
Constitutional Law - Mere Evidence Rule as a Constitutional Standard

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ment freedoms the courts should strive to maintain the balance between individual rights and the rights of society. The thought which remains is whether a literal adherence to the dictates of *Elfbrandt* will tip the scale too heavily in favor of the individual at the expense of the public.

Hugo Scala

CONSTITUTIONAL LAW—MERE EVIDENCE RULE AS A CONSTITUTIONAL STANDARD

Defendant, a California physician, treated a number of patients whose medical care was paid for by the Bureau of Public Assistance of Los Angeles County. In order to receive compensation for such services, the physician was required to submit medical care statements certifying that he had performed the services described and that the amount due for such services had not been paid. Defendant had been submitting fraudulent statements to the Bureau and was convicted in the Superior Court of Los Angeles County, for violating Sec. 72 of the Penal Code of California.¹ At the trial, the state introduced certain of the doctor's medical files which proved that many of the services billed to the Bureau had never been rendered. These files had been seized under a valid search warrant. Defendant appealed, contending that the seizure of the records and their use in evidence was a denial of the constitutional protection of the fourth,² fifth,³ and fourteenth amendments⁴ of the Constitution of the United States. This contention was based upon the theory that the so-called "mere evidence" rule enunciated by the United States Supreme Court, under which objects of merely evidentiary value may not be seized in any manner,⁵ is binding upon the states under the decision in *Mapp v. Ohio*.⁶

¹ CAL. PEN. CODE § 72 (West 1927).

² U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

³ U.S. CONST. amend. V. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

⁴ U.S. CONST. amend. XIV, § 1. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

⁵ See *Boyd v. United States*, 116 U.S. 616 (1886); *Gouled v. United States*, 255 U.S. 298 (1921).

⁶ 367 U.S. 643 (1961).

The Supreme Court of California affirmed the conviction holding that the "mere evidence" rule is not a constitutional standard, that it does not apply in California and that such seizures of mere evidence are properly authorized by statute. *People v. Thayer*, 47 Cal. Rptr. 780, 408 P.2d 108 (1965), *cert. denied*, 384 U.S. 908 (1966).

The issue thus raised is whether the fourth amendment, applicable to the states through the fourteenth, prohibits the seizure of objects of merely evidentiary value without regard to the manner in which they are seized. The purpose of this note is to indicate the state trend towards denying the existence of such a prohibition in the fourth amendment, thus rejecting the applicability of the "mere evidence" rule to the states.

*Boyd v. United States*⁷ is generally considered to be the case in which the "mere evidence" rule had its origin.⁸ The court held that searching for and seizing a man's private papers merely to obtain evidence against him is an unreasonable search and seizure within the meaning of the fourth amendment and their use as evidence is a violation of the fifth amendment. Later, in *Gouled v. United States*,⁹ a clear, yet very general, rule was developed. The Court, at least partially relying on the *Boyd* decision, widened the scope of applicability of the rule to include objects other than private papers.¹⁰ In justifying the application of the rule the Court held that the government's right to seize property must be based on an important and legitimate interest of the public in the property, in the right to its possession or on a valid exercise of police power which has rendered its possession unlawful.¹¹ The terms used to describe the classes of property which were indicated in the *Gouled* case¹² as those which could lawfully be seized under this principle are: (1) fruits of a crime, (2) instruments used in the commission of a crime (instrumentalities), (3) contraband and

⁷ *Supra* note 5.

⁸ See *Gouled v. United States*, *supra* note 5; *State v. Bisaccia*, 45 N.J. 504, 213 A.2d 185 (1965); *Limitation on Seizures of 'Evidentiary' Objects: A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319 (1953); *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593 (1966).

⁹ *Supra* note 5.

¹⁰ *Boyd v. United States*, *supra* note 5, was basically concerned with the seizure of private papers while *Gouled v. United States* extended the rule by saying that private papers had no special sanctity from seizure and that the kind of property taken was not important. The only important question was held to be whether or not the government had an overriding property right in the objects, based on a property rights theory therein discussed.

¹¹ For discussion of the property rights thesis, see generally *Gouled v. United States*, *supra* note 5; *Limitation of Seizures of 'Evidentiary' Objects: A Rule in Search of a Reason*, *supra* note 8; *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 23 U. CHI. L. REV. 664 (1961); *Evidentiary Searches: The Rule and The Reason*, *supra* note 8.

¹² *Supra* note 5, at 308.

(4) weapons and other means of escape.¹³ Under the *Gouled* decision any item of property which does not fit into one of the above-mentioned categories is merely of evidentiary value and accordingly, a search for or seizure of any such item is prohibited by the fourth amendment and the introduction in evidence thereof is prohibited by the fifth amendment to the federal constitution, i.e. the seizure of merely evidentiary material is in itself unreasonable without regard to the manner in which it is seized.¹⁴

All of the Supreme Court and lower federal court cases since *Gouled* have purported to use the "mere evidence" rule in reaching their decisions. However, due to an inconsistent classification by the courts of articles as "mere evidence" which may not be seized, or as instrumentalities which may be seized, these decisions appear to be irreconcilable.¹⁵ It appears that in cases involving the seizure of similar property in connection with similar crimes the courts have reached opposite conclusions, some cases holding the objects seized to be "mere evidence," and other cases holding them to be "instrumentalities."¹⁶ Regardless of this apparent inconsistency, however, all of these decisions do fall into a pattern. In all cases in which the search has been held to have been reasonable with regard to its scope, manner and the authority under which it was made, the courts have found the items seized to be instruments of the crime. In those cases where the search has been found to have been unreasonable because it was general and exploratory, the courts have found the items seized to have been "mere evidence." Thus, the federal cases, although purporting to be based

¹³ For cases involving classes (1), (3), and (4), see *Boyd v. United States*, *supra* note 5, which discusses seizure of stolen goods; *Harris v. United States*, 331 U.S. 145 (1947), which involved seizure of contraband. See generally 82 A.L.R. 782; *Agnello v. United States*, 269 U.S. 20 (1925); *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, *supra* note 11.

¹⁴ See *Gouled v. United States*, *supra* note 5; *Go-Bart Importing Company v. United States*, 282 U.S. 344 (1931); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Kirvin v. United States*, 5 F.2d 282 (2d Cir. 1924); *United States v. Snow*, 9 F.2d 978 (D.C. Mass. 1925); *United States v. Poller*, 43 F.2d 911 (2d Cir. 1930); *Foley v. United States*, 64 F.2d 1 (5th Cir. 1933), *cert. denied*, 289 U.S. 762 (1933); *United States v. Thomson*, 113 F.2d 643 (7th Cir. 1940); *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958). *Abel v. United States*, 362 U.S. 217, 234, exemplifies the above cases as far as the statement that "not every item may be seized which is properly inspectable by the Government in the course of a legal search; for example, private papers desired by the government merely for use as evidence may not be seized, no matter how lawful the search which discovers them. . . ."

¹⁵ *Abel v. United States*, *supra* note 14, at 235; the court stated that "the several cases on this subject in this court cannot be satisfactorily reconciled."

¹⁶ Compare *Marron v. United States*, 275 U.S. 192 (1927) and *Foley v. United States*, *supra* note 14, which both involved the seizure of books and records involved in illegal liquor establishments with *United States v. Lefkowitz*, *supra* note 14, which also involved the seizure of books and papers involved in an illegal liquor establishment.

on the mere evidence rule, can be distinguished on the basis of the reasonableness of the search alone.¹⁷ Three federal courts have gone so far as to say that: "The line between fruit of the crime itself and mere evidence thereof may be narrow, and perhaps turn more on the good faith of the search than the actual distinction between fruits and evidence,"¹⁸ thus proposing the theory that the good faith and reasonableness of the search is the test used by the federal courts to determine which objects are fruits and instruments of crime and therefore subject to seizure, and which are "mere evidence" and therefore not subject to seizure.¹⁹ Nevertheless, the rule still exists and the decision of *Mapp v. Ohio*,²⁰ has created the question of its applicability to the states as a constitutional principle.

In *Mapp v. Ohio*, the United States Supreme Court held the fourth amendment to the federal constitution was applicable to the states through the fourteenth amendment. Thus, it would appear that if the "mere evidence" rule is a constitutional standard, derived from the fourth amendment, it is mandatory on the states under the *Mapp* decision. A recent federal case in Maryland considering this question has held that the rule is of such constitutional proportions that *Mapp v. Ohio* has forced it upon the state courts. In *Hayden v. Warden*,²¹ the court held that: "The proscription against seizure of articles of only evidentiary value is one of constitutional dimensions."²² The court declared that although

judges, aware of the practical problems faced by police officers and prosecutors in the performance of their duties, have sometimes strained mightily to overcome the exclusionary effect of the 'mere evidence' rule by stretching to the point of distortion the category of 'instrumentalities of crime' [citing *Guido*²³ as an example]. . . . [T]he rationale of the mere evidence rule has been the subject of vigorous debate. . . . [I]t may be thought timely to expose the doctrine to reexamination and reinterpretation. . . . [U]nless the Supreme Court sees fit to depart from its oft reiterated position, the judges of subordinate courts are obliged to adhere to it.²⁴

¹⁷ Compare *Marron v. United States*, *supra* note 16; *Furlong v. United States*, 10 F.2d 492 (8th Cir. 1926); *United States v. Poller*, *supra* note 14; *Foley v. United States*, *supra* note 14; *Landau v. United States*, 82 F.2d 285 (2d Cir. 1936), *cert. denied*, 298 U.S. 556 (1936); *United States v. Brengle*, 29 F. Supp. 190 (D.C.W.D. Va. 1939); *Mathews v. Correa*, 135 F.2d 534 (2d Cir. 1943) with *United States v. Lefkowitz*, *supra* note 14; *Kirvin v. United States*, *supra* note 14; *Bushouse v. United States*, 67 F.2d 843 (6th Cir. 1933); *United States v. Thomson*, *supra* note 14; *United States v. Lerner*, 100 F. Supp. 765 (N.D. Cal., S.D. 1951); *Morrison v. United States*, *supra* note 14.

¹⁸ *United States v. Guido*, 251 F.2d 1, 4 (7th Cir. 1958), *cert. denied*, 356 U.S. 950 (1958).

¹⁹ See *Mathews v. Correa*, *supra* note 17; *Harris v. United States*, 151 F.2d 837, 840 (10th Cir. 1945); *United States v. Guido*, *supra* note 18.

²⁰ *Supra* note 6.

²¹ 363 F.2d 647 (4th Cir. 1966).

²² *Id.* at 651.

²³ *United States v. Guido*, *supra* note 18.

²⁴ *Supra* note 21, at 655.

However, a number of other states recently considering the question have, unlike the Maryland case, denied the rule as a constitutional standard and have refused to apply it. These jurisdictions have replaced the rule with one based only on the reasonableness of the search itself and do not consider a search to be unreasonable within the meaning of the fourth amendment only because "mere evidence" is seized. Typical of the language of the decisions:

It is far more palatable to say directly that title and possession are beyond the point: that the fourth amendment, striking a balance between the right of the individual suspected of crime and the duty of the state to protect its citizens, permits a search for the avowed purpose of finding evidence with which to convict so long at least as there is not involved the evil of the general warrant, the unrestricted invasion of the privacy of a man's papers with which *Boyd* . . . was concerned.

The fourth amendment contemplates that things may be seized for their inculpatory value alone and that a search to that end is valid as long as it is not otherwise unreasonable and the fourth amendment formal requirements are met.²⁵

All state decisions which have denied the constitutional proportion of the mere evidence rule are in agreement with the above statements. In *State v. Raymond*,²⁶ the court indicated that it could consider the clothing as an instrumentality of the crime, holding that "such efforts to stay within the rule have correctly been termed frivolous. . . ."²⁷ The court went on to say that the fourth amendment does not prohibit the seizure of "mere evidence" and cites *State v. Bisaccia*,²⁸ a New Jersey case which was in complete agreement on this point. In the *Bisaccia* case, the New Jersey Supreme Court held that a search for evidence with which to convict the accused is permitted by the fourth amendment as long as the search does not involve the evils of the general warrant or the unrestricted invasion of a man's privacy or his private papers. The court indicated that a search for and seizure of private papers is likely to be exploratory in view of the nature of private papers but not because they are "mere evidence" in any one particular situation. The rule which results from the *Bisaccia* decision tests the reasonableness of the search rather than the "instrumentality" or "mere evidence" characteristics of the objects seized.

Some states have statutes which, as construed, authorize the seizure of "mere evidence."²⁹ California is one such state and the Supreme Court of

²⁵ *State v. Raymond*, 142 N.W.2d 444, 451 (Iowa 1966).

²⁶ *Id.*

²⁷ *Id.* at 450. See also *State v. Bisaccia*, *supra* note 8, at 517, 213 A.2d at 195.

²⁸ *Supra* note 8.

²⁹ Included are California, New York, New Jersey, New Hampshire, and Oregon. Some states have statutory provisions which are very similar to the provisions of the states just mentioned. However, these provisions do not appear to have been inter-

California in the instant case³⁰ held such a statute³¹ constitutional. New York also has such a statute.³² In *People v. Carroll*³³ the New York Court said;

It was clearly within the competence of the legislature, under the state's police power, to extend the right of search and seizure to property constituting evidence of crime or tending to show that a particular person committed a crime.

What the constitution only forbids is an unreasonable search and seizure. It does not delineate the types of property subject to seizure—whether it be the fruits of crime, the instrumentalities, matter of contraband, or the evidence as to its commission.³⁴

The application of the New York statute can better be seen in *People v. Martin*³⁵ in which a search warrant was issued for the seizure of an

preted as yet. Illinois has such a statute, ILL. REV. STAT. ch 38, § 108-1 (1963) which reads as follows: "When a lawful arrest is effected, a police officer may reasonably search the person arrested and they are within such person's immediate presence for the purpose of:

- (a) Protecting the officer from attack; or
- (b) Preventing the person from escaping; or
- (c) Discovering the fruits of the crime; or
- (d) Discovering any instruments, articles or things which may have been used in the commission of, or *which may constitute evidence of*, an offense." (Emphasis added. Subsection (d) was not originally included in the drafting of the present statute, but the reason for its later addition is not yet clear.)

Minnesota has a provision which would certainly indicate that the seizure of mere evidence is authorized. MIN. STAT. ANN. § 626.07 (1963) provides: "A search warrant may be issued upon any of the following grounds: (5) The property or things to be seized consist of any item or constitute any evidence which tends to show a crime has been committed, or tends to show that a particular person has committed a crime." Vermont has a search warrant statute, VT. STAT. ANN. tit. 13 § 4701 (1958), which authorizes the issuance of a search warrant, "(9) to search for and seize implements, devices, tools, materials, or any other personal property alleged to have been used in the commission of, or which may constitute evidence of, a crime." Other subsections of this statute allow seizure of specific items which "may tend to convict a person of a criminal offense. . . ."

³⁰ *People v. Thayer*, 47 Cal. Rptr. 780, 408 P.2d 108 (1965), *cert. denied*, 384 U.S. 908 (1966).

³¹ CAL. PEN. CODE. § 1524, subd. 4 (West 1957) provides: "It may be issued upon any of the following grounds: [4] When the property or things to be seized consist of any items or constitutes any evidence which tends to show a felony has been committed or tends to show that a particular person has committed a felony."

³² N.Y. CRIM. CODE PROC. § 792 (4) (1962), allows the seizure of "property constituting evidence of crime or tending to show that a particular person committed a crime."

³³ 238 N.Y.S.2d 640 (1963).

³⁴ *Id.* at 642, 643.

³⁵ 267 N.Y.S.2d 404 (1966).

appointment pad and other papers of the defendant doctor upon which a woman's name appeared, the woman being involved in an abortion. The officers, however, seized two filing cabinets. The court held that:

The Federal standard and most state search warrant statutes limit the warrant to fruits of a crime, contraband and instrumentalities used in the commission of a crime. In 1962 the New York statute . . . was amended to add . . . [P]roperty constituting evidence of a crime. . . .³⁶

The court holds that subdivision 4 as such does not offend any constitutional standard and is a valid statutory enactment, adopted and existent in a number of states. But its use here to authorize a general and exploratory search of an individual's private papers to search for possible evidence of crime . . . is constitutionally impermissible. . . .³⁷

The *Bisaccia* case³⁸ had previously construed a New Jersey court rule³⁹ as rejecting the applicability of the "mere evidence" rule to the states and both *People v. Thayer*⁴⁰ and the *Bisaccia* case are discussed in *Martin* as authority for this New York holding.

In Oregon, where similar legislation has been enacted,⁴¹ an Oregon court held that property which would constitute evidence of the crime could now be seized.⁴² There, the court felt it was not necessary to pass on the applicability of the "mere evidence" rule to the states.

New Hampshire has a statute which allows seizure of "the subject matter of any offense not herein specifically mentioned."⁴³ The Supreme Court of New Hampshire in *State v. Coolidge*,⁴⁴ held that this statutory provision is not contrary to the fourth amendment. According to the court "the test is always whether the search and seizure under the facts and circumstances of the case was reasonable."⁴⁵ The court pointed out that neither the arrest nor the search warrants involved were a pretext for making "a general exploratory search with the sole aim of finding evidence to connect the defendant with some crime."⁴⁶ The court thus found all

³⁶ *Id.* at 406.

³⁷ *Id.* at 407.

³⁸ *State v. Bisaccia*, *supra* note 8.

³⁹ N.J. RULES 3:2A-2, reads: "A search warrant may be issued to search and seize any property: [c] Constituting evidence of or tending to show any such violation."

⁴⁰ *Supra* note 30.

⁴¹ ORE. REV. STAT. ch. 141, § 141.010 (1963) reads as follows: "A search warrant may be issued on the following grounds: [2] When the property was used in the commission of, or which would constitute evidence of, the crime."

⁴² *State v. Cook*, 411 P.2d 78, 82 (Ore. 1966).

⁴³ N.H. REV. STAT. ANN. ch. 595:1, VI (1955).

⁴⁴ 106 N.H. 186, 208 A.2d 322 (1965).

⁴⁵ *Id.* at —, 208 A.2d at 333.

⁴⁶ *Ibid.*

articles taken were the fruit of a proper search and seizure and were thus admissible.

It is apparent that some federal and state courts have refused to give effect to the "mere evidence" rule⁴⁷ and some state courts have gone so far as to reject it outright.⁴⁸ In so doing, most of the state decisions mentioned above discuss the constitutionality of their own statutes and decisions but do not expressly criticize the "mere evidence" rule itself. *People v. Thayer*,⁴⁹ on the other hand, criticizes the rule in detail. The court notes that "the asserted rule that mere evidence cannot be seized under a warrant or otherwise is condemned as unsound by virtually all modern writers."⁵⁰ The court then points out that:

the rationale for this curious doctrine has never been satisfactorily articulated. A person has a constitutional right to be secure from unreasonable searches by the police. When the search itself is reasonable, however, it is impossible to understand why the admissibility of seized items should depend on whether they are merely evidentiary or evidentiary plus something else.⁵¹

The reasons for the "mere evidence" rule are not clearly linked to the fourth amendment. It is obvious that there is no language in the fourth amendment which can be used as a basis for this rule and no case has ever attempted to use the language of the amendment for this purpose.

The *Boyd* case⁵² seemed to be primarily concerned with the implementation of the purpose of the fourth amendment, the prevention of general exploratory searches. However, the "mere evidence" rule does not prevent a particular kind of search. Indeed, the rule is directed only to the objects seized in the search. Under the rule, if the objects seized are not instrumentalities, fruits of a crime, means of escape or contraband, they cannot be seized. This is true without regard to the manner, scope or authority of the search.⁵³ Thus, the rule does not bear any relation to the purpose of the fourth amendment.

⁴⁷ See *Marron v. United States*, *supra* note 16; *Foley v. United States*, *supra* note 14; *Mathews v. Correa*, *supra* note 17.

⁴⁸ See *People v. Thayer*, *supra* note 30; *State v. Bisaccia*, *supra* note 8; *People v. Carroll*, *supra* note 33.

⁴⁹ *Supra* note 30.

⁵⁰ *Supra* note 30, at 731, 408 P.2d at 109. The mere evidence rule has been criticized in MAGUIRE, *EVIDENCE OF GUILT*, 182 (1959); 8 WIGMORE, *EVIDENCE* § 2134(a) and 2264 (McNaughton rev. 1961); Corwin, *The Supreme Courts Construction of the Self-Incrimination Cause*, 29 MICH. L. REV. 1, 16, and 205 (1930); *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, *supra* note 11; *Limitation of Seizures of 'Evidentiary' Objects: A Rule in Search of a Reason*, *supra* note 8; Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474 (1961); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319 (1962).

⁵¹ *Supra* note 30, at 731, 408 P.2d at 109.

⁵² *Boyd v. United States*, *supra* note 5. ⁵³ *Supra* note 14.

Boyd mentioned and *Gouled* relied upon a property rights theory as a basis for the rule.⁵⁴ However, the property rights theory does not fully explain the rule. *Gouled* upheld the government's right to seize an instrument of a crime based on the overriding property right in the government for the public welfare to prevent further use of certain property in perpetration of a crime. The prevention of the further use of an object in crime does not seem to be an appropriate reason for the seizure of a shoe⁵⁵ or a typewriter⁵⁶ (which have been held to be instrumentalities) and fails completely to explain the seizure of items such as water and gas bills (also held to be instruments of crime).⁵⁷ Obviously, a water bill is beyond usefulness in committing a crime even if it is not seized.⁵⁸

Even assuming that the property rights theory sufficiently explains the so-called instrumentality exception, there appears to be no justification for the use of the property as evidence because the seizure of such property, alone, succeeds in preventing its use in furtherance of crime. It might be explained that the use of the property as evidence might also prevent further crime by sending its owner to prison. However, this does not justify the admission in evidence of instrumentalities since "sending the owner to prison may prevent further crimes, but this consideration applies to mere evidence as well as instrumentalities."⁵⁹

If the Supreme Court of the United States finds that the "mere evidence" rule is a constitutional standard, the rule being applied by the courts of the several above mentioned states must be unconstitutional. However, as previously noted, there appears to be no basis in the fourth amendment itself for such a conclusion. Any interpretation by a court should be founded on the express language, background, and purpose of the fourth amendment. The "mere evidence" rule does not appear to be so founded. Since the "mere evidence" rule was conceived, there has been much criticism of it and great confusion concerning it. "The rule has been distinguished nearly out of existence by the application of the instrumentality exception."⁶⁰ It appears that federal courts may be tending towards avoidance of the rule by application of this exception. As noted earlier, the

⁵⁴ *Supra* note 5.

⁵⁵ *United States v. Guido*, *supra* note 18.

⁵⁶ *Foley v. United States*, *supra* note 14.

⁵⁷ *Marron v. United States*, *supra* note 16.

⁵⁸ *Marron v. United States*, *supra* note 16, at 199, defined an instrumentality as anything "used to carry on the criminal enterprise." Within this definition would fall many items which would be of no further value after their initial use. For example, a spent bullet casing and the bullet once used to commit a crime cannot be used again but certainly can be seized as instruments of murder. It thus appears that some items may be seized without regard to the property right theory expressed by *Gouled* and considered necessary under that explanation of the "mere evidence" rule and the so called instrumentality exception.

⁵⁹ *Supra* note 30, at 783, 408 P.2d at 111.

⁶⁰ *Ibid.*

result reached by the application of the instrumentality exception seems to be the same as the result in the recent state decisions which have rejected the rule flatly.⁶¹ These recent state decisions indicate a trend among the states to reject the proposition that the "mere evidence" rule is mandatory on the states under *Mapp v. Ohio*, i.e. that it is a constitutional standard. The states hold instead that the purpose of the fourth amendment was to prevent general exploratory searches and these are prohibited and nothing more.

Many state courts do not appear to have considered the issue. It will be interesting to observe the result when they do. However, the ultimate answer must come from the Supreme Court of the United States. Since state courts are expressly disregarding the rule and the federal courts are reaching a similar result through the application of the instrumentality exception, it appears that the answer may soon be forthcoming. This answer may have already been indicated by the failure of the Supreme Court of the United States to review not only the federal court decisions which have tended towards dilution of the rule,⁶² but also the state court decisions which have clearly rejected the rule.⁶³

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⁶¹ See *People v. Carroll*, *supra* note 33; *People v. Grossman*, 257 N.Y.S.2d 266 (1965); *People v. Martin*, *supra* note 35; *People v. Thayer*, *supra* note 30; *People v. Potter*, 49 Cal. Rptr. 892 (1966); *State v. Bisaccia*, *supra* note 8; *State v. Wade*, 46 N.J. 48, 214 A.2d 411 (1965); *State v. Fioravanti*, 46 N.H. 109, 215 A.2d 16 (1965); *State v. Coolidge*, *supra* note 44; *State v. Cook*, *supra* note 42.

⁶² *Foley v. United States*, *supra* note 14; *Landau v. United States*, *supra* note 14; *United States v. Guido*, *supra* note 18; *United States v. Boyette*, 299 F.2d 92 (4th Cir. 1962).

⁶³ *Supra* note 30.

CONTRACTS—REAL ESTATE BROKER—RIGHT TO COMMISSION UPON VENDOR'S ARBITRARY REFUSAL TO ENTER CONTRACT OF SALE

Stromer, a real estate broker, entered into an oral contract¹ with de-

¹ The fact and terms of employment were found in a counteroffer to the vendee sent through the broker. In addition, when Browning's documents were delivered to the escrow depository, a brokerage contract signed by Browning was included. California courts have held that signed escrow instructions, when of sufficient content, satisfy the Statute of Frauds, *Bezell v. Schrader*, 59 Cal.2d 577, 381 P.2d 390 (1963). Sufficient content means written evidence of an actual employment relationship. *Franklin v. Hansen*, 59 Cal.2d 570, 381 P.2d 386 (1963). In addition to California there are sixteen states which require brokerage contracts to be in writing before a broker can recover his commission: Alaska, Arizona, Idaho, Indiana, Kentucky, Michigan, Montana, Nebraska, New Jersey, New York, Oregon, Texas, Utah, Washington, Wisconsin, and New Mexico.