The Burger Court Opinion Writing Database

United States v. Ceccolini

435 U.S. 268 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

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

From: The Chief Justice

Circulated: MAR 16 1978

Recirculated: _____

1st 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.

[March —, 1978]

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I agree with the Court's ultimate conclusion that there is a fundamental difference, for purposes of the exclusionary rule, between live-witness testimony and other types of evidence. I perceive this distinction to be so fundamental, however, that I would not prevent a factfinder from hearing and considering the relevant statements of any witness, except perhaps under the most remarkable of circumstances—although none such have ever been postulated that would lead me to exclude the testimony of a live witness.

To appreciate this position, it is essential to bear in mind the purported justification for employing the exclusionary rule in a Fourth Amendment context: deterrence of official misconduct. See *Stone* v. *Powell*, 428 U. S. 465, 486 (1976); *United States* v. *Janis*, 428 U. S. 433, 458–459, n. 35 (1976). As an abstract intellectual proposition this can be buttressed by a plausible rationale since there is at least some [redacted] comprehensible connection—albeit largely and dubiously speculative—between the exclusion of evidence and the deterrence of intentional illegality on the part of a police officer.[1] But if that is the purpose of the rule, it seems to me that the appropriate inquiry

[1] Empirically speaking, though, I have the gravest doubts as to whether the exclusion of evidence, in and of itself, has any direct appreciable effect on a policeman's behavior in most situations—emergency actions in particular. See *Bivens* v. *Six Unknown Federal Agents*, 403 U. S. 388, 416–417, 426–427 (1971) (BURGER, C. J., dissenting).

STYLISTIC CHANGES ONLY 1,6

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

Dated:

MAR 20 1978

2nd 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.

[March —, 1978]

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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,

Bill

Mr. Justice Rehnquist

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,

Bill

Mr. Justice Marshall

cc: The Conference

J

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 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

1 ? FEB 1978

1st 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 MARSHALL, dissenting.

While "reaffirm[ing]" the holding of *Wong Sun* v. *United States*, 371 U. S. 471, 485 (1963), that verbal evidence, like physical evidence, may be "fruit of the poisonous tree," the Court today "significantly qualif[ies]" *Wong Sun*'s further conclusion, *id.*, at 486, that no "logical distinction" can be drawn between verbal and physical evidence for purposes of the exclusionary rule. *Ante*, at 6. In my view, the distinction that the Court attempts to draw cannot withstand close analysis. To extend "a time-worn metaphor," *Harrison* v. *United States*, 392 U. S. 219, 222 (1968), I do not believe that the same tree, having its roots in an unconstitutional search or seizure, can bear two different kinds of fruit, with one kind less susceptible than the other to exclusion on Fourth Amendment grounds. I therefore dissent.

The Court correctly states the question before us: whether the connection between the police officer's concededly unconstitutional search and Hennessey's disputed testimony was "so attenuated as to dissipate the taint," *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). See *ante*, at 5. In resolving questions of attenuation, courts typically scrutinize the facts of the individual case, with particular attention to such matters as the "temporal proximity" of the official illegality and the discovery of the evidence, "the presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct." *Brown* v. *Illinois*, 422 U. S. 590, 603–

✓ pp. 1, 2

22 FEB 1978

2nd 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 MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

While "reaffirm[ing]" the holding of *Wong Sun* v. *United States*, 371 U. S. 471, 485 (1963), that verbal evidence, like physical evidence, may be "fruit of the poisonous tree," the Court today "significantly qualif[ies]" *Wong Sun*'s further conclusion, *id.*, at 486, that no "logical distinction" can be drawn between verbal and physical evidence for purposes of the exclusionary rule. *Ante*, at 6. In my view, the distinction that the Court attempts to draw cannot withstand close analysis. To extend "a time-worn metaphor," *Harrison* v. *United States*, 392 U. S. 219, 222 (1968), I do not believe that the same tree, having its roots in an unconstitutional search or seizure, can bear two different kinds of fruit, with one kind less susceptible than the other to exclusion on Fourth Amendment grounds. I therefore dissent.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 20, 1978

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

Dear Bill:

Will you please indicate at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

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

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

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 1, 1978

No. 76-1151 United States v. Ceccolini

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

Recirculated: _____

1st 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 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 belonged 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 anything of, or was in any way involved with, gambling opera-

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,

WHR

Mr. Justice Brennan

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?

"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.

Pp 1, 2, 8, 11

STYLISTIC CHANGES THROUGHOUT

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 26 1978

2nd 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

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,

WEB

Mr. Justice Powell

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr.
Mr.
Mr.

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]

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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: MAR 15 1978

4th 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]

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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. Ceccolini

Dear Bill:

Please join me.

Respectfully,

John

Mr. Justice Rehnquist

Copies to the Conference