FOURTH AMENDMENT--SEARCH AND SEIZURE--ILLEGALLY OBTAINED EVIDENCE CANNOT BE USED TO IMPEACH DEFENSE WITNESS' TESTIMONY--*James v. Illinois*, 110 S. Ct. 648 (1990).

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I. INTRODUCTION

The fourth amendment to the United States Constitution mandates that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[1] In 1914, the United States Supreme Court devised the exclusionary rule to bar evidence which was the product of an unconstitutional search and seizure from an accused's trial.[2] While the fourth amendment does not expressly provide a remedy for its violation, the Supreme Court has determined that law enforcement officials would be less likely to violate this constitutional guarantee if illegally obtained evidence could not be used to their advantage in ensuing trials.[3] Thus, the rule was judicially engineered[4] to defend

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[1] U.S. CONST. amend. IV.

[2] *See* Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court stated:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts . . . .

Id. at 392.

[3] *See id.* at 393. The Court in *Weeks* stated:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the fourth amendment, declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Id. at 393.

[4] Stone v. Powell, 428 U.S. 465, 482 (1976). However, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court considered the exclusionary rule as "part and parcel of the fourth amendment's limitation upon federal encroachment of individual privacy." *Id.* at 651. In addition, the Court stated that the rule is "an essential part of both the fourth and fourteenth amendments." *Id.* at 657.

One faction of the Court posits the exclusionary rule to be a judicially created

fourth amendment rights by deterring potential police misconduct.[5]

Since its adoption, the exclusionary rule has been the subject of tremendous controversy[6] and litigation.[7] While some studies have cast

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remedy, *Stone*, 428 U.S. at 482, not a constitutionally mandated remedy, and argues that the rule's application must depend on a balancing test which weighs its deterrent value against the cost of excluding otherwise reliable evidence from a criminal trial. James v. Illinois, 110 S. Ct. 648, 657 (1990) (Kennedy, J., dissenting). This bloc of the Court generally supports the impeachment exception to the exclusionary rule. These Justices who support the impeachment exception argue that an accused should not be allowed to benefit from the exclusionary rule by knowing in advance that contradictory evidence could not be used to rebut perjured testimony if such evidence was unlawfully procured. *See* Oregon v. Hass, 420 U.S. 714, 722 (1975); Walder v. United States, 347 U.S. 62, 65 (1954). Therefore, these Justices reasoned, by allowing the admittance of tainted testimony for the limited purpose of impeaching a defendant's false testimony, criminal proceedings would become more truthful because effective cross examination would be permitted. *See Hass*, 420 U.S. at 721-22. Meanwhile, the rule's deterrent value would not suffer because illegally obtained evidence would remain inadmissible for the prosecution's case in chief. *See* United States v. Havens, 446 U.S. 620, 627 (1980).

Opposing members of the Court contend that the exclusionary rule is mandated by our Constitution. *See* United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting); *Mapp*, 367 U.S. at 651. They further argue that if such evidence is admitted in trials, "the protection of the fourth amendment, against warrantless searches and seizures, is of no value and [the fourth amendment] might as well be stricken from the Constitution." Weeks v. United States, 232 U.S. 383, 393 (1914). Since the rule's genesis, the Justices oppose any exception and stress that any evidence procured in violation of the fourth amendment should not be admitted for any reason. *See* Harris v. New York, 401 U.S. 222, 232 (1971) (Brennan, J., dissenting). These Justices emphasize that in addition to the exclusionary rule's deterrent purpose, the rule ensures that government will not profit from disregarding the very law it is to protect. *See* Terry v. Ohio, 392 U.S. 1, 13 (1968).

Justice Kennedy, along with Chief Justice Rehnquist and Justices O'Connor and Scalia, all agree that the exclusionary rule should not be employed "where the interest in pursuing truth or other important values outweighs any deterrence of unlawful conduct that the rule might achieve." *James*, 110 S. Ct. at 657 (Kennedy, J., dissenting). Justice Stevens also agrees that the use of unconstitutionally seized evidence is permitted when the truth-seeking function is sufficiently advanced "to overcome the loss to the deterrent value of the exclusionary rule." *James*, 110 S. Ct. at 656 (Stevens, J., concurring). In addition, Justices Blackmun and White joined the Court's decision in Illinois v. Krull, 480 U.S. 340, 347 (1987), which maintained that use of the exclusionary rule appropriately has been confined to those circumstances in which its deterrent purpose is effectively furthered. Since Justice Brennan's retirement from the Court, only Justice Marshall insists that the "Constitution does not countenance police misbehavior, even in pursuit of the truth." *Havens*, 446 U.S. 620, 633 (1980) (Brennan, J., dissenting).

[5] *See, e.g.*, Walder v. United States, 347 U.S. 62 (1954).

[6] Elkins v. United States, 364 U.S. 206, 216 (1960). *See generally* M. WILKEY, ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE (1982); Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259 (1983); Oaks, *Studying*

doubt upon the rule's deterrent effect,[8] the Supreme Court insists that the doctrine was established to deter unlawful searches by law enforcement officials.[9] The Court, however, has been disturbed by the considerable social harm that occurs by excluding evidence from our judicial tribunals to secure the fourth amendment.[10] Indeed, the Court has acknowledged that the rule allows wrongdoers to escape punishment through the suppression of truthful, but unlawfully obtained evidence.[11]

The Supreme Court has consistently carved out exceptions[12] to the exclusionary rule when the rule's corrective ends would not be

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the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665 (1970).

[7] *See e.g.*, Illinois v. Krull, 480 U.S. 340 (1987); United States v. Leon, 468 U.S. 897 (1984); United States v. Havens, 446 U.S. 620 (1980); Stone v. Powell, 428 U.S. 465 (1976); Oregon v. Hass, 420 U.S. 714 (1975); United States v. Calandra, 414 U.S. 338 (1974); Harris v. New York, 401 U.S. 222 (1971).

[8] *See generally* Oaks, *supra* note 6, at 674-78.

[9] *See* United States v. Calandra, 414 U.S. 338, 347-48 (1974).

[10] United States v. Leon, 468 U.S. 897, 907 (1984).

[11] For instance, Justice Brennan, a consistent supporter of the exclusionary rule, has maintained that the exclusion of unlawfully seized evidence is a necessary evil to protect the rights embodied in the Constitution. James v. Illinois, 110 S. Ct. 648, 651 (1990). Consequently, the Justice continued: "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Id.* at 683 (quoting Arizona v. Hicks, 480 U.S. 321, 329 (1987)). Furthermore, Justice Powell in *Stone v. Powell* announced that if the exclusionary rule is "applied indiscriminately it may well have the . . . effect of generating the disrespect for the law and administration of justice." Stone v. Powell, 428 U.S. 465, 491 (1976).

[12] *See* Illinois v. Krull, 480 U.S. 340 (1987) (held that evidence seized by a police officer during warrantless administrative search authorized by, and in objectively reasonable reliance on a statute later declared unconstitutional was admissible); United States v. Leon, 468 U.S. 897 (1984) (held that evidence obtained in reasonable reliance on defective search warrant was admissible); United States v. Havens, 446 U.S. 620 (1980) (held that otherwise inadmissible evidence could be used to impeach accused's statements on cross-examination reasonably suggested by accused's direct examination); Stone v. Powell, 428 U.S. 465 (1976) (held that a state prisoner may not be granted habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial); Oregon v. Hass, 420 U.S. 714 (1975) (held that inculpatory evidence furnished by defendant, prior to his requested conference with his attorney, was admissible only for the purpose of impeaching defendant's testimony); United States v. Calandra, 414 U.S. 338 (1974) (held that exclusionary rule was not applicable to grand jury proceedings); Harris v. New York, 401 U.S. 222 (1971) (held that voluntary but unlawfully obtained statements could properly be used to impeach accused's prior inconsistent utterances); Walder v. United States, 347 U.S. 62 (1954) (held that evidence obtained in violation of the constitution was admissible to impeach defendant's testimony on direct examination).

competently served,[13] and the burden the rule exacts on society outweighs its benefits.[14] Among these numerous exceptions, the Supreme Court has developed an impeachment exception,[15] which tolerates the introduction of unlawfully seized evidence solely for the purpose of rebutting the false testimony of a defendant.[16] Accordingly, the Court has adopted a balancing approach to determine whether to admit illegally obtained evidence for impeachment purposes.[17] In *James*

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[13] *See Calandra*, 414 U.S. at 348.

[14] *See generally* United States v. Leon, 468 U.S. 897, 907 (1984); Stone v. Powell, 428 U.S. 465, 491 (1976). The *Leon* Court noted, that application of the rule impairs the truth seeking function of criminal trials, allowing some criminals freedom or decreased sentences through the use of plea bargains. *Leon*, 468 U.S. at 907. In *Stone*, the majority stated that if the exclusionary rule is employed irrationally "it may . . . generat[e] disrespect for the law and administration of justice." *Stone*, 428 U.S. at 491.

[15] The Supreme Court established the impeachment exception in Walder v. United States, 347 U.S. 62 (1954). In *Walder*, the Court permitted the introduction of unconstitutionally seized evidence to impeach a defendant's fabricated testimony about earlier conduct that had no direct relevance on the issues connected to the case against Walder. *Id.* In Harris v. New York, 401 U.S. 222 (1971) and Oregon v. Hass, 420 U.S. 714 (1975), the Court expanded the exception to admit statements elicited in breach of Miranda v. Arizona, 384 U.S. 436 (1966), to rebut the accused's testimony on direct examination. Moreover, in *Harris*, the unlawfully elicited statements were directly related to the issues on trial. *Harris*, 401 U.S. at 225. Ultimately, the Court expanded the exception to enable the state to employ tainted evidence to impeach a defendant's testimony on cross examination that is clearly "within the scope of a defendant's direct examination." United States v. Havens, 446 U.S. 620, 627 (1980).

[16] *See* Harris v. New York, 401 U.S. 222, 224 (1971).

[17] *See* James v. Illinois, 110 S. Ct. 648, 651 (1990).

The first Supreme Court decision to suppress evidence seized in violation of the Constitution was Boyd v. United States, 116 U.S. 616 (1886). In *Boyd*, the defendant's private papers were confiscated by the government relying on a statute that required the in-court production of a defendant's private tax records. *Id.* at 621. The *Boyd* Court ruled that the government's unreasonable seizure infringed upon the fourth and fifth amendments, thus the confiscated evidence was inadmissible. *Id.* at 638. The *Boyd* decision was influenced by a deeply rooted national mistrust toward the police and in fact all governmental power. Burger, *Who Will Watch The Watchman?*, 14 AM. U.L. REV. 1, 4 (1964). The subsequent important advancement occurred in 1914 in Weeks v. United States, 232 U.S. 383 (1914). In *Weeks*, the Court held that the government cannot disobey the fourth amendment to obtain evidence and then use such evidence to procure a conviction. *Id.* In the beginning, the exclusionary rule was looked upon as the lone device to secure the interests insured by the fourth amendment. Doernberg, *supra* note 6, at 273. However, "[t]he purpose of the exclusionary rule is not to redress the injury to privacy of the search victim. . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." United States v. Calandra, 414 U.S. 338, 347 (1974). Moreover, the policies supporting the exclusionary rule are not supreme, rather, they must be contemplated in the view of conflicting policies. Stone v.

v. Illinois,[18] authored by Justice Brennan, the Court held that further enlarging the exception would not expand the truth-seeking value underlying the impeachment exception to the exclusionary rule with substantial potency but instead would appreciably frustrate the rule's deterrent effect. Thus, the Court concluded that the prosecution was not allowed to introduce unlawfully procured evidence to impeach the testimony of a defense witness.[19] This Note traces the development of the impeachment exception to the exclusionary rule and outlines the Court's balancing approach, which weighs the interest in pursuing the truth at trials against the rule's value in deterring unconstitutional conduct.

On August 30, 1982, a gang of three boys stopped a larger group of youths and demanded money.[20] When this request proved unsuccessful, one of the demanding adolescents fired a gun, killing one boy and wounding another.[21] When the police officers arrived, some boys from the larger group gave them descriptions of the perpetrators.[22]

Responding to an anonymous lead, Chicago police found the petitioner, a boy named Darryl James, with black, curly hair under a hair dryer at his mother's beauty salon.[23] Despite a lack of probable cause, Darryl James was placed in the patrol car.[24] While in the police unit,

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Powell, 428 U.S. 465, 488 (1976).

In the impeachment cases the competing policy is the societal interest ascertaining the truth at trial. *Id.* The balancing approach applied by the *James* Court allows the introduction of unlawfully seized evidence "where the introduction of reliable and probative evidence would significantly further the truth-seeking function of a criminal trial and the likelihood that admissibility of such evidence would encourage police misconduct is but a 'speculative possibility.'" James v. Illinois, 110 S. Ct. 648, 651 (1990) (citing Harris v. New York, 401 U.S. 222, 225 (1971)).

[18] 110 S. Ct. 648 (1990).

[19] James v. Illinois, 110 S. Ct. 648, 656 (1990).

[20] *Id.* at 650. The larger group consisted of eight boys who were walking home from a party. *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* When Darryl James was placed into custody he was 15 years of age. *Id.*

[24] *Id.* Although James was placed in the police car it is not clear if he was technically under arrest. The elements of arrest are: (1) purpose or intention to effect the arrest under real or pretended authority; (2) actual or constructive seizure or detention of the person to be arrested by the person having the present power to control him; (3) communication by the arresting officer of his intention or purpose then and there to make the arrest; and (4) understanding by the person to be arrested that such is the intention of the arrestor. *See* United States v. Raidl, 250 F. Supp. 278, 280 (N.D. Ohio 1965). Notwithstanding, any custodial interrogation, though technically not called "arrest" must

the officers questioned James about his appearance.[25] James stated that on the night of the shooting his hair was straight, long and red, which fit the description of the assailant.[26] Furthermore, the accused confessed that he colored and curled his hair to mask his identity.[27]

Darryl James was indicted for both murder and attempted murder.[28] Prior to the trial, the court sustained James' motion challenging the admissibility of his statements about his appearance because they were the fruit of an unlawful arrest.[29]

At trial, five eyewitnesses testified that the gunman on the night of the shooting sported long reddish-brown hair.[30] These witnesses also identified James as the killer, even though James was sitting in the courtroom with black, curly hair.[31]

Exercising his fifth amendment privilege, James did not testify on his own behalf.[32] However, the defense called Jewel Henderson, a friend of James, as a witness.[33] On direct examination, Henderson testified that on the day of the crime, James had black hair.[34] The prosecution moved to admit the unlawfully acquired statements made by James solely to impeach the credibility of Jewel Henderson.[35] Upon determining that these admissions were not coerced, the trial court entered the statements

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be based on probable cause. Dunaway v. New York, 442 U.S. 200, 212 (1979).

[25] *James,* 110 S. Ct. at 650.

[26] *Id.*

[27] *Id.* At this point Darryl James was responding to the officers' inquiry at the police station. *Id.*

[28] *Id.*

[29] *Id. See also supra* note 24. At a pretrial evidentiary hearing the defendant contended that the officers violated the fourth amendment in procuring his statements. *James*, 110 S. Ct. at 650. The trial court ruled that the statements would not be admissible at trial. *Id.*

[30] *Id.* These witnesses were members of the larger group of boys and they testified for the prosecution. *Id.* Each boy identified the accused at trial. *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* Henderson further asserted that she had taken Darryl to register for school on the date of the shooting. *Id.*

[35] *Id.* At this point the defense objected to introduction of the unlawfully obtained statements. *Id.* at 650-51.

into evidence.[36] At the conclusion of the trial, the jury convicted James of murder and attempted murder.[37] Darryl James appealed.[38] The appellate court reversed, ruling that the trial court erred by admitting the unconstitutional evidence for the purpose of testing the credibility of a defense witness and that such admission of evidence was not a harmless error.[39] The Supreme Court of Illinois reversed the appellate court's decision.[40] The Illinois Supreme Court held that the exclusionary rule's impeachment exception also permitted the challenging of a defense witness' testimony so that the defendant would be prevented from committing what the court called "perjury by proxy."[41] The United States Supreme Court granted certiorari,[42] and in a five to four decision, authored by Justice Brennan, reversed the conviction.[43]

II. HISTORY: THE ROAD TO *JAMES*

A. ADOPTION OF THE EXCLUSIONARY RULE AND THE GENESIS OF THE IMPEACHMENT EXCEPTION

The exclusion of evidence obtained in violation of the fourth amendment was not recognized by the United States Supreme Court until 1914 in *Weeks v. United States*.[44] The *Weeks* decision held that evidence seized by federal officials[45] in violation of the fourth

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[36] *Id.* The trial court allowed one of the detectives to take the stand and the detective proceeded to testify about Darryl's statements admitting that his hair was red on the day of the shooting and that he changed his hair style to mask his identity. *Id.* at 651.

[37] *Id.* James was sentenced to 30 years in prison. *Id.*

[38] *Id.*

[39] *Id.* The appellate court directed a new trial. *Id.*

[40] *Id.*

[41] *Id.* The court subsequently reinstated the sentence. *Id.*

[42] James v. Illinois, 109 S. Ct. 1117 (1989).

[43] James v. Illinois, 110 S. Ct. 648, 656 (1990).

[44] 232 U.S. 383 (1914). Twenty-eight years prior to *Weeks*, in dictum, the Supreme Court stated that proof procured in breach of the search and seizure amendment should be barred from judicial proceedings. *See* Boyd v. United States, 116 U.S. 616 (1886). However, the exclusion of tainted evidence from federal courts did not become law until the *Weeks* decision in 1914. *See* Oaks, *supra* note 6, at 667-68.

[45] The Supreme Court, in *Weeks*, circumscribed use of the exclusionary rule to the federal tribunals and officers of the federal government. *Weeks*, 232 U.S. at 398. In Wolf v. Colorado, 338 U.S. 25 (1949), the Supreme Court held that the fourteenth amendment did not compel the states to apply the exclusionary rule at state trials. The

amendment must be excluded from presentation at trial.[46] Although the fourth amendment does not expressly command the exclusion of unlawfully obtained evidence,[47] the Court stressed that without the exclusion of such evidence, the search and seizure amendment was meaningless.[48]

Forty years later,[49] in *Walder v. United States*,[50] the Supreme Court examined and limited the scope of the exclusionary rule.[51] In *Walder*, petitioner-Walder was indicted for selling narcotics.[52] A few years earlier, Walder had been arrested for heroin possession.[53] The action, however, was dismissed because the evidence was procured through an

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states, however, were required to have some type of remedy to protect rights secured by the fourth amendment. *Id.* at 31. Consequently, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court overruled *Wolf* and held that exclusion was required by the fourth amendment and imposed upon the states through the fourteenth amendment. *Id.* at 654-55. The Court's decision was founded, in part, upon a conviction that other remedies devised to safeguard the fourth amendment were unavailing. *Id.* at 652.

Prior to *Mapp*, the Supreme Court employed what became known as the "silver-platter doctrine" which allowed federal courts to admit unconstitutionally seized evidence obtained by state officials. *See* Lustig v. United States, 338 U.S. 74, 79 (1949). This doctrine was rejected by the Court in 1960 in Elkins v. United States, 364 U.S. 206 (1960). The Supreme Court once again emphasized that the fourth amendment would be meaningless without application of the exclusionary rule. *See id.* at 209. In addition, the *Elkins* Court asserted that the federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold. . . ." *Id.* at 223.

[46] Weeks v. United States, 232 U.S. 383, 398 (1914).

[47] *See* U.S. CONST. amend. IV.

[48] *Weeks*, 232 U.S. at 393. *See supra* note 3.

[49] In 1925, the Supreme Court in Agnello v. United States, 269 U.S. 20, 35 (1925), ruled that the essence of the fourth amendment is that all unlawfully seized evidence shall not be used for any purpose. This aspect of *Agnello* has been ignored and rejected, beginning with Walder v. United States, 347 U.S. 62 (1954).

Furthermore, some jurists have interpreted *Agnello* as a doctrine that prohibits the use of tainted evidence for the impeachment of a defendant's statements on cross-examination. *See* United States v. Havens, 446 U.S. 620, 631 (1980) (Brennan, J., dissenting). This view has clearly been rejected by the Court with its opinion in United States v. Havens, 446 U.S. 620 (1980). The *Havens* Court distinguished *Agnello* merely as a case that refused to allow the prosecution to "smuggle in" unlawfully seized evidence through cross-examination questioning that was not within the scope of direct examination. *Havens*, 446 U.S. at 625. *See infra* note 127 and accompanying text for a further discussion of *Agnello*.

[50] 347 U.S. 62 (1954).

[51] *Id.*

[52] *Id.* at 63.

[53] *Id.* at 62.

illegal search and seizure.[54] At trial, Walder testified that he had never held or dispensed illegal drugs.[55] The Supreme Court, in a seven to two decision, ruled that the unlawfully obtained evidence from the prior arrest was admissable to impeach a defendant's conflicting statement on direct examination.[56] Writing for the majority, Justice Frankfurter utilized the *Weeks* doctrine to suppress the admission of unlawful evidence during the government's case in chief.[57] However, the Justice reasoned that an exception to the exclusionary rule was imperative to prevent the accused from turning the unconstitutional evidence into his own weapon to insulate his perjured testimony.[58]

The Court noted that the defendant must be free to deny all elements of the case against him and that unlawfully seized evidence would not be available for the government's case in chief.[59] The majority, however, reasoned that if such evidence were barred for all purposes, the defendant would be free to contradict reliable but unconstitutionally procured evidence without fear of impeachment.[60] In the Court's opinion there was no justification for excluding unlawfully obtained evidence outside of the case in chief in the face of a defendant's perjurious testimony.[61] Thus, the Court refused to allow the

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[54] *Id.* at 62-63.

[55] *Id.* at 63.

[56] *Id.* at 65.

[57] *Id.* at 65-66.

[58] Walder v. United States, 347 U.S. 62, 65-66 (1954). The Court stated:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Id.

[59] *See id.* The "case in chief" has been defined as "[t]hat part of a trial in which the party with the initial burden of proof presents his evidence after which he rests." BLACK'S LAW DICTIONARY 196 (5th ed. 1979). As a practical matter, the term "case in chief" is used to refer to that part of a trial where evidence is offered to prove that the defendant is guilty of the accused crime. E. CLEARY, MCCORMICK ON EVIDENCE 513 (3d ed. 1984). Thus, if tainted evidence is introduced for impeachment purposes, rather than to prove one's guilt, the defendant is entitled to an instruction informing the jurors that such evidence is only to be considered as bearing on the accused's credibility as a witness. *Id.*

[60] *Walder*, 347 U.S. at 65-66.

[61] *Id.*

defendant an opportunity to use the unlawfully obtained evidence to his advantage.[62]

B. Other Exceptions to the Exclusionary Rule

The Supreme Court has decided several cases which have collaterally influenced the balancing approach employed in the development of the impeachment exception to the exclusionary rule. In *United States v. Calandra*,[63] the United States Supreme Court held that the exclusionary rule was not applicable in a grand jury proceeding.[64] The majority declined to suppress unlawful evidence in grand jury proceedings because such employment of the exclusionary rule would not produce adequate deterrence to vindicate the application of the rule.[65] Similarly, in *Stone v. Powell*,[66] the Court ruled that a petitioner who has been granted a full and fair chance to contest a fourth amendment right could not secure federal habeas corpus relief on the basis that illegally procured evidence was admitted at his trial.[67] Applying the balancing approach, the majority asserted that the deterrent function of the exclusionary rule would not be significantly weakened if defendants were prevented from raising the exclusionary issue in habeas corpus proceedings.[68] The Court concluded that the costs to the criminal justice system would outweigh the added deterrent effect of suppressing the evidence.[69]

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[62] *Id.*

[63] 414 U.S. 338 (1974).

[64] *Id.*

[65] *Id.* at 351. The Court stated that "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 348. Therefore, after recognizing that the tainted evidence would be inadmissible at a subsequent criminal trial, the Court reasoned that excluding the evidence from grand jury proceedings would not significantly enhance the rule's capability to discourage future police misconduct. *Id.* at 351.

[66] 428 U.S. 465 (1976).

[67] *Id.* Powell was initially convicted of murder, partially on grounds of testimony pertaining to a weapon discovered on him when he was arrested for disobeying a vagrancy ordinance. *Id.* at 469-70. At trial Powell argued that the evidence should be suppressed as the fruit of an unlawful search because the ordinance was unconstitutional. *Id.* at 470.

[68] *Id.* at 493-95. The Court also stated that "[t]here is no reason to believe . . . that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions." *Id.* at 493.

[69] *Id.* at 493. The Court in *Powell* stated that "[a]pplication of the rule deflects the truthfinding process and often frees the guilty." *Id.* at 490.

In 1984, the Supreme Court, in *United States v. Leon*,[70] utilized the good faith exception to further limit fourth amendment restraints on government searches.[71] The Court held that the exclusionary rule should not be applied to bar evidence obtained by police acting in "reasonable reliance on a search warrant issued by a neutral and detached magistrate" but subsequently found to be defective.[72] The *Leon* majority reasoned that, "assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the fourth amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."[73] Finally, in 1986, the Court in *Illinois v. Krull*,[74] held that the exclusionary rule did not pertain to evidence seized by police who acted objectively and relied in good faith upon a statute sanctioning warrantless administrative inspections, but which was subsequently found to transgress the fourth amendment.[75] The majority posited that "application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have little deterrent effect" on future police misconduct.[76]

C. Expansion of the Impeachment Exception

In *Harris v. New York*,[77] the Supreme Court expanded the principles espoused by the *Walder* Court.[78] In *Harris*, the defendant was arrested for trading narcotics.[79] Thereafter, the police questioned the defendant

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[70] 468 U.S. 897 (1984).

[71] *Id.*

[72] *Id.* at 913. In *Leon*, a facially legitimate search warrant was issued on the basis of an informant's tip and a subsequent police investigation found to be insufficient for lack of probable cause by the district court. *Id.* at 901-02.

[73] *Id.* at 918.

[74] 480 U.S. 340 (1986).

[75] *Id.* at 347-48. The Illinois statute allowed state officials to inspect the records of licensed automotive parts sellers. *Id.* at 342. Pursuant to the statute Chicago police asked to see the records of vehicles purchased by Krull's wrecking yard. *Id.* at 343. After being informed that the records could not be located the officers searched the yard and discovered three stolen cars. *Id.*

[76] *Id.* at 349.

[77] 401 U.S. 222 (1971).

[78] *Id.*

[79] *Id.* at 222-23.

without warning him of his right to a designated attorney.[80] As a result of this questioning, the defendant admitted that he sold heroin to the undercover officers.[81] Consequently, the prosecution was prohibited from entering into evidence the defendant's admission.[82] On direct examination, the defendant swore that he sold baking powder.[83] During cross examination the trial judge allowed the state to produce the defendant's unlawful confession solely to test the defendant's credibility.[84] Thus, inadmissible evidence, which only partially countered the accused's direct testimony, was admitted on cross examination for impeachment purposes.[85]

Chief Justice Burger, writing for the *Harris* Court, first noted that *Walder* permitted the use of tangible evidence obtained in violation of the fourth amendment for impeachment purposes.[86] The Court stated that the significance of ascertaining the truth outweighed the "speculative possibility" that prohibiting unlawful evidence for appropriate impeachment would further the exclusionary rule's deterrent function.[87] The Chief Justice concluded by stating, "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[88]

In a dissenting opinion, Justice Brennan, joined by Justices Douglas and Marshall, criticized the majority's decision which allowed the state to benefit from unlawful police action.[89] Justice Brennan argued that

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[80] *Id.* at 224.

[81] *Id.* at 223.

[82] Harris v. New York, 401 U.S 222, 223-24 (1971).

[83] *Id.* at 223.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 224. Chief Justice Burger did acknowledge that the defendant in *Walder* was challenged only as to collateral matters, while Harris was questioned on subjects directly related to the crime. *Id.* at 225. The Chief Justice posited that this distinction did not warrant an outcome different than the result in *Walder*. *Id.*

[87] *Id.* Chief Justice Burger stated: "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.*

[88] *Id.* at 226.

[89] *Id.* at 232 (Brennan, J., dissenting). Justice Brennan questioned the majority's logic by declaring:

> I fear that today's holding will seriously undermine [the deterrence of

Harris was distinguishable from *Walder*, which merely authorized the use of unlawful evidence to impeach testimony as to subjects collateral to the offense.[90] According to Justice Brennan, the *Walder* Court allowed testimony pertaining to conduct that was not connected to the case against the defendant,[91] whereas in *Harris*, the Court permitted the use of tainted evidence to impeach testimony on matters directly related to the crime.[92] Finally, Justice Brennan asserted that the exclusionary rule, in addition to deterring future police misconduct, served to protect the integrity of the courts,[93] and added that it was a "heinous offense" for the bench to assist a police officer who has violated the law.[94]

The Supreme Court's ruling in *Oregon v. Hass*[95] further advanced the impeachment exception to the exclusionary rule.[96] In *Hass*, two

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> unlawful police practices]. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution.

Id.

[90] *Id.* at 227 (Brennan, J., dissenting). Justice Brennan contended that *Walder* admitted unconstitutionally seized evidence captured during an arrest unrelated to the offense for which the accused was on trial. *Id.*

[91] *Id.* Justice Brennan stated "that the evidence used for impeachment in *Walder* was related to the earlier 1950 prosecution and had no direct bearing on 'the elements of the case' being tried in 1952." *Id.* at 228 (Brennan, J., dissenting). The Justice continued "[i]n contrast, here, the evidence used for impeachment, a statement concerning the details of the very sales alleged in the indictment, was directly related to the case against petitioner." *Id.*

[92] *Id.* at 227 (Brennan, J., dissenting).

[93] *Id.* at 231 (Brennan, J., dissenting). Justice Brennan stated:

> The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system. The "essential mainstay" of that system, Miranda v. Arizona, 384 U.S. at 460, is the privilege against self-incrimination, which for that reason has occupied a central place in our jurisprudence since before the Nation's birth.

Harris, 401 U.S. at 231-32.

[94] *Id.* at 232. (Brennan, J., dissenting). The dissent quarreled that a government that does not comply with its laws embarks on an avenue to its obliteration. *Id.*

[95] 420 U.S. 714 (1975).

[96] *Id.*

bicycles were stolen from two different homes.[97] Later that day, officers tracked Hass through his motor vehicle license to his residence and arrested him for stealing one of the bicycles which came from the Lehman home.[98] On the way to the police station and after being informed of his rights, the police questioned Hass about the bicycle from the Lehman home.[99] Hass, who was not certain about which bicycle the officer was asking about, confessed that he had stolen two bicycles.[100] On the way to the station, Hass requested consultation with his attorney and was informed he that he could call his attorney at the station. The officer then continued questioning him about the burglary.[101] These questions produced additional information about the location of the crime.[102] At trial, the court suppressed the statements which were uttered after the defendant's request to speak with his attorney.[103] After Hass testified that his friend obtained the bicycle and that he did not know it was stolen, the trial court allowed the suppressed statements as evidence to impeach Hass' testimony.[104]

Justice Blackmun, writing for the majority first observed that there was no difference between the present case and the *Harris* decision.[105] The Justice recognized that the accused testified falsely after learning

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[97] *Id.* at 715.

[98] *Id.*

[99] *Id.* Hass was not arrested for the other burglary. *Id.*

[100] *Id.* The defendant also said that he returned one bicycle "and that the other was where he had left it." *Id.*

[101] *Id.* at 715-16. On the way to the station, the defendant stated that he was in quite a predicament and requested an opportunity to telephone his attorney. *Id.* at 715. The officer replied that the defendant could call as soon as they arrived at the station. *Id.* at 715-16. Thereafter, the defendant pointed to the location where the bicycle was recovered. *Id.* at 716.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 716-17. At trial Hass testified that he and two friends were driving in his truck when his friends got out of the truck. *Id.* at 716. Hass continued driving down the street when one of his friends reappeared and lifted a bicycle into the truck. *Id.* Hass also testified that initially he did not know the bicycle was stolen. *Id.*

The trial court instructed the jury that the initially suppressed statement made by Hass to the officer "may not be used by you as proof of the Defendant's guilt . . . but you may consider that testimony only as it bears on the [credibility] of the Defendant as a witness. . . ." *Id.* at 717.

[105] *Id.* at 722. *See supra* notes 77-94 and accompanying text.

that his statements were ruled inadmissible for the case in chief.[106] Justice Blackmun refused to arm Hass with a "shield" to protect his false testimony.[107] The majority further stressed that evidence obtained as the result of a *Miranda* violation was not banned entirely.[108] As long as such evidence was trustworthy, unconstitutional evidence could be used to prevent perjurious statements that otherwise would be "free from the risk of confrontation with prior inconsistent utterances."[109]

In a dissenting opinion, Justice Brennan declared that the Court's decision would encourage police to question the accused before they were provided an opportunity to meet with their attorney, in order to obtain impeachment evidence.[110] Additionally, Justice Brennan, echoing his dissent in *Harris*, insisted that any use of unlawful evidence by the courts gives the appearance of condoning unlawful official intrusion.[111]

The impeachment exception to the exclusionary rule was again expanded in *United States v. Havens*.[112] In *Havens*, the Burger Court allowed the use of evidence obtained in violation of the fourth amendment to test the statements of the accused which were logically related to the defendant's direct testimony on cross examination.[113]

The issue in *Havens* arose when a friend of Havens was arrested for possession of cocaine after customs officials found the substance in makeshift pockets attached to his T-shirt.[114] Subsequently, Havens' luggage was unconstitutionally searched, revealing cut pieces of material

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[106] *Id.* "Hass' statements were made after the defendant knew [the officer's] opposing testimony had been ruled inadmissible for the prosecution's case in chief." *Id.*

[107] *See id.*

[108] *Id.* The Court reiterated that "the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility . . . and there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.*

[109] *Id.* (quoting Harris v. New York, 401 U.S. 222, 224 (1971)).

[110] *Id.* at 725 (Brennan, J., dissenting). Justice Brennan argued that the decision in Miranda v. Arizona, 384 U.S. 436 (1966) protected suspects from police questioning subsequent to their request to consult with an attorney. *See* Oregon v. Hass, 420 U.S. at 725 (Brennan, J., dissenting). Thus in most cases, after such consultation, the accused would remain silent and avoid making any incriminating statements. *Id.* After "today's decision" police will be encouraged to continue questioning because impeachment evidence is preferable to no evidence at all. *See id.*

[111] *Id.* at 724-25 (Brennan, J., dissenting).

[112] 446 U.S. 620 (1980).

[113] *Id.* at 627-28.

[114] *Id.* at 621-22.

that matched the makeshift pockets.[115] Havens was then arrested and indicted.[116] Evidence relating to the makeshift pockets was suppressed on a pretrial motion.[117] On direct examination, Havens denied any participation in the alleged smuggling operation.[118] On cross examination, the accused was asked about his friend's makeshift pockets.[119] Havens responded that he had nothing to do with any of the material in question or with the preparation of the pockets.[120] Over the defendant's objection, the government was then able to impeach Havens' credibility with the unlawfully seized evidence.[121] Havens was subsequently convicted of importing cocaine.[122] Relying on *Agnello v. United States*,[123] the appellate court reversed the district court's decision and ruled that unlawful evidence could only be used to test a defendant's specific assertions on direct examination.[124] The Court of Appeals read *Agnello* along with *Walder*, to hold that unlawful evidence could not be used to impeach statements voiced by the defendant during the course of cross examination.[125]

The Supreme Court, by a five to four margin, reversed the appellate court's decision.[126] Justice White, writing for the majority, first distinguished *Agnello* on the ground that it prohibited the impeachment of testimony with tainted evidence which was first extracted on cross

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[115] *Id.* at 622. Havens had previously cleared customs, but his associate, John McLeroth, inculpated Havens upon McLeroth's arrest. *Id.* at 621-22.

[116] *See id.* at 622.

[117] *Id.*

[118] *Id.* At trial, McLeroth testified that Havens furnished him with the material and Havens also tailored the pockets. *Id.* On direct examination, Havens stated that he heard McLeroth's implicating testimony. *Id.* Nevertheless, Havens refused to acknowledge any involvement concerning the makeshift pockets. *Id.*

[119] *Id.*

[120] *Id.* at 622-23.

[121] *Id.* at 623. The jury was instructed, by the trial judge, that the unconstitutionally seized material could only be contemplated in weighing the reliability of Havens' testimony. *Id.*

[122] *Id.* at 621. Havens was also convicted of conspiring to import a controlled substance and intentionally possessing cocaine. *Id.*

[123] 269 U.S. 20 (1925). *See supra* note 50.

[124] United States v. Havens, 446 U.S. 620, 623 (1980).

[125] *Id.* at 625. The appellate court asserted that since the defendant was not asked about the T-shirts during his direct examination, the tainted evidence could not be used to impeach his testimony pertaining to the t-shirts during his cross examination. *Id.*

[126] *Id.*

examination and which had "too tenuous a connection with any subject opened upon direct examination . . . ."[127] Furthermore, Justice White noted that the dicta in *Agnello* which expressed that unlawfully seized evidence "shall not be used at all,"[128] was rejected by the Court in subsequent cases.[129] Rather, the Court reaffirmed the decisions in *Harris* and *Hass*.[130] In addition, the majority maintained that both *Harris* and *Hass* stressed that the deterrent function of the exclusionary rule was probably not furthered by excluding unconstitutional evidence for otherwise appropriate impeachment.[131] Thus, in balancing the two aims, truth at criminal trials outweighed the "speculative possibility" of discouraging future police misconduct.[132] The majority, citing *Walder* and its progeny,[133] concluded that the goals of the exclusionary rule were sufficiently promoted by denying prosecutorial use of the tainted

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[127] *Id.* at 625. Justice White stressed that Agnello's testimony on direct examination did not justify the cross-examination, which is limited to the scope of direct examination, that wrongfully opened the door for the admission of the tainted evidence. *Id.* The defendant in *Agnello* was accused of conspiracy to distribute a package of cocaine. *Id.* at 28. On direct examination the accused acknowledged that he possessed the package, however, he stated that he did not know the contents of the package. *Id.* at 29. On cross examination the defendant denied ever seeing narcotics or a package of cocaine. *Id.* Consequently, the trial court permitted the introduction of a package of cocaine unlawfully seized from the defendant's room to rebut his testimony on cross examination. *Id.* at 30. The Supreme Court reversed the trial court's decision and held that the fourth amendment commanded the suppression of the evidence. *Id.* at 35. The Court stressed that the accused did not make false assertions regarding the package of cocaine during his direct examination and, therefore, "did nothing to waive his constitutional protection or to justify cross examination in respect of the [tainted] evidence claimed to have been obtained by the search." *Id.* *See supra* note 49 for further discussion of *Agnello*.

[128] United States v. Havens 446 U.S. 620, 624 (1980) (quoting Agnello v. United States, 269 U.S. 20, 35 (1925) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920))).

[129] *Id.* (citing Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954)).

[130] *See* United States v. Havens, 446 U.S. 620, 626 (1980). The Court in *Harris* and *Hass* held that illegally seized evidence, while unavailable for the prosecution's case in chief, should not become the accused's weapon in evading the truth. Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971). *See supra* notes 77-111 and accompanying text for a detailed discussion of *Harris* and *Hass*.

[131] *Havens*, 446 U.S. at 626.

[132] *See id.* at 627.

[133] Oregon v. Hass, 420 U.S. 714, 723 (1975); Harris v. New York, 401 U.S. 222, 225 (1971).

evidence from its case in chief.[134]

Justice Brennan, dissenting, stated that the issue in *Havens* was the same issue the Court encountered in *Agnello*.[135] The Justice argued that *Agnello* held that unconstitutionally obtained evidence was excluded for the purpose of impeaching all testimony first raised on cross examination.[136] The dissenting Justice criticized the majority by stating that the decision would allow even average prosecutors the ability to enter prohibited evidence anytime the accused took the stand and thereby concluded that this would force many defendants to relinquish their right to testify.[137] Finally, Justice Brennan expressed dissatisfaction with any exception to the exclusionary rule and wondered if the majority would condone the use of torture to arrive at the truth in a trial.[138] The

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[134] *See* United States v. Havens, 446 U.S. 620, 627 (1980). Justice White stated:

> In those cases, the ends of the exclusionary rules were thought adequately implemented by denying the government the use of the challenged evidence to make out its case in chief. The incremental furthering of those ends by forbidding impeachment of the defendant who testifies was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial. We reaffirm this assessment of the competing interests, and hold that a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.

Id. at 627-28.

[135] Agnello v. United States, 269 U.S. 20 (1925). *See supra* notes 50 and 127 and accompanying text. United States v. Havens, 446 U.S. 620, 629 (1980) (Brennan, J., dissenting).

[136] *Havens*, 446 U.S. at 630 (Brennan, J., dissenting). Justice Brennan debated that the majority ignored the real rule of *Agnello*, and expounded:

> [T]he actual principle of *Agnello*, as discerned by *Walder*, is that the Government may not employ its power of cross-examination to predicate the admission of illegal evidence. In other words, impeachment by cross-examination about - or introduction of - suppressible evidence must be warranted by defendant's statements upon direct questioning . . . . Thus, the constitutional flaw found in *Agnello* was that the introduction of tainted evidence had been prompted by statements of the accused first elicited upon cross-examination.

Id. at 630-31 (Brennan, J., dissenting).

[137] *Id.* at 632 (Brennan, J., dissenting).

[138] *Id.* at 633 (Brennan, J., dissenting).

Justice emphasized that the majority, through the use of such evidence, had sacrificed rights secured under the aegis of the Constitution to advance the goal of truthful trials.[139] It was against this background that the United States Supreme Court decided *James v. Illinois*.[140]

III. CURTAILING THE EXPANSION OF THE IMPEACHMENT EXCEPTION

In *James*, the United States Supreme Court finally curtailed expansion of the impeachment exception to the exclusionary rule.[141] Emphasizing that untruthful testimony was already discouraged by the remedy of a subsequent perjury trial,[142] the Court held that the impeachment exception to the exclusionary rule did not permit the use of unlawful evidence to check the testimony of a defense witness.[143]

In an opinion authored by Justice Brennan, the *James* Court initially declared that, occasionally, probative evidence had to be sacrificed to secure superior rights protected by the Constitution.[144] Asserting "that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all," the Court critiqued the impeachment exceptions to the exclusionary edict.[145] The Court stated that the impeachment exception to the rule was applied only when the exception would significantly further the truth-seeking role of our judicial system,

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[139] Id. at 633-34 (Brennan, J., dissenting). The dissenting Justice posited:

> Ultimately, I fear, this ad hoc approach to the exclusionary rule obscures the difference between judicial decisionmaking and legislative or administrative policymaking. More disturbingly, by treating Fourth and Fifth Amendment privileges as mere incentive schemes, the Court denigrates their unique status as constitutional protections. Yet the efficacy of the Bill of Rights as the bulwark of our national liberty depends precisely on public appreciation of the special character of the constitutional prescriptions. The Court is charged with the responsibility to enforce constitutional guarantees; decisions such as today's patently disregard that obligation.

Id. at 634 (Brennan, J., dissenting).

[140] 110 S. Ct. 648 (1990).

[141] *Id.*

[142] *Id.* at 653.

[143] *Id.* at 656.

[144] *Id.* at 651. Justice Brennan argued that while arriving at the truth is an important aim of the adversarial process, superior constitutional principles make it necessary to silence evidence obtained in breach of our Constitution. *Id.*

[145] *Id.* (quoting Arizona v. Hicks, 480 U.S. 321, 329 (1987)).

and where prohibiting the entrance of such evidence was unlikely to prevent future police misbehavior.[146] The Court reasoned that while unlawful evidence was permitted to impeach a defendant's perjurious statements, the accused must be allowed to contest "all the elements of the case against him . . . ."[147] Consequently, the *James* Court asserted that application of the impeachment exception depended upon a balancing of these values.[148]

Next, Justice Brennan argued that extension of the impeachment exception to witnesses did not advance truthful testimony to the same degree as applying the exception to defendants.[149] The Justice pointed out that the original exception frustrated false testimony without repressing honest testimony.[150] He then asserted, that the results would not be the same if the exception was applied to the testimony of defense witnesses.[151] Justice Brennan explained that a witness was unlikely to commit "perjury by proxy" because of the potential consequences of a perjury conviction.[152] Conversely, Justice Brennan reasoned that a possible perjury trial would not deter a defendant, who is already facing trial, from testifying falsely.[153] Expanding the exception, therefore, would not significantly further the truth-seeking function.[154]

In addition, the majority reasoned that expanding the exception, instead of encouraging truthful statements, would inhibit defendants from

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[146] *Id.* (quoting Harris v. New York, 420 U.S. 222, 225 (1971)).

[147] *Id.* at 652 (quoting Walder v. United States, 347 U.S. 62, 65 (1954)). The unabridged quote from *Walder* is:

> [An accused] must be free to deny all 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, 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. (quoting *Walder*, 347 U.S. at 65).

[148] James v. Illinois 110 S. Ct. 648, 652 (1990).

[149] *Id.* at 653.

[150] *Id.* at 652-53.

[151] *Id.* at 653.

[152] *Id.*

[153] *Id.* Thus, Justice Brennan maintained that the Illinois Supreme Court overstated the likelihood of a defendant's prospects of locating a witness willing to engage in "perjury by proxy." *Id.*

[154] *Id.*

calling witnesses.[155] Justice Brennan emphasized that the defense would think twice before calling a witness in fear that its witness might say something that contradicts the unlawfully seized evidence.[156] The Justice stated that this concern would cause some defendants to sacrifice a witness' helpful and truthful testimony.[157] Thus, just as it was improper to permit a defendant to have a shield against his perjured testimony, it would be even more improper to allow the prosecution "to brandish such evidence as a sword with which to dissuade defendants from presenting a meaningful defense through other witnesses."[158]

Turning to the rule's deterrent value, the majority reasoned that expansion of the exception would dilute the rule's deterrent effect.[159] Justice Brennan argued that when the exception was applied to a defendant's testimony, the incentive to obtain unlawful evidence was ineffective because there is no guarantee that the defendant would ever testify.[160] Furthermore, if he did testify, the accused would be unlikely to contradict the besmirched proof.[161] Justice Brennan argued, however,

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[155] *Id.* at 653-54.

[156] *See id.* at 653. Justice Brennan contended that a disinclined or hostile witness summoned by the accused would not be concerned about uttering statements that might impugn the unlawful evidence. *Id.* In addition, the Justice asserted that even a congenial witness does not always testify as anticipated. *Id.* (quoting Brooks v. Tennessee, 406 U.S. 605, 609 (1972)). Thus, even testimony from a favorable witness might unexpectedly open the courtroom door for the constitutionally contaminated evidence. *Id.*

[157] *Id.* at 654. Therefore, expanding the impeachment exception to defense witnesses would injure the defense's ability to present their foremost defense. *Id.* at 653.

[158] *Id.* at 654. Justice Brennan explained:

> This realization alters the balance of values underlining the current impeachment exception governing defendants' testimony. Our prior cases make clear that defendants ought not be able to "pervert" the exclusion of illegally obtained evidence into a shield for perjury, but it seems no more appropriate for the State to brandish such evidence as a sword with which to dissuade defendants from presenting a meaningful defense through other witnesses. Given the potential chill created by expanding the impeachment exception the conceded gains to the truthseeking process from discouraging or disclosing perjured testimony would be offset to some extent by the concomitant loss of probative witness testimony. Thus the truthseeking rationale supporting the impeachment of defendants in *Walder* and its progeny does not apply to other witnesses with equal force.

Id.

[159] *Id.*

[160] *Id.*

[161] *Id.*

if the impeachment exception extended to all defense witnesses, the potential utility of the evidence would increase since there would usually be more witnesses than defendants testifying at trial.[162] Justice Brennan asserted that, if the exception were expanded, evidence uncovered through unconstitutional searches would become more useful to the prosecution.[163] Accordingly, the illegal evidence would deter the calling of some defense witnesses and, therefore, the accused would not put forward his best possible case.[164]

Justice Brennan concluded by rejecting the state's argument that the deterrent function of the exclusionary rule was served by excluding the unlawful evidence from the state's case in chief.[165] The Justice maintained that a rule compelling the suppression of evidence exclusively from the state's case in chief does not completely protect the rights secured by the fourth amendment.[166] Otherwise, Justice Brennan argued, police would be encouraged to secure evidence illegally, which could be effectively used for impeachment purposes even though it would be inadmissible for the case in chief.[167] Thus, Justice Brennan stated that in order to protect the rights secured by the Constitution, the use of evidence obtained in violation of it must continue to be the exception.[168]

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[162] *Id.* at 654-55. Defense witnesses outnumber defendants, Justice Brennan professed, because many times defendants exercise their constitutional privilege and refrain from taking the stand. *Id.* at 655. Furthermore, many defense counsels call multiple witnesses to reinforce the accused's defense. *Id.*

Accordingly, Justice Brennan argued that since defense witnesses were more numerous than defendants, the prosecution's utility of infected proof would swell due to the enlarged opportunity to employ such evidence. *Id.* Consequently, police would have greater incentive to obtain such evidence. *Id.*

[163] *Id.* at 654-55.

[164] *See id.* at 653-54.

[165] *Id.* at 655.

[166] *Id.*

[167] *Id.* Justice Brennan noted, that the police, who arrested Darryl James, unlawfully procured James' incriminating statement after they were aware of witnesses to the murder. *Id.* at 655 n.8. Ergo, Justice Brennan professed, that the police knew they had sufficient evidence to build a direct case against James. *See id.* Thus, excluding the spoiled proof solely from the case in chief would not have discouraged the officers in this instance. *See id.*

[168] *Id.* Justice Brennan stated:

> Narrowing the exclusionary rule in this manner, therefore, would significantly undermine the rule's ability "to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). So long as we are committed

Justice Stevens, concurring, determined that the dissent overrated the benefit of the exclusionary rule to a defendant resolved to offer perjured testimony and magnified the injury that the suppression of unlawfully seized evidence inflicts on the truthseeking function of a criminal trial.[169] In addition, Justice Stevens agreed with the majority that a witness, not facing a possible conviction, was less likely than a defendant to offer fraudulent testimony.[170] Justice Stevens maintained that in deciding whether to enter unlawfully seized evidence, the correct question to ask would be: does the inclusion of such evidence significantly advance the truthseeking function of criminal trials to justify weakening the deterrence of potential police misconduct that would result from admitting such evidence?[171]

Justice Stevens also criticized the dissent for taking the officer's version of James' unconstitutionally tendered statement as fact.[172] The Justice claimed that the dissent presumed that fraudulent testimony was offered by the defense witness.[173] The dissent, however, was disinclined to consider the identical assumption in regard to the government's witnesses.[174] Justice Stevens argued that the dissent cannot be sure that Henderson's testimony was false unless it was certain that every word of the officer's testimony was truthful.[175] Nonetheless, because there were five other witnesses that identified James as the perpetrator of the crime, the Justice conceded that the officer's version of the statement was probably correct.[176] Justice Stevens concluded by stating that if the police officer's testimony was not so substantiated, it would certainly be

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to protecting the people from the disregard of their constitutional rights during the course of criminal investigations, inadmissibility of illegally obtained evidence must remain the rule, not the exception.

James v. Illinois, 110 S. Ct. 648, 655 (1990).

[169] *Id.* at 656 (Stevens, J., concurring).

[170] *Id.* In addition, Justice Stevens criticized the minority for surmising that a witness who was not on trial would honor an invitation to testify falsely. *See id.*

[171] *Id.*

[172] *Id.* Justice Stevens argued that such supposition was unfounded because Henderson's version of James' appearance was just as likely to be accurate. Id. at 656-57 (Stevens, J., concurring). Thus, it was conceivable that the officer's testimony was fabricated or simply a product of imperfect recall. *Id.*

[173] *Id.* at 656 (Stevens, J., concurring).

[174] *Id.*

[175] *Id.*

[176] *Id.*

inappropriate "to presume - as the dissenters do - that conflict between the testimony of the officer and Henderson should necessarily be resolved in the officer's favor or that exclusion of the evidence would result in a decision by jurors who are 'positively misled.'"[177]

Justice Kennedy dissented, joined by Chief Justice Rehnquist, Justices O'Connor and Scalia.[178] Justice Kennedy argued that the majority erred in its application of the balancing test.[179] The Justice asserted that the Court's decision allows the defense to engage in "perjury by proxy" through the testimony of a cooperative witness.[180] Furthermore, Justice Kennedy criticized the majority for permitting the defense to offer false testimony and to allow such testimony to remain unchallenged, by excluding unconstitutional but probative evidence.[181]

The dissent noted that past cases have held that unlawfully obtained evidence was not excluded when its contribution to the truth at trial outweighed the possible discouragement on future police misconduct.[182] Accordingly, Justice Kennedy posited that *Walder* and its progeny held that reliable, but unconstitutionally procured evidence that was generally suppressed may be admissible to contradict a defendant's testimony.[183]

Justice Kennedy condemned the majority's adoption of an inflexible rule that bars the employment of all prohibited evidence to check the

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[177] *Id.* at 657 (Stevens, J., concurring).

[178] *Id.* (Kennedy, J., dissenting).

[179] *See id.* at 657-58 (Kennedy, J., dissenting). The minority asserted: "In sum, our cases show that introduction of testimony contrary to excluded but reliable evidence subjects the testimony to rebuttal by that evidence." *Id.* at 658 (Kennedy, J., dissenting).

[180] *Id.* at 661 (Kennedy, J., dissenting). Justice Kennedy maintained:

> Where the jury is misled by false testimony, otherwise subject to flat contradiction by evidence illegally seized, the protection of the exclusionary rule is "perverted into a license to use perjury by was of a defense, free from the risk of confrontation with prior inconsistent utterances." (citation omitted). The perversion is the same where the perjury is by proxy.

Id. (quoting United States v. Havens, 446 U.S. 620, 626 (1980)).

[181] *See id.* at 659 (Kennedy, J., dissenting).

[182] *Id.* at 657 (Kennedy, J., dissenting). Justice Kennedy argued that the interest in advancing the truthseeking process of the judicial system outweighs the possible deterrence value of excluding unlawful evidence where an accused uses the excluded evidence repulsively to shield his false declarations. *Id.*

[183] *Id.* The exception to the exclusionary rule, Justice Kennedy advanced, applied to unlawfully, but voluntary elicited statements uttered by the defendant, so long as they were reliable. *Id.*

testimony of witnesses.[184] The dissenting Justices contended that by permitting a witness' false testimony to go unchecked, the majority was not only preventing the jury from hearing the suppressed evidence, it was also increasing the credibility of the defense witness' perjured testimony.[185] Justice Kennedy contended that the fact-finders would more likely believe the witness' false testimony when the prosecution does not offer any rebuttal evidence.[186] Because unchallenged statements have "the greater potential to deceive," Justice Kennedy asserted that the jury was not only sheltered from knowledge of the excluded evidence, but in fact they were "positively misled."[187]

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[184] *Id.* at 658 (Kennedy, J., dissenting). Justice Kennedy stressed that the truthseeking interest is just as strong when a witness testifies as it is when a defendant "perverts the fourth amendment." *Id.*

[185] *See id.* at 658-59 (Kennedy, J., dissenting). The witness' testimony that James had black and curly hair, while other witnesses testified that the trigger-man had red and straight hair, could create a genuine reservation in the juror's perception. *Id.* at 658 (Kennedy, J., dissenting).

[186] *See id.* Justice Kennedy stated:

> The potential for harm to the truth-seeking process resulting from the majority's new rule in fact 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 of 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.

Id.

[187] *Id.* Justice Kennedy further explained:

> The interest in protecting the truthseeking function of the criminal trial is every bit as strong in this case as in our earlier cases that allowed rebuttal with evidence that was inadmissible as part of the prosecution's case in chief. Here a witness who knew the accused well took the stand to testify about the accused's personal appearance. The testimony could be expected to create real doubt in the mind of jurors concerning the eyewitness identifications by persons who do not know the accused. 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 the excluded evidence, but were positively misled.

Id.

Next, Justice Kennedy turned to the majority's assertion that permitting the impeachment of a defense witness' testimony would deter defendants from calling witnesses.[188] Justice Kennedy rejected this argument as pure conjecture.[189] The Justice suggested that unlawfully obtained evidence could be admissible to impeach a defense witness' statements, but only so far as it directly contradicts the prohibited proof.[190] Thus, the Justice concluded that the defense could take precautions not to extract conflicting testimony to avoid admittance of the evidence.[191]

In addition, Justice Kennedy refused to accept the majority's reasoning that a subsequent perjury prosecution would deter a witness' false testimony.[192] The Justice observed that successful perjury prosecutions are infrequent.[193] Chancing a possible but unlikely perjury penalty[194] is a small price to pay for the possibility of saving a friend or

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[188] *Id.*

[189] *Id.* Justice Kennedy did acknowledge that the majority's position, that the defendant would be discouraged from calling witnesses, might be supported if a witness could be impeached as to any statement that merely creates tension with the unlawfully procured evidence. *Id.*

[190] *Id.* Justice Kennedy explained that *directly contradict* meant situations where both the suppressed evidence and the witness' assertions "cannot both be true." Justice Kennedy then stated that the trial court refused to allow in the suppressed evidence where Henderson's testimony merely created tension with the tainted evidence. *Id.* at 658-59 n.1 (Kennedy, J., dissenting). For instance, Henderson stated that James was home between 10 p.m. and 11 p.m. during the night of the shooting, but that she could not be specific about the exact time. *Id.* The shooting occurred at 11 p.m. *Id.* There, the trial court refused to enter the unlawfully seized evidence to contradict Henderson's testimony. *Id.*

[191] *See id.* at 660 (Kennedy, J., dissenting).

[192] *Id.* at 659 (Kennedy, J., dissenting) (citing Dunn v. United States, 442 U.S. 100, 108 (1979)).

[193] *See id.* He argued that perjury convictions are unlikely because most states mandate a greater standard of proof to sustain such convictions. *Id.*

[194] The Supreme Court has noted that the requirements for establishing perjury are extremely difficult. *See* Dunn v. United States, 442 U.S. 100, 108 (1979). The evidentiary obstacle in proving perjury are obvious upon review of the model perjury statute. The Model Perjury Act reads in pertinent part:

> (1) *Offense Defined.* A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true . . . .
> (6)*Corroboration.* No person shall be convicted of an offense under this Section where proof of falsity rests solely upon contradiction by testimony of a single

relative from an austere sentence.[195]

Justice Kennedy concluded that the majority's exclusion of the unlawful evidence on rebuttal provides the defense broad immunity to introduce false and misleading testimony.[196] The Justice rejected the majority's contention that admission of the tainted evidence on cross-examination would entice disregard of important civil liberties by law enforcement officers.[197] Noting that past cases held that the deterrent purpose of the exclusionary rule is served by excluding such evidence from the government's case in chief, Justice Kennedy finally stated that the rule's protection of the fourth amendment should not be twisted into a license to commit perjury by defendants or their witness.[198]

IV. CONCLUSION: THE COST OF THE CONSTABLE'S BLUNDER

The majority has apparently undermined the precedent set forth in *Harris* by suggesting that the exclusion of evidence from the prosecution's case in chief is not sufficient to deter future police misconduct.[199] Discouraging law enforcement officials from unlawful conduct is the principal aim of the exclusionary rule.[200] The majority

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person other than the defendant.

MODEL PENAL CODE § 241.1 (1980). It is the corroboration section of the statute, commonly known as the "two witness rule," that make perjury convictions burdensome to sustain. To prove a charge of perjury, prosecutors must introduce testimony from one witness plus independent substantive evidence or testimony from at least two independent witnesses. *See* Shellenberger, *Perjury Prosecutions After Acquittals: The Evils Of False Testimony Balanced Against The Sanctity Of Determinations Of Innocence*, 71 MARQ. L. REV. 703, 711 (1988). The unconfirmed testimony of one witness is not sufficient to prove a case against the defendant accused of perjury. Hammer v. United States, 271 U.S. 620, 626 (1926); *accord* Weiler v. United States, 323 U.S. 606, 608-10 (1945). Thus, the "two witness rule" prohibits proof of perjury by the sole testimony of one witness. *See* Shellenberger, *supra* at 711.

[195] James v. Illinois, 110 S. Ct. 648, 659 (Kennedy, J., dissenting).

[196] *Id.* at 660 (Kennedy, J., dissenting).

[197] *Id.* Justice Kennedy noted that this argument had been rejected in the past impeachment cases. *Id.* (citing United States v. Havens, 446 U.S. 620, 633-34 (1980) (Brennan, J., dissenting); Oregon v. Hass, 420 U.S. 714, 725 (1975) (Brennan, J., dissenting); and Harris v. New York, 401 U.S. 222, 232 (1971) (Brennan, J., dissenting).

[198] *James*, 110 S. Ct. at 661 (Kennedy, J., dissenting).

[199] James v. Illinois, 110 S. Ct. 648, 654 (1990).

[200] United States v. Calandra, 414 U.S. 338, 347 (1974). *But see* Terry v. Ohio, 392 U.S. 1, 12-13 (1967) (stressing that another purpose of the rule is maintaining the character of the courts).

asserts that extending the impeachment exception to defense witnesses embellishes the expected value of the unlawfully seized evidence and subverts the deterrent effect of the rule.[201] This argument was previously rejected when Justice Brennan, in *Hass*, charged that police have incentive to continue unlawful questioning to procure statements for impeachment purposes, after an accused requested consultation with his attorney.[202]

Likewise, it is a "speculative possibility" that a police officer would make a calculated decision to sacrifice evidence for the case in chief because he believes he has a better probability of unlawfully obtaining rebuttal evidence.[203] Moreover, the exclusionary rule is an ineffective judicial tool for directly deterring illegal searches and seizures by law enforcement.[204] Recognizing, however, that the Court still pays homage to the rule's deterrent purpose, "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."[205]

The other element considered in the balancing approach is the damage to the truthfinding process that is caused by application of the exclusionary rule. False testimony is a conspicuous and shameless attack on the integrity of our judicial system.[206] Any rule which withholds probative and reliable evidence from the jury must be carefully limited.[207] The balancing approach utilized by the Court since *Walder*, favors truth at criminal trials over the possible increase in discouraging

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[201] James v. Illinois, 110 S. Ct. 648, 654-55 (1990).

[202] Oregon v. Hass, 420 U.S. 714, 725 (1975) (Brennan, J., dissenting).

[203] *James*, 110 S. Ct. at 660-61 (Kennedy, J., dissenting).

[204] *See* Oaks, *supra* note 6 at 755. Professor Oaks, in studying the deterrent aspects of the exclusionary rule, stated:

> [T]here is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches by law enforcement officers, and it is a failure in that vital task.

Id.

[205] Harris v. New York, 401 U.S. 222, 225 (1971).

[206] United States v. Mandujano, 425 U.S. 564, 576 (1976).

[207] *See* Illinois v. Gates, 462 U.S. 213, 257-58 (1983) (White, J., concurring).

unconstitutional police conduct by suppressing tainted evidence for impeachment purposes.[208]

The majority's assertion that the truth-seeking goal of the judicial system is hurt by expanding the impeachment exception to defense witnesses is inaccurate. By expanding the impeachment exception the jury is permitted knowledge of *all* the facts and the defendant's potential use of suppressed evidence to shield his witness' false testimony is frustrated. If testimony is prohibited in rebuttal, jurors are more likely to rely on a defense witness' false statements because jurors will assume that the prosecution will challenge such statements with contradicting evidence.[209] Thus, by excluding unconstitutionally obtained evidence which is nonetheless probative and reliable the jury is misled in the face of a lying witness.

The majority avers that false testimony from a defense witness is remote because the possibility of a perjury conviction is more likely to deter a witness from concocting testimony rather than a defendant already on trial.[210] While it is true that the tainted evidence can be used against a witness at a subsequent perjury trial,[211] the burdensome standard of proof[212] makes a perjury conviction implausible.[213] Even if a witness is convicted in a subsequent perjury trial, his false testimony has thwarted justice in the preceding criminal trial.

Perhaps the major flaw in the Court's decision in *James* is the majority's insistence that if statements by defense witnesses were allowed to be impeached, a defendant would not come forward with his best defense because the witness might accidentally contradict the suppressed evidence. However, if a witness' testimony is helpful, the defense will not sacrifice such testimony on the speculation that the defense witness might say something that contradicts the evidence obtained in breach of the Constitution. Additionally, the accused only has to worry to the

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[208] *See* United States v. Havens, 446 U.S. 620 (1980); Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954).

[209] James v. Illinois, 110 S. Ct. 648, 658 (1990) (Kennedy, J., dissenting).

[210] *James*, 110 S. Ct. at 653.

[211] *See* Doernberg, *supra* note 6, at 263. An accused wishing to exclude unlawful evidence must prove that his individual right of privacy has been transgressed by government action. *Id.* Accordingly, a witness who commits perjury will not have standing to object to the admission of the unlawful evidence at his subsequent perjury trial. *See id.*

[212] *See supra* note 193.

[213] See *supra* note 194.

extent that the government's tainted evidence is supported by admissible evidence and, therefore, probably true. An accused still has to be proven guilty beyond reasonable doubt. It is highly unlikely that an accused will forgo favorable testimony even if such unlawful evidence is allowed to enter the trial or is not substantiated by other lawful evidence. Accordingly, Justice Brennan's argument that expanding the exception to defense witnesses would chill defendants from summoning witnesses is speculative. Moreover, assuming that Justice Brennan's reasoning is correct, the exception will not impermissibly chill the defendant's right to call witnesses.[214] The accused's right to call witnesses on his own behalf is the right to put forward testimony "in accordance with the oath" and is not a license to commit perjury.[215]

The majority insists that by expanding the scope of the impeachment exception, the rule's capability "to compel respect for the constitutional guaranty by removing the incentive to disregard it" would be thwarted.[216] To the contrary, noted jurists have professed that the people lose admiration for the Constitution when technical violations set known offenders free.[217] After all, "it deprives society of its remedy against one lawbreaker because he has been pursued by another."[218]

Unfortunately, the majority failed to consider the victims of the crime and society's rights in arriving at their conclusion.[219] Again society

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[214] *See* United States v. Grayson, 438 U.S. 41, 54 (1978).

[215] *Id.*

[216] James v. Illinois, 110 S. Ct. 648, 655 (1990) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

[217] *See* M. Wilkey, *supra* note 6, at 21; *See also* Burger, *supra* note 17, at 12. The future Chief Justice stated:

> The operation of the Suppression Doctrine unhappily brings to the public gaze a spectacle repugnant to all decent people- the frustration of justice . . . . If a majority - or even a substantial minority - of the people in any given community . . . come to believe that law enforcement is being frustrated by what laymen call "technicalities," there develops a sour and bitter feeling that is psychologically and sociologically unhealthy. . . .

Id.

[218] Irvine v. California, 347 U.S. 128, 136 (1956).

[219] *Id.* In *Irvine*, Justice Jackson stated:

> Rejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will, release the wrongdoing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does

will have to bear the cost of seeing a known murderer go free because the "constable blundered."[220] In addition, the public's faith in the judicial system diminishes because of the majority's willingness to search for any technical constitutional violation to uphold the accused's "rights."[221]

The impact of the *James* decision will probably result in the Court's eventual reexamination of the exclusionary rule. Since its inception in *Weeks*, the rule has been surrounded by controversy.[222] Curiously, the exclusionary rule's deterrent function has never been proven.[223] Certainly, there are preferable avenues to protect the rights secured by the fourth and fifth amendments.[224] Under the current rule, if police violate the above mentioned amendments, an innocent victim is afforded no remedy and the violating officer escapes without punishment. The only person who benefits by the exclusionary rule is the lawbreaking citizen, who uses the rule to hide the truth from the jury. Again, unfortunately, it is society who will bear the cost.

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nothing to protect innocent persons who are the victims of illegal but fruitless searches.

Id.

[220] *See* People v. Defore, 244 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926).

[221] One commentator has explained:

> It is thus not surprising that we find an ancillary burden on the courts in the resulting diminished respect for the entire judicial system brought about by the absurdity of the exclusionary rule.
>
> Second, to the extent that the recognized guilty are freed by the exclusionary rule, it always diminishes public respect for the legal and judicial system. The layman says, "[h]e got off on a technicality." The layman is right. If a criminal was sprung by the exclusionary rule, he did get off on a technicality, a technicality whose application breeds disrespect for all law.
>
> A third breeding ground of disrespect for the judicial process is the recognition by knowledgeable laymen that many accused, guilty of the most heinous crimes, get off with light sentences by the process known as "plea bargaining." While plea bargaining has its defenders, surely there is no valid argument that we ought to have plea bargaining instead of convicting the accused on unquestioned evidence in a straightforward manner. The exclusionary rule intensifies plea bargaining, since a questionable search is always a bargaining point between prosecution and defense.

M. Wilkey, *supra* note 6, at 21.

[222] *See supra* note 6.

[223] *See* M. Wilkey, *supra* note 6, at 22, 23; Oaks, *supra* note 6, at 672.

[224] *See* M. Wilkey, *supra* note 6, at 36-38; Oaks, *supra* note 6 at 756-57.