Buffalo Law Review

Volume 17
Number 1 *Symposium: Canadian-American Law*

Article 15

10-1-1967

Criminal Procedure—The Abandonment of the "Mere Evidence" Rule: Another Step Toward Re-emphasizing Privacy as the Fourth Amendment Standard

Robert B. Conklin

RECENT CASES

CRIMINAL PROCEDURE—THE ABANDONMENT OF THE "MERE EVIDENCE" RULE: ANOTHER STEP TOWARD RE-EMPHASIZING PRIVACY AS THE FOURTH AMENDMENT STANDARD

On the morning of March 17, 1962, an armed robber entered business premises in Baltimore, Maryland and took approximately $363. Attracted by shouts, two cab drivers in the vicinity followed the man from the scene and notified the company radio dispatcher that the robber—a Negro about 5 feet 8 inches tall, wearing a light cap and a dark jacket—had entered a house at 2111 Cocoa Lane. The police, having had this information relayed to them while proceeding to the scene of the robbery, arrived at the house within minutes and were permitted to enter the premises by defendant Hayden's wife. She offered no objection.[1] After ascertaining that no male was hiding on the first floor, three officers spread out to search the basement and upstairs areas. Hayden was found in the upstairs bedroom feigning sleep, and after it was ascertained that there was no one in the basement, Hayden was placed under arrest. One officer on the upstairs level, hearing the continuous running of the toilet in an adjacent bathroom, found and seized a sawed-off shotgun and a pistol from the flush tank. Ammunition for the guns was found and seized in a search of the bedroom. In the interim, the officer searching the basement discovered a jacket, a pair of pants and a leather belt in a washing machine and seized these items as fitting the description of the clothing worn by the robber. All the seized items were received as evidence without objection.[2] The trial court, sitting without a jury, found the defendant Hayden guilty of armed robbery. After unsuccessful post-conviction proceedings in the state court, Hayden sought and was denied federal habeas corpus relief in the District Court of Maryland. A divided panel of the Court of Appeals for the Fourth Circuit reversed, holding that the clothing seized was improperly admitted in evidence because the items had evidential value only, and therefore were not lawfully subject to seizure.[3] The United States Supreme Court reversed, holding that the fourth amendment allows an intrusion upon privacy incident to an otherwise reasonable search because there is no viable reason to distinguish intrusions

1. Warden, Maryland Penetentiary v. Hayden, 387 U.S. 294, 297 n.3 (1967) [hereinafter cited as Instant case]. The Court determined that the consent to search by defendant's wife was not in issue because the officers would have been "justified in entering and searching the house for the felon, for his weapons and for the fruits of the robbery" when in "hot pursuit" of the suspect. McDonald v. United States, 335 U.S. 451 (1948), was cited as authority for this "hot pursuit" exception.

2. *Id.* at 297-98 n.4. It is significant to note that defendant challenged the competency of his trial counsel, but the state claimed he had waived the search and seizure issue by not making a timely objection at the trial. Brief for Petitioner at 52-65, Instant case, 387 U.S. 294 (1967). The Court, however, gave footnote treatment to the waiver question by remarking that since the state had passed on the merits of his claim in post-conviction proceedings, the deliberate bypass rule had no application. Nowhere in the opinion was the experienced counsel issue treated. *See* Fay v. Noia, 372 U.S. 391 (1963).

3. Hayden v. Warden, Maryland Penitentiary, 363 F.2d 647 (4th Cir. 1966).

to secure "mere evidence" from intrusions to secure fruits of the crime, instrumentalities, or contraband. *Warden, Maryland Penetentiary v. Hayden*, 387 U.S. 294 (1967).

The need for protection against "unreasonable searches and seizures" became apparent in England and the American Colonies before the American Revolution. Abuses of the power to search and to seize had become notorious.[4] The general warrant, issued by the Secretary of State, essentially authorized an unlimited exploratory search for evidence.[5] This practice was finally condemned in the landmark decision of *Entick v. Carrington*,[6] where Lord Camden rejected the use of the general warrant and proclaimed that "the great end for which men entered into society was to secure their property."[7] He recommended the essential safeguards of requiring particularity and probable cause,[8] which were later incorporated in the fourth amendment to the United States Constitution.[9] He seemed to be emphasizing the importance of an individual's privacy when he stated: "Whether this proceedeth from the gentleness of the law toward criminals or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say."[10] The issue was truly joined with respect to the "mere evidence" doctrine in the case of *Boyd v. United States*.[11] There the government conducted an in rem proceeding to establish the forfeiture of certain goods alleged to have been fraudulently imported into the United States. A statute enabled the government to obtain a court order requiring the claimants of such goods to produce invoices for the court's inspection.[12] The Court held this statute to be unconstitutional and such evidence to be inadmissible.[13] Where a man's private papers are produced pursuant to a court order or any governmental compulsion, it was said that "the Fourth and Fifth Amendments run almost into one another"[14] in prohibiting the admission of such evidence. The Court pointed out that:

> [T]he "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a

4. *See generally* N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 22-105 (1937); J. Landynski, Searches and Seizures and the Supreme Court 19-40 (1966).

5. For further discussion of the history of the fourth amendment, *see generally* Frank v. Maryland, 359 U.S. 360, 363-65 (1959); *and* Marcus v. Search Warrant, 367 U.S. 717, 726-29 (1961); *and* Stanford v. Texas, 379 U.S. 476, 481-86 (1965).

6. 19 How. St. Tr. 1029, 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765).

7. *Id.* at 1066.

8. *Id.* at 1067.

9. 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.

U.S. Const. amend. IV.

10. Entick v. Carrington, 19 How. St. Tr. at 1073.

11. 116 U.S. 616 (1886).

12. Act of June 22, 1874, ch. 193, § 5, 18 Stat. 186.

13. Boyd v. United States, 116 U.S. at 638.

14. *Id.* at 630.

> man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.[15]

By this language the Court created a close interrelationship between "unreasonable searches and seizures" and the compulsory self-incrimination which may result. As might have been expected, the intricacies of *Boyd* precipitated varied judicial interpretations.[16] The *Boyd* decision was subsequently codified[17] in the Espionage Act of 1917,[18] which authorized the seizure of contraband, instrumentalities and fruits of the crime. Shortly thereafter, in 1921, the "mere evidence" rule was finally formulated in *Gouled v. United States*.[19] There the defendant was suspected of defrauding the United States in certain government contracts. Personal papers were seized, both secretly by an intelligence agent pretending to be a friend of the defendant, and also incident to a lawfully issued search warrant. The Supreme Court adopted the well-known *"Gouled* Rule," declaring that search warrants may be used to gain access to a man's home or office only to seize contraband,[20] instrumentalities,[21] or fruits of the crime,[22] but not to seize materials of a "merely evidentiary" nature.[23] The Court relied heavily on the language of the *Boyd* opinion, where it was said that search warrants

> may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may

---

15. *Id.* at 633.

16. *Compare* United States v. Wilson, 163 F. 338 (S.D.N.Y. 1908) *with* United States v. Mills, 185 F. 318 (C.C.S.D.N.Y. 1911). The former case introduced a concept that the seizure was justified if the evidence was necessary, but the latter case seemingly disregarded this doctrine

17. Note, *Evidentiary Searches: The Rule and the Reason*, 54 Geo. L.J. 593, 600-01 (1966).

18. Espionage Act of 1917, ch. 30, § 2, 40 Stat. 228. This enactment for the first time granted general authority for the issuance of search warrants limited by the following classifications of seizable items:

> 1. When the property was stolen or embezzled in violation of a law of the United States . . . .
>
> 2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.
>
> 3. When the property, or any paper, is possessed, controlled, or used in violation [of this statute] . . . .

19. 255 U.S. 298 (1921).

20. *See, e.g.*, Harris v. United States, 331 U.S. 145 (1947) (forged draft classification cards); Honig v. United States, 208 F.2d 916 (8th Cir. 1953) (counterfeiting plates).

21. *See, e.g.*, Marron v. United States, 275 U.S. 192 (1927) (ledgers and utility bills in an illegal liquor operation); Leahy v. United States, 272 F.2d 487 (9th Cir. 1959), *motion to withdraw appearance granted*, 364 U.S. 940 (1961) (wagering paraphenalia).

22. *See, e.g.*, United States v. Dornblut, 261 F.2d 949 (2d Cir. 1958), *cert. denied*, 360 U.S. 912 (1959) (a five dollar bill received from a sale of heroin).

23. Gouled v. United States, 255 U.S. at 309. For a discussion of the categories of seizable items, *see* R. Davis, Federal Searches and Seizures 37-42 (1964).

> have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.[24]

The *Gouled* Rule has since been codified in Rule 41(b) of the Federal Rules of Criminal Procedure.[25]

Prior to *Mapp v. Ohio*[26] in 1961,, the "mere evidence" question generated little interest among the individual states. *Wolf v. Colorado*[27] had held that the basic fourth amendment protections were fundamental to a " 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[28] However, there the Court did not consider the exclusionary rule, which requires that all evidence obtained by an illegal search and seizure be excluded from use in a criminal trial, to be an "essential ingredient"[29] to the fourth amendment protection. Therefore, not until *Mapp* had declared that the exclusionary rule henceforth would be applicable to the states did the "mere evidence" limitation upon searches and seizures become relevant to the states. The courts have had difficulty grappling with the subtle distinctions inherent in this restriction. In *United States v. Guido*,[30] the Seventh Circuit Court of Appeals held that shoes worn during a robbery were a means of committing the crime. The Supreme Court of Oregon in *State v. Chinn*[31] held that a camera, soiled bed sheets and empty beer bottles were instruments in the commission of statutory rape. The United States Supreme Court in *Marron v. United States*[32] held that the seizure of certain ledgers and utility bills connected with the operation of an illegal liquor business was justified since these were instrumentalities of the crime. Some five years later, in *United States v. Lefkowitz*,[33] the Court in an almost identical fact situation found the products of such seizures to be "merely evidentiary."[34]

Since the *Mapp* decision at least three state courts have refused to follow

24. *Id.*

25. Fed. R. Crim. P. 41(b) provides:
> A warrant may be issued under this rule to search for and seize any property
> (1) Stolen or embezzled in violation of the laws of the United States; or
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
> (3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. § 957.

26. 367 U.S. 643 (1961).

27. 338 U.S. 25 (1949).

28. Mapp v. Ohio, 367 U.S. at 650.

29. Wolf v. Colorado, 338 U.S. at 29.

30. 251 F.2d 1 (7th Cir. 1958). *See also* Robinson v. United States, 283 F.2d 508 (D.C. Cir.), *cert. denied*, 364 U.S. 919 (1960) (Items of clothing were considered means of committing a crime.).

31. 231 Ore. 259, 373 P.2d 392 (1962). *See also* Schweinefuss v. Commonwealth, 395 S.W.2d 370 (Ky. 1965) (Washing pans and utensils, mouthwash, vaseline, towels, cards used by prostitutes, money bags, and prophylactic contraceptive devices were held to be means of committing prostitution.).

32. 275 U.S. 192 (1927).

33. 285 U.S. 452 (1932).

34. In Abel v. United States, 362 U.S. 217, 235-38 (1960), *rehearing denied*, 362 U.S. 984 (1960), the United States Supreme Court recognized that the inconsistency in these two cases "cannot be satisfactorily reconciled."

the "mere evidence" restriction,[35] and several states have abandoned this limitation on seizures by statute.[36] However, the abiding proscription that general exploratory searches to secure evidence against a person violated the fourth amendment was uniformly maintained by courts on all levels.[37] It has been stated that the Supreme Court has never resolved a non-documentary "mere evidence" question.[38] *Schmerber v. California*[39] set the stage for a definitive declaration by the Supreme Court regarding the "mere evidence" distinction. In that case, the defendant was hospitalized following an accident involving an automobile which he apparently had been driving. The defendant was arrested upon probable cause that he had been driving while intoxicated. Incident to that arrest, and over the objection of the defendant, a hospital physician was directed to take a blood sample. The report of the blood test, indicating that the defendant was intoxicated at the time of the accident, was admitted into evidence and the defendant was convicted. The United States Supreme Court, affirming the conviction, considered constitutional issues presented by the fourth and fifth amendments. It first discussed the scope of the fifth amendment protection, stating that "the privilege protects an accused only from being compelled to *testify* against himself, or otherwise provide the state with evidence of a *testimonial* or *communicative* nature . . . ."[40] It distinguished between the accused's compelled submission to a blood test or any other exhibition of his physical characteristics as contrasted to the compulsory disclosure of knowledge[41] that he may have. Later, having decided that there were no fifth amendment implications in the case, the Court held that this intrusion into the human body, incident to a valid arrest and conducted under reasonable circumstances, was not prohibited by the fourth amendment. Thus it had carved out an exception to the traditional "[l]imitations on the kinds of property which may be seized under warrant . . . ."[42] The Court continued:

---

35. People v. Thayer, 63 Cal. 2d 635, 408 P.2d 108, 47 Cal. Rptr. 780 (1966); State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965); People v. Carroll, 38 Misc. 2d 630, 238 N.Y.S.2d 640 (Sup. Ct. 1963).

36. Illinois, Minnesota, Oregon, Vermont, California, Nebraska, New Jersey, Nevada and New York have enacted provisions allowing the seizure of "mere evidence." N.Y. Code Crim. Proc. § 792 (1958), *as amended*, § 792 (Supp. 1967), may be cited as typical:

> The following property may be ordered seized under a search warrant:
>
> . . . .
>
> (4) property constituting evidence of a crime or tending to show that a particular person committed a crime.

The constitutionality of New York's provision has been discussed in two New York Supreme Court decisions, and a conflict of opinion was expressed. *Compare* People v. Carroll, 38 Misc. 2d 630, 238 N.Y.S.2d 640 (Sup. Ct. 1963), *with* People v. Grossman, 45 Misc. 2d 557, 257 N.Y.S.2d 266 (Sup. Ct. 1965) (Sobel, J.), *rev'd*, 27 A.D.2d 572, 276 N.Y.S.2d 168 (2d Dept. 1966), *rev'd*, 20 N.Y.2d 346, 283 N.Y.S.2d 12 (1967). *See also* N. Sobel, Current Problems in the Law of Search and Seizure 87-97 (1964).

37. *See generally* Brief for the United States as Amicus Curiae at 9-16, Instant case, 387 U.S. 294 (1967).

38. Brief for Petitioner at 20-23, Instant case, 387 U.S. 294 (1967).

39. 384 U.S. 757 (1966).

40. *Id.* at 761. (Emphasis added.).

41. *Id.* at 761 n.5.

42. *Id.* at 768.

> We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.[43]

Although the Court chose to defer discussion of the "mere evidence" implications in *Schmerber*, the clearer definition given the scope of fifth amendment protection, as one aspect of the interrelationship described in *Boyd*,[44] renders the Court's decision in the instant case somewhat predictable.

Accepting the invitation of the Fourth Circuit to "reexamine and reinterpret"[45] the "mere evidence" doctrine, the United States Supreme Court stressed in the instant case that the underlying resolution of the fourth amendment as adopted by our forefathers was to secure privacy. Turning to the "mere evidence" distinction, Mr. Justice Brennan, delivering the majority opinion,[46] asserted that its revival "is attributable more to chance than considered judgment."[47] With profound impatience, Justice Brennan took note of the confusion spawned by the "mere evidence" limitation and remarked "that it is questionable whether it affords meaningful protection."[48] The Court stated that the frequently used distinction between "mere evidence" and instrumentalities[49] involves a "hair-splitting question"[50] and stressed instead the reasonableness of the search. While discarding the "mere evidence" limitation, the Court reiterated the constitutional safeguards of probable cause, particularity, and the intervention of a neutral and detached magistrate for the issuance of a lawful search warrant.[51] The Court emphasized the irrelevance of traditional property concepts, as they relate to the scope of seizable property, which had developed as a result of the *Boyd* decision. Recalling *Silverman v. United States*,[52] which recognized that "inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law,"[53] the majority noted that the superior property interest theory has been abandoned by the Court itself.[54]

43. *Id.*

44. *See generally* Comment, *The Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship,"* 13 U.C.L.A.L. Rev. 857 (1966); Note, *Evidentiary Searches: The Rule and The Reason*, 54 Geo. L.J. 593 (1966); Comment, *Limitations on the Seizure of "Evidentiary Objects"—A Rule in Search of a Reason*, 20 U. Chi. L. Rev. 319 (1953). *See also* 8 J. Wigmore, Evidence §§ 2184, 2264 (3d ed. 1940), *and* 8 J. Wigmore, Evidence §§ 2184, 2264 (J. McNaughton rev. 1961).

45. Hayden v. Warden, Maryland Penitentiary, 363 F.2d at 655.

46. Mr. Justice Brennan wrote for five members of the Court. Mr. Justice Black concurred in the result without expressing an opinion. The opinions of the other members are fully discussed in the text.

47. Instant case, 387 U.S. at 308.

48. *Id.* at 309.

49. *See infra* notes 30-34 and accompanying text for the distinction between "mere evidence" and instrumentalities of the crime.

50. *Id., quoting from* J. Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Calif. L. Rev. 474, 479 (1961).

51. *Id.* at 309-10. *See generally* Johnson v. United States, 333 U.S. 10 (1948).

52. 365 U.S. 505 (1961).

53. *Id.* at 511.

"Searches and seizures," the Court continued, "may be 'unreasonable' within the Fourth Amendment even though the Government asserts a superior property interest at common law."[55] By historically tracing the available remedies to recover illegally seized items, the Court indicated the radical change in procedures that has occurred since *Entick v. Carrington*.[56] Now "suppression of evidence does not in itself necessarily entitle the aggrieved person to its return, . . . [and] the introduction of 'mere evidence' does not in itself entitle the State to its retention."[57]

Thus, the Court fixed squarely on the fourth amendment guarantee of privacy and established the individual right to privacy in one's own home under any circumstances *except* where a search is both reasonable and justified. The majority agreed with the lower court's determination that the search conducted was a reasonable one.[58] Therefore, the Court's determination rested strictly on the "mere evidence" question. The disputed evidence seized in the instant case was adjudged to be tangible evidence as distinguished from "testimonial or communicative" evidence, the latter being protected by the fifth amendment privilege against self-incrimination.[59] The Court did not feel compelled to consider the consequences where the evidence seized could be defined as "testimonial or communicative" as described in *Schmerber v. California*.[60] It is important to note that with respect to "tangible mere evidence," the Court has determined that no meaningful value reflected by the fourth amendment's adoption is enhanced by the continued life of this restriction.

Mr. Justice Fortes and the Chief Justice concurred in the result only, and in a separate opinion expressed concern that "the court today needlessly destroys, root and branch, a basic part of liberty's heritage,"[61] by driving "an enormous and dangerous hole in the Fourth Amendment to accommodate a specific and . . . reasonable exception."[62] It was argued that total repudiation of the "mere evidence" rule was unnecessary since the search and seizure could be sustained in terms of the "hot pursuit" exception.[63] "Searches under each of these exceptions," it was remarked, "have, until today, been confined to those essential to fulfill the purpose of the exception . . . ."[64] Justice Fortes suggested

54. *See also* Jones v. United States, 362 U.S. 257 (1960). Parenthetically, the almost total abandonment of property concepts in the law of search and seizure in the instant case will require that the Court reevaluate past proscriptions against eavesdropping accomplished by means of physical intrusion. Alluding to a trespass in eavesdropping cases no longer is a satisfactory analysis. Silverman v. United States, 365 U.S. 505 (1961), is an instance where the Court held that the implementation of a microphone with a spike about one foot long, inserted under a baseboard until it struck a "sounding board," was a violation of the fourth amendment.

55. Instant case, 387 U.S. at 304.

56. 19 How. St. Tr. 1029, 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765).

57. Instant case, 387 U.S. at 307-08.

58. *Id.* at 298.

59. *Id.* at 302-03.

60. *Id.* See Schmerber v. California, 384 U.S. at 762-4.

61. Instant case, 387 U.S. at 312.

62. *Id.*

63. *Id.* at 310-12.

64. *Id.* at 310.

that only a limited exception to the "mere evidence" rule is warranted, saying: "I agree that the use of identifying clothing worn in the commission of a crime and seized during 'hot pursuit' is within the spirit and intendment of the hot pursuit exception to the search warrant requirement."[65]

In a lone dissent, Mr. Justice Douglas referred to an absolute zone of privacy "that may not be invaded by the police through raids, by the legislature through laws, or by the magistrates through the issuance of warrants."[66] He asserted that a search for and seizure of "mere evidence" falls within this absolute zone of privacy, and there simply can be no exceptions to this rule. This hypothesis was derived from an exhaustive examination of the history of the fourth amendment, tracing its origin as far back as the decision of *Entick v. Carrington*.[67] He especially recalled the debate of the constitutional authors regarding the drafting of the fourth amendment, arguing that the final draft of the amendment indicates an intention to establish an inviolate zone of privacy in the first clause and also to establish a second zone subject to intrusion by guarded exceptional means such as a search warrant.[68] His opinion stressed the fifth amendment aspect of the interplay between the fourth and fifth amendments as discussed in *Boyd*. Framing his own question, he queried whether "the Government, though armed with a proper search warrant or though making a search incident to arrest, may seize, and use, at the trial, testimonial evidence whether it would otherwise be barred by the Fifth Amendment or would be free from such strictures."[69] Having limited his consideration to this particular question, he was compelled to return to his dissent in *Schmerber v. California*,[70] and contended that even "tangible" evidence, such as clothing, "taken from a person without his consent and used as . . . evidence, violates the Fifth Amendment."[71] His position is that the fourth amendment absolutely bans the *seizure* of any "mere evidence" and that seized items may not be admitted into evidence, not only by virtue of the fact of the illegal seizure, but also because such an admission would violate the fifth amendment as he has defined it.

Initially, it is interesting to note the development of the relationship between the fourth and fifth amendments in the formulation of the "mere evidence" rule. It was in *Boyd* that these two amendments first were interrelated, laying the foundation for what has been called the "mere evidence" rule. In Justice Douglas' careful analysis of the language of the fourth amendment, he develops the hypothesis that the fourth and fifth amendments should each stand alone. The former provides absolute protection against the seizure of mere evidence, and the latter prevents the subsequent use of such evidence in a criminal prose-

65. *Id.* at 312.
66. *Id.* at 313.
67. 19 How. St. Tr. 1029, 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765).
68. Instant Case, 387 U.S. at 313.
69. *Id.* at 319.
70. 384 U.S. 757, 778-79 (1966).
71. Instant case, 387 U.S. at 320.

cution.[72] The majority of the Court in the instant case has chosen to redefine the scope of the protection of the fourth amendment independent of the fifth amendment. They have adjusted the focus of the fourth amendment on the reasonableness of the search,[73] without passing on the question "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."[74] The seizure of merely evidentiary, self-incriminating documents, even though accompanied by a strict adherence to the constitutional safeguards set out in the fourth amendment, probably will be struck down as a violation of the fifth amendment protection as presently defined.[75] And the Court, implying that the *Schmerber* definition will survive, has followed its criteria in other decisions rendered this last term.[76]

Moreover, although the Court chose not to discuss the recurrent argument that the recent developments in criminal procedure have inhibited effective law enforcement, this decision reflects a need to clarify the permissable bounds of a very important investigative tool. The United States Supreme Court, in *Miranda v. Arizona*,[77] emphasized that law enforcement officers ought to rely upon scientific means of criminal investigation rather than seeking to elicit admissions of guilt from the mouths of the accused.[78] A denial of the right to search for and seize tangible evidence, even in a reasonable situation, places a shackle on the same means of investigation encouraged in the *Miranda* decision. It is sub-

72. In his dissent, Justice Douglas outlines his constitutional philosophy regarding the fourth and fifth amendments by stating:

> The existence of that choice [*i.e.*: whether to open one's private effects (apart from contraband and the like) to the police or to keep their contents a secret and their integrity inviolate] is the very essence of the right to privacy. Without it the Fourth Amendment and the Fifth are ready instruments for the police state that framers sought to avoid.

Instant case, 387 U.S. at 325.

73. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court also strongly emphasized the importance of securing the individual's constitutional right of privacy.

74. Instant case, 387 U.S. at 303.

75. Admittedly this might suggest that the *Boyd* decision still has effect with respect to private papers, especially those which involve "knowledge" of the accused regarding the alleged crime. *See* Schmerber v. California, 384 U.S. at 761 n.5, 763 n.7. Moreover the Solicitor General and Amicus Curiae argued that *Boyd* is still good law insofar as it was basically a Fifth Amendment case. Brief for the United States as Amicus Curiae, at 6-7, Instant case, 387 U.S. 294 (1967).

But an interesting argument may be made that Berger v. New York, 388 U.S. 41 (1967), extends the Court's repudiation of the "mere evidence" limitation even to the fruits of eavesdropping procedures. A claim was made that New York's permissive eavesdrop statute, N.Y. Code Crim. Proc. § 813-a, violated the fourth amendment by authorizing " 'general searches' for 'mere evidence.' " *Id.* at 44. Even considering the factual context in *Berger*, the Court swiftly disposed of this contention adversely to petitioner's claim merely by citing Warden, Maryland Penitentiary v. Hayden in footnote two. *Id.* Therefore, an inference may be made, regardless of its persuasiveness, that this footnote extends the abrogation of the "mere evidence" limitation beyond tangible evidence to evidence of a testimonial nature. If this be so, the severance of the fourth and fifth amendments of the *Boyd* interplay seems complete.

76. *See, e.g.*, Berger v. New York, 388 U.S. 41 (1967); United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

77. 384 U.S. 436 (1966).

78. *Id.* at 481. There the Court pointed out that "while protecting individual rights, [it] has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties."

mitted that with respect to clothing worn in the commission of a felony, even though not taken from the person himself,[79] there should be no doubt of the reasonableness or propriety of such a seizure.

However, the most significant feature of the *Hayden* decision is that the United States Supreme Court finally responded to the great need for clarification in this confused, if not chaotic, area. Those who feared the impending demise of the "mere evidence" rule have argued that the possibility of a carte blanche authority to conduct "fishing expeditions" would result, making search and seizure a method of discovery. But this danger may be avoided if the standard of reasonableness is strictly maintained.[80] When "mere evidence" is sought, the courts will require probable cause that the evidence will *"aid in a particular apprehension or conviction."*[81] Furthermore, now that the confusion has been abated, the courts will be afforded a clearer picture of each particular case to determine whether or not those constitutional safeguards have been maintained. Thus, the *Hayden* decision should have very healthy results.

Finally, one might speculate as to the effect of this decision on criminal prosecution at the federal level. In essence, what the Court has done is to broaden the constitutional basis of permissible searches and seizures. However, this in no way mandates that the Supreme Court, in its supervisory capacity,[82] make similar rules for the federal courts. Rule 41(b) of the Federal Rules of Criminal Procedure is a product of the Court,[83] and the Court must decide whether to expand the breadth of the Rule to the full scope allowed in the *Hayden* case. It is highly probable, however, that some semblance of the *Hayden* rule will be codified because of the Court's obvious impatience with the prior situation. With this, the many years of confusion will hopefully have come to an end.

ROBERT B. CONKLIN

79. Respondent argued that there is a distinction between seizing clothing from the person of the accused and seizing that same clothing after disrobement. Judge Bryan, dissenting in the circuit court of appeals decision, asserted that "the instantaneous immunization" by disrobement of clothing worn during the crime from seizure is hardly founded in sound logic. Hayden v. Warden, Maryland Penitentiary, 363 F.2d at 656.

80. Instant case, 387 U.S. at 307.

81. *Id.*

82. *See* Ker v. California, 374 U.S. 23 (1963), where the Court determined that the constitutional standard of the fourth amendment, made applicable to the states by *Mapp*, was the reasonableness of the search and seizure. In Henry v. Mississippi, 379 U.S. 443, 449 n.6 (1965), the Court indicated that it has not yet decided whether other federal standards in the area of search and seizure are constitutionally obligatory upon the states. Recalling the difference between constitutional and supervisory rules discussed in *Ker*, it may be considered reasonable to retain Rule 41(b) limitations on the federal level of prosecution.

83. Rules of Criminal Procedure, 18 U.S.C. §§ 3771-72 (1964).