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Criminal Law - Evidence - I Hear You Knocking, but You Can't Come In: The North Dakota Supreme Court Again Declines to Decide Whether the State Constitution Precludes a Good Faith Exceptoin to the Exclusionary Rule

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CRIMINAL LAW—EVIDENCE
"I HEAR YOU KNOCKING, BUT YOU CAN'T COME IN": THE NORTH DAKOTA SUPREME COURT AGAIN DECLINES TO DECIDE WHETHER THE STATE CONSTITUTION PRECLUDES A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE
State v. Herrick, 1999 N.D. 1, 588 N.W.2d 846

I. FACTS

In February 1995, Officer LeRoy Gross, a member of the Jamestown, North Dakota, Police Department, searched garbage cans located near a service alley behind Curtis Herrick's home.[1] Officer Gross found a paper clip with marijuana residue on it, a sterile marijuana seed, and a marijuana stem.[2] In January 1996, Officer Gross, accompanied by Officer Corinne Becker, again searched the garbage cans behind Herrick's home.[3] Officers Gross and Becker found marijuana seeds and stems, two bent wires with marijuana residue on them, a torn check with Herrick's name on it, and handwritten notes from a book on how to grow marijuana.[4]

Using the information obtained from the two garbage can searches, Officer Becker applied for a warrant to search Herrick's home.[5] The magistrate asked Becker if she wanted a "no-knock," nighttime warrant; Becker responded affirmatively.[6] The search uncovered marijuana, marijuana seeds and stems, equipment for indoor horticulture, a book titled

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1. State v. Herrick, 1997 N.D. 155, ¶ 2, 567 N.W.2d 336, 339 (*Herrick I*). Officer Gross was a member of the Jamestown Police Department's Drug Task Force. *Id.* The garbage cans were on Herrick's property, approximately three feet from the alley's edge. *Id.*

2. *Id.*

3. *Id.* ¶ 3. Officer Becker was a member of the Stutsman Country Narcotics Task Force. *Id.* During the second search, the garbage cans were approximately four feet from the alley. *Id.*

4. *Id.*; *see also* State v. Herrick, 1999 N.D. 1, ¶ 3, 588 N.W.2d 847, 848 (*Herrick II*).

5. *Herrick I*, ¶ 4, 567 N.W.2d at 339. Officer Becker applied for the search warrant on the same day as the second search. *Id.* ¶ 15, 567 N.W.2d at 340-41.

6. *Id.* ¶ 4, 567 N.W.2d at 339. Under North Dakota's Controlled Substances Act, North Dakota Century Code, Chapter 19-03.1,

> 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 disposed of . . . .

N.D. CENT. CODE § 19-03.1-32(3) (1997 & Supp. 1999). During an evidentiary hearing on Herrick's motion to suppress the evidence found during the search of his home, Officer Becker stated that a no-knock warrant was necessary because there was evidence that marijuana was in the house and "[m]arijuana is an easily disposed of item when it's dry, when it's processed. It could easily be flushed down a toilet." *Herrick I*, ¶ 4, 567 N.W.2d at 339.

Indoor Marijuana Horticulture, and several items of drug paraphernalia.[7] The officers charged Herrick with possession of a controlled substance, possession of a controlled substance with intent to manufacture, and possession of drug paraphernalia.[8]

Herrick moved to suppress the evidence, arguing: 1) the garbage can searches violated his right against unreasonable searches and seizures; 2) the warrant was issued by a biased magistrate; 3) the warrant was issued without probable cause; and 4) the issuance and execution of the no-knock warrant violated his right against unreasonable searches and seizures.[9] The trial court denied the motion.[10] Herrick entered a conditional plea of guilty, preserving for appeal the issues argued in his motion to suppress.[11]

On appeal, the North Dakota Supreme Court rejected Herrick's first three arguments.[12] As to the garbage can issue, the court held that Herrick had no reasonable expectation of privacy as to the contents of the garbage cans.[13] As to the biased magistrate issue, the court found nothing in the record demonstrating bias or prejudice on the part of the issuing magistrate.[14] As to the probable cause issue, the court held that items found during the garbage can searches provided sufficient probable cause for the search warrant.[15]

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7. *Herrick I*, ¶ 5, 567 N.W.2d, at 339. When the no-knock warrant was executed, the officers first knocked on the door to Herrick's home; then, after waiting three seconds, the officers forced the door open with a battering ram. *Id.*

8. *Id.* ¶ 1.

9. *Id.* ¶ 6.

10. *Id.*

11. *Id.*

12. *Id.* ¶¶ 8-15, 567 N.W.2d at 339-41.

13. *Id.* ¶¶ 8-10, 567 N.W.2d at 339-40 (citing California v. Greenwood, 486 U.S. 35, 40-41 (1988) (holding that warrantless searches of garbage cans set out for disposal are constitutionally valid under the Fourth Amendment); State v. Rydberg, 519 N.W.2d 306, 309 (N.D. 1994) (holding that placing garbage cans on or near a public alley, where they are exposed to the general public, and with the express purposes of abandoning the contents to the trash collector, waives any privacy interest in those contents)). In addressing the garbage can issue, the North Dakota Supreme Court determined that the garbage cans were between two and six feet from the alley, but the court declined to "measur[e] expectations of privacy with a ruler." *Id.* ¶ 10, 567 N.W.2d at 340.

14. *Id.* ¶ 11. A warrant must be issued by a neutral and detached magistrate. *See* State v. Ronngren, 361 N.W.2d 224, 229 (N.D. 1985); *see also* N.D. R. CRIM. P. 41 (2000). The court determined, based on the information found in the affidavit and warrant, that "the issuing magistrate was merely trying to move the application process along when he asked [Officer] Becker if she wanted a no-knock warrant." *Herrick I*, ¶ 11, 567 N.W.2d at 340.

15. *Herrick I*, ¶¶ 12-15, 567 N.W.2d at 340-41. The court applied the "totality-of-the-circumstances" approach to review the issuing magistrate's decision "whether, given all the information considered together, there is a fair probability contraband or evidence of a crime will be found in a particular place." *Id.* ¶ 12, 567 N.W.2d at 340 (quoting *Rydberg*, 519 N.W.2d at 308). "[P]robable cause to search exists if it is established that certain identifiable objects are probably connected with criminal activity and are probably to be found at the present time at an identifiable place." State v. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988). The court determined that the evidence found in Herrick's garbage cans made it reasonable for the magistrate to conclude that more marijuana would be found inside Herrick's home. *Herrick I*, ¶ 14, 567 N.W.2d at 340 (quoting *State v. Johnson*, 531

It was with his fourth argument that Herrick prevailed: that it was not reasonable, under the circumstances, to issue a no-knock warrant.[16] The court began its analysis of the no-knock issue by recognizing that one factor in determining the reasonableness of a search or seizure is whether the officers knock and announce their presence before entering a dwelling.[17] At the same time, the court recognized that "where a threat of . . . possible destruction of evidence may exist, officers may validly execute a no-knock warrant."[18] However, the warrant to search Herrick's home was issued on a "per se" basis, under the court's "prior rhetoric" approving a no-knock warrant whenever the presence of drugs was suspected.[19] The court overruled this per se rule and the "prior rhetoric" on which it was founded.[20] Under the particular facts and circumstances of *Herrick I*,[21] the court found it unreasonable to issue a no-knock warrant.[22]

The state urged the court to adopt a good-faith exception to the exclusionary rule.[23] The court noted that the trial court did not discuss

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N.W.2d 275, 278 (N.D. 1995), which held that it is reasonable for a magistrate to conclude, from the presence of marijuana seeds in a suspect's garbage bag, that more marijuana is probably located inside the suspect's house).

16. *Herrick I*, ¶¶ 16-24, 567 N.W.2d at 341-43.

17. *Id.* ¶ 17, 567 N.W.2d at 341 (citing Wilson v. Arkansas, 514 U.S. 927, 934 (1995) ("[T]he common-law principle of announcement . . . is an element of the reasonableness inquiry under the Fourth Amendment")).

18. *Id.* (citing *Wilson*, 514 U.S. at 936 (1995) ("[U]nannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given")).

19. *Id.* ¶¶ 21, 23, 567 N.W.2d at 342-43 (citing State v. Knudson, 499 N.W.2d 872, 876 (N.D. 1993); State v. Borden, 316 N.W.2d 93, 96-97 (N.D. 1982); State v. Loucks, 209 N.W.2d 772, 777-78 (N.D. 1973), all holding that a court, when determining whether to issue a no-knock warrant, may take judicial notice of the fact that drugs are typically easily disposed of and that those in possession of drugs are ordinarily on the alert to quickly destroy them when alerted to the presence of law enforcement officers).

20. *Id.* ¶¶ 18-21, 567 N.W.2d at 341-42 (discussing Richards v. Wisconsin, 520 U.S. 385, 395-96 (1997) (rejecting a "blanket exception to the knock-and-announce requirement for felony drug investigations")). *Richards* was decided after the issuance of the warrant to search Herrick's home. *Id.* ¶ 18, 567 N.W.2d at 341.

21. 1997 N.D. 155, 567 N.W.2d 336 (*Herrick I*).

22. State v. Herrick, 1997 N.D. 155, ¶ 23, 567 N.W.2d 336, 343 (*Herrick I*). "[I]n each case, it is the duty of [the] court . . . to determine whether the [particular] facts and circumstances . . . justified dispensing with the knock-and-announce requirement." *Richards*, 520 U.S. at 394. In her application for a no-knock warrant to search Herrick's home, Officer Becker offered no evidence other than her belief that marijuana was present in an "easily disposed of" state and that Herrick would destroy the evidence if the officers were required to announce their presence before entering. *Herrick I*, ¶ 23, 567 N.W.2d at 343. Furthermore, the issuing magistrate did not initiate any inquiry as to why Officer Becker held those beliefs. *Id.* The court determined that Officer Becker "did not meet her burden of demonstrating the need . . . for the no-knock warrant." *Id.* "The officers . . . were looking for a grow operation, not simply for controlled substances reflecting personal use." *Id.* ¶ 22, 567 N.W.2d at 342 (reviewing Officer Becker's testimony when applying for the warrant, along with the affidavit attached to the search warrant, which included "[l]ight bulbs, fertilizer, growing equipment"). Regarding the execution of the warrant, the court agreed with the trial court that the officers executed the warrant as a no-knock warrant, since they waited only three seconds between knocking and battering in Herrick's door. *Id.* ¶ 24, 567 N.W.2d at 343 (citing WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 4.8(c), at 608 (1996) (defining a wait of two to four seconds as a no-knock execution)).

23. *Herrick I*, ¶ 25, 567 N.W.2d at 343 (citing United States v. Leon, 468 U.S. 897, 922 (1984)

the good faith issue in its opinion denying Herrick's motion to suppress and that, on appeal, Herrick made no response to the state's brief regarding the good faith issue.[24] The court declined to address the good faith exception, as it had not been adequately briefed.[25] The court reversed both the judgment of conviction and the order denying suppression and remanded the case to the trial court to consider whether a good faith exception to the exclusionary rule should apply in North Dakota.[26]

On remand, the trial court applied the *United States v. Leon*[27] good faith exception to the exclusionary rule, holding that the evidence was admissible.[28] Herrick appealed the trial court's reinstatement of his convictions.[29] The North Dakota Supreme Court *held* that the *Leon* good faith exception to the exclusionary rule applied to Herrick's case.[30]

II. LEGAL BACKGROUND

When law enforcement officers execute a warrant to search a dwelling, they are generally required to knock and announce their presence and authority before entering, unless circumstances exist which allow the officers to forego the announcement requirement.[31] Such circumstances

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(creating a good faith exception to the exclusionary rule where officers' reliance on a magistrate's determination of probable cause was "objectively reasonable")).

24. *Id.*

25. *Id.* ¶ 26, 567 N.W.2d at 344.

26. *Id.* ¶ 27-28. The court instructed the parties that, should an appeal of the remand decision be taken, they were "to brief the question of whether [the court] should recognize a good faith exception, and, if so, whether it should be applied in [Herrick's] case." *Id.* ¶ 27. Justice Meschke dissented from the remand. *Id.* ¶ 31 (Meschke, J., concurring and dissenting). Citing *Leon*, Meschke stated that "the officers had no reasonable grounds to seek a no-knock warrant," and therefore "their application was 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* (quoting *Leon*, 468 U.S. at 922-23 (holding that "in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued" and that an officer could not, in objective good faith, rely on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable") (footnote and citations omitted)).

27. 468 U.S. 897 (1984).

28. State v. Herrick, 1999 N.D. 1, ¶ 7, 588 N.W.2d 847, 848 (*Herrick II*) (citing United States v. Leon, 468 U.S. 897, 922-23 (1984)). In his memorandum opinion, Judge Bekken held "it is right and timely that the 'good faith' exception to the exclusionary rule be adopted." Brief of Appellant at A.19, State v. Herrick, 1999 N.D. 1, 588 N.W.2d 847 (Nos. 980082-84) (*Herrick II*).

29. *Herrick II*, ¶ 7, 588 N.W.2d at 849. Herrick argued that the trial court erroneously adopted the good faith exception and that the trial court "further erred in finding that the 'good faith' exception applie[d] to [Herrick's] case despite the fact that the affidavit . . . lacked the requisite probable cause." Brief of Appellant at 4, *Herrick II* (Nos. 980082-84). Herrick further argued that, under the state constitution, the North Dakota Supreme Court should not adopt the good faith exception. *Id.*

30. *Herrick II*, ¶ 28, 588 N.W.2d at 852.

31. *See generally* Wilson v. Arkansas, 514 U.S. 927, 934-36 (1995) (holding that the knock-and announce requirement is an element in determining whether a search or seizure is reasonable under the Fourth Amendment and listing circumstances in which a search or seizure may be constitutionally valid despite a prior announcement).

exist, for example, if officers are executing what is known as a "no-knock" warrant.[32] If law enforcement officers violate the knock-and-announce requirement, or if a warrant is invalid, the search or seizure violates the constitutional freedom from unreasonable searches and seizures.[33] If a search or seizure is unconstitutional, evidence obtained during that search or seizure will normally be excluded as evidence at trial, unless one of the exceptions to the exclusionary rule applies.[34] One such exception, created by the Supreme Court in 1984, has become known as the "good faith" exception.[35]

A. THE KNOCK-AND-ANNOUNCE REQUIREMENT

The knock-and-announce requirement ordinarily requires law enforcement officers to knock and announce their presence and authority before entering a dwelling to execute a search warrant.[36] There are exceptions to the requirement, however, which allow law enforcement officers to enter unannounced under certain circumstances.[37]

1. *Origins of the Knock-and-Announce Requirement*

In *Wilson v. Arkansas*,[38] the United States Supreme Court traced the knock-and-announce requirement back to the 1603 English decision called *Semayne's Case*,[39] which most courts regard as the origin of the requirement.[40] *Semayne's Case* held that a sheriff, when executing the King's process, "may break the party's house . . . if otherwise he cannot

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32. *See generally* N.D. CENT. CODE § 19-03.1-32(3) (1997 & Supp. 1999) (authorizing the execution of a warrant without prior announcement under certain circumstances).

33. *See generally Wilson*, 514 U.S. at 934 (holding that the knock-and-announce requirement "is an element of the reasonableness inquiry under the Fourth Amendment"); Stanford v. Texas, 379 U.S. 476, 486 (1965) (holding that a warrant lacking the particularity required by the Fourth Amendment was constitutionally invalid).

34. *See generally* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence obtained in violation of the Constitution is inadmissible, both in federal and state courts); Keith A. Fabi, *The Exclusionary Rule: Not the "Expressed Juice of the Woolly-Headed Thistle,"* 35 BUFF. L. REV. 937, 946-48 (1986) (discussing exceptions to the exclusionary rule).

35. *See* United States v. Leon, 468 U.S. 897, 922-23 (1984) (holding that evidence obtained in objectively reasonable reliance on a warrant issued by a neutral and detached magistrate is admissible at trial, even when the warrant is subsequently found to be invalid).

36. *See generally Wilson*, 514 U.S. at 934 (holding that an unannounced entry may be unreasonable under the Fourth Amendment).

37. *See generally id.* at 935-36 (listing situations in which "the presumption in favor of announcement necessarily would give way to contrary considerations").

38. 514 U.S. 927 (1995).

39. 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603).

40. Wilson v. Arkansas, 514 U.S. 927, 932 (1995) (citing Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603)). *Wilson* noted that the knock and announce principle may predate even *Semayne's Case*. *Id.* at 932 n.2 (citing *Semayne's Case*, 5 Co. Rep. at 91b, 77 Eng. Rep. at 196). The principle has roots in a statute enacted in 1275, which was itself merely an affirmance of the then-existing commonlaw. *Id.* (citing *Semayne's Case*, 5 Co. Rep. at 91b, 77 Eng. Rep. at 196).

enter."[41] Before doing so, however, the sheriff shall disclose the reason for his presence and request that the door to the house be opened.[42] This principle quickly became part of early American law, finding a home in state constitutional provisions, statutes, and court decisions.[43]

In North Dakota, the knock-and-announce requirement is codified in North Dakota Century Code section 29-29-08.[44] In interpreting this section, the North Dakota Supreme Court has determined that "[t]he primary policies underlying the knock-and-announce rule are the protection of privacy in the home and the prevention of violent confrontations."[45] The first of those policies—the right to privacy in one's home—is protected not only by the Fourth Amendment, but, in North Dakota, by statutory authority.[46] As "one of the unique values of our society," the North Dakota Supreme Court has held that the right to privacy in one's home should not be grudgingly upheld.[47] The second of those policies—the prevention of violent confrontations—is implicated by an unannounced entry.[48] Such an entry may provoke surprised occupants to take defensive, potentially violent measures they would not have taken had they known the police had a search warrant.[49]

After acknowledging "the longstanding common-law endorsement of the practice of announcement," the United States Supreme Court in

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41. *Semayne's Case*, 5 Co. Rep. at 91b, 77 Eng. Rep. at 195.

42. *Id.*

43. *See Wilson*, 514 U.S. at 933. Some constitutional provisions and statutes incorporated the principle generally, providing that "the common law of England" shall remain in force. *Id.* Some statutes specifically embraced the principle, providing that if admittance was refused, breaking the door was permissible. *Id.*

44. North Dakota Century Code section 29-29-08 provides:

> An officer directed to serve a search warrant may break open an outer or inner door or window of a house, or any part of the house, or anything therein, to execute the warrant, (a) if, after notice of the officer's authority and purpose, the officer is refused admittance, or (b) without notice of the officer's authority and purpose if the warrant was issued by a magistrate who is learned in the law and who has inserted a direction therein that the officer executing it shall not be required to give such notice. The magistrate may so direct only upon written or recorded oral petition and proof under oath, to the magistrate's satisfaction, that the property sought may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice were to be given.

N.D. CENT. CODE § 29-29-08 (1991 & Supp. 1999).

45. *See* State v. Sakellson, 379 N.W.2d 779, 782 (N.D. 1985) (defining a nonconsensual entry through an open main door as a breaking, under ordinary circumstances, under North Dakota Century Code section 29-29-08).

46. *Id.* at 784.

47. *Id.* at 783-84 (citing Miller v. United States, 357 U.S. 301, 313 (1958) (discussing the deeply rooted heritage of the requirement of prior notice of authority and purpose before forcing entry); McDonald v. United States, 335 U.S. 451, 454 (1948) (holding that a warrantless search "demands exceptional circumstances")).

48. *Id.* at 782.

49. *Id.* (citing *Miller*, 357 U.S. at 313 n.12 (reasoning that announcement protects the police themselves against being mistaken for prowlers and being shot down by a fearful householder)).

Wilson "squarely held" that the common law knock and announce principle is an element of the Fourth Amendment reasonableness inquiry.[50] The framers of the Fourth Amendment believed that the method of entry is one of the factors in determining whether a search or seizure was reasonable.[51] Therefore, an unannounced entry might be unreasonable under certain circumstances.[52] At the same time, the Fourth Amendment reasonableness inquiry is flexible and must balance the principle of announcement against "countervailing law enforcement principles."[53]

2. *The "Per Se" Drug Exception to the Knock-and-Announce Requirement*

North Dakota Century Code section 19-03.1-32(3) outlines two of the "countervailing law enforcement principles" that must be balanced against the principle of announcement: destruction or disposal of evidence and danger to law enforcement officers or others.[54] In a trio of cases—*State v. Loucks*,[55] *State v. Borden*,[56] and *State v. Knudson*[57]—the North Dakota Supreme Court created a per se drug exception to the statutory knock-and-announce requirement of North Dakota Century Code section 19-03.1-32(3).[58]

In *Loucks*, a 1973 case, police officers obtained a no-knock warrant to search the defendant's apartment.[59] The affidavit for the warrant

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50. *Wilson*, 514 U.S. at 934.

51. *Id.*

52. *Id.*

53. *Id.* In cataloging some of the circumstances that may justify an unannounced entry, the Court included "circumstances presenting a threat of violence" or where there is "reason to believe that evidence would likely be destroyed if advance notice were given." *Id.* at 936.

54. North Dakota Century Code section 19-03.1-32(3) provides:

> 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 & Supp. 1999) (emphasis added).

55. 209 N.W.2d 772 (N.D. 1973).

56. 316 N.W.2d 93 (N.D. 1982).

57. 499 N.W.2d 872 (N.D. 1993).

58. *See* State v. Knudson, 499 N.W.2d 872, 876 (N.D. 1993); State v. Borden, 316 N.W.2d 93, 96-97 (N.D. 1982); State v. Loucks, 209 N.W.2d 772, 777-78 (N.D. 1973), all holding that a court, when determining whether to issue a no-knock warrant, may take judicial notice of the fact that drugs are typically easily disposed of and that those in possession of drugs ordinarily quickly destroy them when alerted to the presence of law enforcement officers.

59. *Loucks*, 209 N.W.2d at 773.

contained information from an informant that, in the four days prior to his giving the information, he had observed marijuana at the defendant's apartment.[60] The affidavit also stated the officer's knowledge that "drugs might easily be disposed of or destroyed."[61] However, the affidavit did not expressly state that if the officers were required to give notice before executing the warrant, the evidence sought "would likely" suffer such fate.[62] The court held, however, that "[i]t is common knowledge that drugs may be easily disposed of," common knowledge of which a court "may take judicial notice."[63] Therefore, it was not "absolutely essential" that an officer specifically state in an affidavit that drugs would probably be disposed of or destroyed if the officers gave notice before entering.[64] Accordingly, the court ruled that the judge who issued the warrant had probable cause to issue the no-knock warrant.[65]

Borden, a 1982 case, reversed a district court ruling which held a no-knock warrant invalid.[66] The district court ruled that *Loucks* was inapplicable because the evidence pointed to the conclusion that the defendants were in possession of a large quantity of drugs.[67] The district court determined that such evidence could not have given the magistrate probable cause to believe that the drugs might be easily disposed of or

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60. *Id.*

61. *Id.* at 774.

62. *Id.* at 777.

63. *Id.* at 777-78.

64. *Id.* at 777.

65. *Id.* at 778. One of the issues the court had to decide was whether the judge who issued the warrant—a judge of the county court of increased jurisdiction—had authority, under North Dakota Century Code section 19-03.1-32(3), to issue a no-knock search warrant. *Id.* at 776-77. Had the warrant been issued under North Dakota Century Code section 29-29-08, there would not have been sufficient authority, as the statute as it then existed limited authority to issue no-knock warrants to district judges. *Id.* at 776. However, North Dakota Century Code section 19-03.1-32(3), as it then existed, granted authority to issue no-knock warrants to "judges or magistrates." *Id.* at 776-77. The court determined that "judge or magistrate" under North Dakota Century Code section 19-03.1-32(3) included the judge of a county court of increased jurisdiction. *Id.* at 777. Though the two statutes were in conflict, the court determined that North Dakota Century Code section 19-03.1-32(3) prevailed over North Dakota Century Code section 29-29-08 for two reasons: 1) North Dakota Century Code section 19-03.1-32 was enacted later (1971) than North Dakota Century Code section 29-29-08 (1967) and 2) North Dakota Century Code section 29-29-08 is "a general statute dealing with issuance of all search warrants," while North Dakota Century Code section 19-03.1-32 "deals with a specific subject: controlled substances." *Id.* Where two statutes are in conflict, "the one enacted last prevails." *Id.* Furthermore, "a statute dealing comprehensively with a special subject" prevails over "a general statute." *Id.* North Dakota Century Code section 29-29-08 has since been amended to grant authority to issue no-knock warrants to "magistrate[s] who [are] learned in the law." N.D. CENT. CODE § 29-29-08 (1991 & Supp. 1999).

66. State v. Borden, 316 N.W.2d 93, 97 (N.D. 1982).

67. *Id.* at 96. Police officers, conducting surveillance in an motel room adjacent to the one the defendants were renting, overheard a conversation in which "25 pounds" was referenced. *Id.* at 94.

destroyed.[68] The North Dakota Supreme Court disagreed.[69] The majority of the evidence pointed to the conclusion that the defendants were in possession of "probably less than two pounds" of marijuana, as well as "other, 'hard' drugs."[70] Therefore, under *Loucks*, the magistrate had sufficient probable cause to issue a no-knock warrant.[71]

Finally, in the 1983 case of *Knudson*, an officer obtained a no-knock warrant to search the defendant's residence.[72] In his affidavit, the officer testified that an informant had seen several one-quarter ounce baggies of marijuana at the defendant's residence and that, in the officer's experience, the defendant would attempt to hide or destroy the evidence if the officers knocked and announced their presence before executing the search warrant.[73] The court reasoned that "those in possession of controlled substances ordinarily are on the alert to destroy the typically easily disposable evidence quickly at the first sign of a law enforcement officer's presence."[74] Therefore, as in *Loucks* and *Borden*, there was probable cause for the issuance of the no-knock warrant.[75]

In 1997, the United States Supreme Court held in *Richards v. Wisconsin*[76] that a blanket exception to the knock and announce rule was impermissible under the Fourth Amendment.[77] *Richards* reversed a decision of the Wisconsin Supreme Court, which had held that "circumstances justifying a no-knock warrant are always present in felony drug cases."[78] The Court found that creating such a per se rule for a general

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68. *Id.* at 96.

69. *Id.*

70. *Id.* at 97. The hotel security guard overheard the defendants say that they had "two pounds to get rid of." *Id.* Several persons visited the room in which the defendants were staying, including persons with alleged drug involvement. *Id.* at 96-97. Police officers overhead money being discussed during these visits. *Id.* at 97. In a wastebasket outside the defendants' motel room, officers discovered hypodermic syringe caps and bloody facial tissues. *Id.* at 94.

71. *Id.* at 97 (following State v. Loucks, 209 N.W.2d 772, 777-78 (N.D. 1973)).

72. State v. Knudson, 499 N.W.2d 872, 873 (N.D. 1993).

73. *Id.* at 873. The informant had also seen firearms at the defendant's residence and a dog kenneled near the front door to the residence. *Id.* The officer applying for the warrant testified that these facts concerned him. *Id.*

74. *Id.* at 876 (citing *Borden*, 316 N.W.2d at 97; *Loucks*, 209 N.W.2d at 777-78).

75. *Id.* The court did not discuss the firearms and the dog in determining that probable cause existed to issue a no-knock warrant. *Id.* It did, however, mention them in determining that "reasonable cause" existed to authorize a nighttime search. *Id.* at 875; *see also* N.D. R. CRIM. P. 41 (2000)(authorizing nighttime searches only when "reasonable cause" is shown). The court first established that "reasonable cause" is synonymous with "probable cause" under Rule 41(c) of the North Dakota Rules of Criminal Procedure and that a showing that evidence "may be quickly and easily disposed of" is sufficient to establish probable cause for a nighttime search. *Knudson*, 499 N.W.2d at 875 (citing State v. Berger, 285 N.W.2d 533, 538-39 (N.D. 1979) (holding that a belief that evidence will probably be removed or destroyed, because easily disposed of, establishes reasonable cause to justify a nighttime search)). It then agreed with the issuing magistrate's decision to give "little, if any, weight to [the officer's] concern over the presence of firearms and the dog." *Id.*

76. 520 U.S. 385 (1997).

77. Richards v. Wisconsin, 520 U.S. 385, 396 (1997).

78. *Id.* at 390 (citing State v. Richards, 549 N.W.2d 218, 225 (1996)). The Court noted that

category of criminal behavior presents two serious problems.[79] The first is overgeneralization.[80] While many drug investigations present risks to officer safety and evidence preservation, not every investigation presents those risks to the extent sufficient to justify a no-knock warrant.[81] The second is the ease with which similar exceptions could be made for any category of criminal investigation in which officer safety or evidence preservation was at risk.[82] The Court thus held that a no-knock entry is justified only when law enforcement officers have "a reasonable suspicion that knocking and announcing their presence . . . would be dangerous or futile" or may allow evidence to be destroyed.[83] Although the *Richards* Court did not exclude the evidence obtained pursuant to the warrant, its holding suggests that exclusion would be the remedy under the exclusionary rule created by the Supreme Court.[84]

B. THE EXCLUSIONARY RULE

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[85]

Nowhere in its text does the Fourth Amendment provide a remedy for its violation, much less a remedy requiring the exclusion of evidence obtained as a result of that violation.[86] Therefore, the Supreme Court has

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several other state courts—including North Dakota—had adopted similar rules. *Id.* at 390-91 n.1 (citing *Loucks*, 209 N.W.2d at 777-78).

79. *Id.* at 392.

80. *Id.* at 393.

81. *Id.*

82. *Id.* at 394.

83. *Id.*

84. *Id.* at 396 (affirming denial of the motion to suppress on the ground that the officers' conduct was based on a reasonable suspicion that the drugs would be destroyed, making it constitutional under the Fourth Amendment).

85. U.S. CONST. amend. IV.

86. *Id.* Historians believe this is because the framers of the United States Constitution drafted the Fourth Amendment as protection against both general warrants and writs of assistance. *See* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369 (1983) (discussing the history of the Fourth Amendment). The framers had no experience with warrantless searches, and thus they believed that the Fourth Amendment, by providing "a framework for the issuance of search warrants," provided the necessary protection against unconstitutional searches. *See* Richard E. Hillary II, *Arizona v. Evans and the Good Faith Exception to the Exclusionary Rule: The Exception is Swallowing Up the Rule*, 27 U. TOL. L. REV. 473, 477 (1996) (discussing the framers' intent in drafting the Fourth Amendment).

developed the exclusionary rule as the remedy the Fourth Amendment does not expressly provide.[87]

1. *The Origin and Development of the Exclusionary Rule*

The exclusionary rule—in its constitutional context—provides that evidence obtained in violation of a person's constitutional rights is inadmissible as evidence against that person.[88] The exclusionary rule has its foundation in three Supreme Court cases: *Boyd v. United States*,[89] *Adams v. New York*,[90] and *Weeks v. United States*.[91]

In 1886, the Supreme Court in *Boyd* held that compelling the production of a person's private books and papers as evidence is a violation of both the Fourth and Fifth Amendments.[92] In its reasoning, the Court discussed an "intimate relation" between the Fourth and the Fifth Amendments, since "the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself."[93] Compelling the production of a person's private books and papers in a civil forfeiture suit, the Court determined, "is compelling [that person] to be a witness against himself, within the meaning of the Fifth Amendment to the [C]onstitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment."[94]

In 1904, the Supreme Court in *Adams* held that courts need not inquire into how evidence was obtained, as long as the evidence is "pertinent to the issue" being decided.[95] The *Adams* court distinguished

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87. *See generally* Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that evidence obtained in violation of the Constitution should not have been admitted at trial).

88. *See generally* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence obtained in violation of the Constitution is inadmissible, both in federal and state courts).

89. 116 U.S. 616 (1886).

90. 192 U.S. 585 (1904).

91. 232 U.S. 383 (1914).

92. Boyd v. United States, 116 U.S. 616, 634-35 (1886). Although the Court characterized the proceeding as being criminal in nature, *Boyd* in fact involved a civil forfeiture proceeding. *Id.* at 634. Thus, though the act under which the proceeding was brought "expressly exclude[d] criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures)," the act was "within the spirit of both" the Fourth and Fifth Amendments. *Id.* at 633.

93. *Id.*

94. *Id.* at 634-35.

95. Adams v. New York, 192 U.S. 585, 594-95 (1904). In *Adams*, police officers executed a warrant authorizing the search of the defendant's office for "policy slips" (lottery tickets). *Id.* at 588. Along with approximately 3,500 policy slips, the officers seized "certain other papers . . . for the purpose of identifying certain handwriting of the defendant . . . and also to show that the papers belonged to the defendant and were in the same custody as the policy slips." *Id.* The defendant claimed that "other papers" taken in a search for instruments of crime were not admissible into evidence. *Id.* at 598. The Court rejected this argument with what is best described as a "plain view seizure" analysis. *Id.*; *see generally* Horton v. California, 496 U.S. 128, 134 (1990) (reaffirming that warrantless sei

Boyd by reading it to hold merely that "one can[not] be compelled to produce his books and papers in a suit which seeks the forfeiture of his estate on pain of having the statements of government's counsel as to the contents thereof taken as true and used as testimony for the government."[96] Finding no violation of either the Fourth or the Fifth Amendment, the Court determined that the issue before it was one of evidence, not constitutional law.[97] As such, the challenged evidence, being "pertinent to the issue," was admissible.[98]

Ten years later, the Supreme Court in *Weeks* held that private letters and papers illegally obtained must be returned to the owner if the accused has made a timely application for their return.[99] The *Weeks* Court distinguished *Adams* on the ground that, while Adams' objection to the introduction of evidence did not come until trial, Weeks filed a petition for the return of his property before trial.[100] As such, the issue was whether private letters and papers, seized without a warrant, can be admitted as evidence when the accused has made a timely application for their return.[101] The Court held that allowing private letters and papers to be so used would render the protections of the Fourth Amendment meaningless.[102] "The efforts of the courts," the Court reasoned, "are not to be aided by the sacrifice of [the] great principles . . . embodi[ed] in the fundamental law of the land."[103]

Until the 1920s, the exclusionary rule was narrow in scope, as the broad holding of *Adams*—that any relevant evidence was admissible regardless of the manner in which it was obtained—was narrowly limited by the holdings of *Boyd* and *Weeks*.[104] The further development of the

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zures are valid under certain circumstances). The Court analogized the case before it to the legal seizure—and receipt into evidence—of burglars' tools under a warrant to search for stolen property. *Adams*, 192 U.S. at 598. The Court's application of a plain view seizure analysis appears ill-founded, however, as the Court did not seem to dispute that the "certain other papers" seized had "no relation whatsoever" to the crime alleged. *Id.* at 587-88. Unlike papers having "no relation whatsoever" to a crime, the illegal nature of burglars' tools is readily apparent. *Id.* at 587; *see generally Horton*, 496 U.S. at 136 (holding that one of the requirements for a plain view seizure is that the incriminating nature of the items seized must be "immediately apparent").

96. *Adams*, 192 U.S. at 597.

97. *Id.* at 594.

98. *Id.* at 595-96.

99. Weeks v. United States, 232 U.S. 383, 398 (1914). While the defendant was being arrested at his place of work, other police officers entered the defendant's house without a warrant. *Id.* at 386. They searched the defendant's room and seized "various papers and articles," which they turned over to a United States Marshal. *Id.* Later that day, the marshal, accompanied by police officers (none of whom had a warrant), conducted a second search of the defendant's room, seizing "certain letters and envelopes." *Id.*

100. *Id.* at 396.

101. *Id.* at 393.

102. *Id.*

103. *Id.* The Court's holding was limited to the papers seized by the United States Marshal during the second search. *Id.* at 398. The papers seized by the police officers during the first search were not subject to exclusion under the Fourth Amendment, as "the Fourth Amendment is not directed to individual misconduct of [state] officials." *Id.*

104. *See Weeks*, 232 U.S. at 398; Adams v. New York, 192 U.S. 585, 594-95 (1904); Boyd v.

exclusionary rule is found in another trio of Supreme Court cases: *Silverthorne Lumber Co. v. United States*,[105] *Gouled v. United States*,[106] and *Agnello v. United States*.[107]

In 1920, the Supreme Court in *Silverthorne* held that the Fourth Amendment prohibits not merely "physical possession" of illegally obtained evidence, but also "any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."[108] In *Silverthorne*, the government copied and photographed papers and books it had illegally obtained.[109] The trial court ordered the return of the originals and impounded the copies and photographs.[110] The government then used the information it had obtained to issue subpoenas to produce the originals.[111] The Court held that unless the Fourth Amendment is to be reduced "to a form of words," illegally obtained evidence must "not be used at all."[112]

In 1921, the Supreme Court held in *Gouled* that the *Adams* rule—"that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained"—although important, was merely procedural and "must not be allowed for any technical reason to prevail over a constitutional right."[113] In *Gouled*, the accused did not petition for the return of illegally seized papers until trial, as it was not until one of the papers was entered into evidence that the accused knew the papers had been seized.[114] The Court determined that the accused's objection to the evidence was timely, as it came promptly

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United States, 116 U.S. 616, 634-35 (1886).

105. 251 U.S. 385 (1920).

106. 255 U.S. 298 (1921).

107. 269 U.S. 20 (1925).

108. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920). *Silverthorne* thus gave birth to the "derivative evidence" or "fruit of the poisonous tree" doctrine. *Id.*; *see also* Nardone v. United States, 308 U.S. 338, 341 (1939) (referring to evidence obtained as a result of illegal police activity as "fruit of the poisonous tree"). *Silverthorne* was also the first Supreme Court case to discuss the "independent source" doctrine in detail by stating that "[i]f knowledge of [the illegally obtained facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Silverthorne*, 251 U.S. at 392; *see* discussion *infra* Part II.B.3.

109. *Silverthorne*, 251 U.S. at 391. While the defendants were in custody, federal law enforcement officers, "without a shadow of authority," seized "all of the books, papers, and documents" from the defendants' office. *Id.* at 390.

110. *Id.* at 391.

111. *Id.*

112. *Id.* at 392. The government had argued that the Fourth Amendment "covers the physical possession [of illegally obtained evidence] but not any advantages that the Government can gain" from that evidence. *Id.* at 391.

113. Gouled v. United States, 255 U.S. 298, 312-13 (1921).

114. *Id.* at 304-05. A government representative, who was also a business acquaintance of the defendant, entered the defendant's office under the guise of making a friendly call. *Id.* at 304. While the defendant was absent, the government representative seized several documents without a warrant. *Id.*

upon the first notice to the accused that the government was in possession of the papers.[115] As such, the trial court "should have inquired as to the origin of the . . . evidence."[116]

Finally, in 1925, the Supreme Court in *Agnello* again held that procedural rules (i.e., the *Adams* rule) must not prevail over constitutional rights.[117] In *Agnello*, the accused failed to petition for the return of illegally seized drugs, because he contended that he never possessed them.[118] The Court held it unreasonable to require the accused to petition for the return of property that he maintained he never possessed.[119] Where the government seeks to use evidence obtained in violation of the Fourth Amendment, the person whose rights have been violated may immediately invoke the protection of the Fifth Amendment, without first petitioning for the return of the illegally seized property.[120]

2. *Application of the Exclusionary Rule to the States*

In 1949, the Supreme Court in *Wolf v. Colorado*[121] began the process of applying the exclusionary rule to the states.[122] The Court reasoned that "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is . . . implicit in 'the concept of ordered liberty' and as such is enforceable against the States through the Due Process Clause" of the Fourteenth Amendment.[123] *Wolf*, however, did not make exclusion a mandatory remedy under the Fourteenth Amendment, finding that it was not "an essential ingredient of the right."[124] States were free to adopt other

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115. *Id.* at 305.

116. *Id.* at 313. The Court held that taking the papers violated the Fourth Amendment and that their admission into evidence violated the Fifth Amendment. *Id.* at 305-06.

117. Agnello v. United States, 269 U.S. 20, 34-35 (1925) (citing *Gouled*, 255 U.S. at 313).

118. *Id.* at 33-34. Federal agents arrested the defendant along with several other individuals after an apparent narcotics transaction had taken place. *Id.* at 29. While the defendant was being taken to the police station, other agents executed a warrantless search of the defendant's house and found a can of cocaine. *Id.* The Court rejected an argument that the warrantless search was valid as incident to the arrest. *Id.* at 30. "[T]he right does not extend" beyond "the place where the arrest is made," and the defendant's house was "several blocks distant" from where the arrest took place. *Id.* at 30-31.

119. *Id.* at 34.

120. *Id.*

121. 338 U.S. 25 (1949).

122. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (holding that the Fourth Amendment's protection against unreasonable searches and seizures is enforceable against the states through the Due Process Clause of the 14th Amendment).

123. *Id.* Justice Black, in concurrence, agreed with the majority on this point, repeating his "belief that the 14th Amendment was intended to make the Fourth Amendment in its entirety applicable to the states." *Id.* at 39-40 (Black, J., concurring).

124. *Id.* at 29, 33. Justice Black also agreed with the majority "that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence." *Id.* at 39-40 (Black, J., concurring). Justice Douglas dissented on the ground that a Fourth Amendment without an exclusionary rule would have "no effective sanction." *Id.* at 40 (Douglas, J., dissenting). Justice

remedies, so long as the remedies were "consistently enforced [and] equally effective."[125]

In 1960, the Supreme Court in *Elkins v. United States*[126] overruled what had become known as the "silver platter doctrine," which allowed evidence illegally obtained by state officers to be used at a federal trial.[127] This doctrine stemmed from a combination of two rules: 1) state officers cannot violate the Fourth Amendment and 2) prior to *Elkins*, exclusion of illegally obtained evidence was required only for violations of the Fourth, not the Fourteenth, Amendment.[128] The Court in *Elkins* found no logical distinction between evidence seized in violation of the Fourth Amendment and evidence seized in violation of the Fourteenth Amendment.[129] It further reasoned that a rule which required federal courts to differentiate on such a basis would be "curiously ambivalent" and would rest upon an arbitrary basis.[130] *Elkins* held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated . . . the Fourth Amendment is inadmissible . . . in a federal criminal trial."[131]

Rutledge agreed with Justice Douglas that "the [Fourth] Amendment without the [exclusionary] sanction is a dead letter." *Id.* at 47 (Rutledge, J., dissenting). Justice Rutledge was of "[t]he view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained." *Id.* at 48.

125. *Id.* at 31. Justice Murphy, joined by Justice Rutledge, dissented, arguing that the only alternative to the exclusionary sanction "is no sanction at all." *Id.* at 41 (Murphy, J., dissenting). Justice Murphy went on to expose the weaknesses of the alternate remedies: criminal prosecution of violators would require unrealistic levels of self-scrutiny on the part of government prosecutors, and trespass actions will ordinarily result in no or minimal damages, even if the aggrieved party prevails. *Id.* at 42-44.

126. 364 U.S. 206 (1960).

127. Elkins v. United States, 364 U.S. 206, 208 (1960). The Court overruled the silver platter doctrine by invoking its supervisory power, which allows the Court to formulate rules of evidence to be applied in federal criminal prosecutions. *Id.* at 216.

128. *Id.* at 210-13. The silver platter doctrine did not apply where state officials acted in cooperation with federal officials or where state officials acted on behalf of the United States. *Id.* Technically, after *Elkins*, exclusion of illegally obtained evidence was still required only for violations of the Fourth, not the 14th, Amendment, at least in state courts; it was not until *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), that evidence obtained in violation of the 14th Amendment became inadmissible in state courts. *See* discussion *infra* Part II.B.2.

129. *Elkins*, 364 U.S. at 215. Justice Frankfurter, joined by Justices Clark, Harlan, and Whittaker, dissented on the ground that the majority disregarded "the essential difference . . . between the particularities of the first eight Amendments and the fundamental nature of what constitutes due process." *Id.* at 240 (Frankfurter, J., dissenting).

130. *Id.* at 215.

131. *Id.* at 223. Justice Frankfurter further disagreed with the majority's "troublesome and uncertain new criterion"—"the 'unconstitutionality' of [state] police conduct, as distinguished from its mere illegality under state or federal law." *Id.* at 243 (Frankfurter, J., dissenting). The more certain approach, Justice Frankfurter maintained, is to require exclusion on the basis of illegal conduct, "whether or not the rule of conduct flows directly from the constitution." *Id.* at 244. "After all, it makes not the slightest difference from the point of view of the admissibility of evidence whether what a federal officer does is simply illegal or illegal because unconstitutional." *Id.* at 245.

One year later, the Supreme Court in *Mapp v. Ohio*[132] overruled *Wolf* and held that evidence obtained in violation of the Fourth Amendment is also inadmissible in a state court.[133] The Court discussed *Wolf*, deciding that "factual considerations" were the reason the exclusionary rule was not imposed against the states for violations of the Fourth Amendment.[134] In particular, the Court in *Wolf* had been reluctant to interfere with the experience of the states as to other remedies providing for protection against Fourth Amendment violations.[135] *Mapp* recognized "[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies,"[136] and held that the Fourth Amendment is enforceable against the states "by the same sanction of exclusion as is used against the Federal Government."[137]

3. *The Derivative Evidence Rule Exceptions*

The exclusionary rule applies not only to illegally obtained evidence, but all evidence derived from that illegally obtained evidence.[138] In *Nardone v. United States*,[139] this application became known as the "fruit of the poisonous tree" doctrine.[140] Nonetheless, there are three exceptions under which the government may use derivative evidence in

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132. 367 U.S. 643 (1961).

133. Mapp v. Ohio, 367 U.S. 643, 655 (1961). Justice Harlan, dissenting, found fault with the majority's "summary reversal of *Wolf*, without argument." *Id.* at 677 (Harlan, J., dissenting). "[A] case where the question [of overruling *Wolf*] was briefed not at all and argued only extremely tangentially," Justice Harlan maintained, "furnishes a singularly inappropriate occasion for reconsideration of that decision." *Id.* at 674 nn.5 & 6, 676.

134. *Id.* at 650-51 (discussing *Wolf*, 338 U.S. at 27-29).

135. *Id.* at 651-52 (discussing *Wolf*, 338 U.S. at 30-32). Justice Harlan disagreed; in his view "this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in law enforcement." *Id.* at 681 (Harlan, J., dissenting).

136. *Id.* at 652 (citation omitted).

137. *Id.* at 655. The Court further held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments." *Id.* at 657. Justice Black, concurring, reaffirmed his view that "the Fourth Amendment does not itself contain any provision expressly precluding the use of [illegally obtained] evidence," and that it was "extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures." *Id.* at 661-62 (Black, J., concurring). Nonetheless, by considering "the close interrelationship between Fourth and Fifth Amendment," Justice Black found "a constitutional basis . . . which not only justifies but actually requires the exclusionary rule." *Id.* at 662 (citing *Boyd v. United States*, 116 U.S. 616, 633 (1914), which recognized an "intimate relation" between the Fourth and Fifth Amendments). In his dissent, Justice Harlan expressed doubt "that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from 'arbitrary intrusion by the police.'" *Id.* at 682 (Harlan, J., dissenting).

138. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920) (holding that the protection of the Constitution covers not only the physical possession of illegally obtained evidence, but also any advantages that the government can gain over the object of its pursuit by doing the forbidden act).

139. 308 U.S. 338 (1939).

140. Nardone v. United States, 308 U.S. 338, 341 (1939) (holding that the accused has the burden of proving that the evidence against him or her is "fruit of the poisonous tree").

its case in chief: 1) the independent source exception, 2) the inevitable discovery exception, and 3) the attenuation or purged taint exception.[141]

In *Silverthorne Lumber Co.*, a 1920 case, the Supreme Court reasoned that evidence obtained through an independent source could be admissible.[142] The Court explained that facts obtained from illegally obtained evidence are not "sacred and inaccessible," but rather they "may be proved like any others" if the government learns of them through an independent source.[143] In 1978, in *United States v. Ceccolini*,[144] the Court held that illegally obtained evidence is admissible if the government can show that it would have obtained the evidence even without the illegal activity.[145]

The second exception, divulged in the 1984 case of *Nix v. Williams*,[146] provides that illegally obtained evidence is admissible if the evidence inevitably would have been obtained through legal law enforcement techniques.[147] The burden to show inevitable discovery is on the government, which must satisfy a preponderance of the evidence standard.[148] The Court in *Nix* discussed the "functional similarity" between the "inevitable discovery" doctrine and the "independent source" doctrine, in terms of the derivative evidence rule.[149] The premise underlying the derivative evidence rule is that the government should be put in the same position as if there had been no error or violation, but should not be put in a worse position.[150] Just as excluding evidence that could have been obtained from an independent source would put the government in

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141. *See* Fabi, *supra* note 34, at 946-48 (discussing exceptions to the "fruit of the poisonous tree" doctrine).

142. *Silverthorne Lumber* Co., 251 U.S. at 392; *see* discussion *supra* Part II.B.1.

143. *Id.*

144. 435 U.S. 268 (1978).

145. United States v. Ceccolini, 435 U.S. 268, 275-76 (1978). *Ceccolini* involved the discovery of a live witness, as opposed to an inanimate piece of evidence. *Id.* at 270. As such, the Court concluded that "the exclusionary rule should be invoked with much greater reluctance." *Id.* at 280.

146. 467 U.S. 431 (1984).

147. Nix v. Williams, 467 U.S. 431, 443 (1984). In *Nix*, officers obtained incriminating statements from a murder defendant in violation of his right to counsel. *Id.* at 437; *see also* Brewer v. Williams, 430 U.S. 387, 406 (1977) (holding that statements elicited during an interrogation which violated the defendant's right to counsel should not have been admitted into evidence at trial). The statements led the officers to the location of the body of the murder victim. *Nix*, 467 U.S. at 436. The Court held that a large-scale search for the body, which was called off when the defendant disclosed the body's location, would inevitably have found the body. *Id.* at 449-50. Thus, "there [was] no nexus [between the police misconduct and the discovery of the body] sufficient to provide a taint and the evidence [was] admissible." *Id.* at 448.

148. *Nix*, 467 U.S. at 444. Justice Brennan, joined by Justice Marshall dissented, reasoning that because the inevitable discovery doctrine rests on a hypothetical, rather than factual, basis, the government should be required to satisfy a clear and convincing evidence burden of proof before being allowed to use evidence obtained as a result of inevitable discovery. *Id.* at 459 (Brennan, J., dissenting).

149. *Id.* at 443-44.

150. *Id.* at 443.

a worse position, so too would excluding evidence that would inevitably have been discovered.[151]

Finally, in 1939, the Supreme Court in *Nardone* held that, although there may be a causal connection between the illegal activity and the evidence thereby obtained, "such connection may have become so attenuated as to dissipate the taint."[152] This doctrine was applied in *Wong Sun v. United States*,[153] which held that a defendant's admission was not "sufficiently an act of free will to purge the primary taint of unlawful invasion."[154] However, the admission of a second defendant, given "voluntarily several days later," had "become so attenuated as to dissipate the taint."[155]

C. THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE

Until 1984, illegally obtained evidence could be used in the prosecution's case in chief only if it fell within one of the derivative evidence exceptions to the exclusionary rule.[156] If not, use of the evidence was limited to certain forms of impeachment and questioning of a grand jury witness.[157] In 1984, however, the Supreme Court, in the landmark case of *Leon*, created the "good faith" exception to the exclusionary rule,

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151. *Id.* at 443-44.

152. Nardone v. United States, 308 U.S. 338, 341 (1939).

153. 371 U.S. 471 (1963).

154. Wong Sun v. United States, 371 U.S. 471, 486 (1963). The Court rejected the argument that the defendant's statements to federal narcotics agents, made shortly after the agents' illegally entry into the defendant's living quarters and warrantless arrest of the defendant, were "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.* at 486. As such, both the defendant's statements and the narcotics which the agents discovered as a result of those statements, were inadmissible against that defendant. *Id.* at 487-88. Justice Clark, dissenting, submitted that the officers reasonably believed that the first defendant had committed a felony and that his arrest was lawfully justified to prevent his fleeing the officers. *Id.* at 503 (Clark, J., dissenting). Therefore, because there was no "poisonous tree" and therefore no "fruit of the poisonous tree," the statements and the narcotics were admissible against the first defendant. *Id.*

155. *Id.* at 491 (quoting *Nardone*, 308 U.S. at 341). The narcotics were also admissible against the second defendant, as the agents' seizure of the narcotics "invaded no right of privacy of person or premises which would entitle [the second defendant] to object to its use at trial." *Id.* at 492.

156. *See* Nix v. Williams, 467 U.S. 431, 442-44 (1984) (discussing the inevitable discovery exception); *Wong Sun*, 371 U.S. at 486 (applying the attenuation or purged taint exception); Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385, 392 (1920) (discussing the independent source exception).

157. *See* United States v. Havens, 446 U.S. 620, 627 (1980) (holding that illegally obtained evidence may be used to impeach statements made by defendants on cross examination); United States v. Calandra, 414 U.S. 338, 351-52 (1974) (holding that a grand jury witness cannot refuse to answer questions on the ground that they were based on illegally obtained evidence); Walder v. United States, 347 U.S. 62, 65 (1954) (holding that illegally obtained evidence may be used to impeach contradictory statements made by defendants on direct examination).

which allowed the use of illegally obtained evidence in the prosecution's case in chief under certain circumstances.[158]

1. *The United States v. Leon Decision*

In *Leon*, the Supreme Court held that evidence obtained in reasonable reliance on a warrant issued by a neutral and detached magistrate is admissible in the prosecution's case in chief, even if the warrant is subsequently held to be invalid.[159] The Court reaffirmed its rationale from an earlier decision, *United States v. Calandra*,[160] holding that the exclusionary rule is "a judicially designed remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[161]

On the basis of this deterrence rationale, the Court provided three reasons why the exclusionary rule should not apply to judges and magistrates, but only to law enforcement officers.[162] First, the exclusionary rule was not designed to punish judge and magistrate error, but rather "to deter police misconduct."[163] Second, although some judges and magistrates are nothing more than "rubber stamps" for the police, this problem was not significant enough to apply "the extreme sanction of exclusion."[164] No evidence existed to suggest an inclination on the part of judges and magistrates to "ignore or subvert the Fourth Amendment."[165] Third, judges and magistrates ideally are impartial and therefore they cannot be expected to be deterred by the possibility that a certain piece of evidence will be excluded.[166]

As to the application of the exclusionary rule to law enforcement officers, *Leon* held that the exclusionary rule should only be applied where its purposes will be furthered, where it will "alter the behavior of individual law enforcement officers or the policies of their departments."[167] Such circumstances do not exist, the Court reasoned, where law enforcement officers reasonably believe their conduct was not in violation of the Fourth Amendment.[168] This is particularly true, the

158. United States v. Leon, 468 U.S. 897, 922-23 (1984). Both *Nix* and *Leon* were decided in 1984; *Nix* was decided on June 11, but *Leon* was not decided until July 5. *See Leon*, 468 U.S. at 897; *Nix*, 467 U.S. at 431.

159. *Leon*, 468 U.S. at 913, 922.

160. 414 U.S. 338 (1974).

161. *Leon*, 468 U.S. at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

162. *Id.* at 916.

163. *Id.*

164. *Id.* at 916 n.14.

165. *Id.* at 916.

166. *Id.* at 916 n.15.

167. *Id.* at 918.

168. *Id.* (quoting United States v. Peltier, 422 U.S. 531, 539 (1975) (discussing the proposition that

Court continued, where law enforcement officers act "with objective good faith" and within the scope of a search warrant issued by a judge or magistrate.[169] The judge or magistrate, not the law enforcement officer, has the responsibility to determine the existence of probable cause and to prepare a warrant in conformity with the Fourth Amendment.[170] Applying the exclusionary rule would therefore penalize the law enforcement officer, not for the officer's own error, but for that of the judge or magistrate.[171] Such a penalty "cannot logically contribute to the deterrence of Fourth Amendment violations."[172]

Leon also set forth four situations to which the good faith exception would not apply.[173] The first is when the issuing judge or magistrate was misled by information, the falsity of which the affiant knew or recklessly disregarded.[174] Second, when the issuing judge or magistrate failed to act in a neutral and detached manner, and instead acted as "an adjunct law enforcement officer," good faith will not save the warrant.[175] Third, there can be no good faith when the affidavit on which the warrant was based was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[176] Finally, good faith cannot apply when the warrant was "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."[177]

Justice Blackmun wrote a concurring opinion in which he agreed with the majority that the exclusionary rule is not "constitutionally compelled" by the Fourth Amendment.[178] He then discussed the empirical judgment upon which the majority opinion was based; namely, that exclusion does not significantly affect the conduct of "officers act[ing] in objectively reasonable reliance on search warrants."[179] He warned, however, that because the majority opinion rested upon an empirical judgment, the assumptions upon which the opinion was based

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the deterrence rationale "necessarily assumes" willful, or at least negligent, violation of the Fourth Amendment)).

169. *Id.* at 920-21.

170. *Id.* at 921.

171. *Id.*

172. *Id.*

173. *Id.* at 923.

174. *Id.*

175. *Id.* (quoting Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-27 (1979)).

176. *Id.* (quoting Brown v. Illinois, 442 U.S. 590, 610-11 (1975)).

177. *Id.*

178. *Id.* at 927 (Blackmun, J., concurring).

179. *Id.* Justice Blackmun acknowledged "the shortage of hard data concerning the behavior of police officers in the absence of [the exclusionary] rule." *Id.* Therefore, according to Justice Blackmun, the Court's empirical judgment was unavoidable in light of the Court's responsibility to decide the issue presented to it. *Id.*

"cannot be cast in stone."[180] The scope of the exclusionary rule must change as judicial understanding of the effects of the rule changes.[181]

Justice Brennan, joined in dissent by Justice Marshall, attacked the deterrence rationale underlying the exclusionary rule.[182] Applying the deterrence rationale only to law enforcement officers ignores the fact that judges, when they admit illegally obtained evidence, engage in a single Fourth Amendment violation.[183] Brennan also attacked the "cost of excluding reliable evidence" argument underlying the deterrence rationale.[184] First, the loss of reliable evidence is the price of the Fourth Amendment itself, not the cost of the exclusionary rule.[185] Second, the mere attempt to determine, honestly or accurately, the costs and benefits of the exclusionary rule is nearly impossible.[186] Even if the deterrence rationale were plausible, its intended application is as a systematic deterrence against law enforcement agents generally, not as a specific deterrence against law enforcement officers individually; therefore, a good faith exception to the exclusionary rule is erroneous.[187]

Justice Brennan also warned that the majority's decision would have several "grave consequences."[188] First, the ruling was an implicit message to judges and magistrates that their mistakes will no longer have any significant consequence.[189] Second, the ruling "completely vitiated" any previously existing incentive to adequately establish probable cause.[190] Third, the ruling could not be justified with *Illinois v. Gates*,[191]

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180. *Id.* at 927-28.

181. *Id.* at 928.

182. *Id.* at 929-60 (Brennan, J., dissenting).

183. *Id.* at 933. Brennan argued:

> [I]f the [Fourth] Amendment is to have any meaning, police and the courts cannot be regarded as constitutional strangers to each other; because the evidence-gathering role of the police is directly linked to the evidence-admitting function of the courts, an individual's Fourth Amendment rights may be undermined as completely by one as by the other.

Id. at 938 (citing Weeks v. United States, 232 U.S. 383, 392-93 (1914)).

184. *Id.* at 940-43.

185. *Id.* at 941. Generally, it is assumed that had the law enforcement officer simply abided by the Fourth Amendment in the first place, the same evidence would not have been obtained. *Id.* at 941 n.8 (citation omitted).

186. *Id.* at 942. Even where empirical data are available, the benefits of the exclusionary rule are significantly indeterminable, and the costs are less substantial than critics suggest. *Id.*

187. *Id.* at 953 & n.12 (citation omitted). Justice Brennan explained that exclusion of illegally obtained evidence demonstrates society's interest in punishing Fourth Amendment violations, which in turn encourages the incorporation of Fourth Amendment ideals into the policies and value systems of law enforcement agencies. *Id.* at 954. Therefore, application of the deterrence rationale to good faith violations will still have a significant deterrent effect by encouraging greater care and attention in applying for and reviewing warrants. *Id.* at 955.

188. *Id.* at 956.

189. *Id.* In other words, Justice Brennan maintained, if the warrant is valid, the evidence is admissible; if the warrant is invalid, but law enforcement officers rely on it in good faith, the evidence is still admissible. *Id.*

190. *Id.* at 957. So long as a warrant was issued under circumstances that were not "entirely un

in which the Court relaxed the standard for assessing probable cause.[192] The *Gates* and *Leon* standards "overlap so completely" that the majority's good faith exception could only apply where there was "objectively reasonable reliance upon an objectively unreasonable warrant," a concept Justice Brennan found "mindboggling."[193]

Justice Stevens wrote a separate dissent, expressing his view that "an official search and seizure cannot be both 'unreasonable' and 'reasonable' at the same time."[194] Without probable cause, there can be no reasonable reliance.[195] Prior to the majority's opinion, the law on this issue was well-settled: The mere issuance of a warrant does not guarantee that the ensuing search and seizure is reasonable.[196] Justice Stevens pointed to the fact that magisterial authorization of general warrants did not make the colonial officers' searches and seizures "reasonable."[197]

2. *State Response to United States v. Leon*

The Supremacy Clause of the United States Constitution requires states to follow federal precedent as the minimum protection provided to a citizen.[198] However, states are free to provide greater protection under their state constitutions than is provided under the federal constitution.[199] The good faith exception reduces the protection afforded by the exclusionary rule; therefore, states are free to accept or reject the good faith exception as a matter of state constitutional law.[200] Eleven states, as well as the District of Columbia, have adopted a good faith exception under their state constitution through judicial opinion.[201] Five states have

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reasonable," courts would not need to review the conduct of law enforcement officers acting in accordance with that warrant. *Id.*

191. 462 U.S. 213 (1983).

192. *Leon*, 468 U.S. at 958 (discussing Illinois v. Gates, 462 U.S. 213, 238 (1983) (adopting a "totality of circumstances" approach to determine probable cause)).

193. *Id.* at 958-59.

194. *Id.* at 960 (Stevens, J., dissenting). Justice Stevens dissented from the judgment in *Leon* and concurred in the judgment in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). *Id.*

195. *Id.* at 966-67.

196. *Id.* at 969-70.

197. *Id.* at 972.

198. U.S. CONST. art. VI, cl. 2 (declaring that states "shall be bound" by "[the] Constitution and the Laws of the United States which shall be made in Pursuance thereof").

199. *See generally* Cooper v. California, 386 U.S. 58, 62 (1967) (recognizing "the State's power to impose higher standards on searches and seizures than required by the Federal Constitution").

200. *See generally id.*

201. The 11 states are California (People v. Camarella, 818 P.2d 63, 65 (Cal. 1991); People v. Helmquist, 207 Cal. Rptr. 718, 723 (Cal. Ct. App. 1984)); District of Columbia (United States v. Edelen, 529 A.2d 774, 775 (D.C. Ct. App. 1987)); Florida (Bernie v. State, 524 So. 2d 988, 990-91 (Fla. 1988)); Iowa (State v. Beckett, 532 N.W.2d 751, 755 (Iowa 1995)); Kentucky (Crayton v. Commonwealth, 846 S.W.2d 684, 689 (Ky. 1992)); Louisiana (State v. Ebey, 491 So. 2d 498, 500 (La. Ct. App. 1986)); Missouri (State v. Brown, 708 S.W.2d 140, 145 (Mo. 1986) (discussing State v. Sweeney, 701 S.W.2d 420, 426 (Mo. 1985))); Montana (State v. Peterson, 741 P.2d 392, 394 (Mont. 1987) (dissent)); Ohio (State v. Wilmoth, 490 N.E.2d 1236, 1238-39 (Ohio 1986)); South Dakota (State v. Saiz, 427 N.W.2d 825, 828 (S.D. 1988)); Virginia (McCary v. Commonwealth, 321 S.E.2d 637, 644 (Va. 1984)); and Wisconsin (State v. Ward, 604 N.W.2d 517, 531 (Wis. 2000)).

adopted a good faith exception by statute.[202] Fourteen states have rejected a good faith exception under their state constitution.[203] Twenty states have either not addressed or declined to rule on the issue.[204]

The states that have adopted a good faith exception under their state constitutions have generally adopted the reasoning of the *Leon* majority, with little, if any, additional analysis.[205] Often, this results from a judicial

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202. The five states are Arizona (ARIZ. REV. STAT. ANN. § 13-3925 (West 1989 & Supp. 1999)); Colorado (COLO. REV. STAT. ANN. § 16-3-308 (1999)); Illinois (725 ILL. COMP. STAT. ANN. 5/114-12) (West 1993 & Supp. 1999)); Indiana (IND. CODE ANN. § 35-37-4-5 (Michie 1998 & Supp. 1999)); and Texas (TEX. CRIM. P. CODE ANN. ART. 38.23(b) (Vernon Supp. 2000)).

203. The 14 states are Connecticut (State v. Marsala, 579 A.2d 58, 60 (Conn. 1990)); Georgia (Gary v. State, 422 S.E.2d 426, 428 (Ga. 1992)); Hawaii (State v. Lopez, 896 P.2d 889, 902 (Haw. 1995)); Idaho (State v. Guzman, 842 P.2d 660, 667 (Idaho 1992)); Michigan (People v. Sundling, 395 N.W.2d 308, 315 (Mich. Ct. App. 1986) (overruled on other grounds)); New Hampshire (State v. Canelo, 653 A.2d 1097, 1105 (N.H. 1995)); New Jersey (State v. Novembrino, 519 A.2d 820, 857 (N.J. 1987)); New Mexico (State v. Gutierrez, 863 P.2d 1052, 1053 (N.M. 1993)); New York (People v. Bigelow, 488 N.E.2d 451, 455 (N.Y. 1985)); North Carolina (State v. Carter, 370 S.E.2d 553, 562 (N.C. 1988)); Oklahoma (Solis-Avila v. State, 830 P.2d 191, 192 (Okla. Crim. App. 1992)); Pennsylvania (Commonwealth v. Edmunds, 586 A.2d 887, 905-06 (Pa. 1991)); Vermont (State v. Oakes, 598 A.2d 119, 121 (Vt. 1991)); and Washington (State v. Crawley, 808 P.2d 773, 776 (Wash. Ct. App. 1991)).

204. The 20 states are Alabama (State v. Hill, 690 So. 2d 1201, 1207 n.3 (Ala. 1996)); Alaska (Jackson v. State, 926 P.2d 1180 (Alaska Ct. App. 1996)); Arkansas (Jackson v. State, 722 S.W.2d 831, 833 (Ark. 1987) (deciding the good faith exception under the federal, not state constitution)); Delaware (State v. Fleming, Nos. 93-05-0200 to -0205, 0421, 1994 WL 233938, at *4 (Del. Super. Ct. May 11, 1994)); Kansas (State v. Longbine, 896 P.2d 367, 372-73 (Kan. 1995) (resolving the issue under the federal constitution)); Maine (State v. Diamond, 628 A.2d 1032, 1034 (Me. 1993) (resolving the issue under the federal constitution)); Maryland (Connelly v. State, 589 A.2d 958, 966-67 (Md. 1991) (deciding the good faith exception under the federal, not state constitution)); Massachusetts (Commonwealth v. Hecox, 619 N.E.2d 339, 342 n.6 (Mass. App. Ct. 1993) (holding that "Massachusetts has not adopted under State law the 'good faith' doctrine of United States v. Leon") (citing Commonwealth v. Pellegrini, 539 N.E.2d 514, 517 (Mass. 1989))); Minnesota (State v. Zanter, 535 N.W.2d 624, 634 (Minn. 1995) (declining to address the applicability of a good faith exception under the state constitution)); Mississippi (Stringer v. State, 491 So. 2d 837, 841 (Miss. 1986) (in dissent)); Nebraska (State v. Johnson, 589 N.W.2d 108, 117-18 (Neb. 1999) (deciding the good faith issue according on federal, not state, constitutional grounds)); Nevada (Pointe v. State, 717 P.2d 38, 42-43 (Nev. 1986) (overruled on other grounds) (resolving the issue according to the federal constitution)); North Dakota (State v. Herrick, 1999 N.D. 1, ¶ 27, 588 N.W.2d 847, 852 (*Herrick II*)); Oregon (State v. Tanner, 745 P.2d 757, 758-59 (Or. 1987)); Rhode Island (State v. Nunez, 634 A.2d 1167, 1171 (R.I. 1993) (declining "to consider whether [to] adopt the 'good faith exception'")); South Carolina (State v. Austin, 409 S.E.2d 811, 816-17 (S.C. 1991)); Tennessee (State v. Keith, 978 S.W.2d 861, 871 (Tenn. 1998) (holding that Tennessee "[has] not yet addressed the good faith exception") (in dissent)); State v. Taylor, No. 86-144-III, 1987 WL 25417, at **6-8 (Tenn. Crim. App. Dec. 4. 1987)); Utah (State v. Thompson, 810 P.2d 415, 420 (Utah 1991) (leaving "for another day the issue of whether to apply in appropriate circumstances a good faith exception to the exclusionary rule to article I, section 14 of the Utah Constitution")); West Virginia (State v. Lilly, 461 S.E.2d 101, 111 n.16 (W. Va. 1995)); and Wyoming (Southworth v. State, 913 P.2d 444, 449 (Wyo. 1989) (declining "to address the issue of whether [Wyoming] should adopt the good faith exception to the exclusionary rule")).

205. *See generally Crayton*, 846 S.W.2d at 689 (adopting the deterrence rationale of *Leon*); *Ebey*, 491 So. 2d at 500 (adopting the deterrence rationale of *Leon*); *Brown*, 708 S.W.2d at 145 (modifying, implicitly, Missouri's judicially created exclusionary rule to allow for *Leon*'s good-faith exception); *Wilmoth*, 490 N.E.2d at 1247 (adopting the deterrence rationale of *Leon*); *Saiz*, 427 N.W.2d at 828 (finding *Leon* persuasive and adopting its deterrence rationale); *McCary*, 321 S.E.2d at 644 (embracing the recently announced "good faith" exception to the exclusionary rule); *Ward*, 604 N.W.2d at 530 (discussing the development of the exclusionary rule "to deter unreasonable searches

intent to interpret the unreasonable search and seizure provision of the state constitution consistently with the Fourth Amendment.[206] Two states—California and Florida—are required to adopt this interpretation under their state constitutions.[207]

Not all states accept the good faith doctrine.[208] The Supreme Court of Pennsylvania, in *Commonwealth v. Edmunds*,[209] rejected the good faith exception under the Pennsylvania Constitution.[210] *Edmunds* held that adopting a good faith exception under state law "would frustrate the guarantees embodied in Article I, Section 8 of [the Pennsylvania Constitution]."[211] To reach its holding, the *Edmunds* court distinguished the purpose of the exclusionary rule in Pennsylvania from the United State Supreme Court's "metamorphosed view" of the exclusionary rule.[212] In *Calandra*, the United States Supreme Court began to suggest that the purpose of the exclusionary rule "is not to redress the injury to the privacy of the search victim [but, rather,] to deter future unlawful police conduct."[213] In *Leon*, the Court held that the sole purpose for the exclusionary rule was to deter police misconduct and that the rule was

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and seizures").

206. *See generally Beckett*, 532 N.W.2d at 755 (recognizing the court's interest in harmonizing its constitutional decisions with those of the Supreme Court and its consistent refusal to provide greater protection against searches and seizures under its state constitution than under the Fourth Amendment).

207. *See* People v. Camarella, 818 P.2d 63, 64 (Cal. 1991) (holding that, by virtue of Article I, Section 28(d) of the California Constitution, the good faith issue is "purely one of federal constitutional law"); Bernie v. State, 524 So. 2d 988, 990-91 (Fla. 1988) (holding that, by virtue of Article I, Section 12 of the Florida Constitution, the court is "bound to follow the interpretations of the United States Supreme Court with relation to the [F]ourth [A]mendment, and provide no greater protection than those interpretations"). Article I, Section 28(d) of the California Constitution provides, in relevant part, that "[e]xcept as provided by statute hereafter enacted . . . , relevant evidence shall not be excluded in any criminal proceeding . . ." CAL. CONST. art. I, § 28(d). Article I, Section 12 of the Florida Constitution provides, in relevant part, that

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, . . . shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

FLA. CONST. art. I, § 12.

208. *See supra* note 203.

209. 586 A.2d 887 (Pa. 1991).

210. Commonwealth v. Edmunds, 586 A.2d 887, 905-06 (Pa. 1991). *Edmunds* involved a search warrant that was facially invalid, in that the affidavit did not state, with the requisite specificity, the date the informants observed the drugs sought by the police. *Id.* at 888. The trial court nonetheless allowed the admission of the evidence obtained through the execution of the warrant. *Id.* Applying the rationale of *Leon*, the trial court held that the officers relied on the warrant in good faith. *Id.* The superior court, also relying on *Leon*, affirmed. *Id.*

211. *Id.* at 895. Article I, Section 8 is the provision of the Pennsylvania Constitution which provides security against unreasonable searches and seizures. PA. CONST. art I, § 8. The court determined that, although Article I, Section 8 "is similar to the Fourth Amendment of the United States Constitution, we are not bound to interpret the two provisions as if they were mirror images." *Edmunds*, 586 A.2d at 895 (citation omitted).

212. *Edmunds*, 586 A.2d at 897.

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

"a judicially created remedy . . . rather than a personal constitutional right."[214] Cases in Pennsylvania, however, manifest an unshakable link between Article I, Section 8 of the Pennsylvania Constitution and "the implicit right to privacy."[215]

Other states have applied a rationale similar to that in *Edmunds* to reject a good faith exception under their state constitutions.[216] Still others have agreed with Justice Brennan's dissent in *Leon*, criticizing the majority's deterrence rationale.[217] One state, Georgia, has statutorily rejected a good faith exception under state law.[218]

The states that have declined to rule on the issue of a good faith exception under their state constitutions have generally done so because the argument—that the state constitution provides greater protection than the federal constitution—was not raised on appeal and was therefore not properly before the court.[219]

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214. United States v. Leon, 468 U.S. 897, 906, 916 (1984).

215. *Edmunds*, 586 A.2d at 898 (citations omitted).

216. *See generally* State v. Lopez, 896 P.2d 889, 902 (Haw. 1995) (holding that protecting the right of privacy is a purpose of the exclusionary rule equally valuable to deterring governmental violations); State v. Canelo, 653 A.2d 1097, 1105 (N.H. 1995) (holding that "the good faith exception is incompatible with and detrimental to [the] strong right of privacy inherent in part I, article 19 [of the New Hampshire Constitution]") (citing *Edmunds*, 586 A.2d at 899); State v. Gutierrez, 863 P.2d 1052, 1053 (N.M. 1993) (holding that "the good-faith exception is incompatible with the guarantees of the New Mexico Constitution that prohibit unreasonable searches and seizures"); State v. Crawley, 808 P.2d 773, 776 (Wash. Ct. App. 1991) ("The important place of the right to privacy in [the Washington Constitution] seems to us to require that whenever the right is unreasonably violated, the [exclusionary] remedy must follow") (citation omitted).

217. *See generally* State v. Marsala, 579 A.2d 58, 63-68 (Conn. 1990) (criticizing the majority opinion in *Leon*); State v. Guzman, 842 P.2d 660, 671-77 (Idaho 1992) (criticizing the majority opinion in *Leon*); People v. Sundling, 395 N.W.2d 308, 314-15 (Mich. Ct. App. 1986) (questioning "the utility of the good-faith exception") (citing *Leon*, 468 U.S. at 949-51) (Brennan, J., dissenting); State v. Oakes, 598 A.2d 119, 126 (Vt. 1991) (finding unpersuasive "the [Supreme] Court's conclusions in *Leon* concerning the costs and benefits of a good faith exception") (citing *Leon*, 468 U.S. at 943 (Brennan, J., dissenting)).

218. *See* Gary v. State, 422 S.E.2d 426 428 (Ga. 1992) (citing GA. CODE ANN. § 17-5-30 (Harrison 1998 & Supp. 1999)). Official Code of Georgia Annotated Section 17-5-30 provides, in relevant part, that:

> (a) A defendant aggrieved by an unlawful search and seizure may move the court . . . to suppress as evidence anything so obtained on the grounds that:
>
> . . . .
>
> (2) [t]he search and seizure with a warrant was illegal because . . . there was not probable cause for the issuance of the warrant . . . .
>
> (b) . . . If the motion is granted the property . . . shall not be admissible in evidence against the movant in any trial.

GA. CODE ANN. § 17-5-30 (Harrison 1998 & Supp. 1999).

219. *See generally* State v. Austin, 409 S.E.2d 811, 816-17 (S.C. 1991). Chief Judge Sanders of the Court of Appeals of South Carolina put it best:

> Because Mr. Austin has not argued for reversal based on Article I, § 10, we cannot answer the question of whether a good faith exception exists under the State Constitution. "[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." Undoubtedly, the question will be answered some day. Regrettably, today is not that day.

Id. (citations omitted). The first *Herrick* case fell into this category. *See* State v. Herrick, 1997 N.D.

Other courts have declined to rule on the issue either because the evidence was admissible on grounds other than good faith, or because the officers' conduct was so unreasonable that the good faith exception would not have applied even had the court adopted a good faith exception. [220]

D. SUMMARY OF LEGAL BACKGROUND

In summary, the knock-and-announce requirement ordinarily requires law enforcement officers to knock and announce their presence and authority before entering a dwelling to execute a search warrant.[221] If they do not do so, and if none of the exceptions to the knock-and-announce requirement applies, the search is unconstitutional, and the

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155, ¶ 26, 567 N.W.2d 336, 344 (*Herrick I*) (declining "to decide the question [of whether we should or should not recognize a good-faith exception] at this time without adequate briefing"). The second *Herrick* case held the evidence *inadmissible* on other than constitutional grounds, so the good faith issue was again left open. *See* State v. Herrick, 1999 N.D. 1, ¶ 27, 588 N.W.2d 847, 852 (*Herrick II*) (holding that because "[t]he issue . . . is a violation of a statute . . . and not a violation of [the state constitution]," the court need not decide whether the state constitution "preclude[s] a good-faith exception").

220. *See generally* State v. Fleming, Nos. 93-05-0200 to -0205, -0421, 1994 WL 233938, at *2 (Del. Super. Ct. May 11, 1994) (upholding the validity of a warrant where only the lack of the officer's signature was in noncompliance); State v. Tanner, 745 P.2d 757, 759 (Or. 1987) ("[T]he search or seizure must violate the defendant's [state constitutional] rights before evidence obtained thereby will be suppressed; a defendant's [state constitutional] rights are not violated merely by admitting evidence obtained in violation of [the state constitution]"). Prior to the *Herrick* cases, North Dakota caselaw fell into this category. *See* State v. Lewis, 527 N.W.2d 658, 663 (N.D. 1995) (deciding that "[e]ven if we were to follow the good-faith exception, an issue we have yet to decide," it was not "objectively reasonable for the officers to rely on the warrant"); State v. Dymowski, 458 N.W.2d 490, 499 n.3 (N.D. 1990) (declining to decide on the good faith issue on the grounds that there was probable cause to issue to warrant and that the lower court did not raise or address the good faith issue); State v. Mische, 448 N.W.2d 415, 422-23 (N.D. 1989) (leaving open the good faith issue on the ground that probable cause was so lacking that the officers could not have reasonably relied on the warrant); State v. Handtmann, 437 N.W.2d 830, 838 n.6 (N.D. 1989) (declining to rule on the good faith issue as it was not argued by the state); State v. Ringquist, 433 N.W.2d 207, 216 n.4 (N.D. 1988) (stating that since probable cause existed, it was unnecessary to decide the good faith issue); State v. Sakellson, 379 N.W.2d 779, 785 n.5 (N.D. 1985) (noting that "*Leon* is of no assistance," since the officers' conduct was not objectively reasonable); State v. Riedinger, 374 N.W.2d 866, 876 n.10 (N.D. 1985) (overruled on other grounds) (noting that it was "[un]necessary to consider the 'good faith' exception" since the challenged warrants were validly based on evidence obtained during a lawful, "plain view" seizure); State v. Thompson, 369 N.W.2d 363, 370-72 (N.D. 1985) (discussing the *Leon* analysis and finding that "even if we were to apply . . . the Leon good-faith rule," it was not reasonable for the officer to rely on the warrant); State v. Ronngren, 361 N.W.2d 224, 230 n.1 (N.D. 1985) (noting that since probable cause existed, it was unnecessary to rule on the good faith issue); State v. Gronlund, 356 N.W.2d 144, 146 (N.D. 1984) (concluding that the officers' reasonable reading of a search warrant was "in keeping with" the *Leon* good faith exception emphasizing reasonable reliance); State v. Metzner, 338 N.W.2d 799, 800 n.1 (N.D. 1983) (declining, prior to *Leon*, to adopt a good faith exception on the grounds that probable cause existed to issue the warrant and that the issue was neither argued in the lower court nor raised by the State on appeal).

221. *See generally* Wilson v. Arkansas, 514 U.S. 927, 931 (1995) (holding that the knock-and announce requirement is an element in determining whether a search or seizure is reasonable under the Fourth Amendment).

evidence obtained thereby will normally be inadmissible in the prosecution's case in chief, unless one of the exceptions to the exclusionary rule applies.[222] Prior to *Leon*, the exceptions to the exclusionary rule were premised on the theory that the illegal search or seizure did not contribute to the discovery of the challenged evidence.[223] *Leon*, however, created an exception to the exclusionary rule which makes irrelevant the fact that the illegal search or seizure did in fact result in the discovery of the challenged evidence.[224] So long as the search or seizure was conducted in objectively reasonable reliance on a search warrant, issued by a neutral and detached magistrate, the evidence is admissible in the prosecution's case in chief, even if it is later held that the warrant's invalidity rendered the search or seizure unconstitutional.[225]

III. ANALYSIS

Herrick II[226] was decided by a three-to-one majority, which held that the *Leon* good faith exception applied to violations of North Dakota Century Code section 19-03.1-32(3) when the search warrant was issued on a per se basis prior to the *Herrick I* decision.[227] Justice Neumann wrote the majority opinion, which was joined by Justice Sandstrom and Chief Justice VandeWalle.[228] Justice Maring wrote a separate opinion, concurring in part and dissenting in part, in which she stressed the court's need to address the issue of whether to accept or reject the good faith exception under the North Dakota Constitution.[229] Justice Sandstrom wrote a separate concurrence, in which he attacked the basis for Justice Maring's opinion that the court should reject the good faith exception under the North Dakota Constitution.[230]

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222. *See generally Wilson*, 514 U.S. at 935-36 (listing circumstances where law enforcement officers may enter a dwelling without first announcing their presence and authority); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence obtained in violation of the Constitution is inadmissible, both in federal and state courts); Fabi, *supra* note 34, at 946-48 (discussing exceptions to the exclusionary rule).

223. *See* Nix v. Williams, 467 U.S. 431, 442-44 (1984) (discussing the inevitable discovery exception); Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (applying the attenuation or purged taint exception); Silverthorne Lumber Co. v. United States, 251 U.S. 382, 392 (1920) (discussing the independent source exception).

224. *See* United States v. Leon, 468 U.S. 897, 922 (1984) (holding that evidence directly obtained pursuant to an invalid warrant may be admissible at trial).

225. *See id.*

226. 1999 N.D. 1, 588 N.W.2d 847 (*Herrick II*).

227. State v. Herrick, 1999 N.D. 1, ¶ 28, 588 N.W.2d 847, 852 (*Herrick II*). Justice Meschke was a member of the North Dakota Supreme Court when *Herrick II* was argued, but he retired before the court decided the case and took no part in its decision. *Id.* ¶ 30.

228. *Id.* ¶¶ 1-29, 588 N.W.2d at 848-52.

229. *Id.* ¶¶ 39-56, 588 N.W.2d at 853-57.

230. *Id.* ¶¶ 32-38, 588 N.W.2d at 852-53.

A. THE MAJORITY OPINION

The majority decided two separate issues. First, the court determined the appropriate remedy for a violation of North Dakota Century Code section 19-03.1-32(3).[231] Second, the court discussed whether the North Dakota Constitution provides greater protection against unreasonable searches and seizures than the federal constitution.[232]

1. *North Dakota Century Code Section 19-03.1-32(3) and the Appropriate Remedy For Its Violation*

In the first part of its opinion, the North Dakota Supreme Court determined the appropriate remedy for the violation of North Dakota Century Code section 19-03.1-32(3).[233] Although *Herrick II* concerned the violation of a statute, not a constitutional right, the court looked to remedies granted for violations of constitutional rights to determine the appropriate remedy for a violation of North Dakota Century Code section 19-03.1-32(3).[234] In its analysis, the court relied on Professor Wayne R. LaFave's treatise, *Search & Seizure*.[235]

The legislature did not specify a remedy for a violation North Dakota Century Code section 19-03.1-32(3) when it enacted the statute.[236] Nor did the court find any legislative history pertinent to the remedy issue.[237] It was, therefore, the duty of the court to determine the appropriate remedy.[238] Where a statute does not explicitly provide a remedy for its violation, and the guidance of legislative history is unavailable, LaFave suggests that a court determine whether violation of the statute significantly affects a substantial right.[239] Based on *Wilson* and *Richards*, the court determined that North Dakota Century Code section 19-03.1-32(3) "implicates a substantial right under the Fourth Amendment."[240]

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231. *Id.* ¶¶ 8-20, 588 N.W.2d at 849-51.

232. *Id.* ¶¶ 21-27, 588 N.W.2d at 851-52.

233. *Id.* ¶¶ 8-20, 588 N.W.2d at 849-51.

234. *Id.* ¶¶ 10-11, 588 N.W.2d at 849.

235. *Id.* (citing LAFAVE, *supra* note 22, § 1.5(b), at 132-36).

236. *Id.* ¶ 10. Some statutes expressly provide for the exclusion of evidence obtained in violation of the statute, even where a violation of the statute may not also violate the Fourth Amendment. *See* LAFAVE, *supra* note 22, § 1.5(b), at 132 (citing 18 U.S.C.A § 2515, the federal wiretapping and electronic surveillance statute).

237. *Herrick II*, ¶ 11, 588 N.W.2d at 849. If the legislature's view on the appropriate remedy is not explicitly stated in the statute, LaFave advises a court to consider any available legislative history. *See* LAFAVE, *supra* note 22, § 1.5(b), at 133.

238. *Herrick II*, ¶ 10-11, 588 N.W.2d at 849.

239. *See* LAFAVE, *supra* note 22, § 1.5(b), at 133.

240. *Herrick II*, ¶¶ 9-10, 588 N.W.2d at 849 (citing Richards v. Wisconsin, 520 U.S. 385, 396 (11997) (rejecting a "blanket exception to the knock-and-announce requirement for felony drug

The court then considered whether suppression was an appropriate remedy.[241] To obtain a no-knock warrant under North Dakota Century Code section 19-03.1-32(3), law enforcement officers must have evidence sufficient to establish probable cause that giving notice of their authority and purpose would result in the loss of evidence or endanger the safety of the officers; thus, the statute implicates a concern about the quality of evidence.[242] Officers executing a search pursuant to North Dakota Century Code section 19-03.1-32(3) "without notice of [their] authority and purpose, may break open an outer or inner door or window . . ."; thus, the statute also implicates a concern about the manner of entry.[243] Accordingly, the court determined that the proper remedy for violation of North Dakota Century Code section 19-03.1-32(3) is exclusion of the evidence obtained as a result thereof.[244]

The court determined that, because the exclusionary remedy is derived from the Fourth Amendment, it "must also consider" the *Leon* good faith exception.[245] Herrick argued that the affidavit and application for the no-knock warrant were so lacking in indicia of probable cause that a reasonable person could not believe the warrant to be valid.[246] Therefore, Herrick argued, the *Leon* good faith exception did not apply because the officers' reliance on the warrant could not have been objectively reasonable.[247] If the officers' reliance was not objectively reasonable, the *Leon* good faith exception would not apply, and the court would have to exclude the evidence.[248]

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investigations"); Wilson v. Arkansas, 514 U.S. 927, 934 (1995) (holding that the common-law knock-and-announce principle is an element of the Fourth Amendment reasonableness inquiry)). The court did not analyze the "substantial right" issue beyond restating the holdings of *Wilson* and *Richards*, then concluding "it cannot be disputed N.D.C.C. § 19-03.1-32(3) . . . implicates a substantial right under the Fourth Amendment." *Herrick II*, ¶¶ 9-10, 588 N.W.2d at 849 (citing *Richards*, 520 U.S. at 396; *Wilson*, 514 U.S. at 934).

241. *Herrick II*, ¶ 12, 588 N.W.2d at 849.

242. N.D. CENT. CODE § 19-03.1-32(3) (1997 & Supp. 1999).

243. *Id.*

244. *Herrick II*, ¶ 11, 588 N.W.2d at 849. LaFave notes that where the statute "concerns the quality of evidence needed for issuance of the warrant . . . or the manner in which entry is to be gained in order to execute the warrant," suppression is an appropriate remedy for violation of the statute. LAFAVE, *supra* note 22, § 1.5(b), at 136. LaFave explains that "whether the rule or statute exceeds the requirements of the Fourth Amendment" is typically of no consequence when the rule or statute implicates these concerns, as they are "more directly related to Fourth Amendment protections." LAFAVE, *supra* note 22, § 1.5(b), at 136. The court observed that the "probable cause" standard of North Dakota Century Code section 19-03.1-32(3) exceeds the requirements of the Fourth Amendment's "reasonable suspicion" standard. *Herrick II*, ¶ 10, 588 N.W.2d at 849.

245. *Herrick II*, ¶¶ 8-9 588 N.W.2d at 849 (citing United States v. Leon, 468 U.S. 897, 922 (1984) (creating a good faith exception to the exclusionary rule where officers' reliance on a magistrate's determination of probable cause was "objectively reasonable")).

246. *Id.* ¶ 16, 588 N.W.2d at 850.

247. *Id.* (citing *Leon*, 486 U.S. at 923 (holding that suppression remains an appropriate remedy where a warrant is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'")).

248. *See Leon*, 486 U.S. at 923.

The North Dakota Supreme Court disagreed.[249] At the time the warrant was issued, North Dakota's per se drug exception to the knock-and-announce requirement—allowing a no-knock warrant to be issued any time law enforcement officers suspected the presence of drugs—was still valid law.[250] Under that law, the court reasoned, the validity of a no-knock warrant issued in a drug case would not have been questioned.[251] The court determined that the then-valid per se drug exception supplied the officers with indicia of probable cause.[252] As such, the officers' reliance on the no-knock warrant was objectively reasonable.[253] Under federal precedent, therefore, the court determined that the good faith exception applied to the warrant.[254]

2. *The North Dakota Constitution and Whether it Provides Greater Protection Than the Federal Constitution*

In the second part of its opinion, the court addressed whether the North Dakota Constitution provides greater protection than the federal constitution, thus preventing the application of a good faith exception under state law.[255] The court found it to be "axiomatic" that the state constitution may provide greater protection than the federal constitution.[256] However, the interpretation of the state constitution must be based on "the rights and liberties it was created to uphold," not the philosophies of the justices who are responsible for its interpretation.[257]

Relying on an article in the North Dakota Law Review, written by former North Dakota Supreme Court Justice Herbert L. Meschke and Lawrence D. Spears, the court looked to similar provisions in other state

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

250. *Id.* ¶ 18.

251. *Id.*

252. *Id.* ¶ 20, 588 N.W.2d at 850-51.

253. *Id.* at 851. Former North Dakota Supreme Court Justice Herbert L. Meschke maintains that, even before *Herrick I*, federal precedent had "clearly established" that per se drug exceptions to the knock-and-announce requirement were "patently unjustifiable." *See* Herbert L. Meschke, *When Should Ignorance Trump the Constitution? Another Dissent from* Herrick II, 75 N.D. L. REV. 747, 757 (1999) (quoting United States v. Moore, 956 F.2d 843, 850 (8th Cir. 1992)). Accordingly, former Justice Meschke contends that North Dakota law enforcement officers could not have acted in objective, reasonable reliance on a warrant issued pursuant to such a per se rule. *Id.* at 758. As former Justice Meschke correctly reasons, the warrant in *Moore* was upheld because, at the time the warrant was issued, there were no federal precedents holding that per se drug exceptions were unconstitutional. *See Moore*, 956 F.2d at 851; Meschke, *supra*, at 757. Former Justice Meschke states that the *Herrick II* majority "overlooked the real effect of the holding in *Moore*." Meschke, *supra*, at 752.

254. *Herrick II*, ¶ 20, 588 N.W.2d at 851 (citing *Moore*, 956 F.2d at 851 (holding, under the circumstances, that the good faith exception applied to a no-knock warrant issued under a blanket rule permitting no-knock warrants to be issued in all drug cases)).

255. *Id.* ¶¶ 21-27, 588 N.W.2d at 851-52.

256. *Id.* ¶ 22, 588 N.W.2d at 851.

257. *Id.*

constitutions.[258] In particular, it looked to the Supreme Court of Pennsylvania's holding in *Edmunds*, which rejected the good faith exception under the Pennsylvania Constitution.[259] In distinguishing the *Edmunds* holding, the North Dakota Supreme Court noted the differences between Pennsylvania's constitutional history and North Dakota's constitutional history.[260] While acknowledging that privacy is "an important right" under the North Dakota Constitution, the court distinguished North Dakota's constitutional history by concluding that privacy has not been "unequivocally distinguished" as "the major factor" in the application of the exclusionary rule.[261] The court did note its prior decision in *State v. Phelps*,[262] in which it held that the exclusionary remedy furthers the operation of the Fourth Amendment as a safeguard against unwarranted intrusions by the state into personal privacy and dignity.[263] North Dakota precedent, however, did not provide the same "clear guidance" as that provided by Pennsylvania's constitutional history.[264]

Ultimately, the court declined to decide whether the North Dakota Constitution provides greater protection than the federal constitution.[265] The court found that the issue did not involve a violation of the state constitution, but rather a violation of a state statute.[266] As such, the court did not reach the issue whether the state constitution provides greater protection than the Fourth Amendment.[267] Consequently, the court also did not reach the issue whether the North Dakota Constitution precludes a good faith exception to North Dakota's exclusionary rule.[268] The court held only that the *Leon* good faith exception applies to a violation

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258. *Id.* ¶ 24 (discussing Herbert L. Meschke & Lawrence D. Spears, *Digging for Roots: The North Dakota Constitution and the Thayer Correspondence*, 65 N.D. L. REV. 343, 379-80 (1989)). Former Justice Meschke was a member of the North Dakota Supreme Court when he co-authored the *Digging for Roots* article.

259. *Id.* ¶ 25 (discussing Commonwealth v. Edmunds, 586 A.2d 887, 905-06 (Pa. 1991)).

260. *Id.* ¶ 26, 588 N.W.2d at 851-52.

261. *Id.* (citing State v. Wahl, 450 N.W.2d 710, 714 (N.D. 1990); State v. Sakellson, 379 N.W.2d 779, 783 (N.D. 1985) (interpreting North Dakota Century Code section 29-29-08 as requiring a law enforcement officer to give notice of his authority and purpose before entering a dwelling to execute a search warrant)).

262. 286 N.W.2d 472 (N.D. 1979).

263. *Herrick II*, ¶ 26, 588 N.W.2d at 852 (citing State v. Phelps, 286 N.W.2d 472, 475 (N.D. 1979) (holding that the seizure of the defendant's clothing was unreasonable because the seizure was not incident to a lawful arrest and that although the police had probable cause to believe the suspect had committed a crime, the conduct of the police did not constitute "a very limited intrusion" and the evidence sought was not "readily destructible")).

264. *Id.*

265. *Id.* ¶ 27.

266. *Id.*

267. *Id.*

268. *Id.*

of North Dakota Century Code section 19-03.1-32(3), when the violation results from a no-knock warrant issued, pre-*Herrick I*, on a per se basis.[269]

B. JUSTICE MARING'S CONCURRENCE AND DISSENT

Justice Maring wrote a separate opinion, concurring in part and dissenting in part.[270] She dissented because, in her view, the remand in *Herrick I* was clearly based upon constitutional issues.[271] Had the issue been merely one of statutory interpretation, remand would have been unnecessary.[272] It was, therefore, the court's duty to interpret the constitution independently.[273]

According to Justice Maring, a court interpreting a constitution should look first to the constitution's text to determine intent and purpose.[274] If a provision is ambiguous, as Justice Maring determined was the case with Article I, Section 8 of the North Dakota Constitution, other factors must be considered to make this determination.[275] Justice Maring reiterated these factors as "the object to be accomplished; the prior state of the law; and the contemporaneous and practical constructions."[276] As to the object to be accomplished, neither the journal of the constitutional convention nor its official report was helpful in construing the search and seizure provision.[277] Justice Maring instead found support in both North Dakota history and the history of the North Dakota Constitution, which, in her view, evinced an intent not only to protect individual rights against outside interests, but also to provide greater protection than the federal constitution.[278]

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269. *Id.*

270. *Id.* ¶¶ 39-56 (Maring, J., concurring in part and dissenting in part).

271. *Id.* ¶ 43, 588 N.W.2d at 854.

272. *Id.* It is unclear from the opinion why the court in *Herrick I* could have interpreted a statutory issue, but a remand to the trial court was apparently necessary for constitutional issues. *See id.*

273. *Id.* ¶ 44.

274. *Id.* (citing State *ex rel.* Linde v. Robinson, 160 N.W. 514, 516 (1916)).

275. *Id.* (citing Lynn Boughey, *An Introduction to North Dakota Constitutional Law: Contents and Methods of Interpretation*, 63 N.D. L. REV. 157, 219 n.502 (1987)).

276. *Id.* (citing *Robinson*, 160 N.W. at 516); *see also* Boughey, *supra* note 275 at 217-225 (listing the same three factors).

277. *Herrick II*, ¶ 45, 588 N.W.2d at 854-55.

278. *Id.* (citing Boughey, *supra* note 275, at 242-43, 253-59). Boughey explains that "the origin of the movement for statehood stemmed not only from the desire of independence, but also from the desire to throw off outside control and to disengage the minions of corruption." Boughey, *supra* note 275, at 243. This outside control was wielded by the railroads—and their "minions of corruption"—as the price for "open[ing] North Dakota to the outside world and over[coming] its remoteness." Boughey, *supra* note 275, at 242-43. The railroads attempted to preserve their power by appointing officials to the territorial legislature and by delaying statehood. *See* Boughy, *supra* note 275, at 242. Regarding the differences between the North Dakota Constitution and the federal constitution, Boughey concluded that "the federal constitution served as a guide . . . a starting point," but that the framers of the North Dakota Constitution chose to "creat[e] a document substantially more detailed

As to contemporaneous constructions, Justice Maring established that the federal constitution was not the model upon which the North Dakota Constitution was formulated.[279] Rather, the search and seizure provision was based upon the Pennsylvania Constitution, as well as "[C]onstitutions generally."[280] The construction of Article I, Section 8 of the Pennsylvania Constitution was therefore important guidance in interpreting Article I, Section 8 of the North Dakota Constitution because of the clear link between the two constitutions.[281] Justice Maring emphasized that the Pennsylvania Supreme Court construed its Article I, Section 8 as precluding a good faith exception to the exclusionary rule.[282]

Justice Maring discussed the fact that the Pennsylvania Supreme Court held itself not bound to construe Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution "as if they were mirror images."[283] She then cited several decisions in which the North Dakota Supreme Court found greater individual rights under the state constitution than under the federal constitution.[284]

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and containing expanded rights." Boughey, *supra* note 275, at 256.

279. *Herrick II*, ¶ 46, 588 N.W.2d at 855 (citing Honorable Robert Vogel, *Sources of the 1889 North Dakota Constitution*, 65 N.D. L. REV. 331, 332, 342 (1989)). Vogel explains that "only two complete draft constitutions . . . were submitted to the convention when North Dakota's [constitution] was drafted." Vogel, *supra*, at 332. One was the South Dakota Constitution, the other "was the so-called Williams Constitution," which was authored by Harvard Law School Professor James Bradley Thayer and submitted by Delegate Erastus A. Williams. Vogel, *supra*, at 332.

280. *Herrick II*, ¶ 46, 588 N.W.2d at 855 (citing Meschke & Spears, *supra* note 258, at 379 n. 251, 481). Meschke and Spears chart the correlation between the present North Dakota Constitution and a draft constitution authored by Washington F. Peddrick, referred to as "Peddrick draft No. 2." Meschke & Spears, *supra* note 258, at 379 n. 251, 481.

281. *Herrick II*, ¶ 47, 588 N.W.2d at 855 (citing Meschke & Spears, *supra* note 258, at 381).

282. *Id.* ¶ 48 (citing Commonwealth v. Edmunds, 586 A.2d 887, 889 (Pa. 1991)).

283. *Id.* ¶ 49 (citing *Edmunds*, 586 A.2d at 896).

284. *Id.* ¶ 51-52, 588 N.W.2d at 856 (citing Grand Forks-Traill Water Users v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987) (recognizing that the takings provision of the North Dakota Constitution is broader than the corresponding provision of the federal constitution, protecting "not only the possession of property, but also those rights which make possession valuable") (citation omitted); State v. Orr, 375 N.W.2d 171, 177-78 (N.D. 1985) (holding that "the right to counsel under the North Dakota Constitution . . . may be exercised independently of any compulsion under federal law or the federal constitution.") (footnote and citation omitted); City of Bismarck v. Altevogt, 353 N.W.2d 760, 766 (N.D. 1984) (recognizing that North Dakota may grant broader rights to a jury trial than those guaranteed in the federal constitution) (citations omitted); State v. Nordquist, 309 N.W.2d 109, 113 (N.D. 1981) (declaring that the North Dakota Constitution allows the legislature to establish greater protection against grand jury investigations than is provided by the federal constitution); State v. Lewis, 291 N.W.2d 735, 737 (N.D. 1976) (holding that the North Dakota Constitution grants criminal appeals "as a matter of right, and not by permission of the court or by some form of certiorari," as under the federal constitution); State v. Stockert, 245 N.W.2d 266, 271 (N.D. 1976) (recognizing that the search and seizure provision of the North Dakota Constitution may create higher standards for warrantless searches than the Fourth Amendment to the United States Constitution) (citations omitted); Johnson v. Hassett, 217 N.W.2d 771, 776 (N.D. 1974) (finding that, "under a dual constitutional system," statutes may be declared unconstitutional under the North Dakota Constitution even where they "might have passed the federal constitutional screening") (citations omitted); State v. Matthews, 216 N.W.2d 90, 99 (N.D. 1974) (recognizing that the search and seizure provision of the North Dakota Constitution may grant broader standing to contest an illegal search than is granted by the Fourth Amendment to the

Justice Maring further contended that privacy was indeed an important factor underlying Article I, Section 8 of the North Dakota Constitution.[285] She cited *Phelps*, in which the court held that safeguarding personal privacy and dignity against unreasonable searches and seizures was the guiding principle behind Article I, Section 8 and the Fourth and Fourteenth Amendments.[286] She also cited *State v. Sakellson*,[287] in which the court held that "the protection of privacy in the home" was one of two "primary policies underlying the knock-and-announce rule."[288]

Finally, Justice Maring maintained that North Dakota Century Code section 19-03.1-32(3) manifested a legislative intent to provide greater protection against unreasonable searches and seizures than that provided under the federal constitution.[289] She cited *State v. Orr*,[290] which held that "legislative action to 'zealously' guard a right illustrates a special regard for that right."[291] Evidently, Justice Maring equated "special regard" with "intent to provide greater protection"; thus, in her opinion, the twenty-seven year existence of North Dakota Century Code section 19-03.1-32(3) demonstrated a legislative intent to provide greater protection against unreasonable searches and seizures under the North Dakota Constitution than under the United States Constitution.[292] According to Justice Maring, the court needed to address the issue of whether Article I, Section 8 precludes a good faith exception to the exclusionary rule, "based on a thorough and considered analysis." [293]

C. JUSTICE SANDSTROM'S CONCURRENCE

Justice Sandstrom wrote a separate concurring opinion in which he attacked the "historical perspective" of Justice Maring's partial dissent.[294] The Fourth Amendment exclusionary rule limited only the federal government until *Mapp* extended it to the states.[295] Justice Sandstrom reasoned that the framers of the North Dakota Constitution, by including an unreasonable searches and seizures clause, provided "a real

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United States Constitution) (citations omitted)).

285. *Id.* ¶ 52.

286. *Herrick II*, ¶ 52, 588 N.W.2d at 856 (quoting State v. Phelps, 286 N.W.2d 472, 475 (N.D. 1979)).

287. 379 N.W.2d 779 (N.D. 1985).

288. *Herrick II*, ¶ 52, 588 N.W.2d at 856 (quoting State v. Sakellson, 379 N.W.2d 779, 782 (N.D. 1985)).

289. *Id.* ¶ 53.

290. 375 N.W.2d 171 (N.D. 1985).

291. *Herrick II*, ¶ 53, 588 N.W.2d at 856 (citing State v. Orr, 375 N.W.2d 171, 177-78 (N.D. 1985) (recognizing that "the right to counsel under the North Dakota Constitution . . . may be exercised independently of any compulsion under federal law or the federal constitution")).

292. *Id.*

293. *Id.* ¶ 55, 588 N.W.2d at 857.

294. *Id.* ¶¶ 32-38, 588 N.W.2d at 852-53 (Sandstrom, J., concurring).

295. *Id.* ¶¶ 34-35 (discussing Mapp v. Ohio, 367 U.S. 643, 655 (1961)).

protection [against illegal state activity] that otherwise would have been lacking."[296] Therefore, the clause is not "a meaningless redundancy," even if it was never intended to offer more protection than the Fourth Amendment.[297]

Justice Sandstrom also found nothing in either the constitutional records of North Dakota or the jurisprudence surrounding the drafting of the North Dakota Constitution to support Justice Maring's "imputation of an exclusionary rule, let alone an exclusionary rule without a good faith exception."[298] Even if the drafters of the North Dakota Constitution had looked to the constitution and law of Pennsylvania, Justice Sandstrom maintained, they would not have found an "exclusionary rule without any good faith exception."[299] It was not until *Edmunds*, over one hundred years after the adoption of the North Dakota Constitution, that the Supreme Court of Pennsylvania recognized such a principle.[300]

IV. IMPACT

Herrick II is more significant for what it did not hold than for what it held.[301] The North Dakota Supreme Court did not decide whether the North Dakota Constitution precludes a good faith exception to the exclusionary rule; therefore, this remains an open question.[302]

Two post-*Herrick II* cases have touched on that issue; however, the court held in both cases that the defendant had not properly raised the state constitutional issue, and the court therefore declined to consider it.[303] To raise a state constitutional issue properly, a defendant must do more than merely quote the relevant state constitutional provision and

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296. *Id.*
297. *Id.* ¶¶ 33, 36.
298. *Id.* ¶ 37, 588 N.W.2d at 853.
299. *Id.*
300. *Id.*
301. *Id.* ¶ 27, 588 N.W.2d at 852.
302. *Id.*
303. *See* State v. Van Beek, 1999 N.D. 53, ¶ 26 n.4, 591 N.W.2d 112, 118-19 (noting that merely quoting the relevant provision of the state constitution is insufficient to raise a state constitutional issue for the court's consideration); State v. Hughes, 1999 N.D. 24, ¶ 5, 589 N.W.2d 912, 914 (holding that federal precedent was controlling because the argument that the state constitution provides greater protection than the federal constitution was "not properly raised or briefed"). Both *Van Beek* and *Hughes* followed the *Herrick II* holding that the good faith exception to the exclusionary rule applied to violations of North Dakota Century Code section 19-03.1-32(3), when the search warrant was issued on a per se basis prior to *Herrick I*. *See Van Beek*, ¶ 26, 591 N.W.2d at 118; *Hughes*, ¶ 5, 589 N.W.2d at 914.

state that it is a parallel provision to the corresponding federal constitutional provision.[304] Rather, defendant must brief the argument.[305] This is true in both criminal and civil cases.[306]

Herrick and the state both extensively briefed the state constitutional issue as it concerns the good faith exception to the exclusionary rule.[307] Had the court determined that it was presented with a state constitutional issue, the court likely would have given greater consideration to the good faith argument.[308] The court found it unnecessary to rule whether a good faith exception is precluded by the state constitution, however, since the court determined that the case involved only the violation of a statute.[309] Based on the extent to which both parties briefed the state constitutional issue, it is possible that the court is waiting for the proper case—a case which, in the court's determination, does involve a violation of the state constitution.[310]

When presented with such a case, it likely will take a strong argument to convince the North Dakota Supreme Court that it should reject a good faith exception to the exclusionary rule.[311] Arguing that the exclusionary rule is tied to the right of privacy appears to be a fruitless endeavor, as the majority opinion clearly distinguished the *Edmunds* case, in which the Pennsylvania Supreme Court rejected the good faith exception on the basis of the privacy argument.[312] Justice Sandstrom's concurrence rejected the argument that the North Dakota Constitution

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304. *See Van Beek*, ¶ 26 n.4, 591 N.W.2d at 118-19; *see also* State v. Patzer, 382 N.W.2d 631, 639 n.5 (N.D. 1986) (noting that merely quoting the relevant provision of the state constitution and stating that it is a "parallel" of a provision of the federal constitution is insufficient to raise a state constitutional issue for the court's consideration).

305. *See Hughes*, ¶ 5, 589 N.W.2d at 914; *see also* State v. Garrett, 1998 N.D. 173, ¶ 9, 584 N.W.2d 502, 504 n.1 (noting that a bare assertion that a state constitutional provision has been violated is insufficient to brief the state constitutional issue).

306. *See generally* Lund v. North Dakota State Highway Dep't, 403 N.W.2d 25, 29 n.5 (N.D. 1987). In *Lund*, the court found that:

> Lund merely sets forth various provisions of the North Dakota Constitution and apparently expects this court to search through the record and applicable caselaw, although he fails to cite any, to discover deprivations of a constitutional magnitude. This is insufficient to raise the State constitutional issues before this court, and we therefore refrain from addressing them.

Id.; *see also* Andrews v. O'Hearn, 387 N.W.2d 716, 726 n.15 (N.D. 1986) (holding that "the mere mention of the provision in a footnote is insufficient to raise the State constitutional issue").

307. *See* Brief of Appellant at 18-28, State v. Herrick, 1999 N.D. 1, 588 N.W.2d 847 (*Herrick II*) (Nos. 980082-84); Brief of Appellee at 3-20, State v. Herrick, 1999 N.D. 1, 588 N.W.2d 847 (*Herrick II*) (Nos. 980082-84).

308. *See* State v. Herrick, 1999 N.D. 1, ¶ 26, 588 N.W.2d 847, 852 (*Herrick II*).

309. *See id.* ¶¶ 26-27.

310. *See id.*; Brief of Appellant at 18-28, *Herrick II* (Nos. 980082-84); Brief of Appellee at 3-20, *Herrick II* (Nos. 980082-84).

311. *Cf. Herrick II*, ¶ 21-38, 588 N.W.2d at 851-53 (considering but ultimately declining to rule whether the North Dakota Constitution precludes a good faith exception to the exclusionary rule).

312. *Id.* ¶¶ 25-26, 588 N.W.2d at 851-52 (distinguishing Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)).

precludes a good faith exception to the exclusionary rule, on the ground that the argument has no support in North Dakota's constitutional history.[313] Only Justice Maring supported a rejection of the good faith exception.[314]

V. CONCLUSION

In *Herrick II*, the North Dakota Supreme Court held that the *Leon* good faith exception to the exclusionary rule applies to violations of N.D.C.C. § 19-03.1-32(3), where a no-knock warrant was issued on a per se basis prior to the court's decision in *Herrick I*.[315] However, the court again declined to decide whether to adopt the good faith exception to the exclusionary rule under the state constitution.[316] Whether North Dakota will recognize a good faith exception for violations of its state constitution, therefore, remains an open question.

Christopher Paul Fischer

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313. *Id.* ¶¶ 36-37, 588 N.W.2d at 853 (Sandstrom, J., concurring).

314. *Id.* ¶¶ 42-56, 588 N.W.2d at 854-57 (Maring, J., concurring in part and dissenting in part). It is unknown whether Justice Kapsner would have joined the majority or Justice Maring's partial dissent. However, former Justice Meschke would certainly have joined Maring's dissent. *See* Meschke, *supra* note 253, at 747. Interestingly, Justice Meschke was originally assigned *Herrick II* before he left the court. Discussion with former Justice Herbert L. Meschke at University of North Dakota School of Law on April 3, 2000. Before he retired from the court, Justice Meschke wrote a draft opinion reversing the trial court's decision. *Id.; see also* Meschke, *supra* note 253.

315. *Herrick II*, ¶ 27, 588 N.W.2d at 852.

316. *Id.*; *see also supra* notes 219-20.

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