10-1977

United States v. Ceccolini

Lewis F. Powell Jr.

tb/lab 4/18/77

Response Back Page

Grant (I'll dissent if not granted)

An interesting & imp. case involving a drastic extension (as I view it) of Wong Sun & Brown v. Ill.:

Resp. was convicted on basis (in part) of testimony freely given by a witness four months after an alleged 4th Amend violation by a police officer led to search of witness.

4th Amend "violation" was negligible & probably would come within ALI "good faith rule". (See back)

Respond makes and "Grant" a little easier for me

PRELIMINARY MEMORANDUM

April 29, 1977 Conference
List 1, Sheet 2

No. 76-1151

UNITED STATES

v.

CECCOLINI

Cert to CA 2 (Kaufman; Feinberg; Van Graafeiland, dissenting)

Federal/Criminal

Timely (extension by J. Marshall)

Opportunity to make some sense out of use of exclusionary rule in a "taint" (poisonous tree) case

Discuss- This seems a possible grant. The attenuation of taint doctrine is not free from analytical difficulty in this area. LFP

1. SUMMARY: This petn presents questions involving the scope of the exclusionary rule in a prosecution for perjury. The perjury occurred after the Fourth Amendment violation which led to the discovery of a witness who later testified at the perjury trial.

2. FACTS AND DECISIONS BELOW: After a jury-waived trial in the DC for the SDNY, resp was found guilty of one count of making a false declaration before a federal grand jury investigating

gambling operations in violation of 18 U.S.C. 1623. The DC thereupon immediately set aside his finding on the ground that the testimony of government witness Lois Hennessey should have been suppressed as the fruit of an unlawful search of an envelope on a counter in resp's flower shop. On the Gov't's appeal,*/ a divided panel of CA 2 affirmed.

In the second half of 1973, F.B.I. agents conducted an investigation of gambling in North Tarrytown, New York, that included a surveillance of resp's flower shop, a place that was frequently visited by Francis Millow, a target of the investigation. Their observations led them to conclude that the flower shop was either a drop spot or pickup spot for policy gambling operations. The surveillance was discontinued in December 1973.

On December 18, 1974, uniformed police officer Ronald Biro, who had been assigned to patrol school crossings on that day, entered resp's shop on a cigarette break. There was an envelope with money protruding from it sitting on the cash register. In what subsequentl was held to be an unlawful search, Biro picked up the envelope, looked through its contents, observed that the envelope also contained policy slips, and put the contents back in the envelope. He then placed the envelope back on the cash register. In response to Biro's inquiry as to whose envelope it was, Lois Hennessey, an employee at the shop, replied that it was resp's and that resp had told her to give the envelope to someone. Biro did not ask her who the intended recipient was. According to the Gov't, Biro did not know that there

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*/ The appeal appears to be permissible under United States v. Jenkins, 420 U.S. 358, 365-366 (1975).

had been a gambling investigation of the flower shop.

Within 24 hours, Biro notified North Tarrytown detectives who, in turn, informed Lance Emory, an F.B.I. agent who had participated in the earlier gambling investigation. About four months later, Emory interviewed Hennessey at her home for about 20-30 minutes. At the time, Emory was unaware of the Fourth Amendment violation that had resulted in Biro's identification of Hennessey as a witness. Hennessey related the events of the December 18, 1974, incident with Biro to Emory. Thereafter, resp was subpoenaed before the grand jury where he testified that he had never taken policy bets at his flower shop for Millow. The following week, Hennessey gave contradictory testimony based on her observations at the flower shop. Shortly afterwards, resp was indicted on the perjury charge that is the subject of this case.

Because of delays in Gov't compliance with discovery requests, resp did not learn of Biro's involvement until shortly before the scheduled trial date. At the start of the trial, resp moved to suppress testimony, including Hennessey's, derived from Biro's search, but agreed to the DJ's suggestion that the hearing on the motion proceed simultaneously with the non-jury trial. The entire trial was conducted. Later in open court the DJ pronounced resp guilty on Count 1 (and not guilty on Count 2, which is not involved here). The DJ treated resp's earlier motion as including a motion to set aside the guilty verdict. The DJ granted the motion to exclude Hennessey's testimony as the fruit of the illegal search and then set aside the verdict for insufficient evidence.

The DJ proceeded as he did in order to avoid a Double Jeopardy Clause bar to the Gov't's right to appeal.

CA 2 affirmed, rejecting all of the Gov't's arguments. First, the court held that a line of authority, exemplified by United States v. Falley, 489 F.2d 33 (CA 2 1973), was inapplicable. Those cases held taint from an unlawful search is removed if independent investigation would have led to the evidence in question in any event. The DC held that the Gov't had not established that these facts fell within that doctrine, and CA 2 held that that finding was neither clearly erroneous nor based on an error of law. Second, CA 2 rejected the Gov't's arguments which were based on Wong Sun v. United States, 371 U.S. 471 (1963), and Brown v. Illinois 422 U.S. 590 (1975). The Gov't argued that Hennessey's testimony was an act of free will sufficient to purge the taint of any unlawful invasion that occurred on December 18, 1974. The Gov't urged the court to distinguish several recent decisions on the theory that the witnesses there had been coerced, while Hennessey had not. CA 2 noted that resp's counsel disputed the Gov't's version of the facts, and the court stated that it doubted that this point had been raised in the DC, because the only reference to the issue was in a footnote to the Conclusion of the Gov't's memo there. The court then stated that it did not regard the argument dispositive under the authorities under either version of the facts:

> In any event, the road to Miss Hennessey's testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted, and we would not hold her testimony admissible merely because her cooperation with the Gov't was not coerced.

Finally, the court rejected the Gov't's argument (also not raised below) that the rule excluding the fruit of an illegal search is inappropriate in a perjury prosecution, especially when the perjury occurred after the illegal intrusion. The court was sympathetic to the Gov't's concern about perjury, but saw no way to distinguish it from other serious crimes to which the exclusionary rule would apply in the Gov't's case in chief. The court distinguished United States v. Raftery, 534 F.2d 854 (CA 9 1976) and United States v. Turk, 526 F.2d 654 (CA 5 1976). Unlike those cases, this is not a case "in which an immunized witness was aware of an illegal search and thereupon made use of that knowledge to perjure himself with impunity. The court disagreed with the Gov't's contention that the exclusionary rule serves no purpose here.

Judge Van Graafeiland dissented, arguing that this case falls squarely within the attenuation of taint doctrine.

3. CONTENTIONS: Citing, inter alia, United States v. Calandra, 414 U.S. 338 and Stone v. Powell, ___ U.S. ___, the SG argues that the suppression of the fruits of an unlawful search in a prosecution for an independent offense committed long after the search is contrary to the policies underlying the exclusionary rule. Because the primary objective of the rule is to defer future unlawful police conduct, the Court has declined to apply the rule in circumstances where the exclusion would have a minimal deterrent effect on police misconduct and where exclusion would frustrate significant public interests. The SG contends that "it is difficult to imagine how police misconduct could be significantly deterred by the prospect of the exclusion of the fruits of a search in the

prosecution of a crime that has not yet taken place and the commission of which is not foreseeable at the time of the search. The SG argues that the force of the above analysis is even greater when the subsequently committed crime is perjury, citing inter alia, Calandra, supra, and United States v. Mandujano, 425 U.S. 564. The SG argues that this case is in conflict with the CA 5 and CA 9 decisions in Turk and Raftery, supra, and he rejects CA 2's attempt to distinguish those cases on the basis that those defendants were aware of the illegal searches when they gave their false testimony.

The SG also sees this case as a chance to address the question of the application of the exclusionary rule to the voluntar testimony of a witness at trial. The SG notes that the existence of the issue was mentioned in United States v. Brignoni-Ponce, 422 U.S. 873, 876 n.2, but not addressed because not raised. Citing Brown v. Illinois, supra, and Wong Sun v. United States, supra, the SG argues that there is a difference between live testimony and other evidence that has been recognized by other CAs. United States v. Scios, ___ F.2d ___ (CADC 1976)(rehearing en banc granted); United States v. Marder, 474 F.2d 1192 (CA 5). The SG would prefer an approach that took into account the lapse of time, other intervening events, the flagrancy of the violation, and the extent to which the deterrent function would be served. The SG argues that it is generally inappropriate to suppress such testimony, except perhaps in egregious cases where a flagrantly unlawful search is undertaken for the conscious purpose of discovering potential witnesses.

4. DISCUSSION: This case obviously presents the possibility of considering the effect of a variety of factors on

an exclusionary rule decision. If anything, the variety of factors could be a disadvantage because of the difficulty of focusing attention on any particular factor or combination. There is at least a difference in approach between CA 2 here and CA 5 and CA 9 in Turk and Raftery. The significance of the fact that the defendan knew of the illegality of the search was more important in the analysis in Turk than in Raftery.

There is no response.

4/19/77 Baker CA 2 Op. in Petn. Ap

APR 2 9 1977

Court ..CA - 2.......... Voted on.... ...., 19...

Argued .. .., 19... Assigned ...., 19... No. 76-1151

Submitted .. .., 19... Announced .. .., 19...

UNITED STATES, Petitioner

vs.

RALPH CECCOLINI

2/19/77 - Cert.

Harry thinks case presents good opportunity to "put exclusionary rule in focus".

Granted.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING
Stevens, J		✓ as to Q 2 only											
Rehnquist, J.		✓											
Powell, J.		✓											
Blackmun, J.		✓											
Marshall, J		✓	✓										
White, J		✓											
Stewart, J		✓											
Brennan, J.			✓										
Burger, Ch. J				Join 3									

The Response argues that a Gov't appeal here violates the Double Jeopardy Clause, relying on the recent decision in Martin Linen Supply, 76-120 (Ap. 4, 1977). The argument is that the DC's action should be considered an XX acquittal. But, the way the DC XXX handled the issue, no retrial is necessary, and that was stated to be the critical element of double jeopardy determinations in Martin Linen Supply.

With respect to the exclusionary rule issue, resp tries to put the case in a different light factually. He asserts that the violation itself was XX clear and flagrant: the officer XX was in a part of the flower shop where the public did not go; he had no warrant and no probable cause for the search. Although the violation is not shocking in the sense of being brutal, etc., I have to agree that this was a clear violation and not a case where an officer made a reasonable good faith mistake. Resp XX then argues that the illegality was immediately exploited when the officer asked Hennessey about the envelope, and not just when she was more carefully interviewed by the FBI agent four months later. Furthermore, resp argues that the record shows that Hennessey talked to the FBI agent because he told her that he had gotten her name from the police and she knew that he either already had the information or could get it from the police. Resp. at 14. At the same time, resp XXXXX acknowledges that the CA observed that the DC made no specific findings regarding Hennessey's state of mind. In response to the Gov't's reliance on the fact that the perjury offense occurred after the violationX of the 4th Amendment, resp argues that XX he was entrapped by the Gov't. He states that he was given no warning of his right to counsel, or of his privilege against self-incrimination, and that he was advised that he was not a target of the investigation. In what seems a XXXXXXXXXX parody of an argument, resp concludes that he "had no pre-disposition to go to the grand jury."

My conclusion is that the double jeopardy point is a loser for resp. The facts may not be quite as favorable to the Gov't as their brief indicated, but the XX case is probably XXX still XX a reasonable vehicle for analysis. The problem with the analysis XXXXXX regarding a XXXX third party is that the attentuation doctrine seems to be focusing on an element that is normally irrelevant--namely, coercion. This element may make sense when the defendant himself has XXXX been the victimX of the violation, as in Wong Sun, even after one concludes that the statement was voluntary. But XX when the XXXXXXXX violation merely leads to a third party, the notion of coercion/voluntarinces becomes meaningless. I think this was the point that your concurrence in Brown v. Illinois was getting at. The case would be XXX useful for pursuing that question, although I do not think that the proper resolution is XXXXXXXXX self-evident.

of the exclusionary rule issue

422 U.S. 590, 606

Yes

DAB

Yes

Now do I, unlike the court — but then may have your Yes

SE/lab 12/2/77

BENCH MEMORANDUM

To: Mr. Justice Powell Date: December 2, 1977

From: Sam Estreicher

No. 76-1151 United States v. Ceccolini

I. DOUBLE JEOPARDY Not asserted by Resp. on exam - pet. In any event, not meritorious

Resp argues that the Government's appeal in this case violated the Double Jeopardy Clause and is therefore improper under 18 U.S.C. § 3731. In his view, the trial judge's post-verdict order to suppress the "tainted" evidence and his further determination that absent that evidence the Government had failed to sustain its burden of proof constitute the functional equivalent of an "acquittal" under United States v.

Martin Linen Supply Co., 430 U.S. 564, 571 (1977). In Martin Linen Supply Co., the Court noted that the critical inquiry is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."

CA 2 rejected this argument, noting that if the Government's position on the merits of the Fourth Amendment issues is correct, "a retrial would not be required," United States v. Jenkins, 420 U.S. 358, 365 (1975); United States v. Wilson, 420 U. S. 332, 344-45 (1975).

In my view, this contention is foreclosed by the per curiam decision in United States v. Morrison, 429 U. S. (1976). In that case, after a mid-trial denial of def's motion to suppress the DC entered a general finding of guilt in a bench trial. On reconsideration of the motion to suppress, following a CA ruling holding Almeida-Sanchez retroactive, the DC granted the motion. Relying on Wilson and Jenkins, this Court held that the appeal did not violate double jeopardy and was proper under § 3731. "Thus, the District Court's general finding of guilt here is for double jeopardy purposes the same as a jury verdict of guilt. The government is therefore entitled to appeal the order suppressing the evidence, since success on that appeal would result in the reinstatement of the general finding of guilt, rather than in further factual proceedings relating to

guilt or innocence. As in Wilson, there would then remain only the imposition of sentence and the entry of a judgment pursuant to Fed. Rule Crim. Proc. 32." 429 U.S., at 3-4. "The fact that the order of suppression here occurred after a general finding of guilt rendered by a court in a bench trial, rather than after a return of a verdict of guilty by a jury, is immaterial." United States v. Rose, 429 U.S. 5 (1976).

II. "FRUITS" DOCTRINE

A. Opinions Below

The DC ruled that "the government has not sustained its burden of showing that Lois Hennessey's testimony definitely would have been obtained without the legal illegal search." The court applied what is known as the "inevitable discovery" doctrine, which places the burden on the Government to show that "official misconduct was not a sine qua non of the eventual discovery of the questioned evidence." Note, Inevitable Discovery Doctrine, 74 Colum. L. Rev. 88, 103 (1974). The court noted the following factors: (1) Agent Emory's testimony acknowledged that the Biro incident was "at least in part the actual source of the government's information"; (2) prior to the search there had been no investigatory focus on witness Hennessey because of her employment in resp's shop; (3) the Government had not shown that "Lois Hennessey's knowledge of Cercolini's gambling operations and her willingness to cooperate with the FBI was the normal output of the investigation that was in progress at the time of the illegal search." (Petn, 30a-32a).

CA 2, per Judge Feinberg, affirmed. It rejected the Government's argument that since surveillance of the shop and intercepted telephone call both occurred prior to the illegal

search, the latter did not initiate the investigation that led to resp. "However, the direct surveillance of the flower shop had ceased a year before the Biro search and there is no testimony that Agent Emory was aware of the recorded phone call between Ceccolini and Millow when he interviewed Miss Hennessey. Judge Gagliardi obviously felt that the illegal search triggered the phase of the investigation that focused on Ceccolini." (Petn, 11a).

Aside from the "inevitable discovery" rationale, the Government argued on appeal that (1) Hennessey's testimony was an act of free will sufficient to dissipate the taint of any prior illegality; and that (2) the "fruits" doctrine should not be applied to a perjury prosecution, especially when the perjury occurred after the illegal intrusion. CA 2 expressed doubt that the first theory had been raised in the DC, and noted that in any event Hennessey's volition was irrelevant where "the government agents exploited the illegally obtained information by seeking out Lois Hennessey and asking questions directly related to the illegal search." (Petn, 12a-13a & n.9). As to the second contention, the court "put to one side the Government's failure to raise this issue in the trial court," and held that the logic of this argument would render the exclusionary rule inapplicable to any crime that occurred after the illegal search. The fact that the subsequent crime involved perjury was of no significance, as this was not a case in which the witness was aware of the prior illegality and sought to use the exclusionary

rule as a sword in the hope that he could perjure himself with impunity.

B. Government's Position

The Government offers essentially three approaches.

1. Application of Wong Sun and Brown. The first, which appears at the very end of its brief, is that Hennessey's testimony was admissible under the ad hoc inquiry authorized by Wong Sun v. United States, 371 U.S. 471 (1963), and Brown v. Illinois, 422 U.S. 590 (1975). Here, the witness' decision was a product of her own free will, since the interview occurred four months after the search when she was no longer employed by resp, she expressed a ready willingness to cooperate, and she testified that the Biro incident played no part in that decision. With respect to the element of temporal proximity, Hennessey was not contacted until four months after the search and she did not testify until six months after the intial illegality. The Government cannot be said to have exploited the illegal search, because Agent Emory was not aware of how the local police came by the knowledge that Hennessey would prove to be a useful person to interview. Finally, Officer Biro's search of the envelope was not a flagrant violation of resp's Fourth Amendment rights.

The Government would prefer that the Court reverse CA 2 on a broader ground, one which presumptively carves out a certain area from the operation of the exclusionary rule, and thus does not involve the uncertainty of application of the Wong Sun-Brown ad hoc inquiry. Following the analysis of decisions like Stone v.

Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531 (1975); and United States v. Calandra, 414 U.S. 338 (1974), the Government argues that extension of the "fruits" doctrine of Wong Sun to the use of a third party witness' testimony in a prosecution for perjury committed after an illegal search will have a minimal incremental deterrent impact at an unjustifiable cost to society.

2. Inapplicability of Exclusionary Rule Doctrine to Post-Search Perjury. The goal of deterrence will not be significantly furthered by repression of evidence in a prosecution for a crime committed after the search, for the police "are most unlikely to stay their hand at the thought that any evidence that they find might also be inadmissible in the event the target of their search subsequently commits a crime as to which the evidence is relevant." (Br. for United States 17). The Government concedes, however, that a rare case may come along where the government's purpose in conducting the unlawful search was to obtain leads which would be useful in the prosecution of foreseeable subsequent crimes, but this is not the case. When Biro looked into the envelope he was not aware that the shop had been investigated for gambling during the previous year, that Hennessey was giving policy slips to anyone, or that resp might be called before a grand jury months later.

Even if the exclusionary rule might have a meaningful function in the case of subsequently committed crimes, the Government argues, it should not be applied where the subsequent

crime is perjury. The SG relies here on decisions holding that antecedent constitutional violations do not shield a witness from the consequences of his perjury. E.g., United States v. Wong, 97 S.Ct. 1823 (1977); United States v. Mandujano, 425 U.S. 564 (1976); Walder v. United States, 347 U.S. 62 (1954); Harris v. New York, 401 U.S. 222 (1971). The SG also notes that the decision below is contrary to at least the spirit of your decision in Calandra. "Certainly the duty to testify and to respond to questions based on improperly obtained evidence necessarily implies the duty to testify truthfully. But to contend that a witness may nevertheless lie in response to such questions without risk that the same evidence could be sued to punish his lie would make a mockery of the commands of Calandra and render that decision largely ineffectual."

3. Inapplicability of the Exclusionary Rule Doctrine to Live Testimony of Third-Party Witness Discovered as a Result of the Illegal Search. In United States v. Brignoni-Ponce, 422 U.S. 873, 876 n.2 (1975), the Court reserved decision on "whether voluntary testimony of a witness at trial, as opposed to a Government agent's testimony about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure."

> The Government offers the following answer: With [the exception of the testimony of a witness about facts learned by that witness as a result of an illegal search], and on the basis of the inherent differences between testimonial and other evidentiary fruits discussed below, we submit that this Court should decide as a matter

> of exclusionary rule policy that the testimony of a witness whose identity or possession of relevant information was discovered as a result of an illegal search or seizure should not be excluded (1) except to the extent it describes other tainted fruits learned by the witness as a result of the misconduct and (2) unless the facts warrant the conclusion that the search was for the specific purpose of discovering potential witnesses.

(Br. for the United States 50). This approach is preferred because the Wong Sun-Brown factors "break down and produce anomalous results when applied to live-witness testimony, primarily because of the inevitable intrusion of a complex of 'intervening causes' that are usually referred to loosely as the witness's 'free will.'" Id. at 38.

With respect to non-testimonial evidence, however, the usual Wong Sun-Brown analysis would obtain. Several reasons are offered for the distinction between live testimony and non-testimonial evidence: (i) It is less likely that a particular search will yield leads to useful live testimony because, unlike tangible evidence, which generally "speaks for itself," the mere discovery of the name of a person with possibly relevant information is not immediately translatable into useful trial testimony. There are a number of intervening hurdles that have to be overcome, e.g., obtaining the cooperation of the witness. (ii) It is more likely that the names of witnesses will emerge from the normal course of investigation, and thus there is less incentive to stage an unlawful search to obtain such information. (iii) Exclusion of third-party witness testimony is likely to be more costly to the administration of justice than would exclusion of

inanimate evidence, and ordinarily the defendant has a lesser privacy interest in information disclosed by third parties.

C. Respondent's Position

Respondent's principal argument appears to be that "there is a total failure of proof on the part of the Government to meet the burden of establishing either that Lois Hennessey's testimony was not sufficient to trigger the type of investigation which led to her, or that she would have been the normal output of the investigation conducted prior to the illegal search." (Br. for Respondent 34). In other words, resp rests on the "inevitable discovery" doctrine. Little effort is made to analyze the Government's new approaches to the "fruits" question. Resp does argue that, as a factual matter, this case involved exploitation of prior illegality and overreaching by the Government. The chain of events leading to Hennessey's discovery was set in motion by Biro's illegal search, and it is simply incredible that Agent Emory was unaware of the origin of the information he received. Moreover, resp views Hennessey's testimony as acknowledging that she cooperated with Agent Emory because she knew that he had or could get the information from the local police. (The testimony is not clear as resp suggests, see App. 43). The perjury cases are deemed inapposite because resp was compelled to testify before the grand jury, and his testimony was made without knowledge of the Biro search. An exception to the exclusionary rule for live witness testimony blinks the reality that a search is often undertaken for the

purpose of obtaining leads to the discovery of useful witnesses. Moreover, resp alleges that he did not obtain Miranda warnings or have access to counsel and that he was misleadingly assured that he was not a putative witness.

D. Prior Decisions

I am not going to undertake an exhaustive analysis of the prior decisions, but I thought it would be useful to set out the factors that have been relied upon in the previous "fruits" decisions.

The two earliest decisions, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), and Nardone v. United States, 308 U.S. 338, 341 (1939), identify the possibility that the Government's proof "had an independent origin." Justice Frankfurter's opinion in Nardone rejected a "but for" causation analysis, recognizing that the connection between information obtained from the prior illegality and the Government's proof at trial "may have become so attenuated as to dissipate the taint." As the Government correctly points out, principles of 'independent source' are separate and distinct from principles of 'attenuation'.

In Wong Sun, Justice Brennan's opinion for the Court recognized that a "but for" test was inappropriate, and urged that the inquiry should be whether the contested evidence "has been come at by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." 371 U.S. at 488, quoting Maguire, Evidence og Guilt, 221 (1959). Apparently, "an intervening act of a free will" could

"purge the primary taint of the unlawful invasion." Toy's statements were held inadmissible because they were an immediate response to the conditions of the unlawful arrest. Id. at 486. Wong Sun's unsigned confession was held not to be the fruit of an unlawful arrest because intervening circumstances were sufficient to dissipate the taint. "On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" Id. at 491. The Court declined to decide whether Toy's unsigned statement made while he was free on his own recognizance was a forbidden "fruit" of the unlawful arrest. Id. at 488.

In Johnson v. Louisiana, 406 U.S. 356, 365 (1972), the Court rejected the argument that the invalidity of the arrest tainted evidence of a subsequent lineup identification. Using the same intervening cause analysis that led to a finding of admissibility in Wong Sun's statement, Justice White's opinion notes: "Prior to the lineup, at which Johnson was represented by counsel, he was brought before a committing magistrate to advise him of his rights and set bail. At the time of the lineup, the detention of the appellant was under the authority of this commitment. Consequently, the lineup was conducted not by 'exploitation' of the challenged arrest but 'by means sufficiently distinguishable to be purged of the primary taint.' Wong Sun v. United States, 371 U.S. 471, 488 (1963)."

In Michigan v. Tucker, 417 U.S. 433 (1974), the Court held that the failure to advise the def of his right to appointed counsel did not disable the Government from introducing into evidence the statement of a third party whose identity was revealed by the def in the course of the procedurally deficient interrogation. The decision offers considerable support for the Government's argument that the exclusion rule is inapplicable to the testimony of third-party witnesses, for Justice Rehnquist's decision questioned whether any significant incremental deterrent effect would be accomplished by exclusion of the witness' statement in addition to the def's confession. "To extend the excision further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent." Id. at 451. "Although Johnson [v. New Jersey, 384 U.S. 719 (1966),] enabled respondent to block admission of his own statements, we do not believe that it requires the prosecution to refrain from all use of those statements. . . ." Id. at 452. The Court emphasized, however, that the interrogation in question occurred prior to Miranda and was in conformity with the Escobedo rule. Id. at 447. In a sense, the decision can be read as a limitation on the retroactive effect of Miranda. Moreover, the Court noted at some length that since the Miranda rules were in the nature of an extra-constitutional prophylactic safeguard, the failure to give a particular warning violated Miranda policy, but was not in itself a violation of the Self-Incrimination Clause. Id. at 439-446.

The last important "fruits" decision is Brown v. Illinois. The Court rejected the State's argument that the mere giving of the Miranda warnings was sufficient to remove the connection between an unlawful arrest and a subsequent custodial confession. Justice Blackmun's decision identified four factors: (1) volition, (2) temporal proximity, (3) intervening circumstances, and (4) "the purpose and flagrancy of the official misconduct." Id. at 603-04. These factors were considered "relevant," but there is no indication of the relative weight each factor enjoys or suggestion that other considerations are to be excluded from the "attentuation" inquiry. On the merits, the Court found that the arrest was "investigatory" in a nature, undertaken "in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright and confusion." Id. at 605.

Your concurring opinion, in which WHR joined, sought to tailor the inquiry more directly to the nature of the taint. In the case of a "flagrantly abusive" violation, you would require "some demonstrably effective break in the chain of events leading from the illegal arrest to the statement, such as actual consultation with counsel or the accused's presentation before a magistrate for a determination of probable cause before the taint can be deemed removed. . . ." 422 U.S. at 611. In the case of a good-faith error, the Miranda warnings would be sufficient, with the exception of statements made in the

immediate circumstances of the illegal arrest. Between these two extremes, "the Wong Sun inquiry always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus." Id. at 612.

E. Analysis

1. Wong Sun-Brown Inquiry. Although the Government invites the Court to fashion further limitations on the exclusionary rule, in the fashion of Stone-Janis-Peltier-Calandra, I do not think that such a resolution is necessary in this case. CA 2's error was in its exclusive reliance on the "inevitable discovery" doctrine, which in theory is not very different from the "but for" test that this Court has never adopted. At a minimum the lower court should have applied the Wong Sun-Brown factors. Had a proper inquiry been undertaken, "attentuation" would have been found under the existing principles of volition, temporal proximity, intervening circumstances, exploitation, and the nature of the taint.

There was attenuation

2. Perjury Exception. I also agree with the Government that whatever role the general applicability of the "fruits" doctrine, the Court's decisions make clear that perjury is different, and the Government may make use of constitutionally tainted evidence in the cause of a perjury prosecution. The Mandujano-Rose line of cases seems to mandate this result. I have never fully understood why the deterrence objective that ordinarily informs application of the exclusionary rule should be completely ignored because the underlying offense

is perjury. This rule makes sense where the def knows of the prior unlawful search and is trying to use the exclusionary rule as a sword to immunize his perjury, but absent such awareness, there is little reason to treat perjury differently from any other crime.

I would not embrace the subsequent crime rationale as a general exception to the exclusionary rule, although it may be considered as an "intervening" circumstance. Aside from the fact that there is no need to do so in this case, I would note that some subsequent crimes may be completely foreseeable to the police, and that the prior search may have been undertaken for the purpose of obtaining evidence for use in a foreseeable future prosecution. Conspiracies or crimes involving a pattern of conduct may be examples of this. If the Court is inclined, however, to identify a new exception to the exclusionary rule, I would prefer the "subsequent crime" rationale to the "live witness" theory advanced by the Government.

The Calandra argument is inapposite. Your decision makes fairly clear that while the grand jury may use unlawfully seized evidence in the course of conducting its investigation, the Government may not use the same evidence in its case-in-chief at trial. 414 U.S. at 351. Aside from the Court's recognition of the importance of preventing interference with the proper functioning of the grand jury, I do not think that Calandra has any independent force in this case.

3. Live Witness Exception. At this point, I part company with the Government. My primary difficulty is that I do

not concede the premises underlying the SG's argument. It is far from unusual that in conducting a search the government agent hopes to find leads to useful witnesses as well as to uncover physical evidence; the police are concerned with developing both types of evidence. If so, the purpose of deterrence may be substantially furthered by application of the exclusionary rule in many "live witness" cases. Moreover, I do not agree that any principled distinction can be drawn between live witness testimony and non-testimonial evidence. The societal cost of exclusion and the def's privacy interest (which relates to the initial intrusion, not to the subsequent "fruits," as the SG suggests) is the same in both cases. I am not convinced that the likelihood that a search will turn up useful live witness testimony is substantially different from the likelihood that the search will yield useful inanimate evidence. The "cooperation" of the third-party witness in the great majority of cases can be presumed, and the subpoena and grant of immunity are available to prod the recalcitrant. And there is no basis to the Government's surmise that witnesses are more likely to be obtained through the normal investigatory process, and that supposedly there is less of an incentive to stage an improper search in order to develop leads to witnesses.

The Government recognizes an exception for the "purposive" investigatory search, but it would require a showing by the defendant that a specific purpose to obtain leads to live witnesses animated the search. In effect, the Government urges a rule of presumptive validity, with a shift in the burden of

persuasion to the def to show "purposiveness." Because I believe that purpose of obtaining leads to testimony is rarely absent, a per se exception would undercut the deterrence policy of the exclusionary rule. However, if the case-by-case attenuation inquiry fails to give proper weight to exclusionary rule policies, as the Government suggests, there may be justification for a "live witness" exception. I turn to that matter.

In my view, the Wong Sun - Brown factors, while they lack logical precision, do serve to delineate the appropriate scope of the exclusionary rule. The element of volition, as you point in your Brown concurrence, identifies situations where "application of the exclusionary rule can serve little purpose: the police normally will not make an illegal arrest in the hope of eventually obtaining such a truly volunteered statement." 422 U.S. at 610.

The Government is right that ordinarily voluntariness can be presumed in the case of live testimony by third-party witnesses. That is an argument for admitting such evidence in many cases, but it does not follow that a per se "live witness" exception should be fashioned. Moreover, there are situations where the conditions under which the third-party statement is made would be relevant to the deterrence objective of the exclusionary rule. For example, in the course of an unlawful entry into a def's private residence, the police may come across the name and address of a confederate, immediately pursue that confederate, and by pressures permissible under the Constitution, such as threats to prosecute, obtain a statement inculpating the

defendant. I am not entirely certain that exclusion of testimonial evidence developed by such immediate exploitation of the leads obtained from an unlawful search would not serve a useful deterrent role.

Temporal proximity is relevant to the foreseeability of discovery of the disputed evidence. I doubt that temporal remoteness between the primary illegality and the witness' exercise of will in furnishing the evidence can be ignored under any test. In this case, for example, had Officer Biro conducted an extensive interrogation of Hennessey immediately after his illegal peek into the envelope, it may be argued that the interrogation was a continuation of the illegal search, and that exclusion of its product would have a significant incremental deterrent effect.

The factor of intervening circumstances, which suggests tort concepts of proximate and intervening causes, is useful in delimiting the appropriate scope of the exclusionary rule. The Government implicitly concedes this point in its contention that the "fruits" doctrine should not apply to prosecutions for crimes committed subsequent to the search, a paradigm instances of an "intervening circumstance." Some intervening circumstances are not foreseeable and thus presumably could not have informed the decision police to commit the initial intrusion, such as Wong Sun's voluntary return to the police station to make an inculpatory statement. Others may be foreseeable but involve circumstances far removed from the initial intrusion, such as the lineup identification in Johnson v. Louisiana.

The elements of "exploitation" and "flagrancy" of the initial violation need no separate discussion. I agree with the Government that "exploitation" must mean more than "use." The Government urges that the term, properly understood, is simply a shorthand expression for an inquiry into whether the police engaged in the primary illegality for the very purpose of obtaining the evidence in question. This formulation - of a specific intent to obtain the particular evidence - may be too narrow. Wong Sun does not require a showing of specific intent with respect to the leads obtained through an unlawful search, and in this respect Wong Sun was rightly decided.

In short, live witness testimony generally will be held admissible under the Wong Sun-Brown approach. The Government has not made out a case for fashioning what amounts to a new per se exception to the exclusionary rule.

III. CONCLUSION

Double jeopardy interposes no bar to this appeal. I would reverse CA 2 on the ground that it failed to apply the appropriate standard under Wong Sun-Brown. Alternatively, a reversal could be premised on the view that the exclusionary rule does not apply to a prosecution for perjury which occurred subsequent to the search. I would not, however, accept the Government's invitation to carve out a new per se exception from the exclusionary rule for "subsequent crimes" or for the testimony of third-party witnesses who first come within the investigatory focus of the police as a result of a prior illegal search. There is no need to do so in this case.

76-1151 U.S. v. CECCOLINI Argued 12/5/77

Cert to CA 2 - E/Rule case - flower shop - trunk of car

Resp. was indicted only for perjury before G/J.

Nothing to Resp's D/J case. Jenkins + Martinez.

Gov't makes 3 arguments:

1. "Live-witness" exception to E/R.

2. A "perjury" exception if committed after the illegal search

3. Applying the balancing approach of Wong Sun + Brown v Ill, the taint was attenuated.

I am not inclined to adopt an inflexible rule as to "live-witness". That fact is relevant, however, to attenuation (in determining whether test. is "free will".

I think I could agree that perjury ~~after~~ subsequent to "taint" is one subsequent crime not within Wong-Sun rule.

I agree, in any event, that there was clear attenuation.

non-tentative conclusions after argument.

Allen (SG)

Conceded that search (looking into envelope) was unlawful.

CA 2 resolved D/Q issue vs. Resp.

The DC did not enter a judg. of acquittal – merely held that Miss Hennessy's test. was insufficient & to convict, he would have to acquit (see p. 10 of Appendix).

E/P should not apply to crime committed after the unlawful search. Police had no incentive to search for ev. of a crime not yet committed.

Officer Bird's undisputed test. re what he did not know Resp. was under suspicion

The "love-letters" issue is separate & apart from the attenuation of taint issue. In Wong Sun & Bynum the inquiry was whether there was sufficient "attenuation" to assure that a confession was product of free will. Here we have admittedly free and voluntary of Hennessy – not a confession of guilt by an accused.

Two grounds for reversal:

1. Crime committed after search
2. Love letters test. not subject to E/R

Greenspan (Rand)

Rehnquist noted the absence of any completion on the D/J issue.

Reverse - 7 - 1

76-1151 U.S. v. CECCOLINI Conf. 12/7/77

The Chief Justice Reverse
No basis for suppressing test. 5 mo. after violation.
Also could hold that Wong Sun doesn't apply to live witness - also there may be some exceptions.

Mr. Justice Brennan Reverse
There is an appealable order here.
Wong Sun applies - ~~the~~ including attenuation. There was attenuation here.
Would not adopt "live witness" exception.

Mr. Justice Stewart Reverse
Case was appealable - no D/J.
Need not accept any per se rule.
Agree that Wong Sun applies.
The fact that there was "live witness" testimony is an info. attenuation factor.

Mr. Justice White Reverse

Mr. Justice Marshall Affirm or D/G

Mr. Justice Blackmun

Absent

Mr. Justice Powell Reverse

There was abundant attenuation

Mr. Justice Rehnquist Reverse

Attenuation is much more readily found where there is a live witness. Both Hudson we should make this clear.

Mr. Justice Stevens Reverse

Unless there were a live witness here, the attenuation would be less clear.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: JAN 2 0 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1151

United States, Petitioner, v. Ralph Cecolini,	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1978]

Mr. JUSTICE REHNQUIST delivered the opinion of the Court.

In December 1974 Ronald Biro a uniformed police officer on assignment to patrol school crossings, entered the Sleepy Hollow Flower Shop in North Tarrytown, N. Y. He went behind the customer counter and, in the words of Irbuhod Crane, one of Tarrytown's more illustrious inhabitants of days gone past, "tarried," spending his short break engaged in conversation with his friend Lois Hennessey, an employee of the shop. During the course of the conversation he noticed an envelope with money sticking out of it lying on the drawer of the cash register behind the counter. Biro picked up the envelope and, upon examining its contents, discovered that it contained not only money but policy slips. He placed the envelope back on the register and, without telling Hennessey of what he had seen, asked her to whom the envelope belonged. She replied that the envelope belonged to respondent Cecolini, and that he had instructed her to give it to someone.

The next day, Officer Biro mentioned his discovery to North Tarrytown detectives who in turn told Lance Emory, an FBI agent. This very ordinary incident in the lives of Biro and Hennessey requires us, four years later, to decide whether Hennessey's testimony against respondent Cecolini should have been suppressed in his trial for perjury. Respondent was charged with that offense because he denied that he knew anything of, or was in any way involved with, gambling opera-

Renewed
LFP
1/21/78

I am in accord with the essence of much of what Bill says, & also a good deal of it as unnecessary to the opn.

Also I am not sure I agree with the sharpness of Bill's distinction between "tangible evidence" and live witness testimony.

tions. Respondent was found guilty after a bench trial in the United States District Court for the Eastern District of New York, but immediately after the finding of guilt the District Court granted respondent's motion to "suppress" the testimony of Hennessey because the court concluded that the testimony was a "fruit of the poisoned tree"; assuming respondent's motion for a directed verdict included a motion to set aside the verdict of guilty, the District Court granted the motion because it concluded that without Hennessey's testimony there was insufficient evidence of respondent's guilt. The Government appealed these rulings to the Court of Appeals for the Second Circuit.

That court rightly concluded that the Government was entitled to appeal both the order granting the motion to suppress and the order setting aside the verdict of guilty, since further proceedings if the Government were successful on the appeal would not be barred by the Double Jeopardy Clause.[1] The District Court had sensibly first made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceedings in the District Court, but merely a reinstatement of the finding of guilt. *United States* v. *Morrison*, 429 U. S. 1 (1976); *United States* v. *Jenkins*, 420 U. S. 358, 365 (1975); *United States* v. *Wilson*, 420 U. S. 332, 352–353 (1975).

The Government, however, was not successful on the merits of its appeal; the Court of Appeals by a divided vote affirmed the District Court's suppression ruling. We granted certio-

[1] Appeal of the suppression motion is, of course, authorized by the clear language of 18 U. S. C. § 3731. That section permits "[a]n appeal by the United States . . . from a decision or order of a district courts [*sic*] suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding on the indictment or information . . . ." If Congress had intended only pretrial suppression motions to be appealable, they would not have added the phrase "and before the verdict or finding on the indictment or information."

rari to consider the correctness of this ruling of the Court of Appeals.

I

During the latter part of 1973, the Federal Bureau of Investigation was exploring suspected gambling operations in North Tarrytown. Among the establishments under surveillance was respondent's place of business, which was a frequent and regular stop of one Francis Millow, himself a suspect in the investigation. While the investigation continued on a reduced scale after December 1973,[*] surveillance of the flower shop was curtailed at that time. It was thus a full year after this discontinuance of FBI surveillance that Biro spent his patrol break behind the rectory with Hennessey. When Biro's discovery of the policy slips was reported the following day to Emory, Emory was not fully informed of the manner in which Biro had obtained the information. Four months later, Emory interviewed Hennessey at her home for about half an hour in the presence of her mother and two sisters. He identified himself, indicated that he had learned through the local police department that she worked for respondent, and told her that the Government would appreciate any information regarding respondent's activities that she had acquired in the shop. Emory did not specifically refer to the incident involving Officer Biro. Hennessey told Emory that she was studying police science in college and would be willing to help. She then related the events which had occurred during her visit with Officer Biro.

In May of 1975, respondent was summoned before a federal grand jury and testified that he had never taken policy bets

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[*] The extent of the continued investigation is not made clear on the record but we do know at least that on December 3, 1974, a telephone conversation between Millow and Ceccolini, which implicated the latter in a police betting operation, was intercepted by local police participating in a combined federal-state gambling investigation.

for Francis Millow at the flower shop. The next week Hennessey testified to the contrary, and shortly thereafter respondent was indicted for perjury.[1] Respondent waived a jury, and with the consent of all parties the District Court considered simultaneously with the trial on the merits respondent's motion to suppress both the policy slips and the testimony of Hennessey. At the conclusion of the evidence, the District Court excluded from its consideration "the envelope and the contents of the envelope," but nonetheless found respondent guilty of the offense charged. The court then, as previously described, granted respondent's motion to suppress the testimony of Hennessey, because she "first came directly to the attention of the government as the result of an illegal search" and the Government had not "sustained its burden of showing that Lois Hennessy's [*sic*] testimony definitely would not have been obtained without the illegal search." Pet. for Cert., pp. 28a–29a.

The Court of Appeals affirmed this ruling on the Government's appeal, reasoning that "the road to Miss Hennessy's [*sic*] testimony from Officer Bird's concededly unconstitutional search is both straight and uninterrupted." Pet. for Cert., p. 13a. The Court of Appeals also concluded that there was support in the record for the District Court's finding that the ongoing investigation would not have inevitably led to the evidence in question even without Bird's discovery of the policy slips. Because of our traditional deference to the "two court rule," *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949), and the fact that the Government has not sought review of this latter ruling, we leave undisturbed this part of the

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[1] Respondent was also indicted on a second count which charged that he had knowingly made a false statement when he testified that he did not know Hook Bond was involved in gambling operations. The judge found respondent not guilty on this count, however, "because although there is evidence to support this charge the government has not met its burden of proof beyond a reasonable doubt." Pet. for Cert., p. 28a.

Court of Appeals' decision. Because we decide that the Court of Appeals was wrong in concluding that there was insufficient attenuation between Officer Biro's search and Hennessey's testimony at the trial, we also do 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 such as perjury.

II

The "road" to which the Court of Appeals analogized the train of events from Biro's discovery of the policy slips to Hennessey's testimony at respondent's trial for perjury is one of literally thousands of such roads traveled periodically between an original investigative discovery and the ultimate trial of the accused. The constitutional question under the Fourth Amendment was phrased in *Wong Sun v. United States*, 371 U. S. 471, as whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has become 'so attenuated as to dissipate the taint.'" *Id.*, at 487, 491. The question was in turn derived from the Court's earlier decision in *Nardone v. United States*, 308 U. S. 338, 341 (1939), where Mr. Justice Frankfurter stated for the Court:

> "Here, as in the *Silverthorne* case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it simply because it is used derivatively.' 251 U. S. 385, 392.
>
> "In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof.

> As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

This, of course, makes it perfectly clear, if indeed ever there was any doubt about the matter, that the question of causal connection in this setting, as in so many other questions with which the law concerns itself, is not to be determined solely through the sort of analysis which would be applicable in the physical sciences. The issue cannot be decided on the basis of causation in the logical sense alone, but necessarily involves other elements as well. And our cases subsequent to *Nardone*, *supra*, have laid out the fundamental tenets of the exclusionary rule from which the elements that are relevant to the causal inquiry can be divined.

An examination of these cases leads us to reject the Government's suggestion that we adopt what would in practice amount to a *per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment. We also reaffirm the holding of *Wong Sun*, *supra*, at 485, that "verbal evidence which derives so immediately from unlawful entry and an unauthorized arrest as the officer's action in the present case is no less the 'fruit' of official illegality than the more commonplace tangible fruits of the unwarranted intrusion." We are of the view, however, that cases decided since *Wong Sun* significantly qualify its further observation that "the policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence." *Id.*, at 486. Rather, at least in a case such as this where not only was the alleged "fruit of the poisonous tree" the testimony of a live witness, but unlike *Wong Sun* the witness was not a putative defendant, an examination of our cases persuades us that the Court of Appeals was simply wrong in concluding that if the road were uninterrupted, its length was immaterial. Its length, we hold,

is material, as are certain other factors enumerated below to which the court gave insufficient weight.

In *Stone* v. *Powell*, 428 U. S. 465, 486 (1976), we observed that "despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings against all persons." 428 U. S. 645, 486. Recognizing not only the benefits but the costs, which are often substantial, of the exclusionary rule, we have said that "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). In that case, we refused to require that illegally seized evidence be excluded from presentation to a grand jury. We have likewise declined to prohibit the use of such evidence for the purpose of impeaching a defendant who testifies in his own behalf. *Walder* v. *United States*, 347 U. S. 62 (1954).

We have limited the standing requirement in the exclusionary rule context because the "additional benefits of extending the . . . rule" to persons other than the ones subject to the illegal search are outweighed by the "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U. S. 165, 174–175 (1969). Even in situations where the exclusionary rule is plainly applicable, we have declined to adopt a "*per se* or 'but for' rule" that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest. *Brown* v. *Illinois*, 422 U. S. 590, 603 (1975).

Evaluating the standards for application of the exclusionary rule to live-witness testimony in light of this balance, we 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 purpose of the exclusionary rule will be advanced by its application. This is certainly true when the challenged statements are made by a putative defendant after arrest. *Wong Sun*, *supra*, at 491; *Brown v. Illinois*, *supra*, and *a fortiori* is true of testimony given by nondefendants. We think it unlikely that the police will regularly conduct illegal searches in the hope of discovering the identity of knowledgeable witnesses who are truly willing and eager to testify. Not only is the likelihood of finding such witnesses rather speculative in the normal run of cases, but the simple fact is that such witnesses, even when found, are unlikely to be a sure enough bet to give significant additional incentive to police to conduct an illegal search.[4]

The greater the willingness of the witness to freely testify, 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. Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often

[4] As has been suggested, Stokes in Washington, using the computer-based Prosecutor's Management Information System, says that the chief cause of prosecution failure is that "crucial witnesses stop cooperating with the authorities in midcourse." John Stein, Enlisting Ourselves in the War on Crime, The Washington Post, Sec. B, p. 1 (July 24, 1977).

will not play any meaningful part in the witness's willingness to testify.

> "The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volation interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence." *Smith* v. *United States*, 324 F. 2d 879, 881 (DC Cir. 1963), cert. denied, 377 U. S. 954 (1964); Per Burger, J.

Another factor which is not only relevant in determining the usefulness of the exclusionary rule in a particular context, but also seems to us to differentiate the testimony of all live witnesses—even putative defendants—from the exclusion of the typical documentary evidence, is that such exclusion would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby. Rules which disqualify knowledgeable witnesses from testifying at trial are, in the words of Professor McCormick, "serious obstructions to the ascertainment of truth"; accordingly, "[f]or a century the court of legal evolution has been in the direction of sweeping away these obstructions." McCormick on Evidence § 71, p. 150 (1954). Alluding to the enormous cost engendered by such a permanent disability in an analogous context, we have specifically refused to hold that "making a confession under circumstances which preclude its use perpetually disables the confessor from making a usable one after those conditions

have been removed." *United States* v. *Bryer*, 331 U. S. 532, 540 (1974). For many of those same reasons, the Court has also held admissible at trial testimony of a witness whose identity was disclosed by the defendant's statement given after inadequate *Miranda* warnings. *Michigan* v. *Tucker*, 417 U. S. 433, 450–451 (1974).

> "For, when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all conceivably relevant and trustworthy evidence which either party seeks to adduce . . . . Here respondent's own statement, which might have helped the prosecutor show respondent's guilty conscience at trial, had already been excised from the prosecutor's case pursuant to this Court's *Johnson* [v. *New Jersey*, 384 U. S. 719 (1966)] decision. To extend the exclusion further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent." *Ibid.*

In short, since the cost of excluding live-witness testimony often will be greater, a closer, more direct link between the illegality and that kind of testimony is required.

In holding that considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect must play a factor in the attenuation analysis we do no more than reaffirm an observation made by this Court half a century ago:

> "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire* v. *United States*, 273 U. S. 95, 100 (1927).

The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.

III

Viewing this case in the light of the principles just discussed, we hold that the Court of Appeals erred in holding that the degree of attenuation was not sufficient to dissipate the connection between the illegality and the testimony. The evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority as a result of Biro's discovery of the policy slips. Substantial periods of time elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the latter and the testimony at trial on the other. While the particular knowledge to which Hennessey testified at trial can be logically traced back to Biro's discovery of the policy slips, both the identity of Hennessey and her relationship with the respondent was well known to those investigating the case. There is, in addition, not the slightest evidence to suggest that Biro entered the shop or picked up the envelope with the intent of finding tangible evidence bearing on an illicit gambling operation, much less any suggestion that he entered the shop and searched with the intent of finding a willing and knowledgeable witness to testify against respondent in a trial for a crime not yet even committed. Application of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as Biro. The 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.

Obviously no mathematical weight can be assigned to any of the factors which we have discussed, but just as obviously they all point to the conclusion that the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitu-

final violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object. The judgment of the Court of Appeals is accordingly

Reversed

To: Mr. Justice Powell

From: Sam Estreicher Date: January 20, 1978

Re: No. 76-1151, United States v. Ceccolini

WHR has written a draft with characteristic flair. Although he forswears a per se rule for live-witness testimony, that is the tenor of much of his language (see,e.g., passages sidelined in red on pp. 8, 10-11). This opinion will be understood by the outside world as recognizing what is, in effect, a per se rule for live-witness cases, with the possible exception of the situation where the witness himself is coerced to testify. For the reasons stated on p.16 of my bench memo; it is simply bad police science to state, as WHR does, that "[w]e think it unlikely that the police will regularly conduct illegal searches in the hope of discovering the identity of knowledgeable witnesses who are truly willing and eager to testify." Any policeman worth his salt is interesting in unearthing leads to live witnesses, in addition to non-testimonial evidence. And contrary to WHR's assumption, the cooperation of witnesses can be fairly assumed. In any event, the subpoena and grant of immunity are available to prod the recalcitrant. Moreover, the fact that application of the exclusionary rule leads to a loss of useful testimony does not distinguish this case from the run-of-the-mill exclusionary rule case.

There is simply no need for much of WHR's language. Attenuation is amply present for the reasons given in the first ¶ on p.11 (but note that WHR speaks of

"a crime not yet even committed;'" when he reserves that question on the top of p.5). But even a concurrence limited to Part III would embrace the proposition "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." Draft, at 11-12.

I recommend (1) a short concurring opinion which restates the balancing discussion present in the first ¶ of Part III. Although unusual, you might wish to file a separate opinion (2) stating simply, "I concur for the reasons stated in the first ¶ of Part III." (3) A third option would be to concur generally, but urge WHR to drop a footnote to the sidelined discussion on p.8, which states, as the Government itself concedes (Br. 50), that the analysis would differ where there is proof that the search was conducted for the specific purpose of discovering potential witnesses.

S.E.

January 23, 1978

No. 76-1151 U.S. v. Ceccolini

Dear Bill:

I fully agree that there was abundant "attenuation" in this case, and also that the "live witness" is in itself an attenuation factor of importance.

It does seem to me, however, that your opinion may overemphasize the distinction between "live witness testimony" and the introduction of "inanimate" evidence in determining whether there is attenuation under Wong Sun. My own experience convinced me - early and sadly - that live witness testimony all too often is unpredictable and undependable. If I were trying a murder case, I would rather have the weapon, identified positively by ballistic demonstrations, than the eyewitness testimony of half a dozen persons whose accounts of the shooting would vary as much as the testimony of six eyewitnesses in a damage suit as to how the accident happened.

I understand, of course, that we are talking here about attenuation, and the "taint" of a live witness is less likely to be immutable than that of the murder weapon. But undue emphasis on the special qualities of live witness testimony may have the unintended effect of making it more difficult to find attenuation in future cases dealing with inanimate evidence.

One further comment "on the other side" of this case. I would prefer to have a footnote, keyed to an appropriate sentence on page 8, to the effect that the analysis would be different where the search was conducted by the police for the specific purpose of discovering potential witnesses. The government concedes as much (Br. 50), and I think it would be well to make this explicit.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM J BRENNAN, JR

January 23, 1978

RE: No. 76-1151 United States v. Ceccolini

Dear Bill:

I'm sorry that I can't join your opinion. My recollection was that the conference consensus was that we need not reach the live witness question because even assuming that the live witness was a "fruit" of the illegality, there was sufficient attenuation under Wong Sun to make the evidence admissible. In due course I'll circulate an opinion of my own.

Sincerely,

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 23, 1978

Re: 76-1151 - United States v. Cecolini

Dear Bill:

Please join me.

Respectfully,

John

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 23, 1978

Re: No. 76-1151 - United States v. Ceccolini

Dear Bill:

I realize that you voted at Conference in this case that we need not reach the live witness question, because you were willing to overturn the finding of the District Court that there had been insufficient attenuation, which finding had in turn been affirmed by the Court of Appeals. My notes, however, show that the Chief, Potter, John, and I disagreed to a greater or lesser extent with that position. My notes show that John said that if there were not a different rule for live witnesses, he felt he could not in good conscience under the two-court rule overturn the finding of attenuation; I show Potter saying that he would more readily find attenuation in the case of a live witness than in the case of inanimate evidence. I show Byron merely as "reverse", and Lewis as "reverse: sufficient attenuation factor". Thurgood voted to affirm, and Harry, of course, took no part. It seems to me that if my notes are correct, my draft opinion represents as faithful a reflection of the views of the Conference as was possible; whether it will pick up the necessary number of votes is, of course, a question yet to be decided.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 25, 1978

Re: 76-1151 - United States v. Ceccolini

Dear Bill:

I cannot join you here because I am not willing to concede that there is any constitutional or rational basis to exclude the testimony of a human being -- "live witness." (Dead witnesses don't often testify except via death bed folklore!)

In the circumstances I will write along the lines of your page 9 treatment of Smith v. United States (CADC) on which the Court denied cert., 377 U.S. 954 (1964).

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 25, 1978

Re: 76-1151 United States
v.
Ceccolini

Dear Bill,

Please join me in your opinion. I could also take the route that the evidence related to a subsequent crime and in the circumstances here should not be excluded.

Sincerely,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 25, 1978

Re: No. 76-1151 - U. S. v. Ceccolini

Dear Lewis:

With respect to your suggestions regarding Ceccolini, I would be more than happy to insert a footnote somewhere on page 8 to the effect that the result might be different where the search was conducted by the police for the specific purpose of discovering potential witnesses.

I am also more than willing to attempt to accommodate the views expressed in the second and third paragraphs of your letter, but I am not entirely certain how to do so. As I indicated in my letter to Bill Brennan, I am opposed to resolving this case simply by equating live-witness testimony with inanimate evidence and then applying the normal attenuation principles of Wong Sun. Not only is that position somewhat unsatisfying to me as a matter of pure logic, but my conference notes indicate that very likely John, Potter and the Chief would be loath to join an opinion along those lines.

I do agree, however, with your observations that live-witness testimony may often be significantly less reliable than inanimate evidence and that live-witness testimony is not totally unlike inanimate evidence for purposes of determining the degree of attenuation. Thus, I wonder if the following paragraph, inserted on page 10 before the paragraph beginning "In holding", would adequately convey your sentiments?

or independent of

unrelated to

"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. But a determination that the discovery of certain evidence is sufficiently ~~far removed from~~ the constitutional violation ~~to which its discovery may be traced~~ so as to permit its introduction at trial is not a determination which rests on the comparative reliability of that evidence. Attenuation analysis turns instead on the other factors enumerated above. And while live-witness testimony is not so dramatically different from inanimate evidence under this analysis that a proper application of these principles will always result in the admission of such testimony regardless of how close and proximate the connection between it and the constitutional violation, see page 6, ante, a proper application of these principles will more often result in a finding of attenuation with respect to live-witness testimony than with respect to inanimate evidence."

Please let me know if these generous concessions will persuade you to join the opinion. If not, why not let me have some language that would satisfy you and won't risk losing the other votes which I mentioned above.

Sincerely,

Bill

Mr. Justice Powell

Attenuation analysis, which turns on the factors enumerated above with respect to live witness testimony, will focus primarily on different factors where the challenged evidence ~~might be~~ is inanimate.

Ed

January 30, 1978

No. 76-1151 U. S. v. Ceccolini

Dear Bill:

Thank you for your letter of January 25. My tardiness in replying is due to my absence since last Thursday.

Accepting your invitation, I suggest the addition of language along the following lines:

> "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. But a determination that the discovery of certain evidence is sufficiently unrelated to or independent of the constitutional violation to permit its introduction at trial is not a determination which rests on the comparative reliability of that evidence. Attenuation analysis, which turns on the factors enumerated above with respect to live-witness testimony, will focus primarily on different factors where the challenged evidence is inanimate."

With an addition generally along these lines, I will be glad to join your opinion.

Sincerely,

Mr. Justice Rehnquist

LFP/lab

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JAN 31 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1151

United States, Petitioner, v. Ralph Ceccolini,	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In December 1974, Ronald Biro, a uniformed police officer on assignment to patrol school crossings, entered respondent's place of business, the Sleepy Hollow Flower Shop, in North Tarrytown, N. Y. He went behind the customer counter and, in the words of Ichabod Crane, one of Tarrytown's more illustrious inhabitants of days gone past, "tarried," spending his short break engaged in conversation with his friend Lois Hennessey, an employee of the shop. During the course of the conversation he noticed an envelope with money sticking out of it lying on the drawer of the cash register behind the counter. Biro picked up the envelope and, upon examining its contents, discovered that it contained not only money but policy slips. He placed the envelope back on the register and, without telling Hennessey of what he had seen, asked her to whom the envelope belonged. She replied that the envelope belong to respondent Ceccolini, and that he had instructed her to give it to someone.

The next day, Officer Biro mentioned his discovery to North Tarrytown detectives who in turn told Lance Emory, an FBI agent. This very ordinary incident in the lives of Biro and Hennessey requires us, four years later, to decide whether Hennessey's testimony against respondent Ceccolini should have been suppressed in his trial for perjury. Respondent was charged with that offense because he denied that he knew

Bill has added many two suggestions — p 8 & 10 — Though with some changes of language I all join.

LFP

anything of, or was in any way involved with, gambling operations. Respondent was found guilty after a bench trial in the United States District Court for the Eastern District of New York, but immediately after the finding of guilt the District Court granted respondent's motion to "suppress" the testimony of Hennessey because the court concluded that the testimony was a "fruit of the poisoned tree"; assuming respondent's motion for a directed verdict included a motion to set aside the verdict of guilty, the District Court granted the motion because it concluded that without Hennessey's testimony there was insufficient evidence of respondent's guilt. The Government appealed these rulings to the Court of Appeals for the Second Circuit.

That court rightly concluded that the Government was entitled to appeal both the order granting the motion to suppress and the order setting aside the verdict of guilty, since further proceedings if the Government were successful on the appeal would not be barred by the Double Jeopardy Clause.[1] The District Court had sensibly first made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceedings in the District Court, but merely a reinstatement of the finding of guilt. *United States* v. *Morrison*, 429 U. S. 1, 2 (1976); *United States* v. *Jenkins*, 420 U. S. 358, 365 (1975); *United States* v. *Wilson*, 420 U. S. 332, 352–353 (1975).

The Government, however, was not successful on the merits of its appeal: the Court of Appeals by a divided vote affirmed

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[1] Appeal of the suppression motion is, of course, authorized by the clear language of 18 U. S. C. § 3731. That section permits "an appeal by the United States . . . from a decision or order of a district court . . . [sic] suppressing or excluding evidence . . . , not made after the defendant has been put in jeopardy and before the verdict or finding on the indictment or information . . . ." If Congress had intended only pretrial suppression motions to be appealable, it would not have added the phrase "and before the verdict or finding on the indictment or information."

the District Court's suppression ruling. We granted certiorari to consider the correctness of this ruling of the Court of Appeals.

I

During the latter part of 1973, the Federal Bureau of Investigation was exploring suspected gambling operations in North Tarrytown. Among the establishments under surveillance was respondent's place of business, which was a frequent and regular stop of one Francis Mellow, himself a suspect in the investigation. While the investigation continued on a reduced scale after December 1973,[2] surveillance of the flower shop was curtailed at that time. It was thus a full year after this discontinuance of FBI surveillance that Biro spent his patrol break behind the counter with Hennessey. When Biro's discovery of the policy slips was reported the following day to Emory, Emory was not fully informed of the manner in which Biro had obtained the information. Four months later, Emory interviewed Hennessey at her home for about half an hour in the presence of her mother and two sisters. He identified himself, indicated that he had learned through the local police department that she worked for respondent, and told her that the Government would appreciate any information regarding respondent's activities that she had acquired in the shop. Emory did not specifically refer to the incident involving Officer Biro. Hennessey told Emory that she was studying police science in college and would be willing to help. She then related the events which had occurred during her visit with Officer Biro.

In May of 1975, respondent was summoned before a federal grand jury and testified that he had never taken policy bets

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[2] The extent of the continued investigation is not made clear on the record but we do know at least that on December 3, 1974, a telephone conversation between Mellow and Cascolini, which implicated the latter in a policy betting operation, was intercepted by local police participating in a combined federal-state gambling investigation.

for Francis Millow at the flower shop. The next week Hennessey testified to the contrary, and shortly thereafter respondent was indicted for perjury. Respondent waived a jury, and with the consent of all parties the District Court considered simultaneously with the trial on the merits respondent's motion to suppress both the policy slips and the testimony of Hennessey. At the conclusion of the evidence, the District Court excluded from its consideration "The envelope and the contents of the envelope" but nonetheless found respondent guilty of the offense charged. The court then, as previously described, granted respondent's motion to suppress the testimony of Hennessey because she "first came directly to the attention of the government as the result of an illegal search" and the Government had not "sustained its burden of showing that [sic] Hennessy's [sic] testimony definitely would not have been obtained without the illegal search." Pet. for Cert., pp. 28a–29a.

The Court of Appeals affirmed this ruling on the Government's appeal, reasoning that "the road to Miss Hennessy's [*sic*] testimony from Officer Biro's concededly unconstitutional search is both straight and interrupted." Pet. for Cert., p. 13a. The Court of Appeals also concluded that there was support in the record for the District Court's finding that the ongoing investigation would not have inevitably led to the evidence in question even without Biro's discovery of the policy slips. Because of our traditional deference to the "two court rule," *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949), and the fact that the Government has not sought review of this latter ruling, we have undisturbed this part of the

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[1] Respondent was also indicted on a second count which charged that he had knowingly made a false statement when he testified that he did not know Hank Biro was involved in gambling operations. The judge found respondent not guilty on this count, however, because "although there is evidence to support this charge the government has not met its burden of proof beyond a reasonable doubt." Pet. for Cert., p. 28a.

Court of Appeals' decision. Because we decide that the Court of Appeals was wrong in concluding that there was insufficient attenuation between Officer Bird's search and Hennessey's testimony at the trial, we also do 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 such as perjury.

II

The "road" to which the Court of Appeals analogized the train of events from Bird's discovery of the policy slips to Hennessey's testimony at respondent's trial for perjury is one of literally thousands of such roads traveled periodically between an original investigative discovery and the ultimate trial of the accused. The constitutional question under the Fourth Amendment was phrased in *Wong Sun* v. *United States*, 371 U. S. 471 (1963), as whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has become 'so attenuated as to dissipate the taint.'" *Id.*, at 487, 491. The question was in turn derived from the Court's earlier decision in *Nardone* v. *United States*, 308 U. S. 338, 341 (1939), where Mr. Justice Frankfurter stated for the Court:

> "Here, as in the *Silverthorne* case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively. 251 U. S. 385, 392.
>
> "In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof.

> As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

This, of course, makes it perfectly clear, if indeed there was any doubt about the matter, that the question of causal connection in this setting, as in so many other questions with which the law concerns itself, is not to be determined solely through the sort of analysis which would be applicable in the physical sciences. The issue cannot be decided on the basis of causation in the logical sense alone, but necessarily includes other elements as well. And our cases subsequent to *Verdugo*, *supra*, have laid out the fundamental tenets of the exclusionary rule from which the elements that are relevant to the causal inquiry can be divined.

An examination of those cases leads us to reject the Government's suggestion that we adopt what would in practice amount to a *per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment. We also reaffirm the holding of *Wong Sun*, *supra*, at 485, that "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officer's action in the present case is no less the 'fruit' of official illegality than the more commonplace tangible fruits of the unwarranted intrusion." We are of the view, however, that cases decided since *Wong Sun* significantly qualify its further observation that "the policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence." *Id.*, at 486. Rather, at least in a case such as this where not only was the alleged "fruit of the poisonous tree" the testimony of a live witness but unlike *Wong Sun* the witness was not a putative defendant, an examination of our cases persuades us that the Court of Appeals was simply wrong in concluding that if the road were uninterrupted, its length was immaterial. Its length, we hold,

is material, as are certain other factors enumerated below to which the court gave insufficient weight.

In *Stone v. Powell*, 428 U. S. 465, 486 (1976), we observed that "despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings against all persons." 428 U. S. 645, 486. Recognizing not only the benefits but the costs, which are often substantial, of the exclusionary rule, we have said that "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, 414 U. S. 338, 348 (1974). In that case, we refused to require that illegally seized evidence be excluded from presentation to a grand jury. We have likewise declined to prohibit the use of such evidence for the purpose of impeaching a defendant who testifies in his own behalf. *Walder v. United States*, 347 U. S. 62 (1954).

We have limited the standing requirement in the exclusionary rule context because the "additional benefits of extending the . . . rule" to persons other than the ones subject to the illegal search are outweighed by the "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman v. United States*, 394 U. S. 165, 174–175 (1969). Even in situations where the exclusionary rule is plainly applicable, we have declined to adopt a "'but for' or 'fruit of' rule" that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest. *Brown v. Illinois*, 422 U. S. 590, 603 (1975).

Evaluating the standards for application of the exclusionary rule to live-witness testimony in light of this balance, we 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 purpose of the exclusionary rule will be advanced by its application. This is certainly true when the challenged statements are made by a putative defendant after arrest. *Wong Sun*, *supra*, at 491; *Brown v. Illinois*, *supra*, and *a fortiori* is true of testimony given by nondefendants.

The greater the willingness of the witness to freely testify, 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.[1] Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness's willingness to testify.

> "The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a wit-

[1] Of course, the arrestee might be different where the search was conducted by the police for the specific purpose of discovering potential witnesses.

> ness from the relative immutability of inanimate evidence." *Smith v. United States*, 324 F. 2d 879, 881 (DC Cir. 1963), cert. denied, 377 U. S. 954 (1964); Per Burger, J.

Another factor which is not only relevant in determining the usefulness of the exclusionary rule in a particular context, but also seems to us to differentiate the testimony of all live witnesses—even putative defendants—from the exclusion of the typical documentary evidence is that such exclusion would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby. Rules which disqualify knowledgeable witnesses from testifying at trial are, in the words of Professor McCormick, "serious obstructions to the ascertainment of truth"; accordingly, "[f]or a century the course of legal evolution has been in the direction of sweeping away these obstructions." McCormick on Evidence § 71, p. 150 (1954). Alluding to the enormous cost engendered by such a permanent disability in an analogous context, we have specifically refused to hold that "making a confession under circumstances which preclude its use perpetually disables the confessor from making a usable one after those conditions have been removed." *United States v. Bayer*, 331 U. S. 532, 540 (1947). For many of these same reasons, the Court has also held admissible at trial testimony of a witness whose identity was disclosed by the defendant's statement given after inadequate *Miranda* warnings. *Michigan v. Tucker*, 417 U. S. 433, 450–451 (1974).

> "For, when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all conceivably relevant and trustworthy evidence which either party seeks to adduce . . . . Here respondent's own statement, which might have helped the prosecutor show respondent's

guilty conscience at trial, had already been excised from the prosecutor's case pursuant to this Court's *Johnson* [*v. New Jersey*, 384 U. S. 719 (1966)] decision. To extend the exclusion further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent." *Ibid.*

In short, since the cost of excluding live-witness testimony often will be greater, a closer, more direct link between the illegality and that kind of testimony is required.

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. But a determination that the discovery of certain evidence is sufficiently unrelated to or is independent of the constitutional violation to permit its introduction at trial is not a determination which rests on the comparative reliability of that evidence. Attenuation analysis, appropriately concerned with the differences between live-witness testimony and inanimate evidence, can consistently focus on the factors enumerated above with respect to the former, but on different factors with respect to the latter.

In holding that considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect must play a factor in the attenuation analysis, we do no more than reaffirm an observation made by this Court half a century ago:

> "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire v. United States*, 273 U. S. 95, 99 (1927).

The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.

III

Viewing this case in the light of the principles just discussed, we hold that the Court of Appeals erred in holding that the degree of attenuation was not sufficient to dissipate the connection between the illegality and the testimony. The evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority as a result of Biro's discovery of the policy slips. Nor were the slips themselves used in questioning Hennessey. Substantial periods of time elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the latter and the testimony at trial on the other. While the particular knowledge to which Hennessey testified at trial can be logically traced back to Biro's discovery of the policy slips, both the identity of Hennessey and her relationship with the respondent was well known to those investigating the case. There is, in addition, not the slightest evidence to suggest that Biro entered the shop or picked up the envelope with the intent of finding tangible evidence bearing on an illicit gambling operation, much less any suggestion that he entered the shop and searched with the intent of finding a willing and knowledgeable witness to testify against respondent. Application of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as Biro. The cost of permanently silencing Hennessey is too great for an over-handed system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect.

Obviously no mathematical weight can be assigned to any of the factors which we have discussed, but just as obviously they all point to the conclusion 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. The judgment of the Court of Appeals is accordingly

Reversed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 31, 1978

Re: No. 76-1151, United States v. Ceccolini

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 31, 1978

Re: No. 76-1151 - United States v. Ceccolini

Dear Lewis:

As I told you on the phone this morning, the modification of my proposed insert which you suggest in your letter of January 30th is satisfactory to me. With your approval, in order to emphasize that our distinction between the treatment of inanimate evidence and the treatment of live witness testimony for attenuation purposes is consistent, I would prefer changing the last sentence of your proposed paragraph to read as follows:

> "Attenuation analysis, appropriately concerned with the differences between live-witness testimony and inanimate evidence, can consistently focus on the factors enumerated above with respect to the former, but on different factors with respect to the latter."

If you have no objection to this modification, I will circulate a new draft embodying the proposed change discussed in our correspondence.

Sincerely,

Mr. Justice Powell

February 1, 1978

No. 76-1151 United States v. Ceccolini

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 21, 1978

RE: No. 76-1151 United States v. Ceccolini

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Mr. Justice Marshall

cc: The Conference

WBJr	WJB	PS	BRW	TM	HAB	LFP	WHR	JPS
1st draft Concurring in Judgment 3/15/78 2nd draft 3/20/78	join TM 2/21/78	join WHR 1/31/78		dissent 1st draft 2/17/78 2nd draft 2.22.78	dissent 1/20/78	join WHR 2/1/78	12/10/77 1st draft 1/20/78 2nd draft 1/26/78 3rd draft 1/31/78 4th draft 3/15/78	join WHR 1/23/78

76-1151 U.S. v. Ceccolini