North Dakota Law Review

Volume 58 | Number 4 Article 1

1982

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Recommended Citation

Lockney, Thomas M. (1982) "Perspectives on State v. Nagel: The North Dakota Supreme Court's Discordant Medley of Fourth Amendment Doctrines," *North Dakota Law Review*: Vol. 58 : No. 4 , Article 1.
Available at: https://commons.und.edu/ndlr/vol58/iss4/1

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PERSPECTIVES ON STATE v. NAGEL: THE NORTH DAKOTA SUPREME COURT'S DISCORDANT MEDLEY OF FOURTH AMENDMENT DOCTRINES

Thomas M. Lockney*

I. INTRODUCTION

The recent decision of the North Dakota Supreme Court in *State v. Nagel*[1] provides a good opportunity to assess current fourth amendment search and seizure law as applied by the North Dakota court. Local application of important fourth amendment principles seldom receives the attention it deserves. I am happy, therefore, to offer some comments on *Nagel* for comparison with the somewhat different views of Bruce Quick,[2] Assistant State's Attorney for Cass County, the winning advocate in *Nagel*. Read together, we hope that our contrasting perspectives might provoke further discussion and examination of the North Dakota Supreme Court's current approach to contemporary fourth amendment search and seizure issues.

Nagel presents a factual situation equal to the imagination of the most creative fourth amendment buff. Characteristically, the case involves criminal charges against two individuals under the controlled substances act.[3] Monte Nagel was prosecuted for

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1. 308 N.W.2d 539 (N.D. 1981).
2. Quick, *Reflections on* State v. Nagel: *The State's Perspective,* 58 N.D.L. Rev. 745 (1982).
3. N.D. Cent. Code ch. 19-03.1 (1981).

possession of marijuana.[4] Nagel lived at the scene of the crime(s), a home in Fargo, North Dakota, with his young friend, Gary.[5] Gary was charged with delinquent acts of possession with intent to deliver methamphetamines and possession of more than one ounce of marijuana.[6] The drugs in question were suppressed as evidence in both cases because they were obtained incident to illegal arrests. The cases were consolidated on appeal.

The legality of the arrests and resulting searches and seizures provides the grist for Mr. Quick's and my mill. Agent Kim Murphy of the Attorney General's Drug Enforcement Unit made one or two buys[7] of methamphetamines from a man named Jay Braaten. Agent Murphy arranged for another buy from Braaten on November 21, 1979. While Murphy waited for Braaten, a team of officers[8] followed Braaten to the home of Nagel and Gary. After two hours in the home, Braaten left and met with Murphy between 3:30 and 4:00 p.m. During this meeting Braaten delivered one-half pound of methamphetamines to Murphy in exchange for $10,200. Braaten was arrested shortly thereafter. Braaten told Murphy that Nagel and Gary expected him back within twenty minutes. Braaten also stated that if he did not return within that time they would know something had gone wrong. Braaten told Murphy about a large cache of methamphetamines in an upstairs bedroom. He did not know whether Nagel and Gary were armed.

Agent Murphy relayed the information from Braaten to the surveillance team and went to obtain a search warrant. The surveillance team quickly concluded that they had probable cause to arrest Gary and Nagel for the commission of felonies and that

4. State v. Nagel, 308 N.W.2d 539, 541 (N.D. 1981).

5. "Gary" is a pseudonym used by the court because he was a juvenile. *Id.* at 540.

6. *Id.* at 541. For the statutes pertaining to the illegal possession, see N.D. CENT. CODE §§ 19-03.1-07, -23 (1981) (methamphetamines); N.D. CENT. CODE §§ 19-03.1-05, -23 (1981) (marijuana).

7. *See infra* note 21 for a discussion of the confusion regarding the number of drug buys. *Compare Nagel,* 308 N.W.2d at 540 (court's opinion indicating two buys) *with* Appellant's Appendix at 2, *Nagel,* 308 N.W.2d 539 (agent's affidavit in support of search warrant indicating one buy).

8. The size of the surveillance team is in some doubt. It apparently consisted of four to seven officers. Agent Murphy's testimony at the suppression hearing revealed the names of six officers present when he arrived with his warrant. Transcript on Appeal at 18. Another agent apparently testified with Murphy when requesting the search warrant, but whether he was ever a part of the surveillance team is a mystery. *Id.* at 24. However, the same officer (unless there were two Smiths involved) was also said to have been present at the home when Murphy arrived with his warrant. *Id.* at 18. On cross-examination, Murphy was asked questions about the "seven" other officers and never disputed that number as being accurate. *Id.* at 25-26. Murphy also responded affirmatively to a question from the bench that referred to seven officers. *Id.* at 38. He failed to dispute the number seven with the court and also agreed with the court that the purpose of the seven officers in entering and making the arrest was to detain the occupants until the search warrant could be obtained. *Id.* at 40, 42-43. The defendant Nagel indicated in his testimony that four officers initially entered to make the arrest, but that three more then joined them. *Id.* at 47, 52. Of course, he would have no knowledge about the size of the team surreptitiously surveilling him prior to the entry and arrest. Since the burden is on the government to justify a warrantless entry and arrest, this comment proceeds with the assumption that there were seven officers available on the scene.

evidence would be destroyed before the warrant could be executed if Braaten did not return within the twenty minutes. After the team approached the door of the home, knocked, and announced who they were and why they were there, an individual who had come to the door fled. The officers broke down the door and entered. According to the officers' testimony they then made only a cursory search to check for other occupants. They placed Gary and Nagel under arrest and seized a small quantity of marijuana that was in plain view on a magazine stand in the living room. According to police testimony, no further search occurred until after Murphy returned with a warrant.[9] The search under the warrant, served by Murphy at 6:30 p.m., produced the bonanza: a large bag of marijuana in the living room where Gary and Nagel had waited with the surveillance team for Murphy's return, a large amount of methamphetamines in Gary's bedroom, and small amounts of marijuana apparently scattered about the house.

The district court granted Nagel's pretrial motion to suppress the seized evidence.[10] The district court based its decision primarily on *Payton v. New York.*[11] In *Payton* the United States Supreme Court held that in the absence of exigent circumstances, police officers need an arrest warrant to enter a person's home to make a felony arrest.[12] First, the district court determined that *Payton* should be applied retroactively because the relevant constitutional ruling was made prior to Nagel and Gary's trial. Next, the court determined that although *Payton* expressly reserved the question whether warrantless entries can be justified by exigent circumstances, guidelines on that issue laid down by the North Dakota Supreme Court in *State v. Page*[13] were not satisfied in this case. Thus, the entry to arrest could not be justified without a warrant. Finally, the district court held that the subsequent search under the warrant

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9. The defendants told a quite different story. The *Nagel* court noted the defendants' version as follows:

> Gary and Monte testified that they were sitting on the couch in the living room when the officers broke down the door without knocking and arrested them. . . . The defendants said the officers searched through the house although Monte testified at the hearing on the motion to suppress that he could not see whether or not they searched other rooms. The defendants also said that the officers found a bag of marijuana behind a speaker in the living room where Monte and Gary were handcuffed and seated on the couch.

308 N.W.2d at 540.

10. *Id.* at 541. In the juvenile proceeding against Gary, the district court originally denied his motion to suppress the marijuana and methamphetamines. The juvenile court later granted Gary's renewed motion to suppress, relying on the intervening opinion and suppression order in Nagel's case. *Id.*

11. 445 U.S. 573 (1980).

12. Payton v. New York, 445 U.S. 573, 576 (1980).

13. 277 N.W.2d 112 (N.D. 1979).

was rendered invalid by the prior illegal entry.

The structure of the North Dakota Supreme Court's opinion is curious when contrasted with the district court's straightforward progression from retroactivity to illegality to taint.[14] The North Dakota Supreme Court first examined the justification for the entry and arrest and discovered sufficient exigency. Despite that determination, the court went on to hold that *Payton* need not be applied retroactively to the *Nagel* case, thereby rendering the discussion of the previous issue unnecessary.[15] The holding that *Payton* is not retroactive also rendered unnecessary the discussion of additional issues, yet the court indicated that the evidence was admissible in any event because it would have been inevitably discovered by legal means. Finally, almost as an afterthought, the court reached the most important issue and in one short, conclusory paragraph determined that probable cause existed to support issuance of the search warrant.

The court did not mention that essentially the same probable cause that is necessary to justify the warrant must be the basis for the prior entry and arrest. Thus, if probable cause did not exist, neither the entry, the arrest, nor the search is supportable. This is true regardless of the retroactivity of *Payton,* the existence of exigent circumstances, or the use of the inevitable discovery doctrine.

It is, therefore, difficult to understand the logic of the opinion's structure, which discusses belatedly and almost casually the primary issue. But, recognizing with Holmes that "the life of the law has not been logic: it has been experience,"[16] it should be noted that the problem is not merely one of style or semantics. The lawyers and judges of the state deserve guidance in this important and complicated area of the law. They should at least be able to determine the holding of the case, however cursory or unclear the reasoning.[17]

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14. On appeal the prosecution raised the same issues, but reversed the order of the second and third issue. In the second issue the prosecution asked the court to assume the retroactivity of *Payton* and to consider the issue of the connection between the illegal entry and the subsequent search. Then, assuming the seizure was the fruit of an unlawful entry and arrest, the third issue was whether exigent circumstances existed to justify the warrantless entry and arrest. Appellant's Brief at 2.

Although the structure of the issues may appear to be a minor detail, it does seem that the district court had the better approach. If the entry and arrest were legal, either because of the nonretroactivity of the *Payton* decision or because of the existence of exigent circumstances, then there is no illegality to discuss in the context of the issues of "taint" and "fruit of the poisonous tree."

15. As the North Dakota Supreme Court recently observed, "the amended Judicial Article does not require us to discuss and give reasons for every point fairly arising from the record." State v. Skjonsby, 319 N.W.2d 764, 772 (N.D. 1982). The court has also followed a common sense principle of judicial economy by repeatedly holding that any question not necessary to a decision of the case need not be considered. *E.g.*, Inches v. Butcher, 104 N.W.2d 556, 561 (N.D. 1960).

16. O.W. HOLMES, THE COMMON LAW 1 (1881).

17. Consider the court's recent changes of position on the issue of strict liability in criminal law in which major statements in one case, State v. Carpenter, 301 N.W.2d 106, 110 (N.D. 1980),

In one sense, however, the structure of the opinion resembles a masterful shell game because on each issue subsequent opinions can say that a particular portion of *Nagel* was unnecessary to the decision in the case. Thus, we cannot really know which portions of the opinion may be mere dicta.

The remainder of this comment will focus on the reasoning offered by the court as support for the possible specific holdings in the opinion. It attempts to demonstrate how the court could have based its result on any one of several dispositive issues without playing its shell game in which the holding is never found.

II. PROBABLE CAUSE

The North Dakota Supreme Court concludes its opinion in *Nagel* with a brief discussion of the defendants' claim that insufficient probable cause existed to justify issuing the search warrant. The court first recites a typical judicial litany of black letter probable cause cliches: "depends on the facts and circumstances of each case," "relates to factual and practical considerations of everyday life on which reasonable and prudent men act,"[18] "hearsay will support a finding of probable cause," "the informer must be found credible and information must be revealed which shows that the basis of his information is reliable."[19] Then with guidance from only cliches and string citations, the court casually disposes of the heart of the case: was Jay Braaten, drug merchant and chief informant against the defendants in this case, a credible informant based upon information known to Agent Murphy and presented to the magistrate issuing the warrant? Indeed, the issue is more important than the court admits. Although the issue is relevant to the validity of the warrant, the issue also arises in the equally important context of the initial entry and arrest. That is, the very information necessary to validate the warrant must also be used to justify the initial entry and arrest.

How does the court reason its way to probable cause? Its analysis reads in its entirety as follows:

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offered for the "purpose of determining where problems may exist in the statute" a year later were labelled mere "dicta." State v. McDowell, 312 N.W.2d 301, 306 (N.D. 1981).

18. 308 N.W.2d at 547 (quoting State v. Berger, 285 N.W.2d 533, 536 (N.D. 1979)).

19. 308 N.W.2d at 547. The *Nagel* court cited the fourth amendment classics as follows: "Aguilar v. Texas, 386 U.S. 300 . . . (1967); Spinelli v. United States, 393 U.S. 410 . . . (1969); McCray v. State of Illinois, 386 U.S. 300 . . . (1967); Aguilar v. Texas, 378 U.S. 108 (1964). . . ." *Id.*

Obviously, something is amiss. *Aguilar* is cited twice, once incorrectly by repeating the *McCray* citation. Perhaps this is a Freudian slip that recognizes the lack of attention about to be given to the real *Aguilar-Spinelli* issue in *Nagel*. That lack of attention will be discussed next in this comment.

> In this case the informant did not know that he was selling drugs to an agent. He had done so twice before. Surveillance confirmed his statements that he had been at [Nagel] and Gary's shortly before his arrest. He had one-half pound of methamphetamines and said he had seen more in an upstairs bedroom. There was sufficient information to find that the informant was reliable, as his statements saying where he had been were confirmed by the surveillance team and he had twice previously sold drugs to agent Murphy as he had agreed to do. There was probable cause to support the search warrant.[20]

There may well be a variety of bases that support a finding that Braaten's statements were credible.[21] Merely saying he was credible, however, does not make him so.[22] The conclusory analysis of the court, taken at face value, suggests the disturbing possibility that an informant is reliable if a surveillance team has seen him at the place where he says he got the drugs and if he has been a reliable drug dealer in the past. It is hoped that the court did not mean that in North Dakota selling drugs three times is taken as the test of veracity for fourth amendment purposes. In other words, the reliable drug dealer should not be equated with the truthful police informant.

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20. 308 N.W.2d at 547.

21. Most pertinent, although suspect as a matter of precedent, is the declaration against interest theory adopted by a plurality of the United States Supreme Court in Harris v. United States, 403 U.S. 573 (1971). The point here, however, is not whether better arguments might have been offered, but rather their absence from the opinion and the imprudence of suggesting that a drug dealer can be a credible person.

The affidavit offered to the magistrate in support of the warrant informed him of only one prior sale, on the day before the *Nagel* episode. Appellant's Appendix at 2. Also, Agent Murphy testified at the suppression hearing about only one purchase. Transcript on Appeal at 14. In contrast, the affidavit offered to the district court at the suppression hearing vaguely describes two prior deliveries to drug agents. Neither the State's attorney's trial brief, the district court's memorandum opinion that repeated the State's narration of the facts, nor the North Dakota Supreme Court's opinion seems to notice the discrepancy. Although the affidavit in support of the search warrant is full of information about Agent Murphy's experience, and of course he is presumed credible, there is nothing to support Murphy's belief that Braaten was telling the truth about Nagel and Gary and the drugs at their residence, except for elaborate detail about the surveillance team's confirmation that Braaten had been at the residence earlier and was seen leaving "with what appeared to be a package in his hand." Appellant's Appendix at 2.

Only a cynic would suggest that the court was primarily impressed with the additional information in the later affidavit, which indicated that tests on the substance sold by Braaten to Murphy showed that it truly was the controlled substance promised. Moreover, although all information known by the surveillance team need not be put in the affidavit to support the search warrant, it may still justify the reasonable belief in the necessity for the entry and arrest. But that distinction requires careful analysis of the record rather than the court's casual conclusion that there was probable cause to support the search warrant. That conclusion suggests that the court was not concerned with the distinction.

22. That the North Dakota Supreme Court is capable of more careful analysis of probable cause issues is convincingly demonstrated by its painstaking opinion in State v. Schmeets, 278 N.W.2d 401 (N.D. 1979). In *Schmeets* the court clearly discussed and distinguished the separate issues of the credibility of the informant and the basis of his information. *Id.* at 406-10. *But see* State v. Klosterman, 317 N.W.2d 796 (N.D. 1982) (confusing analysis of the probable cause issue).

III. RETROACTIVITY OF PAYTON v. NEW YORK

Assuming for the sake of argument that the North Dakota Supreme Court correctly determined the issue of probable cause, it could have disposed of the case based on its view that *Payton* should not be applied retroactively. The court's analysis of the relevant factors, quoted from *Brown v. Louisiana,*[23] appears sound. The inquiry focused on the purpose of the new rule, the reliance by law enforcement authorities on the old rule, and the effect that retroactive application of the new rule would have on the administration of justice. The court noted that the privacy interest intended to be protected by the warrant requirement of *Payton* could not be retroactively restored to the defendants.[24] Also, the arresting officers were relying in good faith upon a state statute authorizing their warrantless entry and arrest and could not reasonably have been expected to anticipate the *Payton* ruling.[25]

The court faltered somewhat in its reasoning when it concluded that retroactive application would be extremely burdensome to the administration of justice. It referred to cases involving the broader issue of retroactive application of the exclusionary rule itself,[26] which obviously has a greater impact than the occasional warrantless entry to make an arrest in North Dakota. The court correctly noted that subsequent fourth amendment decisions have not been applied fully retroactively, and thus concluded:

> In this case, Monte and Gary were searched in November, 1979. *Payton v. New York* was decided on April 15, 1980. Therefore, as we have determined that *Payton* should not be applied retrospectively, and the search complained of took place before the decision in *Payton,* the entry and arrest pursuant to Section 29-06-14 was not illegal at the time it took place and thus the search warrant was not tainted by any unconstitutional conduct.[27]

23. 447 U.S. 323 (1980).
24. 308 N.W.2d at 545.
25. *Id.*
26. *Id.* The court cited Mapp v. Ohio, 367 U.S. 643 (1961), and Linkletter v. Walker, 381 U.S. 618 (1965), as support for this proposition. 308 N.W.2d at 545.
27. 308 N.W.2d at 545. More perplexing is the following statement by the court: "*The fact that the defendants have not been convicted is inconsequential, the time of application of a new doctrine is on the day after it is decided. Williams v. United States supra,* 401 U.S. at 654-60, 91 S.Ct. at 1153-56." 308 N.W.2d at 545 (emphasis in original).

This passage raises several interesting points. First, it is not to be found on the cited pages of *Williams v. United States.* A citation oversight is neither unusual nor important, but presumably the italics are intended to show the court's strength of conviction in the statement. The cited pages are in fact part of Justice White's plurality opinion, announcing the Court's refusal to apply Chimel v.

The United States Supreme Court recently held in *United States v. Johnson*[28] that decisions construing the fourth amendment are applicable retroactively to all convictions then pending on direct appeal. Neither the North Dakota Supreme Court nor this author could reasonably have anticipated that new approach to fourth amendment retroactivity. In essence, the United States Supreme Court went back to the source of fourth amendment retroactivity doctrine, *Linkletter v. Walker,*[29] and adopted Justice Harlan's later suggestion "that *Linkletter* was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down."[30] This is not a proper place to sort out the almost bitter controversy between the majority and the dissent in *Johnson,* a five-four decision. The point is that the North Dakota court's approach in *Nagel* was reasonable since, as the dissent in *Johnson* concludes "we [the United States Supreme Court] already had a perfectly good rule for resolving retroactivity problems involving the Fourth Amendment."[31] Whether the rule was "perfectly good," it was the rule, and by applying it without foreknowledge of the change in direction signalled by *Johnson,* the North Dakota Supreme Court could have avoided much of its troubling analysis of other issues in *Nagel.*

It is not the North Dakota court's conclusion or reasoning that causes concern on this issue. Instead, as discussed earlier, it is the placement of the issue in the opinion. Assuming the court is correct, and means what it says on this issue, there is no reason to proceed further. If the arrest was legal under the prior standard and the statute authorizing warrantless entries to arrest, then there is no need for the court's preceeding discussion of an exception to the warrant requirement.

IV. EXIGENT CIRCUMSTANCES

Payton v. New York[32] held that the fourth amendment requires

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California, 395 U.S. 752 (1969), retroactively. Does the North Dakota court intend to suggest that it will follow a hard and fast rule that if *Payton* had been decided the day before the entry and arrest in this case, its retroactivity decision would be different?

More pertinent to this comment, however, is a comparison of the *Nagel* opinion's structure and discussion of unnecessary issues with Justice White's response to the prosecution's claim in *Williams* that exigent circumstances existed that justified the warrantless search. He observed, in a footnote, that "[b]ecause of our resolution of the retroactivity question, we find it unnecessary to pass on this contention." Williams v. United States, 401 U.S. 646, 651 n.2 (1971).

28. 102 S. Ct. 2579 (1982).

29. 381 U.S. 618 (1965).

30. United States v. Johnson, 102 S. Ct. 2579, 2586 (1982) (quoting Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting)).

31. 102 S. Ct. at 2579 (White, J., dissenting).

32. 445 U.S. 573 (1980).

the police to secure a valid arrest warrant before entering a person's home to arrest him. The United States Supreme Court in *Payton,* however, avoided as unnecessary any discussion of the "sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' "[33] that might justify a warrantless entry to arrest or search. The North Dakota Supreme Court in *State v. Page*[34] anticipated the possibility that a warrant might be required to enter a person's home to effect an arrest and adopted guidelines from *Dorman v. United States,*[35] which purport to aid in the determination that exigent circumstances exist. The guidelines that justify a warrantless entry read as follows:

> (1) A grievous offense is involved, particularly one that is a crime of violence;
> (2) The suspect is reasonably believed to be armed;
> (3) There exists a clear showing of probable cause;
> (4) There is a strong reason to believe that the suspect is in the premises being entered;
> (5) There is a likelihood that the suspect will escape if not swiftly apprehended; and
> (6) The unconsented entry is peaceably made.[36]

In *Page* the North Dakota court added a caveat that the guidelines should not be interpreted as cardinal maxims, nor rigidly applied to every case. Instead, they were intended as flexible guidelines to determine the lawfulness of warrantless entries. Even more pointedly, the court added that they were not to be viewed as conditions precedent to a lawful entry.[37]

The trial court found that three of the six guidelines were not satisfied in *Nagel:* no crime of violence or grievous offense was involved; the police entertained no reasonable belief that defendants were armed; and the entry was not peaceably made because the door was forced open.[38] The North Dakota Supreme Court read the district court opinion as requiring that all the guidelines be met, and thus found error in treating the guidelines as prerequisites to a lawful arrest and a finding of exigency.[39] It is

33. *Id.* at 583.
34. 277 N.W.2d 112 (N.D. 1979).
35. 435 F.2d 385 (D.C. Cir. 1970).
36. 277 N.W.2d at 118; *Nagel,* 308 N.W.2d at 542 n.2.
37. 277 N.W.2d at 118.
38. State v. Nagel, No. CR-80-20, slip op. at 7 (Cass County Dist. Ct. Oct. 14, 1980). The district court recognized that although sale or possession of drugs is serious, it doesn't approach a matter of life and death. *Id.*
39. 308 N.W.2d at 542.

difficult to understand how the trial court's finding that only half the guidelines were satisfied can be translated to mean that all the guidelines had to be met.

Also questionable is the apparent agreement of the North Dakota Supreme Court and the district court that the State adequately showed a likelihood that the suspects would escape if not swiftly apprehended. The police expressed primary concern with the destruction of evidence, not flight, although flight might be a prelude to destruction. There is no suggestion that the surveillance team was inadequate to apprehend Nagel and Gary had they tried to escape while the officers waited outside until Agent Murphy arrived with the search warrant.

Thus, it is arguable that only two of the guidelines were met: the showing, in the court's view, of clear probable cause[40] and a strong reason to believe that the suspects were in the premises being entered.[41] Of course, without probable cause there is no need to consider the warrant requirement; the entry would be unlawful with or without a warrant. Also, if the officers did not strongly believe that the suspects (and in *Nagel,* the evidence) were in the premises entered, why would they bother to enter? Thus, the two *Page-Dorman* guidelines satisfied in this case hardly seem comparable in significance to those not met since they only reiterate the minimum prerequisites to a legal and logical justification for entering. Without more, then, the exceptional situation would become the rule. The district court in recognizing that may hardly be criticized fairly as requiring too rigid a prerequisite satisfaction of all the guidelines.

But of course the district court could not have anticipated just how flexible the guidelines would become. In *Nagel* the court added a new guideline, presumably as an independently viable justification for a warrantless entry. Now the list of legitimate reasons for warrantless entries to arrest includes the prevention of destruction of evidence.[42]

The addition of a new category to enhance the flexibility of the *Page-Dorman* guidelines is not without precedent[43] nor is it

40. The court does not indicate how a clear showing of probable cause is to be distinguished from the garden variety probable cause required in all other cases, nor does it explain why the probable cause thought to exist here approaches that ineffable level of clarity.

41. A strong reason to believe, like a clear showing of probable cause, is not distinguished by the court from a weak or mere reason to believe, which presumably would not satisfy the "not to be rigidly applied" guideline.

42. 308 N.W.2d at 543-44.

43. *See, e.g.,* United States v. Eddy, 660 F.2d 381, 384-85 (8th Cir. 1981); United States v. Kulcsar, 586 F.2d 1283, 1287 (8th Cir. 1978).

necessarily bad.[44] The court, however, also had to overcome the problem it had created for itself in *State v. Matthews.*[45] *Matthews* held that exigent circumstances as an exception to the warrant requirement for searches is not an independent doctrinal category, but rather is a shorthand description for the generally recognized exceptions to the warrant requirement.[46]

Matthews, the court now tells us, is no barrier to applying an exigent circumstances rationale in *Nagel* because *Matthews* dealt with a search, not an arrest, and *Page* explicitly recognized a difference.[47] But the court never explains why an entry to search and an entry to prevent the destruction of evidence by means of an arrest are different for purposes of the fourth amendment and the warrant requirement. Merely telling us they are different provides a conclusion without a rationale.

It is difficult to imagine any good reason to distinguish the arrest situation from the search situation, except to avoid the result otherwise dictated by *Matthews.* After all, an entry into a home to make an arrest is a search for and a seizure of a person. Arrests as seizures of the person have been dealt with somewhat differently from other seizures, as is shown by *United States v. Watson.*[48] But *Payton* shows a strong preference for some sort of warrant whenever a home is entered.[49] A more recent decision, *Steagald v. United States,*[50] shows the United States Supreme Court's continued preference for warrants in the context of entries into homes. A more helpful analysis by the North Dakota Supreme Court would openly accept and attempt to justify the general notion of an emergency or exigent circumstance exception to the warrant requirement and would overtly and self-consciously balance away the privacy interests in individual cases by detailing the strong

44. No less an authority than Professor Wayne LaFave has recently cited *Dorman* as his favorite example of a case that appears to draw bright lines that are incapable of application by police officers in the field. Regarding *Dorman's* seven factors, Professor LaFave doubts "whether there is a police officer in the country who would bet his lunch money on his ability to apply those seven factors correctly in a particular case." LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 322 (1982). Although the North Dakota Supreme Court in *Page* did not purport to be drawing any bright lines or categorical rules, it nonetheless seems preferable to avoid the guidelines altogether and focus on the exigencies of the particular case. The clear rule is the warrant requirement. The guidelines, although intended to help determine the exceptional situations in which the warrant rule is inapplicable, present the police, criminal lawyers, and trial judges with an illusory promise of predictability and certainty.

45. 216 N.W.2d 90, 102 (N.D. 1974).

46. State v. Matthews, 216 N.W.2d 90, 100 (N.D. 1974).

47. 308 N.W.2d at 543.

48. 423 U.S. 411 (1976) (approving felony arrests without warrants, reserving the question of home entries to accomplish the arrest).

49. 445 U.S. 573 (1980). Indeed, the United States Supreme Court seemed to disavow the North Dakota court's distinction. *Id.* at 589-90.

50. 451 U.S. 204 (1981) (search warrant required to enter a person's home to arrest someone else).

policies necessitating the entry.[51]

In any event, *Nagel* creates a new category of exigent circumstances to justify a warrantless entry to make an arrest to preserve not the custody of the arrestee, but the evidence to be searched for and seized. Having elucidated the underpinnings and problems with the court's analysis in *Nagel,* this comment will now focus briefly on the newly created category of exigency in the context of the facts in *Nagel.*

First, the information giving rise to the exigency comes from the informer and, thus, is no more credible than he. Second, there is sparse evidence in the *Nagel* record to support the inference that the large and presumably very valuable cache of drugs in the home would have been destroyed by the people in the house. The officers hoped to make a very large bust of the suppliers based on the information from Braaten, the retailer. Presumably, then, the large cache of drugs still in the home would be worth substantially more than the $10,200 involved in the buy from Braaten. It is difficult to support the surveillance team's inference that drugs worth tens of thousands of dollars would be destroyed on the drug-pushing informant's statement that if he did not return to the house in twenty minutes the suppliers "would know something had gone wrong."[52]

It is more likely that the drug suppliers would try to flee, probably with the drugs, if they were sufficiently worried about what had gone wrong. Without evidence to the contrary, it must be assumed that the team of officers could have safely and easily arrested them as they left the building.[53] Reasonable people can disagree about the probabilities, and the court is properly concerned with the practical necessities of law enforcement officers making quick judgments in the field. No exigency, however, explains the court's own conclusory reasoning.[54]

51. Mr. Quick's companion article is a healthy step in that direction.

52. 308 N.W.2d at 540.

53. Certainly a court that takes judicial notice of the common knowledge or fact that drugs may be easily disposed of, State v. Borden, 316 N.W.2d 93, 96-97 (N.D. 1982); State v. Loucks, 209 N.W.2d 772, 777-78 (N.D. 1973), could also recognize that forcible entries are dangerous to all parties concerned. Thus, on the facts in *Nagel,* the entry was at best no less dangerous, in terms of assuring the arrests (as opposed to the seizures of evidence), than waiting outside.

54. *Cf.* State v. Miller, 190 Or. App. 604, 528 P.2d 1082, 1084 (Ct. App. 1974) (one of four enumerated facts that gave the police sufficient knowledge of exigency was that the quantity of drugs suspected was small in size and easily disposed of). Had the entry in *Nagel* occurred a few months later, after January 1, 1980, the court would have had the opportunity to consider amended rule 41(c) of the North Dakota Rules of Criminal Procedure. Rule 41(c) provides for the issuance of warrants upon remote or telephonic communication. N.D.R. CRIM. P. 41(c). Federal courts have made it clear that the potential for saving time by the use of a telephonic warrant is a critical factor in the assessment of the degree of exigency in a warrantless entry. United States v. McEachin, 670 F.2d 1139, 1146-48 (D.C. Cir. 1981); United States v. Baker, 520 F. Supp. 1080, 1083-84 (S.D. Iowa 1981).

In any event, the most telling defect in the court's uncritical assumption of exigency is its subsequent determination that any defect in the procedure employed is offset by the inevitable discovery doctrine. The existence of an exigency requiring immediate action to prevent the destruction of evidence appears inconsistent with the conclusion that the subsequent search conducted pursuant to the warrant would have inevitably resulted in discovery of the drugs. The court, with its compartmentalized discussions, does not appear to recognize the contradiction, much less explain it.[55]

V. INEVITABLE DISCOVERY

Assuming a constitutional violation, a sufficient connection must exist between the illegality and the evidence seized and sought to be suppressed before the exclusionary remedy is appropriate. When the evidence is insufficiently connected to the illegality, the metaphor of the United States Supreme Court is that the evidence is not "fruit of the poisonous tree," and thus need not be excluded.[56] Evidence can be found not to be the product of illegality in several ways.

First, if it has been found independently of the illegality, it has an independent source and thus is not "tainted."[57] Another method of determining evidence to be unpoisoned by police illegality is to adjudge the connection between the police illegality and the subsequent acquisition of the evidence sufficiently removed in time or place so that the "taint" of the initial illegality becomes attenuated or purged.[58] In either event, the exclusionary rule does not bar admission of the evidence.

Another possibility, in theory a variation of the independent source rule, is the so-called "inevitable legitimate discovery" doctrine.[59] A more accurate label, since the discovery is seldom inevitable but rather involves varying degrees of speculative certainty, is the "hypothetical independent source rule."[60] Application of the inevitable discovery notion generally follows a typical pattern. The police obtain evidence through a fourth

55. This point, dealing with the apparent inconsistency between the court's discussion of exigency and inevitable discovery, is taken up again in the context of examining the court's misapplication of the inevitable discovery doctrine. *See infra* pp. 741-42.

56. *E.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

57. *Id.*; Nardone v. United States, 308 U.S. 338, 341 (1939).

58. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

59. *See* Note, *The "Inevitable Discovery" Rule*, 40 ALB. L. REV. 483 (1976); Note, *The Inevitable Discovery Exceptions to the Exclusionary Rule*, 74 COLUM. L. REV. 88 (1974).

60. Following common usage, also adopted by the court in *Nagel*, 308 N.W.2d at 545, the name will be shortened to the inevitable discovery doctrine.

amendment illegality. A court is legitimately concerned with the unfortunate effect of excluding probative evidence merely because of the way in which it was seized. A creative prosecutor convinces the court that, absent the unfortunate illegal search, the highly efficient law enforcement team would have found the evidence through other, legal investigative procedures. In other words, but for the unfortunate intervening illegality, the evidence would have been found legally. Thus, the court is asked to hypothesize an independent source.

There are serious problems with the concept, not the least of which is its utility as merely another uncritical device for avoiding the feared, harmful effects of application of the exclusionary rule.[61] The North Dakota Supreme Court resisted adoption of the inevitable discovery doctrine until very recently. As late as two years ago, in *In re M.D.J.*,[62] the court avoided the bold step of hypothesizing an independent source for illegally obtained evidence. In *State v. Phelps*,[63] however, the court cautiously adopted the doctrine and expressed concern that it might become another exclusion that could consume the exclusionary rule.[64] To avoid that effect the court turned to Professor Wayne LaFave for limits on the doctrine and promised to allow introduction of illegally seized evidence only when the police have not acted in bad faith to speed the discovery of the evidence and the evidence "would," not "might," have been discovered anyway.[65]

LaFave's limits are, in theory, conceptual checks on a doctrine that would undercut completely the policies of the exclusionary rule if expanded to its full potential. The North Dakota Supreme Court's experience with the limits, however, shows that attempts to apply the limits prove them virtually incapable of principled use. What were set out as intended meaningful limits on the doctrine in *Phelps*, and were applied in *State v. Johnson*,[66] have now, in *Nagel*, disappeared from mention or application altogether.[67] In *Nagel*

61. The North Dakota Supreme Court's distaste for the exclusionary rule is an attribute it can no longer keep to itself. *See* State v. Klevgaard, 306 N.W.2d 185, 190-91 (N.D. 1981) (strong language indicating dissatisfaction with the exclusionary rule and reluctant admission that it must, as a matter of federal law, abide by the rule); State v. Johnson, 301 N.W.2d 625, 627 (N.D. 1981) (same). To judge whether that distaste has affected the nature of the court's fourth amendment decisions, see the erosion of the exclusionary rule in the court's string of inevitable discovery opinions discussed *infra* notes 66-68 and accompanying text and, for an even clearer example, see the harmless error ruling in State v. Wetsch, 304 N.W.2d 67 (N.D. 1981).

62. 285 N.W.2d 558 (N.D. 1979).

63. 297 N.W.2d 769 (N.D. 1980).

64. State v. Phelps, 297 N.W.2d 769, 774-75 (N.D. 1980).

65. *Id.* at 775. *See also* 3 W. LAFAVE, SEARCH & SEIZURE § 11.4 (1978).

66. 301 N.W.2d 625, 629-30 (N.D. 1981).

67. In State v. Klevgaard, 306 N.W.2d 185 (N.D. 1981), decided between *Johnson* and *Nagel*, inevitable discovery is invoked twice. *Id.* at 193, 194. First, a citation to *Phelps* is followed by the observation that the alleged illegality at worst "merely accelerated the investigation and inevitable

there is merely a statement, accompanied by a footnote to LaFave's treatise, that careless application of the doctrine will encourage unconstitutional shortcuts.[68]

A discussion of *Nagel,* however, is not the place to elaborate on the difficulties with the doctrine of inevitable discovery for one simple reason: *Nagel* is not an inevitable discovery case. As the court interprets the record, the marijuana and methamphetamines in question were discovered in the search under the warrant, not during the entry and arrest challenged by the defendants. Thus, the productive legal search and seizure were neither hypothetical nor inevitable — they were actual. The real question is whether the challenged entry and arrest, if they were illegal, tainted the subsequent search under the warrant. Stated another way, the issue is whether a warrant can purge the taint of an earlier illegality when the warrant is issued independently of any information obtained in the initial entry and arrest.[69]

Indeed, the primary case relied on by the court in its inevitable discovery analysis, *Cruse v. State,*[70] is pitched in the language of independent source and purging of the taint. Its language is very close to that of *Nagel:* "Where the disputed evidence stems from an independent and lawful source, even though it could have emerged from the prior unlawful search as well, the evidence is admissible."[71]

The inapplicability of the inevitable discovery analysis is obvious when juxtaposed with the court's justification for the exigent entry. The officers were justified in entering because of their probable cause belief that the evidence would either disappear

discovery." *Id.* at 193. No mention is made of the good faith and speeding discovery components of LaFave's first limit, thus it is impossible to determine why the officer's faith and timing in *Klevgaard* were appropriate when the officer in *Johnson* was not given the same consideration. The second invocation of inevitable discovery in *Klevgaard* merely cites *Phelps* without any indication or application of the limits to the doctrine. *Id.* at 194.

68. 308 N.W.2d at 546, 546 n.5 (citing 3 W. LAFAVE, SEARCH & SEIZURE § 11.4(a), at 623-24 (1978)). In its latest encounter with the inevitable discovery situation the court again avoids the exclusionary rule and the problem of an alleged constitutional violation of the fifth amendment by noting that "the gun nevertheless was properly seized pursuant to the inevitable discovery doctrine. *See State v. Phelps,* 297 N.W.2d 769 (N.D. 1980)." State v. Skjonsby, 319 N.W.2d 764, 787 (N.D. 1982). If the court is truly concerned with the potential for erosion of constitutional rights that it occasionally mentions, it should provide an explanation in each case of how the prosecution has met its burden of proving that the evidence *would* have been found, the rule adopted in *Phelps.* In *Skjonsby* the court said that the officers "could" have found the car containing the gun, *id.,* therefore the North Dakota Supreme Court apparently has equated "could" with "would." The court should also provide an explanation in each case of how the prosecution has met its burden of proving that the officers were not acting in bad faith to accelerate discovery of the evidence, the second rule adopted in *Phelps.*

69. United States v. Beck, 662 F.2d 527 (8th Cir. 1981), involves a factual situation similar to *Nagel.* In *Beck* the Eighth Circuit found it unnecessary to determine the merits of the prosecution's claim of exigent circumstances because the evidence was found in the subsequent search pursuant to a warrant. For further discussion of *Beck,* see *infra* note 78.

70. 584 P.2d 1141 (Alaska 1978).

71. Cruse v. State, 584 P.2d 1141, 1145 (Alaska 1978).

with the fleeing occupants or be destroyed by them. However, if they were wrong or their actions were somehow found to be illegal, the court tells us it does not matter because the drugs would have been found later by Agent Murphy when he executed the warrant. Thus, law enforcement officers may rely on exigent circumstances if they believe the evidence will disappear. But if they are in error, it does not matter because the court believes that the same evidence that was in imminent danger of destruction would also inevitably be found two hours later when the warrant was executed. Apparently, the police can do no wrong in a situation such as this.

The court's unnecessary discussion of inevitable discovery results in a failure to discuss meaningfully the fruit of the poisonous tree issue. The court does tell us that Agent Murphy's warrant is pure because he knew nothing about the marijuana found by the officers when they entered the home. That may well be, although one may question the believability of such a one-way conversation between members of a law enforcement team. The issue, assuming the purity of the information, is whether the seizure is independent of the prior illegality or, if not, whether the warrant purges the initial police action of its illegality.[72] The *Cruse* case, relied on by the North Dakota court, supports that approach. In addition, the United States Supreme Court in *Wong Sun* tells us that not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police."[73] Application of the exclusionary rule in *Nagel* might seem particularly illogical since the officers making the initial entry were relying in good faith upon a state statute not yet determined to be unconstitutional. Also, they entered the home to make effective a subsequent search that was conducted under a warrant which was already in process at the time of their entry.

More appropriate, perhaps, would have been a discussion of what Professor LaFave calls "the impoundment alternative."[74] He suggests attention to the "question whether there is a way to deal with the loss-of-evidence risk which does not necessitate, on the one hand, warrantless searches or, on the other, arrest of all those present."[75] Assuming the existence of probable cause and a need

72. Although the logic of the proposition is not stated, apparently at least four Justices of the United States Supreme Court believe that a warrant can attenuate the taint of prior illegality because of the insertion of a magistrate into the process. Massachusetts v. White, 439 U.S. 280 (1978) (equally divided Court, affirming per curiam and without opinion); *see also* Johnson v. Louisiana, 406 U.S. 356 (1972) (lineup conducted while appellant was detained pursuant to a magistrate's commitment was purged of taint of challenged arrest).

73. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

74. 2 W. LAFAVE, SEARCH & SEIZURE § 6.5, at 450 (1978).

75. *Id.*

for the warrantless home entry, the arrests in *Nagel* are justifiable. Taking the facts as the court views them and assuming that no information passed from the surveillance team agents at the scene to Agent Murphy and through him to the magistrate, it seems that the practical effect of and the justification for the method and timing of the arrests is as an impoundment prior to a warranted search. Although the pure impoundment question is, according to LaFave, still virtually an unknown quantity,[76] an impoundment in *Nagel* arguably would present only a slight incremental privacy invasion since the initial entry and arrest were undertaken in good faith under the authority of a presumptively valid state statute.

All this, however, merely restates the issues discussed in the context of avoiding *Payton* in this case, either by holding it to be nonretroactive or by finding a justified deviation from its warrant requirement. If either of those grounds is valid, the fruits, taint, purge, and inevitable discovery issues are superfluous—the evidence seized was simply not the result of any illegality.

If the entry and the initial arrests are illegal, it is difficult to see how they could be held to be independent of the later search and seizure pursuant to the warrant since the court had already indicated that they were necessary to the successful later seizure.[77] Similarly, there is no reason to believe that the warrant and the two hour wait could somehow purge the taint of the prior illegality.[78]

As previously discussed, the police can do no wrong under the court's rationale. The court's inevitable discovery argument is based and relies on the mirror image of that discussion, on a feeling that the defendants should not be able to have it both ways either. If as the defendants claimed and the trial court believed there was no adequate exigency, the question is whether the defendants should be bound by their claim that the evidence would have been there and thus would have been discovered "inevitably" and "independently" by the officers executing the warrant. The answer is based on the elementary logic of the fourth amendment.

There are only two possible states of affairs: either there was a need for the entry and arrest or there was not. If the court's version of the paradox is adopted, the result is that the police cannot lose.

76. *Id.* at 451.

77. 308 N.W.2d at 544.

78. *But see* United States v. Beck, 662 F.2d 527 (8th Cir. 1981). In *Beck,* which involved facts similar to those in *Nagel,* the court of appeals ignored the question of exigency by finding the subsequent search pursuant to a warrant to be independent. However, the court's holding that the search and the seizure pursuant to the warrant were independent of the prior entry and arrests is explained on the basis of the fact that the magistrate's probable cause finding was not based upon information obtained as a result of the earlier alleged illegality. *Id.* at 530. Unexplained is the factual connection between the earlier police activity, claimed to be required by exigency, and the success of the subsequent search.

The result in *Nagel* frees the police to enter and arrest in *any* situation in which they have an officer en route to obtain a warrant, irrespective of the correctness of their judgment. Police officers, being only human, cannot be motivated to make judgments in situations in which their judgment is irrelevant. Thus, the court's approach in *Nagel* is inconsistent with the fourth amendment's requirement that the police obtain a warrant before entering a home to search or arrest because it removes the practical necessity for any judgment whatsoever about the legality of the entry prior to the execution of the search warrant.

Even officers acting in good faith will make mistakes. *Nagel,* however, removes the incentive for making any judgment because the evidence will be admissible as long as the probable cause is correctly communicated to the magistrate and the warrant is properly executed. A decision resulting in a rule that the police can do no wrong when they enter and arrest so long as a subsequent search warrant results in the actual search for and seizure of the evidence is inconsistent with a healthy fourth amendment.

VI. CONCLUSION

Although this discussion of the North Dakota Supreme Court's decision in *Nagel* has been critical, it should be clear that the concern is not so much with the court's reversal of the trial court's suppression as it is with the method used to justify that result. Ready answers to the difficult questions posed by *Nagel* cannot be offered, but more careful attention to the process used in supporting the court's decisions is suggested. In summary, the *Nagel* opinion demonstrates that the court could better fulfill its mission of explaining and applying the law by avoiding unnecessary discussion of difficult issues[79] and by offering well-developed discussion of the critical issues.[80]

79. Because of its finding that *Payton* is nonretroactive, the court could have avoided discussing the exigent circumstances issue. *See supra* p. 734. Inevitable discovery is not really an issue, but is discussed by the court at length. *See supra* pp. 739-44.

80. The court dealt with probable cause, a central issue, in very conclusory terms. *See supra* notes 18-22 and accompanying text. The issues of fruit of the poisonous tree and dissipation of taint are barely noticed. *See supra* pp. 739-44.