

6.14 Impeachment by Evidence Improperly Obtained

(1) A voluntary statement of a defendant obtained by law enforcement in violation of (a) the required pre-interrogation warnings or (b) the defendant’s right to counsel may be used to impeach the credibility of a defendant who gives testimony inconsistent with the statement.

(2) A voluntary statement or other evidence that is the product of an illegal seizure of or from a defendant may provide a basis for impeachment of a defendant who testifies in a manner inconsistent with his or her connection to the seized evidence.

(3) While the use of an inconsistent statement or other evidence taken in violation of a constitutional directive may be used to impeach the testimony of a defendant, it may not be used, directly or indirectly, to establish the People’s case.

Note

Introduction. The rationale underlying this rule is that, absent the rule, a “defendant’s constitutional shield against having illegally seized evidence used against him could be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances” or other evidence illegally seized from the defendant (*United States v Havens*, 446 US 620, 626 [1980] [internal quotation marks omitted]; see *People v Johnson*, 27 NY2d 119, 122 [1970] [“the constitutional privilege ought to shield a man against unfairness by the State in using such a statement in his prosecution, but should not immunize him from inquiry when he affirmatively proffers testimony as part of a strategy in contested litigation in which truth is a critical ingredient”]). The use of an inconsistent statement or other evidence taken in violation of a constitutional directive, however, is limited to impeachment of a defendant who testifies on his or her behalf and “may not be used, directly or indirectly, to establish the People’s case” (*People v Ricco*, 56 NY2d 320, 323 [1982]).

Subdivision (1) is derived from both United States Supreme Court and New York Court of Appeals decisions.

The principal decisions in the United States Supreme Court are *Harris v New York* (401 US 222 [1971]), *affg People v Harris*, 25 NY2d 175 [1969] [a

defendant's voluntary statement made to police that was inadmissible on the prosecution's case in chief because it was taken in violation of the required pre-interrogation warnings of *Miranda v Arizona* (384 US 436 [1966]) may be used to impeach the defendant's credibility]) and *Oregon v Hass* (420 US 714, 714-715 [1975] [the *Harris* holding was reaffirmed where the only difference between the two cases was that Harris received defective pre-interrogation warnings and Hass received proper warnings but thereafter asked to telephone a lawyer before making the statement used for impeachment]).

In *Harris*, the prior inconsistent statement was elicited during cross-examination of the defendant (*Harris*, 401 US at 223). In *Hass*, the Court held that the trial court erred in denying the prosecutor's application to call a rebuttal witness to testify to the inconsistent statement (*Hass*, 420 US at 723-724).

The Court of Appeals has long held that "[o]ur rule permits the use for impeachment not only of statements obtained in violation of a defendant's *Miranda* rights, but also of those obtained in violation of his right to counsel under the State Constitution" (*People v Maerling*, 64 NY2d 134, 140 [1984] [citations omitted]).

The principal decisions in the Court of Appeals on permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's pre-interrogation warnings include: *Harris* (25 NY2d at 177 [on cross-examination of the defendant, the prosecutor properly used a statement taken from the defendant in violation of the required pre-interrogation warnings that was at "complete variance" with the defendant's direct testimony to impeach the defendant]) and *People v Wilson* (28 NY3d 67, 72 [2016] [the prosecutor properly used the defendant's statements made to police after he had invoked his right to remain silent to impeach the defendant's testimony]).

The principal decisions in the Court of Appeals on permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's right to counsel include: *People v Kulis* (18 NY2d 318, 322 [1966] [a statement was taken after the defendant requested an attorney]); *People v Boodie* (26 NY2d 779, 781 [1970] [statement taken from defendant after arraignment in the absence of counsel]); *Maerling* (statements to a jail guard made while in custody in absence of counsel); and *People v Meadows* (64 NY2d 956, 958 [1985] [statement taken after the right to counsel attached by virtue of the commencement of the action by the filing of a complaint and issuance of a warrant]).

The defendant must have given the prior statement voluntarily (*Maerling*, 64 NY2d at 140 ["If the statement was voluntary, it may be used to impeach; if it was not, it may not be admitted, even though it may be reliable"]; *People v Walker*, 67 NY2d 776 [1986] [a judicial finding that the defendant's statement was involuntary precluded its use to impeach the defendant's testimony]). The People bear the burden of showing that statements were made voluntarily, i.e., that the "statements were not products of coercion," either physical or psychological (which

includes the use of “deception” in the service of “psychologically oriented interrogation” that “eclipse[s] individual will”); in other words the statements must be given as a result of a “ ‘free and unconstrained choice by [their] maker’ ” (*People v Thomas*, 22 NY3d 629, 641-642 [2014]). Also, a statement obtained by a grant of immunity is involuntary (*New Jersey v Portash*, 440 US 450, 459 [1979] [“Testimony given in response to a grant of legislative immunity is the essence of coerced testimony”]).

Harris authorized the use of the defendant’s prior statement for impeachment “provided of course that the trustworthiness of the evidence satisfies legal standards” (401 US at 224). That proviso, however, was not intended to require a judicial determination of trustworthiness; the purported inconsistent statement, as with any purported inconsistent statement, presents an issue of fact and credibility for the jury to decide (*People v Washington*, 51 NY2d 214, 221 [1980]).

The defendant opens the door to impeachment once the defendant “recounts the events to which the prior inconsistent statement relates” (*People v Wise*, 46 NY2d 321, 327 [1978]; see Guide to NY Evid rule 4.08, “Open Door” Evidence)]. As *Wise* further explained: “where a defendant’s trial testimony offers one version of the events in question, and his prior remark to a police officer suggests a contrary view of those events, the jury is entitled to hear the previous statement so that it may fully assess the witness’ credibility” (*Wise* at 327-328; compare *People v Rahming*, 26 NY2d 411, 418 [1970] [in this case, the prosecutor erred in ranging “beyond the defendant’s direct examination ‘in order to lay a foundation for the tainted evidence (i.e., statement taken in violation of pre-interrogation warnings) on rebuttal’ ” (citations omitted)]; see *Havens*, 446 US 620).

Subdivision (2) is derived from the holdings of the United States Supreme Court. (See *Walder v United States*, 347 US 62, 64 [1954] [the defendant’s testimony on direct examination that he had never possessed any narcotics opened the door, solely for the purpose of attacking the defendant’s credibility, to evidence of the heroin unlawfully seized from him in connection with a prior case that was dismissed due to the illegal seizure of the heroin]; *Havens*, 446 US at 627-628 [holding that “a defendant’s statements made in response to proper cross-examination reasonably suggested by the defendant’s direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible on the government’s direct case, or otherwise, as substantive evidence of guilt”]; see *United States v Leon*, 468 US 897, 910 [1984] [“Evidence obtained in violation of the Fourth Amendment and inadmissible in the prosecution’s case in chief may be used to impeach a defendant’s direct testimony”].)

“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" (*Walder* at 65).

The Court of Appeals has relied on the Supreme Court holdings in its decisions permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's pre-interrogation warnings or right to counsel (*Kulis*, 18 NY2d at 322-323; *Johnson*, 27 NY2d at 121-122; *Maerling*, 64 NY2d at 140-141). The Appellate Division has applied the holding in *Havens* to the facts of individual cases (*People v LaFontant*, 46 AD3d 840, 841-842 [2d Dept 2007] [when the defendant testified that he had not possessed a gun prior to the day of the incident, a photograph of the defendant holding a gun that was the product of an illegal search of his cell phone was properly admitted as impeachment evidence]; *People v Donnelly*, 103 AD2d 941, 941-942 [3d Dept 1984] [when the defendant testified concerning his consumption of alcohol prior to the accident, the results of a blood alcohol test that had been suppressed was properly admitted]; see *People v Dash*, 126 AD2d 737, 737 [2d Dept 1987] ["While illegally obtained physical evidence is inadmissible as substantive proof in the People's case-in-chief, it may be used for purposes of impeaching a defendant who testifies in his own behalf"].

Method of Impeachment. The traditional requirements for proving an inconsistent statement of a defendant are to raise the statement and circumstances of its making with the defendant on cross-examination and, if the defendant denies making the statement, to introduce it through rebuttal evidence (Guide to NY Evid rule 6:15, Impeachment by Prior Inconsistent Statement).

More than a century ago, however, in *Blossom v Barrett* (37 NY 434, 438 [1868]), the Court of Appeals held that the foundation for a prior inconsistent statement "does not apply when the admission sought to be proved is that of a party to the suit. The party's confessions are competent without interrogating him at all in regard to it." *Mindlin v Dorfman* (197 App Div 770, 772 [1st Dept 1921]) explained the rationale for *Blossom* as follows:

"The reason for the difference in the rule relating to witnesses and parties is that the only object of requiring the warning is to provide a fair opportunity of explanation before the witnesses' departure, whereas a party is in theory present during the trial, and has in fact ample opportunity to protect himself by taking the stand for any explanations which he may deem necessary after hearing the testimony of his alleged admissions."

The United States Supreme Court, in *Oregon v Hass* (420 US 714 [1975]), approved the introduction of a statement, taken in violation of *Miranda*, solely in rebuttal, to impeach the credibility of the defendant's testimony. The defendant accordingly was not at first cross-examined about the statement. Consistent with the rationale of *Blossom* as explained in *Mindlin*, the defendant then "again took

the stand” (*id.* at 717) to address the rebuttal evidence, at which point the trial court instructed the jury that the statement bore only on the defendant’s credibility.

Some Appellate Division decisions, without considering *Blossom*, have held that it is error not to employ the traditional foundation requirements for a statement improperly obtained from the defendant, and, upon the failure to confront the defendant on cross-examination with the statement, rebuttal evidence of the inconsistent statement is not authorized (*People v Robinson*, 267 AD2d 1031, 1031 [4th Dept 1999]; *People v Watford*, 146 AD2d 590 [2d Dept 1989]; *People v Jones*, 134 AD2d 915 [4th Dept 1987]; *People v Grainger*, 114 AD2d 285, 290 [4th Dept 1986]).

Since *Blossom*, it appears that the Court of Appeals has not been asked whether the failure to question the defendant on cross-examination about an improperly obtained inconsistent statement precludes its use as rebuttal evidence. The Court has been presented with cases in which the traditional foundation requirements were employed, and, of course, there was no error in doing so. *Wise*, for example, states that the “law pertaining to prior inconsistent statements is well developed” and then lists the traditional foundation requirements that were utilized in that case; but *Wise* also stated that “[p]rimarily at issue here is whether defendant’s previous utterance was sufficiently inconsistent with his trial testimony to warrant its use on cross-examination” (*Wise* at 326).

There are, however, dicta, particularly in *People v Washington* (51 NY2d 214 [1980]), suggesting that *Blossom* still may represent current law and the presentation of an inconsistent statement improperly obtained from a testifying defendant may be admissible on rebuttal, without first confronting the defendant on cross-examination with the statement. *Washington* (at 220) states: “It is also apparent that the prosecutor may use the statements on cross-examination of the defendant (*Harris v New York, supra*) or on rebuttal by calling another witness to testify that the defendant made them (*Oregon v Hass, supra*)” (emphasis added).

Thus, *Washington* states, “or on rebuttal,” and cites to *Hass*, which approved introduction of the inconsistent statement *solely* on rebuttal, with the right of the defendant to resume the stand to address the rebuttal (as authorized by *Blossom*), and with an instruction to the jury that the statement related only to the credibility of the defendant (*Oregon* at 717).

Wise also makes a point of explaining that the evidence of the statement presented in rebuttal in that case met the requirements for rebuttal evidence, not simply that the statement was admissible on rebuttal because the defendant denied making the statement on cross-examination. (*Wise* at 328; *cf. People v Knight*, 80 NY2d 845, 847 [1992] [“the rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide”]; *People v Patterson*, 194 AD2d 570, 571

[2d Dept 1993] [“Under *People v Knight*, extrinsic evidence is not admissible if offered solely on the issue of the witness’s general credibility but may be admitted to the extent that it bears on the truthfulness of the alibi if it is used to challenge the validity of the alibi, a material issue in the case. If this threshold is met, the fact that the evidence also tends to impeach the witness’ credibility does not render the evidence collateral” (citation and internal quotation marks omitted).]

Subdivision (3) states the undisputed holding of decisional law that any authorized use of evidence improperly obtained is solely for the purposes of impeachment (*People v Ricco*, 56 NY2d at 323).