320 IMPEACHMENT OF THE DEFENDANT BY PRIOR INCONSISTENT STATEMENTS WHICH ARE INADMISSIBLE IN THE STATE'S CASE-IN-CHIEF

[MUST BE GIVEN UPON REQUEST.][1]

Evidence has been received that the defendant made a statement[2] before trial which is inconsistent with the defendant's testimony in court.

This evidence may be taken into consideration only to help you decide if what the defendant said in court was true.

It must not be considered as proof of the facts contained in the statement.

COMMENT

Wis JI-Criminal 320 was originally published in 1971 and was revised in 1976, 1981, 1985, 1986, and 1991. The 2001 revision adopted a new format without substantive change.

Wis JI-Criminal 320 is to be given upon request where a defendant's prior inconsistent statement, inadmissible during the state's case-in-chief because it was unconstitutionally obtained, is admitted for impeachment purposes. Such statements are limited to impeachment use, provided they were voluntarily made and are inconsistent with the defendant's testimony.

A brief summary of the history of JI-320 may avoid confusion. In its original form, copyright 1971, Wis JI-Criminal JI-320 cautioned that all prior inconsistent statements were limited to impeachment use. Such was the law of Wisconsin until the adoption of the Rules of Evidence in 1974. Under subsec. 908.01(4)(a)1 of the new Rules, prior inconsistent statements could be used as substantive evidence – they were no longer limited to impeachment use. See Wis JI-Criminal 320A, where the history of the Wisconsin rules relating to impeachment by and substantive use of prior inconsistent statements is summarized.

Wis JI-Criminal 320 (© 1971) was withdrawn in 1976 and replaced with an instruction that applied only to statements of the defendant obtained in violation of Miranda. Such statements continue to be admissible only for impeachment purposes (provided they are voluntary). This is the situation addressed by the current version of Wis JI-Criminal JI-320, though it can also be used where impeachment use is allowed of statements obtained in violation of the 4th or 6th amendment.

The law relating to the impeachment use of statements obtained in violation of Miranda and other constitutional guarantees is summarized below, immediately following footnote 2.

1. When evidence is admitted for a limited purpose, an instruction restricting the evidence to its proper scope shall be given upon request. Section 901.06.

2. The Committee decided not to include any characterization of the statement in terms of why it is admissible for impeachment purposes only. Referring to the statement as "obtained in violation of his constitutional rights" or "obtained before he was advised of his rights" may be distracting or confusing and was therefore not included in the instruction. Further, there can be a number of reasons why a statement may have been obtained in violation of Miranda: no advice at all; advice given too late; advice incorrect; proper advice followed by illegal interrogation; and others. Thus, it would be difficult to include a description of the statement in a model instruction that would be correct in all cases.

However, sometimes it may be helpful to further identify a statement, as, for example, where there are several statements, some admissible for substantive purposes and some limited to impeachment use. In such cases, it may be useful to refer to a statement by the date it was made, by referring to the person to whom it was made, or in some other way.

IMPEACHMENT USE OF OTHERWISE INADMISSIBLE STATEMENTS

The primary issue being considered here is the impeachment use of statements made in violation of the 5th amendment, as protected by the rules announced in Miranda. But three other constitutional principles also restrict the admissibility of out-of-court statements made by criminal defendants:

- Due process, based on the 14th amendment, precludes the use of statements that are not "voluntary." As noted above, involuntary statements are not admissible as direct evidence or for impeachment purposes.

- The 6th amendment excludes statements obtained in violation of the right to counsel afforded by that amendment. In Michigan v. Harvey, 494 U.S. 344 (1990), the Court upheld the impeachment use of statements obtained in violation of rule that any waiver of 6th amendment rights following discussions initiated by police is invalid per se. [This case is the so-called prophylactic rule of Edwards v. Arizona, 451 U.S. 477 (1981), applied to 6th amendment cases by Michigan v. Jackson, 475 U.S. 625 (1986).]

- The 4th amendment exclusionary rule forbids the direct use of statements resulting from illegal arrest or detention. Such statements appear to be admissible for impeachment, but the United States Supreme Court decisions on the subject are not completely consistent. See Agnello v. United States, 269 U.S. 20 (1925); Walder v. United States, 347 U.S. 62 (1954); and United States v. Havens, 446 U.S. 620 (1980). The decisions are discussed in LaFave, Search and Seizure, § 11.6(a) (West 1987).

The rule allowing impeachment use of statements obtained in violation of Miranda is summarized in State v. Mendoza, 96 Wis.2d 106, 118-19, 291 N.W.2d 478 (1980):

> A statement of the defendant made without the appropriate Miranda warnings, although inadmissible in the prosecution's case-in-chief, may be used to impeach the defendant's credibility if the defendant testifies to matters contrary to what is in the excluded statement. Harris v. New York, 401 U.S. 222 (1971); State v. Oliver, 84 Wis.2d 316, 320, 321, 267 N.W.2d 333 (1978); Upchurch v. State, 64 Wis.2d 553, 562, 563, 219 N.W.2d 363 (1974); Wold v. State, 57 Wis.2d 344, 353-356, 204

N.W.2d 482 (1973). It is only if the statements are also found to be involuntary that their use for impeachment purposes is precluded. Upchurch v. State, supra, at 353-56.

The Wisconsin Supreme Court has recommended that a finding on a statement's usability for impeachment purposes be made as part of the Miranda-Goodchild inquiry:

> When a court conducts a hearing to determine the admissibility of evidence in chief, it should make a determination for the use of such evidence, both in chief and for impeachment, and expressly make a finding concerning the trustworthiness as well as such other grounds for admission or exclusion as the evidence permits. However, evidence excluded on direct should not be used for impeachment unless the accused takes the stand and testifies to matters directly contrary to what is in the excluded statement. The foundation for the use of the impeaching statements must be found in prior testimony. Wold v. State, 57 Wis.2d 344, 355-56, 204 N.W.2d 482 (1973).

To be used for impeachment, the statement must be voluntary. A statement found to be "involuntary" on due process grounds may not be used in chief or for impeachment. "Voluntariness" for these purposes requires that the statement must "represent the uncoerced free will of the defendant" and not be "the result of conditions in which the defendant had been deprived of the ability to make a rational choice." Upchurch v. State, 64 Wis.2d 553, 563, 219 N.W.2d 363 (1974). A statement is not "involuntary" unless "improper police practices [were] deliberately used to procure a confession." State v. Clappes, 136 Wis.2d 222, 239, 401 N.W.2d 759 (1987). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" Colorado v. Connelly, 479 U.S. 157, 167, (1986).

It appears to the Committee that a question exists about the admissibility, as direct evidence or for impeachment, of statements that qualify as "voluntary" under the test requiring government coercion but which might not be trustworthy. For example, what about statements which result from threats from a private party or from fear of mob violence? Unreversed decisions of both the United States and Wisconsin Supreme Courts indicate that a showing of trustworthiness is required: ". . . [the court should] . . . expressly make a finding concerning trustworthiness as well as such other grounds for exclusion as the evidence permits." Wold v. State, 57 Wis.2d 344, 355-56; "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." Harris v. New York, 401 U.S. 222, 224 (1971). However, Colorado v. Connelly, supra, indicates that voluntariness is the only constitutional concern and that other questions relating to admissibility are to be resolved under state rules of evidence. While the constitutional issue may not be completely resolved, the Committee believes that before an allegedly untrustworthy statement is admitted, its relevance should be evaluated carefully and its probative value weighed against any danger of unfair prejudice, confusion of the issues, or misleading the jury. See §§ 904.01 and 904.03.

If the statement used to impeach was admissible under Miranda so that it could have been used in the state's case-in-chief, this instruction should not be given. See Ameen v. State, 51 Wis.2d 175, 186 N.W.2d 206 (1971).

