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Evidence—Self Incrimination—Admissibility of Compulsory Voice Identification

In a recent South Carolina case¹ the defendant was accused of committing rape. Before trial he was compelled by the sheriff to repeat certain words which the rapist had spoken at the time of the crime. The prosecutrix immediately identified the accused by his voice as the rapist. Testimony as to this identification was admitted at trial, and the defendant was convicted. On appeal the court held that admission of this testimony was error, since it violated the defendant's constitutional guaranty² not to be compelled to be a witness against himself.

Historically³ the privilege of a person not to be compelled to testify or give evidence against himself in a criminal case developed as a safeguard against the obtaining of testimony from the accused through inquisition and torture in the ecclesiastical courts and the Court of Star Chamber in England. It later became a doctrine of the common law courts, and is now guaranteed in the United States Constitution,⁴ the North Carolina Constitution,⁵ and the constitutions of all but two of the remaining states.⁶ North Carolina⁷ and nearly all other states also have statutes which restate the guaranty in statutory form.⁸ The wording of the privilege varies among the states, but this does not affect the scope or application of the privilege.⁹

While there has been some criticism of the privilege,¹⁰ there are still valid reasons for retaining it. It forces a more diligent search for extrinsic evidence and provides protection against overzealous officers and district attorneys.¹¹ The privilege furnishes no protection against testimony which is voluntarily given,¹² or testimony which is merely degrading rather than actually incriminating.¹³ It does apply to com-

¹ State v. Taylor, 49 S. E. 2d 289 (S. C. 1948).

² S. C. CONST. Art. I, §17: "No person . . . shall be compelled in any criminal case to be a witness against himself."

³ For a comprehensive history of the privilege see 8 WIGMORE, EVIDENCE §2250 (3d ed. 1940).

⁴ U. S. CONST. AMEND. V: "No person . . . shall be compelled in any criminal case to be a witness against himself."

⁵ N. C. CONST. Art. I, §11: "In all criminal prosecutions every man has the right to . . . not be compelled to give evidence against himself."

⁶ Iowa and New Jersey. But both of these states now provide for the privilege by statute. IOWA CODE §622.14 (1946); N. J. STAT. ANN. §2:97-6, 7 (1939).

⁷ N. C. GEN. STAT. §§8-54 (1943).

⁸ 8 WIGMORE, EVIDENCE §2252 n. 3 (3d ed. 1940).

⁹ Councelman v. Hitchcock, 142 U. S. 547 (1871); 8 WIGMORE, EVIDENCE §324 (3d ed. 1940) ("The detailed rules are to be determined by the historical and logical requirements of the principle, regardless of the particular words of a particular constitution.")

¹⁰ 8 WIGMORE, EVIDENCE §2251 (3d ed. 1940).

¹¹ *Ibid.*

¹² State v. Farrell, 223 N. C. 804, 28 S. E. 2d 560 (1944); State v. Simpson, 133 N. C. 676, 45 S. E. 567 (1903).

¹³ 8 WIGMORE, EVIDENCE §2255 (3d ed. 1940).

pulsory production of incriminating papers,¹⁴ and to facts which tend to incriminate as well as those which amount to a direct admission of guilt.¹⁵

The question of the admissibility of compulsory voice identification raised by the *Taylor* case has never been considered by the North Carolina Supreme Court, and only two other jurisdictions besides South Carolina have considered it. In an early Pennsylvania case¹⁶ the court said by way of dictum that such evidence would not violate the privilege against self-incrimination and should be admitted. In a later Texas case¹⁷ the court held in a direct ruling that compulsory voice identification violated the privilege and was not admissible.

In reaching its decision in the instant case the court relied on and followed the previous South Carolina case of *State v. Griffin*¹⁸ which held that compelling an accused person to place her foot in a footprint found at the scene of the crime was a violation of the constitutional privilege and evidence of the comparison was not admissible. The court said, "It is difficult to draw any distinction between compelling a defendant to put his foot in a track at the scene of the crime in order to afford a basis for comparison and requiring a defendant to repeat certain words used at the scene of the crime in order to establish a basis for identity."¹⁹ The decision assumes, without deciding, that if the accused had merely been compelled to speak without any compulsion as to subject or words used, such testimony would have been admissible.²⁰ The questions raised by this decision, therefore, are whether a person may be compelled to give up evidence about his body and person without violating his constitutional privilege against self-incrimination, and whether compulsory voice identification is evidence within this category.

There is great confusion in the cases.²¹ The minority decisions hold

¹⁴ *State v. Hollingsworth*, 191 N. C. 595, 132 S. E. 667 (1926).

¹⁵ *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196 (1895).

¹⁶ *See Johnson v. Commonwealth*, 115 Pa. 369, 395, 9 Atl. 78, 81 (1887).

¹⁷ *Beachem v. State*, 144 Tex. Crim. Rep. 272, 162 S. W. 2d 706 (1942). The decision makes the same distinction which is suggested in the *Taylor* case, that had there been no compulsion as to subject or particular words spoken, the testimony would have been admissible. The court also relied upon a Texas statute which provided that a confession of an accused person shall not be used against him if obtained while he is in jail or custody, unless it is in writing and after a proper warning.

¹⁸ 129 S. C. 200, 124 S. E. 81 (1924).

¹⁹ *State v. Taylor*, 49 S. E. 289, 292 (S. C. 1948).

²⁰ This distinction does not appear to be valid. If the voice identification is admissible at all, compelling the accused to repeat the exact words which had been heard would only make the identification more accurate. In *State v. Neville*, 175 N. C. 731, 95 S. E. 55 (1918), which admitted evidence that the accused was compelled to go to the scene of the crime and stand in a position where the criminal had been seen, the court said, "It was fairer to present him to her amid the surroundings where the occurrence took place."

²¹ 8 WIGMORE, EVIDENCE §2265 n. 2 (3d ed. 1940). See Note, 171 A. L. R. 1144 (1947).

that the privilege should be broadly construed to cover any compulsory actions of the accused,²² while the majority of jurisdictions construe the privilege more strictly and hold that physical evidence about the body of the accused should not be within the privilege.

In the early case of *State v. Jacobs*,²³ the North Carolina Supreme Court held that compelling a defendant to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free Negro was a violation of the privilege. This case has not been overruled by the court, but has been distinguished²⁴ and has never been followed. The decision has been criticized by writers²⁵ and in decisions of other jurisdictions.²⁶ Since the *Jacobs* case, however, North Carolina has consistently followed the more modern view and admitted evidence produced by compulsory physical actions of the accused.²⁷

Application of the minority view, which construes the privilege as applying to any evidence obtained by compulsion, has reached some extreme results. It has been held that a person cannot be compelled to stand up in court to be identified by his accuser;²⁸ that he cannot be compelled to try on a coat²⁹ or hat³⁰ found at the scene of the crime to determine if it fits; and that he cannot be compelled to place his foot in a track for comparison and identification.³¹ Holding that this type of compulsory evidence should not be admissible appears to be an ex-

²² *Hunt v. State*, 248 Ala. 217, 224, 27 So. 2d 186, 193 (1946) ("A person in this state cannot be required against his will to do any positive act tending to operate as evidence against himself in a criminal case.").

²³ 50 N. C. 259 (1858).

²⁴ *State v. Johnson*, 67 N. C. 55 (1872) (the distinction made is that in exhibiting himself to the prosecuting witness rather than the jury, it is testimony of the witness and not the accused which is admitted); *State v. Vincent*, 222 N. C. 543, 23 S. E. 2d 832 (1943).

²⁵ STANSBURY, NORTH CAROLINA EVIDENCE §57 n. 12 (1946); Inbau, *Self-incrimination—What Can an Accused Person Be Compelled to Do?*, 28 J. CRIM. L. & CRIMINOLOGY 261, 272 (1938).

²⁶ *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530 (1879).

²⁷ *State v. Johnson*, 67 N. C. 55 (1872) (defendant required to stand up during trial for prosecuting witness to identify him); *State v. Graham*, 74 N. C. 646 (1876) (defendant compelled to place foot in track for comparison); *State v. Thompson*, 161 N. C. 238, 76 S. E. 249 (1912) (defendant required to aim gun through a window at the scene of the crime to see if he was the proper height to have fired the shot); *State v. Neville*, 175 N. C. 731, 95 S. E. 55 (1918) (defendant compelled to go to the scene of the crime and stand in the position the person committing the crime had been seen in); *State v. Bazemore*, 193 N. C. 336, 137 S. E. 172 (1927) (defendant compelled to place a hat on his head in a particular way); *State v. Garrett*, 71 N. C. 85 (1874) (witness compelled to unwrap her bandaged hand to show whether or not it was burned). See also 5 N. C. L. Rev. 333 (1927).

²⁸ *Smith v. State*, 247 Ala. 354, 24 So. 2d 546 (1946).

²⁹ *Ward v. State*, 27 Okla. Cr. R. 362, 228 Pac. 498 (1924).

³⁰ *Allen v. State*, 183 Md. 603, 39 A. 2d 820 (1944).

³¹ *Cooper v. State*, 86 Ala. 610, 6 So. 110 (1889); *Elder v. State*, 143 Ga. 363, 85 S. E. 97 (1915); *State v. Griffin*, 129 S. C. 200, 124 S. E. 81 (1924).

travagant extension of the constitutional privilege,³² and would tend to protect the guilty and hamper the search for the truth.

The strict interpretation followed by North Carolina and the majority of other jurisdictions appears to be the better reasoned and more practical view. It restricts application of the privilege to *testimonial compulsion* rather than any and every compulsion of the accused. The distinction is clearly stated by Professor Wigmore, who says, "Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not testimonial."³³

Evidence as to physical characteristics of the accused which he is compelled to furnish for use as identification data is not considered as making him furnish evidence against himself. It is dependent upon physical facts and conditions, and does not depend upon confessions, admissions, or statements of the accused.³⁴ Such evidence cannot be influenced by compulsion or fear of punishment. "It is called by the civilians 'real evidence,' is always admissible, and is of greater or less value according to the circumstances."³⁵

Compulsory voice identification is on the borderline between compulsion of identification data about the body of the accused and testimonial compulsion.³⁶ But it is submitted that proper application of the North Carolina and majority reasoning to the instant case would result in a ruling contrary to that handed down by the South Carolina court. There was no *testimonial compulsion* of the accused. He was merely compelled to furnish a sample of his voice for comparison and identification, and the words conveyed no communication or conscious meaning as to the crime or the accused's possible connection with it. The only use made of the words spoken was to compare the quality, pitch, or accent of the voice of the accused with the voice the prosecutrix had heard at the scene of the crime. In this respect the voice was merely a physical characteristic of the accused, such as the size and shape of his foot, hand, or body, his facial features, his fingerprints, or a scar or mark on his body. The resemblance between the voice of the accused

³² *Holt v. U. S.*, 218 U. S. 245 (1910).

³³ 8 WIGMORE, EVIDENCE §375 (3d ed. 1940); in *Holt v. U. S.*, 218 U. S. 245, 252 (1910) Mr. Justice Holmes said, "The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

³⁴ *State v. Thompson*, 161 N. C. 238, 76 S. E. 249 (1912).

³⁵ *State v. Graham*, 74 N. C. 646, 647 (1876).

³⁶ Another borderline situation which is analogous to compulsory voice identification is one where the accused is compelled to furnish a sample of his handwriting for identification. In *Hartzell v. U. S.*, 72 F. 2d 569 (C. C. A. 8th 1934) the court admitted such evidence and said that it was similar to being present in court and being identified. *Contra: Bertran v. Samson*, 53 P. I. 570 (1929).

when compelled to speak³⁷ and the voice heard at the time the rape was committed should not be excluded as a violation of the privilege against self incrimination. It should be admitted as a fact calculated to aid the jury in discovering the truth, the correctness of the identification going to the weight and not the admissibility of the evidence.³⁸

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Labor Law—Unfair Labor Practices—Employer By-passing Designated Bargaining Agent

An employer, after having bargained to an impasse with the certified representative of the employees, submitted his final proposal directly to strikers individually by mail, requesting them to vote on a ballot provided as to whether they would be willing to return to work upon the terms proposed by the employer but rejected by the union. The National Labor Relations Board found¹ that the employer interfered with the rights of the employees to bargain collectively within the meaning of Section 8(a)(1)² of the National Labor Relations Act. Upon petition to the Circuit Court of Appeals for the Seventh Circuit for enforcement of the order, it was held that the evidence did not justify a finding of an unfair labor practice because: (1) the letter disclosed no effort to bargain with the employees individually; (2) the employer had evidenced his good faith in dealing with the union; and (3) the employer

³⁷ No power of compulsion beyond that ordinarily permitted in obtaining testimony should be allowed. The powers of compelling testimony are discussed in 8 WIGMORE, EVIDENCE §2195 (3d ed. 1940). If the accused refuses to repeat the words, testimony as to this refusal would be competent. *State v. Graham*, 74 N. C. 646 (1876).

³⁸ The question of admissibility of voice identification on grounds other than violation of the privilege against self-incrimination is beyond the scope of this note. Proper safeguards should be taken to prevent inducement or suggestion of the identification. The accused should be presented in company with others who are similar in appearance. This procedure was followed in the instant case. 3 WIGMORE, EVIDENCE §§786, 786a (1946). In general such identification is admissible, its probative value to be a question for the jury. *Riner v. State*, 128 Fla. 848, 176 So. 38 (1937); *Fussell v. State*, 93 Ga. 450, 21 S. E. 97 (1895); *Commonwealth v. Williams*, 105 Mass. 67 (1870); 2 WIGMORE, EVIDENCE §660 (3d ed. 1940); STANSBURY, NORTH CAROLINA EVIDENCE, §96 (1946).

¹ *Penokee Veneer Co.*, 74 N. L. R. B. 1683 (1947).

² 49 STAT. 452 (1935), 29 U. S. C. §158(1) (1946), as amended by National Labor Management Relations Act, 61 STAT. —, 29 U. S. C. §158(a)(1) (Supp. 1947): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Sec. 7 provides, "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."