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STATEMENT OF THE ISSUES

- I. **Whether the District Court erred in concluding that the Defendants did not give consent to law enforcement officers for entry into the apartment.**
- II. **Whether the District Court properly concluded that Mr. Parisien voluntarily consented to the search of the apartment, purging any taint resulting from the officers' warrantless entry.**
- III. **Whether the District Court properly concluded that the drugs found in the Defendants' apartment are admissible as evidence under the inevitable discovery rule.**

STATEMENT OF THE CASE

[¶1] Reanna Graf and Samuel Parisien (“Defendants”) appeal from a Memorandum Decision and Order Denying Defendants’ Motions to Suppress and Judgments of Conviction. (Appellants’ App. at 61-71; 87; 92-104.) On February 25, 2005, the State charged the Defendants with various drug-related offenses, including possession of methamphetamine and marijuana with intent to deliver and possession of methamphetamine and marijuana paraphernalia. (Appellants’ App. at 15-22.) On May 9, 2005, the Defendants filed a joint Motion to Suppress the evidence forming the bases for the charges described above. (Appellants’ App. at 23-40.) The District Court denied this Motion, and the Defendants subsequently entered conditional guilty pleas. (Appellants’ App. at 61-71; 72-86.) The Defendants filed a timely Notice of Appeal, giving rise to the issues contested herein. (Appellants’ App. at 87-88.)

STATEMENT OF THE FACTS

[¶2] On February 22, 2005, Maarja Brenna, a property manager for Ridgemont Property Management called the Grand Forks Narcotics Task Force and spoke with Officer Mark Nickel. (Tr. of Suppression Hr’g at 11.) Ms. Brenna told Officer Nickel that, while conducting an inspection at 2211 Library Lane, Apartment #107, she saw illegal drugs and drug paraphernalia. (Tr. of Suppression Hr’g at 11.) Officer Nickel and other agents of the Task Force met with Ms. Brenna shortly after receiving her complaint. (Id. at 12-13.) Ms. Brenna provided agents with a bottle cap containing burnt ashes and a plant stem believed to be marijuana; she collected these items during her routine inspection, notice of which was posted in the apartment complex. (Id. at 12.) Ms. Brenna told the agents that she saw other items in the apartment that she believed to be controlled substances and paraphernalia—including bagged marijuana, a two-foot-tall marijuana plant, an ashtray containing marijuana seeds and stems, a wine bottle that had burn marks at its lip, unused Zig-Zag cigarette rolling papers, and two quart-sized mason jars, one of which contained a milky white substance. (Appellants’ App. at 62.)

[¶3] Ms. Brenna told the officers that, prior to their arrival, she saw several people enter and exit Apartment #107. (Appellants’ App. at 62.) A male left the apartment carrying what Ms. Brenna believed was a marijuana plant. (Id.) A female left the apartment carrying what Ms. Brenna believed was a “bong”—a large device used to ingest controlled substances. (Id.)

[¶4] After speaking with Ms. Brenna, Officer Nickel and the other Task Force Officers went to Apartment #107 and knocked on the door. (Tr. of Suppression Hr’g at 13.) Reanna Graf answered the door, giving the officers her name and stating that she lived at that apartment. (Tr. of Suppression Hr’g at 14.) Ms. Graf spoke with Officer Nickel for a short

time, and then she gave the officers verbal consent to enter the apartment. (Id. at 14-15, 22-23, 38-39, 54-56.) The officers entered the apartment and followed Ms. Graf to the kitchen/dining area, where they were then able to see Samuel Parisien sitting on the couch in the living room. (Id. at 15-16, 39.) One officer performed a cursory search of the apartment to ensure there were no other individuals in the apartment. (Id. at 16.) The others spoke with Ms. Graf and Mr. Parisien, who also told the officers that he lived at the apartment. (Id. at 16-17.) The officers explained their presence, relating the information Ms. Brenna told them. (Id. at 17.) During this conversation, the officers saw a burned marijuana cigarette in an ashtray on the Defendants' coffee table. (Id. at 40-41.) The officers asked if the Defendants would consent to a search of the apartment. (Id. at 18.) The Defendants showed an initial willingness to grant consent for the search, and their demeanor was conversational and cooperative. (Id.) Officer Nickel attempted to explain a form granting consent to search to Mr. Parisien. (Id.) As Officer Nickel explained the form, Mr. Parisien became hesitant, calling his mother on the telephone. (Id.)

[¶5] While Mr. Parisien was on the phone with his mother, the officers asked him if he would consent to a search of the apartment. (Id. at 41-42.) Mr. Parisien gave no clear response, continuing his conversation with his mother. (Id. at 42.) At this point, the officers stated that they no longer needed consent to search, as they would apply for a search warrant instead. (Id.) The officers believed there was probable cause for a search warrant based upon the information from Ms. Brenna and based upon the burned marijuana cigarette seen in the ashtray on the Defendants' coffee table. (Id. at 43-44.) Officer Nickel told the Defendants that they were free to leave, and that they could attend their scheduled medical appointments. (Id. at 31-32, 44-45.) He also stated that the officers would not be leaving, because they had to secure the apartment while a search warrant was applied for. (Id.) Officer Nickel then left

the apartment, traveling to the State's Attorneys Office to apply for a search warrant. (Id. at 64.) The other officers remained at the apartment with the Defendants. (Id. at 45.)

[¶6] During Officer Nickel's absence, Mr. Parisien's mother and her husband arrived at the apartment building. (Id. at 46.) The officers allowed these individuals to enter and converse with the Defendants. (Id. at 46-47.) Attorney Kerry Rosenquist arrived shortly thereafter. (Id. at 47.) Mr. Rosenquist was also admitted to the apartment. (Id. at 47, 51.) After consulting with Mr. Rosenquist, Mr. Parisien signed a form giving his consent for the officers to search the entire premises. (Id. at 47-49.) Mr. Rosenquist witnessed Mr. Parisien's consent, signing the consent to search form regarding the apartment search. (Id. at 48.) Ms. Graf signed a consent to search form allowing officers to search her vehicle, located just outside the apartment building at that time. (Appellee's App. at 4.) Mr. Rosenquist also provided counsel to Ms. Graf before she signed the form granting consent to search her vehicle. (Appellee's App. at 4.)

[¶7] Task Force Officer Steve Hamre contacted Officer Nickel, telling him that, since the Defendants gave their written consent to search, a search warrant was unnecessary. (Tr. of Suppression Hr'g at 19-20.) Officer Nickel returned to the apartment to assist with the search now in progress. (Id. at 21.)

[¶8] Agents located and seized methamphetamine, and over a half-pound of bagged marijuana. (Appellants' App. at 63; Tr. of Suppression Hr'g at 51.) The apartment search also produced several items of drug paraphernalia, including scales, smoking devices for methamphetamine and marijuana, pen tubes with drug residue, containers with drug residue, burnt marijuana cigarettes, a handheld grinder, and \$8,515 in U.S. currency (Appellants' App. at 63.)

ARGUMENT

I. THE DISTRICT COURT'S DECISION DENYING THE DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE SHOULD BE AFFIRMED, BECAUSE LAW ENFORCEMENT OFFICERS ENTERED THE DEFENDANTS' APARTMENT AFTER OBTAINING VALID CONSENT TO DO SO.

[¶9] The District Court properly denied the Defendants' Motions to Suppress Evidence; however, the District Court erred in finding that Ms. Graf did not consent to law enforcement officers' entry into the apartment.

[¶10] The standard used to review the decision of a district court regarding a suppression motion is well-established in this state. The Supreme Court defers to a district court's findings of fact, resolving conflicting testimony in favor of affirmance, thus acknowledging the district court's better vantage in weighing evidence and testimony. City of Jamestown v. Dardis, 2000 ND 186, ¶ 7, 618 N.W.2d 495 (*internal citations omitted*). The Court will assign factual error to a district court where that court's analysis relies on evidence insufficient to support its findings, and if that court's decision is "contrary to the manifest weight of the evidence." Dardis, 2000 ND 186 at ¶ 7 (*internal citations omitted*). "[W]hether findings of fact meet a legal standard is a question of law." Id. (*internal citations omitted*).

[¶11] Ms. Graf consented to law enforcement officers' entry into the apartment. The giving of consent is a question of fact, determined by the totality of the circumstances. State v. Mitzel, 2004 ND 157, ¶ 13, 685 N.W.2d 120 (*internal citations omitted*). To prove this, the State "must show affirmative conduct by the person alleged to have consented that is consistent with the giving of consent[.]" Dardis, 2000 ND 186 at ¶ 11 (*internal citations omitted*). Consent may not be inferred by showing that a person took no steps to prevent the entry of law enforcement; nor may consent be manifested equivocally. Id. at ¶ 11; see Mitzel,

2004 ND157 at ¶ 17 (equivocal indications of consent include nonverbal behavior, such as shrugging one's shoulders).

[¶12] The District Court found that a factual dispute existed as to whether Ms. Graf initially consented to law enforcement officers' entry into the apartment. (Appellants' App. at 65.) The crux of this factual dispute, according to the District Court, lies in Officer Nickel's testimony that Ms. Graf gave verbal permission to enter the apartment, although he could not remember her exact words, versus Ms. Graf's testimony that she did not give permission for entry. (Appellants' App. at 65.) This analysis fails to examine the totality of the circumstances, resulting in a factual finding lying contrary to the weight of the evidence.

[¶13] The totality of the circumstances reveals that Ms. Graf unequivocally consented to the officers' entry into the apartment. This totality of the circumstances is reached by determining "what a reasonable person would have understood by the exchange between the police and the suspect." Mitzel, 2004 ND 157, ¶ 13 (*internal citations omitted*). A number of factors demonstrate unequivocal consent in this instance. Officer Nickel knocked on the door of Apartment #107. Ms. Graf answered the door. Officer Nickel told her his name and asked for hers, which she gave him. She also answered Officer Nickel's question regarding whether she lived in the apartment. Officer Nickel then explained that Ms. Graf's apartment manager saw drugs in the apartment. He then asked if he and the three officers waiting in the hall, all dressed in civilian attire, could enter the apartment to talk about the situation.

[¶14] Testimony diverges at this point. Officer Nickel said that, "She stated that we could come in and speak with her, and that's what we did." (Tr. of Suppression Hr'g at 15.) On cross-examination, Officer Nickel said that, although he could not remember Ms. Graf's exact words, he "would say she said, 'Come in,' or something similar to 'come in[.]'" (Tr. of Suppression Hr'g at 23.) An officer present in the hallway of the apartment building during the exchange, Special Agent Gilpin, testified that Ms. Graf "gave us verbal permission to

enter the apartment.” (Id. at 39.) On cross-examination, Special Agent Gilpin said, while “[t]here was communication between Nickel and Reanna Graf[,]” he could not remember Ms. Graf’s exact words granting consent. (Id. at 54.) He further stated it was something he “[p]robably should have remembered [..., but...] at that point everything was going textbook. It wasn’t an issue.” (Id. at 55.)

[¶15] Ms. Graf testified that, in response to Officer Nickel’s request to come in and speak to the apartment’s occupants, “I don’t think I said anything. I think I turned and called Sam.” (Id. at 67.) After a few more questions on direct examination, Ms. Graf’s testimony became more definite, and she stated, “No, I did not” tell the officers that they could come in. (Id. at 68.)

[¶16] After noting the divergence in testimony, it becomes important to point out that other courts held up determinations that consent to search was given in factually similar situations. In State v. Drummond, 560 S.E.2d 886 (Table) (N.C. App. 2002), 2002 WL 276236, consent to search was upheld on appeal. In that case, the defendant testified that he did not consent to a search of his person, and one of the arresting officers was unable to remember if the defendant consented. Drummond, 560 S.E.2d 886, at p. 1. However, after considering the defendant’s “quite equivocal” testimony following his arrest, the reviewing court determined that sufficient evidence existed for the trial court to find a grant of consent. Id. In State v. Frost, 603 N.E.2d 270, 273-74 (Ohio App. 1991), an “officer could not recall the exact method of consent, [but] he did testify that defendant consented to the search[...].” The court attached weight to the fact that the officer’s testimony was unequivocal: “He testified that defendant consented to this search.” Frost, 603 N.E.2d at 274. The reviewing court found sufficient evidence to support the trial court’s determination that consent was granted. Id. In the case at bar, the police officers testified under oath that Ms. Graf gave unequivocal verbal consent for them to enter the apartment, while her own testimony

remained ambiguous. This is but one factor in the totality of the circumstances; nonetheless, it is one that casts considerable weight to the claim that Ms. Graf consented to the officers' entry.

[¶17] The parties' actions immediately upon entry to the apartment also form the totality of the circumstances, showing that Ms. Graf did indeed manifest unequivocal consent for the officers to enter. There is no dispute that Ms. Graf informed Officer Nickel that Mr. Parisien, her boyfriend, lived in the apartment as well. (Id. at 67.) Ms. Graf said that she turned and walked toward the living room area of the apartment to tell Mr. Parisien that officers wanted to talk to them. (Id. at 67-68.) The officers followed Ms. Graf into the apartment, whereupon Officer Nickel saw Mr. Parisien sitting on the couch. (Id. at 15-16.) Mr. Parisien told Officer Nickel who he was. (Id. at 16-17.) Officer Nickel then told the Defendants that the apartment manager saw drugs in the apartment. (Id. at 17.) The Defendants queried Officer Nickel as to what kind of drugs, specifically, had been observed. (Id.) Officer Nickel told them that the apartment manager saw "someone carrying around a bong and a marijuana plant[.]" whereupon the Defendants laughed and stated that there was nothing like that in their apartment. (Id.) Officer Nickel described both Defendants' demeanor as very conversational and cooperative. (Id. at 18.) At this time, Officer Nickel asked for permission to look around the apartment, and the Defendants "seemed to be relaxed and willing to give us consent when I asked for it." (Id.) The Defendants showed signs of hesitation only after Officer Nickel began explaining a consent to search form to Mr. Parisien. (Id.) At no point during Ms. Graf's testimony or within her Affidavit does she state that she was surprised or alarmed by the officers' entry into the apartment.

[¶18] The District Court relied on two North Dakota cases, inapposite to the facts of the instant case, in reaching its conclusion. The first case involved an argument that an officer had implied consent to enter an apartment where a loud party was in progress, where

the door to the apartment was opened by a non-resident. Dardis, 2000 ND 186 at ¶¶ 4, 10. In that case, the trial court found that no consent was given, as the officer simply walked into the apartment when the door was opened. Id. at ¶ 10. The second case involved officers entering a home after receiving an anonymous report of a domestic disturbance. State v. DeCoteau, 1999 ND 77, ¶ 2, 592 N.W.2d 579. In that case, the trial court found that the woman who answered the door did not consent to officers' entry, when the officers followed her into the home after she merely opened the door. DeCoteau, 1999 ND 77, ¶ 12.

[¶19] The instant case is distinguishable from the cases above. The District Court cast the most weight to Ms. Graf's testimony regarding whether she consented to entry of the apartment. While the District Court's province is that of determining the credibility of witnesses, this task was performed erroneously when other evidence was thrown the wayside to achieve the end result. The District Court made no mention of the fact that the Defendants' demeanor showed no surprise at law enforcement's entry into the apartment. This is not to say that people must affirmatively tell officers that they cannot enter a home, but rather goes toward establishing whether a reasonable person would agree that consent had been given. The Defendants' cooperative, conversational behavior bolsters the fact that the entry was consensual. Finally, and most importantly, two law enforcement officers testified, under oath, that verbal consent to enter the apartment was given, though they could not remember the exact wording of the consent.

[¶20] The totality of the circumstances shows that consent was given for the officers' entry into the apartment. This consent fulfills one of the exceptions to the requirement for a search warrant. Dardis, 2000 ND 186, ¶ 9 (*internal citations omitted*). The Defendants' other contentions are treated below.

II. THE DISTRICT COURT'S DECISION DENYING THE DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE SHOULD BE AFFIRMED, BECAUSE MR. PARIEN VOLUNTARILY CONSENTED TO THE SEARCH OF THE APARTMENT, PURGING ANY PRIOR TAIN FROM THE ENTRY.

[¶21] The District Court properly concluded that Mr. Parisien voluntarily consented to a search of the apartment by executing a written consent to search form after consulting with an attorney, purging any prior taint resulting from the officers' warrantless entry of the apartment.

A. The District Court properly concluded that Mr. Parisien voluntarily consented to the law enforcement search of the apartment.

[¶22] The District Court properly concluded that Mr. Parisien voluntarily consented to the law enforcement search of the apartment by executing a written consent to search form. Voluntariness of a consent to search lies in a totality-of-the-circumstances inquiry, focusing on 1) the characteristics and condition of the accused at the time he or she consented to the search, and 2) the details of the setting surrounding the consent. City of Fargo v. Ellison, 2001 ND 175, ¶ 13, 635 N.W.2d 151 (*internal citations omitted*).

[¶23] The characteristics and condition of Mr. Parisien at the time he consented to the search of his apartment support a determination of voluntariness. Mr. Parisien was never placed in custody before, during, or immediately after the search. See State v. Linghor, 2004 ND 224, ¶ 14, 690 N.W.2d 201 (the test is whether, under the totality of the circumstances, a reasonable person would believe he or she was not under arrest, and that he or she was free to leave). The facts show that neither Defendant was in custody before the consent to search form was signed. The officers entered the apartment with Ms. Graf's verbal consent. The initial consent to enter was voluntary and valid.

[¶24] Contrary to the facts in State v. Mitzel, 2004 ND 157, ¶ 2-6, 685 N.W.2d 120, neither Defendant was under arrest at any time, and neither was handcuffed. They were free to

leave, being told so by the officers on more than one occasion; however, their apartment would be secured and while a warrant was applied for. No one told the Defendants to cancel their medical appointments; the Defendants did that on their own.

[¶25] No Miranda warnings were necessary, as the Defendants were not under arrest, were not being questioned, and were free to leave. State v. Haibeck, 2004 ND 163, ¶ 20, 685 N.W.2d 512 (*citing* Miranda v. Arizona, 384 U.S. 436, 444 (1966)). Moreover, they had an attorney representing them. Besides the cursory search, the officers remained in the common area of the apartment with Mr. Parisien and Ms. Graf. The officers did not wander around, they did not look in cupboards and drawers, and they did not shuffle through paperwork on the kitchen table. No one told Mr. Parisien that if he did not quit talking to his mother, the phone would be disconnected.

[¶26] Mr. Parisien himself was no stranger to law enforcement, having been convicted of a drug offense in the past. Further, his age and level of maturity militate toward a finding of consent. He telephoned his mother shortly after officers entered the apartment, so that he could seek advice as to how he should proceed. His demeanor to that point was conversational and cooperative. It is true that Mr. Parisien suffers complications resulting from the disease lupus; however, this illness has been a fact of his life for years, and it cannot be used to hobble the efforts of law enforcement. Also, it is important to note that the Defendants were never separated from each other by the officers. Ms. Graf remarked that she became anxious while she was in the kitchen, as she was unable to see Mr. Parisien. She remedied this situation by moving into the living room area.

[¶27] The details of the setting also militate toward a finding of voluntariness. It is true that four officers wearing side-arms were present. See State v. Bartelson, 2005 ND 172, ¶ 43, 704 N.W.2d 824 (Maring, J., dissenting) (number of uniformed officers present, exerting a custodial presence, may sway courts to find consent involuntary) (*internal citations omitted*).

However, the officers wore civilian clothing, weapons holstered, and there was no testimony that any party raised his or her voice or spoke in a coercive tone. Indeed, the testimony paints the opposite picture. Officer Nickel apprised Ms. Graf of the situation at the door, asking to come inside and speak with the Defendants about the apartment manager's assertions of drug activity. The other three officers waited in the hallway during this exchange, not crowded behind Officer Nickel in some awe-inspiring show of authority.

[¶28] The officers entered the apartment upon receipt of consent to do so, following Ms. Graf into the living room area to speak with Mr. Parisien. It is true that one officer performed a cursory survey of the apartment; however, testimony established that this was for officer safety, as the officers were investigating alleged drug activity. Further, it must be noted that the officer who performed the cursory survey did not turn up any evidence after doing so; he simply glanced into the side rooms to see if anyone else was present.

[¶29] One officer testified to seeing a controlled substance after entering the apartment. A partially-burnt marijuana cigarette lay in an ashtray on a coffee table in plain view near where the officers spoke to Mr. Parisien. The officers only observed this evidence while accomplishing the stated goal of speaking with the Defendants regarding the apartment manager's earlier statements.

[¶30] At this point, the officers told the Defendants that they were free to leave, but the officers also said that if the Defendants did not leave, the officers had to remain in order to prevent the destruction of evidence. Several cases discuss the propriety of securing premises while officers await the issuance of search warrants. *See, e.g., United States v. Edwards*, 602 F.2d 458, 461 (1st Cir. 1979) (anticipating a warrant, officers secured apartment for one-and-a-half hours following cursory search); *State v. Kitchen*, 1997 ND 241, ¶¶ 17-18, 572 N.W.2d 106 (while serving arrest warrant, officers secured premises from inside, prevented one defendant from closing the door, and waited for another officer to arrive so they could obtain a search

warrant); State v. Wahl, 450 N.W.2d 710, 712 (N.D. 1990) (following warrantless entry and arrest, officers performed a cursory search, awaiting issuance of a warrant prior to conducting a full-blown search). The officers acted according to the standards demanded of law enforcement when confronted with a plain-view observation of controlled substances.

[¶31] Additionally, Mr. Parisien's mother and her husband were allowed entry to speak to the Defendants. Mr. Parisien even left the apartment to speak to attorney Kerry Rosenquist in the hallway for fifteen minutes. Mr. Rosenquist counseled the Defendants prior to their signing the consent to search forms. Further, Mr. Parisien and Mr. Rosenquist assisted the officers in the consented-to search. Testimony established the unusual nature of these circumstances; typically, parties who do not live at premises secured by officers are denied admittance. (Tr. of Suppression Hr'g at 46-47.) The officers were more than accommodating in allowing Mr. Parisien's mother and her husband to enter, a detail lending credence to the Defendants' voluntariness regarding the consent to search.

[¶32] The Defendants' reliance upon State v. Kiekhefer, 569 N.W.2d 316 (Wis. App. 1997) is misplaced. The facts in Kiekhefer are inapposite to the facts of the instant case, deflating the Defendants' argument that any police misconduct occurred. In Kiekhefer, police officers, acting on information that a large quantity of marijuana and some guns would be moved, attempted a consensual search of the defendant's home. Kiefhefer, 569 N.W.2d at 321. The defendant's mother permitted the officers' entry, and the officers smelled the odor of burning marijuana outside the defendant's bedroom door. Id. Four officers entered the bedroom, immediately handcuffed the two occupants, and patted them down. Id. The defendant responded to questioning about controlled substances by gesturing to a marijuana cigarette in an ashtray, but he subsequently refused to consent to a search of his room. Id.

[¶33] The Defendants omit certain of the facts that the Court of Appeals of Wisconsin considered in reaching its decision. After the defendant's initial refusal, an officer did state that

“we can get a warrant if we need to.” Id. However, another officer was quoted as saying, “We can do this easy, you can allow me to [search] or we can do this hard, and then in which case we’ll tear this place apart.” Id.

[¶34] In the instant case, the officers were well within the law in stating their intent to obtain a search warrant for the Defendants’ apartment:

Police may not threaten to obtain a search warrant when there are no grounds for a valid warrant, but ‘[w]hen the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission, it does not vitiate consent.’

Kiekhefer, 569 N.W.2d at 324 (*citing* United States v. Evans, 27 F.3d 1219, 1231 (7th Cir. 1994)).

[¶35] In this case, the officers interviewed the apartment manager, who stated that she saw drugs, and she provided the officers a sample of what they believed was marijuana in a bottle cap. The apartment manager also told the officers that several people came and left the apartment, carrying drugs and drug paraphernalia out. The officers contacted the Defendants, and entered the apartment after receiving valid consent. The officers saw drugs in plain view while conversing with the Defendants. Based on the drugs given to them by the apartment manager, or those that were seen inside the apartment, the officers believed that they had probable cause to obtain a search warrant. Officer Nickel even left the apartment to obtain a search warrant, and he only returned after the Defendants signed forms consenting to search.

[¶36] Further, the officers in this case acted reasonably in making contact with the Defendants prior to obtaining a search warrant. The Supreme Court of Wisconsin distinguished a warrantless entry drug case from Kiekhefer, stating that a defendant’s actions could reasonably be interpreted as “representing a consciousness of the illegal activity going on inside and a concomitant desire to avoid its discovery by the police.” See Wisconsin v. Hughes, 607 N.W.2d

621, 628, n. 7 (Wis. 2000) (where an apartment occupant opened the door to see police waiting outside, retreated, and attempted to slam the door shut).

[¶37] In the case at bar, the officers faced a clear necessity. The apartment manager thought that people were in the apartment when she began her inspection. It is reasonable to infer that the apartment occupants wanted to destroy or remove the evidence of their criminal acts in the event that police arrived. Further, the apartment manager stated that she saw people removing drugs and drug paraphernalia from the Defendants' apartment. Though the exigency created by this situation goes more toward explaining the officers' conduct in purging any prior taint from a supposedly illegal entry, it is also helpful in showing the level of restraint in the officers' conduct under these circumstances. Despite the likely destruction or evacuation of drug-related evidence, the officers remained polite and calm with the Defendants at all times, simply repeating a request to have Mr. Parisien authorize an apartment search. The officers allowed Mr. Parisien's parents to enter; Mr. Parisien even had a private, face-to-face interview with a lawyer. The police merely safeguarded the location of the evidence, as was their duty.

[¶38] The Defendants' reliance upon State v. Thurman, 846 P.2d 1256 (Utah 1993) is similarly misplaced. In that case, the police did not just "inform a suspect that they could get a warrant[,] thus contributing to a coercive atmosphere. (Appellants' Br. at 13.) Rather, law enforcement added to the air of intimidation "when [the defendant] hesitated to sign the first consent form, [by] implying that a refusal to sign the form was futile and that the police would undertake the search in any event." Thurman, 846 P.2d at 1272. However, in that case, the air of intimidation was already quite heady, as:

[S]ix agents burst into [the defendant's] small apartment with weapons drawn, routed him out of bed, handcuffed him behind the back while he was naked (somehow producing a bloody nose in the process), and commenced the search.

Id. The conduct of the officers in the instant case in no way sinks to the levels described in Kiekhefer or Thurman. The District Court parsed ample evidence showing that Mr. Parisien’s consent to search the apartment was given voluntarily.

B. The District Court properly concluded that Mr. Parisien’s written consent to search the apartment became the independent, lawful cause of the discovery of the Defendants’ drugs and drug paraphernalia.

[¶39] The District Court properly concluded that Mr. Parisien’s consent to search the apartment became the independent, lawful cause of the discovery of the Defendants’ drugs and drug paraphernalia. The U.S. Supreme Court identified three factors to be considered by courts in making this determination: “1) the temporal proximity between the illegal search or seizure and the consent, 2) the presence of intervening circumstances, and 3) the purpose and flagrancy of the official misconduct.” Brown v. Illinois, 422 U.S. 590, 603-04 (1995). This rationale applies to consensual searches as well:

The same factors as identified by the United States Supreme Court in Brown, in determining whether a confession retains the taint of an illegal search are relevant in determining whether a voluntary consent to search retains the taint of an illegal stop or arrest.

United States v. Moreno, 280 F.3d 898, 900 (8th Cir. 2002) (*internal citation omitted*).

[¶40] The District Court determined that the intervening circumstances in this case outweighed the close proximity in time between the supposed Fourth Amendment violation and the Defendants’ signing of the consent to search forms. Intervening circumstances may purge the taint of consent granted following illegal law enforcement activity. Cf. United States v. Winborn, 344 F.3d 766, 769 (8th Cir. 2003) (“There are no intervening circumstances that support or detract from our conclusion that Winborn’s consent was freely given.”). A number of intervening circumstances occurred in the instant case, weighing in favor of the District Court’s conclusion that any earlier taint resulting from illegal police activity was purged.

[¶41] The Defendants had the benefit of private, face-to-face conversation with legal counsel. Consultation with an attorney prior to execution of a written consent form is an intervening circumstance sufficient to purge the taint of a Fourth Amendment violation. See, e.g., Brown, 422 U.S. at 611 (Powell, J., concurring in part) (consultation with counsel is a “demonstrably effective break in the chain of events leading from the illegal arrest to the statement”); United States v. Wellins, 654 F.2d 550, 555, n. 6 (9th Cir. 1981) (consultation with an attorney, by itself, may provide sufficient attenuation, “even in the most flagrant of circumstances”); State v. Shular, 400 So.2d 781, 782 (Fla. App. 1981) (consultation with an attorney and with parents purged the taint, where there was no evidence that the defendant was “threatened or subjected to lengthy or repetitive interrogation or that he was overwhelmed by his surroundings”).

[¶42] In the instant case, attorney Kerry Rosenquist arrived at the apartment about eight minutes after Mr. Parisien’s mother and her husband, who had themselves arrived about forty-five minutes after the officers’ first contact with the Defendants. (Tr. of Suppression Hr’g at 29, 46-47.) Mr. Rosenquist and Mr. Parisien conversed privately in the apartment hallway for about ten to fifteen minutes. Mr. Rosenquist then spoke to the officers regarding Mr. Parisien’s concerns prior to signing the consent to search form. After Mr. Parisien signed the form, so did Mr. Rosenquist. Mr. Parisien then actively cooperated with the search, pointing out the locations of drugs and currency to the officers. Mr. Rosenquist accompanied the parties during the search.

[¶43] The officers conducted themselves professionally during this course of events. The officers only entered the apartment after receiving consent to do so. They explained the situation to the Defendants, and while doing so noticed drugs in plain view. Rather than acting immediately upon the probable cause, the officers asked Mr. Parisien to sign a consent form for a search of the apartment. Mr. Parisien chose to ignore the officers, remaining on the telephone with his mother. He was not penalized for this, and the officers never threatened to cut off his

conversation. The officers told the Defendants that they were free to leave at any time; Ms. Graf rescheduled her medical appointment of her own free will.

[¶44] The Defendants also had the benefit of consulting with Mr. Parisien’s parents. “An intervening circumstance, sufficient to purge the taint of an illegal detention, may involve the detainee’s ‘consultation with an attorney, relative, friend, or priest prior to the time a statement is given.’” State v. Carter, 16 S.W.3d 762, 767 (Tenn. 2000) (citing State v. Huddleston, 924 S.W.2d 666, 675 (Tenn. 1996)); Weems v. State, 167 S.W.3d 350, 360-61, n. 9 (Tex. App. 2005); Brown v. State, 503 N.E.2d 405, 408 (Ind. 1987). In the instant case, Mr. Parisien telephoned his mother and spoke to her from about the time of the officers’ entry to the time that she and her husband arrived at the apartment. The officers allowed the couple to enter the apartment and speak with the Defendants. This consultation with Mr. Parisien’s parents should be taken into consideration as an intervening factor affecting the purge analysis.

[¶45] The officers conducted themselves in a lawful, reasonable manner, committing no flagrant acts necessary for the Court to discourage. The Defendants have already compared the conduct of the officers in this case to that of officers in other cases where judicial disapproval was noted. E.g., Kiekhefer, 569 N.W.2d 369; Thurman, 846 P.2d 1256. As those cases are distinguished in detail above, it suffices to say that the officers’ conduct here does not match up with that meriting discouragement in the above-listed cases.

[¶46] There is no deterrent value to be gained by suppressing the evidence in this case. The officers’ actions did not “borde[r] on harassment[.]” as suggested by the Defendants. See Bartelson, 2005 ND 172, ¶ 45 (Maring, J., dissenting) (where the defendant was twice stopped for the same equipment violation, the second time occurring after police had information that he was carrying contraband).

[¶47] In this case, the officers met with a witness who saw drugs and drug paraphernalia, and who provided a bottle cap containing a marijuana stem. This witness also stated that the

drugs and drug paraphernalia were being evacuated while the police were en route to the apartment complex. Officer Nickel knocked on the apartment door. The officers received consent to enter in order to discuss the apartment manager's statements. While doing so, the officers saw drugs in the Defendants' ashtray. The officers asked for consent to search, but made no threats when that consent was refused. The officers told the Defendants in good faith that Officer Nickel left to get a search warrant. Overall, the officers conducted themselves in an exemplary fashion.

[¶48] The Defendants cite a case exemplifying police conduct tainting an otherwise voluntary consent. In State v. Cooper, 2005 WL 2851649 (slip op.) (Ohio App. 2005), ten officers served an early-morning arrest warrant on the defendant at his home. Cooper, 2005 WL 2851649, ¶ 4. With gun drawn, the lead officer explained the purpose for their visit, handcuffed the defendant, and seated the defendant on a couch inside the house. Id. Within five minutes of the officers' entry of the house, the defendant, still handcuffed, had consented to a search of the house. Id. at ¶ 5.

[¶49] The facts of the instant case differ substantially. The officers acted lawfully and reasonably after Ms. Graf consented to their entry of the apartment. The officers could not ignore the marijuana cigarette in plain view inside. The officers merely told the Defendants the truth when stating that Officer Nickel went to get a warrant. Mr. Parisien consented to a search of his apartment only after consultation with his mother, her husband, and an attorney. The officers' conduct inside the apartment did not expedite the search in any way.

III. THE DISTRICT COURT'S DECISION DENYING THE DEFENDANTS' MOTION TO SUPPRESS EVIDENCE SHOULD BE AFFIRMED, BECAUSE THE DRUGS FOUND IN THE DEFENDANTS' APARTMENT ARE ADMISSIBLE AS EVIDENCE PURSUANT TO THE INEVITABLE DISCOVERY RULE.

[¶50] The District Court properly concluded that the drugs found at the Defendants' apartment would have inevitably been discovered. Evidence obtained after an unlawful search or seizure is admissible under the fruit-of-the-poisonous-tree doctrine if the evidence would inevitably have been discovered absent the unlawful conduct. State v. Gregg, 2000 ND 154, ¶ 51, 615 N.W.2d 515 (*internal citations omitted*). Courts developed a two-part analysis to determine whether the inevitable-discovery doctrine applies: 1) if the police have not acted in bad faith to accelerate the discovery of the evidence at issue, and 2) if the evidence would have been found without the unlawful activity, the prosecution must show how the discovery would have happened. State v. Smith, 2005 ND 21, ¶ 32, 691 N.W.2d 203 (*internal citations omitted*).

[¶51] The officers did not act in bad faith to accelerate the discovery of the drugs because they were in the process of applying for a search warrant at the time Mr. Parisien provided written consent for the search. The only search that occurred was cursory in nature, as one of the agents checked the rooms of the apartment for any other people occupying the apartment; this search turned up no evidence. The officers saw a marijuana cigarette in an ashtray in the living room area after speaking with Mr. Parisien, the reason the officers were inside in the first place. From that point onward, the officers could not leave the apartment for fear that the evidence would be destroyed.

[¶52] The drugs would inevitably have been discovered. As noted by the Defendants, probable 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. Fields, 2005 ND 15, ¶ 5, 691 N.W.2d 233. A search warrant will be

issued if, based on the facts and circumstances presented before a reviewing magistrate, a reasonable person would believe the evidence would likely be found in the place to be searched. Id. at ¶ 7.

[¶53] The information concerning drugs in the Defendants' apartment was timely, detailed, and established a fair probability that drugs or drug paraphernalia would be found there. E.g., State v. Frohlich, 506 N.W.2d 729, 731-35 (N.D. 1993). The apartment manager, Ms. Brenna, began a routine inspection of the Defendants' apartment. She saw bagged marijuana, marijuana in an ashtray, cigarette rolling papers, and a curious substance in a mason jar. Ms. Brenna took a sample with her, and immediately called law enforcement. In the short time it took for officers to arrive, Ms. Brenna saw individuals removing a marijuana plant and a large smoking device from the Defendants' apartment. Ms. Brenna's information provided the officers a nexus "between the residence to be searched and the evidence sought[;]" the result of a direct observation. Cf. Frohlich, 506 N.W.2d at 733-34.

[¶54] The Defendants seem to argue that, since people were seen carrying a marijuana plant and a large smoking device out of the apartment, that nothing remained for which a search warrant could issue. However, "the State [is] not required to negate every other possibility about where the [evidence] might be located." Id. at 734-35 (citing United States v. Hendrix, 752 F.2d 1226, 1231 (7th Cir. 1985)). Ms. Brenna saw bagged marijuana and marijuana in an ashtray in addition to the plant and "bong" that were removed minutes prior to the officers' arrival. The Defendants fail to argue that some of the contraband specifically mentioned by Ms. Brenna was not removed. The Defendants' argument also fails to note that, based upon Ms. Brenna's observations and the marijuana sample she brought them, more contraband was likely to be found inside the Defendants' apartment. See State v. Johnson, 531 N.W.2d 275, 278 (N.D. 1995) ("We think it reasonable for the magistrate to have concluded, from the presence of marijuana seeds in Johnson's garbage bag, that more marijuana was probably located inside his

house.”) For all these reasons, the evidence furnished by Ms. Brenna is both timely and detailed, establishing a fair probability that drugs or drug paraphernalia would be found in the Defendants’ apartment.

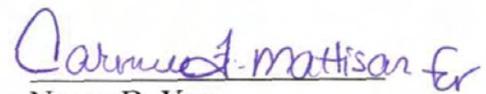
[¶55] The apartment manager was sufficiently credible for search warrant purposes. Citizen informants are presumed to be reliable sources of information, and their reliability “should be evaluated from the nature of [their] report, [their] opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation.” Frohlich, 506 N.W.2d at 733. There is no dispute that Ms. Brenna was the Defendants’ apartment manager at the time of the search. Further, the Defendants do not dispute the legitimacy of her presence in their apartment; it was a routine inspection for which they received ample notice. Ms. Brenna told the officers about the drugs and paraphernalia that she had directly observed inside the apartment, and also about the marijuana plant and “bong” that were evacuated from the apartment before the officers’ arrival. She also provided a marijuana sample in a bottle cap. Following their interview of Ms. Brenna, the officers immediately sought to verify her credibility, a task borne out in full by the chain of events following the officers’ consensual entry of the Defendants’ apartment.

[¶56] Based upon the above facts and circumstances, probable cause existed to obtain a search warrant. Further, the officers did not act in bad faith or attempt to accelerate the discovery of the drugs in any way, as Officer Nickel was obtaining a search warrant at the time the consent to search was given. The evidence would inevitably have been discovered following a search conducted pursuant to the issuance of a search warrant.

CONCLUSION

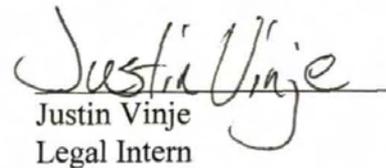
[¶57] For all the foregoing reasons, the State respectfully requests this Court to affirm the District Court's decision denying the Defendants' motions to suppress evidence.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

State of North Dakota,)
)
Plaintiff/Appellee,)
)
vs.)

Reanna Graf,)
)
Co-Defendant/Appellant,)
)
AND)

Dist. Ct. Nos.: 05-K-661; 05-K-663;
05-K-664; 05-K-665
Sup. Ct. Nos.: 20050410-20050413

Samuel Parisien,)
)
Co-Defendant/Appellant.)

Dist. Ct. Nos.: 05-K-675; 05-K-676;
05-K-678; 05-K-679
Sup. Ct. Nos.: 20050414-20050417

AFFIDAVIT OF SERVICE BY E-MAIL

STATE OF NORTH DAKOTA)
)SS.
COUNTY OF GRAND FORKS)

The undersigned, being of legal age and a resident of Grand Forks County, North Dakota, being first duly sworn, on oath deposes and says: That on the 23rd day of March, 2006, she served via e-mail the following documents:

BRIEF OF APPELLEE and APPENDIX OF APPELLEE

and that said e-mail was served on the address of **Robin L. Olson, Attorney at Law**, whose e-mail address is:

rlolson@olsonjohston.com

Arlene Herzog

State's Attorney's Office

Shari L. Vonasek

Notary Public
My commission expires: 08/17/2010

SA #00000089822
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