North Dakota Law Review

Volume 88 | Number 2 Article 7

1-1-2012

Bail – Searches and Seizures: Pre-Trial Release Conditions Imposed Under North Dakota Rule of Criminal Procedure 46(a)(2)(M) Require Explicit Findings

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BAIL – SEARCHES AND SEIZURES: PRE-TRIAL RELEASE CONDITIONS IMPOSED UNDER NORTH DAKOTA RULE OF CRIMINAL PROCEDURE 46(a)(2)(M) REQUIRE EXPLICIT FINDINGS

State v. Hayes, 2012 ND 9, 809 N.W.2d 309

ABSTRACT

In *State v. Hayes*, the North Dakota Supreme Court held a district court abuses its discretion when it imposes a pretrial release condition on a defendant requiring her to submit to warrantless searches and seizures of her person, vehicle, and home under North Dakota Rule of Criminal Procedure 46(a)(2)(M), without first finding those conditions were necessary. In addition, the court held when a person is left between the choice of violating his or her bail conditions or consenting to a search, the person is unable to consent without coercion. Finally, the court held the good faith exception to the warrant requirement did not apply to the officer's enforcement of the bond order signed by the district court. The decision in *Hayes* will significantly affect pretrial release in North Dakota, because district courts will no longer be able to impose any pretrial release conditions under Rule 46(a)(2)(M) without an explicit finding of their appropriateness in a neutral and detached manner.

I. FACTS

On December 1, 2008, Divide County Sheriff's Deputy Rob Melby initiated a traffic stop on Anna Hayes.[1] Deputy Melby testified he stopped Hayes because he recognized her as she was driving, and he was aware that she was on the Divide County Sheriff Department's monthly list of suspended drivers.[2] Deputy Melby arrested Hayes for driving with a suspended driver's license.[3]

When Hayes was searched subsequent to her arrest, the officer found marijuana and six hundred dollars in cash on her person.[4] Another $2133 in cash was also found inside of Hayes' purse.[5] The State charged Hayes with driving with a suspended license and possession of a controlled substance while driving a motor vehicle.[6] Hayes had an initial appearance on December 10, 2008, where the State requested a cash bond.[7] The State also requested the bond order require Hayes to submit to random drug testing as well as warrantless searches of her person, vehicle, and home.[8] The district court granted the State's entire request, and asserted the random drug testing was a standard bond requirement for a person charged with a drug violation.[9] The district court gave no explanation as to why it ordered the warrantless search requirement.[10]

Immediately after the bond conditions were imposed by the district court, law enforcement officers confronted Hayes outside of the courtroom and asked for her to consent to a search of her home.[11] Hayes was informed she could either consent to the search or risk violating her bond conditions.[12] Faced with this Hobson's choice, Hayes consented.[13] Officers searched the address listed on Hayes' driver's license and found various items of drug paraphernalia.[14] There was a dispute about whether the

1. State v. Hayes, 2012 ND 9, ¶ 2, 809 N.W.2d 309, 312.
2. *Id.*
3. *Id.*
4. *Id.* ¶ 3.
5. *Id.*
6. *Id.* Driving with a suspended license is a class B misdemeanor. N.D. CENT. CODE § 39-06-42 (2008). Possession of a controlled substance while driving a motor vehicle is a class A misdemeanor. N.D. CENT. CODE § 19-03.1-23(1) (Supp. 2011).
7. *Hayes*, ¶ 3, 809 N.W.2d at 312.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* ¶ 4.
12. *Id.*
13. *Id.*
14. *Id.* ¶ 5-6, 809 N.W.2d at 313.

address listed on Hayes' driver's license was her residence.[15] During the search, Hayes was given a *Miranda*[16] warning, admitted to using methamphetamine roughly two days prior to the search,[17] and stated she would test positive for marijuana use.[18] As a result of the search, the State brought four new charges against Hayes: two each for drug paraphernalia possession and two for ingesting a controlled substance relating to methamphetamine and marijuana.[19]

Before trial, Hayes moved to suppress all evidence seized during the warrantless search conducted after her initial appearance for the driving under suspension violation.[20] Hayes argued the search violated her Fourth Amendment rights, but the district court disagreed and denied her motion.[21] A jury found Hayes guilty of all six charges.[22] On appeal, only the four charges that were brought subsequent to the warrantless search of Hayes' home were at issue.[23]

II. LEGAL BACKGROUND

There are many aspects of the American legal system that are considered fundamental. Arguably, most fundamental is the concept that people are innocent until proven guilty.[24] From this philosophy emerged the concept of bail.[25] Bail was said to be formed from the presumption of innocence rooted in the Fifth Amendment Due Process Clause,[26] which required defendants charged with noncapital crimes be released on bail,

15. *Id.* ¶ 4, 809 N.W.2d at 312-13.

16. Miranda v. Arizona, 384 U.S. 436 (1966).

17. *Hayes*, ¶ 6, 809 N.W.2d at 313.

18. *Id*.

19. *Id.* ¶ 7; *see* N.D. CENT. CODE § 19-03.4-03 (2009) (prohibiting possession of drug paraphernalia); *id.* § 19-03.1-22 (prohibiting ingestion of scheduled drugs without a prescription).

20. *Hayes*, ¶ 8, 809 N.W.2d at 313.

21. *Id.*

22. *Id.* The six charges consisted of: the two charges originally filed against Hayes – driving with a suspended license and possession of a controlled substance while driving a motor vehicle – and the four charges filed subsequent to the search of Hayes' home. *See id.* ¶¶ 3, 7, 809 N.W.2d at 312-13.

23. *See id.* ¶ 13, 809 N.W.2d at 314. Hayes' appeal was centered upon the district court's denial of her motion to suppress the evidence discovered at her home during the warrantless search. *Id.* Since the two original charges were not founded on that evidence, the court affirmed the two convictions that arose from her original arrest on December 1, 2008. *Id.*

24. *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 727 (2011); *see also* Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

25. *See* Baradaran, *supra* note 24, at 731.

26. U.S. CONST. amend. V.

since a determination of guilt could not occur until trial.[27] Understanding the statutory limitations that have now been imposed on granting a criminal defendant bail in North Dakota requires a brief review of the rules governing bail in this state.

Section A will briefly discuss the North Dakota constitutional requirement for bail. Section B will discuss North Dakota Rule of Criminal Procedure 46. Finally, Section C will briefly discuss the Bail Reform Acts of 1966 and 1984.

A. NORTH DAKOTA CONSTITUTIONAL BAIL REQUIREMENT

In the State of North Dakota, "[a]ll persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted."[28] By adopting this approach to bail in its constitution, North Dakota joins twenty-two other states[29] that are considered to have a "traditional" constitutional bail provision.[30] The "traditional" bail provision is one that expressly grants a right to bail, with capital charges being the only narrow exception to this right.[31]

The fact North Dakota chose to make bail a right of its citizens, unless they are charged with a capital offense, while the United States Constitution did not,[32] demonstrates the state's preference for pretrial release.[33] This belief was demonstrated shortly after the North Dakota Constitution was

27. *See* Baradaran, *supra* note 24, at 731.

28. N.D. CONST. art. I, § 11.

29. 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.3(b), at 48 (3d ed. 2007); *see also* ALA. CONST. art. I, § 16; ALASKA CONST. art. I, § 11; ARK. CONST. art. II, § 8; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 17; IOWA CONST. art. I, § 12; KAN. CONST. § 9; KY. CONST. § 16; ME. CONST. art. I, § 10; MINN. CONST. art. I, § 6; MONT. CONST. art. II, § 21; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 7, N.J. CONST. art. I, ¶ 11; OR. CONST. art. I, § 14; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 8; TENN. CONST. art. II, § 15; WASH. CONST. art. I, § 20; WYO. CONST. art. I, § 14.

30. LAFAVE ET AL., *supra* note 29, § 12.3(b), at 48.

31. *Id.*

32. U.S. CONST. amend. VIII (stating only that "excessive bail shall not be required," not that bail was a guaranteed right).

33. States may seek to demonstrate their own power in construing their laws their own way, even when a federal version of those laws already exists. This is commonly referred to as "new federalism." *What is New Federalism?*, THE LAW DICTIONARY, http://thelawdictionary.org/new-federalism/ (last visited Oct. 27, 2012). "[W]hile a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards, it may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (citations omitted).

adopted in *In re West*,[34] in which the North Dakota Supreme Court held bail was not guaranteed to defendant's charged in capital crimes, although it could still be granted using judicial discretion.[35] The preference for release in North Dakota has continued to be present in the courts[36] as well as the North Dakota Rules of Criminal Procedure.[37]

B. NORTH DAKOTA RULE OF CRIMINAL PROCEDURE 46

North Dakota Rule of Criminal Procedure 46, which governs a defendant's release from custody, is modeled after its federal counterpart, Federal Rule of Criminal Procedure 46.[38] The Federal Rule was adopted in 1944 and required courts to consider several factors when determining bail; namely, "the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."[39] While some scholars argue the opportunity for bail in the federal system is waning as the percentage of defendants being held before trial is significantly increasing,[40] that does not mean North Dakota is following suit.[41] Rule 46 is still interpreted to state a clear preference for the unconditional release of accused persons in North Dakota – either based on their own recognizance or an unsecured bond that is meant to reasonably assure their appearance at trial.[42]

Since Rule 46 of the North Dakota Rules of Criminal Procedure mirrors Federal Rule of Criminal Procedure 46, it has subsequently been amended following the Federal Bail Reform Acts of 1966 and 1984.[43] Although, notwithstanding one exception for persons charged with controlled substance offenses, these amendments have not changed what conditions can be imposed on a recipient of bail in North Dakota.[44]

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34. 88 N.W. 88 (N.D. 1901).

35. *In re West*, 88 N.W. at 90. While bail was not granted in this case due to the particular circumstances surrounding the crime, it was still held that bail could be granted in capital cases in North Dakota. *Id.*

36. *See* City of Fargo v. Stutlien, 505 N.W.2d 738, 743 (N.D. 1993) (holding a court rule providing minimum periods of detention before arrestees are granted pretrial release was unlawful).

37. *See* discussion *infra* Part II.B.

38. N.D. R. CRIM. P. 46 cmt.

39. Stack v. Boyle, 342 U.S. 1, 5 n.3 (1951).

40. *See* Baradaran, *supra* note 24, at 752.

41. *See supra* Part II.A.

42. State v. Hayes, 2012 ND 9, ¶ 20, 809 N.W.2d 309, 316.

43. N.D. R. CRIM. P. 46 cmt.

44. N.D. CENT. CODE § 19-03.1-46 (2009). This statute mandates that courts impose an additional condition of release or bail on an individual who has been arrested upon a felony drug violation, that they not use any controlled substances without a valid prescription from a licensed medical practitioner and, that they submit to random drug testing while they are out on bail. *Id.*

C. THE BAIL REFORM ACTS

There have been two major federal Bail Reform Acts – one in 1966[45] and one in 1984.[46] The Bail Reform Act of 1966 was a result of concern about excessive pretrial detention of defendants.[47] The Bail Reform Act of 1984 was largely enacted in order to ensure potentially dangerous defendants would be prevented from being released into the public prior to trial.[48]

1. *Bail Reform Act of 1966*

Congress stated the purpose of the Bail Reform Act of 1966 (1966 Act) was "to revise the practices relating to bail to assure that all persons, regardless of their financial status,[49] shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."[50] This statement of legislative purpose was widely interpreted to mean the 1966 Act preferred the release of accused persons.[51] Not only was it believed the 1966 Act preferred release, it was also interpreted to mean that conditions of release should only be imposed if absolutely necessary.[52] Further, the hearings held by Congress relating to the 1966 Act demonstrated its philosophy that conditions of release were only necessary if they were needed to ensure the defendants' appearance in court.[53] The United States Supreme Court had also previously handed down key

45. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.

46. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

47. Baradaran, *supra* note 24, at 739.

48. *Id.* at 747-48.

49. *See* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 2 (1985) (stating the Bail Reform Act of 1966 was "aimed principally at eliminating the use of inappropriate pretrial detention, especially among poor defendants held in crowded urban jails").

50. Paul G. Reiter, Annotation, *Construction and Application of Provisions of Federal Bail Reform Act of 1966 (18 U.S.C.A. § 3146, 3147) Governing Pretrial Release or Bail of Persons Charged with Noncapital Offense*, 8 A.L.R. FED. 586, 598 (1971).

51. *See* United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979) ("Bail should be denied under the Bail Reform Act [of 1966] only as a matter of last resort."); United States v. Schiavo, 587 F.2d 532, 533 (1st Cir. 1978) (holding the standards of the 1966 Bail Reform Act have a "presumption in favor of releasability"); United States v. Honeyman, 470 F.2d 473, 474 (9th Cir. 1972) ("The whole spirit of the Bail Reform Act [of 1966] . . . is that a defendant facing trial should be released, rather than detained, unless there are strong reasons for not releasing him.").

52. Wood v. United States, 391 F.2d 981, 983 (D.C. Cir. 1968) ("The Bail Reform Act [of 1966] creates a strong policy in favor of release on personal recognizance, and it is only if such a release would not reasonably assure the appearance of the person as required that other conditions of release may be imposed.").

53. Baradaran, *supra* note 24, at 739.

decisions regarding the purpose of bail – one of which was *Stack v. Boyle*.[54] In *Stack*, the Court stated the function of bail was limited, and the fixing of bail for any defendant "must be based upon standards relevant to the purpose of assuring the presence of that defendant."[55] Thus, the 1966 Act seemed to codify both public sentiment[56] as well as prior Supreme Court decisions.

2. *Bail Reform Act of 1984*

The call for a second bail reform emerged after legislatures were scrutinizing bail practices during the 1980s due to the public's heightened fear of crime that began in the mid-1970s.[57] The basis for the change of ideology was based upon the belief that:

> [T]here is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.[58]

This belief prompted many to feel the 1966 Act had several shortcomings that needed to be rectified.[59] One of the main changes to bail laws following the Bail Reform Act of 1984 (1984 Act) was the implementation of vague references to "danger."[60] Following the 1984 Act, "danger" references are now found in three separate contexts in bail laws across the country: "(1) provisions excluding particular categories of defendants from the right to bail and/or pretrial release;[61] (2) provisions discussing 'conditions of release'; and (3) provisions discussing the factors to be weighed by judges in fixing bail or other conditions of release."[62] While North Dakota Rule of Criminal Procedure 46 was originally adapted from the 1966 Act,[63] in 1995, it was amended to closely follow the 1984 Act.[64]

54. 342 U.S. 1 (1951).
55. *Stack*, 342 U.S. at 4.
56. Goldkamp, *supra* note 49, at 3-4.
57. *Id*. at 1.
58. *Id.* at 1-2 (citing S. REP. NO. 98-225, at 6-7 (1983)).
59. *Id.* at 2.
60. Baradaran, *supra* note 24, at 748-49.
61. The fact that "dangerousness" was now allowed to help determine whether bail would be granted was quickly challenged and upheld by the United States Supreme Court. United States v. Salerno, 481 U.S. 739, 751 (1987) (holding the authorization of pretrial detention based on future dangerousness does not violate due process).
62. Goldkamp, *supra* note 49, at 19.
63. N.D. R. CRIM. P. 46 cmt.

III. ANALYSIS

In *State v. Hayes*,[65] Justice Sandstrom wrote the opinion of the court, holding: (1) it is an abuse of discretion to require a pretrial defendant to consent to warrantless searches of her person, vehicle, and residence as a condition of her bail; (2) Hayes did not voluntarily consent to the search due to duress; and (3) the good faith exception to the warrant requirement did not apply regard to the bond order issued by the district court.[66] Due to the lack of specific findings issued when the pretrial release conditions were imposed on Hayes, the court reversed the four convictions that had resulted from the warrantless search of Hayes' home.[67]

A. WARRANTLESS SEARCH REQUIREMENT

The question of whether a defendant could be forced to consent to warrantless searches as a condition of bail was an issue of first impression in North Dakota.[68] When deciding the issue, the court first considered whether the constitutionality of the pretrial release condition needed to be decided.[69] The court then looked to North Dakota Rule of Criminal Procedure 46 to determine if the pretrial condition was allowed under North Dakota law.[70] Finally, the court looked to a Ninth Circuit case, *United States v. Scott*,[71] to help determine if special findings should be required before the imposition of bail conditions that are not specifically enumerated under the North Dakota rule.[72]

1. *Deciding Constitutional Issues*

Hayes' argument in her original motion to suppress was based on constitutional issues.[73] Hayes argued the bond condition requiring her to submit to warrantless searches of her person, vehicle, and residence violated her Fourth Amendment rights.[74] However, the court noted its preference is

64. *Id.* The purpose of the 1995 Amendments were "to make the safety of any other person or the community a relevant consideration when determining which conditions of release will reasonably assure the appearance of a person charged with an offense." *Id.*

65. 2012 ND 9, 809 N.W.2d 309.

66. *Hayes*, ¶ 15, 809 N.W.2d at 315. There was also a holding relating to a preliminary matter stating Defendant had standing to contest the search of her alleged residence. *Id.*

67. *Id.* ¶ 44, 809 N.W.2d at 322.

68. *Id.* ¶ 16, 809 N.W.2d at 315.

69. *Id.*

70. *Id*. ¶ 20, 809 N.W.2d at 316.

71. 450 F.3d 863 (9th Cir. 2005).

72. *Hayes*, ¶¶ 25-26, 809 N.W.2d at 318.

73. *Id.* ¶ 8, 809 N.W.2d at 313.

74. *Id.*

to "refrain from deciding constitutional questions if [we] can decide a dispute on other grounds."[75] This preference led the court to shift its analysis towards existing North Dakota law.

2. *North Dakota Law*

The court first noted the state constitution guarantees the right to bail unless the person is charged with a capital offense.[76] This right is bolstered by the fact that "[a]n accused released on pretrial bail has not been tried and is presumed innocent."[77] Hayes was using this "presumed innocent" argument to show she should not have been required to consent to warrantless searches because she did not have the same lowered expectation of privacy as a person on probation.[78] The court stated Hayes' argument raised issues regarding "the conditions for pretrial release of an accused under North Dakota Rule of Criminal Procedure 46(a)."[79]

Following traditional methods of analysis, the court first looked at the plain language of the statute.[80] After looking at the language, the court found North Dakota Rule of Criminal Procedure 46(a)(1) "establishes a clear preference for the unconditional release of accused persons on their own personal recognizance or on an unsecured appearance bond to reasonably assure their appearance at trial."[81] However, the court noted North Dakota Rule of Criminal Procedure 46(a)(2) grants magistrates the power to impose release conditions either in addition to or in lieu of the methods of release that are given in Rule 46(a)(1).[82] The court inferred the language of the rule requires the conditions be related to the goal of reasonably assuring an accused will appear at trial.[83] The court also noted the rule lists twelve specific conditions that could be imposed for pretrial release as well as one "catch-all" provision.[84]

While the district court did not specifically state which release condition listed under Rule 46(a)(2) allowed for warrantless searches, the court concluded it could only have been imposed under Rule 46(a)(2)(M)

75. *Id.* ¶ 16, 809 N.W.2d at 315 (quoting Little v. Graff, 507 N.W.2d 55, 59 (N.D. 1993)); *see* Minot Daily News v. Holum, 380 N.W.2d 347, 350 (N.D. 1986); Bismarck Pub. Sch. v. Walker, 370 N.W.2d 565, 566 (N.D. 1985); *In re* Goodwin, 366 N.W.2d 809, 814 (N.D. 1985).

76. *Hayes*, ¶ 17, 809 N.W.2d at 315 (citing N.D. CONST. art. I, § 11).

77. *Id.* ¶ 18.

78. *Id.* ¶¶ 19-20, 809 N.W.2d at 316.

79. *Id*. ¶ 20.

80. *See* N. X-Ray Co. v. State *ex rel*. Hanson, 542 N.W.2d 733, 735 (N.D. 1996).

81. *Hayes*, ¶ 20, 809 N.W.2d at 316.

82. *Id.* ¶ 21.

83. *Id.*

84. *Id.* ¶¶ 21, 22, 809 N.W.2d at 316-17.

since it was not explicitly listed in any of the previous twelve provisions.[85] The court then focused on North Dakota Rule of Criminal Procedure 46(a)(3), which states there are "seven factors that a magistrate 'must consider' when imposing pretrial release conditions to reasonably assure the appearance of an accused at trial."[86]

Citing *In re York*,[87] a California case, the court noted other jurisdictions allow consent to warrantless searches and seizures to be implemented as a pretrial release condition.[88] However, those conditions "must be supported by probable cause and be justified by the totality of the circumstances because of Fourth Amendment reasonableness and the presumption of innocence enjoyed by an accused."[89] The court's choice to look toward outside jurisdictions' interpretations of similar provisions is harmonious with its previous methods of analysis.[90]

The court found *In re York* persuasive.[91] As persuasive authority, the obligation of the district court was to inquire about the release conditions requested by the state, and their relevancy to assuring an accused person's appearance at trial.[92] That persuasiveness, combined with the requirement under North Dakota Rule of Criminal Procedure 46(a)(3) to consider certain factors before imposing pretrial release conditions, led the court to its ultimate holding regarding the requirement of special findings.[93]

3. United States v. Scott *and the Requirement of Special Findings*

Because this was a case of first impression in North Dakota, Hayes' argument relied heavily on *United States v. Scott*,[94] a case out of the Ninth

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85. *Id.* ¶ 22, 809 N.W.2d at 317.

86. *Id.* ¶ 23 (citing N.D. R. CRIM. P. 46(a)(3)). The seven factors to be considered are:

> (A) the nature and circumstances of the offense charged; (B) the weight of the evidence against the person; (C) the person's family ties, employment, financial resources, character and mental condition; (D) the length of the person's residence in the community; (E) the person's record of convictions; (F) the person's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear voluntarily at court proceedings; and (G) the nature and seriousness of the danger to any person or the community posed by the person's release.

N.D. R. CRIM. P. 46(a)(3).

87. 892 P.2d 804 (1995).

88. *Hayes*, ¶ 25, 809 N.W.2d at 318.

89. *Id.*

90. *See* City of Fargo v. Levine, 2008 ND 64, ¶ 7, 747 N.W.2d 130, 133; State v. Ensminger, 542 N.W.2d 722, 723 (N.D. 1996).

91. *Hayes*, ¶ 26, 809 N.W.2d at 318.

92. *Id.*

93. *Id.*

94. 450 F.3d 863 (9th Cir. 2005).

Circuit. The *Scott* court held warrantless searches which were imposed as a pretrial release condition required a showing of probable cause – even if the accused had signed a consent form.[95] The court agreed with Hayes' that *Scott* was persuasive and frequently referred to that decision in its analysis.[96]

Following the analysis laid out in *Scott*, the court looked to the record to determine whether evidence or testimony at Hayes' initial appearance was offered to show that it was likely she would not appear at trial without the imposition of the warrantless search conditions.[97] The court noted "[t]he state 'cannot short-circuit the process by claiming that the arrest itself is sufficient to establish that the warrantless search conditions are required.'"[98] While the State argued the conditions put upon Hayes were made only after an individualized evaluation by the district court, the North Dakota Court disagreed.[99]

The court concluded by holding special findings are necessary when a district court imposes a condition of pretrial release under North Dakota Rule of Criminal Procedure 46(a)(2)(M).[100] The reviewing court must be able "to review the district court's reasoning to determine whether it abused its discretion in imposing release conditions unnecessarily restrictive to reasonably assure a defendant's appearance at trial."[101] The court's approach to the bail condition issue consisted of relying on authority from outside jurisdictions and blending that authority with existing North Dakota law.[102] This methodology is on par with the court's previous approach to issues of first impression in the State.[103] In making its holding, the court guaranteed a condition must be supported by special findings that would closely resemble the probable cause finding required by the Ninth Circuit; unless and until the North Dakota Legislative Assembly explicitly allows magistrates to implement a condition of consent to warrantless searches for persons eligible for pretrial release.[104]

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95. *Scott*, 450 F.3d at 872.

96. *Hayes*, ¶¶ 25-26, 31-33, 809 N.W.2d at 318-20.

97. *Id.* ¶ 31, 809 N.W.2d at 319.

98. *Id.* (quoting United States v. Scott, 450 F.3d 863, 874 (9th Cir. 2005)).

99. *Id.* ¶ 33, 809 N.W.2d at 320 (stating no individualized evaluation was found in the record).

100. *Id.* ¶ 26, 809 N.W.2d at 318.

101. *Id.* ¶ 34, 809 N.W.2d at 320.

102. *See* discussion *supra* Part III.A.2-3.

103. *See* Butz v. World Wide, Inc., 492 N.W.2d 88, 89 (N.D. 1992) (blending authority from different states with prior North Dakota law that indirectly discusses the issue presented).

104. *Hayes*, ¶ 26, 809 N.W.2d at 318 (citing United States v. Scott, 450 F.3d 863, 870-71, 874 (9th Cir. 2005)).

B. EXCEPTIONS TO THE WARRANT REQUIREMENT

Initially, the court briefly outlined the background of the protection against unreasonable searches and seizures,[105] and stated the Fourth Amendment offers protection against unreasonable searches and seizures,[106] as does the North Dakota Constitution.[107] The court remarked that, generally, a search warrant must be issued from a neutral and detached magistrate before law enforcement officers can search a person or a home.[108] Furthermore, the North Dakota Supreme Court has held "[w]arrantless searches inside a person's home are presumptively unreasonable."[109] However, the court went on to state that North Dakota recognizes there are exceptions when a warrant is not needed to enter a home.[110] One of those exceptions is consent.[111]

1. *Consent*

In order for consent to be valid, it must be voluntarily given.[112] This means, "[a] district court must 'determine whether the consent was voluntary under the totality of the circumstances.'"[113] The court stated the elements to be considered when determining voluntariness are: (1) the condition and characteristics of the defendant at the time of consent, and (2) the circumstances of the setting in which the consent was given.[114]

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105. *Id.* ¶ 37, 809 N.W.2d at 321.

106. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

107. N.D. CONST. art. I, § 8 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated . . . .").

108. *Hayes*, ¶ 37, 809 N.W.2d at 321; *see also* Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) ("The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects.").

109. *Hayes*, ¶ 37, 809 N.W.2d at 321 (quoting State v. Mitzel, 2004 ND 157, ¶ 11, 685 N.W.2d 120, 124). The United States Supreme Court has previously come to the same conclusion. Payton v. New York, 445 U.S. 573, 586 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable.").

110. *Hayes*, ¶ 38; *see also* State v. Decoteau, 1999 ND 77, ¶¶ 19-20, 592 N.W.2d 579, 585 (recognizing a "community caretaking" exception to the warrant requirement for a home entry); City of Fargo v. Lee, 1998 ND 126, ¶ 10, 580 N.W.2d 580, 582. (recognizing an "exigent circumstances" exception); State v. Nagel, 308 N.W.2d 539, 543 (N.D. 1981) (defining "exigent circumstances" as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence").

111. *Hayes*, ¶ 38, 809 N.W.2d at 321.

112. State v. Page, 277 N.W.2d 112, 116 (N.D. 1979).

113. *Hayes*, ¶ 38, 809 N.W.2d at 321 (quoting State v. Avila, 1997 ND 142, ¶ 16, 566 N.W.2d 410, 413).

114. *Id.* (citing State v. Mitzel, 2004 ND 157, ¶ 26, 685 N.W.2d 120, 127).

When discussing the elements listed above, the court pointed to the fact that a government agent testified Hayes was left with only two choices regarding consenting to a search of her home.[115] Hayes could either consent to the warrantless search of her home, or she could violate her bail conditions which would trigger her arrest for "failing to comply with the district court's order."[116] The court held under the circumstances Hayes was presented with, her consent was "based upon duress or coercion" and therefore was not voluntary.[117]

The court's "totality of the circumstances" approach to the analysis is in line with its previous decisions.[118] And while there have not been many challenges relating to consent under duress in North Dakota, the approach taken by the court in this case seems to mirror their previous analytical method.[119] While not cited in the court's decision, the court's previous ruling in *City of Fargo v. Ellison*[120] appears to be most on point regarding consent under duress.[121]

In *Ellison*, police arrived at an apartment dwelling after receiving a complaint of a loud party.[122] After the defendant arrived at the door, the police asked for consent to enter the residence and the defendant refused.[123] The defendant later consented to the entry and search of her apartment, "but only after she was threatened with both arrest and handcuffing if she chose to exercise her constitutional right to refuse the police entry."[124] The court held the defendant's consent had not been voluntarily given.[125] The ruling in *Hayes* seems to reinforce the court's earlier assertion in *Ellison* that consent given in the face of arrest amounts to consent under duress and cannot be considered voluntary.[126]

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115. *Id.* ¶ 39.

116. *Id.*

117. *Id.*

118. *See* State v. Graf, 2006 ND 196, ¶ 10, 721 N.W.2d 381, 385; State v. Mitzel, 2004 ND 157, ¶ 13, 685 N.W.2d 120, 124 (citing United States v. Patacchi, 602 F.2d 218, 219 (9th Cir. 1979)).

119. *See* State v. Guscette, 2004 ND 71, ¶ 9, 678 N.W.2d 126, 130 (holding consent to search a vehicle was voluntarily given due to the fact there was "no threat or show of force" by the officer when he asked for consent to search).

120. 2001 ND 175, 635 N.W.2d 151.

121. *See Ellison*, ¶¶ 13-14, 635 N.W.2d at 155-56.

122. *Id.* ¶ 2, 635 N.W.2d at 153.

123. *Id.*

124. *Id.* ¶ 14, 635 N.W.2d at 156.

125. *Id.*

126. *Id.*

2. *Good Faith Reliance*

Having dismissed the State's consent argument, the court next focused on the State's argument that Hayes' motion to suppress was properly denied because officers had relied in good faith on the bond order when conducting the search.[127] Noting the State cited no authority that the good faith exception applies to a bond order,[128] the court conducted a brief overview of the four instances in which the court has previously held the good faith exception inapplicable:

> (1) when the issuing magistrate was misled by false information intentionally or negligently given by the affiant; (2) when the magistrate totally abandoned her judicial role and failed to act in a neutral and detached manner; (3) when the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) when a reasonable law enforcement officer could not rely on a facially deficient warrant.[129]

In this case, the court referenced instances (3) and (4) when analyzing the bond order.[130]

The court reasoned because the bond order itself provided for warrantless searches of Hayes' person, vehicle, and residence, and there was no affidavit attached to the bond order, the order lacked indicia of probable cause.[131] Also, the court noted, nowhere on the bond order was it stated the particular thing to be seized or the particular residence to be searched – both of which are requirements under the Fourth Amendment of the United States Constitution.[132] Given the lack of probable cause on the bond order, as well as its facial deficiency, the court held the good faith exception did not apply to the officer's unreasonable reliance on the bond order.[133]

The analysis completed by the court in *Hayes* regarding the bond order logically flows from prior court decisions involving the good faith

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127. State v. Hayes, 2012 ND 9, ¶ 40, 809 N.W.2d 309, 321-22.

128. *Id.*

129. *Id.* ¶ 41, 809 N.W.2d at 322 (citing State v. Utvick, 2004 ND 36, ¶ 26, 675 N.W.2d 387).

130. *Id.* ¶ 42.

131. *Id.*

132. *Id.*; *see also* U.S. CONST. amend. IV ("[N]o 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."). The North Dakota Constitution has the same requirements. N.D. CONST. art. 1, § 8.

133. *Hayes*, ¶¶ 42-43, 809 N.W.2d at 322.

exception.[134] However, the application of good faith exception analysis to a bond order is an extension of previous North Dakota decisions that have followed that analysis only when discussing officer reliance on invalid warrants.[135]

IV. IMPACT

Deciding an issue of first impression, the North Dakota Supreme Court analyzed the circumstances under which a pretrial release condition can require warrantless searches.[136] After *Hayes*, if a district court wishes to implement a pretrial release condition under Rule 46(a)(2)(M), it needs to issue special findings.[137] What is less clear after *Hayes*, is what is required at a preliminary hearing in order to assure the pretrial release condition is adequately supported by special findings.[138] Additionally, it is unclear under what circumstances, if ever, the good faith exception will apply to bond orders authorizing warrantless searches of a bailee's person, vehicle, or home.[139]

A. EXPLICIT FINDINGS: WHAT STEPS NEED TO BE TAKEN TO SATISFY THE FINDINGS REQUIREMENT?

The court did not specify what would satisfy the new special findings when implementing a bail condition under Rule 46(a)(2)(M). The court also did not specify what level of proof would be needed in order to support the assertion that a warrantless search condition would be warranted – it only vaguely stated that the conditions implemented should have a "reasonable assurance" that they will lead to the defendant's appearance at trial.[140] The court also asserted the ordering court's reasoning must be able to be reviewed.[141] Also referenced was the fact there was no evidence or testimony entered at Hayes' initial appearance that related to the warrantless

134. *See* State v. Lunde, 2008 ND 142, ¶¶ 15-19, 752 N.W.2d 630, 636-37 (holding the good faith exception did not apply "because the search warrant was based on an affidavit lacking in probable cause indicia rendering official belief in its existence entirely unreasonable"); State v. Herrick, 1999 ND 1, ¶¶ 12-16, 588 N.W.2d 847, 849-50.

135. *See* State v. Dodson, 2003 ND 187, ¶ 27, 671 N.W.2d 825, 835 (holding the good faith exception applied to police reliance on a warrant issued based on an affidavit that lacked probable cause); State v. Huges, 1999 ND 24, ¶ 8, 589 N.W.2d 912, 915 (holding the good faith exception applied to officer reliance on a no-knock warrant that lacked probable cause).

136. *See* discussion *supra* Part III.A.

137. *Hayes*, ¶ 26, 809 N.W.2d at 318.

138. *See* discussion *infra* Part IV.A.

139. *See* discussion *infra* Part IV.B.

140. *Hayes*, ¶ 33, 809 N.W.2d at 320.

141. *Id.* ¶ 34.

search requirement of her bail.[142] This indicates in future cases where the government asks for a magistrate to order a pretrial release condition that is not specifically listed in the statute, the government will likely need to be prepared to enter testimony into the record regarding the relevancy of the condition that is being sought.[143]

This could have a major impact on initial appearances in North Dakota. While North Dakota has a smaller population with relatively low rates of crime,[144] these rates appear to be changing with the recent oil boom in the Western area of the state.[145] It is yet to be seen how much stress the special findings requirement will put on already over burdened courts in that region,[146] and whether that will have an effect on the frequency with which Rule 46(a)(2)(M) is utilized by the courts.

B. WILL THE GOOD FAITH EXCEPTION APPLY TO A BOND ORDER THAT HAS AN ATTACHED PROBABLE CAUSE AFFIDAVIT?

At the end of the court's good faith exception analysis, it stated a "warrantless search provision in a bond order is too remote a circumstance to be compared to a probable cause determination resulting in a search warrant."[147] This sentiment is confusing given the fact it is given directly after the court did that exact comparison.[148] The court clearly stated the bond order was facially deficient[149] and lacking in "indicia of probable cause"[150] – both of which are standard elements of traditional good faith analysis.[151]

The court did analyze the good faith exception in response to the State's argument the exception should apply to the bond order.[152] This

142. *Id*. ¶ 31, 809 N.W.2d at 319.

143. *Id*. ("The State did not provide, nor did the district court consider, evidence or testimony at Hayes' initial appearance showing a likelihood Hayes would not appear at trial without the imposition of the warrantless search conditions of pretrial release.").

144. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES BY STATE (2010), *available at* http://www fbi.gov/about-us/chij/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl05.xls.

145. Jennifer Joas, *Report Shows Crime Numbers in Western ND*, KFYR – TV (July 2, 2012), http://www kfyrtv.com/News_Stories.asp?news=57962.

146. CLAIRE ZILLMAN, BAKKEN BOOM CREATING CONSTITUTIONAL CRISIS FOR NORTH DAKOTA COURTS (2012), *available at* http://www.law.com/jsp/article.jsp?id=1202568269279&slreturn=20120908154036.

147. *Hayes*, ¶ 43, 809 N.W.2d at 322.

148. *See* discussion *supra* Part III.B.2.

149. *Hayes*, ¶ 42, 809 N.W.2d at 322 ("The bond order also did not provide for a particular residence to be searched or a particular thing to be seized, as required in a search warrant by the Fourth Amendment of the U.S. Constitution.").

150. *Id.*

151. *See* discussion *supra* Part III.B.2.

152. *See* discussion *supra* Part III.B.2.

seems to signify if a bond order was issued in the future, joined by a probable cause affidavit which was later found to be lacking, the good faith exception would be applicable using traditional good faith exception analysis. Additionally, it should be noted that in future cases, another issue arising in conjunction with good faith reliance on a bond order is at what point the probable cause supporting the bond order would be stale.[153]

C. SHOULD THE NORTH DAKOTA LEGISLATURE AMEND RULE 46(A)(2) TO ALLOW FOR A WARRANTLESS SEARCH CONDITION FOR PRETRIAL RELEASE?

Given the increased crime rates in western North Dakota,[154] it may be time for the state legislature to discuss whether the state would benefit from allowing district courts to impose warrantless searches on defendants granted bail. If the legislature implemented this bail condition in a manner that ensured it would only be used when supported by probable cause, it seems likely that the North Dakota Supreme Court would approve.[155]

One possibility would be to tie it to defendants who are charged only with certain crimes – such as certain drug offenses. North Dakota has already demonstrated its willingness to treat drug defendants in a specialized manner.[156] Also, considering the recent spike in drug overdoses,[157] and the public's growing concern over the problem,[158] this might be the best opportunity the state legislature will have to get this pretrial release condition implemented with the public's approval. If the legislature did decide to codify the warrantless search bail requirement, it would lessen any future uncertainty as to what burden the State would have when attempting to get the condition put upon defendants under Rule 46(a)(2)(M).[159]

153. *See* N.D. R. CRIM. P. 41(c)(1)(D) (requiring a warrant be executed within ten days of issuance).

154. *See* discussion *supra* Part IV.A.

155. In *Hayes*, the court relied heavily upon *United States v. Scott*, which allowed for warrantless searches on an accused as a condition of pretrial release as long as it was supported by a showing of probable cause. ¶ 19, 809 N.W.2d at 316 (citing United States v. Scott, 450 F.3d 863, 872 (9th Cir. 2005)).

156. *See supra* footnote 44.

157. *Law Enforcement Agencies Hold 'Emergency Meeting' in GF on Deadly Synthetic Drug Use*, WDAZ TELEVISION (June 19, 2012), http://www.wdaz.com/event/article/id/14255/.

158. Piper Weiss, *2C-I or 'Smiles': The New Killer Drug Every Parent Should Know About*, SHINE FROM YAHOO! (Sept. 20, 2012), http://shine.yahoo.com/healthy-living/2c-smiles-killer-drug-every-parent-know-234200299 html.

159. *See* discussion *supra* Part IV.A.

V. CONCLUSION

After *Hayes*, any bail condition imposed under North Dakota Rule of Criminal Procedure 46(a)(2)(M) must be supported by special findings.[160] While the court did not strictly rule the bail condition of consenting to warrantless searches of a defendant's person, vehicle, and home violated either the United States or North Dakota Constitutions,[161] the opinion did express that imposing the condition was an abuse of discretion when left unsupported by special findings.[162] The court also held consent cannot be voluntary when the defendant is faced with either consenting or violating the terms of his or her bail.[163] Finally, the good faith reliance doctrine does not apply to facially deficient bond orders that are not supported by probable cause.[164]

After this decision, district courts may be required to enter evidence, which could include testimony, in order to satisfy the special findings requirement needed to support any bail condition made under Rule 46(a)(2)(M).[165] Also, officers are now on notice that bond orders which are facially deficient under the Fourth Amendment and do not include an affidavit showing probable cause, cannot be relied on to execute a search.[166]

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160. *Hayes*, ¶ 26, 809 N.W.2d at 318.
161. *Id.*
162. *Id.* ¶ 35, 809 N.W.2d at 321.
163. *Id.* ¶ 39.
164. *Id.* ¶ 42, 809 N.W.2d at 322.
165. *See* discussion *supra* Part IV.A.
166. *See* discussion *supra* Part III.B.2.

* 2014 J.D. candidate at the University of North Dakota School of Law. I would like to thank my family and friends for their continued love and support. I would also like to give a special thank you to my husband and children for putting up with me while I was going through the writing process.