CRIMINAL PROCEDURE

STATE V. AULT: ARIZONA'S INEVITABLE DISCOVERY DOCTRINE DOES NOT APPLY TO UNLAWFUL SEARCHES AND SEIZURES OF A HOME

In *State v. Ault*,[1] the Arizona Supreme Court held that evidence obtained during a warrantless entry into a defendant's home was inadmissible at trial. By doing so, the court refused to apply the inevitable discovery exception to the exclusionary rule. The court based the decision upon independent state grounds and a strong state policy of prohibiting warrantless entries into homes.

On the morning of December 27, 1984, two Yuma police officers visited the defendant Gary Ault's apartment to question him concerning the sexual molestation of a six year-old child.[2] Without arresting him, the officers persuaded Ault to accompany them to the police station for further investigation. Because he was only partially clothed, Ault went inside his apartment to dress. The officers followed him into the apartment. Although Ault repeatedly told the officers that they were not welcome in his apartment, they remained inside. While waiting inside Ault's apartment, one officer spotted a pair of muddy tennis shoes. The muddy shoes interested the officer because the night of the molestation had been rainy and the officers had found large footprints in the mud outside the victim's house. The officer confiscated this incriminating evidence.

At trial, Ault argued that the warrantless entry into his apartment violated his constitutional guarantee against illegal searches and seizures.[3] He claimed that this violation prohibited the introduction of the illegally seized tennis shoes at trial.

The State argued that exigent circumstances justified the officers' warrantless entry and that the evidence should be admissible because it was in plain view.[4] The exigent circumstances, according to the State, were the officers' need to protect themselves by ensuring that Ault did not secure a weapon to use against them.[5] Alternatively, the State argued, the inevitable discovery doctrine required admission of the unlawfully seized evidence at trial.[6] The State asserted that the tennis shoes would have been seized later

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1. 150 Ariz. 459, 724 P.2d 545 (1986).
2. The facts of the case are set forth in 150 Ariz. at 461-62, 724 P.2d at 547-48.
3. The Arizona Constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art. II, sec. 8.
4. Brief for State, at 7-9, State v. Ault, 150 Ariz. 459, 724 P.2d 545 (1986) (No. 6539).
5. *Id.* at 9.
6. *Id.* at 8. The inevitable discovery doctrine is an exception to the exclusionary rule which allows illegally obtained evidence to be admitted at trial if that evidence inevitably would have been discovered through legal means. The United States Supreme Court adopted the inevitable discovery

the same day, upon execution of a valid search warrant.[7]

The Arizona Supreme Court, relying on Article 2, section 8, of the Arizona Constitution, held that a warrantless entry into a home is unlawful unless exigent circumstances or other necessities are present.[8] The court reasoned that the only exigent circumstances were those created by the officers themselves through their own misconduct; thus, the State could not immunize the officers' illegal acts on that basis.[9] The court also held that the inevitable discovery doctrine was inapplicable because the misconduct involved the illegal entry into the defendant's home.[10]

This Comment will discuss the inevitable discovery exception to the exclusionary rule, the bases for the *Ault* decision, and the decision's scope and likely effect on law enforcement and criminal proceedings in Arizona.

THE EXCLUSIONARY RULE AND ITS EXCEPTIONS

The exclusionary rule prohibits the introduction of illegally obtained evidence at trial.[11] It is a judicially created doctrine primarily intended to protect Fourth Amendment rights against illegal searches and seizures.[12] Its purpose is to deter unlawful police activity by denying the prosecution a benefit from police misconduct.[13] The rule is based upon the rationale that the benefits of the resulting deterrence outweigh the high societal cost of letting obviously guilty persons go unpunished.[14]

The United States Supreme Court first applied the exclusionary rule in *Weeks v. United States*.[15] As adopted in *Weeks*, the exclusionary rule applied only to the misconduct of federal officers and federal court trials.[16] Forty-seven years after *Weeks*, in *Mapp v. Ohio*,[17] the Supreme Court held that the exclusionary rule applied to the states, pursuant to the Fourteenth Amendment.[18] With the *Mapp* decision, any evidence obtained through the

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doctrine in Nix v. Williams, 467 U.S. 431 (1984). The Arizona Supreme Court first recognized the doctrine in State v. Lamb, 116 Ariz. 134, 568 P.2d 1032 (1977), but has applied it in only two subsequent cases.

7. Brief for State, *supra* note 4, at 10.

8. *Ault*, 150 Ariz. at 463, 724 P.2d at 549 (1986).

9. *Id.* at 463-64, 724 P.2d at 549-50.

10. *Id.* at 465, 466, 724 P.2d at 551, 552.

11. United States v. Calandra, 414 U.S. 338, 347 (1974).

12. *Calandra*, 414 U.S. at 338. In *Calandra*, the Court stated: "[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." *Id.* at 348.

13. Nix v. Williams, 467 U.S. 431, 442-43 (1984).

14. *Id.*

15. 232 U.S. 383 (1914). The Court, however, had applied a narrower version of the exclusionary rule, based primarily upon the fifth amendment, in Boyd v. United States, 116 U.S. 616 (1886) (private papers seized in violation of the fifth amendment's guarantee against self incrimination held inadmissible at trial).

16. In *Weeks*, the Court stated : "[T]he Fourth Amendment. . .put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . .forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures." 232 U.S. at 391-92. Since Weeks involved illegal activity by a federal officer, the Court did not consider whether the protection of fourth amendment guarantees necessitated application of the exclusionary rule to the states.

17. 367 U.S. 643 (1961).

18. *Id.* at 655. In Wolf v. Colorado, 338 U.S. 25 (1949), the Court refused to extend the exclusionary rule to state officials and state courts, stating: "[I]n a prosecution in a State court for a State

unlawful conduct of either federal or state officials was inadmissible in all state and federal criminal proceedings. However, since *Mapp*, the Court has recognized several exceptions to the exclusionary rule, and has gradually whittled away its broad protection.[19]

The Inevitable Discovery Doctrine

The inevitable discovery doctrine, announced in *Nix v. Williams*,[20] is one of the latest of the United States Supreme Court's exceptions to the exclusionary rule. The doctrine allows admission of illegally obtained evidence at trial if the prosecution can prove, by a preponderance of the evidence, that the evidence ultimately or inevitably would have been discovered through lawful means.[21] The rationale behind the inevitable discovery doctrine is that the deterrent function of the exclusionary rule has such a minimal effect where the police would have obtained the evidence even without misconduct, exclusion of the illegally obtained evidence in such a situation adds nothing to either the integrity or the fairness of a criminal trial. Thus, the jury should receive the evidence if the police inevitably would have found it absent any illegal conduct.[22]

The Court, in *Nix*, determined that the inevitable discovery rule provided an effective means of balancing society's need to deter unlawful police conduct and its interest in having juries receive all the probative evidence of a crime.[23] The inevitable discovery rule essentially places the prosecution in the same position it would have occupied absent any police misconduct.[24]

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crime the Fourteenth Amendment does not forbid the admission of the evidence obtained by an unreasonable search and seizure." *Id.* at 33. Twelve years later, in *Mapp*, the Court overruled *Wolf*, and held the rule applied to the states. *Mapp*, 367 U.S. at 651-53. Writing for majority, Justice Clark defended the reversal by noting that many states had already adopted the exclusionary rule on their own initiative. *Id.* at 651-53. Justice Harlan, in dissent, argued that the decision to apply the exclusionary rule properly lies with the states, and there the decision should remain. *Id.* at 680-81.

19. *See* Alderman v. United States, 394 U.S. 165 (1969) ("standing" is imposed as a requirement for invoking the exclusionary rule); United States v. Calandra, 414 U.S. 338 (1974) (the scope of the exclusionary rule is limited by employing a balancing test, weighing the deterrent effect against the potential injury); United States v. Janis, 428 U.S. 433 (1976) (evidence excluded from a state criminal trial held admissible in a federal civil tax proceeding); Rakas v. Illinois, 439 U.S. 128 (1978) (fourth amendment rights are personal in nature and may be asserted only by those with a legitimate expectation of privacy in the invaded place); United States v. Havens, 446 U.S. 620 (1980) (illegally obtained evidence is admissible to impeach the testimony of the defendant); Segura v. United States, 468 U.S. 796 (1984) ("independent source" exception to the exclusionary rule); United States v. Leon, 468 U.S. 897 (1984) ("good faith" exception to the exclusionary rule); Nix v. Williams, 467 U.S. 431 (1984) ("inevitable discovery" doctrine as an exception to the exclusionary rule).

20. 467 U.S. 431 (1984). In Brewer v. Williams, 430 U.S. 387 (1977), the predecessor of *Nix*, and also known as the "Christian Burial Speech" case, officers found the body of a murdered child through incriminating statements made by the defendant. The Court held that the statements were made in response to interrogation that violated the defendant's sixth amendment right to counsel. *Id.* at 406-07 n.12. In *Nix*, however, the Court held the evidence of the body's location, obtained through the illegal interrogation, admissible at trial because the evidence inevitably would have been discovered by the search party. *Nix*, 467 U.S. at 448.

21. *Nix*, 467 U.S. at 440-450. The entire Court agreed upon the constitutionality of the inevitable discovery rule, but split upon the requisite burden of proof to attach to this new exception. While Justices Brennan and Marshall, dissenting, argued for a "clear and convincing evidence" standard, *Id.* at 459, the majority favored the less stringent "by a preponderance of the evidence" standard. *Id.* at 444.

22. *Id.* at 444.

23. *Id.* at 446.

24. *Id.* at 445-46. See also Kastigar v. United States, 406 U.S. 441, 458-59 (1972).

In other words, the prosecution should be in neither a better nor a worse position in prosecuting the defendant when the inevitable discovery rule is applied to illegally obtained evidence which ultimately would have been found through legal means.[25] According to the *Nix* Court, this result complies with the deterrent purpose and the fairness rationale of the exclusionary rule.[26]

THE INEVITABLE DISCOVERY DOCTRINE IN ARIZONA

The Arizona Supreme Court first recognized the inevitable discovery doctrine in *State v. Lamb*.[27] In *Lamb*, the court held that evidence obtained as a result of an unlawful search need not be suppressed where, in the normal course of police investigation and absent illegal conduct, the evidence would have been discovered.[28] In *Lamb*, the police conducted a pat-down search of the defendant in his hotel room, found a small cigar box containing illegal drugs, and immediately arrested Mr. Lamb. A further search uncovered currency and a gun linking Mr. Lamb to a murder and a robbery. The court determined that the initial pat-down search may have been permissible, but opening the box constituted an illegal search. The court held that the unlawfully obtained evidence was admissible at trial because it would have been found later through lawful means.[29]

Since the decision in *Lamb*, the Arizona Supreme Court has applied the inevitable discovery rule to illegally seized evidence in only two cases, one involving an illegal car search,[30] and the other involving a *Miranda* viola-

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25. *Nix*, 467 U.S. at 447. The Court stated:

> Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. . . .[S]uppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct.

Id. (emphasis in original).

26. *Id.* at 445-46, 447. In explaining the deterrent effect of the exclusionary rule, the *Nix* Court stated:

> A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered. . . . On the other hand, when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good faith requirement might produce.

Id. The Court's explanation of the deterrent effect of the exclusionary rule did not hold true in the *Ault* case. The exclusionary rule did not stop the police officer from seizing the tennis shoes illegally even though he knew that Mr. Ault would be arrested, that a search warrant would be obtained, and that the shoes, along with other clothing, could be seized pursuant to the warrant. The officer had little to gain by taking this "shortcut," but he took the shortcut anyway. The facts in *Ault* present a direct rebuttal to the reasoning of the *Nix* Court.

27. 116 Ariz. 134, 568 P.2d 1032 (1977). In *Lamb*, the Arizona Supreme Court defined the inevitable discovery exception: "[E]vidence obtained as a result of an unlawful search need not be suppressed where, in the normal course of the police investigation and absent illicit conduct, the evidence would have been discovered anyway." *Id.* at 138, 568 P.2d at 1036.

28. *Id.* at 138, 568 P.2d at 1036.

29. *Id.*

30. State v. Hein, 138 Ariz. 360, 674 P.2d 1358 (1983) (evidence found during an illegal car search admissible based upon inevitable discovery doctrine).

tion.[31] The court in *Ault*, however, refused to apply the rule to illegally seized evidence from a defendant's home. This refusal was based upon independent state grounds.[32]

INDEPENDENT STATE GROUNDS FOR THE *AULT* DECISION

Without regard to the position of the Supreme Court on the inevitable discovery doctrine, the *Ault* court refused to find the unlawfully seized evidence admissible at trial.[33] The court based its decision on independent state grounds, namely, the Arizona Constitution, article II, section 8.[34] That section explicitly guarantees an individual's privacy in his own home. Because the officers unlawfully entered the defendant's home, it was of no importance to the court that Ault's muddy tennis shoes would have been seized legally later that day. The court flatly refused to compromise the constitutional protection by applying the inevitable discovery rule in a case involving the unlawful invasion of a person's home.[35]

The Fourth Amendment to the United States Constitution proscribes unreasonable searches and seizures by state and federal officials.[36] Although the Arizona Supreme Court has held on various occasions that article II, section 8 of the Arizona Constitution incorporates the protections of the fourth amendment, the court stated that the Arizona Constitution is even more insistent on preserving the sanctity of the home and creating a right of privacy therein than the federal Constitution.[37] In *Ault*, the court stated that it would continue to adhere strongly to the state's policy of protecting the privacy rights granted in article II, section 8.[38] Indeed, the court stated that it would not allow further invasions of these rights, absent exigent circumstances or other necessity.[39]

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31. State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986) (officers may have violated defendant's *Miranda* rights by making allegedly coercive threats, but evidence found through defendant's responses was admissible based upon inevitable discovery rule).

32. The *Ault* court attempted to avoid a review or possible reversal of its decision by the United States Supreme Court by unequivocally stating that its holding was based solely upon independent state grounds. *Ault*, 150 Ariz. at 463, 724 P.2d at 549.

In Michigan v. Long, 463 U.S. 1032 (1983), the United States Supreme Court explained its position regarding a state court's decision depending upon independent state grounds: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041.

33. *Ault*, 150 Ariz. at 466, 724 P.2d at 552.

34. *Id.*

35. *Id.*

36. The fourth amendment to the United States Constitution is made applicable to the states by the fourteenth amendment. The fourth amendment states:

> 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.

37. *See supra* note 3. *See also* State v. Martin, 139 Ariz. 466, 473, 679 P.2d 489, 496 (1984); State v. Bolt, 142 Ariz. 260, 265, 689 P.2d 519, 524 (1984); *Ault*, 150 Ariz. at 463, 724 P.2d at 549.

38. *Ault*, 150 Ariz. at 466, 724 P.2d at 552.

39. *Id.* at 463, 724 P.2d at 549. The court noted the few exceptions to the warrant requirement that it does recognize: "[A]side from consent, . . .1) response to an emergency, 2) hot pursuit, 3) probability of destruction of evidence, and 4) the possibility of violence." *Id. See also* State v. Cook, 115 Ariz. 188, 193, 564 P.2d 877, 882 (1977).

In summary, the *Ault* court held, by 3-2 majority, that the inevitable discovery doctrine is inapplicable in cases involving the search and seizure of a home where the search violates article II, section 8 of the Arizona Constitution.[40] Even if the shoes in this case inevitably would have been discovered through legal means (and apparently they would have), the shoes would be inadmissible as evidence at trial because the original discovery of the shoes was a direct violation of article II.[41] The majority did not accept the arguments of the prosecutor and the dissenters that *Nix* required admission of the tennis shoes.[42] The *Ault* court concluded that state constitutional protections exceeded federal constitutional protections.[43]

EFFECT OF THE *AULT* DECISION

The Arizona Supreme Court's decision in *Ault* preserves previous Arizona case law concerning illegal entry into homes,[44] but the decision goes no further. The majority of the court relied upon the strong state policy in prohibiting warrantless entries into homes and rejected the *Nix* Court's reasoning behind the inevitable discovery doctrine.[45]

In *Ault*, the victim of the assault was able to describe the clothes which her assailant wore with convincing accuracy. She also described his height and age, and identified him in a photographic line-up.[46] The illegally seized muddy tennis shoes were helpful to the prosecution and were probably prejudicial to the defendant, but with the wealth of other evidence against him, the shoes may not have been essential to his conviction.[47] It is an interesting

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40. *Ault*, 150 Ariz. at 470, 724 P.2d at 556.

41. *Id.*

42. *Ault*, 150 Ariz. at 466, 724 P.2d at 552.

43. *Id.*

44. *See, e.g.*, State v. Martin, 139 Ariz. 466, 679 P.2d 489 (1984); State v. Bolt, 142 Ariz. 260, 689 P.2d 519 (1984).

45. *Ault*, 150 Ariz. at 466, 724 P.2d at 552. The court in *Ault* stated:

> We recognize the inevitable discovery doctrine in Arizona, [citations omitted] but will allow its use only in appropriate circumstances. We decline to allow its use today . . . . We chose not to allow the inevitable discovery doctrine to reach into the homes of citizens in the factual situation before us.

Id. at 465, 724 P.2d at 551. It is curious that this "appropriate circumstances" language has appeared in *Ault*. In none of the three cases before *Ault*, where the Arizona Supreme Court applied the inevitable discovery doctrine, has the court even hinted that the inevitable discovery rule had selective applicability based upon the factual circumstances. *See* State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986); State v. Hein, 138 Ariz. 360, 674 P.2d 1358 (1983); State v. Lamb, 116 Ariz. 134, 568 P.2d 1032 (1977).

46. *Ault*, 150 Ariz. at 462, 724 P.2d at 548.

47. However, without explaining why, the court stated that the admission of the tennis shoes as evidence was not a case of harmless error. *Id.* at 466, 724 P.2d at 552. In State v. Montes, 136 Ariz. 491, 497, 667 P.2d 191, 197 (1983), the Arizona Supreme Court said that a constitutional error is harmless if it can be said beyond a reasonable doubt that the error did not alter the verdict of the jury. In State v. Hein, 138 Ariz. 360, 674 P.2d 1358 (1983), the court held that, although the trial court improperly admitted Hein's statements made at the scene of the arrest, the improper admission was subject to the harmless error rule, and thus, reversal of the trial court was not required.

In *Ault*, it appears that the wealth of incriminating evidence against the defendant, even without the illegally seized muddy tennis shoes, would be enough for the jury to reach a guilty verdict. The issue of whether, beyond a reasonable doubt, the jury would have reached the same decision absent the trial court's "error" in admitting the tennis shoes deserved, but did not receive, a thorough discussion in the *Ault* opinion.

question whether, absent some or all of the other incriminating evidence, the Arizona Supreme Court would have decided *Ault* the same way.

While explaining the rationale behind its decision, the *Ault* court pointed out that the officers had probable cause to obtain a search warrant and an arrest warrant before going to the apartment.[48] Had the police followed the proper procedure and obtained a warrant, they could have seized the shoes under the plain view doctrine[49] or as a search incident to arrest.[50] Had the police followed the proper procedure, obtaining admission of the tennis shoes at trial would have posed no problem. But, since the police failed to meet the requirements of these alternate theories, the court refused to hold the unlawfully seized evidence admissible at trial.[51]

Although *Ault* follows precedent set in prior Arizona search and seizure cases and upholds the public policy of protecting citizens from unconstitutional police entry into homes, it failed to seriously consider the purpose of inevitable discovery doctrine.[52] By strictly upholding the privacy of the home, and flatly refusing to consider whether the shoes would have been found later through lawful means, the court bypassed an opportunity to apply the type of balancing test adopted by the United States Supreme Court in *Nix*.[53] Such a balance may require a more careful case-by-case analysis of

48. *Ault*, 150 Ariz. at 463, 724 P.2d at 549.

49. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); State v. Cook, 115 Ariz. 188, 194, 564 P.2d 877, 883 (1977). Under the plain view doctrine, if the officer had prior justification to be in a position to view the evidence, the discovery of the evidence was inadvertent, and the evidentiary value of the evidence is immediately apparent, the evidence may be seized and used as evidence at trial. *Coolidge*, 403 U.S. at 465-66.

In *Ault*, the court held that the officers had no prior justification to be inside the defendant's apartment and thus failed the initial requirement of the plain view doctrine. *Ault*, 150 Ariz. at 464, 724 P.2d at 550.

50. *Ault*, 150 Ariz. at 466, 724 P.2d at 552.

51. *Id.* The court in *Ault* stated:

> Since the deputies were not lawfully inside defendant's apartment, the tennis shoes could not lawfully be seized under the guise of 'plain view' . . .We also believe that in spite of the warrantless entry into defendant's home, he was also illegally arrested inside his home. . .We believe defendant was unlawfully under arrest at his home and therefore no legitimate argument can be made that the shoes were seized in plain view or as a search incident to arrest.

Id. at 464, 724 P.2d at 550. The court also noted that exigent circumstances did not justify the warrantless entry into the defendant's home, and the police could have easily obtained the necessary warrant. *Id.* at 466, 724 P.2d at 552.

52. *Id.* at 469, 724 P.2d at 555. The dissent in *Ault* reiterated the rationale of the inevitable discovery rule:

> Where, as here, "the government can prove that the evidence would have been obtained inevitably . . . regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice."

Id. at 469, 724 P.2d at 555 (citations omitted).

53. Such a balancing test would weigh the needs of the criminal justice system and the public interest in punishing obviously guilty persons against the need to protect individual fundamental liberties. Balancing the needs and rights of one side against those on the other, in both criminal and civil cases, has historically been a common approach of the judicial system. In United States v. Calandra, 414 U.S. 338, 349 (1974), the United States Supreme Court weighed the deterrent effect of the exclusionary rule against the potential injury to the functioning of the grand jury in deciding whether to apply the exclusionary rule to grand jury proceedings. *See* Cameron and Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109 (1984).

Justice Cameron of the Arizona Supreme Court has long advocated the balancing approach in judicial decision-making. *See* State v. Bolt, 142 Ariz. 260, 269-73, 689 P.2d 519, 528-32 (1984).

the facts and issues, but would possibly produce a more reasoned, logical result.[54]

While the court's protection of privacy rights and its upholding of constitutional guarantees is certainly commendable and desirable, its refusal to examine related issues in the case seems unreasonable. Although the court addressed the unlawful entry of the defendant's home, it should have also examined whether anything found during that unlawful entry inevitably would have been found. Additionally, the court should have examined whether the "erroneous" admission of a piece of evidence was a harmless error in the proceeding. Such a limited approach in judicial decision-making places considerable burdens upon a prosecutor who may have no preliminary control over what the investigating officers do.

By employing a balancing test in deciding whether to apply the exclusionary rule in cases where the police have violated constitutional guarantees, a court would have to perform a lengthy case-by-case analysis of facts and circumstances. The benefit derived from such an analysis in balancing the needs of the opposite parties, however, seems well worth the effort.

The *Ault* decision sends an unmistakable message to law enforcement personnel that they must follow lawful procedures in search and seizure cases involving entrance into a person's home.[55] The inevitable legal discovery of improperly seized evidence will be of no consequence if officers violate the Arizona Constitution.[56] Essentially, the court is imposing a penalty upon law enforcement personnel for breaking one of the rules of the "game." The *Ault* decision will have the effect of giving the prosecutor no chance to gain admission of evidence seized during an illegal entry into a person's home.[57]

Despite the court's strict support of article II, section 8 of the Arizona Constitution, and its rejection of the inevitable discovery rule in this case, the court initially left open a possibility that it may apply the inevitable discovery doctrine to an appropriate case involving a warrantless entry and search of a home.[58] The language in the supplemental opinion to this case, however, dimmed that possibility.[59] The preclusion of the illegally seized

54. Under the exclusionary rule, Judge Cardozo observed "The criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). He expressed disapproval of the broad effect of the exclusionary rule. Because of the scope of the exclusionary rule, Cardozo said, "[t]he pettiest peace officer would have it in his power, through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious." *Id.* at 230, 150 N.E. at 588. Under a balancing test, the criminal would not go free simply because the constable blundered in gathering evidence of a crime, nor would certain inevitably discoverable evidence be excluded from trial simply because of an official's impropriety.

55. *Ault*, 150 Ariz. at 466 724 P.2d at 552. The court stated: "We strongly adhere to the policy that unlawful entry into homes and seizure of evidence cannot be tolerated. The exceptions to the warrant requirement are narrow and we choose not to expand them. . . . We believe the evidence seized *pursuant* to the search warrant *was* properly admitted at trial. . . ." *Id.* (emphasis added).

56. *Id.*

57. *Id.*

58. *Id.* at 465, 724 P.2d at 551.

59. *Id.* at 470, 724 P.2d at 556. However, Justice Hays, who voted with the majority in *Ault*, has now retired from the court and Justice Moeller has replaced him. The change in personnel may affect the court's views of the inevitable discovery doctrine as it applies to unlawful home searches and seizures.

evidence in *Ault* may not make a great difference in the prosecution of the defendant, considering the wealth of legally obtained incriminating evidence. However, in future cases which lack such a wealth of legally obtained evidence, the decision's effect may be more profound. Guilty criminals may go free because of some officer's intentional or unintentional violation of the requirements of article II, section 8, of the Arizona Constitution.

CONCLUSION

In *State v. Ault*, the Arizona Supreme Court held that evidence discovered through an illegal entry into the defendant's home was inadmissible at trial. Relying upon independent state grounds, the court refused to employ the inevitable discovery rule to allow admission of the evidence.[60] Although the court recognized the inevitable discovery doctrine, and had previously applied it in certain limited situations, the court refused to extend use of the doctrine to this case.[61] The court cited a strong state policy of prohibiting warrantless entries into the homes of citizens as the basis for its refusal.[62] Finding the unlawfully seized tennis shoes inadmissible, the court reversed and remanded the case for retrial.

The dissent in *Ault* advocated admitting the illegally obtained evidence, despite the fact the police unlawfully entered the defendant's home.[63] The dissent placed great importance on the reasoning of the United States Supreme Court, expressed in *Nix v. Williams*, concerning the use of the inevitable discovery doctrine.[64] It appears, however, recognizing the strong language used in the supplemental opinion to this case, that the present Arizona Supreme Court will not allow, under any circumstances, the inevitable discovery doctrine to permit the admission of evidence seized during an unconstitutional home entry.[65]

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60. *Ault*, 150 Ariz. at 466, 724 P.2d at 552.
61. *Id.* at 465, 724 P.2d at 551.
62. *Id.* at 466, 724 P.2d at 552.
63. *Id.* at 468, 724 P.2d at 554.
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65. *Id.* at 470, 724 P.2d at 556.