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Federal Criminal Procedure - Privilege for Adverse Spousal Testimony Vested in Witness Spouse

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INTRODUCTION

The marriage relationship gives rise to two distinct privileges in the federal courts. One, the privilege for adverse spousal testimony, allows a party to exclude the adverse testimony of his or her spouse. The other, the privilege for marital communications, protects confidential communications made to one's spouse during the marriage. The privilege for adverse spousal testimony is used primarily in federal criminal procedure, but there is some authority that the privilege for adverse spousal testimony applies to civil actions. The modern justification for the privilege for adverse spousal testimony is the encouragement of harmony and peace in the marital relationship.

The privilege has common law origins but has been subject to sharp criticism over the years. McCormick labeled the privilege "arbitrary and misguided," and Professor Wigmore called the privilege "the merest anachronism in legal theory and an indefensible obstruction to truth in practice." The United States Supreme Court considered the justification and purpose of the privilege for adverse spousal testimony in Trammel v. United States. That Court held that in the federal criminal courts the witness spouse alone has the privilege to refuse to testify adversely. Formerly, the adverse testimony was barred unless both spouses con-

2. Id.
5. 8 J. Wigmore, Evidence § 2333 (McNaughton rev. 1961).
7. 8 J. Wigmore, supra note 5, § 2228.
9. Id. at 53.
sented. In the opinion by Chief Justice Burger, the Court concluded that such modification of the privilege would further "the public interest in marital harmony without unduly burdening legitimate law enforcement needs."

THE CASE

On March 10, 1976, Petitioner, Otis Trammel, was indicted for importing heroin into the United States from Thailand and the Philippine Islands and for conspiring to import heroin in violation of 21 U.S.C. sections 952(a), 962(a) and 963. Petitioner's wife, Elizabeth Ann Trammel, was named as an unindicted co-conspirator. In a pretrial motion, petitioner asserted his claim to a privilege to prevent his wife from testifying against him. At a hearing on the motion, Mrs. Trammel testified that she and petitioner had been married since 1975. She then related both her role and her husband's role in the heroin distribution conspiracy and explained that her cooperation with the government was based on a grant of immunity from prosecution. The district court held that she could testify as to any act observed during the marriage and to any communication made in the presence of a third person. However, the court did exclude evidence of confidential communications between the petitioner and his wife. At trial, Mrs. Trammel testified within the court's pretrial limitations and petitioner was found guilty on both charges.

On appeal, Trammel argued that the admission of his wife's adverse testimony was contrary to the rule set forth in *Hawkins v. United States.* The *Hawkins* decision provided that testimony of one spouse against the other in a federal criminal action is inadmissible unless both spouses consent to such testimony. The government argued that the testimony of Elizabeth Trammel was admitted properly because both spouses participated in the unlawful enterprise. The Tenth Circuit Court of Appeals affirmed the district court holding with one judge dissenting. The United States

11. 445 U.S. at 53.
12. Edwin Lee Roberts and Joseph Freeman were indicted also for importing heroin and for conspiring to import heroin.
13. 445 U.S. at 43.
14. 583 F. 2d 1166, 1168 (10th Cir. 1978).
15. 358 U.S. at 74.
16. 583 F.2d at 1171.
Supreme Court granted certiorari to examine the validity of the *Hawkins* rule. The Court concluded that the existing *Hawkins* rule should be modified so that the witness spouse alone has the privilege to refuse to testify adversely.

**BACKGROUND**

The privilege against adverse spousal testimony originated at common law as one branch of a two-pronged rule of exclusion. In 1628, Lord Coke stated that "it hath beene resolved by the Justices that a wife cannot be produced either against or for her husband." Thus, at common law, the rule of exclusion included the privilege against adverse spousal testimony and the disqualification of a husband or wife to testify on behalf of his respective spouse. The common law courts recognized the privilege-disqualification distinction but considered the two rules as one unit in judicial opinions over the years.

The privilege branch of the common law rule was not without exception. In trials for crimes of physical violence committed by one spouse against the other, adverse spousal testimony was admissible without the consent of both parties. Without such exceptions, the common law courts felt that strict application of the privilege would permit one spouse to harm the other in private without fear of prosecution.

The federal courts recognized the two-part rule of exclusion in the nineteenth century. Then, in *Funk v. United States*, the United States Supreme Court abolished the disqualification for spousal testimony on behalf of the other spouse in the federal courts. In an opinion by Justice Sutherland, the Court reasoned that since defendants were allowed to testify in their own behalf, there was no reason to prevent them from using their spouses for the same purpose. Any danger of false testimony by the witness

17. 445 U.S. at 41.
18. *Id.* at 53.
19. 8 J. Wigmore, *supra* note 5 § 2227.
20. *Id.*
21. *Id.*
22. *Id.* at § 2239.
25. *Id.* at 381.
spouse was minimal due to the test of cross-examination.\textsuperscript{26} Thus, one branch of the two-pronged common law rule was eliminated.

The other branch has been limited by exceptions and judicial constructions. The first exception to the privilege was established in \textit{Herman v. United States}.

The \textit{Herman} court held that the privilege would not bar adverse spousal testimony where the defendant spouse commits a crime affecting the property of the witness spouse.\textsuperscript{28}

\textit{Hawkins v. United States} reaffirmed the validity of the privilege against adverse spousal testimony in the federal criminal courts.\textsuperscript{29} The \textit{Hawkins} decision provided that in the federal criminal courts testimony of one spouse against the other is barred unless both consent.\textsuperscript{30} In the opinion by Justice Black, the Court concluded that the privilege was necessary to foster family peace, not only for the benefit of the husband and wife, but also for the benefit of the general public.\textsuperscript{31} Relying on Rule 26 of the Federal Rules of Criminal Procedure,\textsuperscript{32} Justice Black stressed that the \textit{Hawkins} decision did not foreclose future changes in the privilege which are dictated by "reason and experience."\textsuperscript{33}

Three important exceptions to the privilege for adverse spousal testimony developed after \textit{Hawkins}. The first was established in \textit{Wyatt v. United States}.\textsuperscript{34} In \textit{Wyatt}, the Court held that a husband-defendant may not prevent his wife from testifying against him in a Mann Act\textsuperscript{35} prosecution where the wife is the victim of the offense.\textsuperscript{36} The second exception to the privilege, estab-

\begin{itemize}
\item \textsuperscript{26} Id. at 380.
\item \textsuperscript{28} 220 F.2d at 226 (the defendant in \textit{Herman} fraudulently converted cash and jewelry owned by his wife).
\item \textsuperscript{29} 358 U.S. 74.
\item \textsuperscript{30} Id. at 78.
\item \textsuperscript{31} Id. at 77.
\item \textsuperscript{32} FED. R. CRIM. P. 26 (1948): "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."
\item \textsuperscript{33} 358 U.S. at 79.
\item \textsuperscript{34} 362 U.S. 525 (1960).
\item \textsuperscript{35} 18 U.S.C. §§ 2421, 2422 (1976).
\item \textsuperscript{36} 362 U.S. at 526. The Court declined to expand this exception to apply to criminal acts other than Mann Act violations. Since 1960, one federal court has applied the exception to criminal acts other than Mann Act violations. \textit{E.g.},
\end{itemize}
lished in *United States v. Allery*,\(^{37}\) allows adverse spousal testimony where one spouse commits a crime against the children of either spouse. The third exception to the privilege was established in *United States v. Moorman*.\(^{38}\) The court in *Moorman* held that the privilege could be waived by the defendant spouse in the federal courts.\(^{39}\)

**ANALYSIS**

In *Trammel v. United States*, the Supreme Court modified the existing *Hawkins* rule and placed the privilege for adverse spousal testimony exclusively in the witness spouse.\(^{40}\) The Court held that when the spouse is called to testify, the spouse may neither be required to testify nor prevented from testifying against the defendant spouse. Relying on Rule 501 of the Federal Rules of Evidence,\(^{41}\) the Court concluded that "reason and experience" no longer justified so broad a rule as established by the Court in *Hawkins*.\(^{42}\) In deciding to limit the rule, the *Trammel* Court balanced the societal interest in preserving marital harmony against the societal need for probative evidence in criminal trials.\(^{43}\) The Court felt that vesting the privilege in the witness spouse would foster marital harmony without frustrating justice.\(^{44}\)

Five important factors influenced the Court to modify the privilege for adverse spousal testimony. First, support for the privilege has diminished among the states. In the twenty-two years between the *Hawkins* and *Trammel* decisions, seven jurisdictions abolished or revised the privilege.\(^{45}\) The Court found this point significant because states traditionally are charged with developing the law of marriage and domestic relations.\(^{46}\) Second, the privilege

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Grulkey v. United States, 394 F.2d 244 (8th Cir. 1968); United States v. Smith, 533 F.2d 1077 (8th Cir. 1976).  
37. 526 F.2d 1362 (8th Cir. 1975).  
38. 358 F.2d 31 (7th Cir. 1966), cert. denied, 385 U.S. 866 (1966).  
39. *Id.* at 33. See United States v. Craig, 528 F.2d 773, 780 (7th Cir. 1976); Peek v. United States, 321 F.2d 934 (9th Cir. 1963), cert. denied, 376 U.S. 954 (1964).  
40. 445 U.S. at 53.  
41. FED. R. EVID. § 501.  
42. 445 U.S. at 53.  
43. *Id.* at 51.  
44. *Id.* at 53.  
45. *Id.* at 48.  
46. *Id.* at 50.
for marital communications remains in effect in the federal criminal courts. Thus, information privately disclosed between husband and wife is still privileged. Third, the privilege against adverse spousal testimony can be invoked by defendants to exclude evidence of criminal activity and communications made in the presence of third persons. In comparison, the privileges between attorney and client, priest and penitent, and physician and patient protect only private communications. Fourth, modern society no longer denies women a legal existence. The common law concept of husband and wife as one person is no longer valid in any jurisdiction. Finally, when one spouse agrees to testify against the other in a criminal trial, the privilege is unjustified because there is probably little marital harmony to preserve. These five factors convinced the Court to modify the Hawkins rule and to shape a privilege that strikes a balance between competing societal interests.

The Supreme Court rejected the reasons advanced by the court of appeals. That court had relied heavily on two points to support its holding that Mrs. Trammel's testimony was admissible. The first point was the fact that Otis Trammel and his wife Elizabeth had participated jointly in the criminal conspiracy. The other was that Elizabeth Trammel had testified under a government grant of immunity. The Supreme Court ignored the first point and hardly mentioned the second. Instead, the Court used the Trammel case as a vehicle to bring the privilege more in line with current legal trends.

Justice Stewart in his concurring opinion indicated that "reason and experience" had not worked a drastic change since Hawkins. Stewart pointed out that "[t]he fact of the matter is that the Court in this case simply accepts the very same arguments that

48. 445 U.S. at 51.
49. E. Cleary, supra note §§ 6, 87, 89, 91.
50. Id. at § 77.
51. Id. at §§ 98, 101.
52. 445 U.S. at 51.
53. Id. at 52.
54. Id.
55. 583 F.2d 1169-70.
56. Id. at 1169.
57. Id.
58. 445 U.S. at 54.
59. Id. at 914.
the Court rejected when the Government first made them in the Hawkins case in 1958."^{60} Justice Stewart had expressed support for modifying the privilege in the Hawkins decision but felt Hawkins was not the proper situation in which to make the change.\footnote{Id.} Contrary to Chief Justice Burger, Stewart felt that the ancient foundations for the privilege disappeared long before 1958 and not within the interim between Hawkins and Trammel.\footnote{358 U.S. at 81-82.}

**CONCLUSION**

Trammel modified the privilege against adverse spousal testimony in the federal criminal courts and placed the privilege exclusively in the witness spouse; thus, “the witness may be neither compelled to testify nor foreclosed from testifying.”\footnote{100 S. Ct. at 914.} Under the old Hawkins rule, testimony of one spouse against the other was barred unless both consented.\footnote{Id.} Such modification of the privilege strikes the best balance between the competing interests of preserving marital harmony and securing accurate trial results. As a matter of self-interest, a defendant spouse usually will seek to prevent adverse spousal testimony regardless of the effect on marital harmony. In almost every case, the Hawkins rule ignored the interest in accurate trial results. Vesting the privilege in the witness spouse provides a proper middle ground between the interest of marital harmony and the need for probative evidence.

Support for the former privilege among the states probably will continue to diminish. Relying on Trammel, the North Carolina Supreme Court recently held that spouses are competent to testify against one another in a criminal proceeding.\footnote{State v. Freeman, No. 99 — Mecklenburg (N.C. April 7, 1981).} Spouses are still incompetent to testify against one another in a criminal proceeding if the substance of the testimony concerns a “confidential communication” between the marriage partners made during their marriage.\footnote{Id. at 5.}

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