

1975

## Criminal Procedure--Testimony Obtained in Violation of Miranda is Admissible in Evidence for Impeachment Purposes

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### Recommended Citation

Douglas B. Chomeau, *Criminal Procedure--Testimony Obtained in Violation of Miranda is Admissible in Evidence for Impeachment Purposes*, 10 Tulsa L. J. 697 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol10/iss4/15>

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CRIMINAL PROCEDURE—TESTIMONY OBTAINED IN VIOLATION OF MIRANDA IS ADMISSIBLE IN EVIDENCE FOR IMPEACHMENT PURPOSES. *Oregon v. Hass*, 43 U.S.L.W. 4417 (U.S. March 19, 1975).

In *Oregon v. Hass*,<sup>1</sup> the United States Supreme Court held that when a suspect in police custody has been given the warnings required by *Miranda v. Arizona*,<sup>2</sup> and the individual has requested that he be allowed to telephone his attorney, any inculpatory information that he has given before his attorney arrives may be used for the purposes of impeachment at trial. Hass was charged with burglary in connection with the theft of two bicycles, one of which had been recovered by the owner. On the day of the theft Hass was arrested and questioned by an Oregon State Patrol officer. *Miranda* warnings had been given before the interrogation had begun and Hass had given a valid waiver. He admitted that he had stolen the two bicycles and that he knew where one of them was located. In route to the location of the stolen bicycle, Hass asked that he be allowed to telephone an attorney. The officer told him that he would be allowed to do so when they returned to the police station. Hass then pointed out the location of the missing bicycle and the two residences from which the bicycles had been stolen.

At trial, the officer was allowed to testify before the jury that the defendant had admitted stealing the bicycles. However, the information obtained from the defendant after he had requested his attorney

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1. 43 U.S.L.W. 4417 (U.S. March 19, 1975).

2. 384 U.S. 436 (1966). In *Miranda*, the Supreme Court established requirements for custodial interrogation which had to be met before a suspect's statements would be admissible in evidence at trial:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not want to be interrogated, the police may not question him.

*Id.* at 444-45. Later in the opinion, the Court also said "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474.

was ruled inadmissible for the prosecution's case in chief. Hass then took the stand and testified that he and two friends were "riding around" in his Volkswagen truck on the day of the thefts. He said his friends departed from the vehicle while he drove slowly down the street. Subsequently, the two friends reappeared with bicycles which Hass said he did not at first realize were stolen. The defendant admitted telling the police officer that he had stolen the two bicycles, but that he had no idea what his friends were going to do and did not know where the victims' residences were located.

The police officer testified in rebuttal that Hass had pointed out the two residences from which the thefts had occurred. The trial court instructed the jury that the prior inconsistent statement of the defendant, obtained in violation of *Miranda*, could not be used as proof of the defendant's guilt but could be considered in deciding the credibility of Hass. The Oregon Court of Appeals reversed the trial court's decision and the Supreme Court of Oregon affirmed. The United States Supreme Court reversed the high court of Oregon and returned to the initial ruling of the trial court.<sup>3</sup>

The Supreme Court's reversal of the Oregon court is another step in the Court's apparent retreat from the protection against self-incrimination that was established in *Miranda*. The undermining of the *Miranda* decision initially began with the case of *Harris v. New York*.<sup>4</sup> Harris was arrested for selling heroin. After his arrest he was interrogated by police but was never given the *Miranda* warnings.<sup>5</sup> At trial he testified to statements which were inconsistent with what he had earlier told police. The prosecution on cross-examination introduced evidence which showed that Harris had made prior inconsistent statements. The trial court allowed the jury to use Harris' prior statements for the purpose of deciding his credibility but not his guilt.<sup>6</sup> The Supreme Court affirmed the trial court's ruling, which, according to the dissent, was in direct conflict with the *Miranda* decision.<sup>7</sup> Chief Justice Warren had said in *Miranda* that the prosecution could not use statements stemming from custodial interrogation if the procedural

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3. *Oregon v. Hass*, 13 Ore. App. 368, 510 P.2d 852, *aff'd*, 267 Ore. 489, 517 P.2d 671 (1973), *cert. granted*, 419 U.S. 823 (1974), *rev'd*, 43 U.S.L.W. 4417 (U.S. March 19, 1975).

4. 401 U.S. 222 (1971).

5. The interrogation in *Harris* took place before *Miranda* had been decided by the Supreme Court.

6. *Id.* at 223.

7. *Id.* at 231 (Brennan, J., dissenting).

safeguards established in *Miranda* were not met. Chief Justice Burger, in writing the majority opinion for *Harris*, dealt with the direct conflict by carving out an exception to the *Miranda* decision. The theory was that all evidence obtained in a way which violated the *Miranda* safeguards was barred from being used in the prosecution's case in chief. However, not all evidence ruled inadmissible for the prosecution's case in chief was to be barred for all other reasons. To justify the result reached in *Harris*, Chief Justice Burger followed *Walder v. United States*,<sup>8</sup> a case in which physical evidence, impermissible for use in the prosecution's case in chief, was permitted for the purpose of impeachment. He quoted the majority opinion of *Walder* which said, "[t]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."<sup>9</sup> The tone of the opinion pointed to an unwillingness to allow perjurious testimony to go uncontrolled merely because the police had illegally gathered the evidence which they possessed. The *Harris* majority said, "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."<sup>10</sup> The new test of admissibility was to be whether trustworthiness of the evidence was sufficient to meet legal standards.<sup>11</sup> The *Harris* decision evidenced a dislike, by certain members of the court, of *Miranda*. It was clear that further attacks upon *Miranda* would come in the future.

Justice Blackmun's majority opinion in *Hass* pinpointed the real issue of the case as whether *Harris* had any bearing on the *Hass* case.<sup>12</sup>

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8. 347 U.S. 62 (1954).

9. *Id.* at 65.

10. 401 U.S. at 226.

11. *Id.* at 224.

12. In his dissent, Justice Marshall disagreed with the idea that the only real issue involved in *Hass* was the bearing which *Harris* had upon the case. In *Hass* the respondent claimed that when state law is more restrictive against the prosecution than federal law, the Court is unable to compel a state to conform to federal law. This claim arose because the Constitution of Oregon had a separate prohibition against compulsory self incrimination. Justice Marshall was concerned with the fact that the lower courts conceivably could have based their decisions upon state law rather than federal and therefore the result reached in the *Hass* case would be incorrect. Concluding that the case should be remanded, he said, "the Court should not review a state decision reversing a conviction unless it is quite clear that the state court has resolved all applicable state law questions adversely to the defendant and that it feels compelled by its view of the federal constitutional issue to reverse the conviction at hand." 43 U.S.L.W. at 4421. The majority dismissed the claim, finding that the Oregon court's decision did not rest on the Oregon Constitution or state law since neither was cited. "The fact that the Oregon courts found it necessary to attempt to distinguish *Harris v. New York* . . . reveals the federal basis." 43 U.S.L.W. at 4419.

He was unable to find a valid distinction that could exist between the *Hass* and *Harris* cases:

[As in *Harris*] the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility . . . [and] 'the benefits of this process should not be lost . . . .' [T]here is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief. . . . Here, too, the shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even prejudicially, free from the risk of confrontation with prior inconsistent utterances.<sup>13</sup>

Justice Blackmun found that if all those reasons sufficed in *Harris* then the same result must therefore exist in *Hass*.

Some writers have viewed the Supreme Court's holding in *Harris* to have been based upon a misapplication of prior case law.<sup>14</sup> *Hass* can also be characterized as such a misapplication by the Court. Justice Blackmun's entire opinion is based on the rationale that *Harris* and *Hass* are not capable of being differentiated and therefore the result must be the same. However, the Supreme Court of Oregon and the dissent of Justice Brennan do point a significant difference between the two cases. In *Harris* there were no *Miranda* warnings given whatsoever. The interrogation in *Harris* took place before the *Miranda* decision had been announced so it is not surprising that the police officers had not given the warnings. The officers at that time did not realize that information obtained in such a way would be inadmissible in the prosecution's case in chief. There was no deterrent effect to illegal police actions of that type and no incentive to refrain from such illegal interrogation.

The Court could easily have distinguished the two cases on the differing effect that each result might have upon police conduct and the public's constitutional rights. The fact that much of the rationale used for deciding *Harris* may also apply to *Hass* is not conclusive that each case should have the same result when the very different aspects of the two cases are also examined.

Although Justice Blackmun was not able to differentiate between *Hass* and *Harris* he did admit that police conduct might be affected by the *Hass* decision:

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13. 43 U.S.L.W. at 4419.

14. Note, *Admitting the Inadmissible—The Wounding of Miranda*, 23 BAYLOR L. REV. 639 (1971); 48 CHI.-KENT L. REV. 124 (1971); 39 GEO. WASH. L. REV. 1241 (1971); 85 HARV. L. REV. 44 (1971). These writers all viewed the Court's use of *Walder v. United States* as a misapplication of the *Walder* decision to *Harris*.

One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material.<sup>15</sup>

However, Justice Blackmun concluded there was only a speculative possibility of gaining from such conduct and, "[i]n any event, the balance was struck in *Harris*, and we are not disposed to change it now."<sup>16</sup>

Justice Brennan, in his dissent, was much more dissatisfied with what effect the *Hass* decision may have upon police conduct. Even after *Harris* the police had some incentive to follow *Miranda* because if the warnings were given the accused might still make statements which could be used in the prosecution's case in chief. However, after the holding in *Hass*, if a suspect requests an attorney, the interrogation will probably continue until the suspect's attorney arrives. While the police still have an incentive to give the *Miranda* warnings, the *Hass* decision allows something to be gained by continued illegal interrogation of a suspect. The Court has now made it possible for the police to obtain information, which, so long as voluntarily given, may be valuable in impeaching the suspect's testimony at trial, effectively preventing him from taking the stand in his own defense.

When Brennan reiterated his dissent for the *Harris* decision it is obvious that he could not condone such a violation of the *Miranda* rules:

[I]t is monstrous that the courts should aid or abet the law-breaking police officer. It is abiding truth that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse its disregard of the charter of its own existence."<sup>17</sup>

Chief Justice Burger was willing, in *Harris*, to allow illegally obtained evidence to enjoy an advantage over perjurious testimony in a trial, but Justice Brennan's dissent in *Hass* shows that he would rather protect the individual from self incrimination than protect the public from perjury.

The decision reached in *Hass* has done a great deal to further weaken the protection against self-incrimination that was created in *Miranda*. However, in the future, the *Hass* decision may result in more

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15. 43 U.S.L.W. at 4420.

16. *Id.*

17. *Harris v. New York*, 401 U.S. 222, 232 (1971) (Brennan, J., dissenting); *Oregon v. Hass*, 43 U.S.L.W. 4417, 4420 (U.S. March 19, 1975) (Brennan, J., dissenting).

than a mere weakening of *Miranda*. Chief Justice Warren's opinion in *Miranda* created a new standard for measuring whether an individual had been compelled to testify against himself. The Chief Justice did not view compulsion as being merely physical coercion or abuse. He viewed custodial interrogation of a suspect as being inherently a form of compulsion. The new rules were intended to create a standard beyond which the police could not go. Whether there was actual compulsion or not, the Court would look to a violation of the *Miranda* rules as constituting compulsion. The new standard eliminated the need for a case by case analysis of the totality of the circumstances which had formerly been used to decide whether compulsion existed.

In *Hass*, the Court has decided that a mere violation of *Miranda* no longer makes testimony inadmissible for all purposes. A change has been made in the method the Court uses in deciding whether evidence to be used for impeachment purposes has been compelled. Justice Blackmun described the standard to be used when he said, "[i]f in a given case, the officer's conduct amounts to abuse, that case like those involving coercion or duress may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."<sup>18</sup> By returning to the standard of voluntariness, for evidence to be used in impeaching a defendant's credibility, the Court has involved itself in duplicity. There are now two standards that must be used for evaluating whether the defendant's statements have been compelled. Not only must a trial judge determine whether inculpatory statements were obtained in *compliance* with *Miranda* for purposes of the prosecution's case in chief, he must also determine, subject to review by the Supreme Court, whether statements obtained in *violation* of *Miranda* were voluntarily made under the traditional "totality of the circumstances" test for the purposes of impeachment. It is unlikely that the court will allow these dual standards to continue. If the Court can so easily return to a case by case approach for such statements, it is but a few cases away until it decides to use the voluntariness test for all statements made by the accused, perhaps using *Hass* as the cornerstone for the abolishment of *Miranda* altogether.

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18. 43 U.S.L.W. at 4420.