

2013

# Shields, Swords, and Fulfilling the Exclusionary Rule's Deterrent Function

James L. Kainen

*Fordham University School of Law*, [jkainen@fordham.edu](mailto:jkainen@fordham.edu)

Follow this and additional works at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship](http://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Criminal Procedure Commons](#), and the [Evidence Commons](#)

---

## Recommended Citation

James L. Kainen, *Shields, Swords, and Fulfilling the Exclusionary Rule's Deterrent Function*, 50 *Am. Crim. L. Rev.* 59 (2013)

Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/507](http://ir.lawnet.fordham.edu/faculty_scholarship/507)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# SHIELDS, SWORDS, AND FULFILLING THE EXCLUSIONARY RULE’S DETERRENT FUNCTION

by James L. Kainen\*

INTRODUCTION . . . . .	59
I. THE FLIGHT OF THE EXCLUSIONARY RULE . . . . .	62
II. ACCURATE FACTFINDING AND SUPPRESSED EVIDENCE . . . . .	69
A. <i>Opening the Door to Suppressed Evidence</i> . . . . .	70
B. <i>Contradicted Inferences or Proof</i> . . . . .	73
C. <i>The Inference That Suppressed Evidence Does Not Exist</i> . . . . .	82
D. <i>When Defendants Waive Protection Against Suppressed Proof</i> . . . . .	90
III. THE INTEGRITY OF THE TRIAL PROCESS AND ETHICAL RULES . . . . .	98
CONCLUSION . . . . .	107

## INTRODUCTION

When the exclusionary rule prevents the prosecution from using evidence necessary to bring a case to trial, the rule deters illegality while raising no issue about how it might interfere with usual factfinding processes. However, when a case proceeds to trial although a court has suppressed some prosecution evidence, courts need to decide the extent to which the defendant may benefit from the absence of the proof without opening the door to its admission. The exclusion of *any* relevant evidence raises similar questions, and courts often say the exclusionary rule is a shield from suppressed evidence, but not a sword with which the defendant can inflict damage on the prosecution’s remaining case.<sup>1</sup> Nonetheless, this Article argues courts err when they analyze whether the defendant “opened the door” to suppressed evidence with a metaphor appropriate for rules excluding evidence for different—and less weighty—reasons than encouraging respect for individual constitutional rights. Employing usual evidentiary tests for opening the door unduly diminishes the effectiveness of exclusion as a deterrent of police misconduct when investigators expect the potential evidentiary payoff will not be necessary to bring the case to trial, but will nonetheless be useful to obtain a conviction.

Whether the defendant has opened the door to suppressed evidence is a related,

---

\* Professor of Law and Brendan Moore Chair in Advocacy, Fordham University School of Law. Thanks to participants in the Fordham Law School Faculty Colloquium (especially Dan Capra) for comments and to Joshua Mitts and Katherine Rudish for research assistance. © 2013, James L. Kainen.

1. See *People v. Johnson*, 107 Cal. Rptr. 3d 228, 246 (Cal. Ct. App. 2010).

though distinct question from what the boundaries of the exclusionary rule should be. The Supreme Court has defined the scope of the exclusionary rule to the extent of holding suppressed evidence can be used to impeach a testifying defendant, but not to establish the prosecution's case-in-chief or to impeach other defense witnesses.<sup>2</sup> Besides the direct questions of scope are questions about how defendants may exploit the absence of suppressed evidence before a court will hold that the defendant opened the door to its admission. This Article criticizes recent decisions finding a defendant opens the door to suppressed evidence merely by highlighting the absence of that evidence or by offering other evidence to which the suppressed proof is relevant rebuttal.<sup>3</sup> It argues those decisions erroneously assume relevance, probative value, and unfair prejudice are the only factors that should influence this decision. While this is true enough for evidence originally excluded to promote accurate factfinding, it is not true for evidence excluded to promote other policy objectives or to respect other principles.

Whether and how a party can take advantage of the exclusion of suppressed evidence is a question whose answer depends upon a contextual analysis of how "opening the door" decisions affect the deterrence promoted by exclusion in the first instance, not upon whether they divert the factfinder in its quest for truth. Thus, courts contravene the prohibition against impeaching defense witnesses when they invoke Rule 403 of the Federal Rules of Evidence to preclude the defendant from admitting evidence that contradicts suppressed proof, because preclusion has the same effect as rebuttal. Similarly, courts improperly extend the prosecution's use of illegally-obtained evidence when they allow it to discourage counsel from arguing inferences the suppressed proof contradicts by permitting its admission if he does. In either case, the prosecution quickly learns obtaining evidence illegally has a payoff in excess of that contemplated by the Supreme Court. Prosecutors routinely find the suppressed evidence useful to deter or rebut defenses even when not introduced in the prosecution's case-in-chief or to impeach a testifying defendant.<sup>4</sup> This is precisely the result rejected by the Court in *James v. Illinois* because of the increased incentive to obtain the evidence illegally.<sup>5</sup>

---

2. See *James v. Illinois*, 493 U.S. 307, 313 (1990); *Walder v. United States*, 347 U.S. 62, 65 (1954); James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles and Politics*, 44 STAN. L. REV. 1301 (1992) (discussing the scope of the impeachment exception). The Court has yet to decide whether prosecutors may use suppressed evidence to impeach defendants' hearsay declarations. See generally James L. Kainen, *Truth, Deterrence, and the Impeachment Exception*, 86 OR. L. REV. 1017 (2007) (analyzing consequences of allowing suppressed evidence to impeach nontestifying defendants' hearsay declarations).

3. See generally *Johnson*, 107 Cal. Rptr. 3d 228; *People v. Fregoso*, No. F050895, 2008 WL 1850973 (Cal. Ct. App. Apr. 28, 2008).

4. See *James v. Illinois*, 493 U.S. 307, 318 ("The United States argues that this result is constitutionally acceptable because excluding illegally-obtained evidence solely from the prosecution's case in chief would still provide a quantum of deterrence sufficient to protect the privacy interests underlying the exclusionary rule. We disagree.").

5. See *id.* at 313.

It may seem obvious that factfinding accuracy or completeness is not itself sufficient reason to admit evidence whose exclusion was mandated in the first instance *despite* interference with—rather than in pursuit of—those goals. However, courts too frequently forget the point when they hold fairness or the integrity of the trial process justifies holding a defendant has taken improper advantage of evidence’s suppression and thus invited its admission.<sup>6</sup> Using muscle memory to rule, they interpret fairness as adversarial fairness, which always counsels in favor of admitting relevant rebuttal. Similarly, they interpret the integrity of the trial process to require advocates to refrain from using evidence’s exclusion to (mis)lead the factfinder to a conclusion inconsonant with the excluded evidence. That approach, too, always counsels in favor of admitting as rebuttal the evidence that was excluded in the first instance. Lost in the analysis is the effect holding the door opened has on the goal promoted by the exclusionary rule. Courts apparently assume no damage will be done if they allow the defendant to use exclusion only as a shield from illegally-obtained evidence, but not as a sword to advance an inference or elicit proof contradicted by the excluded evidence.<sup>7</sup>

This Article shows the question is more complex than the sword and shield metaphor suggests. Discouraging the defendant from arguing inferences from the proof’s absence, or from presenting his own evidence that excluded evidence may contradict, imposes a cost on the defendant and creates a benefit for the prosecution that can interfere as unacceptably with the goals advanced by exclusion as allowing the evidence in the first instance. That is the lesson of ordinary evidence rules that, like the constitutional exclusionary rule, justify exclusion for reasons besides factfinding accuracy. They prohibit uses of evidence that interfere with goals besides accurate factfinding even when the protected party advances claims that make the excluded evidence particularly probative. As those rules show, there can be no general “opening the door” standard because the issue depends on the contextual effect on exclusion’s goal. Questions about whether the door has been opened require courts to consider the same kind of factors that enter into framing exclusionary rules in the first place, not general notions of fairness and integrity or the metaphoric difference between using exclusion as a shield, not as a sword.

Part I shows how a court recently used a finding that counsel opened the door to weaken—indeed, effectively to ignore—a holding by the Supreme Court that specifically prohibits the use of suppressed evidence, even as impeachment or rebuttal. By failing to recognize how suppressed evidence is useful to deter as well as rebut defenses, courts fail to appreciate how ruling that a defendant opens the door to suppressed evidence by capitalizing on its absence can give the prosecution much, if not all, of the benefit that exclusion was meant to prevent.

---

6. See, e.g., *Johnson*, 107 Cal. Rptr. 3d at 246; *Fregoso*, 2008 WL 1850973, at \*38–42.

7. See *Johnson*, 107 Cal. Rptr. 3d at 246 (“The *Miranda* holding was designed to protect the defendant. It was not intended to give him a sword to go after the other side.”).

Part II shows how courts apply an improperly broad view of what it takes to open the door to suppressed evidence when they treat such evidence as if it was excluded for reasons of factfinding accuracy. Instead, such decisions need to be made specifically to avoid undermining the goal of exclusion that has already been placed ahead of factfinding accuracy, even as some limited circumstances support finding defendants waived their protection against illegally-obtained evidence. The idea of taking *unfair* advantage of exclusion must respect the compromise to factfinding that the Court holds necessary to deter illegal investigative actions. Even just a few cases improperly holding counsel opened the door have a dramatic effect unless explicitly repudiated. The threat of forfeiting the defendant's immunity from suppressed evidence encourages defense counsel to avoid taking any advantage of the absence of the proof a court might possibly interpret as opening the door. Therefore, the prosecution will always benefit from foreclosing potential defenses unless courts reverse course to make clear how defendants can exploit the absence of the suppressed evidence without risking the evidence's admission.

Part III shows that a narrower view of opening the door in this circumstance is not at odds with the integrity of our factfinding process nor with the advocate's accepted ethical role within it. The integrity of that process is relative to the limited task of jurors: considering only the universe of evidence admitted at trial, rather than pursuing a self-directed quest for truth. Restrictions on the evidence juries hear reflect the systematic pursuit of justice of which accurate factfinding is not the exclusive component. Jurors, lawyers and judges fulfill critical yet limited roles in this pursuit even when they reach, advocate, or countenance verdicts that deviate from accurate factfinding in pursuit of other goals. Allowing the defense to emphasize the absence of suppressed evidence, therefore, can be a necessary part of the integrity of the factfinding process, not its antithesis.

### I. THE FLIGHT OF THE EXCLUSIONARY RULE

The assumption that defendants open the door to suppressed evidence when they increase its probativity by capitalizing on its absence to offer contrary evidence, or to argue a contrary inference, can effectively eviscerate the deterrent effect of exclusion. As a practical matter, the "opening the door" policy has its largest impact on incentives to conduct improper custodial interrogations, which are typically undertaken after the prosecution concludes it has or will have sufficient evidence besides that obtained from the interrogation to take the defendant to trial.<sup>8</sup> Still, the courts' approach informs law enforcement's calculus to take other improper investigatory measures whenever suppressing their fruits

---

8. The Court's primary justification for the exclusionary rule is the deterrence of illegal police conduct. *See, e.g., United States et al. v. Janis*, 428 U.S. 433, 446 (1976) (citing *United States v. Peltier*, 422 U.S. 531, 536-39 (1975)) ("The Court, however, has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'"); *Tirado v. Comm'r*, 689 F.2d 307, 310 (2d Cir. 1982) (citing *Janis*, 428 U.S. at 453-54 ("[A]ny extension of the rule beyond its core application . . . must be justified by balancing the 'additional

does not eliminate any expected payoff at trial.<sup>9</sup> By defining what opens the door to admission of the suppressed proof, the courts decide what steps defendants must forego at trial to avoid the suppressed evidence. By requiring the defendant to forego those steps or invite the evidence, the courts define the prosecution's payoff for having undertaken the unlawful investigatory measure even if the defendant refrains from opening the door to the evidence. Acquisition of the unlawfully-obtained evidence benefits the prosecution whether introduced to rebut or brandished to deter the defense case. So its possession is always potentially useful at trial unless the prosecution cannot survive a motion for judgment of acquittal without it.

The perception, however, that defendants taking advantage of the absence of suppressed evidence justify its admission is powerful. It has led courts to deny that suppressed evidence is illegally used when they rely on it to prevent defendants from introducing contrary proof as misleading, even though the Supreme Court has specifically prohibited introducing the suppressed evidence as impeachment or rebuttal. Although those courts deny the prosecution benefits from illegally-obtained evidence it has not introduced, its utility to deter a defense case is manifest. As a matter of logic and now well-accepted economic theory, a foregone opportunity to gain a specified amount represents a cost potentially as significant as payment of that amount.<sup>10</sup> Economists often concretize this concept of an opportunity cost by comparing a decision maker's decision to reject an offer to not engage in an activity with a decision to pay the specified amount to engage in the activity.<sup>11</sup> In either case, the decision is costly, potentially equally so. By the same token, the defendant suffers a cost at trial (and the prosecution receives a benefit) from the prosecution's possession of illegal evidence whether he avoids its admission by foregoing otherwise advantageous defenses or suffers its admission in response to opening the door by presenting those defenses. That the defendant will presumably choose the strategy that minimizes the impact of the illegally-obtained proof does not prevent the prosecution from realizing its benefit—to deter or rebut defenses—despite the defendant's choice.

The substantial value of unlawfully-obtained evidence to deter defense evidence

---

marginal deterrence' of the extension against the cost to the public interest of further impairing the pursuit of truth.”).

9. For example, the decision to conduct a search in an ongoing investigation may reflect a belief that its fruits will be useful even if the prosecution cannot use them in its case-in-chief. Current case law encourages that belief by teaching investigators that, routinely, suppressed evidence, inadmissible on the prosecution's case-in-chief, will nonetheless be useful to rebut or deter defenses.

10. The concept of opportunity cost in economic theory dates to the nineteenth century. *See generally* David I. Green, *Pain-Cost and Opportunity-Cost*, 8 Q. J. ECON. 218, 224 (1894) (“[W]hen we once recognize the sacrifice of opportunity as an element in the cost of production, we find that the principle has a very wide application.”).

11. *See generally* T. W. McRae, *Opportunity and Incremental Cost: An Attempt to Define in Systems Terms*, 45 ACCT. REV. 315, 316 (1970) (quoting L.M. FRASER, *ECONOMIC THOUGHT AND LANGUAGE* 103–04 (1937) (“The cost of a thing is simply the amount of other things which has to be given up for its sake . . . . Cost value is . . . merely exchange value seen from the side of the buyer, rather than the seller.”) (internal quotation marks omitted).

was made glaringly obvious in the recent case of *People v. Johnson*<sup>12</sup> in which the court, relying on suppressed evidence, undertook *itself* to prohibit a defendant from offering evidence whose rebuttal the exclusionary rule prohibits. There, prosecutors sought to exclude defense evidence suggesting the crime for which they charged Johnson was committed by a darker-skinned, similar-looking man, perhaps Johnson's cousin, Thaddeus.<sup>13</sup> Prosecutors originally charged Johnson and an accomplice with a string of five gas station robberies including one involving an attendant named Claussen.<sup>14</sup> They asserted all the robberies were committed with a "mode of operation" that was "virtually the same."<sup>15</sup> After Claussen failed to identify Johnson in a lineup, instead noting his robber was darker-skinned, prosecutors dropped the Claussen robbery from the case against Johnson while retaining it in the case against Johnson's accomplice.<sup>16</sup> Johnson now sought to call Claussen to testify to the exculpatory non-identification.<sup>17</sup> The prosecution objected, noting Johnson's statement, suppressed because of a *Miranda* violation, included Johnson's confession to the Claussen robbery.<sup>18</sup>

Had the defense called Claussen, *James v. Illinois*<sup>19</sup> would have prevented admission of Johnson's suppressed statement to contradict Claussen's testimony.<sup>20</sup> Prosecutors sought to exclude Claussen's testimony pursuant to § 352 of the California Evidence Code,<sup>21</sup> which essentially mirrors Rule 403 of the Federal Rules of Evidence.<sup>22</sup> They argued the court should consider the suppressed confession when deciding whether the probative value of Claussen's uncontradicted testimony was substantially outweighed by its tendency to mislead the jury. Although conceding the only reason not to allow Johnson to call Claussen was its knowledge of inadmissible proof contradicting Claussen's anticipated testimony,<sup>23</sup> the court granted the prosecutor's motion.<sup>24</sup> It reasoned the confession was not

---

12. 107 Cal. Rptr. 3d 228 (Cal. Ct. App. 2010).

13. *Id.* at 245.

14. *Id.* at 234, 237.

15. *Id.* at 234.

16. *Id.* at 237, 244.

17. *Id.* at 245.

18. *Id.*

19. 493 U.S. 307 (1990).

20. *James* prevents impeachment of a witness other than the defendant with suppressed evidence. *See id.* at 308–09.

21. CAL. EVID. CODE § 352 (West 2011) ("The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."):

22. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."):

23. In addition to Johnson's suppressed confession, the court also knew his confederate had implicated him in the Claussen robbery in a confession to police that was inadmissible against Johnson pursuant to the hearsay rule and the Confrontation Clause. *See People v. Johnson*, 107 Cal. Rptr. 3d 228, 246 (Cal. Ct. App. 2010).

24. *Id.* at 246.

“used” in violation of *James* when the court relied on it to prevent the defendant from introducing defense evidence misleading in its absence, while nonetheless conceding that, had the defendant elicited Claussen’s testimony without objection, *James* would preclude admitting the confession.<sup>25</sup>

The court’s reasons for distinguishing between using suppressed evidence to exclude exculpatory evidence the suppressed proof contradicts, and allowing its admission after the defendant introduced the exculpatory evidence, belies its claim that the suppressed evidence is only “used” in the latter circumstance. To begin with, the court noted the jury did not use the confession to decide Johnson’s guilt because the jury did not hear it.<sup>26</sup> But by virtue of the prosecution’s possession of the suppressed evidence and motion to exclude, the jury was not permitted to hear Claussen’s testimony either. So the suppressed confession surely determined the evidence the court allowed the jury to hear, potentially influencing its decision about Johnson’s guilt. Indeed, the *Johnson* court conceded as much when it next attempted to show the evidence’s undoubted influence on the jury’s deliberation was somehow consistent with *James*’ holding that the balance between truthseeking at trial and deterrence of police misconduct does not justify allowing impeachment of defense witnesses besides defendants.<sup>27</sup> Yet it was no more successful on this score.

First, the court tried to argue, in contrast to *James*, truthseeking supported precluding Claussen’s testimony because “it prevents false or misleading argument from being made to the jury,” and “[t]he only defense chilled . . . was a false defense.”<sup>28</sup> But this does not distinguish *James* at all. The question in *James* was whether the jury should consider the defense witness’s testimony that James looked different on the night of the murder than prosecution witnesses described him, without considering his suppressed admission that, in fact, he appeared as the prosecution’s witnesses described.<sup>29</sup> The argument for admitting the inculpatory statement the Supreme Court rejected was exactly the same as that accepted by the *Johnson* court: It would prevent the jury from relying on false or misleading argument while potentially chilling only a false defense.<sup>30</sup> At most, the *James* Court held the truthseeking value of testimony offered by defense witnesses *as a class* would generally exceed that of defendants; it hardly claimed truthseeking itself could ever justify excluding evidence *in a particular case* that would be admissible rebuttal evidence had it been legally obtained. Precluding defense evidence in the name of truthseeking whose rebuttal *James* disallows *despite* its acknowledged contribution to truthseeking in the particular case is to take a trip

---

25. *See id.* at 255.

26. *Id.* at 250–51.

27. *Id.* at 251–52.

28. *Id.* at 251.

29. *James v. Illinois*, 493 U.S. 307, 309–10 (1990).

30. *See id.* at 330 (Kennedy, J., dissenting) (*James* allows un rebutted perjury-by-proxy).

down the rabbit hole into the world of *Alice in Wonderland*. To prevent James' witness from testifying because his testimony contradicts James' confession accomplishes exactly what the *James* Court rejected when it disallowed the witness's rebuttal with James' confession. Had the Court allowed the rebuttal, James undoubtedly would not have called the witness, yielding the same outcome as in *Johnson*. The *James* court did not suggest its holding could be circumvented by excluding defense evidence whose rebuttal it prohibited.

The same fundamental error undermined the *Johnson* court's analysis of deterrence when it held precluding a defense witness's testimony—unlike allowing its rebuttal as the *James* Court prohibited—would not “weaken the exclusionary rule's deterrent effect.”<sup>31</sup> It asserted no decrease in deterrence would result because precluding defense witnesses whose testimony was contracted by suppressed evidence “did not increase the number of witnesses against which the confession could be used, nor did it significantly increase the occasions on which the confession could be used.”<sup>32</sup> But this claim rests upon the same erroneously crabbed conception of what it means to “use” the evidence. The court's own analysis conceded its ruling would prevent any “false and misleading argument” and ultimately deter any “false defense,” not just those put forth by a defendant's testimony.<sup>33</sup>

That was exactly the extension of the impeachment exception that the *James* Court *rejected* when it held allowing impeachment of defense witnesses besides defendants with illegally-obtained evidence would unjustifiably diminish deterrence of police misconduct. The *Johnson* court called it “too speculative and tenuous” to envision a scenario wherein a law enforcement officer would see a benefit in obtaining evidence useful to preclude a defense witness from testifying, but it is clearly no less likely to influence prosecutorial behavior than the prospect of using the same evidence to rebut or deter the defense witness's testimony.<sup>34</sup> The incentive to unlawful conduct created by the *Johnson* court is no more “speculative and tenuous” than that rejected as intolerable in *James*. In fact, since the likely result if *James* allowed rebuttal would be to deter the defense witness from testifying, *Johnson* not only reduces deterrence in exactly the manner that *James* rejected, it approves the same outcome *James* rejected.

Finally, the *Johnson* court even seemed to concede the equivalence of precluding defense testimony and allowing its rebuttal when it analogized its facts to that of *People v. Payne*.<sup>35</sup> In *Payne*, the Illinois Supreme Court allowed admission of a suppressed handgun after defense counsel asked the seizing officer on cross-

---

31. See *People v. Johnson*, 107 Cal. Rptr. 3d 228, 252 (Cal. Ct. App. 2010).

32. *Id.*

33. *Id.* at 251.

34. *Id.* at 250.

35. 456 N.E.2d 44 (Ill. 1983).

examination whether he had searched the defendant's apartment.<sup>36</sup> After the officer replied that he had indeed searched the premises, counsel asked no further questions. The court allowed the prosecution to introduce the weapon seized in the illegal search "to rebut the false impression created by the cross-examination that nothing was recovered from the apartment."<sup>37</sup> Calling *Payne* similar to *Johnson*, the *Johnson* court said it reached the "same result" when it precluded the witness contradicted by the suppressed evidence, although the *Payne* court had admitted the evidence after the witness testified.<sup>38</sup> At the end of the day, what mattered to the *Johnson* court—and what led it to find precedent in *Payne* rather than *James*—was not whether defense evidence was excluded in the first instance, deterred by the prospect of rebuttal, or actually rebutted. Using the motion to exclude as an opportunity to evade *James*' holding, the *Johnson* Court acted on its perception that *Johnson*, like *Payne*, would "open the door" to use of the suppressed proof by "affirmatively misrepresent[ing] or falsely imply[ing]" the facts of the case.<sup>39</sup> Whether the remedy was allowing the prosecution to use the suppressed proof to prohibit, deter, or rebut the defense evidence, the point was to forestall the "defendant's attempt to use *Miranda* as a sword to force the jury to consider a false and misleading argument," even if extrapolated from truthful testimony.<sup>40</sup>

The essence of the court's argument, therefore, was not about whether the suppressed evidence had been "used" in a prohibited sense; it clearly had. Instead, it relied on the view—similar to that expressed by the *Payne* court—that the prohibition must yield in appropriate circumstances because "allowing the defense . . . to misrepresent to the jury the actual facts of the case is . . . [in]consistent with the proper functioning and continued integrity of the judicial system."<sup>41</sup> In fact, that view influenced the *Johnson* court strongly enough to construe "use" of suppressed evidence in a fashion clearly inconsistent with *James*, but consistent with *Payne*'s allowance of suppressed evidence absent an applicable exception to the exclusionary rule if the door has been opened. The appellate court in *Johnson* quoted approvingly from the trial judge's analysis as follows:

But . . . contrary to the Court's responsibility to the integrity of the judicial system and of the trial itself, the integrity of the system has to stand for something, and if the Court were to consider what's before me and affirmatively conclude that the uncharged offense which the Court makes a factual finding is something that the defendant and not Mr. Taylor did based upon the defendant's own statement and the statement of Ms. Holmes, the Court would

---

36. *Id.* at 49.

37. *People v. Johnson*, 107 Cal. Rptr. 3d 228, 252 (Cal. Ct. App. 2010) (citing *Payne*, 456 N.E.2d at 46).

38. *Id.*

39. *Id.* (citation omitted).

40. *Id.* at 251.

41. *Id.* at 252 (citing *Payne*, 456 N.E.2d at 46–47).

be complicitous in putting inaccurate, confusing and misleading information before the jury.<sup>42</sup>

Crediting the suppressed evidence rather than the proposed defense witness's testimony,<sup>43</sup> the court concluded admitting the latter without rebuttal—*James* notwithstanding—would undermine the integrity of the courts and of the trial itself.<sup>44</sup> If *James* precluded it from allowing the prosecution to rebut the defense witness, the court would prevent him from testifying at all.

The *Johnson* case illustrates how a court's finding that a defendant justified the use of suppressed evidence by offering contrary proof can undermine even an application of the exclusionary rule the Supreme Court has explicitly approved. It therefore provides an important occasion to consider if courts should find defendants opened the door to suppressed evidence by taking improper advantage of its absence at trial, even if no established exception to the exclusionary rule permitting its use applies. *Johnson* shows how the effectiveness of exclusion as a deterrent depends as importantly on case-by-case determinations about whether defendants opened the door to suppressed evidence as it does on the scope of rule-based exceptions to the exclusionary rule.<sup>45</sup>

Besides defining those exceptions, and taking a broad view of evidence allowed

---

42. *Id.* at 246.

43. *Id.* The court was willing to base its decision on the version of the facts it credited shows the length to which it was willing to go to prevent admission of what it believed to be inaccurate information. Ordinarily, courts balance the probative value of evidence against its capacity to mislead on the assumption that the jury may choose to credit the challenged evidence. See RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 143 (5th ed. 2011) (citing *United States v. Wallace*, 124 F. App'x 165, 167 (4th Cir. 2005) (“[T]he credibility of a witness has *nothing to do with* whether or not his testimony is probative with respect to the fact which it seeks to prove.”); 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5214 (2012) (noting when balancing probative value against prejudice and capacity to mislead the jury, “courts do not count the witness’s credibility,” but rather “[t]he prevailing view is that evaluating the credibility of witnesses is a matter uniquely within the competence of the jury, and that the judge’s role is to estimate the probative value of testimony *if believed.*”) (emphasis added).

44. See *People v. Johnson*, 107 Cal. Rptr. 3d 228, 251–52 (Cal. Ct. App. 2010).

45. Moreover, even if defendants are able to obtain an advance ruling from the court about what evidence or argument opens the door to suppressed evidence, they may waive their right to appeal by refraining from taking the steps to invite the proof, making opening the door decisions as unreviewable as they may be unpredictable. See *Luce v. United States*, 469 U.S. 38, 43 (1984) (a criminal defendant must testify to appeal a decision to admit the defendant’s prior conviction for impeachment); *United States v. Hall*, 312 F.3d 1250, 1258 (11th Cir. 2002) (defendant must elicit the adverse evidence that was deemed admissible under Rule 404(b) on defendant’s pretrial motion in order to preserve appellate review); *United States v. Wilson*, 307 F.3d 596, 601 (7th Cir. 2002) (defendant’s claim that the district court violated his right to remain silent in allowing the government to introduce evidence from defendant’s “selective silence” if defendant were to bring up issue of an associate held to be unreviewable on appeal since defendant never introduced issue “and cannot . . . attack a potential introduction of evidence by the government in response to his potential testimony”); *United States v. Bond*, 87 F.3d 695, 700–01 (5th Cir. 1996) (defendant must testify to appeal *in limine* ruling that his testimony would waive his Fifth Amendment privilege); *United States v. Goldman*, 41 F.3d 785, 788 (1st Cir. 1994) (defendant must testify to appeal Rule 403 and 404 rulings regarding his potential testimony); *United States v. Ortiz*, 857 F.2d 900, 905–06 (2d Cir. 1988) (defendant must actually pursue defense at trial to appeal ruling that uncharged misconduct is admissible if the defendant pursues that defense); *United States v. DiMatteo*, 759 F.2d 831, 833 (11th Cir. 1985) (a

to impeach a testifying defendant,<sup>46</sup> the Supreme Court has yet to provide guidance on how courts are to approach questions about opening the door in the context of suppressed proof when the defendant does not testify. Consequently, the question depends on what the courts see as the appropriate, analogous evidentiary test, borrowed from other contexts. Much of the vitality of the exclusionary rule at trial hangs in the balance; by deciding what constitutes taking *improper* advantage of suppression, courts decide the extent of the benefit derived from obtaining evidence illegally when it is inevitably used to rebut or deter potential defenses.

## II. ACCURATE FACTFINDING AND SUPPRESSED EVIDENCE

Left to evidentiary analogies, courts apply an improperly broad view of what it takes to open the door to suppressed evidence when they treat it as if it were excluded for factfinding reasons. Decisions about whether the door has been opened to evidence excluded to promote factfinding focus exclusively on the balance between the evidence's probative value and its capacity for distracting or prejudicing the jury. Once counsel highlights the absence of the evidence or elicits proof it contradicts, she increases the probative value of the suppressed evidence in a way likely, if not certain, to justify admission. Consequently, the appropriate analogy to deciding whether the door has been opened is provided by rules excluding evidence for reasons other than factfinding accuracy. Only if courts model their decisions on those rules will they assure the constitutional goals of exclusion consistently take precedence over factfinding accuracy to the extent that existing doctrine requires. Using that approach, courts should find defendants open the door to suppressed evidence only when they waive constitutional protection by seeking to benefit from evidence enabled by the illegality about which they complain, not when they merely take advantage of the evidence's absence.

Section A uses a recent case to illustrate the importance of finding the proper metric to decide whether a defendant takes unfair advantage of the absence of suppressed evidence and thus opens the door. Section B shows employing a standard derived from factfinding accuracy improperly diminishes the deterrent effect of exclusion by routinely admitting suppressed evidence to contradict exculpatory proof and inferences. To sustain deterrence, courts must model their decisions on evidence rules that prohibit the use of contradicting evidence in pursuit of other goals. Section C shows how prohibiting contradicting evidence is

---

defendant's witness must testify to appeal a decision allowing his impeachment with evidence offered under Rule 608).

46. *See* *United States v. Havens*, 446 U.S. 620, 626–27 (1980) (any questions “suggested to a reasonably competent cross-examiner” by defendant’s direct testimony are permissible, allowing the prosecutor to use suppressed evidence to impeach statements made in response to cross-examination “reasonably suggested” by the direct examination along with the direct testimony itself); *see also id.* at 631 (Brennan, J., dissenting) (the limit on the scope of contradiction of a defendant’s testimony amounts to “nothing more than a constitutional reflection of the common-law evidentiary rule of relevance”).

appropriate even if effective exploitation of its absence leads jurors to conclude that it does not exist. The unavoidable possibility that they conclude from the lack of expected evidence that it was not found confers no improper evidentiary advantage and cannot justify admission without unduly undermining deterrence. Nonetheless, Section D shows how allowing the defendant to employ exculpatory inferences from the absence of suppressed proof still allows for appropriate limits on his ability to exploit exclusion. When a defendant seeks to use evidence derived from an illegal investigatory step to make himself better off than he would be absent the illegality, he waives his objection by opening a subject that was closed for his benefit.

#### A. *Opening the Door to Suppressed Evidence*

The importance of deciding what opens the door to suppressed evidence is illustrated by the recent case of *People v. Fregoso*.<sup>47</sup> In *Fregoso*, the court suppressed clothing seized from the defendant pursuant to an illegal arrest.<sup>48</sup> The prosecution tested the clothing for plant residue consistent with the cornfield that was the site for the murder with whose commission they charged Fregoso.<sup>49</sup> It also compared footprints found at the scene with the sneakers seized from Fregoso.<sup>50</sup> Although the prosecution's experts found no plant material matching the cornfield on his clothing, they offered to testify that a footprint was consistent with the defendant's left sneaker.<sup>51</sup>

Upon learning that the plant residue tests were negative, the defendant sought an order allowing him to offer evidence of the results without opening the door to admission of the footprints evidence.<sup>52</sup> The court denied the motion, finding the defendant could not offer the residue evidence to show he was not at the scene without opening the door to the footprint evidence suggesting he was.<sup>53</sup> The defendant then sought to "waive that portion of the suppression order relating to the upper clothes, but not the shoes," but "[t]he court declined defense counsel's offer and reaffirmed its ruling."<sup>54</sup>

The prosecution called the criminalist who examined the cornfield. She testified to her observations, taking photographs and collecting evidence, but did not specifically mention collecting plant material or discovering and photographing footprints.<sup>55</sup> Before cross-examining her, defense counsel sought a ruling that he would not open the door to the sneaker-match evidence by eliciting that the

---

47. No. F050895, 2008 WL 1850973 (Cal. Ct. App. Apr. 28, 2008).

48. *Id.* at \*14.

49. *See id.* at \*14–15.

50. *Id.* at \*14.

51. *See id.* at \*14–15.

52. *Id.* at \*14.

53. *Id.* at \*15.

54. *Id.*

55. *Id.*

criminalist had taken plant samples and photographed footprints at the scene.<sup>56</sup> After the court asked how the defense would use that evidence, counsel replied “there was no evidence of Fregoso’s footprints at the scene of the crime.”<sup>57</sup> The Court denied the motion, noting there would be no such evidence “[b]ecause it was suppressed. So you opened the door, you can’t do that. If you get in the footprints, it opens the door up.”<sup>58</sup> Subsequently, the court explained “it would be unfair for the defense to use the clothing to argue Fregoso was not at the crime scene, when the shoes arguably did link him to the scene.”<sup>59</sup> Later, the court held its ruling would apply equally to counsel’s offering photos of footprints at the scene that did *not* match the defendant’s suppressed sneakers, because they, like the exculpatory clothing, would open the door.<sup>60</sup>

Defense counsel recalled the criminalist and elicited that she had collected plant material from the cornfield, but not that she had observed or photographed footprints.<sup>61</sup> The court warned counsel that if she mentioned the absence of “trace evidence found on your client’s clothes or shoes” in summation, he would permit the prosecution to reopen its case to introduce the suppressed sneaker to show that it was consistent with footprints found at the scene.<sup>62</sup> He said he could not “separate the clothing with the trace evidence . . . and the shoes,” “because the clothes and shoes were both suppressed.”<sup>63</sup> When defense counsel said in summation, “[d]id you notice that there was no evidence presented by the prosecution connecting my client to [the] cornfield?,” the court interrupted him and told the jury that it would hear more evidence.<sup>64</sup> It told counsel that because his claim that no evidence connected the defendant to the scene “was based on the ruling suppressing your client’s clothing,” there was no “excuse for what you did . . . except to mislead the jury.”<sup>65</sup> The court then allowed the prosecution to introduce the suppressed sneaker and evidence of its consistency with the footprint, and the defendant to rebut with “evidence that no plant material from the crime scene was found on Fregoso’s clothing.”<sup>66</sup>

The appellate court avoided ruling on the trial court’s allowing the prosecution to reopen its case to introduce the suppressed evidence by holding introduction of the sneaker evidence harmless, if error at all.<sup>67</sup> More importantly, however, it noted it was only concerned about the actual introduction of the suppressed

---

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at \*16.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at \*17.

67. *Id.* at \*18.

evidence.<sup>68</sup> It agreed with the trial court that defense counsel was properly precluded from arguing no evidence connected the defendant and the cornfield<sup>69</sup> because “[a]n attorney commits misconduct by commenting on the adversary’s failure to produce evidence the attorney knows was excluded by the court.”<sup>70</sup> Consequently, the court allowed the prosecution’s possession of the suppressed evidence to benefit it by disallowing comment on the proof’s absence, including how its absence bears on whether the admitted evidence showed guilt beyond a reasonable doubt.<sup>71</sup> It worried only that the trial court had not just prohibited the argument, but had allowed the prosecution to reopen its case actually to introduce the suppressed evidence.<sup>72</sup>

For analytic purposes, this Article distinguishes the idea that the door is opened by counsel’s taking improper evidentiary advantage of suppression from the idea that counsel attempting to do so violates generally applicable ethical rules. Because the courts are not always entirely clear in their reasoning, and because the two ideas can reinforce each other since taking “improper” evidentiary advantage can also reflect unethical practice, distinguishing the approaches is sometimes difficult. Nonetheless, some courts have held counsel opened the door to suppressed evidence without necessarily engaging in unethical practice, suggesting evidence law justifies the evidence’s admission as a matter of “fairness”<sup>73</sup> and the “integrity of the trial process.”<sup>74</sup> In contrast, some courts have cited generally applicable ethics principles as a primary determinant of the kind of actions that justifies a court’s finding that counsel has taken improper advantage.<sup>75</sup> The distinction may help explain why the *Fregoso* appellate court avoided approving introduction of the suppressed proof. As a remedy for counsel’s unethical conduct, allowing the prosecution to introduce the suppressed evidence may not be necessary or appropriate.<sup>76</sup> As a consequence of counsel’s choosing an evidentiary strategy that makes it admissible rebuttal, however, allowing the prosecution to

---

68. *Id.* at \*17.

69. *Id.*

70. *Id.* (citing *People v. Varona*, 192 Cal. Rptr. 44, 46 (Cal. Ct. App. 1983)).

71. *Id.*; cf. *Varona*, 192 Cal. Rptr. at 46 (“Here the prosecutor not only argued the ‘lack’ of evidence where the defense was ready and willing to produce it, but he compounded that tactic by actually arguing that the complaining witness was not a prostitute, although he had seen the official records and knew that he was arguing a falsehood.”).

72. *People v. Fregoso*, No. F050895, 2008 WL 1850973, at \*17 (Cal. Ct. App. Apr. 28, 2008) (“[T]he trial court here went far beyond preventing defense counsel’s misconduct and, in doing so, entered the realm of possible constitutional error.”).

73. *Id.* at \*17 (“The trial court considered allowing the People to reopen and put on the evidence as the ‘only fair way to cure it.’”).

74. *People v. Johnson*, 107 Cal. Rptr. 3d 228, 247 (Cal. Ct. App. 2010) (quoting trial court).

75. *Fregoso*, 2008 WL 1850973, at \*17.

76. See *Rogers v. State*, 844 So. 2d 728, 732–33 (Fla. Dist. Ct. App. 2003) (noting existing rules prevent or mitigate the impact of improper closing arguments and concluding that defense counsel’s misleading closing argument did not justify introducing a confession obtained in violation of the Constitution); see *infra* note 139 and accompanying text.

introduce the suppressed evidence is unexceptional. The remainder of Part II discusses the evidentiary dimensions of opening the door to suppressed evidence, while Part III addresses the ethical aspect.

### B. *Contradicted Inferences or Proof*

The initial evidentiary issue posed by the analyses of the *Fregoso* and *Johnson* courts is whether arguing the lack of evidence or eliciting contradicted proof—without more—opens the door to suppressed evidence because it misleads the jury about facts contradicted by the suppressed evidence. That is the crux of the *Johnson* court’s claim that because “to misrepresent to the jury the actual facts of the case is . . . [in]consistent with the proper functioning and continued integrity of the judicial system,”<sup>77</sup> even evidence clearly inadmissible as proof of guilt or impeachment may be used to prevent the defense from introducing evidence contradicted by the excluded proof. Since “*James* said nothing about a defendant’s attempt to use *Miranda* as a sword to force the jury to consider a false and misleading argument,” the court asserted, normal rules for opening the door to excluded evidence should apply to allow it.<sup>78</sup> A similar assumption informed the *Fregoso* trial court’s holding that arguing the lack of evidence the court had excluded was sufficient to allow its admission when the alternative would allow a jury to draw an inaccurate inference<sup>79</sup> and the appellate court’s view that, at the very least, the argument would be improper.<sup>80</sup>

Although suggesting the jury should not be misled by argument about the lack of suppressed evidence may seem noncontroversial and benign, it misses the critical point that what opens the door to excluded evidence must depend upon the reason we excluded the proof in the first place. Whether a party has opened the door to otherwise inadmissible evidence is a question that can arise when applying (at least) three distinct kinds of evidentiary rules. The first encompasses rules designed to protect policies and principles internal to the accuracy of the factfinding process itself. Application of Rules 404 and 403 to prohibit character evidence, but nonetheless allow proof of other wrongs, crimes, or acts when they are sufficiently probative for a non-character purpose, provides a good example. We intend the rules to insulate the jury from evidence that can distract it from accurate factfinding about matters that the substantive law defines as material.

The second encompasses rules created, at least in part, to prevent the factfinding

---

77. *Johnson*, 107 Cal. Rptr. 3d at 252 (quoting *People v. Payne*, 456 N.E.2d 44, 51 (Ill. 1983)).

78. *Id.* at 251.

79. See *Fregoso*, 2008 WL 1850973, at \*16–17 (“[W]hen you argued just now to the jurors that there was no evidence presented by the prosecutor connecting your client to the cornfield, that was based on the ruling suppressing your client’s clothing . . . [T]here is [no] excuse for what you did . . . except to mislead the jury so we are going to put on evidence.”).

80. See *id.* at \*17 (“An attorney commits misconduct by commenting on the adversary’s failure to produce evidence the attorney knows was excluded by the court.”) (citing *People v. Varona*, 192 Cal. Rptr. 44, 46 (Cal. Ct. App. 1983)).

process from interfering with other important, though nonconstitutional, policies and principles. The federal rules' prohibition of subsequent remedial measures,<sup>81</sup> settlements and settlement discussions,<sup>82</sup> and withdrawn guilty pleas and plea negotiations<sup>83</sup> provide good examples. The third encompasses the constitutional exclusionary rule that is the focus of cases discussed in this Article. We intend it to prevent the factfinding process from presenting too great an incentive for authorities to intrude upon the constitutional policies and principles that exclusion seeks to promote by according them precedence over normal evidentiary policy.<sup>84</sup>

The easy claim that an attorney's taking advantage of the lack of evidence she has successfully excluded opens the door to its admission can make perfect sense only when applied to the first type of rules—those internal to the factfinding process. Exclusion in that case ultimately depends upon a balance of the evidence's probative value and potential to unfairly prejudice the jury in its evaluation of the facts or to mislead the jury about the issues we ask them to decide. The initial decision to exclude thus depends on the excluded evidence's lack of probative value when properly used on a material issue. Comment on the absence of the excluded evidence brings the issue to which the excluded proof is relevant to the fore, increasing its probative value. Just as a defendant may increase its probative value by eliciting evidence from a prosecution or defense witness to establish a defense which the excluded evidence rebuts, defense counsel's argument in summation or assertions in opening may also raise questions that increase the evidence's probative value. As its probative worth increases, the judge must decide whether the accuracy of the factfinding process now demands that the previously excluded evidence be admitted, or counsel be prevented from taking the steps that would justify its admission. Since we uncontroversially intend the application of factfinding rules to further the accuracy of the process, it would hardly be surprising to learn courts generally find the door has been opened to excluded evidence. When defense counsel first argues successfully that prosecution evidence is not probative enough to justify its potential to detract from factfinding accuracy, but then belies that claim by highlighting the evidence's absence, he demonstrates how probative it now is to rebutting the defense case.

Application of Rules 403 and 404(b) provide a classic example. The Court must first consider whether there is a permissible (non-action-in-conformity-with-

---

81. See FED. R. EVID. 407.

82. See FED. R. EVID. 408.

83. See FED. R. EVID. 410.

84. Although the Court has decided neither *Miranda* nor the Fourth Amendment's exclusionary rule is constitutionally mandated, it is clear that their purpose is to promote constitutional values. See, e.g., *Withrow v. Williams*, 507 U.S. 680, 702–03 (1993) (O'Connor, J., concurring in part and dissenting in part) ("Like the suppression of the fruits of an illegal search or seizure, the exclusion of statements obtained in violation of *Miranda* is not constitutionally required. This Court repeatedly has held that *Miranda*'s warning requirement is not a dictate of the Fifth Amendment itself, but a prophylactic rule . . . [which] promotes institutional respect for constitutional values.").

character) inference from the challenged evidence of other crimes, wrongs or acts.<sup>85</sup> Then, it must consider whether there is sufficient evidence to persuade a reasonable jury by a preponderance of the evidence that the other crimes, wrongs, or acts occurred in a fashion that supports the permissible inference.<sup>86</sup> Finally, it must weigh the likelihood that, despite limiting instruction, the jury will use the evidence improperly (for the character inference) against the evidence's probative value when used only for its permissible (non-character) inference.<sup>87</sup> It can then admit the evidence only if the likelihood of impermissible use does not substantially outweigh the likelihood of permissible use. By using evidence or argument increasingly to contest the issue to which the evidence relates when used properly, counsel increases the evidence's probative value in concomitant degrees.<sup>88</sup>

Nonetheless, the analysis of probative value and prejudice hardly applies when exclusion is justified—even in part—by evidentiary or constitutional policies external to the factfinding process. The probative value of excluded evidence increases when it rebuts an issue defense counsel raised, but if we did not base exclusion entirely on relative lack of probativity, additional probativity alone should not render it admissible. Consider, for example, Rule 408's exclusion of statements made in connection with settlement negotiations.<sup>89</sup> The rule's exclusion is based partly on the external policy of encouraging settlements, a policy that does not shift with the significance of the statements thus excluded.<sup>90</sup> The rule once

---

85. See FED. R. EVID. 404(b).

86. See *United States v. Huddleston*, 485 U.S. 681, 690 (1998).

87. See FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

88. For example, a defendant's prior cocaine conviction may yield a permissible inference of knowledge of the drug's appearance without violating the proscription against using the conviction as character proof showing action in conformity with a predisposition to drug possession. By not contesting familiarity with the drug's appearance, a defendant found with cocaine may succeed in keeping the conviction out. He may simply argue he had no knowledge that, say, the bag containing the drug was in his possession. The judge may think using the conviction to show the defendant knew of the bag (apart from knowing what it contained) is impermissible character evidence, while using it merely to show that he would recognize the contents is permissible 404(b) proof of knowledge. By focusing the defense on whether the defendant knew of the bag and essentially conceding that, if he did, he knew its contents, counsel diminishes the evidence's probative value for the permissible purpose. Alternatively, counsel can contest whether the defendant knew what the bag contained by asserting in opening statement that the prosecution will adduce no evidence that the defendant knew what cocaine looked like, eliciting evidence from witnesses suggesting the defendant had reason to believe the substance was not cocaine, or arguing on summation that the prosecution failed to show the defendant knew it was cocaine even if he saw it. By contesting the issue on which the excluded evidence's permissible inference is especially probative in any of these ways, counsel has justified its admission if it were not otherwise justified. The increase in the evidence's probative value tilts the scale in favor of admissibility. *Cf. United States v. Hicks*, 635 F.3d 1063, 1070–73 (7th Cir. 2011); *United States v. Chavis*, 429 F.3d 662, 673 (7th Cir. 2005) (Cudahy, J., concurring) (contrasting the defense theory used at trial, that the drugs were not defendant's, with the unused theory that the defendant did not know drugs were involved, and finding that Rule 404(b)'s exception for absence of mistake applies if “I thought [the drugs] were cough drops,” but not as in the present case where defendant argued “the drugs weren't mine”).

89. See FED. R. EVID. 408(a).

90. See FED. R. EVID. 408(a) advisory committee's note.

allowed such statements to be admitted to show a party spoke inconsistently, but a subsequent amendment extended the party's immunity to encompass impeachment use of such statements.<sup>91</sup> The original decision to allow impeachment use, and the subsequent decision to prohibit it, both reflect judgments about what is necessary to encourage the free discussion that may result in settlement.<sup>92</sup> The decisions first to allow and then to prohibit impeachment use do not ultimately depend upon the relative probative value of the statement if used as substantive evidence or impeachment, but rather upon admission's anticipated effect upon the end that exclusion is designed to promote.<sup>93</sup>

The evidence from settlement negotiations might have been quite probative. But it interferes with an important policy goal—encouraging settlements. Since the evidence's admission undermines that goal, no increase in its probative value alone can determine admission. When courts decide such evidence is admissible because counsel “opened the door,” they undermine this goal. Impeachment use of statements made in settlement negotiations is now prohibited because a party's losing protection against such use by testifying would unduly discourage frank discussions. That a statement confessing responsibility could hardly be more probative—*especially* after the party testifies inconsistently—does not justify the party's surrendering immunity from the statement if admission unduly diminishes the external goal. Rule 408 now conceives that even allowing impeachment use would chill or deter desired settlement negotiations, requiring we forego whatever benefit might flow to factfinding.<sup>94</sup> In contrast, Rule 407 allows the use of subsequent remedial measures to impeach a witness by inconsistent statement, but not to impeach by contradiction except in limited circumstances.<sup>95</sup> Allowing impeachment by self-contradiction typically has minimal impact on a party's

---

91. Rule 408 was recently amended to make statements made in the course of settlement negotiations inadmissible “to impeach by a prior inconsistent statement or through contradiction.” *See id.*

92. *See id.*

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See MCCORMICK ON EVIDENCE* at 186 (5th ed. 1999) (“Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted.”). *See also* *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir. 1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

*Id.*

93. *See id.*

94. *See id.*

95. FED. R. EVID. 407. The substance of the testimony impeached by contradiction would have to fit one of the other exceptions contained in the rule. *See id.* (“[T]he court may admit this evidence for another purpose, such as . . . proving ownership, control, or the feasibility of precautionary measures.”).

taking remedial measures because it may easily defend itself at trial without calling the very person who took the measure to testify to something that taking the measure contradicts. In contrast, allowing a party's remedial measure to contradict any of that party's witnesses would effectively remove the rule's immunity. To Rule 407's allowance of inconsistent statement impeachment and Rule 408's recent disallowance of it, one might also compare Rule 410, which has always prohibited any impeachment use of statements made in plea negotiations.<sup>96</sup> There, the rule contemplates the threat of impeachment to have maximal impact on a defendant's willingness to discuss a plea because allowing the impeachment compromises his ability to testify on his own behalf.<sup>97</sup>

Other limits on exclusionary rules promoting values besides factfinding accuracy similarly reflect the priority of the contextual effect of admission on the desired goal. Rule 408, for instance, allows other uses, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.<sup>98</sup> Again, probative value alone does not explain the permission to use settlement statements for those purposes. We must look to the effect on the external goal.<sup>99</sup> Using the statements to explain the reason for delay or the means by which a party obstructed a criminal investigation is thought not to adversely affect a party's willingness to engage in *bona fide* settlement talks.<sup>100</sup> Eliminating the protection should create no disincentive to engage in behavior the rule aims to encourage. By the same token, when settlement or talks with one party affect the worth of his testimony against another,

---

96. FED. R. EVID. 410; *see also* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:64 (3d ed. 2011) ("The legislative history of the original version of FED. R. EVID. 410 . . . made it plain that FED. R. EVID. 410 entitled the accused to exclude plea bargaining statements, even if offered to impeach him after he took the stand and testified inconsistently with what he said during plea bargaining."). However, after the Supreme Court decided *United States v. Mezzanatto*, 513 U.S. 196 (1995), which held waivers of the right to exclude statements made during plea bargaining are enforceable, the issue of impeachment largely became moot. *See* MUELLER & KIRKPATRICK *supra*.

97. *Cf.* U.S. v. Udeagu, 110 F.R.D. 172, 175 (E.D.N.Y. 1986) (holding statements made by defendant during his plea allocution could not be used to impeach his credibility after his guilty plea was withdrawn; the reason behind 410 "is clear: the incriminatory admissions would make withdrawal of the plea nugatory since conviction would almost surely result from a trial").

98. FED. R. EVID. 408(b).

99. *See* FED. R. EVID. 408 advisory committee's note ("This rule as reported makes evidence of settlement or attempted settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.").

100. *See id.* ("The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule."); *see also id.* ("[S]tatements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims. When private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.").

the desire to encourage *bona fide* settlements does not encompass ignoring the possibility that a party may use dealings with one opposing party to “purchase” favorable testimony against another.<sup>101</sup> Again, the loss of protection by allowing a settlement to show bias or prejudice of a witness discourages no settlements that the rule seeks to promote.

Nonetheless, it seems especially tempting for courts to conceive that probative value determines when they should remove protection against evidence suppressed by the constitutional exclusionary rule. The Supreme Court describes the scope of the exclusionary rule as the product of a balance between truthseeking and deterrence.<sup>102</sup> As counsel contests issues that accentuate the probative value of the suppressed evidence and increase the cost of its exclusion to factfinding accuracy, courts apparently expect the balance to tip in favor of admission. But that is simply not so, at least not without further analysis of the effect of admission on deterrence. Without further analysis, courts should see the balance can remain the same or even tip further in favor of keeping the evidence out. Requiring counsel to forgo making the argument or introducing the evidence to which the illegally-obtained proof would be an especially probative rebuttal can only increase the incentive to obtain it.

It is one thing to say general rules such as allowing suppressed evidence to impeach defendants but not defense witnesses can be shaped by a balance between truthseeking and deterrence; it is entirely another thing to say the opening the door policy *in individual cases* should use the same balance to assure admission of suppressed evidence when it is most probative. While balancing at the “wholesale” level can properly inform the scope of the exclusionary mandate by suggesting a rule that promises greater deterrence at lesser cost to the truth, further balancing at the “retail” level to admit particularly probative evidence undermines the justification for the rule originally selected. Once the prosecution can foresee benefitting from obtaining evidence illegally when the proof is most needed in individual cases, the incentive to obtain it rises along with its probative value. As the comparison with federal rules excluding evidence for reasons external to factfinding shows, only contextual circumstances *besides* probativity can elucidate the effect that admission of excluded evidence will have on the external goal. When the rule itself does not decide whether a particular use of the absence of excluded evidence justifies its admission, the court first needs to consider the circumstances’ effects on the goal—here, deterrence—before allowing increased probativity to justify its admission. When the purpose of exclusion is the pursuit of a policy external to factfinding, opening the door is more complex than determining that the defendant has chosen to contest a point that makes excluded evidence especially probative. It is not enough to say the defendant might have refrained from

---

101. *Id.*

102. *James v. Illinois*, 493 U.S. 307, 319–20 (1990).

disputing the point, since the cost attached to doing so itself can undermine the external goal. By using a standard for opening the door that promises the prosecution use of suppressed evidence to deter or rebut defense evidence when necessary, courts eliminate whatever deterrence was achieved from excluding the evidence in the first place.

The problem of avoiding this complexity is manifest in a recent article distinguishing between the doctrines of specific contradiction impeachment and curative admissibility, both of which courts often refer to as species of the genus “opening the door” to otherwise inadmissible evidence.<sup>103</sup> According to Imwinkelried and Gilligan, specific contradiction impeachment reflects a party’s right to respond to an opponent’s evidence with his own rebuttal proof that can show the opponent’s evidence is false or misleading.<sup>104</sup> It is presumptively admissible, subject only to factors that undermine its probativity.<sup>105</sup> Its exclusion will thus be rare, likely limited to situations where its admission confuses the issues or wastes time.<sup>106</sup> In contrast, curative admissibility reflects a party’s far more discretionary right to introduce evidence countering an opponent’s introduction of evidence inadmissible under evidence law, a doctrine courts sometimes call “fighting fire with fire.”<sup>107</sup> The ability to do so should rest on many factors inapplicable to specific contradiction, such as whether the initial violation was intentional and thus may potentially need to be deterred to prevent recurrence, and whether some combination of less drastic steps, such as requiring objection to prevent admission of the inadmissible evidence in the first place, striking the evidence after its admission, and giving a curative instruction, can undo the damage without allowing introduction of additional, inadmissible evidence.<sup>108</sup> Notably, the authors count the Supreme Court’s allowance of suppressed evidence to contradict a defendant’s testimony as a primary example of specific contradiction.<sup>109</sup> They argue it shows “the probative worth of truly contradictory evidence is so great that it can lift the bar of even a constitutional exclusionary rule,”<sup>110</sup> and the “right to

---

103. Francis A. Gilligan & Edward J. Imwinkelried, *Bringing the “Opening the Door” Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 SANTA CLARA L. REV. 807 (2001).

104. *Id.* at 808 (“[R]ecognizing the entitlement to specific contradiction impeachment is essential to the proper functioning of an effective adversary system of litigation . . . . [T]he entitlement is a corollary of the party’s fundamental right in an adversary system to attack false or misleading unfavorable evidence presented by the opponent.”).

105. *Id.* at 831–32 (citing FED. R. EVID. 403).

106. *Id.* at 811 (quoting MCCORMICK ON EVIDENCE § 45 (John W. Strong ed., 5th ed. 1999)).

107. *Id.* at 823–24 (citing Daniel P. Maguire, *Curative Admissibility: Fighting Fire with Fire*, 23 COLO. LAW. 2321 (1994)).

108. *See id.* at 825–29; *see also* Edward J. Imwinkelried, *Clarifying the Curative Admissibility Doctrine: Using the Principles of Forfeiture and Deterrence to Shape the Relief for an Opponent’s Evidentiary Misconduct*, 76 FORDHAM L. REV. 1295 (2007) (using principles of forfeiture and deterrence to redefine the curative admissibility doctrine).

109. Gilligan & Imwinkelried, *supra* note 103, at 831 (discussing *United States v. Havens*, 446 U.S. 620, 627 (1980)).

110. *Id.*

specifically contradict the opponent's testimony is an essential entitlement" whose disrespect imperils the functioning and integrity of the adversary process.<sup>111</sup>

Contrary to their claim, the probative value of suppressed evidence, however enhanced by its contradiction of defense evidence or important to factfinding accuracy, does *not* necessarily override the deterrence promoted by exclusion. The same evidence the Supreme Court held admissible to specifically contradict a defendant's testimony, *it has held inadmissible if offered to specifically contradict any other witness besides the defendant because the resulting diminution in the deterrent effect of exclusion would be intolerable.*<sup>112</sup> Indeed, the apparent assumption that the integrity of the trial process entitled the prosecution in *Johnson* to exclude, if it could not rebut, Johnson's misidentification evidence, caused the Court to prohibit the defense evidence erroneously.<sup>113</sup> It failed to consider that ruling's impact on the deterrence of constitutional violations sought by the Supreme Court's exclusion of the evidence in the first instance. Since that deterrence depends upon the courts not allowing possession of the illegally-obtained evidence to require the defendant to refrain from taking advantage of its absence to avoid suffering its admission, the error of the *Johnson* court is manifest. It eliminates the deterrence *James* required by creating the very incentive to obtain evidence illegally that *James* eliminated. However probative the suppressed evidence may be in a particular case, its importance is inferior to the diminished incentive effect the Court held intolerable if all defense evidence invited rebuttal with suppressed evidence.

Since specific contradiction of much defense evidence alone does not justify admitting suppressed proof, it easily follows that merely pointing out the absence of suppressed evidence when urging the jury to conclude that the prosecution's evidence does not amount to proof of guilt beyond a reasonable doubt should not open the door. In circumstances such as those in *Fregoso*, for example, counsel should be able to exploit the absence of physical evidence placing Fregoso at the scene by factoring it into whether the government's evidence proved Fregoso's involvement beyond a reasonable doubt. If the purpose of suppression is to deny the government the benefit of its illegally-obtained evidence when making its case for guilt, then we should hardly preclude counsel from urging the jury to do what the rule says they should do, which is to consider the strength of the prosecution's case without the illegally-obtained evidence. Counsel's argument in summation

---

111. *Id.* at 836.

112. See *James v. Illinois*, 493 U.S. 307, 319–20 (1990) (reversing the Illinois Supreme Court's affirmation of the defendant's conviction because the prosecutor used "illegally obtained statements to impeach a defense witness' testimony"). Professor Daniel Capra suggested a felicitous analogy after reading a draft of this Article: The exclusionary rule should be seen as a "Zen counterpart" of FED. R. EVID. 804(b)(6), which admits the hearsay statements of a person whom the defendant wrongfully prevented from testifying. Where FED. R. EVID. 804(b)(6) admits evidence to deter misconduct despite the evidence's unreliability, the exclusionary rule excludes evidence to deter misconduct despite its reliability.

113. See *supra* text accompanying note 43.

alone—“Did you notice that there was no evidence presented by the prosecution connecting my client to [the] cornfield?”—should be perfectly proper.<sup>114</sup> The impact of the evidence’s absence on the jury’s decision defines the deterrent effect of exclusion at trial, and since other goals require the jury to decide the case without the benefit of the proof, it must be appropriate for counsel to point out its absence. The alternative—to require the defendant to refrain from pointing out a weakness in the prosecution’s case for guilt left by the absence of illegally-obtained evidence, or to hold the door opened to the evidence in rebuttal—is to eliminate the deterrence of unlawful conduct that the exclusionary rule seeks unless the evidence is necessary to survive a motion for judgment of acquittal.

The unacceptability of the alternative is illustrated by *Rogers v. State*,<sup>115</sup> in which the trial court held defense counsel’s summation opened the door to the defendant’s confession excluded because of a *Miranda* violation.<sup>116</sup> Defense counsel argued that “hard evidence” introduced at trial tended to show that Rogers’ testifying codefendants rather than Rogers murdered the victim, repeatedly lied to police about it, and then falsely implicated Rogers at trial to minimize their liability.<sup>117</sup> He specifically highlighted their testimony that the murder weapon was stolen from one of their neighbors, wrapped after the murder in one of their shirts, and hidden in a place suggested by one of them, after which two others “used the dead man’s money to buy drugs and rent a room.”<sup>118</sup> Responding to the comparative lack of “hard evidence” that Rogers—rather than his codefendants who admitted much of their involvement—was the shooter, the prosecutor moved to reopen his case to introduce the defendant’s taped confession in which he had admitted to shooting the victim.<sup>119</sup> Although recognizing it was going “out on a limb,” the trial court allowed the prosecution to introduce the confession.<sup>120</sup>

The appellate court reversed, noting the lack of precedent for admitting illegally-obtained evidence to rebut statements made by an attorney in closing argument, however misleading the prosecution claims them to be.<sup>121</sup> More importantly for present purposes, it wrote:

Even assuming that use of an impermissibly obtained confession is justified to rebut improper argument by counsel, the facts of this case do not justify use of the confession because the argument of counsel here was not improper. It was the State’s burden to prove beyond a reasonable doubt that Appellant was guilty. It was not Appellant’s burden to prove his innocence. A reasonable

---

114. *People v. Fregoso*, No. F050895, 2008 WL 1850973, at \*16 (Cal. Ct. App. Apr. 28, 2008).

115. 844 So. 2d 728 (Fla. Dist. Ct. App. 2003).

116. *Id.* at 731–32.

117. *Id.* at 731.

118. *Id.*

119. *Id.*

120. *Id.* at 731–32.

121. *Id.* at 733.

doubt might occur when evidence is lacking or when it is discredited. Therefore, a defense lawyer's duty during closing is to challenge the sufficiency and credibility of the State's proof. Counsel is free to argue these issues using all reasonable inferences that might be drawn from the evidence. That is all that was done here. We conclude, therefore, that the court erred in admitting the confession.<sup>122</sup>

Thus, despite the prosecutor's claim that "admission of the confession was necessary to prevent [defense counsel] from misleading the jury by suppressing the truth" and from making an "argument that he knew to be false in fact," the court held using the absence of evidence to challenge the state's case was perfectly appropriate.<sup>123</sup> Indeed, such argument and its potential for "suppressing the truth" was a contemplated consequence of exclusion:

Application of the exclusionary rule, for example, usually results in the suppression of evidence, either physical or testimonial, that might disrupt the truth-seeking objective of a jury trial. On balance, however, the courts have reasoned that the suppression of truth is justified when important constitutional rights are to be vindicated.<sup>124</sup>

The *Fregoso* trial and appeals courts' suggestion that counsel either acted improperly or opened the door to the suppressed proof merely by pointing out the absence of physical evidence connecting Fregoso to the murder scene, therefore, cannot be any more right than the court in *Johnson*.

### *C. The Inference That Suppressed Evidence Does Not Exist*

The overly broad claim that exploiting the absence of suppressed evidence alone opens the door masks a more subtle analysis of using suppression as a shield but not a sword that may be influencing the courts. Defense counsel in *Fregoso* did not just urge the jury to consider the absence of suppressed evidence. He asked it do so after eliciting that the criminalist had collected plant material that prosecutors potentially could match to defendant's suppressed clothing, effectively suggesting, in the absence of matching evidence, that none was found.<sup>125</sup> The prosecution initially had the criminalist testify generally to taking photographs and collecting evidence at the scene, but did not specifically elicit that she had collected plant

---

122. *Id.* at 731–32.

123. *Id.* at 732.

124. *Id.*; see also *United States v. Duffy*, 133 F. Supp. 2d 213, 218 (E.D.N.Y. 2001), *overruled on other grounds by United States v. Velez*, 354 F.3d 190, 195 (2d Cir. 2004) (rejecting the government's claim that allowing defendants to exclude inconsistent statements made in plea negotiations after testifying "prevents a 'fraud on the court.' That the Court is aware of facts which will be unknown to the jury is not significantly different from the suppression on constitutional grounds of a defendant's statements or other evidence. Indeed, Rule[] . . . 410, . . . referred to in *Mezzanatto* as creating a privilege of the defendant, specifically contemplate[s] that statements made by a defendant during plea discussions will be excluded at trial.").

125. *People v. Fregoso*, No. F050895, 2008 WL 1850973, at \*16 (Cal. Ct. App. Apr. 28, 2008).

material and photographed footprints.<sup>126</sup> Although the trial court warned defense counsel against eliciting those facts, the prosecution recalled the criminalist and elicited the plant material evidence, but not the footprints. Thus when counsel argued the prosecution had produced no physical evidence, the jury likely understood it as a claim that no connection to the cornfield had been found from the plant material.<sup>127</sup> While that claim was true enough, the similarity between the sneakers and the footprints did constitute physical evidence that tended to place the defendant at the scene. The court held it was “unfair for the defense to use the clothing to argue Fregoso was not at the crime scene, when the shoes arguably did link him to the scene.”<sup>128</sup> The court might have reasoned that the jury, evaluating evidence that investigators collected plant material but produced no matching evidence at trial, would interpret counsel’s reference to the lack of physical evidence to indicate that investigators failed to find *any* trace evidence *for which they would likely search*, including footprints.<sup>129</sup> In any event, it is sufficient to focus on the court’s view that surely eliciting the footprints—one of which matched the suppressed sneakers—opened the door to the sneakers. Otherwise, admitting the footprints would surely mislead the jury into concluding that no match for them was found.

On this view, the *Fregoso* court reacted to defense counsel’s exploiting the evidence’s suppression to introduce the footprints and thereby suggest there was affirmative proof the defendant had no matching sneakers, rather than merely argue the significance of their not being produced at trial. If so, counsel took improper advantage only at the point at which he took steps calculated to suggest police found no physical evidence connecting the defendant to the scene rather than merely to argue that the prosecution’s failure to produce it left a reasonable doubt.

*People v. Payne*<sup>130</sup> shows a court using a similar distinction to allow counsel to argue the absence of suppressed evidence at trial, but not to suggest that the evidence was not found. In *Payne*, the court held the defendant opened the door to admission of a suppressed gun found in an apartment when he elicited evidence that police had searched the apartment.<sup>131</sup> Without waiting for summation, the court admitted the gun seized in the illegal search to rebut the “false implication that nothing connected with the robbery was recovered during the search.”<sup>132</sup> The court believed proof of the search coupled with the lack of evidence of its fruits

---

126. *Id.* at \*15.

127. *Id.* at \*16.

128. *Id.*

129. Alternatively, the trial judge simply may have thought it unfair selectively to introduce the exculpatory plant material evidence and exclude the inculpatory footprint evidence, noting “because the clothes and shoes were both suppressed, he could not ‘separate the clothing with the trace evidence . . . and the shoes . . . .’” *Id.*

130. 456 N.E.2d 44 (Ill. 1983).

131. *Id.* at 48–49.

132. *Id.* at 50.

would potentially mislead the jury into finding the search had come up empty.<sup>133</sup> Moreover, waiting for summation to see how counsel would use evidence of the search apparently was not necessary because, considering its fruits were suppressed, the fact it occurred was not relevant *except* to suggest nothing was recovered.<sup>134</sup>

The *Rogers* court suggested a similar distinction. While holding defense counsel's argument about the lack of "hard evidence" showing that his client rather than a codefendant was the shooter did not open the door to his client's confession, the court nonetheless wrote that defense counsel may open the door to suppressed evidence if his "questions falsely suggest a lack of evidence that the lawyer knows exists, but which was subject to pretrial suppression."<sup>135</sup> The analysis rested on the primary distinction between exploiting suppression properly to "challenge the sufficiency . . . of the State's proof . . . using all reasonable inferences that might be drawn from the evidence"<sup>136</sup> and improperly to establish there was no such evidence as was known to exist, but which had been suppressed.<sup>137</sup> It also said arguments and questions designed to suggest suppressed evidence had not been found were improper, though the remedy for counsel's merely suggesting that and eliciting testimony to that effect would differ.<sup>138</sup> The opinion noted courts can deal with improper argument and questions by sustaining objections and, ultimately, reminding counsel of ethics rules.<sup>139</sup> But "[w]hen a lawyer questions a witness, the answer is evidence,"<sup>140</sup> whose impact on the jury might be counteracted only by admitting the suppressed proof.

However appealing and, perhaps, necessary it may be to distinguish between asserting suppressed evidence does not exist and merely arguing the significance of its absence at trial, there is no basis for finding the former gives defendants an unfair evidentiary advantage by allowing the jury to decide based on a false fact. Although the distinction between the "absence of evidence" and "evidence of absence" is critical to good science,<sup>141</sup> it is largely irrelevant to legal factfinding when the prosecution bears the burden of proof and the defendant, who has no obligation to produce evidence, seeks to capitalize on the prosecution's failure to produce it. The structure of a criminal trial places the burden of producing evidence on the prosecution, and we ask the jury to make a decision based on the

---

133. *Id.*

134. *Id.*

135. *Rogers v. State*, 844 So. 2d 728, 733 n.4 (Fla. Dist. Ct. App. 2003).

136. *Id.* at 733.

137. *Id.* at 733 n.4.

138. *Id.* at 732 n.3.

139. *Id.* ("Standard jury instructions caution juries that closing arguments do not constitute evidence. Ethics rules prohibit lawyers from making improper arguments, and trial judges have the power to prevent improper argument by granting timely objections.")

140. *Id.* at 733 n.4.

141. Carl Sagan popularized the aphorism "Absence of evidence is not evidence of absence" in *The Fine Art of Baloney Detection*, *THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK* 201, 213 (1996).

presence or absence of evidence actually produced at trial.<sup>142</sup> From their perspective, there is little difference between deciding a case based on the absence of evidence produced at trial and the absence of evidence found outside the courtroom in an illegal search. The significance of the missing evidence depends far more upon the jury's expectation of its production if the proposition the prosecution seeks to prove is true.<sup>143</sup> In turn, that expectation depends upon numerous factors that dwarf whether the jury concluded authorities did not find it, or simply decided the case without ever considering the reason for its absence. Of critical importance is what all the other evidence in the case along with common experience suggests about the probability the evidence would exist if the defendant were guilty and that the prosecution can find and produce it if it did exist.

Explaining *why* the prosecution did not produce the proof defeats the purpose of exclusion and so evidence of the suppression obviously cannot be admitted to explain its absence. Without an explanation for its non-production, we expect the jury to assess the significance of the evidence's absence for the strength of the prosecution's case without speculating about the existence of a legal impediment to its production that changes its probative worth. So we ask them to consider the evidence before them as a closed universe, which effectively asks them to decide as if all the evidence available to them is all they discovered during the investigation, or, at least, all upon which they can legitimately rely. Assessing the strength of the evidence that is lacking, they may consider that any evidence not before them does not exist outside the courtroom (why else would the prosecution not offer it?) or, perhaps, even that the prosecution failed to pursue it. Both of those explanations are, of course, untrue if one credits the prosecution witnesses testifying to the illegal search and its fruits, but they do not exact a factfinding cost that is unfair from the perspective of what we ask a jury to do.

We ask a jury to decide whether reasonable doubt remains by assessing the significance of missing evidence for the strength of the prosecution's case, a process that may require them to consider possible reasons for its absence. If they do not speculate about a reason for its non-production that is unrelated to its probative worth within the closed universe of evidence they have heard, they are doing exactly what we ask them to do. Assuming some legal impediment such as an illegal search exists, and then considering that impediment to diminish the significance of the evidence's absence within the context of all the proof, is exactly what we do *not* want the jury to do. So even if the jury should consider the absence

---

142. Science makes for a useful comparison. Where neither proponent of conflicting views about a scientific hypothesis bears the burden of proof, the absence of evidence about it is neutral. *Id.* at 210–11. In law, the absence of evidence weighs against the party who bears the burden of proof.

143. On the importance of juror expectations, see, e.g., *Old Chief v. United States*, 519 U.S. 172, 188–89 (1997); Stephen A. Salzberg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1019 (1978). On the dependence of evidence's probative value upon the presence or absence of other evidence, see RONALD J. ALLEN ET AL., *EVIDENCE: TEXT, PROBLEMS, AND CASES* 142 (5th ed. 2011).

of physical evidence a consequence of a search that came up empty or an inadequate investigation, they are still properly assessing its significance for the strength of the prosecution's case. What really matters most is that they do not speculate about its absence for reasons besides those relevant to their job—to reach a conclusion about the strength of the closed universe of proof before them.<sup>144</sup> From the perspective of probativity, that the evidence “merely” does not exist at trial for the jury to consider is not significantly different from the evidence's not having been discovered outside the courtroom. Either way, the prosecution's case needs to be judged without it.

Moreover, as the discussion of opening the door to admission of evidence excluded for factfinding accuracy shows, counsel hardly needs to suggest that absent evidence does not exist to make it particularly probative. The suggestion the prosecution's case fails to eliminate a reasonable doubt that remains because of the absence of the evidence is more than sufficient.<sup>145</sup> So avoidance of an unfair evidentiary advantage does not justify this attempt to distinguish between the use of the exclusionary rule as a mere shield and as a sword. Far more important to the significance of the excluded evidence is how its relationship to other proof affects the jury's expectation that the evidence would exist and the prosecution can produce it if the defendant were guilty, *despite* whether counsel is trying to establish it does not exist at all or “merely” that its absence at trial matters. To the defendant, who has no burden, it is far more important to establish the importance of the missing evidence than to establish why it is missing, as long as the jury does not speculate about a reason for its absence that is unrelated to the strength of the prosecution's case.<sup>146</sup>

Moreover, the two forms of persuasion ultimately cannot help but overlap. When counsel urges the particular significance of the evidence's absence in the context of the proof, she heightens the jury's expectation that they would produce the evidence if the defendant were guilty. Doing so thus makes it more likely the jury will consider its non-production a sign it does not exist or that the prosecution failed to pursue it. Consider *Payne*. The court believed that proving the search occurred unfairly allowed the defense to “affirmatively misrepresent or falsely imply that the police found no physical evidence connected with the robbery during their search” rather than merely to “argue the lack of corroboration of the identifications or point out that the State's case depended almost entirely upon the

---

144. See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 619–23 (2011) (deterrent effect of the exclusionary rule depends upon jurors' not inferring from gaps in the prosecution's proof that probative evidence was excluded, and then relying upon the existence of that extrajudicial proof, consciously or unconsciously, when evaluating the prosecution's case).

145. See *supra* text accompanying notes 85–88.

146. Cf. Jacobi, *supra* note 144, at 630–33 (noting if the jury were to fill “natural holes” in the prosecutor's case by speculating about whether probative evidence was found and suppressed, and if that speculation affects its evaluation of the prosecution's case, deterrence would require courts to allow defense counsel to use the absence of suppressed evidence at trial as proof that it does not exist.).

reliability of the identification testimony.”<sup>147</sup> But it immediately and (presumably) unwittingly revealed how slippery that distinction could be when it noted “[t]he problem in this case arose . . . from cross-examination and potential argument by the defense which *falsely implied the absence of physical evidence connecting defendants with the crimes.*”<sup>148</sup> The ambiguity in the sentence between the absence of physical evidence *introduced at trial* or *discovered during the search* is telling. To argue the lack of corroboration, defense counsel obviously had to argue (at a minimum) the absence of physical evidence produced at trial connecting Payne to the crime. But to argue its significance, he also had to ask the jury to consider that it should exist and be produced if they adequately proved the identification.

That the police searched the apartment where they arrested the defendant the same day as the robbery surely increased the likelihood that corroborating evidence would be produced if it existed, and with it the likelihood the jury would conclude from its non-production that it was not found. Nevertheless, evidence the defendant carried a weapon, made off with proceeds of the robbery, and was arrested in the apartment shortly after the robbery alone, *without mention of the search at all*, also increased the likelihood that corroborating evidence should be found and produced. Those facts magnify the significance of corroborating evidence’s absence while unavoidably increasing the likelihood that the jury would falsely conclude they produced none because none was found.<sup>149</sup> Yet the false explanation for the gap in the proof does not meaningfully increase its significance, conferring no unfair evidentiary advantage.

While factfinding does not suffer when counsel’s highlighting the significance of suppressed evidence unavoidably suggests it was not found, deterrence clearly does when courts use that circumstance to justify admitting illegally obtained evidence. Counsel, anxious to avoid opening the door, is deterred from establishing the significance of absent evidence because, by doing so, he also suggests it does not exist.<sup>150</sup> Just as evidence of a search without its fruits (as in *Payne*)

---

147. *Payne*, 456 N.E.2d at 46–47.

148. *Id.* at 46 (emphasis added).

149. Alternatively, the jury might consider that the prosecution failed to search for the evidence. But the significance of the gap in the proof would not differ materially. A rational jury considering the significance of missing evidence that it expected the prosecution to produce should not consider failure to search any more favorably for the prosecution by speculating that the evidence, though not produced, might yet exist. Apparently, the prosecution in *Fregoso* did not think so; while the court was concerned eliciting the plant material would create the impression that no incriminating physical evidence was found, the prosecution, at least at one point, complained that counsel’s eliciting the plant material without the footprints would “‘set[] up’ a failure to investigate argument.” *People v. Fregoso*, No. F050895, 2008 WL 1850973, at \*16 (Cal. Ct. App. Apr. 28, 2008).

150. The Court has frequently explained exceptions to the exclusionary rule at trial undermine the rule’s deterrent effect when they “chill” defendants “from calling witnesses who would otherwise offer probative evidence” or “from presenting their best defense and sometimes any defense at all” because “[w]henver police obtained evidence illegally, defendants would have to assess prior to trial the likelihood that the evidence would be admitted.” *See James v. Illinois*, 493 U.S. 307, 314–16 (1990). An exception that is too broad or whose application is too uncertain engenders that effect. *Id.* at 315–16 (rejecting possibilities of only allowing impeachment of defense testimony “purposely presented” by defense counsel or in “direct conflict” with

suggested nothing was found, so does any proof or argument increasing the significance of potential evidence whose absence is unexplained suggest it does not exist. For example, if there were testimony the victim saw the perpetrator enter the apartment carrying weapons shortly before his arrest, the failure to produce weapons to corroborate the victim's identification of Payne as the perpetrator would be significant in a way it would not be without the testimony. If the defendant elicited the testimony, would it, like the search, open the door to the suppressed evidence because the testimony also "falsely impl[ied] that the police found no [weapons]?"<sup>151</sup> That is essentially what *Fregoso* held when it decided evidence of the footprints justified introduction of the suppressed sneakers.<sup>152</sup> If the prosecution elicited the weapons testimony, would the defendant still open the door by arguing reasonable doubt because the prosecution did not produce the weapons that its evidence suggests it can produce if the identification were accurate? *Fregoso* supports that result too. If counsel's introducing the evidence or making the argument in these scenarios opens the door, what is left of the *Rogers* court's holding that counsel can urge the jury to consider the sufficiency of the State's proof "using all reasonable inferences that might be drawn from the evidence"?<sup>153</sup>

The overlap between counsel's making effective use of the suppressed evidence's absence at trial and effectively suggesting it was not found means counsel legitimately doing the former will always run the risk of opening the door to the suppressed proof. This risk increases proportionately as defense counsel succeeds in highlighting the significance of the absent evidence in the context of the case. Meanwhile, the consequences of opening the door are dramatic. Admission of the suppressed evidence not only corrects the impression that suppressed evidence was not found; it establishes defense counsel as, at best, a thoroughly unreliable analyst of the strength of the prosecution's case or, at worst, a manipulator guilty of having deliberately misled the jury. The combination of uncertainty about a court's finding that counsel has opened the door and its Draconian consequence sends a powerful message.

To risk-averse defense counsel, avoiding opening the door is critical because doing so is an avoidable blunder fatal to the defendant's chances of acquittal. If factfinding were the only issue, that result would be unproblematic, but deterrence is the critical metric, and counsel's compulsion to take all steps necessary to prevent opening the door greatly diminishes it. To avoid any possibility of opening

---

suppressed evidence because the "inherent subjectivity" and "ex ante uncertainty" of the tests will "chill defendants' presentation of potential witnesses."). The chilling effect is certain to occur if courts hold counsel's exploiting the absence of suppressed evidence opens the door to its admission whenever the jury might infer from the importance of the missing evidence that it must not have been found because effective exploitation will *always* highlight the importance of the missing proof.

151. *Payne*, 456 N.E.2d at 47.

152. *Fregoso*, 2008 WL 1850973, at \*16-17; see *supra* text accompanying note 128.

153. *Rogers v. State*, 844 So. 2d 728, 733 (Fla. Dist. Ct. App. 2003) (emphasis added).

the door, counsel would have to allow the prosecution to determine the consequence of suppression by selectively introducing evidence to minimize the significance of the missing proof by, for example, omitting testimony that would lead the jury to expect suppressed corroborating evidence. Introducing evidence or making an argument that specifically called the jury's attention to facts leading them to expect the suppressed evidence would inevitably risk opening the door by suggesting that the absent evidence does not exist. The result would be similar to when a defendant waives his immunity against the use of plea discussions by allowing the prosecution to use his statements "to rebut any evidence or arguments offered by or on behalf of [the defendant]."<sup>154</sup> As a court interpreting such a waiver<sup>155</sup> observed, the provisions require counsel who wishes to avoid opening the door only to "argue reasonable doubt" because the government's witnesses "should not be believed," while prohibiting him from asserting "any affirmative theory of factual innocence" such as whether the charged crime occurred or whether the defendant committed it.<sup>156</sup>

Once counsel attempts to establish the proof is consistent with the defendant's factual innocence, as, for example, when the absence of expected corroborating evidence challenges the victim's identification of Payne or Fregoso's presence at the crime scene, he crosses the line between capitalizing on suppression to shield his client from the illegally-obtained evidence and using the evidence's absence to establish a contradictory theory of events based on a false fact, opening the door to the suppressed proof. Allowing the prosecution to use its illegally-obtained proof to eliminate the defendant's ability to advance a theory of factual innocence<sup>157</sup> thus confers a substantial benefit. At the very least, it confers a benefit that the Court's holding merely that suppressed evidence is inadmissible on the prosecution's case-in-chief does not contemplate. It is a long way from not considering the evidence when deciding the prosecution's affirmative case is sufficient to survive a motion for judgment of acquittal to allowing the evidence to prevent the defendant from developing any theory of factual innocence rebutted by the illegally-obtained evidence. In that distance, there is much room for the prosecution to realize that obtaining evidence illegally, while forgoing the opportunity to use it to survive a motion for judgment of acquittal, nonetheless makes the difference between a

---

154. See *United States v. Velez*, 354 F.3d 190, 192 (2d Cir. 2004).

155. See *United States v. Duffy*, 133 F. Supp. 2d 213, 216 (E.D.N.Y. 2001), *overruled on other grounds by United States v. Velez*, 354 F.3d 190. Defense counsel would be hamstrung even though the waiver in *Duffy* was arguably narrower than that in *Velez* because the former allowed rebuttal of "factual assertions" while the latter also permitted rebuttal of counsel's "arguments." Compare *Duffy*, 133 F. Supp. 2d at 214, with *Velez*, 354 F.3d at 192.

156. *Duffy*, 133 F. Supp. 2d at 216.

157. Advancing a theory of factual innocence includes suggesting an innocent factual scenario the prosecution's proof does not disprove beyond a reasonable doubt. It is therefore equivalent to advancing a theory of factual inadequacy enabled by the absence of the excluded evidence. That is precisely the reason why the prosecution—when it can—demands permission to use excluded evidence to rebut defense counsel's statements even though they do not constitute evidence. See *supra* notes 115–20 and accompanying text.

merely possible and certain conviction. That very possibility moved the *James*<sup>158</sup> Court to prohibit the general use of suppressed evidence for rebuttal, reasoning its contribution to factfinding accuracy could not justify the diminished deterrence resulting from its admission.<sup>159</sup>

Moreover, to the extent there is precedent, there is every reason for defense counsel to expect that highlighting the significance of the missing proof by establishing that its absence allows for an innocent factual scenario that the prosecution has not disproved would not automatically open the door. Just as the suggestion that nothing was found when Payne was arrested cast doubt on the victim's identification, the evidence that the defendant in *James* had changed his appearance before the crime cast doubt on his. But *James*' evidence did not open the door because using his confession to deter or rebut any exculpatory evidence besides his own testimony attached too extensive a reward for obtaining evidence illegally. We can hardly fault counsel for thinking any attempt to establish a theory of factual innocence, with evidence elicited from witnesses besides the defendant and ordinarily appropriate argument, would not open the door to the suppressed evidence. After all, if defense counsel can call a witness to testify Payne arrived at the apartment empty-handed without risking rebuttal, why—from the perspective of a jury's finding false facts—should eliciting there was a search open the door? If counsel can call a witness to testify that Fregoso was not at the crime scene without risking rebuttal, why should eliciting what investigators collected at the scene—to educate jurors about the kind of proof the prosecution might have produced to place him at the scene, but did not—open the door? So less risk-averse counsel may try it, but if the cases are any guide, they will do so with disastrous consequences certain to dissuade them, and others, from repeating the mistake.

#### *D. When Defendants Waive Protection Against Suppressed Proof*

Except for using suppressed evidence to impeach a testifying defendant, the deterrent purpose of the exclusionary rule requires defense counsel be allowed to elicit evidence and make arguments contradicted by suppressed evidence without

---

158. *James v. Illinois*, 493 U.S. 307, 319 (1990) (declining to allow impeachment of witnesses besides the defendant with suppressed evidence because “expanding the exception to encompass the testimony of all defense witnesses would not further the truth-seeking value with equal force but would appreciably undermine the deterrent effect of the exclusionary rule”).

159. *James v. Illinois*, 493 U.S. at 319 (“[M]uch if not most of the time, police officers confront opportunities to obtain evidence illegally after they have already legally obtained (or know that they have other means of legally obtaining) sufficient evidence to sustain a prima facie case. In these situations, a rule requiring exclusion of illegally obtained evidence from only the government's case in chief would leave officers with little to lose and much to gain by overstepping constitutional limits on evidence gathering. 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 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.”).

fear of opening the door.<sup>160</sup> This permission must encompass the ability to exploit all factual inferences available because of the absence of the suppressed proof, even though a consequence may be to allow the jury to conclude the suppressed evidence must not exist. That does not mean, however, there is no limit on the defendant's legitimate exploitation of the exclusion of illegally-obtained evidence, just that it cannot be justified by focusing on the probative value of suppressed evidence while turning a blind eye to deterrence when exclusion seems to pinch the most. This Section argues courts fairly require defendants to waive their protection against suppressed evidence when they seek to use evidence enabled by the violation about which they complain. That encompasses circumstances where they seek to introduce proof of an unlawful search or interrogation (including any resulting evidence) or when they ask the jury to consider why the suppressed evidence is absent at trial—for example, because the prosecution failed to pursue or to find it. In each of these cases, the defendant chooses to open a subject—the existence of the unlawful investigatory step, its product or the reason for the evidence's absence—closed for his benefit, and attempts to use suppression to make himself better off than he would have been absent the illegality.<sup>161</sup>

The circumstances under which defendants would waive their protection are far narrower than all the occasions upon which defense arguments or evidence will mislead in the absence of suppressed evidence, preserving deterrence even when counsel's emphasis on the importance of missing evidence might lead the jury to conclude that it does not exist. Simultaneously, however, it prevents counsel from exploiting evidence to whose acquisition he objects without waiving that objection.<sup>162</sup> It also prevents him from proffering an explanation for the evidence's absence enabled only by the need to prevent the prosecution from offering *its* explanation, with the effect of undermining suppression's goal.<sup>163</sup> The circumstances are narrower because they focus not on factfinding accuracy, but rather on the non-factfinding reasons for exclusion, and hold the door is opened when those

---

160. This result is required by *James's* injunction to prevent the prosecution from using illegally-obtained evidence to deter defenses (*James v. Illinois*, 493 U.S. 307, 314–15 (1990)), a goal that requires jurors—if they are to speculate about why evidence was not produced—to equate the absence of evidence with its nonexistence rather than to infer that it was found and excluded. Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 630–33 (2011).

161. The argument of this Part is similar to that applied by Richard L. Marcus to waiving the attorney-client privilege in *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605 (1986). Professor Marcus argues one can explain waivers of the attorney-client privilege only by recognizing that courts sometimes err by relying on “the unfairness of having a privilege, rather than the unfairness of the act relied upon, to show a waiver.” *Id.* at 1630. The argument aptly captures some courts' misuse of truthseeking to hold that defendants open the door to suppressed evidence by making it particularly probative. Although Marcus is skeptical of “using the purposes of the privilege to decide waiver issues,” and would have courts shift focus from “purposes of the privilege to purposes for waiver—to protect against unfairness,” his argument acknowledges that it is critical to prevent courts from defining unfairness to undermine the purpose of excluding the evidence in the first place. *Id.* at 1619, 1627. To that extent, the purpose of the privilege is paramount.

162. *Cf. id.* at 1627–28 (selective disclosure of material covered by attorney-client privilege justifies waiver).

163. *See infra* note 169.

reasons do not require continuing the defendant's immunity.<sup>164</sup>

The exclusionary rule creates an immunity from evidence obtained by violating defendants' rights to be free of unreasonable searches and seizures and pressure to make involuntary or uncounseled statements.<sup>165</sup> Defendants may, of course, waive their rights to have their case adjudicated without illegally-obtained evidence by choosing not to challenge investigators' actions.<sup>166</sup> By introducing evidence obtained illegally, the defendants should also waive their rights to exclude other evidence obtained in the same unlawful search, seizure, or interrogation as that which yielded the evidence they introduce. It does not advance the goal of protecting affected defendants from the consequences of those constitutional violations if they are not so much objecting to the violation of their rights as trying to take strategic advantage of it with evidence they would not otherwise have. While they undoubtedly would prefer to take advantage of suppression to use any exculpatory proof gathered illegally while excluding the inculpatory proof, there is no justification for allowing them to do so.

First, the underlying constitutional protections themselves address the authorities' actions, not the affected party's right to avoid only incriminating evidence gathered thereby.<sup>167</sup> A defendant insisting in good faith on protection from the consequences of authorities' illegality is hard pressed to claim that he is entitled to exploit those consequences selectively. Second, although one might imagine allowing defendants to make selective use of suppressed evidence imposes a penalty deterring violations even further, there is no reason to believe doing so is necessary. The police deciding whether to take the challenged investigatory measure undoubtedly anticipate that it will produce incriminating evidence. It is unlikely the decision to do so will be deterred by the prospect that, besides losing the anticipated inculpatory evidence, the prosecution may have to suffer some exculpatory evidence obtained during the same search, seizure or interrogation that can be rebutted only by inculpatory, but suppressed, evidence. The requisite

---

164. *Cf. Marcus*, *supra* note 161, at 1629–30 (waiver of attorney-client privilege should depend on whether privilege-holder seeks to make selective use of privileged material, not on whether he “raise[s] certain legal or factual issues” justifying loss of the privilege as the “price” of doing so). *Marcus* uses Judge Learned Hand’s distinction between application of an evidentiary privilege legitimately to “suppress” or improperly to “garble” the truth to help explain the unfairness of selectively using excluded evidence. *Id.* at 1627 (citing *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942)). While helpful, the distinction is hardly self-evident in various contexts and cannot fully justify an “Opening the Door” policy, which ultimately depends on whether the reasons for excluding particular types of evidence justify *either* consequence for the truth. *See infra* notes 167, 173 and accompanying text.

165. *See generally* *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

166. We do not prevent a defendant from electing not to challenge an unlawful search or interrogation to preserve exclusion’s deterrent effect on future violations.

167. U.S. CONST. amends. IV, V, VI. The Court has rejected the argument that deterring government misconduct requires imposing penalties beyond eliminating benefits from obtaining the proof when their prospect is likely to affect investigators’ future conduct. *See Harris v. New York*, 401 U.S. 222, 225 (1971) (suppression unjustified when the likelihood that admissibility of illegally-obtained evidence would encourage police misconduct is but a “speculative possibility.”).

deterrence is adequately achieved by making the defendant no worse off for the government's having obtained evidence illegally that is inadmissible on its case-in-chief or, under the circumstances, as rebuttal. It does not require selective use of the tainted evidence that, by making the defendant better off than he would have been without the government illegality, amounts to a windfall.<sup>168</sup>

Recasting opening the door as a question of waiving one's protection by seeking advantage enabled by the government's illegality offers a different perspective on the cases. First, waiving protection against suppressed evidence depends upon whether the evidence the defendant offers was obtained by the same illegal means to which the defendant objects, not whether it is contradicted by the suppressed evidence or creates an inference allowing the jury to conclude that it does not exist. *Fregoso* provides an example. Before the court allowed the prosecution to use Fregoso's suppressed clothing to show an inculpatory footprint in response to counsel's pointing out the absence of physical evidence placing Fregoso at the scene, it responded to his attempt partially to withdraw his suppression motion. Counsel sought to use the suppressed clothing to show it was free of plant material while nonetheless prohibiting the prosecution from using the sneakers to show the matching footprint.<sup>169</sup> Counsel later tried to use the sneakers to show they did not match some footprints, while preventing the prosecution from using the sneakers to show the match with other footprints.<sup>170</sup> Neither of these uses would be allowed under a waiver rule that requires the defendant to object to a search or suffer all evidence it produced. At one point, the court found its way to a similar conclusion when it finally explained the defendant could not introduce the clothing without the sneakers because they were "both suppressed,"<sup>171</sup> though the linchpin of waiver is not that they were both suppressed, but that they were discovered during the same unlawful search.

If they had seized the inculpatory sneakers in one unlawful search and the other clothing in another, there is no reason the defendant's choice to introduce the exculpatory clothing should prevent him from challenging the separate, unlawful search revealing the sneakers. Using probativity as a guide, however, the court struggled to explain why the defendant could not selectively introduce the clothing to establish the lack of plant material evidence, while nonetheless excluding the inculpatory footprints, finally suggesting that introducing the exculpatory evidence without the rebuttal was simply misleading.<sup>172</sup> But that rationale is far too

---

168. A similar result flows from a conception of the exclusionary rule as primarily concerned with restoring the status quo ante before the violation rather than deterring future violations. See Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261 (1998) (noting the purpose of the exclusionary rule is to put the state and the accused in the positions they would have been had the Constitution not been violated—neither better nor worse).

169. See *People v. Fregoso*, No. F050895, 2008 WL 1850973, at \*16 (Cal. Ct. App. Apr. 28, 2008).

170. See *id.*

171. *Id.*

172. *Id.*

broad; it cannot explain the doctrine that clearly permits the defendant to do exactly that if they obtained the exculpatory clothing lawfully while they obtained the inculpatory sneakers illegally.<sup>173</sup> The waiver rule, however, asks whether the defendant chooses to use evidence enabled by the unlawful search of which he complains. The *Fregoso* court decided *that* issue correctly. Since the clothing and sneakers were part of the same unlawful search, the defendant could not both complain of the violation and capitalize on it. But the proper rationale is not rooted in the probative value of the suppressed evidence considered against the defense the defendant advanced, or else we would admit it despite whether the defendant used evidence from the same, or a different, search to make his defense.<sup>174</sup> Similarly, Payne was subjected to a lawful search upon arrest that yielded nothing right before the illegal apartment search that produced the gun.<sup>175</sup> Had he offered evidence that the search of his person came up empty, he would not have waived his right to suppress the gun seized in the illegal apartment search.

*Payne* also presents the scenario of indirect proof of a search's result that merits similar analysis. Defense counsel refrained from directly eliciting evidence of what was seized, eliciting only that police had conducted a search. When linked to the prosecution's failure to produce any seized evidence, proof of the search created the inference that nothing was found. Indeed, since counsel did not seek to elicit anything they had seized, proof that authorities conducted a search had no relevance besides indirectly proving it came up empty. Consequently, the evidence amounted to proof of the search's results, justifying waiver as if counsel had directly elicited evidence that nothing was found in the search or selectively introduced some seized items. Moreover, the prohibition on mentioning the search works both ways. The prosecution's eliciting the search but not its outcome—daring the defendant to ask about what was found—is improper.<sup>176</sup> In this scenario, the relevance of the search is dependent upon the jury's inferring police found something incriminating that the prosecution cannot elicit and of which the defendant would rather have the jury be unaware. Courts need to prevent this and other indirect efforts to prove something incriminating was found, just as they need to prevent indirect efforts by defendants to prove that nothing incriminating was found. The way to do that is to prevent both sides from eliciting proof that the

---

173. This is a necessary consequence of the holding in *James v. Illinois*, 493 U.S. 307 (1990), that deterrence requires defense evidence besides the defendant's testimony to be immune from rebuttal with illegally-obtained evidence, however misleading the former may be in the absence of the latter. *See supra* text accompanying notes 27–30.

174. Nor is this result easily explained by the distinction between consequences of excluding evidence that merely “suppress” rather than “garble” the truth. *See supra* note 164.

175. *People v. Payne*, 456 N.E.2d 44, 49 (Ill. 1983). Payne's search was initially considered lawful because the trial court found probable cause to arrest, but it suppressed the weapons found in the refrigerator because they were not in an area within Payne's immediate control. *Id.*

176. *See United States ex rel. Castillo v. Fay*, 350 F.2d 400, 402–03 (2d Cir. 1965) (holding improper, but not constitutionally prohibited, for prosecution to elicit the search of defendant's apartment and say that “something” (but not what) was found, implying that incriminating evidence had been suppressed).

illegal investigatory step occurred at all.

The waiver rule also explains why the court's holding in *Payne* preventing the defendant from "affirmatively misrepresent[ing] or falsely imply[ing] that the police found no physical evidence connected with the robbery during their search"<sup>177</sup> should provide no support for courts, such as that in *Johnson*, finding counsel opens the door whenever she introduces evidence or makes an argument contradicted by suppressed evidence. The *Payne* court was careful to note the defendant could use the absence of physical evidence to "argue the lack of corroboration of the identifications" and "allowing the defense or prosecution to misrepresent to the jury the actual facts of the case is neither consistent with the proper functioning and continued integrity of the judicial system *nor with the policies of the exclusionary rules.*"<sup>178</sup> Considering the policies underlying the exclusionary rule, the court's reference to the "actual facts" misrepresented was to counsel's establishing that no evidence was found in the search rather than to his arguing inferences from the absence of the evidence for the strength of the prosecution's case. If the defendant wants to prove investigators found no incriminating items or to ask the jury so to conclude, he is free to do so, understanding he has waived his immunity to the prosecution's proof of what police actually discovered during the illegal search. Allowing him to do so without waiving his immunity is not necessary to achieve the purpose of the exclusionary rule, while arguing all the inferences from the absence of the evidence is. The "actual facts of the case" about whose misrepresentation *Payne* was concerned,<sup>179</sup> therefore, are those surrounding the illegal investigatory measure whose assertion is unnecessary to accomplish exclusion's purpose, not to the "actual facts" concerning the crime.

The waiver rule preserves the requisite deterrence that flows from the evidence's suppression in this circumstance as well. Prohibiting proof of the unlawful investigation amounts to prohibiting any explanation for why suppressed evidence is absent that implicates the existence of the investigation. We prohibit the prosecution's explanation for the obvious reason that allowing it would completely undermine deterrence. Meanwhile, meaningful deterrence depends upon the defendant's ability to expose weaknesses in the prosecution's case by exploiting the absence of suppressed evidence, including arguing why they should produce it to eliminate reasonable doubt. Allowing the defense to do so requires a test for opening the door that will not deter them from introducing evidence or making arguments suggesting innocent factual scenarios that the prosecution's lawfully-obtained evidence does not disprove. Allowing the defendant to suggest reasons why the prosecution failed to produce the evidence, however, is not necessary to

---

177. *Payne*, 456 N.E.2d at 47.

178. *Id.* (emphasis added).

179. *Id.*

do that effectively, while arguing the significance of its absence is. Closing off the prosecution's ability to raise this subject is necessary to create the desired deterrence and inures to the benefit of the defendant. There is no reason to allow the defendant to raise that issue, typically by asserting not only that the prosecution failed to produce evidence at trial, but the jury should thereby infer that it does not exist, without presumptively allowing the prosecution to respond. The deterrent effect does not depend upon an explanation for the evidence's absence; indeed the ideal deliberation omits speculation about any reason for its absence that does not bear on the ability of the prosecution's case to eliminate reasonable doubts.

Consequently, the defendant should be able to introduce evidence and make arguments about the importance of the missing evidence, even when its importance might lead a jury to think its non-existence must explain its absence—the prosecution having failed to find it. Nevertheless, the defendant *cannot ask the jury to draw that inference* directly or indirectly without opening the door.<sup>180</sup> This requires little sacrifice of the defendant who can make his point without asking the jury to speculate about reasons for its absence unrelated to the prosecution's case as we ask them to judge it. Meanwhile, prohibiting the defendant from offering his un rebutted explanation for the evidence's absence prevents him from taking unnecessary advantage of suppression. From the perspective of factfinding accuracy, the absence of suppressed evidence at trial and proof of its non-existence elide as argument or evidence showing the importance of missing proof increasingly suggests the prosecution must have failed to produce it because they did not find it. Yet from the perspective of whether the defendant should waive his protection by asking the jury to consider *why* they did not produce the evidence, all depends upon whether the defendant confined himself to arguing inferences from the absence of the proof. Although this allows the possibility the jury will imply from its importance that the absent evidence was not found, the point is not whether they are misled to that conclusion by the absence of suppressed evidence. That possibility always exists—and is tolerated—whenever we exclude evidence for reasons besides factfinding accuracy. The question is whether the defendant waives his protection against the explanation for the suppressed evidence's absence by himself interjecting this unnecessary issue.<sup>181</sup>

---

180. Again, this result is not explained by the distinction between consequences of excluding evidence that merely "suppress" rather than "garble" the truth. *See supra* note 164.

181. By asking the jury to conclude that no proof was found, the defendant asks it to find a fact whose support is enabled only by the evidence's suppression, making it roughly equivalent to selectively using evidence produced by government illegality. Similar examples include instances in which a defendant, rather than avoid mentioning a suppressed interrogation, introduces evidence of what he told the police during the interrogation. *See Doyle v. Ohio*, 426 U.S. 610, 619 n.11 (1976) (prosecution may use defendant's post-*Miranda* silence if the defendant claimed "to have told the police the same version upon arrest [as that offered at trial]," even though such silence would otherwise be inadmissible to impeach the defendant's testimony); *Groshart v. United States*, 392 F.2d 172, 178 n.4 (9th Cir. 1968) (implying in dicta even the prohibition on impeachment use of illegal statements yields "where the defendant's testimony puts in issue the very question of what he told the police")

Consequently, while Fregoso should not introduce the exculpatory plant material tests made with his suppressed clothing without waiving his right to object to the inculpatory footprint analysis developed with evidence obtained in the same unlawful search, he should be able to prove what the criminalist collected at the scene to make concrete the significance of the absence of trace evidence. Showing police collected footprints and plant material at the scene, and then pointing out the prosecution produced no evidence connecting the trace evidence to the defendant, was proper. The defendant did not use evidence produced by the unlawful seizure of his clothing nor argue investigators failed to find evidence connecting him to the collected material. When he introduces evidence the police found nothing connecting him to the material or asks the jury so to conclude, however, he opens the door.

The waiver rule promises a clearer standard by which courts can decide and counsel can anticipate when defense evidence or argument justifies introduction of suppressed evidence. Whether the defendant directly or indirectly introduces suppressed statements or physical evidence should be clear enough. Whether counsel merely asks the jury to consider the importance of missing evidence or to conclude the prosecution failed to find it, or is otherwise capitalizing on the prosecution's disability to explain the reason for its absence—created to protect the defendant—should also be relatively clear. Even indirect references to the reasons for the evidence's non-production such as "You know the prosecution would produce this evidence if it could" or "You bet it would be here if they found it" can open the door on this view. The key for counsel is simply to avoid argument about the reason they did not produce the evidence and focus instead on how its absence allows for reasonable doubt.

Moreover, as the *Rogers* court noted, when argument rather than evidence potentially opens the door, a court can more easily prevent and potentially cure the problem without admitting the suppressed evidence.<sup>182</sup> For defense counsel's purposes, arguing the absence of evidence that she establishes the jury should expect to see if the defendant were guilty will be sufficient. If counsel takes the next step to argue the evidence's absence supports the inference the police failed to find it, the judge can sustain an objection and remind counsel (outside the presence of the jury) of the consequences. If a sustained objection is not enough to stop it, the court can also remind the jury they are not to speculate about why they did not produce the evidence, just evaluate the significance of its absence from the prosecution's case. The hint of evidence outside the record on whose absence the defendant improperly commented should be incentive enough for counsel to refrain. As a last resort, the court can always admit the suppressed evidence. But with a rule establishing limits that also makes clear the wide latitude given counsel

---

(quoting *United States v. Armetta*, 378 F.2d 658, 662 (2d Cir. 1967)); *Hunt v. Cox*, 312 F. Supp. 637, 641–43 (E.D. Va. 1970) (reasoning defendant's post-arrest silence admissible to rebut defendant's testimony that he had offered an alibi to police at the time of his arrest).

182. See *supra* note 76 and accompanying text.

to take advantage of the absence of suppressed evidence without opening the door, it is unlikely it would frequently come to that.

### III. THE INTEGRITY OF THE TRIAL PROCESS AND ETHICAL RULES

Although setting limits on counsel's exploitation of evidence's exclusion justified by the purpose of the exclusionary rule, the standard for waiving protection against admission of suppressed evidence proposed in this Article amounts to naught if it violates prevailing conceptions of the integrity of the trial process or standards for attorneys' ethical conduct. The courts have occasionally used both rationales to justify using ordinary factfinding standards to hold the defendant opened the door to admission of suppressed evidence. In *Johnson*, the court argued the integrity of the judicial system prevented it from "allowing the defense . . . to misrepresent to the jury the actual facts of the case," and thus excluded defense evidence it found was false after considering suppressed proof inadmissible to rebut the defense evidence.<sup>183</sup> The trial court in *Fregoso* held the door was opened when there was not "any excuse" for counsel's actions "except to mislead the jury,"<sup>184</sup> a ruling which was affirmed on appeal with the gloss that "[a]n attorney commits misconduct by commenting on the adversary's failure to produce evidence the attorney knows was excluded by the court."<sup>185</sup> Finally, the *Rogers* court also suggested it would be improper for "a lawyer's questions falsely [to] suggest a lack of evidence that the lawyer knows exists but which was subject to pretrial suppression," even though it could properly "challenge the sufficiency . . . of the State's proof" by arguing "reasonable doubt . . . when evidence is lacking . . . using all reasonable inferences that might be drawn from the evidence."<sup>186</sup> This Part examines those claims and concludes neither the integrity of the trial process nor a defense lawyer's ethical duty of candor to the tribunal prevents counsel from arguing (and attempting to establish through proof) the prosecution's case fails to eliminate reasonable doubt about the defendant's guilt because of the absence of suppressed evidence. Consequently, neither claim justifies a court's holding such actions open the door to the suppressed evidence.

Within an evidentiary framework holding other goals sometimes trump factfinding accuracy, the integrity of the trial process cannot routinely require an advocate to refrain from urging a jury to reach conclusions assisted by their ignorance of evidence that the law excludes in pursuit of those other goals. If it did, application of any exclusionary rules not premised on factfinding accuracy—including those excluding plea discussions, settlements, and subsequent remedial measures—would itself violate that integrity. When the defense lawyer in *Fregoso*, for

---

183. *People v. Johnson*, 107 Cal. Rptr. 3d 228, 252 (Cal. Ct. App. 2010).

184. *People v. Fregoso*, No. F050895, 2008 WL 1850973, at \*16 (Cal. Ct. App. Apr. 28, 2008).

185. *Id.* at \*17.

186. *Rogers v. State*, 844 So. 2d 728, 733 n.4 (Fla. Dist. Ct. App. 2003).

example, elicits evidence collected at the crime scene to argue there is reasonable doubt because of the lack of proof connecting him to the evidence collected, the jury may conclude no such proof exists. But it might reach the same conclusion if defense counsel elicited nothing beyond what the prosecution elicited about the inspection of the crime scene and simply argued no physical evidence was produced, still leaving the jury to reason about what might have been produced, but was not. In either case, the jury might well be led to a conclusion they would not otherwise reach were the evidence admitted. But that is hardly to say they have been misled; we ask them to judge the sufficiency of the prosecution's case in the absence of the excluded evidence, and that is exactly what they have done. Defense evidence of what was collected, if not already introduced by the prosecution and if showing more than what the jury would already expect to have been collected, simply allows the defendant to make more effective, though not improper, use of the suppressed evidence's exclusion. Of course, by asking the jury to decide without the benefit of evidence that we would otherwise admit because of its probativity, we "mislead" them to the extent their exclusive function is to find the truth of what happened rather than to reach a decision based on the evidence our law permits. But it is the latter we ask them to do when we ask them to serve in a system where evidentiary rules occasionally subordinate truthseeking to other values.

The integrity of the trial process applicable here has a narrower meaning than it would have if the system were structured to serve the single goal of finding the truth. Indeed, when the appellate court in *Fregoso* affirmed because "[a]n attorney commits misconduct by commenting on the adversary's failure to produce evidence the attorney knows was excluded by the court,"<sup>187</sup> it relied on a case, *People v. Varona*,<sup>188</sup> that was inapt for many reasons. In *Varona*, a prosecutor, having successfully excluded evidence an alleged rape victim was a prostitute who worked the area where the charged rape occurred, "argued the 'lack' of evidence [the victim worked the area as a prostitute] where the defense was ready and willing to produce it [and] compounded that tactic by actually arguing that the [woman] was not a prostitute, although he had seen the official [conviction] records and knew that he was arguing a falsehood."<sup>189</sup> After finding the trial court erroneously excluded the evidence, the appellate court concluded the prosecutor's "whole argument went beyond the bounds of any acceptable conduct."<sup>190</sup> Reliance on *Verona* well-illustrates the pitfalls of indiscriminately applying ideas about what amounts to misconduct opening the door to otherwise inadmissible evidence across contexts.

To begin with, *Varona* involved evidence that was *improperly* excluded. That

---

187. *Fregoso*, 2008 WL 1850973, at \*17.

188. *People v. Varona*, 192 Cal. Rptr. 44 (Cal. Ct. App. 1983).

189. *Id.* at 46.

190. *Id.*

the evidence about whose absence the prosecutor commented should have been admitted alone distinguishes *Varona* from cases where evidence is properly suppressed.<sup>191</sup> Where the evidence about whose absence an attorney comments was improperly excluded, the misconduct, such as it is, simply follows from, and aggravates, the evidentiary error. Arguing the absence of the proof *per se* is not misconduct absent the wrongful exclusion of the evidence.<sup>192</sup> Moreover, if proper, the exclusion of the victim's prostitution was based on reasons linked to the evidence's probative value and capacity for prejudice inapplicable once the prosecutor himself made an issue of her other sexual behavior,<sup>193</sup> which is exactly what he did.<sup>194</sup> Excluding the proof only to assert its absence when raising the issue whose closure justifies exclusion was an attempt to have it both ways not contemplated by the rule, even if it excluded the prostitution evidence in the first place.<sup>195</sup> Finally, the prosecutor made an issue of the victim's other sexual behavior only after it was too late for the court easily to reverse the ruling premised on the prosecution's not doing so.<sup>196</sup> Having engaged in strategic delay to make unilateral use of an improperly applied rule which, even when properly applied, allows or excludes evidence equally from both sides, the prosecutor surely committed misconduct by, *inter alia*, commenting on the failure to produce evidence that he had excluded. But that provides no support for the proposition defense counsel does wrong to argue the failure to produce evidence properly suppressed by the constitutional exclusionary rule, whose purpose requires that the prosecution suffer adverse inferences from the evidence's absence.

Also, *Varona* involved a prosecutor, not a defense lawyer. While both, like all lawyers, are enjoined from offering evidence they "know[] to be false,"<sup>197</sup> their obligations differ when it comes to ethical use of evidence—or its absence—that does not fall into that category. A prosecutor has a special duty not to impede the

---

191. See, e.g., *People v. Daggett*, 275 Cal. Rptr. 287 (Cal. Ct. App. 1990) (asserting the prosecutor improperly misleads the jury by asking the jurors to draw an inference they might not have drawn if they had heard the evidence the judge erroneously excluded); cf. *People v. Herrera*, No. E051246, 2011 WL 2120214 (Cal. Ct. App. May 31, 2011) (holding it was not improper for prosecutor to argue the jury did not hear evidence the defendant chose not to introduce after the court deferred ruling on its admissibility rather than erroneously excluded the evidence).

192. *Herrera*, No. E051246, 2011 WL 2120214, at \*10 (asserting it is permissible to argue the absence of evidence that the defendant chose not to present).

193. See *State v. Williams*, 477 N.E.2d 221, 228 (Ohio Ct. App. 1984) (finding where alleged forcible rape victim testified on direct examination that as a lesbian she never consented to sexual intercourse with men, thereby putting her own sexual past at issue, the defendant's Sixth Amendment right to confront witnesses against him was violated as such right outweighed the interests of the state in excluding this type of evidence. Furthermore, "as the victim put her own sexual past in issue on direct examination, she waived the protections of [the rape shield laws] as far as any evidence of her past sexual conduct which was directly probative of and relevant to a material element of the charged crime.").

194. *People v. Varona*, 192 Cal. Rptr. 44, 46 (Cal. Ct. App. 1983).

195. See discussion *supra* notes 85–88.

196. The prosecutor's assertions were not made until summation. See *Varona*, 192 Cal. Rptr. at 46.

197. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2012).

truth that does not apply to defense attorneys.<sup>198</sup> In fact, inasmuch as the truth may be that a defendant is guilty, and zealous representation nonetheless entails finding fault with the prosecution's case, it has been said that "it is generally agreed that defense counsel's ethical duty to represent his client zealously includes an affirmative duty to impede the search of truth."<sup>199</sup> In *United States v. Wade*, the Court wrote:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty.<sup>200</sup>

Thus, the prosecutor's using the absence of the prostitution evidence he excluded in *Varona* to suggest the victim engaged in no such activity, and defense counsel's using the absence of physical evidence she suppressed in *Fregoso* to suggest he was not at the scene are treated quite differently, although both may impede the jury from finding the truth. A prosecutor has an obligation to the truth to avoid inferences disproved by excluded evidence. No obligation to refrain from arguing inferences misdirecting the jury from the truth as indicated by suppressed evidence requires defense counsel to avoid using its absence to show a reasonable doubt. *Varona* provides no support for the *Fregoso* court's claim "[defense counsel] commit[ted] misconduct by commenting on the adversary's failure to produce evidence the attorney knows was excluded by the court."<sup>201</sup> While there may be such situations, defense counsel's arguing the absence of suppressed evidence establishes reasonable doubt is not one of them.

The *Varona* court's observation that the prosecutor compounded his error by "actually arguing the woman was not a prostitute although he had seen the official [conviction] records and knew he was arguing a falsehood,"<sup>202</sup> is also inapplicable to *Fregoso*. Defense counsel was hardly guilty of arguing a falsehood by pointing out the lack of physical evidence placing the defendant at the scene. As the *Varona* court recognized, pointing out the lack of evidence of a fact and affirmatively

---

198. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 316 (2001). This duty is "special" in that it is unique to prosecutors. *See id.* at 316 n.38 (citing *United States v. Wade*, 388 U.S. 218, 256–58 (1967) (White, J., concurring in part & dissenting in part)).

199. *Id.* (citing *United States v. Wade*, 388 U.S. 218, 256–58 (1967) (White, J., concurring in part & dissenting in part)).

200. *United States v. Wade*, 388 U.S. 218, 256–57 (1967) (White, J., concurring in part & dissenting in part).

201. *People v. Fregoso*, No. F050895, 2008 WL 1850973, at \*17 (Cal. Ct. App. Apr. 28, 2008).

202. *People v. Varona*, 192 Cal. Rptr. 44, 46 (Cal. Ct. App. 1983).

asserting its opposite are not the same thing.<sup>203</sup> Even if the asserted fact is true, it is misconduct for an attorney to put himself in the position of being a witness by making a factual assertion that reflects his personal knowledge or belief because it invites the jury to speculate about off-record evidence.<sup>204</sup> Thus the assertion in *Varona* that the victim was not a prostitute would be improper quite apart from whether the prosecutor had successfully suppressed evidence of her prostitution to the extent it was not supported by inferences from evidence in the record.<sup>205</sup> In the absence of such proof, the jury could not understand the assertion as an argument about what the evidence showed or failed to show, leaving it to rely on the prosecutor's presumed extra-record knowledge of the matter.

Defense counsel in *Fregoso* made no such argument. The court acknowledged she had merely pointed out the lack of evidence of the defendant's presence at the crime scene and did nothing to suggest extra-record knowledge that he had not been there. Indeed, even by the court's account, defense counsel had not phrased her argument about a lack of physical evidence connecting the defendant to the scene *generally*, rather than a lack of such evidence produced *at trial*.<sup>206</sup> Thus the court could not have worried counsel was possibly making an argument that was literally false (there was, in fact, some such evidence, though not admitted) even if the distinction would be lost on the jury instructed evidence consists only of proof

---

203. *Id.* (arguing the victim was not a prostitute compounded the error in arguing the lack of evidence of prostitution).

204. *See, e.g.,* *United States v. Cotter*, 425 F.2d 450, 452 (1st Cir. 1970) ("Essentially, the prosecutor is to argue the case. He may discuss the evidence, the warrantable inferences, the witnesses, and their credibility. He may talk about the duties of the jury, the importance of the case, and anything else that is relevant. He is not to interject his personal beliefs. The prosecutor is neither a witness, a mentor, nor a 'thirteenth juror . . . .'"); *Greenberg v. United States*, 280 F.2d 472, 475 (1st Cir. 1960) ("To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon to be elemental and fundamental."); *see also* NEW YORK RULES OF PROF'L CONDUCT R. 3.4(d)(4) (2012) ("A lawyer shall not . . . assert personal knowledge of facts in issue except when testifying as a witness."); MODEL RULES OF PROF'L CONDUCT R. 3.4 (2012) ("A lawyer shall not . . . (e) . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . ."). *See generally* James W. Gunson, *Prosecutorial Summation: Where is the Line Between "Personal Opinion" and Proper Argument?*, 46 ME. L. REV. 241 (1994).

205. It is improper for counsel to sum up on evidence beyond that admitted at trial. *See, e.g.,* *United States v. Quinn* 467 F.2d 624, 627 (8th Cir. 1972) ("It is well settled that the arguments of counsel must be confined to the issues of the case, the applicable law, pertinent evidence, and such legitimate inferences as may properly be drawn.") (citing *Wakaksan v. United States*, 367 F.2d 639, 646 (8th Cir. 1966)). These rules are all versions of the idea that attorneys must confine their arguments to the world of evidence admitted at trial.

206. *Fregoso*, 2008 WL 1850973, at \*16 (arguing "there was no evidence presented by the prosecution connecting my client to the cornfield") (emphasis added).

admitted at trial.<sup>207</sup> Thus counsel was careful in summation to argue the evidence, and even then careful to direct her comments to the evidence produced at trial rather than to evidence that might otherwise exist, although unnecessary in this context.<sup>208</sup>

That is not to say counsel would not have crossed the line into misconduct by asserting there was no evidence *found* connecting the defendant to the scene. That claim would be literally false and potentially construed by the jury as counsel's assertion of a fact unsupported by a record that did not affirmatively address, much less show, the absence of such extrajudicial proof. The misconduct, however, is no broader than the actions discussed in the previous Part as triggering a waiver.<sup>209</sup> Should counsel err, the court would need to ask whether the error merited introduction of suppressed counter-proof rather than interruption of the argument, unless counsel persists in his claim.<sup>210</sup> A jury instructed to decide based on the evidence or lack of evidence admitted at trial that is not speculating about the possibility of extrajudicial proof will find no significant difference between the claims that no evidence was *found* and no evidence was *produced at trial* that connected the defendant to the scene.<sup>211</sup> Nonetheless, counsel's repeated attempts to establish that nothing was found should waive protection against the suppressed evidence.<sup>212</sup> The integrity of the factfinding process demands as much even though factfinding would hardly be improved. Conversely, factfinding integrity—rather than accuracy—does not require counsel be prohibited from arguing the inferences from the absence of suppressed evidence for the sufficiency of the prosecution's case. As the *Payne* court recognized, the integrity of the process in this context is properly protected by preventing defense counsel from affirmatively misrepresenting the prosecution's investigation while allowing her to exploit suppression of its unlawful fruits.<sup>213</sup> The *Rogers* Court had it exactly right when it said although counsel could draw all inferences from the absence of proof to establish reasonable doubt, he could not "falsely suggest a lack of evidence that the lawyer knows

---

207. See JOHN S. SIFFERT ET AL., 1–2 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL § 2.01 (Matthew Bender 2012) ("The evidence before you consists of the answers given by witnesses—the testimony they gave, as you recall it—and the exhibits that were received in evidence . . . . You may also consider the stipulations of the parties as evidence."); PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURT OF THE FIRST CIRCUIT § 3.04 (2012) ("The evidence from which you are to decide what the facts are consists of sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness; the exhibits that have been received into evidence; and any facts to which the lawyers have agreed or stipulated . . . . You are permitted to draw from facts that you find to have been proven such reasonable inferences as you believe are justified in the light of common sense and personal experience.").

208. Since the jury is instructed evidence consists of that admitted at trial, it is usually redundant for counsel to refer to evidence "received at trial."

209. See *supra* Part II.D.

210. See *supra* text accompanying notes 181–82.

211. *Id.*

212. *Id.*

213. *People v. Payne*, 456 N.E.2d 44, 47 (Ill. 1983).

exists.”<sup>214</sup> The “lack of evidence” to which it referred was the improper suggestion that evidence had not been found, not the proper argument that, considering all reasonable inferences from the proof, the absence of certain evidence at trial establishes reasonable doubt.<sup>215</sup> As these courts show, there is no reason to think the constitutional exclusionary rule—like other rules excluding evidence for reasons besides probativity—cannot be part of the fabric of factfinding integrity.

Effectively using the absence of suppressed evidence to establish reasonable doubt also does not violate a lawyer’s obligation of candor to the tribunal. Ethical rules prohibit a lawyer from offering evidence the lawyer “knows to be false” while allowing (though not requiring) a lawyer to “refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”<sup>216</sup> These rules are justified, in part, by the need to protect “the integrity of the adjudicative process,” which requires the lawyer prevent the tribunal from being “misled by false statements of . . . fact or evidence that the lawyer knows to be false.”<sup>217</sup> While the comments, when addressing the lawyer’s responsibility to disclose a client’s false testimony, speak of “subverting the truth-finding process which the adversary system is designed to implement,”<sup>218</sup> the obligation falls well short of imposing a responsibility on the defense lawyer for the factfinder’s conclusions that would prevent him from introducing evidence or making arguments that the suppressed evidence contradicts.<sup>219</sup>

First, the likelihood the suppressed evidence would rise to the level of establishing the attorney “knows” that evidence contradicting the suppressed proof is false is remote. “Knows” in this context means “actual knowledge,”<sup>220</sup> and although that knowledge “may be inferred from circumstances,”<sup>221</sup> it must “ordinarily [be] based on admissions the client has made to the lawyers.”<sup>222</sup> In any event, no court in the cases discussed in this Article remotely suggested counsel had engaged in an ethical violation of this sort. Indeed, the evidence defense counsel sought to elicit—the misidentification in *Johnson*, the collection of specimens in *Fregoso*, even the existence of the search in *Payne*—was true, and the only issue was the inference that the factfinder might draw in the absence of contradictory, but

---

214. *Rogers v. State*, 844 So. 2d 728, 733 n.4 (Fla. Dist. Ct. App. 2003).

215. *Id.*

216. MODEL RULES OF PROF’L CONDUCT R. 3.3 (2012).

217. MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 2 (2012).

218. *Id.* at cmt. 11.

219. I am assuming here the suppressed evidence does not rise to the level of establishing that the attorney “knows” the evidence contradicting the suppressed proof is false, as would rarely be the case. *See infra* notes 220–22 and accompanying text. Moreover, “false” in this context generally refers to the evidence itself rather than to the inferences that may be drawn from it. So the cases focus on a lawyer’s knowledge of a witness’s perjury, not on whether a witness’s truthful testimony might induce the factfinder to reach a false conclusion. *See infra* notes 223–25 and accompanying text.

220. MODEL RULES OF PROF’L CONDUCT R. 1.0(f) (2012).

221. *Id.*

222. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 87-353 (1987).

suppressed evidence.<sup>223</sup> The ethical rules do not make the defense lawyer responsible for that inference, just as she is not responsible for furthering the quest for truth.<sup>224</sup> For instance, the rules specifically do not *require* lawyers to avoid presenting evidence even if they reasonably believe it (but do not know it) to be false.<sup>225</sup> It merely creates an option to do so. If the lawyer is not responsible for the factfinder's potentially inaccurate conclusion after presenting evidence he reasonably believes is false, it cannot follow that he is bound to refrain from presenting truthful evidence that may mislead in the absence of suppressed evidence.

Second, even when there is an obligation not to present testimony because it is known to the lawyer to be false, that obligation may yield to other goals, such as the defendant's right to testify. Thus the rules contemplate that the defense lawyer's responsibility is not to the accuracy of factfinding *per se*, but rather to the integrity of the process designed to produce truth *within boundaries sometimes established by competing goals*. The rules, for instance, clearly distinguish between the lawyer's obligation to the "tribunal"<sup>226</sup> and to the factfinder.<sup>227</sup> The lawyer's responsibility ends at notifying the court of testimony he knows to be false if the client is unwilling to cooperate in further remedial action, leaving it to the court "to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing."<sup>228</sup> In no event is the defense lawyer directly responsible for the accuracy of factfinding rather than to the court, which we charge with protecting the integrity of an adjudicative process whose rules sometimes subordinate accurate factfinding to other goals.

The candor-to-the-tribunal rules dovetail with trial conduct and other ethical rules to reinforce the advocate's limited responsibility for the outcome. The rules require advocates to avoid making themselves witnesses in cases they argue, to avoid appearing to have personal knowledge of events at issue in the trial, and to refrain from making arguments beyond those supported by the evidentiary record (which, as stated, does not contain their testimony).<sup>229</sup> The advocate should not be making *any* statements based on personal knowledge which the factfinder can

---

223. "False" in this context thus refers to the evidence itself rather than to the inferences that may be drawn from it. So the cases focus on a lawyer's knowledge a witness has testified or intends to testify falsely, not on whether his testimony might induce the factfinder to reach a potentially false conclusion in the absence of other evidence.

224. See *supra* text accompanying note 210.

225. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2012).

226. See MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2012) ("'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.").

227. See, e.g., *Salazar v. Patel*, No. 00CECG11130, 2007 WL 2019803, at \*11 (Cal. Ct. App. July 13, 2007) (distinguishing between judge, which is encompassed within term "tribunal" under Rule 3.3, and jury, which as fact-finder, is not).

228. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 10 (2012).

229. See *supra* text accompanying notes 204–05.

properly consider as evidence. Consequently, “the false statements . . . of fact”<sup>230</sup> from which the advocate must refrain are those made to the court in its supervisory role; otherwise the advocate’s role is not to make statements of fact at all, unless they are statements *about the evidence*—in effect, descriptions of others’ statements and assertions—made while arguing the inferences the advocate would have the factfinder draw from them. Before the jury, the advocate is required to act as if he only has personal knowledge of the proof adduced at trial, not of external factual matters relevant to the case. The advocate does not violate the duty to refrain from knowing presentation of evidence she knows, or even reasonably believes, is false by accurately describing the evidence (or lack thereof) and arguing its significance for deciding whether a party has met its burden of proof. There is simply no fraud on the tribunal in taking advantage of the absence of evidence about which the court surely knows, having excluded it by virtue of evidentiary rules.<sup>231</sup> Nor is there any fraud in truthfully asserting the absence of that evidence while asking the factfinder to consider its absence when deciding whether certain facts have been adequately proved. Indeed, there is nothing in the rules suggesting there is any fraud in calling a witness to testify to matters which, although true, support an inference inconsistent with the excluded proof, and then to urge the factfinder to draw the inference. Far from it; that is exactly what we should expect a defense lawyer to do when zealously representing his client within an adversarial system.<sup>232</sup>

Zealous advocacy that uses the absence of suppressed evidence to show the weakness of the prosecution’s case, but does not affirmatively misrepresent the facts of the investigation, is consistent with the integrity of a factfinding process that draws a prudential, but significant line between withholding evidence from juries for a variety of reasons and asking them to consider false proof. A prepared investigator who participated in an illegal search knows that an innocuous “What happened next?” question from the prosecutor does not justify describing an illegal search, but he is not prohibited from describing the search should defense counsel ask about it. Where rules exclude evidence at all, including those intended only to promote accurate factfinding, we understand the necessity of distinguishing between a witness’s telling the whole truth, and truly answering questions while omitting inadmissible evidence unless specifically asked about it.<sup>233</sup> The same distinction informs opening the door to evidence suppressed by the exclusionary rules. Arguments urging jurors to conclude the prosecution did not produce

---

230. MODEL RULES OF PROF’L CONDUCT R. 3.3 (2012).

231. *United States v. Duffy*, 133 F. Supp. 2d 213, 218 (E.D.N.Y. 2001), *overruled on other grounds by United States v. Velez*, 354 F.3d 190 (2004).

232. Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 316 (2001) (noting zealous representation can require defense counsel in the adversary system to impede the search for truth by finding fault with the prosecution’s case).

233. See Bruce A. Green, *The Whole Truth: How Rules of Evidence Make Lawyers Deceitful*, 25 LOY. L.A. L. REV. 699 (1992).

suppressed evidence because investigators failed to find it entail a waiver similar to that which would occur if defense counsel asked investigators whether they found additional evidence. In effect, the waiver reflects a morality appropriate to preserving the integrity of the jury's particular role; it prevents the exclusionary rule from requiring jurors to rely on evidence that is equivalent to testimony that could not have been given truthfully—effectively a lie—though, by necessity, they do not get to hear inadmissible evidence that might prevent them from inferring a false fact. The test suggested here respects the distinction between the equivalent of false testimony, unnecessary to accomplish exclusion's legitimate goals, and potentially false inferences drawn from the absence of proof, a necessary consequence of any rules excluding relevant evidence. It is entirely consistent with the integrity of the trial process and the ethical standards governing all its participants.<sup>234</sup>

### CONCLUSION

Courts holding defendants open the door to suppressed evidence by using exclusion as a “sword” to elicit proof or make arguments contradicted by that evidence negate the exclusionary rule's incentive to forego unlawful investigatory steps that the Supreme Court holds is necessary. Their reasoning applies conceptions about what opens the door to evidence excluded for reasons of accurate factfinding that are inapt when applied to rules justified by other goals. Whether a party opens the door to evidence excluded by a particular rule must be a contextual decision based on what the rule seeks to accomplish. If acquiring evidence unlawfully benefits the prosecution by preventing the defendant from introducing evidence or arguing inferences rebutted by that proof, the constitutional exclusionary rule's deterrent function is removed once the prosecution has a legally sufficient case.

---

234. Recently, Professor Pettys argued that the exclusionary rule violates Kantian morality because withholding evidence interferes with jurors' moral integrity as autonomous actors. See Todd E. Pettys, *Instrumentalizing Jurors: An Argument Against The Fourth Amendment Exclusionary Rule*, 37 *FORDHAM URB. L.J.* 837 at 844, 854 (2010) [hereinafter Pettys, *Instrumentalizing Jurors*]; Todd E. Pettys, *The Immoral Application Of Exclusionary Rules*, 2008 *WIS. L. REV.* 463 at 480–86, 508 [hereinafter Pettys, *Immoral Application*]. He thus equates withholding evidence from jurors with lying to them, in violation of Kant's categorical imperative. See Pettys, *Instrumentalizing Jurors*, *supra* at 849; Pettys, *Immoral Application*, *supra* at 468 (“[J]urors possess a moral right to see and hear all of the relevant, readily available evidence.”). It is hardly clear that Kant would agree, even at his most categorical. As Professor Mahon points out, Kant's “duty to be truthful is not the duty to be candid,” and so “does not cover what is sometimes called ‘a lie of omission.’” James E. Mahon, *Kant on Lies, Candour and Reticence*, 7 *KANTIAN REV.* 101, 123 (2003). So even if Kant is correct that one ought not lie to a murderer about the location of his intended victim, he also argues that there is no duty to provide him with that information, even in circumstances where one knows that, in its absence, the murderer will reach a false conclusion about his victim's whereabouts. See *id.* (“The duty to be truthful . . . does not prohibit engaging in non-mendacious linguistic deception when the goal is . . . to avert an evil.”). Mahon reads Kant as distinguishing the categorical duty not to lie from the absence of a categorical duty to provide information, even where necessary to prevent the putative recipient from reaching a false conclusion, a position consistent with the integrity of our trial process which includes rules excluding relevant evidence.

Courts allowing such evidence justify their decisions by arguing the integrity of the factfinding process requires they prevent juries from being misled about the facts or from concluding that suppressed evidence does not exist. The integrity of the factfinding process, however, is protected by holding defendants waive protection against suppressed proof by themselves using illegally-obtained evidence or by asking jurors to consider why suppressed evidence was not produced. This waiver rule allows the exclusionary rule to perform its deterrent function without violating ethical standards for trial conduct or the jury's accepted role as arbiters of the closed universe of evidence admitted for their consideration.