**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

| | | |
|---|---|---|
| | * | |
| **UNITED STATES OF AMERICA** | * | |
| **v.** | * | **Case No. 99-390PWG** |
| **SHAUN L. JAMES** | * | |

* * * * *

## MOTION TO EXCLUDE PRIVILEGED SPOUSAL STATEMENT

Because the statement made by Mrs. Tawanda James to a police officer at the time of her husband's arrest is protected by the spousal privilege it should be excluded from evidence.

## STATEMENT OF FACTS

On December 12, 1998, while accompanied by his wife Sergeant Tawanda James and their two children, Shaun James was stopped and arrested for assault by Officer Kevin Okun. Officer Okun testified that Mrs. James made a statement at the time to the effect that Mr. James had slapped the back of her head with his open hand and that she wanted to press charges. When Officer Okun asked Mrs. James to put that statement in writing, she declined. Mrs. James subsequently invoked her privilege not to testify against her husband in this case. The government seeks to use Mrs. James's prior out-of-court statement as evidence against her husband.

At trial on August 19, 1999, at which Mrs. James was not present, this court found that Mrs. James had properly invoked her spousal privilege against testifying. Transcript of Hearing ("Tr.") at 23 (attached as Exhibit 1). The court also held that Mrs. James's statement qualified as an excited utterance under Fed. R. Evid. 803(2) and therefore was not excludable as hearsay. Tr.

at 35. The court reserved final judgment in the case pending briefing of the issue of whether Mrs. James's statement should be excluded under the spousal privilege. Tr. at 36.

## ARGUMENT

### I. THE PRIVILEGE AGAINST ADVERSE SPOUSAL TESTIMONY COVERS OUT-OF-COURT STATEMENTS AND THUS COVERS THE STATEMENT MADE BY MRS. JAMES.

Under the privilege against adverse spousal testimony, a husband or wife can decline to testify against his or her spouse. The privilege is held solely by the would-be witness spouse, who can neither be required to nor prevented from testifying by the defendant spouse. *See Trammel v. United States*, 445 U.S. 40, 53 (1980).[1] In the Fourth Circuit, the spousal privilege also protects a spouse's prior out-of-court statements once the declarant spouse invokes his or her right not to testify. *United States v. Hall*, 975 F.2d 711, 716, 717 (4th Cir. 1993). In *Hall*, the prosecution attempted to use the defendant's wife's statement, made prior to her invocation of her spousal privilege, by reading it during cross-examination. The court found that the use of the out-of-court statement violated the wife's privilege:

> Use of the statement also violated both Mr. and Mrs. Hall's marital privilege. Mrs. Hall had asserted her privilege not to testify against her husband, and the government did not call her to the stand in order to test her assertion of the privilege. Instead, to avoid risking an adverse ruling on this issue, the prosecutor simply identified the statement in front of the jury, and then read it in open court . . . .

*Id.* at 716; *see also id.* at 717 (reiterating that the use of the statement violated "both Mr. and Mrs. Hall's spousal privileges").[2] The court's finding of error turned on its treatment of Mrs.

---

[1] Confidential marital communications are also protected under a separate privilege not at issue in this case.

[2] The court also found that reading the statement gave rise to a number of other errors, including violations of the hearsay rule and the Confrontation Clause.

Hall's out-of-court statement as if it were in-court testimony, both of which are covered by the privilege.

Scholars and commentators confirm this analysis of Fourth Circuit law. Judge Weinstein interprets the spousal privilege to exclude "all testimony" and cites *United States v. Hall* for the proposition that "all testimony" includes a spouse's out-of-court "statement." WEINSTEIN'S FEDERAL EVIDENCE § 505.05[1] & n.1 (2d ed. 1999). According to Professor Wright, courts and writers believe that under the common law, "[h]earsay statements – oral or documentary – are testimonial utterances [and thus] are equally privileged with testimony on the stand." WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5576 pp. 589-92 (1989) (quoting 8 WIGMORE, EVIDENCE at 225-226 (1961)); *see also id.* § 5576 n.45 (Supp. 1999) (citing *United States v. Hall*).

*Hall* thus requires the exclusion of Mrs. James's statement: its use would violate her asserted spousal privilege in the same way that the use of Mrs. Hall's statement violated hers. Moreover, exclusion makes sense in this particular case. The privilege aims to protect marital harmony and vests the important and sensitive decision about whether or not to testify in the declarant spouse. *See Trammel*, 445 U.S. at 53. Mrs. James has made every effort to distance herself from her oral statement: within minutes of her statement she declined to put it in writing and indicated that she did not wish to provide any further information, Tr. at 27, and has since maintained her right not to take the stand. By seeking to introduce her out-of-court statement despite her demonstrated wish that her testimony not be used against her husband, the prosecution is usurping the authority vested in Mrs. James by *Trammel* to balance the value of her testimony against the value of her marriage.

## II. THE INTRODUCTION OF A SPOUSE'S OUT-OF-COURT STATEMENTS WHERE THE SPOUSE HAS INVOKED THE SPOUSAL PRIVILEGE OFFENDS THE CONFRONTATION CLAUSE AND UNDERMINES THE PRIVILEGE.

The prosecution's efforts to introduce Mrs. James's statement in the face of her asserted spousal privilege raise additional concerns under the Confrontation Clause. U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). The Confrontation Clause requires that where a witness cannot be cross-examined, that witness's hearsay statements will be admitted only if they bear "adequate indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Such reliability can be "inferred" where the statement falls within "a firmly established hearsay exception" or where there is a showing of "particularized guarantees of trustworthiness." *Id*. A further factor in assessing whether the Confrontation Clause permits admission of a hearsay statement is whether the statement constitutes "crucial" or "devastating" evidence against the accused. *Dutton v. Evans*, 400 U.S. 74, 87 (1970); *see Gochicoa v. Johnson*, 118 F.3d 440, 446-47 (5th Cir. 1997) (two most important factors in assessing whether Confrontation Clause is violated by admission of evidence are "whether the hearsay evidence was 'crucial' or devastating' . . . [and] the degree to which the hearsay evidence is supported by 'indicia of its reliability'" (*citing Dutton v. Evans*, 400 U.S. 74 (1970)).

Had Mrs. James declined to exercise her privilege and simply been "unavailable" for some other reason, *see* Fed. R. Evid. 804(a), the introduction of her statement would not offend the Confrontation Clause because it falls within a firmly established exception to the hearsay rule. *See White v. Illinois*, 502 U.S. 346, 356 n.8 (1992) (excited utterance a firmly rooted exception). But Mrs. James's statement is not merely an excited utterance. It is a statement

made by a witness who has exercised her privilege against testifying against her spouse. As the court pointed out in *Hall*, using such a spousal statement "introduce[s] testimony of a witness who c[an] not be cross-examined as required by the Confrontation Clause." *Hall*, 989 F.2d at 717. The introduction of such a spousal out-of-court statement thus would create a tension between the privilege and the defendant spouse's right of confrontation. Particularly where, as here, the statement is "critical to the issue of guilt or innocence," Tr. at 50 (statement of Grimm, Mag.), the threat of the introduction of such a statement would either force the witness spouse to relinquish the privilege and take the stand, or deprive the defendant spouse of the right to cross-examine the key witness in the prosecution's case. Such tension undermines the spousal privilege itself which is designed to strengthen marital harmony. By contrast, excluding such statements preserves the values underlying both the spousal privilege and the Confrontation Clause because it allows both spouses to exercise their rights and privileges without penalizing their marriage.

Finally, Mrs. James's out-of-court statement should be excluded because it is "crucial" and would be "devastating" to Mr. James's defense. *See Dutton v. Evans*, 400 U.S. at 87 (admitting out-of-court statement repeated by witness where witness was one of twenty and testimony was "peripheral" to the case). This court has indicated that "it would be difficult . . . to convict" Mr. James if his wife's statement was excluded. Tr. at 50. The admission of such critical evidence without benefit of cross-examination would violate the truth-seeking purpose of the Confrontation Clause.

## CONCLUSION

For the reasons stated, Mr. James respectfully requests that the statement of his wife Mrs. James be excluded from evidence in this case.

Respectfully submitted,

_____

SASHA NATAPOFF
Assistant Federal Public Defender
100 South Charles Street
Suite 1100, Tower II
Baltimore, Maryland 21201
(410) 962-3962

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this _____th day of July, 2000, a copy of the foregoing Motion to Exclude Privileged Spousal Statement was delivered to Paul Marone, Special Assistant Federal Public Defender, U.S. Army Garrison, Building 310, Wing 10, Aberdeen Proving Ground, Maryland, 21001.

_____
SASHA NATAPOFF
Assistant Federal Public Defender

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

| | | |
|---|---|---|
| | * | |
| **UNITED STATES OF AMERICA** | * | |
| **v.** | * | **Case No. 99-390PWG** |
| **SHAUN L. JAMES** | * | |

* * * * *

**REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE PRIVILEGED SPOUSAL STATEMENT**

In its response to Mr. James' motion, the government argues that Mrs. James cannot assert her spousal privilege because she was allegedly a victim of her husband's crime. The government also asserts that because Mrs. James' statements were excited utterances, their admission comports with the Confrontation Clause. Both of these arguments give short shrift to Mrs. James' right, articulated in *Trammel v. United States*, 445 U.S. 40 (1980), to assert her privilege against testifying against her husband.

ARGUMENT

I. THE GOVERNMENT CONCEDES THAT UNDER *UNITED STATES v. HALL*, THE SPOUSAL PRIVILEGE COVERS MRS. JAMES' OUT-OF-COURT STATEMENTS.

As explained in Mr. James' initial motion, the law of this Circuit is that where a spouse asserts the privilege against adverse spousal testimony, the declarant spouse is protected not only from having to testify but also from having his or her out-of-court statements used against the defendant spouse. *See United States v. Hall*, 975 F.2d 711, 716, 717 (4th Cir. 1993) (prosecution's use of declarant wife's out-of-court statement, made prior invocation of spousal privilege, violated wife's spousal privilege); Defendant's Motion to Exclude Privileged Spousal

Statement ("Def. Mot.") at 2. The government does not contest this analysis. *See* Government's Response to Defendant's Motion to Exclude Privileged Spousal Statement ("Gov't Resp.") at 4. Accordingly it is conceded.

## II. UNDER *TRAMMEL*, THE "INTRA-SPOUSAL CRIME" EXCEPTION TO THE PRIVILEGE DOES NOT APPLY WHERE THE WITNESS SPOUSE CHOOSES TO ASSERT HER PRIVILEGE.

At common law, the spousal privilege originally belonged to both spouses and could be asserted by either. In particular, a defendant spouse could use the privilege to prevent a witness spouse from testifying. *See Trammel*, 445 U.S. at 44-45. An exception to the privilege existed where one spouse was charged with a crime against the other. *See United States v. Wyatt*, 362 U.S. 525, 526 (1960); *Trammel*, 445 U.S. at 46 n.7. The intra-spousal crime exception was based on the perceived "necessity" of preventing the defendant spouse from using the privilege to keep the injured spouse – often the only witness to the crime – off the witness stand. *See* WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5592 pp. 739 (1989) (describing history of the exception).

All that changed in 1980. When the Supreme Court in *Trammel* decided to vest the federal spousal privilege exclusively in the witness spouse, it eliminated the primary rationale for the intra-spousal crime exception because it deprived the defendant spouse of the power to prevent the injured spouse from testifying. *See* WRIGHT & GRAHAM, EVIDENCE § 5592 p. 739 (*Trammel* "has cast some doubt over the future of the exception in federal court"). Indeed, the central holding of *Trammel* is that "the witness [spouse] may be neither compelled to testify nor foreclosed from testifying." *Trammel*, 445 U.S. at 46. Typically, it is in the defendant spouse's interest to foreclose testimony while it is in the prosecution's interest to compel it. *Trammel*

expressly forbids both and vests the decision about whether or not to testify solely in the witness spouse.[3]

Nowhere does *Trammel* suggest that the intra-spousal crime exception modifies its central holding to permit the prosecution to compel testimony from a spouse who has invoked the privilege. The Court was clearly aware of the exception, mentioning its historical existence in passing, *Trammel* 445 U.S. 46 at n.7, but makes no reference to it when redefining the contours of the federal privilege. As the Tenth Circuit noted with respect to another, related exception, "one would have expected the Court at least to have indicated that the exception might still make the privilege unavailable even when the witness spouse asserted it." *In re Grand Jury Subpoena*, 755 F.2d 1022, 1026 (10th Cir.) (holding that after *Trammel*, marital privilege not subject to exception for joint participation in criminal activities), *cert. granted*, 474 U.S. 815 (1985), *judgment vacated as moot*, 475 U.S. 133 (1986). Significantly, the government cites no post-*Trammel* case in its response, *see* Gov't Resp. at 4, and undersigned counsel was unable to find a single post-*Trammel* federal case applying the intra-spousal crime exception to the privilege against adverse spousal testimony.[4]

The rationale of *Trammel* fundamentally undermines the application of the intra-spousal crime exception to spouses who refuse to testify. *Trammel* explicitly rejected the anachronistic

---

[3] The government remarks that Mr. James cannot assert the spousal privilege because it is vested in Mrs. James. It is Mrs. James' privilege, not Mr. James', that is at issue in this case.

[4] The only post-*Trammel* cases that address the exception deal with the marital communications privilege in which a defendant spouse asserts the privilege to protect confidential communications. Such cases do not implicate the right, established by *Trammel*, of the witness spouse not to testify.

notion that a female spouse's decision whether or not to testify should be controlled by someone else. *Trammel*, 445 U.S. at 51-52. By divesting any spouse of the power to make that decision for the other spouse, *Trammel* established that wives, and wives alone, are entitled to balance their interest in marital harmony against the possible prosecution of their husbands.[5] For the same reasons, the intra-spousal crime exception cannot be used to compel a reluctant spouse to testify. Simply because a husband is accused of committing a crime against his wife does not mean that the wife loses the ability to make an independent decision about whether to testify. Nor should a prosecutor be able to wrest the privilege from a wife whenever the prosecutor suspects that the wife has been victimized.

In sum, the federal law of privilege does not authorize the abrogation of Mrs. James' spousal privilege as it applies to her out-of-court statements. For this reason, those statements cannot be admitted against Mr. James.

## III. THE CONFRONTATION CLAUSE IS OFFENDED WHERE THE ADMISSION OF A SPOUSE'S UNRELIABLE OUT-OF-COURT STATEMENT PITS THE WITNESS SPOUSE'S ASSERTED PRIVILEGE AGAINST THE DEFENDANT SPOUSE'S RIGHT TO CONFRONT HIS ONLY ADVERSE WITNESS.

As argued in Mr. James' initial motion, the admission of Mrs. James' out-of-court statements would violate his right under the Confrontation Clause to confront a key, indeed, the only witness against him. While the government correctly notes that, generically speaking, the

---

[5] This aspect of *Trammel* effectively repudiates the rationale of *Wyatt v. United States*, 362 U.S. 525 (1960), in which the Court decided that a wife could be forced to testify against her will where her husband was accused of violating the Mann Act. The Court rested its holding on the theory that a prostituted wife could not be said to have a will of her own. *See id.* at 530 ("[T]he [Mann] Act reflects the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected against themselves. It is not for us to re-examine the basis of that supposition." (citations omitted)).

admission of an excited utterance by an unavailable witness is permissible, that is not the end of the matter. Mrs. James is unavailable by virtue of her exercise of a privilege designed to preserve marital harmony between her and the very person the statements will be used against. The use of her statements effectively destroys her assertion of privilege and nullifies the promise in *Trammel* that witness spouses have the independent right to control the use of their testimony against their accused partners. For this reason, an utterance by a spouse who later declines to testify about it should not be treated as a simple excited utterance under a firmly rooted hearsay exception.

In addition, the rationale for admitting excited utterances is undermined where, as here, the statements are made under particularly unreliable circumstances. The touchstone of Confrontation Clause acceptability is reliability. *Lilly v. Virginia*, 119 S. Ct. 1887, 1894 (1999) (plurality opinion) (Confrontation Clause prohibits admission of nontestifying accomplice's statement against penal interest because insufficiently reliable). Whether a hearsay statement is reliable must be determined from "the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 820 (1990). The proponent of the evidence, in this case the government, bears the burden of establishing the reliability of the statement. *Id.* at 816.

The rationale for admitting excited utterances into evidence is that the influence of the exciting event itself makes the ensuing statement reliable. *See White v. Illinois*, 502 U.S. 346, 355 (1992) (excited utterance is "offered in a moment of excitement – without the opportunity to reflect on the consequences of one's exclamation"). But where an "excited" spousal statement is the result of a marital spat, the opposite is true. The "excitement" exhibited by the declarant

spouse may well stem, not from the event – in this case an alleged assault – but from the marital conflict itself. Anger at a marital partner can generate particularly untrustworthy statements. *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (hearsay statements may be admitted if they demonstrate "particularized guarantees of trustworthiness"). The need for cross-examination is thus enhanced where, as here, the only incriminating information against Mr. James is contained in angry statements made by his spouse.

In the instant case, were Mrs. James to testify that she falsely accused her husband of assault, she would expose herself to the charge of making a false statement to the police. By contrast, by asserting her privilege she can protect herself, her husband, and her marriage. Since she has declined to be cross-examined, the fairness and truth-seeking concerns embodied in the Confrontation Clause demand that her statements be excluded from evidence.

## CONCLUSION

For the reasons stated, Mr. James respectfully requests that the statement of his wife Mrs. James be excluded from evidence in this case.

Respectfully submitted,

_____

SASHA NATAPOFF
Assistant Federal Public Defender
100 South Charles Street
Suite 1100, Tower II
Baltimore, Maryland 21201
(410) 962-3962

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of August, 2000, a copy of the foregoing Reply to the Government's Response to Defendant's Motion to Exclude Privileged Spousal Statement was delivered to Paul Marone, Special Assistant Federal Public Defender, U.S. Army Garrison, Building 310, Wing 10, Aberdeen Proving Ground, Maryland, 21001.

_____
SASHA NATAPOFF
Assistant Federal Public Defender