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Accused May Be Compelled to Provide Handwriting Exemplars, Voice, Blood, and Urine Samples without Violating the Constitutional Safeguards against Self-Incrimination.

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CRIMINAL LAW—EVIDENCE—HANDWRITING EXEMPLARS—ACCUSED MAY BE COMPELLED TO PROVIDE HANDWRITING EXEMPLARS, VOICE, BLOOD, AND URINE SAMPLES WITHOUT VIOLATING THE CONSTITUTIONAL SAFEGUARDS AGAINST SELF-INCRIMINATION. *Olson v. State*, 484 S.W.2d 756 (Tex. Crim. App. 1969), *rehearing denied*, 484 S.W.2d 759 (Tex. Crim. App. 1972).

Clifford Olson was convicted of forgery and was sentenced to life imprisonment. The defendant challenged the sufficiency of the evidence. As a rebuttal, the trial court allowed the prosecution to introduce handwriting exemplars[1] taken from the defendant for comparison.

The defendant appealed to the court of criminal appeals urging that the introduction of the handwriting exemplars could not be justified under the Texas constitutional provision against self-incrimination which he claimed is broader in scope than the protection afforded by the United States Constitution. The appellant relied upon previous Texas decisions indicating that the taking of voice,[2] blood,[3] and urine[4] samples without the consent of the accused violated the constitutional protections of self-incrimination. Held —*Affirmed.* Taking of handwriting, blood, voice, and urine samples does not constitute compelling an accused "to give evidence against himself" in violation of Article I, Section 10 of the Texas Constitution.[5]

"Religious zealots and royal agents of seventeenth-century English history had no scruples against extracting from the accused by torture words they desired to hear him speak."[6] Today's prohibition against self-incrimination developed "as a necessary safeguard against the cruel and arbitrary abuses of the early English ecclesiastical courts."[7] The privilege against

1. "Exemplar" is defined as a specimen which is capable of supporting both deduction and inference. BLACK'S LAW DICTIONARY 681 (4th ed. 1968).

2. Beachem v. State, 144 Tex. Crim. 272, 162 S.W.2d 706 (1942), *noted in* 21 TEXAS L. REV. 816 (1943). A robbery occurred in which the assailant uttered certain words. After his arrest, an officer ordered Beachem to speak the specific words used during the robbery. This procedure formed the basis for a positive identification at the lineup and at court. The voice samples were held to have been compelled from the accused in violation of the self-incrimination provision.

3. Trammell v. State, 162 Tex. Crim. 543, 287 S.W.2d 487 (1956). A driver had been taken to the hospital after an accident, and a blood sample was taken while he was unconscious. The court held that the specimen was inadmissible in a trial for driving while intoxicated in the absence of a showing of consent.

4. Apodaca v. State, 140 Tex. Crim. 593, 146 S.W.2d 381 (1940). After a serious accident, the accused was taken to jail where he was required to perform an "intoxication" test involving simple motor functions. He was also required to furnish a urine sample. The court held that Apodaca's rights against self-incrimintaion had been violated.

5. TEX. CONST. art. I, § 10.

6. Note, *Evidence—Admissibility of Results Obtained from Intoxication Tests and Other Bodily Examinations of Defendant*, 19 TEXAS L. REV. 463, 480 (1941).

7. *Id.* at 467.

self-incrimination has rapidly developed as a sacred right of the accused.[8]

The fifth amendment to the United States Constitution has been the traditional cornerstone in the preservation of the self-incrimination privilege. It provides: "No person . . . shall be compelled . . . *to be a witness against himself*. . . ." The Texas Constitution contains a similar safeguard, although it reads: ". . . the accused shall . . . not be compelled *to give evidence against himself*. . . ."[9]

The appellant, Olson, contended in his motion for rehearing that this difference in wording was intended to expand the language of the United States Constitution. Judge Onion quickly disposed of this theory by pointing out that a majority of the states use the same phraseology as Texas,[10] and added that this variation had been held in other jurisdictions neither to enlarge nor to narrow the scope of the law.[11] He added that there is no evidence to support the contention that the framers of the Texas Constitution intended such an extension.[12]

The federal judiciary has narrowly construed the fifth amendment self-incrimination provision thus limiting it merely to a privilege against verbal or oral testimony against one's self. In *Rochin v. California,* the Supreme Court stated that the state's invasion into the body of an accused "is bound to offend even hardened sensibilities."[13] The Supreme Court thus extended the privilege beyond testimonial evidence to include real or physical evidence, although it has been limited by subsequent decisions.[14] In 1966, the Supreme Court decreed that the extraction of blood, even against the will of the accused, did not offend one's "sense of justice."[15] One year later the Court held both handwriting and voice exemplars admissible as identifying physi-

8. 14 U.C.L.A.L. REV. 680, 687 (1967). "The policy behind the privilege against self-incrimination is two-fold: it eliminates coercion as an instrumentality of law enforcement and encourages police and prosecutors to procure evidence against the accused as the result of their independent efforts. One of the consequences of the privilege is that it creates an area of personal inviolability, a right of privacy which the police are required to respect."

9. TEX. CONST. art. I, § 10 (emphasis added).

10. Olson v. State, 484 S.W.2d 756, 760 n.5 (Tex. Crim. App. 1969).

11. *Id.* at 761 n.8.

12. *Id.* at 761 nn.9 & 10.

13. 342 U.S. 165, 172, 72 S. Ct. 205, 210, 96 L. Ed. 183, 190 (1952). Police officers engaged in an illegal search observed the defendant swallow two capsules believed to be narcotics. Over Rochin's objections, they forced him to regurgitate the capsules through a tube from his stomach. The capsules were subsequently used as evidence against him. On appeal the Supreme Court held the evidence to be inadmissible.

14. Breithaupt v. Abram, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957). The Court held that a conviction would be sustained even though based upon the results of a blood test made while the accused was unconscious.

15. Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Justice Black filed a strong dissent.

cal characteristics outside the scope of the fifth amendment's protection.[16] The Court has quite apparently retreated from its decision in *Rochin* and the trend appears to be in the direction of the "Wigmorean orthodoxy."[17]

Well aware of the federal view, the court of criminal appeals was faced with the monumental task of determining the posture of the Texas case law. The court had to decide if its previous decisions had expanded the scope of the state's minimal requirements outlined in the fifth amendment.[18] The Texas cases dealing with self-incrimination may, at best, be described as confusing.[19] Significantly, the specific question of whether the admissibility of handwriting exemplars violates the Texas self-incrimination privilege is one of first impression.[20] Many cases have impliedly considered handwriting exemplars in one aspect or another, but this is the first direct confrontation with the question of self-incrimination.

Early Texas cases approached the question of the admissibility of handwriting exemplars as if they were confessions given in custody without a warning.[21] As indicated by Judge Onion:

> [O]ne constant source of confusion in Texas self-incrimination cases is the number of cases which have interwoven both the constitutional prohibition and the statutory inhibition concerning confessions into an almost unintelligible maze.[22]

In essence, the courts overtly avoided discussing self-incrimination by turning it into a confession question[23] which clouded both issues.[24] Later Texas

16. Gilbert v. California, 388 U.S. 263, 266, 87 S. Ct. 1951, 1953, 18 L. Ed. 2d 1178, 1182 (1967). "The taking of the exemplars did not violate petitioner's Fifth Amendment privilege against self-incrimination. The privilege reaches only compulsion of 'an accused's communications' . . . ." *See* United States v. Wade, 388 U.S. 218, 223, 87 S. Ct. 1926, 1930, 18 L. Ed. 2d 1149, 1155 (1967). Voice exemplars are not protected by the self-incrimination clause.

17. The "Wigmorean orthodoxy" is a theory "advocated by the late Dean Wigmore which affords the protection of the privilege only to statements extracted 'from the person's own lips.'" Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 S. CAL. L. REV. 597, 597 (1970).

18. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). For the first time, the minimal standards set forth in the fifth amendment were held applicable to state proceedings as well as to the previously included federal proceedings.

19. Comment, *Admissibility and Constitutionality of Chemical Intoxication Tests*, 35 TEXAS L. REV. 813, 822 (1957). "[I]n Texas, the court of criminal appeals has never explicitly set out the boundaries of the privilege."

20. *Cf.* Burns v. State, 432 S.W.2d 93, 94 (Tex. Crim. App. 1968). Handwriting exemplars taken from the accused were admitted into evidence, but there was no indication that an objection was made on the grounds of self-incrimination under the Texas Constitution.

21. *See* Kennison v. State, 97 Tex. Crim. 154, 260 S.W. 174 (1924); Jones v. State, 73 Tex. Crim. 152, 165 S.W. 144 (1914); Ferguson v. State, 61 Tex. Crim. 152, 136 S.W. 465 (1911); Hunt v. State, 33 Tex. Crim. 252, 26 S.W. 206 (1894); Williams v. State, 27 Tex. Crim. 466, 11 S.W. 481 (1889).

22. Olson v. State, 484 S.W.2d 756, 764 (Tex. Crim. App. 1969).

23. In Kennison v. State, 97 Tex. Crim. 154, 260 S.W. 174 (1924), the accused

decisions sidestepped the self-incrimination issue by finding that the accused had waived his privilege, thus eliminating the need for any further discussion.[25]

However, many Texas decisions met the issue head-on, and as a result, numerous items of physical evidence have been held to be admissible notwithstanding the self-incrimination provision.[26] Olson was aware of the many varieties of physical evidence which have been held admissible, but he based his contention upon the constitutionally protected areas—urine specimens,[27] voice exemplars,[28] and blood specimens.[29] Although criticized and limited,[30] these decisions had maintained their stature as unyield-

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was compelled to produce handwriting specimens which were subsequently used for comparison at his trial. The court of criminal appeals reversed the conviction relying strictly on the basis of a coerced confession. The court did not even mention either the fifth amendment or the Texas constitutional protection against self-incrimination. *See* Hamilton v. State, 397 S.W.2d 225, 228 (Tex. Crim. App. 1965). The court made an independent finding that the appellant was duly warned before giving the handwriting specimens and that the same was voluntarily done.

24. Olson v. State, 484 S.W.2d 756, 765 (Tex. Crim. App. 1969). "The exclusionary rule concerning coerced or involuntary confessions has a separate history covering a different period of time than the self-incrimination privilege. While there is an underlying relationship between the two, the original designs were different. Unfortunately, courts have sometimes applied the two rules without making any distinction between them." (Citations omitted.)

25. *E.g.*, Long v. State, 120 Tex. Crim. 373, 48 S.W.2d 632 (1932). The court held that the accused's privilege against self-incrimination was not violated by requiring her to give a handwriting exemplar upon cross-examination because the accused had taken the stand as a witness in her own behalf. *See also* Hamilton v. State, 397 S.W.2d 225, 228 (Tex. Crim. App. 1965).

26. Webb v. State, 467 S.W.2d 449, 450 (Tex. Crim. App. 1971) (use of a bullet taken from an accused's body during a previous operation). The court distinguished the case from *Apodaca* on the grounds of waiver. Gordon v. State, 461 S.W.2d 415 (Tex. Crim. App. 1971) (fingerprints); Isaac v. State, 421 S.W.2d 661 (Tex. Crim. App. 1967) (requiring accused to try on clothes); Travis v. State, 416 S.W.2d 417 (Tex. Crim. App. 1967) (fingerprints); Whitlock v. State, 170 Tex. Crim. 153, 338 S.W.2d 721 (1960) (requiring the accused to raise a deformed hand for identification); Carpenter v. State, 333 S.W.2d 391 (1960) (admission of motion pictures of the accused taken while in a drunken condition); Richardson v. State, 159 Tex. Crim. 595, 266 S.W.2d 129 (1954) (tongue examination); Henson v. State, 159 Tex. Crim. 647, 266 S.W.2d 864 (1953) (paraffin test); Coleman v. State, 151 Tex. Crim. 582, 209 S.W.2d 925 (1948) (removal of scrapings from under fingernails); Ash v. State, 139 Tex. Crim. 420, 141 S.W.2d 341 (1940) (fluoroscopic examination followed by an enema); Long v. State, 120 Tex. Crim. 373, 48 S.W.2d 632 (1931) (requiring the accused to try on clothes); Martinez v. State, 96 Tex. Crim. 138, 256 S.W. 289 (1923) (physical examination for venereal disease); McGarry v. State, 82 Tex. Crim. 597, 200 S.W. 527 (1918) (fingerprints); Hahn v. State, 73 Tex. Crim. 409, 165 S.W. 218 (1914) (footprints); Pitts v. State, 60 Tex. Crim. 524, 132 S.W. 801 (1910) (footprints).

27. Apodaca v. State, 140 Tex. Crim. 593, 146 S.W.2d 381 (1940).

28. Beachem v. State, 144 Tex. Crim. 272, 162 S.W.2d 706 (1942).

29. Trammell v. State, 162 Tex. Crim. 543, 287 S.W.2d 487 (1956).

30. *See* Lee v. State, 455 S.W.2d 316 (Tex. Crim. App. 1970); Gage v. State, 387 S.W.2d 679 (Tex. Crim. App. 1964); Lucas v. State, 160 Tex. Crim. 443, 271 S.W.2d 821 (1954); 20 Sw. L.J. 869, 878 (1966).

ing guideposts in Texas jurisprudence. Because of *Apodaca v. State*, *Beachem v. State*, and *Trammell v. State*, Texas law could best be summarized as giving "greater effect to the self-incrimination privilege contained in its constitution than the United States Supreme Court gives to the fifth amendment self-incrimination privilege."[31]

Olson rested his case by drawing an analogy between blood, voice, urine, and handwriting samples. He contended that compelling him to produce handwriting samples was tantamount to requiring him to furnish evidence against himself. In an extraordinary decision, the court overruled its three previous holdings and declared that handwriting exemplars may be compelled from an accused *regardless of his consent.* With one sweeping strike of the pen, the court of criminal appeals crushed three landmark Texas decisions. Judge Onion rationalized the action by reason of the criticism[32] and limitations imposed upon the *Apodaca*[33] and *Beachem*[34] decisions. He found difficulty, however, illustrating limitations on the *Trammell*[35] decision.[36] Almost as an excuse, Judge Onion pointed to other Texas decisions which had abruptly changed the law.[37] Texas has now joined those jurisdictions which have declared handwriting exemplars admissible with no consideration of the accused's consent.[38]

A matter of immediate concern is the failure of the court to discuss the reliability of handwriting exemplars as a means of identification. This failure, which could be a future method of attacking their validity, is of the utmost importance. *The reliability of evidence tending to incriminate the accused certainly should be included in a discussion of whether or not such evidence may be compelled from one's person.* Yet, on this point the court was silent.

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31. 20 Sw. L.J. 869, 877 (1966).

32. Gage v. State, 387 S.W.2d 679, 681 (Tex. Crim. App. 1964). In this case the court explicitly recognized its reluctance to extend *Beachem* and *Apodaca.* Gage was forced to give fingerprints and Judge Morrison, writing for the majority which found no violation of the privilege, said: "This court has in the past demonstrated its reluctance to extend the rules announced in *Beachem* . . . and *Apodaca* . . . ."

33. Apodaca v. State, 140 Tex. Crim. 593, 146 S.W.2d 381 (1940).

34. Beachem v. State, 144 Tex. Crim. 272, 162 S.W.2d 706 (1942).

35. Trammell v. State, 162 Tex. Crim. 543, 287 S.W.2d 487 (1956).

36. Olson v. State, 484 S.W.2d 756, 771 (Tex. Crim. App. 1969). ". . . *Trammell* is a widely accepted decision and the court has adhered to *Trammell* even after *Schmerber* placed blood tests . . . beyond the pale of the Fifth Amendment." *See* Hearn v. State, 411 S.W.2d 543, 545 (Tex. Crim. App. 1967).

37. Olson v. State, 484 S.W.2d 756, 771 n.51 (Tex. Crim. App. 1969). The court seems to have expected a great deal of criticism of the *Olson* decision by the way in which the court retreated to a defensive posture in announcing its decision.

38. United States v. McGann, 431 F.2d 1104 (5th Cir.), *cert. denied,* 401 U.S. 919 (1970); People v. Hess, 90 Cal. Rptr. 268 (Dist. Ct. App. 1970); Lewis v. United States, 382 F.2d 817 (D.C. Cir.), *cert. denied,* 389 U.S. 962 (1967); State v. Thompson, 240 So. 2d 712 (La. 1970); State v. Archuleta, 482 P.2d 242 (N.M. Ct. App. 1970); Rosenblatt v. Danzis, 285 N.Y.S.2d 654 (Sup. Ct. 1967); State v. Fisher, 410 P.2d 216 (Ore. 1966).

One study in 1946, concluded that handwriting samples were too faulty to be regarded as evidence.[39] Expert testimony lends a great deal of credibility to the practice of comparing handwriting exemplars, but evidence of handwriting is merely opinion.[40] The reliability of handwriting comparison is far from being totally accurate, and the practice certainly is not as acceptable as fingerprinting in the identification process. "[T]he comparison of a disputed signature with the handwriting of the suspect forger will not always yield positive results."[41] A very practical problem is the fact that handwriting may be altered or disguised at will.[42] Even noted handwriting expert Charles C. Scott agrees that sometimes an experienced forger is quite successful in imitating another's handwriting.[43]

> For the criminal investigator, disguised writing may present special matters for consideration. The handwriting examiner is faced with the problem of determining the disguise factors, and of differentiating between such factors and those that tend to identify the maker.[44]

The credibility of handwriting comparisons is a very important issue not included in the court's discussion and could prove to be a future means of attacking the validity of handwriting exemplars.

Another aspect of the *Olson* decision which must be examined is the extension of the handwriting exemplar question to include a discussion of blood, voice, and urine samples.[45] While voice and urine samples are analogous to handwriting exemplars in that the defendant need only perform some physical act, the intrusion into one's body to draw blood is clearly distinguishable.[46] Such an invasion of the sanctity of one's body borders upon shocking one's conscience. Justice Black dissented in *Schmerber v. California* and expressed amazement at the conclusion that compelling a person to give his blood to help the state to convict him is not equivalent to com-

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39. Tresselt, *A Study of the Factors in the Identification of Handwriting*, 24 J. SOCIAL PSYCH. 101 (1946). The study attempted to investigate the ability of lay witnesses to identify their own and other handwriting. In one experiment the percentage of correct recognition was 32.46.

40. H. ROGERS, THE LAW OF EXPERT TESTIMONY 214 (3d ed. 1941).

41. Annot., 43 A.L.R.3d 653, 659 (1972).

42. People v. Hess, 90 Cal. Rptr. 268, 271 (Dist. Ct. App. 1970). The problem is well illustrated in this recent California case in which the defendant was ordered to provide an exemplar of a "disguised back-hand handwriting style," notwithstanding that a backhand slant was not the defendant's natural writing style.

43. C. SCOTT, PHOTOGRAPHIC EVIDENCE—PREPARATION AND PRESENTATION § 402, at 347 (1942).

44. Annot., 43 A.L.R.3d 653, 659 (1972).

45. Judge Morrison raised this issue in his dissent: "[O]verruling *Trammell* . . . is entirely unnecessary in order to reach the result which Judge Onion's opinion concludes is a proper disposition of this case." Olson v. State, 484 S.W.2d 756, 773 (Tex. Crim. App. 1969).

46. State v. Moore, 483 P.2d 630, 637 (Wash. 1971). Judge Rosellini dissented: "Blood tests . . . are clearly distinguishable from physical examination tests . . . no material substances are taken from his body."

pelling him to be a witness against himself.[47] The court of criminal appeals went out of its way to reverse three prior decisions before reaching its conclusion in the *Olson* case. The court extended the handwriting question presented by the fact situation to three separate areas. This in itself is significant in that Texas courts strictly adhere to the principle of stare decisis and are usually reluctant to overrule prior decisions in order to lend greater stability to the law.

In retrospect, *Olson* must be considered as a landmark decision. Defendants will probably regard it as a return to "the rack and the thumbscrew"[48] while prosecutors will undoubtedly hail it as a giant leap forward in Texas criminal jurisprudence.

Olson's future impact upon criminal prosecutions in Texas will be enormous.[49] *The decision virtually restricts the Texas self-incrimination privilege to the mind and thoughts of the accused.*[50] Every other form of evidence may be compelled or extracted from a defendant regardless of his consent. Applying the *Olson* decision to a recent and very controversial Georgia case,[51] there would be little question that Texas courts would agree with the Georgia Supreme Court in ordering a defendant to undergo surgery to remove a bullet which could later be used as evidence against him.

Most significantly, *Olson* may be regarded as a "house cleaning" decision. Perhaps the court of criminal appeals is attempting to harmonize its decisions in anticipation of a revised Penal Code[52] being enacted by the legislature and with a view toward the constitutional convention soon to be called.[53] The framers of the new constitution should pay particular atten-

47. 384 U.S. 757, 773, 86 S. Ct. 1826, 1837, 16 L. Ed. 2d 908, 921 (1966).

48. 21 TEXAS L. REV. 816, 817 (1943).

49. It is also reasonable to assume that the *Olson* decision will be extended to grand jury witnesses. The United States Supreme Court has recently held that a federal grand jury witness may not interpose the fifth amendment privilege against self-incrimination against an order compelling him to produce samples of his physical characteristics for identification. *See* United States v. Dionsio, 41 U.S.L.W. 4180 (U.S. Jan. 22, 1973); United States v. Mara, 41 U.S.L.W. 4185 (U.S. Jan. 22, 1973). There is no reason to believe that Texas will not follow suit.

50. Olson v. State, 484 S.W.2d 756, 772 (Tex. Crim. App. 1969). Judge Onion concluded: "[I]t was the intent of the framers of our constitutional privilege to provide the citizens of this state with a safeguard similar to that contained in the Fifth Amendment. We adopt the view that the Texas constitutional self-incrimination privilege extends . . . [only] to testimonial compulsion."

51. Creamer v. State, 192 S.E.2d 350 (Ga. 1972). The state alleged that a bullet was fired in self-defense by a woman before she and her husband were killed. Doctors reported they detected metal in Creamer's back, but Creamer refused to undergo surgery relying on his privilege against self-incrimination. The Georgia Supreme Court ordered the operation.

52. PROPOSED TEX. PENAL CODE (1970).

53. On November 7, 1972, Texas voters approved a referendum calling for a constitutional convention to revise the current constitution. A specially appointed commission will present a draft to the Texas Legislature sitting in constitutional convention in the fall of 1973.