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Fourth Amendment--Illegal Searches and the Exclusionary Rule

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FOURTH AMENDMENT—ILLEGAL SEARCHES AND THE EXCLUSIONARY RULE


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 re prosecuted its case against the accused. United States v. Wilson, 420 U.S. 332, 352-53 (1975).

\(^8\) The district court decision is unreported.
decision. 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, 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. The dissent argued that the Hennessey testimony should be admissible, having accepted the government's second proposition that the act of free will will sufficiently purged the taint of illegality.

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.

II

Since Weeks v. United States, the Court has interpreted the fourth amendment to require that evidence obtained as the fruit of an illegal search not be used at trial. The exclusionary rule also precludes the use of evidence which was derivatively obtained as the result of the illegal search unless the connection between the evidence and the illegality is "so attenuated as to dissipate the taint." 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." The Court has assumed that the exclusionary rule does have the desired deterrent effect, 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, thereby depriving society of its remedy against lawbreakers, as well as punishing

9 308 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 authoritative 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) 408.

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.

14 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.

15 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)).


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. 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.

III

In reaching its decision in Ceccolini, the Court considered both whether the taint of illegality had been sufficiently dissipated and whether the application of the rule to live witness testimony would advance its basic deterrent purposes. 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. Second, it concluded that in this case the exclusionary rule would have no deterrent effect. 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.

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. 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.” 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.

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. 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.

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” 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.” 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-

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.


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 Id. at 277.

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.

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.\textsuperscript{38} The Court noted that live witness testimony may not be as "reliable or dependable" as inanimate evidence.\textsuperscript{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\textsuperscript{40} rejected the majority's amorphous "greater reluctance" standard. Arguing that the fourth amendment precludes the use of \textit{any} illegally obtained evidence,\textsuperscript{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.\textsuperscript{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.\textsuperscript{43} His concurrence in \textit{Ceccolini} is consistent with other recent opinions written by the Chief Justice in which he criticized the expansive use of the exclusionary rule.\textsuperscript{44} In \textit{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.\textsuperscript{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,\textsuperscript{46} the Court refused to exclude evidence which is 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 cannot 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.\textsuperscript{38} The Court noted that live witness testimony may not be as "reliable or dependable" as inanimate evidence.\textsuperscript{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.

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obtained in good faith through a search pursuant
to an invalid search warrant and refused to ex-
tend federal habeas corpus review to exclusionary
rule claims if the state had provided a "full and
fair litigation" of the issue in its courts. In reach-
ing these decisions, the Court determined that the
contribution of the exclusionary rule to the effec-
tuation of the fourth amendment goals was out-
weighed by the substantial societal costs.

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." But the Court not only con-
cluded that the exclusion of the Hennessey testi-
mony would have no deterrent effect, it also con-
cluded 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, 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." Since the
discussion of the Ceccolini Court focused on a con-

slideration of the deterrent purposes of the exclu-
sionary 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 deter-
rent effect. 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, 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 exclusion-
ary rule decisions to reevaluate the use of the rule
in cases in which its deterrent effects are out-
weighed by its societal costs. United States v. Ceccolini
follows that trend. But in the narrower area of the
exclusionary rules' application to illegally discov-
ered live witness evidence, the Court's conclusion
that the rule should be invoked with "greater
reluctance" than in the case of illegally-obtained
tangible evidence. How

53 Id.
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 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.

52 428 U.S. at 280.