

1992

# Utah v. Jason Thomas Genovesi : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 920803

STATE OF UTAH,

:

Plaintiff-Appellee,

:

Case No. 920803-CA

v.

:

JASON THOMAS GENOVESI,

:

Priority No. 2

Defendant-Appellant.

:

BRIEF OF APPELLEE

- - - - -

APPEAL BY DEFENDANT OF CONVICTION FOR  
MANSLAUGHTER, A SECOND DEGREE FELONY IN  
VIOLATION OF UTAH CODE ANN. § 76-5-205 (1990),  
ENTERED BY THE THIRD JUDICIAL DISTRICT COURT,  
IN AND FOR SALT LAKE COUNTY, UTAH, THE  
HONORABLE DAVID S. YOUNG, PRESIDING.

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**FILED**  
Utah Court of Appeals

JUL 26 1993

  
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff-Appellee, : Case No. 920803-CA  
v. :  
JASON THOMAS GENOVESI, : Priority No. 2  
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IN THE UTAH COURT OF APPEALS

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JASON THOMAS GENOVESI, : Priority No. 2  
Defendant-Appellant. :

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendant Jason Thomas Genovesi appeals his conviction for manslaughter, a second degree felony in violation of Utah Code Ann. § 76-5-205 (1990), entered, upon a jury verdict, by the Third Judicial District Court, in and for Salt Lake County, Utah, the Honorable David S. Young, presiding. This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993) (non-capital, non-first degree felony conviction).

ISSUES PRESENTED ON APPEAL  
AND  
STANDARDS OF APPELLATE REVIEW

In response to the issues framed by Genovesi, the State first raises some threshold issues that may be dispositive of part of his appeal. The issues addressed in this brief are:

**I. Was there Reversible Error in the Trial Court's Denial of Genovesi's Pretrial Motion to Suppress Evidence Obtained in Two Searches of His Home?** The State divides this issue into four subissues and alternative issues, as follows:

**A. Has Genovesi Waived His Search and Seizure Argument, at Least in Part, by Failing to Properly Specify**

the Evidence Obtained During the Two Searches? This issue, not ruled upon in the trial court, is a question reviewed de novo by this Court, thus effectively as a matter of law.

**B. Even Assuming that Both Home Searches Were Improper, Was the Trial Court's Refusal to Suppress the Evidence Obtained During the Searches Harmless Error?**

Again, this is a de novo question, by nature addressed for the first time on appeal. For this appeal, the State accepts the burden of proving harmlessness. Cf. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967).

**C. Can this Court Adequately Review the Trial Court's Denial of Genovesi's Motion to Suppress Evidence, Even Though the Trial Court Did Not Enter Fully Detailed Findings of Fact and Conclusions of Law?** The adequacy of trial court findings, and the consequence of inadequate findings, is again a question that is determined de novo by the reviewing appellate court. See State v. Ramirez, 817 P.2d 774, 786-89 (Utah 1991).

**D. If the Trial Court's Ruling Can be Reviewed on the Present Record, Did the Trial Court Correctly:**

**1. Determine that the First Home Search, Performed Incident to a Medical Emergency Call to Genovesi's Home, Was Proper?** Because the trial court did not formally resolve this question, this Court may effectively analyze it de novo; the underlying "predicate facts" are deferentially reviewed, for

"clear error." State v. Vigil, 815 P.2d 1296, 1301 (Utah App. 1991).

2. Determine that the Second Home Search Was Proper, Because Supported by the Voluntary Consent of Genovesi's Wife? Where consent is not preceded by illegal police conduct, the determination of voluntariness is a fact question, reviewed for "clear error." Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48 (1973); Utah R. Civ. P. 52(a). But see State v. Thurman, 846 P.2d 1256, 1262, 1268-71 (Utah 1993) (apparently broadly holding that question of voluntary consent, while "primarily a factual question," is always reviewed on appeal as a matter of law, without deference to trial court).

II. Was Defendant's Constitutional Right to an Impartial Jury Satisfied, Given that His Jury Was Selected from a Panel Composed Largely of Persons Whose Last Names Begin with the Letters "S" and "T"? This appears to be a question of law, reviewed without deference to the trial court, asking whether persons with last names beginning with particular letters are "cognizable groups" for the purpose of "fair cross-section" analysis, under constitutional guarantees that criminal defendants shall be tried to impartial juries. See State v. Tillman, 750 P.2d 546, 575-76 (Utah 1987) (declining to hold that Hispanics are a cognizable group, for sixth amendment purposes, in Utah); Walker v. Goldsmith, 902 F.2d 16 (9th Cir. 1990) (per

curiam) (persons whose surnames begin with particular letters do not constitute cognizable groups).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The fourth amendment to the United States Constitution and article I, section 14 of the Utah Constitution are practically identical in their language. The former provision reads:

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

The sixth amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The text of other constitutional, statutory, and rule provisions pertinent to this appeal will be set forth as needed in the body of this brief.

STATEMENT OF THE CASE

Defendant Genovesi's Statement of the Case (Br. of Appellant at 6-7) accurately reports that he was tried for murder (formerly second degree murder), Utah Code Ann. § 76-5-203 (Supp.

1992), a first degree felony, in connection with the death of his stepson. The trial jury convicted Genovesi of the lesser included offense of manslaughter, Utah Code Ann. § 76-5-205 (1990), a second degree felony (R. 220). He was sentenced to a prison term of one to fifteen years, and fined (R. 224). Genovesi now appeals, alleging reversible error stemming from two searches of his home, and in the process by which a panel of prospective jurors was summoned to serve for his trial.

### STATEMENT OF FACTS

#### Investigation of Death

On the afternoon of March 20, 1992, medical personnel responded to an emergency "911" call from a home shared by Genovesi, his wife Lisa, and her two children from a previous marriage (R. 423-24, 496). Genovesi, who made the call, had been at home, in charge of the children, while Mrs. Genovesi was at work (R. 424-25). The medical workers found Genovesi kneeling over his two-year-old stepson, Gavin Adams. Gavin appeared to be dead, his neck broken (R. 424, 497-99, 550-54). Nevertheless, resuscitation efforts were begun.

Police also responded to the Genovesi emergency, the first officers arriving while the medical personnel were working on Gavin (R. 516-18, 561-63). Officer Kenneth Patrick, who arrived shortly after Gavin was removed by ambulance, performed a cursory search of the Genovesi home. He seized a wash cloth that had been used by Genovesi and the medical personnel, and took some photographs of the home's interior (R. 242, 245, 249). Upon

interviewing Genovesi, Officer Patrick arrested him for child abuse (R. 10, 249).

The resuscitation efforts failed, and Gavin Adams was pronounced dead shortly after his arrival at a nearby hospital (R. 586). The next day, March 21, investigating Gavin's death as a possible homicide, Officer Patrick telephoned Lisa Genovesi.<sup>1</sup> Mrs. Genovesi agreed to allow Patrick into the Genovesi home, to take measurements and to search for evidence. Officer Patrick verified Mrs. Genovesi's permission, restating his intentions at least once, if not twice (R. 242-44).

Mrs. Genovesi, who was staying elsewhere in the aftermath of Gavin's death, arranged for a friend to meet Officer Patrick at her home with the house key, to permit his entry (R. 244-45). Inside the home, Officer Patrick, assisted by another officer, took measurements and more photographs--particularly of a bunk bed from which, according to Genovesi, Gavin had fallen, causing his fatal injuries.

In the children's bedroom that contained the bunk bed, the officers observed a dented section of plasterboard wall, with a piece of hair stuck to it; they seized and preserved the hair (R. 685-86). They also cut away and seized, as evidence, the dented wall section and a section of carpet, also from the bedroom (R. 245-46, 684-88).

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<sup>1</sup>When this case went to trial, Lisa Genovesi had resumed her previous last name, Adams (R. 423). She is referred to as "Mrs. Genovesi" in this brief solely for purposes of clarity.

Meanwhile, the autopsy of Gavin Adams confirmed that his death had been caused by severe head and neck injuries. Accordingly, the charge against Genovesi was upgraded from child abuse to murder (R. 6-8).

#### Pretrial Motions

Before trial, Genovesi moved to suppress all evidence seized from his home (R. 30, 41-50). Following an evidentiary hearing (R. 238-62), the trial court found that "Lisa Genovesi, the wife of the defendant, did tell Kenneth Patrick, in a 21 March 1992 telephone conversation, that he could go to defendant's and her residence to search for and collect evidence pertinent to the death of Gavin Adams." The motion to suppress was therefore denied (R. 112-13).

On the date set for trial, the trial court discovered that of the forty-eight prospective jurors summoned for the case, all but five had last names beginning with the letters "S" or "T" (R. 315-17). The district court's "jury clerk" explained that this odd pattern resulted from a computer program that randomly culled "blocks" from the nearly three thousand-member pool of citizens available for jury service. The computer had evidently defined many of its prospective juror "blocks" alphabetically (R. 295-310, T. 3-18 (copied in Addendum IV to Br. of Appellant)). Defendant objected to the summoned panel. The trial court, finding that no constitutionally "recognizable group" had been eliminated from the panel by the computer's method of summoning

jurors, overruled the objection (R. 309-10, T. 17-18 (Addendum IV to Br. of Appellant)).

### Trial

Once the final eight-member jury was seated, trial spanned three days (R. 404-915). In exhaustive detail, the medical examiner who had autopsied Gavin Adams described her findings (R. 572-680). Based upon Gavin's serious injuries, and upon reference to published medical studies, she opined that Gavin had not died as the result of a fall, as suggested by the defense. Rather, the examiner testified, Gavin had died as the result of homicide (R. 587-88, 624-35).<sup>2</sup> The prosecutor stressed this medical evidence in closing argument (R. 861-63, 871, 900).

The medical examiner also placed the time that Gavin was injured at five to six hours before death--that is, several hours before Genovesi placed his "911" call (R. 623). This was consistent with the observations, by the emergency medical workers, that Gavin appeared to be beyond resuscitative efforts when they arrived at the Genovesi home, just minutes after the "911" call (R. 547, 552). It was inconsistent with Genovesi's story, told to his wife the next day, that he had "heard a thump," found Gavin fallen by the bunk bed, and "immediately" made the "911" call (R. 440).

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<sup>2</sup>The examiner concluded that Gavin's fatal head and neck injuries had been caused by "the head being swung or moved forcibly against a relatively fixed object . . ." (R. 619-20).

The "911" call, recorded on tape, was replayed at trial: during that call, Genovesi reported that Gavin had fallen from the bunk bed while playing with his older brother (R. 530, 855, 892).<sup>3</sup> To the responding medical personnel and police, however, Genovesi gave inconsistent accounts: To some, he reported that Gavin had fallen from "a crib," not a bunk bed (R. 497, 511-12, 520, 537, 565). The crib, however, was in a different room, on a different level of the split-level home, than the bunk bed (R. 565-67).

Genovesi also told the emergency responders that the older brother had been with him, rather than with Gavin, when Gavin allegedly fell (R. 520, 716-17). Genovesi's inconsistent accounts of what had happened to Gavin were, along with the medical evidence, also highlighted in the prosecutor's closing argument (R. 855-56, 860, 867).

A State's expert witness testified that the hair, found in the dented section of the home's bedroom wall during the second search, "could have come" from Gavin's scalp (R. 703-04). However, during closing argument, the prosecutor acknowledged uncertainties on this question, and on the question of whether the wall dent had been made by Gavin's head (R. 904-06).<sup>4</sup>

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<sup>3</sup>The "911" tape has not been transmitted to the State with the record on appeal; the recited portion of Genovesi's statement on the tape is taken from the prosecutor's closing argument.

<sup>4</sup>Because the hair found in the wall had been broken off, rather than pulled out, it contained no hair root tissue for DNA comparison, which might have allowed a more certain conclusion that it had come from Gavin's scalp (R. 708).

The wash cloth, taken from the Genovesi home on March 20, the day of the emergency call, was not offered into evidence. Numerous photographs of the home's interior were admitted, but without differentiation between those taken on March 20, and those taken March 21, during the search permitted by Mrs. Genovesi (State's exhibits 5-29, R. 294).

The dented plasterboard wall section and piece of carpet, seized during the March 21 search, were admitted into evidence (R. 690-93). Neither item, as it turned out, was claimed by the State to be especially probative of its homicide theory. Instead, the defense used them heavily, calling expert witnesses--two engineers, not medical experts--to testify about elaborate tests they had performed by dropping a bowling ball on to the piece of carpet, and by swinging a bowling ball and a dumbbell against a piece of plasterboard similar to that taken from the Genovesi home (R. 391-96, 780-803, 815-28). Perhaps using measurements taken by Officer Patrick (this is not clear), the engineers used fifty-three inches as the height of the bunk bed in the Genovesi home (R. 735, 741, 796). The defense thus attempted to show that Gavin Adams's death could have been caused by a fall from the bunk bed on to the carpeted floor below.<sup>5</sup>

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<sup>5</sup>The defense was a bit more detailed than described in the main text: Genovesi actually attempted to show that Gavin could have died from a combination of a bathtub fall several days earlier, which was then compounded by the purported bunk bed fall (R. 416, 469-71, 890). Main text references to "a fall," as the defense theory of the cause of Gavin's death, are intended to encompass both claimed mishaps.

Evidently not satisfied that the elements of murder had been proven, the jury found Genovesi guilty of manslaughter. He now appeals, alleging reversible error in the denial of his pretrial motions.

#### SUMMARY OF ARGUMENT

Because Genovesi failed to fully specify which evidence was obtained in each of the two separate home searches, he has effectively waived the opportunity to achieve suppression of some evidence, on appeal, unless this Court invalidates both searches. One seized item complained of by Genovesi was not even offered into evidence, and the propriety of its seizure is therefore a moot question on appeal.

Even assuming that the trial court should have suppressed all of the seized evidence from use at trial, the error in failing to do so was harmless beyond a reasonable doubt. The evidence seized from the Genovesi home was unnecessary to prove the State's case. Genovesi was convicted on the strength of overwhelming evidence, unrelated to any possible impropriety in the two home searches, that Gavin Adams did not die in an accident, but because of an assault by Genovesi.

The testimony supporting the denial of Genovesi's pretrial motion to suppress evidence was uncontradicted and internally consistent. The only pertinent, unaddressed factual issue, involving the scope of Mrs. Genovesi's consent to the second home search, can be conceded by the State for this appeal. Therefore, this Court can review the denial of Genovesi's

suppression motion on the present record, and need not remand the issue for a more detailed trial court ruling.

Genovesi's motion to suppress was properly denied. The first search was conducted incident to Genovesi's emergency call, and incident to his arrest, also made at that time. The search was cursory in nature, and properly limited in scope to the exigency that prompted it. The trial court's ruling that the second search was authorized by voluntary consent was correct, for there is no inkling that Mrs. Genovesi's consent was obtained by coercion. The consent probably did not contemplate the physical cutting away of parts of the home. However, the trial court's refusal to suppress the pieces of wall and carpet seized in this manner was harmless beyond a reasonable doubt: those items were wholly insignificant as State's evidence.

Genovesi's motion to strike the summoned jury panel was also properly denied. Genovesi fails to show systematic exclusion of any properly "cognizable" or "distinctive" groups from the jury panel. His argument that such groups can be defined solely from the first letters of their surnames has been squarely rejected by the other courts that have considered it. The panel reflected the broad range of relevant citizen backgrounds, and was therefore a proper, "fair cross-section" source for the selection of Genovesi's trial jury.

## ARGUMENT

### POINT ONE

THERE WAS NO REVERSIBLE ERROR IN THE TRIAL COURT'S DENIAL OF GENOVESI'S MOTION TO SUPPRESS EVIDENCE.

#### Introduction

Genovesi requests reversal of the trial court's denial of his motion to suppress evidence, which was founded upon his allegation that both the March 20 and 21 home searches violated constitutional search and seizure principles. The March 20 search, he argues, went beyond the scope of what was permissible incident to his "911" call. He then argues that the March 21 search was not supported by legally adequate, voluntary consent, and that it also exceeded the proper scope contemplated by Mrs. Genovesi's consent.

Before proceeding to the issues framed by Genovesi, the State raises two threshold issues. Considered in tandem, these two issues permit rejection of Genovesi's search and seizure argument altogether.

#### A. Genovesi's Nonspecific Motion to Suppress Impedes his Claim to Appellate Relief.

The State's first threshold issue involves Genovesi's inadequate specification of the precise relief sought. Genovesi has not, either in the trial court or on appeal, ever fully specified which items of evidence were seized during the March 20 search, as opposed to the March 21 search. In fact, his written motion to suppress, challenging "the warrantless search," only addressed the latter search (R. 30, 41-49, copied in Appendix I

of this brief). Genovesi did not challenge the March 20 search until the hearing on his motion to suppress (R. 253).

As follows, such lack of specificity causes problems for Genovesi. If he proves that only one of the two searches was improper, only some uncertain portion of all the seized evidence will be subject to the exclusionary rule. There is also one item, apparently assailed by Genovesi as wrongfully seized, that was never offered into evidence, and therefore is not a proper subject for this appeal.

#### **1. Photographs: When Taken?**

Twenty-five interior photographs of the Genovesi home were admitted at Genovesi's trial (State's exhibits 5-29, R. 294). Photos were taken during both the March 20 and 21 searches, but nothing in the record ties any of the photos admitted at trial to a specific search date. It seems likely that some of the photos were taken during each of the two searches.

Therefore, if only one of the two searches is ruled improper on appeal, only the photos taken during that search are subject to suppression, while photos taken during the other, proper search remain admissible. This leaves a problem: which of the photos are to be suppressed? In short, Genovesi has not specified the precise relief due to him if only one search was improper. But as the movant for suppression of evidence, such specification has always been his duty. See Utah R. Crim. P. 12(a) (a pretrial motion "shall state with particularity the

grounds upon which it is made and shall set forth the relief sought").

Accordingly, if this Court holds that only one of the searches was improper, it should deem the prospect of suppressing photographs taken during such search to be waived. See Utah R. Crim. P. 12(d) (failure to make timely request constitutes waiver thereof). Put another way, unless Genovesi convinces this Court that both searches were improper, he cannot achieve suppression of any of the photographs that were admitted at his trial.

## **2. Wash Cloth: Mootness**

While complaining about the seizure of a wash cloth during the March 20 search (Br. of Appellant at 10), Genovesi neglects to mention that this item was neither offered nor admitted into evidence at trial. Therefore, the question of whether the wash cloth should have been suppressed has no bearing on his criminal prosecution.<sup>6</sup> As such, that question is moot, and under Rule 37(a), Utah Rules of Appellate Procedure, it should not be addressed. Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989) (question is moot where its resolution cannot affect the litigants' rights).

## **3. Hair, Piece of Wall, Piece of Carpet.**

The record does show that the hair that "could have come" from Gavin Adams's head, the dented section of wall in which the hair was found, and the section of carpet were all

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<sup>6</sup>If the wash cloth was unreasonably seized, Genovesi's remedy would simply be that it be returned, or if not returned, that he be compensated for its loss.

seized during the March 21 search. These items will be addressed at the appropriate points in this brief.

B. Even if Genovesi's Motion to Suppress Was Erroneously Denied in All Aspects, Such Error Was Harmless Beyond a Reasonable Doubt.

This Court does not need to sort out Genovesi's vague, nonspecific motion to suppress. Instead, it can decline to address the propriety of either of the two challenged searches. As its second threshold issue, dispositive of Genovesi's search and seizure arguments, the State submits that any error in the admission of the seized evidence, against Genovesi's pretrial motion to suppress, was harmless.

For purposes of this analysis, this Court may assume, without deciding, that both searches of Genovesi's home were improper, and that all evidence obtained during those searches should have been suppressed. Even so assuming, Genovesi's conviction need not be reversed for the failure to suppress that evidence at his trial.

**1. Reasons for Harmless Error Analysis.**

Harmless error analysis is, of course, a legitimate and venerable approach to trial errors involving procedural and evidentiary rules. E.g., Utah R. Crim. P. 30(a); Utah R. Evid. 103(a); Utah R. Civ. P. 61 (harmless error rules mandating that trial errors that do not affect "substantial rights" shall be disregarded). See generally State v. Verde, 770 P.2d 116, 120-22 (Utah 1989); State v. Knight, 734 P.2d 913, 919-20 (Utah 1987) (discussing harmless error). Such analysis serves the beneficial

purpose of avoiding needlessly duplicative new trials, thereby conserving trial court resources:

[I]f the fabled "day in court" is permitted casually to multiply into twenty days in court, the inevitable consequence is that, by the inexorable law of mathematics, nineteen other litigants are denied any court time at all, save only the few moments required for the tendering of their negotiated pleas.

Davis v. State, 611 A.2d 1008, 1010 (Md. App.), cert. granted, 616 A.2d 1286 (Md. 1992). New trials, for errors that had no discernible impact upon the original trial, also subject litigants and witnesses to needless inconvenience, expense, and, in cases like this one, repetition of trauma and heartache.

Consistent with such concerns, the federal Supreme Court has squarely endorsed harmless error analysis even for errors that are constitutional in dimension. See Chambers v. Maroney, 399 U.S. 42, 52-53, 90 S. Ct. 1975, 1982 (1970) (upholding conviction where possibly erroneous admission of evidence under the fourth amendment was harmless beyond a reasonable doubt); compare Bumper v. North Carolina, 391 U.S. 543, 550, 88 S. Ct. 1788, 1792 (1968) ("Because the [improperly seized] rifle was plainly damaging evidence . . . its admission at the trial was not harmless error"). See also Arizona v. Fulminante, 499 U.S. \_\_\_, \_\_\_, 111 S. Ct. 1246, 1263-64 (1991); Rose v. Clark, 478 U.S. 570, 576-79, 106 S. Ct. 3101, 3105-06 (1986); Delaware v. Van Arsdall, 475 U.S. 673, 678-84, 106 S. Ct. 1431, 1434-1438 (1986); Chapman v. California, 386 U.S. 18, 21-24, 87 S. Ct. 824, 827-28 (1967) (all discussing harmless

constitutional error). So ruling, the Court has observed that reversal of convictions for constitutional error, even when such error is inconsequential to the trial verdict, "encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Rose v. Clark, 478 U.S. at 577, 106 S. Ct. at 3105; Van Arsdall, 475 U.S. at 681, 106 S. Ct. at 1436 (both quoting and approving R. Traynor, The Riddle of Harmless Error 50 (1970)). Accord Fulminante, 111 S. Ct. at 1264 (harmless error doctrine "promotes public respect for the criminal process by focusing on the underlying fairness of trial rather than on the virtually inevitable presence of immaterial error" (quoting Van Arsdall, 475 U.S. at 681, 106 S. Ct. at 1436)).

Further, a trial court's failure to suppress wrongfully seized evidence is not constitutional error in and of itself. Rather, suppression under the "exclusionary rule" is simply a judicially created remedy for improper searches and seizures. United States v. Calandra, 414 U.S. 338, 348, 94 S. Ct. 613, 620 (1974). See State v. Larocco, 794 P.2d 460, 473 (Utah 1990) (two-justice plurality opinion invoking exclusionary rule under article I, section 14, without deciding whether the rule is constitutionally required: "We simply hold that it exists"); contra State v. Aime, 62 Utah 476, 484-85, 220 P. 704, 708 (1923) (unanimously rejecting exclusionary rule under article I, section 14). Nor does the possibly erroneous denial of a suppression motion amount to a "structural defect" in the ensuing trial. Instead, as with evidentiary admissibility rulings in general,

such error is the kind of error that can be "quantitatively assessed in the context of other evidence presented" for its actual impact upon the trial. See Fulminante, 499 U.S. at \_\_\_, 111 S. Ct. at 1263 (explaining that structural errors are those that call the fairness of trial itself into question).

Indeed, in State v. Scandrett, 24 Utah 2d 202, 468 P.2d 639 (1970), the Utah Supreme Court, consistent with the federal approach, endorsed a harmlessness analysis even for errors that are constitutional in magnitude:

We think the correct view, and the one which is both practical and in keeping with the desired objective of fundamental fairness and due process of law, is that there is a presumption that [constitutional] error is prejudicial, but that it can be overcome when the court is convinced beyond a reasonable doubt that it had no such prejudicial effect upon the proceedings. Correlative to this it is also true that when the guilt is shown by other untainted evidence so overwhelming that there is no likelihood whatsoever of a different result in the absence of such error or irregularity, there should be no reversal.

24 Utah 2d at 208, 468 P.2d at 643 (footnotes omitted). So holding, the Utah court approved the policy of avoiding "unnecessary proliferation of legal proceedings." Id.

Harmless error analysis has also been at least tacitly approved under the Utah Constitution. The Scandrett opinion did not distinguish between federal and state constitutional error. However, there is no reason to believe that Scandrett was intended to make the analysis available only in cases of federal error, given that the same policy considerations apply under both constitutions. Indeed, post-Scandrett Utah Supreme Court

opinions do not question the availability of harmless error analysis under the state constitution. Rather, they merely express reservation about the form of such analysis. See State v. Verde, 770 P.2d 116, 121 n.8 (Utah 1989); State v. Hackford, 737 P.2d 200, 205 n.3 (Utah 1987).

In sum, this Court can confidently hold that harmless error analysis is permitted in reviewing allegedly erroneous denial of motions to suppress, under both the fourth amendment and article I, section 14 of the Utah Constitution. The only question is how to apply the analysis.

## **2. Parameters of the Harmless Error Analysis.**

The State answers that question by voluntarily assuming a heavy burden. Chapman, endorsed by the Utah Supreme Court in the above-quoted passage from Scandrett, places the burden upon the State to demonstrate that a constitutional error is harmless beyond a reasonable doubt.<sup>7</sup> 386 U.S. at 24, 87 S. Ct. at 828. Even though an erroneous failure to apply the exclusionary rule is not itself a constitutional error, the State shoulders the burden of proving harmlessness in this case.

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<sup>7</sup>The error in Chapman lay in permitting the prosecutor to comment at length upon the defendants' decision to not testify at their trial. 386 U.S. at 19-20, 87 S. Ct. at 825-26.

The State reserves its prerogative, in some future case, to argue that harmless error analysis, applied to the allegedly erroneous failure to apply the exclusionary remedy for search and seizure violations, might proceed differently--perhaps even with the burden of demonstrating trial-level harm placed upon the defendant. Chambers v. Maroney and Bumper v. North Carolina do not appear to allocate the burden of persuasion in this context.

To show harmlessness beyond a reasonable doubt, the State adapts the test set forth in Van Arsdall, a case that involved the erroneous denial of the defendant's confrontation rights at trial. Modified to fit the exclusionary rule error alleged in this case, the State first examines the challenged evidence for its importance to the prosecution. The overall strength of the State's case, independent from that evidence, is then be examined. Van Arsdall, 475 U.S. at 684, 106 S. Ct. at 1438. This "overwhelming evidence" analysis is identical to that set forth in Scandrett, quoted above, where the at-trial admissibility of an accused's statements to police was in issue.

As just mentioned, the Utah Supreme Court has expressed reservation about how to apply harmless error analysis under the state constitution. In Hackford, 737 P.2d at 205 n.3, the court asserted that the Van Arsdall "overwhelming evidence" test of harmless error is more lenient than the earlier formulation in Chapman, which states: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 386 U.S. at 23, 87 S. Ct. at 827 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 230 (1963)). But strictly read, that formulation would make harmless constitutional error analysis--specifically endorsed in Chapman and Scandrett--impossible to satisfy. The "overwhelming

evidence" test relaxes the standard just enough to make harmless error analysis viable in constitutional error situations.<sup>8</sup>

The modern "overwhelming evidence" test of harmless error is especially appropriate in this case, given that the exclusionary rule violation asserted by Genovesi is not itself of constitutional magnitude. In shouldering the burden of persuasion under the overwhelming evidence test, the State will further obey the caveat very recently set forth by the federal Supreme Court in Sullivan v. Louisiana, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2078 (1993):

Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." Yates v. Evatt, 500 U.S. \_\_\_, \_\_\_ [111 S. Ct. 1884, \_\_\_] (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was actually attributable to the error.

113 S. Ct. at 2081.

Under these parameters, the State's Van Arsdall and Scandrett-based harmless error analysis is stringent yet

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<sup>8</sup>In the context of a confrontation clause violation, as happened in Van Arsdall, the Utah Supreme Court noted criticism of the "overwhelming evidence" analysis. Defense-favoring evidence that might have been gleaned through confrontation and cross examination may be not known on appeal. An appellate court, reviewing the error for harmlessness, therefore may indulge in excessive speculation about the content of the denied evidence, and may also deny the defendant's jury trial right, by ruling upon evidence that has not been placed before a jury. See Hackford, 737 P.2d at 205 n.3, and The Supreme Court, 1985 Term--Leading Cases, 100 Harvard L. Rev. 100, 115-16 (1986), cited therein. Such problem is not present in this case, for Genovesi only complains of evidence that was admitted, and is therefore known on appeal: he has no complaint that he was denied his fair right to "confront" the State's evidence, or to elicit his own evidence.

realistic: it should satisfy both federal and state constitution-based requirements. Under it, Genovesi's guilty verdict, like that of the accused in Chambers v. Maroney, is attributable to overwhelming evidence that, without dispute, was properly admitted--and not to evidence obtained during the challenged home searches.

### **3. Application of Harmless Error Analysis.**

Because the wash cloth seized during the March 20 search was not offered into evidence, it will not be addressed. The State's harmless error analysis addresses the following, actually admitted evidence: the interior photographs and measurements of the Genovesi home; the hair taken from the dented plasterboard wall; the dented wall piece removed from the home; the piece of carpet removed from the home. Compared to other, overwhelming State's evidence, the admission of these items was harmless beyond a reasonable doubt.

#### **Photographs and Measurements**

Several of the home photos show the bunk bed from which, under the defense theory, Gavin Adams may have fallen, causing his injuries (State's exhibits 24-27, admitted at R. 452). One or two photos show the dented wall (State's exhibits 27 and 28, admitted at R. 452). Apparently based on measurements taken by police, the jury learned the height of the bunk bed, and the height of the dent in the home's wall (R. 741, 692-92A). None of this evidence was especially probative of any pertinent trial fact. Arguably, much of this evidence might have been

excluded as irrelevant, cumulative, or time-wasting, Utah R. Evid. 401, 402, 403, had Genovesi raised such objection.

#### Hair

As things developed at trial, the hair found in the wall dent only "could have" come from Gavin Adams's head; its origin was not certain. The prosecutor conceded as much in his closing argument to the jury (R. 905). Thus the broken-off strand of hair held negligible value, if any, for the purpose of proving Genovesi's guilt.

#### Dented Piece of Wall

This item also proved unhelpful to the State's case. It was "almost certain," the prosecutor admitted to the jury, that Gavin Adams's head injury had not been caused by being struck against the wall (R. 863, 904-06). Further, Genovesi himself, through his own expert witnesses, described elaborate tests on a similar piece of plasterboard (R. 395-96, 815-28). Those tests were evidently designed to show that Gavin's skull had not been fractured against the wall--a possibility that, again, the State conceded. Such concession, however, in no way ruled out numerous other hard surfaces against which Gavin could have been battered, causing his death: it was unnecessary, as an element of murder or manslaughter, to prove the exact method and place of Gavin's death.

#### Piece of Carpet

The carpet was heavily relied upon by Genovesi, rather than by the State. Again through his expert witnesses, Genovesi

attempted to show that Gavin Adams's fatal injuries could have been caused by a fall from the bunk bed, on to the carpeted floor, rather than by Genovesi's hands (R. 392-95, 780-803). As State's evidence, the piece of carpet was needless for proving Genovesi's guilt.

#### Independent Strength of State's Case

Independent, properly-received State's evidence was overwhelmingly probative of Genovesi's guilt. The medical examiner's testimony, by itself, soundly defeated the defense theory that Gavin Adams had died from an accidental fall. Gavin's injuries, the examiner testified, were far too severe to support that theory (R. 587-88, 624-35). This evidence was stressed to the jury (R. 861-63, 871, 900). Indeed, as a matter of common experience, the likelihood that a simple, in-home fall could cause Gavin's severe head and neck injuries appears vanishingly remote.

Independent evidence also showed that the defense theory of an accidental fall was inconsistent with Genovesi's "911" call, which was taken by emergency responders to suggest a fresh accident: instead, Gavin appeared dead beyond resuscitation to the responding medical personnel (R. 498). The jury learned that in all likelihood, Gavin had suffered his fatal injuries several hours before Genovesi placed the emergency call (R. 623). These inconsistencies supported a powerful inference that no accident caused those injuries, but that instead, Gavin was physically battered by Genovesi; then, in the vain hope that

Gavin's injuries were not serious, Genovesi waited several hours before summoning help, and fabricated the "fall" report.

Further inconsistencies in the defense theory were also powerfully telling. These included Genovesi's varying accounts, to emergency responders and police, about where and how the "fall" suffered by Gavin had occurred, and about the location of Gavin's brother when that "accident" happened (R. 497, 511-12, 520, 530, 537, 565-67, 855, 892).

Quite independently of the evidence that Genovesi moved to suppress, then, the trial jury had ample and far more powerful evidence that Genovesi killed Gavin Adams. This Court should therefore hold that even if the trial court erroneously denied Genovesi's motion to suppress, such error was harmless beyond a reasonable doubt. Upon such holding, Genovesi's request for reversal of his conviction, under the constitutional search and seizure errors he alleges, should be denied.

C. The Trial Court's Denial of Genovesi's Motion to Suppress Can be Adequately Reviewed On the Present Record.

If this Court does not find harmless error in the admission of evidence obtained during both home searches, it must address the arguments advanced by Genovesi. The State now responds to those arguments.

Genovesi first argues that the trial court entered inadequate findings of fact and conclusions of law, underpinning its denial of his motion to suppress evidence seized from his home. The assailed "Findings and Order" (R. 112-13) are copied

in Addendum I to Genovesi's Brief of Appellant. Genovesi argues that this short written ruling does not permit meaningful appellate review, and that this case "must be remanded" for adequate findings and conclusions (Br. of Appellant at 14).

The trial court's written ruling is inadequate in that it omits any mention of the March 20 search. (However, that inadequacy is due, at least in part, to Genovesi's failure to specify a challenge to that search in his written suppression motion.) The trial court's ruling is minimally adequate in its treatment of the March 21 search. Nevertheless, the fair interpretation of the ruling is that the trial court found the second search to have been conducted under the authority of Mrs. Genovesi's valid--i.e., voluntary--consent.

The shortcomings in the trial court's ruling do not require a remand. The ruling was issued nearly two weeks before trial began (R. 113, 292), giving Genovesi ample time to object to its shortcomings in the trial court. No such objection appears in the record, and the failure to raise it constitutes its waiver now, on appeal. See Utah R. Crim. P. 12(d) ("Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof . . .").

Even overlooking the waiver, this Court need not remand the suppression question for a more detailed trial court ruling. In State v. Ramirez, 817 P.2d 774 (Utah 1991), the Utah Supreme Court explained that the failure to enter detailed findings of

fact and conclusions of law does not always require reversal or remand. Instead, appellate courts will uphold a trial court's ruling whenever the record supports a presumption that the proper underlying factual findings were made. 817 P.2d at 787-88 n.6. Such a presumption is supported when the prevailing party's evidence is internally consistent, not self-contradictory or in conflict. See id. at 787 (police officers' testimony was in conflict, necessitating remand).<sup>9</sup>

In this case, the trial court's denial of Genovesi's motion to suppress was supported by consistent State's evidence. The sole witness at the motion hearing was Officer Patrick. While acknowledging that the March 20 search was conducted without explicit consent, Patrick also described the search as cursory, limited to taking some photographs and the seizure of a wash cloth. No evidence contradicts this description.

The manner in which Officer Patrick obtained Mrs. Genovesi's consent to the March 21 search was also uncontradicted: Patrick told Mrs. Genovesi of his wish to "take measurements and search for evidence" (R. 242). Mrs. Genovesi was not told that she was required to comply with Patrick's request, nor was she threatened. Mrs. Genovesi facilitated Patrick's entry into the home, by sending a friend to meet him there with a key (R. 244-45).

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<sup>9</sup>Ramirez trumps this Court's prior suggestions on this question, e.g., State v. Lovegren, 798 P.2d 767, 771 n.11 (Utah App. 1990), and State v. Marshall, 791 P.2d 880, 882 (Utah App.), cert. denied, 800 P.2d 1105 (Utah 1990) (cited in Br. of Appellant at 14).

There is only a single factual matter of note that was not addressed by the trial court. That is the question of whether Mrs. Genovesi's search consent, even though freely and voluntarily given, necessarily included permission for Officer Patrick to cut away and remove the dented wall section and a piece of carpet from the home. Neither Genovesi nor the State presented evidence, at the hearing of the motion to suppress, on this "scope-of-consent" issue. For the purpose of this appeal, however, the State concedes that Mrs. Genovesi's consent, as recounted in the present record, did not contemplate that pieces of the home itself would be collected by Officer Patrick.

This Court is therefore presented with a trial court ruling that implicitly upheld the March 20 search of the Genovesi home, presumably by finding that search, on Officer Patrick's uncontroverted testimony, to be cursory in nature. The ruling explicitly upheld the March 21 search, presumably on a finding, also on uncontroverted evidence, that Mrs. Genovesi voluntarily consented to at least so much of the search as did not include the removal of the wall and carpet pieces. So clarified, the trial court's ruling can be reviewed on the present record.

D. Genovesi's Challenges to the Two Home Searches Were, for the Most Part, Correctly Denied.

**1. The March 20 Search.**

The home search on March 20 was proper. Police entered the Genovesi home that day in response to Genovesi's call for emergency assistance. "[T]he Fourth Amendment does not bar

police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." Mincey v. Arizona, 437 U.S. 385, 392, 98 S. Ct. 2408, 2413 (1978). Genovesi's "911" call, inasmuch as it requested immediate aid for Gavin Adams, clearly operated to permit a police entry into his home.

Further, once the dire nature of Gavin's injuries was known, there was probable cause to arrest Genovesi. The first-arriving responders quickly ascertained that Gavin's neck appeared broken (R. 501). In light of such a severe injury, reasonable officers could readily determine that Genovesi's claim of an accidental fall rang false, and suspect him as the likely true cause of Gavin's injuries. At that moment, Genovesi was legally subject to arrest; indeed, he was arrested (R. 249). A limited search of the immediate premises, incident to his arrest, was then permissible. See State v. Harrison, 805 P.2d 769, 784-85 (Utah App.) (citing authorities), cert. denied, 817 P.2d 327 (Utah 1991). Such a search was permissible even though it may have preceded, rather than followed, Genovesi's actual, formal arrest. Rawlings v. Kentucky, 448 U.S. 98, 111, 100 S. Ct. 2556, 2564 (1980).

With the foregoing bases for a warrantless search established, the remaining question is whether the March 20 search was properly limited in scope. See Mincey, 437 U.S. at 393, 98 S. Ct. at 2413. There are several components to this "scope" inquiry.

First, the search occurred during a continuous police presence in the Genovesi home--a presence that began before emergency medical workers removed the injured Gavin Adams. Genovesi inaccurately asserts that no officers arrived until after emergency medical workers removed Gavin (Br. of Appellant at 10). While testimony at the hearing of Genovesi's motion to suppress does suggest this (R. 248-49), trial testimony shows that at least two police officers, Kendra Herlin and Steve Winters, entered the home before Gavin was removed (R. 516-18, 561-63). Officer Patrick, who conducted the search, arrived after Gavin was removed, but while Officer Herlin was still present (R. 240-41). This undercuts Genovesi's apparent allegation that officers entered his home only after Gavin was removed, and used false "emergency" authority to conduct the March 20 search.

Next, Genovesi at least implicitly contends that once the scene was secured, and all occupants of his home accounted for, Officer Patrick could not make any further intrusion without explicit consent, or a search warrant (Br. of Appellant at 10; R. 248). While not spelling it out, Mincey clearly supports such a rule. 437 U.S. at 393-95, 98 S. Ct. at 2413-15. Similarly, it cannot be surely said that the two bedrooms entered by Officer Patrick as the purported site of Gavin's "accident" were necessarily within Genovesi's immediate control, for the purpose of the "search incident to arrest" rule. In Harrison, however,

this Court took note of the rather elastic definition of the area within an arrestee's "immediate control." 805 P.2d at 784.

Under both the "emergency" and "incident to arrest" exceptions to the warrant requirement, the textual constitutional limitation, under both the fourth amendment and article I, section 14 of the Utah Constitution, is reasonableness. A reasonableness-based approach to the March 20 search is proper, even acknowledging, as did Officer Patrick, that the immediate emergency had diminished when he arrived at the Genovesi home (R. 248). It is also proper even if the search does not perfectly fit the judicially-defined limits of an emergency scene search or a search incident to arrest. In a post-Mincey opinion, the Supreme Court held that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." Illinois v. Lafayette, 462 U.S. 640, 647, 103 S. Ct. 2605, 2610 (1983). Thus even if Officer Patrick might be criticised for failing to more strictly circumscribe the March 20 search, such criticism ought not render that search unreasonable per se.<sup>10</sup>

Under these principles, Officer Patrick's March 20 search of the Genovesi home, incident to the emergency call, was reasonably limited in scope, even if not perfectly so. No

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<sup>10</sup>A prompt inspection of the premises, as occurred here, was not appropriate solely to assure safety and perhaps discover incriminating evidence. It was also important, and potentially beneficial, as a means to possibly corroborate Genovesi's claim that Gavin Adams had been injured in an accidental fall. A flexible standard of reasonableness, as permitted in Lafayette, is therefore appropriate.

evidence contradicts Patrick's characterization of that search as "very preliminary, cursory" (R. 248). In an attempt to confirm or dispel Genovesi's report that Gavin Adams had been injured in a fall, Patrick merely entered the two rooms variously described by Genovesi as the site of Gavin's "fall," and took some photographs (R. 249). The only item physically seized was the wash cloth--again, not pertinent to this appeal.

Officer Patrick's cursory investigation pales in comparison to the "exhaustive and intrusive" four-day, warrantless apartment search that was condemned in Mincey, 437 U.S. at 389, 98 S. Ct. at 2411.<sup>11</sup> Patrick's initial search of the Genovesi home was reasonably commensurate in scope to the emergency situation that prompted it, and also to the scope of a search incident to Genovesi's arrest. Although not perfect, the March 20 search should be deemed permissible.

## **2. March 21 Search.**

The trial court correctly ruled that Mrs. Genovesi voluntarily consented to the second home search, on March 21.<sup>12</sup> Genovesi agrees that his wife had authority to consent to the

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<sup>11</sup>"[T]he entire apartment was searched, photographed, and diagrammed. The officers opened drawers, closets, and cupboards, and inspected their contents; they emptied clothing pockets; they dug bullet fragments out of the walls and floors; they pulled up sections of the carpet and removed them for examination. Every item in the apartment was closely examined and inventoried, and 200 to 300 objects were seized. In short, Mincey's apartment was subjected to an exhaustive and intrusive search." 437 U.S. at 389, 98 S. Ct. at 2411.

<sup>12</sup>There were no exigent circumstances to justify the March 21 search. Cf. Br. of Appellant at 37. For that second search, the State relies solely upon consent.

search (Br. of Appellant at 17, citing State v. Elder, 815 P.2d 1341, 1343 (Utah App. 1991), and federal authority). He argues, however, that his wife did not give her consent voluntarily, and that Patrick exceeded the scope of the consent that was given. The State addresses, in turn, Genovesi's arguments under the fourth amendment and article I, section 14 of the Utah Constitution. It then turns to the "scope of consent" question regarding the March 21 search.

#### Fourth Amendment

Under federal law, "the question of whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."

Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48 (1973) (emphasis added); accord State v. Webb, 790 P.2d 65, 82 (Utah App. 1990) ("We deferentially review a trial court's finding of voluntary consent, . . . disturbing it only if the appellant demonstrates that there has been clear error").

However, in State v. Thurman, 846 P.2d 1256 (Utah 1993), the Utah Supreme Court rejected this precedent, and applied a "two-standard" appellate approach to the voluntary consent question. Under that approach, the appellate court defers only to the trial court's findings of underlying "subsidiary" facts, and reserves the "voluntariness" determination, derived from those facts, as a nondeferentially-reviewed legal matter. 846 P.2d at 1270-71.

Under either standard of appellate review, adequate evidence supports the trial court's ruling that Mrs. Genovesi voluntarily consented to the March 21 search. In seeking the consent, Officer Patrick explained his intentions to Mrs. Genovesi at least twice (R. 242-44). She, in turn, facilitated his entry, by dispatching a friend with the house key to meet Officer Patrick (R. 244-45). This evidence reveals no claim by Patrick that he already had authority to search the Genovesi home; nor does it suggest the use of force, deception, or trick to obtain the consent.<sup>13</sup> Instead, it reveals that Patrick made a request, with which Mrs. Genovesi willingly cooperated. See State v. Whittenback, 621 P.2d 103, 106 (Utah 1980) (listing factors to be considered in voluntary consent determination). Patrick's wholly uncontradicted testimony is also sufficiently "clear and positive" to overcome the "presumption against the waiver of fundamental constitutional rights," set by this Court in Webb, 790 P.2d at 82.

Utah Constitution, Article I, Section 14

Although article I, section 14 is virtually identical in text to the fourth amendment, Genovesi urges a divergent analysis of the consent question under this state constitutional provision. He argues that a "Miranda-type warning," advising a person of his or her right to refuse, and the consequences of

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<sup>13</sup>Compare Bumper v. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 1791 (1968) (valid consensual search not possible where "consent" was given in response to police officer's unsubstantiated claim that he had a warrant).

granting consent, should be given whenever a search consent is sought (Br. of Appellant at 21-22 & n.14). In Schneckloth, 412 U.S. at 227, 93 S. Ct. at 2048, the United States Supreme Court squarely rejected this argument under the fourth amendment. Defendant invites this Court to depart from this long-settled federal approach, and make the "Miranda-type warning" a "sine qua non" for finding, upon judicial review, that a search consent was valid under article I, section 14 (Br. of Appellant at 21).

This Court should decline defendant's invitation. As the Utah Supreme Court has explained, state constitution-based departures from federal law "may be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given the fourth amendment by the federal courts." State v. Watts, 750 P.2d 1219, 1221 n.8 (Utah 1988). However, there has been no inconsistency in federal court adherence, as commanded in Schneckloth, to the "totality of the circumstances" approach to examining the voluntariness of a search consent. That analytical approach has also been embraced by both Utah appellate courts. See Whittenback, 621 P.2d at 106 ("the prosecution is not required to prove that defendant knew of his right to refuse consent . . ."); State v. Grovier, 808 P.2d 133, 137 (Utah App. 1991).

Further, other states to consider this question under their state constitutions have overwhelmingly opted to maintain the "totality of the circumstances" approach, wherein the "Miranda-type warning" is significant, but not dispositive, for

showing voluntary consent. E.g., People v. Hayhurst, 571 P.2d 721, 724 n.4 (Colo. 1977); State v. Christofferson, 610 P.2d 515, 517 (Idaho 1980); State v. Stemple, 646 P.2d 539, 541 (Mont. 1982); State v. Flores, 570 P.2d 965, 968 (Or. 1977); Frink v. State, 597 P.2d 154, 169 (Alaska 1979); King v. State, 557 S.W.2d 386, 389 (Ark. 1977); State v. Osborne, 402 A.2d 493, 497 (N.H. 1979); State v. Rodgers, 349 N.W.2d 453, 459 (Wis. 1984). Against this widespread adherence to the "totality" approach, Genovesi advances only State v. Johnson, 346 A.2d 66, 67 (N.J. 1975), and Penick v. State, 440 So. 2d 547 (Miss. 1983).

Recently, in State v. Singleton, 214 Utah Adv. Rep. 30 (Utah App. 1993), this Court rejected a similar overture to depart from fourth amendment search and seizure analysis, in the context of a challenge to a search warrant. So doing, this Court rejected a strict "informant reliability" approach to the issuance of search warrants--previously discarded under the fourth amendment, and embraced a "totality of the circumstances" standard under the Utah Constitution. 214 Utah Adv. Rep. at 33. The Court found "no reason" to depart from the settled, federally-originated "totality" approach.<sup>14</sup> Id.

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<sup>14</sup>The Singleton panel also rejected the appellant's historical reference to the "unique circumstances" of Utah history. 214 Utah Adv. Rep. at 33. Genovesi raises a similar historical argument in this case, observing that Utah's white settlers, because they practiced "slavery and polygamy," often found themselves in conflict with federal authorities (Br. of Appellant at 28). It is difficult, at best, to justify expansive search and seizure protections on the rationale that the settlers ran into trouble for practices that are now both widely disapproved and constitutionally forbidden. U.S. Const. Amend. XIII (slavery prohibited); Utah Const. Art. III, para. 1 ("polygamous or plural marriages are

The identically-named, federal approach to consent voluntariness appropriately recognizes that there is no "infallible touchstone" for determining voluntariness. Instead, the "totality" inquiry appropriately examines both the police conduct and the subjective state of mind of the person who is alleged to have consented. Schneckloth, 412 U.S. at 229, 93 S. Ct. at 2048-49. Further, rejecting a strict "Miranda-type warning" or "waiver" approach to search consents in Schneckloth, the Supreme Court observed that in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), the "inherently coercive" nature of custodial interrogation--that is, police questioning of an arrestee--was the driving concern behind establishment of the "Miranda warning" requirement. Schneckloth, 412 U.S. at 240, 93 S. Ct. at 2054.

In this case, because Mrs. Genovesi was not in police custody when she consented to the March 21 search, the main concern underlying Miranda was absent. Nor were concerns about Mrs. Genovesi's fifth and sixth amendment protections against self-incrimination and the right to counsel particularly important. Those concerns, which also animated Miranda, were of greatly diminished importance in this case, given that Mrs. Genovesi was not an "accused" person, U.S. Const. Amends. V, VI, Utah Const. Art. I § 12, at the time consent was sought.

Genovesi therefore seeks to extend, to law governing consensual searches, policy considerations that have never been a  

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forever prohibited").

part of that law. See Schneckloth, 412 U.S. at 241, 93 S. Ct. at 2055 ("There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment"). See also American Fork City v. Crosgrove, 701 P.2d 1069, 1075 (Utah 1985), State v. McCumber, 622 P.2d 353, 358 (Utah 1980), and State v. Van Dam, 554 P.2d 1324, 1325 (Utah 1976) (all holding that Utah's constitutional self-incrimination provision, Art. I § 12, does not bar physical evidence, but only coerced testimony or statements). That extension, rejected overwhelmingly under other state constitutions, and in conflict with settled, albeit federally-based, search and seizure law in Utah, should not be undertaken. Instead, this Court should hold that Mrs. Genovesi's consent to the March 21 search was voluntary, under both the federal and Utah constitutions.

#### Scope of Consent

The final search and seizure question is whether the March 21 search was conducted within the scope of Mrs. Genovesi's consent. See State v. Arroyo, 796 P.2d 684, 692 (Utah 1991), Grovier, 808 P.2d at 137, and State v. Marshall, 791 P.2d 880, 888 (Utah App.), cert. denied, 800 P.2d 1105 (Utah 1990) (searches that exceed scope of consent are unconstitutional). On this question, the trial court erred in part, but harmlessly.

Reasonably viewed, Mrs. Genovesi's consent included permission to take photographs, and to make measurements in the home. These activities, not interfering with property rights, and of which Mrs. Genovesi was clearly informed, were not even

constitutionally-defined "seizures." See Arizona v. Hicks, 480 U.S. 321, 324, 107 S. Ct. 1149, 1152 (1987) (conduct that does not "meaningfully interfere" with possessory interests is not a seizure). The piece of hair was reasonably seized from the dented wall, inasmuch as nobody would reasonably assert an ongoing possessory interest in such an item. It was also well within the reasonable scope of Officer Patrick's request, to Mrs. Genovesi, that he wished to "go into the house and take measurements and search for evidence" (R. 242-44).

Under the established facts, however, the State cannot justify Officer Patrick's removal of the wall and carpet sections from the home. He might have received permission to do this, had he made such a request to Mrs. Genovesi. But he made no such request, and nothing else in the record indicates that such dismantling of the home itself, even if minimal, was either contemplated by Mrs. Genovesi, or might reasonably be considered a normal part of a home search.

Cutting away pieces of wall and carpet is qualitatively different from, say, temporarily removing an automobile heater hose, as was done in Grover, 808 P.2d at 134-35, or unscrewing a home electrical fixture, to peer inside. Obviously, pieces of wall and carpet cannot be quickly replaced with the same tools used to remove them, as can the latter items. On the facts of record, the wall and carpet sections were unreasonably seized, and were erroneously admitted into evidence.

To affirm Genovesi's conviction despite the foregoing error, the State is therefore compelled to upon a harmless error analysis. As set forth earlier in this brief, all the evidence obtained in the Genovesi home was harmlessly admitted, for Genovesi was convicted upon far more powerful evidence, unrelated to any police misconduct. Even if this Court does not accept that argument in its entirety, it should accept its application to the wall and carpet sections.

Again, the prosecutor acknowledged, to the jury, strong doubts about the probative value of the wall section. Again, Genovesi, not the State, heavily utilized the carpet section as trial evidence. Accordingly, beyond a reasonable doubt, these two items did not contribute to Genovesi's conviction: his fate was sealed by other, far more powerful evidence. The admission of the wall and carpet sections was therefore harmless error, and does not justify setting Genovesi's conviction aside.<sup>15</sup>

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<sup>15</sup>The State again notes that Genovesi, or a similarly situated home occupant, would not be bereft of any remedy for such an improper overreaching of a consensual home search. It appears entirely appropriate, under such circumstances and upon a proper request, to require the offending police agency to pay for the repairs needed to restore the home to its pre-search condition.

## POINT TWO

THERE WAS NO SYSTEMATIC EXCLUSION OF  
CONSTITUTIONALLY COGNIZABLE GROUPS FROM THE  
PANEL OF PROSPECTIVE TRIAL JURORS.

Genovesi next argues that his trial jury was selected from a panel of prospective jurors that was summoned in a manner contrary to his sixth amendment right to an impartial jury.<sup>16</sup> To be impartial, a jury must be selected from a panel that represents a "fair cross-section" of the community from which it is summoned. Taylor v. Louisiana, 419 U.S. 522, 530, 95 S. Ct. 692, 697-98 (1975); State v. Tillman, 750 P.2d 546, 574 (Utah 1987). A fair cross-section panel is one from which no constitutionally "cognizable" groups have been systematically excluded. Tillman, 750 P.2d at 574-75.

Cognizable groups are those that are "distinctive" in terms of holding a unique perspective on events, or who bring particular "qualities of human nature and varieties of human experience" to jury service. Peters v. Kiff, 407 U.S. 493, 503, 92 S. Ct. 2163, 2169 (1972). See James H. Druff, Comment, The Cross-Section Requirement and Jury Impartiality, 73 Cal. L. Rev. 1555, 1561-62 (1985). Cognizable, or distinctive groups have been defined according to race, gender, national origin, religion, and economic status. See id. (citing cases).

In fact, the forty-eight prospective jurors summoned for duty at Genovesi's trial appear to reflect an appropriate

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<sup>16</sup>Rule 18, Utah Rules of Criminal Procedure, sets the procedure for jury selection. Genovesi does not allege a Rule 18 violation, but only a constitutional one.

cross-section of various cognizable groups. Roughly equally divided by gender, the panel included names such as Trimble, Samowitz, Sundquist-Valdez, Vavricek, Sorensen, Torres, Paulk, and Thurber (R. 23-25, copied at Appendix II of this brief). So far as can be discerned, these names appear to reflect a variety of at least national origins, and perhaps races and religions.

Due to a computer "glitch," however, the jury panel contained mainly persons whose last names began with the letters "S" and "T." Genovesi contends that persons whose last names begin with the letters "A" through "R," largely excluded from the panel, constitute a "distinctive" or constitutionally "cognizable" group; the elimination of such persons from the panel, he argues, violated his impartial jury right. Three federal courts of appeals have considered the argument that such alphabetically-classified people are constitutionally cognizable: all have rejected it. See Walker v. Goldsmith, 902 F.2d 16 (9th Cir. 1990) (following authority from the First and Eleventh Circuits). Genovesi cites no contrary judicial authority.

Instead, Genovesi attempts to show "distinctiveness" in the alphabetically excluded jurors by reference to a Dr. Trevor Weston, who reported, in the mid-1960s, that persons whose last names begin with the letters "S" through "Z" are fifty percent more likely to develop "alphabetic neurosis" than are "A" through "R" surnamed persons (Br. of Appellant at 41-42). Nowhere does Genovesi explain the symptoms of this alleged malady. Further, "alphabetic neurosis" appears nowhere in the American Psychiatric

Association's Diagnostic and Statistical Manual of Mental Disorders (3rd Ed., Rev. 1987) (DSM III-R), a publication that would presumably identify the malady if its overall incidence was at all noteworthy.<sup>17</sup>

Because the DSM III-R does not recognize "alphabetic neurosis," one may reasonably assume that it is exceedingly rare, if it exists at all. A "fifty percent greater likelihood" of contracting such a malady, when its overall incidence appears negligible, is hardly significant. Therefore, Genovesi has no basis to assert that the panel summoned for jury duty in his case consisted "predominantly of people with alphabetic neurosis" (Br. of Appellant at 42).

Further, the scientific article cited by Genovesi in support of his "alphabetic neurosis" argument actually discredits Dr. Weston's claim. In J. Autry & D. Barker, Academic Correlates of Alphabetical Order of Surname, 8 J. Sch. Psychology 22 (1970) (copied in Appendix III of this brief), three hundred students were tested for possible correlation of academic achievement with alphabetical order of surname. The resulting data, scrutinized for statistical significance, "did not support the hypothesis that academic achievement is related to alphabetic order of surname." Id. at 23.

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<sup>17</sup>The Utah Legislature has adopted the current DSM as its authority for defining mental illness. See Utah Code Ann. § 62A-12-202 (Supp. 1993); see also State v. Murphy, 760 P.2d 280 (Utah 1988) (citing DSM-III as authority).

Just as it would seem at first glance, then, Genovesi's argument that the jury selection process improperly excluded persons without "alphabetic neurosis" is fanciful. No constitutionally cognizable group can be defined by the first letters of individuals' last names.

Genovesi's jury selection complaint fails solely because of his failure to identify any constitutionally cognizable "distinctiveness" in persons whose last names begin with letters other than "S" and "T." If this Court wishes, it may also note that there was nothing "systematic" about the computer "glitch" that caused the omission of such persons from the panel of prospective jurors summoned for Genovesi's trial.

Instead, as detailed by the jury selection clerk's testimony, the alphabetical summoning process used by the computer in this case was an unforeseen, random event (R. 297-302, copied in Addendum IV to Br. of Appellant as T. 5-10). Nothing in the inherent design of the process was, directly or indirectly, aimed at "alphabetical exclusion." Compare Duren v. Missouri, 439 U.S. 357, 366-67, 99 S. Ct. 664, 669-70 (1979) (selection system, by purposeful design, tended to exclude women at two critical points in panel-summoning process). Because no constitutionally cognizable group was excluded by any means that might be described as "systematic," then, Genovesi's sixth amendment-based jury selection challenge fails.

CONCLUSION

There was no reversible error in the admission, at trial, of evidence obtained during the searches of Genovesi's home. Genovesi was found guilty of manslaughter, by a jury selected in accord with constitutional impartiality requirements. For these reasons, Genovesi's conviction should be affirmed.

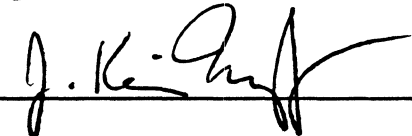
RESPECTFULLY SUBMITTED this 26 day of July, 1993.

JAN GRAHAM  
Attorney General

  
J. KEVIN MURPHY  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to BRADLEY P. RICH, of YENGICH, RICH & XAIZ, attorneys for defendant-appellant, 175 East 400 South, Suite 400, Salt Lake City, Utah 84111, this 26 day of July, 1993.

  
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APPENDIX I

Genovesi's Motion to Suppress, and Supporting Memorandum

MAY 29 1992

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Attorney for Defendant  
72 East Fourth South, Suite 330  
Salt Lake City, Utah 84111  
Telephone: (801) 364-6474

SALT LAKE COUNTY  
By [Signature]  
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

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THE STATE OF UTAH,

Plaintiff,

v.

JASON GENOVESI,

Defendant.

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MOTION TO SUPPRESS

Case No. 921900681

Judge David Young

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The defendant, Jason Genovesi, by and through his attorney of record, G. Fred Metos, hereby moves this court to enter an order suppressing all evidence obtained as a result of the warrantless search of the defendant's residence. Said motion is made on the grounds and for the reason that there were neither exigent circumstances nor consent to justify said warrantless search. Consequently, that search violated both Article I, Section 14 of the Constitution of Utah and the Fourth and Fourteenth Amendments to the United States Constitution.

DATED this 28 day of May, 1992.

[Signature]  
G. FRED METOS  
Attorney for Defendant

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was mailed/hand delivered on this 29 day of May, 1992, to:

**JAMES COPE**  
Deputy County Attorney  
231 East Fourth South, Suite 300  
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "A. R. Pearson", is written over a horizontal line.

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Aug 3 1 43 PM '92  
BY [Signature]  
CLERK

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**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH**

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**THE STATE OF UTAH,**

**Plaintiff,**

**v.**

**JASON GENOVESI,**

**Defendant.**

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:

**MEMORANDUM IN SUPPORT  
OF MOTION TO SUPPRESS**

**Case No. 921900081**

**Judge David Young**

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**STATEMENT OF FACTS**

On March 20, 1992, paramedics were dispatched to a residence at 5459 West Balsa Avenue in Salt Lake County. The paramedics attended to an injured child, Gavin Adams. Sheriff's deputies arrived and secured the residence. In the residence, the deputies located a three year old, Justin Adams, and the eighteen year old stepfather of the two children, Jason Genovesi. Later that afternoon, Gavin Adams was pronounced dead at the Pioneer Valley Memorial Hospital. On March 21, 1992, sheriff's deputies re-entered the residence without a search warrant and without consent to make a crime scene inspection of the residence. The officers seized hair samples, carpet samples and cut out a piece of a wall. Measurements were also taken in Gavin Adams' bedroom.

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## **ARGUMENT**

### **POINT I**

#### **THERE WERE NO EXIGENT CIRCUMSTANCES TO JUSTIFY THE SEARCH.**

When a life may be in danger or evidence destroyed, officers may conduct a search without taking time to obtain a search warrant. Mincy v. Arizona, 437 U.S. 385 (1978); State v. Ashe, 745 P.2d 1255 (Utah 1987). In Mincy, narcotics officers were attempting to purchase drugs. When the officers attempted to effect an arrest, a shootout ensued in which an undercover officer was killed. The officers initially entered the premises to locate the gunman and persons who may be injured. Detectives then spent four days processing the scene without a warrant. The Court held that the police may respond to emergency of life threatening situations without a warrant. However, the Court specifically held that " . . . a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation'", 437 U.S. at 393. Similarly, in Michigan v. Tyler, 436 U.S. 499 (1978), the Court allowed fire fighters to make a warrantless entry into a building to suppress a fire and conduct an initial investigation after the smoke and steam had cleared. This was justified by what was described as a " . . . compelling need for official action [when there is] no time to secure a warrant," 436 U.S. at 509.

In State v. Ashe, supra, the court allowed narcotics officers to enter a residence without a warrant, effect an arrest and perform a protective sweep of a residence to

prevent the destruction or removal of evidence. In that case, agents were making a drug purchase from a woman named Glasser. She was to sell four ounces of cocaine for \$8,500. The agent gave Glasser \$500 to obtain one ounce of cocaine to inspect. Glasser was observed by surveillance agents leaving the restaurant where the money was received. They then watched her meet with a co-defendant, Cricks. Cricks was followed to Ashe's residence then back to a parking lot where he met with Glasser. Glasser then provided the cocaine to the officers. Glasser and Cricks were arrested. Prior to that time, Glasser stated that the rest of the deal was to take place shortly and would be conducted "at the door" of a residence. The officers went to Ashe's residence where they observed him moving away from an upstairs window. They were not aware of Ashe's existence or location until the transaction was in process. The court found that the officers did not have "a realistic opportunity to secure a warrant". Consequently, the court held that the warrantless entry fell within the exigent circumstances exception to the warrant requirement.

Conversely, in State v. Northrup, 256 P.2d 1288 (Utah App. 1988), police officers entered and searched the defendant's residence without a warrant. Money had been given a co-defendant, he entered the residence and was arrested after leaving. He did not have the money at the time of the arrest. The State claimed that there were exigent circumstances because they believed that the money may be destroyed or removed. The court of appeals recognized that preservation of evidence is an exigent circumstance that makes a search imperative. The court also held that

the burden of proving such a exigency is on the State. The court found that there were no exigent circumstances in Northrup to justify the failure to obtain a warrant. The officers knew where and when the drug transaction was to take place. There had been two previous transactions at that location. Surveillance units were in place and the transaction occurred when the courts were open. The co-defendant was not expected back in the residence at the time of he was arrested.

Similarly in State v. Case, 752 P.2d 356 (Utah App. 1987), the Court held that the arrest of the defendant outside of his hotel room did not justify a warrantless entry and search of the room. In that case, hotel guests reported screaming in the defendant's room. The victim of the assault which was charged, was located at the manager's apartment naked and bleeding. The defendant stated he had a crazy person in his room. The State claimed exigent circumstances justified the search. The Court found that none were present since the defendant was outside of the room at the time of arrest.

The search that was conducted in this case took place one day after the alleged homicide. There were no exigencies that excused the officers' failure to obtain a warrant. All of the persons had been removed from the residence and it had been locked and secured. The evidence seized as a result of the search of the defendant's residence must be ordered suppressed.

## **POINT II**

### **THE DEFENDANT'S RESIDENCE WAS NOT SEARCHED PURSUANT TO A VOLUNTARY CONSENT.**

The Supreme Court has given some general tests to determine the voluntariness of a consent to search. In Bumper v. North Carolina, 391 U.S. 543 (1968), the Court held that the mere acquiescence to a claim of lawful authority to search does not constitute a voluntary consent. In that case, officers claimed to have a valid warrant and the defendant's mother allowed them to search his room. That warrant was later found to be invalid.

Subsequently, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court rejected the contention that before a consent may be voluntary, the person giving the consent must know he has a right to refuse to allow officers to search. The Court went on to hold that a consent must be freely and voluntarily given and not the result of duress or coercion. Voluntariness, it was held, is a question of fact to be determined from all the circumstances. The Court described some of the factors to be considered when applying this totality of the circumstances test. Those include: the defendant's intelligence, whether or not the defendant was in custody, the nature of the police questioning, the environment in which the search took place, the defendant's knowledge of his right to withhold consent and any other circumstances that weigh on the issue of voluntariness.

The issue of coercion as it relates to a consent to search has been addressed by the Supreme Court in other contexts. The primary issues raised in United States v. Mendenhall, 446 U.S. 544 (1980), were whether airport authorities had illegally stopped the defendant and if she voluntarily consented to accompany agents to an office. The Court found that the authorities acted properly in stopping and asking the defendant for identification. The Court went on to find that the defendant had consented to go to the Drug Enforcement Administration office. The officers had not kept the defendant's airline ticket or identification. The Court found that the defendant could reasonably interpret officers' actions to indicate that she did not have to accompany them.

Conversely, in Florida v. Royer, 460 U.S. 491 (1983), it was held that a stop of an individual based on less than probable cause cannot justify a detention in a small room by two police officers. The officers had retained the defendant's airline ticket and identification. They also had his luggage brought to the room where he was being held. The Court found that such a situation would result in the defendant's belief that he was under arrest. Because the defendant had not been informed that he was free to board his plane and he actually believed he was being detained, it was held that the encounter had lost its consensual nature. The Court went on to hold as a practical matter, Royer was under arrest. Since there was no probable cause to arrest, the search was illegal. Thus, the evidence was ordered suppressed. The Court then made the following observations about the nature of searches based on consent:

. . . where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.

460 U.S. at 497.

The Court of Appeals for the Tenth Circuit addressed a similar issue in United States v. Recalde, 761 F.2d 1448 (10th Cir. 1985). In that case, the defendant had been stopped for speeding in New Mexico. He produced a Virginia driver's license, and the car was not registered to the defendant. The officer ran a NCIC check to determine if the vehicle had been reported stolen. The check was negative. He then requested assistance from a backup officer stating that he had a "gut instinct" that the defendant was transporting narcotics. The officer returned to the defendant's car and told Recalde he could either plead not guilty or sign the ticket. When it was signed, the officer asked the defendant to step out of the car and requested to inspect the trunk. During the inspection, the officer found that there had been tampering with the screws in the molding. The officer then requested that the defendant accompany him to a nearby town. The defendant agreed to do so. At no time had the officer returned the defendant's driver's license, vehicle registration or provided the traffic ticket. At the police station the defendant consented to the search of the car. In analyzing the issue of whether the trip was made with the defendant's consent, the

Tenth Circuit employed a three tier analysis that was later adopted by this court in State v. Marshall, 791 P.2d 880 (Utah App. 1990).<sup>1</sup>

In determining if there has been duress or coercion in obtaining a consent to search, the Supreme Court of Utah has described a number of factors that should be considered. In State v. Whittenback, 621 P.2d 103 (Utah 1980), the court stated,

Clearly the prosecution has the burden of establishing from the totality of the circumstances that the consent was voluntary given; however, the prosecution is not required to prove that defendant knew of his right to refuse to consent in order to show voluntariness. Factors which may show a lack of duress or coercion include: 1) the absence of a claim of authority to search by the officers; 2) the absence of an exhibition of force by the officers; 3) a mere request to search; 4) cooperation by the owner of the vehicle; and 5) the absence of deception or trick on the part of the officer. [Footnote omitted]

621 P.2d at 106.

In State v. Marshall, supra, the court noted that the test for voluntariness must be based on the totality of the circumstances of the case. To determine if a consent is voluntary, the Utah court then adopted the Tenth Circuit's three part test<sup>2</sup>:

(1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given";

(2) the government must prove consent was given without duress or coercion, express or implied; and

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<sup>1</sup>That analysis will be discussed, infra.

<sup>2</sup>See: United States v. Recalde, supra.

(3) the court indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

791 P.2d at 888.


With respect to the scope of a search made pursuant to a consent, the court in Marshall, also relied on Tenth Circuit cases. On that issue, the court stated,

Even when a defendant voluntarily consents to a search, the ensuing search must be limited in scope to only the specific area agreed to by defendant. "The scope of a consent search is limited by the breadth of the actual consent itself . . . Any police activity that transcends the actual scope of the consent given encroaches on the Fourth Amendment rights of the suspect.

Id. at 888.

Although the permission to search the house in this case was obtained from the defendant's wife, the same standard of voluntariness applies. Bumper v. North Carolina, supra. It is expected that the evidence will show that any consent to the search was not clear positive or unequivocal. State v. Marshall, supra. Likewise, it is expected that the evidence will show that the consent was not free from duress or coercion. Consequently, the evidence seized should be ordered to be suppressed.

DATED this 31 day of July, 1992.

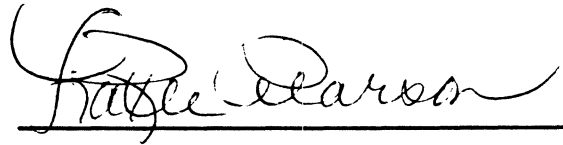
  
\_\_\_\_\_  
G. FRED METOS  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was mailed/hand delivered  
on this 3 day of ~~July~~, 1992, to:

*August*

**JAMES COPE**  
Deputy County Attorney  
231 East Fourth South, Suite 300  
Salt Lake City, Utah 84111

  
\_\_\_\_\_

APPENDIX II

Jury Panel Members

1 OF JUDGMENT RATHER THAN OF EMOTION-CHARGED REACTIONS OR  
2 CIRCUMSTANCES. I HOPE EVERYONE WILL BE ATTENTIVE TO THAT  
3 REQUEST.

4 COUNSEL, ANYTHING FURTHER IN THAT REGARD?

5 MR. COPE: NO, YOUR HONOR. THANK YOU.

6 MR. METOS: NO, YOUR HONOR.

7 JUDGE YOUNG: ALL RIGHT. I WILL BE IN BRIEF  
8 RECESS WHILE WE CONVENE THE PROSPECTIVE JURY PANEL. YOU  
9 MAY HAVE TO ORGANIZE THE SEATING TO DO THAT.

10 (RECESS).

11

12 JUDGE YOUNG: GOOD MORNING, LADIES AND GENTLEMEN.  
13 THIS IS THE TIME SET FOR TRIAL IN THE CASE OF THE STATE  
14 OF UTAH VERSUS JASON THOMAS GENOVESI. THE CASE NUMBER IS  
15 92-1900681.

16 ARE THE PARTIES PRESENT AND PREPARED TO PROCEED?

17 MR. COPE: JAMES COPE AND KIMBERLY HORNAK  
18 APPEARING FOR THE STATE OF UTAH. THE STATE OF UTAH IS READY  
19 TO PROCEED, YOUR HONOR.

20 JUDGE YOUNG: THANK YOU.

21 MR. METOS: FRED METOS ON BEHALF OF THE DEFENDANT.  
22 HE'S PRESENT AND WE'RE READY TO PROCEED.

23 JUDGE YOUNG: THANK YOU. THOSE OF YOU WHO HAVE  
24 BEEN SUBPOENAED HERE AS PROSPECTIVE JURORS I'LL ASK THAT  
25 THE CLERK CALL YOUR NAME. AS YOUR NAME IS CALLED WOULD

1 YOU COME FORWARD IMMEDIATELY AND BE SEATED AT THE DIRECTION  
2 OF THE BAILIFF.

3 THE CLERK: NO. 27, TERRY, T-E-R-RY, TRUDI G.;  
4 NO. 42, TREXLER, T-R-E-X-L-E-R, RUTH DIANA;  
5 NO. 23, TAYLOR, T-A-Y-L-O-R, GRANT;  
6 NO. 9, SHRIVER, S-H-R-I-V-E-R, CYNTHIA LADD;  
7 NO. 28, THACKER, T-H-A-C-K-E-R, JONI S.;  
8 NO. 49, ULIBARRI, U-L-I-B-A-R-R-I, VICKIE M.;  
9 NO. 4, SAMOWITZ, S-A-M-O-W-I-T-Z, SCOTT DEE;  
10 NO. 35, THORNTON, T-H-O-R-N-T-O-N, TAMARA B.;  
11 NO. 31, THOMAS, T-H-O-M-A-S, KENT MADSEN;  
12 NO. 20, SUNDQUIST-VALDEZ, S-U-N-D-Q-U-I-S-T HYPHEN  
13 V-A-L-D-E-Z, SALLY;  
14 NO. 44, TRIPP, T-R-I-P-P, KEITH;  
15 NO. 29, THATCHER, T-H-A-T-C-H-E-R, ALTON VERE;  
16 NO. 24, TAYLOR, T-A-Y-L-O-R, JOANN LILLIAN;  
17 NO. 21, TANNER, T-A-N-N-E-R, LILA JANE;  
18 NO. 7, SHARP, S-H-A-R-P, SHARON CELINE;  
19 NO. 12, SMITH, S-M-I-T-H, GLENN C.;  
20 NO. 43, TRIMBLE, T-R-I-M-B-L-E, STEPHEN A.;  
21 NO. 41, TOWNER, T-O-W-N-E-R, LISA JEAN;  
22 NO. 50, VAVRICEK, V-A-V-R-I-C-E-K, BONNIE L.;  
23 NO. 25, TAYLOR, T-A-Y-L-O-R, KENNETH D.;  
24 NO. 34, THOMSON, T-H-O-M-S-O-N, DANIEL L.;  
25 NO. 1, DAVIES, D-A-V-I-E-S, MARK;

1 NO. 22, TARPENNING, T-A-R-P-E-N-N-I-N-G, GREG  
2 ERIN;  
3 NO. 16, SORENSEN, S-O-R-E-N-S-E-N, SANDRA R.;  
4 NO. 32, THOMAS, T-H-O-M-A-S, RICHARD JOSEPH;  
5 NO. 40, TORRES, T-O-R-R-E-S, PAUL LOVATO;  
6 NO. 18, STEADMAN, S-T-E-A-D-M-A-N, KAREN H.;  
7 NO. 26, TAYLOR, T-A-Y-L-O-R, MICHAEL JON;  
8 NO. 30, THEURER, T-H-E-U-R-E-R, CAROL MUIR;  
9 NO. 2, JENSEN, J-E-N-S-E-N, SHELLY ANN;  
10 NO. 14, SMITH, S-M-I-T-H, VIRGINIA RUTH;  
11 NO. 15, SORENSEN, S-O-R-E-N-S-E-N, MARCE AIKEN;  
12 NO. 11, SMITH, S-M-I-T-H, ELIZABETH T.;  
13 NO. 47, TUTTLE, T-U-T-T-L-E, SAMUEL E.;  
14 NO. 46, TUCKER, T-U-C-K-E-R, TODD MARTIN;  
15 NO. 8, SHERMAN, S-H-E-R-M-A-N, LYNNE P.;  
16 NO. 10, SMITH, S-M-I-T-H, DONNA KREMERS;  
17 NO. 13, SMITH, S-M-I-T-H, HOWARD LUCIEN;  
18 NO. 5, SARA, S-A-R-A, STEVEN C.;  
19 NO. 48, TWINTING, T-W-I-N-T-I-N-G, KARLA NIELSEN;  
20 NO. 3, PAULK, P-A-U-L-K, KAREN M.;  
21 NO. 19, STECK, S-T-E-C-K, DAVID KEITH;  
22 NO. 38, TINGEY, T-I-N-G-E-Y, GARY;  
23 NO. 37, THURBER, T-H-U-R-B-E-R, CAROLYN LOCKETT;  
24 NO. 39, TORGENSEN, T-O-R-G-E-R-S-E-N, BONNIE;  
25 NO. 6, SHARP, S-H-A-R-P, JAMES;

1 NO. 33, THOMAS, T-H-O-M-A-S, TAMARA;

2 NO. 17, SORENSON, S-O-R-E-N-S-O-N, EILEEN.

3 JUDGE YOUNG: ALL OF YOU WHO HAVE BEEN SEATED  
4 NOW AS PROSPECTIVE JURORS, WILL YOU STAND TOGETHER AND  
5 RAISE YOUR RIGHT HAND AND RECEIVE AN OATH FROM THE CLERK?

6 (WHEREUPON, THE PROSPECTIVE JURORS WERE SWORN  
7 IN).

8 JUDGE YOUNG: THANK YOU. AND YOU MAY EACH BE  
9 SEATED.

10 THE INITIAL PART OF THE PREPARATION FOR A JURY  
11 TRIAL IS TO INQUIRE OF THE PROSPECTIVE JURORS OF FACTS THAT  
12 MAY BE HELPFUL FOR COUNSEL TO SELECT AN APPROPRIATE PANEL  
13 FOR THE JURY. I WANT TO SAY TO YOU, FIRST OF ALL, THAT  
14 I THANK YOU FOR YOUR RESPONDING TO THE REQUEST OF THE COURT  
15 TO COME FORWARD AND TO PROSPECTIVELY PARTICIPATE IN THIS  
16 JURY. I KNOW THAT THE OPPORTUNITY TO SO COME IS NOT AT  
17 A MOST CONVENIENT TIME FOR YOU. I KNOW THAT YOUR LIFE AND  
18 CIRCUMSTANCES ARE OTHER THAN YOU MIGHT PREFER TO BE HERE.  
19 BUT I WANT TO THANK YOU FOR RESPONDING.

20 THIS CASE IS A MURDER CASE. THE DEFENDANT IN  
21 THIS CASE IS ACCUSED OF HAVING KILLED A TWO AND A HALF YEAR  
22 OLD STEPSON ON MARCH 20TH, 1992 IN A RESIDENCE IN KEARNS.

23 AS WE BEGIN PRELIMINARILY INQUIRING OF EACH OF  
24 YOU--WELL, LET ME SAY REGARDING THAT FACTUAL STATEMENT,  
25 DURING THE COURSE OF THESE INQUIRIES OF YOU THERE MAY COME

APPENDIX III

Academic Correlates of Alphabetical Order of Surname

8 J. Sch. Psychology 22 (1970)

## ACADEMIC CORRELATES OF ALPHABETICAL ORDER OF SURNAME

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*Summary:* This study was suggested by Weston's contention that alphabetic position of surname might be a significant independent variable affecting human characteristics. Using the 306 twelfth grade students of a heterogeneous high school as a sample, correlation coefficients were computed to indicate the degree of relationship between alphabetical order of surname and each of eleven variables of the Iowa Test of Educational Development. Correlations were generally of a direction indicating higher achievement associated with students whose last names began with the letters toward the beginning of the alphabet, but most of these were not statistically significant.

In an Associated Press release (1967), Dr. Trevor Weston was reported to have described to the British Medical Association a condition he called "alphabetic neurosis." According to the newspaper account, Weston found in a ten-year survey of mortality statistics at a London teaching hospital that the incidence of neurosis was 50% higher among persons whose last names began with the letters "S" through "Z" than among those whose last names began with the letters "A" through "R." Weston (1965) further found that individuals in the S-Z group were twice as prone as others to ulcers and three times more likely to undergo heart attacks. In personal correspondence, Weston (1967) classified his paper on "alphabetic neurosis" as a presentation of a hypothesis supported by preliminary investigation rather than as a completed research project. He attributed the adverse effects of a name beginning near the end of the alphabet to the constant strain of waiting for one's name to be reached in the classroom and in other situations.

Weston's work (1965) suggested to the authors that alphabetic order of surname might be associated with academic achievement as well as with physical and mental health. This study is a partial test of that hypothesis.

*Subjects.* The subjects of this study were the 306 twelfth grade students of a comprehensive high school which draws students from all sectors of a small city in central Texas. They were

approximately evenly divided between boys (158) and girls (148).

### PROCEDURE

Within each sex, the subjects' last names were listed alphabetically and ranked ordinally, with the names nearest the beginning of the alphabet ranked lowest and those nearest the end ranked highest. The ranks thus assigned were treated as measures of alphabetic order. No attempt was made to transform these to other than a rectilinear distribution.

The subtest scores of the Iowa Test of Educational Development (1963) were available for each subject and were used as the measures of academic achievement. The following variables of the ITED were considered: social studies background, science background, correctness of expression, quantitative thinking, social studies reading, science reading, literary reading, average of reading tests, general vocabulary, comprehensive achievement, and use of sources.

Alphabetic order was correlated with each of these ITED measures, using the product-moment coefficient of correlation. According to DuBois (1965), the derivation of the formula for the product-moment correlation coefficient makes no assumption regarding the shapes of the distributions correlated, except when applying the standard error of estimate in specific instances of prediction. The correlation analysis was performed separately for the sample of

158 boys and the sample of 148 girls. Correlations with absolute values beyond 0.16 were considered indicative of relationships significantly different from independence or zero relationships.

### RESULTS AND DISCUSSION

The coefficients of correlation of alphabetic order of surname with the various measures of academic achievement for both groups are displayed in Table 1. Positive correlations indicate

Table 1  
Academic Correlates of Alphabetic  
Order of Surname

Variable	Correlation with Alphabetic Order of Surname	
	Boys (N = 158)	Girls (N = 148)
Social studies background	-0.01	-0.13
Science background	-0.12	-0.19*
Correctness of expression	-0.02	-0.07
Quantitative thinking	-0.02	-0.09
Reading: social studies	0.02	-0.10
Reading: science	-0.05	-0.06
Reading: literary materials	0.00	-0.13
Reading: average	-0.01	-0.10
General vocabulary	-0.05	-0.07
Comprehensive achievement	-0.04	-0.12
Use of sources	-0.06	-0.08

\*Significant beyond 0.05 level of confidence

that higher academic achievement is associated with names nearer the end of the alphabet, while negative correlations indicate the reverse: higher academic achievement associated with names nearer the beginning of the alphabet.

The 22 correlation coefficients varied from -0.19 to +0.02. All but two of the 22 coefficients were negative (one

was 0.02, and one 0.00), but only one was significantly different from zero, beyond the 0.05 level of confidence. All the correlations of alphabetic order with achievement were negative in the analysis of the data for girls; and, in every case, the correlation was "more negative" in the data for girls than in those for boys.

The correlation data did not generally permit rejecting the null hypotheses of zero correlations and therefore did not support the hypothesis that academic achievement is related to alphabetic order of surname. Most of the correlations, however, were of such a direction as to suggest a tendency toward higher achievement by students whose names begin nearer the beginning of the alphabet, especially in the case of the data for girls.

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