

A man was charged with murder. Several witnesses testified that the crime was committed by a person of the man's general description who walked with a severe limp. The man in fact walks with a severe limp. He objected to a prosecution request that the court order him to walk across the courtroom in order to display his limp to the jury to assist it in determining whether the man was the person that the witnesses had seen.

How should the court respond to the man's objection?

- A. Overrule the objection, because a criminal defendant has no legitimate expectation of privacy.
- B. Overrule the objection, because the order sought by the prosecution is a legitimate part of a proper courtroom identification process.
- C. Sustain the objection, because the order sought by the prosecution would constitute an illegal search and seizure.
- D. Sustain the objection, because the order sought by the prosecution would violate the man's privilege against self-incrimination.

## 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

The Fifth Amendment **privilege against self-incrimination** protects defendants from being compelled to provide incriminating evidence—evidence that could be used, or lead to other evidence that might be used, against a person in a criminal prosecution. However, this privilege only applies to **testimonial communications** (eg, oral testimony, act of producing documents)—**not real or physical evidence** (eg, movements, gestures, blood test).

Here, several witnesses testified that the murderer walked with a severe limp (same as the man), so the prosecution requested that the court order him to walk across the courtroom to show the jury his limp. Since the privilege against self-incrimination does not apply to physical evidence (eg, a limp), the order sought is a legitimate part of a proper courtroom identification process (**Choice D**). Therefore, the man's objection should be overruled.

**(Choices A & C)** The Fourth Amendment protects a person's legitimate expectation of privacy by prohibiting unreasonable searches and seizures. However, a person has no legitimate expectation of privacy in his/her physical characteristics because they are exposed to the public. Therefore, an order compelling the man to display his limp would not constitute an illegal search and seizure or otherwise violate the Fourth Amendment.

#### Educational objective:

The Fifth Amendment privilege against self-incrimination prohibits the government from compelling a defendant to provide incriminating testimonial communications—not real or physical evidence.

#### References

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

Schmerber v. California, 384 U.S. 757, 764 (1966) (recognizing that self-incrimination does not apply to real or physical evidence).

Missouri v. Proctor, 535 S.W.2d 141, 144–45 (Mo. Ct. App. 1976) (holding that a compelled walk in the courtroom does not violate privilege against self-incrimination).

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