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A Defendant's Testimony, Which Is Expounded on Direct Examination or Elicited on Cross-Examination, May Be Rebutted by the Prosecution's Introduction of Evidence, Obtained in Violation of Gideon, for the Purpose of Impeaching the Defendant's Credibility, Regardless of Whether Such Evidence Pertains to a Collateral Matter or Is Directly Related to the Crime in Question.

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It has been suggested that *Getty* provides hope for a more modern and better balanced handling of our natural resources.[35] This is certainly a desired effect and in line with the court's recognition of our public policy of developing mineral resources while at the same time permitting the utilization of the surface for productive agricultural uses.[36] There is, however, a limit to the effective accommodation which can be achieved or recognized between two conflicting interests. Although there are fact questions inherent in a determination of what is reasonable, positive guidelines should be given when possible.[37]

The dissent points out that lease provisions were given very little weight by the majority in arriving at their decision. This minimizing of the contractual considerations coupled with the effective application of the "due regard" concept, makes an inroad on the former emphasis upon the mineral lessee's rights. This trend is more clearly revealed when *Getty* is read in conjunction with *Acker v. Guinn*.[38] The policy or goal of our supreme court is not questioned; however, in an effort to achieve balance between the lessee's rights and the surface owner's interests, there may presently be a tendency to overemphasize the surface owner's rights.

Peter R. Tinsley

CRIMINAL LAW—ADMISSIBILITY OF EVIDENCE FOR IMPEACHMENT PURPOSES—A DEFENDANT'S TESTIMONY, WHICH IS EXPOUNDED ON DIRECT EXAMINATION OR ELICITED ON CROSS-EXAMINATION, MAY BE REBUTTED BY THE PROSECUTION'S INTRODUCTION OF EVIDENCE, OBTAINED IN VIOLATION OF *Gideon*, FOR THE PURPOSE OF IMPEACHING THE DEFENDANT'S CREDIBILITY, REGARDLESS OF WHETHER SUCH EVIDENCE PERTAINS TO A COLLATERAL MATTER OR IS DIRECTLY RELATED TO THE CRIME IN QUESTION. *United States ex rel. Walker v. Follette*, 443 F.2d 167 (2d Cir. 1971).

Matthew Walker had been indicted for committing the crimes of rape, attempted robbery, grand larceny and possession and use of a dangerous weapon. The prosecution's chief witness was a woman who testified that the petitioner, a man whom she had never seen before, forced himself into her car, threatened her with a knife, struck her and demanded her money. She alleged that the petitioner then took over

35 *See* Note, 2 TEX. TECH L. REV. 355 (1971).
36 Getty Oil Company v. Jones, 14 Tex. Sup. Ct. J. 372, 375 (May 26, 1971).
37 Also, contractual considerations should not be minimized in an effort to put into effect the policy regarding our mineral resources. It should be noted that prior cases rarely refer to this policy statement that appears in *Getty*.
38 464 S.W.2d 348 (Tex. Sup. 1971).

the wheel of the car and drove away with her. She further alleged that he struck her again several times and eventually raped her. The petitioner's testimony was at a direct variance with that of the prosecution's witness. He denied committing the crimes and testified that he and the witness were well acquainted and their relations on that night were entirely voluntary. Thus, the credibility of the petitioner was an extremely important issue in the case. In an apparent attempt to display his good character the petitioner testified on direct examination that he had never been convicted of a crime. On cross-examination the prosecutor elicited testimony from the petitioner concerning two prior convictions; a firearms violation and disorderly conduct. No contention was made by the petitioner at the trial that he had not been represented by counsel in these two prior convictions. The petitioner was convicted by a jury verdict in the county court and the conviction was affirmed by the appellate division.[1] Walker subsequently filed a petition for a writ of habeas corpus in the District Court for the Southern District of New York. Relying on the United States Supreme Court's decision in *Gideon v. Wainwright*,[2] the petitioner claimed that his right to a fair trial, guaranteed by the sixth amendment, was violated when he was cross-examined about the two prior convictions in which he allegedly was not represented by counsel.[3] In denying the petition Judge Mansfield stated that the petitioner's constitutional rights had not been violated.[4] Held—*Affirmed.* A defendant's testimony, which is expounded on direct examination or elicited on cross-examination, may be rebutted by the prosecution's introduction of evidence, obtained in violation of *Gideon*, for the purpose of impeaching the defendant's credibility, regardless of whether such evidence pertains to a collateral matter or is directly related to the crime in question. The disposition of this case is controlled by the recent Supreme Court decision in *Harris v. New York*.[5] The fact that the constitutional infirmity in *Harris* was a violation of *Miranda*, whereas in this case it was a violation of *Gideon*, has no effect on the conclusion. When the petitioner elected to testify in his own defense, he put his credibility in issue. By lying in the course of his testimony, he opens the door for the prosecution to attack his credibility by the admission of tainted evidence, provided such evidence satisfies legal standards of trustworthiness.

[1] People v. Walker, 265 N.Y.S.2d 609 (Sup. Ct. 1965), *cert. denied*, 385 U.S. 864, 87 S. Ct. 121, 17 L. Ed.2d 91 (1966).

[2] 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963).

[3] No objection was made by the petitioner during the trial because *Gideon* was not decided until March 18, 1963, after the petitioner had been convicted. The rule in *Gideon* is retroactive and therefore would be available to the petitioner. *See* Doughty v. Maxwell, 376 U.S. 202, 84 S. Ct. 702, 11 L. Ed.2d 650 (1965) (mem.); Pickelsimer v. Wainwright, 375 U.S. 2, 84 S. Ct. 80, 11 L. Ed.2d 41 (1963) (mem.).

[4] United States *ex rel.* Walker v. Follette, 311 F. Supp. 490 (S.D.N.Y. 1970).

[5] 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed.2d 1 (1971).

The traditional common law doctrine of admitting evidence which was procured by illegal means[6] was almost universally accepted[7] until the Supreme Court's decision in *Weeks v. United States*[8] established the doctrine of excluding evidence which had been secured in violation of constitutional safeguards.[9] In *Weeks* the trial court permitted the admission of evidence which had been seized by a United States marshal from the defendant's home, in his absence and without a search warrant. In reversing the defendant's conviction, Justice Day stated:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshal . . . acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in *direct* violation of the constitutional prohibition against such action.[10]

The Supreme Court subsequently extended the scope of this exclusionary doctrine in the cases of *Silverthorne Lumber Co. v. United States*[11] and *Agnello v. United States*.[12] The decision in *Silverthorne* displayed the Court's willingness to extend the *Weeks* doctrine beyond the exclusion of the immediate fruits of the search.[13] Government agents

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6 C. McCORMICK, LAW OF EVIDENCE, § 137, at 291 (1954).

7 Prior to 1914, the Supreme Court deviated from the traditional view on one occasion. In Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1885), the Court stated that an order to produce an incriminating document was an unlawful search and since it was secured in violation of the fourth amendment it was inadmissible. In 1904, the Court reapproved the traditional doctrine of the admissibility of illegally obtained evidence by impliedly overruling *Boyd* in the case of Adams v. New York, 192 U.S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1904).

8 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

9 The Court's decision in *Weeks* applied only to the federal law. In Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), the Court stated that the right of privacy, protected by the fourth amendment, was binding on the states through the due process clause of the fourteenth amendment, however, the federal exclusionary rule of *Weeks* was held not to be a part of the fourth amendment, and thus was not binding on the states. The federal exclusionary rule was ultimately imposed on the states in the cases of Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed.2d 1081 (1961) (fourth amendment); Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed.2d 653 (1964) (fifth amendment); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963) (sixth amendment).

10 Weeks v. United States, 232 U.S. 383, 393, 34 S. Ct. 341, 344, 58 L. Ed. 652, 656 (1914). (Emphasis added.)

11 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920).

12 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925).

13 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S. Ct. 182, 183, 64 L. Ed. 319, 321 (1920). In Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963), the Court stated that the "fruit of the poisonous tree doctrine" is not limited to physical tangible evidence. *See generally* Note, *Fruit of the Poisonous Tree—A Plea For Relevant Criteria*, 115 U. PA. L. REV. 1136 (1967).

attempted to use the knowledge gained from the use of the photographed copies of papers illegally seized from the defendant company's premises to cause subpoenas to be issued requiring production of the original papers. The government, while in form repudiating and condemning the illegal seizure, attempted to use this evidence in an *indirect* violation of the defendant's constitutional rights under the fourth amendment.[14] Justice Holmes, delivering the opinion of the Court, declared:

> 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.*[15]

As a result of these cases, the courts refused to allow the introduction of evidence which was either a direct[16] or an indirect[17] violation of the fourth amendment.

In the case of *Agnello v. United States* the prosecution introduced into evidence a can of cocaine, which had been illegally obtained from the defendant's room, to rebut the testimony given by the defendant on cross-examination. In reversing the defendant's conviction, the Court held:

> [T]he 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, . . . 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. . . . The admission of evidence obtained by the search and seizure was error and prejudicial to the rights of Frank Agnello.[18]

In 1954, the Court was called upon in the case of *Walder v. United States*[19] to determine whether the defendant's assertions on *direct examination* opened the door, solely for the purpose of attacking the defendant's credibility, to the admission of illegally obtained evidence which stemmed from an earlier proceeding.[20] On direct examination the defendant stated that he had never possessed, purchased or sold narcotics. The prosecution on cross-examination asked the defendant

14 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391, 40 S. Ct. 182, 182, 64 L. Ed. 319, 320 (1920).

15 *Id.* at 392, 40 S. Ct. at 183, 64 L. Ed. at 321. (Emphasis added.)

16 Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

17 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920).

18 Agnello v. United States, 269 U.S. 20, 35, 46 S. Ct. 4, 7, 70 L. Ed. 145, 150 (1925), *quoting* from Justice Holmes' opinion in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S. Ct. 182, 183, 64 L. Ed. 319, 321 (1920).

19 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). *See* Note, 32 TEXAS L. REV. 883 (1954).

20 Walder v. United States, 347 U.S. 62, 64, 74 S. Ct. 354, 355, 98 L. Ed. 503, 506 (1954).

about a heroin capsule which was unlawfully seized from the defendant's home in connection with a previous arrest. The evidence was admitted over the defendant's objections. The trial judge charged the jury that this evidence was not to be considered for determining the defendant's guilt, but solely for the purpose of impeaching the defendant's credibility. Justice Frankfurter, speaking for the majority, stated:

> 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. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.[21]

The Court stated that the Constitution guarantees the defendant the right to deny all the elements of a case against him without thereby allowing the prosecution to introduce constitutionally infirm evidence.[22] When the defendant goes beyond the mere denial of complicity in the crimes for which he was charged and perjures himself, he should not then be allowed to capitalize on the government's disability to use such tainted evidence to challenge his credibility.[23] The Court sharply contrasted the situation in this case with that in *Agnello*.[24] The defendant in *Agnello* made no perjurious statements on direct examination, as did the defendant in the *Walder* case. The constitutionally infirm evidence in *Agnello* was directly related to the crime for which he was being charged, whereas in *Walder* such evidence related to *collateral matters*.

In 1968, the United States Court of Appeals for the Second Circuit, in the case of *United States v. Fox*,[25] adhered to the principles set out in *Walder* and *Agnello*. In *Fox* the defendant denied on cross-examination that he had given an inconsistent statement to government agents after his arrest. The trial court permitted the government on rebuttal to prove the inconsistent statement, even though the statement was given without the benefit of the *Miranda* warnings. The Second Circuit, in reversing the defendant's conviction, stated that the doctrine expressed in *Walder* could not be extended to the facts of this case.[26]

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21 *Id.* at 65, 74 S. Ct. at 356, 98 L. Ed. at 507.

22 *Id.*

23 *Id. Cf.* Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

24 Walder v. United States, 347 U.S. 62, 66, 74 S. Ct. 354, 356, 98 L. Ed. 503, 507 (1954).

25 403 F.2d 97 (2d Cir. 1968). *Contra*, United States v. Vanterpool, 394 F.2d 697 (2d Cir. 1968); United States v. Anderson, 394 F.2d 743 (2d Cir. 1968), where the "warnings," given prior to the decision in *Miranda*, went much further toward complying with the substance of *Miranda* than those given in *Fox*.

26 United States v. Fox, 403 F.2d 97, 103 (2d Cir. 1968). *Contra*, United States v. Curry, 358 F.2d 904 (2d Cir. 1966), where the court extended the *Walder* doctrine by permitting the use of statements which were illegally obtained from the defendant in order to im-

In explanation of this refusal to extend the *Walder* doctrine, the Second Circuit drew a fine distinction between *Walder* and this case. In *Walder* the defendant's testimony was given on *direct examination* and was related to a *collateral matter*. In *Fox* the testimony was elicited on *cross-examination* and was *directly related* to the crime in question.

The recent Supreme Court case of *Harris v. New York*[27] revitalized and broadened the Court's decision in *Walder*.[28] The majority recognized and even pointed out the fact that in *Walder* the defendant was impeached as to *collateral matters* included in his *direct examination*, whereas in *Harris* the petitioner was impeached as to testimony elicited on *cross-examination* and *related directly* to the crime for which he was being charged.[29] Mr. Chief Justice Burger, speaking for the majority, stated:

> We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*. . . . The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby.[30]

In rendering their decision in *Harris* the Court considered certain exclusionary language in *Miranda v. Arizona*.[31]

> Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. . . . It does not follow from *Miranda* that evidence inadmissible against an

peach his credibility on collateral matters not directly related to the question of guilt or contradictory of his allegations regarding the facts. *See generally* Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939 (1967).

27 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed.2d 1 (1971). *See* Comment, *Impeachment of a Defendant-Witness By the Use of Illegally Obtained Statements: From "Walder" to "Harris"—The Exception Becomes the Rule*, 22 SYRACUSE L. REV. 685 (1971); Note, 52 MIL. L. REV. 180 (1971). *See generally* Cole, *Impeachment With Unconstitutionally Obtained Evidence: Coming to Grips With the Perjurious Defendant*, 62 J. CRIM. LAW 1 (1971).

28 Note, 52 MIL. L. REV. 180 (1971).

29 Harris v. New York, 401 U.S. 222, —, 91 S. Ct. 643, 645, 28 L. Ed.2d 1, 4 (1971).

30 *Id.*

31 *Id.* The Court in *Miranda* said:

> The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. . . . [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.

Miranda v. Arizona, 384 U.S. 436, 476, 86 S. Ct. 1602, 1629, 16 L. Ed.2d 694, 725 (1966). The majority in *Harris* treated this language as dictum, while the minority relied on the same language in their conclusions.

> accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.[32]

The Court further stated:

> The 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.[33]

The dissenting opinion in *Harris* based its conclusion on the *distinctions* propounded in the *Walder* case.[34] The minority stated that in *Walder, collateral evidence* was used to impeach the defendant's *direct testimony,* whereas in *Harris* the petitioner was impeached as to matters *directly related* to the crimes for which he was being charged.[35] Mr. Justice Brennan, delivering the dissenting opinion, pointed out that the Court in *Walder* held:

> 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.[36]

Walder did not specify which constitutional guarantees allow ". . . a defendant the fullest opportunity to meet the accusation against him."[37] Justice Brennan stated that the Court in *Miranda* made the fifth amendment's privilege against self-incrimination one of these guarantees.[38] The dissent interpreted the language used by the Court in *Miranda*[39] to mean an exclusion of *all* tainted evidence for *any* purpose, and to effect a complete disposal of ". . . any distinction between statements used on direct as opposed to cross-examination."[40]

Speaking for the Second Circuit, in the case of *United States ex rel. Walker v. Follette,*[41] Judge McLean stated that the disposition of this case is controlled by *Harris* and is also controlled by *Walder* because

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32 Harris v. New York, 401 U.S. 222, —, 91 S. Ct. 643, 645, 28 L. Ed.2d 1, 4 (1971).
33 *Id.* at —, 91 S. Ct. at 646, 28 L. Ed.2d at 5.
34 *Id.*
35 *Id.*
36 *Id.* at —, 91 S. Ct. at 647, 28 L. Ed.2d at 7, *citing* Walder v. United States, 347 U.S. 62, 65, 74 S. Ct. 354, 356, 98 L. Ed. 503, 507 (1954).
37 Harris v. New York, 401 U.S. 222, —, 91 S. Ct. 643, 647, 28 L. Ed.2d 1, 7 (1971).
38 *Id.*
39 Miranda v. Arizona, 384 U.S. 436, 476, 86 S. Ct. 1602, 1629, 16 L. Ed.2d 694, 725 (1966).
40 Harris v. New York, 401 U.S. 222, —, 91 S. Ct. 643, 648 n.4, 28 L. Ed.2d 1, 8 n.4 (1971). Six federal courts of appeals and the appellate courts of fourteen states have applied the language in *Miranda* (citations omitted). Only three state appellate courts have followed the interpretation given this language by *Harris* (citations omitted).
41 443 F.2d 167 (2d Cir. 1971).

the factual situation in the instant case is closer to that in *Walder*, in that both defendants gave inconsistent statements on *direct examination* and both defendants were impeached by the use of illegal evidence relating to *collateral matters*.[42] The court concluded that:

> It can make no difference that the constitutional infirmity in *Harris* and in *Walder* was 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.[43]

The Second Circuit could have justified their decision in *Walker* by relying *only* on the principles stated in *Walder*. The fact that the defendants in both cases testified as to *collateral matters* on *direct examination* would appear to constitute sufficient justification. Instead, the court held that *Harris* also governs this decision, even though in *Harris* the prosecution elicited the inconsistent statements from the petitioner on *cross-examination* and they were *directly related* to the crime for which he was charged. Thus, *Walker* completely abolished the distinctions the Second Circuit made in *Fox*.[44] The effect of such a sweeping decision amounts to an extension of the *Harris* case in that all utterances made by a defendant in the course of his testimony may be rebutted for impeachment purposes by the admission of *any prior inconsistencies*, no matter how constitutionally infirm they may be, as long as such inconsistencies otherwise satisfy legal standards of trustworthiness.[45] It makes no difference that the "prior inconsistencies" may have been violations of the fourth, fifth or sixth amendments.

An accused individual has constitutional guarantees which afford him an opportunity to deny all of the elements of the case against him.[46] As a result of *Harris* and *Walker*, if a defendant elects to testify in his own defense, a jury will be able to hear all the evidence accumulated by the prosecution, whether legally or illegally obtained, provided such evidence satisfies legal standards of trustworthiness. This defendant would be considered foolish to even take the stand in his own defense if the circumstances surrounding his arrest provide the government with prior inconsistencies in the defendant's story.[47] There is no authority for the proposition that the prosecution will completely disregard judicially protected rights in order to obtain evidence which

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[42] *Id.* at 170.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Walder v. United States, 347 U.S. 62, 65, 74 S. Ct. 354, 356, 98 L. Ed. 503, 507 (1954).
[47] Harris v. New York, 401 U.S. 222, —, 91 S. Ct. 643, 649, 28 L. Ed.2d 1, 9 (1971).