

IN THE SUPREME COURT OF THE UNITED STATES

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OTIS TRAMMEL, JR., :

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 Petitioner, :

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 v. : No. 78-5705

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UNITED STATES, :

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 Respondent. :

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Washington, D. C.,

Monday, October 29, 1979.

The above-entitled matter came on for oral argument

at 2:30 o'clock p.m.

BEFORE:

- WARREN E. BURGER, Chief Justice of the United States
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice
- HARRY A. BLACKMUN, Associate Justice
- LEWIS F. POWELL, JR., Associate Justice
- WILLIAM H. REHNQUIST, Associate Justice
- JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

- J. TERRY WIGGINS, ESQ., 200 Steele Park, 50 South

Steele Street, Denver, Colorado 80209; on

behalf of the Petitioner

- WADE H. McCREE, JR., ESQ., Solicitor General of the

United States, Department of Justice, Washington,

D. C., on behalf of the Respondent

C O N T E N T SORAL ARGUMENT OFPAGE

J. TERRY WIGGINS, ESQ.,

on behalf of the Petitioner

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-5705, Trammel v. United States.

Mr. Wiggins, you may proceed whenever you are ready.

ORAL ARGUMENT OF J. TERRY WIGGINS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WIGGINS: Mr. Chief Justice, and may it please the Court:

This matter comes on for review of this Court as the result of the conviction of Otis Trammel, Jr., the petitioner herein, for aiding and abetting the importation of heroin from the Philippines into Hawaii and the United States and for conspiring with others, approximately nine persons named in the original indictment, for the importation of heroin into the United States.

It resulted from the arrest of Elizabeth Trammel on November 6, 1975 in Hawaii as she entered the country carrying a substantial quantity of heroin on a trip in from Clark Air Force Base in the Philippines. At the time of Mrs. Trammel's arrest, she was alone. She was told that she was charged with a serious felony and she was offered the voluntary opportunity of cooperating with the government in exchange for being charged with a misdemeanor and a recommendation of probation or, in the alternative, being jailed for the felony for which she had been arrested.

She elected the latter alternative and indicated that she would cooperate with the government, notifying the Customs agents at that time that she intended to take the heroin to Colorado, to deliver it to an individual by the name of Roberts who was then stationed in Colorado Springs, Colorado.

That was done under a controlled circumstances and at the first statement given by Mrs. Trammel to the Customs authorities in the Drug Enforcement Administration at that time, she did not in any way implicate the petitioner here, Otis Trammel.

After the controlled delivery took place in Denver, Colorado, and Mr. Roberts was arrested together with a Mr. Richardson, Mrs. Trammel was sent on at that time and still told that her cooperation would be necessary and in exchange for her cooperation she was being offered a misdemeanor and a recommendation of probation.

She was again interviewed at Denver and at that time once again she did not implicate her husband, the petitioner here. Finally, approximately a month to six weeks after Mrs. Trammel's arrest, she was interviewed in Birmingham, Alabama, which was her family home, at that time she implicated her husband as the part of an importation conspiracy and as an aider and abettor to the initial importation for which she had been caught and she was notified once again that she

would have -- that her cooperation with the government would be recognized and that she would receive leniency for that.

QUESTION: If she had implicated her husband at the very first time she was approached by the government, would your case be any different?

MR. WIGGINS: Mr. Justice Rehnquist, I don't know that it would be any different, but I --

QUESTION: You spent considerable time pointing out the fact that she took a while to consent. I didn't see how that was directly involved with the legal principle.

MR. WIGGINS: Well, I think it is involved with the legal principle is the principle that the government tries in their brief and I assume by argument here today to convince this Court that there should be an exception to the husband-wife privilege, that being the voluntary consent of the witness spouse or one of the parties to the marriage. If that were to be an exception, it seems to me that voluntariness becomes a serious question and her voluntariness is certainly subject to consideration when she in two prior interviews does not notify the authorities of his participation and only ultimately, with all of the offers on the table, she finally agrees to or she talks about him and agrees to testify against him. It is hard to call that in my estimation voluntary.

QUESTION: Well, in the two earlier interviews, had she said he did not participate or had she simply not said

anything about it?

MR. WIGGINS: I think she had neglected to mention him in the earlier interviews. She mentioned more people as time went by apparently to get a better deal. The ultimate deal she got is she was not charged with any crime nor convicted of anything; in fact, she was given witness immunity in exchange for her testimony.

QUESTION: Well, in ordinary plea negotiation situation, Mr. Wiggins, where there is no husband and wife problem or the testimonial aspect you have here, do you regard the testimony of the witness who cooperates with the government as involuntary?

MR. WIGGINS: In certain circumstances, Mr. Chief Justice. I think it must be viewed as involuntary but whether it is voluntary or not I think certainly representing a defendant charged as a result of such plea negotiation, it would be the right of counsel in most circumstances to bring that out, bring out the negotiations, to point out what that person has traded for his testimony, and juries are instructed, it has been my experience, to weigh that testimony very carefully where an accomplice is involved, because those people have a self interest.

QUESTION: To come back to my question, do you regard that as involuntary?

MR. WIGGINS: In certain circumstances, yes,

Your Honor.

QUESTION: In what circumstances would you characterize it as involuntary and in what would you characterize it as voluntary?

MR. WIGGINS: Certainly, Mr. Chief Justice where witness immunity is granted to a witness who does not want it, that is involuntary. Certainly --

QUESTION: Well, did she not want it here?

MR. WIGGINS: No. You asked me for a circumstance where I would find it to be involuntary. I think she wanted it here.

QUESTION: Yes.

MR. WIGGINS: Certainly it would seem to me in a situation where a person is offered to either be charged with a serious felony and serve time in prison as a result of that charge or in the alternative to become a witness and not be charged with anything and serve no time, I think there is coercion.

QUESTION: Can you suggest any situation in which the defendant, the possible defendant so testifying is coerced into accepting immunity? Can anyone be forced to accept immunity?

MR. WIGGINS: A person can be granted immunity without their permission.

QUESTION: Can they be forced to accept it?

MR. WIGGINS: No, they can elect contempt of court as opposed to the accepting of the immunity and actually testifying.

QUESTION: Well, if they don't want to accept it, they simply take their chances as a defendant and stand trial, isn't that the usual pattern?

MR. WIGGINS: Not entirely, Mr. Chief Justice. I have seen people granted immunity who didn't want it and would just as soon have stood trial and who opted for contempt as opposed to willingness to testify. That has happened and that is a circumstance where a person didn't want it but nonetheless the result is the same.

Some two months after Mrs. Trammel or three months after Mrs. Trammel was caught entering the United States with heroin, the defendants were indicted, three defendants were indicted and six persons were named as unindicted co-conspirators in this case in count two which was conspiracy to import heroin.

Prior to the trial of the lawsuit, the matter was here before the court and husband-wife privilege was raised by a motion to suppress, requesting the District Court judge -- a motion to sever, excuse me, requesting the District Court judge to sever Mr. Trammel from the other two defendants who were then charged so that Mr. Trammel could claim his privilege in an independent trial.

The whole point of the hearing, however, was strictly the privilege question and at that time the District Court judge refused to recognize that such a privilege existed and the government argued that no such privilege existed, and the District Court judge indicated that Mrs. Trammel would in fact be required to testify. Subsequently, within approximately three days, the trial began.

Mrs. Trammel was called to testify, a motion and order granting immunity were given her, and again the petitioner, Mr. Trammel, raised the question of the husband-wife privilege and once again the court said that the ruling of the court would be the same and basically not recognizing the privilege, only recognizing a communications privilege and noting that the communications privilege would be fully enforced and that she would not be able to testify to privileged communications.

In addition, at the time that this matter was argued before the United States Court of Appeals for the Tenth Circuit, the government once again, according to the Circuit Court's opinion, took the position that the privilege that I am here to argue today just didn't exist in effect. The Circuit Court of Appeals found that the privilege did in fact exist but took the position that because of the fact that she was a co-participant or a co-conspirator in the case, and also because of the fact that

she was granted witness immunity, that she should have been permitted to testify and that it did not violate the precedent set forth in *Hawkins v. United States*, which is the last case in which this Court came face-to-face with the privilege that is before the Court today.

In the *Hawkins* case, the Court held, this Court has held that the privilege was an absolute one, of one spouse to keep the other spouse off the witness stand and that that privilege took precedence over, in the case of *Hawkins* at least, the conviction of Mr. *Hawkins*, his wife was called to testify against him and who was, I think it is clearly arguable from the case and clearly notable within the case, that his wife was herself a co-participant at least to the degree that she was running the house of prostitution to which the young lady being transported across state lines was to go at the conclusion of the trip and may well have been an aider and abettor, may well have been a co-conspirator in that case.

QUESTION: Mr. Wiggins, maybe it is shown by the record, but I didn't see that.

MR. WIGGINS: Mr. Justice Stevens, I think the opinion shows that she was running a house of prostitution in the state in which the young lady was going, and I think it also shows that that is where the young lady ended up. Whether or not she was a participant is subject to some

speculation.

QUESTION: I thought it only showed that she was a former prostitute. I didn't realize that --

MR. WIGGINS: I think the record also indicates that -- I think the report of the case also indicates that she testified that the young lady was coming to her establishment.

QUESTION: I see.

MR. WIGGINS: At any rate, Hawkins made the privilege -- it is my position an absolute privilege, the government argued at that time the same thing that the government argues before this Court in its brief now, that the privilege should reside in the witness spouse rather than the defendant spouse, and that the witness should be the one to make a voluntary determination as to whether or not he or she should testify when his or her spouse is accused and on trial. This Court rejected that argument in Hawkins, and I urge that it be rejected again.

I would also note that it is clear from the legislative history of the rules of evidence that this Court took the position in approximately 1974 when the rules of evidence were being considered by the Congress, this Court sent up rules of evidence and the husband and wife privilege sent up by the Advisory Committee was identical to the privilege that is presently set out in

Hawkins.

QUESTION: You don't regard that kind of a decision as equivalent to a holding of the Court, do you?

MR. WIGGINS: No, Mr. Chief Justice, I don't, but it does seem that it would have been, if the Court were inclined to change the Hawkins situation, that the rules of evidence -- it would have been an ideal time to formulate a rule that was more consistent with the Court's thinking.

QUESTION: Well, what did Congress do about that suggested rule?

MR. WIGGINS: Excuse me, Mr. Justice --

QUESTION: What did Congress do about that suggested rule?

MR. WIGGINS: What Congress did was it took the 13 rules that were sent up on privilege and got rid of all except one. Congress rejected both the Advisory Committee's suggestion of rules as well as the Justice Department's suggestion of the --

QUESTION: And then came up with one rule, 501?

MR. WIGGINS: That's correct.

QUESTION: And said that privilege shall be left to the common law process?

MR. WIGGINS: They say it should be left to common law as determined by reason and experience, the

same thing they --

QUESTION: Do you think then what Congress has done to date, that we would be forbidden to overrule Hawkins?

MR. WIGGINS: Yes, Mr. Justice White, I think you would be --

QUESTION: Not by 501?

MR. WIGGINS: Not by 501, but I think by Title 28, section 2076, that you are in fact forbidden, at least arguably so from overruling it, and I have to confess that --

QUESTION: We wouldn't be overruling it by proposed rule.

MR. WIGGINS: It seems to me that if --

QUESTION: This 2076 deals with the rulemaking process --

MR. WIGGINS: That's right.

QUESTION: -- and all the evidence rules except privilege would just have to -- would go into effect within 180 days unless one House or the other acted. But any changes by rule about privilege, Congress would have to affirmatively approve.

MR. WIGGINS: That's right.

QUESTION: And I take it that would be whether you created a new one or overruled an old one.

MR. WIGGINS: Or abolished or modified an old one. But because privilege is set out specifically in 2076 as having to have the approval of Congress, and because the only thing relative to privilege in the rules of evidence, Rule 501, the only thing relative at all to privilege is in that rule. It seems to me that --

QUESTION: Well, Rule 501 is utterly meaningless because it isn't left to the common law process. 2076 leaves it to the legislative process exclusively.

MR. WIGGINS: It seems to me that it does. It seems to me that --

QUESTION: Well, 501 is utterly meaningless.

MR. WIGGINS: If you read the two together, I think you have to come to the conclusion that the Congress is encouraging the Court to reconsider privilege but is holding the string that they want to --

QUESTION: We should decide a case and then send it over to Congress to see if our decision should be --

MR. WIGGINS: No, Mr. Justice White, I don't think that is what they are saying.

QUESTION: Well, should we dismiss this case then and say that we have no jurisdiction to entertain your petition?

MR. WIGGINS: No, I --

QUESTION: Or should we summarily reverse on the

grounds that the Court of Appeals had no business tinkering with Hawkins in light of 2076?

MR. WIGGINS: That is strongly arguable, that it should be summarily reversed for that very reason and that the Advisory Committee on the Courts should be the ones to recommend changes in the rules or the Justice Department to recommend changes in the rules to Congress and that Congress should act on them.

QUESTION: Well, are you suggesting then that privilege questions are just non-justiciable?

MR. WIGGINS: I'm not suggesting that they are non-justiciable. What I am suggesting is that unless the last sentence in 2076 means nothing, it has to be read with 501, and the only way they can be read together is that rule changes must go through Congress.

QUESTION: Well, every application of a privilege rule that would -- say there is a conflict that develops between two Courts of Appeals.

MR. WIGGINS: All right.

QUESTION: Now, can we resolve it or not?

MR. WIGGINS: I think that that is your duty.

QUESTION: Or do we have to wait until Congress resolves it?

MR. WIGGINS: I think that is part of your duty, to resolve it.

QUESTION: Well, how can we? We would be changing the law in one way or the other.

MR. WIGGINS: Where privilege is concerned, you might be required to reverse it were the Court of Appeals to --

QUESTION: Say it was 4-to-5 between the Court of Appeals, they just split 4-to-5. Now, if we decided one way or the other that the law would be changed in one group of circuits or the other --

MR. WIGGINS: That's correct.

QUESTION: --- and it couldn't be changed until Congress said or not?

MR. WIGGINS: 2076 seems to indicate that is a fact, and I don't pretend to know that that is what it means.

QUESTION: Are you saying that Congress said they were going to leave it to the courts, then leave it to the courts to do what?

MR. WIGGINS: Mr. Chief Justice, they said they were going to leave it to the courts, at the same time they enacted something that said the courts must come to us for permission where privilege is concerned. I can only --

QUESTION: The courts or the rulemaking process?

MR. WIGGINS: I think they are talking about the

rulemaking process.

QUESTION: We aren't sitting in a rulemaking process now, are we?

WIGGINS: Absolutely, you're not, but we are discussing a rule before this Court that was left in a certain way by Congress as a rule they didn't want changed. I'm not arguing for the fact that a decision of this Court in any way would have to be sent to Congress for the Congress to say yes or no to it. I am only saying that that is the only suggestion that can be made from 2076 as I read it.

QUESTION: So I can only read you as saying we should ignore it.

MR. WIGGINS: Unfortunately I had considered that seriously when I came up here and suggesting that, because it does seem to me to be inconsistent and no consistent way for this Court to deal with it in this case.

QUESTION: Do you suggest that they were advocating anything other than how the rulemaking process would function?

MR. WIGGINS: No. They are advocating how the rulemaking process should function.

QUESTION: Not how we were to decide a future case, as Justice White suggested, resolving a conflict in

the circuits?

MR. WIGGINS: I agree with you there, not how you should decide cases.

QUESTION: So we should go ahead and decide the case.

MR. WIGGINS: Yes, Mr. Chief Justice, you should in my favor. But I also think that when they say that, that it is perhaps somewhat presumptuous of the circuits to then decide a case contrary to Hawkins and contrary to the prior law and say on a case by case basis we have decided to change it when the Congress wanted to retain the rulemaking power as a result of that statute. And I point that out because it is there. I am not suggesting in any way that it is necessarily controlling in this case.

QUESTION: How much weight do you put on the suggestion that appears in the Hawkins case and elsewhere that this has a deleterious effect on the marriage relationship when the husband or wife goes into court and testifies against the other and perhaps sends the other spouse to prison? You recall, Justice Black seemed to rest to a significant extent on that aspect.

MR. WIGGINS: Yes, Mr. Chief Justice, and I agree with that. I think I agree very strongly with the statement that it was Mr. Justice Black's opinion at that time that it would destroy almost any marriage for

one of the marriage partners to be called as a witness against the other, and I think that is true regardless of the outcome of the trial of the case, because it seems to me if a spouse stands up and testifies in open court against his or her mate, that the marriage is probably at that point irretrievably shattered and would not return to any semblance of trust between the two as a result of the testimony. So I think that the situation that Mr. Justice Black suggests early on, I think that is still the same situation today.

QUESTION: The concurring opinion suggested that this whole concept was a relic of the past and has no place in the modern world of women's lib -- not quite in those terms. What do you have to say about that?

MR. WIGGINS: It is part of what Mr. Justice Stewart suggested in the concurring opinion. However, he also suggested in the concurring opinion, which I agree very strongly with, that no one case is the case that should change this if it is a relic of the past, and we submit that it is not, but that the Advisory Committee for the courts should consider this matter seriously and if a change should be made it should be an intelligent change on that basis.

QUESTION: We have changed some other doctrines and rules of ancient lineage, haven't we?

MR. WIGGINS: Yes, Mr. Chief Justice, we have. There is certainly no question about that. But this rule strikes at the very heart of the family, of marital harmony which is I suggest an institution of authority, a non-governmental institution of authority in this country which undergoes a significant amount of fire in today's times as a result of the way society operates, and I think that this Court should strongly support the institution of the home, the institution of marriage against attacks in this kind of situation against that institution to testify and in effect break the home.

QUESTION: This case was tried in the District Court of Colorado?

MR. WIGGINS: Yes, Mr. Justice Stewart, it was.

QUESTION: What is the law of Colorado? Perhaps you have already been asked this, but if so I didn't get the answer.

MR. WIGGINS: The law of Colorado is --

QUESTION: With respect to this question.

MR. WIGGINS: -- it would be identical to the law in the federal court with respect to this question. It is the privilege of the accused to keep the witness off the witness stand if the accused chooses to use that, utilize the privilege.

QUESTION: Not identical to the law in the

federal courts as construed in this case by the Tenth Circuit.

MR. WIGGINS: Correct, not identical, but identical to what the Hawkins --

QUESTION: The general Hawkins rule.

MR. WIGGINS: The general Hawkins approach to this particular privilege would be identical in Colorado.

MR. CHIEF JUSTICE BURGER: We will resume at this point at 10:00 o'clock in the morning, Mr. Solicitor General.

(Whereupon, at 3:00 o'clock p.m., the case in the above-entitled matter was recessed, to reconvene on Tuesday, October 30, 1979, at 10:00 o'clock a.m.)

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