

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEON SEMINOLE – PETITIONER

vs.

UNITED STATES – RESPONDENT
ON PETITION FOR A WRIT OF CERTIORARI TO
NINTH CIRCUIT COURT OF APPEALS
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court properly compelled the defendant's victim-wife to testify against him when his wife invoked her marital privilege not to testify.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and has been designated for publication but is not yet reported.

JURISDICTION

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 11, 2017, and a copy of the order denying rehearing appears at Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None

STATEMENT OF THE CASE

On May 22, 2015, the defendant/petitioner, Leon Seminole, was named in a two-count Indictment filed in the United States District Court, District of Montana, Billings Division. Count I charged the defendant with Strangulation, in violation of 18 U.S.C. §§ 1153(a) and 113(a)(8). Count 2 charged the defendant with Assault Resulting in Substantial Bodily Injury, in violation of 18 U.S.C. §§ 1153(a) and 113(a)(7). The offense occurred in Lame Deer, Montana on the Northern Cheyenne Indian Reservation. The alleged victim was Mr. Seminole's wife M.L.

Leon Seminole and M. L. had been married for over 12 years. They have two children together and shared a home in Lame Deer. In 2014, M. L. moved out of the home following a dispute with Mr. Seminole. She made plans to return to the house with her two brothers, Donavin Limberhand and Enoch Limberhand, and Enoch's girlfriend, Tyrie Fisher, to retrieve some of her belongings from the family home.

On August 14, 2014, the defendant was outside of the house when Limberhand and her family arrived. At some point M. L. and Mr. Seminole entered the house and everyone else remained outside. Once inside the house, according to police reports, Mr. Seminole closed and locked the door. Mr.

Seminole began striking and punching M. L. and she fell to the ground. Mr. Seminole continued to hit and punch her while she was on the ground. She rose up to her knees and he went behind her and tried to put her in a choke hold. She sat down and wiggled out of the hold. She wrestled away from him, unlocked the door and went outside.

Minutes after M.L. and Mr. Seminole went into the house, M.L. left the house holding her head. Witnesses described her face as red and swollen. Enoch approached his sister on the porch of the house. Mr. Seminole then walked out of the house loading ammunition into a small black pistol. He motioned towards Enoch to “bring it on” and waved the pistol around in his hand.

M.L. and her family left the house and made contact with BIA Officer Molanna Clifford. Enoch advised Officer Clifford that his sister was beaten and when Enoch attempted to stop it, the defendant “pulled a gun on him.” The officer observed the victim and indicated he would meet her and her family at Indian Health Service emergency room. Enoch Limberhand estimated they arrived at the house around 1:00 p.m. and spoke with Officer Clifford at 1:53 p.m.

M.L. advised Dr. Richard Moore, the attending physician, what had occurred and he noted she was “tearful.” Medical records note that M.L. suffered contusions to her head and face. Office Clifford took photographs of the victim at

the hospital. M.L. provided a recorded statement to BIA Agent John Dodd. Officer Clifford took follow-up photographs on August 19, 2014. The swelling was still present and both of her eyes were black and blue. M.L. submitted a written statement about the assault to Office Clifford.

Mr. Seminole and M.L. renewed their relationship and on February 12, 2016, M.L. provided a statement that she wanted to withdraw her subsequent statements. She advised she and Mr. Seminole were receiving spiritual instruction and direction from their local tribal religious elders and did not want the case to be continued in federal court. Her subsequent statements were inconsistent with prior reports.

Mr. Seminole proceeded to trial before a jury on April 25, 2016. The district court overruled Mr. Seminole's pre-trial motion to exclude his wife's testimony. Before she took the witness stand, M.L. clearly stated she did not wish to testify against her husband. The following transaction took place when M.L. was called by the government as a witness:

Q: (BY MR. DAKE) And can you describe your relationship with him, and how long you all have been together?

A: No. I'm pleading the Fifth. I'm not obligated to testify against my husband

Following his conviction by the jury, The district court imposed a 48 month term of imprisonment. The sentence was imposed on both counts of conviction to run concurrently. This sentence is to be followed by a 60 months of supervised release.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Opinion Conflicts with the Supreme Court's decision in *Trammel v. United States*, 445 U.S. 40 (1980).

In holding that the District Court was correct in compelling trial testimony from the victim-spouse, the Ninth Circuit went against the plain language in *Trammel* which ruled that the witness spouse "*may be neither compelled to testify nor foreclosed from testifying.*" Id. at 53. [Emphasis added.]

The Ninth Circuit relied primarily on the Supreme Court's opinion in *Wyatt v. United States*, 362 U.S. 525 (1960), a Mann Act case which concerns specifically the unique facts of so-called white slavery cases. However, if *Wyatt* has universal application to all cases of spousal privilege it would not have been necessary to decide the opinion in *Trammel*. In that case, a spouse was willing to testify against her husband in a drug case but the lower court ruled the husband spouse had the power to prevent her testimony based upon the marital privilege. The *Trammel* Court, in a watershed opinion, ruled the witness spouse alone held

the privilege of deciding to testify or not.

The Ninth Circuit reasoned that the language cited above was mere *obiter dicta* because in *Trammel* the spouse was willing to testify and therefore the language regarding compelled testimony was unnecessary to the Court's opinion.

However, the Supreme Court cited *Trammel* no less than six times in a later opinion *Jaffee v. Redmond*, 518 U.S. 1 (1995) in which the Supreme Court ruled a psychotherapist could *not* be compelled to testify concerning matters discussed during confidential counseling sessions. The Court in *Jaffee* reasoned, "Like the spousal and attorney client privileges, the psychotherapist patient privilege is 'rooted in the imperative need for confidence and trust.' *Trammel*, 445 U.S., at 51."

The *Jaffee* Court went on to find, "Thus, the purpose of the attorney client privilege is to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' (Cite omitted) And the spousal privilege, **as modified in *Trammel***, is justified because it "furthers the important public interest in marital harmony,' 445 U.S. at 53." [Emphasis added.] Of course, the *modification* of the privilege in *Trammel* was to allow the witness spouse to testify against her husband *if she so chose*.

B. The Ninth Circuit Opinion Conflicts with the Tenth Circuit's Decision in *United States v. Jarvison*, 409 F.3d 1221 (10th Cir. 2005).

Like the parties in the case before this Court, the parties in *Jarvison* were a traditional Native American married couple. Unlike *Seminole*, the crime charged was sexual abuse of a grandchild. While not precisely on point, a wife would have the same emotional conflict between protecting a grandchild and protecting her husband as the wife in this case had between protecting herself versus protecting her husband.

In *Jarvison*, the 10th Circuit cited the precise language from *Trammel* that was cited by Mr. Seminole in this case and the 10th Circuit came to the exact opposite conclusion: a court cannot compel a witness-spouse to testify against her husband.

In *Jarvison*, the 10th Circuit ruled:

The district court in this case held that Esther and Ben Jarvison "have a valid marriage and that Esther Jarvison wishes to invoke the privilege against adverse spousal testimony, pursuant to *Trammel v. United States*, 445 U.S. 40 (1980)." The Court in *Trammel* specifically held that "the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying." *Trammel*, 445 U.S. at 53; . . .

United States v. Jarvison, 409 F.3d at 1232.

The Tenth Circuit relied upon the decisions in both *Trammel* and *Jaffee*. Of

note, the Tenth Circuit did not cite to *Wyatt*:

The government invites us to create a new exception to the spousal testimonial privilege akin to that we recognized in *United States v. Bahe*, 128 F.3d 1440 (10th Cir. 1995). In *Bahe*, we recognized an exception to the marital communications privilege for voluntary spousal testimony relating to child abuse within the household. Federal courts recognize two marital privileges: the first is the testimonial privilege which permits one spouse to decline to testify against the other during marriage; the second is the marital confidential communications privilege, which either spouse may assert to prevent the other from testifying to confidential communications made during marriage. See *Trammel*, 445 U.S. at 44-46; *Bahe*, 128 F. 3d at 1442; see also *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (recognizing justification of marital testimonial privilege as modified by *Trammel* because it "furthers the important public interest in marital harmony"). In order to accept the government's invitation, we would be required not only to create an exception to the spousal testimonial privilege in cases of child abuse, but also to create an exception - not currently recognized by any federal court - allowing a court to compel adverse spousal testimony.

In conclusion, the 10th Circuit declined to create an exception to the marital testimonial privilege which would permit a trial court to compel a witness-spouse to testify against her husband. In ruling to affirm the lower court decision, the 10th Circuit expressly relied upon the language from *Trammel* cited by Mr. Seminole in his appellate argument: "The Court in *Trammel* specifically held that "the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying." *Trammel*, 445 U.S. at 53."

CONCLUSION

The Ninth Circuit's decision is in direct conflict with decisions of the United States Supreme Court and a decision of the Tenth Circuit Court of Appeals which declined to carve out an exception to the marital privilege to permit a court to compel a witness spouse to testify against her husband. For these reasons, and given the importance of the issue involved and its contradiction to other relevant authority, this Petition for Writ of Certiorari should be GRANTED.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert L. Kelleher Jr.", written over a horizontal line.

Robert L. Kelleher Jr.
Attorney for Petitioner

Date: 11 December 2017

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I, Robert L. Kelleher, do swear or declare that on this date, December 11, 2017, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendars days.

The names and addresses of those served are:

Brian Dake at the Office of the U.S. Attorney
2602 Second Ave, N, Ste 3200
Billings, MT 59101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 11, 2017.


(Signature)