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FOURTH AMENDMENT—ILLEGAL SEARCHES AND THE EXCLUSIONARY RULE

United States v. Ceccolini, 435 U.S. 268 (1978).

In its past term, the Supreme Court proposed a new standard of admissibility for live witness evidence obtained as the result of an illegal search. The Court in *United States v. Ceccolini*[1] refused to adopt a per se rule—that the testimony of a live witness should never be excluded at trial, no matter how close and proximate the connection between it and a violation of the fourth amendment[2]—because "verbal evidence which derives so immediately from unlawful entry . . . is no less the 'fruit' of official illegality than the more commonplace tangible fruits of the unwarranted intrusion."[3] However, Justice Rehnquist, writing for the majority,[4] concluded that "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object."[5] While it is clear that the Court did not intend to adopt a per se rule, the *Ceccolini* decision does not clearly indicate how the Court expects the exclusionary rule to operate against live witness testimony obtained as the result of an illegal search.

I

In December 1974, Ronald Biro, a uniformed police officer on assignment to patrol school crossings, went into the Sleepy Hollow Flower Shop in North Tarrytown, New York, to enjoy a cigarette break with his friend Lois Hennessey, an employee in the shop. Officer Biro picked up an envelope lying on the drawer of the cash register and discovered that it contained gambling policy slips and cash. Without telling Hennessey what he had seen, Biro asked her to whom the envelope belonged. She replied that it belonged to Ralph Ceccolini.

The following day Biro mentioned his discovery to some North Tarrytown detectives who reported the information to Lance Emory, an FBI agent who until December 1973 had conducted a surveillance of the flower shop, which was believed to be involved in illegal gambling operations. Four months after the Biro search, Emory interviewed Hennessey in her home. Emory did not specifically refer to the incident involving Officer Biro. Hennessey indicated her willingness to aid the government and related the events which occurred during her visit with Officer Biro.

In May 1975 Ceccolini testified before a federal grand jury that he had never taken policy bets. Hennessey refuted this testimony, and the grand jury indicted Ceccolini for perjury. He waived a jury trial and, with the consent of all the parties, the district court considered Ceccolini's motion to suppress Hennessey's testimony as the fruit of an illegal search[6] simultaneously with the trial on the merits. The court returned a verdict of guilty, which was immediately set aside[7] on the grounds that without Hennessey's testimony, which the court found to be the inadmissible fruit of an illegal search, there was insufficient proof of Ceccolini's guilt.[8]

The court of appeals affirmed the district court's

[1] 435 U.S. 268 (1978).

[2] U.S. CONST. amend. IV provides:

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

[3] 435 U.S. at 275 (citing Wong Sun v. United States, 371 U.S. 471, 485 (1963)).

[4] Justice Rehnquist's opinion was joined by Justices Powell, Stevens, Stewart, and White. Chief Justice Burger concurred in the judgment, and Justice Marshall, joined by Justice Brennan, dissented. Justice Blackmun took no part in the decision.

[5] 435 U.S. at 280.

[6] The government conceded in oral argument that officer Biro's search was illegal. United States v. Ceccolini, 542 F.2d 136, 140 n.5 (2d Cir. 1976).

[7] Since the judge ruled in favor of the defendant's motion to suppress after a verdict of guilty had been entered, a reversal of the ruling would require no further proceeding in the district court, but merely a reinstatement of the finding of guilt. 435 U.S. at 290–91. Such a procedure has been held not to violate the fifth amendment right not to be twice placed in jeopardy for the same offense since the Double Jeopardy Clause in such an instance only prohibits the government from reprosecuting its case against the accused. United States v. Wilson, 420 U.S. 332, 352–53 (1975).

[8] The district court decision is unreported.

decision.[9] The court held that Hennessey's testimony was inadmissible, rejecting the government's arguments that it would have inevitably discovered Hennessey in the course of the investigation apart from the illegal search,[10] that the testimony of Hennessey was an act of free will sufficient to purge the taint of illegality, and that illegally obtained evidence should not be excluded from a trial for a crime that occurred after the illegal search.[11] The dissent argued that the Hennessey testimony should be admissible, having accepted the government's second proposition that the act of free will sufficiently purged the taint of illegality.[12]

The Supreme Court reversed and held that there was a sufficient degree of attenuation between Biro's search and Hennessey's testimony at trial to dissipate the connection between the illegality and the evidence.[13]

II

Since *Weeks v. United States,*[14] the Court has interpreted the fourth amendment to require that evidence obtained as the fruit of an illegal search not be used at trial.[15] The exclusionary rule also precludes the use of evidence which was derivatively obtained as the result of the illegal search[16] unless the connection between the evidence and the illegality is "so attenuated as to dissipate the taint."[17]

According to Supreme Court opinions, the basic purpose of the exclusionary rule is to deter unlawful police conduct. "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it."[18] The Court has assumed that the exclusionary rule does have the desired deterrent effect,[19] and therefore, its use is thought to be worth the societal costs it engenders. These costs include deflecting the truth-finding process and freeing the guilty,[20] thereby depriving society of its remedy against lawbreakers,[21] as well as punishing

[9] 542 F.2d 136 (2d Cir. 1976). The decision was by a vote of two to one.

[10] There is judicial support for the proposition that illegally obtained evidence which would have inevitably been discovered in the normal course of a legal investigation is admissible. *See* United States v. Falley, 489 F.2d 33, 40-41 (2d Cir. 1973). But the constitutionality of this "inevitable discovery" rule has never been passed upon by the Supreme Court. *See* Fitzpatrick v. New York, 414 U.S. 1050 (1973) (White, J., joined by Douglas, J., dissenting from denial of certiorari).

[11] 542 F.2d at 141-43.

[12] *Id.* at 143 (Van Graafeiland, J., dissenting).

[13] 435 U.S. at 279. The government did not seek review of the court of appeal's decision that the investigation would not have inevitably lead to the discovery of Hennessey, and the Court did not reach the government's contention that the exclusionary rule should not be applied when the evidence derived from the search is being used to prove a subsequent crime. *Id.* at 273.

[14] 232 U.S. 383 (1914).

[15] "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."
Id. at 393.

[16] *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), in which the Court held that copies of papers and documents illegally seized from the accused could not be admitted in evidence.

[17] 308 U.S. at 341. This attenuation analysis standard was first proposed in Nardone v. United States, 308 U.S. 338 (1939), and has since been adopted as the authoritive test for determining whether evidence derivatively obtained as the result of an illegal search is admissible. *See also* 471, Wong Sun v. United States, 371 U.S. (1963) 488.

In *Nardone* the Court held that § 605 of the Communications Act, 47 U.S.C. § 605, which prohibits the publication of illegally monitored communications, also prohibits its derivative use unless the "connection [between the illegality and the evidence] has become so attenuated as to dissipate the taint." 308 U.S. at 341.

In *Wong Sun* the Court employed this attenuation analysis in reaching its decision that the voluntary statement made by Wong Sun several days after the fourth amendment violation was admissible evidence. 371 U.S. at 490. *See* note 37 and accompanying text *infra.*

[18] Elkins v. United States, 364 U.S. 206, 217 (1960). In *Elkins* the Court held that evidence obtained by state officers in a search which violated the accused's fourth amendment rights is inadmissible in a federal criminal trial, even when there was no participation by federal officers.

[19] *See* United States v. Janis, 428 U.S. 433, 449-54 (1976), in which the Court concluded that there was no evidence that the exclusionary rule did have a deterrent effect.

> Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than those states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule.

Id. at 453 (quoting Elkins v. United States, 364 U.S. 205, 218 (1960)).

[20] Stone v. Powell, 428 U.S. 465, 490 (1976).

[21] Irvine v. California, 347 U.S. 128, 136 (1954), in the Court in a five-to-four decision refused to impose the exclusionary rule to prevent evidence unlawfully obtained by state police officers from being admitted in a state trial. This decision was overruled in Mapp v. Ohio,

police for good faith law enforcement efforts.[22] Recognizing both the assumed deterrent benefit and the societal costs of the rule, the Court has restricted its application to those areas in which its remedial objectives are thought most efficaciously served.[23]

III

In reaching its decision in *Ceccolini,* the Court considered both whether the taint of illegality had been sufficiently dissipated[24] and whether the application of the rule to live witness testimony would advance its basic deterrent purposes.[25] However, it is not always clear throughout the Court's discussion which of these two factors was considered predominant.

The *Ceccolini* Court reached three distinct decisions. First, the Court held that in this case, the degree of attenuation between the search and Hennessey's testimony at trial was sufficient to dissipate the taint of illegality.[26] Second, it concluded that in this case the exclusionary rule would have no deterrent effect.[27] And, third, the Court decided that, in general, live witness testimony which is the fruit of an illegal search should be excluded with "greater reluctance" than is illegally obtained physical evidence.[28]

In reaching these decisions, Justice Rehnquist based his majority decision on two factors. First, he declared that the degree of free will exercised by the witness in deciding to testify is a relevant factor in determining whether his testimony should be admissible.[29] He reasoned that "[t]he greater the willingness of the witness to testify freely the greater the likelihood that he or she will be discovered by legal means, and concomitantly, the smaller the incentive to conduct an illegal search to discover the witness."[30] Furthermore, the time, place, and manner of the initial questioning of the witness may be so removed from the illegality which led to the discovery of the witness that said illegality will not affect the witness's willingness to testify.[31]

The second factor concerning admissibility discussed by the majority was that exclusion of the live witness testimony would result in perpetually prohibiting that witness from testifying about relevant and material facts unrelated to the purpose of the illegal search.[32] Justice Rehnquist concluded that the cost of excluding this live witness testimony is greater than the cost of excluding similarly obtained physical evidence. Therefore, "a more direct link" between the illegality and the testimony is required in order to make the testimony inadmissible.[33]

The Court's initial determination that "[t]he greater the willingness of the witness to testify . . . the smaller the incentive to conduct an illegal search to discover the witness"[34] presupposes that the police can know prior to the discovery of a witness that he will freely testify. But, as the dissent in *Ceccolini* pointed out, "This reasoning surely reverses the normal sequence of events; the instances must be very few in which a witness' willingness to testify is known before he or she is discovered."[35] Additionally, it is not clear what this consideration adds to the determination of whether the accused's fourth amendment rights have been violated—the relevant question in determining whether the exclusionary rule should be invoked. If the witness was discovered without an illegal search, the exclusionary rule clearly is not appli-

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367 U.S. 643 (1961), in which the Court held that the fourteenth amendment fully incorporated the fourth amendment and that the exclusionary rule was an essential element of that amendment. The rule was thus applicable in state as well as federal trials.

[22] *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 736–57 (1970).

[23] *See* United States v. Calandra, 414 U.S. 338, 348 (1974), in which the Court refused to extend the application of the exclusionary rule to grand jury use of illegally obtained evidence; Walder v. United States, 347 U.S. 62 (1954), in which the Court refused to exclude illegally-obtained evidence used to impeach the credibility of the accused's testimony at trial.

[24] "The constitutional question under the Fourth Amendment [is] . . . whether "the connection between the lawless conduct and the discovery of the challenged evidence has become 'so attenuated as to dissipate the taint'"" 435 U.S. at 273–74 (citations omitted).

[25] *Id.* at 275.

[26] *Id.* at 279.

[27] *Id.*

[28] *Id.*

[29] It is interesting to note that in presenting this factor, Justice Rehnquist shifted his focus from attenuation analysis to the consideration of the deterrent purposes of the rule. As he wrote, "[W]e are first impelled to conclude that the degree of free will exercised by the witness is not irrelevant in determining the extent to which the basic deterrent purpose of the exclusionary rule will be advanced by its application." *Id.* at 276.

[30] *Id.*

[31] *Id.* In presenting this factor, Justice Rehnquist shifted the focus back to the determination of whether the taint resulting from the illegality has been sufficiently attenuated to permit the admission of the evidence.

[32] *Id.* at 277.

[33] *Id.*

[34] *Id.* at 276.

[35] 435 U.S. at 288 (Marshall, J., dissenting).

cable. But if the witness was discovered as the result of a fourth amendment violation, speculation that he might have come forward without the illegal search does not address the issue whether the connection between this witness and an illegality is such as to require the exclusion of his testimony.

Justice Rehnquist's observation that the time, place and manner of the initial questioning of the witness may be sufficiently removed from the illegality to dissipate any taint, is on point concerning attenuation analysis. In *Wong Sun v. United States*,[36] the Court held that although the arrest of an individual and the search of his apartment for narcotics violated his fourth amendment rights, the statement which he made voluntarily several days later after he had been released on his own recognizance was sufficiently unconnected with the illegality as to dissipate any taint.[37] Similarly, the *Ceccolini* Court appeared to have been relying on this type of analysis in holding that the illegal search of Ceccolini's store and the statement Hennessey made voluntarily four months later were sufficiently unconnected to rid the Hennessey testimony of any illegal taint. In going beyond this determination to reach its other two decisions, the Court indicated its desire to examine further the value of the exclusionary rule.

In its concern over the perpetual exclusion of the witness's testimony, the second factor considered by Justice Rehnquist, the majority opinion failed to make clear that it is the witness, not the testimony, which is the evidence obtained as the result of the illegal search. Since the exclusionary rule prohibits the admission of illegally obtained evidence, it follows that if knowledge of the witness was illegally obtained, that witness can not testify at trial. Furthermore, in concluding that the cost of excluding live witness testimony is so great that the decision to apply the exclusionary rule in live witness cases should be made with "greater reluctance" than in similar physical evidence cases, the Court ignored the fact that the cost of excluding testimony may be no greater than the cost of excluding any probative physical evidence which may have no connection with the original purpose of the illegal search, but was obtained as a result thereof.[38] The Court noted that live witness testimony may not be as "reliable or dependable" as inanimate evidence.[39] If the excluded physical evidence is more "reliable or dependable," it seems that the cost of excluding it is just as great, if not greater, than that of excluding its less probative live witness counterpart. If the societal costs are equal, the rule governing admissibility should be the same.

Both the concurrence and the dissent[40] rejected the majority's amorphous "greater reluctance" standard. Arguing that the fourth amendment precludes the use of *any* illegally obtained evidence,[41] Justice Marshall, in his dissent, rejected any standard which would apply the exclusionary rule differently to live witness evidence than to physical evidence. He considered the issue of attenuation to be the relevant question and concluded that Hennessey's testimony was not removed sufficiently from the search to purge it of its illegal taint.[42]

While Chief Justice Burger, who concurred in the judgment, also rejected the majority's "greater reluctance" standard, he did so because he concluded that live witness testimony should always be admissible.[43] His concurrence in *Ceccolini* is consistent with other recent opinions written by the Chief Justice in which he criticized the expansive use of the exclusionary rule.[44] In *Ceccolini*, Burger concluded that the high societal cost of losing the testimony of an eye-witness who would appear under oath outweighed its unlikely deterrent benefit.[45]

Recent Supreme Court cases concerning the application of the exclusionary rule have evidenced a trend toward reexamining its application in light of its societal costs. In companion cases during the 1976 term,[46] the Court refused to exclude evidence

[36] 371 U.S. 471 (1963).

[37] *Id.* at 490.

[38] As the dissent pointed out, "While it is true that 'often' the exclusion of testimony will be very costly to society, at least as often the exclusion of physical evidence ... will be costly to the same societal interests." 435 U.S. at 289 (Marshall, J., dissenting) (citations omitted).

[39] "This is not to say, of course, that live-witness testimony is always or even usually more reliable or dependable than inanimate evidence. Indeed, just the opposite may be true." *Id.* at 278.

[40] *Id.* at 280 (Burger, C. J., concurring); *id.* at 286 (Marshall, J., dissenting).

[41] "I do not believe that the same tree, having its roots in an unconstitutional search or seizure, can bear two different kinds of fruit, with one kind less susceptible than the other to exclusion on Fourth Amendment grounds." *Id.* at 286 (Marshall, J., dissenting).

[42] *Id.* at 290 (Marshall, J., dissenting).

[43] *Id.* at 280 (Burger, C. J., concurring).

[44] *See* Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C. J., concurring); Bivens v. Six Unknown Federal Agents, 403 U.S. 388, 411 (1971) (Burger, C. J., dissenting).

[45] 435 U.S. at 285 (Burger, C. J., concurring).

[46] United States v. Janis, 428 U.S. (1976) 433; Stone v. Powell, 438 U.S. 465 (1976).

obtained in good faith through a search pursuant to an invalid search warrant[47] and refused to extend federal habeas corpus review to exclusionary rule claims if the state had provided a "full and fair litigation" of the issue in its courts.[48] In reaching these decisions, the Court determined that the contribution of the exclusionary rule to the effectuation of the fourth amendment goals was outweighed by the substantial societal costs.[49]

In *Ceccolini*, the Court reached the same result, concluding that "[t]he cost of permanently silencing Hennessey is too great for an even-handed system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect."[50] But the Court not only concluded that the exclusion of the Hennessey testimony would have no deterrent effect, it also concluded that the testimony was not fruit tainted by the illegal search. The former conclusion assumes that the exclusionary rule would ordinarily apply but should not in this case because the rule's purpose would not be furthered, whereas the latter conclusion assumes that the rule does not apply to this particular fact situation at all. Clearly, the Court can not mean both.

The Court may be positing a general rule that when the deterrent effect of excluding evidence is outweighed by the societal costs that exclusion imposes, the evidence should be admitted. If so, the *Ceccolini* Court did not break new ground with its decision for in *United States v. Janis*,[51] the Court postulated this same rule. In that case, the Court had explicitly stated that, "[i]f . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted."[52] Since the discussion of the *Ceccolini* Court focused on a consideration of the deterrent purposes of the exclusionary rule and on weighing its costs and benefits, the Court could have reaffirmed *Janis* and ended its inquiry in this case with its conclusion that silencing Hennessey would have a negligible deterrent effect.[53] But the *Ceccolini* court did not end its inquiry at that point. It went beyond *Janis* and concluded that the exclusionary rule should be invoked with "greater reluctance" in the case of illegally obtained live witness evidence than in cases of illegally-obtained tangible evidence. How this arguably unnecessary and nebulous standard will be applied by courts in future cases is an open question.

Conclusion

There appears to be a trend in recent exclusionary rule decisions to reevaluate the use of the rule in cases in which its deterrent effects are outweighed by its societal costs. *United States v. Ceccolini* follows that trend. But in the narrower area of the exclusionary rules' application to illegally discovered live witness evidence, the Court's conclusion that the rule should be invoked with "greater reluctance" than in the case of illegally obtained physical evidence is one without precedent. The majority specifically said that it was rejecting a per se rule that live witness evidence should always be admissible, but it provided no standards for determining when, if ever, the exclusionary rule could be applied to live witness testimony in a situation in which the societal costs did not outweigh its deterrent benefits. In fact, Chief Justice Burger in concurrence noted that he could not imagine such a situation.[54] Perhaps none exists. If not, since the Court has concluded that the exclusionary rule should only be invoked where there is a deterrent benefit greater than the societal costs,[55] perhaps the Court should have adopted the per se rule of admissibility proposed by the government and accepted by the concurrence. As it stands, all *United States v. Ceccolini* indicates is that the Court has rejected a per se rule and adopted something else. What that something else is remains unclear.

[47] In United States v. Janis, 428 U.S. 433 (1976), the search in question had been conducted pursuant to a search warrant, but three weeks after the warrant's issuance, the Court in United States v. Spinelli, 393 U.S. 410 (1969), held that this type of warrant was constitutionally insufficient.

[48] Stone v. Powell, 428 U.S. at 494.

[49] *Id.* at 495.

[50] 435 U.S. at 280.

[51] 428 U.S. 433.

[52] 428 U.S. at 454. *See also* Desist v. United States, 394 U.S. 244 (1969). There the Court refused to apply the exclusionary rule to evidence obtained through wiretapping since the seizure was conducted before the Court ruled such wiretappings unconstitutional in Katz v. United States, 389 U.S. 347 (1967). "We simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." 394 U.S. at 254 n.24.

[53] 435 U.S. at 280.

[54] "I would not prevent a fact finder from hearing and considering the relevant statements of any witness, except perhaps under the most remarkable circumstances—although none such have ever been postulated that would lead me to exclude the testimony of a live witness." *Id.* at 280 (Burger, C. J., concurring).

[55] *See* note 52 and accompanying text *supra*.