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James v. Illinois: Wither the Exclusionary Rule - Not Quite Yet, 24 J. Marshall L. Rev. 493 (1991)

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CASENOTE

*JAMES v. ILLINOIS:** WITHER THE EXCLUSIONARY RULE? . . . NOT QUITE YET

In James v. Illinois,[1] the United States Supreme Court protected the scope and vitality of the fourth amendment's exclusionary rule.[2] The *James* Court addressed the issue whether the

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* 110 S. Ct. 648 (1990).

1. 110 S. Ct. 648 (1990).

2. Professor LaFave described the exclusionary rule stating:

> Under the Fourth Amendment rule, if a search or seizure in violation of the Amendment has occurred, then upon timely objection by a defendant with standing to object the fruits of that illegality must be suppressed and consequently may not be introduced into evidence in the criminal trial of that defendant.

4 W. LAFAVE, SEARCH AND SEIZURE § 11.6 (2d ed. 1987) (footnotes omitted).

In 1914, the United States Supreme Court initially applied the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914). In *Weeks*, state and federal officers participated in a warrantless search of the defendant's home and seized evidence. *Id.* at 387. The defendant was convicted at trial through the use of this tainted evidence. *Id.* at 386. The Court reversed, holding that the illegally seized evidence was inadmissible in federal criminal prosecutions. *Id.* at 398.

In Wolf v. Colorado, 338 U.S. 25 (1949), the Court held that the fourth amendment guarantee against unreasonable searches and seizures must also apply to state actors through the due process clause of the fourteenth amendment. The *Wolf* Court, however, was unwilling to impose the *Weeks* remedy of exclusion of evidence at trial, via the exclusionary rule, to state criminal proceedings. *Id.* at 28. The Court noted that the majority of both states and English speaking countries did not mandate the exclusion of evidence at trial as the remedy for illegal searches and seizures. *Id.* Therefore, the Court deferred to the state to select and develop their own remedies. *Id.* at 29.

In 1961, the Court reexamined the application of the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961). In *Mapp*, local police officers made a warrantless entry into defendant's home and obtained evidence of state obscenity law violations. *Id.* at 644-45. Although the Ohio Supreme Court condemned the police actions, it affirmed the defendant's conviction through the use of the tainted evidence. State v. Mapp, 170 Ohio St. 427, 431, 166 N.E.2d 387, 389-90 (1960). The United States Supreme Court reversed, holding that illegally seized evidence must also be excluded from state criminal prosecutions. *Mapp*, 367 U.S. at 655. The Court reasoned that its decision to disallow the "silver platter" doctrine in Elkins v. United States, 364 U.S. 206 (1960) (federal use of illegally seized evidence by state actors impermissible), combined with the ineffectiveness or lack of state remedies to fourth amendment violations mandated

impeachment exceptions[3] to the exclusionary rule ("rule") should

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the application of the exclusionary rule in state trials to protect privacy interests guaranteed by the fourth amendment. *Mapp*, 367 U.S. at 651-54.

For a historical perspective of the exclusionary rule see 1 W. LAFAVE, *supra*, at § 1.1. *See also* Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States and its Progeny*, 30 ST. LOUIS U.L.J. 1031 (1986). For examples of the international application of the exclusionary rule see Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1066 (1983) (exclusionary rule applied in Germany); Comment, *Comparative Analysis of the Exclusionary Rule and its Alternatives*, 57 TUL. L. REV. 648, 680 (1983) (exclusionary rule not applied in most foreign legal systems).

3. The United States Supreme Court first created an exception to the exclusionary rule in Walder v. United States, 347 U.S. 62 (1954). In *Walder*, the Court permitted the introduction of illegally seized heroin to impeach the defendant's testimony that he had never possessed narcotics. *Id.* at 64. The heroin had been illegally seized in the defendant's arrest two years prior and those charges were subsequently dismissed. *Id.* at 62-63. The Court reasoned that the defendant must be free to deny all the elements of the crime charged but refused to extend the rule to protect him from his own perjurious testimony concerning facts outside those charged. *Id.* at 65.

The Court addressed a second impeachment exception in Harris v. New York, 401 U.S. 222 (1971). In *Harris*, the defendant was arrested for sales of heroin to undercover police officers and gave an inculpatory statement while in custody. *Id.* at 222-23. The statement was suppressed because the officers had failed to inform the defendant of his rights via Miranda v. Arizona, 384 U.S. 436 (1966). *Id.* The prosecution did not use the suppressed statement in its case in chief but did use it to impeach the defendant once he testified inconsistently with that statement. *Id.* The Supreme Court affirmed the conviction reasoning that the exclusionary rule's deterrent effect on future police misconduct was adequately served by excluding the suppressed evidence from the state's case-in-chief. *Id.* at 225.

Four years later, the Court dealt with a similar situation in Oregon v. Hass, 420 U.S. 714 (1975). In *Hass*, the defendant was arrested and informed of his *Miranda* rights. *Id.* at 715-16. The defendant requested counsel but later gave inculpatory statements to the police without counsel present. *Id.* The court suppressed the statement from the state's case-in-chief but permitted its use for impeachment purposes once the defendant testified inconsistently. *Id.* at 717. The Supreme Court affirmed the use of the suppressed statement reasoning that the deterrent effect on police misconduct was sufficiently advanced by excluding the evidence from the state's main case. *Id.* at 722-23.

The final exception was created in United States v. Havens, 446 U.S. 620 (1980). In *Havens*, the defendant and a friend arrived at Miami airport from Lima, Peru, and proceeded through customs. *Id.* at 621. Customs agents searched the defendant's friend and discovered cocaine sewn into pockets which were constructed from a T-shirt. *Id.* at 622. Police officers later illegally searched the defendant and found the T-shirt used to make the pockets. *Id.* At trial, the defendant did not mention the suppressed T-shirt during direct examination but the prosecutor asked him about it in cross-examination. *Id.* at 622-23. The trial court permitted the T-shirt to be introduced into evidence to impeach the defendant's inconsistent testimony during cross-examination. *Id.* The Supreme Court affirmed the use of the suppressed evidence, for impeachment purposes, reasoning that the prosecutor's questions were "within the scope" of the defendant's direct examination and that prohibiting the evidence from the state's case in chief would adequately deter future police misconduct. *Id.* at 627-28.

For additional information concerning the development of impeachment exceptions to the exclusionary rule see generally 4 W. LaFave, *supra* note 2, at

be expanded to permit the impeachment[4] of *any* defense witness with the suppressed statements of a defendant. The closely divided Court correctly held that this expansion would be inconsistent with the underlying purpose of the rule and refused to broaden the rule's exceptions under the facts of the *James* case.[5]

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§ 11.6; Comment, *The Impeachment Exception to the Constitutional Exclusionary Rules*, 73 COLUM. L. REV. 1476 (1973).

The Court has also carved out exceptions to the exclusionary rule, in non-impeachment contexts, when the prospective deterrent effect on future police misconduct is minimal. *See* Illinois v. Krull, 480 U.S. 347 (1987) (exclusionary rule inapplicable to evidence obtained pursuant to state statute later found to be unconstitutional); United States v. Leon, 468 U.S. 897 (1984) (exclusionary rule inapplicable when police officer relies on invalid warrant in good faith); I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (exclusionary rule inapplicable to deportation hearings); United States v. Janis, 428 U.S. 433 (1976) (exclusionary rule inapplicable to federal civil tax proceedings); Stone v. Powell, 428 U.S. 465 (1976) (exclusionary rule inapplicable for federal habeas corpus relief of state prisoner); United States v. Peltier, 422 U.S. 531 (1975) (exclusionary rule inapplicable to illegal search of an automobile); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule inapplicable to grand jury proceedings); Alderman v. United States, 394 U.S. 165 (1969) (exclusionary rule inapplicable when defendant's own fourth amendment rights not violated). *See generally* Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and Seizure Cases*, 83 COLUM. L. REV. 1365, 1389-92 (1983).

4. Impeachment is the calling into question the credibility of a witness. C. MCCORMICK, LAW OF EVIDENCE § 33 (2d ed. 1972). There are five methods to perfect the impeachment of a witness: (a) prior inconsistent statement of the witness; (b) bias of the witness; (c) attack the character of the witness; (d) a defect in the capacity of the witness; and (e) proof by other witnesses that material facts are otherwise than as testified to by the witness sought to be impeached. *Id.*

The most effective and widely used method of impeachment is through the use of a prior inconsistent statement of the witness. *Id.* In People v. James, 123 Ill. 2d 523, 538, 528 N.E.2d 723, 730 (1988), however, the method applied is proof by other witnesses that material facts are otherwise than as testified to by the witness sought to be impeached. Thus, the impeachment is perfected, and the witness is discredited, only if the trier of fact accepts the contradicting testimony as true. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, §§ 1000, 1018 (Chadbourne rev. 1970).

5. The United States Supreme Court has stated three different purposes underlying the exclusionary rule. The first rationale, judicial integrity, is premised on the theory that the judiciary must not: (1) sanction the government's fourth amendment violations; (2) commit a second fourth amendment violation by hearing illegally seized evidence; or (3) sanction perjurious testimony. Stewart, *supra* note 3, at 1382. Justice Holmes first expounded this reasoning in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) and later in Olmstead v. United States, 277 U.S. 438 (1928). Judicial integrity continued to form a basis for majority opinions in Terry v. Ohio, 392 U.S. 1 (1968) (admitting illegally seized evidence at trial legitimizes the illegal conduct), and Elkins v. United States, 364 U.S. 206, (1960) (courts must not become accomplices in the willful disobedience of a Constitution they are sworn to uphold).

Today the judicial integrity rationale is still advanced as an alternative basis for the exclusionary rule. *See, e.g.*, Amicus Curie Brief for the A.C.L.U. at 35-40, Illinois v. Gates, 462 U.S. 213 (No. 81-430) (1983) (arguing for revival of judicial integrity rationale). However, judicial integrity is now generally limited to dissenting opinions, *e.g.*, Harris v. New York, 401 U.S. 222, 226-32 (1971) (Brennan, J., dissenting), Oregon v. Hass, 420 U.S. 714, 724-25 (1975) (Brennan,

On the evening of August 30, 1982, Delbert Collins, Geliria Boyd and some friends were returning home from a party on Chicago's south side.[6] A group of three teenagers confronted Collins, Boyd and their friends and demanded money.[7] Delbert Collins re-

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J., dissenting), and to evidence preclusion in other circumstances. *See* Taylor v. Illinois, 484 U.S. 400 (1988) (judicial integrity basis for testimony preclusion).

The second purpose substantiating the rule is premised on the theory that judicial use of the fruits of governmental action undermines popular trust in government. 4 W. LAFAVE, *supra* note 2, at § 1.1. This theory was first stated in *Weeks*:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibition of the Constitution, intended for the protection of the people against such unauthorized action.

Weeks v. United States, 232 U.S. 383, 392-94 (1914). This rationale for the exclusionary rule is today generally limited to dissenting opinions. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 355-67 (1974) (Brennan, J., dissenting).

The third purpose substantiating the exclusionary rule is the deterrent effect on future police misconduct. Terry v. Ohio, 392 U.S. 1 (1968). The Supreme Court first introduced this rationale in Wolf v. Colorado, 338 U.S. 25 (1949), stating that "the exclusion of evidence may be an effective way of deterring unreasonable searches." *Id.* at 31. Later, the *Terry* Court held that the exclusionary rule's "major thrust is a deterrent one." *Terry*, 392 U.S. at 12. Eventually the Court's majority opinions rested solely on the purpose of deterrence. *See, e.g.*, United States v. Leon, 468 U.S. 897, 907-08 (1984) (deterrence rationale controlling); United States v. Janis, 428 U.S. 433, 446-55 (1976) (deterrence rationale controlling); United States Calandra, 414 U.S. 338, 347 (1974) (deterrence rationale controlling).

The Court's narrowing of the purposes underlying the exclusionary rule has effectively limited the scope of the rule to only those cases where deterrence is accomplished. White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1281 (1983). Therefore, when the rule has only a "speculative possibility" of deterring police misconduct, an exception is created. *Harris*, 401 U.S. at 225. In fact, since the single purpose deterrence theory was first applied in *Alderman*, 394 U.S. 165 (1969), the Court has only twice held that an exception to the rule was unwarranted. James v. Illinois, 110 S. Ct. 648 (1990); *see* United States v. Johnson, 457 U.S. 537 (1982) (exclusionary rule applies retroactively to arrests prior to Payton v. New York, 445 U.S. 573 (1980)). Therefore, the limiting of the purposes underlying the rule has also limited the application of the rule. *See generally*, Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

6. This group of young men were all friends and called themselves the "B Boys." People v. James, 123 Ill. 2d 523, 526, 528 N.E.2d 723, 724 (1988).

7. *Id.* at 525, 528 N.E.2d at 724. Witnesses described one of the trio as being approximately five feet four inches tall, and the other two offenders were described as being about six feet one inch tall. *Id.* at 526, 528 N.E.2d at 724. Additionally, the witnesses told the police that all three offenders wore baseball caps and ski jackets and that the shortest one was the shooter. *Id.* at 526, 528 N.E.2d at 724. However, none of the witnesses gave statements to the police concerning the shooter's hair color or style. *Id.* at 526, 528 N.E.2d at 724.

sponded with a smart remark.[8] In response, the shortest boy of the trio pulled a gun and fired several shots into Collins' group striking two people.[9] As a result, Geliria Boyd died from a gunshot wound to the head and Delbert Collins sustained injuries from a gunshot wound in the back.[10]

The next evening, two Chicago detectives went to a beauty parlor during their investigation of the incident.[11] While speaking with Diane James, the proprietor, they noticed Darryl James, her fifteen year old son, sitting under a hair dryer.[12] The detectives took Darryl James into custody placing him in their police car.[13] In the car, the detectives questioned James about the color and style of his hair on the previous day.[14] James replied that his hair had been long, reddish brown and combed back.[15] Later that night, the police again questioned James, this time at a Chicago police station.[16] James stated that he had gone to his mother's beauty parlor to have his appearance changed by dying his hair black and curling it.[17]

The State of Illinois indicted Darryl James for murder and attempt murder.[18] The trial court granted James' motion to suppress the statements he made to the police.[19] At trial, Delbert Collins and four other witnesses identified Darryl James as the shooter.[20] These witnesses also testified that, on the evening of the shooting, James had long, slicked back, red hair.[21] At trial, James' hair was

8. Brief for Petitioner at 2, James v. Illinois, 110 S. Ct 648 (1990) (No. 88-6075).

9. *James*, 123 Ill. 2d at 525, 528 N.E.2d at 724.

10. *Id.*

11. Brief for the Petitioner, *supra* note 8, at 2. The police arrested an individual based upon a name given by one of the witnesses. *Id.* This suspect was subsequently released but not before he gave the police the name of another possible suspect. *Id.* This new suspect was brought to the police station but later released. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* Although James was only fifteen years old at the time of his arrest, a juvenile court judge granted the prosecution's motion to prosecute him as an adult. *Id.* at 3.

19. *Id.* The trial court held that the police officers lacked probable cause to arrest James and therefore suppressed his statements as fruit of an unlawful arrest. *Id*; *see* Wong Sun v. United States, 371 U.S. 471, 484 (1963) (exclusionary rule extended to include indirect evidence seized from fourth amendment violations).

20. *James*, 123 Ill. 2d at 527, 528 N.E.2d at 724. Each witness identified James in court although none of the witnesses had informed police of the defendant's alleged hair style or color during the police investigation after the shooting. *Id.* at 526-27, 528 N.E.2d at 724.

21. *Id.* The witnesses testified that they recalled seeing the defendant a few weeks earlier at the Bud Billiken parade (an annual Afro-american parade on

black and curly.[22]

Darryl James did not testify at trial but two witnesses were called on his behalf.[23] One of them, Ms. Jewell Henderson, a friend of the James family, testified that on the day of the shooting she had taken Darryl James to enroll him in high school and at that time his hair was black. Ms. Henderson's testimony contradicted the prosecution's witnesses' testimony, as well as James' suppressed statement.[24]

The trial court permitted the prosecution to use James' suppressed statements in rebuttal to impeach Ms. Henderson's testimony.[25] The jury found Darryl James guilty of both murder and attempt murder.[26] The court sentenced James to concurrent terms of thirty and fifteen years respectively.[27]

A unanimous panel of the Illinois appellate court reversed James' conviction on the ground that the trial court erred in admitting the defendant's suppressed statements to impeach Ms. Henderson's testimony.[28] The court noted that prior case law permitted

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Chicago's south side) and distinctly remembered seeing him, due to his red colored "buttered" hairstyle. People v. James, 153 Ill. App. 3d 131, 132, 505 N.E.2d 1118, 1119 (1987).

22. *Id.* at 132, 505 N.E.2d at 1119.

23. Brief for the Petitioner, *supra* note 8, at 4. The second witness was a detective who testified concerning the varying descriptions given by three of the witnesses. *Id.* However on surrebuttal, defendant's brother and aunt testified that defendant's hair had been black and curly for some time, including during the Bud Billiken parade, a few weeks earlier. *Id.* at 6.

24. *Id.* Ms. Henderson also testified that the defendant had watched the Bud Billiken parade from his mother's beauty parlor; that the defendant had a reputation for being a non-violent person; and that the defendant had arrived home between 10:00 and 11:00 P.M. the night of the shooting. *Id.*

25. *James*, 153 Ill. App. 3d at 135, 505 N.E.2d at 1120.

26. *Id.* at 133, 505 N.E.2d at 1118.

27. *Id.*

28. *Id.* at 136, 505 N.E.2d at 1121. The appellate court also rejected the state's contention that the trial court's error in admitting the suppressed statements was harmless. *Id.* at 135, 505 N.E.2d at 1121. The appellate court acknowledged that there was considerable evidence of James' guilt independent of his suppressed statement. *Id.* However, since a major issue in the case was "identification," and the statements were used to "directly reflect on the issue of identification", the appellate court held that the error was not harmless "beyond a reasonable doubt." *Id.* at 136, 505 N.E.2d at 1121.

In addition, the appellate court criticized the trial court's failure to properly instruct the jury as to the use of the suppressed statement. *Id.* at 136, 505 N.E.2d at 1121. The trial court refused two proffered jury instructions limiting the use of James' statement for the purpose of impeachment. Brief for Respondent at 5, James v. Illinois, 110 S. Ct. 648 (No. 88-60750) (1990). The proffered instructions stated: "Evidence that the defendant made statements following his arrest may be considered by you only as it may affect the believability of Jewel Henderson of witnesses. It may not be considered by you as evidence of the commission of any of the crimes charged." Brief for Petitioner, *supra* note 8, at 6. Instead, the trial court recited Illinois Pattern Jury Instruction, Criminal, No. 3.11 (2d ed. 1981) which limited the use of the suppressed statements to the witness' own prior inconsistent statement. *Id.* The appellate court con-

illegally obtained evidence to be used at trial *only* for the purpose of impeaching a *defendant's* testimony[29] but not to impeach a witnesses' testimony as in *James*.

A closely divided Illinois Supreme Court reversed the appellate court decision holding that James' suppressed statements were properly admitted to rebut the defense witness' testimony.[30] The court noted that its decision expanded the impeachment exceptions to the exclusionary rule to include all defense witnesses, but held that this expansion was consistent with the rationale of prior decisions.[31] The court reasoned that this expansion was necessary to

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cluded that this instruction permitted the suppressed statement to be used as substantive evidence. *James*, 153 Ill. App. 3d at 135, 505 N.E.2d at 1121. The appellate court reasoned that the substantive use of the defendant's suppressed statement additionally influenced the jury improperly preventing the error from being harmless. *Id.* at 135-36, 505 N.E.2d at 1121.

29. *Id.* at 134, 505 N.E.2d at 1120. The appellate court opined that the prior impeachment exceptions to the exclusionary rule were permitted to impeach the defendant upon his testifying because he had taken an affirmative step to commit perjury while attempting to hide behind the fourth or fifth amendment. *Id.* The appellate court reasoned that when a defendant chooses not to testify, he does not take that affirmative step necessary to deprive him of a constitutional right. *Id.* at 134, 505 N.E.2d at 1120. This "waiver" theory has been applied by other courts in denying the extension of the impeachment exception to defense witnesses. *See, e.g.*, State v. Burnett, 637 S.W.2d 680, 690 (Mo. 1982) (*en banc*) (waiver theory prevents impeachment of defense witness).

Furthermore, the appellate court warned of the consequences of the extension of the impeachment exception and stated:

> We refuse to make such an exception to the exclusionary rule. Were we to hold otherwise, we would provide little or no deterrence against further Fourth Amendment violations and the State would be able, under the guise of impeachment, to use any illegally obtained evidence relevant to the principal issues in the case.

James, 153 Ill. App. 3d at 135, 505 N.E.2d at 1121.

30. People v. James, 123 Ill. 2d 523, 528 N.E.2d 723 (1988). The Illinois Supreme Court also rejected the petitioner's alternative argument that the prosecution used the suppressed evidence "substantively" in his closing argument and that this error was not harmless. *Id.* at 539, 528 N.E.2d at 730-31. The high court noted that a trial court has discretionary control of closing argument and that its decision is presumed correct. *Id.* at 541, 528 N.E.2d at 731. The court stated that in light of the independent evidence of petitioner's guilt that any error that the prosecutor committed in closing argument was harmless. *Id.*

31. *Id.* at 536-37, 528 N.E.2d at 728-29 (1988). The Illinois Supreme Court acknowledged that while all prior impeachment exceptions only applied to defendants, this fact was not determinative. *Id.* at 536, 528 N.E.2d at 728-29. The court held that the "waiver" theory was not controlling. *Id.* at 536, 528 N.E.2d at 729. For a discussion of the waiver theory, see *supra* note 29. Instead, the Illinois high court held that the "animating" principle, underlying the prior exceptions, was to prevent a defendant from using perjury as a defense. *James*, 123 Ill.2d at 536, 528 N.E.2d at 729. The court reasoned that in preventing the use of perjury as a defense that "it matters not from whose lips that perjury comes." *Id.* Thus the court opined that its new exception in *James*, although now including all defense witnesses, was consistent with the prior impeachment exceptions. *Id.*

prevent "perjury by proxy."[32]

The United States Supreme Court reversed and held that the Illinois Supreme Court's expansion of the impeachment exception to the exclusionary rule to include all defense witnesses was improper.[33] The Supreme Court reasoned that this expansion would have a "chilling effect" on a defendant's ability to present probative evidence through defense witnesses for fear their testimony would conflict with the defendant's suppressed statements.[34] In addition, the Court noted that this expansion would defeat rather than promote the objective of the exclusionary rule which is deterrence of future police misconduct.[35]

The Court's opinion, written by Justice Brennan,[36] initially acknowledged that the discovery of truth was a primary function of our legal system but added that this truth seeking function must be limited to protect and promote other important constitutional values.[37] One such important value is the protection of individual pri-

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32. *James*, 123 Ill. 2d at 536, 528 N.E.2d at 729 (1988). The theory of "perjury by proxy" is that a defendant, bent on presenting perjurious testimony, will intentionally circumvent the prior impeachment exceptions through the willful perjury of biased defense witnesses. *Id.* This testimony, unlike the defendant's own, would be immunized from impeachment with suppressed evidence. *Id.*; *see* James v. Illinois, 110 S. Ct. 648, 661 (1990) (Kennedy, J., dissenting) (dissent accepts "perjury by proxy" theory). *But see* United States v. Hinckley, 672 F.2d 115, 134 (D.C. Cir. 1982) (appellate court rejects similar theory of "testimony by proxy").

33. James v. Illinois, 110 S. Ct. 648, 652 (1990).

34. *Id.* at 653.

35. *Id.* at 654-55; *see, e.g.*, Illinois v. Krull, 480 U.S. 340, 347 (1987) (when evaluating proposed exceptions to the exclusionary rule, the Court weighs the deterrence of police misconduct against the cost of withholding information from the truth seeking process).

The question whether the exclusionary rule does, in fact, deter police misconduct is still in dispute. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) (exclusionary rule does not significantly deter police misconduct and should be replaced with an effective tort remedy). *But see* Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than 'An Empty Blessing,'* 62 JUDICATURE 337, 349-50 (1979) (increase in number of search warrants issued after Mapp v. Ohio, 367 U.S. 643 (1961), shows rule has deterrent effect); Stewart, *supra* note 3, at 1395-96 (exclusionary rule does have deterrent effect). For additional data supporting the rule's deterrent effect see *infra* note 74.

Another factor examined in evaluating the exclusionary rule is the "cost" of lost prosecutions due to successful motions to suppress physical evidence, confessions and identifications. *See* Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585 (in a study of 7,500 cases, less than 0.6% of cases lost due to successful use of exclusionary rule); Comptroller General, U.S. General Accounting Office, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 14 (1979) (Rep. No. GGD-79-45) (exclusionary rule accounted for only 0.4% of all cases declined for prosecution by United States attorneys). *See generally* 1 W. LAFAVE, *supra* note 2, at § 1.2.

36. *James*, 110 S. Ct. at 650 (1990).

37. *Id.* at 651.

vacy interests against unreasonable searches and seizures caused by police misconduct.[38] The Court indicated its prior decisions mandated the exclusion of illegally obtained yet probative evidence as a necessary method to deter future police misconduct.[39]

The Court noted this exclusion of illegally obtained evidence, the exclusionary rule, was not an absolute imperative but rather a principle forged by a balancing of competing interests: the deterrence of future police misconduct versus the need for probative evidence in the truth seeking process.[40] The Court recognized that when balancing these competing interests the deterrent effect on police misconduct is but a "speculative possibility," the scales of justice swing toward the establishment of exceptions to the rule.[41] The Court then reviewed its prior impeachment exceptions to the rule and concluded that this balancing approach controlled.[42]

Next, the Court applied this balancing test to the Illinois Supreme Court's expansion of the impeachment exception in *James*.[43] The majority held that this extension of the impeachment exception to include all defense witnesses was impermissible.[44] This exception, the Court reasoned, would alter both sides of the balancing test in such a manner as to render the rule inconsistent with its underlying purpose.[45]

The Court noted that the rule's truth seeking function, on one side of the scale, would not be advanced by this expansion.[46] Enlarging the exception to include all defense witnesses would "chill" defendants from presenting some or any testimony from defense witnesses.[47] The Court reasoned that defendants may need to call a wide range of witnesses to provide probative testimony and that "hostile" or "reluctant" witnesses may not care whether their testimony "opens the door" to impeachment through suppressed evidence.[48] Furthermore, the Court noted there was no guarantee that even "friendly" witnesses would not subject themselves to im-

38. *Id.*

39. *Id.* The Court approvingly quoted Arizona v. Hicks, 480 U.S. 321, 329 (1987), and stated that "[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." *James*, 110 S. Ct. at 651 (quoting Arizona v. Hicks, 480 U.S. 321, 329 (1987)).

40. *James*, 110 S. Ct. at 651.

41. *Id.* (quoting Harris v. New York, 401 U.S. 222, 225 (1971)).

42. *Id.* at 651-52.

43. *Id.* at 652.

44. *Id.*

45. *Id.*

46. *Id.* at 653.

47. *Id.*

48. *Id.*

peachment through their own carelessness.[49] The Court concluded that a defendant's legitimate fears of inviting impeachment would stifle the presentation of probative evidence and frustrate the truth seeking function of the trial court.[50]

The Court opined that, on the other side of the scale, this expansion would decisively weaken the deterrent effect of future police misconduct.[51] The Court found that defense witnesses are a much larger group than testifying defendants, thus permitting a substantially greater use of tainted evidence at trial.[52] Furthermore, this "chilling effect" would stifle the presentation of defense witnesses and probative evidence.[53] The Court concluded that these two factors would create much more than a "speculative possibility" that police misconduct would aid the prosecution.[54] Therefore, the Court held that a lowering of the deterrent effect on police on one side, combined with a chilling effect on the truth seeking function on the other side, rendered this extension to the rule's exceptions impermissible.[55]

The United States Supreme Court correctly decided *James* for three reasons. First, expanding the impeachment exception to the exclusionary rule to include all defense witnesses would "chill" a defendant's ability to offer probative evidence and, quite possibly, prohibit him from presenting any defense at all. This result drastically limits the application of the exclusionary rule. Second, the Court correctly analyzed the new exception as a minimal deterrent on future police misconduct. Finally, the Illinois Supreme Court's rationale of "perjury by proxy," supporting its new impeachment exception, is faulty. Current statutory and case law are adequate to deal with this problem.

The Court's admonition that affirming this new impeachment exception to the rule would have a "chilling" effect on a defendant's ability to present probative evidence is understated. Existing exceptions to the rule already permit prosecutors to use suppressed evidence to impeach a defendant in rebuttal[56] and on cross-exami-

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49. *Id.*

50. *Id.* at 654.

51. *Id.*

52. *Id.* at 655.

53. *Id.*

54. *Id.*

55. *Id.* at 656. The Court also dismissed the other *James* rationale of "perjury by proxy." *Id.* at 653. This theory supposes that the defendant will intentionally circumvent the prior impeachment exceptions through the willful perjury of third parties. *Id.* The Court reasoned that a third party's fear of prosecution for perjury is sufficient to guard against this subterfuge of the truth seeking process. *Id.*

56. *See* Oregon v. Hass, 420 U.S. 714, 717 (1975) (impeachment of defendant with suppressed evidence permitted in rebuttal).

nation where the in court testimony is inconsistent with suppressed evidence and within the scope of direct examination.[57] The reasoning supporting these exceptions is that a defendant is free to offer probative testimony so long as it is consistent with the suppressed evidence.[58] However, in reality, the situation is quite different.

Although a defendant has the option of testifying on his own behalf, he does so at the great risk of testifying inconsistently with any suppressed evidence. Because the question whether a defendant has testified inconsistently with tainted evidence is difficult to determine,[59] a defendant may well forego testifying at all for fear of testifying inconsistently. This is especially true because evidentiary principles permit considerable latitude in the cross-examination of an opposing witness.[60] Given this great latitude in questioning, a prosecutor has little difficulty in eliciting testimony inconsistent with suppressed evidence.[61] Therefore, defendants may chose not to testify at all for fear of the prosecutor's ability to easily introduce tainted evidence.

An extension of the impeachment exception of the exclusionary rule to include all defense witnesses would create disastrous results. Upon the defense calling *any* witness, the prosecutor would possess the power, through her own questions, to introduce suppressed evidence under the guise of impeachment.[62] This exception would stifle the truth seeking function because defendants would be reluctant to call any witnesses for fear of introducing the suppressed evidence.[63] This "chill" to call witnesses denies the trier of fact probative evidence and effectively limits the use of the exclusionary rule to those instances in which the defendant presents no defense at all.[64] Only in this situation would a defendant be certain

57. *See* United States v. Havens, 446 U.S. 620, 627, *reh'g denied*, 448 U.S. 911 (1980) (impeachment of defendant with suppressed evidence permitted in cross-examination if within the scope of direct examination).

58. *James*, 110 S. Ct. at 652-53.

59. *See* J. WIGMORE, *supra* note 4, at § 1040 ("[s]uch is the possible variety of statements that it is often difficult to determine whether this inconsistency exists").

60. *See* C. MCCORMICK, *supra* note 4, at §§ 21-24 (evidentiary principles accord parties considerable latitude in cross-examining an opposing witness).

61. *See Havens*, 446 U.S. at 632 (Brennan, J., dissenting) ("even the moderately talented prosecutor [can] 'work in . . . evidence on cross-examination [as it would] in its case in chief . . . .' To avoid this consequence, a defendant will be compelled to forgo testifying on his own behalf").

62. *See* People v. James, 153 Ill. App. 3d 131, 134-35, 505 N.E.2d 1118, 1121 (1987) (new exception would permit the prosecution to introduce any illegally seized evidence "under the guise of impeachment").

63. *See* People v. James, 123 Ill. 2d 523, 551, 528 N.E.2d 723, 735 (1988) (Clark, J., dissenting) (defendant "opens the door" for admission of suppressed evidence by presenting a witness).

64. *James*, 110 S. Ct. at 655.

that the suppressed evidence would be excluded.[65] This counterproductive expansion of the impeachment exception creates the situation "where the exception swallows up the rule."[66]

Next, the Supreme Court correctly weighed the competing interests in denying the proposed exception to the exclusionary rule. On the one side, the truth seeking function of the trial court is stifled by the exception's chilling effect on a defendant's ability to offer probative evidence from defense witnesses.[67] On the other side, the deterrent effect on future police misconduct would be minimal. This is true for three reasons.

First, where suppressed evidence is used to impeach all defense witnesses, the value of this tainted evidence is greatly increased because it could be used more often.[68] Thus, it would be advantageous for the prosecution to obtain as much tainted evidence as possible.[69] Second, once sufficient evidence to make a *prima facie* case[70] against a person is collected, there is minimal deterrence to keep police from violating that person's fourth amendment's rights and seizing additional evidence. Although this tainted evidence cannot be used in the prosecution's case in chief, it can be used to impeach any witness the defense calls to testify.[71] Therefore, this exception would only encourage police to gather additional evidence once the *prima facie* case is established thereby creating prosecutorial advantage.[72] Finally, the preceding reasons effectively decrease the deterrent effect on police if the officers are actually informed about

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65. *See James*, 123 Ill. 2d at 550, 528 N.E.2d at 735 (Clark, J., dissenting) ("a defendant *who puts on a defense* thereby waives his fourth amendment right to the exclusion of suppressed evidence which contradicts his defense") (emphasis added).

66. *James*, 153 Ill. App. 3d at 135, 505 N.E.2d at 1121 (quoting People v. Walls, 42 A.D.2d 575, 577, 344 N.Y.S.2d 435, 437 (1973)).

67. For a discussion of exceptions to the chilling effect see *supra* note 47 and accompanying text.

68. *James*, 110 S. Ct. at 655.

69. *Id.*

70. A case which will prevail unless contradicted and overcome by other evidence. Pacific Tel. & Tel. Co. v. Wallace, 158 Or. 210, 217, 75 P.2d 942, 947 (Or. 1938).

71. *See* Harris v. New York, 401 U.S. 222 (1971) (suppressed evidence cannot be introduced in the state's case in chief).

72. *James*, 110 S. Ct. at 655. Justice Stamos warned that the new exception would encourage rather than deter future police misconduct stating:

> But in any case in which police officers can, through lawful means, acquire enough evidence to make out a case against a suspect, they will be strongly tempted to secure additional evidence illegally . . . [E]ventually the more ambitious and aggressive policemen and prosecutors, engaged as they are in the highly competitive business of ferreting out crime, will discover a handy new tool in their arsenal. I am not so sanguine about human nature as to believe that they will all be scrupulous enough not to use it.

People v. James, 123 Ill. 2d 523, 553, 528 N.E.2d 723, 736-37 (1988) (Stamos, J., dissenting).

them. Although the Supreme Court's dissent depicts police officers as being "unschooled in the law,"[73] substantial data exists indicating that police officers are apprised of fourth amendment law developments and that these changes directly influence their behavior.[74] Therefore, this exception frustrates both the truth seeking function of the trial court and the deterrent effect on future police misconduct.[75]

The Illinois Supreme Court's rationale of "perjury by proxy" to substantiate the need for this new impeachment exception to the exclusionary rule is misplaced. The court's rationale is that a defendant, wanting to introduce perjured testimony but realizing that his own testimony is open to impeachment by the use of suppressed evidence, will elicit perjury through his defense witnesses.[76] In the present case, the Illinois Supreme Court as well as Justice Kennedy in his dissent assume, as a premise to this rationale, that Ms. Henderson intentionally testified falsely regarding James' appearance on the day of the shooting.[77] This assumption is unfounded.[78] Only

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73. *James*, 110 S. Ct. at 660 (Kennedy, J., dissenting).

74. *See* Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 72 (1978) (New York and Los Angeles police commissioners describe policy changes in response to adoption of the exclusionary rule); Mertens & Wasserstrum, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 399-401 (1981) (detailing how Washington, D.C. and Delaware police departments responded to Delaware v. Prouse, 440 U.S. 648 (1979), by issuing specific new instructions to officers in the field setting forth the rules established in that case); *see also* Canon, *Is the Exclusionary Rule in Failing Health?*, 62 KY. L.J. 681, 710-14 (1974) (large increase in number of search warrants issued after Mapp v. Ohio, 367 U.S. 643 (1961); Mertens & Wasserstrum, *supra*, at 400, n.174 (describing similar reaction to Almeida-Sanchez v. United States, 413 U.S. 266 (1973)); *Id.* at 401, n. 175 (discussing methods F.B.I. director used for apprising field agents of relevant Supreme Court and court of appeals fourth amendment decisions).

75. In addition, all other courts which have addressed the question whether to expand the impeachment exception to include defense witnesses have held against it. *See* United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982) (defendant's suppressed statement cannot be used to impeach psychiatrist's testimony in support of the affirmative defense of insanity); State v. Hubbard, 103 Wash. 2d 570, 693 P.2d 718 (Wash. 1985) (*en banc*) (suppressed statements cannot be used to rebut testimony of witness other than defendant); State v. Kilborn, 143 Vt. 360, 466 A.2d 1175 (Vt. 1983) (suppressed evidence cannot be used to rebut inferences raised by defense counsel); State v. Burnett, 637 S.W.2d 680 (Mo. 1982) (*en banc*) (suppressed evidence cannot be used to impeach a witness other than the defendant); People v. Walls, 42 A.D.2d 575, 344 N.Y.S.2d 435 (1973) (suppressed statement cannot be used to impeach defense witness).

76. *James*, 123 Ill. 2d at 538, 528 N.E.2d at 729.

77. *See* James v. Illinois, 110 S. Ct. 648, 659 (1990) (Kennedy, J., dissenting) (Henderson's testimony was "known to be untrue"); People v. James, 123 Ill. 2d at 538, 528 N.E.2d at 729 (James "cannot be allowed to use perjurious testimony through a biased defense witness").

78. *James*, 123 Ill. 2d at 547, 528 N.E.2d at 734 (Stamos, J., dissenting). The record reveals only that a police officer testified as to defendant's statement concerning his hair color and style and that a friend of the defendant's family

by giving total credence to the police officer's recollection and veracity while also assuming Ms. Henderson willfully committed perjury can this premise be valid.[79] This reasoning is fallacious.

Assuming, *arguendo*, that *James* is a case where perjurious testimony is elicited by the defendant, there are already sufficient remedies available. First, the prosecutor has criminal sanctions available to discourage perjury.[80] Although the threat of prosecution may not deter a defendant who is already charged with a crime, the same cannot be said about other defense witnesses, regardless of their relationship to the defendant. Second, a recent Supreme Court ruling, *Taylor v. Illinois*,[81] potentially provides an alternative remedy, which could deal with willful perjury at trial.

In *Taylor*, the Court decided whether a defense counsel's intentional conduct justified the exclusion of a defense witness' testimony.[82] The trial court had found, via a *voir dire* hearing, that the defense counsel had "intentionally" violated local discovery rules.[83] The Supreme Court affirmed the exclusion of the testimony reasoning that exclusion was necessary to maintain "the integrity of the judicial process itself," which includes the "vital interest in protecting the trial process from the pollution of perjured testimony."[84] Therefore, the Court found that a party's intentional misconduct provided the nexus to offending judicial integrity and mandated exclusion of evidence.

The *Taylor* reasoning can be interpreted as providing a remedy for "perjury by proxy". If a trial court finds that a defendant, or his counsel, has intentionally elicited perjured testimony from a defense witness, a nexus may exist offending judicial integrity, as in *Taylor*, and mandate exclusion of the testimony.[85] Thus, the truth seeking function of the trial court is protected from intentionally

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testified as to defendant's hair style and color and that these two statements were inconsistent. People v. James, 153 Ill. App. 3d 131, 131-32, 505 N.E. 2d 1118, 1118-19 (1987).

79. *James*, 110 S. Ct. at 656 (Stevens, J., concurring).

80. The prosecutor can charge the defendant with subornation of perjury and the defense witness with perjury. *See, e.g.*, 18 U.S.C. § 1622 (1988) (subornation of perjury); 18 U.S.C. § 1621 (1988) (perjury).

81. Taylor v. Illinois, 484 U.S. 400 (1988).

82. *Id.* at 413.

83. *Id.* at 405-06.

84. *Id.* at 417.

85. There are other situations where the Supreme Court has held that willful conduct mandates exclusion. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (a police officer's intentional conduct prohibits good faith exception to warrant requirement); Franks v. Delaware, 438 U.S. 154 (1978) (an affiant's willful or reckless inclusion of falsehoods in his affidavit for a search warrant will mandate exclusion of the fruits of the search if the false statement was necessary to the finding of probable cause); United States v. Mandujano, 425 U.S. 564 (1976) (defendant's perjured statements to a grand jury, although given without *Miranda* warnings, held admissible in subsequent perjury prosecution).

perjured testimony. This remedy is narrowly tailored to adequately deal with perjury by proxy without unduly hampering a defendant's ability to present a defense.

In conclusion, the *James* decision averted the destruction of the fourth amendment's exclusionary rule. Although the Supreme Court has steadily chipped away at fourth amendment rights by continually creating exceptions to the rule,[86] this decision prevents elimination of the rule's applicability under the guise of fashioning a "perjury" exception. The Court will undoubtedly continue to create new exceptions to the exclusionary rule and expand the already existing impeachment exceptions. Furthermore, given the recent change in the Court's composition, there soon may be no need for additional exceptions as the future existence of the exclusionary rule is certainly in question. However, the *James* decision has kept the fourth amendment's exclusionary rule alive . . . at least for now.

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86. *See* Comment, *The United States Supreme Court's Erosion of Fourth Amendment Rights: The Trend Continues*, 30 S.D.L. REV. 574 (1985) (discussing the continuous development of exceptions to the exclusionary rule).