

The Burger Court Opinion Writing Database

Trammel v. United States
445 U.S. 40 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 8, 1980

Re: 78-5705 - Trammel v. United States

MEMORANDUM TO THE CONFERENCE:

Attached is first draft in the above. Further study and reflection have convinced me that we should go beyond the position taken at Conference where seven of us voted to retain the privilege against adverse spousal testimony, but to vest it in the witness-spouse. We did not explore the difference between a witness-spouse who is wholly "innocent" and one who is a partner in the crime.

In these circumstances I wish to point out that this draft proposes that we give the privilege to the witness-spouse, but only in cases in which the witness is not a participant in the crime; however, where the witness is a criminal participant, I am persuaded that there should be no privilege in either spouse. If a majority accepts this, the opinion, as drafted, can stand.

I "flag" you on this so as to make very clear the line of demarcation between the innocent spouse and others. This is by no means without difficulty, but I am persuaded that we should take this one step beyond our Conference discussion. Other problems may arise in future cases. If this result does not command the necessary votes, it will be a relatively simple matter to draw back on the holding giving the witness-spouse control of his or her testimony even when that spouse is a "guilty" participant with full immunity.

I hope "reason and experience" will persuade others to join in what seems to me to be the better solution, buttressed by our Clark case statement that a privilege "takes flight" when it is abused. I invite your comments.

Regards,

For Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From The Chief Justice

Circulated: JAN 8 1980

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-5705

Otis Trammel, Jr., Petitioner, | On Writ of Certiorari to the
 v. | United States Court of Appeals for the Tenth Circuit,
 United States. |

[January —, 1980]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether an accused may invoke the privilege against use of the adverse testimony of a spouse so as to exclude the voluntary testimony of his wife who is identified as a participant in the criminal offense charged. — U. S. — (1979). This calls for a re-examination of *Hawkins v. United States*, 358 U. S. 74 (1958).

I

On March 10, 1976, petitioner Otis Trammel was indicted with two others, Edwin Lee Roberts and Joseph Freeman, for importing heroin into the United States from Thailand and the Philippine Islands and for conspiracy to import heroin. 21 U. S. C. §§ 952 (a), 962 (a), and 963. The indictment also named six unindicted co-conspirators, including petitioner's wife Elizabeth Ann Trammel.

The indictment charged that petitioner and his wife flew from the Philippines to California in late August 1975, carrying with them a quantity of heroin. Freedman and Roberts assisted them in distributing the heroin. In late September, Elizabeth Trammel travelled to Thailand where she purchased another supply of the drug. On November 3, 1975, with four ounces of heroin on her person, she boarded a plane for the United States. During a routine customs search in Hawaii,

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

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1980

Trammel v. United States, No. 78-5705

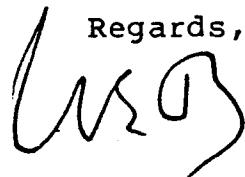
MEMORANDUM TO THE CONFERENCE:

I have been led to re-examine the proposed draft in this case in which I expressly "flagged" the fact that I was treating an issue we did not reach in Conference discussion.

Absent a clear majority for the "whole package" I am inclined to fall back to a holding which would preserve for even a spouse-participant the choice of asserting the spousal privilege. Actually, this will, in practical effect, mean very little. Where the spouses are joint participants, a prosecutor will try -- and likely succeed -- in indicting or implicating both. At that point the less culpable spouse is a good candidate for immunity and the situation will likely develop about the way it has developed here.

I will recirculate with the necessary changes.

Regards,



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

From: The Chief Justice

Circulated: _____

Recirculated: FEB 15 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5705

Otis Trammel, Jr., Petitioner, | On Writ of Certiorari to the
 v. | United States Court of Ap-
 United States. | peals for the Tenth Circuit,

[January —, 1980]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether an accused may invoke the privilege against adverse spousal testimony so as to exclude the voluntary testimony of his wife. — U. S. — (1979). This calls for a re-examination of *Hawkins v. United States*, 358 U. S. 74 (1958).

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On March 10, 1976, petitioner Otis Trammel was indicted with two others, Edwin Lee Roberts and Joseph Freeman, for importing heroin into the United States from Thailand and the Philippine Islands and for conspiracy to import heroin in violation of 21 U. S. C. §§ 952 (a), 962 (a), and 963. The indictment also named six unindicted co-conspirators, including petitioner's wife Elizabeth Ann Trammel.

According to the indictment, petitioner and his wife flew from the Philippines to California in August 1975, carrying with them a quantity of heroin. Freeman and Roberts assisted them in its distribution. Elizabeth Trammel then travelled to Thailand where she purchased another supply of the drug. On November 3, 1975, with four ounces of heroin on her person, she boarded a plane for the United States. During a routine customs search in Hawaii, she was searched, the heroin was discovered, and she was arrested. After dis-

RAB

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

CHAMBERS OF
THE CHIEF JUSTICE

February 25, 1980

RE: No. 78-5705 - Trammel v. United States

MEMORANDUM TO THE CONFERENCE

All the votes are now in.

Absent dissent it will come down Wednesday.

Regards,

WB

STYLISTIC CHANGES

2, 3, 5, 11

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

From: The Chief Justice

Circulated:

Recirculated:

FEB 26 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5705

Otis Trammel, Jr., Petitioner, } On Writ of Certiorari to the
v. } United States Court of Ap-
United States. } peals for the Tenth Circuit,

[January —, 1980]

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We granted certiorari to consider whether an accused may invoke the privilege against adverse spousal testimony so as to exclude the voluntary testimony of his wife. — U. S. — (1979). This calls for a re-examination of *Hawkins v. United States*, 358 U. S. 74 (1958).

I

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

CHAMBERS OF
THE CHIEF JUSTICE

April 8, 1980

MEMORANDUM TO THE CONFERENCE:

Re: Cases held for No. 78-5705 - Trammel v. United States

Two cases have been held for Trammel.

No. 78-6374 - Fletcher v. United States. I will DENY.

Petitioner was convicted of 10 counts of passing forged securities. Three accomplices including petitioner's wife, whom he married after the crimes were committed, testified against him. His wife identified various forged signatures as being petitioner's handwriting. On appeal, CA 7 held that the introduction of the wife's testimony was admissible on two grounds: (a) the spouses were partners in crime and (b) the spouses were not yet married when the crimes occurred. It appears that the petitioner's wife chose to testify against him for the same reasons that induced Mrs. Trammel to testify. Trammel therefore is controlling. The issues of whether a witness' spouse can invoke the spousal privilege as to pre-marital events or whether the privilege "takes flight" when the spouses are joint participants in crime were not decided in Trammel. Those issues can be left to percolate in the circuits.

No. 79-5431 - TSINNIJINNIE v. UNITED STATES I will DENY.

This case presents the question whether an accused can exclude the hearsay statements of his spouse by invoking the privilege against adverse spousal testimony. Petitioner was charged with the second-degree murder of his mother-in-law whom he ran over with his truck. At trial, he successfully invoked his Hawkins privilege to bar his wife's testimony. The trial judge, however, permitted a third-party to testify to the wife's excited utterance -- "He ran over my mother" -- made at the scene of the crime. See F.R.Evi. 803(2). On appeal, CA 9

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

1980?

January 10, 1979

No. 78-5705 - Trammel v. United States

Dear Chief:

I would be delighted to join your opinion in the above in-sofar as it overrules Hawkins and concludes that the marital privilege should reside only in the witness-spouse. However, I find the suggestion that the privilege disappears entirely when the witness-spouse is a participant in the underlying crime extremely troubling. Indeed, I'm neither persuaded as a substantive matter that the privilege should disappear in that situation nor remotely confident that if we were so persuaded we could devise rules and procedures for effectuating that result.

First, I'm not sure the analogy to the "flight" of the attorney-client privilege when that relationship is used to perpetrate a crime is terribly persuasive. The fact that the partners to a marriage are involved in some criminal conduct does not mean that they have "abused" their marital status, or even that they are using that status for criminal purposes. Their relationship extends beyond, and often very far beyond, any criminality.

Second, I wonder what it means to say that the privilege yields when the witness-spouse is a "participant" in the crime. Would you include aiding and abetting the defendant spouse? Hiding him or her? Knowing of proposed conduct before it took place but not telling the authorities? Learning of that conduct after the fact and not reporting it? Must there be an act in furtherance? And, if so, how important and how purposeful?

It seems to me that these are important and difficult questions. Presumably the prosecution will have no reason to call the witness-spouse unless that spouse possesses information. But quite often the mere possession of such information could lead to at least a colorable charge of complicity or participation. Do we really want such complicity or participation to be sufficient to set aside the privilege? I would think not. We expect spouses to know what one-another are doing, and they generally will. And we should recognize that if one is engaged in a crime the other is likely, wittingly or unwittingly, to have done something to facilitate the conduct which constitutes that crime. This complicity or participation will be the normal situation, and where it is not present, the prosecution will probably have no reason to call the witness-spouse to begin with. As a result, your proposal would have the effect of knocking the privilege out of most cases in which it would make any difference. If we want to eliminate the privilege en-

tirely, I think we should do so openly rather than purporting merely to fine tune it.

Third, assuming we could arrive at a definition of participant which avoids some of the foregoing problems, how would it be applied? As you suggest on page 14, the prosecution would surely have to do more than allege that the witness-spouse was a participant. Equally, I take it that merely naming the witness-spouse in an information or indictment would be insufficient. Thus there would have to be some kind of a showing of culpability, perhaps analogous to that required before the co-conspirator exception to the hearsay rule may be invoked. But the problems of proof will be severe -- so much so that the societal benefits of the rule you propose may be quite limited. In addition to meeting what is bound to be an ungainly definition of complicity or participation, the prosecution would have to base its showing upon evidence other than the witness-spouse's own testimony. (Asking an unwilling spouse is unlikely to be fruitful since he or she can invoke either the privilege against self-incrimination or the marital privilege, which presumably would remain in place until a showing of culpability had been made.) Yet the cases in which the prosecution will be able to muster such information are bound to be those in which the testimony of the witness-spouse will be least important. And conversely, it is precisely when the government is short on independent evidence and thus unable to

make the showing necessary to obtain the witness-spouse's testimony that it will be most in need of that testimony. Accordingly, I fear that only when the public's need for the evidence of a reluctant spouse is relatively modest will it be vindicated under your proposal.

Since the issues are troubling and the present case is entirely resolved by the first part of your opinion, I wonder why we need stray further at this time.

WJB Jr.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

February 19, 1980

RE: No. 78-5705 Trammel v. United States

Dear Chief:

I agree with your circulation of February 15.

Sincerely,



The Chief Justice
cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 21 FEB 1980

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-5705

Otis Trammel, Jr., Petitioner, | On Writ of Certiorari to the
 v. | United States Court of Appeals for the Tenth Circuit,
 United States. |

[February --, 1980]

MR. JUSTICE STEWART, concurring in the judgment.

Although agreeing with much of what the Court has to say, I cannot join an opinion that implies that "reason and experience" have worked a vast change since the *Hawkins* case was decided in 1958. In that case the Court upheld the privilege of a defendant in a criminal case to prevent adverse spousal testimony, in an all-but-unanimous opinion by Mr. Justice Black. Today the Court, in another all-but-unanimous opinion, obliterates that privilege because of the purported change in perception that "reason and experience" have wrought.

The fact of the matter is that the Court in this case simply accepts the very same arguments that the Court rejected when the Government first made them in the *Hawkins* case in 1958. I thought those arguments were valid then,¹ and I think so now.

¹ "The rule of evidence we are here asked to re-examine has been called a 'sentimental relic.' It was born of two concepts long since rejected: that a criminal defendant was incompetent to testify in his own case, and that in law husband and wife were one. What thus began as a disqualification of either spouse from testifying at all yielded gradually to the policy of admitting all relevant evidence, until it has now become simply a privilege of the criminal defendant to prevent his spouse from testifying against him.

"Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. When such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 17, 1980

Re: No. 78-5705 - Trammel v. United States

Dear Chief,

Rule 505 of the proposed Rules of Evidence approved by the Judicial Conference and sent by us to Congress provided that "a person has a privilege to prevent any testimony of his spouse from being admitted in evidence in a criminal proceeding against him" and that "the privilege may be claimed by the person or by the spouse on his behalf." The accompanying Advisory Committee note stated that about thirty states then recognized a privilege of an accused to prevent his spouse from testifying. The note then declared that this "is believed to represent the one aspect of marital privilege the continuation of which is warranted" and observed that the proposed Rule recognizes no privilege in the testifying spouse and no privilege for confidential communications.

Of course, Congress rejected the Rule and left privileges where the cases put them.

It is now proposed that we eliminate the defendant's privilege but afford the testifying spouse his or her own privilege unless, as you suggest, the spouse is implicated in the crime. I have waltzed around these issues since your draft arrived, and although I could be persuaded to scuttle the privilege entirely, I am now content to give the witness-spouse the choice and to qualify it (if the votes are there) as you suggest.

In short, I join your opinion and would still be with it if the Conference prefers that all testifying spouses have the privilege.

Sincerely yours,



The Chief Justice
Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 19, 1980

Re: 78-5705 - Trammel v. United States

Dear Chief,

I acquiesce.

Sincerely yours,



The Chief Justice
Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 21, 1980

Re: No. 78-5705 - Trammel v. United States

Dear Chief:

Please join me.

Sincerely,

JM
T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20530

C. AMBULS OF
JUSTICE HARRY A. BLACKMUN

February 25, 1980

Re: No. 73-5705 - Trammel v. United States

Dear Chief:

Please join me in your recirculation of February 15.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 11, 1980

78-5705 Trammel v. United States

Dear Chief:

This is in response to your memorandum of January 8, inviting comments on your draft opinion.

First, I am willing to "join four" to make a Court for the view that where the witness is a criminal participant, there should be no testimonial privilege in either spouse. There is an argument, not insubstantial, that eliminating the privilege in these circumstances could affect adversely the marital relationship (and probably would!). The answer is that if husband and wife participate in a crime they should be prepared to pay the consequences of a fair trial.

I also have one suggestion. On page 14 of the draft, there are a couple of sentences that suggest the necessity of holding a preliminary hearing on the issue of spousal joint participation. In some cases a preliminary hearing may very well be desirable. But in others, I would think it preferable to allow the issue to be disposed of during the course of a trial after a proper foundation has been laid for spousal testimony. In sum, I would prefer to leave to trial courts the procedure to be followed.

In general, I think you have written a fine opinion.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference



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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 15, 1980

78-5705 Trammel v. United States

Dear Chief:

Please join me in your modified draft of February 15.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 9, 1980

Re: No. 78-5705 - Trammel v. United States

Dear Chief:

I have read your letter of January 8th, indicating that your proposed draft in Trammel goes beyond the Conference vote vesting the privilege in the witness-spouse. This week and the next being ones devoted to oral argument, I hope you will indulge me until the week of January 14th for any comments which I might have in response to your invitation.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 14, 1980

Re: No. 78-5705 Trammel v. United States

Dear Chief:

Please join me in your recirculation in Trammel.

Sincerely,

wn

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 14, 1980

Re: 78-5705 - Trammel v. United States

Dear Chief:

Although I am presently of the view that the marital privilege should be limited to private communications, I have sufficient doubt about that proposition--particularly since compelled testimony from a spouse comes pretty close to compulsion against the accused--to make me favor the narrower decision in this case. I would simply hold that the witness spouse can waive the privilege. I should add that I think your draft opinion is excellent.

Respectfully,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 19, 1980

Re: 78-5705 - Trammel v. United States

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference