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Demonstrative Evidence in Federal Criminal Cases

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DEMONSTRATIVE EVIDENCE IN FEDERAL CRIMINAL CASES

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DEMONSTRATIVE EVIDENCE IN GENERAL

Demonstrative evidence is admissible where it shows the commission of the crime charged or throws light on how it was committed, provided that it is properly identified.[1] Weapons,[2] counterfeit coins,[3] liquor,[4] narcotics,[5] and empty whiskey bottles[6] are all examples of objects that may be admissible in a proper case. Demonstrative evidence must always be relevant. Thus a paper found in a trunk, with a signature other than that of the defendant, and not addressed to him, is not evidence unless it is proved that he was the owner of the trunk and in some way connected with the paper.[7]

Demonstrative evidence must at the start be authenticated by the testimony of a witness showing that the object has

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1. Colasurdo v. United States, 22 F.2d 934 (9th Cir. 1927); Rubio v. United States, 22 F.2d 766, 768 (9th Cir. 1927), *cert. denied* 276 U.S. 619, 72 L.Ed. 734 (1928); Goodfriend v. United States, 294 Fed. 148, 152 (9th Cir. 1923).

2. Banning v. United States, 130 F.2d 330, 335 (6th Cir. 1942); Pedersen v. United States, 271 Fed. 189, 192 (2d Cir. 1921); Sorenson v. United States, 168 Fed. 785, 793 (8th Cir. 1909).

3. Hanger v. United States, 173 Fed. 54, 60 (4th Cir. 1909).

4. Gandreau v. United States, 300 Fed. 21, 28 (1st Cir. 1924).

5. Gin Bock Sing v. United States, 8 F.2d 976, 977 (9th Cir. 1925); Silverman v. United States, 59 F.2d 636, 638 (1st Cir. 1932), *cert. denied* 287 U.S. 640, 77 L.Ed. 554 (1932).

6. Pleich v. United States, 20 F.2d 383 (9th Cir. 1927).

7. United States v. Craig, 25 Fed.Cas. 682, 683 (C.C.E.D.Pa. 1827). See Ray v. United States, 10 F.2d 359, 360 (6th Cir. 1926); Thomas v. United States, 11 F.2d 27, 28 (4th Cir. 1926). On demonstrative evidence see 3 WIGMORE, EVIDENCE §§790-798(a), 4 WIGMORE §§1150-1169, 6 WIGMORE §1913; 7 WIGMORE §2129, 8 WIGMORE §2265 (3d ed. 1940); McCormick, Evidence, pp. 384-394; Morgan, Basic Problems of Evidence, pp. 165-168 (1954); 2 Wharton, Criminal Evidence, pp. 557-684 (12th ed. 1955); 2 Jones, Evidence, pp. 840-881 (5th ed. 1958); 1 Underhill, Criminal Evidence, pp. 196-233, 261-271 (5th ed. 1956); Michael and Adler, *Real Proof*, 5 VAND.L.REV. 344 (1952); Garment, *Real Evidence: Use and Abuse*, 14 BROOK.L.REV. 261 (1948); Ladd, *Demonstrative Evidence and Expert Opinion*, 1956 WASH.U.L.Q. 1; Hickam, *Visual Evidence*, 23 Ind. L.J. 395 (1948).

some relation to the case, thus making it relevant.[8] Even when the condition has substantially changed, the object may be relevant and admissible provided the change is not such as to make the evidence overly misleading. Thus sample bottles of drugs have been held admissible.[9] But where a sample of the object is admitted it must be fairly representative of the entire quantity.[10]

Wigmore has pointed out that a chattel must be identified or authenticated by testimonial proof in order to be admissible.[11] On a prosecution for drunken driving, an expert's testimony based on a urine sample was rejected even though a witness testified to taking the specimen, labeling it with the name of the defendant, and had the bottle with him in court.[12] The fact that the first witness was not asked to identify the bottle was held to leave missing a necessary link in the chain of evidence. Apparently such testimony was thought necessary to constitute adequate proof of delivery to the expert. It is possible that this case also holds that the specimen must in all cases be identified by the person making it.

Proof of identity does not occur merely because there is proof of custody. In one case a physician who worked in the admitting office of a hospital testified that he had taken a vaginal and urethral smear from a child who was the victim of an alleged rape. He had placed them on separate slides for delivery to the hospital laboratory technicians for microscopic analyses and, although two slides were produced in court, the physician could not specifically identify them. He stated, however, that they were of the kind used in the hospital and were labelled as the hospital usually labelled them. The name of the child and the date, "8/11/51," were scratched on both sides. A bacteriologist from the hospital laboratory testified that two slides bearing the name of the child and the date, "8/11," were received by the laboratory

8. McCormick, Evidence §179 (1954).

9. United States v. S. B. Penick & Co., 136 F.2d 413, 415 (2d Cir. 1943). The court cited 2 WIGMORE, EVIDENCE §437(1) (3d ed. 1940). See also Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960).

10. Gormley v. United States, 167 F.2d 454, 458 (4th Cir. 1948).

11. 7 WIGMORE, EVIDENCE §2129 (3d ed. 1940). See Hanger v. United States, 173 Fed. 54, 60 (4th Cir. 1909) (counterfeit coins); Parlton v. United States, 75 F.2d 772, 775 (D.C.Cir. 1935). (Arson: stained mat in possession of defendant.)

12. Novak v. District of Columbia, 160 F.2d 588 (D.C.Cir. 1947). See 21 A.L.R.2d 1216, 1225, 1233, 1236 (1952).

from the admitting office in accordance with established practice. He then testified as to the results of the microscopic examination of those two slides. The slides produced by the government were admitted in evidence. Even though the witnesses lacked knowledge of any of the intervening steps from preparation of the slides to their production in court, the court admitted them on the grounds they were hospital records made in the regular course of business.[13] While this may have been sufficient to show custody, it does not, however, meet the objection that the slides produced by the government may not have been those examined by the bacteriologist.[14]

In a prosecution for making and/or using false writings in a matter within the jurisdiction of a department of the United States and for conspiracy, the court was affirmed in admitting a sample of certain weapons which were the subject of false invoices made out by the defendants. They were not offered as having constituted instrumentalities of the offense, but to enable the jury to understand terms used in the documents in question, and to demonstratively show, in connection with testimony of certain witnesses, that no work had been performed on such weapons as had been charged in the documents.[15]

In a prosecution for conspiracy to counterfeit, anything said or done as to a block of iron not offered in evidence, but placed where it could be seen by the jury and examined by one of them, is not reviewable where no objection was made and the court was not called upon to make any ruling.[16]

Where exhibits are not included in the record on appeal, the court of appeal will not assume that the trial court erroneously excluded them.[17] Also, where an exhibit is not in the record, defendant on appeal cannot complain of its admission.[18]

13. Wheeler v. United States, 211 F.2d 19, 21-23 (D.C.Cir. 1953), *cert. denied* 347 U.S. 1019, 98 L.Ed. 1140 (1954).
14. See Morgan, Maguire and Weinstein, Cases and Materials on Evidence, pp. 86 and 623 (4th ed. 1957).
15. Ebeling v. United States, 248 F.2d 429, 436 (8th Cir. 1957). The court cited 3 WIGMORE, EVIDENCE, §790 (3d ed. 1940).
16. York v. United States, 241 Fed. 656, 658 (9th Cir. 1916).
17. McCutchan v. United States, 70 F.2d 658, 668 (8th Cir. 1934), *cert. denied* 293 U.S. 568, 79 L.Ed. 666 (1934).
18. Sheridan v. United States, 112 F.2d 503, 505 (9th Cir. 1940).

MAPS AND CHARTS

A map need not be an official one where it is offered only in connection with the testimony of the witness, and not as independent evidence.[19]

In a manslaughter prosecution it was not error to admit a map prepared by a witness from a personal survey for the purpose of illustrating testimony as to the place of a shooting.[20] In a civil case it was indicated that such admission is discretionary with the trial judge.[21] It was held in a conspiracy prosecution that admitting a chart prepared by the government to illustrate the way the conspirators had to act to withdraw whisky under prescriptions accompanied with explanatory testimony of the Assistant United States Attorney, was not an abuse of discretion.[22] It was not used as independent evidence, and no one was misled. Also, superiors of a witness have been allowed to testify that his drawings of atomic bomb parts were reasonably accurate.[23]

PHOTOGRAPHS

In a prosecution for importation of women for prostitution, photographs of the women in the presence of the defendant were held admissible as being competent to show the connection of the defendant with the women.[24] Photographs belonging to a defendant found in the pocketbook of a woman allegedly acting as the defendant's accomplice were held competent corroboration in a prosecution for shipping obscene matter in interstate commerce.[25] Photographs have

19. Turner v. United States, 66 Fed. 280, 282 (5th Cir. 1895).

20. Benway v. People of Michigan, 26 F.2d 168, 169 (6th Cir. 1928). The court cited WIGMORE, EVIDENCE §§790-792. See also United States v. Rosenberg, 195 F.2d 583, 598 (2d Cir. 1952), *cert. denied* 344 U.S. 838; West v. United States, 15 F.2d 916, 917 (8th Cir. 1926); Hewitt v. United States, 110 F.2d 1, 8 (8th Cir. 1940), *cert. denied* 310 U.S. 641; Harris v. United States, 261 F.2d 792, 798 (9th Cir. 1958), *cert. denied* 360 U.S. 933.

21. New York Life Ins. Co. v. Gamer, 106 F.2d 375, 378 (9th Cir. 1939), *cert. denied* 308 U.S. 621, 84 L.Ed. 518. See MCCORMICK, EVIDENCE §180 (1954); 9 A.L.R.2d 1044 (1950).

22. United States v. Park Ave. Pharmacy, 56 F.2d 753, 756 (2d Cir. 1932). See Elder v. United States, 213 F.2d 876, 879 (5th Cir. 1954).

23. United States v. Rosenberg, 195 F.2d 583, 598 (2d Cir. 1952), *cert. denied* 344 U.S. 838, 97 L.Ed. 687 (1952).

24. United States v. Pagliano, 55 Fed. 1001, 1004 (C.C.S.D.N.Y. 1893). On photographs see 3 WIGMORE, EVIDENCE §§792-796 (3d ed. 1940); MCCORMICK, EVIDENCE, pp. 387-389 (1954).

25. United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933). See also Robinson v. United States, 63 F.2d 147, 148 (D.C.Cir. 1933).

also been held admissible to prove the identity of a murder victim.[26]

In the trial of a defendant charged with breaking into a post office four years previously, photographs of the defendant and his alleged confederates, shown to be favorable likenesses of them at the time the crime was committed, were shown to government witnesses shortly thereafter. They were able to identify them as likenesses of men who were seen together at the place of the crime on the evening previous to its commission. The court held the photographs were properly used by the government to identify the defendant and his confederates as the persons seen.[27]

A photograph of the deceased leader of a group of mail robbers taken when he was dead has been held admissible.[28] A photograph of the scene where liquor had been seized has been used to identify the defendant.[29] Photographs may also be conclusive autoptical proof of obscenity.[30]

A photograph taken by the government of a defendant while in custody for the purpose of identifying him at the trial is also admissible. "It is one of the usual means employed in the police service of the country, and it would be a matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege.[31] In a case in which the defendant's measurements were taken and introduced in evidence the court stated: "We think that officers having a person in custody have a right to acquire information, even by force, and that, for example, when his photograph is taken, or his measurement taken, it is simply the

26. Wilson v. United States, 262 U.S. 613, 621, 40 L.Ed. 1090 (1896). See United States v. A Lot of Jewelry, etc., 59 Fed. 684, 688 (E.D.N.Y. 1894). This was a forfeiture proceeding.

27. Considine v. United States, 112 Fed. 342, 347 (6th Cir. 1901), *cert. denied* 184 U.S. 699, 46 L.Ed. 765 (1902). The court cited Cowley v. People, 83 N.Y. 464, 38 Am.Rep. 464, 471 (1881); and Commonwealth v. Connors, 156 Pa. 147, 27 Atl. 366 (1893). See also Litsinger v. United States, 44 F.2d 45, 47 (7th Cir. 1930).

28. Dixon v. United States, 7 F.2d 818, 821 (8th Cir. 1925).

29. Madden v. United States, 20 F.2d 289, 294 (9th Cir. 1927), *cert. denied* 275 U.S. 554, 72 L.Ed. 423 (1927). See also Tucker v. United States, 279 F.2d 62, 64 (5th Cir. 1960) citing MCCORMICK, EVIDENCE §181 (1954).

30. Womack v. United States, 294 F.2d 204, 205 (D.C.Cir. 1961). The court cited 4 WIGMORE, EVIDENCE §1150 (3d ed. 1940); WIGMORE, CODE OF EVIDENCE §§200, 207 (3d ed. 1942).

31. Shaffer v. United States, 24 App.D.C. 417, 426 (1904), *cert. denied* 196 U.S. 639. See MCCORMICK, EVIDENCE §126 (1954).

act of the officers, and is not compelling him to give evidence against himself."[32]

Photographs offered by the government as representative of the defendant's appearance when arrested were held not prejudicial on the questions of his flight and on efforts to conceal his identity because an F.B.I. serial number appeared on one picture where no objection was made and the trial judge on his own motion instructed that no meaning be attached to the number.[33] The government was allowed to show that the defendant had dyed his hair to avoid arrest.

The government was allowed to introduce an F.B.I. "Wanted Circular" containing the defendant's picture for the purpose of dispelling an inference raised by the defendant's cross-examination of the government witness that the witness had been shown a photograph of the defendant prior to identifying him in the police "line-up".[34] The admission of a photograph taken of the defendant at a "line-up" is not plain error affecting the substantive rights of the defendant.[35] If not raised at the trial, it will not be reviewed on appeal.

A photographic copy of handwriting may be used instead of the original, as far as the accuracy of the medium is concerned,[36] and photostats have been received to supply accurate facsimiles of public records which cannot conveniently be brought into court.[37]

In a case arising in Alaska a defendant was given the right on his application to photograph a piece of glass in the custody of the prosecuting officers upon which it was claimed there were fingerprints of the defendant. The district judge stated: "I am unable to see any ground for refusing the application, except that there is no express statutory provision for granting it, and no precedent has been cited."[38]

32. United States v. Cross, 20 D.C. (9 Mackey) 365, 382 (D.C. 1892), *writ of error dismissed*, 145 U.S. 571, 36 L.Ed. 821 (1892).
33. United States v. Amorosa, 167 F.2d 596, 599 (3d Cir. 1948).
34. Tucker v. United States, 214 F.2d 713, 715 (9th Cir. 1954).
35. Jones v. United States, 307 F.2d 190, 191 (D.C.Cir. 1962).
36. Hartzell v. United States, 72 F.2d 569, 583 (8th Cir. 1934). The court cited 3 WIGMORE, EVIDENCE §797.
37. Mullican v. United States, 252 F.2d 398, 70 A.L.R.2d 1217 (5th Cir. 1958). See Orfield, *Proof of Official Records in Federal Cases*, 22 MONT.L.REV. 137, 149 (1961).
38. United States v. Rich, 6 Alaska 670 (1922). The court quoted 6 WIGMORE, EVIDENCE §1862.

Examination of chattels before trial was frequently allowed in civil cases in the United States, Canada, and England.[39]

In a prosecution for second degree murder the government was allowed to introduce in evidence X-ray films showing a soft drink bottle lodged in the victim's body.[40]

MOVING PICTURES

A trial judge in his discretion may exclude motion pictures where such evidence is of slight or no value.[41] The defendant cannot complain of exclusion of motion pictures when he introduces other evidence establishing the point he wishes to make.[42] Moreover, motion pictures do not prove actual occurrence apart from the testimony of witnesses.

In a perjury prosecution the government asked to show a short silent film of the defendant testifying before a Senate subcommittee. The film was exhibited without opportunity by defense counsel to see it first. This was held irregular but not prejudicial unless failure to see the film in advance deprived the defendant of an opportunity to make valid objection.[43] The government has been permitted to show motion pictures even though the defendant stipulates the facts as the pictures are about to begin.[44]

SOUND RECORDINGS

In a prosecution for treason in that the defendant had allegedly made disc recordings for radio broadcast in Ger-

39. See also notes, 23 IND.L.J. 333 (1948), and 26 N.C.L.REV. 398 (1948).

40. Guthrie v. United States, 207 F.2d 19, 25 (D.C. Cir. 1953). See 3 WIGMORE, EVIDENCE §795 (3d ed. 1940); Scott, *X-ray Pictures as Evidence*, 44 MICH.L.REV. 773 (1946).

41. Pandolfo v. United States, 286 Fed. 8, 16 (7th Cir. 1922) *cert. denied* 261 U.S. 621, 67 L.Ed. 831 (1923). See also Baker v. United States, 115 F.2d 533, 538 (8th Cir. 1940), *cert. denied* 312 U.S. 692, 85 L.Ed. 1128 (1941).

42. DeCamp v. United States, 10 F.2d 984 (D.C. Cir. 1926). The court cited WIGMORE, EVIDENCE §798. See Kennedy, *Motion Pictures in Evidence*, 27 ILL.L.REV. 424 (1932); Gray, *Motion Pictures in Evidence*, 15 IND.L.J. 408 (1940); Busch, *Photographic Evidence*, 4 DE PAUL L.REV. 195 (1954); 3 WIGMORE, EVIDENCE §798(a) (3d ed. 1940); MCCORMICK, EVIDENCE, pp. 388-389 (1954).

43. United States v. Moran, 194 F.2d 623, 626 (2d Cir. 1952), *cert. denied* 343 U.S. 965, 96 L.Ed. 1362 (1952).

44. United States v. Palmiotti, 254 F.2d 491, 496 (2d Cir. 1958); Parr v. United States, 255 F.2d 86, 88 (5th Cir. 1958), *cert. denied* 358 U.S. 824, 3 L.Ed.2nd 64 (1958), citing 9 WIGMORE, EVIDENCE §2591 (3d ed. 1940).

many, it was held that the recordings could be introduced in evidence.[45] The court stated that there was no violation of the right against self-incrimination; the records were the embodiment of the act of treason.[46]

Recordings of conversations between a police officer and a defendant were held admissible where the officer testified to the operation of the recording device, the accuracy of the recordings, and the identities of the persons speaking.[47] A defendant may even present tape recordings of an interview with the victim.[48]

In a bribery prosecution it was held that the jurors could consider what they heard from the playing of the records of conversations between the defendant and the persons allegedly bribed even though certain portions were less audible than others; but transcribed notes made by the stenotype operator from hearing the records repeatedly played were excluded.[49]

May a defendant have discovery before trial of recordings of conversations between the defendant and a police officer? The Court of Appeals of the District of Columbia held that the defendants could properly request inspection of recordings of conversations between the defendants and police officers.[50] But the trial court did not err when in its discretion it denied the request, the defendants having already been given an opportunity to inspect the recordings. The government need not allow inspection of the original recordings where they are too fragile and where the reproduction

45. Burgman v. United States, 188 F.2d 637, 639 (D.C.Cir. 1951). See also Gillars v. United States, 182 F.2d 962, 973 (D.C.Cir. 1950).

46. See the critical comment in Morgan, Maguire and Weinstein, Cases on Evidence 117-118 (1957). See also Conrad, *Magnetic Recordings in the Courts*, 40 VA.L.REV. 23 (1956); 168 A.L.R. 927 (1947); 3 WIGMORE, EVIDENCE §809 (3d ed. 1940).

47. Cope v. United States, 283 F.2d 430, 435 (9th Cir. 1960); Brandow v. United States, 268 F.2d 559, 567 (9th Cir. 1959); Monroe v. United States, 234 F.2d 49, 54 (D.C.Cir. 1956), *cert. denied* 352 U.S. 873, 1 L.Ed.2nd 76 (1956).

48. United States v. McKeever, 169 F.Supp. 426, 429 (S.D.N.Y. 1958).

49. United States v. Schanerman, 150 F.2d 941, 944 (3d Cir. 1945). See note, 34 N.C.L.REV. 233, 236 (1956). See United States v. Correa, File No. 134-347 (not reported) (S.D.N.Y. 1953) summarized in Morgan, Maguire and Weinstein, Cases on Evidence 117, n.28 (4th ed. 1957).

50. Monroe v. United States, 234 F.2d 49, 55 (D.C.Cir. 1956). See Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 57 W.VA.L.REV. 221, 246 (1957); Orfield, *Subpoena in Federal Criminal Cases*, 13 ALA.L.REV. 1, 70-71 (1960).

was shown to be accurate. Rule 16 of the Federal Rules of Criminal Procedure did not allow discovery as the recording is analogous to a confession. But Rule 17 (c) is broader and allows a subpoena as the recordings are evidentiary.

The use of sound recordings may sometimes raise questions of admissibility under the Federal Communications Act[51] regarding the constitutional guaranty against unreasonable searches and seizures[52] and as to due process.[53]

FINGERPRINTS

Fingerprints of one charged with the unlawful sale of liquor may lawfully be taken by federal officers at the time of arrest even though there is no federal or state statute authorization.[54] This rule applies to misdemeanor cases as well as to felonies. After acquittal, under instructions of the Attorney General, such records are to be destroyed or surrendered to the defendant. Fingerprints taken after a lawful arrest may be compared at the trial with fingerprints found on the newspapers used to wrap narcotics.[55] Where fingerprints are voluntarily taken from a person not yet arrested, a motion to suppress will not be granted.[56] But fingerprints taken of the defendant after an illegal arrest are not admissible in evidence, being a product of an illegal arrest in violation of the Fourth Amendment.[57]

The photograph of fingerprints on a bottle and an enlargement of such a photograph are admissible when it appears that the part of the bottle containing the fingerprints has disappeared and cannot be produced.[58]

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51. Goldman v. United States, 316 U.S. 129, 133, 86 L.Ed. 1322 (1942). See MCCORMICK, EVIDENCE, pp. 299-301 (1954); 168 A.L.R. 927, 928 (1947).
52. Gillars v. United States, 182 F.2d 962, 973-974 (D.C.Cir. 1950).
53. Irvine v. California, 347 U.S. 128, 139, 143, 74 S.Ct. 381 (1954).
54. United States v. Kelly, 55 F.2d 67, 68, 83 A.L.R. 122 (2d Cir. 1932). See also United States v. Keegan, 141 F.2d 248, 255 (2d Cir. 1944). On fingerprinting see 1 WIGMORE, EVIDENCE §151(a) (3d ed. 1940); 2 WIGMORE §§414 and 414(a); 8 WIGMORE, EVIDENCE §2265 (McNaughton Rev. 1961); Underhill, Criminal Evidence, pp. 261-271 (5th ed. 1956); Orfield, *Proceedings Before the Commissioners in Federal Criminal Procedure*, 19 U.PITT.L.REV. 489, 510 (1958); Inbau, *Scientific Evidence in Criminal Cases*, 25 J.CRIM.L. 500, 514 (1934).
55. United States v. Iacullo, 226 F.2d 788, 792 (7th Cir. 1955).
56. United States v. McCarthy, 297 F.2d 183 (7th Cir. 1961).
57. Bynum v. United States, 262 F.2d 465, 466 (D.C.Cir. 1958).
58. Duree v. United States, 297 Fed. 70, 71 (8th Cir. 1924).

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FOOTPRINTS

The government may introduce in evidence footprints and the shoes of the defendant.[59]

VARIOUS INSTANCES OF PRODUCTION AND INSPECTION IN COURT

In a prosecution for failure to support an illegitimate child evidence of the likeness of the child to its supposed father has been held inadmissible.[60] Accordingly, a court has stated in a bastardy proceeding: "Where the issue in a case is the paternity of the child, the child, unless it is old enough to possess settled features and other corporal characteristics, should not be exhibited to the jury as evidence of resemblance to the putative father."[61]

Testimony as to a post-mortem examination of the body of the victim of a homicide is admissible, though no notice is given to the defendant of the government's intention to make the investigation.[62]

In a murder prosecution a watch chain taken from the person of a man allegedly killed by the defendant while the defendant was perpetrating a robbery was received as evidence.[63]

In a prosecution for defrauding by falsely pretending to be an officer of the United States, a badge used in impersonating an officer was found admissible.[64] Here the defendant had thrown away the badge when arrested.

Evidence found in an account book taken from the pocket of one of the defendants was held admissible in a prosecution for conspiracy.[65]

In a prosecution for burglary of a post office, tools and gloves which might have been used to effect the entry, found

59. Downey v. United States, 263 F.2d 552 (10th Cir. 1959). The court cited 1 WIGMORE, EVIDENCE §149 (3d ed. 1940). On footprints see 1 WIGMORE, EVIDENCE §151(a) (3d ed. 1940); 2 WIGMORE, EVIDENCE §415, 660; 8 WIGMORE, EVIDENCE §2285 (McNaughton Rev. 1961).

60. United States v. Collins, 25 Fed.Cas. 541, case no. 14,835 (C.C.D.C. 1809). Compare 4 WIGMORE, EVIDENCE §1154 (3d ed. 1940). See also 1 WIGMORE §166. See notes, 40 A.L.R. 111 (1926), 95 A.L.R. 314 (1935) and 11 Corn.L.Q. 380 (1926).

61. Fillipone v. United States, 2 F.2d 928, 931 (D.C.Cir. 1924).

62. Laney v. United States, 294 Fed. 412, 415 (D.C.Cir. 1923).

63. Goldsby v. United States, 160 U.S. 70, 73, 40 L.Ed. 343 (1895).

64. Kelly v. United States, 46 F.2d 286, 288 (3d Cir. 1931).

65. Chalocoff v. United States, 10 F.2d 505 (6th Cir. 1926).

a few days later near the trailer in which the defendant lived, were held admissible.[66] For bank robbery prosecution the implements used were allowed to be displayed in the presence of the jury for purposes of illustration.[67]

A defendant in a prosecution for obstructing justice, who allegedly had assaulted a prospective witness fifteen months previously, was not entitled to a physical examination of the witness.[68] In such a case the nature and extent of the injuries is not material.

It is arguable that discovery before trial with respect to demonstrative evidence is allowable under Rule 26 of the Federal Rules of Criminal Procedure, as well as under Rules 16 and 17 (c).[69] A court of appeals has stated: "Rule 17 (c) providing for a subpoena duces tecum does not of itself answer any of these inquiries, for it does not in so many words exclude other procedure. Rule 26 admonishes us to proceed in accord with the principles of the common law, in the light of reason and experience."[70]

DEMEANOR

With respect to the appearance of the defendant when arrested, witnesses were allowed to testify that there were blood spots on his person. "Out of court as well as in court, his body may be examined with or without his consent."[71]

The demeanor of a defendant who takes the witness stand would seem to constitute real or demonstrative evidence.[72] A court has stated: "Appellant was not obliged to take the

66. White v. United States, 200 F.2d 509, 513 (5th Cir. 1952), *cert. denied* 345 U.S. 997, 97 L.Ed. 1405 (1953).

67. Sanders v. United States, 238 F.2d 145 (10th Cir. 1956).

68. United States v. Verra, 203 F.Supp. 87, 91 (S.D.N.Y. 1962). See Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W.VA.L.REV. 221, 249-250 (1957); note 60 YALE L.J. 626, 644-645 (1951).

69. Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 57 W.VA.L.REV. 312, 336 (1957); Orfield, *Subpoena in Federal Criminal Procedure*, 13 ALA.L.REV. 1, 90-91 (1960). See 6 WIGMORE, EVIDENCE §§1859(g), 1863 (3d ed. 1940); MCCORMICK, EVIDENCE, p.210 (1954).

70. United States v. Gordon, 196 F.2d 886, 888 (7th Cir. 1952). The Supreme Court reversed on other grounds. Gordon v. United States, 344 U.S. 414, 417, 97 L.Ed. 447 (1953).

71. McFarland v. United States, 150 F.2d 593, 594 (D.C.Cir. 1945), *rehearing denied* 326 U.S. 788, 90 L.Ed. 478 (1946). The court cited WIGMORE, EVIDENCE §§2263, 2265 (3d ed. 1940). That the statement is too broad, see annotation 95 L.Ed. 195 (1952). See 2 WIGMORE, EVIDENCE §273 (3d ed. 1940).

72. See 2 WIGMORE, EVIDENCE §274 (3d ed. 1940).

stand, but when he did so, he submitted himself to the same rules for weighing his testimony and determining its truthfulness as would apply to other witnesses. The jury was entitled to consider his manner of testifying."[73] While a decision of the Supreme Court possibly did not consider the defendant's demeanor as evidence,[74] it seems more accurate to say that the demeanor is evidence and there may be comment on it, provided the comment be fair.[75]

On an inquiry into the sanity of a defendant the trial judge stated: "Apart from the expert testimony, it is proper for the court in deciding the issue involved in a hearing of this kind to consider the conduct of the defendant in court."[76]

The demeanor of the ordinary witness is governed by the same principle. A court stated in a civil case: "A witness's demeanor on the stand is an element of importance in the solution of the always difficult problem of determining the truthfulness of his testimony. The demeanor of a witness is always assumed to be in evidence."[77]

COMPULSORY ACTIVITY BY THE DEFENDANT IN THE COURTROOM

One court has stated: "The requirement that an accused present himself for trial is one of the earliest established in the criminal law. The modern rule is that he must also identify himself if so required."[78] The defendant must occupy a place in the courtroom in such a way that he is in the presence and view of the judge and jury. He may be compelled "to come to the bar of the court for trial."[79]

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73. Seerman v. United States, 96 F.2d 732, 734 (5th Cir. 1938).
74. Quercia v. United States, 289 U.S. 466, 471, 77 L.Ed. 1321 (1933).
75. Note, 1 U.CHI.L.REV. 335, 336 (1934).
76. United States v. Chandler, 72 F.Supp. 230, 238 (D. Mass. 1947). See 4 WIGMORE, EVIDENCE §1160 (3d ed. 1940).
77. The William J. Riddle, 102 F.Supp. 884, 887 (S.D.N.Y. 1952). The court cited 3 WIGMORE, EVIDENCE §946 (3d ed. 1940). See also Broadcast Music, Inc. v. Havana-Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949) citing 3 WIGMORE, EVIDENCE §949 (3d ed. 1940); Michael and Adler, *Real Proof*, 5 VAND.L.REV. 344, 351, 366 (1952).
78. Kivette v. United States, 230 F.2d 749, 755 (5th Cir. 1956), *cert. denied* 355 U.S. 935, 2 L.Ed. 418 (1958). See also Roberson v. United States, 282 F.2d 648, 651 (6th Cir. 1960); Swingle v. United States, 151 F.2d 512 (10th Cir. 1945); United States v. Sorrentino, 78 F.Supp. 425, 432 (M.D.Pa. 1948); Annotation, 96 L.Ed. 198 (1952); 8 WIGMORE, EVIDENCE §2265 (McNaughton Rev. 1961); MCCORMICK, EVIDENCE, pp. 263-267 (1954).
79. Swingle v. United States, 151 F.2d 512, 513 (10th Cir. 1945).

Requiring the defendant to stand up and walk before the jury, and stationing the jury during a recess so as to observe his size and walk, if error, does not go to the jurisdiction of the court; hence, habeas corpus does not lie.[80]

Forcible dyeing of the defendant's hair before trial by a police officer does not invalidate the trial so that habeas corpus lies although there were issues of identification.[81] Here the prisoner could have protected himself by cross-examination of witnesses and, if there was any error, take an appeal. There was no self-incrimination.

There seem to be no federal cases requiring the defendant to demonstrate his voice for the purpose of identification. The few state cases in point do not seem to allow it.[82]

A defendant taking the stand may, on cross-examination, be compelled to write when he denies that certain handwriting in question is his.[83]

Where other evidence indicated no disability, an appellate court upheld a refusal of the trial judge to permit the defendant to exhibit his leg to the jury to show that he was disabled at the time of a liquor offense.[84] However, where the defendant takes the stand and is cross-examined, he may be compelled to bare his arm.[85]

UNFAIR PREJUDICE TO THE DEFENDANT

In a murder prosecution the clothes of the deceased should not be admitted where they do not tend to solve any controverted issue. But they may be introduced and exhibited to establish the position of the parties, the number of shots fired, the location from which the shots came, or any other material matter.[86] In a prosecution for murder in resisting arrest the blood-soaked shirt of the deceased was held ad-

80. Matter of Moran, 203 U.S. 96, 105, 51 L.Ed. 105 (1906).
81. Smith v. United States, 187 F.2d 192, 198 (D.C.Cir. 1950), *cert. denied* 341 U.S. 927, 95 L.Ed. 1358 (1951).
82. See 16 A.L.R.2d 1322 (1951). See also note, 1 VAND.L.REV. 243, 250 (1948) and 8 WIGMORE, EVIDENCE §2265 (McNaughton Rev. 1961).
83. United States v. Mullaney, 32 Fed. 370 (C.C.E.D.Mo. 1887). See 8 WIGMORE, EVIDENCE §2255 (McNaughton Rev. 1961).
84. Krashowitz v. United States, 282 Fed. 599, 601 (4th Cir. 1922).
85. Neely v. United States, 2 F.2d 849 (4th Cir. 1924); United States v. Mullaney, 32 Fed. 370, 371 (C.C.E.D.Nev. 1887). See 8 WIGMORE, EVIDENCE §2265 (McNaughton Rev. 1961).
86. Suhay v. United States, 95 F.2d 890, 894 (10th Cir. 1938), *cert. denied* 304 U.S. 580, 82 L.Ed. 1543 (1938).

missible.[87] The defendant pleaded guilty and the evidence was allowed with respect to fixing punishment. In a prosecution for murder during rape, although the victim's blood-stained clothes could be properly shown to the jury, it was held improper to keep them conspicuously displayed for several hours.[88] But where the evidence is overwhelming it is not reversible error.

In a Mann Act prosecution lurid photographs taken at the time of the offense of the defendant and a woman not named in the indictment were found relevant to prove intent and were not objectionable as a matter of law as tending to cause prejudice.[89] It was held in a prosecution for assault with a dangerous weapon that the government could properly introduce in evidence photographs of the victim's head shortly after the skull fracture.[90] The prejudice did not outweigh the probative value. In a homicide prosecution the trial court may permit the government, over objection of the defendant, to introduce exhibits consisting of parts, or photographs of parts, of dismembered portions of the victim's body, even though the government's case showed death by asphyxiation and the defendant's counsel admitted dismemberment.[91]

SAMPLING BY THE JURY

Permitting the jury to smell or taste liquor in evidence has been held an improper practice.[92] It is not helpful and is not in keeping with orderly administration of justice. In a libel action by the United States involving canned goods the court pointed out that matters not cognizable by the senses, such as decomposition of goods, may not be sampled by the jury.[93]

87. United States v. Dalhover, 96 F.2d 355, 359 (7th Cir. 1938).
88. McFarland v. United States, 150 F.2d 593 (D.C.Cir. 1945).
89. Jarabo v. United States, 158 F.2d 509, 513 (1st Cir. 1946).
90. Eagleston v. United States, 172 F.2d 194, 200 (9th Cir. 1949), *cert. denied* 336 U.S. 952, 93 L.Ed. 1107 (1949).
91. Rivers v. United States, 270 F.2d 435, 437 (9th Cir. 1959), *cert. denied* 362 U.S. 920, 4 L.Ed.2d 740 (1959). The court cited 159 A.L.R. 1413 (1945). See also 18 CAN.B.REV. 813 (1940); 14 LA.L.REV. 421 (1954).
92. Gallaghan v. United States, 299 Fed. 172, 178 (8th Cir. 1924); Jianole v. United States, 299 Fed. 496, 499 (8th Cir. 1924). See 4 WIGMORE, EVIDENCE §1159 (3d ed. 1940).
93. Bruce's Juices v. United States, 194 F.2d 935, 937 (5th Cir. 1952).

EXPERIMENTS IN COURT

In a murder prosecution it was held to be within the discretion of the trial judge to refuse a request by the defendant that the gun be fired in the presence of a deputy marshal in order to test how it threw shot.[94]

A defendant was not permitted to give a test or exhibition in open court of his power to communicate with the spirits of deceased persons in a trial for using the mails to defraud by advocating such powers.[95] Such a test is not practical and would not enlighten the jury.

In a prosecution for counterfeiting, permitting a plating machine taken from the defendants to be operated in the presence of the jury by an expert to illustrate that it could be employed for plating coins such as the defendants were charged with having made was not error.[96]

Where it was sought to impeach a witness in a liquor prosecution involving wiretapping, it was discretionary to refuse a test in open court or elsewhere of his ability to identify voices over the telephone.[97] It was held that the conditions would not be identical, and the test would not enlighten the jury.

During the trial in a murder prosecution a ballistics expert was properly permitted to make an examination of a gun offered in evidence.[98] A ballistics test of the murder weapon is not a part of the trial requiring the presence of the defendant.

In an Internal Revenue Code prosecution in which an investigator testified that he saw the defendant pour kerosene from a jug into a barrel, and that he skimmed off some kerosene and determined that moonshine was underneath, the court properly permitted the government to introduce into evidence a bottle of kerosene and a bottle of moonshine and

94. Ball v. United States, 163 U.S. 662, 673, 41 L.Ed. 300 (1896). See 2 WIGMORE, EVIDENCE §457 (3d ed. 1940). On experiments in court see 4 WIGMORE, EVIDENCE §1154(a) (3d ed. 1940); MCCORMICK, EVIDENCE, pp. 390-391 (1954).

95. United States v. Ried, 42 Fed. 134, 135 (W.D. Mich. 1890).

96. Taylor v. United States, 89 Fed. 954, 957 (9th Cir. 1898). See 2 WIGMORE, EVIDENCE §451 (3d ed. 1940).

97. Green v. United States, 19 F.2d 850 (9th Cir. 1927), *affirmed* without discussion of this point, 277 U.S. 438, 72 L.Ed. 944 (1928).

98. Goodall v. United States, 180 F.2d 397, 402 (D.C.Cir. 1950), *cert. denied* 339 U.S. 987, 94 L.Ed. 1389 (1950).

subsequently perform an experiment for the jury showing that when they are mixed the kerosene will float to the top.[99] The defendant, however, was not allowed to experiment with ammonia as the properties are quite different.

There seems to be no case permitting the defendant to inspect the results of government conducted tests and experiments,[100] although a number of state court decisions permit such inspection.[101] In December, 1952, however, the Advisory Committee on Criminal Rules of the Judicial Conference proposed to give the defendant an opportunity for discovery prior to the trial of objects "which are within the possession, custody or control of the government, including . . . the results of or reports of physical examinations and scientific tests, experiments and comparisons." Rule 16 on Discovery and Inspection would be amended to that effect.[102]

VIEWS

The defendant has no absolute right to an order of the trial judge permitting the jury to view the premises of the offense.[103] The trial judge in his discretion may permit the jury to view the scene of the crime to enable them to understand the evidence.[104] Since it does not constitute the taking of testimony, the judge need not accompany the jury. "It is the presentation of evidence that requires the presence of a

99. Atkins v. United States, 240 F.2d 849, 851 (6th Cir. 1957), *cert. denied* 353 U.S. 974, 1 L.Ed.2d 1136. The court cited 4 WIGMORE, EVIDENCE §§1159, 1160; Goodall v. United States, 180 F.2d 397, 402, 17 A.L.R.2d 1070 (D.C.Cir. 1950).

100. Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 57 W. VA.L.REV. 221, 250 (1957).

101. Note, 41 J.CRIM.L. 64 (1950).

102. See Preliminary Draft, pp. 8-10 (1962).

103. Casias v. United States, 302 F.2d 513 (10th Cir. 1962); United States v. Pinna, 229 F.2d 216, 219 (7th Cir. 1956); United States v. Pagano, 207 F.2d 884, 885 (2d Cir. 1953); Hodge v. United States, 126 F.2d 849, 850 (D.C.Cir. 1942) citing 4 WIGMORE, EVIDENCE §1164 (3d ed. 1940); Neufield v. United States, 118 F.2d 375, 388 (D.C.Cir. 1941). On views see 4 WIGMORE, EVIDENCE §§1162-1169 (3d ed. 1940); MCCORMICK, EVIDENCE, pp. 391-393 (1954); 124 A.L.R. 841 (1940).

104. Price v. United States, 14 D.C.App. 391, 401 (1899); Schonfeld v. United States, 277 Fed. 934, 938 (2d Cir. 1921), *cert. denied* 258 U.S. 623, 66 L.Ed. 796 (1921); Massenberg v. United States, 19 F.2d 62, 64 (4th Cir. 1927); Snyder v. Massachusetts, 291 U.S. 97, 114, 78 L.Ed. 674, 90 A.L.R. 575 (1934); Hodge v. United States, 126 F.2d 849 (D.C.Cir. 1942); LePrell v. United States, 192 F.2d 132 (5th Cir. 1951); United States v. Pinna, 229 F.2d 216, 219 (7th Cir. 1956) (defendant's request denied); Harris v. United States, 261 F.2d 792, 798 (9th Cir. 1958).

judge, jury, and defendant."[105] In a state court case the Supreme Court held that in a murder prosecution the refusal of the trial court to grant the defendant's request to be present at the view, when his counsel was present and there was no showing of injustice, was not a denial of due process under the Fourteenth Amendment.[106] However, four Justices dissented in this decision. In the state courts the usual view is that parties and their counsel may be present.[107] A majority of the Supreme Court held that a view is not a part of the trial, and that there was no violation of the right of confrontation. The Supreme Court said in a federal case: "A leading principle that pervades the entire law of criminal procedure is that, after indictment found nothing shall be done in the absence of the prisoner."[108] It is unrealistic to say that the purpose of a view is not to receive evidence, and that it is not part of the trial.[109] The instant case uniquely held that while a view is evidence, it is not part of the trial. The dissenting Justices rightly contended that the error is so fundamental that the defendant should not have to show prejudice. However, the defendant may waive the error by requesting or acquiescing in the view, or failing to object at the time.[110] In another federal case the Supreme Court held that the defendant had waived the right to accompany the judge to the view.[111] The view was taken with the consent of defendant's counsel and in his presence; no testimony was taken, and no improper remarks were addressed to the judge. In another case it was held that while a defendant has a right to be present, there may be a waiver by counsel in de-

105. Schonfeld v. United States, 277 Fed. 934, 938 (2d Cir. 1921), *cert. denied* 258 U.S. 623, 66 L.Ed. 796 (1921). *But see* Price v. United States, 14 D.C.App. 391, 404-405 (1899).

106. Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674, 90 A.L.R. 575 (1934), *criticized* 14 BOSTON U.L.REV. 402, 34 COL.L.REV. 767, 2 DUKE BAR ASS'N J. 69, 12 N.C.L.REV. 267. It is approved in 19 CORN.L.Q. 477, 22 GEO.L.J. 606, 2 GEO.WASH.L.REV. 517, 24 J.CRIM.L. 1103, 11 N.Y.U.L.Q. REV. 643.

107. MCCORMICK, EVIDENCE §183 (1954). In Price v. United States, 14 D.C.App. 391, 404 (1899) it is intimated that the defendant has a right to be present.

108. Lewis v. United States, 146 U.S. 370, 372, 36 L.Ed. 1011 (1892).

109. 12 HARV.L.REV. 211 (1898); 4 WIGMORE, EVIDENCE §1168, MCCORMICK, EVIDENCE §183 (1954); Morgan, Basic Problems of Evidence, pp. 167-168 (1954). See the dissent in Valdez v. United States, 244 U.S. 432, 446, 453, 61 L.Ed. 1242 (1917). But in Price v. United States, 14 D.C.App. 391, 401, 405 (1899), the court intimated that a view is neither a part of the trial nor of the taking of evidence.

110. Price v. United States, 14 D.C.App. 391, 401 (1899).

111. Valdez v. United States, 244 U.S. 432, 442, 61 L.Ed. 1242 (1917). Two Justices dissented.

fendant's presence, or by failure of the defendant to go along with the jury.[112]

There is no reversible error when the trial judge denies a motion for new trial because two jurors in a narcotics prosecution visited the defendant's place of business where the opium was found; no prejudice was found.[113] There was a similar holding where four jurors had an unauthorized view of the premises in a liquor nuisance prosecution.[114] During a bootlegging prosecution a juror, contrary to express instructions of the court, was known by the defendant to have visited the rectifying house of the defendant. The juror said nothing of this until after the trial. In denying his motion for new trial,[115] the court stressed the wrongful participation of the defendant. The juror was subsequently punished for contempt of court.

Where the trial court grants a view on applications of both the defendant and the government, witnesses in the case should not be present at the view. But there is no reversible error if a government witness is present at the view and engages in harmless conversation with a juror.[116]

Where trial is by the judge without a jury the judge may have a view.[117] For example, in a contempt proceeding against a sheriff for allowing prisoners to escape, the judge inspected the jail. The judge concluded "on my own examination, and from the evidence . . . it would have been impossible" to escape.[118]

EXHIBITS IN THE JURY ROOM

In a federal civil case the court stated: "For every jury trial the taking of papers, memoranda, or exhibits by the jury to their room is a matter primarily within the sound discretion of the court."[119] Thus it is improper for the clerk

112. Kanner v. United States, 34 F.2d 863, 868 (7th Cir. 1929).
113. Ng Sing v. United States, 8 F.2d 919, 922 (9th Cir. 1925).
114. Roberts v. United States, 60 F.2d 871, 872 (4th Cir. 1932).
115. United States v. Salentine, 27 Fed.Cas. 927, case no. 16,213 (E.D.Wis. 1879).
116. Johnson v. United States, 207 F.2d 314, 322 (5th Cir. 1953), *cert. denied* 347 U.S. 938, 98 L.Ed. 1087 (1954).
117. 4 WIGMORE, EVIDENCE §1169 (3d ed. 1940). See annot. 97 A.L.R. 335 (1935); 124 A.L.R. 841, 851 (1940).
118. United States v. Fanning, 6 F.Supp. 412, 415 (S.D.W.Va. 1934).
119. Murray v. United States, 130 F.2d 442, 444 (D.C.Cir. 1942). See also Buckner v. United States, 154 F.2d 317 (D.C.Cir. 1946). In United

of court to supply a copy of the stenographic transcript of the trial to the jury without leave of court or agreement of counsel. It seems clear in some cases that the exhibits may be prejudicial.[120] But whether the trial court should provide the jury with a full set of the minutes of the prosecution is in the discretion of the trial judge.[121]

Where fingerprint cards containing the defendant's criminal history on the reverse side were sent to the jury room, and neither the defendant nor the government discovered this until after conviction, the Court of Appeals reversed and ordered a new trial, holding that the history may have influenced the jury in recommending a death penalty.[122]

On a prosecution for offering a bribe, a copy of a memorandum addressed by the National Headquarters of the Selective Service System was admitted in evidence. The court stated: "Since this memorandum was offered and admitted as an exhibit in the case it was not error for the Court below to have sent it out to the jury for them to examine during their deliberations. It would have been error to have done otherwise."[123]

It was held in an income tax prosecution that the sending to the jury room of government exhibits which were computations based on a government witness' evidence was prejudicial error[124] since the exhibits were sent to the jury while it was deliberating. In a narcotics prosecution where inadmissible exhibits prepared by government agents were sent to the jury room, there was a reversal.[125]

States v. Foster, 9 F.R.D. 367, 394 (S.D.N.Y. 1949) the exhibits were made "available for the jury if the jury wish to have them." See 6 WIGMORE, EVIDENCE §1913 (3d ed. 1940); MCCORMICK, EVIDENCE, pp. 393-394 (1954); note, 31 TULANE L.REV. 690 (1957).

120. Karn v. United States, 158 F.2d 568, 572 (9th Cir. 1946).

121. United States v. Carminati, 247 F.2d 640, 646 (2d Cir. 1957), *cert. denied* 355 U.S. 883, 2 L.Ed.2d 113 (1957); United States v. Rosenberg, 195 F.2d 583, 598 (2d Cir. 1952).

122. United States v. Dressler, 112 F.2d 972, 978 (7th Cir. 1940). One judge dissented.

123. Kemler v. United States, 133 F.2d 235, 240 (1st Cir. 1943). Whether the trial judge acting on his own motion should send exhibits to the jury room is a matter of discretion. Robinson v. United States, 210 F.2d 29, 32 (D.C.Cir. 1954).

124. Steele v. United States, 222 F.2d 628, 630 (5th Cir. 1955). Compare Elder v. United States, 213 F.2d 876, 880 (5th Cir. 1954).

125. United States v. Ware, 247 F.2d 698, 700 (7th Cir. 1957). See also Sanchez v. United States, 293 F.2d 260, 267 (8th Cir. 1961).

A trial judge may properly require that documents be read to the jury instead of turning them over to the jury.[126] Obscene books need not be read in open court even though the defendant so moves, but they may be taken by the jury to the jury room.[127]

Where the indictment was inadvertently sent with other papers to the jury room while the jury was deliberating, but no injury was shown to have resulted, a motion in arrest of judgment was properly refused.[128] Where the jury took to the jury room two indictments on which the defendant had been convicted in a former trial containing notations of previous convictions, a new trial was granted.[129] The defendant was not required to show that the notations were actually read by any of the jurors. But if there is knowledge, the objection should be raised at the trial.[130] There was no reversible error where an indictment contained 120 pages and 24 counts, the jury being instructed that the indictment was not evidence of the truth of the charges.[131] Even in a treason case permitting the indictment to go to the jury room was not reversible error.[132] There is no reversible error when a jury is clearly instructed that the indictment is not evidence and they were allowed to have it merely to read the charge.[133] Where surplusage has been striken out on motion of the defendant, the altered indictment may be taken into the jury room.[134] It is reversible error to permit an information with the affidavit attached to go to the jury room, as the jury may have been influenced by the affidavit stating that the

126. Simon v. United States, 123 F.2d 80, 83 (4th Cir. 1941) *cert. denied* 314 U.S. 694, 86 L.Ed. 555 (1941).

127. Alexander v. United States, 271 F.2d 140, 144 (8th Cir. 1955).

128. United States v. Angel, 11 Fed. 34, 46 (C.C.D.N.H. 1881). See Orfield, *Indictment and Information in Federal Criminal Procedure*, 13 SYRACUSE L.REV. 218, 253, 391, 407 (1961-1962).

129. Ogden v. United States, 112 Fed. 523, 526 (3rd Cir. 1902). But if the former convictions are omitted, the defendant cannot complain. United States v. El Rancho Adolphus Products, 140 F.Supp. 645, 650 (M.D.Pa. 1956).

130. Holmgren v. United States, 217 U.S. 509, 520, 54 L.Ed. 861 (1910). See United States v. Knopfer, 12 F.Supp. 980, 981 (M.D.Pa. 1955) on exhibits sent to the jury room.

131. United States v. Thompson, 27 F.Supp. 905, 906 (M.D.Pa. 1939). See also Capriola v. United States, 61 F.2d 5, 7 (7th Cir. 1932).

132. Haupt v. United States, 330 U.S. 631, 643, 91 L.Ed. 1145 (1947).

133. Phelps v. United States, 160 F.2d 626, 629 (9th Cir. 1947); United States v. Schanerman, 150 F.2d 941, 945 (3d Cir. 1945); Little v. United States, 73 F.2d 861, 864, 96 A.L.R. 889 (10th Cir. 1934).

134. Williamson v. United States, 262 F.2d 476, 481 (9th Cir. 1959); United States v. Krepper, 159 F.2d 958, 969-970 (3d Cir. 1946), *cert. denied* 330 U.S. 824, 91 L.Ed. 1275 (1947).

facts set out in the information are true.[135] Permitting the jury to take with them the affidavit on which the information is based, if error, is harmless when the affiant testified to all the facts stated in the affidavit.[136]

In one case where the jury was permitted to take a confession of a co-defendant into the jury room the trial judge later withdrew the confession from the jury.[137]

The sending to the jury at their request a deposition, part of which had been excluded, was not reversible error when done with the consent of counsel.[138] It is the duty of counsel, as well as of the court, to determine what papers are delivered to the jury. The same rule has been applied to letters turned over to the jury.[139]

In a case before the Supreme Court the issue of taking notes by a juror and using them in the jury room was not passed on, as the record did not show that any notes were taken.[140] The refusal of the trial judge to permit the jury to take notes of the testimony and requiring them to surrender those previously taken is not ground for a new trial.[141] It is "perhaps a matter within the discretion of the court." Judge Learned Hand has stated: "The supposed dangers appear to us as far-fetched, if not imaginary; but even if we are wrong, it has never been suggested that the judge must *permit* the practice; the question has always been whether he must *forbid* it. Moreover, it is at most a matter of discretion."[142] In 1956 a federal district judge held that only in an exceptional situation should a juror be stopped by the court from taking notes on his own volition, and only

135. United States v. Grady, 185 F.2d 273, 275 (7th Cir. 1950); United States v. Douglas, 155 F.2d 894, 895 (7th Cir. 1946).

136. Miller v. United States, 4 F. 2d 384 (9th Cir. 1925). See Marrone v. State, 359 P.2d 969, 975 (Alaska 1961).

137. Hagen v. United States, 268 Fed. 344, 346 (9th Cir. 1920), *cert. denied* 255 U.S. 569, 65 L.Ed. 790 (1921).

138. Rumely v. United States, 293 Fed. 532, 557 (2d Cir. 1923), *cert. denied* 263 U.S. 713, 68 L.Ed. 520 (1923). The deposition was taken in Switzerland. See also Bailey v. United States, 282 F.2d 421, 426 (9th Cir. 1960); compare McCORMICK, EVIDENCE, p. 184 (1954).

139. Winters v. United States, 201 Fed. 845, 849 (8th Cir. 1912). See also Goins v. United States, 99 F.2d 147, 151 (4th Cir. 1938).

140. Agnew v. United States, 165 U.S. 36, 45, 41 L.Ed. 424 (1897).

141. United States v. Davis, 103 Fed. 457, 470 (C.C.W.D.Tenn. 1900).

142. United States v. Chiarella, 184 F.2d 903, 907 (2d Cir. 1950). In United States v. Carlisi, 32 F.Supp. 479, 483 (E.D.N.Y. 1940), the practice of taking notes apparently was approved.

in an exceptional situation should the request for leave to take notes be denied.[143]

Where the trial judge orally instructs the jury and also gives certain written instructions requested by the defendant, it is not reversible error to refuse to permit the jury to take such written instructions to the jury room.[144] After the jury began its deliberations, the fact that a copy of the instructions was requested and sent by the judge to the jury room, is not reversible error though counsel were neither present nor advised of such action.[145] It is frequently desirable that instructions reduced to writing be not only read to the jury, but handed over to them.[146] Many state courts allow it. Even in a treason case, to allow the jury to have a typewritten copy of the court's instructions is not reversible error.[147]

Objection that the jury was allowed to examine books of account from which a witness testified cannot first be made on appeal, even though they had not been formally introduced in evidence.[148] When counsel for defendant knew that unadmitted government exhibits were sent to the jury room with others, and was present but made no objection, there was no reversible error in the absence of prejudice shown.[149] Professor McCormick suggests that "if the writing or article has been read or exhibited to the jury in connection with the testimony

143. United States v. Campbell, 138 F.Supp. 344, 348 (N.D. Iowa 1956) citing many cases and comments. See also Harris v. United States, 261 F.2d 792, 796 (9th Cir. 1958), *cert. denied* 360 U.S. 933, 3 L.Ed.2d 1546 (1959); Toles v. United States, 308 F.2d 590, 594 (9th Cir. 1962). See bibliography on note-taking in *The Jury System in the Federal Courts*, 26 F.R.D. 411, 537-538 (1961).

144. Garst v. United States, 180 Fed. 339, 345 (4th Cir. 1910). Sending the court stenographer on request of the jury to read the entire instructions is reversible error unless it is affirmatively shown that there was no prejudice. Little v. United States, 73 F.2d 861, 864, 96 A.L.R. 889 (10th Cir. 1934).

145. United States v. Graham, 102 F.2d 436, 444 (2d Cir. 1939).

146. Copeland v. United States, 152 F.2d 769 (D.C.Cir. 1945). See also Outlaw v. United States, 81 F.2d 805, 808 (5th Cir. 1936), *cert. denied* 298 U.S. 665, 80 L.Ed. 1389 (1936); Carrado v. United States, 210 F.2d 712, 722 (D.C.Cir. 1953), *cert. denied* 347 U.S. 1018, 98 L.Ed. 1140 (1953).

147. Haupt v. United States, 330 U.S. 631, 643, 91 L.Ed. 1145 (1947).

148. Black v. United States, 294 Fed. 828, 831 (5th Cir. 1923), *cert. denied* 264 U.S. 580, 68 L.Ed. 859 (1924). See also Silkworth v. United States, 10 F.2d 711, 721 (2d Cir. 1926), *cert. denied* 271 U.S. 664, 70 L.Ed. 1134 (1926); Tinkoff v. United States, 86 F.2d 868, 878 (7th Cir. 1936), *cert. denied* 301 U.S. 689, 81 L.Ed. 1346 (1937).

149. Finnegan v. United States, 204 F.2d 105, 115 (8th Cir. 1953), *cert. denied* 346 U.S. 821, 98 L.Ed. 347 (1953). Compare Marrone v. State, 359 P.2d 969, 978 (Alaska 1961).

even though not formally offered it should be treated for this purpose as in evidence."[150]

With respect to the use to which the jury may put the exhibits and writings, they may test the validity of the inferences for which such items of evidence are offered by examining or manipulating them. The trial judge may permit a questioned document, together with specimens of handwriting for comparison, to go with the jury.[151]

In a case involving the smuggling of opium prepared for smoking, the government was required to prove whether it was so prepared; this could not be left for determination by the jury in retirement by experimenting with the opium to see whether it could burn.[152] The jury may not experiment in the absence of the defendant who should have an opportunity to contest the correctness of the jury's experiments.

It has been held that the sending of an electric drop cord to the jury room is reversible error if the jury used the cord to experiment with machines already in the room.[153]

150. McCORMICK, EVIDENCE, p. 394 (1954).
151. Goins v. United States, 99 F.2d 147, 151 (8th Cir. 1938).
152. Wilson v. United States, 116 Fed. 484, 486 (9th Cir. 1902). See McCORMICK, EVIDENCE, p. 394 (1954); annot., 80 A.L.R. 108 (1932).
153. United States v. Beach, 296 F.2d 153, 158 (4th Cir. 1961).