CRIMINAL LAW—SEARCH AND SEIZURE: THE NORTH DAKOTA SUPREME COURT ADOPTS A FOUR-PRONG TEST TO DETERMINE WHETHER *MIRANDA* WARNINGS ARE SUFFICIENT TO CURE A FOURTH AMENDMENT VIOLATION

STATE V. GAY, 2008 ND 84, 748 N.W.2D 408

I. FACTS

On May 3, 2007, the Northwest Narcotics Task Force received information indicating that probationer Ben Smith would be selling drugs in Williston, North Dakota.[1] The tip claimed that Smith planned to meet a man driving a black car at Smith's workplace and that the person meeting Smith intended to buy methamphetamine.[2] The informant conveyed the information to probation officers Darin Cote and Lloyd Haagenson as well as other law enforcement officials.[3]

After receiving the tip, several law enforcement officers watched Smith's workplace and saw another male, later identified as David Gay, get into Smith's vehicle with him.[4] Deputy Verlan Kvande of the Williams County Sheriff's Office knew that law enforcement had received information and aided the Sheriff's Office in the investigation.[5] Deputy Kvande assisted with the investigation after the other officers stopped Smith's car.[6]

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1. State v. Gay, 2008 ND 84, ¶ 2, 748 N.W.2d 408, 411. Smith was a felon on probation for drug convictions in two separate counties. Brief for Appellant at ¶ 4, State v. Gay, 2008 ND 84, 748 N.W.2d 408 (No. 20070348). The identity of the informant was not disclosed in any of the police reports, testimony, or affidavits submitted during the pretrial suppression hearing. *Gay*, ¶ 2, 748 N.W.2d at 411.

2. *Gay*, ¶ 2, 748 N.W.2d at 411. The unknown male arranged to buy a half-ounce of methamphetamine from Smith. Brief for Appellant, *supra* note 1, ¶ 5.

3. *Gay*, ¶ 2, 748 N.W.2d at 411. Probation Officer Cote and law enforcement set up surveillance at Dakota Farms Restaurant, Smith's place of employment. Brief for Appellant, *supra* note 1, ¶ 5.

4. *Gay*, ¶ 4, 748 N.W.2d at 411. The officers noticed an adult male drive into the restaurant's parking lot and park next to Smith's vehicle. Brief for Appellant, *supra* note 1, ¶ 5. Gay exited his vehicle and entered the passenger side of Smith's vehicle. *Id.* The police followed Smith and Gay to a gravel parking lot. *Id*. Smith was spotted in the lot near a storage unit a short distance from his car. *Id.* Smith was speaking to an individual named Bryce Raad, a known drug user. *Id.*

5. *Gay*, ¶ 4, 748 N.W.2d at 411. Deputy Kvande did not know the source of the information or whether the source was reliable. Brief for Appellee at ¶ 10, State v. Gay, 2008 ND 84, 748 N.W.2d 408 (No. 20070348). Deputy Kvande did not participate in the surveillance of Smith's place of employment. *Gay*, ¶ 4, 748 N.W.2d at 411.

6. *Gay*, ¶ 4, 748 N.W.2d at 411. The stop occurred several blocks from Smith's place of employment. *Id*.

The officers were conducting a probation search of Smith and his vehicle when Deputy Kvande arrived on the scene.[7] Officers also handcuffed the passenger, David Gay, before Deputy Kvande arrived.[8] Prior to Deputy Kvande's contact with Gay, officers read Gay his *Miranda* rights and handcuffed him for officer safety.[9] Deputy Kvande testified that he re-read the *Miranda* warnings to Gay, who was still handcuffed, and with Gay's consent conducted a pat-down search for weapons.[10] No drugs, weapons, or other illegal materials were found on Gay's person, but the officers discovered a large sum of cash in Smith's pocket and methamphetamine paraphernalia in Smith's car.[11]

Deputy Kvande testified that he spoke with Gay after the pat-down search and *Miranda* recitation.[12] Gay was still handcuffed at that time.[13] Deputy Kvande testified that Gay stated he was not involved in any drug deal, but that he smoked marijuana the previous day.[14] Kvande then placed Gay under arrest.[15] Officers detained Gay with handcuffs for about fifteen minutes prior to his formal arrest.[16]

David Gay was arrested for ingestion of a controlled substance (marijuana), which is a class A misdemeanor in North Dakota.[17] Gay brought a motion to suppress the statement he made to Deputy Kvande about smoking marijuana.[18] The district court granted the motion on the ground that the basis for questioning Gay terminated after the initial search revealed that Gay was not a risk to officer safety.[19] The district court then determined that probable cause for Gay's continued detention did not exist when he

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7. *Id.*

8. *Id.*

9. *Id.* When Kvande arrived, Gay was standing by Smith's vehicle with his hands handcuffed behind his back. Brief for Appellant, *supra* note 1, ¶ 14.

10. *Gay*, ¶ 4, 748 N.W.2d at 411. Kvande believed that officers also searched Gay for weapons prior to Kvande's arrival on the scene. *Id.*

11. *Id.* Deputy Kvande's report and testimony did not indicate whether the cash and paraphernalia were found before the first officers at the scene handcuffed Gay. *Id.* Gay told Kvande that he came to Williston to buy a car from Smith. Brief for Appellant, *supra* note 1, ¶ 7.

12. *Gay*, ¶ 5, 748 N.W.2d at 411-12. Kvande left Gay for some time in order to assist officers with the third individual on the scene. Brief for Appellant, *supra* note 1, ¶ 7.

13. *Gay*, ¶ 5, 748 N.W.2d at 412.

14. *Id.* Gay told Deputy Kvande that smoking marijuana was not illegal and that law enforcement could not do anything about it. Brief for Appellant, *supra* note 1, ¶ 7.

15. *Gay*, ¶ 5, 748 N.W.2d at 412.

16. *Id.*

17. Brief for Appellee, *supra* note 5, ¶ 5; N.D. CENT. CODE § 19-03.1-22.3 (Supp. 2007).

18. *Gay*, ¶ 6, 748 N.W.2d at 412. Deputy Kvande was the only witness called by the state at the suppression hearing to testify regarding the investigation, charge, and arrest of Gay. *Id.* ¶ 3, 748 N.W.2d at 411.

19. *Id.* ¶ 6, 748 N.W.2d at 412. The district court explained the legal rationale underlying its decision on the record, but did not create written findings of fact. *Id.* ¶ 3, 748 N.W.2d at 411.

admitted to smoking marijuana.[20] The district court further noted that being handcuffed was intimidating to the point that *Miranda* warnings did not cure the unlawful arrest.[21] The State appealed the suppression order, arguing the district court erred because the search and seizure of Gay was reasonable under both the United States Constitution and the North Dakota Constitution.[22] The North Dakota Supreme Court affirmed the district court's suppression order.[23] The North Dakota Supreme Court held that the administration of *Miranda* warnings to protect Gay's right not to incriminate himself did not cure the ongoing Fourth Amendment violation.[24]

II. LEGAL BACKGROUND

The United States Supreme Court established the exclusionary rule to prohibit evidence that is seized in violation of the Fourth Amendment from being admitted against the victim of the unlawful search.[25] To understand the Court's exclusionary rule jurisprudence, an overview of the rule and discussion of the rule's application to verbal statements is provided.[26] Next, the reasonableness of pat-down searches is examined.[27] Then, an explanation of the application of North Dakota's search and seizure law to vehicle passengers is considered.[28] The next section examines the limitations imposed on a probationer's Fourth Amendment rights in North Dakota.[29] After the basic framework is established, the interaction between the Fourth and Fifth Amendments is discussed.[30] Finally, the prosecution's statutory right to appeal in North Dakota is addressed.[31]

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20. *Id.* ¶ 6, 748 N.W.2d at 412.

21. *Id.*

22. *Id.* ¶ 7.

23. *Id.* ¶ 25, 748 N.W.2d at 417.

24. *Id.* ¶ 24.

25. *See* Boyd v. United States, 116 U.S. 616, 633-34 (1886); Weeks v. United States, 232 U.S. 383, 398 (1914). *See also* 1 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 28 (4th ed. 2004) (1978) ("The nature of the exclusionary rule is such that it makes the cost of honoring the Fourth Amendment apparent.").

26. *See* discussion *infra* Part II.A (providing an overview of the exclusionary rule and discussing the rule's application to verbal statements).

27. *See* discussion *infra* Part II.B (examining the reasonableness of pat-down searches and stop and frisks).

28. *See* discussion *infra* Part II.C (discussing searches and seizures of vehicle passengers in North Dakota).

29. *See* discussion *infra* Part II.D (examining a probationer's limited Fourth Amendment rights in North Dakota).

30. *See* discussion *infra* Part II.E (discussing the interaction between the Fourth and Fifth Amendments).

31. *See* discussion *infra* Part II.F (addressing the statutory limitation upon a prosecutor's right to appeal in a criminal case).

A. APPLICATION OF THE EXCLUSIONARY RULE TO VERBAL EVIDENCE

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures; and it applies to the states through the Fourteenth Amendment.[32] The Fourth Amendment is a safeguard against government intrusion embedded in the United States Constitution.[33] The North Dakota Constitution also protects against unreasonable searches and seizures.[34] The Fourth Amendment does not, however, define the word "unreasonable."[35] The amendment also does not describe the relationship between the clause prohibiting unreasonable searches and the conditions under which warrants may issue.[36] Further, the Fourth Amendment is void of any language barring unlawfully seized items from evidence—now known as the exclusionary rule.[37]

1. *Overview of the Exclusionary Rule*

Courts initially formulated the exclusionary rule to serve two primary purposes: (1) to deter unreasonable searches and seizures and (2) to promote judicial integrity.[38] Recognition of these rationales by the United States Supreme Court largely dictated the scope of the rule.[39] Adherence to the rationales, however, prompted several exceptions to the rule.[40]

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32. U.S. CONST. amend. IV & XIV. The Fourth 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.

U.S. CONST. amend. IV.

33. 1 LAFAVE, *supra* note 25, at 5 (quoting JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 19 (1966)).

34. N.D. CONST. art. I, § 8. Article I, section 8 of the North Dakota Constitution provides: "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated."

35. *See* 1 LAFAVE, *supra* note 25, at 8 (discussing the origins of the Fourth Amendment).

36. *Id.*

37. *See* U.S. CONST. amend. IV (noting the absence of any express remedy). *See also* 1 LAFAVE, *supra* note 25, at 28-29 (stating that the drafters of the Fourth Amendment may not have contemplated the exclusionary sanction, but certainly envisioned compliance with the Fourth Amendment).

38. Elkins v. United States, 364 U.S. 206, 221-23 (1960).

39. *See* 1 LAFAVE, *supra* note 25, at 23 (stating that the Supreme Court's perception of the rule shaped its scope and could determine its fate).

40. *See* 6 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 258-85 (4th ed. 2004) (1978) (generally discussing the exceptions to the exclusionary rule).

The "independent source" exception allows the admission of evidence gained independent of unlawful police activity.[41] Specifically, the exception allows certain facts that are gained through an independent source to be used as evidence.[42] The other relevant exception is the "attenuation doctrine" or the "fruit of the poisonous tree doctrine," which allows the government to establish a causal connection between the unlawful activity of law enforcement and the evidence obtained.[43] The causal connection must be "so attenuated as to dissipate the taint" of the unlawful events.[44] This doctrine applies not only to tangible evidence, but also to verbal statements.[45]

2. *Exclusionary Rule Applied to Verbal Evidence*

In 1963, the United States Supreme Court decided *Wong Sun v. United States*,[46] which declared that verbal evidence derived from an illegal arrest "is no less the 'fruit' of official illegality than the more common tangible fruits" of an unwarranted arrest.[47] In *Wong Sun*, federal agents arrested Hom Way for heroin possession.[48] Hom Way, who was not a police informant, told agents that he bought an ounce of heroin from "Blackie Toy," an owner of a laundromat.[49] Several agents then went to a laundromat owned by James Wah Toy.[50] Agents handcuffed and arrested Toy, but found no narcotics on the premises.[51] Toy then told the agents that he did not sell narcotics, but knew someone named "Johnny" who did.[52] Agents proceeded to Johnny Yee's house, entered, and found Yee in the bedroom.[53] Yee took several tubes containing heroin from a drawer and surrendered the drugs to the agents.[54]

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41. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (allowing facts obtained through an independent source to be used as evidence).

42. *Id.*

43. Nardone v. United States, 308 U.S. 338, 341-42 (1939).

44. *Id.* at 341.

45. *See* Wong Sun v. United States, 371 U.S. 471, 487 (1963) (applying the exclusionary rule to a verbal confession); Silverman v. United States, 365 U.S. 505, 510-12 (1961) (excluding verbal evidence obtained by law enforcement through illegal wire-tapping).

46. 371 U.S. 471 (1963).

47. *Wong Sun*, 371 U.S. at 485.

48. *Id.* at 473.

49. *Id.* Hom Way told the agents that the laundry was on Leavenworth Street. *Id.*

50. *Id.* Toy owned a laundry located on Leavenworth Street. *Id.* at 474.

51. *Id.* The Court's record did not identify James Wah Toy as "Blackie Toy." *Id.*

52. *Id.* Toy described the house where Johnny lived. *Id.* He also described a bedroom in which Johnny kept approximately an ounce of heroin. *Id.*

53. *Id.* at 475.

54. *Id.* Yee surrendered less than one ounce of heroin. *Id.*

Agents took Yee and Toy to the Office of the Bureau of Narcotics where Yee told officers that Toy and a man called "Sea Dog" brought the seized heroin to Yee four days earlier.[55] Toy told the agents that "Sea Dog" was actually Wong Sun.[56] James Wah Toy, Johnny Yee, and Wong Sun were arraigned and released on their own recognizance.[57] A few days later, agents interrogated all three men at the Narcotics Bureau.[58]

The Government's evidence at trial consisted of four items: (1) the statements Toy made at the time of his arrest; (2) the heroin from Yee's house; (3) Toy's unsigned statement; and (4) Wong Sun's unsigned statement.[59] The district court admitted all four items over objections that the evidence constituted inadmissible "fruits" of unlawful arrests or searches.[60] Wong Sun and James Wah Toy appealed after they were convicted of transportation and concealment of heroin.[61] The Ninth Circuit Court of Appeals held that the arrests of Toy and Wong Sun were unlawful because the arrests were not based on probable cause within the meaning of the Fourth Amendment.[62] The Ninth Circuit Court of Appeals nevertheless held that the four items of evidence were not "fruits" of the unlawful arrests and thus were properly admitted at trial.[63]

The United States Supreme Court reversed the Ninth Circuit and declared that verbal evidence derived from an unlawful entry or arrest may constitute a "fruit" in the same way as tangible items.[64] The Court recognized that the underlying purposes of the exclusionary rule did not suggest a reason for distinguishing between physical and verbal evidence.[65] Rather, the Court stated that a distinction between physical and verbal evidence might damage the underlying policies of the rule.[66]

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55. *Id.*

56. *Id.* Toy showed officers where Wong Sun lived. *Id.* Several officers entered the apartment and brought Wong Sun out handcuffed. *Id.* The officers searched the apartment but did not find narcotics. *Id.*

57. *Id.*

58. *Id.* at 476. An agent advised the men of their right to withhold information and their right to counsel. *Id.* Toy's statement was read to him, but he refused to sign it. *Id.* Wong Sun also refused to sign his statement, but he admitted its accuracy to the officers. *Id.* at 477.

59. *Id.*

60. *Id.*

61. *Id.* at 473.

62. *Id.* at 477.

63. *Id.* at 478.

64. *Id.* at 485.

65. *Id.* at 486.

66. *Id.* *See* Elkins v. United States, 364 U.S. 206, 221-23 (1960) (proclaiming that judicial integrity is protected by the exclusion of unlawfully seized evidence); Weeks v. United States, 232 U.S. 383, 398 (1914) (stating that excluding evidence is the foremost method of discouraging unlawful police conduct).

The Supreme Court assessed the evidence that prompted the officers to investigate Toy's laundry and determined that the officers did not have probable cause to procure a warrant for Toy's arrest.[67] The lack of probable cause made Toy's arrest unlawful under the Fourth Amendment.[68] The unlawful activity prompted application of the exclusionary rule to Toy's statements.[69] The statements led law enforcement to Yee's home, thus enabling the officers to discover the drugs by utilizing the unlawfully obtained statements.[70] The Court deemed the drugs "fruits" of the unlawful activity and consequently inadmissible against Toy.[71]

The Court then applied the attenuation doctrine to Wong Sun's unsigned confession.[72] The Court determined that the confession was not the fruit of an unlawful arrest, because the causal connection between the arrest and the confession attenuated the constitutional violation.[73] The Court overturned Toy's conviction, and held that Wong Sun was entitled to a new trial.[74]

The *Wong Sun* Court did not explicitly declare that all unlawfully obtained statements must be excluded from evidence.[75] Exclusion of improperly seized evidence is initially prompted by an unlawful or unreasonable search, but the attenuation question depends upon the specific facts of each case.[76] Ordinarily, law enforcement must procure advance judicial authorization through the use of warrants to conduct searches and seizures.[77] The United States Supreme Court, however, formulated a limited exception to

67. *Wong Sun*, 371 U.S. at 484.

68. *Id.*

69. *Id.* After determining that the exclusionary rule applied to Toy's statements, the Court analyzed the narcotics seized from Johnny Yee. *Id.* at 487.

70. *Id.* at 488.

71. *Id.* As applied to Toy, the Court determined that neither the independent source exception nor the attenuation doctrine applied to the drugs found at Yee's residence. *Id.* at 487 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) and Nardone v. United States, 308 U.S. 338, 341 (1939)).

72. *Id.* at 491.

73. *Id.* (citing *Nardone*, 308 U.S. at 341). Wong Sun was released after a lawful arraignment, but voluntarily returned several days later to make the statement. *Id.*

74. *Id.* at 491, 493.

75. *Id.* at 491-92. *See also* 6 LAFAVE, *supra* note 40, at 287 (recognizing that *Wong Sun* does not bar all statements made following an unlawful arrest).

76. 6 LAFAVE, *supra* note 40, at 259 (citing Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring)).

77. *See* Terry v. Ohio, 392 U.S. 1, 20 (1968) (reaffirming that law enforcement must utilize the warrant procedure whenever practicable); Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that the admission of papers seized without a warrant was prejudicial error).

the Fourth Amendment's protection from unreasonable searches and seizures and the warrant requirement.[78]

B. REASONABLENESS OF PAT-DOWN SEARCHES

In *Terry v. Ohio*,[79] the United States Supreme Court outlined both the prerequisites and underlying purposes of pat-down searches.[80] This form of police contact is commonly called a "stop and frisk."[81] The Court proclaimed that police officers may conduct a brief search of a person's outer clothing if the officer has reasonable suspicion, rather than probable cause, to believe that the person is armed and dangerous.[82] Such a search is considered reasonable under the Fourth Amendment, and any weapons seized may be introduced as evidence against the person.[83] These intrusive means are permitted to protect police officers and others in the area of the search.[84] The Court characterized the intrusions as "less than a 'full' search."[85] The next section will examine *Terry* and the reasonableness of stop and frisks.[86] The subsequent section will then provide an assessment of whether handcuffs may be used during a frisk search and the duration of time reasonably allowed to conduct a frisk.[87]

78. *See Terry*, 392 U.S. at 30-31 (declaring that police officers are allowed to conduct frisks of a person's outer clothing upon reasonable suspicion that the person is presently armed and dangerous).

79. 392 U.S. 1 (1968).

80. *Terry*, 392 U.S. at 30.

81. *See, e.g.*, California v. Hodari D., 499 U.S. 621, 636 (1991) (rejecting the suggestion that the use of such terms as "stop" and "frisk" place the police conduct outside the scope of the Fourth Amendment).

82. *Terry*, 392 U.S. at 30. The Court set forth the "stop and frisk" standard as:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id.

83. *Id.* at 31.

84. *Id.* at 26.

85. *Id.*

86. *See* discussion *infra* Part II.B.1 (examining the United States Supreme Court's validation of frisk searches).

87. *See* discussion *infra* Part II.B.2 (discussing whether handcuffs may be used to effectuate a frisk and the duration of time which will be considered reasonable).

1. *The United States Supreme Court Validates Stop and Frisk Searches*

In *Terry*, the defendant was convicted of carrying a concealed weapon after Detective Martin McFadden grabbed John Terry, spun him around, and felt the outside of his clothing, which revealed a pistol.[88] The ultimate issue was whether, under the totality of the circumstances approach, the officer's actions violated the defendant's Fourth Amendment rights.[89] The Court first analyzed whether Terry was "seized" by Officer McFadden and whether, and at what point, McFadden conducted a "search."[90]

The State argued that a stop and frisk did not rise to the level of a "search" or a "seizure."[91] The Court rejected the notion that a stop and frisk conducted by police officers was outside the realm of the Fourth Amendment.[92] In defining a seizure, the Supreme Court stated that a person is seized whenever a police officer confronts the person and restrains the person's freedom to walk away.[93] Thus, the Fourth Amendment does not exclusively apply to circumstances when police make a "technical arrest" or conduct a "full-blown search."[94] The Court held that Officer McFadden seized Terry and subjected him to a search when the officer felt the outer surfaces of Terry's clothing.[95]

The Court, however, chose not to invalidate prior holdings that police must, whenever practicable, obtain warrants prior to conducting searches and seizures.[96] Instead, the Court determined that the conduct in *Terry* did not necessitate an assessment of probable cause, but rather reasonableness.[97] The Court then examined the reasonableness of the search and sei-

88. *Terry*, 392 U.S. at 7. The officer observed two men, one later identified as John Terry, standing on a street corner. *Id.* at 5. The officer noticed that one man would leave the other, pause and look in a store window, walk past the store, turn around, and walk back to the corner pausing to look in the store window again. *Id.* at 6. The other man would then repeat these actions. *Id.* Each of the men did this about five or six times. *Id.* A third man approached the men, spoke with them briefly, and all three men left the street corner. *Id.* Officer McFadden believed that the men were "casing" a robbery. *Id.* McFadden followed the men and approached them. *Id.* He identified himself as a law enforcement officer then asked the men for their names. *Id.* at 6-7. After the men "mumbled something" in response to McFadden, he conducted the pat-down search of Terry. *Id.* at 7. The officer then patted down the other two men and discovered a gun on one man. *Id.*

89. *Id.* at 8.

90. *Id.* at 16.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 19.

95. *Id.*

96. *Id.* at 20.

97. *Id.* An assessment of probable cause was not required because the police conduct was not subject to the Warrant Clause of the Fourth Amendment. *Id.* The Court stated that in deter-

zure by analyzing whether the officer's action was tenable from the beginning, and whether the action was reasonably related to the events that gave rise to the intrusion.[98] In order to meet the reasonableness threshold, the Court first required that the police intrusion be supported by specific facts, which reasonably warrant the interference.[99] Next, the Court declared that the search must be limited to the discovery of weapons that might be used to harm the officer or others nearby.[100] Ultimately, the Court declared a stop and frisk a "protective search," calling it a brief intrusion upon the dignity of the individual.[101]

The Court applied this standard and held that Officer McFadden's actions against Terry were reasonable under the circumstances.[102] The fact that the officer limited his intrusion to what was necessary to learn whether the men were armed was crucial to the Court's decision.[103] Officer McFadden limited the scope of the intrusion; thus, the weapon seized from Terry was not subject to the Fourth Amendment exclusionary rule.[104] The Court, however, did not determine a reasonable duration for conducting the stop, or whether handcuffs could be used to effectuate the intrusion.[105]

2. *Use of Handcuffs and Prolonged Detentions to Promote Officer Safety*

Two significant concepts emerged from the Supreme Court's decision in *Terry*: (1) a seizure need not be deemed an "arrest" to be subject to Fourth Amendment requirements; and (2) a seizure that is limited in intrusiveness may be reasonable under the Fourth Amendment even in the absence of probable cause, which is generally required.[106] A Fourth Amendment analysis essentially requires a determination of whether police have

mining reasonableness, the test is the balance between the need to search and the intrusion that the search involves. *Id.* at 21 (citing Camara v. Mun. Ct., 387 U.S. 523, 534-35 (1967)).

98. *Id.* at 19-20.

99. *Id.* at 21. The Court noted that the particular government interests involved were effective crime prevention, officer safety, and the safety of others. *Id.* at 22-24.

100. *Id.* at 26.

101. *Id.* The intrusion is to be evaluated under a "reasonably prudent man" standard, but giving due weight to the reasonable inferences which a police officer is allowed to deduce from his experience in law enforcement. *Id.* at 27.

102. *Id.* at 28.

103. *Id.* at 30.

104. *Id.* at 30-31.

105. *See id.* at 30 (stating that each case must be decided on its own facts and limiting the holding to the facts presented).

106. *Id.* at 26-30; *see also* 3 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 12 (4th ed. 2004) (1978) (discussing whether a Fourth Amendment seizure constitutes an arrest).

made an arrest and, if so, when the arrest actually occurred.[107] Physical restraint of an individual usually results in a conclusion that an arrest has been made, which in turn requires probable cause.[108] Since *Terry*, however, several courts and jurisdictions have held that the use of handcuffs in conducting a stop and frisk is reasonable.[109]

In *United States v. Miller*,[110] the Eighth Circuit Court of Appeals agreed with the district court's determination that a Drug Enforcement Administration agent's use of handcuffs on the defendant was the least intrusive means of conducting a *Terry* stop and was therefore reasonable under Fourth Amendment analysis.[111] The agents involved in the investigation detained the defendants at an airport, searched their luggage, and found cocaine.[112] The Eighth Circuit declined to mistrust the agent's decision to use handcuffs.[113] The court stated that the nature of the crime of which the defendants were suspected—drug trafficking—created a reasonable concern that the defendants carried weapons.[114]

In *Houston v. Clark County Sheriff Deputy John Does 1-5*,[115] the Sixth Circuit Court of Appeals found that an investigative stop lasting from thirty-five to sixty minutes was reasonable and did not exceed the scope of a *Terry* stop.[116] After an alleged shooting at a bar, and amid police confusion, officers pulled over the two suspects as the suspects left the scene.[117] Police detained and questioned the men, and searched their vehicle.[118] The officers did not find any evidence and released the men.[119] The officer dis-

107. *See* 3 LAFAVE, *supra* note 106, at 4 (examining the circumstances which may constitute an arrest).

108. *Id.* at 9 (citing Kaupp v. Texas, 538 U.S. 626, 632 (2003)).

109. *See* United States v. Miller, 974 F.2d 953, 957 (8th Cir. 1992) (holding that an officer's use of handcuffs was reasonable in conducting a *Terry* stop); United States v. Bautista, 684 F.2d 1286, 1290 (9th Cir. 1982) (holding that an officer's use of handcuffs as a protective measure was not unreasonable or excessive); State v. Munson, 594 N.W.2d 128, 137 (Minn. 1999) (holding that briefly handcuffing vehicle occupants until officers determined that the occupants were not armed was reasonable).

110. 974 F.2d 953 (8th Cir. 1992).

111. *Miller*, 974 F.2d at 957.

112. *Id.* at 956-57. A Los Angeles police officer alerted the agents of the defendants. *Id.* at 955. The police officer became suspicious of the defendants after questioning them in an airport. *Id.* at 956.

113. *Id.* at 957. The Eighth Circuit Court of Appeals, relying on the agent's testimony, recognized that the suspects involved outnumbered law enforcement officials by six to three, and that the agent's safety concerns were sincere. *Id.*

114. *Id.*

115. 174 F.3d 809 (6th Cir. 1999).

116. *Houston*, 174 F.3d at 815.

117. *Id.* at 811-12.

118. *Id.* at 812. Both men denied being involved in the shooting. *Id.*

119. *Id.* Police also suspected the men of an assault on a security guard. *Id.* The officers did not find any evidence that implicated the men on the assault. *Id.*

patch logs showed that approximately thirty-three minutes elapsed between the shooting and the release of the two suspects, but the suspects claimed that the detention lasted about one hour.[120] The suspects sued the officers, alleging that the stop and detention violated their Fourth Amendment rights.[121] The men also argued that the use of weapons and handcuffs turned the investigative stop into an arrest unsupported by probable cause.[122]

The Sixth Circuit Court of Appeals held that the investigative stop did not evolve into an arrest that would require probable cause.[123] The court recognized that the length and method of an investigative stop must be rationally related to the reason for the primary intrusion.[124] The court also noted that a *Terry* stop may turn into an arrest by the passage of time or use of force.[125] However, the court determined that the officers did not violate the Fourth Amendment.[126] The court held that the use of handcuffs and the detention in a police vehicle did not exceed the scope of *Terry* because the precautions were rationally related to the investigation.[127]

The Sixth Circuit stated that law enforcement officers can conduct a more exhaustive detention and questioning when their suspicions are not initially dispelled.[128] The court also declared that meeting the *Terry* requirements does not involve a precise time limit.[129] Finally, the court determined that the investigative stop, which included several steps and protective measures, was reasonably related to the original grounds for stopping the vehicle and therefore did not violate the Fourth Amendment.[130]

The use of handcuffs by police officers to effectuate a *Terry* stop may be reasonable in certain circumstances.[131] Law enforcement officials are also allowed to continue the detention for as long as reasonably necessary to eliminate their initial suspicions.[132] Whether these same procedures also

120. *Id.*
121. *Id.*
122. *Id.* at 812-13.
123. *Id.* at 814.
124. *Id.* (citing United States v. Palomino, 100 F.3d 446, 449 (6th Cir. 1996)).
125. *Id.*
126. *Id.*
127. *Id.* at 815.
128. *Id.*
129. *Id.* (citing United States v. Garza, 10 F.3d 1241, 1246 (6th Cir. 1993)).
130. *Id.*
131. *See* United States v. Miller, 974 F.2d 953, 957 (8th Cir. 1992) (holding that an officer's use of handcuffs was reasonable in conducting a *Terry* stop).
132. *See Houston*, 174 F.3d at 814-15 (stating that the duration of the stop must be reasonably related to the grounds for the initial stop).

apply to vehicle passengers is important to understanding the Fourth Amendment framework.[133]

C. SEIZURES AND PAT-DOWN SEARCHES AS APPLIED TO VEHICLE PASSENGERS IN NORTH DAKOTA

The North Dakota Supreme Court recognizes three tiers of law enforcement-citizen encounters: (1) arrests, which require probable cause; (2) reasonable suspicion stops, which are seizures requiring a reasonable and articulable suspicion of criminal activity; and (3) community caretaking encounters, which do not constitute Fourth Amendment seizures.[134] In *State v. Boline*,[135] the North Dakota Supreme Court stated that a seizure occurs when officers, by use of physical force or show of authority, have in some way restrained a person's liberty.[136] Later, the court decided that the same standard is appropriate in determining whether an officer seized a passenger of a vehicle.[137]

1. *Seizure of Vehicle Passenger Not Suspected of Wrongful or Criminal Conduct*

In *State v. Heitzmann*,[138] police officers stopped a vehicle, in which Heitzmann was a passenger, because the driver operated the vehicle with a suspended driver's license.[139] An officer addressed Heitzmann, who appeared nervous, and informed Heitzmann that the driver was under arrest.[140] The officer told Heitzmann that the vehicle would be searched, and asked

133. *See* discussion *infra* Part II.C (analyzing whether seizures and pat-down searches of vehicle passengers that are not suspected of any wrongdoing are also reasonable under the Fourth Amendment).

134. State v. Boline, 1998 ND 67, ¶ 24, 575 N.W.2d 906, 909 (citing State v. Halfmann, 518 N.W.2d 729, 730 (N.D. 1994)).

135. 1998 ND 67, 575 N.W.2d 906.

136. *Boline*, ¶ 25, 575 N.W.2d at 909 (quoting *Halfmann*, 518 N.W.2d at 731). An officer seized the defendant when he asked the defendant to step outside a service station and into the officer's patrol car. *Id.* At the time of Boline's seizure, the police were investigating an alleged domestic violence crime. *Id.* ¶ 27, 575 N.W.2d at 909-10. After an officer witnessed Boline driving, the officer approached Boline regarding the domestic violence allegations and the scent of alcohol. *Id.* ¶ 14, 575 N.W.2d at 908. The officer questioned Boline about the allegations, asked him if he had been drinking, administered field sobriety tests, and placed Boline under arrest for driving while impaired. *Id.* ¶¶ 15-16. The court viewed the defendant's presence in the patrol car as a momentary restraint of freedom indicative of a *Terry* stop. *Id.* ¶ 27, 575 N.W.2d at 910. Therefore, the defendant was initially seized, but not formally arrested. *Id.* ¶ 26, 575 N.W.2d at 909.

137. State v. Heitzmann, 2001 ND 136, ¶¶ 9-10, 632 N.W.2d 1, 6.

138. 2001 ND 136, 632 N.W.2d 1.

139. *Heitzmann*, ¶ 2, 632 N.W.2d at 4. Police arrested the driver and informed him that the vehicle would be searched. *Id.* A deputy told the officer that Heitzmann was on probation. *Id.* The deputy also told the officer that law enforcement had information that Heiztmann received a recent shipment of methamphetamine. *Id.*

140. *Id.* ¶ 3, 632 N.W.2d at 5.

Heitzmann to exit the vehicle.[141] The police officer then frisked Heitzmann.[142] The officer felt a bag of "crushed substance" in Heitzmann's pants pocket and asked Heitzmann to remove the contents, after which the defendant attempted to break free.[143] The officer removed a sum of money from Heitzmann's jacket.[144] While the officer restrained Heitzmann by holding onto Heitzmann's jacket, Heitzmann pulled his arm out of his jacket and ran.[145] The officers took the defendant down to the ground and handcuffed him.[146] Heitzmann then yelled that there was "crank" in his wallet.[147] Officers found methamphetamine and a razor blade in Heitzmann's wallet.[148] He was charged with felony possession of a controlled substance.[149] Heitzmann did not contest the investigative stop of the vehicle, the driver's arrest, or the officers' right to search the passenger compartment of the vehicle.[150] He did, however, argue that the pat-down search of his person violated his Fourth Amendment rights.[151]

The North Dakota Supreme Court held that a passenger's Fourth Amendment rights were not violated when police officers asked the passenger to exit the vehicle so that the officers could search the vehicle incident to the driver's arrest.[152] The court cited *State v. Gilberts*[153] in upholding the removal of Heitzmann from the vehicle.[154] In *Gilberts*, the court acknowledged two grounds that validate a passenger's removal from a vehicle and make a brief search of the passenger both reasonable and permissible under the Fourth Amendment.[155] The first basis was officer safety.[156] The court stated that the interest in officer safety outweighed the minor intrusion on a passenger's liberty.[157] The second basis was that law enforcement officials

141. *Id.*

142. *Id.* The officer told Heitzmann that the search was for "the safety of both Heitzmann and the officer." *Id.*

143. *Id.* ¶¶ 4-5.

144. *Id.* ¶ 5.

145. *Id.*

146. *Id.* Heitzmann's arm was broken in the scuffle and the officers had to call for an ambulance. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* ¶ 6.

150. *Id.* ¶10, 632 N.W.2d at 6.

151. *Id.* ¶ 7, 632 N.W.2d at 5.

152. *Id.* ¶ 10, 632 N.W.2d at 6.

153. 497 N.W.2d 93 (N.D. 1993).

154. *Heitzmann*, ¶ 10, 632 N.W.2d at 6.

155. *Gilberts*, 497 N.W.2d at 96. The court stated that a reasonableness determination requires balancing the public interest with the individual's right to be free from arbitrary intrusion by law enforcement officers. *Id.* at 95.

156. *Id.* (citing State v. Ferrise, 269 N.W.2d 888, 890-91 (Minn. 1978)).

157. *Id.*

are allowed to search the passenger compartment incident to a driver's lawful arrest.[158] Police officers are allowed to remove vehicle passengers in order to conduct a safe and thorough search of the vehicle.[159] A seizure of a vehicle passenger does not, however, automatically justify a search of the passenger.[160]

2. *Search of Vehicle Passenger Not Suspected of Wrongful or Criminal Conduct*

The North Dakota Supreme Court then turned to Heitzmann's search and stated that there is no automatic search rule for vehicle passengers.[161] A search occurs when the government interferes with a person's reasonable expectation of privacy.[162] The Fourth Amendment allows police to require a passenger not suspected of committing a crime to exit a vehicle so that police can conduct a search of the vehicle.[163] However, a frisk of the passenger requires a reasonable and articulable suspicion that the passenger is armed and dangerous.[164]

In *Heitzmann*, the court concluded that law enforcement had a reasonable and articulable suspicion that the defendant could have been armed and dangerous; therefore, the frisk was warranted.[165] The court analyzed the facts surrounding the frisk using the totality of the circumstances approach.[166] The officers believed that the defendant had earlier received a shipment of methamphetamine.[167] The defendant appeared nervous when approached by police.[168] A deputy warned the officer conducting the search to be cautious of the defendant.[169] Most importantly, the officer knew that an unloaded pistol was in the vehicle because the driver previ-

158. *Id.*

159. *Id.* (citing United States v. Bell, 762 F.2d 495, 499-500 (6th Cir. 1985)).

160. *See* State v. Heitzmann, 2001 ND 136, ¶ 11, 632 N.W.2d at 7 (recognizing that there is no automatic search rule for vehicle passengers).

161. *Id.* (citing Wyoming v. Houghton, 526 U.S. 295, 303 (1999) and Ybarra v. Illinois, 444 U.S. 85, 92-96 (1979)).

162. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); State v. Dunn, 2002 ND 189, ¶ 4, 653 N.W.2d 688, 690 (citing State v. Winkler, 552 N.W.2d 347, 351 (N.D. 1996)).

163. *Gilberts*, 497 N.W.2d at 96.

164. *Heitzmann*, ¶ 11, 632 N.W.2d at 7 (quoting State v. Haverluk, 2000 ND 178, ¶ 22, 617 N.W.2d 652, 657); *see also* Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that limited frisk searches are permitted and defining the reasonable suspicion standard).

165. *Heitzmann*, ¶ 12, 632 N.W.2d at 8.

166. *Id.* at 7 n.1 (citing Geiger v. Backes, 444 N.W.2d 692, 693 (N.D. 1989)).

167. *Id.* ¶ 12.

168. *Id.*

169. *Id.*

ously told the officer.[170] The court concluded that these facts amounted to reasonable suspicion and justified the officer's frisk of Heitzmann.[171]

The court also concluded that the officer acted reasonably in asking the defendant to remove the contents of his pockets because the officer reasonably believed the protrusion might be a weapon.[172] Thus, when a pat-down search reveals an object that an officer reasonably believes might be a weapon, the officer may search the inner garments in order to determine whether the object is a weapon.[173] In addition, Heitzmann's evasion of the search triggered "extenuating circumstances" for a more intrusive search.[174] The court recognized that a more intrusive *Terry* search may be permitted under the Fourth Amendment if the detained person attempts to prevent an officer from performing a frisk.[175] Threatening conduct by a detainee during a frisk entitles law enforcement officials to act reasonably to protect themselves.[176] Here, the defendant's attempt to avoid the frisk, his resistance during the search, and his nervousness led the court to conclude that the more intrusive search was reasonable.[177]

Finally, the court examined whether the confrontation between the defendant and police constituted an unlawful arrest not supported by probable cause.[178] While there is no bright-line rule for when an investigative stop becomes a de facto arrest, the length of the interaction is an important factor in determining whether a seizure is justified on reasonable suspicion.[179] Other factors include the underlying purposes for the stop, the reasonable amount of time needed to effectuate those purposes, the severity of the crime, whether the suspect poses an immediate threat to safety, and whether the suspect is resisting or evading the seizure.[180] In *Heitzmann*, the detention was brief, the defendant was detained to effectuate a search upon a vehicle incident to the driver's arrest, and the defendant attempted to escape from police.[181] Therefore, the detention amounted to a lawful arrest.[182]

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170. *Id.*
171. *Id.* at 8.
172. *Id.* ¶ 14.
173. *Id.* ¶ 13 (citing State v. Zearley, 468 N.W.2d 391, 392 (N.D. 1991)).
174. *Id.* ¶ 17, 632 N.W.2d at 10.
175. *Id.* ¶ 16, 632 N.W.2d at 9.
176. *Id.* (citing Thomas v. State, 498 S.E.2d 760, 762 (Ga. Ct. App. 1998)).
177. *Id.* ¶ 17, 632 N.W.2d at 10.
178. *Id.* ¶ 18. Law enforcement is allowed to use some degree of force to achieve the investigation's purpose, maintain the status quo, and promote officer safety. *Id.* (citing Rhodes v. State, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997)).
179. *Id.* (citing United States v. Sharpe, 470 U.S. 675, 685 (1985)).
180. *Id.*
181. *Id.* ¶ 19, 632 N.W.2d at 10-11.
182. *Id.* at 11.

In North Dakota, passengers can be removed from a vehicle so that officers can conduct a lawful search of the vehicle.[183] To search the passenger, officers must have reasonable suspicion the passenger is armed and dangerous.[184] In addition to analyzing the Fourth Amendment rights of a vehicle passenger, the North Dakota Supreme Court has examined whether probationers enjoy these same protections.[185]

D. LIMITATION OF FOURTH AMENDMENT RIGHTS UPON PROBATIONERS

In 1972, the North Dakota Supreme Court determined that a probationer's Fourth Amendment rights are limited because of their status as a probationer.[186] Thirty-two years later, the court decided *State v. Krous*[187] and held that certain probationary conditions, if accepted by the probationer, constitute consent to reasonable warrantless searches.[188] In *Krous*, the defendant was sentenced to imprisonment, followed by probation, for controlled substance violations.[189] Police officers went to the defendant's home and conducted a probation search after the defendant neither reported nor responded to her probation officer.[190] The State moved to revoke the defendant's probation based on drugs and drug paraphernalia discovered during the search.[191] The defendant moved to suppress the drugs and paraphernalia.[192] Krous argued that the word "submit" in her conditions of probation required officers to ask permission prior to conducting a search.[193] Krous contended that if she then opposed the search, her probation could be revoked.[194]

The North Dakota Supreme Court upheld the district court's denial of the suppression motion.[195] The North Dakota Supreme Court interpreted

183. *Id.* ¶ 10, 632 N.W.2d at 7.

184. *Id.* ¶ 12, 632 N.W.2d at 8.

185. *See* discussion *infra* Part II.D (discussing the limitations that may be placed on a probationer's Fourth Amendment rights).

186. State v. Schlosser, 202 N.W.2d 136, 139 (N.D. 1972).

187. 2004 ND 136, 681 N.W.2d 822.

188. *Krous*, ¶ 19, 681 N.W.2d at 827. The probation condition at issue was as follows: "Condition (2)(h) Defendant shall submit to search of her person, vehicle, or place of residence by any probation officer at any time of the day or night, with or without a search warrant." *Id.* ¶ 2, 681 N.W.2d at 824.

189. *Id.* ¶ 2. The probation conditions subjected Krous to warrantless searches. *Id.*

190. *Id.* ¶¶ 3-4. Krous was also seen associating with a known drug user. *Id.* ¶ 3. Officers did not seek permission to search the defendant's residence. *Id.* ¶ 4.

191. *Id.* ¶ 5.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* ¶ 23, 681 N.W.2d at 827.

the terms of the defendant's probation and determined that the word "submit" included future consent to reasonable searches, which do not require officers to seek consent at the time of the search.[196] The court rejected the defendant's request to interpret the word "submit" to allow the probationer to resist a search.[197] The court also declared that probationers enjoy limited rights under the Fourth Amendment.[198] The North Dakota Supreme Court concluded that the judiciary has a duty to monitor a probationer's activities to aid in the rehabilitation process.[199] Allowing a probationer to oppose a search defeats the purposes of probation conditions employed to prevent further wrongdoing by the probationer.[200]

While probation searches may be considered reasonable under certain probation conditions, the searches must not be conducted in an unreasonable manner.[201] Probation conditions do not justify infringement upon the Fourth Amendment's reasonableness standard.[202] The United States Supreme Court has also examined whether affording an unlawfully seized individual with the Fifth Amendment's *Miranda* protections justifies infringement upon the Fourth Amendment's reasonableness standard.[203]

E. INTERACTION BETWEEN THE FOURTH AND FIFTH AMENDMENTS

The Fifth Amendment of the United States Constitution provides: "No person shall . . . be compelled in any criminal case to be a witness against himself."[204] The *Miranda* warnings are procedural safeguards that protect

196. *Id.* ¶¶ 16, 19, 681 N.W.2d at 826, 827. Probation searches are derived from North Dakota Century Code section 12.1-32-07, which provides:

> When imposing a sentence to probation, probation in conjunction with imprisonment, or probation in conjunction with suspended execution or deferred imposition of sentence, the court may impose such conditions as it deems appropriate, and may include any one or more of the following: . . . (n) Submit the defendant's person, place of residence, or vehicle to search and seizure by a probation officer at any time of the day or night, with or without a search warrant.

N.D. CENT. CODE § 12.1-32-07(4) (Supp. 2007).

197. *Krous*, ¶ 15, 681 N.W.2d at 826. Krous argued that the court should adopt Oregon authority which states that a probationer may resist a search, but then the probationer risks having his or her probationary status revoked. *Id.* (citing State v. Gulley, 921 P.2d 396, 398 (Or. 1996)). Oregon courts also hold that a probationer's consent to reasonable searches is not prospective and must be given before a search is conducted. *Id.* (citing *Gulley*, 921 P.2d at 398).

198. *Id.* ¶ 16 (citing State v. Schlosser, 202 N.W.2d 136, 139 (N.D. 1972)).

199. *Id.* (citing *Schlosser*, 202 N.W.2d at 139).

200. *Id.* ¶ 18, 681 N.W.2d at 827.

201. *Id.* ¶ 21.

202. *Id.*

203. *See* discussion *infra* Part II.E (examining whether the *Miranda* warnings are sufficient to dissipate the taint of an unlawful arrest).

204. U.S. CONST. amend. V.

an individual's right to be free from coercive self-incrimination under the Fifth Amendment.[205] Under certain conditions, *Miranda* allows exclusion of incriminating statements made in the absence of warnings.[206] The warnings are meant to deter law enforcement officials from obtaining incriminating statements without first informing the declarant of his or her Fifth Amendment rights.[207]

In 1975, the United States Supreme Court specifically addressed the effect of administering *Miranda* warnings to an individual following a Fourth Amendment violation.[208] In *Brown v. Illinois*,[209] the Court declared that *Miranda* warnings are not a means of remedying or deterring Fourth Amendment violations even though, ninety years prior, the Court recognized the "intimate relation" between the Fourth and Fifth Amendments.[210] While the Amendments are interrelated, application of the exclusionary rule under the Fourth Amendment protects different interests than those protected under the Fifth Amendment.[211] The Fourth Amendment applies to all unlawful searches and seizures, regardless of whether any incriminating evidence is discovered.[212] The Fifth Amendment, however, may only require exclusion of a confession made without *Miranda* warnings.[213] The exclusion of an unwarned confession under the Fifth Amendment does not fully protect Fourth Amendment rights.[214] According to the Court, *Miranda* warnings alone do not sufficiently deter Fourth Amendment violations.[215]

In *Brown*, officers investigating a murder received information that Brown was an acquaintance of the victim.[216] Two officers entered Brown's apartment, searched the residence, and arrested Brown when he returned home.[217] The officers acted without probable cause or an arrest warrant.[218]

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205. Miranda v. Arizona, 384 U.S. 436, 457-58 (1966).

206. *Id*. at 458.

207. *See* Brown v. Illinois, 422 U.S. 590, 600-01 (1975) (stating that the *Miranda* warnings deter the taking of incriminating statements without first advising an individual of his or her Fifth Amendment rights).

208. *See id*. at 603 (holding that *Miranda* warnings do not per se attenuate the taint of an unconstitutional arrest).

209. 422 U.S. 590 (1975).

210. *Brown*, 422 U.S. at 601 (citing Boyd v. United States, 116 U.S. 616, 633 (1886)) (observing the relationship between the Fourth and Fifth Amendments).

211. *Id.*

212. *Id.*

213. *Id*.

214. *Id.*

215. *Id.*

216. *Id.* at 592.

217. *Id.* The officers held Brown at gunpoint, ordered him to stand against the wall, searched him, and arrested him for murder. *Id.* at 593. On the way to the police station, Brown

The two officers informed Brown of his *Miranda* rights, and questioned Brown for about twenty-five minutes.[219] Brown's signed statement provided that on the evening prior to the murder, he and another man, Jimmy Claggett, visited the victim.[220] Brown admitted that the men drank alcohol and smoked marijuana.[221] Brown stated that Claggett ordered Brown to bind the victim with a cord.[222] According to Brown, Claggett then shot the victim three times.[223]

Several hours later, an Assistant State's Attorney informed Brown of his *Miranda* rights.[224] The Assistant State's Attorney told Brown that he would be charged with murder and Brown gave a second statement with a factual account of the murder.[225] Brown subsequently refused to sign this statement.[226] Both Brown and Claggett were indicted for the murder.[227] Brown moved to suppress his two statements, alleging that his arrest and detention were unconstitutional.[228] The motion was denied, and Brown was found guilty.[229] On appeal, the Illinois Supreme Court affirmed the convictions.[230] The Court concluded that Brown's arrest was unlawful, but held that the administration of *Miranda* warnings broke the causal chain between the unlawful arrest and the statements.[231] The United States Supreme Court granted certiorari and rejected the Illinois Supreme Court's per se rule.[232]

The Court first declared that even if the defendant's statements were voluntary under the Fifth Amendment, the Fourth Amendment issue remained.[233] The Court cited to *Wong Sun* and stated that the admissibility of the statements must also be analyzed under Fourth Amendment policies and interests.[234] To declare *Miranda* warnings sufficient to rectify an unconsti-

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evaded police questioning. *Id.* at 593-94. Police placed Brown in an interrogation room upon arrival at the station. *Id.* at 594.

218. *Id.* at 592.

219. *Id.* at 594.

220. *Id.* at 594-95.

221. *Id.* at 595.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 596.

227. *Id.*

228. *Id.*

229. *Id.* At trial the State elicited testimony regarding Brown's two statements, but the first statement was not placed into evidence. *Id.* The second statement was read to the jury in full. *Id.*

230. *Id.*

231. *Id.* at 596-97.

232. *Id.* at 597, 603.

233. *Id.* at 601-02.

234. *Id.* at 602.

tutional arrest would curtail the exclusionary rule and remove the incentive to avoid constitutional violations.[235] The *Miranda* warnings would essentially become a "cure-all," reducing the Fourth Amendment protections to a form of words.[236] Instead, the Court devised four factors to determine whether *Miranda* warnings break the causal connection between unconstitutional arrests and confessions.[237] The four attenuation factors included: (1) whether *Miranda* warnings were administered; (2) the temporal proximity between the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy behind the unlawful arrest or misconduct.[238]

The Court concluded that the State failed to meet its burden of showing Brown's statements were admissible under *Wong Sun*.[239] The Court also declined to overrule *Wong Sun*, which the Court stated must be done for the first statement to be admissible.[240] Thus, Brown's second statement was a "fruit" of the first statement and was inadmissible.[241] The Court acknowledged that the officers' unlawful search for evidence was intentional, but the Court limited its holding to the error made by the Illinois courts in determining that *Miranda* warnings remedy an unlawful arrest.[242]

Twenty-six years after *Brown*, the Eighth Circuit Court of Appeals applied the four-prong *Brown* test to determine whether *Miranda* warnings were sufficient to rectify Fourth Amendment violations.[243] In *United States v. Reinholz*,[244] police officers investigated the defendant for purchasing thirty grams of iodine crystals, which are used in the manufacturing of methamphetamine, from pharmaceutical stores.[245] Officers obtained and executed a search warrant on Reinholz and his residence.[246] Prior to the police search of his residence, and without *Miranda* warnings, Reinholz told an officer that drug paraphernalia would be found and that the paraphernalia belonged to Reinholz.[247] Officers then informed Reinholz of his *Miranda*

235. *Id.*
236. *Id.* at 602-03 (citing Mapp v. Ohio, 367 U.S. 643, 648 (1961)).
237. *Id.* at 603-04.
238. *Id.* The voluntariness of the statement is a threshold determination. *Id.* at 604.
239. *Id.*
240. *Id.* at 604-05.
241. *Id.* at 605.
242. *Id.*
243. United States v. Reinholz, 245 F.3d 765, 779 (8th Cir. 2001).
244. 245 F.3d 765 (8th Cir. 2001).
245. *Reinholz*, 245 F.3d at 770.
246. *Id.* at 771. Police officers apprehended Reinholz, searched him, handcuffed him, and drove to his residence. *Id.* The officers informed Reinholz that his residence would be searched, and then Reinholz made the admission. *Id.*
247. *Id.*

rights.[248] Reinholz waived his rights, and repeated his admission.[249] Law enforcement officers found drugs in the garage, and Reinholz admitted to manufacturing methamphetamine.[250] He was thereafter indicted on several drug charges and filed a motion to suppress the evidence on several grounds, including unlawful arrest.[251] The district court granted the motion, holding that Reinholz was unlawfully arrested and that no causal break existed between the arrest and the statements Reinholz made to police.[252]

The Eighth Circuit cited *Brown* and recognized that unlawfully obtained statements must be voluntary under the Fifth Amendment and must not be the result of an unlawful seizure under the Fourth Amendment to be admissible.[253] The Eighth Circuit Court of Appeals listed four attenuation factors for determination: (1) whether *Miranda* warnings were administered to the suspect prior to the statement; (2) the temporal proximity of the statements to the unlawful seizure; (3) the existence of intervening causes between the unlawful arrest and the statements; and (4) the purpose or flagrancy of the police misconduct.[254] The court held that the defendant's statements were all inadmissible due to his unconstitutional arrest.[255]

Recitation of the *Miranda* warnings does not serve as a "cure-all" to Fourth Amendment violations.[256] Rather, the attenuation determination is a matter of degree, which depends upon the facts of each case.[257] The factors derived from *Brown* offer guidance in determining whether statements obtained following an unlawful detention are attenuated enough to cure the unlawful police activity.[258] In North Dakota, if a district court orders the unlawfully obtained statements suppressed, and the prosecutor appeals, the appeal must meet certain statutory requirements.[259]

248. *Id.*
249. *Id.*
250. *Id.* at 772.
251. *Id.*
252. *Id.* at 779.
253. *Id.* (citing Brown v. Illinois, 422 U.S. 590, 602 (1975)).
254. *Id.* (citing *Brown*, 422 U.S. at 603-04).
255. *Id.* at 780.
256. *Brown*, 422 U.S. at 602 (citing Mapp v. Ohio, 367 U.S. 643, 648 (1961)).
257. *Id.* at 609 (Powell, J., concurring); *see also* 6 LAFAVE, *supra* note 40, at 259 (recognizing that the test of attenuation depends on the particular facts of each case).
258. *See* 6 LAFAVE, *supra* note 40, at 260 (stating that there is no bright-line test for determining whether there is an attenuation between a Fourth Amendment violation and evidence derived therefrom).
259. *See* City of Harvey v. Fettig, 2001 ND 12, ¶ 5, 621 N.W.2d 324, 325 (stating that the prosecution's right to appeal is limited by statute).

F. PROSECUTION'S STATUTORY RIGHT TO APPEAL IN NORTH DAKOTA

In North Dakota, a prosecutor's right to appeal in a criminal case is limited by statute.[260] In *City of Harvey v. Fettig*,[261] the North Dakota Supreme Court dismissed an appeal from an order granting the defendant's motion to suppress, because a statement by the prosecutor, as required by North Dakota Century Code section 29-28-07(5), did not accompany the appeal.[262] The purpose of the statute is to ensure that the prosecutor diligently evaluates the case and the effect of the suppression order, prior to filing the notice of appeal.[263]

In *Fettig*, a police officer stopped the defendant's vehicle for a headlight violation.[264] The driver fled the scene, and law enforcement towed the vehicle to Harvey City Hall.[265] Law enforcement officers then conducted a warrantless search of the vehicle.[266] The officers found alcoholic beverages, the defendant's wallet, and the defendant's driver's license in the vehicle.[267] An officer visited Fettig's home and questioned him regarding the incident.[268] Fettig admitted to being the driver and having beer in the vehicle.[269] The trial court held that the warrantless search of the vehicle was a violation of Fettig's right to be free from unreasonable searches under the Fourth Amendment.[270] The City of Harvey filed an interlocutory appeal after the trial court suppressed statements made by Fettig and the evidence that alcohol was found in his vehicle.[271]

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260. N.D. CENT. CODE § 29-28-07(5) (2006). The section provides:

> An appeal may be taken by the state from: . . . (5) An order granting the return of property or suppressing evidence, or suppressing a confession or admission, when accompanied by a statement of the prosecuting attorney asserting that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. The statement must be filed with the clerk of district court and a copy must accompany the notice of appeal.

Id. An argument premised on the prosecution's failure to properly appeal will not always arise, but in *Gay* the defendant argued and the court addressed the issue. Brief for Appellee, *supra* note 5, ¶ 14; State v. Gay, 2008 ND 84, ¶ 8, 748 N.W.2d 408, 412.

261. 2001 ND 12, 621 N.W.2d 324.

262. *Fettig*, ¶ 1, 621 N.W.2d at 325.

263. *Id.* ¶ 6 (citing State v. Norton, 2000 ND 153, ¶ 5, 615 N.W.2d 531, 533).

264. *Id.* ¶ 2.

265. *Id.* ¶¶ 2-3.

266. *Id.* ¶ 3.

267. *Id.* Fettig was also the registered owner of the vehicle. *Id.*

268. *Id.*

269. *Id.* Fettig was charged with minor in possession, open container, fleeing an officer, care required, and a parking violation. *Id.* ¶ 4.

270. *Id.*

271. *Id.*

The prosecuting attorney filed an affidavit with the notice of appeal and other documents, but the documents did not mention the statute or the statutorily required statement.[272] The affidavit was void of any language that indicated the appeal was not taken for purposes of delay.[273] The document also failed to explain the relevance and importance of the suppressed evidence.[274] Therefore, the court dismissed the appeal proclaiming that the statement "must have substance" and cannot merely paraphrase the statutory language.[275] The court emphasized that prosecutors must supplement their appeals with a description of the relevance of the suppressed evidence.[276] The appeal will not proceed unless the court is satisfied with the prosecutor's statement.[277] The North Dakota Supreme Court applied this analysis to *State v. Gay*[278] in 2008.[279]

III. ANALYSIS

Justice Kapsner wrote for the majority in *Gay*, joined by Chief Justice VandeWalle and Justice Crothers.[280] The majority allowed the State's appeal to proceed and ultimately adopted the four-prong test derived from *Brown* to determine whether *Miranda* warnings are sufficient to dissipate the taint of an unreasonable seizure.[281] Justice Sandstrom dissented and was joined by Justice Maring.[282]

A. MAJORITY OPINION

The first issue before the North Dakota Supreme Court was whether the State's appeal was properly taken in the case.[283] The court allowed the appeal to proceed, because the State referenced the relevant statute, addressed both prongs of the statute, and the suppressed evidence was clearly pertinent to the prosecution.[284] The second issue was whether the trial court erred in suppressing the defendant's statements.[285] The court held that the

272. *Id.* ¶ 7, 621 N.W.2d at 326.
273. *Id.*
274. *Id.*
275. *Id.* ¶¶ 1, 6, 621 N.W.2d at 325.
276. *Id.* ¶ 6, 621 N.W.2d at 325.
277. *Id.*
278. 2008 ND 84, 748 N.W.2d 408.
279. *See* discussion *infra* Part III (providing analysis of the opinion in *State v. Gay*).
280. *Gay*, ¶¶ 1, 26, 748 N.W.2d at 411, 417.
281. *Id.* ¶¶ 10, 23-24, 748 N.W.2d at 413, 417.
282. *Id.* ¶ 34, 748 N.W.2d at 420 (Sandstrom, J., dissenting).
283. *Id.* ¶ 8, 748 N.W.2d at 412.
284. *Id.* ¶ 10, 748 N.W.2d at 413.
285. *Id.* ¶ 11.

stop and search of the vehicle in which Gay rode as a passenger was constitutional.[286] The court, however, upheld the suppression of Gay's statements, because his continued seizure violated the Fourth Amendment.[287] Finally, the court addressed whether *Miranda* warnings cure a Fourth Amendment violation.[288] The court applied the factors from *Brown* to Gay's case and concluded that the suppression order was proper.[289]

1. *Proper Appeal by the State*

Gay argued that the prosecution did not properly appeal from the suppression order.[290] The court permitted the prosecution's appeal pursuant to North Dakota Century Code section 29-28-07(5).[291] The court distinguished *Gay* from *Fettig* and determined that the prosecution adequately referenced both prongs of the statute.[292] The court found that although the State failed to describe the relevance and necessity of the suppressed evidence, the facts alone demonstrated the importance of the statements.[293] The statements were the only evidence indicating that Gay ingested a controlled substance.[294] The relevance of this evidence was apparent, so the court did not require an explanation.[295] The appeal proceeded and the court next examined the suppression of Gay's statements regarding the use of marijuana.[296]

2. *Suppression of the Statements*

The court reviewed the district court's ruling on the motion to suppress evidence.[297] The North Dakota Supreme Court, when reviewing a suppression order, defers to the trial court's findings of fact and resolves evidentiary conflicts in favor of affirmance.[298] The court addressed: (1) the stop and search of the vehicle in which Gay rode; (2) the pat-down search conducted upon Gay; and (3) whether the police conduct following the pat-

286. *Id.* ¶ 12.
287. *Id.* ¶ 18, 748 N.W.2d at 415.
288. *Id.* ¶ 21, 748 N.W.2d at 416.
289. *Id.* ¶ 24, 748 N.W.2d at 417.
290. *Id.* ¶ 8, 748 N.W.2d at 412.
291. *Id.* ¶ 10, 748 N.W.2d at 413 (citing N.D. CENT. CODE § 29-28-07(5) (2006)).
292. *Id.* ¶¶ 9-10 (citing City of Harvey v. Fettig, 2001 ND 12, ¶¶ 7-8, 621 N.W.2d 324, 326).
293. *Id.* ¶ 10 (citing *Fettig*, ¶ 8, 621 N.W.2d at 326).
294. *Id.*
295. *Id.*
296. *Id.* ¶ 11.
297. *Id.*
298. *Id.* (citing State v. Guscette, 2004 ND 71, ¶ 5, 678 N.W.2d 126, 128).

down search was constitutional.[299] The North Dakota Supreme Court affirmed the suppression order because Deputy Kvande's testimony and police reports supported the trial court's factual conclusions.[300]

a. Stop and search of the vehicle

The court held that the stop and search of the vehicle in which Gay was a passenger posed no constitutional problem.[301] Gay rode with Smith, a probationer with limited Fourth Amendment rights.[302] The officers stopped Smith's vehicle to conduct a probation search.[303] The court relied on *Krous* to state that officers did not need probable cause or reasonable suspicion of criminal activity to render the stop and search of the vehicle constitutional since the premise of the stop was a probation search of Smith's vehicle.[304] The search of the vehicle alone, however, did not justify a search of the passenger.[305]

b. The pat-down search of Gay

The State argued that the initial pat-down search of the defendant was constitutional because law enforcement based the search on officer safety.[306] First, the court provided the applicable North Dakota and federal Fourth Amendment jurisprudence.[307] The court derived the definition of a "seizure" from both *Heitzmann* and *Boline*.[308] The court then acknowledged the proper standard for determining the reasonableness of a seizure under North Dakota law.[309] The public interest in safety must be balanced with the person's right to be free from arbitrary interference by law enforcement.[310] Lastly, the court defined a "search."[311] A search occurs when law enforcement intrudes upon a person's "reasonable expectation of

299. *Id.* ¶¶ 12, 16, 17, 748 N.W.2d at 413-15.

300. *Id.* ¶ 20, 748 N.W.2d at 416.

301. *Id.* ¶ 12, 748 N.W.2d at 413.

302. *Id.*

303. *Id.*

304. *Id.* (citing State v. Krous, 2004 ND 136, ¶ 19, 681 N.W.2d 822, 827).

305. *Id.* ¶ 16, 748 N.W.2d at 414 (citing State v. Heitzmann, 2001 ND 136, ¶¶ 10-11, 632 N.W.2d 1, 6-7).

306. *Id.* ¶ 13, 748 N.W.2d at 413.

307. *Id.* ¶ 14, 748 N.W.2d at 414.

308. *Id.* (citing *Heitzmann*, ¶ 9, 632 N.W.2d at 6; State v. Boline, 1998 ND 67, ¶ 26, 575 N.W.2d 906, 909). A seizure occurs when a law enforcement officer stops an individual and restrains the individual's freedom. *Id.* (citing *Heitzmann*, ¶ 9, 632 N.W.2d at 6). The officer must restrain a person's liberty in order for a seizure to occur. *Id.* (citing *Boline*, ¶ 25, 575 N.W.2d at 909).

309. *Id.*

310. *Id.* (citing *Heitzmann*, ¶ 9, 632 N.W.2d at 6).

311. *Id.*

privacy."[312] Relying upon the United States and North Dakota Constitutions, the court emphasized that searches, like seizures, must be reasonable.[313]

The court then examined the removal of Gay from the vehicle.[314] The court analyzed *Heitzmann* to determine whether Gay's removal from the vehicle was constitutionally permissible.[315] The court determined that removing a passenger for officers to conduct a search of the vehicle was reasonable.[316] The same is true even if the passenger did not commit a traffic violation and is not suspected of criminal activity.[317] The court recognized, however, that there is no "automatic search rule" that allows law enforcement to search persons associated with an arrested individual.[318] Instead, the court proclaimed that an officer must have a reasonable suspicion that a person, including a passenger, is armed and dangerous to conduct a pat-down search.[319]

Finally, the court quoted *Terry* in recognizing the prerequisites and the limited purposes underlying a pat-down search.[320] The North Dakota Supreme Court deferred to the district court's factual findings on the initial pat-down search and handcuffing of Gay.[321] The court upheld the district court's conclusion, based on Deputy Kvande's testimony, that these actions were constitutional because of the officers' safety concerns.[322] The court then examined the police conduct following the initial pat-down search to determine whether it was constitutionally permissible.[323]

c. The prolonged detention

The district court concluded that the police conduct following the initial search was not reasonable under the Fourth Amendment.[324] Relying on

312. *Id.* (citing State v. Dunn, 2002 ND 189, ¶ 4, 653 N.W.2d 688, 690).

313. *Id.* (citing U.S. CONST. amend. IV and N.D. CONST. art. I, § 8).

314. *Id.* ¶ 16, 748 N.W.2d at 414-15.

315. *Id.* (citing *Heitzmann*, ¶¶ 10-11, 632 N.W.2d at 6-7).

316. *Id.* at 414.

317. *Id.*

318. *Id.* ¶ 15 (citing *Heitzmann*, ¶ 11, 632 N.W.2d at 7).

319. *Id.*

320. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)). Law enforcement must be allowed to conduct a search for weapons in order to protect officer safety. *Id.* The standard is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.*

321. *Id.* ¶¶ 16, 20, 748 N.W.2d at 415, 416.

322. *Id.* ¶ 16, 748 N.W.2d at 415.

323. *Id.* ¶ 17.

324. *Id.* The State argued that the detention of Gay "lasted no longer than reasonably necessary to effectuate the purpose of the stop and that the officers used the least intrusive means avail-

Heitzmann, the North Dakota Supreme Court stated that a frisk is not a precursor to conducting a more exhaustive search.[325] Here, the court recognized that law enforcements' use of handcuffs restrained Gay's liberty.[326] The officers' use of handcuffs on the defendant consequently amounted to a seizure under *Boline*.[327] The seizure, however, continued after police determined Gay was not a threat to officer safety.[328]

The court noted that officers may use forcible means to effectuate the investigation, maintain the status quo, or promote officer safety, as long as the means are reasonable.[329] Ultimately, the North Dakota Supreme Court agreed with the district court's finding that after law enforcement frisked Gay, searched Smith, and searched Smith's car, Gay's continued seizure violated his Fourth Amendment rights.[330] The court held that the Fourth Amendment violation warranted application of the exclusionary rule.[331]

The court concluded by reviewing the facts of the case.[332] Deputy Kvande arrived at the scene after officers handcuffed, frisked, and informed Gay of his *Miranda* rights.[333] Kvande then searched Gay a second time, left him handcuffed, re-read Gay his *Miranda* rights, and questioned Gay about his involvement with Smith.[334] The questioning led to Gay's admission to smoking marijuana the previous day.[335] The court deferred to the factual findings of the district court and held that Gay's statements were made during an unlawful seizure, which warranted application of the exclusionary rule under *Wong Sun*.[336]

3. *Adoption of the Four-Prong Attenuation Test*

Finally, the court examined whether *Miranda* warnings, which guard against Fifth Amendment violations, are adequate to attenuate the taint of

able to dispel their suspicion in a timely fashion." Brief for Appellant, *supra* note 1, ¶ 28 (citing United States v. Jones, 269 F.3d 919, 924 (8th Cir. 2001)).

325. *Gay*, ¶ 16, 748 N.W.2d at 414 (citing State v. Heitzmann, 2001 ND 136, ¶ 13, 632 N.W.2d 1, 8).

326. *Id.* ¶ 17.

327. *Id.* (citing State v. Boline, 1998 ND 67, ¶ 25, 575 N.W.2d 906, 909).

328. *Id.* A police officer may detain an individual for as long as reasonably necessary to effectuate the purpose for the confinement. *Id.*

329. *Id.*

330. *Id.* ¶ 18. None of these searches uncovered any evidence of weapons. *Id.*

331. *Id.*

332. *Id.* ¶ 19, 748 N.W.2d at 415-16.

333. *Id.* at 415.

334. *Id.* at 415-16.

335. *Id.* at 416.

336. *Id.* ¶¶ 18-20, 748 N.W.2d at 415-16 (citing Wong Sun v. United States, 371 U.S. 471, 484-88 (1963) (holding that verbal statements may be deemed inadmissible if obtained by methods prohibited by the Fourth Amendment)).

an unreasonable seizure, making unlawfully obtained statements admissible.[337] The district court concluded that reciting *Miranda* warnings did not attenuate the taint of the Fourth Amendment violation.[338] Because the district court addressed the overlap of the Fourth and Fifth Amendments, the North Dakota Supreme Court held that the trial court did not err in suppressing the statements.[339]

The court quoted the United States Supreme Court's rationale from *Brown*, and stated that the impact of the exclusionary rule would be weakened if *Miranda* warnings alone were enough to cure an unconstitutional arrest.[340] Recognizing that the United States Supreme Court first devised the test used to determine whether *Miranda* warnings are sufficient to cure Fourth Amendment violations, the court chose to adopt the precise language used by the Eighth Circuit in *Reinholz*.[341] Applying the *Reinholz* factors in *Gay*, the court again concluded that the district court properly suppressed Gay's statements.[342]

The court first found that the officers informed Gay of his *Miranda* rights, which weighed against the suppression of his statements under the first factor.[343] Next, the court noted that Gay's statements occurred during the unlawful activity, which meant that the temporal proximity of the statements to the unlawful detention weighed in favor of suppression under the second factor.[344] Finally, the court adopted the district court's conclusion that the purpose of Gay's detention was to protect officer safety.[345] Law enforcement, however, detained Gay with handcuffs for approximately fifteen minutes.[346] The officers did not release Gay after they dispelled the issue of officer safety.[347] Therefore, the court accepted the district court's findings that the *Miranda* warnings did not rectify the Fourth Amendment

337. *Id.* ¶ 21, 748 N.W.2d at 416. Neither party raised the issue on appeal, but the court addressed the issue because the trial court discussed the intersection between the Fourth and Fifth Amendments. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* ¶ 22 (citing Brown v. Illinois, 422 U.S. 590, 601-02 (1975)).

341. *Id.* ¶ 23, 748 N.W.2d at 417. The *Reinholz* factors are: "(1) whether the suspect has been advised of his *Miranda* rights prior to giving his statement; (2) the temporal proximity of his statements to his illegal seizure; (3) the existence of intervening causes between the illegal arrest and the statements; and (4) the purpose or flagrancy of the official misconduct." United States v. Reinholz, 245 F.3d 765, 779 (8th Cir. 2001).

342. *Gay*, ¶ 24, 748 N.W.2d at 417.

343. *Id.*

344. *Id.*

345. *Id.* The court did not analyze the third factor, because the district court did not discuss any intervening causes that may have dissipated the taint of the unlawful seizure. *Id.*

346. *Id.*

347. *Id.*

violation.[348] The majority held that the evidence supported these factual and legal conclusions, and affirmed the suppression order.[349] Justice Sandstrom, joined by Justice Maring, disagreed with the majority's decision.[350]

B. DISSENTING OPINION

Justice Sandstrom opined that law enforcement acted reasonably and that the district court misapplied the law.[351] First, he stated that similar detentions, which lasted longer than Gay's, have been recognized as reasonable.[352] He equated Gay's confinement to the detention in *Houston*, a civil rights suit.[353] The Sixth Circuit Court of Appeals deemed the investigative stop reasonable where law enforcement kept the two vehicle occupants handcuffed for thirty-five to sixty minutes after they had been frisked.[354]

Next, Justice Sandstrom stressed that the use of handcuffs to effectuate investigatory stops is reasonable under the Fourth Amendment.[355] He noted that there was no evidence that the use of handcuffs coerced Gay into making the incriminating statements.[356] Justice Sandstrom recognized that law enforcement informed Gay of his *Miranda* rights on two separate occasions.[357] Gay then chose to make the incriminating statements.[358] Justice Sandstrom also argued that the district court's conclusion that the use of handcuffs after officers frisked Gay was unreasonable has been rejected in several jurisdictions.[359]

Finally, Justice Sandstrom determined that the actions of law enforcement were reasonable under the circumstances because Gay may still have

348. *Id.*

349. *Id.* ¶¶ 24, 25.

350. *Id.* ¶¶ 33, 34, 748 N.W.2d at 420 (Sandstrom, J., dissenting).

351. *Id.* ¶ 28, 748 N.W.2d at 417.

352. *Id.* ¶ 30, 748 N.W.2d at 418.

353. *Id.* (citing Houston v. Clark County Sheriff Deputy John Does 1-5, 174 F.3d 809, 815 (6th Cir. 1999)). *Houston* was a suit brought under 42 U.S.C. § 1983, rather than an appeal from a suppression order as in *Gay*. *Houston*, 174 F.3d at 811. The plaintiffs alleged that officers violated their Fourth Amendment by handcuffing and detaining two suspects while police investigated an alleged shooting. *Id.* at 811-12.

354. *Gay*, ¶ 30, 748 N.W.2d at 418 (citing *Houston*, 174 F.3d at 815).

355. *Id.* ¶ 31, 748 N.W.2d at 418-20.

356. *Id.* ¶ 28, 748 N.W.2d at 417.

357. *Id.*

358. *Id.*

359. *Id.* ¶ 31, 748 N.W.2d at 418-19 (citing United States v. Miller, 974 F.2d 953, 957 (8th Cir. 1992); United States v. Crittendon, 883 F.2d 326, 329 (4th Cir. 1989); United States v. Kapperman, 764 F.2d 786, 791 (11th Cir. 1985); United States v. Taylor, 716 F.2d 701, 709 (9th Cir. 1983); United States v. Bautista, 684 F.2d 1286, 1289-90 (9th Cir. 1982); People v. Soun, 40 Cal. Rptr. 2d 822, 831-33 (Cal. Ct. App. 1995); State v. Munson, 594 N.W.2d 128, 137 (Minn. 1999); Thomas v. Commonwealth, 434 S.E.2d 319, 323 (Va. Ct. App. 1993)).

posed a danger to law enforcement.[360] Justice Sandstrom stated that the officers acted reasonably because the absence of a weapon from Gay's person may not have relieved the officers' safety concerns.[361] Justice Sandstrom referred to the fact that Gay could have obtained a weapon from the two unsearched vehicles that were at the scene.[362] He also recognized that the defendant could have accessed a weapon from a nearby building.[363] Justice Sandstrom argued that the officers' actions were reasonable with regard to officer safety.[364] For these reasons, and because the majority opinion "unreasonably imperil[ed] officer safety," Justice Sandstrom would have reversed and remanded for trial.[365]

IV. IMPACT

The essential impact of *Gay* is that the North Dakota Supreme Court rejected a per se, or "but for," rule that *Miranda* warnings are sufficient to dissipate a Fourth Amendment violation.[366] The adoption of the *Brown* factors though, should positively impact the criminal justice system in North Dakota.[367] By adopting the four-prong test, the court further enabled criminal defense attorneys to advocate for added protections under the North Dakota Constitution.[368] The adoption of the test in *Gay* should also encourage law enforcement officers to be well-educated on Fourth Amendment law.[369] Further, the decision will aid the district courts in evaluating Fourth Amendment issues.[370]

A. CONSIDERATIONS FOR CRIMINAL DEFENSE ATTORNEYS

In *Gay*, the North Dakota Supreme Court clarified one facet of interaction between Fourth and Fifth Amendment protections in North Dakota.[371]

360. *Id.* ¶ 32, 748 N.W.2d at 420.
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.* ¶ 33.
366. *Id.* ¶ 23, 748 N.W.2d at 417.
367. *See* discussion *infra* Parts IV.A-B (discussing the positive impacts that *Gay* will have in North Dakota).
368. *See* discussion *infra* Part IV.A (recognizing that criminal defense attorneys are free to argue that the North Dakota Constitution affords greater protections than the federal constitution).
369. *See* discussion *infra* Part IV.B (examining the effects of *Gay* on North Dakota's law enforcement officials).
370. *See* discussion *infra* Part IV.B (discussing the effects of *Gay* on North Dakota's district courts).
371. *See Gay*, ¶ 21, 748 N.W.2d at 416 (addressing the interaction between the Fourth and Fifth Amendments).

The court held that administration of *Miranda* warnings does not cure an unlawful seizure.[372] The court, however, neglected an opportunity to broaden Fourth Amendment protections under the North Dakota Constitution.[373] Instead, the court adopted the federal standard for examining the attenuation exception to the exclusionary rule.[374] The court neither diluted nor augmented the exclusionary rule's potency in North Dakota.[375]

Under the North Dakota Constitution, the court in *Gay* was free to provide a more stringent attenuation rule for citizens, rather than replicating the analysis set forth in *Brown*.[376] Former Justice William J. Brennan of the United States Supreme Court once stated that "[t]he legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."[377] By merely adopting the *Brown* factors, the North Dakota Supreme Court further empowered criminal defense attorneys to argue for a more protective rule, or set of factors, in analyzing a situation similar to *Gay*.[378] The federal constitution and the *Brown* decision set the minimum for constitutional protections, not the maximum.[379]

The framers of the North Dakota Constitution intended to grant broader individual rights than those guaranteed by the federal constitution.[380] The North Dakota Supreme Court is responsible for interpreting the basic individual rights afforded by the state constitution.[381] By not arguing state constitutional protections, defense attorneys would deprive criminal defendants

372. *Id*. ¶¶ 22-23, 748 N.W.2d at 416-17.

373. *See* 1 LAFAVE, *supra* note 25, at 156-74 (recognizing that a search or seizure may not violate the federal constitution but may still offend a state constitution). The parallel language from the Fourth Amendment to the United States Constitution appears in Article 1, Section 8 of the North Dakota Constitution. *See* N.D. CONST. art. I, § 8.

374. *Gay*, ¶¶ 24, 25, 748 N.W.2d at 417.

375. *See* Brown v. Illinois, 422 U.S. 590, 602 (1975) (declaring that "the exclusionary rule would be substantially diluted" if *Miranda* warnings alone could dissipate the taint of unconstitutional arrests).

376. *See* State v. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988) (stating that the North Dakota Supreme Court, as a matter of state constitutional law, may advance greater protections than those provided by the federal constitution).

377. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

378. *See id.* at 502 (arguing that United States Supreme Court decisions should not be dispositive of questions regarding individual rights afforded by counterpart provisions of state law).

379. *Ringquist*, 433 N.W.2d at 219 (Levine, J., concurring in part and dissenting in part).

380. Lynn M. Boughey, *An Introduction to North Dakota Constitutional Law: Contents and Methods of Interpretation*, 63 N.D. L. REV. 157, 253-59 (1987).

381. *See* State v. Jacobson, 545 N.W.2d 152, 160 (N.D. 1996) (Levine, Surr. J., dissenting) (recognizing that the North Dakota Supreme Court is the ultimate interpreter of the North Dakota Constitution and that independent interpretation of the state constitution is a fundamental principle of federalism).

of one aspect of their basic rights and ignore principles of federalism.[382] While *Gay* does not afford individuals greater protections under the state constitution, the decision will aid the district courts in analyzing similar search and seizure issues.[383] The decision may also prompt law enforcement to further educate officers on Fourth Amendment law.[384]

B. CONSIDERATIONS FOR STATE DISTRICT COURTS AND LAW ENFORCEMENT

The exclusionary rule acts as a deterrent to police misconduct by excluding evidence seized in violation of the Fourth Amendment.[385] The attenuation factors from *Gay* minimize the likelihood that officers will make investigatory arrests in order to elicit incriminating statements.[386] The court declared that evidence derived from such investigatory arrests is not made admissible at trial by merely administering *Miranda* warnings.[387] *Gay* communicates to police officers that unlawful arrests followed by an administration of the *Miranda* warnings is not per se sufficient to remedy the Fourth Amendment violation.[388] This deterrent effect should prompt police officers to act in compliance with the Fourth Amendment and encourage police organizations to offer training on Fourth Amendment procedures.[389]

Further, the exclusionary sanction focuses on the misbehavior of an individual officer, but may be a more effective deterrent if police departments disciplined officers for committing blatant Fourth Amendment violations.[390] Professor Wayne R. LaFave, an expert on the Fourth Amendment, stated this proposition best: "to apply the exclusionary rule when an individual officer oversteps his bounds but not when the violation of the Fourth Amendment is caused by systemic defects would be to turn the Fourth

382. *See* Brennan, *supra* note 377, at 502 (proclaiming that a failure to argue state constitutional questions in state courts would be unwise).

383. *See* State v. Gay, 2008 ND 84, ¶ 23, 748 N.W.2d 408, 417 (enumerating a four-prong test to determine whether *Miranda* warnings cure an unlawful seizure).

384. *See generally* Kevin Jon Heller & John Paul Reichmuth, *Lying in Wait for the Good Faith Exception,* THE CHAMPION, Jan./Feb. 1998, at 54 (suggesting that law enforcement officers should be familiar with all established Fourth Amendment law).

385. Terry v. Ohio, 392 U.S. 1, 12 (1968).

386. *See* Brown v. Illinois, 422 U.S. 590, 602 (1975) (stating that unlawful arrests would be encouraged if officers knew that giving *Miranda* warnings would cure the violations).

387. *Gay*, ¶ 22, 748 N.W.2d at 416-17 (citing *Brown*, 422 U.S. at 602).

388. *See id.* (citing *Brown*, 422 U.S. at 601-02) (stating that the *Miranda* warnings are not a "cure-all" to an unlawful arrest).

389. Heller & Reichmuth, *supra* note 384, at 54 n.126 (discussing defense attorneys' roles in raising the standard of "reasonableness" applied to law enforcement in order to defeat arguments made under the good faith exception to a warrantless search).

390. *See* John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1050 (1974) (stating that the exclusionary rule does not account for a police officer's regard for departmental expectations).

Amendment on its head."[391] By upholding the deterrent effect of the exclusionary rule, the North Dakota Supreme Court provided motivation for law enforcement organizations to further educate and train officers in Fourth Amendment law.[392] Some scholars, however, contend that the exclusionary rule has no influence on police whatsoever.[393]

Studies of police practices demonstrate that the exclusionary rule does not deter violations of constitutionally guaranteed rights where officers are willing to forego successful prosecution in the interest of serving an alternative goal.[394] Some authors have even suggested that officers may commit perjury in order to avoid application of the exclusionary rule.[395] The district courts must counteract these unlawful actions.[396] These offensive behaviors may be monitored by the district courts, and judges should take care not to accept these behaviors in order to prevent imposing the exclusionary sanction.[397] The district courts are in a better position to be the "guardians of our liberties" than the appellate courts.[398] The district courts can utilize the factors adopted in *Gay* as guideposts in analyzing whether *Miranda* warnings cure an unlawful seizure.[399]

Gay offers further guidance to the district courts in analyzing the interaction between the Fourth and Fifth Amendments.[400] Additionally, the rejection of a per se rule stating that *Miranda* warnings cure an unlawful seizure communicates to police that Fourth Amendment violations are not

391. 1 LAFAVE, *supra* note 25, at 48 (arguing against a general "good faith" exception to the exclusionary rule).

392. Heller & Reichmuth, *supra* note 384, at 54 n.126.

393. *See* Kaplan, *supra* note 390, at 1032-33 (stating that the exclusionary rule has fallen short of its goal in deterring police misconduct); Brent D. Stratton, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 J. CRIM. L. & CRIMINOLOGY 139, 162-64 (1984) (arguing that the attenuation exception undermines the deterrent effect of the exclusionary rule).

394. Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 318-19 (1982) (citing Terry v. Ohio, 392 U.S. 1, 14 (1968)).

395. Kaplan, *supra* note 390, at 1038 (citing JOSEPH WAMBAUGH, THE BLUE KNIGHT 178-220 (1972)).

396. Brennan, *supra* note 377, at 491 (asserting that the state courts must guard state citizens' liberties).

397. *See* Kaplan, *supra* note 390, at 1038-39 (citing Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970)) (stating that trial judges are often ambivalent and eager to believe the police in order to prevent imposition of the exclusionary rule).

398. Brennan, *supra* note 377, at 491 (stating that state courts, no less than federal, are in a position to guard individual liberties).

399. *See* State v. Gay, 2008 ND 84, ¶ 23, 748 N.W.2d 408, 417 (adopting four factors to analyze whether *Miranda* warnings attenuate the taint of a Fourth Amendment violation).

400. *See id.* (enumerating four attenuation factors).

simply remedied by administering the warnings.[401] The decision should, in turn, encourage law enforcement to become well-educated on search and seizure issues.[402] Finally, the court's adoption of *Brown*'s federal standard allows criminal defense attorneys to continue arguing for broader protections under the state constitution.[403]

V. CONCLUSION

In *Gay*, the North Dakota Supreme Court adopted four attenuation factors to analyze whether incriminating statements obtained after an unlawful arrest are barred by the exclusionary rule.[404] These factors include: (1) whether *Miranda* warnings were administered prior to the statements; (2) the temporal proximity of the statements to the unlawful seizure; (3) whether any intervening causes exist between the seizure and the statements; and (4) the purpose or flagrancy of the police misconduct.[405] Applying these factors to the facts in *Gay*, the court held that the district court properly suppressed the defendant's statements.[406] The court determined that the stop of the vehicle the defendant rode in was constitutional, based on the driver's status as a probationer.[407] Additionally, the court concluded that the detention and frisk of the defendant was constitutional because of the officers' concerns for safety.[408] Finally, the court held that keeping a suspect detained in handcuffs after officers dispel their concerns for safety violates the Fourth Amendment.[409]

Kasey McNary[*]

401. *See* Brown v. Illinois, 422 U.S. 590, 601-02 (1975) (stating that the *Miranda* warnings are not a "cure-all" to unlawful seizures).

402. Heller & Reichmuth, *supra* note 384, at 54 n.126.

403. *See* Brennan, *supra* note 377, at 502 (stating that federal court decisions should not be dispositive of questions regarding individual rights afforded by state law).

404. *Gay*, ¶ 23, 748 N.W.2d at 417.

405. *Id.*

406. *Id.* ¶ 24.

407. *Id.* ¶ 12, 748 N.W.2d at 413.

408. *Id.* ¶¶ 16, 20, 748 N.W.2d at 414-16.

409. *Id.* ¶ 18, 748 N.W.2d at 415.

*2009 J.D. with distinction from the University of North Dakota School of Law. This article is dedicated to my late mother, Wanda K. McNary. I would also like to specially thank my grandparents, M. Duane and Darlene H. McNary, and my father, Duane L. McNary, for their continuing encouragement and support.