IN THE SUPREME COURT OF THE UNITED STATES

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OTIS TRAMMEL, JR.,

Petitioner,

v. No. 78-5705

UNITED STATES,

Respondent.

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Washington, D. C.,

Tuesday, October 30, 1979.

The above-entitled matter came on for further oral argument at 10:02 o'clock a.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

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
WADE H. McCREE, JR., ESQ., on behalf of the Respondent	24
J. TERRY WIGGINS, ESQ., on behalf of the Petitioner -- Rebuttal	41

- - -

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will resume arguments in Trammel v. United States. At this stage, Mr. Wiggins, are you reserving the rest of your time for rebuttal?

MR. WIGGINS: Yes, Mr. Chief Justice, I am.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

There is no dispute about the facts in this case and we concede essentially that if this Court adheres to its ruling in Hawkins, the judgment below must be reversed because without the spouse's testimony there is nothing in the record to link the petitioner to the conspiracy charge.

I qualified my concession with the word "essentially" because the Court could decline to hold that the privilege against adverse spouse testimony does not apply where the witness spouse is willing to testify and it could still admit her testimony here for the reasons that she and petitioner were joint participants in the conspiracy to import heroin as charged in the indictment.

This argument about their being joint conspirators was not presented to the court in Hawkins, nor was it

considered by the Court in its opinion.

We also observe at the outset that the opinion in Hawkins does not foreclose our request that the Court reconsider it, because although the Court said "under these circumstances we are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned, nevertheless," it stated, "as we have already indicated, however, this decision does not foreclose whatever changes in the rule may eventually be dictated by reason and experience."

QUESTION: How much does the voluntariness aspect figure in your exception to the Hawkins rule that you just suggested?

MR. McCREE: Well, that is our principal argument and I --

QUESTION: How voluntary is it when once she is offered or tendered immunity?

MR. McCREE: If the Court please, no one's choice is ever absolutely voluntary. Everyone makes a choice, whenever he does, within the context of a series of circumstances and we have to begin with the premise that she was already involved in the offense and therefore her selection of choices was necessarily limited.

QUESTION: Let's take it just step by step. Suppose they had not consulted her in advance. She had refused

to talk with the prosecution or investigators, she is called to the stand when the case is in trial, she could assert the Fifth Amendment, could she not at that stage in this case?

MR. McCREE: She indeed could assert the Fifth Amendment.

QUESTION: And then if that were countered at that stage, rather than in advance as it was here, with a tender of complete immunity, then what would be her posture?

MR. McCREE: Well, she could still as we suggest claim the privilege as the witness spouse not to testify. She could claim it on the basis of preserving marital harmony. And we do not ask the Court to overturn that, we just say that the privilege should continue but the privilege should be exercised by the witness spouse instead of the defendant spouse, because she is the one more likely by her decision to indicate whether there is anything worth saving. We suggest that by placing the privilege in the defendant spouse, he will invariably prevent the witness spouse from testifying, not because of a desire to save the marital harmony but to save his own hide in the prosecution. So we are suggesting that her decision is a reliable indicator of the existence of a marriage whose harmony and felicity should be protected, but to place it with him doesn't serve the underlying

purpose of the privilege. That essentially is our argument about the rule enunciated in Hawkins. We say don't destroy the privilege but give it to the witness spouse instead of the defendant spouse.

As we suggested in our brief -- and I won't dwell on this at any great length -- actually there are two related rules and we are only talking about one of them, and I would like to make that clear.

As the concurring opinion in Hawkins states, there was originally only one rule and it stemmed from two concepts both long since rejected. One was the rule that a party, an interested party could not testify in a lawsuit, and the other was the fiction that at law husband and wife were one and, as some persons have said, he was it. And since he could not testify in his own behalf, he could prevent his subordinate alter-ego or his subordinate alter-ego also was incompetent to testify in his behalf. But after the law evolved to permit interested parties to testify, two rules evolved from this earlier one. One is the rule that prevents either spouse from testifying against the other, and that is the rule that Hawkins -- with which Hawkins was concerned, and the other rule, of course, is a rule relating to confidential communications, and neither spouse can be required to reveal a confidential communication and each spouse has a right to prevent the

other from doing it, and that rule even survives the demise of a marriage, and we are not talking about that at all here. We are talking --

QUESTION: You are not challenging that?

MR. McCREE: We are not challenging that at all. And we point out, Mr. Justice Rehnquist, that in Trammel, in the court below, the court very carefully made this distinction between these two rules, and we are talking about what is sometimes called the anti-marital rule, although the reason for that nomenclature rather escapes me, it is the rule that permits either or both spouses from preventing the other from testifying against him as to matters not confidential communications. And it is our submission that this rule should not permit the defendant spouse to exercise it but should permit the witness spouse to exercise it.

We begin in our argument by pointing out that the public has a right to every person's evidence. This Court has frequently enunciated that rule and, as has been observed, whenever the public will be deprived of relevant evidence, there should be an overriding consideration to compel such an exception to this general rule. And we suggest that there may be, with reference to confidential communications between spouses, we don't touch that at all. But we suggest that if the price would be that an offense

would not be proved without violating any effort to be confidential between the spouses, that that is too great a price to pay.

QUESTION: Mr. Solicitor General, putting aside the confidential communication, would not the logic of your argument equally apply to a claim of privilege by the witness as well as by the defendant? I'm just wondering if you are writing on a clean slate, wouldn't you ask the Court to abolish the privilege entirely except for the confidential aspects?

MR. McCREE: Well, I think I would and many states have. As a matter of fact, the mandate of Rule 501 of the Federal Rules of Criminal Procedures is that the privileges should be based upon principles of the common law as interpreted by the United States courts in the light of experience and reason.

I would address first the question of experience. The experience of this country indicates the following: In 1958, when Hawkins was decided, as the concurring opinion states, there were 19 states that permitted inter-spousal testimony. Now that number has increased to 27 states, including the District of Columbia, which incidentally did not change but had the rule then. Now, a clear majority of the states have no rule that would prevent the Hawkins result, and we think that this tells us something about

the experience of the country because these 27 states and the District include some very populous states like New York, Illinois, California, Ohio, and in their totality they include 60 percent of all the population. And if this is their experience, we think this Court could consider it, particularly in the light of the fact that this Court has regarded matters pertaining to the family and to domestic matters as peculiarly within the concern of the states under an appropriate approach to federalism.

So we think on experience there is a reason to reexamine Hawkins, and we think on the basis of reason there is, as I have suggested, if we want to see whether there is a marriage worth saving, find out whether the witness spouse is willing to testify. If it is a good marriage, she is not going to want to testify. If it is just a sham, if it is a shell, if it is just a nominal marriage, she is likely to do it. But the defendant spouse always will.

QUESTION: In these 27 states, Mr. Solicitor General, has the rule been altered with respect to both civil and criminal cases or are they ---

MR. McCREE: I have not examined all of them that carefully and I can't answer the Chief Justice's question. We set them forth in the appendix to our brief and some of them relate to civil and others to criminal, but almost invariably they relate to criminal and that is

what we are talking about in Hawkins and for that reason I did not pursue it to determine it to that extent.

It is interesting to observe that the District of Columbia has had a rule that allowed a witness spouse to testify against a defendant spouse in a criminal case for more than half a century, and I think that is significant because the Congress has approved the District of Columbia rule.

QUESTION: Well, it would be kind of tough to conduct a contested divorce proceeding if you had this sort of a privilege in civil litigation.

MR. McCREE: That's exactly right, Mr. Justice Rehqnsuit, and there are exceptions to the inter-spousal rule that have developed out of common sense reasons, just like the divorce one. Others are if the defendant spouse is accused of an offense, a criminal offense against the witness spouse --

QUESTION: Right.

MR. McCREE: -- obviously the witness spouse can testify there or else the defendant spouse could inflict criminal injury on her in private and enjoy complete immunity. It has been extended to allow the witness spouse to testify when the defendant spouse is charged with an offense against children of the marriage. In fact, some rules go as far as children of the other spouse even if

they are not children of the marriage. Other exceptions extend to offenses by the defendant spouse against property of -- separate property of the witness spouse, and we suggest that if these exceptions are valid, and we think they are -- we think they serve a societal purpose -- it also serves a societal purpose to permit the witness spouse to decide whether she will testify against the defendant spouse when the public is in dire need of her testimony. Because here a major drug trafficker is going to go free if we adhere to the rule of Hawkins, without it serving any purpose of promoting marital harmony here.

QUESTION: Mr. Solicitor General, what bothers me about your argument is that it is almost precisely the same argument that was made in the Hawkins case, which was argued in my very first week on this Court. While, as you know, I wrote separately, I didn't agree with the Court in the Hawkins case, eight members of the Court applying their reason did reach the result that they reached. And all that you have pointed out to us that has happened since in the 21 years since then is that some eight more states have amended their evidentiary laws.

MR. McCREE: Well, we think that is --

QUESTION: There was certain reason, there was reason of eight members of the Court in 1958 that the Hawkins rule was the right rule.

MR. McCREE: Well, we think that is significant because -- and as Rule 501 mandates and as the Court observed in Hawkins before Rule 501, that these privileges evolved in the light of experience and reason, and we think that the fact that eight more states have moved is significant experience.

QUESTION: That is some experience, from 19 to 27.

MR. McCREE: Well, we think that --

QUESTION: But what has changed in the way of reason?

MR. McCREE: Well, we think --

QUESTION: Now, as you know, I didn't agree with the Court, but eight members were of the same view and that was the exercise of their reasoning. What has changed it since?

MR. McCREE: Well, this case is different in another respect, too, and maybe we don't have to overrule Hawkins if this Court would decide that where both spouses were engaged in a joint criminal activity that the interest of society in having the testimony of the witness spouse should override any consideration of marital harmony.

QUESTION: That was the ground on which the Court of Appeals based its decision, isn't it?

MR. McCREE: It is, sir.

QUESTION: I take it that there wouldn't be any privilege by either spouse.

MR. McCREE: No, we don't even ask the Court to go that far.

QUESTION: I know, but that reasoning you just gave would mean that the public would be able to overrule the objection of the witness spouse.

MR. McCREE: We welcome the Court, if it wished to take that step, but we say the Court doesn't have to take that much of a step. If it leaves the privilege in the witness spouse, that is sufficient to uphold this and it is still --

QUESTION: It denies the public her testimony if she objects.

MR. McCREE: But what the public would gain would be the preservation of marital harmony if she believed that it would be jeopardized by her testimony. We suggest that her willingness or not to testify would be an indicator of whether there was anything there worth saving.

QUESTION: Mr. Solicitor General, insofar as your position involves any change in the Hawkins rule, is there any limitation on our changing it under 2076?

MR. McCREE: We see no limitation on your changing it. My brother yesterday was addressing Title 28,

section -- well, we refer to it in a footnote on page 10 of our brief.

QUESTION: 2076.

MR. McCREE: 2077. But that relates only to this Court and specifically relates to this Court in its rulemaking function and not its adjudicatory function, and we are here in the latter capacity and not the former.

QUESTION: Then you are saying that conferred no new power or jurisdiction on us that we didn't have before.

MR. McCREE: That's my understanding, and it doesn't inhibit, it doesn't prevent the Court at this time from --

QUESTION: Well, what you are really saying is that 2076 is no limitation whatever on our changing the Hawkins rule, inclusive of overruling it.

MR. McCREE: That's exactly right, unless the Court presumed to do it in its rulemaking capacity.

QUESTION: And you find that in that last sentence in the word "such," any such amendment?

MR. McCREE: No, I find that in the language that speaks of the Court in its rulemaking power.

QUESTION: Yes?

MR. McCREE: (no response)

QUESTION: The subject of 2076 is amendments to the Federal Rules of --

MR. McCREE: That is my understanding, Mr. Justice Brennan.

QUESTION: So when you get down to any such amendment creating, and so forth, that means any such amendment to the Federal Rules of Evidence.

MR. McCREE: And that would be in the exercise of its rulemaking power.

QUESTION: Does this case require us to decide any more than that there is no privilege when the wife admittedly is engaged in the same criminal enterprise?

MR. McCREE: We are saying that when -- we are not saying that there is no privilege. We are saying that the Court can allow the privilege to remain but just permit her to exercise the privilege. That is one thing we are saying.

The other is we are saying you can abolish the privilege when she is jointly charged with the offense. And under either formulation, the conviction of Trammel below would stand.

QUESTION: Well, in this case she I take it admitted her participation but was protected by the immunity.

MR. McCREE: That's correct, and she was charged or she was named in the indictment as an unindicted co-conspirator. And we are suggesting that logically to do otherwise would permit a person bent on a criminal

enterprise to enlist the services of his wife in that enterprise with the full knowledge that she could never be used as a witness against him, and we are suggesting that that is not socially desirable and that certainly if that is a consequence, it isn't a reason for overruling the general principle that the public is entitled to every person's testimony or evidence. But that could indeed be the consequence of overturning this conviction of Trammel. He could enlist her as indeed he did and she did all of the actual obtaining of the heroin in the Southeast Pacific, bringing it into the country, while he would remain immune just because this rule in Hawkins would prevent it if we listen to petitioner's contention, and we submit that we should not.

QUESTION: Don't you think that there is a possibility that if the Court should overrule the Hawkins rule to the broad extent that you urge this morning, that there might be a claim in every case and therefore the necessity of a judicial inquiry into just how voluntary the wife's testimony was? I remember the Hawkins case, the wife had been jailed and released on $3,000 bond, as I remember it, condictioned upon her testifying in court against her husband, and that didn't seem very voluntary.

In this case, she was granted immunity and that arguably doesn't seem very voluntary. Don't you think

that this would lead to an inquiry, the claim being made and therefore a necessary inquiry in every case as to just was it or was it not voluntary testimony?

MR. McCREE: If the contention were made, it would, I must concede, Mr. Justice Stewart, that it would.

QUESTION: Well, don't you think every convicted defendant would make that contention?

MR. McCREE: Well, he probably would, but similar contentions are made in similar instances. For example, this Court has said many times that the testimony of a co-conspirator made during the course of the conspiracy and in furtherance of its objects may be used against any other conspirator, but this requires the preliminary showing of some quantum of proof before that comes in.

In the exception to the attorney-client privilege, one of the exceptions is if the person consults an attorney and enlists him in the commission of an offense, no privilege exists there and there, too, some quantum of showing that they were both involved in the criminal activity would be necessary before you could penetrate the attorney-client privilege. So it isn't anything new to the law, but it is something that courts can handle and do handle competently.

There was a so-called in limine act hearing here to determine voluntariness and this happens in a

number of instances, and if it happened here it wouldn't differentiate this at all.

QUESTION: Your exception, your narrow exception would not cover a case where the wife -- if this wife had been aware of the criminal conduct of the husband and had constantly protested against his activity and had not participated in it, then your exception would not permit her to testify, would it?

MR. McCREE: The second branch of my exception would not, and that is why we urge the first, that she should be the holder of the privilege, and if she felt that there wasn't anything worth saving we could expect her to be willing to testify. If she felt there was something worth saving, she wouldn't, and --

QUESTION: The second one would also prohibit her testimony if she saw her husband murder anotherperson, if there were only the three of them including the victim present.

MR. McCREE: It would, and that is why we suggest --

QUESTION: The broader one?

MR. McCREE: -- the broader one, and we think society doesn't benefit by preserving a marriage at this extreme cost.

QUESTION: But your voluntariness factor element

does, as Mr. Justice Stewart suggested, put the court into a subsidiary or a collateral inquiry?

MR. McCREE: Well, we concede it but the courts are in these collateral inquiries all the time where predicates for the operation of a rule have to be shown and different quant of evidence are required frequently to trigger it.

I would also like to observe that the rule in Hawkins would penalize Mrs. Trammel because she is married and that is an unfortunate result. There is another woman involved in this case who was the girlfriend -- in fact, at one point she was referred to as the roommate of another defendant, and she was able to bargain for her liberty with the prosecution and she was not -- she was named as an unindicted co-sponsorator and she was not prosecuted at all. Mrs. Trammel would be penalized because she had gone through the bonds of matrimony with Trammel and this other woman who was just living with the other fellow would not be.

QUESTION: She would be penalized because she could offer no quid pro quo in the negotiations?

MR. McCREE: To the prosecutor. She couldn't bargain for her personal freedom.

QUESTION: I see.

MR. McCREE: So for these several reasons, as we

set forth in our brief, we respectfully request that the Court reconsider Hawkins and hold that the admission of Mrs. Trammel's testimony was not erroneous and affirm the conviction.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wiggins.

ORAL ARGUMENT OF J. TERRY WIGGINS, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

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

QUESTION: How do you -- I suppose there are several ways, but how would you characterize the reason basis for the exception of permitting a wife to testify against her husband in a divorce action, whether she is the plaintiff or whether he is the plaintiff and she is resisting the divorce? Would that be on the theory that at that stage in the court room the marriage is shattered already?

MR. WIGGINS: I certainly think it would and it would be -- it is a practical reaction to the fact that a divorce could not otherwise in most situations be accomplished because you are talking about a matter that is solely within the interest of the two parties who are being divorced and --

QUESTIONS: Assume divorces are granted, and a

many of them are granted without the testimony of the spouse, if there is objective evidence from other people.

MR. WIGGINS: If that is true, Mr. Chief Justice, I am unfamiliar with it. In Colorado, it could not happen.

QUESTION: Well, there is a general exception to the rule, isn't there, that a spouse may always testify as to wrongdoing by the other spouse against him or her?

MR. WIGGINS: That, Mr. Justice Stewart, is the general exception.

QUESTION: But you put that on the basis and the rule rests on the basis that that kind of a marriage is pretty well shattered. When this wife took the stand in the criminal case to testify against her husband, is that marriage any less shattered?

MR. WIGGINS: By the time that she elected to take the stand in this case to protect herself, I think it is no less shattered. I think in this case it might easily be said that the marriage were shattered by her choice. It could have had problems prior to that time, but certainly once she took the witness stand, the marriage I would think would have been ruined. But the question is whether the government should have the opportunity, it seems to me, to try to convince her to destroy the marriage by taking the witness stand so that merely for her own protection the government argues in their brief about the fact

that they feel a defendant in almost every case for his own self interest would claim the privilege, and I wouldn't deny that argument. But by the same token, Mrs. Trammel in her own self interest, to keep herself out of jail, elected to speak about activities between her husband and anyone else, including everyone involved in this.

I would point out that the co-conspirator exception that the government argues for has a glaring problem in this case that can be seen from the record, and that is how simple it is to accuse someone as an unindicted co-conspirator without actually them having any great involvement in the case. I'm not speaking of Elizabeth Trammel. I am speaking of Ben Richardson, Jr. and Josephine Flewellen. If you look at the record in this case, you will find that both of those persons were named as unindicted co-conspirators. Ben Richardson, Jr. did no more than drive Mr. Roberts to the airport, not knowing his reason for going and not knowing what was going to happen when he arrived. Josephine Flewellen did no more than ride in an automobile from the airport at Clark Air Force Base in the Philippines to the airport so that Mrs. Trammel could get on an airplane to come to the United States, and yet both of those people were named as unindicted co-conspirators simply to get in testimony that may have been available and otherwise would have been unavailable

perhaps because of the rules of hearsay. Mr. Richardson testified at trial, didn't ask for immunity, denied all personal culpability in the case, but he was named as an indicted co-conspirator.

If the same circumstance had taken place where Mrs. Trammel was concerned and she had been permitted to go on and testify simply because the government chose to indict her or name her in the indictment, then the marriage would equally have been destroyed but to no gain for anyone because it would have been clear that she was not a part of the conspiracy. I'm not arguing that there was not a conspiracy in this case, there certainly was.

QUESTION: But the government has to prove a co-conspiracy, doesn't it? It can't just by naming someone as an unindicted co-conspirator, without any proof get their testimony.

MR. WIGGINS: Mr. Justice Rehnquist, I think if the circumstance of getting a conviction, yes, the government has to prove that the person is a co-conspirator, but I think before a grand jury by placing the name of a person in an indictment as an unindicted co-conspirator is a very simple matter and I can't conceive of a situation where an assistant United States attorney could not draft an indictment in such a way if he chose to do so.

QUESTION: Or threaten to indict her.

MR. WIGGINS: Or threaten to indict her or call her an aider or abettor. In the Lilley case out of the Eighth Circuit, the husband and wife were called aiders and abettors, under Title 18, section 2. In that case, both denied and laid it off on the other, but the Eighth Circuit held that the rule prevented the testimony of one against the other.

The Cameron case, that the government relies on strongly, out of the Fifth Circuit, a 1977 case, would if this Court adopts what the government argues for, of necessity should have been overruled because Mrs. Cameron said "I don't want to testify against my husband, I'm not involved, I have no desire to testify," and the judge said, "I don't think you have much of a marriage anyway, therefore you will testify."

QUESTION: Yes, but I thought one proposal of the government was that the privilege just belonged to the witness --

MR. WIGGINS: That is --

QUESTION: -- whether a co-conspirator or not --

MR. WIGGINS: Yes, that is one of the --

QUESTION: -- in which event in your Fifth Circuit case there would have been no testimony.

MR. WIGGINS: In the Cameron case there could have been no testimony, that's correct, Mr. Justice White.

QUESTION: But the other proposal is that the privilege is entirely absent if they are co-conspirators.

MR. WIGGINS: That is what the government is arguing for in their second --

QUESTION: Do you understand their proposal in that regard to mean that if the wife is a co-conspirator and there is a prima facie showing of it, I suppose, as a predicate to demanding her testimony, she could be made to testify over her objection?

MR. WIGGINS: That is what I understand their position to be, Mr. Justice White. I understand them to talk about the implementation of that rule in terms of the prosecutor making an offer of proof to the court, saying, okay, she will testify to the following things.

QUESTION: Just like you have to lay the predicate for a lot of other testimony.

MR. WIGGINS: Absolutely correct, and once the offer of proof is made then the judge decides whether or not the judges believes she is a co-conspirator. If he does, then her permits her to testify.

QUESTION: I didn't understand the government's position to be in either of its alternative arguments that the spouse could be compelled to testify against her will. Perhaps I misunderstood it.

MR. WIGGINS: My understanding --

QUESTION: The Solicitor General seemed to indicate that maybe the court could stop short of that on the one branch of their -- but as I read their brief, it would be to go all the way.

MR. WIGGINS: As I read their brief, the witness spouse would still have some choice and, as the Solicitor General indicated in his argument in terms of the grant of witness immunity, the privilege could still be claimed --

QUESTION: As the spousal privilege.

MR. WIGGINS: Yes -- then that would imply a choice, but on page 28 of the government's brief they do indicate that what they are suggesting is that if the parties are co-conspirators then the government would make an offer of proof to the court and when it does that, make the offer of proof, if the judge decides that he believes they are co-conspirators, then he would permit the wife to testify.

QUESTION: Not only permit but could require.

MR. WIGGINS: I wouldn't go quite that far, but it is --

QUESTION: If immunity were granted?

MR. WIGGINS: -- it is argued, yes, that that is true.

QUESTION: If immunity were granted, he could require under those facts.

QUESTION: Not if there is spousal privilege.

MR. WIGGINS: Mr. Chief Justice --

QUESTION: We are starting with the proposition that Mr. Justice White put to you, that she has the option. Now, she exercises that option ordinarily at the risk that she might later be indicted if she doesn't cooperate with the government. Isn't that one of your problems?

MR. WIGGINS: Yes, that is one of my problems. But I think, Mr. Chief Justice, the granting of witness immunity -- I think the Tenth Circuit confused the rights of witness immunity and the privilege considerably because witness immunity I had understood after the Kastigar case was a fairly settled matter. And now to take witness immunity and try to superimpose a husband-wife privilege where the privilege has always been held not in the immunized party but in the other person, both not only confuses the privilege, the husband-wife privilege, but I think confuses immunity, because the Solicitor General argues that there are circumstances where a person could be granted witness immunity and still claim the marital privilege, at least the way the law has been to date.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:38 o'clock a.m., the case in the above-entitled matter was submitted.)

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