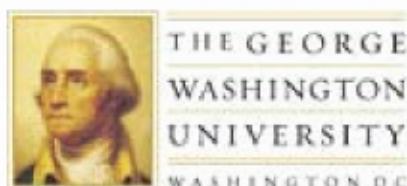
*Brooks v. Tennessee*

406 U.S. 605 (1972)

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

May 9, 1972

CHAMBERS OF  
THE CHIEF JUSTICE

3  
No. 71-5318 -- Brooks v. Tennessee

Dear Harry:

Dear Bill:

Do you contemplate joining the above?

I see the Court as confusing what may be a "bad" statute in a policy sense with unconstitutionality.

If no one is disposed to write, I would do so in about these terms and along these lines.

"CHIEF JUSTICE BURGER, dissenting.

The plain purpose of the Tennessee statute is to require the accused to testify before other witnesses for the defense are called so as to preclude him from "tailoring" or "trimming" his testimony to that of his adherents. It is a statute of dubious utility to begin with and one I would oppose were I a legislator confronted with voting for it. I would consider the traditional approach followed in federal courts and all other states as the sound one. But we do not sit to evaluate the wisdom of state statutes; only their constitutionality is our legitimate concern.

Thus although I share the Court's distaste for the Tennessee statute I would allow Tennessee to make the decision and not strain to find constitutional defects in the statute because I do not like it."

Regards,

Mr. Justice Blackmun

Mr. Justice Rehnquist

Supreme Court of the United States  
Washington, D.C.  
May 16, 1972

CHAMBERS OF  
THE CHIEF JUSTICE

No. 71-5313 -- Brooks v. Tennessee

Dear Bill:

Fire away on the above.

My "squib" was just some late night sputtering that I put on the Codaphone.

I'll join you in advance.

Regards,

Mr. Justice Rehnquist

cc: Mr. Justice Blackmun ✓

*B*  
*29*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 29, 1972

Re: No. 71-5313 - Brooks v. Tennessee

Dear Bill:

Please join me in your dissent.

Regards,

*WSB*

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
THE CHIEF JUSTICE

May 29, 1972

Re: No. 71-5313 - Brooks v. Tennessee

## MEMORANDUM TO THE CONFERENCE:

Contrary to our agreement this morning, the  
above case will go over for another week.

Regards,

WRB

I may add a few  
well chosen words!

B

To: Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: \_\_\_\_\_ JUN 2 1972

No. 71-5313 -- Brooks v. Tennessee

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

MR. CHIEF JUSTICE BURGER, dissenting.

This case is an example of the Court confusing what it does not approve with the demands of the Constitution. As a matter of choice and policy -- if I were a legislator, for example -- I would not vote for a statute like that the Court strikes down today. But I cannot accept the idea that the Constitution forbids the states to have such a statute.

Of course it is more convenient for a lawyer to defer the decision to have the accused take the stand until he knows how his other witnesses fare. By the same token it is helpful for an accused to be able to adjust his testimony to what his witnesses have had to say on the matter. No one has seriously challenged the absolute discretion of a trial judge to exclude witnesses, other than the accused, from the courtroom until they are called to the stand. The obvious purpose is to get honest testimony and minimize the prospect that a witness will adjust and "tailor" his version to fit what others have said, and it seems somewhat odd to say the Constitution forbids all states to require the accused to give his version before his other witnesses speak, since it is not possible to exclude him from the courtroom, as is the common rule on witnesses who are not parties.

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

April 1, 1972

Dear Chief:

Since I will not be here Monday when  
you are making assignments, I should pass on to you  
my suggestion in No. 71-5313 - Brooks v. Tennessee.  
The vote there was 7 - 2.

I would suggest it be assigned to Bill  
Brennan.

W. O. D.

The Chief Justice

cc: Conference

3  
M  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS      April 12, 1972

Dear Bill:

In No. 71-5313 - Brooks v.

Tennessee, please join me in your opinion.

W. O. D. (W)

Mr. Justice Brennan

cc: The Conference

*B*  
*Please join me*  
*Pls. mail to me*

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

Recirculated: 4/14/72

No. 71-5313

Recirculated: \_\_\_\_\_

Donald L. Brooks, Petitioner, | On Writ of Certiorari to  
v. | the Court of Criminal  
State of Tennessee. | Appeals of Tennessee.

[April —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was tried and convicted in the Circuit Court of Hamilton County, Tennessee, on charges of armed robbery and unlawful possession of a pistol. During the trial, at the close of the State's case, defense counsel moved to delay petitioner's testimony until after other defense witnesses had testified. The trial court denied this motion on the basis of Tenn. Code Ann. § 40-2403, which requires that a criminal defendant "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."<sup>1</sup> Although the prosecutor agreed to waive the statute, the trial court refused, stating that "the law is, as you know

<sup>1</sup> Section 40-2403 was first enacted in 1887 as part of a Tennessee statute which provided that criminal defendants were competent to testify on their own behalf. That statute appears in the Tennessee Code Annotated as follows:

"§ 40-2402. Competency of defendant. In the trial of all indictments, presentments, and other criminal proceedings, the party defendant thereto may, at his own request but not otherwise, be a competent witness to testify therein.

"§ 40-2403. Failure of defendant to testify Order of testimony. The failure of the party to testify in his own behalf shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."

2, 3, 6, 7, 8

Please find me

the Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

Brennan, J.

SUPREME COURT OF THE UNITED STATES *Recirculated: \_\_\_\_\_*

No. 71-5313

Recirculated: 4/13/72

Donald L. Brooks, Petitioner, } On Writ of Certiorari to  
v. { the Court of Criminal  
State of Tennessee. { Appeals of Tennessee.

[April —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was tried and convicted in the Circuit Court of Hamilton County, Tennessee, on charges of armed robbery and unlawful possession of a pistol. During the trial, at the close of the State's case, defense counsel moved to delay petitioner's testimony until after other defense witnesses had testified. The trial court denied this motion on the basis of Tenn. Code Ann. § 40-2403, which requires that a criminal defendant "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."<sup>1</sup> Although the prosecutor agreed to waive the statute, the trial court refused, stating that "the law is, as you know

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Page 8.

joined

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

From: Brennan, J.

3rd DRAFT

Circulated: \_\_\_\_\_

Recirculated: 4-14-72

## SUPREME COURT OF THE UNITED STATES

No. 71-5313

Donald L. Brooks, Petitioner, | On Writ of Certiorari to  
v. | the Court of Criminal  
State of Tennessee. | Appeals of Tennessee.

[April —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was tried and convicted in the Circuit Court of Hamilton County, Tennessee, on charges of armed robbery and unlawful possession of a pistol. During the trial, at the close of the State's case, defense counsel moved to delay petitioner's testimony until after other defense witnesses had testified. The trial court denied this motion on the basis of Tenn. Code Ann. § 40-2403, which requires that a criminal defendant "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."<sup>1</sup> Although the prosecutor agreed to waive the statute, the trial court refused, stating that "the law is, as you know

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"§ 40-2403. Failure of defendant to testify Order of testimony. The failure of the party to testify in his own behalf shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."

Page 8

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

4th DRAFT

From: Brennan, J.

## SUPREME COURT OF THE UNITED STATES

No. 71-5313

Recirculated: 4-25-74

Donald L. Brooks, Petitioner, } On Writ of Certiorari to  
v. } the Court of Criminal  
State of Tennessee. } Appeals of Tennessee.

[April —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was tried and convicted in the Circuit Court of Hamilton County, Tennessee, on charges of armed robbery and unlawful possession of a pistol. During the trial, at the close of the State's case, defense counsel moved to delay petitioner's testimony until after other defense witnesses had testified. The trial court denied this motion on the basis of Tenn. Code Ann. § 40-2403, which requires that a criminal defendant "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."<sup>1</sup> Although the prosecutor agreed to waive the statute, the trial court refused, stating that "the law is, as you know

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"§ 40-2403. Failure of defendant to testify Order of testimony. The failure of the party to testify in his own behalf shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."

May 11, 1972

RE: No. 71-5313 - Brooks v. Tennessee

Dear Lewis:

On April 25 you were good enough to write me in the above that while "not necessarily in disagreement with Part I" you thought the case "could be disposed of" on Part II and preferred "to join on that basis."

I am now faced with a dilemma. Bill Douglas, Byron and Thurgood join both Parts I and II and you and Potter only Part II. There are therefore four votes on Part I and six votes on Part II (the Chief, Harry and Bill Rehnquist are in dissent). In the circumstances is there a chance whether you might consider joining Part I?

Sincerely,

WJB

Mr. Justice Powell

W. B.  
OC '71  
(Approved 5/11/72)

B — Pages 4-8 & Technical changes  
joined 4/13

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

From: Brennan,

Circulated: \_\_\_\_\_

5th DRAFT

From: Brennan,

Circulated: \_\_\_\_\_

**SUPREME COURT OF THE UNITED STATES**

Circulated: 5-22-72

No. 71-5313

Donald L. Brooks, Petitioner, } On Writ of Certiorari to  
v. } the Court of Criminal  
State of Tennessee. } Appeals of Tennessee.

[April —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was tried and convicted in the Circuit Court of Hamilton County, Tennessee, on charges of armed robbery and unlawful possession of a pistol. During the trial, at the close of the State's case, defense counsel moved to delay petitioner's testimony until after other defense witnesses had testified. The trial court denied this motion on the basis of Tenn. Code Ann. § 40-2403, which requires that a criminal defendant "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."<sup>1</sup> Although the prosecutor agreed to waive the statute, the trial court refused, stating that "the law is, as you know

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"§ 40-2402. Competency of defendant. In the trial of all indictments, presentments, and other criminal proceedings, the party defendant thereto may, at his own request, but not otherwise, be a competent witness to testify therein.

"§ 40-2403. Failure of defendant to testify—Order of testimony. The failure of the party defendant to make such request and to testify in his own behalf, shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."

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

*joined*  
CHAMBERS OF  
JUSTICE POTTER STEWART

April 13, 1972

71-5313, Brooks v. Tennessee

Dear Bill,

I should appreciate your adding the following at the foot of your opinion in this case:

MR. JUSTICE STEWART joins Part II of the opinion, and in the judgment of the Court.

Sincerely yours,

*P.S.*

Mr. Justice Brennan

Copies to the Conference

30  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 23, 1972

*joined  
JRW*

Re: No. 71-5313 - Brooks v.  
Tennessee

Dear Bill:

Please join me in your  
opinion in this case.

Sincerely,

*BRW*

Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 13, 1972

Re: No. 71-5313 - Brooks v. Tennessee

Dear Bill:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Brennan

cc: The Conference

12  
Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 19, 1972

Re: No. 71-5313 - Brooks v. Tennessee

Dear Bill:

Please join me in the dissent you have  
prepared for this case.

Sincerely,

  
—

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 2, 1972

Re: No. 71-5313 - Brooks v. Tennessee

Dear Chief:

Please join me in your proposed dissent  
for this case.

Sincerely,

*H. A. B.*

The Chief Justice

cc: The Conference

April 25, 1972

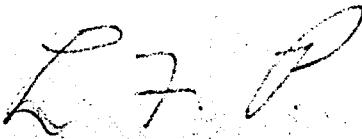
Re: No. 71-5313 Brooks v. Tennessee

Dear Bill:

I would appreciate your adding my concurrence in the judgment of the Court and in Part II of your opinion.

Perhaps you could include me with the statement requested by Potter in his memorandum of April 13.

Sincerely,



Mr. Justice Brennan

cc: The Conference

May 18, 1972

Re: No. 71-5313 Brooks v. Tennessee

Dear Bill:

I have reconsidered my position and am happy to join fully in your opinion, but would like you to add the following brief concurrence:

"I concur in the opinion of the Court but wish to emphasize that, in my view, both grounds of the reversal here rest on the due process clause of the Fourteenth Amendment and its command that state criminal prosecutions comport with the fundamentals of fair trial. See Malloy v. Hogan, 378 U. S. 1 - (1964); Ferguson v. Georgia, 365 U. S. 570 (1961). "

Sincerely,

LFP

Mr. Justice Brennan

cc: The Conference

May 24, 1972

Re: No. 71-5313 Brooks v. Tennessee

Dear Bill:

Please join me in the opinion of the Court.

Sincerely,

*Levin*

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

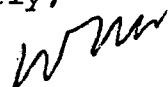
May 15, 1972

Re: 71-5313 - Brooks v. Tennessee

Dear Chief:

Your memorandum relating to Brooks v. Tennessee arrived during my absence in the mid-West. Harry and I had talked very briefly about what we would do in this and a couple of other cases, and I felt that the majority opinion was analytically vulnerable in placing the weight it did on the privilege against self-incrimination argument, whatever might be said as to the so-called right of the defendant to testify in his own behalf. I had tentatively planned to put together five or six paragraphs making this point. I would be happy to put them together in draft form for your perusal, with the thought that if you approve you could add so much of it to your proposed dissent as might appeal; alternatively, I could put them together as a dissent under my own name and circulate for your judgment. Please let me know what you think best.

Sincerely,



The Chief Justice

cc: Mr. Justice Blackmun

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 16, 1972

Re: 71-5313 - Brooks v. Tennessee

Dear Bill:

I am in the process of preparing an opinion dissenting from your majority opinion in the above case, and in due course will have some devastating things to say about your disposition of the merits. In the meantime, I hesitantly observe that there may be at least a debatably erroneous use of terminology in your footnote 4. There you say:

"Arnold v. State, 139 Tenn. 674, 202 S.W. 935 (1918), holds that a defendant may testify in rebuttal if he has testified first on direct."

My rather imperfect recollection from the days of trying cases is that the converse of direct is "cross", referring to the type of examination to which the witness is subject, and that the converse of "rebuttal" would be "case-in-chief".

If I am correct in my lexicology, the holding of Arnold is that a defendant may testify in rebuttal if he has previously testified "in the defendant's case-in-chief", rather than "on direct".

Forgive the nit-picking.

Sincerely,

*WB*

Mr. Justice Brennan

5/18/72  
Dated 5/18/72  
To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-5313

From: Rehnquist, J.

Donald L. Brooks, Petitioner, | On Writ of Certiorari to  
v. | the Court of Criminal Appeals of Tennessee.  
State of Tennessee. | Received: 5/18/72

[May —, 1972]

MR. JUSTICE REHNQUIST, dissenting.

The Court's invalidation of the Tennessee statute challenged here is based upon both its stated repugnance to the privilege against self-incrimination and its infringement of counsel's right to plan the presentation of his case.

While it is possible that this statute regulating the order of proof in criminal trials might in another case raise issues bearing on the privilege against self-incrimination, its application in this case certainly has not done so. Petitioner Brooks never took the stand, and it is therefore difficult to see how his right to remain silent was in any way infringed by the State. Whatever may be the operation of the statute in other situations, petitioner cannot assert that it infringed *his* privilege against self-incrimination—a privilege which he retained inviolate throughout the trial.

The Court's alternative holding that the Tennessee statute infringes the right of petitioner's counsel to plan the presentation of his case creates a far more dominant role for defense counsel than that indicated by the language of the Constitution. While cases such as *Gideon v. Wainwright*, 372 U. S. 335 (1963), establish the fundamental nature of the constitutional right to the assistance of counsel, no case previously decided by this Court elevates defense counsel to the role of impresario with

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 5, 1972

Re: 71-5313 - Brooks v. Tennessee

Dear Chief:

Please join me in your dissent in this case.

Sincerely,



Mr. Chief Justice

Copies to the Conference