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20070140

STATE OF NORTH DAKOTA
IN SUPREME COURT
NO. 2007-0140

STATE OF NORTH DAKOTA,

Plaintiff/Appellee,

– vs.–

STEVEN ARTHUR TORKELSEN,
Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT
COUNTY OF TOWNER, NORTHEAST JUDICIAL DISTRICT,
NO. 48-04-K-083, HON. LEE A. CHRISTOFFERSON, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

1. Whether Defendant made a timely and unequivocal request to represent himself.

   District Court held: in the negative.

2. Whether the evidence obtained with Defendant's consent was admissible because the Defendant's repeated voluntary consents, after being given a *Miranda* warning, after being told he was not under arrest, and after being expressly advised of his right to refuse consent, rendered the evidence sufficiently distinct from the illegal stop.

   District Court held: in the affirmative.

3. Whether the evidence seized pursuant to the nighttime search warrant for Arthur and Leona Torkelsen's home was admissible--

   a. Because there was probable cause for the nighttime search warrant.

   District Court held: in the negative.

   b. Because the warrant was admissible under *Leon* exception.

   District Court held: in the negative.

   c. Because the evidence would inevitably have been discovered.

   District Court held: in the affirmative.

4. Whether admitting the Defendant's boot, if it were error, would be harmless beyond a reasonable doubt.

   District Court did not rule.

STATEMENT OF THE CASE

On July 8, 2004, Defendant Steven Torkelsen was charged by Complaint with the offense of Murder in violation of NDCC 12.1-16-01 by intentionally causing the death of Rebecca Flaa under circumstances manifesting extreme indifference to the value of human life. On July 1, 2005, after denial of his motions to dismiss or suppress evidence, Defendant entered an *Alford* [*North Carolina v. Alford*, 400 U.S.25 (1970)] conditional plea of guilty under N.D. Rules of Crim.Proc. 11 (a)(2). Under this plea, he accepted his sentence subject to his right to appeal the District Court's pre-trial rulings.

On July 18, 2006, the North Dakota Supreme Court reversed the District Court's denial of Defendant's motion to suppress [*State v. Torkelsen*, 2006 ND 152, ¶18, 718 N.W.2d 22]. The Supreme Court held that the officers did not have grounds to make a *Terry* stop of Defendant's vehicle.

On January 12, 2007, Defendant filed motions seeking the suppression of evidence seized from the Defendant's camper and truck, as well as from his parents' home. [Motion to Suppress Evidence Following Remand, App. 5, docket #222; Motion to Suppress Evidence

from Camper, App. 5, docket #223; Motion to Suppress Evidence from Pickup Truck, App. 5, docket #224; Motion to Suppress Evidence from Arthur Torkelsen's Residence, App. 5, docket #225]. On March 16, 2007, the District Court held admissible evidence obtained from Defendant's person, camper, parents' home and Rugby trailer. [Order on Motions to Suppress Evidence, docket #296, App. at 20-52][1].

Trial commenced April 30, 2007. On May 8, 2007, the jury returned its verdict, finding defendant guilty of the murder of Rebecca Flaa. [Tr., p. 1505]. Defendant was sentenced to life without parole. [Tr., p. 1525]. Notice of Appeal was filed May 17, 2007. [App., p. 55].

STATEMENT OF FACTS

Appellant's Brief, ¶10-11, restates some facts set forth in the District Court's Order on Motion to Suppress Evidence, omitting other facts relevant to the issues on this appeal.

After Rebecca Flaa's burning body was discovered on Sunday, June 27, 2004, at about 9 a.m., Defendant appeared at the scene, smoking

[1]The court issued a Corrected Order (docket #302) on March 19, which corrected typographical problems but did not change the substance of the order.

a cigarette. A cigarette butt (later shown to bear Defendant's DNA) was found on the gravel road above the body site. [App. 21, par. 1]. Emergency personnel recognized Torkelsen's vehicle. [App. 22, par. 2]. At 10:20 a.m, investigators determined that the body was female and that an accelerant had been used. [*Id.,* par. 3]. Investigators found a bloody Florida Marlins jacket on the road Defendant took when leaving the crime scene. [*Id.,* par. 5].

About 1 p.m., Defendants' red pickup truck was observed heading west, about 10 miles west of Cando. [*Id.,* par. 6-7]. Defendant was stopped at about 1:26 p.m., 28 miles west of Cando. [*Id.,* par. 8]. He was transported to Cando for questioning, where he was met by Agent Zachmeier at about 2:00 p.m. Zachmeier removed his handcuffs and read Defendant his *Miranda* rights. [*Id.,* par. 9, 11]. Defendant acknowledged that he understood his rights, and the interview commenced. The tone of the interview was conversational. When the Defendant asked if he was under arrest, Zachmeier informed him that he was not under arrest. Defendant consented to photographs of his person. During the interview, Zachmeier noticed an alcohol odor, and Defendant consented to a breath test. The test, conducted by another officer, showed a .003% blood alcohol concentration. [*Id.*, par. 11]. Defendant offered to allow a search

of his camper. On two separate occasions, Defendant consented to a search of his camper when such search was requested. On three occasions, Defendant orally consented to a search of his pickup truck when such search was requested. [*Id*, par. 12]. At about 3 p.m., Zachmeier read to the Defendant a written Consent to Search form which expressly states that Defendant had a right to refuse to consent to the search. Defendant signed the written consent form without objection or discussion of the right to refuse. [*Id.,* par. 13]. The interview ended at 3:02 p.m.

At about 3:10 p.m., Defendant accompanied law enforcement officers to his camper for the search. [App. 23, par. 15]. Upon arrival at the camper, at about 3:28 p.m., Zachmeier again asked Defendant for consent to search it. Defendant again consented to the search, and told the officers how to open the camper door, which was secured with a bungee cord. [*Id.,* par. 16]. In the course of the search of the camper, the officers discovered:

> . . . tissue with apparent human blood; marijuana cigarette packs; zig zag rolling papers; documentation with name of Flaa; video case with apparent human blood on it; apparent blood on a cupboard, on cabinet doors, and on ceiling; female accessories pack with name of Becky marked on it (had makeup in it); knife with broken tip in sink; subway shirt; flannel shirt; gun magazines; multiple cigarette and marijuana cigarette butts; documentation with Defendant's name; documentation with Flaa's name dated

9/30/02; pornography; molding with apparent blood.

At 5:30 p.m., before leaving the camper site, Agent Zachmeier again asked Defendant for consent to search his pickup, and Defendant again consented. [par. 18]. On the way to the pickup, the officers and the Defendant stopped for food and beverages. Defendant's request to stop by his parents' house was denied. [par. 19].

At 6:20 p.m., they arrived at the pickup. Probation Officer Thomas called and a probation hold was placed on the Defendant. Defendant was again asked for consent to search the pickup and permission to move it off the highway for safety. Defendant again consented to the search and approved moving the truck. [par. 20]. In the search of the pickup truck, the officers discovered [par. 21]:

> . . . red material which appeared to be blood (later determined not to be blood) in pickup box plus apparent human hair and burnt fabric, bloody bed sheets (Flaa's), pillow case, knife, blanket with hairs on it, porno videos and magazines, three 270 caliber rifle cartridges, Viagra prescription, nylon rope several feet long, black plastic bags . . .

At 6:30 p.m., the police discovered that Defendant and Rebecca Flaa had been living together on the Abrahamson farm (where the camper was located) and that the owner had a week earlier padlocked the farmhouse to prevent Defendant and Flaa from using it. [par. 22]. At 8:25 p.m. (after completion of the pickup search), Defendant was transported

back to Cando for a second interview. [par. 24-25]. A consent search of the house and outbuildings on the Abrahamson farm was conducted at about 8:45 p.m., discovering documents and magazines with Defendant's name, together with other evidence. [par. 26].

At about 9:45 p.m., Agent Zachmeier commenced a second interview of the Defendant by reading him his *Miranda* rights. Defendant acknowledged that he understood those rights. Defendant then reviewed the consent to search documents and again stated that he had no problem with the searches. [par. 27]. During the interview, the Defendant stated [par. 28]:

> (1) he knew Flaa; (2) about three weeks ago he picked up Flaa at her boyfriend's residence in Lakota because Flaa was having problems with her boyfriend; (3) he brought Flaa back to his camper located at the Gibbens farm; (4) they were in a sexual relationship; (5) for approximately the last week (June 13-20, 2004) Flaa stated that she was going to leave Defendant and go back to her boyfriend in Lakota; (6) on Wednesday night (June 23) Defendant and Flaa stayed in camper and had sexual intercourse; (7) Defendant left camper approximately 9 a.m. Thursday morning (June 24) and went to his parents' residence in Cando; (8) Defendant left parents' residence approximately 9 p.m. and went back to camper to find that Flaa was gone; (9) Defendant suspected that Flaa had left camper to go back to her boyfriend's residence in Lakota; (10) Defendant stayed at camper Thursday night June 24; (11) Defendant stayed at his parents' residence Friday night June 25; (12) Defendant stayed at his parents' residence Saturday night June 26; (13) Defendant left his parents' residence on Sunday morning (June 27) at 6 a.m. and went back to camper where he slept until 8:30 a.m.; (14) Defendant then traveled back to Cando up a rural county road out of his way; (15) Defendant encountered Belzer and asked Belzer if he needed help; (16) Flaa owned a

> leather jacket and a sports jacket; (17) Defendant identified the Florida Marlins jacket as belonging to Flaa; (18) Flaa has reddish-brownish hair; (19) Defendant described Flaa and it matched the smaller female victim that was found burning in the ditch; (20) Defendant left crime scene and went to his parents' residence where he showered and changed clothes; (21) Defendant left a pair of work boots at his parents' residence; (22) Defendant left a pair of tennis shoes near the fireplace; (23) Defendant left his parents' residence and then law enforcement took him into custody; (24) some of the blood in the camper was from Flaa cutting her lip when the trailer door opened she hit her lip on the trailer door and that caused the blood throughout the trailer; (25) the bloody tissue might be from Flaa; (26) or the bloody tissue might be from Julie Herald from Devils Lake who was at the trailer approximately three weeks ago (June 6) with Defendant when she got a bloody nose and the tissue may have been used to stop the bleeding; (27) Defendant was not upset that Flaa was gone as they were not in love; (28) two days prior (Friday, June 25), the Florida Marlins jacket was hanging in the camper. Zachmeier again noticed cuts and /or scratches on Defendant's arm. His hand was more swollen than during the first interview. Defendant not free to leave but not under arrest.

At 10:05 p.m., Defendant consented to a saliva sample collected for DNA. [par. 29].

At 11:00 p.m. Art and Leona Torkelsen, Defendant's parents, were interviewed. They stated that Defendant had been with Flaa last week and that Defendant came to their home on 6/24/04 to get candy and food to bring back to Rebecca. They stated that Defendant told them that when he got back to the camper, Rebecca was gone. [par. 30]. At 11:00 p.m., the Defendant was formally arrested, on drug charges, Mirandized and transported to Lake Region Correctional center. [par. 32].

At 12:05 a.m., Defendant's parents consented to a search of their home, and the police seized tennis shoes, cigarette butts, and a baggie with marijuana. [par. 33]. At about 1:30 a.m., Art Torkelsen revoked his consent to the search and the officers complied by leaving the house. Later, an officer came back to watch the house. [par. 34]. At 2:28 a.m., Judge Foughty signed a search warrant authorizing a nighttime search of the Art and Leona Torkelsen home for clothing, gas can and evidence of the murder. [par. 36]. The reason given for the nighttime warrant was Art Torkelsen's revocation of consent, the parents' prior history of posting bail, and the parents' inclination to protect their child when faced with a crime this serious. [Search warrant transcript, p. 11].

At 2:54 a.m., the officers began the search of the Torkelsen home. They knocked and rang the doorbell and were let in by Art Torkelsen. They seized boots (later determined to be Defendant's) splattered with blood (later determined to be Rebecca Flaa's), gas cans, a rug, a loaded pistol and other firearms. [par. 36]. The search was completed at about 4:15 a.m.

In the morning of June 28, Detective Schwab became aware of Flaa's death and provided investigators with a tape of her 8/4/03 interview with Flaa. [par. 38]. That same morning, Doreen Kukuk reported that she saw Defendant pour gas into his pickup on Sunday

morning (June 27) between 10 a.m. and noon in the alley behind his parents' home. [par. 40]. Tom Weippert reported that he had retrieved a yellow woman's shirt from his trash can (located across the alley from Art and Leona Torkelsen's home) which he observed being placed there by the Defendant. [par. 40]. The same morning, two girls reported seeing Defendant in the alley acting strange and unloading things out of his truck. [par. 41].

In addition to the foregoing evidence, the prosecution presented at trial witnesses to admissions of guilt by the Defendant, made two years after Rebecca Flaa's death. The trial court dealt fairly, with restraint, in response to the Defendant's disruptive behavior at trial.

ARGUMENT

I. DEFENDANT DID NOT MAKE A TIMELY AND UNEQUIVOCAL INVOCATION OF HIS RIGHT OF SELF-REPRESENTATION.

Under the Sixth Amendment to the United States Constitution and Article I, section 12 of the North Dakota Constitution, a defendant has

the right to be represented by counsel. *State v. Ochoa*, 2004 ND 43, ¶15, 675 N.W.2d 16; *Faretta v. California*, 422 U.S. 806, 808-21, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The Sixth Amendment also provides the corollary right to self-representation. *Id*. These rights are mutually exclusive. *Id*; *State v. Dvorak*, 2000 ND 6, ¶9, 604 N.W.2d 445.

The Defendant claims that he invoked this right to self-representation on May 4, 2007, the fifth day of trial. [Appellant's Brief, §12]. He claims to have invoked the right immediately after the prosecution presented the testimony of three witnesses to admissions by the Defendant. They testified that – the day after this Court's opinion in *State v. Torkelsen*, 2006 ND 152, 718 N.W.2d 22 (July 18, 2006) – Torkelsen admitted murdering Rebecca Flaa. He stated, "I got away with it" [Tr. 1111]; "I went back out to where Rebecca's body was burning" [Tr. 1113]; "I'm going to get away with it. [Tr. 1123]; "I got away with it . . . Becky had found my whiskey . . . I lost my temper and beat her up" [Tr. 1132]; "put her in the back of [my] pickup . . . came across a pile of brush . . . lit her body on fire." [Tr. 1133]. He further stated that he went back to the site of Rebecca's burning body to pick up his cigarette butt so they wouldn't be able to link him to her murder and that, after that, he went into town and washed out his pickup. [Tr. 1133]. Finally, he stated,

"I got away with murder."

Immediately after this damaging testimony, the Defendant lost his temper. [Tr. 1139-1140]. The court then, without the jury and the prosecutors, made inquiry of the Defendant and his lawyers. The Defendant stated that he had some questions he wanted his attorney to ask. [Tr. 1140-1147]. Upon inquiry by the court, attorney Merrick explained why he did not ask the questions proposed by the Defendant. [Tr. 1148-1150].

When the court asked Merrick if he had any further questions to ask those witnesses, Merrick said "No, your honor." The Defendant then stated [Tr. 1150-1152]:

> THE DEFENDANT: Excuse me, Your Honor. If they don't, I – I believe you haven't ruled on his motion to withdraw as counsel. That's still under advisement for the last six months.
>
> THE COURT: Right.
>
> THE DEFENDANT: I ask that now you do accept his motion to withdraw as counsel.
>
> THE COURT: You're really asking me to let your attorneys go --
>
> THE DEFENDANT: These questions . . * * * Now, either he's going to ask him or I – or I'll sit here and ask him. It will take me longer in between questions, but at least I'll – there will be some thought put into each question.
>
> THE COURT: Your request for counsel to be dismissed based on the motion --
>
> THE DEFENDANT: I ---
>
> THE COURT: – is denied. Counsel will continue to address the witnesses in the court in representing the defendant. And. Mr. Torkelsen, you – the same behavioral rules that I set forth yesterday will apply.

After this, his attorneys continued to conduct the trial.

Prior to trial, the Defendant had various counsel appointed and removed, including previous appeal counsel, David Dusek and William Hartl. Thomas Merrick, his primary trial attorney, moved to withdraw (for lack of cooperation) on November 3, 2006. At hearing on December 8, 2006, Defendant expressly declared that he did want Merrick to represent him. This motion was denied on December 13, 2006. William MacKenzie's Motion to Withdraw was taken under advisement and granted on February 9, 2007. In April of 2007, Ryan Sandberg was appointed as co-counsel. On April 23, 2007, ten days before the trial was to begin, Merrick and Sandberg moved to withdraw based on failure to cooperate and a formal complaint filed with the Disciplinary Board. The court made a record of the attorneys' position and numerous reasons for denial of the motion, including the fact that jury trial was to commence within 10 days. At no time prior to trial did the Defendant ask to represent himself.

Timeliness. The right to self-representation must be unequivocally invoked in a timely manner. In *Faretta*, supra, 422 U.S. at 835, the court held that a motion made "weeks before trial" was timely. The Defendant's equivocal request, made during trial, was untimely and

did not invoke a constitutional self-representation right. North Dakota cases involving the constitutional right to self-representation have not involved requests made mid-trial. See, *State v. Ochoa*, 2004 ND 43, 675 N.W.2d 161 [various pretrial motions and requests]; *State v. Dvorak*, 2000 ND 6, ¶3-7, 604 N.W.2d 445 [counsel waived at pre-trial hearing]; *State v. Hart*, 1997 ND 188, 569 N.W.2d 451 [court granted pretrial request for self-representation]; *State v. Poitra*, 1998 ND 88, 578 N.W.2d 121 [same]. A criminal defendant cannot sit silently and acquiesce in criminal procedures and then later assert denial of constitutional rights. *State v. Murchison*, 2004 ND 193, ¶11, 687 N.W.2d 725 [failure to assert right to court-appointed counsel at preliminary hearing]. Defendant did not ask to represent himself prior to trial. He expressly declared his desire to have Merrick represent him. He never objected to representation by Sandberg. His comments on May 7, 2007 were too late to invoke *Faretta*. Courts applying *Faretta* uniformly hold that a request to represent oneself must be made prior to trial. *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005); *Russell v. State*, 270 Ind. 55, 383 N.E.2d 309, 314 (1978); *People v. Windham*, 19 Cal.3d 121, 126-30, 137 Cal.Rptr. 8, 560 P.2d 1187 (1977), *cert.denied*, 434 U.S. 848, 98 S.Ct. 157, 54 L.Ed.2d 116 (1977); *Hamiel v. State*, 92 Wis.2d 656, 285 N.W.2d 639, 649 (1979). In *People v. Windham*,

the defendant moved to represent himself on the third day of trial. The California Supreme Court held that failure to move prior to trial waives the constitutional right [19 Cal.3d at 127-128]:

> [I]n order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time *prior to the commencement of trial* . . .once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court. [emphasis added].

Even if Defendant had made an unequivocal request to represent himself, it was untimely.

Equivocal. Even if it had been timely, Defendant's statement was too equivocal to invoke the right to self-representation. In *State v. Ochoa*, 2004 ND 43, 675 N.W.2d 161, the defendant argued that he had invoked his right to self-representation early on by filing *pro se* motions. The court held that Ochoa negated his claim when he accepted appointment of new counsel and filed a speedy trial motion. ¶20. Moreover, the court held that statements about self-representation in his *pro se* motion were ambiguous and equivocal under the circumstances [par. 21].

Ochoa's counsel moved, prior to trial, for clarification of her role. In her motion, she stated that Ochoa wished to represent himself "at various stages of the trial." Ochoa wanted to "do the direct and cross-

examination of the witnesses" and otherwise represent himself. The court held that this sort of request is not "an unequivocal request to represent himself," but rather a request to act as co-counsel. [¶28,29].

Unlike Ochoa, defendant Torkelsen did not even make a colorable claim prior to trial. His mid-trial dissatisfaction with counsel's cross-examination was equivocal and insufficient to require a *Faretta* inquiry [2004 N.D. 43, ¶30]:

> [¶ 30] Ochoa argues the trial court improperly failed to inquire into his desire to represent himself, and the trial court had a clear and unambiguous obligation to conduct a colloquy with Ochoa to determine if the waiver is knowing, voluntary, and intelligent. We have already determined Ochoa did not unequivocally waive his right to counsel nor did he assert his right to self-representation. Thus, without any such waiver or assertion, there is no need for the trial court to conduct a colloquy or inquire into Ochoa's wishes.

Defendant Torkelsen also did not unequivocally waive his right to counsel or assert his right to self-representation. He repeatedly invoked his right to counsel prior to trial. His request to question witnesses was improper if he sought to act as co-counsel and untimely if he sought self-representation. The trial court conducted a reasoned inquiry into defense counsel's cross examination strategy. Defendant was not deprived of any Sixth Amendment right.

II. THE EVIDENCE OBTAINED WITH DEFENDANT'S VOLUNTARY CONSENT WAS PROPERLY ADMITTED.

Appellant argues that "the majority of the evidence in this case" would not have been obtained "but for" the stop of the Defendant, which was determined to be in violation of the Fourth Amendment, relying on *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) [Appellant's Brief, ¶23, 24]. *Wong Sun refused* to suppress the defendant's confession, even though it would not have been discovered "but for" the illegal arrest [371 U.S. at 488, 83 S.Ct. At 417]:

> . . . the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence as to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

The rejection of this "but for" test "recognizes that in some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement that can be justified by the rule's deterrent purposes." *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring).

To determine whether consented-to searches are reasonable, the test looks first to whether the consent was voluntary and second to whether time and/or circumstances purged the taint of the illegal stop. *State v. Smith*, 2005 ND 21, ¶26, 691 N.W.2d 203. In *State v. Graf*, 2006 ND 196, ¶13, 721 N.W.2d 381, the court stated the *Smith* test as follows:

> If the consent was voluntary under the totality of the circumstances, the court must then proceed to the second inquiry and determine whether the taint of the prior unlawful conduct is purged, considering: (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. *Id*.

In *Graf*, the consent was given a matter of minutes after the illegal entry. Nevertheless, the court held that the evidence seized in the search was admissible because the taint was purged when the defendant was advised of her rights in a consultation with an attorney.

Smith relied for this formulation on the Eighth Circuit decision in *U.S. v. Becker*, 333 F.3d 858 (8th Cir. 2003). In *Becker*, the court found the evidence admissible because the defendant twice consented to a search 19 minutes after the illegal detention began, even though he was not advised of his right to refuse. Clearly, the consents given by Defendant were knowing and voluntary and, under the circumstances, purged of the taint of the illegal stop.

The Consents were Voluntary. Appellant's Brief concedes that the trial court's findings of fact are sufficient to establish that Defendant's consents were voluntary, apparently conceding that this prong of the *Smith* test is met. [Appellant's Brief, ¶ 28]. It is very clear that these consents were voluntary.

A consent is voluntary if it is the product of free and unconstrained choice and not the product of coercion. *State v. Mitzel*, 2004 ND 157, 685 N.W.2d 120. To make this determination, the court should consider the characteristics and condition of the accused at the time of the consent and the details of the setting in which the consent was obtained. *State v. Haibeck*, 2004 ND 163, 685 N.W.2d 512. The district court heard testimony and viewed the videotapes of the Defendant's interviews. It considered in detail the characteristics and condition of the accused and the setting in which the consents were obtained. [App. p. 29-30]. As to the characteristics and condition of the accused, the court found [App. p. 29]:

> (1) Defendant is of a mature age and has adequate education to read and actively participate in his defense;
> (2) Defendant was read his *Miranda* rights at the beginning of both the afternoon interview (2:15 p.m.) and the evening interview (9:45 p.m.), and he acknowledged he received them;
> (3) Defendant was tested for alcohol with a result of .003% BAC, showing that his ability to consent was not impaired;
> (4) Defendant's criminal record demonstrates extensive prior

experience with the police, and it does not appear that he was intimidated during the interviews;
(5) Defendant's mental condition was appropriate when he answered questions – he was very cooperative, but he would disagree from time to time and offer a correction.

Based upon these findings, the Court concluded that the first factor favors a finding that the consent was voluntary.

As to the setting in which the consent was obtained, the court found [App. p. 30]:

(1) Defendant was informed that he would be transported back to Cando for questioning and he was handcuffed while being transported;
(2) When Agent Zachmeier arrived, the handcuffs were removed;
(3) Between the stop (@1:30 p.m.) and his formal arrest (@11 p.m.) there is no evidence of law enforcement exerting intimidation or making promises to Defendant;
(4) Defendant was informed during the first interview that he was not under arrest, but he was not informed that he was free to leave;
(5) The first interview was conversational and the Defendant was calm, collected and responsive to questions;
(6) Defendant consented to all photographs and freely removed his shirt and dropped his pants when asked;
(7) Defendant easily provided a breath sample for another officer;
(8) Defendant signed the written consent to search form at 3 p.m.;
(9) Before driving to the camper and truck for the consent searches, the officers took a snack break and provided the Defendant with a snack bar and water;
(10) Agent Zachmeier asked Defendant twice verbally for his consent to search of the pickup and camper and later Defendant signed the written request;
(11) Defendant was given a Subway sandwich and a beverage for his supper;
(12) Defendant was quiet and relaxed during the second interview;
(13) The officers did not team up or use any "good cop, bad cop" techniques;
(14) Agent Zachmeier gave Defendant the opportunity to explain

evidence found in the searches, particularly blood spots in the camper;
(15) Defendant answered questions, disagreeing from time to time and offering corrections;
(16) Defendant was casual during a break.

The court concluded [App. p. 30]:

> The interviews clearly show that the Defendant was not intimidated, no grounds for any misconduct by the officers during either interview and no diverse pressures used that would sap this Defendant's powers of resistance or self control. There is nothing to indicate that the officers in this case were unreasonably coercive in attempting to get the Defendant to cooperate with them. As such, the second factor weighs in favor of consent.

Based on the totality of the circumstances, the district court held that the Defendant voluntarily agreed to the two interviews and voluntarily consented to the searches that resulted in obtaining evidence, both during the interviews and at the camper and pickup truck. [*Id.*].

Temporal Proximity. This factor may enhance or lessen the taint of the initial wrongdoing. In this case, the police did not immediately attempt to question the Defendant. There was no attempt to immediately exploit the stop. Defendant was transported to Cando without interrogation. When he arrived in Cando, agent Zachmeier immediately removed his handcuffs and gave him a *Miranda* warning. Defendant first consented to a search at 2:15 p.m., 45 minutes after the stop, when he volunteered his willingness to have his camper searched. The time

elapsed between the stop and the consents separated the consents from the stop.

Between then and 3:00 p.m., he consented to having photographs taken of his person and he again stated that it was OK if the agent looked through his truck and that it was OK to search the camper and then the truck. At 3:00 p.m., Defendant signed the written consent forms, consenting to the search of the camper and the truck. When they arrived at the farm at about 3:30 p.m., he stated that it was still OK for officers to search the camper. At 5:20 p.m., and again at 6:30 p.m., he twice consented to the search of the truck.

At 9:45 p.m., after the searches of the camper and the truck, the Defendant reviewed the consent to search documents and stated that he had no problem with the search. At about 10:05 p.m., he consented to giving a DNA sample. Hours after the illegal stop, after being read his *Miranda* rights and after being told that he was not under arrest, Torkelsen gave his voluntary consent to these searches.

Defendant relies [Appellant's Brief, ¶30] on *State v. Phillips*, 577 N.W.2d 794, 805 (Wis. 1998) for the proposition that the illegality of the stop continues to taint the entire detention. In *Phillips*, the agents illegally entered the defendant's home. The defendant gave his consent to search

his bedroom "only minutes" after the illegal entry. Nevertheless, the court found the evidence admissible because the taint was dissipated when the defendant consented to the search of his bedroom knowing he had a right to refuse.

Defendant argues [Appellant's Brief, ¶30] that "no time elapsed" here because Defendant continued to be detained after the stop. The cases, however, do consider the time elapsed after an illegal stop or search even if there is continued detention. Elapsed time does attenuate the connection to the stop when the police conduct during that elapsed time is not coercive. *Becker*, *supra* [consent given 19 minutes after unlawful detention began was not too close in time]; *United States v. Moreno*, 280 F.3d 898, 901 (8th Cir. 2002) [time between illegal stop and tow was "considerable time" for attenuation purposes even though the defendant was detained]. In this case, the elapsed time served to separate the consents from the stop. As the district court found, the important thing is what happened during this elapsed time.

Intervening circumstances. The district court found numerous intervening circumstances, including: Defendant was not interrogated while being transported to Cando; Defendant was met at Cando by a new

officer who removed his handcuffs; Defendant was given a *Miranda* warning and signed a written consent to search. As the district court held, these events separated the Defendant's voluntary consent from the illegal stop. Defendant claims that there are no intervening circumstances but concedes that Eighth Circuit precedent says otherwise. [Appellant's Brief, ¶31]. The circumstances after the stop, including the *Miranda* warning, the informed written consent and the non-coercive questioning, sufficiently attenuated the connection between the illegal stop and the repeated voluntary consents. *United States v. Becker*, 333 F.3d 858, 862 (8th Cir. 2003); *United States v. Moreno*, 280 F.3d 898, 900 (8th Cir. 2002).

As to the camper, Defendant first volunteered consent before he was even asked, by itself sufficient to purge the taint of an illegal stop. *State v. Fortier*, 113 Az. 332, 553 F.2d 1206 (1976). Defendant concedes, moreover, that a signed, written consent-to-search is a sufficient intervening circumstance [Appellant's Brief, par. 31] under *United States v. Ramos*, 42 F.3d 1160, 1164 (8th Cir. 1994). The Defendant's signed and written consent to search form states:

> I, Steven Torkelsen, *knowing that I may refuse to consent to such a search*, hereby authorize the following officers or agents . . . to conduct a search of my person or the following personal property, vehicle, or premises: Forester Fifth wheel camper located at [J.R. Gibbens] Farm 1998 red Ford F-150 4x4 parked on HWY #17 *This written permission is being given by me* to the above-named

officers and/or agents *voluntarily and without threats or promises of any kind*.
[Emphasis added].

Defendant recognizes that informing the Defendant of his right to refuse consent purges the taint of an illegal stop under *United States v. Moreno*, *supra*. He asserts, however, that doing so is "not always sufficient to purge the taint," citing a Kansas court of appeals case, *State v. Wilson*, 39 P.3d 668, 673 (Kan.App. 2002). [Appellant's Brief, ¶31]. Defendant does not reveal any basis for finding *Wilson* more persuasive than Eighth Circuit precedent.

Moreno is plainly more factually similar to this case than *Wilson*. The defendant in *Wilson* was ordered to the floor and handcuffed. Minutes later, while still in handcuffs and without a *Miranda* warning, he was asked to consent to a search. In *Moreno*, the defendant was informed of his right to refuse consent at the situs of the illegal stop, during the time it took a tow truck to arrive. The circumstances here are more compelling than either case. Defendant's handcuffs were removed prior to questioning, and he was given a *Miranda* warning. Moreover, the written consent form unmistakably advised him of his right to refuse consent. He was given repeated opportunities to refuse or withdraw consent. He accompanied the officers to the search of his camper and pickup. He was

asked again at these sites, and he again consented. There is no question that he voluntarily consented to these searches and that his voluntary consent was independent of compulsion from the illegal stop. The evidence seized in these consent searches was properly admissible at trial.

The purpose and flagrancy of the official misconduct. The district court found that, "[t]he officers' misconduct in making the illegal stop was not flagrant . . . there is no evidence that the officers acted knowing their stop was unconstitutional, illegal or improper." [App. p. 34]. Defendant concedes that the stop itself was not "flagrant." [Appellant's Brief, par. 34]. Instead, he argues that a flagrant violation should not be required, without citing to any authority.

In *State v. Graf*, 2006 ND 196, ¶13, 721 N.W.2d 381, the court described the third prong of the test as, "the purpose and flagrancy of the official misconduct." Misconduct may be considered flagrant when it involves intentional harassment or excessive force. *State v. Gregg*, 2000 ND 154, ¶44, 615 N.W.2d 515. There was no such misconduct here.

The officers stopped the Defendant's truck believing that circumstances justified a *Terry* stop. They felt they had a sufficient reasonable suspicion for the stop, based on the Defendant's presence and

suspicious behavior at the crime scene, a bloody jacket found on the road after his truck drove past, his failure to yield to emergency vehicles, and his apparent imminent departure from the Cando area. This Court held that the officers did not have a sufficient basis for the stop. However, the stop was not so patently unconstitutional as to make it flagrant misconduct.

Defendant suggests that the officers in this case had the same motivation in stopping him that the officers in *Brown v. Illinois*, 422 U.S. 590, 605 (1975), had in arresting Brown. That is simply not the case. The officers in *Brown* went to Brown's residence and arrested him, knowing they lacked probable cause to do so, in violation of clearly established constitutional law, of which they were aware. Here, in contrast, the officers made a stop of the Defendant, believing that the stop was proper under *Terry v. Ohio*, 392 U.S., 86 S Ct. 868 (1968).

As the district court found, there is no factual basis for concluding that the officers knew the stop was unconstitutional, and the dissenting opinion on appeal shows that the illegality of the stop was not so obvious that such knowledge should be presumed. [App. p. 35]. Defendant suggests that, in order to discourage unlawful police behavior, the evidence should be excluded even if the misconduct was not flagrant and

even if the officers had a good faith but mistaken belief that their conduct was constitutional. [Appellant's Brief, par. 34]. That is not the law, and Defendant cites no case authority for this position.

The fact that the police were mistaken about the sufficiency of the circumstances to meet that test does not indicate bad faith. In *State v. Riedinger*, 374 N.W.2d 866 (N.D. 1985), the court overturned a lower court finding of bad faith, stating [374 N.W.2d at 872]:

> Society expects law enforcement officers to exhibit alertness and probing thoughtfulness, qualities inherent in their training and work, in seeking to solve crimes. It is unrealistic to expect officers to leave reasonable suspicions behind when they enter premises to execute a search warrant. Courts should not condemn such good law enforcement qualities unless compelled by overriding reasons.

When police operate under a good faith, albeit mistaken, belief that circumstances exist justifying a stop or detention, it cannot be said that their conduct is in bad faith or for an improper purpose. *State v. Wahl*, 450 N.W.2d 710, 715 (N.D. 1990). The Defendant's voluntary consents to the searches are sufficiently removed from the taint of the illegal stop, and the evidence obtained with Defendant's consent was properly admissible at trial.

III. EVIDENCE SEIZED FROM ART AND LEONA TORKELSEN'S HOME WAS PROPERLY ADMITTED.

Art and Leona Torkelsen, Defendant's parents, consented to a search of their home. During the course of that search, Art Torkelsen withdrew consent to the continuation of the search. At that point, the officers applied for and obtained a nighttime search warrant to resume the search of the house. The search was conducted between 2:54 a.m. and 4:15 a.m. on June 28, 2004. The district court held that the burden of showing special circumstances for issuance of a nighttime warrant was not met. The court nevertheless found that the evidence seized in that search was admissible under the inevitable discovery rule.

A. The Evidence was admissible under the inevitable discovery rule. In *Nix v. Williams*, 467 U.S. 431, 444 (1989), the Court stated the inevitable discovery rule as follows:

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means. . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience and common sense.

The prosecution showed that the evidence seized under the nighttime

warrant would have been discovered by lawful means wholly apart from the warrant.[2] The evidence was therefore properly received in evidence at the trial.

In *State v. Waltz*, 2003 ND 197 ¶17, 672 N.W.2d 457, the court stated:

> Evidence obtained by unlawful police conduct is admissible if the prosecution proves by a preponderance of the evidence that the evidence would inevitably have been discovered by lawful means. *State v. Olson*, 1998 ND 41, ¶16, 575 N.W.2d 649 (citing *State v. Johnson* 531 N.W.2d 275, 279 (N.D. 1995) and *Nix v. Williams*, 467 U.S. 431, 444 (1984)).

See also, *State v. Parizek*, 2004 ND 78 ¶22, 678 N.W.2d 154, 162.

The police did not act in bad faith.[3] In *State v. Handtmann*, 437 N.W.2d 830, 838 (N.D. 1989), the Court stated [*quoting State v. Phelps*, 297 N.W.2d 769, 797 (N.D. 1980)]:[4]

"First, use of the doctrine is permitted only when the police have

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[2]The prosecution also showed, and the district court found, that evidence seized in the consent searches would also have been discovered under the inevitable discovery rule. Defendant does not challenge that ruling on this appeal.

[3]The only specific claim of bad faith made in this appeal is with respect to the nighttime search of Art and Leona Torkelsen's home. [Appellent's Brief, ¶45-47].

[4]Many of the North Dakota cases apply federal constitutional law, which does not have a bad faith component. *Nix v. Williams*, 467 U.S. 431, 444 (1989).

> not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and must show how the discovery of the evidence would have occurred. . . . A showing that discovery might have occurred is entirely inadequate."

In *State v. Wahl*, 450 N.W.2d 710 (N.D. 1990), officers illegally entered the defendant's apartment to detain him while another officer went to get a search warrant. The district court found that the circumstances were not actually exigent, but– even if the officers were wrong in their belief – the officers did not enter the apartment in bad faith for the purpose of accelerating the discovery of evidence.

The district court herein also found no bad faith [App. p. 45]:

> [A] review of the actions and evidence gathering by numerous law enforcement does not indicate any action in bad faith to accelerate the discovery of the evidence from the searches of the camper, pickup, the parents' home or the Defendant himself. Even the nighttime request for the search warrant does not show bad faith. The court concludes that the first prong has been established by a preponderance of the evidence.

Defendant argues that this finding is inconsistent with the court's finding that the good faith exception (*United States v. Leon*, 468 U.S. 897 (1984)) did not apply to the nighttime search warrant. [Appellant's Brief, par. 46]. As discussed below, the district court should have applied the *Leon* exception. Moreover, the *Leon* test is different – it measures the reasonableness of reliance on a search warrant. The court correctly ruled

that the officers did not act in bad faith for purposes of the inevitable discovery rule.

The evidence seized (Defendant's boots)[5] would have been found without the unlawful activity. The court sets forth in great detail how the evidence seized would have been discovered based upon probable cause search warrants from independent lawful sources. [App. p. 46-49]. Defendant's argument that the court fails to mention how specifically the evidence would have been found [Appellant's Brief, ¶50] is simply wrong.

The State showed how it would have discovered the boots in Art and Leona Torkelsen's garage based on : (1) Independent evidence linking the Defendant to the victim (Rebecca Flaa) [App. p. 46-48]:

1. That the burned victim was Rebecca Flaa, and that her body was ignited with an accelerant (gasoline), and that a cigarette butt with DNA matching Torkelsen's was found near the crime scene (from the autopsy and ND Crime Lab report).
2. 9:00 am Fire and body discovered by farmer Belzer who called Cando emergency authorities. About the same time, Defendant arrived at scene of body but left scene after Belzer told him to leave. Defendant was smoking a cigarette at the time and a cigarette butt was found on gravel road above body site.

[5]The trial court also found that other evidence seized from the parents' home, as well as evidence from Defendant's camper and trailer home, would be admissible under the inevitable discovery rule, but Defendant challenges only the boots seized from his parents' home.

3. 9:12 am Emergency vehicles arrive at scene, extinguished the fire, and set up crime scene perimeters. Several emergency personnel recognized the Defendant and his vehicle as emergency vehicles approached fire scene.
4. 10:20 am Agent Hendrickson arrived at crime scene which Officer Weyrauch had secured. Agent Hendrickson identified that an accelerant had been used and determined that the body was female.
5. That a Florida Marlins jacket with Rebecca Flaa's blood on it was found.
6. 11:00 am A Florida Marlins jacket with wet and dry blood picked up at north edge of Highway 17 east of Cando. Still on clothes hangar Agent Zachmeier first noticed in middle of road at 10:20 am on way out to crime scene.
7. That Rebecca Flaa had previously been staying with and was allegedly beaten up by Torkelsen (from Lynn Estvold, from Cando police, and Rugby police reports, court records).
8. That Rebecca Flaa had been staying with Steven Torkelsen at the Abrahamson (J.R. Gibbens) farm (from Jayson Knutson).
9. 6:30 pm Deputy Judy Bulie informs Trooper Kennedy that Defendant and Rebecca were together at the Abrahamson farm, owned by J.R. Gibbens. Kennedy went to visited with Gibbens since a week earlier, Gibbens had padlocked the farmhouse to prevent Defendant and Flaa from using it.
10. 7:40 pm Owner/Landlord Gibbens signed a consent form to permit the farmhouse search on the Abrahamson farm. Trooper Kennedy went to Helma Gibbens' home near the Abrahamson farmstead to get the key for the farmhouse. Defendant's camper was located on the same Abrahamson farmstead.
11. 8:45 pm Consent search of house and outbuildings located on Abrahamson farmstead. Evidence found included a document with Lynn Estvold's name and a document with Defendant's name in the farmhouse, a pair of male underwear, hair samples in the shower, pair of blue sweat pants like pant found at crime scene under the body (not fully burned), bar of soap, hair brush, three magazines (June 2004) found in northwest bedroom, magazine with Defendant's name in kitchen garbage; magazine with

Estvold's name on kitchen table, numerous cigarette butts in bathroom garbage, clump of auburn hair like victim's hair found in bathroom garbage, newspaper dated 6/12/04, spot of blood in the living room.

12. That Torkelsen had a violent history of assaults on women and that Rebecca Flaa stated in an interview 8/20/03 with Cando Police Chief Marvin Holweger that she was afraid Torkelsen would kill her (from police reports) Actual interview with Det. Schwab on 8-4-03.
13. Morning hours: Det. Sue Schwab became aware of Flaa death so spoke with officers and gave them the tape of her 8/4/03 interview with Flaa.

(2) Independent evidence providing probable cause that evidence of Torkelsen's involvement in Rebecca Flaa's death was located at Art and Leona Torkelsen's home [App. p. 47-48]:

14. Morning hours: Officer Dupree interviewed Doreen Kukuk, a Cando woman who saw Defendant pour gas into his pickup from a red gas can with yellow spout on Sunday morning (27th) between 10 am-12 noon, in the alley behind his parents' house.
15. Morning hours: Tom Weippert reported that he had retrieved a yellow woman's shirt from his trash can which he observed being placed there on June 27th by the Defendant. His house is across the alley and down from Art and Leona Torkelsen's home.
16. Morning hours: Two girls who were painting a shed/garage near Art and Leona's home on June 27th stated they say Defendant in the alley unloading stuff out of his truck. They stated he acted strange.

In addition, Leona Torkelsen independently advised the police that Defendant had been staying at the home and changed clothes there. [App. p. 48]. The court correctly reasoned that, based upon the foregoing independently-discovered evidence: "the police would have obtained a

search warrant if consent had not been given to search the Art/Leona Torkelsen house, garage and shed."

The court's findings are sufficiently specific, and the State clearly established, by a preponderance of the evidence, both that they would have discovered and how they would have discovered, by search warrant based on independent evidence, Defendant's boots in his parents' garage.

B. The evidence was properly seized pursuant to search warrant. The trial court's admission of evidence seized from the Torkelsen home should also be upheld because the evidence was properly seized pursuant to search warrant. The testimony in support of the search warrant clearly established probable cause for the search and the trial court so found. The trial court found, however, that the search warrant's nighttime service provision was not sufficiently supported.

Rule 41(c)(1)(E), N.D.R.Crim.P., permits a search warrant to be served at night if authorized "for reasonable cause shown":

> (E) **Service and return.** The warrant may be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It may designate a state or federal magistrate to whom it must be returned.

The search warrant expressly authorized nighttime service. In support of the nighttime provision, the applicant stated [page 11, lines 8-15]:

> At this point Judge obviously, it's in the middle of the night I

> would request that it be issued as a night time search warrant because this is – ah, what we are investigating here is a serious crime – a justification can get rid of evidence. That parents can protect their kids, and that might happen, and then the Torkelsen's have on occasion posted substantial bonds for Steve Torkelsen to get him out of jail in the past. So I would request a night time search warrant.

Judge Foughty gave his approval to the nighttime provision, stating [page 12, l. 14-20]:

> Based on the seriousness of the crime, and based on the unwillingness of the owners of the residence to help you in the search a night time service of this search warrant is authorized. Also based on the seriousness of the crime a no knock is authorized in that – the reason the no knock is being given is a safety issue with regard to law enforcement, and I think they have to have the flexibility at this time.

The seriousness of the crime charged (and the potential penalty for their son) gave the parents motivation to hide or destroy evidence. The fact that the parents had withdrawn consent in the middle of the search and that they had been willing to post bond for prior offenses provided further reasonable basis for issuance of the nighttime warrant. In *State v. Knudson*, 499 N.W.2d 872, 875 (N.D. 1993) [quoted in *State v. Fields*, 2005 ND 15, ¶10, 691 N.W.2d 233], the court stated:

> Although there may be a variety of circumstances that justify the authorization of a nighttime search, we have indicated that probable cause for a nighttime search exists upon a showing that the evidence sought may be quickly and easily disposed of, and we have taken judicial notice that drugs are such evidence.

This Court noted that there "may be a variety of circumstances" other

than drugs to justify a nighttime search.

The trial court found that the seriousness of the crime was not an appropriate factor in issuing a nighttime warrant. Defendant on appeal concurs [Appellant's Brief, ¶42]. The warrant-issuing judge considered that the parents' willingness to protect the Defendant would be enhanced by the seriousness of the offense. Arthur Torkelsen had cut short the consent search. The items sought were easily removable. Bloody clothing could be washed. In considering whether it is appropriate to authorize a nighttime intrusion, the seriousness of the crime should be a factor. When a defendant is faced with such consequences, there is a higher danger of loss of evidence. Moreover, because such serious offenses are rare, the intrusion on citizen privacy is likewise reduced. The district court's decision to admit this evidence should be affirmed on the ground that the nighttime search was reasonable.

C. Even if the nighttime provision was improper, the evidence seized was properly admitted because the officers proceeded in good faith. Under the good-faith exception, evidence will not be suppressed if the police reasonably relied on a search warrant. *United States v. Leon*, 468 U.S. 897 (1984). The investigators engaged in no misconduct, and they relied in good faith on the judge's determination of probable cause. The good faith exception applies unless the testimony in support of the

warrant is "so lacking in indicia of probable cause as to render official belief in its existence *entirely* unreasonable." *State v. Utvick*, 2004 ND 36, ¶33, 675 N.W.2d 387. Judge Foughty found probable cause for issuance of the nighttime warrant. Since the officers relied in good faith on his judgment, the exclusionary rule does not apply and the evidence was admissible on that ground. The trial court found sufficient probable cause for the search, but not for the nighttime provision. The exclusionary rule generates substantial social costs, and it should not be applied unless its deterrence benefits outweigh those costs. *Hudson v. Michigan*, 126 S.Ct. 2159 (2006).

Judge Foughty was not misled by false information and did not fail to act in a neutral manner. Agent Zachmeier presented particularized facts indicating his belief that the Torkelsens presented a threat to remove or destroy evidence. The trial court disagreed that these facts demonstrated such a threat. However, a neutral judge agreed with Agent Zachmeier. Under such facts, Agent Zachmeier's reliance on this search warrant was objectively reasonable. *Roth v. State*, 2007 ND 112, ¶33, 735 N.W.2d 882.

Prior case law respecting nighttime search warrants has primarily involved drugs. *State v. Fields*, 2005 ND 15, 691 N.W.2d 233. In these

cases, the application must show something more than the presence of disposable drugs. *State v. Utvick*, 2004 ND 36, ¶21, 675 N.W.2d 387. These cases do not give much guidance in non-drug cases. A reasonably well-trained officer would not have known this search was illegal despite the judge's approval. The trial court arbitrarily rejected consideration of the seriousness of the crime and Arthur Torkelsen's sudden revocation of consent. Under the totality of the circumstances, these were significant factors increasing the risk that evidence would be removed or destroyed.

IV. ADMITTING DEFENDANT'S BOOTS IN EVIDENCE WAS NOT ERROR, BUT IF IT HAD BEEN IN ERROR, THE ERROR WOULD BE HARMLESS.

Defendant argues that admission of his boots at trial was a constitutional error that cannot be considered harmless. As discussed above, the trial court properly admitted the boots, and there was no constitutional error. Even if it had been error to admit the boots in evidence, the other evidence of guilt is so overwhelming that any error would be harmless beyond a reasonable doubt.

Under N.D.R.Crim.P. 52(a), "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." If, upon review of the entire record, the alleged error did not contribute to the verdict, it is harmless. *State v. Blue*, 2006 ND 134, ¶29, 717 N.W.2d 558.

Defendant asserts that the evidence provided by his boots was so critical that it can't be considered harmless. However, when viewed in light of the entire record, the other overwhelming evidence of his guilt demonstrates that not admitting the boots in evidence would not have changed the verdict. If the boots had not been admitted, the other

evidence shows, beyond any reasonable doubt that Rebecca Flaa was assaulted by Steven Torkelsen in his camper and that Torkelsen then transported her body to a country ditch where he set her on fire.

Multiple witnesses established that Rebecca Flaa was living with Defendant in the Defendant's camper in the days prior to her murder. Some of her belongings were still in the camper when it was searched. Other items of hers, including her luggage, were burned at a nearby farm. Truck tracks similar to Defendant's pickup and a cigarette with Defendant's DNA were found near this burn site. The medical examiner and blood from the camper established that Rebecca was brutally beaten in the camper. Her blood was splattered all over the walls and ceiling of the camper. On one wall was a mixture of Defendant's and Rebecca's blood. Rebecca suffered blows to the face and head and chest and neck, leaving bruises and abrasions. Her brain was hemorrhaged. Her left leg was fractured. Her arms and wrists had defensive injuries. Defendant's arms had scratches. Rebecca's death was by blunt force injury and asphyxiation.

Sometime after the murder, Defendant transported Rebecca's body to a ditch on a farm not far from the camper. The soil under her body showed that she was burned with gasoline. A cigarette butt bearing Defendant's DNA was found about 15 feet from the body. Defendant

subsequently admitted that he returned to retrieve that cigarette butt at about 9 a.m. on Sunday, June 27. However, he had to leave because a farmer was there and emergency vehicles were arriving. After Defendant drove away from the scene, Rebecca's blood-stained jacket was found near the road. After he went into Cando, witnesses saw him pour gas into his pickup and hurriedly move items from his pickup into his parents' garage. Among the items found in the garage are the workboots identified as Defendant's by his mother. A neighbor, about the same time, saw him throw two things in the neighbor's garbage (including a woman's yellow shirt like one of Rebecca's). Another witness saw him washing off his pickup at the local car wash.

Defendant's own statements, made two years after the crime, admitted that he murdered Rebecca. Independent evidence demonstrates that exclusion of the boots would not have changed the verdict. Even if it had been error to admit the boots in evidence, the error would be harmless. *State v. Chihanski*, 540 N.W.2d 621, 623-624 (N.D. 1995).

CONCLUSION

Based upon the arguments and authorities presented herein, the Defendant's conviction must be affirmed.

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Respectfully submitted,

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