NORTH CAROLINA LAW REVIEW

Volume 51 | Number 3 Article 14

2-1-1973

Criminal Procedure -- Fourth Amendment Protection and Handwriting Exemplars -- Is Probable Cause Unreasonable?

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Only in the past few years has any case law appeared which specifically addressed the problem. In *People v. West*[49] the California Supreme Court held that court room disclosure and recordation of plea bargaining agreements would be required in California. To avoid the needless waste of courtroom time and expense which would occur every time a defendant alleged a breach of a plea bargaining agreement, courts will necessarily have to begin disclosing and recording these agreements. Otherwise, false allegations of plea bargains will surely occur. Disclosure and recordation of plea bargains would also provide further protection for defendants by eliminating the almost impossible task of proving a plea bargain.

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Criminal Procedure—Fourth Amendment Protection and Handwriting Exemplars—Is Probable Cause Unreasonable?

After the Supreme Court decision in *Gilbert v. California*,[1] which specifically rejected any constitutional objection to the compulsion of handwriting exemplars grounded on either the fifth amendment privilege against self-incrimination or the sixth amendment right to counsel, defendants have redoubled their efforts to bring handwriting exemplars within the fourth amendment's protection against unreasonable search and seizure.[2] They have argued that courts should deny any governmental request for handwriting exemplars that, if granted, would violate the defendant's fourth amendment rights and that the exclusionary rule should be available to enforce that requirement.[3]

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[49]3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970); *see* United States v. Williams, 407 F.2d 940 (4th Cir. 1969); State *ex rel.* Clancy v. Coiner, ___ W. Va. ___, 179 S.E.2d 726 (1971).

[1]388 U.S. 263 (1967).

[2]The fourth amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. This protection is guaranteed by the judicially imposed exclusionary rule. In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court barred, in a federal prosecution, the use of evidence secured through an illegal search or seizure. Mapp v. Ohio, 367 U.S. 643 (1961), extended this protection to criminal trials in state courts.

[3]*See, e.g.*, United States v. Harris, 453 F.2d 1317 (8th Cir. 1972), where the court applied the exclusionary rule to suppress handwriting exemplars taken from one defendant, finding that the defendant was subjected to an unreasonable search and seizure.

Davis v. Mississippi,[4] decided by the Supreme Court in 1969, has been the leading case in the area of fourth amendment protection for such nontestimonial evidence as fingerprints and voice or handwriting exemplars. In *Davis* the Supreme Court invoked the exclusionary rule to reverse the defendant's conviction on the ground that the fingerprint evidence used at his trial was the product of an unlawful detention and therefore should have been excluded.[5] Stressing the need for judicial scrutiny, the Court held that the fourth amendment protection applies to the "investigatory stage" and to "detentions for the sole purpose of obtaining fingerprints."[6] However, *Davis* did not conclusively designate probable cause as the required fourth amendment standard.[7] Apparently Justice Brennan, writing for the Court, realized the burden that the decision in *Davis* could place on police investigatory practices, for he suggested that "because of the unique nature of the fingerprinting process, such detentions [for the purpose of obtaining fingerprints] might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense."[8] This dictum has given rise to varying responses.

Recently, courts have considered fourth amendment claims with respect to handwriting exemplars not only in the factual context of a request for exemplars by the prosecution but also in the context of a request by a grand jury. Two main questions are presented by these fourth amendment claims: does the taking of handwriting exemplars constitute a search or seizure protected by the fourth amendment and, if so, what showing must the government make in order to satisfy the reasonbleness standards of the fourth amendment? The decisions reflect different answers to both questions.[9] Three of these decisions present the

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[4]394 U.S. 721 (1969).

[5]*Id.* at 722-23. In an investigation concerning the rape of an elderly white woman, the defendant was fingerprinted along with at least twenty-four other Negro youths. After being investigated at several other times, the defendant was driven ninety miles, jailed overnight, returned and again fingerprinted.

[6]*Id.* at 727.

[7]Beck v. Ohio, 379 U.S. 89, 91 (1964), stated the traditional probable cause test: "[w]hether at that moment the facts and circumstances within [the police officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

[8]394 U.S. at 727.

[9]*Compare In re* September 1971 Grand Jury, 454 F.2d 580 (7th Cir. 1971), *cert. granted sub nom.* United States v. *In re* September 1971 Grand Jury, 92 S. Ct. 2058 (1972) (No. 71-850); *In re* Riccardi, 337 F. Supp. 253 (D.N.J. 1972); *and* United States v. Bailey, 327 F. Supp. 802 (N.D. Ill. 1971), *with* United States v. Doe, 457 F.2d 895 (2d Cir.), *stay granted*, 92 S. Ct. 1243 (1972) (No. A-926).

extent of divergence in viewpoints. In *United States v. Praigg*,[10] involving a police request for exemplars from a defendant who was free on bail after an arrest for forgery, the court held that handwriting exemplars fall within the protection of the fourth amendment and can be compelled only on a showing of probable cause. In *In re September 1971 Grand Jury*,[11] presently before the Supreme Court, the Seventh Circuit held that a grand jury request for handwriting exemplars constitutes a search and seizure within the protection of the fourth amendment and must be substantiated by a governmental showing of reasonableness not necessarily amounting to probable cause. On the other hand, in *United States v. Doe*,[12] the Second Circuit did not reach the question of what showing the government must make since the court held that the use of process to compel handwriting exemplars for a grand jury does *not* constitute a search and seizure within the fourth amendment. Since the Supreme Court has not specifically recognized a constitutionally protected interest in nontestimonial evidence such as fingerprints and voice or handwriting exemplars, this note will consider the rationales in *Praigg, Doe*, and *1971 Grand Jury* in an attempt to determine the basis of such a fourth amendment interest. More specifically, this note will consider whether the approach taken by the *1971 Grand Jury* court in the grand jury context should be applied to the police-citizen encounter in *Praigg*.

In addition to *Davis*, the defendants in *Praigg, Doe*, and *1971 Grand Jury* also relied upon *In re Dionisio*,[13] a per curiam decision by the Seventh Circuit which is presently before the Supreme Court, being argued in tandem with *1971 Grand Jury*. *Dionisio* reversed a lower court order committing the defendants for contempt for their refusal to furnish voice exemplars as requested by a grand jury. The court in *Dionisio* cited *Davis* for the proposition that, under the fourth amendment, "law enforcement officials may not compel the production of physical evidence absent a showing of the reasonableness of the seizure."[14] Reasoning from *Hale v. Henkel*,[15] in which the Supreme Court struck down grand jury subpoenas as overbroad because of the inherent

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[10]336 F. Supp. 480 (C.D. Cal. 1972).

[11]454 F.2d 580 (7th Cir. 1971), *cert. granted sub nom.* United States v. *In re* September 1971 Grand Jury, 92 S. Ct. 2058 (1972) (No. 71-850).

[12]457 F.2d 895 (2d Cir.), *stay granted*, 92 S. Ct. 1243 (1972) (No. A-926).

[13]442 F.2d 276 (7th Cir. 1971) (per curiam), *cert. granted sub nom.* United States v. Dionisio, 92 S. Ct. 2056 (1972) (No. 71-229).

[14]*Id.* at 280.

[15]201 U.S. 43 (1906).

unreasonableness of general fishing expeditions, the court in *Dionisio* concluded that voice exemplars were as much within the scope of the reasonableness requirement as were the books and papers subpoenaed in *Hale v. Henkel*.[16] With respect to requests by a grand jury, the court in *Dionisio* went on to state that "[t]he fourth amendment bans 'wholesale intrusions' upon personal security whether such intrusions stem from illegal arrests or from grand jury subpoenas ostensibly issued only because of the Government's bald statement that the witnesses are potential defendants."[17]

But in *United States v. Doe*,[18] the Second Circuit affirmed an order adjudging the defendant in contempt for her refusal to furnish handwriting exemplars to a grand jury. The court held that where a grand jury had not engaged in either a search or a seizure, there is no justification for a court's imposing even so moderate a requirement as a showing of reasonableness.[19] In an attempt to determine exactly what fourth amendment interest, if any, the defendant had in her handwriting exemplars, the court distinguished *Davis* by differentiating between a *detention* to take the handwriting exemplars and the taking of the exemplars themselves. The court characterized the *Davis* fact pattern as a "police-citizen encounter which amounted to a 'seizure' of the person."[20] Since no preliminary showing of need or relevancy is required to subpoena a person before a grand jury, the court concluded that compulsory appearance before a grand jury cannot constitute a seizure of the person.[21] This distinction left the court free to determine whether the defendant had a valid fourth amendment claim to her handwriting exemplars themselves. The court held that she did not, since a grand jury request for exemplars did not violate the defendant's "reasonable expectation of privacy."[22] To underscore the position that the defendant had no reasonable expectation of privacy that was violated by compulsion of her handwriting exemplars, the opinion incorporated a quotation from *Davis*, stating that "fingerprinting, surely more nearly private than exemplars of the voice or handwriting, 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or

[16] 442 F.2d at 279.
[17] *Id.* at 281.
[18] 457 F.2d 895 (2d Cir.), *stay granted*, 92 S. Ct. 1243 (1972) (No. A-926).
[19] *Id.* at 900.
[20] *Id.* at 898.
[21] *Id.*
[22] *Id.* at 898-99.

search.' "[23] Thus, because of the difference in the extent of the intrusions involved in the two cases, the *Doe* court read *Davis* as authority for a grand jury dispensing with a showing of probable cause to obtain handwriting exemplars.

Other courts have declined to distinguish a detention for taking exemplars from any interest the defendant might have in the exemplar itself. The courts generally have held that the interposition of the grand jury between the witnesses and the government does not eliminate the fourth amendment protection which would otherwise bar the government from obtaining the evidence.[24] For example, the court in *United States v. Bailey*,[25] rather than recognizing different standards for the police and the grand jury, concluded that the Seventh Circuit's decision in *Dionisio* announced a new constitutional principle that equated the grand jury with the police so far as the fourth amendment is concerned.

It would seem that the court in *Doe* did not require the grand jury to make the same showing of reasonableness as it would require of the police because of a misconception of the actual function of the grand jury. Recognizing the grand jury's investigative power to compel handwriting exemplars without even a showing of reasonableness, the Second Circuit referred to the grand jury's function as a "protective buffer between the accused and the prosecutor" included in the fifth amendment to safeguard the defendant against unfounded prosecution.[26] However, other courts, recognizing that the grand jury frequently functions under the direction of the prosecutor as an arm of the prosecution, have refused to exempt the grand jury from making a showing of reasonableness.[27] Therefore, a decision such as *Doe* that would require a showing of reasonableness by the police but not by the grand jury could eventually undermine *Davis* and completely subvert any "protective buffer" function of the grand jury. If the grand jury were not required to show the reasonableness of its requests for exemplars, the police could accom-

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[23] *Id.* at 899.

[24] *In re* Dionisio, 442 F.2d 276 (7th Cir. 1971) (per curiam), *cert. granted sub nom.* United States v. Dionisio, 92 S. Ct. 2056 (1972) (No. 71-229); United States v. Bailey, 332 F. Supp. 1351 (N.D. Ill. 1971); *In re* Riccardi, 337 F. Supp. 253 (D.N.J. 1972).

[25] 332 F. Supp. 1351 (N.D. Ill. 1971).

[26] 457 F.2d at 899. The court found sufficient procedural protections, without reliance on the fourth amendment, in the grand jury requirements of enforced secrecy and the use of court process rather than the "constable's intruding hand" as a means of gathering evidence.

[27] *See, e.g.*, note 24 *supra*. Also, *1971 Grand Jury*, recognizing that the grand jury has frequently been used as a tool of the prosecution, held that governmental use of the grand jury to perform investigative work formerly done by regular investigative agencies constitutes an abuse of the grand jury process. 454 F.2d at 585.

plish their investigations by empaneling a grand jury and having it direct law enforcement officers to round up all possible suspects and compel each of them to provide the appropriate exemplars.

Since evidence seized in an unconstitutional search is ordinarily just as reliable as evidence seized under a valid warrant, the defendant's objection is not to the trustworthiness of the evidence or to the adequacy of the trial procedure. Rather the objection under the fourth amendment is to the manner in which the evidence was acquired.[28] The taking of handwriting exemplars is certainly a type of search; the police take evidence from the person of the defendant to be used in determining whether a crime has been committed and whether the defendant is guilty. Since the fourth amendment would protect a defendant's home from a warrantless search for exemplars, an intrusion into his personal privacy to compel similar exemplars should also be protected. Where the police or the grand jury seek to obtain handwriting exemplars, the defendant should be able to invoke the protection of the fourth amendment to insure that the search and seizure is not accomplished in an unreasonable manner.

The extent of the fourth amendment protection is necessarily contingent upon the degree of reasonableness required by the court's interpretation of the required standard. The court in *Praigg* applied the standard of probable cause, as required by the warrant clause of the fourth amendment;[29] the court in *1971 Grand Jury* applied a less stringent standard of reasonableness.[30] An examination of the rationale behind each decision and the logical implications of each decision would seem to suggest that if the courts do recognize a fourth amendment interest in handwriting exemplars, the same standard of reasonableness applied in the grand jury context might also be applicable to the police-citizen encounter.

Having determined that the taking of the defendant's handwriting exemplars is within the fourth amendment, the court in *Praigg* stated the premise that " 'a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.' "[31] Then finding that handwriting exemplars do not fall within the "limited exceptions to the rule that searches and seizures must be based upon

[28]J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 14 (1966).

[29]336 F. Supp. at 484.

[30]454 F.2d at 584-85.

[31]336 F. Supp. at 483-84, *quoting* United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

probable cause,"[32] the court imposed the warrant clause requirements of probable cause and specificity:

> [A]t the least . . . the government must demonstrate in its motion that probable cause exists to believe the defendant was involved in a substantive violation of the law in which his handwriting played a part. It would not be sufficient, on the other hand, to show merely that a handwriting exemplar would be helpful to the preparation of the government's case or that it might be relevant to the investigation of other crimes in which the defendant's involvement is suspected.[33]

The *Praigg* court's analysis leads to an automotic application of the same probable cause and specificity requirements that have traditionally been required when the police seek warrants for the search and seizure of property. Although probable cause is usually an essential requirement for a lawful search and seizure,[34] there is some authority for a limited intrusion based on less than probable cause.[35] Also, since the intrusion in *Praigg* was to obtain nontestimonial evidence similar in nature to fingerprints, Justice Brennan's dictum in *Davis* concerning the taking of fingerprints without probable cause becomes all the more relevant.

The analytical approach used by the Supreme Court in *Schmerber v. California*[36] is also relevant to the taking of handwriting exemplars. *Schmerber*, decided before *Davis*, involved a defendant's constitutional objections to police compulsion of samples of his blood. After determining that the defendant had no valid fifth or sixth amendment objection to the compulsion of the blood sample, the court considered his fourth amendment claim. Noting that "[s]uch testing procedures [taking blood samples] plainly constitute searches of 'persons' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment,"[37] the court stated:

> [T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit [to the taking of the

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[32] *Id.* at 484.

[33] *Id.*

[34] Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[35] *See* text accompanying notes 52-56 *infra*.

[36] 384 U.S. 757 (1966).

[37] *Id.* at 767.

> blood sample] and whether the means and procedures employed [in taking the blood sample] respected relevant Fourth Amendment standards of reasonableness.[38]

Because alcohol dissipates from the bloodstream with the passage of time and because the sample was taken incident to arrest, the Court in *Schmerber* found an exception to the warrant requirement. Therefore, in analyzing any fourth amendment claim, especially any claim not subject to the warrant requirement, it is necessary to examine the facts of each case in order to determine just what would respect "relevant Fourth Amendment standards of reasonableness."

Since the court in *In re September 1971 Grand Jury* was concerned with a request for handwriting exemplars by a grand jury, the court used "reasonableness" rather than warrant clause probable cause as the standard. In *1971 Grand Jury*, the Seventh Circuit fleshed out its decision in *Dionisio* and defined the "content" of the "reasonableness" that the government is required to show to compel handwriting exemplars for a grand jury. After concluding that the government "must affirmatively show that the grand jury process is not being abused," the court continued: "[I]t would be an abuse of the grand jury process for the Government to conduct a general fishing expedition under grand jury sponsorship with the mere explanation that the witnesses are potential defendants."[39] While there must be "a sufficiently explicit connection between the identification evidence sought and the purpose to be served," the connection, the Seventh Circuit is careful to point out, need not amount to probable cause.[40]

The *Praigg* solution requiring probable cause has the advantage of easy judicial determination and certainly protects the defendant from police harassment or overbroad searches. However, the government is in the position of needing probable cause to indict but at the same time also needing to show probable cause to obtain sufficient evidence to indict.[41] Thus, in cases like *Praigg* where the police have a forged document and seek the handwriting exemplars of a suspect in order to obtain probable cause to arrest or indict, they must first show probable cause to believe that the suspect was involved in a substantive crime in which

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[38] *Id.* at 768.

[39] *Id.* at 585.

[40] *Id.*

[41] This is, of course, the same situation encountered by the police in obtaining fingerprints when they work in a jurisdiction which requires a strict showing of probable cause under *Davis*. *See* Carrington, *Speaking for the Police*, 61 J. CRIM. L.C. & P.S. 244, 255-56 (1970).

his handwriting played a part. Obvously it would be extremely difficult to make this showing of probable cause at the investigatory stage; therefore, without the exemplars, often there would be no way to connect the forgeries with the suspects.

In an attempt to protect the interests of both society in law enforcement and of the individual in the security of his person, one obvious solution, consistent with the suggestion in *Davis*, would be to allow a judicially supervised detention for the purpose of taking handwriting exemplars on a governmental showing of reasonableness not necessarily amounting to probable cause to arrest.

One result of the suggestion in *Davis* has been the proposal to add a Rule 41.1[42] to the Federal Rules of Criminal Procedure to define the procedure for the police to follow in obtaining nontestimonial evidence.[43] The proposed rule would allow a magistrate to issue an order for nontestimonial personal identification evidence (including handwriting exemplars) only on the basis of a sworn affidavit establishing:

> 1) that there is probable cause to believe that an offense has been committed;
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> 2) that there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and
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> 3) that the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.[44]

Rule 41.1 would incorporate several provisions to protect the rights of the individual: the time and place for the taking of the evidence can be suited to the individual's convenience;[45] the order, on its face, would give the individual full information as to the purpose and extent of the evidence to be taken;[46] and detention would be no "longer than is reasonably necessary to conduct the specified nontestimonial procedures."[47] The rule further requires that the products of the identification

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[42]52 F.R.D. 462 (1971).

[43]Proposed Rule 41.1 is noted in Note, *Proposed Federal Rule of Criminal Procedure 41.1*, 56 MINN. L. REV. 667 (1972), which concluded that the Supreme Court would probably adopt the proposed rule if submitted for their consideration. *But see* Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 COLUM. L. REV. 712 (1972), concluding that the proposed rule should not be adopted since it erodes constitutional protections.

[44]Proposed Rule 41.1(c), 52 F.R.D. at 463.

[45]Proposed Rule 41.1(e), 52 F.R.D. at 464.

[46]Proposed Rule 41.1(h), 52 F.R.D. at 464-65.

[47]Proposed Rule 41.1(i), 52 F.R.D. at 465.

procedure be returned to the issuing magistrate within forty-five days. If at the end of this forty-five day period the evidence does not amount to probable cause to believe that the individual has committed an offense, the individual is entitled to an order compelling the destruction of the products of the investigation. However, the rule further provides that the destruction order will not be granted if the government makes a showing of "good cause."[48]

The reasoning that led Justice Brennan to conclude that "[d]etention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions"[49] is also applicable to the taking of handwriting exemplars. Since a suspect cannot destroy his handwriting ability, the "limited detention need not come unexpectedly or at an inconvenient time."[50] Also, there would be no reason for the police to fail to obtain prior judicial authorization. Like fingerprinting, the process of taking handwriting exemplars does not involve probing into an individual's thoughts as an interrogation does.[51]

Proposed Rule 41.1 is founded upon more authority than just the dictum in *Davis*. In several different situations the Supreme Court has categorized an intrusion as within the fourth amendment but has nevertheless allowed the intrusion on a showing that did not amount to probable cause. In *Camara v. Municipal Court*,[52] the Supreme Court held that administrative inspections for the purpose of enforcing housing codes must meet warrant clause requirements. However, the applicable standard was reasonableness, not probable cause, thereby giving "full recognition to the competing public and private interests . . . at stake."[53] In *Terry v. Ohio*,[54] the Court used this balancing approach in the context of a criminal prosecution to allow a police officer to make a self-protective search for weapons without probable cause. The limited search was reasonable since society's interest in the protection of its police officers outweighed the individual's right to be secure in his person from the limited search involved. In *Wyman v. James*,[55] the Court

[48]Proposed Rule 41.1(j), 52 F.R.D. at 465-66.
[49]Davis v. Mississippi, 394 U.S. 721, 727 (1969).
[50]*Id.*
[51]*See id.*
[52]387 U.S. 523 (1967).
[53]*Id.* at 539.
[54]392 U.S. 1 (1968).
[55]400 U.S. 309 (1971).

rejected the claim of a state welfare beneficiary who contended that a home visit, when not consented to or supported by probable cause, violated her fourth amendment rights. Here the Court balanced society's interest in the proper administration of the welfare program against the proposed limited intrusion into the security of the defendant's home. Although the Court held that the authorized home visit was not a search, the opinion went further to state that even if it were, it would not be unreasonable under the fourth amendment.[56]

The taking of handwriting exemplars presents a situation in which individual rights must be carefully balanced against societal rights. If the police were to have uncontrolled discretionary power to compel exemplars, any investigation could turn into a dragnet in which anyone could be forced to compromise the security and privacy of his person. On the other hand, if the police were to be initially required to show traditional probable cause as a prerequisite to obtaining exemplars, police effectiveness would be lost to an unproductive merry-go-round standard requiring probable cause in order to obtain sufficient evidence to show probable cause to arrest. Since the taking of handwriting exemplars does involve obtaining evidence from the person of a suspect and since this taking is so intimately tied to a detention restricting the freedom of the person, the taking should first be judicially scrutinized.

In an attempt to resolve the question of whether a court should distinguish between nontestimonial identification evidence and the more usual forms of criminal evidence that are objects of police searches, application of the *1971 Grand Jury* standard of reasonableness probably does not provide a standard that will safeguard both the public and the private interests. The adoption of a strictly limited statutory procedure similar to proposed Rule 41.1 could possibly protect both public and private interests. The requirement of a judicial determination of the reasonableness of the requests of both the grand jury and the police would insure due process in that an individual would not be subject to arbitrary contempt citations for noncompliance. This same requirement of a showing of reasonableness should also be sufficient to prevent any investigatory dragnet fishing expeditions. Of course if a magistrate erred, defendants could appeal that decision in the same manner as they would the issuance of a warrant on less than probable cause. Nevertheless, to effectively safeguard the interests involved, courts should apply a rule such as proposed Rule 41.1 very carefully, realizing that any

[56] *Id.* at 318.

investigation on a showing of less than probable cause approaches the outer limit of a permissible governmental intrusion.

KENNETH R. KELLER

Criminal Procedure—Free Transcripts for Indigents

In *Britt v. North Carolina*[1] the United States Supreme Court, for only the second time[2] since the *Griffin v. Illinois*[3] decision in 1956, refused to grant an indigent state defendant a free transcript of a prior proceeding. Following the landmark *Griffin* case, which held that an indigent petitioner was entitled to a transcript of his trial for use on direct appeal, the Court had consistently expanded the right of indigents to free records to include use of a transcript in habeas corpus proceedings,[4] appeal of habeas corpus proceedings,[5] and *de novo* habeas corpus hearings.[6] The procedural relationship in *Britt* was entirely different from any of the prior transcript cases the Court had heard, for it was a request for a record of a mistrial for use during the second trial. The distinctions in the procedures involved could have served as a basis for the denial of the transcript, but the Court did not rest its decision on the basis of the difference in procedural posture. Instead the *Britt* fact pattern seems to have been forced into the *Griffin* line of cases in order to make clear a new policy of more limited application of *Griffin* in the future.

Britt had been indicted for first degree murder, and his first trial had ended in a hung jury. Before the start of the second trial the defendant's attorney had requested a free transcript of the mistrial, but no particular reason for the request was given other than the defendant's indigency. The trial court denied the motion, and in a second trial in the same town Britt was convicted. The North Carolina Court of Appeals affirmed the conviction, finding no error in the refusal to grant

[1]92 S. Ct. 431 (1971).

[2]The only other decision which upheld the denial of a transcript was Norvell v. Illinois, 373 U.S. 420 (1963), where the court reporter for the defendant's trial had died and no one could read his shorthand notes.

[3]351 U.S. 12 (1956).

[4]Wade v. Wilson, 396 U.S. 282 (1970).

[5]Long v. District Court, 385 U.S. 192 (1966) (per curiam).

[6]Gardner v. California, 393 U.S. 367 (1969).