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Court Ordered Handwriting Exemplars—How Effective?

Handwriting samples are admitted as standards of comparison by specific Federal Statute, Title 28 United States Code, Section 1731, "The admitted or proved handwriting of any person shall be admissible for purposes of comparison to determine genuineness of another handwriting attributed to such person." This, of course, would presume that such standards are available.

To perform an adequate handwriting examination, it is necessary that the document examiner have available known standards which possess the same letters and letter combinations as the handwriting in question. Such known standards are often not easily obtained, and many handwriting examinations must result in "no conclusion" findings because the lack of adequate known exemplars precludes the examiner from expressing a definite opinion.

Because of recent court decisions there is now available to the investigator a means of obtaining handwriting standards from defendants which may prove adequate for use by the handwriting expert in his evaluation of known and questioned writings. These court decisions created a prosecutorial tool by which the defendant, upon court order, is compelled to provide specimens of his handwriting for examination purposes.

The availability of this procedure now enables the prosecutor to procure handwriting specimens otherwise not obtainable. The defense objection to this procedure is the obvious contention that this action violates the defendant's privilege against self-incrimination as afforded by the Fifth Amendment to the Constitution.

In that the "privilege" plays such an important role in the court proceedings relating to the compulsion to provide exemplars of handwriting, it would seem appropriate to briefly review the development of the "privilege" as we now know it.

Development of the Self-Incrimination Privilege[2]

The controversy over self-incrimination had its beginning in England in the 11th century when William the Conqueror decreed that the bishops, who had been sitting as judges in the popular courts, were to decide cases according to ecclesiastical law. From this requirement there evolved two separate systems of courts in England; the ecclesiastical and the common law courts.

In the 13th century, the ecclesiastical court instituted in its proceedings the inquisitorial oath, whereby the accused affirmed that he would answer truthfully questions put to him

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[2] 10 *Vanderbilt Law Review* 485 (1957).

by the judge. This replaced the "compurgation oath" where the accused swore his own innocence.

The inquisitorial oath came to suffer considerable abuse. This abuse arose from "fanatical" ecclesiastical judges summoning individuals to answer to any charge the judge might choose to select. This indiscriminate use of the oath was often directed toward the persecution of heretics and in this form became known as the "ex-officio" oath.

Sir Edward Coke, who became Chief Justice of the Common Pleas in 1606 and Chief Justice of the Kings Bench in 1613, exerted his influence to prevent the "ex-officio" application of the inquisitorial oath. Through the efforts of Coke, the common law courts generally adopted the view that ecclesiastical courts could not, as a matter of jurisdiction, administer the "ex-officio" oath to laymen who were under penal charges.

It should be noted that at this time there was no restriction against employing the inquisitorial oath, only its "ex-officio" application.

Popular opinion was mounting in England over the use of this inquisitorial oath. The events in the proceedings against one John Lilburn served to justify this opinion. Lilburn was arrested on order of the Star Chamber and charged with sending heretical books from Holland to England. At his appearance before this body he refused to take the inquisitorial oath and also demanded that he be confronted by his accusers. The result of his defiance of the Star Chamber was a fine, imprisonment, and a sentence to be whipped and stand in pillory. The sentence imposed was carried out in 1638.

Acting on an appeal for his release, the House of Commons discharged Lilburn from prison and subsequently awarded him reparation in the amount of 5,000 pounds for the unjust treatment he received.

By the close of the 17th century, in large part resulting from the cause of John Lilburn, defendants at trials in both ecclesiastical and common law courts were not bound to incriminate themselves.

The emigration of many colonists to America may be attributed to the desire to avoid the persecution typified by the ordeal of John Lilburn. Yet, the religious zeal which in large part prompted them to depart their homeland, found its way into their treatment of individuals who chose to pursue a religion other than that which was popularly accepted. The use of the ecclesiastical "ex-officio" oath was often administered in the colonies. Prior to the incorporation of the Fifth Amendment into the United States Constitution, seven states had incorporated provisions against self-incrimination into their constitutions or Bills of Rights. At the present time two states have no constitutional provision against self-incrimination but afford statutory recognition of the privilege.

The presence of the states' concern for this privilege is highly significant for, until 1964 when the Supreme Court rendered its decision in *Malloy v. Hogan*, 378 U.S. 1 (1964), the Fifth Amendment was binding only in affairs related to the federal government.

Court Decisions Pertaining to Non-Testimonial Evidence

The most significant recent court decision directed toward defining the application of the Fifth Amendment as it relates to non-testimonial evidence was delivered by the Supreme Court in matters relating to Armando Schmerber, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966).

Schmerber was convicted in Los Angeles, California, Municipal Court of driving an automobile while under the influence of intoxicating liquor. His conviction was affirmed by the Appellate Department of the California Superior Court and certiorari was granted by the U.S. Supreme Court.

Among Schmerber's contentions was that blood extracted from him at a hospital, over his objection, and the introduction at trial of the analysis of this blood was a violation of his privilege against self-incrimination as afforded by the Fifth Amendment of the U.S. Constitution.

By a 5 to 4 decision, the Court held that the above described events were not in violation of the Fifth Amendment privilege. Regarding this privilege, the Court held that the Fifth Amendment affords the accused protection from being compelled to testify against himself, or otherwise provide evidence of a testimonial or communicative nature—but the withdrawal of blood and the use of the analysis did not involve testimonial compulsion. An earlier decision relied on by the Court in this opinion was *Holt v. U.S.*, 281 U.S. 245 (1910), wherein Holt was told to try on a blouse found at the scene of a murder. The fact that the blouse fit Holt was offered in evidence at his trial; however, his contention that this violated his Fifth Amendment privilege was denied by the Court.

Of pertinence to our concern is the Court's statement that both federal and state courts have held that it (the "privilege") "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, or to make a particular gesture." In summation then, "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it," supra, 384 U.S. at 764.

The *Schmerber* decision was reinforced the next year when the Supreme Court delivered its opinions in *Gilbert v. Calif.*, 388 U.S. 263 (1967), and *U.S. v. Wade*, 388 U.S. 218 (1967).

Gilbert was convicted in the Superior Court of Los Angeles, California, for armed robbery and murder in connection with the robbery of an Alhambra, California, savings and loan association and the slaying of a police officer in the aftermath of the robbery. Gilbert's appeal to the California Supreme Court was affirmed in part and reversed in part. The Supreme Court of the United States granted certiorari.

One facet of this appeal concerned the use at trial of handwriting exemplars which were given by Gilbert subsequent to his arrest in Philadelphia by federal agents. He declined to discuss with these agents the robbery and slaying in Alhambra, but did talk concerning robberies in the Philadelphia area in which handwritten notes had been used. In his appeal, Gilbert claimed that he was not told that the samples of his handwriting which he had provided in Philadelphia could be used in conjunction with the investigation of other than the Philadelphia robberies and that their use at the California trial was in violation of the self-incrimination provision of the Fifth Amendment.

Relying on *Schmerber*, supra, the Court held that "a mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection," supra, 388 U.S. at 266, 267.

Relying principally on the decisions in *Schmerber* and *Gilbert*, the government has been able to obtain from the courts, orders to compel defendants to provide otherwise unobtainable handwriting exemplars.

Obtaining the Order

In the event that an arrested defendant declines to furnish desired handwriting samples, the prosecutor may apply to the court for an order which directs the defendant to provide such samples under pain of contempt.

The United States Court of Appeals for the Ninth Circuit upheld the criminal contempt sentence of a defendant who refused to furnish hand printing samples on order of the court, *U.S. v. Rudy*, 429 F. 2d 993 (1970). Rudy was charged with depositing in the mail a

communication making ransom demands in a kidnaping case. The government's motion for an order directing Rudy to provide hand printing exemplars was granted; however, Rudy refused to comply with the order. In his appeal Rudy allowed that he was bound by *Gilbert*, supra, to provide handwriting exemplars, but contended that "hand printing is susceptible to erroneous identification." The court held that hand printing is within the handwriting rule of *Gilbert*.

A similar finding is seen in the matter of *U.S. v. Doe*, 405 F. 2d 436 (1968), which relates to the refusal of a witness before the Grand Jury to provide specimens of his handwriting. The witness was held in civil contempt and his appeal for relief from this action was denied, again based on the findings in the *Gilbert* case.

Court Imposed Limitations

The type of handwriting exemplars obtained and the manner in which they are given following a court order will vary in almost as many ways as there are judges who grant such orders.

The court may direct that the number of exemplars be limited; in one instance even to the number of letters to be printed. One judge limited exemplars obtained to a reproduction of the alphabet, while another decreed that the defendant must print only 100 letters. In another instance, a judge terminated the taking of exemplars after 45 minutes, stating that if this weren't sufficient time it would be necessary to obtain another order. Yet, some defendants have been required to execute handwriting in the wording of that which is in question.

Conditions under which the defendant executes the exemplars are also controlled variables. The defendant may be required to execute handwriting in open court or at a designated place in the presence of the attorneys representing the defendant and the government. In one instance, the judge required that the handwriting expert be present to supervise and dictate the specimens which the defendant was ordered to provide, while another concurred with the defense in ordering that the document examiner *could not* be present at the taking of handwriting specimens.

With all the conditions imposed and the willingness or contrariness of the defendant to provide normal handwriting, the quality of the specimens provided can vary considerably.

Effectiveness of the Court Order and Exemplars Obtained

The guilty defendant will, in all likelihood, have a single thought in mind when executing handwriting specimens which the court has ordered him to provide. That thought is how to effectively disguise his handwriting so that it will preclude an identification by the expert.

An attempt to disguise handwriting, by other than the most skillful, is readily apparent. The try at disguise may often be neutralized by securing sufficient specimens to the point that the mode of disguise becomes confused in the mind of the writer, habit takes over, and he reverts to his normal method of handwriting.

The judge, too, may take steps to insure that the handwriting prepared by the defendant is not atypical. The happenings at a recent trial in Superior Court in Tennessee may serve to best illustrate this judicial action.

The defendant had been charged with burglary. In an attempt to show his complicity in the burglary, the state desired handwriting exemplars to compare with signatures appearing on gasoline credit card invoices. These purchases were made with a credit card which had been stolen in the burglary. A court order for such specimens was obtained and the

handwriting exemplars were to be given in open court. The defendant commenced to comply with the order by writing with his left hand. The court noted that this attempt was being made with more than the usual amount of labor required for one to write a name. The judge admonished the defendant and instructed him to write with his proper hand. He then proceeded to execute the exemplars by hand printing with his right hand and after a very few specimens had been completed, complained of being tired. At this point, the court's judicial ire reached its zenith. He instructed the defendant to write in a normal manner, as his writing appeared on court papers the judge held before him, or he would be held in contempt and fined $50 and spend 10 days in jail for each signature written which, in the eyes of the judge, was held to be disguised. The resultant signatures continued to display some signs of disguise but were sufficiently normal to enable a handwriting identification to be made.

The courts, too, have taken notice of the obvious inclination of the defendant to deliberately distort his handwriting. A case in point is *U.S. v. Izzi*, 427 F. 2d 293, cert. denied 90 S. Ct. 2244 (1970).

Izzi was charged in the sale of stolen securities and indicted under provisions of the Interstate Transportation of Stolen Property statute, Title 18 United States Code, Section 2314. In furthering the sale of these securities, Izzi traveled to Gettysburg, Pennsylvania, from New York City where, under a pseudonym, he registered at a motel. Because of the absence of suitable handwriting specimens of Izzi for comparison with the motel registration card, the government sought, and was granted, a court order for Izzi to provide handwriting specimens. At the subsequent trial, the handwriting expert for the government explained the absence of certain handwriting characteristics through reference to the slow manner in which the ordered handwriting has been prepared. The expert witness for the defense implied in his testimony that the absence of the same characteristics suggested the questioned signature had been written by an individual other than Izzi.

In his appeal, Izzi claimed not that the handwriting was employed in violation of the privilege, (for *Gilbert* precluded this argument), but that remarks by the government witness "emphasized the differences between Izzi's normal signature and the exemplars, intentionally suggesting that he had attempted to disguise his normal handwriting and by so doing had indicated consciousness of guilt." Izzi claimed this was an "implied admission wrung from him in violation of the Fifth Amendment."

In response to this argument, the court said, "If *Gilbert* is not to be rendered meaningless, the government must be allowed to explain differences between the exemplars and the signature sought to be identified, particularly where the defense points to these differences as evidence of non-common authorship."

Current Court Decisions and Future Possibilities

That a defendant may be compelled by court order to provide samples of his handwriting has now been well established as the results of recent court decisions, principally *Schmerber* and *Gilbert*, supra.

There may be occasions, however, when the court feels that a request for handwriting exemplars should not be allowed. An example of the denial of a motion for the defendant to provide requested specimens is found in *U.S. v. Green*, 282 F. Supp. 373 (S. D. Ind. 1967).

Defendant Green was charged with filing false and fraudulent claims with the United States in violation of Title 18 United States Code, Section 287 and for conspiracy in violation of Title 18 United States Code, Section 371. The government did not deny that it had an ample supply of Green's handwriting, but desired his writing in the wording of

the questioned signatures. The court denied the government's request for the order, stating that the request for the defendant to produce signatures in a name germane to the case would be an infringement upon the spirit of the constitutional prohibition against compelling the accused to be a witness against himself. The court held that the requested exemplars fell within the exceptions noted in *Schmerber*, supra, for providing handwriting samples where the corpus of the crime alleged requires proof of the unlawful signature goes considerably beyond use as a "mere identifying physical characteristic." Therefore, in view of the scientific certainty which accompanies handwriting analysis, such signatures would be "communicative" as to an element of the crime and are therefore incriminating.

The ruling in *Green* was advanced by the defense in *Izzi*, supra, in an attempt to dissuade the court from ruling for the government in its motion to secure the defendant's handwriting. In *Izzi*, however, the court held in accord with the prosecutor's motion.

Our discussion thus far has been concerned with obtaining handwriting exemplars only from those individuals who have been lawfully arrested and are to be future defendants in a criminal proceeding. More frequently, the investigator is confronted with the task of obtaining handwriting or some other identifying physical characteristics from suspects. Under current practices, the quest for these data can be satisfied only with the suspect's willingness toward voluntary submission. The possibility that a *suspect* may be compelled to provide physical identifying characteristics looms on the horizon as the result of the Supreme Court's comments in its decision in *Davis v. Mississippi*, 394 U.S. 721 (1969), and legislation which was introduced into the 91st Congress.

Davis involved the rape of an elderly lady in Mississippi. The only leads available were the victim's description of her attacker as being a Negro youth and that fingerprints and palm prints were found on the window at the scene. Acting on this information, the police rounded up some two dozen likely suspects who were fingerprinted and then released. A comparison of the fingerprints of suspect Davis with the latent prints found at the scene of the attack resulted in an identification. He was subsequently tried and convicted and sentenced to life imprisonment. His appeal reached the Supreme Court. The Court reversed the conviction on the grounds that the fingerprints of Davis were obtained as the result of illegal detention; therefore his Fourth Amendment right to be free of unlawful seizure had been violated. In its opinion, however, the Court took notice of the dilemma which confronted the police. They had evidence which could lead to the solution of the crime, but without probable cause could not effect a lawful arrest to enable them to identify the perpetrator of the crime. The Court said "that because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense."

Relying on the words of the Court, efforts have been set in motion to enable investigators to obtain identification evidence without having to effect an arrest and with prior judicial approval. The results of these efforts were to be found in S. 2997, a bill introduced into the United States Senate. The adjournment of this particular session of the Senate without acting on the bill will require its resubmission; however, it contents are such that a review of the bill's main provisions seems in order.

This bill would amend Chapter 223 Title 18 United States Code by adding a new section to provide for the issuance of subpoenas for the limited detention of individuals to obtain physical identification evidence. Before a subpoena could be issued, this bill would require an affidavit affirming that:

1) Reasonable cause exists for the belief that a felony has been committed.

2) Physical identifying evidence obtained from a particularly described individual may provide the solution to this crime.

3) This type of evidence is not obtainable from some other investigative or law enforcement agency.

The bill requires that any subpoena issued must be very specific as to the type of evidence to be obtained, place to be obtained, and other requirements intended to minimize the possibility of conflict with the Fourth Amendment safeguards.

There are some who would favor that the appearance of a person to provide physical identifying characteristics be obtained through a court-issued order rather than through the use of a subpoena, and also that the requirement that the evidence not be available from other sources would create problems in implementation which would serve as a barrier to effective use of the proposed legislation.

The State of Colorado, by virtue of rules of criminal procedures adopted by its Supreme Court, has put into effect procedures whereby a suspect may be required to submit to fingerprinting even though the evidence necessary to establish probable cause is not available.

Rule 41.1 of the State of Colorado Rules of Criminal Procedure and S. 2997 have evolved as a result of the comments of the U.S. Supreme Court in *Davis*. They were both devised with provisions to safeguard the rights of the individual as guaranteed in the Fourth Amendment of the U.S. Constitution. Should S. 2997 be reintroduced and become law, its implementation will surely be soon followed by an appeal requiring a ruling as to its constitutionality. It is only then that we can determine whether the remarks of the Supreme Court were properly interpreted.

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