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When Should Ignorance Trump the Consitution - Another Dissent from Herrick II

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WHEN SHOULD IGNORANCE TRUMP THE CONSTITUTION? ANOTHER DISSENT FROM *HERRICK II*

HERBERT L. MESCHKE*

"To write clearly and to speak clearly, you first must think clearly."
*Appellate Practice Tip of the Week, North Dakota Supreme Court Home Page,** Tuesday, January 12, 1999 (quoting Elmer Lower, former president, ABC News).*

I. WHEN IS OFFICIAL RELIANCE OBJECTIVELY REASONABLE?

This writer was a member of the North Dakota Supreme Court when it first heard and decided *State v. Herrick*[1] (hereinafter "*Herrick I*") in 1997. I was also on the Court when *State v. Herrick*[2] (hereinafter "*Herrick II*") was argued in 1998, but I retired on October 1, 1998, without accepting a surrogate judgeship. Therefore, I did not participate in the split decision in *Herrick II*. I write to agree with the *Herrick II* dissent by Justice Mary Muehlen Maring, endorse her clearly written analysis, and propose additional reasons why the *Herrick II* majority opinion was wrong.

In her dissent, Justice Maring clearly marshaled the reasons why there should not be a good faith exception to the exclusionary remedy under North Dakota Constitution Article I, Section 8, which prohibits unreasonable searches.[3] Her opinion was well "based on a thorough and considered analysis of North Dakota history, the origin of the right, our own precedent, related case law from other jurisdictions, subsequent legislation, and the purposes of Article I, Section 8 our court has recognized."[4] There is nothing I would add to that particular constitutional analysis.

The majority, on the other hand, disclaimed any intent to decide, as Justice Maring would, whether "North Dakota does provide greater state constitutional protections than the Fourth Amendment" and, if so, "whether such heightened protection would preclude a good faith exception to North Dakota's exclusionary rule."[5] Thus, Justice Maring's thoughtful analysis may yet be a defining one for heightened state

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** <http://www.court.state.nd.us/>.

1. 1997 N.D. 155, 567 N.W.2d 336.
2. 1999 N.D. 1, 588 N.W.2d 847.
3. *See* State v. Herrick, 1999 N.D. 1, ¶¶ 41-54, 588 N.W.2d at 847, 854-57 (*Herrick II*).
4. *Id.* ¶ 55, 588 N.W.2d at 857.
5. *Id.* ¶ 27, 588 N.W.2d at 852.

protections for the constitutional right of privacy expressed in this state's independently developed prohibition of unreasonable searches and seizures.

Still, Justice Maring spoke more clearly about the majority's awkward reasoning than did the majority itself. She explained the majority "reasons that, because the exclusionary rule in our state has its genesis from federal constitutional doctrine, we 'must' follow *United States v. Leon*[6] and adopt a good faith exception."[7] She pointed out the majority "determine[d] the good faith exception applie[d] . . . and conclude[d] . . . the 'officers acted in objective reasonable reliance on the no-knock warrant.'"[8] While Justice Maring did not agree or disagree with the majority's conclusion that the officers "acted in objective reasonable reliance," she accurately commented on the harsh irony in the majority interpreting a statute that "actually provides greater protection to our citizens from no-knock warrants than the federal constitution in a way that arguably weakens this protection."[9]

In this unofficial dissent, I seek to reinforce Justice Maring's position by analyzing one of the majority's conclusions not addressed by her dissent: Whether the officers fairly could be said to have acted in objective reliance on a perception of a blanket rule that justified a valid no-knock warrant in every drug case. In my opinion, because clear federal precedent for this state had already clarified that the presence of drugs alone did not supply valid constitutional grounds for a no-knock warrant, the officers' reliance in *Herrick* could not have been objectively reasonable.

II. THE *HERRICK* CASE CONTEXT

Police searched garbage in an alley behind Curtis Herrick's home twice, in February 1995 and January 1996. Each time they found a few pieces of marijuana and a wire or two with drug residues. In the second search, officers also found notes on growing marijuana and a torn check with Herrick's name on it.[10] With this evidence, the officers obtained a no-knock search warrant for Herrick's home. In the search, the officers found marijuana and drug paraphernalia.[11] They charged Herrick with

6. 468 U.S. 877 (1984).
7. *Herrick II*, ¶ 41, 588 N.W.2d at 854.
8. *Id.*
9. *Id.*
10. *Id.* ¶¶ 2-3, 588 N.W.2d at 848.
11. *Id.* ¶ 4.

drug possession, possession with intent to deliver, and possession of drug paraphernalia.[12]

Herrick moved to suppress the evidence from the search of his home, arguing the no-knock feature of the search warrant violated his state and federal constitutional rights to protection from unreasonable searches.[13] When the trial court refused suppression, Herrick pled conditionally guilty to preserve the suppression question for appellate review.[14]

In 1997, the North Dakota Supreme Court provisionally reversed Herrick's conviction.[15] The Court concluded the issuing magistrate was neutral and detached and there had been probable cause for a search of Herrick's home.[16] *Herrick I* held, however, that North Dakota Century Code section 19-03.1-32(3) required a separate showing of probable cause for a no-knock entry, which had not been shown.[17] The presence of drugs, without more, did not constitutionally permit a no-knock entry.[18] Rather than reverse Herrick's conviction outright, however, the Court remanded for the trial court to consider whether a good faith exception to the exclusionary remedy should apply and, for any further appeal, specifically directed the parties to "brief the question of whether [the Court] should recognize a good-faith exception, and if so, whether it should be applied" to *Herrick*.[19]

On remand, the trial court applied the good faith exception first formulated by the United States Supreme Court in *United States v. Leon*.[20] The trial court reasoned the North Dakota Supreme Court would adopt that exception, found the applicant-officer had "acted in good faith when she obtained and executed the search warrant because at the time . . . it was legal in North Dakota to issue no-knock search warrants in all cases w[h]ere drugs are involved," and concluded the affidavit by the officer was not "so lacking in indicia of probable cause to render official belief in its existence entirely unreasonable."[21] The trial court therefore reinstated Herrick's conviction, and Herrick appealed.[22]

On appeal, Herrick mainly argued that the North Dakota Constitution, in Article I, Section 8, gives greater protection against unreasonable

12. *Id.*
13. *Id.* ¶ 5.
14. *Id.*
15. State v. Herrick, 1997 N.D. 155, ¶ 28, 567 N.W.2d 336, 344 (*Herrick I*).
16. *Id.* ¶¶ 11, 15, 567 N.W.2d at 340-41.
17. *Id.* ¶ 23, 567 N.W.2d at 343.
18. *Id.* ¶ 21, 567 N.W.2d at 342.
19. *Id.* ¶ 27, 567 N.W.2d at 344.
20. United States v. Leon, 468 U.S. 897 (1984).
21. State v. Herrick, 1999 N.D. 1, ¶ 7, 588 N.W.2d 847, at 848-49 (*Herrick II*).
22. *Id.*

searches than the Fourth Amendment of the United States Constitution.[23] Herrick also argued, if the good faith exception to the exclusionary remedy was available to law officers in North Dakota, it was wrongly applied to him. He insisted "the affidavit and application for the no-knock warrant [were] so lacking of indicia of probable cause and specificity that a reasonable person could not believe the warrant was valid," one of the four categorical circumstances for exclusion of evidence that *Leon*[24] held unaffected by the good faith exception.[25]

III. THE *HERRICK II* MAJORITY'S REASONING

The majority reasoned that the North Dakota legislature enacted North Dakota Century Code section 19-03.1-32(3) to afford greater protection for a no-knock entry than the Fourth Amendment did by requiring an officer to show knocking and announcing would probably cause destruction of evidence or endanger the entering officers.[26] The majority compared North Dakota's statutory requirement to the United States Supreme Court's holding in *Richards v. Wisconsin*,[27] which established that the Fourth Amendment required only a reasonable suspicion, not probable cause, before officers can enter without knocking and announcing.[28] The majority nevertheless concluded that "when a violation of N.D.C.C. [section] 19- 03.1-32(3) is so closely associated with Fourth Amendment and Article I, Section 8, rights, it is

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23. *Id.* ¶ 21, 588 N.W.2d at 851.

24. *Leon*, 468 U.S. at 923.

25. *Herrick II*, ¶ 16, 588 N.W.2d at 850.

26. *Id.* ¶ 8, 588 N.W.2d at 849. The statute reads:

> Any officer authorized to execute a search warrant, without notice of the officer's authority and purpose, may break open an outer or inner door or window of a building, or any part of the building, or anything therein, if the judge or magistrate issuing the warrant has *probable cause* to believe that if such notice were to be given the property sought in the case may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, and has included in the warrant a direction that the officer executing it is not required to give such notice. Any officers acting under such warrant, as soon as practicable after entering the premises, shall identify themselves and state the purpose of entering the premises and the authority for doing so.

N.D. CENT. CODE § 19-03.1-32(3) (1997) (emphasis added).

27. 520 U.S. 385 (1997). In *Richards*, the Supreme Court reversed a Wisconsin Supreme Court ruling that no-knock warrants are per se reasonable where the search is for drugs or evidence of drug-related activity. Richards v. Wisconsin, 520 U.S. 385, 388 (1997).

28. *Herrick II*, ¶ 9, 588 N.W.2d at 849. The distinction, if any, between a reasonable suspicion and probable cause is difficult to express and may be more metaphysical than real. Each is a preliminary standard of evidence needed to justify official action to seize someone or to search someone's property. The difference between them, if any, would take up more space and time to study than is available in this essay. Anyway, it may be doubtful whether *Richards v. Wisconsin* intended to change the probable cause standard to authorize a warrant for a no-knock entry, as differentiated from the customary standard of reasonable suspicion for "the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed," that *Richards* apparently applied in its part III. *Richards*, 520 U.S. at 388.

appropriate, and arguably necessary for us to consider similar remedies for this statutory violation as granted for constitutional violations."[29]

However, having recognized that it was "arguably necessary" to exclude evidence obtained in violation of the statute on no-knock drug warrants, the majority abruptly dismissed that remedy because "the source of the exclusionary remedy in this state is the Fourth Amendment."[30] Since *State v. Manning*[31] held that "the state rule . . . allowing illegally obtained evidence at trial ha[d] been overruled by *Mapp v. Ohio*,"[32] the majority concluded it "must . . . consider the application of the good faith exception delineated in" *Leon*.[33] The *Herrick II* majority thus mainly confined its remaining analysis to *Leon* as the controlling federal Fourth Amendment doctrine for applying the exclusionary remedy and the good faith exception.

Later in the opinion, the majority returned to the protection against unreasonable searches in Article I, Section 8 of the North Dakota constitution.[34] However, the majority avoided addressing Herrick's major argument that the state constitution provides greater protection than the Fourth Amendment.[35] The majority simply declared that "we need not decide today the question of whether North Dakota's Constitution may indeed provide greater protections than the United States Constitution" because the "issue . . . in this case is a violation of a statute . . . and not a violation of Article I, Section 8" of the state constitution.[36] The majority did not explain why they concluded the state constitutional protection against unreasonable searches could not apply to Herrick. Rather, the majority simply closed their minds to an argument plainly made.

The majority's devaluation of a state statute implementing a state constitutional protection was surprising, unprecedented, and virtually unexplained.[37] The majority thus left a hole in *Herrick II's* reasoning. Later, I will say more about gaps in the majority opinion's reasoning.

Herrick also made a related argument for suppression, citing *Leon's* third category of instances in which suppression is unaffected by the good faith rule.[38] Under this category, suppression remains appropriate

29. *Id.* ¶ 10.
30. *Id.* ¶ 12.
31. 134 N.W.2d 91, 98 (N.D. 1965).
32. 367 U.S. 643 (1961).
33. *Herrick II*, ¶ 12, 588 N.W.2d at 849.
34. *See id.* ¶¶ 23-27, 588 N.W.2d at 851-52.
35. *Id.* ¶ 27, 588 N.W.2d at 852.
36. *Id.* ¶¶ 26-27.
37. *Cf.* State v. Orr, 375 N.W.2d 171, 177 (N.D. 1985) (recognizing that statutes guarding right to counsel implement state constitutional guarantee).
38. *Herrick II*, ¶ 16, 588 N.W.2d at 850.

when "the affidavit and application for the no-knock warrant in this case were so lacking in indicia of probable cause . . . that a reasonable person could not believe the warrant was valid."[39] The majority concluded that two prior state precedents, *State v. Loucks*[40] and *State v. Knudson*,[41] supplied "the officers here . . . indicia of probable cause . . . to seek a no-knock search warrant":

> Law enforcement in North Dakota generally, and specifically in this case, operated under the belief that if drugs were present a no-knock warrant was justifiably obtainable. This belief was directly traceable to our prior rulings in cases like *Loucks* and *Knudson* in which we took judicial notice . . . that drugs were easily disposed of.[42]

The majority then concluded, "under federal precedent," that it must hold "the good faith exception to the exclusionary rule . . . appl[ied] to a no-knock warrant issued on a per se basis by a judge or magistrate under N.D.C.C. [section] 19-03.1-32(3)."[43] The majority used *United States v. Moore*[44] for this conclusion.[45] It correctly recognized that *Moore* applied the good faith exception in a federal prosecution after a Nebraska state judge had issued an invalid no-knock warrant under an impermissible blanket rule allowing no-knock entries in all drug searches.[46]

However, this phase of the majority's holding left several other things unnoticed and unsaid (more "gaps") and overlooked the real effect of the holding in *Moore* (a "glitch"). For all courts in the Eighth Circuit, *Moore* made clear a blanket rule for drug cases could not thereafter reasonably be used to obtain a no-knock search warrant.[47] This article suggests that glitch and the other gaps in *Herrick II* make it questionable precedent for any purpose.

IV. WHAT IS "OBJECTIVELY REASONABLE GOOD FAITH"?

The *Herrick II* majority correctly summarized *Leon*, the landmark case that established a good faith exception to the exclusionary remedy

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39. *Id.*
40. 209 N.W.2d 772 (N.D. 1973).
41. 499 N.W.2d 872 (N.D. 1993).
42. *Herrick II*, ¶ 20, 588 N.W.2d at 850-51 (citing State v. Loucks, 209 N.W.2d 772 (1973) and State v. Knudson, 499 N.W.2d 872 (1993)).
43. *Id.*
44. 956 F.2d 843, 851 (8th Cir. 1992).
45. *Herrick II*, ¶ 20, 588 N.W.2d at 851 (citing United States v. Moore, 956 F.2d 843, 851 (8th Cir. 1992)).
46. *Id.*
47. *See Moore*, 956 F.2d at 850 (referring to such a blanket rule as "patently unjustifiable").

for Fourth Amendment violations. In doing so, the majority quoted Justice Blackmun's *Leon* concurrence: "Evidence obtained in violation of the Fourth Amendment by officers acting in objectively reasonable reliance on a search warrant . . . need not be excluded, as a matter of federal law, from the case in chief of federal and state criminal prosecutions."[48] *Leon*, however, also recognized that an officer may not always rely on a facially valid warrant and that suppression remains the remedy in some situations when a warrant is invalid.[49] Among the four situations where police cannot reasonably rely on a warrant, *Leon* describes the third to be 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."[50]

So, what distinguishes an "entirely unreasonable belief" from "objectively reasonable reliance"? In other words, the question must be: When is official ignorance of the law reasonable enough to justify overriding a citizen's constitutional right to be free of unreasonable searches and seizures?

The United States Supreme Court has given us scant guidance on when official ignorance can be reasonable. However, we have enough guidance to conclude the *Herrick II* officers could not have reasonably relied on the *Loucks* and *Knudson* precedents because there had been clear judicial warnings those precedents were no longer the law.

In *Leon*, the trial court and the court of appeals had held the officer's affidavit for the warrant did not show probable cause to search three separate residences, including Leon's, because the informant's knowledge of criminal activity was stale and the affidavit had insufficient information about the informant's credibility.[51] Probable cause was neither briefed nor argued to the *Leon* Court.[52] *Leon* pointed out, but disregarded as "speculative," that:

> One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or "magistrate shopping" and thus promote the ends of the Fourth Amendment.[53]

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48. *Herrick II*, ¶ 14, 588 N.W.2d at 850 (quoting United States v. Leon, 468 U.S. 897, 927 (1984)).
49. *See Leon*, 468 U.S. at 923.
50. *Id.*
51. *Id.* at 903.
52. *Id.* at 905.
53. *Id.* at 918.

Thus, under *Leon*, a warrant based on an officer's affidavit, which in turn is based on stale and unreliable information, may be "objectively reasonable."[54]

Since *Leon*, the United States Supreme Court has spoken only twice more on the good faith exception. In *Illinois v. Krull*,[55] a five-to-four decision, the Supreme Court held the good faith doctrine permitted use of evidence obtained by an officer without a warrant in objectively reasonable reliance on a statute later declared unconstitutional.[56] In *Krull*, the Court noted its prior cases had observed "evidence should be suppressed 'only if it can be said that the law enforcement officer *had knowledge, or may properly be charged with knowledge*, that the search was unconstitutional under the Fourth Amendment.'"[57] Later in *Krull*, the Court explained: "Nor can a law enforcement officer be said to have acted in good faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional."[58] The Court supported this assertion by quoting from its civil liability decision in *Harlow v. Fitzgerald*[59]:

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.[60]

Thus, when rights are "clearly established" by statute or case law, an officer cannot reasonably rely on a contradictory warrant.

In a dissent for four members of the Court, Justice O'Connor helped explain the effect of the majority opinion by pointing out that "[t]he scope of the Court's good faith exception is unclear."[61] She added: "I think the Court errs in importing *Harlow's* 'clearly established law' test into this area, because it is not apparent how much constitutional law the reasonable officer is expected to know."[62] Justice O'Connor explained also that for the case of a facially valid warrant, as in *Leon*, "Courts need not inquire into the officer's probable understand-

54. *See id.* at 925-26.
55. 480 U.S. 340 (1987).
56. Illinois v. Krull, 480 U.S. 340, 349-53 (1987) (applying *Leon* good faith exception to subsequently invalidated statute).
57. *Id.* at 348-49 (quoting United States v. Peltier, 422 U.S. 531, 542 (1975)) (emphasis added).
58. *Id.* at 355.
59. 457 U.S. 800, 818 (1982).
60. *Krull*, 480 U.S. at 355 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
61. *Id.* at 366.
62. *Id.* at 367.

ing of the state of the law except in the extreme instance of a search warrant upon which no reasonable officer would rely."[63]

Later, in *Arizona v. Evans*,[64] the Supreme Court held the good faith of officers enabled admission of evidence seized in violation of the Constitution when erroneous information in the affidavit resulted from clerical errors by court employees and the affiant-officer did not know about the error.[65]

Lack of knowledge defines ignorance. Thus, an ignorant and uninformed officer can search for evidence, unreasonably and unconstitutionally but without consequences, according to *Leon*, *Krull*, and *Evans*. What ignorance should override a remedy for constitutional violations? What ignorance should trump constitutional rights?[66] *Krull* told us, at the very least, an official cannot ignore "clearly established" law.[67]

V. THE GAPS IN *HERRICK II*

In rejecting Herrick's argument that a reasonable person could not have believed the warrant to search his home was valid, the *Herrick II* majority concluded the searching officers "operated under the belief that if drugs were present a no-knock warrant was justifiably obtainable," and their "belief was directly traceable to our prior rulings in cases like *Loucks* and *Knudson* [that] took judicial notice that drugs were easily disposed of."[68] This conclusion, however, omitted any consideration, or even mention, of Herrick's clear argument, citing three prior opinions of the North Dakota Supreme Court that each suppressed evidence resulting from an invalid search warrant when the officer's reliance on a determination of probable cause was objectively unreasonable.[69]

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63. *Id.*

64. 514 U.S. 1 (1995).

65. Arizona v. Evans, 514 U.S. 1, 4 (1995).

66. Usually, ignorance of the law does not excuse a citizen. *See* State v. Sundquist, 542 N.W.2d 90, 91 (N.D. 1996) ("It is a well-established concept that everyone 'is charged with knowledge of the provisions of statutes and must take notice thereof.'") (quoting Lumkin v. Streifel, 308 N.W.2d 878, 880 (N.D. 1981)); Berg v. Hogan, 322 N.W.2d 448, 452 (N.D. 1982); State v. Thorstad, 261 N.W.2d 899, 905-06 (N.D. 1978); Montgomery v. Montgomery, 88 N.W.2d 104, 107 (N.D. 1958); State v. Pyle, 71 N.W.2d 342, 346 (N.D. 1955) ("[I]t is a well-established rule that ignorance of the law excuses no one . . . ."); Regional Agricultural Credit Corp. v. Stewart, 289 N.W. 801, 804 (N.D. 1940); *In re* Voss, 90 N.W. 15, 21 (N.D. 1902) ("Neither his ignorance of the laws, nor the crudity of his notions of professional ethics, can excuse an offense against professional propriety by one whose duty it is to assist in the administration of justice."); State *ex rel.* Sheeks v. Hilliard, 87 N.W. 980, 982 (N.D. 1901) ("Her ignorance of the law presents no excuse which can be recognized as valid."). Should there be a double-standard: Ignorance cannot excuse a citizen, but it will excuse an official's conduct that violates a citizen's constitutional right to privacy?

67. *See Krull*, 480 U.S. at 355.

68. *Herrick II*, ¶ 20, 588 N.W.2d at 851.

69. *See* State v. Lewis, 527 N.W.2d 658 (N.D. 1995) (concluding that "the implication of criminal activity in this case is simply too weak and tenuous to make it objectively reasonable for the officers to rely on the warrant"); State v. Sakellson, 379 N.W.2d 779, 785 (N.D. 1985) (rejecting application of

Herrick's attorney argued the application for the warrant in this case contained nothing but conclusory and tenuous suggestions of need for a no-knock entry.[70] His argument pointed out the application contained no reference to concerns for officer safety or easily disposable evidence, two justifications for no-knock warrants in North Dakota.[71] Herrick's attorney also argued the officers lacked training and experience in drug-related matters, thus precluding a conclusion they acted in good faith.[72]

When appellate counsel has marshaled firepower for an apt argument, as Herrick's did here, the Court ought to deal with it directly, face the supporting cases cited, and not sidestep the subject. The majority's failure to do so here was a gap in its *Herrick II* opinion that may have contributed to its major glitch.

Traditionally, "every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefor shall be concisely state in writing, signed by the judges concurring."[73] Currently, the North Dakota Constitution, Article VI, section 5, says, "When a judgment or order is reversed, modified, or confirmed by the supreme court, the reasons shall be concisely stated in writing, signed by the justices concurring." I submit "reasons . . . concisely stated" should still cover "every point fairly arising upon the record."

It is understandable why the Court does not address arguments not made, poorly made, or poorly supported, but it is difficult to understand why the majority failed to address or discuss an explicit argument made and clearly supported with the Court's own precedents. It is particularly difficult to understand here, because the majority made clear that "both parties submitted well-developed arguments and briefs on the reasons for and against applying a good-faith exception to the exclusionary remedy in this case."[74] The failure to address directly one of Herrick's main arguments left a large gap in the majority opinion.

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good faith exception to suppression because the officers' conduct was not objectively reasonable when "veteran officers, aware of the availability of no-knock warrants . . . and without belief there were exigent circumstances, entered through the open main door without knocking or ringing the doorbell."); State v. Thompson, 369 N.W.2d 363, 372 (N.D. 1985) (concluding that the officer's affidavit had nothing but "a most tenuous and conclusory suggestion that the Thompsons were involved in criminal activity" at their home).

70. *See* Brief of Appellant at 7-13, State v. Herrick, 1999 N.D. 1, 588 N.W.2d 847 (Nos. 980082-980084).

71. *See id.* at 9-10.

72. *See id.* at 8-9, 12.

73. Former section 101 of the 1889 North Dakota Constitution, repealed by art. amend. 97, approved Sept. 7, 1976 (1975 N.D. Laws, ch. 615, § 2; 1977 N.D. Laws, ch. 599).

74. State v. Herrick, 1999 N.D. 1, ¶ 13, 588 N.W.2d 847, 849 (*Herrick II*).

VI. A MAJOR GLITCH: MISREADING *MOORE*

However, there was also another glitch here. The majority concluded the officers in this case "operated under the belief that if drugs were present a no-knock warrant was justifiably obtainable" because older rulings of the North Dakota Supreme Court had been read to say that. The majority interpreted *Loucks* and *Knudson* as supplying "indicia of probable cause" that made the officers' reliance on the warrant objectively reasonable.[75] Indeed, the discussion in *Herrick I*, declaring unconstitutional a blanket rule that justified issuance of a no-knock warrant on the presence of drugs alone, seemed to imply a change in constitutional doctrine. The change was not new or sudden. *Moore* and *Knudson* had already published the change; *Herrick I* simply republished it.

Even before *Herrick I*, the Eight Circuit had "clearly established" the federal law for North Dakota when it ruled in 1992 that "a blanket rule permitting no-knock search warrants in all drug cases, regardless of whether the forms and quantities suspected to be present can be readily destroyed, is patently unjustifiable."[76] The Eighth Circuit's geographical federal jurisdiction includes North Dakota.[77] After the *Moore* pronouncement, the federal constitutional law for North Dakota was clearly established: no more automatic no-knock warrants in drug cases.[78] The *Herrick II* majority missed the plain meaning of *Moore*.

The majority cited *Moore* for applying the good faith exception to the exclusionary remedy when a no-knock warrant had been issued "on a per se basis," because the majority was deciding "under federal precedent."[79] For that purpose, however, the majority missed the key sentence in *Moore*'s reasoning: "There were no Supreme Court or Eighth Circuit precedents that should have warned [the officer] that his affidavit was obviously inadequate under the Fourth Amendment."[80] By the time of the warrant in Herrick's case, there was an Eighth Circuit precedent that clearly warned the officer that her affidavit "was obvi-

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75. *Id.* ¶ 20, 588 N.W.2d at 851.

76. United States v. Moore, 956 F.2d 843, 850 (8th Cir. 1992).

77. *See* 28 U.S.C. § 41 (1994).

78. *Moore*, 956 F.2d at 850-51.

79. *Herrick II*, ¶ 20, 588 N.W.2d at 851.

80. *Moore*, 956 F.2d at 851. Perhaps the majority was misled because Herrick's appellate brief did not cite or discuss *Moore*. *See* Brief of Appellant at ii, State v. Herrick, 1999 N.D. 1, 588 N.W.2d 847 (Nos. 980082-980084). However, the prosecution's brief quoted this very sentence, loud and clear. *See* Brief of Appellee at 22, State v. Herrick, 1999 N.D. 1, 588 N.W.2d 847 (Nos. 980082-980084).

ously inadequate under the Fourth Amendment."[81] *Moore* broadcast that warning.[82]

The *Herrick II* majority thus overlooked the importance of an Eighth Circuit precedent for federal law in North Dakota.[83] Both state courts and the federal courts of appeal must obey the Supremacy Clause of the United States Constitution, Art. VI: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby."[84]

Moreover, *Moore* specifically dealt with North Dakota's older precedent. The *Herrick II* majority did not notice that the *Loucks* case had been explicitly mentioned by *Moore*[85] to show North Dakota was one of a minority of six states "upholding a blanket rule," a rule that *Moore* condemned as "patently unjustifiable."[86]

So, any North Dakota lawyer or judge who did customary "homework" by citating *Loucks* would have discovered *Moore*. A reading of *Moore* would have made it clear that a "blanket" or "per se" rule no longer fit federal doctrine. It is difficult to imagine how there could be any "objective reasonableness" in relying on a "blanket" rule already condemned by a published Eighth Circuit precedent.

Under *Leon* and *Krull*, ignorance of clear precedent can hardly be objectively reasonable for either judges or officers. The *Herrick II* majority's conclusion the officers acted reasonably was thus wrong, in the light of the clearly established federal precedent for North Dakota.

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81. *See Moore*, 956 F.2d at 851.

82. *See id.* at 850-51.

83. *See* McNabb v. Osmundson, 315 N.W.2d 9, 13 (Iowa 1982):

> We are mindful that the federal judiciary is supreme in exposition of the law of the United States Constitution, which is the supreme law of the land. *See, e.g.*, Michigan v. Sommers, 452 U.S. 692 (1981) (Michigan Supreme Court reversed on federal constitutional grounds); Cooper v. Avery, 358 U.S. 1, 18 (1958). We therefore make no attempt to arrive at our own independent interpretation of the United States Constitution, but follow the federal decisions as we understand them.

Id.; see also Fox v. McDonnell Douglas Corp., 890 S.W.2d 408, 410 (Mo. Ct. App. 1995) ("Because this court is construing a federal statute, the decisions of the United States Supreme Court and of the federal courts interpreting that statute are binding"); St. Cloud v. Leapley, 521 N.W.2d 118, 122 (S.D. 1994). *Cf.* Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1991) ("In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court").

84. U.S. CONST. art. VI, § 2.

85. *Moore*, 956 F.2d at 850 n.9.

86. *Id.* at 850.

VII. ANOTHER GLITCH: MISREADING *KNUDSON*

The majority's narrow reading of *Knudson*[87] is also remarkable in the light of the prior *Moore* decision. The Court in *Knudson* applied *Loucks'* blanket rule "because we have taken judicial notice" that drugs are "typically easily disposable evidence" in the past.[88] However, when the magistrate issued the *Knudson* search warrant, *Moore* had barely been decided and had not yet been published.[89] Thus, it was reasonable in *Knudson*, as in *Moore*, to conclude that there "were no Supreme Court or Eighth Circuit precedents that should have warned [the *Knudson* officer] that his affidavit was obviously inadequate under the Fourth Amendment."[90]

Moore was decided on February 12, 1992.[91] The no-knock warrant in *Knudson* was issued by a North Dakota magistrate on February 29, 1992, barely two weeks after the *Moore* decision was announced and before it could be generally known.[92] Rather than reading *Knudson* as continuing a blanket rule, the *Herrick II* majority should have understood *Knudson* as the last appearance of an unsound rule in North Dakota. After *Knudson* pointedly called North Dakota practitioners' attention to *Moore*'s holding that the blanket rule was "patently unjustifiable,"[93] prosecutors and police officers should no longer have been able to rely reasonably on a blanket rule to obtain a no-knock warrant in drug cases.

Justice Levine's 1993 opinion for the Court in *Knudson* not only cited *Moore* but also quoted its clear warning that "a blanket rule . . . is patently unjustifiable."[94] Soon after that, Professor Thomas M. Lockney discussed and quoted the cautionary *Knudson* footnote about *Moore* in an article published for the North Dakota legal community.[95] After 1992, how could a North Dakota prosecutor argue with a straight face that law enforcement officials were reasonably ignorant of the correct

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87. State v. Knudson, 499 N.W.2d 872 (N.D. 1993).

88. State v. Herrick, 1999 N.D. 1, ¶ 17, 588 N.W.2d 847, 850 (*Herrick II*) (quoting *Knudson*, 499 N.W.2d at 876).

89. *Moore* was decided February 12, 1992. *Moore*, 956 F.2d at 843. The warrant in *Knudson* was issued February 29, 1992. *Knudson*, 499 N.W.2d at 873.

90. *Moore*, 956 F.2d at 851.

91. *Id.* at 843.

92. *See Knudson*, 499 N.W.2d at 873.

93. *See id.* at 875 n.2.

94. *Id.*

95. *See* Thomas M. Lockney, *Probable Cause for Nighttime, No-Knock Drug Searches: The Illusion of Judicial Control in North Dakota*, 69 N.D. L. REV. 613, 620-21 (1993).

rule of law for obtaining a no-knock warrant to search for drugs? Yet one did, and the *Herrick II* majority let him get away with it.[96]

VIII. CONCLUSION

This essay submits there were more reasons to reverse and to suppress in *Herrick II* than given in Justice Maring's dissent. Despite the North Dakota Supreme Court's older mistaken precedents, the *Herrick II* officer's ignorance of the need to develop specific facts to show probable cause for a no-knock entry could not have been objectively reasonable in light of "clearly established" federal law known, published, and applicable in North Dakota.

With its gaps and glitches, in my "dissenting" view, *Herrick II* is questionable precedent for any purpose, except for Justice Maring's thoughtful thesis: North Dakota's independently developed prohibition of unreasonable searches and seizures should be interpreted to afford our citizens heightened protection for their right to privacy.[97]

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96. Again, Herrick did not cite or discuss *Knudson* in his appellate brief, but the prosecution did. *See* Brief of Appellee at 25, State v. Herrick, 1999 N.D. 1, 588 N.W.2d 847 (Nos. 980082-980084).

97. Unfortunately, the North Dakota Supreme Court quickly relied on *Herrick II* as controlling precedent. *See* State v. VanBeek, 1999 N.D. 53, ¶ 26, 591 N.W.2d 112; State v. Hughes, 1999 N.D. 24, ¶ 8, 589 N.W.2d 912.