

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

IN RE GRAND JURY SUBPOENA OF )  
KIM TYSON<sup>1</sup> ) No.  
 ) \*\*\*TO BE FILED UNDER SEAL\*\*\*

**MOTION TO QUASH GRAND JURY SUBPOENA, FOR A PROMPT HEARING  
AND TO SUSPEND ENFORCEMENT OF SUBPOENA**

Comes now Kim Tyson, by her attorney, John D. Stobbs II, and moves to Quash Grand Jury Subpoena, For a Prompt Hearing and to Suspend Enforcement of Subpoena because requiring her to testify before the grand jury against her husband would violate Kim’s rights under the adverse spousal privilege.

***Background***

A federal grand jury has been convened in the Southern District of Illinois to investigate alleged violations of Wilfred Carruthers civil rights by Brent Tyson who is employed as a Makanda, Illinois policeman. Attached and marked Exhibit A is the police report prepared by the Makanda Police Department regarding this incident.

The essential facts are that on March 10, 2015, at approximately 4:00 a.m. the Tyson family was peacefully at sleep. Mr. Tyson was jarred from his sleep by a noise at his front door. This is every family’s nightmare. Someone was at the front door trying to break into the house. Mr. Tyson immediately contacted the Makanda Police Department. He then went to the door and asked the intruder what he was doing at the Tyson’ residence. The intruder turned out to be Thomas Carruthers, an 18 year old teenager who in a drunken stupor went to the wrong house. Even though intruder Carruthers was at the wrong house he told Mr. Tyson to “fuck off,” that he was going inside to sleep. He refused to leave. Intruder Carruthers began approaching the house where Kim and their 5 year old daughter were still inside. Mr. Tyson subdued intruder Carruthers when he raised his fists to strike Mr. Tyson.

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<sup>1</sup> This Motion to Quash is similar to one I filed previously. The names and events have been modified so as to respect the privacy of the grand jury.

As this commotion was going on, Stan Tyson' wife Kim and the couple's 11 year old daughter were present, no doubt terrified about what was transpiring.

Ultimately, after law enforcement arrived, intruder Carruthers was arrested, taken away, charged with disorderly conduct, criminal trespass to real property, disobeying a police officer and resisting a peace officer. The police report reflects that intruder Carruthers's left eye appeared red and swollen. When Officer Johnson inquired about this injury, intruder Carruthers advised the he had been in a fight earlier. No doubt because of his inebriated state intruder Carruthers could not recall with whom he had been in a fight.<sup>1</sup>

The undersigned is obviously not privy to the Government's theory of how intruder Carruthers's civil rights were violated by an off-duty police officer acting in a civilian capacity at 4:00 a.m. in the morning to protect himself, his property and his family. The undersigned has no way of knowing if the Government feels that the "color of law" requirement of a 1983 violation is met when a police officer is in pajamas as opposed to a uniform. Similarly, the undersigned does not know how the Government will clear the common sense hurdle of the police report indicating that intruder Carruthers claimed his injuries occurred as a result of a fight earlier in the evening, not anything Mr. Tyson or any police officer did.

But, the Government has decided to plough ahead. It believes that Kim is needed as a witness who, through the undersigned, was served with Exhibit B, a grand jury subpoena. Notwithstanding the police report and common sense, Mr. Tyson is *the target* of the grand jury.

The undersigned spoke with the Assistant U.S. Attorney regarding the subpoena and the AUSA originally acknowledged that Kim would not be required to testify as a result of the spousal privilege.

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<sup>2</sup>The fact that intruder Carruthers has yet to file in Jackson County, Illinois a civil lawsuit regarding civil rights violations against Mr. Tyson is striking. It's *Alice in Wonderland*-like that the Department of Justice will attempt to criminally prosecute Mr. Tyson when apparently no Jackson County personal injury lawyer in a bad economy will do so civilly.

Thereafter, the undersigned was contacted by the AUSA who indicated that Kim would in fact be required to testify before the grand jury about matters “she observed” and people she spoke to about matters on the date in question. The AUSA indicated that he did not believe Kim could refuse to testify against Mr. Tyson for matters she “observed” or individuals she spoke to after the occurrence.

The AUSA indicated that he did not want to learn what Kim had to say for the first time during presentation of Mr. Tyson’s defense at his trial. Even though the AUSA would be prohibited at trial from cross-examining Kim about her refusal to testify before the grand jury under her adverse spousal privilege, The AUSA nevertheless wanted to “lock down” her testimony.

The undersigned advised he would speak to Kim about her testimony. Subsequently, the AUSA contacted the undersigned and advised that Kim would have to testify before the grand jury pursuant to the subpoena. Subsequently, the undersigned spoke to Kim who advised that under the circumstances she desired to invoke her right not to testify under the adverse spousal privilege exception.

### ***Federal Rule of Evidence 501***

The original draft of the Federal Rules of Evidence (FRE) by the Judicial Conference Advisory Committee in 1974 included rules that recognized nine separate common law privileges, including spousal privilege. The individual rules dealing with privileges, however, were dropped in favor of a single rule incorporating all common law rules of privilege. The FRE rule regarding privileges is as follows:

*Rule 501. General Rule* Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be

determined in accordance with state law.

### *Adverse Spousal Privilege*

#### *Common Law*

The common law has recognized spousal privileges since medieval times. *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 911 (1980) Over time the spousal privilege has evolved and until the 1930's there were three distinct privileges: 1) incompetency, 2) anti-marital facts, and 3) marital confidentiality. *Trammel* at 43 and 909 The number of privileges changed when the Court in *Funk v. United States*, 290 U.S. 371, 54 S. Ct. 212 (1933) effectively abolished incompetency as one of the spousal privileges. Prior to this decision, courts did not allow the spouse of the defendant to testify, even if the spouse volunteered to testify on behalf of the defendant.

The two remaining spousal privileges that continue to be recognized are anti-marital facts, now commonly known as adverse spousal testimony, and marital confidentiality, now referred to as marital communications.

#### *Trammel v. United States*

In *Trammel* the willingness of the wife to testify against her husband prompted the U.S. Supreme Court to reconsider whether the privilege should be vested solely with the defendant spouse and ultimately the Court reasoned that if the witness spouse *wanted* to testify, there was no spousal harmony left to protect.

Elizabeth and Edwin Trammel, husband and wife, conspired to import heroin into the United States. When Elizabeth Trammel was arrested during an airport customs search, she immediately agreed to cooperate with the Government in exchange for a grant of immunity. Understandably, because Elizabeth Trammel was a cooperating Government witness, by the time of the trial, the dissolution of the Trammel marriage was well underway. At trial, Edwin Trammel objected to his wife's testimony against him on the grounds that the adverse spousal testimonial privilege barred her from doing so. The lower court affirmed the existing rule and precluded Elizabeth Trammel from testifying.

Breaking with precedent, the Supreme Court unanimously held that the existing rule, which permitted someone other than the witness spouse to assert the privilege, contravened public policy. Chief Justice Burger stated the obvious by explaining, “[W]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse testimony seems far more likely to frustrate justice than to foster family peace.”

But, the “adverse spousal testimony” privilege permits an individual to refuse to testify adversely against his or her spouse. At *Trammel* 53 “This privilege rests on the notion that a husband and wife should be able to trust each other completely, and that marriage is a sanctuary. The privilege is described as being ‘broadly aimed at protecting marital harmony.’” *United States v. Premises Known as 281 Syosset Woodbury Rd., Woodbury, N.Y.*, 71 F.3d 1067, 1070 (2d Cir. 1995) (quoting *In re Grand Jury Subpoena United States*, 755 F.2d 1022, 1027 (2d Cir. 1985), vacated on other grounds sub nom *United States v. Koecher*, 475 U.S. 133 (1986)).

*Kim Tyson*

The clever twist here is that the Government wants to call Kim to testify as to what she observed. If she observed her husband clobbering intruder Carruthers in self-defense, the Government claims that is not testimonial. That might be correct, but it would be adversarial. Forcing Kim to testify about her observations to the grand jury certainly would have a dour impact on the marriage. It definitely would not be a celebrated moment of the marriage. This fact alone meets the *Trammel* requirements and the discussion and debate should end there.

*Even if*, Kim were to testify to the grand jury that she did not observe anything, she should not be placed in a “perjury trap.” This sort of testimony would no doubt go against the Government’s theory of the case. The Government appears Hell-bent to indict an off duty officer for a 1983 violation and apparently will ramp up “color of law” to mean

wearing pajamas instead of a uniform. If a jury reaches the obvious conclusion and acquits Mr. Tyson, Kim has opened herself up to a perjury charge, because the Government could come back and claim to another grand jury that the other witnesses were truthful and Kim lied. Again, this would impermissibly harm “marital harmony” mentioned in *Trammel*.

### *Ripeness*

The Government will no doubt claim that this issue is not ripe for review and that Kim should be forced to appear before the grand jury and refuse to answer any questions by invoking her right to the adverse spousal privilege at which time the Government would seek and Order compelling her testimony.

This approach is improper and unfair for two reasons. Kim’s invocation of her adverse spousal privilege in front of the grand jury will obviously have an adverse impact on Mr. Tyson, because there will be a negative connotation of Kim invoking her right not to testify under the adverse spousal privilege. That is precisely what the adverse spousal privilege is meant to prohibit.

Likewise, as demonstrated by Exhibit C, the Government now knows that Kim will invoke her right not to testify under the adverse spousal privilege. Why waste taxpayer money, the grand jury’s time and this Honorable Court’s resources?

In *A.B. v. United States*, 24 F. Supp. 2d 488 (D. Md. 1998) the District Court granted the movant’s Motion to Quash because she had invoked her right not to testify under the adverse spousal privilege. So, this Honorable Court can certainly hear this Motion without forcing Kim to appear before the grand jury to answer *any* questions.

### *U.S. Attorney’s Manual Violation*

Of course, it would be an entirely different story if The AUSA were to give Kim immunity. Kim would still refuse to testify but the debate would be much closer. While this Honorable Court cannot require that the U.S. Attorney’s Manual be followed, it is nevertheless interesting to note that it appears these types of situations are frowned on. Even the U.S. Attorney’s Manual recognizes the sour taste that compelling a wife to testify

against her husband has. It appears that there are mechanisms in place that an Assistant must meet before a wife is required, or even requested to testify against her husband.

For purposes of this Motion, the pertinent Sections of the U.S. Attorney's Manual are found in Chapter 5 Section L.

Section L states:

*Immunizing Close Family Relative of Defendant or Target* states:

“Attorneys should consult the U. S. Attorneys' Manual, § 9-23.211, when seeking to immunize an individual to compel that individual to testify about a close family relative.” That section describes the factors that should be considered in determining whether to compel an individual to testify against a close family relative. That section reads as follows:

Consideration should be given to whether the witness is a close family relative of the person against whom the testimony is sought. A close family relative is a spouse, parent, child, grandparent, grandchild or sibling of the witness. **Absent specific justification, we will ordinarily avoid compelling the testimony of a witness who is a close family relative of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing.** Such justification exists, among other circumstances, where (i) the witness and the relative participated in a common business enterprise and the testimony to be elicited relates to that enterprise or its activities; (ii) the testimony to be elicited relates to illegal conduct in which we have reason to believe that both the witness and the relative were active participants; or (iii) the testimony to be elicited relates to a crime involving overriding prosecutorial concerns.” (Emphasis added)

**“As this provision makes clear, the ordinary course is to avoid compelling the testimony of a close family relative of a grand jury target or trial defendant. . . (emphasis added)**

Chapter 5 Section L Subsection 1 (c) states the criteria for the foregoing.

*“Prospective testimony relating to joint participation in the commission of a crime*

A brief discussion of the marital privileges is useful to understand the current

state of the law as to whether joint participation in a crime will override the assertion of the marital privilege. Although there are no general privileges protecting an individual when compelled to testify against a close family relative, when compelling a witness to testify about his spouse, two marital privileges may be asserted. First, the confidential marital communications privilege protects privately disclosed statements or communications made in confidence during the marriage. This privilege may be asserted by either spouse, and the privilege survives the deterioration of the marriage. The communications, however, must be made during the marriage, and not before or after, to come within the privilege. The privilege protects the privacy of the marital communications. **Second, the testifying spouse may claim the privilege against adverse spousal testimony which applies to all testimony against the spouse, including testimony on non-confidential matters or matters that occurred prior to the marriage. Although this privilege covers a greater range of potential information, it may be asserted only by the spouse called or compelled to testify and not by the spouse against whom the testimony is sought.** Furthermore, this privilege does not survive the deterioration of the marriage, as it is intended to protect the sanctity of the marriage as it exists at the time of the trial or grand jury proceeding.” (Emphasis added)

So, it appears from the foregoing that the only way that Kim might be compelled to testify is for the Government to provide her immunity, which according to its own directives it should not do.

The undersigned has no knowledge of The AUSA attempting to obtain immunity for Kim from his superiors as it appears he is required to do based on the U.S. Attorney’s Manual.

The only “end around” to its own policy is to request that this Honorable Court use its inherent authority over the grand jury to compel Kim to answer questions. In essence the Government would be requesting that this Honorable Court rule against Kim’s right to invoke her adverse spousal privilege. Hopefully, this Honorable Court will see through this sham and quash the subpoena.

### **Conclusion**

Kim is not willing to testify against her husband. That is her right under the adverse spousal privilege.



The Assistant U.S. Attorney handling this case has been requested to withdraw the subpoena and he has refused to do so.

Under these facts, the adverse spousal privilege constitutes a blanket prohibition against Kim being called before the grand jury and as such the subpoena is improper and should be quashed.

As such, Kim Tyson requests that this Honorable Court set this matter for hearing, to quash the grand jury subpoena and in the interim to suspend her attendance at the grand jury.

KIM TYSON

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