

No. _____

IN THE
Supreme Court of the United States

SCOTT BOOKS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of *Certiorari*
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court ruled that police coerced the defendant's confession and granted defendant's motion to suppress the confession and its physical fruit. The court, however, later ruled that the government could impeach the defendant with the confession and its physical fruit if he testified. At trial, the defendant chose not to testify.

The first question presented is under *Brooks v. Tennessee*, 406 U.S. 605, 612–13 (1972), did the district court's ruling permitting impeachment with the confession and its fruit impermissibly interfere with defendant's right to counsel about "the actual worth" of defendant testifying in his own defense?

The second question presented is did the Seventh Circuit err when it distinguished the impeachment ruling as "far afield from the extreme circumstances" in *Brooks* where state statute required the defendant to testify first in the defense's case or not at all, contrary to the Fifth Amendment right against self-incrimination?

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SCOTT BOOKS,

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**PETITION FOR WRIT OF CERTIORARI TO
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PETITION FOR A WRIT OF CERTIORARI

Scott Books petitions for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 914 F.3d 574. (App. 1a-13a.) The district court's suppression order (App. 14a-20a) and the transcript of the oral ruling permitting impeachment with the confession and its fruits (App. 33a-34a) are not reported.

JURISDICTION

The court of appeals issued its opinion on January 29, 2019. (App. 10a.)

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On July 28, 2016, a masked man robbed a credit union staffed by two tellers in Normal, Illinois. (App. 2a.) The robber took 20 seconds, and the robber said 10 words total. (App. 2a.) He was about 6 feet tall, wore a black hoodie, a black mask, neon yellow gloves, and carried a black gun. (App. 2a, 14a.)

Police obtained a search warrant for Scott Books' home based on: a teller telling police she recognized the mannerisms and voice of the masked man as a customer, Books; and the teller matching the getaway vehicle to a photo of his wife's SUV. Police executed the search warrant on July 29, 2016, in the early morning. (App. 2a-3a, 15a.) Police arrested Books for bank robbery. (App. 3a.)

At the police station, a detective and FBI agent interrogated Books from 3 a.m. until 6 a.m. (App. 3a, 17a–18a.) Around 5:12 a.m., Books confessed. (App. 3a, 18a.) He provided information that police used to locate physical evidence including yellow gloves, a black sweatshirt, and a fake black gun. (App. 3a, 18a.)

Books moved to suppress his confession. The district court granted the suppression motion. (App. 14a–20a.) It ruled police threatened to charge his wife with robbery and refer his children to child services, and Books' will was overborne by those threats. (App. 3a.) The court suppressed Books' statements after timestamp 5:12:45 of the interrogation video—including his confession and his statements about where to find physical evidence—and physical evidence derived from those statements. (App. 3a, 19a.)

The government filed a pretrial motion asking for wide latitude to use the confession's substance and physical fruit to impeach Books if he testified. The government argued “[a]ny relevant testimony” from Books “would implicate [his] independent and specific knowledge of instrumentalities of the robbery.” (App. 39a.) It argued that under “the impeachment rule” the scope of cross-examination could go into any “question that is material” even if “it is not explicitly brought up on direct examination.” (App. 32a.) The government proposed cross-examining Books about why he was aware of where police recovered the robbery's instrumentalities. (App. 24a–25a, 29a.) Books objected

that permitting the confession's substance and physical fruits to be used for impeachment purposes would violate his rights to due process and against self-incrimination, contrary to the suppression order. (App. 28a-29a, 30a-31a.)

All acknowledged that the court's ruling would affect defense counsel's advice about Books' testifying. The court and defense counsel agreed "that Defense Counsel needs to know the answer to this question before the trial starts" presumably because Books wanted to determine if he should testify. (App. 33a.) The government admitted it filed the motion because Books filed his Rule 609(a) motion, and the government said this showed he wanted to "testify in his own defense." (App. 37a, 39a.)

The district court conditionally granted the government's motion. (App. 4a, 33a:25-34a:19.) It cited two main grounds. First, mirroring the government, the court alluded to Justice Kennedy's concurrence in *United States v. Patane*, 542 U.S. 630, 645 (2004), that under *Miranda* reliable "physical evidence might be considered somewhat differently" from a coerced confession respecting admissibility. *Compare* (App. 28a), *with* (App. 38a)). Second, the court focused on "balancing policies" between the admissibility of evidence from a coerced confession and the criminal justice system's antiperjury interests. (App. at 29a-30a, 34a.)

While the court's oral ruling stated the government's questions must be submitted outside the jury's presence so Books could make specific objections, (App. 4a, 34a), this procedure would only occur *post hoc*, after Books testified. At trial, Books elected not to testify. (App. 6a.) The jury found Books guilty of bank robbery in violation of 18 U.S.C. § 2113(a). (App. 6a.)

On appeal, Books argued, *inter alia*, that the district court's impeachment ruling violated his Fifth Amendment right to due process and Sixth Amendment right to counsel. (App. 10a, 12a-13a.) He argued that under *Brooks v. Tennessee*, 406 U.S. 605 (1972) his counsel could not evaluate whether his testimony would be useful to his case. (App. 12a-13a.) For under the district court's impeachment ruling, Books' testimony permitted the government to violate his Fifth Amendment right against self-incrimination, impeach him with the coerced confession and its fruits, and render his testimony toxic. (App. 33a-34a) ("THE COURT: You would ask him if he told the police where the items were? MR. KORN: That's correct. . . . [THE COURT:] My ruling is that I'm going to—I would allow that."); *accord* (App. 24a) ("[MR. KORN:] [W]hat I'm seeking to do is [ask] something to the effect of, 'If you didn't commit the robbery, how are you aware' – 'how were you aware of the gloves that were used on Veterans Parkway? How were you aware of the bag of clothes and the fake firearm that was' – 'that you directed law enforcement to at CVS?'"'). Books' appeal argued

that under *Brooks* and *New Jersey v. Portash*, 440 U.S. 450, 458–59 (1979), antiperjury interests did not permit the district court to use the impeachment ruling to limit a defendant’s relief respecting a coerced confession and its fruit. He also argued that a right to counsel error under *Brooks* was a structural error.

The Court of Appeals for the Seventh Circuit affirmed Books’ conviction on January 29, 2019. The Seventh Circuit did not resolve whether the impeachment ruling was impermissible under the Fifth Amendment because Books did not testify. (App. 10a–11a.) It reasoned that *Brooks* did not bar the ruling because the potential admission of a coerced confession and its fruit as impeachment was “far afield from the extreme circumstances” in *Brooks*. (App. 13a.) It characterized the ruling as only concerning the “fruit of his confession,” although it acknowledged “the government sought to impeach him on cross-examination *with his prior statements.*” (App. 4a) (emphasis added). It characterized Books as “fac[ing] only the uncertainty that often accompanies an unfavorable (and perhaps even incorrect) pretrial ruling on the scope of impeachment.” (App. 13a.) The court contrasted this description with *Brooks* where “the Supreme Court considered a state statute that required a defendant, if he chose to put on a defense at trial, to be the first defense witness to testify, forcing a preemptive decision to take the stand absent a ‘full survey of all the case.’” (App. 13a.)

This petition for a writ of *certiorari* now follows.

REASONS FOR GRANTING THE WRIT

When police interrogate a suspect about a crime, obtaining a confession is a key objective. The Fifth Amendment right against self-incrimination regulates interrogations by excluding coerced confessions and their fruit from the criminal process. *Chavez v. Martinez*, 538 U.S. 760, 769–70 (2003) (plurality opinion); *Kastigar v. United States*, 406 U.S. 441, 452 n.36 (1972). The right is a protection that maintains the criminal justice system as an accusatorial rather than inquisitorial system. *Michigan v. Tucker*, 417 U.S. 433, 439–40 (1974). It return parties to a “substantially the same position” as before police coerced the incriminating statements and derivative evidence. *Kastigar*, 406 U.S. at 458. Absent that rule, police have a strong incentive to coerce confessions.

The Seventh Circuit’s opinion incentivizes coercing a confession to deter a defendant testifying in his own defense. The district court’s conditional impeachment ruling accepted that impeachment with a coerced confession and its fruit was permissible, in principle, based on antiperjury concerns. (App. 33a-34a.) Allowing objections to specific impeachment questions, (App. 34a), provided meager protection because it would occur after Books testified and allegedly would have opened the door to such impeachment. Only declining to testify guaranteed the suppressed evidence stayed suppressed. That the Seventh

Circuit declined to hold that the Fifth Amendment bars physical evidence derived from a coerced confession underlines how the opinion encumbers defense counsel when advising a defendant about testifying. (App. 10a-11a.)

Under these rules, defense counsel could not “evaluate the actual worth of their evidence” from Books’ prospective testimony for even stronger reasons than in *Brooks*, 406 U.S. at 612. This Court’s review is warranted.

I. Under *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972), the district court’s ruling permitting impeachment with the coerced confession and its physical fruit impermissibly interfered with defendant’s right to counsel about “the actual worth” of defendant testifying in his own defense.

1. In *Brooks*, the Tennessee trial court ruled conditionally that state statute required a criminal defendant either to be the first defense witness or not to testify at all. 406 U.S. at 606. The rationale for the statute was that testifying first served the court’s antiperjury interests because the defendant could not tailor his testimony to that of other defense witnesses. *Id.* at 607, 611-12. This Court rejected that rule in two holdings citing the defendant’s constitutional right against self-incrimination and right to counsel.

First, this Court held the state statute was unconstitutional under the Fifth Amendment right against self-incrimination. *Id.* at 611-12. The problem was it diminished that right because it made “assertion [of that right] costly.” *Id.* at 611. The Court analyzed that cost as twofold. On one hand, a defendant testifying in his own defense opened himself to “impeachment and cross-examination.” *Id.* at

612. On the other hand, a defendant could not be certain *ex ante* that his other witnesses would perform under pressure of cross-examination, appear credible to the jury, or avoid giving adverse testimony. *Id.* at 609–10.

Because of these uncertainties, a defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed.

Id. at 610.

Second, the Court held that the Fifth Amendment violation interfered with the defendant's right to counsel because it "deprived the accused of 'the guiding hand of counsel at every step in the proceeding against him.'" *Id.* at 612 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). The Court opined:

Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of its case.

Id. at 612. The state statute encumbered defense counsel's ability to determine whether and when a defendant should testify, and this was contrary to defendant's Sixth Amendment right to counsel. *Id.* at 613.

This Court clarified in later cases that a *Brooks* right to counsel error is a structural error. *Bell v. Cone*, 535 U.S. 685, 695, 696 n.3 (2002) (citing *Brooks*, 406 U.S. 612–13); *Perry v. Leeke*, 488 U.S. 272, 280 (1989) (same); *Strickland v.*

Washington, 466 U.S. 668, 692 (1984) (same); *United States v. Cronic*, 466 U.S. 648, 659 & n.25 (1984) (same).

2. In distinguishing *Brooks*, the Seventh Circuit incorrectly characterized “Books . . . [as] fac[ing] only the uncertainty that often accompanies an unfavorable (and perhaps even incorrect) pretrial ruling on the scope of impeachment.” *Books*, 914 F.3d at 581. On the contrary, the district court’s impeachment ruling permitting use of the coerced confession and its physical fruit impermissibly interfered with defense counsel’s ability “to evaluate the actual worth of their evidence” and this “restrict[ed] the defense . . . in the planning of its case.” *Brooks*, 406 U.S. at 612.

The district court’s impeachment ruling rendered Books’ testimony, even on discrete topics, toxic because the threatened impeachment would inform the jury about his coerced confession to police about the physical evidence. “Triers of fact accord confessions such heavy weight . . . that ‘the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.’ . . . No other class of evidence is so profoundly prejudicial.” *Connelly*, 479 U.S. at 182 (Brennan, J., dissenting). Being forced to accept a coerced confession and its physical fruits *via* impeachment as the price of providing “[a]ny relevant testimony,” (App. 39a), inserted a peculiarly potent poison pill into defense

counsel's deliberations about the value of Books testifying. The government was forthright that Books' deliberations about testifying motivated the government's motion to admit the confession and its fruits for impeachment. (App. 37a.)

While the district court "reserved a final ruling" about particular questions (App. 4a), this procedure (App. 34a:1-6) provided no *ex ante* guidance about testimony that might avoid admission of the coerced confession and its fruits as impeachment evidence. It did not put defense counsel in any better position to evaluate the costs and benefits of Books testifying given the looming threat of impeachment with the confession. Once Books testified, he would not be able to unring that bell to avoid impeachment with the coerced confession and its fruit. The impeachment ruling thus "interfere[d]" with the "ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (citing *Brooks*, 406 U.S. at 612-13).

3. Antiperjury concerns did not render the impeachment ruling's interference with the defense's ability "to evaluate the actual worth of [its] case" permissible. While the district court cited antiperjury interests as grounds for its ruling, (App. 29a-30a, 34a), this Court has held that antiperjury concerns notwithstanding, impeachment with an involuntary confession is impermissible under the Fifth Amendment. *Portash*, 440 U.S. at 459 (holding that "[b]alancing of interests," including antiperjury interests, is an "impermissible" reason to admit

a coerced confession for impeachment purposes); *see Brooks*, 406 U.S. at 611 (rejecting “ensuring [defendant’s] honesty” as a “constitutionally permissible” footing for burdening the right against self-incrimination).

Instead, the Fifth Amendment shifts antiperjury interests respecting a coerced confession from the initial prosecution – where the coerced confession and its fruits are inadmissible even for impeachment – to a subsequent perjury case where the confession and its fruits are admissible in the case-in-chief. *See United States v. Apfelbaum*, 445 U.S. 115, 128, 130 (1980); *United States v. Pantone*, 634 F.2d 716, 722 (3d Cir. 1980); *United States v. Frumento*, 552 F.2d 534, 544 (3d Cir. 1977). Additionally, defense counsel’s obligations to the court and to clients deter perjury. *See Nix v. Whiteside*, 475 U.S. 157, 169–71 (1986).

II. The Seventh Circuit erred when it distinguished the impeachment ruling as “far afield from the extreme circumstances” in *Brooks* where state statute required the defendant to testify first in the defense’s case or not at all, contrary to the Fifth Amendment right against self-incrimination

1. The Seventh Circuit distinguished Books’ situation as “far afield from the extreme circumstances defense counsel confronted in *Brooks*.” (App. 13a.) On the contrary, the impeachment ruling in Books’ case struck at the heart of the Fifth Amendment – how a coerced confession and its fruit may be used in a criminal case – whereas *Brooks* concerned a more peripheral problem of when a defendant must testify if at all. Moreover, the potential damage to

Books from admission of the coerced confession and its fruit as impeachment dwarfed the danger and uncertainty the *Brooks* defendant faced.

2. Unlike the state statute in *Brooks*, regulating the use of coerced statements in criminal cases is the heart of the right against self-incrimination. Commenting on the right's history, this Court wrote in *Michigan v. Tucker*:

The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. . . . Certainly anyone who reads accounts of those investigations, which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, cannot help but be sensitive to the Framers' desire to protect citizens against such compulsion. As this Court has noted, the privilege against self-incrimination "was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality."

417 U.S. 433, 440 (1972) (citations omitted). Through this right, "the Founders sought to close the doors against like future abuses by law-enforcing agencies." *Ullmann v. United States*, 350 U.S. 422, 428 (1956). In contrast, *Brooks'* state statute was rooted in an "ancient practice" but constitutional criticism of it was unique to the *Brooks* litigation. See 406 U.S. at 608 (stating the extant court opinions conflicting with the state statute in *Brooks* "were not based on constitutional grounds").

3. Contrary to the Seventh Circuit's opinion, the impeachment ruling involved significantly more "extreme circumstances than defense counsel confronted in *Brooks*," (App. 13a), because the ruling eviscerated the Fifth

Amendment's numerous, robust protections against the use and derivative use of involuntary statements and their fruits. "The Fifth Amendment privilege" against self-incrimination provides "[i]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom . . . [and] [p]rohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."

Kastigar v. United States, 406 U.S. 441, 453 (1972). "[C]ompelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.* at 457 (citation omitted). It is a "total prohibition" on use and derivative use. *Id.* at 460. "[T]he Court requires the exclusion of the physical fruits of actually coerced statements . . ." *United States v. Patane*, 542 U.S. 630, 644 (2004) (plurality opinion).

These protections apply not only to immunized testimony but also to coerced confessions. *Chavez v. Martinez*, 538 U.S. 760, 769-70 (2003) (plurality opinion) (citations omitted) ("[T]hose subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) . . . that is coextensive with the use and derivative use immunity mandated by *Kastigar* . . ."); *Kastigar*, 406 U.S. at 452 n.36 (quoting 2 Nat'l Comm'n on Reform of Fed. Crim. Laws, *Working Papers of*

the Commission 1446 (1970), <https://bit.ly/2K9XaVF>) (“Immunity from use . . . flow[s] from a violation of the individual’s right to be protected from . . . be[ing] coerced into confessing . . . [and is] of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers.”).

This Court recognizes that a coerced confession is inadmissible even for impeachment purposes. *See, e.g., Kansas v. Ventris*, 556 U.S. 586, 590 (2009) (“The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise.”); *Patane*, 542 U.S. at 639 (stating that “statements taken without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant’s testimony at trial . . . though the fruits of actually compelled testimony cannot”); *Michigan v. Harvey*, 494 U.S. 344, 351 (1990) (“We have mandated the exclusion of reliable and probative evidence for *all* purposes only when it is derived from involuntary statements.”); *Oregon v. Elstad*, 470 U.S. 298, 306–07, 309 (1985) (distinguishing a presumptively coerced confession under *Miranda*, admissible “for impeachment purposes,” from the “irremediable consequences [of] police infringement of the Fifth Amendment itself.”); *Portash*, 440 U.S. at 459 (holding that “[b]alancing of interests,” including antiperjury interests, is an “impermissible” reason to admit

an involuntary confession for impeachment purposes); *Mincey v. Arizona*, 437 U.S. 385, 397–98, 401–02 (1978) (holding involuntary confession is inadmissible for impeachment purposes).

4. Contrary to the Seventh Circuit’s opinion, the impeachment ruling involved significantly more “extreme circumstances than defense counsel confronted in *Brooks*,” (App. 13a), because risking admission of the confession and its fruits would “make the other aspects of a trial in court superfluous.” *Connelly*, 479 U.S. at 529 (Brennan, J., dissenting). If having to testify first or not at all impermissibly interfered with the right to counsel in *Brooks*, it is inconceivable that losing the protections of the suppression order to testify did not also impermissibly interfere with Books and his defense counsel.

The Seventh Circuit’s determination that the district court’s impeachment ruling did not violate Books’ Sixth Amendment right to counsel is contrary to *Brooks v. Tennessee*. This Court’s self-incrimination clause jurisprudence underscores this error. For the foregoing reasons, this Court should grant this writ to correct the Seventh Circuit’s errors.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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