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Miranda v. Arizona—The Use of Inadmissible Evidence for Impeachment Purposes

Stanley B. Kent

Although the Miranda decision primarily focused upon the inadmissibility into evidence of a defendant's illegally obtained confession, a different but closely related problem of impeachment of the defendant-witness, briefly touched upon by Miranda, is the subject of this article. Illegally obtained evidence is inadmissible in the prosecutor's case in chief, and the author argues that even though this evidence is admissible for certain collateral matters, defendants are and should be immune from impeachment by otherwise inadmissible evidence when the effect is to contradict the exculpatory nature of their direct testimony. Mr. Kent also criticizes admissions on collateral matters and "minor points," which authorize the use of illegally obtained evidence and invite a disregard of United States Supreme Court mandates rendering illegal acquisition of evidence profitless under all circumstances.

WHEN A RULE of evidence is applicable solely to the federal court system, the federal cases construing that rule generally are of little interest to the individual states. Thus, state courts that permitted the introduction of illegally seized evidence under any circumstances were likely to regard federal definitions of probable cause as exercises in casuistry.[1] But when the United States Supreme Court in *Mapp v. Ohio*[2] announced that the exclusionary rule extends to the state as well as to the federal system, scores of federal cases defining probable cause immediately became relevant and were often decisive in state prosecutions. In time, no doubt, the states will acquire considerable experience in administering the criminal evidence rules recently imposed upon them. Nor is there reason to believe that state judges are less ca-

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[1] Before 1960, fewer than half of the states had punitive provisions in their law relating directly to unreasonable searches and seizures. See Mapp v. Ohio, 367 U.S. 643, 652 (1961). But it would have been incorrect to assume that because punitive measures could have been taken in many states against officers who acted in violation of these provisions, the evidence illegally procured was thereby necessarily excluded in a subsequent trial. Twenty-four states held illegally seized evidence admissible in criminal trials. See Elkins v. United States, 364 U.S. 206, app. 224-25 (1960).

[2] 367 U.S. 643 (1961).

pable than their federal brethren of interpreting and applying Supreme Court decisions. For the present, however, the states must look to federal interpretations, if only for the practical reason that the federal judiciary has had to contend with these rules and their exceptions for years.

I. ANCILLARY EFFECT OF MIRANDA

Miranda v. Arizona[3] has created results similar to those following *Mapp*: a series of federal impeachment cases previously ignored by the states have now become an integral part of their criminal jurisprudence. The comment on *Miranda*, especially the early, acrimonious remarks predicting the imminent collapse of law and order in the United States, has focused on the inadmissibility into evidence of a defendant's statement or confession in the prosecution's case in chief.[4] This is natural enough, for *Miranda* and its three companion cases focused upon this precise issue. The federal impeachment cases are addressed to a different but closely related problem: assuming that a statement given to the police by the defendant is inadmissible, can it nevertheless be used for impeachment purposes if the defendant elects to testify and his testimony conflicts with the statement? *Miranda* itself barely touches upon this question. Until the Supreme Court confronts it directly, the answer must be sought in the federal cases that followed, interpreted, and applied *Walder v. United States*.[5]

A. Impeachment Process

There is, as suggested, a terse reference to impeachment in *Miranda*. The Court, fully aware that this opinion would be closely examined for exceptions and omissions, took special precautions to discourage attempts at fine distinctions between different types of statements by asserting:

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[3] 384 U.S. 436 (1966). *Miranda* was bracketed with three other cases, all of which carry the same Supreme Court citation because they were argued, considered, and decided as a group.

[4] Among the most acrimonious and certainly the earliest comments are the dissenting opinions in *Miranda* itself: "I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large." *Id.* at 504 (Harlan, J., dissenting); "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him." *Id.* at 542 (White, J., dissenting).

[5] 347 U.S. 62 (1954).

> The warnings required and the waiver necessary . . . are . . . prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at a 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. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.[6]

Evidently, then, the principal reason for the Court's refusal to except even exculpatory statements from the preconditions for admissibility is its belief that a statement intended to be exculpatory often proves later to be quite inculpatory.[7] By way of illustration the Court cited the perils of impeachment.[8] On the other hand, it can be argued that if there had been an intention to absolutely forbid the use of inadmissible statements for impeachment purposes, the opinion would have so stated. But the Court was silent as to this point, and it can only be taken to mean that the impeachment rules forged by the *Walder*[9] line of cases are neither abrogated nor weakened.

B. Admission of Exculpatory Statements

A second question is under what circumstances might an exculpatory statement — that is, a statement absolving one from guilt — become damaging. If a suspect is taken into police custody on a homicide charge and gives a statement to the effect that he did not commit the crime and, moreover, that he never even met the

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[6] 384 U.S. at 476-77.

[7] In Escobedo v. Illinois, 378 U.S. 478 (1964), the defendant, at the police station, accused another man of committing the crime. The Supreme Court pointed out that the defendant, in this way, had, for the first time since he had been taken into custody, admitted to some knowledge of the crime. *Id.* at 482-83.

[8] 384 U.S. at 477.

[9] Walder v. United States, 347 U.S. 62 (1954). See text accompanying note 5 *supra.*

victim, the statement is unquestionably meant to be exculpatory. At this stage it undoubtedly is. At trial, in addition to the testimony which links the defendant to the homicide, the prosecutor probably will present witnesses who can testify to having seen the defendant and the victim together on several occasions.

The defendant will then be faced with the choice of testifying in his own behalf. If he takes the stand, he will vigorously deny the charge but will admit that he had known the deceased victim. If he may now be cross-examined and impeached on the conflict between his testimony and his previous statement, his credibility will be severely, and perhaps fatally, damaged. Merely having known the victim is surely not incriminating, but the turn of events would have radically altered the originally exculpatory character of the defendant's statement. It has now become a powerful weapon in the hands of the prosecutor and has exposed the defendant as a liar. Notwithstanding the latter's strenuous effort to rehabilitate himself by protesting that he was confused, misled, or frightened at the police station, his untruthfulness on this collateral point may cause the jury to disbelieve him altogether. Presumably, this is what the *Miranda* Court had in mind when it spoke of "guilt by implication."

In the situation described, there is no question that impeachment would be permitted if the *Miranda* rules had been heeded when the statement was taken. The *Walder* line of cases[10] becomes significant when these strictures are not heeded.

II. The Walder Line of Cases

Walder itself is a peculiar case. The defendant was indicted in 1950 on drug charges. Before trial, he moved to suppress the physical evidence taken from him on the ground that the search and seizure violated *Weeks v. United States.*[11] His motion was granted. Deprived of its principal evidence, the government was forced to dismiss the indictment.

In 1952, the defendant was again indicted on drug charges, the alleged acts, however, being later than and distinct from those in the 1950 indictment. On direct examination, the defendant stated that he never had possessed narcotics, and he repeated this assertion

[10] *Ibid.*

[11] 232 U.S. 383 (1914). This case was limited in its application to the federal court system and federal government agencies. Nearly a half-century elapsed before, in Mapp v. Ohio, 367 U.S. 643 (1961), the exclusionary principle of *Weeks* was extended to the states.

on cross-examination.[12] The government, over objection, then rebutted the defendant's testimony with evidence obtained in the 1950 raid. The defendant was convicted, and the Supreme Court ultimately granted certiorari because the case raised a novel aspect of the *Weeks* rule.[13]

The Court's opinion, written by Mr. Justice Frankfurter, centered on the direct testimony aspect of the trial, emphatically stating that a defendant is constitutionally guaranteed the right to deny all the elements of the crime charged against him.[14] Such a denial does not permit the government to rebut the defendant's testimony with evidence illegally obtained and therefore not available for its case in chief. But, in the present situation, the defendant did not merely deny commission of the crime; rather, he made a "sweeping claim"[15] that he had never possessed or dealt in narcotics. To bar rebuttal in these circumstances would allow the defendant to resort to "perjurious testimony"[16] in reliance on the incapacity of the government to attack his credibility. The Court continued:

> 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 . . . .[17]

A. Edible Apples of the "Poisoned Tree"

There is more to be said about *Walder*, but this much is already clear: evidence procured by judicially condemned methods may still be admissible in some circumstances and for some purposes. The imagery so often encountered in commentary on *Mapp* and *Miranda* is more colorful than accurate; apparently a "poisoned tree" can produce a few edible apples.

The *Walder* Court was satisfied that the facts before it were to be "sharply contrasted"[18] with those in *Agnello v. United States*,[19]

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12 347 U.S. at 63-64.

13 *Id.* at 64.

14 *Id.* at 65.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 *Id.* at 66.

19 269 U.S. 20 (1925). In *Agnello*, the Court referred to this passage in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1919): "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." 269

which had been cited by the defendant. The contrast is said to be found in the sparse direct testimony of the *Agnello* defendant who, unlike the defendant in *Walder v. United States*,[20] had not waived his protection from impeachment.

That the two cases differ in this respect is unarguable, but it seems not to be the crucial difference. More to the point is the predictable effect of the impeaching evidence. In *Walder*, even if full credence had been given to the government's claim that its agents had found narcotics in the defendant's possession two years earlier, all the jury was necessarily bound to do was find him less than impeccably truthful. But because these narcotics were not the subject of the indictment, acquittal was still possible. In *Agnello*, on the contrary, the impeaching testimony related directly to the indictment; if it were believed, the jury had no reasonable alternative to a finding of guilty. In short, in one instance the evidence was inculpatory, in the other it was not.

B. *Standards for Admitting Evidence*

This interpretation of *Walder* has been adopted by later federal courts even though it departs from the rationale of that case.[21] As the standard for judging admissibility of evidence, this test is easier to apply than one which demands close scrutiny and analysis of the defendant's direct testimony. Also, the later cases make no distinction between different forms or types of illegally acquired evidence, that is, whether the evidence is physical or in the form of written or spoken words.[22]

Before *Miranda*,[23] the conditions which permitted a statement to be introduced into evidence had not been defined with precision. The Supreme Court cases spoke of the "totality of circumstances"[24]

U.S. at 35. If the last phrase is taken literally, impeachment vis-à-vis such evidence is barred, too. Obviously, however, later courts have not taken it literally.

[20] 347 U.S. 62, 66 (1954).

[21] *E.g.*, United States v. Curry, 358 F.2d 904, 909-12 (2d Cir. 1966); Inge v. United States, 356 F.2d 345, 349-50 (D.C. Cir. 1966); White v. United States, 349 F.2d 965, 967-70 (D.C. Cir. 1965); Johnson & Stewart v. United States, 344 F.2d 163, 165-66 (D.C. Cir. 1964); Tate v. United States, 283 F.2d 377, 379 (D.C. Cir. 1960).

[22] There is a basis for distinguishing between evidence illegally seized and statements that violate the standards established in *Miranda*. The latter are excluded by the fifth amendment which, by its terms, is directed at the exclusion of evidence. The fourth amendment contains no such direct provision, and the courts have said repeatedly that the exclusion of illegally seized evidence is intended to deter police from unconstitutional conduct.

[23] Miranda v. Arizona, 384 U.S. 436 (1966).

[24] The "totality of circumstances" rule was enunciated in Haynes v. Washington, 373 U.S. 503 (1963). See also Leyra v. Denno, 347 U.S. 556 (1954).

surrounding the taking of a statement; therefore, a case-by-case determination of admissibility was necessary. *Escobedo v. Illinois*[25] was a long stride towards the development of a more exact standard, to say nothing, of course, of the case's specific extension to the states of prohibitions once considered exclusively federal. With *Miranda*, there is very little room left for speculation on standards for case-in-chief admissibility.[26]

The cases that follow in this discussion were decided before *Miranda* and in the wake of *Walder*. The policy considerations that motivated the *Miranda* decision may one day lead the Court to announce that evidence proscribed in the case in chief is proscribed for all purposes; if so, even the distinction between inculpatory statements and those which merely impeach credibility will become moot. But, to reiterate, it is assumed that this is not presently the law and that *Miranda*'s specific pronouncements govern only the narrow fact situation in *Miranda* and the cases joined with it, that is, the use of a statement in the case in chief. It is therefore further assumed that labeling an illegally acquired statement inculpatory remains decisive.

In *White v. United States*[27] the defendant, subsequently convicted of murder, testified that he had acted in self-defense when the deceased had come menancingly towards him with his hand in his pocket. There was no such claim in his statement following his arrest, but use of this point to impeach the defendant was held reversible error.[28]

The court said that "Inadmissible evidence is not rendered admissible merely because the defendant testified in his own behalf."[29] It was further held that as the statement contradicted his only defense, it was clearly improper for impeachment.[30] The *White* opinion referred to *Johnson & Stewart v. United States*,[31] particularly to that portion of the opinion that explains the real sense of *Walder*.[32]

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[25] 378 U.S. 478 (1964).

[26] The defendant must be warned that he has the right to remain silent and that anything he says can be used against him; and he must be informed that he has the right to the presence of an attorney and that if he cannot afford one, an attorney will be appointed for him. Although a knowing and intelligent waiver may be made, the burden of proving such waiver rests with the prosecution. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[27] 349 F.2d 965 (D.C. Cir. 1965).

[28] *Id.* at 968.

[29] *Id.* at 967.

[30] *Id.* at 968.

[31] 344 F.2d 163 (D.C. Cir. 1964).

[32] Walder v. United States, 347 U.S. 62 (1954).

"Moreover, the evidence used purportedly to impeach him was a confession of the very charge on trial, raising a clear likelihood of prejudice not present when, as in *Walder*, the impeaching evidence is unrelated to the indictment."[33] It is therefore obvious that, in the future, defendants will be immunized from the impeachment process if the effect of it would be to contradict the exculpatory nature of their direct testimony.

An especially illuminating case is *United States v. Curry*,[34] in which the defendant's statement to Federal Bureau of Investigation agents concerning his associations with accomplices and his wearing of a false mustache was in conflict with his direct testimony at trial. The trial court permitted impeachment on both matters, and the appellate court approved the ruling on the ground that these parts of the statement were "collateral to the ultimate issue of guilt."[35]

C. *Other Aspects of Impeachment*

Curry touches on two other aspects of impeachment likely to creep into later cases. While adhering to the principle that inadmissible statements on non-inculpatory matters may generally be used for impeachment, it suggests that there are limitations to this principle. If the statement is coerced by methods involving trickery or physical force, it may be inadmissible even for impeachment on issues collateral to guilt. But if the flaw in the taking of the statement is of a more technical nature, that is, of a nature not shocking to normal concepts of due process, it retains its admissibility for impeachment — but, of course, pertains only to collateral questions.[36]

Curry also comments on the instructions to be given to the jury. In *Walder*, Mr. Justice Frankfurter stated that the trial court had carefully instructed the jury that the impeaching testimony was to be received and considered only for the purpose of attacking the credibility of the defendant and not as evidence of guilt.[37] It is not clear whether the instruction was requested by the defendant in *Walder*, although *Curry* holds that the court is not bound to admon-

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[33] 344 U.S. at 166.

[34] 358 F.2d 904 (2d Cir. 1966).

[35] *Id.* at 910.

[36] The court found, as a matter of fact, that the statement was even admissible in the government's case in chief so, a fortiori, it was admissible for impeachment. But, if a statement were found to have been "unconstitutionally coerced," it would be inadmissible even for impeachment. *Id.* at 912. The absence of counsel at the interrogation is not an unconstitutional coercion, the opinion stated, but this case was decided fourteen months before *Miranda*.

[37] Walder v. United States, 347 U.S. 62, 64 (1954).

ish the jury on this point unless there is a specific request by the defendant.[38]

D. Impeachment on Collateral Matters

In the *Walder* line of cases, none presents more dramatic and irreconcilable conflicts between a defendant's direct testimony and his earlier statements than does *Inge v. United States*.[39] The defendant said at trial that the deceased had a knife, that he himself had been injured, and that he had no recollection of injuring the deceased; his pre-trial statement to the police was to the contrary on each point. The impeachment that followed was held on appeal to be reversible error.[40] After restating the rule that only collateral matters may be impeached and not those that pertain to the crux of the indictment, the court added that only inconsistencies on "minor points" or "lawful proper acts"[41] can be assailed by an otherwise inadmissible statement because untruthfulness in these respects does not tend to establish guilt.

Inge successfully refuted the government's contention that the defendant had had ample opportunity to rehabilitate himself and that the jury could very well have accepted his explanation of the inconsistencies. Such a finding, the court held, would be mere speculation.[42]

A few courts dealing with impeachment in this context have paused to consider the clash of values involved in their rulings. Such a case is *Tate v. United States*,[43] in which the court speaks of the proscription as a "prophylactic measure" but adds that the effect of the proscription on the use of illegally obtained evidence interferes with the historical function of a trial as a search for the truth.[44] The balance is struck, it is evident, by separately classifying inadmissible evidence as: (1) "minor" or "collateral," in which event its use as a means of impeaching the credibility of the defendant is fully authorized; or (2) as "inculpatory," in which event it is as ab-

[38] United States v. Curry, 358 F.2d 904, 912 (2d Cir. 1966). The trial court had not instructed the jury that the rebuttal evidence was admitted for impeachment only, but this was not held to be error because no request for such instruction had been made by the defendant.

[39] 356 F.2d 345 (D.C. Cir. 1966).

[40] *Id.* at 349.

[41] *Ibid.*

[42] *Id.* at 350.

[43] 283 F.2d 377 (D.C. Cir. 1960).

[44] *Id.* at 379.

solutely prohibited as when the prosecutor is presenting his case initially and the defendant has not yet approached the witness chair. It is a simple enough formula and ought not to confuse trial courts. But it is suggested that only the most careful analysis of the mental processes of juries — or for that matter, of judges when they are the triers of facts — can indicate whether the formula is sound. The troublesome question that remains is whether a defendant, revealed as a liar on "minor" matters, is still sufficiently credible to be believed on "major" matters. Furthermore, when it is remembered that the goal of the Supreme Court opinions in both *Miranda*[45] and *Mapp*[46] was to make illegal acquisition of evidence profitless, continued authorization of the use of such evidence, even for the limited purpose of impeachment of the defendant's credibility, invites continued disregard of the standards prescribed by those cases.

Measured by time, only a dozen years passed between *Walder*[47] and *Miranda*, but measured by more sensitive and sophisticated indices, the two cases are separated by totally different concepts of the impact of the Constitution on the minutiae of criminal procedure. One need not speculate to any great extent to predict that there will soon be a re-examination of the cases, state and federal, which, like *Walder*, maintain that there is still some evidentiary value in evidence illegally acquired.

III. CONCLUSION

Finally, consider the tragicomic facts of *United States v. Poe*.[48] The trial court ruled the defendant's statement inadmissible for the Government's case in chief. The defendant then asked the court whether, if he testified, the statement could be used for impeachment, but the court declined to make its ruling in advance.[49] Yield-

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[45] Miranda v. Arizona, 384 U.S. 436 (1966).

[46] Mapp v. Ohio, 367 U.S. 643 (1961). This "purpose" is not as clearly explicated in *Miranda* as it was in *Mapp*, although there can be doubt that police will not bother to engage in custodial interrogation techniques that are of no value in ensuing trials. However, in *Mapp*, the Court candidly admitted that the only effective means of prohibiting unconstitutional searches and seizures is to make their product inadmissible. On the other hand, the same consideration influenced the Supreme Court when it decided Weeks v. United States, 232 U.S. 383 (1914); in deciding Walder v. United States, 347 U.S. 62 (1954) forty years later, the Court nevertheless specifically authorized the use of illegally seized evidence for impeachment in some circumstances.

[47] *Ibid.*

[48] 352 F.2d 639 (D.C. Cir. 1965).

[49] *Ibid.*

ing to the advice of his lawyer who predicted that it would indeed be admissible and ruinous to his chances of acquittal in the process, the defendant chose not to testify and was found guilty. One year later a remorseful court, in granting a new trial on the application of the defendant's new counsel, determined that the ruling should have been made when requested and that under the *Walder* decision, the statement would be excluded.[50] Until the Supreme Court squarely answers the question raised in this discussion, other defendants are likely to face Mr. Poe's agonizing dilemma.

[50] This case is not clear authority for the proposition that a court must rule in advance of the defendant's taking the stand in his own defense. All that was actually decided was that the trial court had not abused its discretion in granting a new trial. *Id.* at 640.