

A defendant was lawfully arrested for bank robbery, without an arrest warrant. He was not given Miranda warnings but was immediately taken to a police station, where he and five other men were placed in a lineup to be viewed by the bank teller who had been on duty at the time of the robbery. Each man was required to say the words spoken by the bank robber: "Give me all your money. I've got a gun." After all the men in the lineup spoke those words, the teller identified the defendant as the robber.

The defendant subsequently moved to suppress the teller's testimony, claiming that the lineup violated his privilege against self-incrimination. At the suppression hearing, the teller testified that she had not gotten a good look at the robber's face, because the robber had been wearing a hat pulled down over most of his face, but that she was certain the defendant was the robber because she had recognized his voice at the lineup.

Should the defendant's motion be granted?

- A. No, because being required to speak at the lineup, while compelled, was not testimonial or communicative.
- B. No, because testimony of a witness based on firsthand observation is not subject to exclusion as the fruit of the poisonous tree.
- C. Yes, because the defendant was compelled to speak at the lineup, and this compelled speech led to the teller's identification testimony.
- D. Yes, because the defendant was never informed that he could refuse to make a statement and that any statement could be used as evidence against him.

## Explanation:

### Fifth Amendment privilege against self-incrimination

#### Testimonial communications

(privileged)

Oral testimony

Act of producing documents

#### Real or physical evidence

(not privileged)

Fingerprints

Handwriting samples

Voice tests

Photographs

Physical characteristics & clothing

Movements or gestures

Blood, DNA, urine samples

A court should grant a motion to suppress if the defendant's statement was taken in violation of his/her Fifth Amendment **privilege against self-incrimination**. This privilege protects a suspect from being compelled to provide incriminating evidence. But the privilege only applies to compelled **testimonial communications** (eg, oral testimony)—**not real or physical evidence** (eg, fingerprinting, voice identification).

Here, the police arrested the defendant and forced him to say the words spoken by the bank robber in a lineup (compulsion). The teller then identified the defendant as the robber by his *voice* (incriminating evidence). But since the privilege against self-incrimination does not apply to real or physical evidence (eg, voice identification), the court should deny the defendant's motion to suppress.

**(Choice B)** The [fruit of the poisonous tree doctrine](#) excludes evidence and testimony obtained from unconstitutional police actions. Here, since the police validly conducted a voice identification procedure and the defendant's constitutional rights were not otherwise violated, this doctrine does not apply.

**(Choice C)** The privilege against self-incrimination applies to compelled testimony (discloses the defendant's *knowledge*)—not compelled speech (discloses the *characteristics* of the defendant's voice). Since the defendant was compelled to disclose his vocal characteristics (not what he knew), the privilege against self-incrimination does not apply.

**(Choice D)** Police must give a suspect Miranda warnings (eg, suspect has the right to remain silent, any statement can be used against him/her at trial) when he/she is subject to a [custodial interrogation](#). Here, though the defendant was lawfully arrested (custody), the purpose of the lineup was to identify his voice—not to elicit an incriminating statement (no interrogation). Therefore, Miranda warnings were not required.

## Educational objective:

The Fifth Amendment privilege against self-incrimination protects a suspect from being compelled to provide incriminating testimonial communications, but not real or physical evidence.

### **References**

U.S. Const. amend. V (privilege against self-incrimination).

United States v. Wade, 388 U.S. 218, 222–23 (1967) (recognizing that voice identification is not a testimonial communication since it does not disclose the defendant's knowledge).

United States v. Hubbell, 530 U.S. 27, 35 (2000) ("[E]ven though the act may provide incriminating evidence, a criminal suspect may be compelled . . . to make a recording of his voice").

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