THE PRIVILEGE AGAINST SELF INCRIMINATION DURING THE BOOKING PROCESS

The Fifth Amendment privilege against self-incrimination protects an accused from being compelled to testify against himself or otherwise provide the State with evidence of a testimonial or communicative nature. Schmerber v. California, 384 U.S. 757 (1966). The privilege exists to spare the accused from having to reveal, directly or indirectly, his knowledge of facts connecting him to the offense or from having to share his thoughts and beliefs. It does not protect an accused person from providing any evidence against himself, but only evidence that is "testimonial". "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." Doe v. United States, 487 U.S. 201 (1988).

Thus, the results of a blood test are not testimonial, Schmerber v. California, supra, 384 U.S 757 (1966), nor is evidence of the refusal to take a blood test. South Dakota v. Neville, 459 U.S. 553 (1983). Similarly, handwriting exemplars, Gilbert v. California, 388 U.S. 263 (1967), voice exemplars, United States v. Dionisio, 410 U.S. 1 (1973), fingernail scrapings, Cupp v. Murray, 412 U.S. 291 (1973), and requiring the arrestee to put on a garment, Holt v. United States, 218 U.S. 245 (1910) or appear in a lineup, United States v. Wade, 388 U.S. 218 (1967) are not testimonial in a Fifth Amendment sense and do not implicate the privilege against self incrimination.

A defendant's statement to police or police agents, however, is testimonial and is inadmissible if made in the absence of Miranda warnings and in response to questioning or interrogation. Bucknor v. State, 965 So.2d 1200 (4th DCA 2007 "Questioning"

includes not only direct questions between the police and the suspect, but also discussion between the police officers themselves in the presence of the suspect, that is reasonably likely to lead to, or designed to lead to, an incriminating response. See Rhode Island v. Innis, 446 U.S. 291 (1980); Edwards v. Arizona, 451 U.S. 477 (1981).

During the booking and release process, arrestees are asked a series of questions, some of which may include requests for information that go beyond just the bare-bones biographical data. In Pennsylvania v. Muniz, 496 U.S. 582 (1990) a plurality of the Supreme Court carved out a "booking exception" to the Miranda rule, and held that questions may be asked of a suspect for the purpose of obtaining biographical data that may be necessary to complete the booking process or to provide pretrial services. Id. at 601. The proper post-arrest questions in the Muniz case, however, were identified as being "routine" and were somewhat benign, having concerned the defendant's name, address, height, weight, eye color, date of birth and age. Id. at 987. The Court did rule inadmissible the unwarned question of when was the accused's sixth birthday, as it was testimonial and required the suspect to communicate an assertion of fact or belief. "Testimonial" responses, said the Court, "must encompass all responses to questions that, if asked of a sworn suspect in a criminal trial, could place the suspect in the cruel trilemma" of remaining silent, telling the truth and incriminating himself, or giving a false statement. Id. at 597. "The vast majority of verbal statements thus will be testimonial because there are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts." Id. (citation and quotations omitted).

A question by an impartial booking officer, which asks, for example, the arrestee's

occupation, to which he responds "assassin" or "drug dealer" might be considered to be unlikely to lead to an incriminating response, and therefore might not run afoul of the privilege, despite the clearly incriminating answer. On the other hand, if the officer doing the booking was the arresting officer, and he or she knew that the arrestee was an accused drug dealer, the question might be considered as being designed to lead to incriminating information, and might be inadmissible. Similarly, if during the pretrial services interview the arrestee is asked about his knowledge of, or relationship to the victim, this presents a much greater potential for incrimination, and since it is unnecessary for the officer to gather that information from the suspect herself, the warnings are probably required. "You mean the guy I killed?" could easily be the answer. Even if the arrestee denies knowledge of the victim, her answer could tend to incriminate her, as the State may be in possession of other evidence which shows that they were indeed acquainted. In the Miranda decision itself, the Court recognized that no distinction should be drawn between statements which constitute full confessions, statements which contain admissions, and statements intended by the suspect to be merely exculpatory (but subsequently used by the prosecution), as all are "incriminating in any meaningful sense of the word and may not be used without the full warnings and [an] effective waiver."

The gathering of information from the arrestee during the booking and release process potentially implicates the Self-Incrimination Clause. Even when the interrogatory which resulted in the self-incriminating answer is couched within a booking or pre-trial officer's "standard" questionnaire, defense counsel should scrutinize the questions and make a determination whether the question was reasonably likely, given

the case, to elicit a response that is self-incriminating, and one which is therefore protected by the privilege against self incrimination. Defense counsel should move to suppress incriminating statements made during the interview whenever the questioning goes beyond the typical biographical information, or whenever it appears that the interrogator already knew or could easily have found the answer but chose to elicit it from the arrestee's mouth.

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