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Reflections on State v. Nagel: The State's Perspective

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REFLECTIONS ON STATE v. NAGEL: THE STATE'S PERSPECTIVE

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I. INTRODUCTION

Scenario: A notorious bank robber is released on bail from the city jail following his most recent arrest for bank robbery. A police officer follows the robber to an anticipated rendezvous with suspected accomplices. From his vantage point on the outside of the apartment,[1] the officer observes the thieves begin to divide the stolen bank proceeds.

Now armed with unassailable probable cause to arrest the accomplices and to seize the stolen money the officer faces a dilemma. What is a police officer, schooled in the fourth amendment[2] and mindful of the competing concerns of the

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1. The officer, of course, is immensely clever and is familiar with fourth amendment principles including "curtilage," "open fields," and "reasonable expectation of privacy." *See* Katz v. United States, 389 U.S. 347 (1967); Hester v. United States, 265 U.S. 57 (1924). Because his observations are made from outside the defendants' curtilage (zone of habitation) through an open window, the suspects do not have a reasonable expectation of privacy. *See* United States v. Johnson, 561 F.2d 832 (D.C. Cir.) (no fourth amendment violation when police officer looks through window after receiving tip about narcotics violation), *cert. denied*, 432 U.S. 907 (1977).

2. U.S. CONST. amend. IV. The amendment provides:

> 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.

Id. Section 8 of the North Dakota Constitution is identical. *See* N.D. CONST. art. I, § 8.

suspect's privacy rights and society's need for effective law enforcement, to do?[3] The officer's choices are limited — he can rush to obtain a search or arrest warrant or both, or he can make a warrantless entry.[4] The officer is between Scylla and Charybdis:[5] leaving the scene to obtain a warrant would likely result in the suspects and the money disappearing; an immediate entry would no doubt result in the robber and his confederates crying "foul" and lead to a prolonged pretrial suppression hearing with an uncertain result. Law enforcement officers throughout the country face this dilemma daily:[6] when may a law enforcement officer make a warrantless entry because there is insufficient time to obtain a warrant?

The starting point in answering this inquiry is the fourth amendment. The fourth amendment does not prohibit all warrantless searches and seizures, only those that are unreasonable.[7] Consequently, the United States Supreme Court has established in piecemeal fashion numerous exceptions to the fourth amendment warrant requirement.[8] In this case by case adoption of search warrant exceptions, the United States Supreme

3. The United States Supreme Court has on numerous occasions in many different ways discussed the purpose and social policy of the fourth amendment. Perhaps the most quoted phrase is from *Johnson v. United States:*

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948). *See also* Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam).

4. There is no doubt that some fourth amendment scholars would argue that the officer should not arrest the suspects until they leave the apartment. *See* Lockney, *Perspectives on* State v. Nagel: *The North Dakota Supreme Court's Discordant Medley of Fourth Amendment Doctrines,* 58 N.D.L. REV. 727 (1982). This may not be a reasonable alternative. The officer is alone, and the suspects are dividing the money. The officer may reasonably expect that each suspect will leave the apartment immediately and depart in a separate direction. *See* United States v. Johnson, 561 F.2d at 843-44; United States v. Curran, 498 F.2d 30, 34-36 (9th Cir. 1974); *see also* 2 W. LAFAVE, SEARCH AND SEIZURE § 6.5, at 449-50 (1978). Furthermore, although the officer may call for assistance, one must assume that help would not arrive before the suspects began to leave.

5. HOMER, THE ODYSSEY 163-68 (A. Cooke trans. 1967). Homer's *Odyssey* details the travels of Odysseus and his return from the Trojan War. Charybdis was a dangerous whirlpool off the coast of Italy, opposite a rocky cave where the six-headed monster Scylla lived. To avoid the whirlpool and certain destruction, ships had to pass near Scylla who would grab and devour seamen.

6. *See* United States v. Johnson, 561 F.2d 832 (D.C. Cir. 1977) (warrantless entry necessary to prevent destruction of evidence).

7. *See* Pennsylvania v. Mimms, 434 U.S. at 108-09; Ker v. California, 374 U.S. 23, 29-34 (1963). The United States Supreme Court, however, has stated in almost every major fourth amendment case that warrantless searches are per se unreasonable, subject to certain exceptions. *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Katz v. United States, 389 U.S. at 357.

8. *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion) (plain view doctrine); Chambers v. Maroney, 399 U.S. 42 (1970) (automobile exception); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception).

Court has contended that search warrant exceptions are few, narrow, and well-delineated.[9]

The rationale often cited for the various exceptions is that the "exigencies of the situation made that course imperative."[10] Many courts, including occasionally the United States Supreme Court,[11] have referred to a separate search warrant exception entitled "exigent circumstances," which is used to justify a warrantless entry.[12]

The term "exigent circumstances," however, describes a number of factually distinguishable situations and indiscriminate overuse of this phrase results in much confusion. The cases applying this emergency exception fit roughly into five categories:[13] 1) emergencies in which life, health, or property is threatened, 2) hot pursuit, 3) crime scene investigation, 4) element in other search warrant exceptions, and 5) emergencies in which evidence or suspects might disappear.

The first category usually consists of those cases in which an officer makes a noninvestigative entry to rescue occupants or property. Often these entrys are made without probable cause,[14]

9. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. at 454-55; Katz v. United States, 389 U.S. at 357. Search warrant exceptions, however, are not necessarily few, narrow, or well-delineated. *See* Cupp v. Murphy, 412 U.S. 291 (1973) (Court upheld a warrantless search that did not fit neatly into any pre-existing pigeonholes); Franklin v. State, 18 Md. App. 651, ____, 308 A.2d 752, 761 (Ct. Spec. App. 1973) (Judge Moylan referred to the case as creating a new exception entitled "search incident to a detention, based upon probable cause but not amounting to arrest, for readily destructible evidence").

10. Coolidge v. New Hampshire, 403 U.S. at 455.

11. Payton v. New York, 445 U.S. 573, 582-83 (1980); Coolidge v. New Hampshire, 403 U.S. at 477-78.

12. *See* Mascolo, *The Duration of Emergency Searches: The Investigative Search and the Issue of Re-Entry*, 55 N.D.L. REV. 7 (1979); Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFFALO L. REV. 419 (1973).

13. Because an emergency presents a myriad of variables, all cases will not fit neatly into these categories. The doctrine of emergency has been characterized to include the following:

> Law enforcement officers may enter private premises without either an arrest or a search warrant in "hot (or prompt) pursuit" of a fleeing suspect; to arrest, or to prevent the imminent escape of, a dangerous criminal, or to seize hazardous evidence, on the basis of probable cause to believe that either the suspect, the possessor, or the materials are within the premises, and time is of the essence so as to realistically preclude recourse to a warrant; to prevent the actual, or imminently threatened loss, destruction, or removal of seizable evidence; to preserve life or property or to render first aid and assistance, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a limited investigation involving a substantial and continuing threat of imminent danger to either life, health, or property, and provided, further, that they do not enter, in any such instance, with a predetermined intent either to arrest or to search; to protect the premises against a felony in progress; and to conduct a reasonable inspection to determine the cause of a fire while it is still burning, or reasonably following its suppression, and to seize evidence either relevant to the cause of the blaze or of an unrelated crime inadvertently discovered.

Mascolo, *The Duration of Emergency Searches: The Investigative Search and the Issue of Re-Entry*, 55 N.D.L. REV. 7, 13-14 (1979).

14. Many courts label this category the emergency doctrine and limit its availability to cases in

however there are cases in this category in which probable cause clearly exists.[15] The hot pursuit exception is used to describe situations in which a police officer is allowed to make a warrantless arrest (and search) of a fleeing criminal in the suspect's home.[16]

A third group of cases discusses exigent circumstances in the context of crime scene investigations. A number of state courts[17] specifically held that these investigations constituted a separate search warrant exception and allowed the police to conduct an unlimited search and seizure at the scene of a crime.[18] The United States Supreme Court refused to recognize this exception.[19] Limited investigation, however, is usually justified pursuant to a rationale similar to that of the cases in category number one.[20] Subsequent investigation, however, requires a search warrant or search warrant exception.[21]

The phrase "exigent circumstances" is also used as an element in other search warrant exceptions. For example, the automobile exception, or *Carroll* doctrine,[22] requires two elements: probable cause and exigent circumstances.[23] Similarily, exigent circumstances is often cited in conjunction with the stop and frisk exception.[24]

Finally, this overworked and misunderstood phrase is often

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which probable cause to search or arrest does not exist. *See, e.g.,* People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246 (1976); State v. Jordan, 79 Wash. 2d 480, 487 P.2d 617 (1971); State v. Sanders, 8 Wash. App. 306, 506 P.2d 892 (Ct. App. 1973); State v. Pires, 55 Wis. 2d 597, 201 N.W.2d 153 (1972).

15. Wayne v. United States, 318 F.2d 205 (D.C. Cir.) (Burger, J., concurring), *cert. denied,* 375 U.S. 860 (1963).

16. Warden v. Hayden, 387 U.S. 294 (1967).

17. *E.g.,* State v. Mincey, 115 Ariz. 472, ____, 566 P.2d 273, 283-84 (1977); State v. Chapman, 250 A.2d 203 (Me. 1969); People v. Tyler, 50 Mich. App. 414, 213 N.W.2d 221 (Ct. App. 1973), *rev'd,* 399 Mich. 564, 250 N.W.2d 467 (1977), *aff'd,* 436 U.S. 499 (1978).

18. The rationale most often cited for the existence of a separate exception was that the search was not unreasonable within the meaning of the fourth amendment and that there was a need for prompt investigation. *See, e.g.,* State v. Sample, 107 Ariz. 407, ____, 489 P.2d 44, 46-47 (1972).

19. Mincey v. Arizona, 437 U.S. 385, 395 (1978); Michigan v. Tyler, 436 U.S. 499, 511 (1978).

20. The reason this issue did not reach the United States Supreme Court until 1978 was probably that the majority of searches in this category could be justified on the basis of consent or lack of standing to complain. 2 W. LAFAVE, *supra* note 4, § 6.5, at 458-66.

21. Mincey v. Arizona, 437 U.S. at 392-93; Michigan v. Tyler, 436 U.S. at 509-10. In *Mincey* the Court was concerned with the legality of a four-day investigation of a homicide scene. The Court had no trouble upholding the initial entry nor finding the four-day search unreasonable. The middle ground was to be decided by the Arizona Supreme Court on remand. 437 U.S. at 402. *See* State v. Mincey, 130 Ariz. 389, ____, 636 P.2d 637, 648-50 (1981) (all evidence admissible on remand based upon plain view doctrine and good faith of police officers). In *Tyler* the Court was concerned with an arson investigation encompassing the day of the fire and the following day and with entries made approximately 4, 7, and 25 days later. The Court upheld the initial warrantless entry to fight the fire and the right of firemen to remain or re-enter for a reasonable time thereafter to investigate the cause of the blaze. 436 U.S. at 510.

22. Carroll v. United States, 267 U.S. 132 (1925).

23. *Id.* at 159. *See* Moylan, *The Automobile Exception: What It Is and What It Is Not — A Rationale in Search of a Clearer Label,* 27 MERCER L. REV. 987 (1976).

24. Terry v. Ohio, 392 U.S. 1, 26 (1968) (search necessary to discover weapons); State v. Matthews, 216 N.W.2d 90, 100 (N.D. 1974) (exigent circumstances noted as supporting stop and frisk exception).

used to describe the situation in which a residence is entered without a warrant to prevent the destruction or loss of evidence.[25] A corollary to this category is the warrantless entry into a dwelling to arrest those present to prevent them from escaping.[26]

This Article is concerned with this last category of cases. In *State v. Nagel*[27] the North Dakota Supreme Court addressed the destruction or loss of evidence issue as it relates to a warrantless entry to make an arrest.[28] In the *Nagel* decision the North Dakota Supreme Court has answered, at least partially, a question that the United States Supreme Court has declined to answer.[29] This Article will discuss the destruction or loss of evidence exception, its history and evolution in both the United States and North Dakota Supreme Courts, and its anticipated future application.

II. UNITED STATES SUPREME COURT OPINIONS

In the companion cases of *Payton v. New York*[30] and *Riddick v. New York*[31] the United States Supreme Court decided that the fourth amendment to the United States Constitution prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.[32] The Court, however, expressly reserved ruling on the question of what

25. *See* Note, *Warrantless Residential Searches to Prevent the Destruction of Evidence: A Need for Strict Standards,* 70 J. CRIM. L. & CRIMINOLOGY 255 (1979).

26. Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970); People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629, *cert. denied,* 429 U.S. 929 (1976).

27. 308 N.W.2d 539 (N.D. 1981).

28. State v. Nagel, 308 N.W.2d 539, 543-44 (N.D. 1981).

29. Payton v. New York, 445 U.S. at 582-83 (reserving question of what constitutes exigent circumstances).

30. 445 U.S. 573 (1980).

31. *Id. Payton* and *Riddick* were consolidated on appeal to the United States Supreme Court. *Id.* at 576.

32. *Cf.* United States v. Watson, 423 U.S. 411 (1976). In *Watson* the Court held that a warrantless arrest in a public place was constitutionally permissible if based upon probable cause even though there was sufficient time to obtain a warrant. *Id.* at 423-24. The Court, however, did not decide the issue of warrantless arrest in a suspect's dwelling. Justice Stewart, in his concurring opinion, stated:

> The arrest in this case was made upon probable cause in a public place in broad daylight. The Court holds that this arrest did not violate the Fourth Amendment, and I agree. The Court does *not* decide, nor could it decide in this case, whether or under what circumstances an officer must obtain a warrant before he may lawfully enter a private place to effect an arrest.

Id. at 433 (Stewart, J., concurring); *see also id.* at 418 n.6.

Lower courts, both federal and state, that have addressed this issue have not been unanimous. *Compare* Commonwealth v. Williams, 483 Pa. 293, 396 A.2d 1177 (1978) (warrantless entry found illegal) *with* People v. Payton, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395 (1978) (entry allowed). The majority of courts that have considered the question have required a warrant to enter a dwelling for either an arrest or search, absent exigent circumstances. *See, e.g.,* United States v. Houle, 603 F.2d 1297 (8th Cir. 1979). Many states, however, including North Dakota, have allowed these entries by statutory provision. N.D. CENT. CODE § 29-06-14 (1974). For a list of the states with statutory provisions, see *Payton,* 445 U.S. at 598-99 n.46.

circumstances would have to be present to justify a warrantless entry because of insufficient time to obtain a warrant saying, "[W]e have no occasion to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances' that would justify a warrantless entry into a home for the purpose of either arrest or search."[33]

Although a majority[34] of the United States Supreme Court has not directly ruled on the destruction or loss of evidence question, the Court has, in dicta, suggested in a number of decisions the existence of such an exception.

In *Johnson v. United States*[35] the defendant was arrested and convicted of a narcotics violation after his hotel was searched without a warrant.[36] The probable cause for the entry was based in part on the odor of burning opium that the officers smelled while outside the suspect's room in the hallway of the hotel. Although the United States Supreme Court suppressed the evidence in question, the Court suggested that if the evidence or contraband had been threatened with removal or destruction the result may have been different.[37]

Similarily in *McDonald v. United States*[38] the Court found insufficient justification for a warrantless entry and search in an illegal lottery case. Although the Court found ample probable cause to obtain a search warrant, a warrantless entry was not justified as the defendant was not fleeing or seeking to escape, "[n]or was the property in the process of destruction."[39]

Three years after *Johnson* and *McDonald* the United States Supreme Court issued one of its broadest statements to date. In

33. Payton v. New York, 445 U.S. at 583.

34. In *Ker v. California* a plurality of the Court held alternatively that destruction or loss of evidence justified the warrantless entry. Ker v. California, 374 U.S. 23, 41-42 (1963). *See infra* notes 45-51 and accompanying text.

35. 333 U.S. 10 (1948).

36. Johnson v. United States, 333 U.S. 10, 12 (1948). The constitutional protections provided by the fourth amendment have been extended to hotel rooms. *See* Stoner v. California, 376 U.S. 483, 490 (1964).

37. 333 U.S. at 14-15. The Court stated:

> There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear.

Id.

38. 335 U.S. 451 (1948).

39. McDonald v. United States, 335 U.S. 451, 455 (1948).

United States v. Jeffers[40] a policeman and hotel detective entered the defendants' room while they were gone and seized narcotics without a warrant.[41] The Court disallowed the search but appeared, by negative inference, to adopt a destruction or loss of evidence exception when it noted the following:

> [The occupants] were not even present when the entry, search and seizure were conducted, nor were there exceptional circumstances present to justify the action of the officers. There was no question of violence, no movable vehicle was involved, nor was there an arrest or an imminent destruction, removal or concealment of the property intended to be seized. In fact, the officers admit they could have easily prevented any such destruction or removal by merely guarding the door.[42]

Thus, by stating what was not present, the Court implied that if the property were in the process of imminent destruction, removal, or concealment, a warrantless entry would have been allowed.

In this trilogy of cases, however, the Court did not specify the parameters of the threatened destruction of evidence. For example, does *McDonald* require the evidence actually be in the process of destruction? Is a threatened destruction as described in *Johnson* sufficient? What constitutes "imminent" destruction of evidence as mentioned in *Jeffers*?

Two years after the landmark decision of *Mapp v. Ohio*[43] the United States Supreme Court decided *Ker v. California,*[44] the first decision that appeared to allow a warrantless entry on the basis of threatened destruction of evidence. In *Ker* the defendant was convicted of possession of marijuana based in part on evidence that was seized without a warrant from his apartment. The police developed probable cause to justify the entry and arrest after two days of surveillance of a known drug dealer, during which time an unwitting informant purchased marijuana from the dealer and delivered the contraband to an undercover agent. The day after this delivery police officers observed a similar encounter between the defendant Ker and the drug dealer. The officer, however, did not see any substance pass between the two men. The officers began to

40. 342 U.S. 48 (1951).
41. United States v. Jeffers, 342 U.S. 48, 50 (1951).
42. *Id.* at 52.
43. 367 U.S. 643 (1961) (exclusionary rule made applicable to the states through the fourth and fourteenth amendments to the United States Constitution).
44. 374 U.S. 23 (1963).

follow Ker but lost him in traffic when he made a U-turn in the middle of the block. The police subsequently located Ker's apartment by checking his automobile registration and, without a warrant, entered his apartment with a passkey provided by the manager.[45]

In a plurality decision,[46] the Court upheld the warrantless entry against a multitude of objections,[47] including the argument that the officers should have obtained a search warrant.[48] In a dissenting opinion authored by Justice Brennan, four of the judges disagreed.[49] Nonetheless, the dissenters appeared to recognize an exception for destruction or loss of evidence:

> Even if probable cause exists for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons

45. Ker v. California, 374 U.S. 23, 25-29 (1963).

46. *Id.* at 24. Justice Clark wrote for eight members of the Court in the wake of *Mapp v. Ohio,* establishing in *Ker* a standard to be used in determining the question of reasonableness of a state search and seizure. In applying the standard to the facts in the case, however, Justice Clark was joined only by Justices Black, Stewart, and White in holding that the search was valid. *Id.* Justice Harlan concurred in the affirmance of the lower court judgment but on the ground that the seizures did not violate the due process clause of the fourteenth amendment. *Id.* at 44.

47. In addition to arguing the warrantless entry issue, the defendant contended that probable cause for his arrest was lacking and that the method of entry was unlawful because the police did not "knock and announce" their authority and purpose. *Id.* at 34-41.

48. *Id.* at 41-42. The Court stated:

> [W]e agree with the California court that time clearly was of the essence. The officers' observations and their corroboration, which furnished probable cause for George Ker's arrest, occurred at about 9 p.m., approximately one hour before the time of arrest. The officers had reason to act quickly because of Ker's furtive conduct and the likelihood that the marijuana would be distributed or hidden before a warrant could be obtained at that time of night.

Id. at 42. The Court's reasoning in *Ker* concerning the warrantless entry is confusing. The Court specifically stated in the opinion that for the search to be valid, it must fall within the search warrant exception of search incident to an arrest. *Id.* at 34-35, 41-42. The Court, however, appeared to rely on the actual or potential threat of destruction or loss of evidence as an additional basis for the decision:

> Petitioners contend that the search was unreasonable in that the officers could practically have obtained a search warrant. The practicability of obtaining a warrant is not the controlling factor when a search is sought to be justified as incident to arrest. . . . [W]e agree with the California court that time clearly was of the essence.

Id. at 41-42. Furthermore, in a footnote to the above statement, the Court appeared to distinguish the facts in *Ker* from other decisions in which the Court disallowed warrantless entries. The Court reasoned:

> In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances, such as the threat of destruction of evidence, supported the Court's holdings that searches without warrants were unconstitutional.

Id. at 42 n.13.

49. *Id.* at 46. Justice Brennan was joined by Chief Justice Warren and Justices Douglas and Goldberg.

> within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) *where those within,* made aware of the presence of someone outside (because, for example, there has been a knock at the door), *are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.*[50]

Although a plurality decision, *Ker* appears to expressly adopt the destruction or loss of evidence exception. The commentators, however, have not widely cited the *Ker* decision for this proposition.[51]

The Court continued[52] its discussion of warrantless searches and exigent circumstances in *Vale v. Louisiana.*[53] The police had obtained arrest warrants for the defendant Vale and were watching him when they observed a suspected narcotics transaction outside the house. When the police approached Vale he quickly hurried back toward the house where the police arrested him on the steps of the home. The police made a cursory inspection of the house to see if anyone was inside. Minutes later Vale's mother and brother entered the premises, at which time the police searched the house without a warrant and found narcotics in a rear bedroom.[54]

The United States Supreme Court suppressed the evidence seized in this warrantless search restating the standard of

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50. *Id.* at 47 (emphasis added).

51. The reason for this apparent oversight is that *Ker* is viewed as a search incident to arrest decision, *see, e.g.,* Brown v. State, 15 Md. App. 584, ____ n.31, 292 A.2d 762, 772 n.31 (Ct. App. 1972), and not as a destruction or loss of evidence decision. *See* Note, *Warrantless Residential Searches to Prevent the Destruction of Evidence: A Need for Strict Standards,* 70 J. CRIM. L. & CRIMINOLOGY 255 (1979) (the commentator, in a discussion of all relevant United States Supreme Court decisions in this area, does not mention the *Ker* decision).

In 1978 the United States Supreme Court appeared to attach more significance than do the commentators to the *Ker* decision. For example, in *Tyler* the Court cited *Ker* to support a "warrantless and unannounced entry of a dwelling by police to prevent imminent destruction of evidence." Michigan v. Tyler, 436 U.S. 499, 509 (1978).

52. The Court decided three more cases prior to *Vale v. Louisiana* that are worth mentioning. In *Chapman v. United States* the Court suppressed the warrantless search and seizure of an unregistered distillery at the petitioner's home. Chapman v. United States, 365 U.S. 610, 618 (1961). The Court relied on *Johnson,* 333 U.S. 10 (1948), stating that "no evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear." 365 U.S. at 615. In *Schmerber v. California* the Court upheld the warrantless seizure of a blood sample from a defendant charged with driving while under the influence of alcohol. Schmerber v. California, 384 U.S. 757, 772 (1966). The *Schmerber* Court relied in part upon a destruction of evidence rationale. *Id.* at 770-71. The seizure of the blood sample, however, was also considered to be incident to the defendant's arrest pursuant to *Chimel.* Chimel v. California, 395 U.S. 752 (1969) (allowing search of area within immediate control of the person arrested). Therefore, *Schmerber's* precedential value for warrantless entry into a dwelling is questionable. Finally, a year later in the landmark decision of *Warden v. Hayden,* the Court adopted the hot pursuit exception. Warden v. Hayden, 387 U.S. 294, 298-99 (1967). *See supra* note 16 and accompanying text.

53. 399 U.S. 30 (1970).

54. Vale v. Louisiana, 399 U.S. 30, 31-33 (1970).

destruction of evidence espoused nineteen years earlier in *McDonald,*[55] that the goods seized "were not in the process of destruction."[56] The dissenting Justices,[57] however, pointed out the Court's apparent inconsistency:

> [T]he Court suggests that the contraband was not "in the process of destruction." None of the cases cited by the Court supports the proposition that "exceptional circumstances" exist only when the process of destruction has already begun. On the contrary we implied that those circumstances did exist when "evidence or contraband was *threatened* with removal or destruction."[58]

Having displayed an inconsistency on the issue of emergency searches, the Court expressly reserved the question of what constitutes exigent circumstances in *Payton v. New York.*[59] Thus, each state court was free to adopt its own solution to the complex problem of emergency searches.

III. THE NORTH DAKOTA SUPREME COURT APPROACH

The North Dakota Supreme Court had a number of opportunities prior to *State v. Nagel*[60] to discuss the concept of exigent circumstances. In *State v. Matthews,*[61] a North Dakota encyclopedia on fourth amendment law, the court was confronted with a unique situation in which it was essentially asked whether two packages at a bus depot were more like a car or a house.[62] In other words, the court had to decide whether the movable character

55. McDonald v. United States, 335 U.S. 451 (1948).

56. *Vale,* 399 U.S. at 35.

57. Justice Black was joined by Chief Justice Burger in dissent. *Id.* at 36.

58. *Id.* at 39. That the Court has continued to show indecision in this area is indicated by the Court's statement in *Michigan v. Tyler:* "Our decisions have recognized that a warrantless entry by criminal law enforcement officals may be legal when there is compelling need for official action and no time to secure a warrant." Michigan v. Tyler, 436 U.S. at 509. The *Tyler* Court went on to cite *Ker* as a case which allowed a warrantless entry to prevent imminent destruction of evidence. *Id.*

59. 445 U.S. 573, 583 (1980). After *Vale* the Court also decided another "hot pursuit" case, United States v. Santana, 427 U.S. 38 (1976), and the two "crime scene" cases, Michigan v. Tyler, 436 U.S. 499 (1978), and Mincey v. Arizona, 437 U.S. 385 (1978). *See supra* notes 18-23 and accompanying text. Finally, the Court opened a new chapter in search warrant exceptions, *see supra* note 11 and accompanying text, and added a new concept to the exigent circumstances idea with its decision in *Cupp v. Murphy.* The *Cupp* Court, allowing the warrantless seizure of fingernail scrapings from a murder suspect who was not yet arrested, relied on the presence of probable cause for the arrest, the limited nature of the intrusion, and the "highly evanescent" nature of the evidence. Cupp v. Murphy, 412 U.S. 291, 296 (1973).

60. 308 N.W.2d 539 (N.D. 1981).

61. 216 N.W.2d 90 (N.D. 1974).

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

of the packages allowed an analogy to the *Carroll* automobile exception, thus permitting a warrantless search.[63]

In *Matthews* the Jamestown police and North Dakota Crime Bureau developed probable cause to believe that two packages containing marijuana were being sent from Arizona to Jamestown by Greg Anderson to two unidentified persons. The two packages arrived at the Jamestown bus depot, the authorities were notified, and police maintained surveillance until the packages were picked up. The package involved in the *Matthews* decision was in the possession of the bus company, with full knowledge of the police, approximately twenty-two hours before it was picked up. During this time and prior to the arrest of the defendant the package was opened without a warrant at the direction of a North Dakota Crime Bureau agent.[64]

Prior to discussing the issues in the case, the court outlined a number of principles applicable to search and seizure questions generally.[65] The court then discussed some of the search warrant exceptions recognized by the United States Supreme Court and concluded with a discussion of exigent circumstances:

> The State seems to claim that a category of "exigent circumstances" constitutes a separate exception to the general rule that search warrants must be obtained prior to searches and seizures . . . . However, we believe that the term "exigent circumstances" originated as a shorthand way of describing those facts which give rise to a previously accepted exception to the rule, and not as a new exception in itself. . . .
>
> We conclude that "exigent circumstances" is not an exception to the requirement of a warrant, but is only a handy way of describing the circumstances which give

63. The prosecution in *Matthews,* in claiming exigent circumstances, was not alone in its position. *See, e.g.,* United States v. Valen, 479 F.2d 467 (3d Cir. 1973) (search of suitcases at airport supported by exigent circumstances); United States v. Mehciz, 437 F.2d 145 (2d Cir. 1971) (search of suitcase permissible as search incident to arrest); People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972) (search of boxes at airport reasonable because probable cause existed), *cert. denied,* 411 U.S. 931 (1973); Waugh v. State, 20 Md. App. 682, 318 A.2d 204 (Ct. App. 1974) (warrantless search of suitcase at airport permissible because of exigent circumstances), *rev'd on factual grounds,* 275 Md. 22, 338 A.2d 268 (1975). *Cf.* Arkansas v. Sanders, 442 U.S. 753 (1979) (warrant required to search luggage taken from automobile); United States v. Chadwick, 433 U.S. 1 (1977) (United States Supreme Court decided against the automobile-package (suitcase) analogy).

64. *Matthews,* 216 N.W.2d at 95.

65. *Id.* at 99. The *Matthews* court established that all warrantless searches are unreasonable unless pigeonholed into an established search warrant exception, that the burden of proof on a motion to suppress is on the state, and that evidence seized in violation of the fourth amendment is inadmissible in court. *Id.*

> rise to one or another of the generally recognized exceptions mentioned earlier.[66]

Although the *Matthews* court stated that exigent circumstances was not a separate search warrant exception, the court did consider the State's argument on the merits and suppressed the evidence.[67] Even though case law existed that applied the *Carroll* doctrine to packages,[68] the majority of those cases were distinguishable because the law enforcement officers did not have probable cause for a substantial period of time prior to the search and seizure of the package.[69] While the court did not specifically recognize exigent circumstances as a separate search warrant exception in *Matthews,* it may be because no exigency actually existed.[70]

In *State v. Page*[71] the North Dakota Supreme Court was presented with its next opportunity to consider the proper role of exigent circumstances. Two masked men robbed a farmer at gunpoint in Ward County. During an immediate investigation the police discovered boot prints and tire tracks in the snow near the victim's home. Investigation began to focus on two brothers, Brian and Randall Page, after interviews of nearby neighbors revealed that the brothers were in the area immediately prior to the robbery.

When the police compared tire tracks and boot prints found near the farmer's home with those found outside the Page brothers', they discovered a near perfect match. The police were allowed to enter the Page residence, and the brothers agreed to accompany the police to the station for further investigation. While

66. *Id.* at 100.

67. *Id.* at 102-03. The court concluded that there were no exigent circumstances because "[t]he package was under constant surveillance by the police, who had arranged with the common carrier to hold it in a nonpublic area until such time as it was called for while the police were present. There was no danger of destruction, removal or concealment." *Id.* The court also stated:

> It may be that the officers who made the warrantless search of the package in the Jamestown bus depot had probable cause to believe that a crime had been committed, but probable cause alone, without a search warrant or a simultaneous, valid arrest or other exigent circumstances, is insufficient to justify a warrantless search. . . . There was ample time to obtain a warrant; the package was, in effect, in the custody of the police, since they had made arrangements to hold it until they authorized delivery; and no other legitimate excuse for not obtaining a warrant is shown.

Id. at 104.

68. *See supra* note 63.

69. 216 N.W.2d at 101. The North Dakota court specifically distinguished People v. McKinnon, 500 P.2d 1097 (1972), by noting "that the exigencies of the situation were different in *McKinnon.*" *Matthews,* 216 N.W.2d at 101.

70. The *Matthews* court's discussion of the issue on the merits is confusing. Did the court mean to imply that if probable cause for the search of the package developed at the same time or shortly before the consignor (Matthews) arrived to pick up the package, the search or at least the seizure could have been made without a warrant? In other words, was the court acknowledging a separate search warrant exception for the destruction or loss of evidence instead of relying on the exigent circumstances concept?

71. 277 N.W.2d 112 (N.D. 1979).

one of the brothers was getting dressed, the police observed a large amount of money in his wallet. Both brothers were arrested for the robbery. A search warrant was subsequently executed on the defendants' apartment and automobile, leading to the discovery of miscellaneous evidentiary items.[72]

The defendants challenged the initial warrantless entry on the grounds that it violated their fourth amendment rights.[73] The court found that one of the brothers had consented to the entry, thus waiving any fourth amendment protection.[74]

The court, however, proceeded to consider the defendants' fourth amendment claim on the merits.[75] The court acknowledged that the United States Supreme Court had not yet ruled on whether an arrest warrant was required for police to arrest a suspect in a dwelling.[76] The North Dakota court then looked to other jurisdictions for guidance, relying upon the Circuit Court of the District of Columbia's decision in *Dorman v. United States.*[77]

The *Dorman* court[78] held that a warrantless nonconsensual entry into a dwelling to make a routine arrest was unconstitutional.[79] The federal court did, however, enunciate six guidelines to determine when exigent circumstances exist to allow a warrantless entry to make an arrest.[80] Before considering whether

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72. State v. Page, 277 N.W.2d 112, 114 (N.D. 1979).

73. *Id.* at 116.

74. *Id.* at 116-17. The court was explicit in its reasoning:

> From the record it appears that the Pages are intelligent and aware individuals, capable of refusing entry to the officers. Randall Page, nevertheless, chose to invite the officers in, even after he was informed that their purpose was to inquire about activities the previous evening. From the totality of the circumstances we conclude consent was voluntarily given to enter.

Id. at 117.

75. *Id.* The *Page* court does not clearly indicate whether the discussion of the warrantless entry is dictum or an alternative basis for the court's decision. Because the discussion of the consent issue appears first and because consent is normally viewed as a waiver of any fourth amendment objection, the discussion of the entry on the merits appears to be dictum.

76. *Id.* The court acknowledged that the United States Supreme Court had elected to decide the issue in Payton v. New York, 445 U.S. 573 (1980). 277 N.W.2d at 117 n.1.

77. 435 F.2d 385 (D.C. Cir. 1970).

78. The *Dorman* decision was recognized by the United States Supreme Court in *Payton. Payton,* 445 U.S. at 575 n.4, 587-88.

79. *Dorman,* 435 F.2d at 391.

80. *Id.* at 392-93. The guidelines were summarized by the *Page* court 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.

277 N.W.2d at 118.

these guidelines should be adopted in North Dakota, the *Page* court distinguished the *Matthews* statement made five years earlier regarding exigent circumstances.[81] The North Dakota court distinguished exigent circumstances necessary to justify an entry for an arrest from exigent circumstances necessary to justify an entry for a search.[82]

In the same opinion, however, the North Dakota court appeared to accept a general definition of exigent circumstances from a California court: "The term 'exigent circumstances' has been defined as an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence."[83]

In applying these concepts to the facts in *Page* the court found that the officers' entry was lawful, with or without the defendants' consent.[84] In so holding, the court reduced the *Dorman* court's guidelines to a two-pronged inquiry: (1) Is there probable cause to arrest? (2) Will the time and circumstances effectively prohibit the officers from obtaining a warrant?[85] The court, however, did not appear to distinguish an entry to arrest from an entry to search.[86]

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81. 277 N.W.2d at 117-18. The *Page* court distinguished its conclusion that exigent circumstances did not constitute a separate search warrant exception by saying that "[t]he existence of exigent circumstances justifying a warrantless entry for arrest necessarily differ somewhat from those applicable to a search." *Id.* (citing United States v. Shye, 492 F.2d 886, 891 (6th Cir. 1974)).

82. 277 N.W.2d at 117-18.

83. *Id.* at 117 (citing People v. Ramey, 16 Cal. 3d. 263, ____, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (1976)). The location of this definition in the *Page* opinion is interesting. The court initially cited the *Dorman* decision for the proposition that a nonconsensual warrantless entry into a home to make an arrest is unreasonable absent exigent circumstances. The court then acknowledged the definition of exigent circumstances from the California Supreme Court opinion before distinguishing a search from an arrest situation. 277 N.W.2d at 117.

84. 277 N.W.2d at 119.

85. *Id.* at 118. The *Page* court reduced the *Dorman* court's guidelines to a two-pronged inquiry in response to a commentator's criticism of the *Dorman* guidelines. *Id.* The commentator had stated that the *Dorman* guidelines may be "too sophisticated to be applied, requiring . . . the making of on-the-spot decisions by a complicated weighing and balancing of a multitude of imprecise factors." *Id. See* 2 W. LAFAVE, SEARCH AND SEIZURE § 6.1, at 386-90 (1978).

86. 277 N.W.2d at 118-19. The *Page* court described the factors necessitating an entry as follows:

> Here, the officers had probable cause to enter the Page apartment. The circumstances surrounding the entry did not, in fairness, require delay. Swift action to prevent possible escape by the suspects and to preserve the fruits of the robbery may be essential to effective law enforcement. When the officers had obviously located the suspects' car and apartment, it would have been foolhardy not to make further inquiry of the apartment occupants. Because a Pontiac, identified as the one seen in the Sawyer area, was parked outside, it was reasonable to assume that the Page brothers might be in the apartment. In addition, it was not unreasonable to assume that the apartment occupants had seen the officers examining tire and boot tracks and would have escaped or destroyed any incriminating evidence while the officers were procuring a warrant. Although it may have been wise when viewed with hindsight, we do not fault the officers for failing to post a "stake out" while a warrant was being obtained.
>
> *Id.*

The North Dakota Supreme Court had one more minor opportunity to discuss the exigent circumstances concept. In *State v. Johnson*[87] the court was concerned with the admissibility of a stolen air compressor that was discovered outside the defendant Johnson's mobile home approximately ten months after the theft.[88] After two visits to the home, and although Johnson was not at home, the sheriff seized the air compressor without a warrant.[89]

On appeal, the court used unusual reasoning to suppress the warrantless seizure. The court initially acknowledged the general statement from *Matthews* that exigent circumstances do not constitute a separate search warrant exception,[90] but the court went on to hold that "we cannot, *in the absence of exigent circumstances,* condone his failure to secure a warrant."[91] The court concluded, "In no instance is this type of shortcut more apparent than in the present case in which the warrant requirement was bypassed *in the absence of exigent circumstances.*"[92]

The stage was set for *State v. Nagel.*[93] With the background provided by *Matthews*[94] and *Page*[95] and the decision of the United States Supreme Court in *Payton,*[96] the North Dakota Supreme Court was prepared to invoke the destruction or loss of evidence exception.

The *Nagel*[97] case involved three young men who were involved in the trafficking of methamphetamines.[98] One of them was Jay Braaten who as an unwitting informant delivered controlled substances three times to agents of the North Dakota Drug Enforcement Unit. At the scene of his third and final delivery, which involved over $10,000.00 worth of methamphetamines, Braaten was arrested.[99] At the time of his arrest, Braaten informed Special Agent Murphy that Braaten had received the drugs in question from Gary[100] and Nagel, and that if he were not back

87. 301 N.W.2d 625 (N.D. 1981).
88. State v. Johnson, 301 N.W.2d 625, 626 (N.D. 1981).
89. *Id.*
90. *Id.* at 628. In fact, the court directly quoted the exigent circumstances language from *Matthews. Id.*
91. *Id.* at 629 (emphasis added).
92. *Id.* (emphasis added).
93. 308 N.W.2d 539 (N.D. 1981).
94. State v. Matthews, 216 N.W.2d 90 (N.D. 1974). *See supra* notes 61-70 and accompanying text.
95. State v. Page, 277 N.W.2d 112 (N.D. 1979). *See supra* notes 71-86 and accompanying text.
96. Payton v. New York, 445 U.S. 573 (1980). *See supra* notes 30-33 and accompanying text.
97. State v. Nagel, 308 N.W.2d 539 (N.D. 1981).
98. Methamphetamine is a schedule I controlled substance. *See* N.D. CENT. CODE § 19-03.1-05 (1981).
99. 308 N.W.2d at 540. Although Braaten's arrest was warrantless, it occurred in the parking lot of a grocery store; therefore, it was valid pursuant to United States v. Watson, 423 U.S. 411 (1976) (warrantless public arrest permissible). *See supra* note 32 and accompanying text.
100. 308 N.W.2d at 540. At the time of his arrest, Gary was a juvenile and the court chose a pseudonym. *Id.*

within twenty minutes, they would know that something had gone wrong. Braaten also informed Agent Murphy that Gary and Nagel had additional drugs in their residence. The information about where Braaten had obtained the drugs was corroborated by a surveillance team who monitored Braaten's movements prior to his arrest.[101] Prior to the execution of a search warrant requested by Agent Murphy, the surveillance team entered the residence and arrested Gary and Nagel.[102] Execution of the warrant revealed marijuana in the living room and a large cache of methamphetamines in Gary's bedroom.[103]

After the arrest and search but prior to the district court's ruling on the defendants' subsequent suppression motions, the United States Supreme Court decided *Payton*.[104] Applying the *Payton* decision retroactively the lower court suppressed the warrantless entry as well as the subsequent searches.[105] The court also refused to find that exigent circumstances justified the entry,[106] relying upon *Page*.[107]

The State appealed, raising three issues,[108] but it is the author's belief that the central issue was the surveillance team's

101. *Id.* Braaten had delivered methamphetamines on two prior occasions, including a delivery on the day before the arrest. At that time, arrangements were made for a larger delivery. There were numerous phone calls that evening and the next day between Braaten and Murphy concerning the procurement and exchange of the drugs. In one of the phone calls made the day of the arrest, Braaten informed Murphy that he was going to his "man" to obtain the drugs. The surveillance team then followed Braaten to Monte's residence, where Braaten remained for approximately two hours. During this time Braaten again called Murphy, this time informing him that Braaten was at the source of his supply but that there would be a short delay. Braaten then changed the location of the exchange. The reason for the delay was to "round up" the entire quantity of drugs that had been agreed upon. During this time the surveillance team observed another person, later identified as Gary, leaving the residence. Gary was then lost in traffic. Gary returned, and Braaten left shortly thereafter carrying what appeared to be a package. Based upon the above activitity and Braaten's statement at the time of his arrest, the drug agents clearly had probable cause to request a search warrant. *Id. See, e.g.*, United States v. Harris, 403 U.S. 573 (1971) (plurality of the Court recognized the inherent credibility of statements made against a penal interest). That the probable cause question was never an issue in the lower court was no doubt the reason for the North Dakota Supreme Court's brief treatment of the issue. *See* 308 N.W.2d at 547.

102. 308 N.W.2d at 540. Murphy informed the surveillance team by radio of Braaten's statements and the team entered the apartment approximately 20 minutes later. The warrant was not obtained for approximately two hours. *Id.*

103. *Id.* at 540-41.

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

105. 308 N.W.2d at 542.

106. *Id.*

107. *Id.* at 542. The lower court found that three of the six *Dorman* guidelines were absent; therefore, exigent circumstances did not exist. *Id.*

108. *Id.* at 541. The court quoted the State's issues in the opinion:

> " I. Does the United States Supreme Court Opinion in *Payton and Riddick v. New York* that prohibited law enforcement agents from making a warrantless entry into a suspect's home to make a routine felony arrest apply retroactively?
> " II. Assuming retroactive application of *Payton* and *Riddick,* was the seizure of the controlled substances involved in this case pursuant to a valid search warrant the 'derivative fruit' of an unlawful entry and arrest?
> "III. Did 'exigent circumstances' exist to justify the warrantless entry and arrest?"

Id.

warrantless entry into the residence.[109] The North Dakota Supreme Court phrased the issue as follows: "Is the imminent destruction of evidence of a crime a sufficient exigent circumstance to make a nonconsensual, warrantless entry into a suspect's home to arrest him when there is probable cause to believe that a felony has been committed by that person?"[110]

To decide this issue, the court faced two alternatives: (1) restrict the *Matthews* language quoted in *Page* and *Johnson* that rejected exigent circumstances as a separate search warrant exception[111] or (2) attempt to reconcile the decisions. The court chose the latter.

The court distinguished *Matthews* with the following statement:

> [W]e are not addressing the issue of whether or not the police may *enter and search* without a warrant when they have probable cause to believe a felony has been committed and exigent circumstances exist, but whether or not they may enter and arrest under those circumstances. Thus, exigent circumstances in the context of a search situation as discussed in *State v. Matthews* . . . is not applicable. . . .[112]

Because the court was limiting its discussion to warrantless entries for the purpose of an arrest, it was necessary to reconsider the *Page* decision in which the court had accepted the *Dorman* guidelines.[113] The court held that the district court was too stringent in its application of these guidelines.[114] After reconciling its previous decision the court addressed the exigent circumstances issue, reversing the lower court. The North Dakota Supreme Court concluded that there was probable cause for the entry and that

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109. Although the court could have avoided the issue by not applying the *Payton* decision retroactively, the State urged the court to address the issue because the earlier decision in *Page* was being strictly construed. *Id.* Thus, the court addressed this issue first. *Id.*

110. *Id.* at 543.

111. *See supra* note 60 and accompanying text.

112. 308 N.W.2d at 543 (emphasis in original).

113. *Id.* at 542. *See supra* notes 78-83 and accompanying text.

114. 308 N.W.2d at 542. The court limited the use of the *Dorman* guidelines as follows:

> The district court erred when it determined that exigent circumstances did not exist at the time the officers entered the residence of [Nagel] and Gary and secured the premises. The error was in treating the *Dorman* guidelines as prerequisites to a lawful arrest which must be met before there can be exigent circumstances. In other words, by requiring the existence of all of the *Dorman* elements to find exigent circumstances the court erred.

Id.

exigent circumstances supported the entry.[115] The court did, however, add a caveat that a mere belief that destruction of the evidence is probable would not be sufficient to support a warrantless entry.[116]

IV. FUTURE APPLICATION

In its decision in *Nagel,* the North Dakota Supreme Court adopted a necessary and practical exception to the fourth amendment warrant requirement. Because of dicta in prior decisions, however, the court unnecessarily distinguished entries for the purpose of making an arrest from entries for the purpose of making a search.

Although certain differences still remain between warrantless arrests and warrantless searches,[117] the United States Supreme Court in *Payton* rejected the distinction when it involved a warrantless entry into a dwelling.[118] Although the North Dakota court's distinction between arrests and searches in a dwelling appears arbitrary and due largely to the court's reluctance to overrule precedent, if the court's opinion is construed as limiting a warrantless entry to its purpose of preventing the destruction or loss of evidence, the opinion would have solid constitutional footing.

The principle that a warrantless search (or presumably entry) must be strictly limited to its purpose is aptly illustrated by *Terry v. Ohio,*[119] in which the United States Supreme Court adopted the stop and frisk exception to the fourth amendment warrant

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115. *Id.* at 544. The *Nagel* court stressed the need for both probable cause and exigent circumstances:

> The great probability of imminent destruction or removal of evidence constituted exigent circumstances which permitted the officers to act when they had probable cause to believe that a felony had been committed and there was not sufficient time to obtain a warrant. We emphasize the necessity of the combination of probable cause and exigent circumstances.

Id.

116. *Id.* The court indicated that mere belief should be "coupled with the fact that the suspects know or will soon become aware that the police are on their trail . . . and that the entry is the least intrusive which, under the circumstances, is possible." *Id.* (citation omitted).

117. *See supra* note 35 and accompanying text.

118. *Payton,* 445 U.S. at 589. The Court analyzed possible differences in the two types of entries as follows:

> The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.

Id.

119. 392 U.S. 1 (1968).

requirement.[120] The exception was adopted because the scope of the search was found reasonable under the fourth amendment.[121]

Thus, the North Dakota court's rationale in *Nagel* can be viewed as a scope limitation and not necessarily as a prohibition against all entries to search to prevent the destruction or loss of evidence. In the *Nagel* case a search of the premises[122] could have constituted a scope violation as the parties were under arrest and the exigency extinguished.[123] Under other circumstances, however, a warrantless entry to conduct a search could be justified under a destruction or loss of evidence rationale.[124]

Finally, this new exception should not be used to subvert the warrant requirement or the social policy which demands that a neutral and detached magistrate be placed between the individual's right to privacy and the law enforcement officer engaged in the competitive enterprise of ferreting out crime.[125] The court's caveat[126] concerning that issue should be construed to require good faith on behalf of law enforcement officers coupled with specific and articulable facts to justify the entry.

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120. Terry v. Ohio, 392 U.S. 1, 30 (1968).

121. *Id.* at 30-31. The Court concluded:

> The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental actions as by imposing preconditions upon its initiation. . . . Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation.

Id. at 28-29.

122. Any plain view seizure, however, should be allowed under the authority of Coolidge v. New Hampshire, 403 U.S. 443 (1971) (evidence in plain view may be seized without a warrant).

123. *See* Mascolo, *The Duration of Emergency Searches: The Investigative Search and the Issue of Re-Entry*, 55 N.D.L. REV. 7 (1979).

124. *See, e.g.*, People v. Clemens, 37 N.Y.2d 675, 339 N.E.2d 170, 376 N.Y.S.2d 480, *cert. denied*, 425 U.S. 911 (1975).

125. *See supra* notes 4-5 and accompanying text.

126. *See supra* note 116 and accompanying text.