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Probable Cause for Nighttime, No-Knock Drug Searches: The Illusion of Judicial Control in North Dakota

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VIEWPOINT

PROBABLE CAUSE FOR NIGHTTIME, NO-KNOCK DRUG SEARCHES: THE ILLUSION OF JUDICIAL CONTROL IN NORTH DAKOTA

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I. INTRODUCTION

It is my pleasure to accept the LAW REVIEW's invitation to examine a recent North Dakota Supreme Court case. (I only had to ask them once to invite me.) As explained previously by the Editor, this new Viewpoint feature provides an opportunity to comment on recent North Dakota legal developments with short, "op-ed" type comments by members of the bench and bar. If readers accept the LAW REVIEW's invitation to respond to this Viewpoint, or to write their own, the resulting debate can add a new perspective on the work of the most important court in North Dakota.[1]

Choosing a recent case to view critically is difficult because of

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1. The kind of written debate I have in mind is not without precedent in this review. In 1982, the LAW REVIEW invited me to write *Perspectives on State v. Nagel: The North Dakota Supreme Court's Discordant Medley of Fourth Amendment Doctrines*, 58 N.D. L. REV. 727 (1982), and I enticed Bruce Quick, a North Dakota attorney, to write a corresponding piece on the same case, *Reflections on State v. Nagel: The State's Perspective*, 58 N.D. L. REV. 745 (1982). Some years later, I audaciously shared some thoughts about the exclusionary rule and search and seizure. Thomas M. Lockney, *An Open Letter to the North Dakota Attorney General Concerning Search and Seizure Law and the Exclusionary Rule*, 62 N.D. L. REV. 17 (1986). Soon after its publication, I received an excellent critique in a letter from Minot lawyer Neven Van de Streek, which the LAW REVIEW willingly published. Neven Van de Streek, *A Response to the Proposed Establishment of an Administrative Agency to Create and Enforce Rules Regulating Police Conduct*, 62 N.D. L. REV. 223 (1986).

To those who maintain that such writing is not "serious" enough, I recommend Fred Rodell's classic *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936). Rodell found only two things wrong with traditional law review writing: its content and its style! *Id.* at 38. I make no claim to useful or important content. But I have tried to bear in mind Rodell's observation that as to "the question of style . . . , it seems to be a cardinal principle of law review writing and editing that nothing may be said forcefully and nothing may be said amusingly." *Id.*

One of my efforts at iconoclasm was rejected by the editors. The Bluebook now recognizes the practitioners' use of "Court" in its capitalization rules for the court to which a document is submitted. Assuming nobody reading a NORTH DAKOTA LAW REVIEW Viewpoint reviewing a North Dakota Supreme Court case in the annual North Dakota Supreme Court Review would confuse my references to our North Dakota Supreme Court with references to the United States Supreme Court, I wrote this article capitalizing "Court" to refer to the North Dakota Supreme Court to distinguish it from the trial courts

the high quality of the current court demonstrated by its decisions and opinions.[2] After reviewing many recent cases, [3] I elected to

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of our state. The editors, however, refused to allow me to pay that homage to the victims of my critique.

2. No longer do we have such easy targets as State v. Wetsch, 304 N.W.2d 67 (N.D. 1981). In *Wetsch*, the Court found admission into evidence at trial of the gun the defendant illegally possessed in a bar and his confession to be "harmless error" because of testimony from the barmaid. *Id.* at 68. *Wetsch* demonstrated a court misstating the test for harmless error, thus avoiding a decision under the disfavored Fourth Amendment and the exclusionary remedy. Although the current court avoids more egregious examples of discounting the Fourth Amendment, members still occasionally express discomfort with the exclusionary remedy. *E.g.*, Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 294 (N.D. 1987) (VandeWalle, J., dissenting).

Another favorite from the "old days" is *State v. Hanson*, in which the court found that a person taking blood was a registered nurse because a highway patrol officer testified that she said she was a nurse and she wore a totally white hospital uniform and white shoes, along with a name tag indicating "RN." State v. Hanson, 345 N.W.2d 845, 848 (N.D. 1984). To be fair, the court held, as with most evidentiary matters, that the trial court had not abused its discretion in finding that a registered nurse took the blood, and pointed out that the defendant had not contended the nurse was not a registered nurse. *Id.* at 850. Perhaps the court could have relied more convincingly on rule 104(a) of the North Dakota Rules of Evidence, which leaves preliminary questions, such as the admissibility of evidence, to determination by the court, unbound by the rules of evidence except privilege.

3. I thought I had found my case when I read State v. Deery, 489 N.W.2d 887 (N.D. Ct. App. 1992). Deery was convicted of driving under suspension based on the testimony of the car's owner. *Id.* at 888. The court held that the owner was not an "accomplice" and thus his testimony was sufficient to convict the defendant without corroboration despite the accomplice corroboration requirement in section 29-21-14 of the North Dakota Century Code. *Id.* at 889. I was curious whether the court would stick to its guns if the question was accomplice liability for DUI of someone who lends a car to a drunk. I was ready to predict that result orientation might cause the court's narrow *Deery* view of "complicity" to expand, accordion-like, to allow *conviction* of an "accomplice" who, as a witness against a principal, is *not* an accomplice under *Deery*. But I gave up my "when is an accomplice not an accomplice" riddle for this "Viewpoint" when I noticed that the court was only North Dakota's elusive (or is it illusive?) Court of Appeals.

I next considered choosing one or all of the seven cases in the last year or so holding that reasonable suspicion is enough to justify an investigative stop, usually of an automobile, even for a traffic offense. McNamara v. Department of Transp., 500 N.W.2d 585 (N.D. 1993); State v. Guthmiller, 499 N.W.2d 590 (N.D. 1993); City of Grafton v. Swanson, 497 N.W.2d 421 (N.D. 1993); State v. Woytassek, 491 N.W.2d 709 (N.D. 1992); State v. Nelson, 488 N.W.2d 600 (N.D. 1992); Department of Transp. v. DuPaul, 487 N.W.2d 593 (N.D. 1992); State v. Kettleson, 486 N.W.2d 227 (N.D. 1992). I also considered two surprising cases finding no reasonable suspicion to support an investigative stop. State v. Sarhegyi, 492 N.W.2d 284 (N.D. 1992); State v. Langseth, 492 N.W.2d 298 (N.D. 1992). I am continually amazed by the fact that although our legislature has clearly limited reasonable suspicion stops to very specific and serious criminal activity by section 29-29-21 of the North Dakota Century Code (1991), *not* including traffic offenses, nobody seems to have noticed. But other than my amazement, I did not know what else to write about beyond wondering whether any attorneys have argued the statutory limit to the court. If so, I could speculate why the court has ignored it. If not, why not? My wonderment and speculation, however, were for the most part worn thin by my disappointment that nobody else even mentioned the statute during the debate on the recently failed initiated Measure 6 which would have gone further than section 29-29-21 by elevating the requirement for vehicle stops from reasonable suspicion to probable cause.

Because I have primarily written about search and seizure in this journal, I was tempted to switch from procedure to some very interesting developments in the law of crimes: limitations on possession crimes (*In re* K.S., 500 N.W.2d 603 (N.D. 1993) (finding that possession of alcohol by a minor, prohibited by North Dakota Century Code section 5-01-08, means actual, not constructive, possession); *In re* J.D., 494 N.W.2d 160 (N.D. 1992) (stating that "control" for purposes of unauthorized use of a vehicle conviction must be the "directing influence"), and the use of injunctions or court orders to supplement criminal prosecution as a tool of social control. *See, e.g.*, protection orders under section 14-07.1-02

focus again on search and seizure and what at first glance seems to be a fairly run-of-the-mill case, *State v. Knudson*.[4] Despite appearance, however, I view *Knudson* as a fascinating example of the judicial process. A much improved court, in attempting a reasonable accommodation of privacy interests and prosecution practicalities, purports to impose limitations on the execution of search warrants at night and without the usual requirement of announcement of authority and purpose. But although the opinion "reads" well, the appearance of limitation is illusory. I will first try to explain the court's patent "holding." Then, I will try to dig beneath the surface of the opinion to figure out what it really means.

In *Knudson*, the court first held that the North Dakota Rule of Criminal Procedure 41(c) requirement of reasonable grounds for a nighttime search warrant supplements rather than contradicts the drug statute, which omits a showing of special need.[5] Therefore, because of the court's reconciliation of the statute with the rule, a warrant obtained under the statute also requires reasonable grounds in addition to the basic probable cause requirement for all warrants. Thus far, the case looks like a defense/privacy interest victory. The court next held that the warrant was issued upon reasonable grounds for a nighttime, "no-knock"[6] entry and search. The main problem is whether there is any substance to the court's actual requirements as opposed to its high sounding rhetoric that something special, more than the probable cause necessary for any drug warrant, is necessary to justify a nighttime as well as a no-knock warrant.

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of the North Dakota Century Code, orders authorized by the 1993 legislature against disorderly conduct, and the new crime of stalking. N.D. CENT. CODE §§ 12.1-31.2-01 and 17-07.1 (Supp. 1993); State v. Franck, 499 N.W.2d 108 (N.D. 1993) (articulating that even an irregular or erroneous injunction must be obeyed while in force, and that the defendant had adequate notice of an injunction given over a police bullhorn); Fargo Women's Health Org., Inc. v. Lambs of Christ, 488 N.W.2d 401 (N.D. 1992) (stating that although equity does not restrain crimes, it may enjoin criminal acts connected with violation of legal rights, but injunctions are subject to constitutional limitations such as vagueness and overbreadth).

Both the limits on possession crimes and the civil alternatives to crimes, however, seemed too complex for the type of commando raid, hit-and-run essay I anticipated for this new Viewpoint feature. My prediction is that because criminal convictions are by design and tradition difficult (as demonstrated by the possession cases), the use of the civil law will continue to expand as a means of social control (demonstrated by the injunction statutes and cases).

4. 499 N.W.2d 872 (N.D. 1993).

5. State v. Knudson, 499 N.W.2d 872, 874 (N.D. 1993) (citing N.D. CENT. CODE § 19-03-1-32(2) (1991)).

6. "No-knock" is used as a shorthand for a search executed by an entry, by force if necessary, without the usual requirement of announcement of the executing officer's authority and purpose. *See* N.D. CENT. CODE § 29-29-08 (1991); State v. Sakellson, 379 N.W.2d 779, 782 (N.D. 1985).

II. *STATE V. KNUDSON*, BRIEFLY

In order to be clear about what the court actually held, let's expand the summary in the last paragraph with an old-fashioned law school style case "brief."[7]

Facts

Defendant was convicted of drug possession with intent to deliver and related crimes. He pled guilty, conditioned on his right to appeal the denial of his motion to suppress evidence. The evidence was obtained pursuant to a warrant authorizing the nighttime, no-knock search of his home.

A police officer testified one evening before the issuing magistrate that a confidential informant had seen "a number of one-quarter ounce baggies of marijuana in a plastic container" and firearms in defendant's residence, and a dog in a kennel near the front door. He told the magistrate that he was concerned about the firearms and dog, and that, in his experience, an entry to search for drugs and paraphernalia prefaced by a knock and announcement of authority would lead to an attempt to hide or destroy them.

At 10:48 p.m., the magistrate issued the search warrant authorizing a nighttime, no-knock entry and search. The warrant was executed about 12:10 a.m. the next morning.

Issues and Holdings

Issue A: What is the standard of review for the denial of a suppression motion?

Holding A: The standard is whether, resolving all the testimony in favor of the State, sufficient competent evidence is fairly capable of supporting the trial court's determination. The trial court has a signifi-

7. This "brief" was added in response to the Editor's request to lay out clearly what the court did in *Knudson*. It was first written in the traditional style with separate fact, issue, holding, and rationale sections, and without footnotes. The Editor collapsed the issue, holding, and rationale sections, but allowed the omission of most of the footnotes conditioned upon the observation that all of the statements in the brief (other than the statements already footnoted) may be found in *Knudson*, 499 N.W.2d at 873-876.

cant opportunity to judge witness credibility and weigh testimony.

Issue B: Was the magistrate's issuance of a nighttime warrant proper?

Holding B: Yes.

Issue B1: What justification, if any, is necessary to obtain a nighttime warrant for drugs in light of the general reasonable cause requirement of Rule 41(c) of the North Dakota Rules of Criminal Procedure and the absence of any stated condition for a nighttime search for controlled substances under section 19-03.1-32(2) of the North Dakota Century Code?

Holding B1: Rule 41(c) supplements the drug statute by providing a standard, reasonable cause (which equals probable cause), for the magistrate's decision. The court has rule-making authority under the state constitution and its rules of procedure prevail over legislative rules. The court prefers harmony over conflict, and thus read Rule 41(c) as supplementing the statute by providing the issuing magistrate with a necessary benchmark (probable cause) for careful consideration by magistrates issuing nighttime warrants.

Issue B2: If required, was there sufficient justification in this case?

Holding B2: Yes. The magistrate carefully considered the issue and found probable cause for a nighttime search for drugs. The magistrate gave careful consideration to the issue and was satisfied that the drugs probably would have been moved or destroyed. The court has taken judicial notice of the easy disposability of drugs, and here there was a "relatively" small quantity. The affiant officer's concern about the presence of firearms and a dog was properly given little, if any, weight by the magistrate, who "doubtless" recognized the court's earlier observation in *State v. Sakellson*.[8] *Sakellson* declared that unannounced entries increase the potential

8. *Knudson*, 499 N.W.2d at 875 (citing State v. Sakellson, 379 N.W.2d 779, 782 (N.D. 1985)).

for violence by provoking surprised occupants into taking defensive measures they would forego if they knew an officer had a warrant to search the home.[9]

Issue C: Was there probable cause to believe that notice of police authority and purpose (the "knock" of so-called no-knock warrants plus an announcement) prior to entry for execution of the warrant would result in easy and quick destruction of the evidence or danger to life or limb justifying a no-knock warrant under North Dakota Century Code 19-03.1-32(3)?

Holding C: Yes. Probable cause existed because of judicial notice that drugs are typically and easily disposed of at the first sign of police. No-knock warrants are available in drug cases because the court has taken judicial notice that drug possessors "ordinarily are on the alert to destroy the typically easily disposable evidence quickly at the first sign of a law enforcement officer's presence." In *State v. Loucks*,[10] the court upheld a no-knock warrant because marijuana had been seen at the defendant's apartment.[11] The court declined the defendant's invitation to overrule *Loucks* which he conceded disposed of his argument.

III. CRITIQUE

On the surface, the opinion appears to make sense. On closer inspection, it is less convincing.

A. DEFERENCE TO THE TRIAL COURT

It is understandable that evidentiary conflicts will be resolved on appeal in favor of the trial court's decision with deference to its better opportunity to determine credibility and weight. But there is nothing in *Knudson* to suggest that any testimony before the trial court was controverted. In the procedural context of this appeal, it is fair to assume that the only relevant "testimony" was that of the affiant officer before the magistrate, not the trial court,

9. *Sakellson*, 379 N.W.2d at 782.
10. 209 N.W.2d 772 (N.D. 1973).
11. State v. Loucks, 209 N.W.2d 772, 777-78 (N.D. 1973).

to support the warrant. Assuming that the court's statement of facts accurately summarizes that testimony, aren't the primary issues both at the suppression hearing and on appeal legal questions about the sufficiency of those facts to warrant the police actions? If not "pure" legal questions, aren't they at least mixed questions of law and fact, requiring less deference to the trial court or magistrate? But, as usual, this "issue" is just a warm-up for the main events.

B. PROBABLE CAUSE FOR NIGHTTIME SEARCH FOR DRUGS = PROBABLE CAUSE FOR A SMALL QUANTITY

The court attaches significance to magistrates' needs for a reasonable grounds/probable cause benchmark to determine whether a nighttime warrant is justified.[12] But how hard will it be to show probable cause for a nighttime warrant? In *Knudson*, the court found probable cause in the "relatively small quantities of drugs"[13] which the magistrate and court assumed could, and thus probably would, be easily and quickly removed or destroyed.

From what the court tells us in the opinion, however, we know only that the small quantity was "a number of one-quarter ounce baggies of marijuana in a plastic container."[14] We are also told that the magistrate carefully considered the issue and expressly authorized the nighttime execution.[15] The actual basis for the magistrate's decision, however, is never explained. Instead, we are told that the magistrate "properly" discounted the police fear of violence because of the presence of firearms and a dog.[16] "Doubtless, the magistrate recognized that 'an unannounced entry by officers increases the potential for violence by provoking defensive measures a surprised occupant would otherwise not have taken had he known that the officers possessed a warrant to search his home.' "[17]

In other words, we are told only that the magistrate properly discounted one reason for issuing a no-knock warrant. A reason *not* to issue a no-knock warrant is a strange basis for explaining the reason *for* a nighttime entry. How is the magistrate's discounting of a reason for one police action evidence of sufficient considera-

12. *Knudson*, 499 N.W.2d at 874.
13. *Id.* at 875.
14. *Id.* at 873.
15. *Id.* at 875.
16. *Id.* at 875.
17. *Knudson*, 499 N.W.2d at 875 (quoting State v. Sakellson, 379 N.W.2d 779, 782 (N.D. 1985)).

tion for another? Why did the magistrate believe that this particular plastic container containing a "number" of baggies would disappear before morning? We cannot determine reasonableness without knowing the reason.

Perhaps it is unnecessary to describe any careful consideration or reasoning by the magistrate. The court reminds us that it has previously indicated that evidence which may be quickly and easily disposed of justifies a nighttime search and that judicial notice may be taken of the fact "that drugs are such evidence."[18] Thus, it would seem that the careful consideration required of a judge trying to determine "probable cause" for a nighttime warrant involves nothing more than reference to the predicate determination for all drug search warrants—probable cause to search for drugs.

To review, first the court determines that Rule 41(c)'s reasonable cause requirement must be read into the drug statute to provide magistrates with a "benchmark" or "lodestar," without which their consideration of the request for a nighttime warrant would be an "empty gesture."[19] The necessity for such a standard is coherence with the court's own "recognition that 'nighttime searches constitute greater intrusions on privacy than do daytime searches.' "[20] But the standard turns out to be no more than judicial notice that drugs are quickly and easily disposable.

In a footnote, the court adds:

> The Eighth Circuit Court of Appeals suggests that the barometer of the reasonableness of "no-knock entries based upon a general or blanket judgment that contraband such as drugs will otherwise be destroyed," is the quantity of drugs suspected to be at the structure to be searched. The Court cogently observed that "[i]t is reasonable for police officers to assume that suspects selling illegal drugs in small quantities from a residence that has normal plumbing facilities will attempt to destroy those drugs if officers knock before a search warrant is executed. . . . On the other hand, a blanket rule permitting no-knock search warrants in all drug cases, regardless of whether the forms and quantities suspected to be present can be readily destroyed, is patently unjustifiable and

18. *Id.* (citing State v. Borden, 316 N.W.2d 93 (N.D. 1982)).
19. *Id.* at 874.
20. *Id.* at 874 (quoting State v. Berger, 285 N.W.2d 533, 538 (N.D. 1979)).

> would invite unnecessarily violent and intrusive execution of many search warrants."[21]

Perhaps the court is hinting, with this footnote and its description of the drugs sought as a "relatively" small quantity, that it now imposes a small-quantity limit to what previously looked very much like a blanket authorization for nighttime warrants in all drug cases. However, at least two formidable obstacles make that potential limitation problematic.

First, the quoted language from the Eighth Circuit case describes a rationale for no-knock entries, not nighttime entries. Whatever fear justifies a quick entry without notice to prevent an even quicker disposal by a simple flush, my assumption about residential plumbing is that it works the same in the daytime as at nighttime. That is, the rationale stated for the no-knock entry does not seem to have anything to do with the time of the entry.

Second, if the court is impressed with a presumption of "careful consideration" by the magistrate,[22] shouldn't we expect something more careful or precise from the court itself in its formulation of a small quantity rule? In discussing the magistrate's careful consideration, the court mentions that it was "bolstered by the relatively small quantity of drugs."[23] How small is "relatively" small? The court cites *State v. Borden*[24] for judicial notice that drugs are quickly and easily disposable, without mentioning a quantity limitation. The court's recitation of facts discloses only that the informant, "within the past twelve hours, observed a number of one-quarter ounce baggies of marijuana in a plastic container. . . ."[25] What is "a number?" A small or large number? What size container? My experience with residential plumbing is that it would not take too many plastic baggies of a marijuana-like substance to clog the toilet.[26] Far fewer, in my guess, than might be contained, for example, in a gallon plastic ice cream container, not to mention a large plastic wastebasket or an even larger plastic garbage can.

If, in fact, the baggies were few, or the container was small, my idea of careful consideration involves a very specific discussion

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21. *Id.* at 875 n.2 (citations omitted).
22. *Knudson*, 499 N.W.2d at 875 (quoting State v. Berger, 285 N.W.2d 533, 539 (1979)).
23. *Id.*
24. *Id.* at 875 (citing State v. Borden, 316 N.W.2d 93 (N.D. 1982)).
25. *Id.* at 873.
26. I do not claim careful consideration or extensive experience with this particular factual assumption. The point is that the court focuses entirely on the "quantity" aspects of the drug while it ignores the "form" aspect, both of which were mentioned in the Eighth Circuit opinion it cited. *See supra* text accompanying note 21.

of quantity and size. Instead, we find judicial notice about drugs. Whatever cogency that judicial assumption may have regarding the efficacy of a knock and announcement, it is difficult for me to see what it has to do with the necessity for the nighttime execution of that warrant, with or without a knock. Moreover, despite its ability to "notice" the disposability of drugs in general, the court displays no recognition of the fact that some drugs, for example marijuana in baggies, are significantly less compact and flushable than, for example, heroin or cocaine. Given the differences in composition and disposability for various controlled substances, coupled with differences in value and severity of punishment, failure to distinguish "drugs" is also an indication of the categorical or generic nature of the probable cause determination the court in fact, rather than in rhetoric, provides as its "benchmark" for the magistrate's decision.

But perhaps the court was consciously or unconsciously assuming that the drugs were likely to be either smoked, sold, or moved out of the house before morning, not flushed down the toilet. Again, there is nothing to indicate why that was probable. Maybe the court knows something special it did not tell us about the nocturnal habits of Bismarck marijuana users.

Is the court now also taking judicial notice of the fact that people possessing small quantities of marijuana are particularly likely to smoke, sell, or move their residential marijuana while others sleep? If the testimony before the magistrate disclosed something about the defendant's daily routine, the opinion gives us no hint what that information was. Thus, we have no specific basis for evaluating the probability of disappearance of the marijuana except the court's blanket notice that drugs are easily and quickly disposed of, especially "relatively" small quantities. But why does the fact they can be easily and quickly destroyed or moved, without more, make it probable that they will be destroyed or moved during that particular night?

To summarize the nighttime issue: we only know from the opinion that with "relatively small quantities" of drugs (a number of small quarter-ounce bags in a plastic container), the magistrate was convinced the drugs might disappear. But we don't know why. If there was additional evidence about the defendant's household and plans for that evening or usual pattern of nighttime activity, we are not told about it. Without such evidence, we have a very sweeping rule: A "presumption" of careful consideration exists in any case involving an unspecified, but relatively small

quantity of drugs. If that's not a "blanket" rule, it certainly looks to me like a heavy flannel sheet.

C. THE NO-KNOCK AUTHORIZATION

After relying on discussions of no-knock warrants to ratify the magistrate's determination of grounds for nighttime execution, the court turned to the issue of no-knock authorization for the warrant.[27] No-knock warrants are allowed under section 19-03.1-32(3) of the North Dakota Century Code when the magistrate is shown probable cause to believe that notice prior to entry might cause evidence to be "easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result . . . ."[28]

After citing the statute and observing its dual rationale for no-knock entries, preserving both officers and evidence, the court never mentions the police fear of firearms and the presence of a dog discounted in its prior discussion of the nighttime issue.[29] Instead, the court again relies on its 1973 decision in *State v. Loucks*, permitting magistrates " 'to take judicial notice of the fact that drugs are easily disposed of.' "[30] The court expressly declined the defendant's urging to overrule *Loucks;* instead, it declared that the "relatively small quantity of drugs raised the specter of the quick and easy disposability of evidence."[31]

The court observes that an unannounced entry might provoke defensive measures by surprised occupants in its discussion of the nighttime issue and then ignores the police fear of firearms and a dog when discussing the no-knock issue. It does seem plausible that an announced entry may, in some situations, increase the danger of violence. Otherwise, the legislative inclusion of "dan-

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27. *Knudson*, 499 N.W.2d at 876.

28. N.D. CENT. CODE § 19-03.1-32(3) (1991).

29. I'm not disagreeing categorically with the court's concern for the possibility that unannounced entries may sometimes increase the danger of violence by provoking defense by a surprised occupant. *See supra* text accompanying notes 8, 9, and 17, quoting State v. Sakellson, 379 N.W.2d 779, 782 (N.D. 1985). Instead, I am pointing out that neither the danger rationale nor the destruction rationale, as applied by the court, requires a specific, case-by-case evaluation of particular situations, notwithstanding the court's benchmark, probable cause rhetoric. It is remarkable that the testifying police officer's concern for the presence of the dog and firearms is never mentioned in the court's discussion of the no-knock issue itself. As the court presumes or notices drugs are quickly and easily disposable, it also seems to presume that no-knock entries are as dangerous, or more dangerous, than announced entries. The point is that case-specific evidence of either disposability or danger, not presumptions, is required for a meaningful check on intrusive execution of warrants.

30. *Knudson*, 499 N.W.2d at 876 (quoting State v. Borden, 316 N.W.2d at 93, 97 (N.D. 1982) and *Borden*'s espousal of State v. Loucks, 209 N.W.2d 772 (N.D. 1973)).

31. *Id.*

ger to the life or limb of the officer or another" in section 19-03.1-32(3) of the North Dakota Century Code would itself be the kind of idle act or useless gesture the court thinks it avoids by reading a reasonable-cause standard into the nighttime provision of subsection (2).[32] Since the court does not tell us in its no-knock discussion why the fear in *Knudson* was insufficient, we can only guess that it will approve of no-knock warrants only when presented with probable cause to believe that the particular resident will more likely respond to a knock violently than an unannounced entry.

What kinds of cases might that involve? Specific evidence of prior violence against police presents the clearest, and, I hope, rare case. Absent specific evidence of prior violence, what factor is a court that relies on its judicial notice of drug defendants' probable actions likely to consider dangerous? My guess is that it will involve a large (or "relatively" large?) quantity of drugs.

Let's consider a hypothetical case where the police have reasonable grounds to search for a large or "relatively" large quantity of drugs. The opinion in that case might read like this:

> Because probable cause to search for a large quantity of drugs also implies a very valuable quantity of drugs and a more professional type of drug trafficker or serious abuser in possession thereof, it is reasonable for courts to take notice of the fact that such large and presumably valuable quantities of drugs are likely to be defended by armed and dangerous drug dealers or abusers. We are loathe to indicate that courts should not give officers who judge that it would be safer to execute warrants in such cases without first knocking and announcing their purpose, and to do so at night, the right to do so, given the specter of violence raised by professional drug traffickers or people who consume large quantities of drugs themselves.

Is there any doubt that such an opinion could easily result from a court that took judicial notice of disposability in *State v. Borden*[33] and continues to affirm *State v. Loucks*?[34]

IV. GENERAL REFLECTIONS

In my open letter to the Attorney General,[35] I suggested the

32. *See* N.D. CENT. CODE § 19-03.1-32(2) to (3) (1991).
33. 316 N.W.2d 93 (N.D. 1982).
34. 209 N.W.2d 772 (N.D. 1973).
35. *See supra* note 1.

need for clearer rules of police conduct and my belief that the courts were not likely to provide them. The court has promulgated Rule 41(c) requiring reasonable grounds for authorization of nighttime execution of search warrants. The legislature has given us section 19-03.1-32 of the North Dakota Century Code, authorizing nighttime entries, which is now supplemented by the court in *Knudson* to require reasonable grounds under Rule 41(c), and no-knock warrants upon reasonable grounds to believe evidence will be destroyed or people injured if notice is given. Is that clear?

I believe a clearer rule can be deduced from *Knudson* and earlier judicial interpretations of the rule and statute. Legend has it that Thomas Reed Powell, a Harvard teacher of Constitutional Law, presented his students with his "Restatement of the Law of the Commerce Clause" shortly after the initiation of the ALI's Restatements of the Law. It read something like this, complete with blackletter rule and comment:

> ***Blackletter Rule:*** **Congress has the power to regulate interstate commerce. The States have the power to regulate interstate commerce too, but not too much.**
> *Comment*: How much is too much is beyond the scope of this restatement.

In that spirit, I offer Lockney's Restatement of the North Dakota Law for Nighttime and No-knock Warrants (try typing that three times fast):

> ***Blackletter Rule*** **Police seeking a nighttime, no-knock warrant[36] for drugs can have it.**
> *Comment*: Police may have a nighttime, no-knock warrant for a small quantity of drugs because it is easily destructible and for a large quantity because of the danger of armed resistance. How small is small enough and how large is large enough are beyond the scope of this restatement.

In other words: the state can't lose! The only time a magistrate will need to refuse a nighttime, no-knock warrant for drugs is for a magic quantity of drugs too large to destroy quickly but too

36. Since this essay is a "Viewpoint" rather than an article, I have not discussed several important related issues. For example, I have not considered whether a nighttime or no-knock warrant must always be sought if practicable, whether exigent circumstances might allow a nighttime or no-knock warrantless search, or whether exigent circumstances might allow execution of a daytime, knock and announce warrant at night and without knocking because of developments after issuance.

small to bother defending by force. This is not the kind of simplicity I had in mind.

In light of the court's reluctance in *Knudson* to rely on the danger to officers to justify either the nighttime or no-knock aspects of a warrant, perhaps my generic rule is a misstatement, not a restatement. If so, I look forward to a refinement by the court in future opinions. Perhaps a reader will respond to this Viewpoint and explain why our courts may take judicial notice that small quantities of drugs are likely to disappear if not seized quickly at night, but not take judicial notice that possessors of large quantities of drugs are probably armed and likely to defend their drugs. My prediction regarding large quantities of drugs and the chimerical nature of any intermediate category between relatively small and relatively large amounts could be countered by a willingness to focus more carefully on particular cases. We will see.

V. CONCLUSION

If I am right about the court's likely approach to large quantities of drugs, the police will automatically be able to show probable cause for a nighttime, unannounced drug search in virtually all drug cases. The "benchmark" or "lodestar" the court believes it provides in *Knudson* will turn out to be illusory in virtually every drug search.

But if I predict wrongly about large quantities of drugs and unfairly criticize the small quantity limit as illusive, the ironic result will be that the persons least protected by the court's purported limit on invasive nighttime, no-knock entries will be the least serious offenders. If so, in the North Dakota drug war, as in most wars, the little guys will be hit hardest.

The defendant in *Knudson* claimed that reasonable suspicion for incrementally more intrusive searches requires a particularized showing of need. The prosecution argued that probable cause to search for drugs is categorically sufficient. It is troubling that the court tries to have it both ways by creating a restriction that prosecutors and police will barely notice.