

Grand Jury's Right to Demand Handwriting Exemplars (United States v. Doe (Schwartz))

St. John's Law Review

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not easily derived where such a variety of possible situations exist, and it may be that varying factual situations will give rise to varying results even within a particular court. Nevertheless, the letter and spirit of the Omnibus Crime Control and Safe Streets Act appears to have been more closely followed by the Fifth Circuit in *Robinson* than by the Second Circuit in *Pisacano*.

The doctrine of separation of powers provides the judiciary with an essential role: to identify, prevent, and correct abuses of laws mandated by Congress. In performing this role, its attitude should be one of vigilance, rather than acquiescence. Every case decided outside of the Second Circuit in which the Executive Assistant subscribed the Attorney General's initials to the authorization to approve a wiretap application has read literally the requirement that an "Assistant Attorney General [be] specifically designated by the Attorney General."²³² This requirement is not satisfied when such designation of an Assistant Attorney General is made, not by the Attorney General himself, but by his Executive Assistant affixing his initials.²³³ In holding to the contrary, the Second Circuit has taken a unique position, and one of dubious validity.

GRAND JURY'S RIGHT TO DEMAND HANDWRITING EXEMPLARS

United States v. Doe (Schwartz)

The fourth amendment protects individuals against unwarranted intrusions by the government into their private lives and personal

that case by the conclusion that defendant's guilt was established on the basis of evidence obtained through wiretaps authorized by the Attorney General himself. *Id.*

Nearly all of the cases in which the Attorney General himself initialed the memorandum delegating to the Assistant Attorney General authority to approve wiretap applications held that the evidence so derived was not obtained in violation of Congressional mandate and could therefore be used: *Pisacano*; *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972); *United States v. Mainello*, 345 F. Supp. 863 (E.D.N.Y. 1972); *United States v. Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972); *United States v. Consiglio*, 342 F. Supp. 556 (D. Conn. 1972) (citing *Pisacano* as "laying down the rule of the law to be followed in this Circuit on such matters," *Id.* at 558); *United States v. Doolittle*, 341 F. Supp. 163 (M.D. Ga. 1972); *United States v. D'Amato*, 340 F. Supp. 1020 (E.D. Pa. 1972); *United States v. Iannelli*, 339 F. Supp. 171 (W.D. Pa. 1972); *United States v. La Gorga*, 336 F. Supp. 190 (W.D. Pa. 1971); *United States v. Cantor*, 328 F. Supp. 561 (E.D. Pa. 1971).

The lone exception was *United States v. Casale*, 341 F. Supp. 374 (M.D. Pa. 1972), in which it was held that the signing of the Assistant Attorney General's name to the application for a court order to wiretap by the Assistant's Deputy violated the procedure mandated by § 2516(1), and that the memorandum designating the Assistant Attorney General to authorize the particular application would not suffice to satisfactorily authorize the application itself.

In *United States v. Aquino*, 338 F. Supp. 1080 (E.D. Mich. 1972), there were two memoranda at issue, one initialed by the Attorney General, the other by the Executive Assistant. As to each the court followed the majority rulings outlined above.

²³² 18 U.S.C. § 2516(1).

²³³ See note 230 *supra*.

effects.²³⁴ The Supreme Court has recognized that “[t]he security of one’s privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society.”²³⁵ Questions remain, however, as to what exactly is covered under this blanket of protection.

*Terry v. Ohio*²³⁶ offered one standard for judging the area that falls within the fourth amendment’s protection, that is, “. . . wherever an individual may harbor a reasonable ‘expectation of privacy’ . . . he is entitled to be free from unreasonable governmental intrusion.”²³⁷ The Second Circuit, in *United States v. Doe (Schwartz)*,²³⁸ applied this criterion in deciding whether a grand jury’s request for handwriting exemplars from a subpoenaed witness fell within the ambit of the fourth amendment prohibition against unreasonable searches and seizures. Appellant refused to furnish such exemplars until the Government presented evidence of probable cause for such a demand.²³⁹ The

²³⁴ The fourth amendment’s warrant requirement is designed to ensure that the decision to invade an individual’s personal privacy and freedom will be based on an impartial showing of probable cause and that reasonable limits will be placed on the scope of the intrusion. As the United States Supreme Court has indicated, “reasonableness” turns, at least in part, on the more specific commands of the warrant clause: “probable cause” for the warrant and its issuance by a “neutral and detached magistrate.” *Coolidge v. New Hampshire*, 403 U.S. 443, 453, *rehearing denied*, 404 U.S. 874 (1971); *Chimel v. California*, 395 U.S. 752, 760-61 (1969). See Tentative Draft, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE § 5.4 commentary (1968). The warrant’s “probable cause” requirement must therefore be interpreted as crucial to the scheme of the fourth amendment.

²³⁵ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (evidence obtained by illegal search and seizure was admissible in state courts), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment protection extended to state criminal prosecutions).

²³⁶ 392 U.S. 1 (1968). Here the relationship between the police and a citizen in a stop and frisk situation was examined in the light of the fourth amendment standard of reasonableness.

²³⁷ *Id.* at 9.

²³⁸ 457 F.2d 895 (2d Cir. 1972). Appellant, Cynthia B. Schwartz, had been subpoenaed to appear before a grand jury which was investigating possible mail and wire frauds. She refused to comply with the request to give the grand jury a handwriting sample, asserting her rights under both the fourth and fifth amendments.

²³⁹ Appellant presented two arguments here: first, she argued that the Government had to show the “reasonableness” of its request for the handwriting samples; second, after the Government had submitted an affidavit to District Judge Lasker to substantiate its request, appellant interjected a higher standard, contending that the Government had to prove “probable cause” for its demand. 457 F.2d at 896.

As stated earlier, “reasonableness” turns, at least in part, on the more specific commands of the warrant clause: “probable cause” for the warrant and its issuance by a “neutral and detached magistrate.” See note 234 *supra*. This point was emphasized in *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) when the Supreme Court repeated Mr. Justice Jackson’s classic statement on the warrant requirement:

[The fourth amendment’s] protection consists in requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 449, quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

United States District Court for the Southern District of New York agreed that the government had sufficiently shown the reasonableness of its request and directed the appellant to produce the samples.²⁴⁰

After reviewing the inapplicability of the "self-incrimination" privilege of the fifth amendment in this area,²⁴¹ the court of appeals emphatically refused to extend the fourth amendment protection to handwriting or voice samples, placing these identifying characteristics in the realm of public communication,²⁴² and thereby releasing the government from the burden of showing either the reasonableness of the demand or probable cause. Handwriting samples were held to be encompassed within the term, "persons," under the fourth amendment. The court concluded, without any further explanation, that decisions involving constitutionally protected "papers" are therefore "marginally relevant at best."²⁴³

The court drew a distinction between the "seizure" of a person by a grand jury subpoena and by police detention. "The latter is abrupt,

The United States District Court for New Jersey has recently drawn a distinction between "reasonableness" and a "general fishing expedition" with respect to a grand jury request for handwriting exemplars. In *In re Riccardi*, 337 F. Supp. 253, 256 (D.N.J. 1972), Judge Whipple held that the defendant's fourth amendment rights would be violated if the grand jury, which identified the defendant as a "target" although its investigation gave rise to only "mere suspicions," could obtain exemplars of his handwriting. The court also held that an individual's handwriting, as well as his fingerprints, are within areas of personal security protected by the fourth amendment. *Id.* at 255.

In a recent Ninth Circuit decision, *United States v. Dinsio*, No. 72-2413 (9th Cir., Sept. 15, 1972), it was held that the government must not only submit to the court an affidavit supporting its contention that a grand jury's request for finger and palm print exemplars was "reasonable," but must also make such affidavit available to counsel of the witness to afford him an opportunity to determine the applicability of the just cause criterion of 28 U.S.C. § 1826(a) (1970) (by which a witness who "refuses without just cause shown to comply with an order of the court to testify or provide other information" may be confined). The court pointed out that the defendant "cannot be expected to demonstrate just cause in a factual vacuum." Slip opinion at 3. The court dismissed concern that the disclosure of the affidavit would breach the secrecy of grand jury proceedings and added that ". . . modest breaches of grand jury secrecy may well be required when non-disclosure would defeat fundamental constitutional rights, including the right to due process of law." *Id.*

²⁴⁰ Mrs. Schwartz again refused to give the exemplars and Judge Lasker subsequently cited her for civil contempt, with a sentence of thirty days. 457 F.2d at 896.

However, there have been cases where witnesses were permitted to withhold testimony from a grand jury. *See, e.g., Gelbard v. United States*, 408 U.S. 41 (1972); *In re Evans*, 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 430 (1972); *Hoffman v. United States*, 341 U.S. 479 (1951); *Blau v. United States*, 340 U.S. 332 (1951).

²⁴¹ 457 F.2d at 896. Handwriting exemplars generally do not constitute "testimony" and as such are outside the protective shell of the fifth amendment. In *Gilbert v. California*, 388 U.S. 263 (1967), the Court held that a mere handwriting exemplar is not a testimony or a communication but an "identifying physical characteristic" beyond fifth amendment protection. *Id.* at 266-67.

²⁴² "Handwriting and voice exemplars fall on the side of the line where no reasonable expectation of privacy exists." 457 F.2d at 898.

²⁴³ *Id.* at 897.

[and] is effected with force or the threat of it [while] . . . [a] subpoena is served in the same manner as other legal process"²⁴⁴ This distinction paved the way for rejecting the rationale of three Supreme Court cases, *Schmerber v. California*,²⁴⁵ *Terry v. Ohio*,²⁴⁶ and *Davis v. Mississippi*,²⁴⁷ all of which involved some type of police detention.²⁴⁸

²⁴⁴ *Id.* at 898.

²⁴⁵ 384 U.S. 757, 764 (1966). Defendant, involved in a car accident, was taken to a hospital where a police officer placed him under arrest on the grounds of possible intoxication and ordered that a blood sample be taken from him. Rejecting the argument that the withdrawal of blood from a suspect and the admission of the chemical analysis into evidence violated the defendant's privilege against self-incrimination, the Court pointed to the distinction between two kinds of evidence—communications or testimony and real or physical evidence. Only the former is protected by the fifth amendment. See 8 J. WIGMORE, EVIDENCE § 2263 (McNaughton rev. 1961).

The Court went on to state that submission of a defendant to a blood test, fingerprinting, photographing, or writing and speaking tests is for identification purposes only and is not a communicative act. The defendant's participation in these activities is purely as a donor of physical evidence and so does not force him to give testimony. The results of a lie detector test, on the other hand, would result in testimonial evidence. The reasoning is that, although the detector records are physical, they are aimed at determining the truth of testimony and are, therefore, communicative. 384 U.S. at 764.

²⁴⁶ 392 U.S. 1 (1968). See note 236 *supra*.

²⁴⁷ 394 U.S. 721 (1969). Without securing warrants, police brought a large number of black youths to the police station for both questioning and fingerprinting. The defendant's fingerprints were found to match those found at the scene of the crime but the Court reversed the conviction, finding that the defendant was illegally detained and, therefore, the fingerprints could not be used in evidence.

In discussing the nature of fingerprints, the Court placed this type of evidence outside the sphere of a person's private life. *Id.* at 727. The Second Circuit in *Doe (Schwartz)* used this classification to support its contention that if fingerprinting, "surely more nearly private than exemplars of the voice or handwriting . . .," is not an intrusion of privacy, then a demand for a handwriting sample is certainly not. 457 F.2d at 899. But see Weintraub, *Voice Identification, Writing Exemplars, and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485 (1957), where the author illustrates a clear distinction between handwriting samples and fingerprints:

In short, the creation of a handwriting exemplar is an act involving the veracity of the accused. He can lie. If he is talented enough to successfully disguise his handwriting, he may even deceive the police and throw them off the trail.

In this respect, handwriting exemplars are to be distinguished from fingerprints, body markings, blood tests and other examinations of the body of the accused. . . .

Id. at 497.

²⁴⁸ 457 F.2d at 899. The appellant contended that the government was accomplishing through the grand jury's subpoena power that which it could not otherwise do since there was no probable cause to issue a warrant for her arrest. The Seventh Circuit, in *In re Dionisio*, 442 F.2d 276 (7th Cir. 1971) *cert. granted*, 406 U.S. 956 (1972), accepted a similar contention and held that a seizure which violates the fourth amendment cannot be accomplished through the misuse of the grand jury's subpoena power.

The Second Circuit answered this argument by stressing the historical role of the grand jury "as a protective buffer between the accused and the prosecutor." 457 F.2d at 899. See *Stirone v. United States*, 361 U.S. 212, 218 (1960); *Ex parte Bain*, 121 U.S. 1, 10-11 (1887).

Whether the traditional role of a grand jury as a "buffer" is still accurate today has been the subject of some debate. In England, grand juries were abolished in 1933 (presumably because they no longer served the traditional function). The procedures initially established to protect an accused, such as complete secrecy, now arguably provide no such benefit. The grand jury has been called "a rubber stamp for prosecutors." District Attor-

While the court did not consider the grand jury proceeding to be a "seizure," this did not foreclose the possibility of an unreasonable "search." Applying the test of whether there is a "reasonable expectation of privacy" to the "search" in question, the court found exemplars not to be included within the category deserving of such privacy. It reasoned that "nothing is being exposed to the grand jury that has not previously been exposed to the public at large."²⁴⁹

By rejecting even the more "modest requirement" of reasonableness, the Second Circuit has taken a position in conflict with both the Seventh and Eighth Circuits. The leading Seventh Circuit case, *In re Dionisio*,²⁵⁰ concerned a refusal by the witnesses to furnish voice exemplars in a grand jury investigation.²⁵¹ As in *Doe (Schwartz)*, the issue was whether the voice samples belonged in that realm of privacy which is protected by the fourth amendment. Expounding the proposition that "[c]ompelling a person to furnish an exemplar of his voice is as much within the scope of the fourth amendment as compelling him to produce his books and papers,"²⁵² the Seventh Circuit equated voice exemplars with documentary evidence,²⁵³ a relationship which the Second Circuit had deliberately rejected in favor of placing these exemplars under the category of "persons."²⁵⁴

Following this rationale, the Seventh Circuit subsequently held, in *In re Mara*²⁵⁵ that the government must establish, by providing an

ney, Office of Philadelphia, ANNUAL REPORT 1952 at 40 as quoted in Coates, *The Grand Jury, The Prosecutor's Puppet: Wasteful Nonsense of Criminal Jurisprudence*, 33 PENN. B.A.Q. 311, 316 (1962). "The grand jury almost invariably returns a true bill, unless (it may be) the district attorney hints or suggests that he doesn't think a case has been made out." *Id.* at 314.

It seems, as *Doe (Schwartz)* illustrates, that the grand jury is being used, not to protect an accused but to get evidence from him which he would not otherwise be compelled to give. 457 F.2d at 899. "The increasing professionalization of the federal prosecutorial establishment, . . . and the devising of new means to compel testimony give the grand jury a fearsome potential power." Tigar and Levy, *The Grand Jury as the New Inquisition*, 50 MICH. S.B.J. 693, 696 (1971) (emphasis added).

²⁴⁹ 457 F.2d at 899.

²⁵⁰ 442 F.2d 276 (7th Cir. 1971), cert. granted, 406 U.S. 956 (1972).

²⁵¹ The FBI, pursuant to a court ordered wire tap, had recorded certain phone conversations. Defendants were called before the grand jury, told that they were potential suspects in its investigation and were requested to give voice exemplars which would be compared with the FBI tapes. The Government apparently could not identify all of the recorded voices and, therefore, needed these voice samples as valuable evidence for possible indictment against these defendants. *Id.* at 278.

²⁵² *Id.* at 279.

²⁵³ *Id.*

²⁵⁴ 457 F.2d at 897. By following this line of reasoning, the Second Circuit focused on cases concerning the type of fourth amendment protection given to the person, thus eliminating the large body of cases dealing with searches and seizures of documentary evidence.

²⁵⁵ 454 F.2d 580 (7th Cir. 1971), cert. granted, 406 U.S. 956 (1972).

affidavit in open court, that the grand jury request for a handwriting exemplar is reasonable.²⁵⁶

The Eighth Circuit, like the Seventh, has reached the conclusion that handwriting exemplars are within the purview of fourth amendment protection.²⁵⁷ However, that court of appeals was not faced with the issue of grand jury investigation but rather with that of ordinary investigations where fourth amendment protections have been clearly defined. Nonetheless, since the court has recognized that these exemplars are not ordinarily subject to public scrutiny, it is more likely than not that it would extend such a holding to grand jury proceedings as well.²⁵⁸

One factor that all three Circuits have ignored is that the accuracy and reliability of handwriting samples is highly suspect.²⁵⁹ The Supreme Court, in *Gilbert v. California*²⁶⁰ held that handwriting exemplars are not covered by the fifth amendment, stating that "[i]f for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial . . ." ²⁶¹ However, the potential defendant before the grand jury has no right to bring in his own expert witnesses to rebut the prosecutor's experts. As Justice Fortas said in his dissent in *Gilbert*:

This is not like fingerprinting . . . It is a process involving the use

²⁵⁶ *Id.* at 582.

²⁵⁷ *United States v. Harris, United States v. Long*, 453 F.2d 1317 (8th Cir. 1972). The *Harris* case concerned the acquisition of a handwriting sample from defendant, a juvenile, who was under investigation for theft and forgery of a check from the United States mails. Inspectors came to defendant's home and, in the presence of his parents, requested such a sample, omitting to tell defendant that he had a right to refuse. Harris voluntarily gave them the sample which the court of appeals later found admissible since the fourth amendment does not protect against the voluntary giving of evidence.

In the *Long* case, defendant had been arrested by state officials with the aid of federal agents who were also investigating the defendant for possible federal offenses. While Long was in police custody, the federal agents requested a sample of his handwriting but failed to inform him of his rights until after he had given them the exemplar. This evidence was excluded on the basis that it had not been given voluntarily. The conduct of the postal inspectors was not considered "unconstitutional police conduct," *id.* at 1321, the court pointing out that no type of duress was used. Harris was free to refuse to give the exemplars. The fourth amendment does not aim at discouraging citizens from aiding police investigations.

²⁵⁸ The Eighth Circuit maintained that the police procurement of the handwriting sample was a search for evidence of guilt and this evidence ". . . must be obtained from the person of the suspect himself, and it involves some intrusion into the privacy of the person which the Fourth Amendment is intended to protect." *Id.* at 1320. By such a statement, interestingly, the Eighth Circuit seems to follow the Second Circuit classification of a handwriting sample as an element of the "person."

²⁵⁹ See Weintraub, *Voice Identification, Writing Exemplars, and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485, 497 (1957).

²⁶⁰ 388 U.S. 263 (1967).

²⁶¹ *Id.* at 267.

of discretion. It is capable of abuse. It is in the stream of inculcation. Cross-examination can play only a limited role in offsetting false inference or misleading coincidence from a 'stacked' handwriting exemplar.²⁶²

Moreover, the Seventh Circuit has indicated that it is "an abuse of the grand jury process for the Government to impose on that body to perform investigative work that can be, and heretofore has been, successfully accomplished by the regular investigation agencies of Government."²⁶³

In short, the Second Circuit has provided law enforcement agencies with a new evidence-gathering tool. Perhaps, as the Ninth Circuit has held,²⁶⁴ the more fundamental question that should be answered is whether the witness (potential defendant) is being afforded due process of law. The degree of unreliability of handwriting samples and the potential abuse that this may engender present serious constitutional doubts. Our system of justice should not tolerate any procedure which may so readily undermine basic constitutional protections.

RIGHT TO COUNSEL — *Kirby* DISTINGUISHED

Saltys v. Adams

The Second Circuit recently demonstrated its reluctance to follow the spirit of the Supreme Court's latest ruling on the sixth amendment right to assistance of counsel. Earlier this year, a plurality of the Supreme Court, in *Kirby v. Illinois*,²⁶⁵ held that "a person's sixth and fourteenth amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against

²⁶² *Id.* at 292 (Fortas, J., dissenting).

²⁶³ *In re Mara*, 454 F.2d 580, 585 (7th Cir. 1971).

²⁶⁴ *In United States v. Dinsio*, No. 72-2413 (9th Cir., Sept. 15, 1972); the court opined: [M]odest breaches of grand jury secrecy may well be required when nondisclosure would defeat fundamental constitutional rights, including the right to due process of law.

Slip opinion at 3. The Seventh Circuit has also decided that fifth amendment due process considerations are "needed to protect citizens from infringement of their Fourth Amendment rights through abuse of the grand jury process." 454 F.2d at 584.

²⁶⁵ 406 U.S. 682 (1972). Kirby was stopped and asked to produce identification by police who thought he was a suspect wanted for an unrelated offense. Kirby was carrying travelers' checks and a social security card bearing the name Shard. He was arrested when he could not satisfactorily explain his possession of these items. Upon arrival at the station house, the police learned that one Shard had been robbed the day before. At the police station and again at trial, Kirby was identified by Shard as one of the robbers. At the time of the station house identification, no formal proceedings had been initiated, no attorney was present and Kirby had not been advised of any right to counsel. Kirby was convicted and appealed on the grounds that the identification confrontation violated his sixth amendment right to assistance of counsel.