HB
349

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: January 12, 2004 — **FURTHER REFERRALS:**

Date of Committee Action: February 9, 2004

The JUDICIARY Committee considered: — **HB 349**

HOUSE BILL NO. 349 — **ILLEGALLY OBTAINED EVIDENCE**

"An Act amending Rule 412, Alaska Rules of Evidence."

Recommends it be replaced with [ ] **HCS** *or* [X] **CS for** HB 349 (JUD)
For Senate Bills with new title: [ ] *Technical Title* [ ] *New Title: HCR_* ______ [X] **Same Title** [ ] **New Title**

[ ] attach amendments
[ ] add new referral to ____________Committee
[ ] Letter of Intent____________Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES (*Assigned by Chief Clerk's Office)

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW				✓
ADM				✓

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
[signature]	SAMUELS	X			
[signature]	Holm	✓			
Gara	Gara			✓	
Chair: [signature]	McGuire	✓			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: HB349-LAW-CDCO-1-23
Bill Version: HB 349
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating Rule 412, Alaska Rules of Evidence."
RDU Criminal
Component CDCO
Sponsor Representatives Samuels, McGuire, Stolze, Dahlstrom, Wilson
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Rule 412, Alaska Rules of Evidence is amended in this bill to allow illegally obtained evidence to be used if a statement illegally obtained in violation of the Miranda Warning would be used to accuse or charge the person who made the statement if the prosecution shows that the statement was otherwise voluntary and not coerced. The bill also makes admittable illegally obtained evidence in a prosecution to impeach a witness if the prosecution shows that the evidence did not substantially violate the rights of the witness.

Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

Prepared by: Kathryn A. Daughhetee, Director
Phone 465-3673
Division Administrative Services
Date/Time 1/23/04 4:28 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 1/23/2004
Agency Department of Law

(Revised 12/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSHB 349(JUD)
() Publish Date:

Revision Date/Time (Note if correction):
Title: An Act amending Evidence Rule 412
Sponsor: Representatives Samuels, McGuire..
Requester: (H) Judiciary

Dept. Affected: Administration
BRU: Legal and Advocacy Services
Component: Public Defender Agency
Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Othe (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill, as amended in the CS, could have a fiscal impact on the operations of the Agency, but hopefully not a significant one. If enacted however, there will be additional hearings required to determine admissibility of illegally obtained evidence, and likely constitutional challenges, both of which will affect the operations of the Agency.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)-334-4416
Division: Public Defender Agency
Date/Time 2/13/04 12:00 AM
Approved by: Mike Miller, Commissioner
Date
Agency: Administration

(Revised 9/2003 OMB)

Representative Nancy Dahlstrom
Representative Lesil McGuire
Representative Ralph Samuels
Representative Bill Stoltze

HB 349

Sponsor Statement

"An Act Amending Rule 412, Alaska Rules of Evidence"

HB 349 is a bill that promotes truth telling by criminal defendants who choose to testify at trial.

Every criminal defendant has a constitutional right to testify in his defense. But that right must never be construed to include the right to commit perjury. Alaska's current law prevents courts from using suppressed prior inconsistent statements to challenge the credibility of defendants. This perverts the truth-finding process. It gives those who would lie under oath in a bid to escape justice a license to deceive jurors and judges as happened in a recent murder trial in Anchorage.

Under the supervision of a judge, a new law will permit prosecutors to cross-examine defendants using prior suppressed statements and evidence. Passage of HB 349 will bring Alaska into the mainstream of American and federal jurisprudence where such rules have been the law for years.

Alaska State Capitol Building, Juneau, AK 99801

(iii) Judgment on a plea of guilty or nolo contendere is reversed on direct or collateral review.

(b) This rule shall not apply to (1) the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas when offered in subsequent proceedings as prior inconsistent statements, and (2) proceedings by a defendant to attack or enforce a plea agreement.

(Added by SCO 364 effective August 1, 1979)

Rule 411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Annotations

Cases

When examining a defendant's conduct to determine whether punitive damages are appropriate, it should make no difference that the defendant is insured or uninsured; accordingly, where jury responded "no" to question on special verdict form on whether plaintiff was entitled to punitive damages, exclusion of evidence of liability insurance was, if error, merely harmless error, even though defendant was allowed to present evidence to demonstrate his inability to absorb a punitive damage award. **Shane v. Rhines**, Op. No. 2750, 672 P2d 895 (Alaska 1983).

Where liability was not an issue in victim's suit against driver, evidence of driver's insurance coverage focused on the relevance of insurance to the driver's financial condition, a purpose not excluded by Alaska R. Evid. 411. **Fleegel v. Estate of Boyles**, Op. No. [illegible]41, 61 P.3d 1267 (Alaska 2002).

Rule 412. Evidence Illegally Obtained.

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under Miranda v. Arizona, 384 U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights.

(Added by SCO 364 effective August 1, 1979)

Annotations

Cases

Where the arrest is lawful, fact that arresting officer uses excessive force does not make the evidence obtained as a result of the arrest the product of illegality. **Martin v. State**, Op. No. 2298, 623 P2d 1225 (Alaska 1981).

Illegally seized evidence may be considered in fashioning a sentence when the illegally seized evidence is reliable, when the police conduct involved in obtaining the evidence does not shock the conscience of the court, and when it is clear that the evidence was not obtained for purposes of influencing the sentencing judge. **Elson v. State**, Op. No. 40, 633 P2d 292 (Alaska App. 1982).

The traditional requirement of standing has not been abrogated in search and seizure cases by adoption of this rule. **G.R. v. State**, Op. No. 61, 638 P2d 191 (Alaska App. 1982).

Defendant did not have standing to argue that his confession should be suppressed on the ground that it was the product of an illegal arrest and detention of his companion. **G.R. v. State**, Op. No. 61, 638 P2d 191 (Alaska App. 1981).

Defendant had no standing to object to police officers' contact with his building manager and no right to seek suppression of the evidence derived from her even if the contact was the result of a trespassory entrance into the apartment building. **Hubert v. State**, Op. No. 62, 638 P2d 677 (Alaska App. 1981).

Defendant had standing to contest the illegal arrest of codefendant which led to defendant's confession. **Unger v. State**, Op. No. 65, 640 P2d 151 (Alaska App. 1982).

This rule, which permits evidence illegally obtained to be used under certain circumstances in perjury prosecutions, applies to such evidence regardless of the basis for determining that it was illegally obtained. **Worthan. v. State**, Op. No. 69, 641 P2d 223 (Alaska Op. No. 1982).

Suppression of illegally obtained evidence in defendant's cocaine prosecution was not res judicata nor did it collaterally estop the state from using the evidence in defendant's subsequent perjury prosecution where there was no suggestion that this rule was considered at the first suppression hearing. **Wortham v. State**, Op. No. 69, 641 P2d 223 (Alaska App. 1982).

Illegally obtained tape recording of conversation between defendant and undercover police agent which was properly suppressed at defendant's drug trial was admissible at defendant's subsequent perjury trial where the recording was made in good faith and was not an intentional violation of the law. **Wortham v. State**, Op. No. 214, 657 P2d 856 (Alaska App. 1983).

Although this rule is not necessarily limited to violations of constitutional rights, it does not automatically apply to violations of all statutes. **Harker v. State**, Op. No. 2665, 663 P2d 932 (Alaska 1983).

Illegally obtained tape recording of conversation between defendant and undercover police agent was admissible at defendant's perjury trial. **Wortham v. State**, Op. No. 2697, 666 P2d 1042 (Alaska 1983).

This rule contains a standing requirement for search and seizure violations, but under the Alaska Constitution there are

exceptions to the requirement. Waring v. State, Op. No. 2719, 670 P2d 357 (Alaska 1982).

A defendant has standing to assert the violation of a co-defendant's fourth amendment rights if he or she can show (1) that a police officer obtained the evidence as a result of gross or shocking misconduct, or (2) that the officer deliberately violated the co-defendant's rights. Waring v. State, Op. No. 2719, 670 P2d 357 (Alaska 1983).

Assuming, without deciding, that the warnings received by defendant regarding his testimony at a coroner's inquest were less than adequate to safeguard his right to remain silent, his testimony was nevertheless not involuntary or the product of coercion; therefore, his testimony at the coroner's inquest could be used against him in subsequent trial for perjury. Esmailka v. State, Op. No. 721, 740 P2d 466 (Alaska App. 1987).

Exclusionary rule did not apply to error by trial court in using telephonic testimony in support of search warrant without following statutory procedure since violation of statute was not in bad faith and since there was no claim that absent telephonic testimony warrant would have been invalid. Burrece v. State, Op. No. 1618, 976 P2d 241 (Alaska App. 1999).

ARTICLE V. PRIVILEGES

Rule 501. Privileges Recognized Only as Provided.

Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to:

(1) refuse to be a witness; or

(2) refuse to disclose any matter; or

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(Added by SCO 364 effective August 1, 1979)

Rule 502. Required Reports Privileged by Statute.

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer of an agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or ot failure to comply with the law in question.

(Added by SCO 364 effective August 1, 1979)

Rule 503. Lawyer-Client Privilege.

(a) **Definitions.** As used in this rule:

(1) A client is a person, public officer, or cor ration, association, or other organization or ent either public or private, who is rendered professio legal services by a lawyer, or who consults a law with a view to obtaining professional legal service

(2) A representative of the client is one hav authority to obtain professional legal services anc act on advice rendered pursuant thereto, on behal the client.

(3) A lawyer is a person authorized, or reas ably believed by the client to be authorized, to pi tice law in any state or nation.

(4) A representative of the lawyer is one ployed to assist the lawyer in the rendition of pro sional legal services.

(5) A communication is confidential if intended to be disclosed to third persons other t those to whom disclosure is in furtherance of rendition of professional legal services to the cl or those reasonably necessary for the transmissio the communication.

(b) **General Rule of Privilege.** A client ha privilege to refuse to disclose and to prevent other person from disclosing confidential comm cations made for the purpose of facilitating rendition of professional legal services to the cli (1) between the client or the client's representa and the client's lawyer or the lawyer's representat or (2) between the client's lawyer and the lawy representative, or (3) by the client or the clie lawyer to a lawyer representing another in a matte common interest, or (4) between representative the client or between the client and a representa of the client, or (5) between lawyers representing client.

(c) **Who May Claim the Privilege.** The pi lege may be claimed by the client, the clie guardian or conservator, the personal representa of a deceased client, or the successor, trustee similar representative of a corporation, associat or other organization, whether or not in existe The person who was the lawyer at the time of communication may claim the privilege but only behalf of the client. The authority to do so is sumed in the absence of evidence to the contrary.

of insurance coverage is a tenuous one, as is its converse, evidence of insurance coverage or of the absence of such coverage lacks great probative value on the issue of fault. More importantly, perhaps, the rule is designed to prevent a jury from deciding a close case on an improper basis — i.e., whether or not a party is insured. There is a danger that insurance evidence might skew the decision-making process of the jury by making it regret a possibly wrong decision against an uninsured person much more than a similar decision under identical facts against a person whose insurance status is unknown, or by making the jury regret any erroneous decision against an insured party less than it would an erroneous decision against a person whose insurance status is unknown. This is not to suggest that a jury will intentionally make a mistake. It suggests only that in close cases someone must bear the risk of error, that the presence or absence of insurance is not regarded as an appropriate guide for allocating the risk, and that it is possible that a jury will misuse insurance evidence. This rule, identical to the federal rule, is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence of this rule describes the limitations on it. Whereas evidence of insurance coverage is inadmissible to prove negligence, there are several well established issues for which evidence of insurance coverage, or the lack of it, has probative value and is therefore admissible. Evidence of insurance of an object often indicates the person who controls or owns the object in question. Or, if A has insured B, there is some reason to draw the inference that A considers himself responsible for B's acts. While it is inconclusive proof of an agency relationship, the existence of such insurance has evidentiary value in helping to establish such a relationship.

Bias or prejudice of a witness or juror is a common concern when a witness or juror is connected with an insurance company. Such information often has been elicited during voir dire when a prospective juror is asked whether or not he has any connection with the insurance business. Although this is often a legitimate question, it may serve to remind the jury that a party may be insured. Similarly, questions as to a witness' affiliation with insurance interests may be legitimate impeachment tools, despite the danger of misuse of the insurance evidence.

But, the fact that evidence of insurance is sometimes admissible does not mean that it must be admitted whenever offered for a proper purpose. The danger of misuse of the evidence by the jury does not totally disappear when the evidence is introduced for a reason other than to prove fault or absence thereof, even though a limiting instruction will be given upon request under Rule 105. Rule 403 requires the trial judge to balance the probative value of the evidence on one issue against the potential danger that the jury will favor uninsured defendants and disfavor insured defendants.

Trial lawyers are on notice that insurance is admissible for some purposes and not others. Alaska R. Civ. P. 26(b) (2) allows discovery of insurance agreements, and the parties should be able to obtain a judicial decision on whether insurance evidence is to be admitted or otherwise utilized and for what purposes before such evidence is brought to the attention of the jury. *Poulin v. Zartman*, 542 P.2d 251, 265 (Alaska 1975).

If this rule is to have maximum effectiveness, it must be enforced by the trial judge Inadvertent or deliberate tactical references to insurance should be cured immediately, if possible, with instructions to the jury to disregard the information. The trial judge is vested with wide discretion to grant a new trial where such slips are not easily cured. *See Peters v. Benson*, 425 P.2d 149, 152-153 (Alaska 1967).

Rule 412. Evidence Illegally Obtained.

Although illegally obtained evidence may be highly probative, this rule recognizes that such evidence must generally be excluded in order to breathe life into constitutional guarantees and to remove incentives for governmental intrusion into protected areas. While these rules of evidence generally do not incorporate constitutional doctrine, Rule 412 will go beyond what federal constitutional decisions require in protecting the rights of those accused of crime. Thus, for example, in *Harris v. New York*, 401 U.S. 222, 28 L.Ed.2d 1 (1971), the United States Supreme Court approved the use of statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 695 (1966), for impeachment purposes but not as part of the prosecutor's case-in-chief. *Walder v. United States*, 347 U.S. 62, 98 L.Ed. 503 (1954), sanctioned the introduction of testimony on illegally seized heroin to rebut the defendant's denial of prior drug possession. Rule 412 would forbid such uses as long as proper objection is made by the defendant. This last proviso is a change from Criminal Rule 26 (g).

This ban on the use of both testimonial and physical evidence for impeachment purposes should not amount to a significant incentive for defendants

to commit perjury. The prosecution will still be able to cross-examine the defendant on his claims, if it believes in good faith that the defendant's testimony is false. And, as discussed below, some otherwise inadmissible evidence will still be permitted in perjury prosecutions.

Rule 412 also does not bar the use as impeachment evidence of statements made by a defendant who testifies on a preliminary question of fact as permitted by Rule 104(d). If the preliminary question of fact involves a constitutional question, the argument could be made that a ruling favorable to the defendant renders any statements made during the preliminary hearing "fruit of the poisonous tree" and therefore inadmissible. *Cf. Harrison v. United States,* 392 U.S. 219 (1968) (use of evidence in case-in-chief). *But see People v. Sturgis,* 317 N.E.2d 545 (Ill. 1974), *cert. denied,* 420 U.S. 936, 43 L.Ed.2d 412 (1975). *See also United States v. Kahan,* 415 U.S. 239, 39 L.Ed.2d 297 (1974); *United States v. Mandujano,* 425 U.S. 564, 584, 48 L.Ed.2d 212, 277 (1976) (Brennan, J., concurring in the judgment). Where the defendant is successful in suppressing evidence the underlying constitutional right is protected. It seems an extravagant extension of constitutional protection to permit one version of facts from the defendant's mouth to keep evidence from a tribunal and to permit the defendant to offer another version at trial. If the motion to suppress is unsuccessful, there is even less reason to refrain from using the defendant's statements in support of the motion as impeachment evidence. The decision to take the oath and testify is attenuation enough to remove the taint of the initial illegality. The record of the statements, the advice of counsel, and the oath together remove many of the problems associated with *Harris v. New York, supra.*

In perjury prosecutions, the government's interest in convicting guilty defendants and the extreme difficulty of obtaining reliable evidence warrant controlled use of illegally obtained evidence. Hence Rule 412 contains two narrow exceptions to the blanket prohibition on the use of illegally obtained evidence properly objected to.

The first exception governs statements obtained in violation of the right to warnings under *Miranda,* if the statement whose admission is sought is relevant to the issue of guilt or innocence and shown to be otherwise voluntary and not coerced. The latter limitation, meant to guarantee the statement's reliability, is derived from *Harris v. New York, supra,* where the U.S. Supreme Court observed, "Petitioner makes no claim that the statements made to the police were coerced or involuntary." 401 U.S. at 224, 28 L.Ed.2d at 4.

The second exception governs evidence obtained in violation of the fourth amendment and/or its Alaska counterpart, article I, section 14. Again a limitation is imposed: the evidence must be relevant to the issue of guilt or innocence, and must not have been obtained "in substantial violation of rights." This limitation is not imposed to ensure reliability of the evidence, but rather recognizes that judicial integrity requires the exclusion of evidence for all purposes if the police misconduct involved in obtaining it was flagrant. The concept of a "substantial violation of rights" is necessarily flexible, and whether or not such a violation occurred will depend on the facts of each case. The simple reference to "rights" is intended to emphasize that this section has no bearing on the law of standing in search and seizure cases.

ARTICLE V. PRIVILEGES

Introductory Comment

Article V provides for eight different privileges and recognizes that other privileges may be created by statute or court rule. Because most of the privileges covered by Article V were recognized before the adoption of these Rules, the Reporter's Comments do not attempt to state the rationales for the various privileges and to justify them. Most of the privileges have been debated elsewhere, and the privileges have survived the debate. The Reporter's Comments accompanying the various rules do explain, however, why particular approaches to defining rules were taken and why others were rejected.

Two rules of privilege which are found in several jurisdictions are omitted from these rules. One is the privilege for official information; the other is the privilege previously provided by Rule 43 (h) (7), Alaska R. Civ. P., covering evidence tending to degrade the character of a witness. This Comment explains the omissions.

The Wigmore treatise, 8 Wigmore on Evidence § 2378, at 807-08, (J. McNaughton rev. 1961), states that the best collection of arguments in favor of an official information privilege is as follows (quoting Gellhorn & Byse, Administrative Law Cases and Comments 617-18 (4th ed. 1960):

> [The discussion relates to the SEC and summarizes that agency's brief in a federal case]. The documents and testimony relating to intra-agency discussions, communications, memoranda, reports, recommendations, positions taken at staff and Commission level with respect to the

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Gerry Luckhaupt, Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: February 16, 2004

Re: CS Request

Please create a work draft House Judiciary Committee Substitute for work order # 23-LS1322\I, HB 349, incorporating the following changes:

Page 2, Line 1 and Page 2, line 13:
After "or" Insert "a" (so it reads "or a former defendant" in both places).

Page 2, Lines 3-4:
1) Insert commas before and after the clause "if required by law" to set it apart.
2) Delete "was governed by" and Insert " has been determined to be"
(if that language sounds awkward to you, then just please come up with something other than "was governed by"...Rep. Gara did not like that language).

The bill was passed out of committee last week, but we had some continuing discussion regarding the amendments.

If you have any questions, please call me at 4990. Thank you for all your work on this bill!

23-LS1322\I
Luckhaupt
2/11/04

CS FOR HOUSE BILL NO. 349(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES SAMUELS, MCGUIRE, STOLTZE AND DAHLSTROM, Wilson

A BILL

FOR AN ACT ENTITLED

1 **"An Act amending Rule 412, Alaska Rules of Evidence."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 *** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
4 to read:
5 DIRECT COURT RULE AMENDMENT. Rule 412, Alaska Rules of
6 Evidence, is amended to read:
7 **Rule 412. Evidence Illegally Obtained.** Evidence illegally obtained shall not
8 be used over proper objection by the defendant in a criminal prosecution for any
9 purpose except:
10 (1) a statement illegally obtained in violation of the right to warnings
11 under Miranda v. Arizona, 384 U.S. 436 (1966), may be used in
12 **(A)** a prosecution for perjury if the statement is relevant to the
13 issue of guilt or innocence and if the prosecution shows that the statement was
14 otherwise voluntary and not coerced; **or**
15 **(B) any prosecution, to impeach the defendant,**

1 codefendant, or a former defendant who made the statement if the
2 prosecution shows that the statement was
3 (i) otherwise voluntary and not coerced; and
4 (ii) recorded if required by law or was governed by
5 one of the recognized exceptions to the recording requirement; and
6 (2) other evidence illegally obtained may be admitted in
7 (A) a prosecution for perjury if it is relevant to the issue of
8 guilt or innocence and if the prosecution shows that the evidence was not
9 obtained in substantial violation of rights of the defendant; or
10 (B) any criminal action, to impeach the defendant,
11 codefendant, or former defendant if the prosecution shows that the
12 evidence was not obtained in substantial violation of rights of the
13 defendant, codefendant, or a former defendant, as appropriate.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: February 10, 2004

Re: CS Request

Please create a work draft House Judiciary Committee Substitute for work order # 23-LS1322\H, HB 349, incorporating the attached three amendments.

Regarding conceptual amendment #3, in addition to requirement that the statement be otherwise voluntary and not coerced, the committee wanted to add the requirement that the statement must also have been "recorded if required by law." (Rep. Gara wanted to be sure police could not abuse this law by saying they "lost" the tape.) The committee also wanted to be clear, however, that this would not exclude statements that were not recorded due to any currently recognized exception to the recording requirement (tape recorder malfunction, etc.). Please feel free to state this in any manner you see fit to make it clear this was the intent of the committee.

The bill was passed out of committee yesterday. If you have any questions, please call me at 4990. Thank you so much as always!

The information attached to this memo is **CONFIDENTIAL** an/or privileged. It is intended to be reviewed initially by only the individual named above. If the reader of this Memorandum is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination, or copying of the information contained herein is prohibited. If you have received this in error, please immediately notify the sender by telephone and return this to the sender at the above address.

23-LS1322\H
Luckhaupt
2/6/04

CS FOR HOUSE BILL NO. 349(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES SAMUELS, MCGUIRE, STOLTZE, AND DAHLSTROM, Wilson

A BILL

FOR AN ACT ENTITLED

1 **"An Act amending Rule 412, Alaska Rules of Evidence."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
4 to read:
5 DIRECT COURT RULE AMENDMENT. Rule 412, Alaska Rules of
6 Evidence, is amended to read:
7 **Rule 412. Evidence Illegally Obtained.** Evidence illegally obtained shall not
8 be used over proper objection by the defendant in a criminal prosecution for any
9 purpose except:
10 (1) a statement illegally obtained in violation of the right to warnings
11 under Miranda v. Arizona, 384 U.S. 436 (1966), may be used in
12 __(A)__ a prosecution for perjury if the statement is relevant to the
13 issue of guilt or innocence and if the prosecution shows that the statement was
14 otherwise voluntary and not coerced; __**or**__
15 __**(B) any prosecution, to impeach the ~~person~~ who made the**__ [handwritten: defendant, co-defendant or former defendant]

1 **statement if the prosecution shows that the statement was otherwise**
2 **voluntary and not coerced;** and
3 "recorded if required by law, ..." (2) other evidence illegally obtained may be admitted in
4 **(A)** a prosecution for perjury if it is relevant to **the** issue of
5 guilt or innocence and if the prosecution shows that the evidence was not
6 obtained in substantial violation of rights **of the defendant; or**
7 **(B) any civil or criminal action, to impeach** ~~a witness~~ the defendant, co-defendant or former defendant **if the**
8 **prosecution shows that the evidence was not obtained in substantial**
9 **violation of rights of the** ~~witness.~~ defendant, co-defendant or former defendant

CS HB 349/H Amendment #1 – PASSED
Offered by Rep Samuels

Page 2, line 7-9

(B) **any criminal action,** to impeach the **defendant** if the prosecution shows that the evidence was not obtained in substantial violation of rights of the **defendant.**

CSHB 349
Amendment #2 - PASSED
by Rep. Gruenberg

P. 1, Line 15
Delete "person"
Insert "defendant, co-defendant, or former defendant"

P. 2, Line 7
Delete "witness" (A#1 actually changed "witness" to "defendant")
Insert "the defendant, co-defendant, or former defendant"

P. 2, Line 9
Delete "witness" (A#1 actually changed "witness" to defendant")
Insert "the defendant, co-defendant, or former defendant

CSHB 349 by Rep. GARA
Conceptual Amendment 3 - PASSED

Insert @ p. 2 line 2 after "voluntary",

", recorded if required by law, * and not governed by one of * the existing/recognized exceptions to the recording requirement,"

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: February 5, 2004

Re: CS Request

Please create a work draft House Judiciary Committee Substitute for work order # 23-LS1322\D, HB 349, incorporating the following amendment:

Technical A.#1" Page 2, line 4: After "to" Insert "the"
(the committee is aware that the court rules do not have the word "the" there, but feels that this is grammatically incorrect and wishes to insert it in the bill)

The following were not adopted as amendments, but we would like the following changes incorporated into the CS as well:

1) Page 1, line 15: After "prosecution" Insert a comma so that (1)(B) reads as follows:

(B) any prosecution, to impeach the person who made the statement if the prosecution shows that the statement was otherwise voluntary and not coerced.

2) Page 2, line 7: After "any" Delete "prosecution" and Insert "civil or criminal action," (including a comma) so that (2)(B) reads as follows:

(B) any civil or criminal action, to impeach a witness if the prosecution shows that the evidence was not obtained in substantial violation of rights of the witness.

The bill will be reheard on Monday, February 9th at 1:00 p.m. If you have any questions, please call me at 4990. Thank you!

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

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IN THE DISTRICT COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ISAIAH L WALLNER,
DOB: 12/29/76
APSIN ID: 6714211
DMV NO. 6714211
SSN: 574-84-4768
ATN: 107-284-518

Defendant.

Court No. 3AN-S02-4342 Cr.
Search Warrant Nos: 3AN-02-229, 230, 231 SW

INFORMATION

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The following counts charge a crime involving DOMESTIC VIOLENCE as defined in AS 18.66.990: ALL COUNTS

Count I - AS 11.41.100(a)(1)(A)
Murder In The First Degree
Isaiah L Wallner - 001

Count II - AS 11.41.110(a)(1)
Murder In The Second Degree
Isaiah L Wallner - 002

Count III - AS 11.56.610(a)(1)
Tampering With Physical Evidence
Isaiah L Wallner - 003

THE DISTRICT ATTORNEY CHARGES:

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
(907) 269-6300

Count I

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L WALLNER intentionally caused the death of Brenda L. Wallner.

All of which is an unclassified felony offense being contrary to and in violation of AS 11.41.100(a)(1)(A) and against the peace and dignity of the State of Alaska.

Count II

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L WALLNER with intent to cause serious physical injury to Brenda L. Wallner or knowing that the conduct was substantially certain to cause death or serious physical injury to another person, caused the death of Brenda L. Wallner.

All of which is an unclassified felony offense being contrary to and in violation of AS 11.41.110(a)(1) and against the peace and dignity of the State of Alaska.

Count III

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L WALLNER destroyed, mutilated, altered, suppressed, concealed, or removed physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation.

All of which is a class C felony offense being contrary to and in violation of AS 11.56.610(a)(1) and against the peace and dignity of the State of Alaska.

The undersigned swears under oath this Information is based upon a review of police report 02-24984 submitted to date.

On May 22, 2002, at approximately 6:52 a.m. the Anchorage Police Department received a 911 call from Patricia Barazi stating that there was a female in the parking lot, unable to breathe, who had apparently been stabbed in the chest. A second call came from the upstairs neighbors who reported a female screaming for help in apartment number nine. Anchorage Police Officers arrived at the scene, in the

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parking lot at 1338 Ingra. Officers Foraker and Robinson made contact with the female, trying to hold her still, waiting for the paramedics. She was later identified as Brenda Wallner. When asked who did this to her, she replied "my husband", and when asked why, she said she did not know. The victim was transported to ARH and was declared dead at approximately 7:30 a.m. She had at least one stab wound in her chest, one on her arm, and three stab wounds in the back.

Sgt. Spadafora and Officer Jensen knocked at the door of the victim and suspect's apartment, 1335 Hyder #9. A person later identified as the defendant, Isaiah Wallner, the victim's husband, opened the door, and the police entered. The defendant was seated on the floor in the corner of the kitchen, with a knife to his throat. After refusing repeated demands to drop the knife, he was shot with a less lethal weapon four times. He was taken into custody and transported to Providence Medical Center for treatment of his injuries. He had bruising and tearing on both legs, and one arm.

After treatment for his injuries, he was transported to the Anchorage Police Department for an interview. He stated that he had been working the night shift, getting off work at 1:30 a.m. He walked home. The victim and two children were asleep on mattresses in a bedroom upstairs. One child, T.W., 20 months, is the child of the defendant and the victim. The other child, T.G., eight years old, is the child of the victim. His father lives out of state. The defendant stated that he sat on the corner of the mattress watching the victim sleep from approximately 1:45 until 5:00. He stated that he was "contemplating killing her". At one point he went down to the kitchen and got a paring knife, returning to the bedroom. The victim woke up and went to the kitchen. The victim and the defendant got into a verbal argument. Part of the argument included the fact that she was going to get a divorce, and take his child out of state. The defendant stated that she was always "poking" at him, calling him names, arguing about minor things. At one point the victim asked the defendant what he had been doing earlier that morning and he told her that he had been contemplating killing her. She told him that she was going out to call the police. He went upstairs to get the knife where he had left it, and then returned to the kitchen. The victim pushed him away to get to the

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door, after he pulled the knife on her. He said that he did not want her to call the police. They began to struggle, and he admitted stabbing her in the back. He said he was looking f r a good "vantage point" when he stabbed her in the back. When asked how far the knife went in, he stated "all the way". She fell to the floor on her back, and he stabbed her in the chest. According to the defendant, the victim then said to him "I'm going to die". The defendant let go of the knife. The victim was able to get out of the apartment. The defendant stated he began pacing around the kitchen. He said that there was a lot of blood. He began cleaning up the blood with a mop, and then heard the sirens. When he heard a knock on the door, he looked out and saw the police. He unlocked the door and left it ajar. He sat down with another knife, holding it to his throat. He admitted he wanted to kill himself. He said he would not drop the knife because he did not want to go to jail. He said that neither he nor the victim had been drinking or using drugs. When he was told that his wife had died, he responded "I wish there was the death penalty, I deserve it."

Members of the crime scene team recovered the murder weapon near where the victim had been found. Bloodstain patterns reveal that the stabbing was confined to the kitchen. There was quite a bit of blood in the kitchen, and it was noted that there was an attempt to mop up blood. There was a bloody palm print on the door leading outside from the hallway of the apartment building, where the victim had apparently run.

The eight-year-old boy, T.G. was also interviewed. He said he saw the defendant go into the kitchen and get a knife and stab his mom in the chest. He also said that his mom had been "grumpy" that morning.

BAIL INFORMATION

Defendant has following Alaska criminal conviction:

08/02/95 Damage Property

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(907) 269-6300

NCIC indicates Tennessee shows the following arrests but no disposition on the cases.

03/16/00	Possession of Marijuana
03/16/00	Possession of Drug Paraphernalia
03/16/00	Carrying Weapon For Purpose Of Going Armed
01/26/02	Domestic Assault
02/29/02	Theft Of Property

Particulars of these police contacts will be filed in a bail document tomorrow.

Dated at Anchorage, Alaska, this 22 day of May, 2002.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Mary Anne Henry
Mary Anne Henry
Assistant District Attorney
Alaska Bar No. 7610097

SUBSCRIBED AND SWORN to before me this 22nd day of May, 2002 at Anchorage, Alaska.

Linda D. Kiser
Notary Public in and for Alaska
My commission expires: 06/20/05

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
(907) 269-6300

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
ISAIAH L. WALLNER,)
DOB: 12/29/76)
APSIN ID: 6714211)
DMV NO. 6714211)
SSN: 574-84-4768)
ATN: 107-284-518)
)
Defendant.)
)

No. 3AN-S02-4342 CR.

INDICTMENT

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The following counts charge a crime involving DOMESTIC VIOLENCE as defined in AS 18.66.990: All

Count I - AS 11.41.100(a)(1)(A)
Murder In The First Degree
Isaiah L. Wallner - 001

Count II - AS 11.41.110(a)(1)
Murder In The Second Degree
Isaiah L. Wallner - 002

Count III - AS 11.56.610(a)(1)
Tampering With Physical Evidence
Isaiah L. Wallner - 003

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
(907) 269-6300

THE GRAND JURY CHARGES:

Count I

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L. WALLNER intentionally caused the death of Brenda L. Wallner.

All of which is an unclassified felony offense being contrary to and in violation of AS 11.41.100(a)(1)(A) and against the peace and dignity of the State of Alaska.

Count II

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L. WALLNER with intent to cause serious physical injury to Brenda L. Wallner or knowing that the conduct was substantially certain to cause death or serious physical injury to another person, caused the death of Brenda L. Wallner.

All of which is an unclassified felony offense being contrary to and in violation of AS 11.41.110(a)(1) and against the peace and dignity of the State of Alaska.

Count III

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L. WALLNER destroyed, mutilated, altered, suppressed, concealed, or removed physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation.

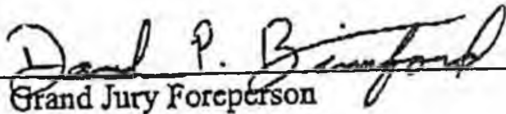
All of which is a class C felony offense being contrary to and in violation

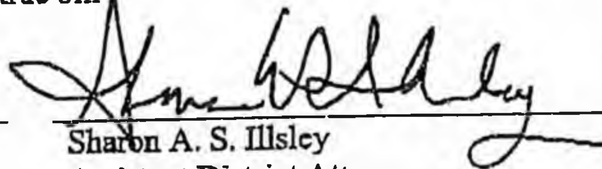
DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
(907) 269-6300

of AS 11.56.610(a)(1) and against the peace and dignity of the State of Alaska.

DATED this 30 [31st] day of May, 2002 at Anchorage, Alaska.

A true bill





Grand Jury Foreperson

Sharon A. S. Illsley
Assistant District Attorney
Bar No. 9009057

02-229 SW; 02-230 SW; 02-231 SW

WITNESSES EXAMINED BEFORE THE GRAND JURY:
Det. Pamela Perrenoud DSN 930
Karen Larkin
Dr. Franc Fallico

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
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Wallner convicted of murder
FIRST DEGREE: Man who killed wife destroyed evidence also, jury finds.

7/24/03
Thursday
B1
Alaska
Final

By SHEILA TOOMEY
Anchorage Daily News
Staff

A man who stabbed his wife 43 times intended to kill her, an Anchorage jury concluded Wednesday, convicting Isaiah **Wallner**, 28, of first-degree murder after one day of deliberation.
Judge Larry Card set sentencing for Nov. 25.
Prosecutor Sharon Illsley said after the verdict that she'll wait for a report on **Wallner** from the Department of Corrections before deciding what sentence to request. However, it's "a very aggravated case," she said.
The sentence range for first-degree murder is from 20 to 99 years with about 60 years the average.
Wallner also was convicted of destroying evidence for trying to clean up his bloodied kitchen before police arrived.
There was never any question that **Wallner** killed his wife, stabbing her repeatedly with a paring knife the morning of May 22, 2002. But defense attorney Craig Howard insisted it was an unreasoning rage killing and urged jurors to convict **Wallner** of second-degree murder or even manslaughter.
Brenda **Wallner**, 28, stumbled from the couple's Hyder Street apartment shortly after 6 a.m., crying for help, awakening several neighbors who came to her aid. She had been stabbed in both lungs and in her heart, Illsley told jurors. She named her husband as her killer before she died.
Her two sons, 8 years and 20 months, were in the apartment and the 8-year-old witnessed the murder.
Shortly after being taken in to custody, **Wallner** told police he came home from his night job at about 1:45 a.m. and watched his sleeping wife for hours, contemplating killing her. According to charging documents, he said he was unhappy because she wanted a divorce and because she was always nagging him.
He said he went to the kitchen at one point and got a knife, then returned to the bedroom. When his wife woke up, an argument started and he told her he had been thinking about killing her.
She said she was going to a nearby gas station to call police. Their apartment had no phone.
He started stabbing her because he didn't want her to call police, he said.

But this statement was ruled inadmissible at the trial because police continued questioning **Wallner** after he mentioned possibly wanting to contact a lawyer. Thus, when **Wallner** took the witness stand Tuesday and said that his wife had a knife, that he stabbed her in self defense only after she lunged at him, and that he wasn't thinking of killing her, Illsley couldn't use his prior statement to suggest he was lying.
Illsley declined to discuss the suppressed statement but said Wednesday that there are legal consequences for lying under oath.

Daily News reporter Sheila Toomey can be reached at stoomey@adn.com.

All Archives

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Wallner says he stabbed his wife in self-defense
TRIAL: Defendant said he snapped when she came after him with knife.

7/23/03
Wednesday
B1
Alaska
Final

By SHEILA TOOMEY
Anchorage Daily News
Staff

A man accused of killing his wife by stabbing her 43 times took the witness stand Tuesday and said it was self-defense.

Isaiah **Wallner** said his wife, Brenda, also had a knife the morning of May 22, 2002, when harsh words in the couple's apartment kitchen escalated to fatal violence.

Prosecutor Sharon Illsley told jurors **Wallner** killed his unarmed wife deliberately, stabbing her repeatedly after working himself into a fury over a series of minor irritations that culminated when she tried to leave the apartment to call police from a corner gas station.

The Hyder Street apartment did not have a phone.

Mortally wounded, Brenda **Wallner** ran from the apartment, covered in her own blood with a knife handle protruding from her chest, according to a neighbor who came to her aid. Before dying, she told witnesses and police that her husband killed her.

But **Wallner** said it wasn't an intentional killing. He just snapped when his wife lunged at him with her knife, he said. That caused him to also pick up a knife. He said he couldn't be more specific about what happened because he doesn't remember the killing.

Police found no trace of a second knife because he washed it and put it back in the drawer, he said. When police asked him about what happened that day, he didn't mention his wife also had a knife because he was trying to protect her.

Wallner's loss of memory caused some problems for him on cross-examination. He couldn't explain why his allegedly armed wife, who weighed 20 pounds more than him, had 43 wounds and he had only what seemed to be a fingernail scratch on his face.

And, although he doesn't remember what he repeatedly referred to as "the incident," he said his stepson's eyewitness testimony that he stabbed Brenda **Wallner** three times in the back "when she wasn't looking" was wrong.

According to medical testimony, Brenda **Wallner** had three stab wounds in her back, including one in each lung. She also had a knife wound in the heart, which Illsley said was probably the last blow delivered before she ran from the apartment. "He buried the knife in her chest" to keep her from leaving, but she got out, although it was too late for anyone to save her, Illsley said.

To assist Wallner's memory, Illsley played a tape of him talking to police shortly after the killing. He was sitting at his kitchen table threatening suicide with a knife and they were trying to talk to him. At one point he told them, "I think I lost it when she said she was going to call the cops when I said I was contemplating killing her."

Wallner said this wasn't what happened.

"So, you have no memory of what happened," Illsley snapped. "But you remember what didn't happen."
The two-knife theory dominated a long, agitated closing argument by defense attorney Craig Howard. "This was an uncontrollable rage," he told jurors, set off by a knife swipe from Brenda, the real cause of the scrape on Isaiah's face.
The defendant had no "conscious objective" to kill his wife, so he is obviously not guilty of first-degree murder, Howard said.
"Ms. Illsley should go into writing pulp fiction," he said, accusing the prosecution of trying to hide the presence of a second knife.
The 8-year-old stepson who witnessed the killing told police his mother started the fight and said he saw his stepfather clean and put a knife in the drawer after his mother left the apartment, Howard said. Police didn't photograph the contents of the drawer because they leaped to the conclusion that the bloody knife found on the ground outside was the only one involved, he said.
The woman who testified that Brenda had a knife sticking out of her chest before she fell down was wrong, Howard said. The dying woman must have been carrying it in her hand. Use deductive logic, he urged jurors.
And why was the knife found with the victim so bloody since she obviously didn't stab anyone with it? Because the **Wallners** must have somehow switched knives before she left the apartment, Howard said.
Illsley told jurors there was no second knife. Offering a photograph of Brenda Wallner's palms, sliced with defensive wounds, Illsley said it was obvious the victim wasn't holding anything in her hands during the attack.
The jury is expected to begin deliberating the case today.

Daily News reporter Sheila Toomey can be reached at stoomey@adn.com.

BILL ROTH / Anchorage Daily News
Murder defendant Isaiah **Wallner** said Tuesday that police found no trace of a second knife because he washed it and put it back in the drawer.

Photo 1: IsaiahWallner_072303.jpg

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Trial focuses on whether man meant to kill wife
MURDER? Brenda Wallner was cut 43 times in May 2002.

7/15/03
Tuesday
B1
Alaska
Final

By SHEILA TOOMEY
Anchorage Daily News
Staff

With stab wounds in both lungs, a knife handle protruding from her chest, and blood leaking from dozens of slices in her body, Brenda Wallner ran from her Fairview apartment one Wednesday morning last summer, screaming for help.
She collapsed near Patricia Barazi's first-floor balcony in a pool of blood that so drenched her T-shirt that the first police officer on the scene thought she was wearing a red top.
She fought to keep breathing and lived long enough to tell police and other people who came to her aid that her husband, Isaiah Wallner, killed her.
"I asked her, 'Who did this to you,' " said Karen Larkin, who was driving down Ingra Street on her way to work about 6:45 a.m. on May 22, 2002, and stopped to help.
"She told me, 'My husband did it.' "
In all, her husband did it 43 times, according to prosecutor Sharon Ilisley in opening statements Monday at Wallner's trial: 24 stab wounds were found on Brenda Wallner's body, and 19 defensive cuts.
So whodunit is not an issue in Judge Larry Card's sixth-floor courtroom. The only question is intent. Despite the carnage, Isaiah intended only to hurt Brenda, attorney Craig Howard told jurors. He did not intend to kill her.
The issue is first-degree murder vs. second-degree murder and a commensurate difference in the likely prison sentence. First-degree sentences tend to be from 65 to 99 years.
Second-degree is more likely to earn a defendant 30 to 60 years.
Howard said the fact that most of the stab wounds, made with a common kitchen paring knife, were superficial is evidence the defendant didn't mean to kill his wife. Only three wounds were fatal, he said.
The Wallners met in Tennessee. She was a customer at a gas station where he worked, Howard said. They fell in love but had a contentious off-and-on relationship. She had an 8-year-old son by a previous marriage, and the two of them had a son together in September 2000. They married in 2001 and life was great, Howard said.
Isaiah's father is an Alaska state trooper and his mother lives in Tennessee, so he split his time between the two, Howard said. He came back to Alaska hoping to find a better job.
At the time of the murder, Isaiah, now 28, worked nights at a fast-food restaurant and Brenda, 30, worked days in an ulu factory.
Everything was fine on May 21 and 22, Howard told jurors during the defense opening

statement. Isaiah walked home from work with a co-worker and was upbeat about life. So how did Brenda end up mortally wounded a few hours later?

"Sometime in the early morning hours there was a confrontation between Isaiah and Brenda. It became irrational on both sides," Howard said. Isaiah's attack was a rage killing, he said. Brenda was walking and yelling when she left the apartment, so Isaiah had no way of knowing she was mortally wounded.

Howard said the fact that Wallner didn't realize his wife was dead until police told him shows he didn't intend to kill her.

After Brenda ran out, Isaiah started mopping up the blood in the kitchen, Illsley said. When police tracked Brenda's blood trail back to the apartment, they found Isaiah holding a knife to his neck, threatening suicide. Police tried to talk him down, then shot him with nonlethal ammunition and took him into custody.

What no one mentioned Monday were Isaiah's alleged statements to police as he sat there with the knife. He said he watched his wife sleep for about three hours after he got home from work and contemplated killing her because she wanted a divorce, according to charging papers filed at the time of his arrest. The statements are not admissible at the trial.

Wallner is a slight, pale man with a long, dark pony tail. He has not cut his hair since his wife died, Howard said. At the defense table, Wallner closed his eyes at the sight of bloody pictures of his wife on the overhead projector and bowed his head at the sound of her voice on a tape made as she lay dying.

The trial is expected to wrap up this week or early next week.

Daily News reporter Sheila Toomey can be reached at stoomey@adn.com.

Graphic 1: Quote marks_071503.pdf

All Archives

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▷

Supreme Court of the United States

WALDER
v.
UNITED STATES.

No. 121.

Argued Nov. 30, 1953.
Decided Feb. 1, 1954.

Prosecution for unlawful sale of narcotics. The United States District Court for the Western District of Missouri entered judgment of conviction, and defendant appealed. The United States Court of Appeals for the Eighth Circuit, 201 F.2d 715, entered judgment affirming the conviction. On writ of certiorari, the United States Supreme Court, Mr. Justice Frankfurter, held that defendant's assertion on direct examination that he had never possessed any narcotics opened the door, solely for purpose of attacking his credibility, to evidence that heroin had been unlawfully seized from him in connection with earlier prosecution.

Affirmed.

Mr. Justice Black and Mr. Justice Douglas dissented.

West Headnotes

[1] Criminal Law ⚿394.1(3)
110k394.1(3) Most Cited Cases
(Formerly 110k394)

The government cannot violate the constitutional right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures and use the fruits of such unlawful conduct to secure a conviction and cannot make indirect use of such evidence in order to secure conviction, and a conviction cannot be supported by evidence obtained through leads from evidence obtained in violation of such constitutional right. U.S.C.A.Const. Amend. 4.

[2] Witnesses ⚿337(4)
410k337(4) Most Cited Cases

Defendant's assertion on direct examination in prosecution for unlawful sales of narcotics that he had never possessed any narcotics opened the door, solely for purpose of attacking his credibility, to evidence that heroin had been unlawfully seized from him in connection with earlier prosecution. 26 U.S.C.A. (I.R.C.1939) § 2554(a); U.S.C.A.Const. Amend. 4.

****354 *62** Mr. Paul A. Porter, Washington, D.C., for petitioner.

Mr. Robert S. Erdahl, for respondent.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

****355** In May 1950, petitioner was indicted in the United States District Court for the Western District of Missouri for purchasing and possessing one grain of heroin. Claiming that the heroin capsule had been obtained through an unlawful search and seizure, petitioner moved ***63** to suppress it. The motion was granted, and shortly thereafter, on the Government's motion, the case against petitioner was dismissed.

In January of 1952, petitioner was again indicted, this time for four other illicit transactions in narcotics. The Government's case consisted principally of the testimony of two drug addicts who claimed to have procured the illicit stuff from petitioner under the direction of federal agents. The only witness for the defense was the defendant himself, petitioner here. He denied any narcotics dealings with the two Government informers and attributed the testimony against him to personal hostility.

Early on his direct examination petitioner testified as follows:

'Q. Now, first, Mr. Walder, before we go further in your testimony, I want to you (sic) tell the Court and jury whether, not referring to these informers in this case, but whether you have ever sold any narcotics to anyone. A. I have never sold any narcotics to anyone in my life.

'Q. Have you ever had any narcotics in your possession, other than what may have been given to you by a physician for an ailment? A. No.

'Q. Now, I will ask you one more thing. Have

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you ever handed or given any narcotics to anyone as a gift or in any other manner without the receipt of any money or any other compensation? A. I have not.

'Q. Have you ever even acted as, say, have you acted as a conduit for the purpose of handling what you knew to be a narcotic from one person to another? A. No, Sir.'

*64 On cross-examination, in response to a question by Government counsel making reference to this direct testimony, petitioner reiterated his assertion that he had never purchased, sold or possessed any narcotics. Over the defendant's objection, the Government then questioned him about the heroin capsule unlawfully seized from his home in his presence back in February 1950. The defendant stoutly denied that any narcotics were taken from him at that time. [FN1] The Government then put on the stand one of the officers who had participated in the unlawful search and seizure and also the chemist who had analyzed the heroin capsule there seized. The trial judge admitted this evidence, but carefully charged the jury that it was not to be used to determine whether the defendant had committed the crimes here charged, but solely for the purpose of impeaching the defendant's credibility. The defendant was convicted and the Court of Appeals for the Eighth Circuit affirmed, one judge dissenting. 201 F.2d 715. The question which divided that court, and the sole issue here, is whether the defendant's assertion 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 in connection with the earlier proceeding. Because this question presents a novel aspect of the scope of the doctrine of Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, we granted certiorari. 345 U.S. 992, 73 S.Ct. 1144.

FN1. This denial squarely contradicted the affidavit filed by the defendant in the earlier proceeding, in connection with his motion under Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A. to suppress the evidence unlawfully seized.

**356 [1] The Government cannot violate the Fourth Amendment [FN2]--in the only way in which the Government can do anything, namely through its agents--and use the fruits *65 of such unlawful conduct to secure a conviction. Weeks v. United States, supra. Nor can the Government make indirect use of such evidence for its case, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence, cf. Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men.

FN2. 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.'

[2] 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.

Take the present situation. Of his own accord, the 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. 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. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. [FN3]

FN3. Cf. Michelson v. United States, 335

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U.S. 469, 479, 69 S.Ct. 213, 220, 93 L.Ed. 168: 'The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.'
The underlying rationale of the Michelson case also disposes of the evidentiary question raised by petitioner, to wit, 'whether defendant's actual guilt under a former indictment which was dismissed may be proved by extrinsic evidence introduced to impeach him in a prosecution for a subsequent offense.'

*66 The situation here involved is to be sharply contrasted with that presented by Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145. There the Government, after having failed in its efforts to introduce the tainted evidence in its case in chief, tried to smuggle it in on cross- examinaton by asking the accused the broad question 'Did you ever see narcotics before?' [FN4] 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 foreshadowed, perhaps unwittingly, the result we reach today:

FN4. Transcript of Record, p. 476, Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145.

'And 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 **357 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. * * *' 269 U.S. at page 35, 46 S.Ct. at page 7.

The judgment is affirmed.

Affirmed.

Mr. Justice BLACK and Mr. Justice DOUGLAS dissent.

74 S.Ct. 354, 347 U.S. 62, 98 L.Ed. 503

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91 S.Ct. 643
28 L.Ed.2d 1
(Cite as: 401 U.S. 222, 91 S.Ct. 643)

Supreme Court of the United States

Viven HARRIS
v.
NEW YORK.

No. 206.

Argued Dec. 17, 1970.
Decided Feb. 24, 1971.

The Westchester County Court, Robert E. Dempsey, J., found defendant guilty of selling narcotics and he appealed. The Supreme Court, Appellate Division, Second Judicial Department, 31 A.D.2d 828, 298 N.Y.S.2d 245, affirmed and defendant appealed. The Court of Appeals, 25 N.Y.2d 175, 303 N.Y.S.2d 71, 250 N.E.2d 349, affirmed and certiorari was granted. The Supreme Court, Mr. Chief Justice Burger, held that statement which was inadmissible against defendant in prosecution's case in chief because defendant had not been advised of his rights to counsel and to remain silent prior to making statement but which otherwise satisfied legal standards of trustworthiness was properly usable for impeachment purposes to attack credibility of defendant's trial testimony.

Affirmed.

Mr. Justice Black, dissented.

Mr. Justice Brennan, dissented and filed opinion in which Mr. Justice Douglas and Mr. Justice Marshall joined.

West Headnotes

[1] Witnesses ⟹88
410k88 Most Cited Cases

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.

[2] Witnesses ⟹390
410k390 Most Cited Cases

Statement which was inadmissible against defendant in prosecution's case in chief because defendant had not been advised of his rights to counsel and to remain silent prior to making statement but which otherwise satisfied legal standards of trustworthiness was properly usable for impeachment purposes to attack credibility of defendant's trial testimony.
**644 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*222 Statement inadmissible against a defendant in the prosecution's case in chief because of lack of the procedural safeguards required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack the credibility of defendant's trial testimony. See Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503. Pp. 644--646.

25 N.Y.2d 175, 303 N.Y.S.2d 71, 250 N.E.2d 349, affirmed.

Joel Martin Aurou, White Plains, N.Y., for petitioner.

James J. Duggan, White Plains, N.Y., for respondent.

Sybil H. Landau, New York City, for District Attorney of New York County, amicus curiae.

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted the writ in this case to consider petitioner's claim that a statement made by him to police under circumstances rendering it inadmissible to establish the prosecution's case in chief under Miranda v. Arizona, 384 U.S. 436, 86

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S.Ct. 1602, 16 L.Ed.2d 694 (1966), may not be used to impeach his credibility.

The State of New York charged petitioner in a two-count indictment with twice selling heroin to an undercover *223 police officer. At a subsequent jury trial the officer was the State's chief witness, and he testified as to details of the two sales. A second officer verified collateral details of the sales, and a third offered testimony about the chemical analysis of the heroin.

Petitioner took the stand in his own defense. He admitted knowing the undercover police officer but denied a sale on January 4, 1966. He admitted making a sale of contents of a glassine bag to the officer on January 6 but claimed it was baking powder and part of a scheme to defraud the purchaser.

On cross-examination petitioner was asked seriatim whether he had made specified statements to the police immediately following his arrest on January 7--statements that partially contradicted petitioner's direct testimony at trial. In response to the cross-examination, petitioner testified that he could not remember virtually any of the questions or answers recited by the prosecutor. At the request of petitioner's counsel the written statement from which the prosecutor had read questions and answers in his impeaching process was placed in the record for possible use on appeal; the statement was not shown to the jury.

The trial judge instructed the jury that the statements attributted to petitioner by the prosecution could be considered only in passing on petitioner's credibility and not as evidence of guilt. In closing summations both counsel argued the substance of the impeaching statements. The jury then found petitioner guilty on the second count of the indictment. [FN1] The New York Court of **645 Appeals affirmed in a per curiam opinion, 25 N.Y.2d 175, 303 N.Y.S.2d 71, 250 N.E.2d 349 (1969).

FN1. No agreement was reached as to the first count. That count was later dropped by the State.

At trial the prosecution made no effort in its case in chief to use the statements allegedly made by petitioner, *224 conceding that they were inadmissible under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The transcript of the interrogation used in the impeachment, but not given to the jury, shows that no warning of a right to appointed counsel was given before questions were put to petitioner when he was taken into custody. Petitioner makes no claim that the statements made to the police were coerced or involuntary.

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. Miranda barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from Miranda that evidence inadmissible against an 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.

In Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), the Court permitted physical evidence, inadmissible in the case in chief, to be used for impeachment purposes.

> '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 (Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652) would be a perversion of the Fourth Amendment.
> '(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.' 347 U.S., at 65, 74 S.Ct., at 356.

*225 It is true that Walder was impeached as to collateral matters included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly on

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the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in Walder. Petitioner's testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. 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, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

[1] 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. See United States v. Knox, 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275 (1969); cf. Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966). 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 **646 process. [FN2] Had *226 inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

FN2. If, for example, an accused confessed fully to a homicide and led the police to the body of the victim under circumstances making his confession inadmissible, the petitioner would have us allow that accused to take the stand and blandly deny every fact disclosed to the police or discovered as a 'fruit' of his confession, free from confrontation with his prior statements and acts. The voluntariness of the confession would, on this thesis, be totally irrelevant. We reject such an extravagant extension of the Constitution. Compare Killough v. United States, 114 U.S.App.D.C. 305, 315 F.2d 241 (1962).

[2] 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. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

Affirmed.

Mr. Justice BLACK dissents.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL, join, dissenting.

It is conceded that the question-and-answer statement used to impeach petitioner's direct testimony was, under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), constitutionally inadmissible as part of the State's direct case against petitioner. I think that the Constitutional also denied the State the use of the statement on cross-examination to impeach the credibility of petitioner's testimony given in his own defense. The decision in Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), is not, as the Court today holds, dispositive to the contrary. Rather, that case supports my conclusion.

The State's case against Harris depended upon the jury's belief of the testimony of the undercover agent that petitioner 'sold' the officer heroin on January 4 and again on January 6. Petitioner took the stand and flatly denied having sold anything to the officer on January 4. He countered the officer's testimony as to the January 6 sale with testimony that he had sold the officer two glassine bags containing what appeared to be heroin, but that actually the bags contained only baking powder intended to deceive the officer in order to obtain $12. *227 The statement contradicted petitioner's direct testimony as to the events of both days. The statement's version of the events on January 4 was that the officer had used petitioner as a middleman to buy some heroin from a third person with money furnished by the officer. The version of the events on January 6 was that petitioner had again acted for the officer in buying two bags of heroin from a third

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person for which petitioner received $12 and a part of the heroin. Thus, it is clear that the statement was used to impeach petitioner's direct testimony not on collateral matters but on matters directly related to the crimes for which he was on trial. [FN1]

FN1. The trial transcript shows that petitioner testified that he remembered making a statement on January 7; that he remembered a few of the questions and answers; but that he did not 'remember giving too many answers.' When asked about his bad memory, petitioner, who had testified that he was a heroin addict, stated that 'my joints was down and I needed drugs.'

Walder v. United States was not a case where tainted evidence was used to impeach an accused's direct testimony on matters directly related to the case against him. In Walder the evidence was used to impeach the accused's testimony on matters collateral to the crime charged. Walder had been indicted in 1950 for purchasing and possessing heroin. When his motion to suppress use of the narcotics as illegally seized was granted, the Government dismissed the prosecution. **647 Two years later Walder was indicted for another narcotics violation completely unrelated to the 1950 one. Testifying in his own defense, he said on direct examination that he had never in his life possessed narcotics. On cross-examination he denied that law enforcement officers had seized narcotics from his home two years earlier. The Government was then permitted to introduce the testimony of one of the officers involved in the 1950 seizure, that when he had raided Walder's home at that time he had seized narcotics there. *228 The Court held that on facts where 'the 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,' 347 U.S., at 65, 74 S.Ct., at 356, the exclusionary rule of Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), would not extend to bar the Government from rebutting this testimony with evidence, although tainted, that petitioner had in fact possessed narcotics two years before. The Court was careful, however, to distinguish the situation of an accused whose testimony, as in the instant case, was a 'denial of complicity in the crimes of which he was charged,' that is, where illegally obtained evidence was used to impeach the accused's direct testimony on matters directly related to the case against him. As to that situation, the Court said:

> '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.' 347 U.S., at 65, 74 S.Ct., at 356.

From this recital of facts it is clear that the evidence used for impeachment in Walder was related to the earlier 1950 prosecution and had no direct bearing on 'the elements of the case' being tried in 1952. The evidence tended solely to impeach the credibility of the defendant's direct testimony that he had never in his life possessed heroin. But that evidence was completely unrelated to the indictment on trial and did not in any way interfere with his freedom to deny all elements of that case against him. In contrast, here, the evidence used for impeachment, a statement concerning the details of the very sales alleged in the indictment, was directly related to the case against petitioner.

*229 While Walder did not identify the constitutional specifics that 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, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), identified the Fifth Amendment's privilege against self- incrimination as one of those specifics. [FN2] *230 That **648 privilege has been extended against the States. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). It is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will,' id., at 8, 84 S.Ct., at 1493 (emphasis added). The choice of whether to testify in one's own defense must therefore be 'unfettered,' since that choice is an exercise of the constitutional privilege, Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Griffin held

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that comment by the prosecution upon the accused's failure to take the stand or a court instruction that such silence is evidence of guilt is impermissible because it 'fetters' that choice--'(i)t cuts down on the privilege by making its assertion costly.' Id., at 614, 85 S.Ct., at 1233. For precisely the same reason the constitutional guarantee forbids the prosecution to use a tainted statement to impeach the accused who takes the stand: The prosecution's use of the tainted statement 'cuts down on the privilege by making its assertion costly.' Ibid. Thus, the 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. [FN3] We settled this proposition in Miranda where we said:

FN2. Three of the five judges of the Appellate Division in this case agreed that the State's use of petitioner's illegally obtained statement was an error of constitutional dimension. People v. Harris, 31 A.D.2d 828, 298 N.Y.S.2d 245 (1969). However, one of the three held that the error did not play a meaningful role in the case and was therefore harmless under our decision in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). He therefore joined in affirming the conviction with the two judges who were of the view that there was no constitutional question involved. 31 A.D.2d, at 830, 298 N.Y.S.2d, at 249. I disagree that the error was harmless and subscribe to the reasoning of the dissenting judges, id., at 831--832, 298 N.Y.S.2d, at 250:

'Under the circumstances outlined above, I cannot agree that this error of constitutional dimension was 'harmless beyond a reasonable doubt' (Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705). An error is not harmless if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction' (Fahy v. Connecticut, 375 U.S. 85, 86--87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171). The burden of showing that a constitutional error is harmless rests with the People who, in this case, have not even attempted to assume that demonstration (Chapman v. California, supra). Surely it cannot be said with any certainty that the improper use of defendant's statement did not tip the scales against him, especially when his conviction rests on the testimony of the same undercover agent whose testimony was apparently less than convincing on the January 4 charge (cf. Anderson v. Nelson, 390 U.S. 523, 525, 88 S.Ct. 1133, 20 L.Ed.2d 81). On the contrary, it is difficult to see how defendant could not have been damaged severely by use of the inconsistent statement in a case which, in the final analysis, pitted his word against the officer's. The judgment should be reversed and a new trial granted.'

The Court of Appeals affirmed per curiam on the authority of its earlier opinion in People v. Kulis, 18 N.Y.2d 318, 274 N.Y.S.2d 873, 221 N.E.2d 541 (1966). Chief Judge Fuld and Judge Keating dissented in Kulis on the ground that Miranda precluded use of the statement for impeachment purposes, 18 N.Y.2d, at 323, 274 N.Y.S.2d, at 875, 221 N.E.2d, at 542.

FN3. It is therefore unnecessary for me to consider petitioner's argument that Miranda has overruled the narrow exception of Walder admitting impeaching evidence on collateral matters.

'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 *231 any other statement.' 384 U.S., at 476--477, 86 S.Ct., at 1629 (emphasis added).

This language completely disposes of any distinction between statements used on direct as opposed to cross-examination. [FN4] **649 'An incriminating statement is as incriminating when used to impeach credibility as it is when used as

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direct proof of guilt and no constitutional distinction can legitimately be drawn.' People v. Kulis, 18 N.Y.2d 318, 324, 274 N.Y.S.2d 873, 876, 221 N.E.2d 541, 543 (1966) (dissenting opinion).

FN4. Six federal courts of appeals and appellate courts of 14 States have reached the same result. United States v. Fox, 403 F.2d 97 (CA 2 1968); United States ex rel. Hill v. Pinto, 394 F.2d 470 (CA 3 1968); Breedlove v. Beto, 404 F.2d 1019 (CA 5 1968); Groshart v. United States, 392 F.2d 172 (CA 9 1968); Blair v. United States, 130 U.S.App.D.C. 322, 401 F.2d 387 (1968); Wheeler v. United States, 382 F.2d 998 (CA 10 1967); People v. Barry, 237 Cal.App.2d 154, 46 Cal.Rptr. 727 (1965), cert. denied, 386 U.S. 1024, 87 S.Ct. 1382, 18 L.Ed.2d 464 (1967); Velarde v. People, 171 Colo. 261, 466 P.2d 919 (1970); State v. Galasso, 217 So.2d 326 (Fla.1968); People v. Luna, 37 Ill.2d 299, 226 N.E.2d 586 (1967); Franklin v. State, 6 Md.App. 572, 252 A.2d 487 (1969); People v. Wilson, 20 Mich.App. 410, 174 N.W.2d 79 (1969); State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960); State v. Catrett, 276 N.C. 86, 171 S.E.2d 398 (1970); State v. Brewton, 247 Or. 241, 422 P.2d 581, cert. denied, 387 U.S. 943, 87 S.Ct. 2074, 18 L.Ed.2d 1328 (1967); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968) ; Spann v. State, 448 S.W.2d 128 (Tex.Cr.App.1969); Cardwell v. Commonwealth, 209 Va. 412, 164 S.E.2d 699 (1968); Gaertner v. State, 35 Wis.2d 159, 150 N.W.2d 370 (1967); see also Kelly v. King, 196 So.2d 525 (Miss.1967). only three state appellate courts have agreed with New York. 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).

The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system. The 'essential mainstay' of that system, Miranda v. Arizona, 384 U.S., at 460, 86 S.Ct. 1602, is the privilege against self-incrimination, which for *232 that reason has occupied a central place in our jurisprudence since before the Nation's birth. Moreover, 'we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. * * * All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government * * * must accord to the dignity and integrity of its citizens.' Ibid. These values are plainly jeopardized if an exception against admission of tainted statements is made for those used for impeachment purposes. Moreover, it is monstrous that 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.' Mapp v. Ohio, 367 U.S. 643, 659, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081 (1961). Thus even to the extent that Miranda was aimed at deterring police practices in disregard of the Constitution, I fear that today's holding will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of Miranda cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution. I dissent.

91 S.Ct. 643, 401 U.S. 222, 28 L.Ed.2d 1

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LEXSEE 666 P.2D 1042

Floyd WORTHAM, Appellant, v. STATE of Alaska, Appellee

No. 5459

Supreme Court of Alaska

666 P.2d 1042; 1983 Alas. LEXIS 449

July 8, 1983

PRIOR HISTORY: [**1]

Petition for Hearing from the Court of Appeals of the State of Alaska, on appeal from a judgment of the Superior Court of the State of Alaska, Third Judicial District, Seaborn J. Buckalew, Jr., Judge.

COUNSEL:

Joseph R. D. Loescher, and Robert L. Manley, Hughes, Thorsness, Gantz, Powell and Brundin, Anchorage, for Appellant.

Rhonda F. Butterfield, Assistant Attorney General, Anchorage, Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

JUDGES:

Burke, Chief Justice, Rabinowitz, Matthews, and Compton, Justices, and Dimond, Senior Justice. * Connor, Justice, not participating.

* Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 11 of the Constitution of Alaska.

OPINIONBY:

RABINOWITZ

OPINION:

[***1042**] Floyd Wortham was convicted of two counts of perjury under former *AS 11.30.010(a)*, following his plea of no contest. n1 Prior to these convictions Wortham had been tried and convicted of the crime of the unlawful sale of cocaine. n2

n1 Pursuant to *Oveson v. Municipality of Anchorage, 574 P.2d 801, 803 n.4 (Alaska 1978)*, and *Cooksey v. State, 524 P.2d 1251 (Alaska 1974)*, Wortham preserved his right to appeal the superior court's denial of his motion to suppress certain evidence. [**2]

n2 See *Wortham v. State, 617 P.2d 510 (Alaska 1980).*

At his trial for illegal sale of cocaine, Wortham testified on his own behalf and, [*1043] during this testimony, made certain statements which resulted in his indictment for perjury. The state had notified Wortham that, at his perjury trial, it intended to use a transcript of a tape recording made of a conversation between Wortham and an undercover police agent. The recording was made without Wortham's knowledge. n3 At his trial for sale of cocaine, Wortham had successfully suppressed the tape recording on the basis of *State v. Glass, 583 P.2d 872 (Alaska 1978).* Relying on this ruling, Wortham again sought to have the same evidence suppressed in the perjury prosecution. The superior court, apparently relying on Alaska Rule of Evidence 412(2), denied the suppression motion. n4 Wortham then appealed to the court of appeals where the superior court's judgment was affirmed. n5

n3 In its decision, the court of appeals set forth in detail the factual circumstances surrounding the tape recording of the conversation. Briefly, the facts were stated as follows:

> On September 25, 1978, Wortham met Ms. Gail J. Reas (an undercover police officer) and a police informant at the Kentucky Fried Chicken Restaurant on Tudor Road in Anchorage, Alaska. The purpose of the meeting was to enable Reas to purchase cocaine from Wortham. Prior to the meeting, Ms. Reas equipped herself with an electronic transmitter. Police Officer Charles M. Adams, Jr. equipped himself with an electronic monitoring and recording system in an unmarked police vehicle. The conversation surrounding the transaction was electronically monitored and recorded by Officer Adams. The electronic monitoring and recording took place without the benefit of a search warrant or any other court order.

Wortham v. State, 657 P.2d 856, 857 (Alaska App. 1983) (per curiam). The court noted that the above statement of facts was based on Wortham's brief and uncontested by the state. *Id. at 857.* [**3]

n4 The procedural history of this matter is taken essentially verbatim from the Court of Appeals' opinion. *See id. at 856-57.*

n5 *Id. at 856.*

Rule of Evidence 412(2) provides in part:

> Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:
>
> . . .
>
> (2) . . . . evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to [the] issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights.

The Commentary to Rule 412(2) states in part:

> The second exception governs evidence obtained in violation of the fourth amendment and/or its Alaska counterpart, article I, section 14. Again a limitation is imposed: the evidence must be relevant to the issue of guilt or innocence, and must not have been obtained "in substantial violation of rights." This limitation is not imposed to ensure reliability of the evidence, but rather recognizes that judicial integrity requires the exclusion of evidence for [**4] all purposes if the police misconduct involved in obtaining it was flagrant.

For the reasons stated by Judge Singleton in his concurring opinion, we affirm the superior court's judgment. Rule 412 provides generally that evidence which has been illegally obtained shall on proper objection be excluded in criminal prosecutions. Subsection 2 of Rule 412 provides an exception to the exclusionary rule for illegally seized evidence in

criminal prosecutions. Under this exception, illegally seized evidence may be used in perjury prosecutions, unless the police misconduct amounts to a flagrant or egregious invasion of personal rights. As Judge Singleton stated in his concurrence:

> The drafters of the rule did not intend to bar the introduction of evidence obtained in violation of the fourth and fifth amendments, and their Alaska counterparts, unless the violation of rights was such that it independently violated due process. *Rochin v. California, 342 U.S. 165, 96 L. Ed. 183, [72 S. Ct. 205]* (1952). In the absence of coercion, violence or brutality to the person, I would admit evidence obtained in violation of the fourth and fifth amendments in perjury **[*1044]** **[**5]** prosecutions. *See Irvine v. California, 347 U.S. 128, 98 L. Ed. 561, [74 S. Ct. 381]* (1954) (applying the *Rochin* standard to a fact situation similar but more egregious than the instant one). It seems to me that the *Rochin* test strikes an appropriate balance between the need to deter perjury on the one hand and judicial integrity on the other. Since the instant facts do not meet the *Rochin* test, I join the decision to affirm.

657 P.2d at 858.

Given the absence of flagrant police misconduct in recording the conversation between Wortham and the undercover police agent we hold that the superior court properly ruled that, pursuant to the provisions of Rule 412(2), the transcript of this tape recording was admissible in the perjury prosecution of Wortham.

For the foregoing reasons, the court of appeals' affirmance of the superior court's judgment is AFFIRMED.

Connor, Justice, not participating.

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Honorable Representative Bill Stoltze
State Capitol, Rm 421
Juneau, AK 99801-1182

Honorable Representative Peggy Wilson
HESS Chair
State Capitol, Rm 104
Juneau, AK 99801-1182

RE: CSHB349(JUD) February 24, 2004

Dear Representatives:

The Alaska State Prosecutor's Association (ASPA) writes to express its support for passage of CSHB 349 (JUD). This Bill amends a court rule so that determinations of truth will be the primary goal in any criminal proceeding in which the defendant or co-defendants testify.

This needed amendment to Evidence Rule 412 would bring Alaska law in accord with federal law, from which the Miranda rights originate. It will also bring Alaska into the mainstream of American jurisprudence and at least 28 other states that have similar rules such including Alabama, Arizona, Arkansas,

RE: CSHB349 (JUD)
Page two

February 24, 2004

California, Colorado, Delaware, Florida, Georgia, Illinois Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New York, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, Washington.

We thank you for your continued commitment to effective law enforcement as well as the protection and advancement of the rights of all crime victims throughout our state.

Respectfully,
2004 ASPA Board Members

Keri Ann Brady
Anchorage

William Hawley
Anchorage

Jeff O'BRYANT BY W. H. HAWLEY (TELEPHONIC AUTHORIZATION)

Jeff O'Bryant
Fairbanks

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STATE OF ALASKA

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January 26, 2004

Hon. Lesil McGuire, Chair
House Judiciary Committee
State Capital Room 118
Juneau, Alaska 99811

Re: HB 349

Dear Representative McGuire,

I am writing to voice our support of House Bill 349, which allows a witness to be impeached with evidence taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) as long as the statement was otherwise voluntary and not coerced. It would also allow the prosecution to cross-examine a witness who testifies contrary to a statement that has been suppressed, as long as it was not seized in substantial violation of the witness's rights.

The provisions in House Bill 349 were part of the Governor's crime bill, HB 244, that was introduced last year. In our view, the technical requirements of the *Miranda* rule should not give witnesses a chance to testify falsely at trial, and this bill would contribute to the truth-finding process.

Thank you for the opportunity to express our support of House Bill 349.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:
David W. Marquez
Chief Assistant Attorney General

cc: Representative Anderson
Representative Holm
Representative Ogg
Representative Samuels
Representative Gara
Representative Gruenberg