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Criminal Procedure - The Evisceration of the Exclusionary Rule: The Supreme Court Invents the Oral Evidence Exception - United States v. Ceccolini

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CASE NOTES

CRIMINAL PROCEDURE—The Evisceration of the Exclusionary Rule: the Supreme Court Invents the Oral Evidence Exception. United States v. Ceccolini, 435 U.S. 268 (1978).

For more than 65 years American courts have recognized the rule that evidence seized during an unlawful search cannot be used against the victim of that search.[1] In cases where the challenged evidence is obtained as a direct result of an illegal search, there is little question the evidence must be suppressed. Where, however, evidence stems only indirectly from the illegal search, a more difficult question is presented. For example, where the name of a witness is found in a file folder illegally seized, the file folder and its contents probably would not be admissible against its owner since it is regarded as primary, "poisonous tree" evidence. The illegal seizure was a violation of the owner's property rights in the file. But the testimony of the witness whose identity was discovered because of that illegal seizure may be treated differently. This sort of secondary or derivative evidence presents a quandary to a

1. This rule, commonly called the exclusionary rule, was first adopted for federal courts by the Supreme Court in 1914 in Weeks v. United States, 232 U.S. 383 (1914), and extended to secondary or derivative evidence obtained in like fashion six years later in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The Supreme Court held the rule applicable to state courts as well as federal in Mapp v. Ohio, 367 U.S. 643 (1961). Although judicially created, the rule was viewed by the Court as a constitutional measure rooted in the Fourth Amendment to the United States Constitution, which reads as follows:

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

However, the Court no longer treats the rule as having a constitutional justification; instead, it views the rule as existing solely for deterrence of police misconduct. This view was first expressed by a majority of the justices in United States v. Calandra, 414 U.S. 338 (1974) and affirmed in Stone v. Powell, 428 U.S. 465, 486 (1976). Not all members of the Court agree with the majority's characterization, however. In a dissenting opinion in United States v. Calandra, *supra*, at 356-57, Mr. Justice Brennan chastised the majority:

> This downgrading of the exclusionary rule . . . reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule . . . . [C]urtailment of the evil . . . was at best only a hoped-for effect of the exclusionary rule, not its ultimate objective. [There was] no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formulation. Their concern as guardians of the Bill of Rights was to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees.

court: Is society's interest in conviction so strong the testimony must be admitted? Would suppression deter future illegal police invasions? Or is the evidence so tainted by the illegal action that fair trial standards demand its exclusion—is it the forbidden fruit of the poisonous tree?[2] This was the question the Court faced in *United States v. Ceccolini*.[3] And in its answer, the Court further limited the application of the exclusionary rule by creating a new exception: that of oral evidence obtained by law enforcement officials incident to an otherwise illegal search and seizure.

The illegal invasion that spawned *Ceccolini* began when a local police officer on a break stopped at a flower shop to visit with a friend, Hennessey. Ceccolini was the owner of the shop and Hennessey's employer. While there, the officer spotted an envelope with money sticking out of it on the cash register. Without a warrant, he inspected its contents and discovered betting-policy slips. The officer asked Hennessey who owned the envelope; he was told it belonged to Ceccolini. Thus, Hennessey became a potential witness, found because of the illegal search. She was the fruit of the poisonous tree.

The police officer reported the incident to his superiors, who relayed the information to the Federal Bureau of Investigation.[4] Four months later an FBI agent interviewed Hennessey. Shortly thereafter, Ceccolini was summoned before a grand jury where he testified that he had never taken policy bets at the shop. Hennessey was called as a rebuttal witness, and Ceccolini was indicted for perjury.

Ceccolini's subsequent conviction was set aside by the trial court on the ground Hennessey had been discovered as a result of an illegal search. The Court of Appeals affirmed, but was reversed by the United States Supreme

2. Secondary evidence was first characterized as fruit of the poisonous tree in Nardone v. United States, 308 U.S. 338, 340-341 (1939).
3. United States v. Ceccolini, 435 U.S. 268 (1978).
4. The FBI had been investigating suspected gambling operations in the town, and had kept Ceccolini's flower shop under surveillance for a period of time ending about one year before the discovery of the betting-policy slips.

Court in a 6-2 decision written by Mr. Justice Rehnquist.[5] The Supreme Court held there had been sufficient "attenuation"[6] between the search and the testimony and Ceccolini's conviction should stand.[7]

THE EXCLUSIONARY RULE

When the exclusionary rule was first adopted by the Supreme Court, its blanket application forbid the introduction of any evidence which had been obtained directly or indirectly from an illegal search. But as time passed, the rule was diminished as courts found it difficult to exclude secondary evidence that appeared removed from the illegal action from which it was derived. One commentator noted that if the fruit of the poisonous tree doctrine were "limited to confessions extracted by rack and screw methods as it was decades ago, lower courts would have less trouble excluding derivative evidence than they do today."[8] And of all secondary evidence, the testimony of witnesses and written confessions have presented the greatest problems. Judges across the land seem to have a "visceral reaction" to excluding oral evidence merely because the witness was discovered by means of illegal police action.[9]

Three major exceptions to the rule have been recognized by the courts: the independent source exception,[10] the inevitable discovery exception,[11] and the attenuation doctrine.[12] Even though evidence may have been obtained by an illegal

5. Joining with Rehnquist in the majority opinion were Stewart, White, Powell and Stevens. Burger filed a concurring opinion. Marshall filed a dissenting opinion, in which Brennan joined. Blackum took no part in the consideration or decision of the case.
6. *See* note 12, *infra*.
7. United States v. Ceccolini, *supra* note 3, at 269-273.
8. Pitler, *'The Fruit of the Poisonous Tree' Revisited and Shepardized*, 56 CALIF. L. REV. 579, 584-585 (1968).
9. *Id.* at 621.
10. The independent source doctrine is derived from Silverthorne Lumber Company v. United States, *supra* note 1, at 392.
11. The inevitable discovery exception has never been formally approved by the Supreme Court although it has generally been recognized among lower courts. LAFAVE, 3 SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT 612, 617 (1978).
12. The doctrine of attenuation springs from Nardone v. United States, *supra* note 2. It is based upon the supposition that at some point in time the evidence may become so attenuated, so dissipated, that the detriment of illegal police action does not warrant the cost of allowing criminals to go free.

search, it is generally admissible if the prosecution can prove the information or the witness was discovered through a source independent of the illegal invasion, or that through the course of the investigation the information would have been lawfully discovered, or that so many independent intervening events have occurred that the taint has been attenuated or diminished.

Before *Ceccolini*, no formal distinction was made between oral and physical evidence. In *Wong Sun v. United States*,[13] the Supreme Court officially recognized that words could be as much a fruit of illegal invasion as physical evidence, and it explicitly refused to draw a distinction between the two.[14] But the Court did recognize that a witness' intervening, independent act of free will, regardless of police conduct, could attenuate the taint of the illegal invasion.[15] It was under the attenuation doctrine that lower courts began refusing to exclude the testimony of witnesses discovered by impermissible state action.[16]

THE CECCOLINI EXCEPTION

On its surface, the *Ceccolini* decision appears to be simply another affirmation of the *Wong Sun* attenuation doctrine. The Court found six separate factors in Ceccolini's predicament that sufficiently attenuated the link between the illegal search and Hennessey's testimony. They were: (1) Hennessey's testimony was of her own volition and was not coerced or induced by the police search; (2) the

13. Wong Sun v. United States, 371 U.S. 471 (1963).
14. *Id.* at 486.
15. *Id.*
16. The finding of attenuation was based on varying factors. In Smith v. United States, 344 F.2d 545 (D.C. Cir. 1965), for example, the court said the fact that an initially reluctant witness reflected, then changed his mind, was sufficient attenuation to break the chain of causation. In United States v. Scotten, 428 F.Supp. 256, 257 (D.Nev. 1976) the defendant moved unsuccessfully to suppress the testimony of an unindicted co-conspirator as fruit of an illegal search. The court ruled the witness' decision was "an independent act of free will" as "[h]e was concerned with his own hide, not Scotten's and the possible admissibility of the evidence at Scotten's trial was of no concern to (him)." In McLindon v. United States, 117 U.S. App. D.C. 283, 329 F.2d 238, note 2, at 241 (1964), the court listed various factors of free will which would attenuate the taint: (1) how great a role the manifestation of individual personality played; (2) whether the witness would have voluntarily gone to the police had they not known the witness' identity, (3) the fact the witness' testimony never varied.

betting-policy slips themselves were not used by the FBI during Hennessey's interrogation; (3) substantial periods of time had elapsed between the search and the interview and between the interview and the trial; (4) the investigators had been familiar with Hennessey's identity and with her relationship to Ceccolini prior to the search; (5) nothing in the record suggested the policeman entered the shop or searched the envelope intending to find evidence, let alone a witness, and (6) application of the exclusionary rule would not deter police in similar situations.[17]

Substantively, however, the *Ceccolini* Court sharply departed from *Wong Sun.* Although purporting to follow *Wong Sun,* the Court ignored its warning of the danger of distinguishing between physical and oral evidence. Rather, the *Ceccolini* Court held that there was a logical distinction between physical and oral evidence.[18] The distinguishing factor was the voluntariness, or free will, of the witness whose testimony was the fruit of the poisoned search.[19] The opinion noted that 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."[20] And the Court cited with favor a 1963 decision[21] of the District of Columbia Court of Appeals written by Chief Justice Burger which held that the fact the name of a witness had been obtained illegally by police was of no evidentiary significance: "The uniqueness of this human process (of free will) distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence."[22]

After recognizing a difference between physical and oral evidence, the Court drew an even finer distinction between testimony from both potential and actual defen-

17. United States v. Ceccolini, *supra* note 3, at 279-80.
18. *Id.* at 275.
19. *Id.* at 276.
20. *Id.* The Court did note its analysis might differ, however, if the search were conducted for the specific purpose of finding witnesses.
21. Smith v. United States, 117 U.S. App. D.C. 1, 324 F.2d 879 (1963) *cert. den.* 377 U.S. 954 (1964).
22. United States v. Ceccolini, *supra* note 3, at 277, quoting Smith v. United States, *supra* note 21 at 882.

dants, and mere witnesses. The Court said the "degree of free will exercised by the witness is not irrelevant. . . . This is certainly true when the challenged statements are made by a putative defendant after arrest . . . and *a fortiori* is true of testimony given by nondefendants."[23] To further bolster its conclusions, the Court noted exclusion of the witness would be a serious obstruction to the ascertainment of truth: "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."[24]

Other factors cited by the Court were that the degree of free will necessary to dissipate a taint would be found more often with live witnesses[25] and that the initial illegality would very often have nothing to do with the witness' willingness to testify.[26] The Court also said the costs of excluding testimony would often be greater than those of excluding physical evidence; thus, a closer link between the illegality and the testimony must be shown before exclusion would be warranted.[27]

AN ANALYSIS OF CECCOLINI'S EFFECT

Although the *Ceccolini* decision did not *per se* spell out a new exception to the exclusionary rule,[28] its effect on the lower courts so far has been precisely that. By holding that a witness' motive is always relevant,[29] the Court equated free will with attenuation and thus lessened the burden of proof borne by the state for the admission of oral evidence. For example, when the prosecution seeks admission of evidence based on the independent source doctrine, it must prove it obtained the evidence from an independent origin, that the evidence gained in the illegal action did not directly

23. United States v. Ceccolini, *supra* note 3, at 276.
24. *Id.* at 277.
25. *Id.* at 276.
26. *Id.* at 277.
27. *Id.* at 278.
28. The Court appeared careful not to do that. *Id.* at 274-5.
29. *Id.* at 276.

or indirectly lead to the evidence in question.[30] If the prosecution seeks admission based on the inevitable discovery doctrine, it would have to prove not only that another procedure would have produced the evidence, but that the other procedure actually would have been used.[31] But the notion of attenuation or dissipation "attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its costs."[32] Although the prosecution still bears the burden of proof under this exception, it only needs to show (1) sufficient free will and (2) lack of deterrent effect, and the burden will be met. Except for those very few cases where it can be proved that law enforcement officials knowingly committed the illegal invasion with the purpose of finding potential witnesses, an awesome burden in itself for the defense, live witness testimony now appears admissible, whether the witness is a "putative defendant" or a "nondefendant."[33] The degree of scrutiny involved, however, will vary with each classification.

In the first classification, *i.e.*, testimony of nondefendants, the court's scrutiny will be considerably lighter than that given to the testimony of potential or putative defendants. The first inquiry will be the degree of free will exercised by the potential witness. If the witness is a willing nondefendant, as was Hennessey, admissibility is virtually assured.[34] The *Ceccolini* policy that the exclusion of a knowl-

30. MaGuire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. LAW, CRIMINOLOGY, AND POLICE SCIENCE, 307, 309 (1964).
31. Novikoff, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUMBIA L. REV. 88, 93 (1974).
32. Brown v. Illinois, 422 U.S. 590, 609 (1975) (concurring opinion).
33. United States v. Ceccolini, *supra* note 3, at 276.
34. It should be noted that Ceccolini's attorneys did not classify Hennessey as a "willing nondefendant," although the Court did. At pp. 18-19 of Respondent's Brief, it is pointed out that Hennessey "answered Patrolman Biro originally after he confronted and interrogated her with the illegally received evidence in his hands at a time and place where he was in uniform, and she felt constrained by the circumstances to answer his questions, but not to volunteer information . . . . [she did not, for example, tell the officer about other betting activities, evidence of which was also in the shop.] Hennessey further testified she answered [the FBI agent's] questions because *she knew that he had or could get the information which he inquired about from the North Tarrytown Police*. . . . This can hardly be construed as an act of free will divorced from the illegal search." (emphasis in original)

edgeable witness is a perpetual disablement, a "serious obstruction(s) to the ascertainment of truth,"[35] has neatly set the stage for a blanket exception for willing nondefendants. As Mr. Justice Rehnquist stated in *Michigan v. Tucker*,[36] the strong interest of society in the effective prosecution of criminals will be weighed along with protection of defendants' rights.

The *Ceccolini* decision mimicked the *Michigan v. Tucker* balancing act with one of its own: "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."[37] The purpose which the *Ceccolini* Court saw the exclusionary rule serving was that of deterrence.[38] As long as the proferred evidence is gained by good faith police efforts—which are unlikely candidates for deterrence—the testimony will in most cases be admissible.

A case in point is *United States v. Carsello*.[39] Names of potential witnesses had been gleaned from records illegally seized by the local police. Those witnesses gave government investigators the names of other witnesses who could not be considered potential defendants. Those witnesses were freely willing to testify. The Court did admit that "in some sense of the word the Government did 'exploit' the illegal action of the . . . police by photocopying the usury records and using them as a source of leads,"[40] but it saw no deterrent benefit and thus no justification for suppression of the oral evidence. The Government agents had not been responsible for the search that yielded the records, and the documents themselves were suppressed as illegal because of a

35. United States v. Ceccolini, *supra* note 3, at 277.
36. Michigan v. Tucker, 417 U.S. 433, 450-1 (1974).
37. United States v. Ceccolini, *supra* note 3, at 279.
38. The Court did not explicitly list deterrence as the basis for the exclusionary rule in Ceccolini, although it is implicit in the Court's rationale. However, earlier decisions of the Court (Stone v. Powell, 428 U.S. 465 (1976) and United States v. Janis, 428 U.S. 433 (1976)) held the primary justification for the rule was deterrence of illegal police conduct, as was pointd out by Mr. Chief Justice Burger, in his concurring opinion in United States v. Ceccolini, *supra* note 3, at 281.
39. United States v. Carsello, 578 F.2d 199 (7th Cir. 1978).
40. *Id.* at 203.

technicality: everything seized was outside the scope of the warrant.[41]

The underlying problems presented by the *Ceccolini* decision come not with the presentation of evidence in cases like *Carsello*, but with the presentation of evidence in cases where putative defendants—unindicted co-conspirators, co-defendants and the like—are offered to the court as potential witnesses. Under traditional definitions of voluntariness or free will, even "subtly coercive police questions" must be taken into account,[42] although little account has generally been taken where the questions are merely "subtly coercive." Attempts by the Court in the past to set forth a litmus-paper test for voluntariness have not resulted in any set standard. The Court has recognized that "kindess, cajolery, entreaty, deception, persistent cross-questioning, even phyical brutality"[43] in the form of police interrogation is an indispensable element in crime detection,[44] and have refused to hold that confessions obtained by these methods were involuntary. But courts grappling with the *Ceccolini* decision have taken the meaning of voluntariness several steps further in order to give effect to the *Ceccolini* mandate that even putative defendants' testimony should be excluded "with much greater reluctance"[45] than inanimate evidence.

An extreme example is found in *United States v. Houltin*,[46] a case that at least superficially would be a likely candidate for evidence suppression as a deterrent to illegal police action.[47] The six defendants in *Houltin* were convicted of conspiracy to import and possess marijuana. The convictions of two defendants, Houltin and Phillips, were reversed by an appellate court because of the use of illegal wiretaps in the investigation. But the convictions of the others were upheld because they lacked standing to challenge the illegally obtained evidence. Upon retrial, the evidence

41. *Id.*
42. Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973).
43. Culombe v. Connecticut, 367 U.S. 568, 571-572 (1961) (concurring opinion).
44. *Id.*
45. United States v. Ceccolini, *supra* note 3, at 280.
46. United States v. Houltin, 566 F.2d 1027 (5th Cir. 1978) (decision entered prior to Ceccolini; however, rehearing denied after Ceccolini).
47. *Id.* at 1038 (dissenting opinion).

obtained by the illegal methods was suppressed, but the other defendants were granted immunity to testify and did. On the second appeal, the convictions of Houltin and Phillips were affirmed, because the appellate court decided the testimony of the four codefendants had been voluntary. Sufficient "free will" on the part of the witnesses was found in two factors: (1) the witnesses came forward on their own volition and (2) the witnesses had been completely uncooperative when originally discovered but later changed their attitudes and came forward to testify.[48] The court acknowledged, but otherwise ignored the facts that had the four refused to testify they would have risked being cited for contempt and adversely affected their chances for sentence reductions.[49] The "choice may have been hard," the court said, "but it was a choice nonetheless."[50]

Another example of the same sort of questionable finding of free will is found in *Commonwealth v. Caso*,[51] where the testimony of an unindicted coconspirator who was granted immunity was suppressed at the trial court. The appellate court remanded the case for reconsideration of the admissibility of the testimony, directing that "a truly voluntary decision by a witness to testify should not be overridden unless the extreme circumstances of a particular case require the suppression of the testimony as a deterrent to further resort to the unlawful conduct which resulted in the discovery of the witness."[52]

48. *Id.* at 1032
49. *Id.*
50. *Id.*
51. Commonwealth v. Caso, 385 N.E.2d 979 (Mass. 1979).
52. *Id.* at 982. *See also:* United States v. Scios, 590 F.2d 956 (D.C. Cir. 1978), where the testimony of a witness who had been discovered as the result of an illegal search was suppressed. The witness testified only after receiving immunity; the Scios court suppressed that tstimony on the basis it was the product of coercion. *Id.* at 961. Disturbing, however, were the dissenting opinions. One judge would have admitted the testimony because he felt the FBI agent who conducted the illegal search "had acted in good faith." *Id.* at 978. Another urged the traditional analysis be thrown out where live witness testimony was involved. He said the proper question was only "whether the deterrence benefits of excluding live-witness testimony outweigh the social costs of such exclusion." *Id.* at 984-5; United States v. Cruz, 581 F.2d 535 (5th Cir. 1978), where disagreement about the proper scope of the exclusionary rule resulted in the court hearing the case en banc. The majority relied upon Ceccolini to suppress the testimony of two witnesses, holding that they had been discovered as a result of a search having no purpose other than their discovery, *id.* at 542, and that the witnesses' presence at the trial could hardly

Of course, free will is not always defined in so broad a fashion. In *State v. Washington*,[53] the Arizona Supreme Court ruled that an allegation that a codefendant had agreed to testify against partners in crime because of a favorable plea agreement offered by the state was sufficient to cast doubt upon the extent of free will the codefendant exercised.[54]

But the occasions on which courts have already seen fit to apply a looser free-will standard point to a widening chasm between the considerations in admission of witness testimony and those for physical evidence. If the definitions of free will used by the *Houltin* and *Caso* courts stand, a *per se* rule of admissibility of live witness testimony[55] appears inevitable.

THE DEMISE OF THE EXCLUSIONARY RULE

The notion of differentiating between oral and physical evidence for purposes of applying the exclusionary rule has no logical basis.[56] The reasoning used by Mr. Justice Rehnquist to qualify the decision could just as easily be applied to physical evidence. For example, exclusion of physical evidence would "disable" that evidence just as surely as would exclusion of testimony disable a witness.[57] As the majority opinion noted, police who know a witness can be discovered by legal means will have no incentive to find that witness by illegal means.[58] But the same can be said about physical evidence which is discoverable by legal means.

Other telling criticisms of the distinction were made by the dissent of Justices Brennan and Marshall, who char-

be said to be voluntary or resulting from detached reflection since they had been kept in custody from the date of the arrest until trial. Five judges dissented, however, on varying grounds, one because "Live swearers under severe cross examination had the truth to tell." *Id.* at 543.

53. State v. Washington, 120 Ariz. 229, 585 P.2d 249 (1978).
54. *Id.* at 254.
55. Blanket admissibility was advocated by Chief Justice Burger in United States v. Ceccolini, *supra* note 3, at 280.
56. As Mr. Justice Marshall, with whom Mr. Justice Brennan joined, noted in his dissent: "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 of exclusion on Fourth Amendment grounds." *Id.* at 288.
57. *See* United States v. Ceccolini, *supra* note 3, at 277 (dissenting opinion).
58. *Id.* at 276 (dissenting opinion).

acterized the special live-witness exception as a "form of judicial 'double counting,'"[59] which employed two exceptions to solve one problem.

But the most frightening characteristic of the Court's free will analysis is that it too easily misdirects attention from the central meaning of the exclusionary rule: that of protection of the constitutional rights of the defendant. It is the defendant's constitutional rights, not necessarily those of the prospective witness, with which the courts must be concerned. The defendant is the only individual who can waive those constitutional rights, no matter how much "free will" a potential witness may have to incriminate him. The underlying principle of the exclusionary rule—and its primary justification—was the effectuation of Fourth Amendment rights by the deterrence of police conduct that violates those rights.[60] It would seem axiomatic that police officers who know that testimony of witnesses discovered by illegal means will not be suppressed will redirect the thrust of all questionable searches to the discovery of "live" evidence which might have the "free will" to be admissible. If it is the Court's position, as it most certainly appears to be, that this sort of deterrence is no longer necessary in this society, the basis for the exclusionary rule will crumble, and with it, the application of the rule in more and more situations.

The author of the opinion, Mr. Justice Rehnquist, supports the total abolition of the exclusionary rule, albeit in favor of some other protection. In a recent dissent to an Order in a Pending Case, *California v. Minjares*,[61] Mr. Justice Rehnquist advocated precisely that. He noted that there was no question police need rules, as there was equally no question that those whose constitutional rights were infringed should have an avenue for redress. But Rehnquist said it was not at all necessary that the forum for redress

59. *Id.* at 287 (dissenting opinion).
60. Stone v. Powell, 428 U.S. 465 (1976), at 482, 486.
61. California v. Minjares, ... U.S. ....., 100 S.Ct. 9 (1979).

of rights and the forum for the police officer's education need be one and the same.[62]

CONCLUSION

In his concurring opinion, Mr. Chief Justice Burger advocated a *per se* rule of admissibility for live witness testimony. And, as the dissenting opinion pointed out, there is no real difference in the reasons the Court put forth for admitting live witness testimony than there is for admitting physical evidence. With only two justices opposed to the new limitations on the rule, and with no real difference between oral and physical evidence, the next exception to the rule would reasonably involve certain types of physical evidence. As the number of exceptions grows, the strength of the rule fails. Its total demise is surely within the foreseeable future, albeit by a slow whittling at each edge.

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62. *Id.* at 3118.