

Government's application to compel the production of handwriting exemplars

Unknown.

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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff v. THEODORE JOHN KACZYNSKI, Defendant. ----- GOVERNMENT'S APPLICATION TO COMPEL THE PRODUCTION OF HANDWRITING EXEMPLARS	CR. NO. S-96-0259 GEB
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INTRODUCTION

During the execution of a search pursuant to warrant at Kaczynski's cabin near Lincoln, Montana, during the week of April 3, 1996, federal officers seized a substantial quantity of documentary evidence bearing handwriting and handprinting. These documents, which are written in English, Spanish, and numeric code, bear directly on the defendant's guilt, and thus the government will seek to introduce many of the seized documents at trial as admissions by the defendant. As foundation for the introduction of the documents at trial, the government must present some evidence that the defendant wrote the seized documents. See Fed. R. Evid. 104(b) and Advisory Committee Note; Fed. R. Evid. 901(a); see generally

28 U.S.C. Sec. 1731 (providing for the admission of examples of "admitted or proved handwriting of any person" to establish the "genuineness of other handwriting attributed to such person"). Since July, 1996, the government has sought a stipulation that would have identified the defendant as the author of the seized documents. The defendant has declined to enter into any proposed stipulation. To establish the authenticity of the documents, therefore, the government seeks exemplars of the defendant's handwriting and handprinting so that its experts can compare them with the writing on the seized documents. Accordingly, the government seeks an order from this Court compelling the defendant to provide undisguised handwriting and handprinting exemplars.

If the Court grants the order, the government will obtain the exemplars by having FBI agents provide the defendant with typed text, which the defendant will then be asked to copy in his own handwriting and handprinting. To make a reliable authentication of the handwriting on the seized documents, the government must obtain writings that replicate the questioned writings as much as possible. Thus, due to the sheer volume of documents seized from the defendant's cabin, the government must obtain a substantial quantity of writing and printing from the defendant. Because the documents are in English, Spanish and numeric code, the government will ask that the defendant furnish samples in each medium. It is anticipated that the process of acquiring the requested exemplars may span several days. The government has no objection to counsel for the defendant being present when the samples are taken.

ARGUMENT

The defendant has no Fifth Amendment right to refuse to provide non-testimonial exemplars. *Schmerber v. California*, 384 U.S. 757, 765 (1966). The Fifth Amendment protects an accused only from being compelled to testify against himself or to otherwise provide the state with evidence of a testimonial or communicative nature. *Deering v. Brown*, 839 F.2d 539, 540 (9th Cir. 1988). In order to be considered testimonial, a communication must, explicitly or implicitly, relate to a factual assertion or disclose information that expresses the contents of an individual's mind. *Doe v. United States*, 487 U.S. 201, 210 (1988). Compelling a defendant to provide handwriting exemplars does not raise Fifth Amendment concerns because a defendant's actions are not testimonial. *Gilbert v. California*, 388 U.S. 263, 266-67 (1967); *United States v. Roth*, 466 F.2d 1111, 1114 (9th Cir.)("Securing exemplars of handwriting or handprinting from [an indicted] defendant does not violate his right against self-incrimination"), cert. denied, 409 U.S. 1048 (1972). As a result, an individual has no general right to refuse to obey an order to give handwriting exemplars which on its face contains no request for testimonial matter. See *In re Braughton*, 520 F.2d 765, 767 (9th Cir. 1975).

Nor do compulsion orders for handwriting exemplars run afoul of the Fourth Amendment protection against unreasonable search and seizure. See *United States v. Mara*, 410 U.S. 19, 22 (1973); *United States v. Sedillo*, 496 F.2d 151, 152 (9th Cir. 1974)("taking of the handwriting samples [does not] violate appellant's right under the Fourth or Fifth Amendments"); *United States v. Lincoln*, 494 F.2d 833, 839 (9th Cir. 1974)("[No] violation of the Fourth Amendment is found from compelling [post arraignment] execution of handwriting...exemplars.")

Because the taking of handwriting exemplars will not infringe upon defendant's Fourth or Fifth Amendment rights, the defendant should be ordered to provide undisguised handwriting and handprinting exemplars to the government.

CONCLUSION

Based on the foregoing reasons, the United States respectfully requests that the defendant be ordered to provide undisguised handwriting and handprinting exemplars to agents of the

Federal Bureau of Investigation.

DATED: January 17, 2000

CHARLES J. STEVENS

United States Attorney

By: _____

BERNARD F. HUBLEY

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CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers.

That on _____, 1997, she served a copy of the GOVERNMENT'S APPLICATION TO COMPEL THE PRODUCTION OF HANDWRITING EXEMPLARS by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Sacramento, California, or by depositing said envelope and contents in the inter-office mailbox in the Clerk's office, Federal Building, Sacramento, California.

Addressee(s):

Quin Denvir Federal Defender 801 K Street, Suite 1024 Sacramento, CA 95814 Executive Director of Federal Defenders of Eastern Washington & Idaho 10 North Post, Suite 700 Spokane, WA 99201	Judy Clark
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SANDRA CALLAHAN

The Ted K Archive

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