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The Use of Suppression Hearing Testimony to Impeach

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The Use of Suppression Hearing Testimony to Impeach

In 1968, the Supreme Court decided in *Simmons v. United States* "that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."[1] Since the *Simmons* decision, a major point of controversy has been whether the shield created by *Simmons* is broad enough to prohibit the use of the defendant's suppression hearing testimony to impeach the defendant who later testifies inconsistently at trial. Although in 1980 the Supreme Court had an opportunity to clarify the *Simmons* rule in *United States v. Salvucci*,[2] the Court chose not to consider this issue.[3]

The precise extent of protection the *Simmons* rule provides a defendant who testifies at a suppression hearing remains an open question. It is evident that there is confusion among different courts as to whether the *Simmons* rule excludes the use of suppression hearing testimony for impeachment purposes. Some courts view *Simmons* as not applying to impeachment, and permit suppression hearing testimony to be used.[4] In contrast, other courts view *Simmons* as *not* providing sufficient protection against the use of suppression hearing testimony, and have created their own rules precluding its use.[5] Still other courts have yet to decide whether *Simmons* precludes the use of suppression hearing testimony for impeachment.[6]

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1. 390 U.S. 377, 394 (1968).
2. 448 U.S. 83 (1980).
3. *Id.* at 94.
4. People v. Smith, 67 Ill. App. 3d 952, 385 N.E.2d 707 (1979) (dicta) (if a defendant chooses to testify, suppression hearing testimony otherwise protected by *Simmons* can be used to impeach him); People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1947) (testimony or documents attested to by a defendant during a motion to suppress are available to the state for impeachment purposes if a defendant chooses to testify); Gray v. State, 43 Md. App. 238, 403 A.2d 853 (1979) (nothing in *Simmons* precludes the use of suppression hearing testimony for impeachment purposes).
5. State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980). *Simpson* argues that "state courts have the power to interpret their state constitutional provisions as more protective of individual rights than parallel provisions of the United States Constitution." *Id.* at 177. The court decided as a result of the *Salvucci* Court's interpretation of *Simmons* discussed *infra* at text accompanying notes 46-67, that *Simmons* was not sufficient protection against self-incrimination. *Id.* at 180. *See also* United States v. Salvucci, 448 U.S. 83, 96 (1980) (Marshall, J., dissenting); People v. Sturgis, 58 Ill. 2d 211, 216, 317 N.E.2d 545, 548 (1974) (Goldenhersh, J., dissenting).
6. Pendergrast v. United States, 416 F.2d 776, 780 n.13 (D.C. Cir.), *cert. denied*, 395 U.S. 926 (1969) ("we express no opinion as to whether appellant's hearing testimony could have been used at trial for purposes of impeachment."); Duddles v. United States, 399 A.2d 59, 63-64 n.11 (D.C. Ct. App. 1979) (dicta) (recognizing that the impeachment issue has not been resolved by the courts, but stating it was an issue they were not going to decide).

One purpose of this Note is to delineate the parameters of the *Simmons* rule. In doing so, this Note reviews the process involved in making a motion to suppress illegally seized evidence and analyzes the case law formulating the requirement of standing to assert a fourth amendment claim. This analysis reveals that the "dilemma"[7] supposedly cured by *Simmons* of having to choose between exercising a fourth amendment right and protecting against self-incrimination remains a dilemma for the defendant who wants to testify at both a suppression hearing and at his trial.

This Note argues that the Supreme Court has compounded the confusion by giving inconsistent signals in the recent *Salvucci* decision. The Court should eliminate this confusion by deciding whether the use of supression hearing testimony to impeach a defendant forces him to make a constitutionally impermissible "choice"[8] between his fourth and fifth amendment rights. One appropriate way to decide whether this choice is permissible is to examine other situations that require a person to choose between constitutional rights. By considering situations analogous to the impeachment issue, this Note identifies the competing personal and state interests which a court should consider in its decision-making process.

This Note then examines the analytical trap into which the Burger Court fell in failing to deal decisively with the impeachment issue in *Salvucci*. It is demonstrated that the probative value of using suppression hearing testimony to impeach a defendant at trial does not outweigh its prejudicial effect. A proper analysis of the situation in which a defendant must choose between asserting a fourth amendment claim and asserting a right against self-incrimination when suppression hearing testimony can be used to impeach shows that such a choice between rights is constitutionally impermissible.

THE PROTECTION OF SUPPRESSION HEARING TESTIMONY

Jones, Simmons and Salvucci

Rule 41(e) of the Federal Rules of Criminal Procedure[9] provides a method for protecting against the admission of illegally seized evidence. The use of 41(e) is triggered by a motion raised by the aggrieved party of an illegal search

7. *See infra* notes 15-19 and accompanying text.

8. For lack of a better word, "choice" will be used throughout this Note in connection with the intercourse between a defendant and his exercise of one of two constitutional rights. "Choice," in this context, does not meet the definitional criteria of the word; what lacks is a sense of voluntariness in the selection of two or more things. *See generally* WEBSTER'S NEW INTERNATIONAL DICTIONARY 473 (2d ed. 1957). While there is an option between two constitutional rights, the selection is a forced one. *See supra* notes 68-70 and accompanying text.

9. FED. R. CRIM. P. 41(e):

> Motions for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing

or seizure.[10] An unsupported motion will not be sustained.[11] Generally, the moving party must prove that the search was illegal,[12] with the judge receiving evidence regarding any issue of fact related to the motion.[13] The movant carries the burden of persuasion, and must overcome a presumption of legality of the search on the part of law enforcement officials.[14]

One requirement in a 41(e) motion is that the movant be the aggrieved party;[15] that is, he must have standing to assert a fourth amendment violation.[16] In attempting to establish standing on a 41(e) motion or under an equivalent state criminal procedure rule, a defendant can encounter a serious problem. Traditionally, to challenge the constitutionality of a search and seizure an aggrieved party had to assert ownership or interest in the seized property.[17] In doing so, the party often had to waive his privilege against self-incrimination.[18] If he tried to protect against self-incrimination, however, the party then waived his fourth amendment right to contest an alleged illegal violation of his privacy.[19]

> or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

10. *Id.*

11. 3 W. LAFAVE, SEARCH AND SEIZURE § 11.2, at 496 (1978 & Supp. 1984) (quoting A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 252 (3d ed. 1975) [hereinafter cited as LAFAVE].

12. 8B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 41.23, at 301-02 (2d ed. 1983) [hereinafter cited as MOORE].

13. *See supra* note 9. *See generally* 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 675, at 780 (1982) [hereinafter cited as WRIGHT].

14. Mascolo, *The Use at Trial of Suppression Hearing Admissions: An Erosion of the Privilege Against Self-Incrimination*, 72 DICK. L. REV. 1, 21-22 (1967). *E.g.*, Duddles v. United States, 399 A.2d 59, 63 (D.C. Ct. App. 1979) ("defendant has burden of making a prima facie showing of illegality and demonstrating a causal connection between the illegality and the seized evidence."). The initial burden does shift to the government, however, if the search is made without a warrant in a situation where one is necessary. LAFAVE, *supra* note 11, § 11.2, at 499.

15. *See supra* note 9.

16. For a general discussion of standing to assert a fourth amendment violation, see LAFAVE, *supra* note 11, § 11.3, at 543; MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 179 (2d ed. & Supp. 1978); White & Greenspan, *Standing to Object Search and Seizure*, 118 U. PA. L. REV. 333 (1970).

17. *See* Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471, 472-80 (1952).

18. *Id.* at 486-87.

19. *Id.* This problem was best stated by Learned Hand in Connally v. Medalie, 58 F.2d 629 (2d Cir. 1932):

> The petition is a pleading; it must squarely allege some violation of the petitioner's rights; else he has no standing. Perhaps he may mend his hold while the proceeding is in progress; perhaps he may accept as true what is alleged against him and go on; but nothing short of that is enough. The difference is substantial. Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.

Id. at 630.

In 1960, the Supreme Court first dealt with this dilemma in *Jones v. United States.*[20] In *Jones*, the Court was concerned with a defendant who moved to suppress illegally seized evidence taken from his apartment.[21] The government took the position that the defendant had no standing because he did not claim ownership of the seized items or an interest in the apartment.[22] The district court agreed with the government and denied the defendant's motion.[23] In reversing, the Supreme Court recognized the defendant's dilemma and noted that:

> [S]ince narcotics charges like these in the present indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him.[24]

The Court was concerned with the government's use of suppression hearing statements because it would result in a defendant perjuring himself in satisfying standing requirements while claiming in his defense lack of possession or interest in the item seized.[25] As a result, the Court created what is known as automatic standing:[26] "[t]he same element . . . which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged."[27]

In 1968, with automatic standing still intact, the Supreme Court in *Simmons v. United States*[28] created a privilege for defendants accused of possessory or non-possessory offenses by precluding the use of suppression hearing testimony at trial. *Simmons* was a case involving armed robbery.[29] A defendant, Garrett, had testified in a suppression motion to having an interest in certain property seized by law enforcement officials.[30] Garrett's motion was denied,[31] and over objection by his attorney the suppression hearing testimony was admitted at trial against him as evidence of guilt.[32]

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20. 362 U.S. 257 (1960).
21. *Id.* at 259.
22. *Id.*
23. *Id.*
24. *Id.* at 261-62.
25. *Id.* at 262. While the *Jones* Court was concerned with the government having the advantage of a defendant's contradictory positions, the Court was also concerned with the government having to take contradictory positions (trying to bar the suppression motion by showing defendant's lack of interest in the property searched or seized, yet prosecuting for possession). *Id.* at 263-64.
26. *See generally* sources cited *supra* note 16.
27. *Jones*, 362 U.S. at 263.
28. 390 U.S. 377 (1968).
29. *Id.* at 379.
30. *Id.* at 381. The defendant had given suppression hearing testimony to exclude a suitcase which contained incriminating contents. The testimony included a statement that the suitcase was similar to one he owned and that he owned the clothing therein. *Id.*
31. *Id.*
32. *Id.*

Garrett argued before the Supreme Court that "his constitutional rights were violated when testimony given by him in support of his 'suppression' motion was admitted against him at trial."[33] The Court agreed. Justice Harlan, writing for the majority, found that it was "intolerable that one constitutional right should have to be surrendered in order to assert another."[34] As a result, the Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."[35]

In 1980, the Supreme Court dramatically changed the standing requirements to assert a fourth amendment violation. In *United States v. Salvucci*,[36] the Court overruled the automatic standing rule of *Jones*, stating that the rule "has outlived its usefulness in this Court's Fourth Amendment jurisprudence."[37] In *Salvucci*, the defendants were charged with unlawful possession of stolen mail.[38] Defendants filed a motion to suppress a number of stolen checks found during a search by law enforcement officials. The district court granted the motion.[39] Despite the government's appeal that the defendants lacked standing, the First Circuit affirmed, ruling that automatic standing obviated the need for them to "establish a legitimate and reasonable expectation of privacy in the premises searched or property seized."[40]

The Supreme Court found, however, that the defendants had not satisfied certain entry conditions in order to utilize the protections of the fourth amendment. They were unable to "establish that they had a legitimate expectation of privacy in the areas . . . where the goods were seized;"[41] that is, the defendants failed to show standing to challenge the constitutionality of the search.[42] The defendant's fear, that prosecutors could use at trial for impeachment purposes the suppression hearing testimony presented to establish standing[43] (thus creating the "dilemma" identified in *Jones*), was not addressed by the Court.[44] Instead, the Court stated that "[t]he 'dilemma' identified in *Jones* . . . was eliminated by our decision in *Simmons v. United States* . . . . *Sim-*

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33. *Id.* at 382.
34. *Id.* at 394.
35. *Id.*
36. 448 U.S. 83 (1980).
37. *Id.* at 95.
38. *Id.* at 85.
39. *Id.*
40. United States v. Salvucci, 599 F.2d 1094, 1097 (1979).
41. 448 U.S. 83, 95.
42. The Court viewed automatic standing as only providing a "windfall to defendant's whose Fourth Amendment rights have *not* been violated." *Id.* at 95. There has been an ongoing debate over whether the automatic standing rule should have been retained. *See generally* Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387 (1981); Note, *Criminal Law and Procedure—Search and Seizure*, 58 U. DET. J. URB. L. 504 (1981); Note, *United States v. Salvucci: The Problematic Absence of Automatic Standing*, 8 PEPPERDINE L. REV. 1045 (1981).
43. *Salvucci*, 448 U.S. at 93.
44. *Id.* at 93-94.

mons . . . extends protection against this risk of self-incrimination in all of the cases covered by *Jones* . . . [and] grants a form of 'use immunity' to those defendants charged with nonpossessory crimes."[45]

Salvucci's *Signals on the Scope of the* Simmons *Protections*

In its analysis as to why automatic standing was no longer needed, the *Salvucci* Court recognized defendants' concern that using suppression hearing testimony to impeach them at trial goes against the "dilemma" principle of *Jones*.[46] Although the Court did not precisely address whether the use of suppression hearing testimony for impeachment creates an unconstitutional dilemma for a defendant,[47] the *Salvucci* opinion provides some signals as to how the Court might decide this issue. The Court, citing three state court decisions where suppression hearing testimony was held to be admissible to impeach a defendant and one federal appeals case that discusses the impeachment issue,[48] stated that "[t]his Court has not decided whether *Simmons*

45. *Id.* at 89-90.

46. *Id.* at 93.

47. *Salvucci* is the only Supreme Court case to date in which the Court has addressed (or failed to address) a party's argument against the use of suppression hearing testimony for impeachment purposes. While *Simmons* and *Jones* concerned the use of suppression hearing testimony, the defendants in both of these cases were trying to block the use of their hearing testimony on the issue of guilt.

48. 448 U.S. 83, 93 n.8. The three state court cases cited in footnote 8 of the opinion were Gray v. State, 43 Md. App. 3d 238, 403 A.2d 853 (1979); People v. Douglas, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358 (1977); and People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974). The federal case cited was Woody v. United States, 379 F.2d 130 (D.C. Cir. 1967).

In Gray v. State, the court, in referring to the impeachment issue, decided in summary fashion that "there is nothing in Simmons v. United States, that precludes the use of testimony at a suppression hearing for such a purpose." 43 Md. App. 3d at 245. In People v. Douglas the court stated that the *Simmons* Court "did not have before it . . . the more limited question of whether such testimony might be admissible for the purpose of impeachment." 66 Cal. App. 3d at 1003, 136 Cal. Rptr. at 361. The court held:

> We concluded that defendant's testimony at a suppression hearing may be used for impeachment purposes if he takes the stand at his trial and testifies in a manner inconsistent with his pretrial testimony. . . . In the event that he chooses to testify *truthfully* at trial, he runs no risk of being impeached.

Id. at 1006-07, 136 Cal. Rptr. at 363. In People v. Sturgis, the court also stated that *Simmons* concerns only the use of suppression hearing testimony as evidence of guilt, and held that "testimony of a defendant or documents voluntarily attested to by him in conjunction with his motion to suppress evidence . . . may be used for purposes of impeachment should the defendant choose to testify at trial." 58 Ill. 2d at 216.

The opinion in Woody v. United States was written by then circuit Judge Burger. Burger commented on what should be considered by a lower court, on remand, in deciding whether certain statements made by a defendant prior to *Miranda* warnings were voluntary:

> Allowing an accused to testify out of the jury's hearing at 9:30 a.m., for example, does not give him a license for perjury at 11:00 a.m., when the jury is recalled. . . . [I]f the appellant on remand testified that he indeed made incriminating statements but that these utterances were coerced, he could surely be impeached by his testimony in this case that he had made no such statements whatever . . . . Similarly if an accused testifies in a non-jury hearing to suppress evidence, his testimony at that hearing may be used, at the very least, to impeach later contrary statements.

379 F.2d at 131-32.

precludes the use of a defendant's testimony . . . at trial."[49] The *Salvucci* Court concluded by stating:

> [W]hether "use immunity" extends only through the Government's case-in-chief, or beyond that to the direct and cross-examination of a defendant in the event he chooses to take the stand . . . need not be and is not resolved here, for it is an issue which more aptly relates to the proper breadth of the *Simmons* privilege, and not to the need for retaining automatic standing.[50]

The *Salvucci* Court's citations suggest that it would allow the use of suppression hearing testimony for impeachment purposes.[51] But if the Court truly believes the answer to the impeachment issue lies within the "breadth" of *Simmons*, the Court may find a different result. The *Simmons* decision is very different from the state and federal court cases cited in *Salvucci*.

The *Simmons* Court was concerned with protecting testimony given in support of a motion to suppress evidence on fourth amendment grounds. The Court discussed the need of having an exclusionary rule but only limiting its use to those individuals whose rights are violated.[52] The Court also analyzed at length the effect of *Jones* on standing.[53] The Court viewed the defendant's suppression testimony as "an integral part of his Fourth Amendment exclusion claim . . . [but that the defendant] could give that testimony only by assuming the risk that the testimony would later be admitted against him at trial."[54] The Court considered "it intolerable that one constitutional right should have to be surrendered in order to assert another."[55]

While the *Simmons* Court had no occasion to reach the issue of using suppression hearing testimony for impeachment purposes, the Court did recognize the hazards of testifying at a suppression hearing without testimonial protections, and the tension that it created between competing constitutional rights.[56] Also, at least according to *Salvucci*, *Simmons* is supposed to offer all of the protections afforded by *Jones*.[57] To assess the extent of the *Simmons* protections, therefore, it is important to determine what interests the *Jones* Court was trying to protect.

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49. 448 U.S. 83, 93-94. Following this quotation, in footnote 9 of the opinion, the Court cited United States v. Kahan, 415 U.S. 239 (1974). In *Kahan*, the defendant had testified at arraignment that he was without funds and needed appointed counsel. It was later determined that the defendant had access to funds. The Court, allowing the government to use defendant's prior inconsistent statements regarding lack of funds in its case in chief, stated that "[t]he protective shield of *Simmons* is not to be converted into a license for false representation . . . ." *Id.* at 243.

50. 448 U.S. 83, 94.

51. *See supra* notes 48-49.

52. 390 U.S. 377, 389 (1968). For the facts of *Simmons*, see *supra* text accompanying notes 29-32.

53. *Id.* at 389-92.

54. *Id.* at 391.

55. *Id.* at 394 (*see supra* text accompanying note 35, for the specific language of the *Simmons* rule).

56. *Id.* at 391-94.

57. 448 U.S. 83, 89. "The 'dilemma' identified in Jones . . . was eliminated by our decision in Simmons v. United States." *See supra* text accompanying notes 43-45.

In creating the automatic standing rule, *Jones* was concerned with standing requirements that force a defendant to testify to facts which, if made available to the prosecution, could be sufficient to convict him.[58] The *Jones* opinion also reveals that the Court was concerned with the use of suppression hearing testimony to test witness credibility. The Court discussed what effect pre-automatic standing rules had on a defendant involved in a suppression hearing:

> [The defendant is] faced, not only with the chance that the allegations made on the motion to suppress may be used against him at trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession.[59]

This language is evidence that *Jones* was concerned with witness credibility as it relates to a defendant asserting one position at the suppression hearing and asserting another at trial. It is unclear whether witness credibility was as important to the *Jones* Court as was preventing the use of suppression hearing testimony on the issue of guilt. Because *Jones* was concerned with a defendant trying to block use of hearing testimony as direct evidence of guilt[60] (as was *Simmons*[61]), it is difficult to say whether the *Jones* Court would lend its words to a defendant before the Court only on the impeachment issue.

On its face, however, *Jones* seems to stand for two goals: not allowing the use of suppression hearing testimony against the defendant at trial, and keeping the defendant from perjuring himself by having to establish standing.[62] If this is the proper analysis of the protections afforded by *Jones*, then *Simmons* should also stand for these two goals, assuming the *Salvucci* Court was correct when it decided that *Simmons* deals fully with the protections afforded by *Jones* and automatic standing.[63] If *Simmons* does not concern itself with the impeachment issue,[64] then the *Salvucci* Court incorrectly determined the extent of the *Simmons* protections.[65] In either case, the few signals provided by the Supreme Court on whether suppression hearing testimony can be used for impeachment purposes are at best confusing, if not inconsistent. As a result, it is little wonder that courts[66] and commentators[67] arrive at dif-

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58. 362 U.S. 257, 261-62. *See also supra* note 25.
59. *Id.* at 262.
60. *Id.* at 259.
61. 390 U.S. 377, 381.
62. *See supra* text accompanying note 59.
63. 448 U.S. 83, 89-90.
64. *See* cases cited *supra* note 4.
65. Note, *Defendants Charged with Crimes of Possession May Claim the Benefits of the Exclusionary Rule Only if Their Fourth Amendment Rights Have Been Violated*, 3 WHITTIER L. REV. 257, 271 n.100 (1981) (if the *Jones* Court was trying to deal with impeachment as well as self-incrimination, then *Simmons* solves only half of the problem).
66. *See supra* notes 4-6.
67. *Compare* Moore, *supra* note 12, at 304 n.6, *with* LAFAVE, *supra* note 11, at 14 (Supp. 1982). *See also* WRIGHT, *supra* note 13, at 754; Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387, 398-99 n.118 (1981).

ferent interpretations as to the scope of the *Simmons* protections. While the Court is certainly not bound by the language in *Salvucci* that is relevant to the impeachment issue, the Court should attempt to alleviate the present confusion surrounding its signals.

"Choosing" Between Constitutional Rights

A Continuum of Constitutional Choices

Over the years, a continuum has developed that relates to the choices an individual must sometimes make between the exercise of one of two constitutional rights. Along this continuum are cases in which the Supreme Court has found the imposition of such a choice to be unreasonable; in other cases the choice has been justified. What becomes apparent in an analysis of cases requiring an election between constitutional rights is that the critical component is the nature of the choice a defendant must make; that is, whether the choice is truly voluntary or forced.

In our judicial system there are situations in which a defendant can exercise a right without waiving some other constitutional right (e.g., a decision not to testify at trial), and therefore not be required to choose between rights. At the other extreme our system allows for situations in which a defendant can do nothing yet waive a constitutional right (e.g., a decision not to contest the legality of a search and seizure waives a claim of a fourth amendment violation), and in this sense requires that a defendant choose between exercising that right and waiving it. Our judicial system also allows for situations between these extremes in which a defendant can exercise a right, yet at the same time waive a different constitutional right (e.g., a decision to testify at trial requires a waiver of a right to remain silent when cross-examined), thereby forcing a defendant to choose between the benefit of exercising one right and preventing the loss of another.

While the existence of a choice between constitutional rights does not in itself create a constitutional issue, what is at issue is whether this election of one of these rights over the other "violates the constitutional 'policies' underlying one or more of the two rights,"[68] and therefore is not constitutionally permissible. To determine whether an election is constitutionally permissible, at least when the Constitution is silent as to how tensions between constitutional choices are to be resolved,[69] the question becomes whether, on balance, the conditioning of a constitutional right can be justified by a significant state interest. This balancing is a process of analysis[70] to determine the

68. See Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 Iowa L. Rev. 741, 758 (1981).

69. Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 Colum. L. Rev. 1022, 1029, 1046 (1978).

70. *Id.* at 1048-49. *See generally* Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977).

competing defendant and state interests, the relative weights that should be assigned to each interest, and the events which occur that affect this balancing.

These various situations involving the choosing of rights become important when it is realized that the courts are applying different levels of scrutiny depending on which situation a defendant encounters. By analyzing cases within these situations which form the continuum that relates to the choices a defendant must sometimes make between constitutional rights, insight can be gained into what is considered a reasonable or unreasonable choice. While labels such as "reasonable" and "unreasonable" have no predictive value in themselves, the process of determining the inherent policies and factors which make reasonable cases on the continuum similar to and distinguishable from unreasonable cases, helps resolve whether or not the use of suppression hearing testimony requires that a defendant make a constitutionally permissible choice between rights.

The Foundation Cases

It is easiest to begin the analysis with cases that seem to fall more at the extremes of the continuum. In *Corbitt v. New Jersey*,[71] for example, a defendant was faced with a choice between taking his murder prosecution to the jury, thereby risking a sentence of mandatory life imprisonment, and entering a plea of *non vult* to a judge with the possibility of receiving less than a life sentence.[72] In essence, the defendant had to choose between exercising his right to a jury trial with the hope of getting a sympathetic jury (but getting a life sentence if he lost his case), and not exercising his right to a jury trial but receiving a benefit in the way of a shorter sentence if he lost his case. The state encouraged the defendant not to exercise this right. The choice for the defendant was a voluntary one. The result of the choice would effect no other constitutional rights (there is no right to a lesser sentence).

The defendant argued that this choice violated of his fifth, sixth and fourteenth amendment rights.[73] The Supreme Court did not agree: "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid."[74] The Court agreed with the New Jersey Supreme Court's conclusion that there was a substantial state interest in requiring that the defendant make such a choice, and that it was

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71. 439 U.S. 212 (1978).

72. *Id.* at 215.

73. *Id.* at 216.

74. *Id.* at 218. In footnote 8 of the *Corbitt* opinion the Court quoted from language contained in McGautha v. California, 402 U.S. 183 (1971):

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

Id. at 213 (citation omitted).

not a "needless or arbitrary burden on the defendant's constitutional rights . . . ."[75] The test related to constitutional choices that derives from *Corbitt*, then, asks whether the state's action is an unnecessary burden on the defendant's rights and whether this imposition serves a substantial state interest.

In *Stein v. New York*,[76] the Supreme Court confronted a situation in which the defendant was required to make a different choice. The defendant wanted to testify at trial that certain admissions at a preliminary hearing were coerced, but did not want to be cross-examined out of fear of incrimination.[77] In this situation if the defendant testified, he was benefited by the introduction of favorable evidence; but if he did not testify, he was benefited by the protection against self-incrimination. The defendant had to waive the right to testify at trial[78] at the exercise of another; the waiver, however, took place only after first obtaining a benefit from the exercise of a right. The choice was also a voluntary one as nothing would happen (the waiver of some other constitutional right) if the defendant chose not to testify.

The Supreme Court held that "[i]n a trial of a coercion issue . . . an accused must choose between the disadvantage from silence and that from testifying."[79] The Court made it clear that the Constitution does not protect the right to remain silent when a defendant begins to reap the benefits that come with the right to testify.[80] Once a defendant testifies at trial, the policy reasons for protecting the defendant from self-incrimination shift in favor of the state's interest in testing the credibility of witnesses. When the defendant testifies at trial, the state is placed in a worse position. To regain the proper balance between the state's interests and defendant's interests, the Court allows the defendant to be cross-examined.

At the other end of the constitutional continuum, in contrast to *Stein* and *Corbitt*, are cases such as *Garrity v. New Jersey*[81] and *Spevack v. Klein*.[82] In *Garrity*, the defendant was confronted by the choice between exercising the right to remain silent with the possibility of job forfeiture, and testifying thus risking self-incrimination in later criminal proceedings.[83] Either choice

75. 439 U.S. 212, 223. *See also* Crampton v. Ohio, 402 U.S. 183 (1971) (a state statute allowing a jury to determine both guilt and punishment in a single verdict, did not unconditionally force a defendant to choose between the right to remain silent at trial and the right to plead on the issue of punishment); Brady v. United States, 397 U.S. 742 (1970) (not all guilty pleas encouraged out of fear of possible death are involuntary); Parker v. North Carolina, 397 U.S. 790, 795 (1969) ("an otherwise valid plea is not involuntary because induced by a defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial").

76. 346 U.S. 156 (1953).

77. *Id.* at 159-60.

78. While there is no express right in the Constitution or Bill of Rights to testify at trial, the Supreme Court "has recently assumed the existence of a right to testify." Bradley, *Havens, Jenkins, and Salvucci and the Defendant's "Right" to Testify*, 18 AM. CRIM. L. REV. 419, 422 (1981). *See, e.g.*, Harris v. New York, 401 U.S 222, 225 (1971).

79. 346 U.S. at 177.

80. *Id.*

81. 385 U.S. 493 (1967).

82. 385 U.S. 511 (1967) (5-4 decision).

83. 385 U.S. at 496.

would damage the defendant in some way. Any benefit from testifying would be washed out by self-incrimination, and any benefit from remining silent would be negated by the threat of job loss. The choice was, therefore, not a voluntary one. The Supreme Court stated that in this situation, "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."[84]

In *Spevack*, the Court dealt with a member of the New York Bar Association who was confronted with a choice between producing certain records and foregoing a right to remain silent (thereby incriminating himself), and remaining silent but facing possible disbarment.[85] As in *Garrity*, the defendant had a choice between two options—either of which would have harmed him. If the defendant chose not to testify, he could have been disbarred; however, if he chose to testify, he could have subjected himself to self-incrimination at a later trial. The defendant was forced to decide which option would be less damaging to him; there was no alternative route which would produce a favorable result.

The Supreme Court disapproved of the choice the defendant in *Spevack* had to make. "[T]he Self-Incrimination Clause of the Fifth Amendment . . . extends its protection to lawyers . . . and . . . should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."[86] In *Garrity* and *Spevack*, the Court balanced the defendant's interests in not being compelled to testify against the state's interest in obtaining information. Several considerations factored into the balance which favored the defendant: whether the same information could have been obtained by other means, the need for the penalty (loss of job or disbarment), and the possibility of self-incrimination.

Situations Analogous to a Suppression Hearing

Corbitt, *Stein*, *Garrity*, and *Spevack* are several cases[87] that form the two poles of the continuum of reasonable and unreasonable choices a defendant must sometimes make. Other cases which fall more towards the center of the continuum, however, are more analogous to the suppression hearing/impeachment issue. Cases dealing with parole revocation proceedings, for example, are in many ways similar to a suppression hearing. In these cases, a defendant is sometimes faced with a choice between constitutional rights because of the threat of impeachment.

In 1980, the Supreme Court of Alaska decided *McCracken v. Corey*.[88] A

84. *Id.* at 497.
85. 385 U.S. at 512-13.
86. *Id.* at 514.
87. It is not within the scope of this Note to attempt to review all of the state and federal cases that have dealt with the making of constitutional choices. Rather, a few cases were offered as examples of the make-up of the continuum which has developed over the years.
88. 612 P.2d 990 (Ala. 1980).

felon had been charged with possession of a firearm, a violation of the terms of the felon's parole.[89] As the parole revocation proceeding was held prior to his hearing on criminal charges, the defendant did not testify at the revocation proceedings to preserve his defenses. Because of his silence, the revocation board found the defendant in violation of his parole.[90] In this situation the defendant had to choose between testifying at his parole hearing for the benefit of his immediate case but incriminating himself at a later trial, and not testifying and protecting against self-incrimination but damaging his parole violation case (thereby possibly losing his freedom). Because he had to choose one route (testifying or remaining silent) which triggered some harm to him, the defendant's choice was less than voluntary.

The defendant in *McCracken* claimed that the scheduling of the revocation proceeding prior to trial "forced him to make an unconstitutional election between his due process right to present a defense at the hearing and his right against compulsory self-incrimination."[91] The Supreme Court of Alaska agreed, stating that "[i]n the interests of fairness, a parolee should not be forced to choose between remaining mute at a revocation proceeding, thereby surrendering his right to present a defense, or testifying at the revocation hearing and incurring the possibility of incriminating himself."[92] While the court in *McCracken* held that the testimony presented at the revocation hearing was inadmissible in later criminal proceedings,[93] the court did not state whether such hearing testimony could be used for impeachment purposes. The court did, however, rely heavily on the California decision of *People v. Coleman*;[94] *Coleman* discusses the impeachment issue in the context of the parole revocation proceeding.[95]

In *Coleman*, the parolee was faced with the same predicament.[96] The Supreme Court of California also characterized this situation as a self-incrimination problem.[97] The *Coleman* court, however, was more explicit in describing the extent of protection afforded the defendant from the use of the revocation hearing testimony against him at trial. The court stated that testimony given during a probation revocation hearing was inadmissible against the defendant at later proceedings on criminal charges.[98] Probation hearing testimony was admissible, however, for impeachment or rebuttal purposes if the defendant presented testimony at trial that was clearly inconsistent with

89. *Id.* at 991.
90. *Id.* The defendant was later acquitted of the criminal charges. *Id.* at 992.
91. *Id.* at 993.
92. *Id.* at 997-98. The court also made an analogy to the job forfeiture cases, discussed *supra* in text accompanying notes 81-86. 612 P.2d at 994 & n.10.
93. *Id.* at 998.
94. *Id.* at 995-98.
95. 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975).
96. *Id.* at 888-89, 533 P.2d at 1041, 120 Cal. Rptr. at 401.
97. *Id.*
98. *Id.* at 889, 533 P.2d at 1042, 120 Cal. Rptr. at 402.

his probation revocation hearing testimony.[99] The court reasoned that California's exclusionary rule already protected against the use of a probationer's testimony (at least as far as direct use). Consequently, it denied the defendant's claim that he was forced to forego his fifth amendment right to remain silent.[100]

In the probation revocation setting, then, there exists the potential for probation revocation testimony being used to impeach a defendant who later testifies at his trial.[101] In this situation the defendant must choose between exercising a right to testify and protecting himself from incrimination at later proceedings. In *McCracken* and *Coleman*, the imposition on the defendant's rights by using hearing testimony as direct evidence was too great compared to the state's interest. The state has little or no interest in scheduling parole revocation proceedings before a trial.[102] But when a defendant's testimony is "clearly inconsistent," the policy interests in protecting the defendant from self-incrimination become subservient to a greater state interest in showing that he may have lied at either the parole revocation proceeding or at trial. Under *Coleman*, this state interest supercedes the interest in protecting against the chance that a defendant will refrain from testifying at his parole revocation hearing out of fear that it could, to some degree, require him to forego his fifth amendment rights.[103]

Although courts allow the use of parole revocation hearing testimony for impeachment purposes at trial and do not see this as requiring a defendant to make an unreasonable choice between constitutional rights, this is not the case with the use of grand jury testimony. In 1979, the Supreme Court decided in *New Jersey v. Portash*[104] that "testimony before a grand jury under a grant

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99. *Id.* The inconsistency must be "so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruits in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing." *Id.*

100. *Id.* at 892, 533 P.2d at 1044, 120 Cal. Rptr. at 404.

101. The *Coleman* court discussed at length the use of the hearing testimony for impeachment purposes. *Id.* One can compare this use of testimony for impeachment purposes to situations such as habitual criminal proceedings in which the use of this type of hearing testimony for impeachment has also been allowed. *See* People v. Chavez, ___ Colo. ___, 621 P.2d 1362 (1981). In *Chavez*, the defendant made a motion to exclude from the habitual proceeding any testimony that he might give at trial. ___ Colo. at ___, 621 P.2d at 1364. The constitutional choices exercised by the defendant were the right to testify in one's defense, and the right to have the state prove the elements of his habitual criminality. The court held that substantive use of the defendant's trial testimony in this manner burdens the defendant's right to testify. The court also held, however, that the "impeachment use of an admission of prior convictions elicited from a defendant who chooses to testify is permissible." ___ Colo. at ___, 621 P.2d at 1366. *See also* United States v. Dohm, 597 F.2d 535 (5th Cir. 1979) (statements made at a pretrial hearing while exercising an eighth amendment right are admissible at trial on question of guilt as well as for impeachment).

102. The California Supreme Court saw the solution to this problem as only requiring that the parole revocation proceeding be scheduled after the criminal trial. 13 Cal. 3d at 889, 533 P.2d at 1042, 120 Cal. Rptr. at 402.

103. *Id.* at 892, 533 P.2d at 1044, 120 Cal. Rptr. at 404.

104. 440 U.S. 450 (1979).

of immunity cannot constitutionally be used to impeach . . . a defendant in a later criminal trial."[105] The Court considered such grand jury testimony, where the defendant was required to testify or be held for contempt, to be the "essence of coerced testimony."[106]

In the grand jury situation the Supreme Court would not force the defendant to choose between his right to testify at trial and his right not to incriminate himself. The defendant's choice in *Portash* was clearly involuntary, and can be placed on the continuum with the situations addressed in *Garrity* and *Spevack*. If the defendant did not testify he could be held in contempt. If he did testify, however, he risked self-incrimination at a later trial. He was forced to make a choice between two situations—either of which harmed him.

Some commentators argue that the situation the defendant faced in *Portash* closely resembles the situation a defendant faces at a hearing on a motion to suppress evidence. Professor LaFave[107] believes the degree of coercion present in the *Portash* grand jury situation is similar to the degree of coercion in making a motion to suppress evidence in a suppression hearing (as the suppression hearing is the only way to suppress evidence).[108] LaFave maintains that the defendant in a motion to suppress evidence situation is compelled to give testimony just as was the defendant in *Portash*, because the "defendant is confronted with the choice of 'either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination.' "[109] LaFave argues that "[t]his being so, it is certainly not fanciful to suggest that defendant's testimony at a Fourth Amendment suppression hearing likewise cannot later be used for impeachment purposes."[110]

Jones and *Simmons*

The constitutional posture of a grand jury or parole revocation proceeding case is analogous to the posture of a case involving the use of suppression hearing testimony to impeach. Two other important cases concerning con-

105. *Id.* at 459-60. In *Portash*, the defendant agreed to testify before a grand jury after being granted immunity. After testifying, the state decided to bring charges against the defendant and wanted to use the grand jury testimony for impeachment purposes. *Id.* at 451-52. The trial judge ruled that the grand jury testimony could be used at his criminal trial to impeach him if he testified. As a result, the defendant chose not to testify at his criminal trial and was later found guilty. *Id.* at 452.

106. *Id.* at 459. *Compare* United States v. Guglielmini, 425 F.2d 439 (2d Cir. 1970) (grand jury testimony can be used to impeach when the witness later testifies at trial, but is no longer a defendant in the case).

107. *See* LaFave, *supra* note 11.

108. *Id.* at 196 (Supp. 1984).

109. *Id.* (quoting *Simmons v. United States*).

110. *Id.* Other commentators recognize the similarity between the choices a defendant must make when testifying at a suppression hearing or before a grand jury. *See* Slobogin, *supra* note 42; Comment, *Standing Up for Fourth Amendment Rights: Salvucci, Rawlings, and the Reasonable Expectation of Privacy*, 31 Case W. Res. L. Rev. 651, 681 (1981).

stitutional choices in the context of suppression hearings are *Jones v. United States* and *Simmons v. United States*.[111] In *Jones* and *Simmons*, the defendants could have testified at a suppression hearing in order to exercise a fourth amendment right, thereby making that testimony available to the prosecution for direct evidence of guilt, or could have remained silent at the suppression hearing (and risk the possibility of the Court finding the defendants lacked standing), losing a fourth amendment claim, but protecting against self-incrimination.[112]

This choice is as involuntary as the *Portash* situation in which the defendant could have been held in contempt,[113] and may be as involuntary as the *Spevack* or *Garrity* situations in which there existed possible harm of job forfeiture and self-incrimination.[114] In *Jones* and *Simmons*, silence at the suppression hearing was harmful because a fourth amendment claim was waived. Non-silence was harmful, however, because the hearing testimony could be used against the defendants at trial on the issue of guilt. Therefore, as in *Spevack*, *Garrity* and *Portash*, the defendants in *Jones* and *Simmons* had a choice between two options—either of which was harmful.

The degree of involuntariness the defendants faced in *Jones* and *Simmons* was also greater than that of the defendants in *McCracken* and *Coleman*:[115] in *Jones* and *Simmons*, the involuntariness was in the form of waiving a fourth amendment claim or facing self-incrimination; in *McCracken* and *Coleman* the involuntariness was in the form of choosing between damaging their case against parole revocation (not a constitutional right) and subjecting themselves to self-incrimination at a later trial.[116] In *Jones* and *Simmons*, therefore, the Supreme Court decided that the choices made by defendants were more akin to the unconstitutional choices made in *Stein* and *Corbitt* (one end of the constitutional continuum), than the constitutional choices made in *Spevack* and *Garrity* (the other end of the constitutional continuum), and involve choices more like those present in *Portash*, than in *McCracken* and *Coleman*.[117]

THE USE OF SUPPRESSION HEARING TESTIMONY TO IMPEACH

The various cases discussed above[118] have developed the foundation for the continuum on which a future case concerning the suppression hearing testimony impeachment issue, exposed in *United States v. Salvucci*,[119] can be placed.[120]

111. For a discussion of the facts of *Jones* and *Simmons*, see *supra* notes 20-45 and accompanying text.
112. *Id.*
113. *See supra* text accompanying notes 104-10.
114. *See supra* text accompanying notes 81-86.
115. *See supra* text accompanying notes 88-103.
116. *Id.*
117. *Compare supra* text accompanying notes 104-10, *with supra* text accompanying notes 88-103.
118. *See supra* text accompanying notes 71-117.
119. 448 U.S. 83, 94 (1980).
120. While this continuum allows for insight into what courts consider to be a constitutionally permissible choice between rights, part of the answer will also be based on how this form of

suppression hearing testimony (voluntary or involuntary) meshes with our judicial system's goal of utilizing only legally obtained evidence. As the suppression hearing testimony/impeachment issue is triggered only because of an alleged violation of search and seizure laws, it is also important to analyze how the Supreme Court views the importance of being able to suppress illegally obtained evidence, and analyze the choices a defendant must make if he knows illegally seized evidence may be used against him at trial.

In certain situations the government can use illegally secured evidence to impeach a defendant at trial, forcing the defendant to choose between his right to testify and his right to protect against self-incrimination. This is analogous to the suppression hearing testimony/impeachment situation, as the damaging evidence can be used to tarnish the defendant's credibility if he chooses to testify; but if he remains silent to protect against the use of damaging impeachment evidence, he foregoes his right to testify. The appropriate analysis here determines why a court will allow the use of illegally secured evidence to impeach a witness, and then applies this reasoning to the use of suppression hearing testimony.

Until recently, commentators, *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, 1208, have consistently read Miranda v. Arizona, 384 U.S. 436 (1966), to prohibit the use of statements in violation of its rules for *any* purpose. The language in *Miranda* that is important to the impeachment issue, however, is ambiguous:

> When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. . . . [U]nless and until such [*Miranda*] warnings and a waiver are demonstrated by the prosecutor at trial, *no evidence* obtained as a result of interrogation can be used *against* him.

Id. at 478-79 (emphasis added). The circuit courts are split over whether this language applies to impeachment. *See* United States v. Fox, 403 F.2d 97, 102 (2d Cir. 1968) (*Miranda* prohibits the use of statements obtained in violation of its rules, "whether inculpatory or exculpatory, whether bearing directly on guilt or on collateral matters only, and whether used on direct examination or for impeachment"). *See also* Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968) (not allowing use for impeachment purposes); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967) (not allowing use for impeachment purposes). *But see* United States v. Miller, 676 F.2d 359, 364 (9th Cir. 1982) ("statements suppressed because of a *Miranda* violation may be used to impeach a defendant who takes the stand to testify in his own behalf"); Woody v. United States, 379 F.2d 130 (D.C. Cir. 1967) (*see supra* note 48). A number of Supreme Court cases can be examined, however, to interpret the extent of the *Miranda* protections against the use of illegally obtained statements. Harris v. New York, 401 U.S. 222 (1971), has probably had the greatest impact as to how *Miranda* should be interpreted. In *Harris*, the defendant made statements in violation of *Miranda*, but did not claim the statements were coerced or involuntary. *Id.* at 224. The statements were admitted into evidence but were restricted to the question of witness credibility. *Id.* at 223. The Supreme Court, in a 5-4 decision, concluded that the lower court made a proper ruling on the admissibility of this evidence for impeachment purposes. *Id.* at 226. The *Harris* Court stated that "[i]t does not follow from *Miranda* that evidence inadmissible against an accused in the prosecutor's case in chief is barred for all purposes, provided that the trustworthiness of the evidence satisfies legal standards." *Id.* at 224. The Court concluded that while everyone has a right to testify, no one has a right to commit perjury; "[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from risk of confrontation with prior inconsistent utterances." *Id.* at 225-26.

Harris has been criticized by both commentators, *see* Dershowitz & Ely, *supra*, and courts. A number of state courts disagree with *Harris*, and refuse to follow the decision or recognize the Supreme Court's interpretation of *Miranda*. *See* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (the California Constitution prohibits any use whatsoever of statements obtained in violation of *Miranda*); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975) (any statement by a defendant declared inadmissible for any reason by a suppression court cannot be used for impeachment purposes). Some find solace by interpreting *Harris* to mean that statements that do not meet "legal standards" of "trustworthiness" may not be used for impeachment. *See* State v. Denny, 27 Ariz. App. 354, 555 P.2d 111 (1976) (using *Harris*' "trustworthiness" test to find statements made by a defendant to be inadmissible for impeachment purposes).

Despite the criticisms, the Supreme Court continues to follow *Harris* in fifth amendment impeachment cases. In Oregon v. Hass, 420 U.S. 714 (1975), for example, the Court reiterated

that evidence obtained in violation of *Miranda* is not barred for all purposes. The Court found that the statements made by this appellant met the trustworthiness standard of *Harris* as they were not coerced or involuntary: "[T]he pressure on him was no greater than that of any person in like custody or under inquiry by any investigating officer. . . . [I]nadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth." *Id.* at 723.

Given cases like *Harris* and *Hass*, it is evident that *Miranda* is no longer a blanket protection against the use of illegally obtained statements. The Court has, to a certain extent, shifted the relative weight of certain interests in its constitutional analysis. The Court now balances the interests of determining witness credibility against the interests in barring illegally obtained evidence that meets the *Harris* standard of trustworthiness. Once trustworthiness is established, the defendant's interest in suppressing the statement becomes less than the state's interest in clarifying witness credibility and in barring immunity. Since *Miranda* protections are restricted by the Supreme Court, the question then becomes whether it will do the same to the *Simmons* protections. Because many of the constitutional interests and policy justifications under *Miranda* fall under *Simmons*, the *Harris* perspective will influence the Court's analysis of whether *Simmons* protects against impeachment use of suppression hearing testimony.

While *Miranda*, *Harris*, and *Hass* are all fifth amendment cases that concern the use of illegally obtained statements for impeachment purposes, the Court has also considered the impeachment issue in the context of fourth amendment violations. In 1954, the Court decided in Walder v. United States, 347 U.S. 62 (1954), that evidence obtained from an illegal search and seizure could be admitted into evidence for impeachment purposes. *Id.* at 63-64. In *Walder* the Supreme Court recognized the basic premise of Weeks v. United States, 232 U.S. 383 (1914), that the government cannot violate the fourth amendment and use the fruits of the illegal conduct to secure a conviction. 347 U.S. at 64-65. The Court, however, then made the distinction between a government not being able to use such evidence affirmatively, and a defendant trying to use the non-admissibility as "a shield against contradiction of his untruth. . . . [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." *Id.* at 65.

The *Walder* Court also was quick to point out that the defendant "went beyond 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." *Id.* In doing so, the Court attempted to distinguish Angello v. United States, 269 U.S. 20 (1925), where the Court held that the use of illegally seized evidence to rebut a witness was not allowed where the defendant was not asked on direct examination anything pertaining to the illegally seized evidence. The *Walder* Court implied that *Angello* was limited to those defendants who "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." 347 U.S. at 66. Presumably, the *Walder* Court believed that the defendant at bar failed to meet that condition.

The basic principles that underly *Walder* have been affirmed recently by United States v. Havens, 446 U.S. 620 (1980). The Court in *Havens* stated that "arriving at truth is a fundamental goal of our legal system." *Id.* at 626. The Court made it clear that defendants who choose to testify as well as those who are compelled to testify, must do so truthfully or suffer the consequences. *Id.* The Court considered the use of illegally seized evidence as a proper and effective way of cross-examination to elicit the truth: "[H]is privilege against self-incrimination does not shield him from proper questioning." *Id.* at 626-27.

Also interesting about *Havens* as a fourth amendment/impeachment case is the Court's reliance on *Harris* and *Hass* as the controlling policy. *Id.* This suggests that the Court believes that the language in fourth and fifth amendment cases can be readily meshed to support either type of case. The Supreme Court in *Harris* (fifth amendment case) relied heavily on *Walder* (fourth amendment case). 401 U.S. 222, 224-25. The Court in *Havens* (fourth amendment case) relied heavily on *Harris* and *Hass* (fifth amendment cases) 446 U.S. 620, 626-27. While the Supreme Court may not view these differences in cases as important in answering questions regarding the use of illegally secured evidence for impeachment purposes, the distinctions do become important when confronted with such a situation as related to the use of suppression hearing testimony for impeachment purposes. As both fifth and fourth amendment rights are triggered (a right to protect against self-incrimination and the right to protect against an illegal search and seizure), the constitutional analysis the Court will perform should differ considerably from an analysis of a case concerning a single constitutional right. *See* Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 757-60 (1981).

These analogous cases have been examined to determine how they can gauge the strength and validity of the various competing interests involved in using suppression hearing testimony for impeachment purposes. Where the defendant's "choice" between exercising a fourth amendment claim and preventing self-incrimination if the state can use suppression hearing testimony to impeach will be placed on the continuum of reasonable and unreasonable choices, depends upon the result of a constitutional analysis not yet performed by the Supreme Court.

The Failings of the Burger Court

In *United States v. Salvucci,*[121] the Burger Court erred when it failed to take heed of the defendant's fear that testimony given by him in a suppression hearing to establish standing could be used against him for impeachment purposes.[122] Had the Court's majority performed a thorough analysis of the defendant's arguments in *Salvucci,* it would have realized that such fears were justified as the defendant may have been forced to make an impermissible choice between constitutional rights. A thorough analysis of the dilemma faced by the defendant in *Salvucci* reveals that the Burger Court made certain erroneous assumptions, and failed to address properly the constitutionality of forcing a defendant either to assert a fourth amendment right by testifying at a suppression hearing or to protect against self-incrimination at trial.

It has been said that each time "the exclusionary rule is applied there is a social cost directly proportional to the relevance of the excluded evidence."[123] Clearly, the Court in *Salvucci* was concerned with the needs of the government in being able to utilize suppression hearing testimony for impeachment purposes.[124] Despite this concern, however, the Court still should have weighed the disadvantage of deterring a defendant from testifying at a motion to suppress out of fear of being impeached at trial, or deterring a defendant from testifying at trial if he has already testified at a suppression hearing, against the advantages flowing to the government in being permitted to use suppression hearing testimony for impeachment purposes. Viewed in a different way, the Court should have balanced the defendant's (or society's) interest in excluding illegally secured evidence with the state's interest in having evidence pertaining to the defendant's credibility.

Thus, the real issue confronting the defendant in *Salvucci* was "whether the disadvantages associated with deterring a defendant from testifying on a motion to suppress are significant enough to offset the advantages of permitting the Government to use such testimony . . . ."[125] It is evident that

121. 448 U.S. 83 (1980).
122. *Id.* at 93.
123. White & Greenspan, *Standing to Object to Search and Seizure,* 118 U. PA. L. REV. 333, 334 (1970).
124. 448 U.S. at 93.
125. Simmons v. United States, 390 U.S. 377, 397 (1968) (Black, J., dissenting).

"arriving at the truth is a fundamental goal of our legal system,"[126] and that the Court has "repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences."[127] Obviously, part of the theoretical basis for allowing impeachment is to check the credibility of witnesses and to foster truthtelling.[128] Therefore, from a policy standpoint, the state is in a worse position when a defendant testifies at trial, than it was before the defendant took the stand.[129] The "state must show [,however,] that the prejudice it suffers from the change of position is *constitutionally significant;*"[130] that is, the defendant's interest in exercising his right to testify is outweighed by the state's interest in attacking the false or damaging evidence.[131]

United States v. Simmons[132] was designed, in part, to respond to state interests by recognizing that a defendant might have to testify at a suppression hearing to establish standing to assert a fourth amendment claim.[133] By eliminating automatic standing,[134] the Burger Court in *Salvucci* wanted to protect further the state's interest in preventing what it perceived to be false representations of fourth amendment claims[135] and a "windfall to defendants whose Fourth Amendment rights have *not* been violated."[136] The defendant in *Simmons* was also protected, however, because the state could not use the suppression hearing testimony on the issue of guilt.[137]

What the Burger Court failed to recognize in its treatment of *Salvucci*, however, is that *Jones v. United States*[138] (by providing automatic standing) and *Simmons* (by preventing the use of suppression hearing testimony as evidence of guilt) arguably were also designed to serve the defendant in other ways not addressed in *Salvucci*. Both cases appear to grant a form of

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126. United States v. Havens, 446 U.S. 620, 626 (1980). *See also supra* note 120.

127. *Id.*

128. McCormick, Handbook of the Law of Evidence § 34, at 68 (2d ed. & Supp. 1978).

129. Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 Iowa L. Rev. 741, 750 (1981).

130. *Id.* at 751 n.33 (emphasis in original).

131. *Id.* What is also evident from cases such as United States v. Havens, 446 U.S. 620, 626 (1980), and United States v. Harris, 401 U.S. 222, 225 (1971), is that little defendant (or public) interest is served by excluding evidence for impeachment purposes because it might have a deterrent effect on police misconduct. The Supreme Court believes the same amount of deterrent effect on police misconduct can be achieved if the evidence is excluded only from the prosecutor's case in chief. 446 U.S. at 626. The Court sees it as only a "speculative possibility," 401 U.S. at 225, that making illegally seized evidence unavailable for impeachment "would contribute substantially" to deter unlawful searches and seizures. 446 U.S. at 626.

132. 390 U.S. 377 (1968). *See also supra* notes 28-35 and accompanying text.

133. *Id.* at 390-91.

134. 448 U.S. 83, 95 (1980).

135. *See id.* at 94 n.8, 95.

136. *Id.* at 95 (emphasis in original).

137. *Simmons*, 390 U.S. at 394.

138. 362 U.S. 257 (1960). *See also supra* notes 20-27 and accompanying text.

immunity[139] to foster uninhibited testimony at the suppression hearing,[140] but in doing so require that such testimony be excluded from trial for *two* reasons. First, the assertions at a suppression hearing are of a nature sufficient to convict him if brought out at trial.[141] Also, the state should be prevented from using suppression hearing testimony to impeach a defendant at trial which could result in a defendant being wrongfully convicted of a crime he did not commit.

In creating this immunity from the potentially harmful use of testimony given at a suppression hearing, *Jones* and *Simmons* rely upon the correct assumption that a defendant is more likely to commit perjury (possibly coached by his attorney without any apparent consequences) at a suppression hearing to establish standing in order to suppress certain evidence. What follows from this assumption is that if the defendant fails to establish standing at the suppression hearing, the defendant will truthfully disclose at trial that the illegally seized evidence is not his. Lying by the defendant will occur most often when his interests for doing so are great and the repercussions are worth the risk.[142] When automatic standing was still intact, the defendant's interests in producing certain testimony at the suppression hearing to ensure standing to assert a fourth amendment violation were minimal. Without automatic standing, however, the defendant's interests clearly require him to produce testimony, possibly perjurious, which will allow a court to find that the defendant has standing to assert a fourth amendment violation. Thus, while the *Salvucci* Court's rationale was to prevent false assertions of a fourth amendment claim,[143] the Court failed to recognize certain repercussions fostered by automatic standing.

The Burger Court's rationale behind *Salvucci* seems sound; but this rationale works only if it is assumed that the defendant is telling the *truth* at the suppression hearing and is *lying* at trial. The rationale in *Salvucci* for eliminating automatic standing is unsound if lying takes place at the suppression hearing. With automatic standing, the *Salvucci* Court feared fraudulent fourth amendment claims.[144] But with the removal of automatic standing, the Court now

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139. In the context of *Jones*, immunity was in the form of granting automatic standing. *See supra* text accompanying note 27. In *Simmons*, the immunity was a "'use immunity' to those defendants charged with nonpossessory crimes" and a "protection against [the] risk of self-incrimination in all of the cases covered by Jones [possessory offenses]." 448 U.S. 83, 90 (*Salvucci* Court interpreting *Simmons*).

140. 390 U.S. 377, 392-93.

141. 362 U.S. at 261-62.

142. "The principle is founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against his own interest." 5 J. WIGMORE ON EVIDENCE § 1457 (1974) (quoting Gibblehouse v. Strong, 3 Rawle 437, 438 (Pa. 1832)).

143. *See* 448 U.S. 83, 94 n.9, 95.

144. *Id.*

requires that defendants testify at the suppression hearing in order to obtain standing to assert a fourth amendment claim.[145] The defendant will be producing testimony concerning essential elements of his case,[146] for his own interests. Consequently, the defendant will be more likely to perjure himself.[147]

Because of the Burger Court's incorrect assumption that lying takes place at trial, and its failure to recognize that lying by the innocent defendant[148] is more likely to take place at the suppression hearing, the innocent defendant who makes a small mistake (perjury) at the suppression hearing to satisfy standing requirements pays too high a price for wrongly being found guilty at trial for a crime he did not commit. In this situation, it is true that the defendant lies one of two times in giving testimony under oath. The problem is that a jury will misuse the small lie at the suppression hearing[149] (e.g., asserting possession of contraband to establish an interest in items illegally seized) to convict the defendant of a major crime he did not commit when his truthful trial testimony is impeached by the earlier inconsistent statement from the suppression hearing.[150] Being found guilty of a major crime the defendant did not commit is disproportionate to the extent of harm the state suffers as a result of perjurious suppression hearing testimony.[151]

145. *Id.* at 95 (automatic standing has outlived its usefulness). *See also supra* notes 9-19 and accompanying text.

146. *See* 390 U.S. 377, 391.

147. *See supra* notes 142-43 and accompanying text.

148. Obviously this analysis does not take into account those defendants that do not have to testify at the suppression hearing to establish standing, *see infra* notes 166-67 and accompanying text, and those defendants that are telling the truth at a suppression hearing (that they did have an interest in the items seized) and are lying at trial that they did not commit the crime.

149. *See generally,* C. McCormick, Handbook on the Law of Evidence § 39, at 77 (1954); Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court,* 75 Mich. L. Rev. 1320, 1379 (1977) (judge's instructions to a jury regarding limited use of evidence do not fully protect defendant from damage when such evidence is admitted). *See, e.g.,* Krulewitch v. United States, 336 U.S. 440, 453 (1949).

150. This reasoning is applicable to other situations. In Miranda v. Arizona, 384 U.S. 436 (1966), and other cases involving the use of illegally obtained confessions, trial testimony is probably perjurious. Common sense dictates that pre-trial confessions or statements admitting guilt are more likely truthful because admitting guilt goes against a defendant's self-interest. *Miranda* rules were established to prevent only the use of involuntarily obtained confessions as evidence of guilt because their truthfulness is suspect. *See* Harris v. New York, 401 U.S. 222 (1971). Allowing the use of illegal but voluntarily obtained confessions to impeach, however, is the correct approach. The result is conviction of guilty parties since the defendant is probably testifying falsely at trial that he did not take part in a crime he did indeed commit. In the *Salvucci* situation, however, lying more likely takes place at the suppression hearing in order to establish standing to assert a fourth amendment claim. The result here is that a lie at the suppression hearing will be used as impeachment evidence to discredit the defendant's truthful statement at trial that he did not commit the crime.

See also Bradley, *Havens, Jenkins, and Salvucci and the Defendant's "Right" to Testify,* 18 Am. Crim. L. Rev. 419 (1981). Bradley states that "[w]hen the ostensible search for truth becomes merely a vehicle for circumventing the proper functioning of the exclusionary rule—that is, when the primary impact of impeachment is to inculpate the defendant—then it is an exaltation of form over substance to allow that 'impeachment' to proceed." *Id.* at 433.

151. For example in Indiana, perjury is a class D felony. Ind. Code § 35-44-2-1 (1982), and punishable by a fixed term of two years, *id.* § 35-50-2-7, with up to two more years for aggravating circumstances, *id.* § 35-4.1-4-7 and a $10,000 fine. While possession of most controlled substances is also a class D felony in Indiana, *id.* § 35-48-4-6, dealing in narcotics (e.g. cocaine) (which

Because the *Salvucci* Court failed to recognize the problems associated with eliminating automatic standing, and because of its erroneous assumptions regarding when a defendant is likely to commit perjury, the Court did not realize that the prejudicial effect in allowing suppression hearing testimony to impeach a defendant at trial is tremendous—a wrongful finding of guilt for a crime the defendant did not commit. Had the Court performed a more sound analysis, it would have recognized this prejudicial effect and weighed it against the probative value of using suppression hearing testimony for impeachment purposes.[152] Clearly, the "probative value [in using suppression hearing testimony to impeach] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[153] While a judge may instruct a jury to limit the use of impeachment evidence to witness credibility, jurors seldom limit the application of such evidence only to those areas directed by the court.[154] If use of suppression hearing testimony by the state confuses or misleads jurors, allowing them to speculate what effect impeachment evidence has on direct evidence of guilt, improper convictions could occur. Such results will render meaningless the doctrine established in *Simmons* to protect defendants[155] (and apparently supported by the Burger Court in *Salvucci*).[156] The important state policy of promoting truthful testimony at all stages of the adjudicatory process can and should be served, but by bringing a separate prosecution for perjury, not by convicting an innocent defendant.

Placement on the Constitutional Continuum

As in cases like *Garrity v. New Jersey*,[157] *Spevack v. Klein*,[158] and *New Jersey v. Portash*,[159] a defendant in the *Salvucci* dilemma has a choice be-

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includes delivery of controlled substances) is a class B felony, *id.* § 35-48-4-2, punishable by a fixed term of ten years, *id.* § 35-50-2-5, with up to ten years for aggravating circumstances, *id.* § 35-4.1-4-7, and a $10,000 fine. Dealing narcotics to someone eighteen years or younger can be a class A felony, *id.* § 35-48-4-2, punishable by a fixed term of thirty years, *id.* § 35-50-2-4, with up to twenty years more for aggravating circumstances, *id.* § 35-4.1-4-7.

152. *See supra* notes 126-37 and accompanying text, which discuss the state's interest in being able to utilize suppression hearing testimony for impeachment purposes:

> The . . . policy [of preventing fabricated testimony] . . . is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of evidence, viz., the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies. The truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent.

5 J. WIGMORE ON EVIDENCE § 1477 (1974).

153. FED. R. EVID. 403.

154. *See supra* note 149.

155. 390 U.S. 377 (1968). *See supra* notes 28-35 and accompanying text.

156. *See* 448 U.S. 83, 89-90, 93-94 (1980).

157. 385 U.S. 493 (1967). *See supra* notes 81-84 and accompanying text.

158. 385 U.S. 511 (1967). *See supra* notes 85-86 and accompanying text.

159. 440 U.S. 450 (1978). *See supra* notes 104-10 and accompanying test.

tween two options—either of which harms him. If the defendant chooses to testify at the suppression hearing in order to obtain standing and that testimony can be used for impeachment purposes, the innocent defendant who testifies falsely at the suppression hearing risks wrongly being found guilty when he testifies truthfully but inconsistently at trial. If the defendant decides not to testify at the suppression hearing and asserts his fifth amendment right to protect against the consequences of testifying at the suppression hearing, he then waives a fourth amendment right to suppress illegally obtained evidence that will be incriminating when introduced at trial.

Whether this choice is as involuntary and constitutionally impermissible as the choices made by defendants in such situations as found in *Garrity*, *Spevack*, *Portash*, or *Jones v. United States*[160] and *Simmons*,[161] however, must also be measured in terms of how necessary it is for a defendant to testify at a suppression hearing to assert a fourth amendment violation. If the only alternative is to have the defendant testify to establish standing, the choice becomes more akin to *Portash*, as suggested by Professor LaFave.[162] If the defendant's testimony is not necessary to establish standing (more likely in the non-possessory offense case), however, the choice becomes more akin to the voluntary choices made in *People v. Coleman*[163] and arguably as reasonable as the choices made by defendants in *Corbitt v. New Jersey*[164] and *Stein v. New York*.[165]

In non-possessory cases, because the defendant may not be the "aggrieved party,"[166] the defendant's testimony may not be necessary to establish standing. In this situation, the defendant is not as compelled to testify at the suppression motion as the defendant charged with a possessory offense. Also, if suppression hearing testimony is used to impeach a defendant in a non-possessory offense, the damage will be less severe compared to the effect impeachment would have on a defendant charged with a possessory offense. As the nonpossessory defendant would not be testifying at the suppression hearing to factors "the proof of which would tend, if indeed not be sufficient, to convict him,"[167] any misuse by the jury of such suppression hearing testimony as a result of the defendant testifying inconsistently at trial will not greatly prejudice the material elements of his case.

In possessory offense cases, however, the situation is quite different. Because *Salvucci*[168] involved a possessory offense, the Supreme Court should have analyzed the constitutional implications of the defendant's choice within this context. In *Portash*, the Supreme Court decided that testimony given in the

160. 362 U.S. 257 (1960). *See supra* notes 111-17 and accompanying text.
161. 390 U.S. 377 (1967). *See supra* notes 111-17 and accompanying text.
162. *See supra* notes 107-10 and accompanying text.
163. 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975). *See supra* notes 95-103 and accompanying text.
164. 439 U.S. 212 (1978). *See supra* notes 71-75 and accompanying text.
165. 346 U.S. 156 (1953). *See supra* notes 76-80 and accompanying text.
166. *See supra* note 9.
167. Jones v. United States, 362 U.S. 257, 261-62 (1960).
168. 448 U.S. 83, 85 (1980).

context of a grand jury subpoena is compelled testimony.[169] Although the state does not force the defendant to testify in a suppression hearing (there is no direct penalty for not testifying at a suppression motion), the circumstances surrounding the requirements of standing may require that he testify. To be successful on a motion to suppress, the movant must establish his standing and support his motion with enough evidence to meet the requisite burden of proof.[170] For search and seizure violations, the best way to establish standing to suppress certain evidence is to bring forth the aggrieved party. In possession cases, therefore, the aggrieved party that must show standing is likely to be a defendant in a given case.[171]

In this sense, the defendant charged with a possessory offense is compelled to testify at the suppression motion; without his testimony there can be no standing (given *Salvucci*'s elimination of automatic standing), and the motion would be denied. Just as a failure to testify at a grand jury hearing may result in a penalty of contempt of court, the penalty for not testifying at a suppression motion may be the loss of a fourth amendment right.[172] On the other hand, as discussed earlier,[173] by testifying at the suppression hearing when the testimony can be used to impeach the defendant at trial, the defendant

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169. 440 U.S. 450, 459 (1979).

170. *See supra* text accompanying notes 9-14.

171. Jones v. United States, 362 U.S. 257, 264 (1960). *See also* Slobogin, *supra* note 42. Slobogin believes the *Portash* situation resembles the suppression hearing requirements under the fourth amendment:

> In the fourth amendment *Portash* situation, the defendant must talk, and perhaps incriminate himself, in order to protect the fourth amendment rights to which he is entitled. The defendant in a fifth amendment *Harris* situation, however, does not have to talk in order to receive a constitutional benefit, and, in fact, is constitutionally protected from punishment for remaining silent. In the first case, the State is coercing, before trial, the generation of possibly incriminating information; in the latter the State is explicitly required to prove that the confession is voluntary before it can use the confession to impeach.

Id. at 398-99 n.118.

172. In Simmons v. United States, 390 U.S. 377 (1968), the Court was aware of the problems in compelling a defendant to make a suppression motion, but allowing the evidence to be used against him:

> A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testimony he will have to forgo a benefit, and testifying is not always involuntary as a matter of law simply because it is given to obtain a benefit. *However, the assumption that underlies this reasoning is that the defendant has a choice:* he may refuse to testify and give up the benefit. *When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created.* . . . In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

Id. at 393-94 (emphasis added).

See also id. at 397 (Black, J., dissenting). Justice Black did not agree with the majority's view regarding what is and is not compelled testimony. Black believed that "any threat of harm or promise of benefit is sufficient to render a defendant's statements involuntary." *Id.* While this language is even stronger than the majority's position, Black reached a different result because he considered the privilege against self-incrimination waived when the defendant testifies at the suppression hearing. Since the defendant waived his right by testifying, Black concludes, the testimony is no longer compelled and the statements can be used against him. *Id.* at 398.

173. *See supra* text accompanying notes 148-56.

risks being wrongfully found guilty of a crime he did not commit. This Note concludes that by forcing a defendant to choose between testifying at a suppression motion when charged with a possessory offense, thus exercising a fourth amendment right, and protecting against self-incrimination and possibly being wrongfully found guilty, is constitutionally impermissible.

CONCLUSION

As a result of certain erroneous assumptions made by the Burger Court and the elimination of automatic standing, the Court has underestimated the prejudicial effect of using suppression hearing testimony for impeachment purposes. *United States v. Salvucci* suggests that it is unclear whether the scope of protections under *Simmons v. United States* is broad enough to protect defendants from being impeached at trial by testimony presented by their motion to suppress evidence. The Court should alleviate the current confusion among the courts and deal decisively with this issue in a manner that fulfills policies expounded by the *Simmons* rule, and prevents the possibility of an innocent defendant being wrongfully found guilty of a crime he did not commit. For guidance, the Court should look to analogous cases that contend with impeachment issues as well as require an election between constitutional rights. Analysis of constitutional choices defendants have been required to make in other contexts forms a continuum which can be used to gauge the strengths and weaknesses of the various competing interests that make certain defendant choices between constitutional rights reasonable, while others are constitutionally impermissible.

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