

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) No. 08-00026-04-CR-W-FJG
)
CHRISTOPHER L. ELDER,)
)
Defendant.)

**UNITED STATES' SUGGESTIONS IN OPPOSITION TO
DEFENDANT ELDER'S MOTION TO SUPPRESS HANDWRITING IDENTIFICATION**

The United States of America provides the following suggestions in opposition to defendant Christopher L. Elder's motion to suppress the identification by Diane Hearn of defendant Elder's handwriting:

Suggestions in Opposition

Witness Diane Hearn's identification of defendant Elder's handwriting is admissible testimony pursuant to Fed. R. Evid. 901(a) and (b)(2) for the purpose of authentication and identification. The issue here is an evidentiary one, not a Constitutional one. Fundamental differences exist between identification of persons and identification of handwriting, which cause Elder's reliance on an analogy to line-ups to be misplaced. This incorrect approach explains why Elder has not cited a single case in support of his novel proposition of law.

Fed. R. Evid. 901 governs authentication and identification of evidence. Rule 901(a) provides that:

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.

Rule 901(b)(2) then provides nonexpert identification of handwriting as an illustration of the general rule:

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: . . .
(2) Nonexpert opinion as to the genuineness of handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

Consequently, handwriting may be identified in two ways, either through a lay witness who has familiarity with the handwriting, not acquired for the purposes of litigation, or through an expert witness who examined the handwriting for the purposes of litigation, or both. *United States v. Scott*, 270 F.3d 30, 48-49 (1st Cir. 2001); *United States v. Tipton*, 964 F.2d 650, 655 (7th Cir. 1992).

In order for nonexpert handwriting testimony to be admissible at all, the proponent of the evidence must lay a sufficient foundation for the witness's familiarity with the handwriting. *See, e.g., United States v. Aguirre*, 155 Fed. Appx 145, 150 (5th Cir. 2005) (two witnesses testified to their extensive experience viewing the defendant's handwriting). Without laying such a foundation, a nonexpert witness would not be able to testify at all. *Id.*

It is at this juncture that Elder's attempt to analogize handwriting identification to identification of persons breaks down. With identification of persons, no issue of suggestiveness exists if the identification is based on the witness's independent personal familiarity with the defendant. *United States v. Thomas*, 128 Fed. Appx. 986, 991-92 (4th Cir. 2005); *United States v. Burgos*, 55 F.3d 933, 942 (4th Cir. 1995). With handwriting, the proponent of a lay identification must show that the witness has sufficient familiarity with the handwriting to support the

identification. Without such testimony, the proffered testimony would not be admissible. *Scott*, 270 F.3d at 52.

Thus, to be admissible at all, a lay witness must have sufficient familiarity with the handwriting to authenticate it and therefore, by definition, no issue of suggestiveness would exist. No counterpart to a line-up exists for handwriting identification; if a lay witness is not qualified to make the identification based on out-of-court knowledge of the handwriting, then an expert witness must be used if any identification is to be made. *Id.*

The United States is not aware of a single case where a line-up of handwriting samples has been required for use with a lay witness, nor has Elder cited to one. Indeed, it is unknown how such a procedure would work. The United States submits that no such case law exists because if such an extreme measure were needed the nonexpert witness's testimony would not be admissible anyway under Rule 901.

Diane Hearn will testify at trial that she is very familiar with Elder's handwriting as a result of Elder working with her in a clinic. It is for the trial court judge to determine whether her testimony establishes a sufficient foundation for her to identify Elder's handwriting. A pre-trial hearing on this issue would accomplish nothing, as the admissibility of the evidence is solely an issue for trial. Elder's motion should be denied as a matter of law. A nonexpert witness's ability to identify handwriting must come from her past knowledge of the handwriting gained not for the purpose of litigation. If the witness has such an ability, then no issue of suggestiveness exists, by definition. If the witness lacks such an ability, then the witness's

testimony will not be admitted, and the notion of a “handwriting line-up” simply becomes irrelevant.¹

Counsel for Elder has taken the opportunity in the suggestions supporting the motion to reargue a prior motion concerning a witness speaking to the defense and to argue that certain facts might be impeaching of Ms. Hearn. These points are entirely irrelevant to the motion made here by Elder. Counsel will have the opportunity to make these points at the proper time and place.

CONCLUSION

The United States respectfully urges that Elder’s motion to suppress handwriting identification testimony be denied..

Respectfully submitted,

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¹The United States does not intend to bring Ms. Hearn to Kansas City for the October 21 hearing, both because no evidentiary hearing is needed on this motion and because, if one were to occur, the DEA Diversion Investigator’s testimony is the relevant testimony on this issue.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on October 15, 2008, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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