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# Constitutional Law--Evidence--Use of Miranda-violative Confessions for Impeachment Purposes

William F. Dobbs Jr.
*West Virginia University College of Law*

due process hearing requirements or it will serve as a vehicle for far reaching changes in the state's regulatory scheme.

*Stephen R. Crislip*

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**Constitutional Law—Evidence—Use of Miranda-violative Confessions for Impeachment Purposes**

Defendant Harris was charged with the sale of dangerous drugs. After being taken into custody, he made self-incriminating statements to the police prior to being warned of his right to appointed counsel. These statements were conceded by the prosecution to be in violation of the constitutional requirements set forth in *Miranda v. Arizona.*[1] However, there was never any contention by the defendant that the statements were coerced or involuntary.

At trial, an undercover agent testified that Harris had sold him heroin on two separate occasions. The prosecution, however, made no attempt to use Harris' incriminating statements in its case in chief. Harris later took the witness stand in his own defense and denied making the sale to the undercover agent on the first occasion. He admitted making a sale on the second occasion but asserted that the glassine envelope sold to the undercover agent contained only baking powder. On cross-examination, Harris was confronted with his illegally obtained prior contradictory statements, in which he had admitted to obtaining narcotics on *two* different occasions.[2] The trial court instructed the jury that these statements were to be used only for the purpose of assessing the defendant's credibility as a witness and not as substantive evidence of his guilt. On appeal, Harris contended that the illegally obtained statements could not be used by the state to impeach his credibility. *Held*: Conviction affirmed. A statement taken from an accused in violation of *Miranda* but otherwise

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[1] 384 U.S. 436 (1966). *Miranda* requires that the defendant be given the following warnings: "He [the defendant] must be warned prior to questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning . . . ." *Id.* at 479. The *Miranda* decision permits the courts to avoid determination of whether or not a defendant's statements are voluntary by prescribing stringent procedural requirements which must be met before the statements are admissible.

[2] The essence of the prior statements "read in the presence of the jury is twofold: (1) on January 4, 1966 defendant acted as the undercover police officer's agent in obtaining narcotics and (2) on January 2, 1966 defendant obtained narcotics from an unknown person outside a bar and then sold the drugs to the undercover agent . . . ." People v. Harris, 298 N.Y.S.2d 245, 247 (1969).

satisfying legal standards of trustworthiness is admissible to impeach the defendant's credibility as a witness. Every criminal defendant is privileged to testify in his own defense, but having voluntarily taken the witness stand, he is under an obligation to speak truthfully. Impeachment of the defendant's credibility with prior inconsistent statements is merely one of the traditional truth-testing devices of the adversary system, and the safeguards provided by *Miranda* do not include the right to use perjury as a defense. *Harris v. New York,* 401 U.S. 222 (1971).

The Court, in the majority opinion by Chief Justice Burger, held that the language in *Miranda* which indicated a bar to the use of uncounseled statements for *all* purposes *was dictum,*[3] and limited the holding in *Miranda* to bar the use of uncounseled statements by the prosecution *only* in making its substantive case. The majority relied upon the principle enunciated by the Supreme Court in *Walder v. United States*[4] to reach the result in the *Harris* case. In *Walder* the Court held that physical evidence which had been illegally seized could be used to impeach the defendant's direct testimony on matters "collateral" to the accusations contained in the indictment. The evidence which was admitted to impeach the defendant in *Walder* related to a crime with which the defendant had been charged two years earlier and was not directly related to the elements of the crime then at bar.[5] The Court in *Harris* seemed to adopt the basic rationale of the majority in *Walder*:

[3] Those statements dismissed by the court as dicta are: "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by defendant. . . . The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; . . . [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial . . . . These statements are incriminating in any sense of the word and may not be used without the full warnings and effective waiver required for any other statement." Miranda v. Arizona, 384 U.S. 436, 476-477 (1966). The Court further provided: "[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Id.* at 479.

[4] 347 U.S. 62 (1954).

[5] In 1950 Walder had been indicted for the purchase and possession of heroin. He was granted a motion to suppress the introduction into evidence of the illegally seized narcotics, forcing the Government to discontinue prosecution. Two years later, Walder was again indicted for a completely unrelated narcotics violation. Testifying in his own defense he made the sweeping assertion that he had never in his life possessed narcotics. On cross-examination he denied that law enforcement officers had seized narcotics from his home two years earlier, whereupon the government was permitted to introduce the testimony of one of the officers who had been involved in the 1950 seizure, and he stated that he had then seized narcotics from the defendant's home.

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.[6]

The Court admitted that Walder was impeached on collateral matters whereas Harris was impeached on matters more directly related to the charges against him, but found that there is no difference in principle between impeachment on matters collateral to the elements of the crime and impeachment on matters bearing directly on the elements of the crime.[7]

Dismissing the contention of many legal scholars that the total exclusion of illegally obtained confessions is necessary to deter illegal police conduct,[8] the majority reasoned that the unavailability of such confessions in the prosecution's substantive case is a sufficient deterrent in itself to illegal police activity:

> The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of the process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.[9]

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[6] 401 U.S. at 224. The Court in *Harris* was quoting directly from its language in *Walder v. United States,* 347 U.S. at 65.

[7] Mr. Justice Brennan noted in his dissent in *Harris* that the Court, in *Walder,* was careful to distinguish the situation where the defendant is impeached on collateral matters from the situation where the defendant is impeached on matters directly related to the elements of the charges against him. In *Walder* the Court declared: "Of course the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. *He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it,* and therefore not available for its case in chief." 347 U.S. at 65 (emphasis supplied). Chief Justice Burger, writing for the majority in *Harris,* apparently ignored this possible declaration of policy and attempted to reconcile *Walder* with the result reached in *Harris.*

[8] *See e.g.,* T. ABBOT, J. CRATSLEY, S. ENGELBERG, D. GROVE, P. MANAHAN, B. SAYPOL, LAW AND TACTICS IN EXCLUSIONARY HEARINGS, 9-10 (1969); *Developments in the Law-Confessions,* 79 HARV. L. REV. 938, 1030 (1966); Wolfe, *A Survey of the Expanded Exclusionary Rule,* 32 GEO. WASH. L. REV. 193, 236 (1963); Note, *The Impeachment Exception to the Exclusionary Rules,* 34 U. CHI. L. REV. 939,945-46 (1967); 42 N.Y.U. L. REV. 772, 775 (1967).

[9] 401 U.S. at 225.

Prior to the Supreme Court's decision in *Harris,* six federal courts of appeal and the appellate courts of thirteen states had interpreted the *Miranda* decision to require the exclusion of uncounseled statements for impeachment purposes, while only four courts, including the New York Court of Appeals in *Harris,* had allowed impeachment of the defendant's direct testimony by his illegally obtained prior statements.[10] The view had prevailed among legal scholars that certain dicta[11] in *Miranda* required the total exclusion of uncounseled statements by the accused, notwithstanding the impeachment exception in *Walder.*[12] Prior to *Harris,* such dicta furnished the principal basis for the refusal of most courts to permit impeachment with illegally obtained confessions, but numerous underlying justifications were also advanced in support of that result. The justifications were of two types: (1) those pointing out the distinctions between exclusion of illegal confessions and exclusion of physical evidence violating the fourth amendment, and (2) those attacking the impeachment exception in the context of the general considerations underlying all the exclusionary rules.[13] Included in

[10] Cases *contra Harris*: United States v. Fox, 403 F.2d 97 (2d Cir. 1968); United States v. Pinto, 394 F.2d 470 (3d Cir. 1968); Breedlove v. Beto, 404 F.2d 1019 (4th Cir. 1968); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967); Blair v. United States, 401 F.2d 387 (D.C. Cir. 1968); People v. Barry, 237 Cal. App. 2d 154, 46 Cal. Rptr. 727 (Dist. Ct. 1965), *cert. denied,* 386 U.S. 1024 (1967); Velarde v. People, 466 P.2d 919 (Colo. 1970); State v. Galasso, 217 So. 2d 326 (Fla. 1968); People v. Luna, 37 Ill. 2d 299, 226 N.E.2d 586 (1967); Franklin v. State, 6 Md. App. 572, 252 A.2d 487 (1969); People v. Wilson, 20 Mich. App. 410, 174 N.W.2d 79 (1969); Kelly v. King 196 So. 2d 525 (Miss. 1967); State v. Catrett, 276 N.C. 86, 171 S.E. 2d 398 (1970); State v. Brewton, 247 Ore. 241, 422 P.2d 581, *cert. denied,* 387 U.S. 943 (1967); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968); Spann v. State, 448 S.W.2d 128 (Tex. Ct. App. 1969); Cardwell v. Commonwealth, 209 Va. 412, 164 S.E.2d 699 (1968); Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967). Cases in *accord* with *Harris*: State v. Kimbrough, 109 N.J. Super. 57, 262 A.2d 232 (1970); State v. Butler, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969); State v. Grant, 459 P.2d 639 (Wash. 1969).

[11] See note 3 *supra.*

[12] e.g., T. ABBOT, *supra* note 8, at 18. Note, *The Collateral Use Doctrine: From Walder to Miranda,* 62 NW. U. L. REV. 912, 933 (1968); 42 N.Y.U. L. REV. 772, 774 (1967).

[13] "[T]he criminal law now clearly recognizes at least six rules of exclusion. These are the rules based on the Fourth, Fifth and Sixth Amendments to the federal Constitution and those grounded in rule 5 (a) of the Federal Rules of Criminal Procedure, Title 18 U.S.C. § 3109 and § 605 of the Federal Communications Act. In addition, less well known and accepted is the exclusionary rule grounded in the due process clause of the Fifth and Fourteenth Amendments." T. ABBOT, supra note 8, at 23. Subsequent to the publication of the above-cited authority, the Supreme Court in *Simmons v. United States,* 390 U.S. 377 (1968), added to the list of exclusionary rules by holding that testimony given by the defendant at a preliminary hearing on the question of admissibility of evidence cannot later be introduced at trial on the question of guilt.

the first category is the contention that the impeachment exception is inappropriate to illegal confessions because the fifth amendment privilege against self-incrimination is directed by its terms at exclusion of involuntary confessions and the use of an involuntary confession for the purpose of impeachment compels the defendant to be a "witness" against himself much the same as it would if used in the prosecution's substantive case.[14] On the other hand, the impeachment exception is not on its face inappropriate to the privilege against illegal search and seizure because the fourth amendment is directed at protection of the privacy interest. Moreover, *Miranda* was designed to avoid the necessity of determining whether confessions are voluntary and reliable, by prescribing certain police conduct. The admission of illegal confessions for the purpose of impeachment returns to the courts the necessity of making this determination, because the court has retained the requirement of trustworthiness.[15]

The second category attacks the impeachment exception as applied to all of the exclusionary rules. If the defendant asserts his right to testify in his own defense, he is penalized by the introduction of illegal evidence for the purpose of impeachment. However, if he refuses to take the witness stand because he fears that his testimony

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The fourth amendment exclusionary rule prevents use of evidence obtained as a result of illegal search and seizure, whether tangible or intangible; and the exclusionary rule based upon the fifth and sixth amendments excludes from evidence confessions obtained as a result of coercive police tactics or in violation of the *Miranda* warnings. Also predicted upon the sixth amendment is the exclusionary rule which prohibits the use in evidence of a witness's pretrial identification of the accused in a police line-up conducted in the absence of counsel. Three of the exclusionary rules are based upon the federal supervisory power. Rule 5(a) of the Federal Rules of Criminal Procedure requires that arrested persons be heard by the nearest available United States Commissioner without unnecessary delay. A confession obtained during a period of unnecessary delay is inadmissible. Title 18 U.S.C. § 3109 prohibits an officer from opening a door pursuant to the execution of a warrant until he has been refused admission to the premises. Evidence obtained in violation of this rule is also inadmissible. The exclusionary rule based upon § 605 of the Federal Communications Act of 1934 prohibits use of evidence obtained as a result of unauthorized wiretapping, and has been made applicable to the states. T. ABBOT, *supra* note 8 at 12-24.

[14] *Developments, supra* note 8. *See also* Mr. Justice Brennan's dissenting opinion in *Harris*. He argued that the fifth amendment's privilege against self-incrimination "is fulfilled only when an accused is guaranteed 'the right to remain silent, unless he chooses to speak in the unfettered exercise of his own free will,'" and that if a comment by the prosecution on the defendant's failure to take the stand "fetters that choice" because "'[i]t cuts down on the privelege by making its assertion costly,'" the same reasoning leads to the conclusion that the prosecution's use of a tainted statement to impeach the defendant also fetters the defendant's choice of taking the stand. 401 U.S. at 232.

[15] *The Impeachment Exception, supra* note 8, at 948.

would allow the illegal evidence to be admitted, he is prevented from freely exercising his right to testify in his own defense, and the jury is denied the benefit of the defendant's testimony.[16] Furthermore, the impeachment exception violates the basic tenet of the exclusionary rules which requires the courts to discourage illegal police conduct by refusing to sanction it.[17] "A court sworn to uphold the law cannot adequately perform its function if it ignores illegality in the enforcement of the law."[18] The knowledge that failure to follow legal procedures absolutely precludes the use of any of the illegally obtained evidence removes incentive for the police to violate the laws. On the other hand, the admissibility of illegally obtained evidence even for the limited purpose of impeachment severely weakens the deterrent effect of the exclusionary rules, because such evidence would remain useful to the prosecution. By holding the evidence in reserve, the prosecution is in a position to discourage the defendant from testifying in his own defense.[19] The only measurable loss to the judicial system in banning the use of illegal evidence for impeachment purposes occurs where a guilty person is acquitted on the basis of his own testimony, which is unlikely since a defendant in criminal cases is automatically impeached by the jury's knowledge that he is an interested party and its skepticism of his assertions.[20]

The holding in *Harris* does not permit the use of coerced or involuntary statements for impeachment purposes. To be used for impeachment, a statement by the accused must satisfy "legal standards of trustworthiness," even though the *Miranda* warnings need not be shown.[21] For instance, if the accused has made a statement under the influence of lengthy interrogation and police pressure, without being advised of his right to an appointed attorney during the interrogation,

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[16] *Id.* at 944. *See* State v. Brewton, 422 P.2d. 581, 583 (Ore. 1967).

[17] *The Impeachment Exception, supra* note 8, *at 945-46.* See *also T. Abbot, supra* note 8, at 8-12; 42 N.Y.U.L. REV. 772, 777 (1967).

[18] Schwartz, *Retroactivity, Reliability and Due Process,* 33 U. CHI. L. REV. 719, 752 (1966).

[19] "Although the prosecution could not use unlawfully obtained evidence in its case in chief, such evidence would still be useful to it. By holding the evidence in reserve, it could place the defendant in a position where he could: (1) take the stand and tell the 'whole story' knowing full well that the unlawfully obtained evidence would then be admitted; (2) just deny the crime without going into detail; or (3) not take the stand at all. Since the impact on the jury of a weak denial or refusal to testify could be just as harmful to the defendant as the admission of the evidence, deterrence of unlawful police activity by the exclusionary rules is seriously weakened." *The Impeachment Exception, supra* note 8 at 943-44.

[20] *Id.* at 944.

[21] 401 U.S. at 224.

the statement could not be used even for impeachment purposes because it would be characterized as "untrustworthy." However, if the same statements were voluntarily made by the defendant in response to interrogation without pressure, it would be admitted for impeachment even though the full *Miranda* warnings were not given, because it would be characterized as "trustworthy." *Miranda* was an attempt by the Court to avoid the issues of voluntariness and reliability by prescribing conditions for lawful police interrogation,[22] but it appears that the *Harris* decision has re-immersed the courts in the task of determining the trustworthiness of confessions.

In order for the question of trustworthiness to arise, however, the court must first have determined at a preliminary hearing or have had it stipulated at trial that the accused's statement was taken in violation of *Miranda*; otherwise, the statement would remain fully available and no determination of trustworthiness would be necessary.

After a statement has been found to violate *Miranda,* it would appear from the *Harris* case that it remains available for impeachment purposes, absent any contention of coercion or unreliability by the defendant.[23] Thus, in order to prevent the prosecution's use of the statement for impeachment purposes, the defendant would be required to bring the question of trustworthiness to the attention of the court. Once the defendant has raised the issue of trustworthiness, however, the illegal methods of obtaining the confession should give rise to a presumption that its trustworthiness does not satisfy legal standards, thereby compelling the prosecution to prove trustworthiness.[24] To hold otherwise would substantially weaken the require-

[22] *The Impeachment Exception, supra* note 9, at 948.

[23] There is no indication in *Harris* that the prosecution made an affirmative showing of trustworthiness before introducing the accused's statements for impeachment purposes, although it can be inferred from the record that the statements were in fact trustworthy. For this reason it would appear that the state need make no affirmative showing of trustworthiness before introducing illegal statements of the accused for impeachment purposes. The Court said in *Harris*: "The transcript of the interrogation used in the impeachment, but not given to the jury, shows no warning of a right to appointed counsel was given before questions were put to petitioner when he was taken into custody. *Petitioner makes no claim that the statements made to the police were coerced or involuntary.*" 401 U.S. at 224 (emphasis supplied).

[24] The *Miranda* warnings must be affirmatively shown by the state before the statement of the accused is admissible for the prosecution's substantive case. Although the *Miranda* requirements need no longer be shown to admit such statements for impeachment purposes, the same considerations which place the burden of showing compliance on the state before the use of statements in its substantive case also exist with respect to showing compliance with

ment of trustworthiness. After the court determines that the statement satisfies legal standards and it is admitted for impeachment purposes, the jury must be instructed that prior statements of the accused should be used only to judge the credibility of the defendant as a witness and not to judge the defendant's guilt.

No longer must a distinction be made between illegally obtained evidence which can be characterized as collateral to the elements of the crime charged and evidence which can be characterized as relating directly to the elements of the crime charged. For instance, if the defendant in a murder trial takes the stand and denies that he was at the scene of the crime, the prosecution may then introduce the defendant's prior exculpatory statement in which he admitted being at the scene of the crime an hour before the murder but denied participating in the actual crime. Even though the prosecution could not use this statement for its case in chief because of some violation of *Miranda,* it would be available, provided it met legal standards of trustworthiness, for impeachment of the defendant's direct testimony. While the court must instruct the jury not to consider the statement as proof of the defendant's guilt but only as to his credibility as a witness, it is doubtful that a jury will draw a distinction between evidence used to impeach and evidence used to prove a fact in issue.[25] As a result the defendant may be convicted in part on the basis of illegally obtained statements if they are inconsistent with his direct testimony, especially if the statement is closely related to a material issue in

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legal standards of trustworthiness before the use of statements for impeachment:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. This court has always set high standards of proof for the waiver of constitutional rights and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.
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> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. Miranda v. Arizona, 384 U.S. 436, 475-76 (1966) (citations omitted).

[25] Note, *The Limiting Instruction—Its—Effectiveness and Effect,* 51 MINN. L. REV. 264 (1966).

the case.[26] Thus, the effect of impeachment is much more extensive in practice than in theory. With the knowledge that the state can introduce the defendant's illegal statement if he testifies as to matters contained therein, the real impact of the impeachment exception may be to keep the defendant from testifying at all.[27]

## Conclusion

Although *Harris* expressly dealt with impeachment by the use of illegal statements, it is difficult to escape the conclusion that *Harris* also permits impeachment of the defendant with evidence obtained in violation of the other exclusionary rules. The Court in *Harris* considered the basic premises underlying all the exclusionary rules and dismissed them as inapplicable to impeachment. On the other hand, the reasons advanced by the Court for permitting impeachment by the use of *Miranda*-violative statements apply equally well to impeachment by evidence obtained in violation of the other exclusionary rules.[28] At, the very least, the *Walder* impeachment exception to the fourth amendment exclusionary rule has been broadened to include impeachment on matters bearing directly upon the defendant's guilt.

The practical effect of *Harris* will be a tendency to keep the defendant off the stand entirely in most cases where the state has illegally obtained evidence which can be used to impeach him. Thus, the Court appears to be cautiously retreating from the full impact of *Miranda.*

*William F. Dobbs, Jr.*

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[26] In a study of curative instructions and their effect on the jury it was concluded that an instruction to disregard, instead of preventing the jurors from considering the evidence, sensitized the jury to the evidence. Broeder, *The University of Chicago Jury Project,* 38 Neb. L. REV. 744, 753-54 (1959). In a less comprehensive study on the jury's ability to follow instructions it was found that of eighteen jurors interviewed, only one remembered the judge's instructions well enough to attempt to follow them. Hoffman & Bradley, *Jurors on Trial,* 17 MO. L. REV. 235 (1952). Although both studies dealt with curative rather than limiting instructions, it is difficult to escape the conclusion that juries have equal difficulty following limiting instructions.

[27] *The Impeachment Exception, supra* note 8, at 943-44. *See* State v. Brewton, 247 Ore. 241, 245, 422 P.2d 581, 583 (Ore. 1967): "[A]s commendable as it may be to prevent perjury, the price of such prevention could be to keep defendants off the stand entirely."

[28] 401 U.S. at 225, 226.