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Harris v. New York: The Retreat From Miranda

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NOTE

HARRIS V. NEW YORK: THE RETREAT FROM MIRANDA

Petitioner, arrested and charged with selling heroin, voluntarily[1] answered questions of the police without having first been warned of his right to counsel required by *Miranda v. Arizona*.[2] At trial, petitioner, on direct examination, gave an account of the sales which differed from the account given the police in his original statements.[3] Over objection of defense counsel, the prosecution was permitted to use the prior statements in cross-examining the petitioner.[4] The trial judge instructed the jury that the statements attributed to petitioner by the prosecution could be considered only in deciding petitioner's credibility and not as evidence of guilt. Petitioner was found guilty, and his conviction was affirmed by the New York appellate courts.[5] On certiorari, the United States Supreme Court affirmed, *holding* that trustworthy, voluntary prior inconsistent statements of a defendant, even though inadmissible in the prosecution's case in chief because they are violative of *Miranda v. Arizona*, may nonetheless be used on cross-examination to attack the credibilty of defendant's direct testimony. *Harris v. New York*, 401 U.S. 222 (1971).

Generally, evidence obtained in violation of a defendant's constitutional rights cannot be admitted against him at trial to obtain his conviction.[6] In 1954 the Supreme Court in *Walder v.*

1. Petitioner made no claim that the statements made to the police were coerced or involuntary.

2. 384 U.S. 436 (1966).

3. On direct examination petitioner denied making a sale on January 4. He admitted selling the contents of a glassine bag to the undercover officer on January 6, but claimed that the bag contained baking powder. The appeals court summarized his statements to the police as follows: "[O]n January 4, 1966 defendant acted as the undercover police officer's agent in obtaining narcotics and . . . on January 6, 1966 defendant obtained narcotics from an unknown person outside a bar and then sold the drugs to the undercover agent in a bar." People v. Harris, 31 App. Div. 2d 828, ——, 298 N.Y.S.2d 245, 247, *aff'd*, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969).

4. Petitioner replied that he could remember virtually none of the questions or answers recited to him by the prosecution from his original statements.

5. People v. Harris, 31 App. Div. 2d 828, 298 N.Y.S.2d 245, *aff'd*, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969).

6. Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment privilege against self-incrimination); Escobedo v. Illinois, 378 U.S. 478 (1964) (sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (*Weeks* doctrine applied to states); Brown v. Mississippi, 297 U.S. 278 (1936) (due process requirements of fourteenth amendment); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (information obtained was through

United States[7] provided a narrow exception to the rule by holding that illegally seized evidence may be used to impeach the credibility of a defendant at a later unrelated proceeding where on direct examination "[t]he defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics."[8]

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an unconstitutional search and seizure); Weeks v. United States, 232 U.S. 383 (1914) (fourth amendment right against unreasonable search and seizure).

7. 347 U.S. 62 (1954). In *Walder* the defendant took the stand during his trial for illicit transactions in narcotics and testified on direct examination that he had never dealt in narcotics. The goverment then introduced testimony that, nearly two years previously, the police had seized narcotics from the defendant, which evidence had been suppressed at a prior trial because it was obtained during an unconstitutional search of defendant's home. The Court distinguished *Walder* from Agnello v. United States, 269 U.S. 20 (1925), by emphasizing that in the present case the defendant on direct examination "made the sweeping claim that he had never dealt in or possessed any narcotics." *Id.* at 65. However, in *Agnello*, the government, after failing to introduce the tainted evidence in its case in chief, tried to bring it in on cross-examination by asking the defendant the broad question of whether or not he had ever seen narcotics before.

8. Walder v. United States, 347 U.S. 62, 65 (1954). Justice Frankfurter stated, however: "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." *Id.* Although the Court in *Walder* outlined a very narrow exception, lower federal courts expanded the exception to include evidence directly related to the crime in question, though not to the ultimate question of guilt. *See* United States v. Curry, 358 F.2d 904 (2d Cir.), *cert. denied*, 385 U.S. 873 (1966): Defendant was charged with bank robbery and conspiracy. Defendant had made two statements to the police while being illegally detained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure and without advice of counsel. Both on direct and on cross examination, defendant denied wearing a moustache on the day of the crime. To impeach the defendant's credibility an FBI agent was allowed to testify that during illegal detention the defendant had admitted wearing a moustache. The court held it was proper for the district court to permit use of the suppressed statement for impeachment "to establish facts collateral to the ultimate issue of guilt." *Id.* at 910. In Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960), defendant, accused of theft of equipment from a hospital, testified he did not know the man charged with having been his accomplice in the theft and that he had gone to the hospital only to visit a friend. The court held that defendant's confession obtained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure could be used to rebut his testimony, stating that "[t]he accused is still free to take the stand and truthfully deny all elements of the crime." *Id.* at 381. *See also* Bailey v. United States, 328 F.2d 542 (D.C. Cir.), *cert. denied*, 377 U.S. 972 (1964); Lockley v. United States, 270 F.2d 915 (D.C. Cir. 1959) (dissenting opinion of Judge Burger). *But see* Inge v. United States, 356 F.2d 345 (D.C. Cir. 1966); White v. United States, 349 F.2d 965 (D.C. Cir. 1965).

Further, the rationale of *Walder* was applied to permit, for impeachment purposes, the use of confessions obtained in violation of the defendant's sixth amendment right to counsel. United States v. Mancusi, 272 F. Supp. 261 (W.D. N.Y. 1967). *See* United States v. Curry, 358 F.2d 904 (2d

Although the Court in *Miranda v. Arizona*[9] did not expressly bar, for impeachment purposes, the use of evidence gained in violation of the procedural guidelines it laid down, the Court said in dictum,

> "[S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement."[10]

In light of this language and the general tenor of *Miranda*, the majority of federal and state courts which dealt with the issue held that statements inadmissible for the prosecution's case in chief, because of failure to follow *Miranda* safeguards, were also inadmissible for impeachment purposes.[11]

In the instant case the Supreme Court, although noting the broad language of *Miranda*, concluded that *Miranda* was limited to excluding uncounseled statements only from the prosecution's case in chief. The Court, recognizing that *Walder* concerned impeachment only of matters other than elements of the present crime, felt that there was no difference in principle to warrant a different result where the alleged contradiction concerned elements of the present crime. The majority noted

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Cir.), *cert. denied*, 385 U.S. 873 (1966); Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1964); and the *McNabb-Mallory* rule, *discussed in* United States v. Curry, 358 F.2d 904 (2d Cir.), *cert. denied*, 385 U.S. 873 (1966); Bailey v. United States, 328 F.2d 542 (D.C. Cir.), *cert. denied*, 377 U.S. 972 (1964); Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960). *See also Developments in the Law—Confessions*, 79 HARV. L. REV. 938, 1030 (1966); Comment, 622 NW. U.L. REV. 912 (1968).

9. 384 U.S. 436 (1966).

10. *Id.* at 477.

11. Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968); United States v. Fox, 403 F.2d 97 (2d Cir. 1968); United States *ex rel.* Hill v. Pinto, 394 F.2d 470 (3d Cir. 1968); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967); Velarde v. People, 171 Colo. 261, 466 P.2d 919 (1970), *overruled by* Jorgenson v. People, 842 P.2d 962 (Colo. 1971), because of the *Harris* decision; State v. Galasso, 217 So.2d 326 (Fla. 1968); 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); Gaertner v. State, 35 Wis.2d 159, 150 N.W.2d 370 (1967). *See also* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 630 (1968); Note, 19 S.C. L. REV. 281 (1967). *Contra*, 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, 77 Wash. 2d 47, 459 P.2d 639 (1969).

further that the speculative possibility of police misconduct[12] should not outweigh the value of the impeachment process in aiding the jury to determine the defendant's credibility. Finally, the Court stated that *Miranda* should not be perverted into a license to use perjury as a defense, free from the risk of confrontation with prior inconsistent utterances. In a vigorous dissent criticizing the majority's interpretation of *Walder*[13] and *Miranda*,[14] Justice Brennan argued that the defendant's fifth amendment privilege against self-incrimination was violated.[15] He further contended the decision would seriously undermine *Miranda's* deterrent effect on police misconduct.

Surely *Harris* will promote truthfulness by the defendant who takes the witness stand. It is submitted, however, that this worthwhile effect is outweighed by unfortunate results which may arise out of the application of the *Harris* rule. Whereas the underlying purpose of *Miranda* appears to have been to place all citizens on an equal footing with respect to knowledge of their constitutional rights[16] and to promote government

12. The Court felt that police are sufficiently deterred when the evidence seized illegally is made unavailable to the prosecution in its case in chief.

13. Justice Brennan emphasized the fact that *Walder* concerned impeachment of matters unrelated to the present crime. *See* note 7 *supra*.

14. "[T]he accused is denied an 'unfettered' choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him. We settled this proposition in *Miranda* where we said:

> '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 meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.*'

[Emphasis added by Justice Brennan.] This language completely disposes of any distinction between statements used on direct as opposed to cross-examination. 'An incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn.'" Harris v. New York, 401 U.S. 222, 230-31 (1971) (dissenting opinion).

15. "While *Walder* did not identify the constitutional specifics which guarantee 'a defendant the fullest opportunity to meet the accusation against him . . . [and permit him to] be free to deny all the elements of the case against him,' in my view Miranda v. Arizona, identified the Fifth Amendment's privilege against self-incrimination as one of those specifics." *Id.* at 647.

16. "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full

respect for the dignity of its citizens,[17] this purpose may be undercut by *Harris* because police are now given an incentive to withhold *Miranda* warnings.[18] Although it is generally agreed that there is value in the defendant's testifying in his own behalf,[19] *Harris* will probably reduce the number of defendants taking the stand. Furthermore, courts have long been concerned with the jury's capacity to comply with limiting instructions.[20] Although the judge, as in *Harris*, may instruct the jury that

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opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." Miranda v. Arizona, 384 U.S. 436, 467 (1966).

17. "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. . . . In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" Miranda v. Arizona, 384 U.S. 436, 460 (1966).

18. Groshart v. United States, 391 F.2d 172, 180 (9th Cir. 1968): "Surely, too, we should not encourage law enforcement officials to interrogate one in violation of his constitutional rights with the sole purpose of obtaining evidence for use in impeaching him should he testify at a future trial or for the purpose of thereby preventing a defendant from taking the stand in his own defense. Impeachment is often an extremely significant factor in close cases." State v. Brewton, 247 Ore. 241, 245, 422 P.2d 581, 583, *cert. denied*, 387 U.S. 948 (1967): "If we should today adopt a restrictive application of the exclusionary rule, the result could be a major step backward. This court would in effect be saying to the overzealous that police officers will be free in the future to interrogate suspects secretly, at arms length, without counsel, and without advice, so long as they use means consistent with threat-or-promise voluntariness, and so long as they understand that they may file the information only for use to keep the defendant honest. Thus, the police could, at their option, take a calculated risk: By giving up the possibility of using the suspect's statements in the state's case, they could obtain by unconstitutional means and store away evidence to use if the defendant should elect upon trial to take the stand. As commendable as it may be to prevent perjury, the price of such prevention could be to keep defendants off the stand entirely. In some cases, the temptation to silence a suspect of dubious probity might very well outweigh the desire to conduct a constitutionally valid interrogation. We have concluded that to introduce such a rule could undo much of the recent progress that has been made in upgrading police methods to preserve the rights guaranteed under the Fifth and Sixth Amendments, and would be inconsistent with the trend of our recent decisions."

19. *See, e.g.*, Ferguson v. Georgia, 365 U.S. 570 (1961).

20. "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitation of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123, 135 (1968). *See also* Jackson v. Denno, 378 U.S. 368 (1964); C. McCORMICK, EVIDENCE § 39, at 77 (1954).

the prior inconsistent statements are to be used only for impeachment purposes, there is great temptation on the part of the jury to consider the statements as indicative of guilt.

Harris also leaves some important questions unanswered. First, the Court did not specifically limit its decision to impeachment of the defendant's direct testimony. It appears, then, that even though a defendant has made no inconsistent statement on direct examination, the *Harris* rule may allow the prosecution to lead the defendant into an inconsistency on cross-examination. This result depends, of course, upon the scope of cross-examination in the particular jurisdiction.[21] Secondly, *Harris* apparently applies even where the police have intentionally withheld *Miranda* warnings.[22] However, the courts may limit the applicability of the rule to cases where the police inadvertently fail to inform the defendant of his constitutional rights. Thirdly, the rule of *Harris* is by its terms limited to statements which are both trustworthy and not "coerced and involuntary."[23] The question remains, however, as to the rule applicable where the statements are obtained unfairly in violation of *Rogers v. Richmond*.[24] Since *Harris* does not include the

21. *See The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Evidence*, 32 LA. L. REV. 344, 345-46 (1972); Agnello v. United States, 269 U.S. 20 (1925). In *Agnello* the government, after having failed in its efforts to introduce the tainted evidence in its case in chief, tried to introduce it on cross-examination by asking the accused the broad question of whether he had ever seen narcotics before. After eliciting the expected denial, it sought to introduce evidence of narcotics located in the defendant's home by means of an unlawful search and seizure, in order to discredit the defendant. In holding that the government could no more work in this evidence on cross-examination than it could in its case in chief, the Court said, "[a]nd the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search." *Id.* at 35.

22. In *Harris* the police evidently did not intentionally withhold the *Miranda* caution. However, the court makes no distinction between situations in which the caution is intentionally withheld and those in which it is inadvertently withheld.

23. 401 U.S. 222, 224 (1971).

24. 365 U.S. 534 (1961). Where the police obtained a confession from the defendant after leading him to believe his wife was to be taken into custody, the Supreme Court abandoned truthfulness as a permissible standard under the due process clause of the fourteenth amendment and adopted the rule that the confession must be obtained so as not "to overbear petitioner's will to resist and bring about confessions not freely determined." *Id.* at 544.

Rogers prohibition, apparently unfairly obtained statements will be admitted to attack the defendant's credibility.

Finally, the question arises concerning the exclusionary rules to which the *Harris* decision applies. Although *Harris* concerns a violation of *Miranda*, it has already been extended to include a violation of *Gideon v. Wainwright*.[25] Since the Court in *Harris* relied upon *Walder*, presumably evidence obtained pursuant to an illegal search and seizure can now be used to discredit the defendant's testimony even though the evidence is directly related to the elements of the present crime. In light of the broad language of *Harris*,[26] then, it is possible that its

25. 372 U.S. 335 (1963). In Burgett v. Texas, 389 U.S. 109 (1967), where the prosecution sought to introduce proof of prior convictions under the Texas recidivist statute, the Supreme Court held that where, in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), the defendant was not afforded the right to counsel at the previous trials, the prior convictions cannot be used to support guilt or enhance punishment for another offense. Yet in United States *ex rel.* Walker v. Follette, 443 F.2d 167 (2d Cir. 1971), the court held that where the defendant testified on direct examination that he had never been convicted of crime, allowing the prosecutor on cross-examination to elicit from the defendant the fact that he had previously been convicted, did not deprive the defendant of a fair trial even though the convictions for the prior offenses were invalid for want of legal representation. The court in justifying its decision said: "Harris [involved] a violation of *Miranda* whereas here it was a violation of *Gideon*. The principle is the same in either event. If a defendant testifies, he puts his credibility in issue. If he lies in the course of his testimony, he lays himself open to attack by means of illegal evidence which otherwise the prosecution could not use against him." *Id.* at 170. *But see* Howard v. Craven, 446 F.2d 586 (9th Cir. 1971), where the court held it was error to use a felony conviction obtained without counsel to impeach petitioner at his felony trial, where the principal issue at trial was the credibility of petitioner's story as compared to that of the complainant. The court held *Harris* not applicable and distinguished *Follette*. "We reject the suggestion that Harris v. New York . . . is applicable here. One obvious difference between Harris and this case, *Burgett*, and *Tucker* is that the danger of unreliability of a defendant's statements is not necessarily great merely because *Miranda* has been violated . . . but there is a clear danger of convicting the innocent when the accused is denied the assistance of counsel at trial. . . . A second difference is that in *Harris* the illegal evidence was admitted to rebut a specific false statement made by defendant while testifying . . . here it was offered only for its general tendency to discredit appellant's character. This difference also distinguishes United States ex rel. Walker v. Follette . . . in which proof of prior convictions obtained without the assistance of counsel was held to be admissible to rebut defendant's false testimony that he had never been convicted of a crime." *Id.* at 587. *See also* Untied States v. Ramirez, 441 F.2d 950 (5th Cir. 1971).

26. "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." 91 S. Ct. 643, 645-46 (1971).

holding may be extended to include evidence obtained in violation of *any* exclusionary rule.

Although some states have apparently felt required to adopt the rule of *Harris*,[27] that decision merely recognizes that states may constitutionally receive such evidence for impeachment purposes. It *does not* require that result. It is hoped that states will continue to exclude evidence for impeachment purposes where the evidence is seized in violation of an exclusionary rule and is directly related to the matter of guilt.

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27. *See* State v. Dixon, 15 Ariz. App. 62, 485 P.2d 1179 (1971); Rooks v. State, 466 S.W.2d 478 (Ark. 1971); Jorgenson v. People, 482 P.2d 962 (Colo. 1971); Davis v. State, 271 N.E.2d 893 (Ind. 1971); People v. Calhoun, 33 Mich. App. 141, 189 N.W.2d 743 (1971); Small v. State, 466 S.W.2d 281 (Tex. Crim. App. 1971); Morales v. State, 466 S.W.2d 293 (Tex. Crim. App. 1971); Riddell v. Rhay, 79 Wash.2d 248, 484 P.2d 907 (1971); Taylor v. State, 52 Wis.2d 453, 190 N.W.2d 208 (1971); Ameen v. State, 51 Wis.2d 175, 186 N.W.2d 206 (1971).