James v. Illinois – The Impeachment Exception to the Exclusionary Rule: Here Today...

Brandon Edward Mary

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JAMES V. ILLINOIS—THE IMPEACHMENT EXCEPTION TO THE EXCLUSIONARY RULE: HERE TODAY . . .

The exclusionary rule precludes the use of evidence in a criminal proceeding where such evidence was obtained in violation of the fourth, fifth, or sixth amendments to the United States Constitution.1 The United States Supreme Court's application of the exclusionary rule preserves the integrity of the judicial system by refusing to condone the illegal actions of law enforcement officials.2 For many years the exclusionary rule acted as a complete prohibition against the admission of tainted evidence.3 The Court

1. For purposes of clarity, this Note refers to a single exclusionary rule. There is, however, a separate, judicially created exclusionary rule coupled with each of these constitutional guarantees which bars the use of evidence obtained in violation of the specific guarantee.

The fourth amendment states that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Thus, the fourth amendment exclusionary rule precludes the use of physical evidence obtained from an unlawful search and seizure or without probable cause. See Mapp v. Ohio, 367 U.S. 643, 655-56 (1961); Weeks v. United States, 232 U.S. 383, 393 (1914); see also Wasserstrom and Mertens, The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?, 22 AM. CRIM. L. REV. 85, 85-87 (1984) (discussing exclusionary rule's creation as protection of fourth amendment privileges).

The fifth amendment provides, in part, that “[n]o person shall be . . . compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. The fifth amendment “in and of itself directly and explicitly commands its own exclusionary rule—a defendant cannot be compelled to give evidence against himself.” Coolidge v. New Hampshire, 403 U.S. 443, 498 (1971) (Black, J., dissenting); see Miranda v. Arizona, 384 U.S. 436, 444 (1966) (statements obtained from a criminal suspect in violation of established procedures will be excluded from use at trial based on defendant's privilege against self-incrimination).

The sixth amendment provides, in part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” U.S. CONST. amend. VI. Thus, the sixth amendment exclusionary rule prohibits the use of statements obtained in violation of a criminal suspect's right to counsel. See Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964); see also Note, The Impeachment Exception to the Sixth Amendment Exclusionary Rule, 87 COLUM. L. REV. 176, 184-91 (1987) (tracing development of sixth amendment exclusionary rule).

2. See infra notes 49-53 and accompanying text.

recognized, however, that defendants were using the exclusionary rule to their advantage by offering testimony contrary to the suppressed evidence.4 Accordingly, the Court created the impeachment5 exception to the exclusionary rule.6

The impeachment exception was designed to prevent defendants from "perverting" the judicial system through the presentation of perjurious testimony in reliance on the prosecutors' inability to admit the suppressed evidence to challenge the defendants' credibility.7 While the impeachment exception was initially applied to evidence violating the fourth amendment,8 the Court eventually broadened it to encompass evidence obtained in violation of both the fifth9 and sixth10 amendments.

4. See infra notes 65-73 and accompanying text.

5. Impeachment may be achieved through any combination of the following five techniques: 1) proving the inconsistency of testimony with prior statements; 2) showing the witness to be emotionally biased (such as kinship for one party); 3) attacking the character of the witness; 4) showing a defect in the witness' ability to observe, remember, or recount the matters testified about; and 5) proving through other witnesses that facts are otherwise than as testified to by the witness. C. McCormick, McCormick on Evidence § 33 (3d ed. 1984). Use of the impeachment exception to the exclusionary rule is generally impeachment by contradiction. That is, the excluded evidence is admitted and tends to show that the witness either erred or lied, and the excluded evidence highlights this contradiction. Id. § 47.

6. Walder v. United States, 347 U.S. 62, 65 (1954) (allowing defendant to use the exclusionary rule to his advantage would be "a perversion of the Fourth Amendment"); see infra notes 65-73 and accompanying text.

There are other exceptions to the exclusionary rule which are beyond the scope of this Note. For example, the "good faith" exception allows for the admission of evidence seized by police under the good faith belief of a warrant's validity, despite a subsequent finding that the warrant was defective. United States v. Leon, 468 U.S. 897, 919-20 (1984); see C. McCormick, supra note 5, § 177 (3d ed. 1984 & Supp. 1987). The Supreme Court has also held the rule to be inapplicable to grand jury proceedings, United States v. Calandra, 414 U.S. 338 (1974), and deportation proceedings, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

The exclusionary rule's boundaries continue to be explored. For example, in 1991, President George Bush submitted the Comprehensive Violent Crime Control Act to Congress and proposed to further extend the good faith exception to warrantless searches and to make the rule inapplicable to the introduction of unlawfully seized firearms in the prosecution for violent or drug related offenses. S. 635, 102d Cong., 1st Sess., 137 Cong. Rec. S3192-93 (1991).


9. Harris v. New York, 401 U.S. 222, 225 (1971) (impeachment of defendant with otherwise excluded, self-incriminating statements is proper); see infra notes 87-102 and accompanying text.

10. Michigan v. Harvey, 110 S. Ct. 1176, 1177-78 (1990) (statements elicited from defendant in violation of sixth amendment right to counsel admissible to impeach defendant's false or inconsistent testimony).
Until recently, the Court's decisions concerning impeachment exception application dealt solely with the defendant's testimony. Specifically, the Court has addressed whether the impeachment exception should be triggered on direct or cross-examination, and whether the exception should apply to collateral evidence or evidence bearing directly on the indicted crime. In *James v. Illinois*, the Court confronted an entirely different question: Given the boundaries of the impeachment exception, to whom should it apply?

In *James*, Chicago police detectives took Darryl James into custody as a suspect for murder and attempted murder after a confrontation between two groups of youths resulted in the shooting death of one person and the serious injury of another. The detectives found James sitting under a hair dryer at his mother's beauty salon, and when he emerged his hair was black and curly. Without first obtaining a warrant, the detectives arrested and questioned James. In response to the questions, James revealed that his hair was reddish-brown and straight the day before, and he admitted that he went to the salon to have his hair "dyed black and curled in order to change his appearance."

The state indicted James for both murder and attempted murder. Prior to trial, the court suppressed James' statements regarding his hair because

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13. *Harris*, 401 U.S. at 225 (impeachment exception applies to evidence both collaterally and directly related to the crimes charged); see also The Supreme Court, 1970 Term, 85 HARV. L. REV. 3, 44-53 (1971) (*Harris* represents "basic hostility" to impeachment exception limitations); Comment, *Harris v. New York: The Death Knell of Miranda and Walder?*, 38 BROOKLYN L. REV. 357, 359-70 (1971) (criticizing *Harris* as a "law and order' decision" which disregards the impeachment exception's previously established limitations); infra text accompanying notes 87-108.
15. *Id.* at 309.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
the statements were the result of a warrantless arrest lacking probable cause. At trial, five youths involved in the confrontation testified for the state, each identifying James as the murderer. While James did not testify, he called Jewel Henderson, a family friend, to testify on his behalf. Henderson testified that she was with James on the day before the shooting, and that, at that time, his hair was black. Over the objection of James’ counsel, the court allowed the state to introduce James’ unlawfully obtained statements to impeach Henderson’s testimony. James was subsequently convicted of both murder and attempted murder.

The Illinois Appellate Court reversed James’ convictions and granted a new trial, holding that the impeachment exception was created solely to impeach a defendant’s testimony and is inapplicable to defense witnesses. The Illinois Supreme Court, however, reversed and reinstated the convictions, choosing to expand the exception to deter the defendant from engaging in perjury “by proxy.” The Illinois Supreme Court reasoned that although the defendant did not testify in his own defense, the trial court was correct in granting use of the statements for impeachment because the testimony of the witness was purposely presented on direct examination and clearly contrary to the defendant’s prior statements. The United States Supreme Court granted certiorari.

In an opinion written by Justice Brennan, the Supreme Court reversed the Illinois Supreme Court and refused to expand the impeachment exception to encompass defense witnesses. The Court focused its reasoning on

20. Id. at 309-10
21. Id. at 310. There was some discrepancy between the testimony of these witnesses and their in-court identifications. Each testified that the shooter had “reddish” hair, while at trial James’ hair was black. Id. Nevertheless, each positively identified James as the shooter. Id.
22. Id.
23. Id.
24. Id. The trial court, however, did not limit the state in its introduction of the statement. The state went beyond impeaching Jewel Henderson’s testimony about James’ hair color and added the statement that he did so to “change his appearance.” Id.
25. Id.
28. Id. at 538-39, 528 N.E.2d at 730.
31. Id. at 320.
two competing values: the search for truth in criminal proceedings and the
deterrence of police misconduct.\textsuperscript{32} The Court concluded that expansion of
the impeachment exception to defense witnesses would discourage defend-
ants from presenting witnesses who might open the door to otherwise sup-
pressed evidence.\textsuperscript{33} Moreover, the Court reasoned that expanding the
impeachment exception would not deter police misconduct and could actu-
ally lead to its increase.\textsuperscript{34} Accordingly, while recognizing that defendants
often use the exclusionary rule as a shield, the Court refused to permit the
state to "brandish [the impeachment exception] as a sword."\textsuperscript{35}

In his dissent, Justice Kennedy\textsuperscript{36} criticized the majority for failing to con-
sider the consequences of its decision.\textsuperscript{37} He pointed out that failure to ex-
pand the exception would mislead jurors and deprive them of the
opportunity to consider a witness' credibility.\textsuperscript{38} Justice Kennedy rejected
the argument that defendants will be prejudicially limited in their ability to
present witnesses,\textsuperscript{39} and found the majority's opinion inconsistent with prior
Court holdings.\textsuperscript{40} Further, Justice Kennedy accepted the Illinois Supreme
Court's perjury "by proxy" premise and found defense witnesses no less de-
serving of impeachment than the defendant.\textsuperscript{41} Justice Stevens filed a concur-
ring opinion in response to the dissent's criticism, pointing out that the
threat of prosecution for perjury is a "'hard reality'" which will deter per-
jury "'by proxy.'"\textsuperscript{42}

This Note first examines the development of the exclusionary rule and the
creation and application of the impeachment exception to the rule. Next,
this Note reviews \textit{James v. Illinois} and discusses the ramifications of the de-
cision. Finally, this Note concludes that the Court's failure to adopt a
limited expansion of the impeachment exception to encompass defense
witnesses places it in the position of advocating the introduction of false and
misleading testimony, a result the impeachment exception was created to
prevent. Further, the Court discloses a weakness in the existing impeach-
ment exception, allowing for manipulation of the judicial system.

\textsuperscript{32} \textit{Id.} at 312-13.
\textsuperscript{33} \textit{Id.} at 314-15.
\textsuperscript{34} \textit{Id.} at 317-19.
\textsuperscript{35} \textit{Id.} at 317.
\textsuperscript{36} Justice Kennedy was joined by Chief Justice Rehnquist and Justices O'Connor and
Scalia. \textit{Id.} at 322 (Kennedy, J., dissenting).
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 324-25.
\textsuperscript{39} \textit{Id.} at 328-29.
\textsuperscript{40} \textit{Id.} at 322.
\textsuperscript{41} \textit{Id.} at 330.
\textsuperscript{42} \textit{Id.} at 320-22 (Stevens, J., concurring) (quoting \textit{id.} at 326 (Kennedy, J., dissenting)).
I. THE EXCLUSIONARY RULE

A. The Rationale: Judicial Integrity and Deterrence of Police Misconduct

The exclusionary rule was first developed in *Weeks v. United States*.\(^{43}\) In *Weeks*, police officers conducted a warrantless search of Weeks' home, seizing papers that subsequently were used as evidence to convict Weeks of using the mails to operate a lottery.\(^{44}\) The United States Supreme Court reversed the conviction, holding that the fourth amendment prohibits the use of illegally obtained evidence in federal criminal proceedings.\(^{45}\) The Court stated that however "praiseworthy" the efforts of the courts are in administering punishment to the guilty, these efforts cannot "be aided by the sacrifice of [constitutional] principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."\(^{46}\) Expansion of the exclusionary rule continued with applications developed to encompass the rights afforded under the fifth\(^{47}\) and sixth\(^{48}\) amendments.

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44. *Id.* at 386.
45. *Id.* at 398. The Supreme Court later expanded the scope of the exclusionary rule to include state prosecutions via the due process clause of the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643, 651, 657 (1961). In *Mapp*, a police raid of the defendant's home resulted in the seizure of pornographic material. *Id.* at 644-45. While the raid allegedly was supported by a search warrant based on other suspected crimes, no warrant was produced at trial. *Id.* at 645. Nevertheless, the defendant ultimately was convicted of possession of the pornographic material. *Id.* at 643. The Supreme Court reversed the conviction, finding it based on evidence seized in violation of the fourth amendment protection against unreasonable search and seizure. *Id.* The Court questioned that as it "has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, ... [w]hy should not the same rule apply to ... unconstitutional seizure[s] of goods, papers, effects, documents, etc.?" *Id.* at 656 (citation omitted). The Court answered that "holding that the exclusionary rule [as] an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense." *Id.* at 657; see Traynor, *Mapp v. Ohio At Large In the Fifty States*. 1962 DUKE L.J. 319, 319-43 (discussing *Mapp* and the ramifications of the Court's extension of the exclusionary rule to the states).
46. *Weeks v. United States*, 232 U.S. 383, 393 (1914); see United States v. Jeffers, 342 U.S. 48, 51, 54 (1951) (narcotics seized during an unlawful search must be suppressed from evidentiary use at trial based on mandate of fourth amendment); *McDonald v. United States*, 335 U.S. 451, 453 (1948) (prosecution may not "flout" constitutional safeguards against unreasonable search and seizure through admission of unlawfully obtained evidence).
The Impeachment Exception to the Exclusionary Rule

Justification for the exclusionary rule is twofold. First, as articulated in Justice Brandeis’ dissent in Olmstead v. United States, the rule acts to ensure the integrity of the judicial system. Justice Brandeis reasoned that admitting tainted evidence effectively would condone the actions of law enforcement officials who themselves violated the law. Second, the rule acts as a deterrent to future police misconduct by commanding respect for constitutional guarantees. Yet, while the exclusionary rule may operate to pro-

50. Id. at 485 (Brandeis, J., dissenting).
51. Id. Justice Brandeis stated:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

mote these values, the rule is not an absolute bar to the use of illegally obtained evidence.

B. Carving the Exception to the Exclusionary Rule

1. Agnello v. United States

After Weeks, the harsh reality of excluding truthful, incriminating facts became apparent. By applying the exclusionary rule, and thus refusing to admit tainted evidence, those guilty of crimes were acquitted simply due to police error. Shortly after the exclusionary rule was created in Weeks, Agnello v. United States presented the Court with the opportunity to create an impeachment exception to the rule. In Agnello, Agnello was charged with selling narcotics after the government unlawfully seized cocaine from him. At trial, Agnello did not mention the cocaine on direct examination, but on cross-examination he testified that he had never seen narcotics. Agnello was convicted after the court allowed the government to introduce the illegally obtained cocaine during rebuttal to impeach his testimony.

The Supreme Court reversed the conviction, holding that because Agnello made no mention of the cocaine during direct examination, no justification

678-709, 755 (1970) (offering empirical data to demonstrate exclusionary rule's failure to deter police misconduct, and advocating abolition of the exclusionary rule).

Since the rule's creation, the Court has recognized that the underlying policies of the exclusionary rule are not absolute and that these policies "must be evaluated in light of competing policies." Stone v. Powell, 428 U.S. 465, 488 (1976). For example, "the public interest in determination of truth at trial [may] outweigh the incremental contribution" of the exclusionary rule. Id. (footnote omitted); United States v. Leon, 468 U.S. 897, 907 (1984) ("'unbending application of the exclusionary sanction... would impede unacceptably the truth-finding functions of judge and jury'") (quoting United States v. Payner, 447 U.S. 727, 734 (1980)); United States v. Janis, 428 U.S. 433, 454 (1976) (exclusion of unlawfully obtained evidence must have sufficient likelihood of deterrence to outweigh the societal costs incurred).

As illustrated by the terse comment of Justice Cardozo, then serving as a New York Court of Appeals judge, the rule permits "[t]he criminal... to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (scrutinizing Agnello v. United States, 269 U.S. 20 (1925), Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), and Weeks v. United States, 232 U.S. 383 (1914)), cert. denied, 270 U.S. 657 (1926); see also Stone, 428 U.S. at 490 ("Application of the rule... deflates the truth-finding process and often frees the guilty."); Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. PA. L. REV. 378, 389 (1964) (acknowledging Justice Cardozo's conclusion and commenting that "pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest"); Wright, Must the Criminal Go Free if the Constable Blunders?, 50 TEX. L. REV. 736, 737 (1972) ("the Exclusionary Rule in its direct application benefits only the guilty").
existed for allowing the introduction of the evidence during cross-examination. The Court concluded that because Agnello did not waive his constitutional protection, the exclusionary rule remained in effect and, therefore, impeachment was improper. Thus, while presented with an opportunity to create an impeachment exception to the exclusionary rule, the Court declined to do so. Instead, the Court's refusal to permit the use of tainted evidence in any manner implicitly reinforced the exclusionary rule. Despite this holding, however, the Court eventually did create an impeachment exception in Walder v. United States.

2. Walder v. United States: The Exclusionary Rule is Not a Shield

In Walder v. United States, Walder was indicted on federal narcotics charges after the government unlawfully seized heroin from his home. Although the indictment was dismissed, Walder was brought to trial on unrelated narcotics violations two years later. During both direct and cross-examination, Walder emphatically denied having sold or possessed narcotics at any time during his life. The trial court allowed the government to use the evidence unlawfully seized two years earlier to impeach Walder's testimony, and he was convicted. The Supreme Court upheld the conviction, giving the impeachment exception to the exclusionary rule its first footing. While maintaining the application of the exclusionary rule as a prohibition against the government's use of unlawfully obtained evidence, the Court refused to allow the defendant to invoke the exclusionary rule as a "shield" to protect his own perjured testimony; such an expansive view of the exclusionary rule would constitute "a perversion of the Fourth Amendment." The Court reasoned that Walder's voluntary testimony surrounding his involvement with drugs "opened the door" to the excluded evidence, and impeach-

60. Id. at 35.
61. Id.
62. Id.
63. Id. ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).
65. Id.
66. Id. at 62-69.
67. Id. at 63.
68. Id. at 63-64.
69. Id. at 64.
70. Id. at 66.
71. Id. at 65.
ment with the tainted evidence was proper. Thus, while acknowledging the many constitutional protections afforded criminal defendants, the Court refused to protect the submission of perjured testimony.

Commentators initially considered application of the Walder impeachment exception to be limited by three factors. First, the sole purpose of the admission of tainted evidence must have been for impeachment. This requirement limited the use of otherwise excluded evidence to those instances where the defendant "opened the door" to the evidence. Second, the evidence must have been related to testimony elicited on direct examination of the defendant. This requirement served to reinforce Agnello's holding that the prosecutor had no justification for utilizing excluded evidence when a defendant had not voluntarily attempted to refute the excluded evidence. It also reflected the Court's intention to frustrate a defendant's attempt to use the exclusionary rule as a shield. Finally, the subject of the evidence must have been collateral to the charges brought against the defendant.

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72. Id. at 64. The Court easily distinguished its prior holding in Agnello by explaining that 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-examination." Id. at 66. In Walder, however, the Court intimated that the defendant's emphatic denials on direct examination were an affront to the judicial system and warranted challenge by the prosecutor. See id. at 65.

73. Id. The Walder Court stated:

[T]he 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.

Id. at 65. For an insightful analysis to the Court's reasoning in Agnello and Walder, see Dershowitz & Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 YALE L.J. 1198, 1211-17 (1971) (arguing that Walder was a "rather special exception" to the Court's unanimous rule in Agnello, an exception not to be so easily expanded).

74. See C. McCormick, supra note 5, § 178; W. LaFave & J. Israel, Criminal Procedure § 9.6 (1985); see also Comment, The Impeachment Exception to the Exclusionary Rules, 34 U. CHI. L. REV. 939, 941-47 (1967) (discussing Walder's apparent limitations to the impeachment exception).

75. Walder, 347 U.S. at 64-65.

76. Id.

77. Id. at 64-66.

78. See Agnello v. United States, 269 U.S. 20, 35 (1925).

79. Walder, 347 U.S. at 65.

80. Collateral facts are those that "are outside the controversy, or are not directly connected with the principal matter or issue." BLACK'S LAW DICTIONARY 262 (6th ed. 1990). See Johnson v. United States, 344 F.2d 163, 166 (D.C. Cir. 1964) (recognizing Walder as establishing collateral limitation and refusing to apply impeachment exception to matters related directly to the crimes charged); see also Note, State v. Durepo: Toward a Principled
The collateral requirement reinforced the exception’s design to be used solely for impeachment purposes. If testimony sought to be impeached was related directly to the crimes charged, admission of the excluded evidence would serve not only an impeachment function, but also as direct evidence against the crimes charged. Admitting the tainted evidence would essentially support the prosecution’s case in chief and leave the exclusionary rule devoid of purpose.

Although lower courts consistently applied the *Walder* exception, the Supreme Court’s enthusiasm for the exclusionary rule increased in the 1960’s, causing speculation about the impeachment exception’s vitality.

*Maine Version of the Impeachment Exception to the Exclusionary Rule, 37 ME. L. REV. 383, 408 n.112 (1985) (discussing distinction between collateral and direct evidence in relation to impeachment exception).*

81. *See C. McCormick, supra note 5, § 178; W. Lafave & J. Israel, supra note 74, § 9.6; see also Comment, supra note 74, at 941-43 (recognizing Walder exception as limited to collateral matters); Note, The Collateral Use Doctrine: From Walder to Miranda, 62 NW. U.L. REV. 912, 920 (1968) (collateral restriction based in Walder’s holding).*

82. *See Walder, 347 U.S. at 64.\n
83. *See Recent Decisions, 42 GEO. L.J. 542, 565 (1954) (“defendant is probably partially convicted on the basis of illegally obtained evidence [despite the fact that it was only] used to impeach him”).*

84. *See Note, supra note 80, at 408 n.112. But see Stone v. Powell, 428 U.S. 465, 485 (1976) (citing Walder) (“the interest in promoting judicial integrity does not . . . require that the trial court exclude [unlawfully obtained] evidence from use for impeachment of a defendant, even though its introduction is certain to result in conviction in some cases”).*

85. *See, e.g., United States v. Curry, 358 F.2d 904, 910 (2d Cir. 1965) (trial court properly relied on Walder in admitting suppressed statements used to impeach defendant), cert. denied, 385 U.S. 873 (1966); Jackson v. United States, 311 F.2d 686, 689 (5th Cir.) (impeachment of defendant at trial with his excluded statements was justified under Walder), cert. denied, 374 U.S. 850 (1963); Tate v. United States, 283 F.2d 377, 378-79 (D.C. Cir. 1960) (based on Walder, statements obtained from defendant during period of unlawful detention were admissible to impeach defendant’s contradictory testimony at trial); Ferrari v. United States, 244 F.2d 132, 140-41 (9th Cir.) (impeachment of defendant at trial with inadmissible testimony was proper under Walder), cert. denied, 355 U.S. 873 (1957).*

86. *In Miranda v. Arizona, 384 U.S. 436 (1966), the Court pronounced its well known protection of a defendant’s fifth amendment right prohibiting the use of evidence obtained during an interrogation of the defendant unless the government followed certain procedures prior to the interrogation. Under these pre-interrogation procedures, law enforcement officials must advise a suspected criminal: 1) of the right to remain silent; 2) that any statement made may be used against the suspect as evidence in a criminal proceeding; and 3) of the right to have an attorney, either retained or appointed, present during questioning. *Id.* at 444, 478-79. Although Miranda involved the suppression at trial of incriminating statements and not the impeachment exception, the Court stated that the fifth amendment protects a defendant from self-incrimination in any manner, and recognized that exculpatory statements made by defendants are often used to impeach their testimony at trial. *Id.* at 476. The Court reasoned that these statements are “incriminating in any meaningful sense of the word and may not be used without the full warnings and effective [fifth amendment] waiver required for any other statement.” *Id.* at 477. Therefore, although the Court created an impeachment exception for unlawfully seized physical evidence, Miranda seemed to suggest that no such exception would
C. Molding the Exception—Will the Exception Swallow the Rule?


In *Harris v. New York*, the Court revived the impeachment exception and applied it to evidence obtained in violation of the fifth amendment. *Harris* redefined the *Walder* limitations and dismissed language in a prior case that called into question the exception’s vitality. In *Harris*, Harris was arrested after selling heroin to an undercover police officer, and he subsequently made incriminating statements without being informed of his *Miranda* rights. At trial, the prosecution conceded the inadmissibility of the statements in its case in chief. After Harris took the stand in his own defense and denied the distribution charge on direct examination, however, the trial court permitted the prosecutor to read the suppressed statements on cross-examination to contradict Harris’ direct testimony. Harris was convicted and the Supreme Court affirmed.

In a relatively brief opinion, the Court began by dispelling prior case language that made negative reference to the impeachment exception as *dictum*. In reaffirming the validity of the impeachment exception, the Court reiterated the prohibition against using the exclusionary rule as a shield. Furthermore, the Court declined to adopt the presumed limitations of *Walder*. Specifically, the Court recognized that while the issue impeached in *Walder* was collateral to the chief issue at trial, the impeached apply to fifth amendment violations. See C. McCormick, supra note 5, § 178; Comment, supra note 74, at 947-49 (after *Miranda*, extension of the impeachment exception to pretrial statements is not “tenable”).

88. Id. at 223-24.
89. See id. at 224; C. McCormick, supra note 5, § 178; supra note 86.
90. *Harris*, 401 U.S. at 222-23.
91. Id. at 223-24. The Court did not elaborate on the content of the statements. See id.
92. Id. at 223.
93. Id.
94. Id. at 226.
95. The majority’s opinion consisted of approximately four pages. For criticism of this brevity, see Dershowitz & Ely, supra note 73, at 1198-99 (*Harris* Court hastily decided broad questions of constitutional law without clarity and offered little guidance to lower courts).
96. See supra note 86.
97. *Harris*, 401 U.S. at 224.
98. Id.
99. Id. at 224-25. See supra notes 74-84 and accompanying text.
100. See supra notes 65-69 and accompanying text.
testimony in *Harris* related more directly to the crimes charged.\textsuperscript{101} The Court noted that Harris' trial testimony sharply contradicted his earlier statements. Although the earlier statements were obtained unlawfully, the Court concluded that failure to allow impeachment essentially would condone the defendant's attempt to manipulate the judicial system.\textsuperscript{102} Once again, the Court prevented a defendant from using the exclusionary rule as a shield.

In supporting its expansion of *Walder*, the Court focused on the benefit of impeachment to the trial's truth-seeking objective, determining that it was valuable in aiding the jury's assessment of the defendant's credibility.\textsuperscript{103} Although recognizing the exclusionary rule's attempt at preventing police misconduct, the Court justified the impeachment exception by referring to the potential for police misconduct as only a "speculative possibility."\textsuperscript{104} The Court reasoned that the current prohibition of the evidence in the prosecution's case in chief sufficiently deters police misconduct.\textsuperscript{105} By abandoning the presumed collateral evidence requirement of *Walder*,\textsuperscript{106} the Court thus further expanded the use of the impeachment exception.\textsuperscript{107} And while *Walder* and *Harris* indicated that the impeachment exception applied only to the direct examination of defendants, the Court later continued its expansion of the impeachment exception by applying it to cross-examination in *United States v. Havens*.\textsuperscript{108}

2. *United States v. Havens*: Expansion of the Exception to Cross-Examination

In *United States v. Havens*,\textsuperscript{109} airport customs officials unlawfully searched Havens' luggage and seized a T-shirt implicating him in a narcotics smuggling operation.\textsuperscript{110} The T-shirt was suppressed at trial based on the

\begin{itemize}
\item \textsuperscript{101} *Harris*, 401 U.S. at 225. The Court did not explain, however, how Harris' statements were directly related. *Id.* See Dershowitz & Ely, supra note 73, at 1214 (criticizing the *Harris* Court's representation of the trial record).
\item \textsuperscript{102} *Harris*, 401 U.S. at 225.
\item \textsuperscript{103} *Id.*
\item \textsuperscript{104} *Id.*
\item \textsuperscript{105} *Id.*
\item \textsuperscript{106} *Id.* See supra note 74-84 and accompanying text.
\item \textsuperscript{107} With *Harris*, the Court extended the impeachment exception to include coverage of the fifth amendment's exclusionary rule. See Michigan v. Tucker, 417 U.S. 433, 451-52 (1974). For criticism of the Court's reasoning in *Harris*, see supra notes 13, 95, 101.
\item \textsuperscript{108} 446 U.S. 620 (1980).
\item \textsuperscript{109} *Id.*
\item \textsuperscript{110} *Id.* at 622-23. Havens' co-defendant was searched by a customs officer who found cocaine sewn into pockets created from pieces of another T-shirt. *Id.* After searching Havens' luggage, the customs officer found a T-shirt with cut holes matching the makeshift patches. *Id.* at 622.
\end{itemize}
fourth amendment's exclusionary rule. On direct examination, Havens denied involvement in the smuggling scheme, but made no reference to the T-shirt. On cross-examination, the prosecution questioned Havens as to whether he possessed the T-shirt when going through customs and whether the T-shirt was seized from his luggage. He denied both possession and knowledge of the seizure. The trial court allowed the prosecution to introduce the T-shirt into evidence and instructed the jury to consider it solely for impeachment purposes. Havens was convicted and the Supreme Court, finding the government's impeachment proper, affirmed the conviction.

In expanding the impeachment exception to cross-examination, the Havens Court focused heavily on the truth-seeking value of the exception. The Court applied the exception to cross-examination testimony because the prosecution's questioning was reasonably based on Havens' direct examination testimony. During cross-examination, Havens provided false statements closely related to his direct examination testimony. The Court thus reasoned that Havens "opened the door" for the prosecutor to challenge him with the otherwise suppressed evidence. The Court distinguished Agnello v. United States, in which impeachment was held improper when the excluded evidence was raised on cross-examination. The Havens Court found the cross-examination in Agnello "too tenuous" to any subject raised.

111. Id.

112. Id.

113. Id. at 623.

114. Id.

115. Id.

116. Id. at 629. The Court held that "a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained." Id. at 627-28.

117. Id. at 626-27. In Havens, the Court adopted the truth-seeking goal articulated in Harris as a basis for the impeachment exception. In Harris, the Court stated that "[h]aving voluntarily taken the stand, [the defendant] 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 process." 401 U.S. at 225. Subsequent decisions have relied on the Harris Court's reasoning in support of the truth-seeking goal. See Nix v. Whiteside, 475 U.S. 157, 173 (1986) ("Harris . . . make[s] it crystal clear that there is no right whatever—constitutional or otherwise—for a defendant to use false evidence."); Jenkins v. Anderson, 447 U.S. 231, 237-38 (1980) (citing Harris); Oregon v. Hass, 420 U.S. 714, 722 (1975) (the Court is "always engaged in a search for truth"); see also C. McCormick, supra note 5, § 178 (discussing truth-seeking function of the impeachment exception).

118. Havens, 446 U.S. at 628.

119. Id.

120. 269 U.S. 20 (1925).

121. Id. at 35. See supra notes 58-61 and accompanying text.
on direct examination to allow impeachment\textsuperscript{122} and held that because allowing the prosecutor to cross-examine effectively is an essential element of the adversarial system's goal of attaining the truth,\textsuperscript{123} a defendant must testify truthfully or "suffer the consequences."\textsuperscript{124} Accordingly, Havens further extended the opportunity for use of unlawfully obtained evidence at trial.\textsuperscript{125}

\textsuperscript{122} 446 U.S. at 625. On this point, the Court followed Walder, which also implied that Agnello's cross-examination was too far removed from the issues raised on direct to open the door for impeachment. \textit{Id.} See Note, The Exclusionary Rule, supra note 12, at 234 (discussing distinctions between Agnello and Walder); Comment, The Impeachment Exception to the Constitutional Exclusionary Rules, 73 COLUM. L. REV. 1476, 1479 (1973).

\textsuperscript{123} Havens, 446 U.S. at 626-27.

\textsuperscript{124} \textit{Id.} at 626. The Court also reaffirmed its holding in Harris, which stated that the issue of whether the matter sought to be impeached was collateral was no longer a necessary determination in applying the impeachment exception. \textit{Id.} at 624-25.

\textit{Havens} drew sharp criticism for expanding the impeachment exception to cross-examination. \textit{See} United States v. Havens, 446 U.S. 620, 633 (1980) (Brennan, J., dissenting) ("hop[ing] that \textit{after} Havens the Court \[will\] not be prepared to acquiesce in torture or other police conduct that 'shocks the conscience' even if it demonstrably advance[s] the factfinding process"); \textit{see also} Note, The Exclusionary Rule, supra note 12, at 236-41 (Havens overemphasized the truth-seeking rationale and disregarded the exclusionary rule's deterrence goal); Note, \textit{Impeachment By Illegally Obtained Evidence}, supra note 12, at 671 (after Havens, "defendant no longer may be free to make a meaningful denial of the elements of the crime charged").


State courts vary in their application of the impeachment exception due to the Supreme Court's unwillingness to discourage heightened evidentiary safeguards. As the Court stated in Oregon v. Hass, 420 U.S. 714 (1975), "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." \textit{Id.} at 719 (emphasis in original) (citing Sibron v. New York, 392 U.S. 40, 60-61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967); State v. Kaluna, 55 Haw. 361, 368-69, 520 P.2d 51, 58-59 (1974)). The Court continued, however, that "a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." Hass, 420 U.S. at 719 (emphasis in original) (citing Smayda v. United States, 352 F.2d 251, 253 (9th Cir. 1965), \textit{cert. denied}, 382 U.S. 981 (1966);
Although the exclusionary rule initially barred the use of all unlawfully obtained evidence in criminal proceedings, the impeachment exception emerged to preclude unfair use of the rule.\textsuperscript{126} Because of its limited application to impeachment, the exception enhanced the ability of prosecutors to further the truth-seeking goal of the judicial system without undermining the exclusionary rule’s attempted deterrence of police misconduct.\textsuperscript{127} Although the impeachment exception presumably had certain boundaries,\textsuperscript{128} subsequent decisions removed these by expanding use of the exception to both direct and collateral evidence elicited on both direct and cross-examination.\textsuperscript{129} In \textit{James v. Illinois},\textsuperscript{130} the Court faced another opportunity to expand the exception by broadening its application to defense witnesses.\textsuperscript{131}

\textbf{II. \textit{James v. Illinois: Disallowing Expansion to Defense Witnesses}}

\textit{A. The Majority}

Although the Supreme Court consistently expanded the impeachment exception after \textit{Walder},\textsuperscript{132} the Court in \textit{James v. Illinois}\textsuperscript{133} refused to extend the exception to defense witnesses.\textsuperscript{134} Justice Brennan, writing for the ma-
majority, began the analysis by recognizing that arriving at the truth is the fundamental goal of America’s legal process. The Court noted that this truth-seeking goal may be overcome, however, by the fact that the Constitution does insulate the accused criminal from the illegal actions of law enforcement officials. Justice Brennan acknowledged the historical progression of the impeachment exception from Walder to Havens as a balance between truth-seeking and deterring police misconduct, and refused to expand coverage to defense witnesses because such an expansion would not further these two purposes. In its opinion, the majority first analyzed whether expansion of the exception would further the truth-seeking function of the trial. The Court then looked at whether the exclusionary rule would remain an effective deterrent to police misconduct if the exception was expanded.

1. Truth-Seeking Rationale

Addressing the truth-seeking rationale behind the impeachment exception, Justice Brennan noted that the existing exception provides defendants the opportunity to testify freely and truthfully, but does not prevent the introduction of evidence that contradicts the defendant’s testimony. The Court reasoned that “[t]he exception thus generally discourages perjured testimony without discouraging truthful testimony.” In contrast, Justice Brennan suggested that expanding the exception to include the testimony of all defense witnesses would not have the same effect.

First, the Court rejected the Illinois Supreme Court’s premise that expansion of the exception is needed to deter “‘perjury by proxy.’” Justice Brennan held that the threat of criminal prosecution for perjury is a sufficient deterrent against defense witnesses providing false testimony. Refer-

135. Id. at 311 (quoting United States v. Havens, 446 U.S. 620, 626 (1980)).
136. Id. (citing Arizona v. Hicks, 480 U.S. 321, 329 (1987)).
137. Id. at 311-20.
138. Id. at 313-17.
139. Id. at 317-19.
140. Id. at 314.
141. Id.
142. Id.
143. Id. The Illinois Supreme Court maintained that the “animating principle” behind the Court’s impeachment exception cases was the balancing of the exclusionary rule’s goals with the ability to arrive at the truth through use of the exception. People v. James, 123 Ill. 2d 523, 536, 528 N.E.2d 723, 729 (1988), rev’d, 493 U.S. 307 (1990). Given this mandate, the Illinois Supreme Court reasoned that “if a defendant is prohibited from using perjury by way of a defense, it matters not from whose lips that perjury comes.” Id.
144. 493 U.S. at 314. But see Shellenberger, Perjury Prosecutions After Acquittals: The Evils of False Testimony Balanced Against the Sanctity of Determinations of Innocence, 71
ring to the "'perjury by proxy'" premise as "suspect," Justice Brennan noted the dissent's concession\textsuperscript{145} that "'false testimony can result from faulty recollection' as opposed to intentional lying."\textsuperscript{146} Thus "'perjury by proxy'" was not of great concern to the majority.\textsuperscript{147}

Next, the Court predicted that applying the exception to all defense witnesses would "chill" the defendant's case.\textsuperscript{148} Justice Brennan first explained that "'friendly'" witnesses, due to either insufficient care or inadequate preparation, often cannot be "'trusted' " to testify without giving statements "in sufficient tension" with the suppressed evidence.\textsuperscript{149} A court might view such tension as contrary to the suppressed evidence and allow the prosecution to introduce the evidence to impeach such witnesses.\textsuperscript{150} According to Justice Brennan, defendants would likely choose not to call witnesses rather than run the risk of "opening the door" to the admission of suppressed evidence based on a "'friendly'" witness' testimony.\textsuperscript{151} He noted that "'reluctant'" or "'hostile'" witnesses called by a defendant might not share the defendant's concern about introducing contradictory evidence and could make statements triggering the impeachment exception.\textsuperscript{152} Again, Justice Brennan claimed that because "a party 'cannot be absolutely certain that his witnesses will testify as expected,'" expansion of the impeachment exception would inhibit a defendant's ability to call witnesses who could offer probative evidence.\textsuperscript{153}

\begin{flushleft}
Marq. L. Rev. 703, 708-09 (1988) (perjury prosecutions are rare and perjury sanction is not an effective deterrent).\textsuperscript{145} See James, 493 U.S. at 326 (Kennedy, J., dissenting).\textsuperscript{146} Id. at 314 n.4 (quoting id. at 326 (Kennedy, J., dissenting)).\textsuperscript{147} See id. at 314-16 & n.4.\textsuperscript{148} Id. at 314-16.\textsuperscript{149} Id. at 315.\textsuperscript{150} Id.\textsuperscript{151} Id.\textsuperscript{152} Id.\textsuperscript{153} Id. (quoting Brooks v. Tennessee, 406 U.S. 605, 609 (1972)).\textsuperscript{154} Id. at 315-16. The Court maintained that the potential "chill" such an expansion would create outweighed the gains to the truth-seeking process. Id. at 314-17. The Court continued that under an expansion of the impeachment exception, regardless of a witness' motive, the impeachment exception could be used when witnesses make statements merely in "tension," rather than in direct conflict, with the suppressed evidence. The Court held that mere tension would result in the use of excluded evidence becoming unbridled. Id. at 315-16. Justice Kennedy's application of the exception, however, would require more than mere tension, thereby avoiding unbridled use of the excluded evidence. See infra note 173 and accompanying text.

The Illinois Supreme Court proposed that the expansion of the impeachment exception could be limited to statements that are "purposely presented by the defendant." People v. James, 123 Ill. 2d 523, 537, 528 N.E.2d 723, 729 (1988), rev'd, 493 U.S. 307 (1990). Because the trial court failed to determine whether the testimony of the defense witness in James was
The majority concluded this issue by noting that while defendants should not be allowed to pervert the exclusionary rule and shield their perjury, the state should not be allowed to wield the excluded evidence as a sword and hinder defendants’ presentation of witnesses. The majority next turned to the issue of whether expansion of the impeachment exception would weaken the exclusionary rule’s deterrent effect on police misconduct.

2. Police Misconduct: Stacking the Deck

The Court also determined that expanding the impeachment exception would erode the exclusionary rule as a deterrent to police misconduct. Although recognizing the Court’s previous characterization of police misconduct as only a “‘speculative possibility’” under the existing impeachment exception, Justice Brennan concluded that because defense witnesses outnumber testifying defendants, an expansion of the impeachment exception to include all defense witnesses would necessarily increase the opportunity to use tainted evidence and thereby raise police misconduct beyond a speculative possibility. Justice Brennan claimed that under the expanded version of the exception law enforcement officials “would recognize that obtaining evidence through illegal means stacks the deck heavily in the prosecution’s favor” and that misconduct would necessarily increase as a result.

The majority rejected the argument that, regardless of the additional opportunities for use of the excluded evidence via impeachment, the unavaila-

purposely presented, and because this proposed test could be too subjective, the Court rejected this suggestion. 493 U.S. at 316 n.6. The Illinois Supreme Court further proposed that expansion be limited to statements elicited from defense witnesses on direct examination. People v. James, 123 Ill. 2d at 538, 528 N.E.2d at 730. Because of the holding in United States v. Havens, 446 U.S. 620 (1980), that eliminated the distinction between testimony elicited on direct versus cross-examination when employing the impeachment exception, the majority also rejected this suggestion. 493 U.S. at 316 n.6. Finally, the Illinois Supreme Court proposed limiting expansion of the exception to testimony in direct conflict with the suppressed evidence, with conflict determinations made through a judicial inquiry. People v. James, 123 Ill. 2d at 538, 528 N.E.2d at 730. The majority rejected this suggestion, arguing that the result of such inquiry could be unpredictable. 493 U.S. at 316 n.6. In response to the supposed unpredictable nature of such hearings, however, the dissent recognized that such inquiries are “commonplace” in evidentiary matters. Id. at 325 n.1 (Kennedy, J., dissenting); see infra text accompanying note 175.

155. James, 493 U.S. at 317.
156. Id.
158. Id. at 318.
159. Id.
160. Id.
bility of the evidence from the prosecutor's case in chief still provides a "quantum of deterrence" for police misconduct.\footnote{161} In doing so, the Court reasoned that police misconduct occurs in relation to a police officer's assessment of a prosecutor's prima facie case.\footnote{162} In situations where the officer believes that illegally obtained evidence might hamper the efforts of establishing a prima facie case, misconduct is deterred for "fear of jeopardizing the entire case."\footnote{163} The Court noted, however, that law enforcement officials typically know when they have sufficient, legally obtained evidence to establish a prima facie case, and they would have "little to lose and much to gain by overstepping constitutional limits on evidence gathering" to secure evidence for impeachment purposes.\footnote{164} Thus, according to Justice Brennan, the suggested "quantum of deterrence" has a limited effect on misconduct.\footnote{165}

The Court concluded that the impeachment exception's expansion to include defense witnesses would not significantly further the truth-seeking objective, but rather would "appreciably undermine" the exclusionary rule's deterrent effect.\footnote{166} Based on this reasoning, the Court refused to expand the impeachment exception.\footnote{167}

**B. The Dissent: A Practical Solution Versus the Majority's "Wooden Rule"**

In his dissent, Justice Kennedy stated that the majority's "exaggerated view [of expansion] leads to a drastic remedy: The jury cannot learn that defense testimony is inconsistent with probative evidence of undoubted value."\footnote{168} Although agreeing with the majority that expansion of the impeachment exception requires consideration of its truth-seeking value

\begin{enumerate}
\item \footnote{161} Id.
\item \footnote{162} Id. at 318-19.
\item \footnote{163} Id. at 319.
\item \footnote{164} Id.
\item \footnote{165} Justice Brennan suggested that the police officers in James already knew of several eyewitnesses to the shooting, and likely believed that these witnesses would sufficiently establish a prima facie case. \textit{Id.} at 319 n.8. Nevertheless, the officers elicited the statement in spite of this fact, demonstrating that exclusion of the evidence to the prosecutor's case in chief, as suggested by the United States (as \textit{amicus curiae}), would have little deterrent effect. \textit{Id. But see id.} at 329 n.3 (Kennedy, J., dissenting) ("contrary to the impression conveyed by the majority, the arresting officers knew almost nothing of the state of a future prosecution case" (citation omitted)). The Court also held that in addressing exceptions to the exclusionary rule, focus must be placed on the "systemic effects" such exceptions have on individual liberty vis a vis "arbitrary or oppressive police conduct." \textit{Id.} at 319-20.
\item \footnote{166} Id. at 320.
\item \footnote{167} Id.
\item \footnote{168} Id. at 322 (Kennedy, J., dissenting).
weighed against the likelihood of deterring police misconduct, Justice Kennedy argued that "the exclusionary rule does not apply where the interest in pursuing truth . . . outweighs any deterrence of unlawful [police] conduct that the rule might achieve." The dissent claimed that the majority's opinion grants the defendant "broad immunity" to introduce false testimony. Accordingly, Justice Kennedy stated that the refusal to expand the impeachment exception will result in misleading jurors with false testimony, thereby harming the truth-seeking function of the trial.

Justice Kennedy rejected the majority's prediction that expansion of the impeachment exception would "chill" a defendant's ability to present witnesses as far too speculative to justify the majority's holding. He conceded that if testimony in mere tension with the suppressed evidence could trigger the impeachment exception, the majority's concern would be more credible. Recognizing this weakness, the dissent offered a limit on com-


170. Id.

171. Id. at 324-25. The dissent maintained that failure to allow expansion would also leave jurors skeptical of the prosecution's case due to the inability to challenge such testimony. Id. Justice Kennedy illustrated:

To deprive the jurors of knowledge that statements of the defendant himself revealed the witness' testimony to be false would result in a decision by triers of fact who were not just kept in the dark as to excluded evidence, but positively misled. The potential for harm to the truth-seeking process . . . will be greater than if the defendant himself had testified. It is natural for jurors to be skeptical of self-serving testimony by the defendant. Testimony by a witness said to be independent has the greater potential to deceive. And if a defense witness can present false testimony with impunity, the jurors may find the rest of the prosecution's case suspect, for ineffective and artificial cross-examination will be viewed as a real weakness in the State's case. Jurors will assume that if the prosecution had any proof the statement was false, it would make the proof known. The majority does more than deprive the prosecution of evidence. The State must also suffer the introduction of false testimony and appear to bolster the falsehood by its own silence.

172. Id. at 325.

173. Id. To exemplify that mere tension does not routinely trigger the impeachment exception, however, Justice Kennedy cited the James trial court's refusal to introduce excluded evidence on this basis. Id. at 325 n.1. He pointed out that:

There is no suggestion that the trial court considered witness Jewel Henderson's testimony about petitioner's hair color to be a basis for admitting petitioner's other statements about the shootings. Henderson also testified that she was with petitioner at his home on the night of the shooting, and that petitioner had arrived there between 10 and 11 p.m., but that she could not be specific about the time. The State sought to rebut this testimony with petitioner's suppressed statements about the shooting, contending that Henderson's testimony established an alibi for the shooting, which occurred around 11:00. The court concluded that no alibi was established, and refused to allow introduction of the suppressed statements on rebuttal.
plete expansion of the exception by suggesting that the evidence should only be admitted when in direct conflict with the testimony, leaving the jury to decide. Justice Kennedy maintained that the separate hearings routinely conducted by trial judges to determine the admissibility of evidence could be employed to resolve issues of direct conflict, thus identifying inconsistencies and defining the proper application of impeachment. Justice Kennedy argued that adoption of this alternative would preserve the truth-seeking function of the trial for the jury and satisfy fourth amendment concerns through exclusion of the evidence from the prosecutor’s case in chief, both consistent with previous Court holdings regarding the impeachment exception.

The dissent then criticized the majority’s failure to acknowledge the “almost certain [conclusion] that the testimony immunized from rebuttal is false.” Justice Kennedy characterized “[t]he majority’s apparent assumption that defense witnesses protected by [the Court’s holding] have only truth-telling in mind . . . as far too sanguine to support acceptance of a rule that controls the hard reality of contested criminal trials.” Justice Kennedy continued that the “majority’s ironclad rule is one that applies regardless of the witness’ motives, and may be misused as a license to perjure. Even if the witness testifies in good faith, the defendant and his lawyer, who offer the testimony, know the facts.” Because the defendant, through counsel, controls the questioning on direct examination, Justice Kennedy determined that the defendant could avoid admission of the excluded evidence by simply not calling a witness whose testimony contradicts the suppressed evidence.

Id.

174. Id. at 325 (stating that the impeachment exception should apply “where, within reason, the witness’ testimony and the excluded testimony cannot both be true”).

175. Id. at 325 & n.1.

176. Id. at 329-30, 352.

177. Id. at 326.

178. Id. The majority’s assumption could be credible, but for the fact that it overlooks thirty years of impeachment exception cases dealing with defendants’ attempts to pervert the judicial system through their lies. These cases represent a committed stand against such perversion. See supra notes 65-125 and accompanying text.

179. Id. at 326.

180. Id. at 328. The dissent pointed out that the defense attorney in James expected the witness to cast doubt on the validity of the eyewitness identifications of a red-haired shooter by eliciting testimony contrary to the defendant’s own statements, id. at 326, and that failure to allow impeachment would stand squarely against the truth-seeking goal. Furthermore, by recognizing this tactic as the obvious motivation for calling the witness, the failure to allow impeachment adds merit to the perjury “by proxy” argument. The defendant has created a solid assurance of avoiding the excluded evidence, and in doing so, perverted the judicial system by purposefully casting doubt on the other, reliable evidence.
Next, Justice Kennedy dismissed the majority's reliance on the threat of prosecution as a deterrent against perjury for two reasons. First, because of the heightened proof requirements in prosecuting a perjury charge, perjury convictions are difficult to sustain. Second, Justice Kennedy noted that when the testimony is elicited from a friend or family member to benefit a defendant, threats of future perjury prosecutions are "idle." Therefore, the dissent determined that reliance on this threat to reject expansion of the impeachment exception was hollow.

Addressing the majority's claims about the increase of police misconduct, the dissent flatly disagreed with the majority's notion that police officers regularly confront and succumb to the temptation to gather illegally evidence to bolster the prosecution's case. The dissent characterized the majority's vision of calculating police officers as "unrealistic" and inconsistent with the conclusions reached in earlier cases involving the impeachment exception. The dissent stressed that police officers are "unschooled in the law," and the Court has no reason to believe that police officers make assessments as to the legality of evidence already obtained by them and whether such evidence will survive evidentiary hearings. The dissent then reiterated the Court's previous holding from *Harris v. New York*, where it found that even "'[a]ssuming that the exclusionary rule has a deterrent effect on proscribed police conduct,' " such deterrence is present when the suppressed evidence is unavailable during the prosecution's case in chief. Accordingly, Justice Kennedy concluded that expansion of the impeachment exception would

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181. *Id.* at 326-27.
183. 493 U.S. at 327 (Kennedy, J., dissenting).
184. *Id.* Justice Kennedy noted that the majority's concern that the state could obtain unbridled power to utilize suppressed evidence under the expansion might be justified if the testimony involved was elicited on cross-examination. *Id.* at 328. While the majority refused to consider this claim based on the Court's holding in *United States v. Havens*, 446 U.S. 620 (1980), Justice Kennedy suggested that perhaps a modified rule could be adopted for witnesses other than the defendant. 493 U.S. at 328 (Kennedy, J., dissenting). The dissent pointed out that "'[r]ather than wait for an appropriate case to consider this or similar measures, however, the majority opts for a wooden rule immunizing all defense testimony from rebuttal.'" *Id.*
185. *Id.*
187. *Id.* at 329.
188. 401 U.S. 222 (1971).
189. 493 U.S. at 329-30 (Kennedy, J., dissenting) (quoting *Harris*, 401 U.S. at 225). Justice Kennedy also recognized that, by introducing James' statements that he dyed his hair to "'change his appearance,'" the prosecution did go beyond what was necessary to rebut the witness' testimony about James' hair color. *Id.* Nevertheless, the dissent emphasized that any
prevent the perversion sought to be avoided through the existing exception and classified the perversion in *James*, albeit by proxy, as no different from that in previous cases.\textsuperscript{190}

\hspace{1em}**C. Justice Stevens' Concurrence: Threat of Perjury Prosecution is a "Hard Reality"**

Justice Stevens, while joining the majority, submitted a concurring opinion in response to certain issues raised by the dissent.\textsuperscript{191} Justice Stevens criticized the dissent for mischaracterizing the issue actually before the Court in *James*.\textsuperscript{192} According to Justice Stevens, the question facing the Court was not whether to uphold the interest of protecting the truth-seeking function of the trial, as this is an interest conceded to be "self-evident."\textsuperscript{193} Rather, Justice Stevens determined that the issue was whether admission of the illegally obtained evidence would "sufficiently advance the truth-seeking function to overcome the loss to the deterrent value of the exclusionary rule."\textsuperscript{194} Without elaborating on his particular assessment of the issues before the Court, Justice Stevens simply stated that the dissent presented an exaggerated view of the damage the majority's holding would have on the truth-seeking function.\textsuperscript{195} Justice Stevens also criticized the dissent's brief dismissal of the threat of prosecution as a deterrent effect for perjury "by proxy."\textsuperscript{196} He acknowledged that even though a defendant may want to overstate his case with witnesses, the dissent ignored the "'hard reality'"\textsuperscript{197} that witnesses "will think long and hard before accepting a defendant's invitation to knowingly offer false testimony."\textsuperscript{198}

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\textsuperscript{190} Id.

\textsuperscript{191} Id. at 320 (Stevens, J., concurring).

\textsuperscript{192} Id.

\textsuperscript{193} Id.

\textsuperscript{194} Id.

\textsuperscript{195} Id.

\textsuperscript{196} Id. at 321.

\textsuperscript{197} Id. (quoting id. at 326 (Kennedy, J., dissenting)).

\textsuperscript{198} Id. Justice Stevens also questioned whether the police detective's testimony about James' statements should be given "100 percent credence," for it is only then "that the dissent can so categorically state that 'the defendant himself revealed the witness' testimony to be false.'" Id. (quoting id. at 324 (Kennedy, J., dissenting)). This criticism was apparently intended to deflate the dissent's view that the majority's decision undermines the truth-seeking process. See Id. at 324-28. Finally, addressing the dissent's conclusion that any error committed by the trial court was harmless, Justice Stevens questioned whether the impeachment of the defense witness in *James* was even necessary, given the testimony of the five eyewitnesses. 493 U.S. at 321-22 (Stevens, J., concurring).
III. THE EXCEPTION'S VITALITY: THE SEARCH FOR TRUTH

When applying the impeachment exception, courts must balance the truth-seeking goal of the trial against the possible encouragement of police misconduct caused by admitting tainted evidence. If the truth-seeking process can benefit through the admission of tainted evidence, with minimal deterioration of the exclusionary rule's deterrent effect, the proper balance must be struck in favor of truth. Where, however, admitting tainted evidence appears to encourage or further increase police misconduct and will result in little or no benefit to the truth-seeking process, courts should exclude the evidence. Justice Kennedy's proposed limit on expansion of the impeachment exception strikes the proper balance.

In James, the Court refused to expand the impeachment exception to defense witnesses because of its concern that expansion would do little to enhance the truth-seeking process and do much to weaken the deterrent goal of the exclusionary rule. Expansion of the impeachment exception, however, likely would have just the opposite effect. By refusing to further expand the impeachment exception, the Court relied on the ability of prosecutors to pursue perjury charges against lying witnesses. Rather than permitting the prosecution to challenge falsehoods in the trial in which they are entered, the Court allowed their presentation to the jury without challenge.

In refusing to expand the exception, the Court abandoned the truth-seeking function of the trial.

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199. See id. at 311-12 (majority opinion).
200. This is, of course, accepting the premise that the exclusionary rule has an actual deterrent effect. See supra note 52 and accompanying text.
201. 493 U.S. at 320.
202. Id. at 314.
203. In opting for such a result, the Court failed to take into account two important considerations. First, if a defense witness' testimony is false, albeit from faulty recollection, it is nonetheless false. See id. at 327 (Kennedy, J., dissenting). A successful perjury prosecution cannot result from false testimony given by a witness who honestly believed the truthfulness of the testimony. See BLACK'S LAW DICTIONARY 1139 (6th ed. 1990) (“A person is guilty of perjury if in any official proceeding he makes a false statement under oath... and he does not believe it to be true.”). Nevertheless, by refusing to allow impeachment, the Court apparently endorses a jury's deliberation on falsehoods. In James, no one knew more clearly than the defendant what color his hair was the night of the shooting. Disallowing the impeachment of the witness' testimony stands in direct conflict with any search for the truth. In his concurrence, Justice Stevens attempted to deflect criticism of the majority's endorsement of the introduction of false testimony by criticizing the dissent's "100 percent credence" in the police officer's testimony. 493 U.S. at 321 (Stevens, J., concurring). But the majority gave equal credence to the witness' testimony, however, and Justice Stevens' concurrence fell short of deflecting the criticism.

Second, the majority's reliance on perjury prosecutions does nothing to remedy the problems presented in the prosecution of a defendant such as Darryl James. If a defendant is acquitted, the fifth amendment's protection against double jeopardy precludes a second trial to
Justice Brennan stated that a defendant's best defense often includes the presentation of witnesses, and the majority's holding was based significantly on the claim that expanding the exception would eliminate the defendant's ability to call witnesses. The Court's concerns, however, are misplaced. If the Court's previous focus in developing the impeachment exception was on enhancing truth and thwarting perversion of the judicial system, any limitation on the presentation of witnesses should be weighed against the resulting benefit of admitting the evidence in relation to the truth-seeking function of the trial. That is, if a defendant decides not to call a witness because he fears the witness may open the door to truthful but suppressed evidence, then it is probable that the witness would not have told the truth. The majority's concern for the ability of a defendant to call witnesses replaced any sincere consideration of the positive effect that expansion of the impeachment exception could have on arriving at the truth. Therefore, while earlier Court cases cited truth-seeking as paramount, the James Court abandoned precedent and instead created a new goal to protect: remedy an acquittal based on the perjurious testimony of a defense witness. See U.S. Const. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."). Therefore, the majority's decision favors the acquittal of a murderer over the uncertain possibility of a perjurer's future conviction. See 493 U.S. at 313-20.

204. 493 U.S. at 314-15.

205. Id. The majority also justified its refusal to expand the impeachment exception based on its prediction that unprepared or "hostile" witnesses may "open the door" to suppressed evidence. Id. However, the prediction assumed that the testimony would be contradictory and questionable, if not plainly false, and indicates both the majority's recognition that witnesses would subjugate the truth by providing false testimony, either by perjury or faulty recollection, and the majority's willingness to accept this result. See id. at 313-20. Where the suppressed evidence is physical, no problem exists as to whether a witness' contradictory testimony is false, as the evidence exists and the testimony either does or does not conflict with it. When the suppressed evidence is a defendant's statement, however, the issue becomes the credibility of the defense witness testifying and of the law enforcement official who received the statement. The jury should be the judge of this credibility, and the Court takes away that function by disallowing expansion of the impeachment exception. Id. at 327 n.2.; see id. at 327 (Kennedy, J., dissenting) ("missing from the majority's analysis is the almost certain knowledge that the testimony . . . is false"). Under James, defendants are still free to testify themselves and mold their testimony around the suppressed evidence to avoid its admission. Defendants may present witnesses, however, who can purposely contradict the suppressed evidence without challenge from the prosecution. See id. at 324-25. With such an option, the entire impeachment exception is lost, as there is nothing to prevent a defendant from curbing his testimony along certain boundaries and then presenting a witness to offer falsehoods which, under James, cannot be challenged by the prosecutor. Id. at 325.

206. See supra notes 65-125 and accompanying text.

207. Furthermore, the Court failed to offer any examples of how the truth would not be reached by expanding the exception, choosing instead to mask this lack of support by citing speculative damage to a defendant's ability to present witnesses. See 493 U.S. at 314-15.

208. See supra notes 73, 103, 123-24 and accompanying text.
enhancement of a defendant's ability to call witnesses. But any hindrance on the ability to put forth a defense should rightly rest on defendants. If they elect to contradict suppressed evidence through the testimony of their witnesses, defendants should also run the risk of having their lies revealed.

The impeachment exception was designed to prohibit defendants from manipulating the judicial system. Regardless of whether the manipulation is exercised via agents of the defendant, it is manipulation nonetheless, and the Court's previous stance against such perversion of the judicial system should have dictated the James Court's adoption rather than its dismissal of expansion. Furthermore, witnesses are sworn to tell the truth on the witness stand, and if expansion of the impeachment exception would lead to the limitation of the presentation of witnesses, this surely would not undermine the truth, but instead, foil attempts to conceal it. By disallowing expansion, the majority adeptly has provided defendants a manipulative procedural tactic and effectively destroyed the impeachment exception, while endorsing the concept of perjury "by proxy."

Although deterring police misconduct was a major rationale behind the exclusionary rule's development and the majority's holding in James, the majority did little to explain how misconduct would increase under an expanded impeachment exception. The Court merely speculated that, because of the increased opportunity for use of the impeachment exception under an expanded interpretation, misconduct would necessarily increase. But concluding, as the James majority does, that misconduct increases in proportion to the availability of the fruits of such misconduct assumes de-

209. Because James presented the Court with the issue of whether to expand the impeachment exception to defense witnesses, the Court's focus on the innovative protection of a defendant's right to call witnesses is not surprising. Yet, that does not mean the Court should have compromised the truth-seeking goal of the trial in the process. Instead, the Court's holding should have reflected consideration of the new protection in light of the truth-seeking goal.

210. The Court's acceptance of this risk would be consistent with the Havens Court's view that defendants must "suffer the consequences" if offering false testimony. United States v. Havens, 446 U.S. 620, 626 (1980). See Note, Impeachment By Illegally Obtained Evidence, supra note 12, at 669.

211. See supra notes 71-73 and accompanying text.


213. See supra notes 52, 156-65 and accompanying text.

214. This "numbers" rationale, however, wrongly assumes that police misconduct is not a reflection of an officer's integrity, or lack thereof, but rather results from careful review of Supreme Court decisions by police officers so that their conduct is guided by the current "temperature" of the Court. See Burger, supra note 52, at 11 (police officers have neither the time nor inclination to digest judicial opinions and act thereupon).

215. 493 U.S. at 318.
fendants routinely provide prosecutors with witnesses offering testimony contrary to the excluded evidence. If so, endorsing the truth-seeking goal of the judicial process should place the burden on defendants to present witnesses offering truthful testimony, rather than reject the introduction of evidence, although illegally obtained, to satisfy an overly broad, speculative fear of scheming law enforcement officials. Justice Brennan's speculation was not new, but until *James* it lacked the support of a majority.  

By adopting a "direct conflict" approach, Justice Kennedy's proposed resolution would curb any procedural manipulation of the exclusionary rule. Only where testimony stands in direct conflict with the suppressed evidence would impeachment be proper. With such an approach, the majority's prediction of a "chilling" effect easily is dismissed. The direct conflict approach involves a limited use of the exception which, while still allowing the presentation of an adequate defense, would only ensure that such a defense was truthful. Moreover, the requirement of a separate evidentiary hearing to determine whether testimony was presented purposely and in direct conflict with the suppressed evidence would remedy the majority's speculation of unbridled prosecutorial power and retain judicial integrity. The dissent achieved the proper balance between the truth-seeking goal of the impeachment exception and retention of the exclusionary rule as a deterrent.


217. See supra notes 174-76 and accompanying text.

218. *Id.*

219. See supra notes 148-54 and accompanying text.


221. See supra notes 159-60 and accompanying text.

222. Justice Kennedy's analysis of the majority's holding shows that without impeachment the jury is essentially forced to believe the witness, as the prosecutor's inability to challenge the testimony effectively serves as an endorsement of its veracity. See 493 U.S. at 325 (Kennedy, J., dissenting).
IV. CONCLUSION

The exclusionary rule, which bars unlawfully obtained evidence from use in a criminal proceeding, was developed to preserve the integrity of the judicial system and deter police misconduct. The impeachment exception was created to prevent defendants from perverting the judicial system. This exception ensures truth and enables prosecutors to confront defendants choosing to contradict suppressed evidence. The exception applies to testimony elicited on both direct and cross-examination, and applies to matters both directly related and collateral to the crimes charged. The exception previously was applied to a defendants’ testimony. In *James v. Illinois*, however, the Court refused to expand the impeachment exception to the testimony of defense witnesses.

By disallowing expansion of the impeachment exception to defense witnesses, the *James* decision greatly weakened, if not destroyed, the existing exception. The Court’s speculation that the exclusionary rule will be frustrated by allowing unlawfully obtained testimony to flood the courts was based on the assumption that defendants routinely rely on false and contradictory testimony of their witnesses, as it is only then that the impeachment exception can be used. Conversely, in rejecting expansion of the impeachment exception, the majority’s failure to consider the consequences of a witness whose false testimony is a result of faulty recollection placed the Court in a position of supporting jury deliberations based on falsehoods.

While the exclusionary rule initially served as a stand against overzealous law enforcement activity, the Court ultimately refined the rule through the impeachment exception. With the impeachment exception, police misconduct was still discouraged by the unavailability of suppressed evidence in the prosecution’s case in chief, but because certain truthful statements could be admitted for impeachment, the truth-seeking goal of the judicial system was enhanced. Failure to further expand the impeachment exception to defense witnesses only sacrifices the integrity of the judicial system for the sake of calculating defendants.

*Brandon Edward Mary*