

1992

Utah v. Jason Thomas Genovesi : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH.

Plaintiff/Appellee,

VS.

JASON THOMAS GENOVESI.

Defendant/Appellant.

BRIEF OF APPELLANT

Case No. 920803-CA
Priority No. 2

APPEAL FROM THE CONVICTION , JUDGMENT AND SENTENCE
OF MANSLAUGHTER, A SECOND DEGREE FELONY, IN
VIOLATION OF UTAH CODE ANNOTATED, § 76-5-203 (1992), IN THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE DAVID S. YOUNG, PRESIDING
JUDGE

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JUN 08 1993

Mary T. Noonan
Clerk of the Court

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)	Priority No. 2
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STATEMENT OF JURISDICTION

This is an appeal from a judgment and conviction for Manslaughter, a second degree felony, in violation of Utah Code Ann. § 76-5-205 (1992). This Court obtains jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1992).

ISSUES PRESENTED FOR REVIEW

1. Whether the district court's factual findings and conclusions of law are insufficiently detail to address all relevant issues. This issue is reviewed under the clearly erroneous standard. *State v. Lovegren*, 798 P.2d 767 (Utah Ct. App. 1990).

2. Whether defendant's wife's consent to the search of the residence she jointly occupied with defendant was voluntary under the federal constitution and whether she waived her right to refuse consent under the state constitution. This is a mixed question of law and fact requiring correctness standard of review for the district court's ultimate conclusion and clearly erroneous standard of review for its factual findings. *State v. Thurman*, 846 P.2d 1256 (Utah 1993).

3. Whether the warrantless search conducted in this case violated the Utah Constitution, which independently mandate that a consent search be made pursuant to a valid waiver. This is a question of law reviewed under the correction of error standard. *State v. Thurman*, 846 P.2d 1256 (Utah 1993); *State v. Naisbitt*, 827 P.2d 969 (Utah Ct. App. 1992).

4. Whether exigent circumstances justified the warrantless search of defendant's residence. This is a mixed question of law and fact requiring correctness standard of review for the district court's ultimate conclusion and clearly erroneous standard of review for its factual findings. *State v. Brown*, 1992 WL 355069, at 2 (Utah 1992); *United States v. Stewart*, 867 F.2d 581, 584 (10th Cir. 1989); *State v. Northrup*, 756 P.2d 1288, 1291 (Utah Ct. App. 1991).

5. Whether the jury was not impartially impaneled and did not represent a cross-section of the community, as to have denied defendant his constitutional rights guaranteed by the Sixth Amendment to the United States Constitution, Article 1, Section

12, of the Utah Constitution, and Utah Code Annotated § 78-46-12 *et seq.* (1992). This is a question of law reviewed for correction of error. *State v. Thomas*, 830 P.2d 243, 245 (Utah 1992).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, Amendment IV:

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.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Constitution, Article 1, Section 14:

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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah Constitution, Article 1, Section 12:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf,

to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Utah Code Annotated § 76-5-205 (1992):

- (1) Criminal homicide constitutes manslaughter if the actor:
 - (a) recklessly causes the death of another; or
 - (b) causes the death of another under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse; or
 - (c) causes the death of another under circumstances where the actor reasonably believes the circumstances provide a legal justification or excuse for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.
- (2) Under Subsection (1)(b), emotional disturbance does not include a condition resulting from mental illness as defined in Section 76-2-305.
- (3) The reasonableness of an explanation or excuse under Subsection (1)(b), or the reasonable belief of the actor under Subsection (1)(c), shall be determined from the viewpoint of a reasonable person under the then existing circumstances.
- (4) Manslaughter is a felony of the second degree.

Utah Code Annotated § 78-46-12 (1992):

- (1) Prospective jurors shall be selected at random from the master jury list and, if qualified, placed on the qualified jury list. A prospective juror shall remain on the qualified jury list for no longer than six months or for such shorter period established by rule of the Judicial Council. The qualified jury list may be used by all courts within the county, but no person shall be summoned to serve as a juror in more than one court.

(2) The Judicial Council shall by rule govern the process for the qualification of jurors and the selection of qualified jurors for voir dire.

(3) The state court administrator shall develop a standard form for the qualification of jurors. The form shall include:

(a) the name, address, and daytime telephone number of the prospective juror;

(b) questions suitable for determining whether the prospective juror is competent under statute to serve as a juror;

(c) the person's declaration that the responses to questions on the qualification form are true to the best of the person's knowledge; and

(d) a statement that a willful misrepresentation of a material fact is punishable as a class C misdemeanor.

(4) Any prospective juror who fails to return a completed form as instructed shall be directed by the court to appear before the clerk to complete the form. A person who fails to appear is subject to the procedures and penalties in Section 78-46-20.

(5) Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror is guilty of a class C misdemeanor.

Utah Code Annotated § 78-46-16 (1992):

(1) Within seven days after the moving party discovered, or by the exercise of diligence could have discovered the grounds therefore, and in any event before the trial jury is sworn to try the case, a party may move to stay the proceedings or to quash an indictment, or for other appropriate relief, on the ground of substantial failure to comply with this act in selecting a grand or trial jury.

(2) Upon motion filed under this section containing a sworn statement of acts which if true would constitute a substantial failure to comply with this act, the moving party may present testimony of the county clerk, the clerk of the court, any relevant records and papers not public or otherwise available used by the jury commission or the clerk, and any other relevant evidence. If the court determines that in selecting either a grand or a trial jury there has been a substantial failure to comply with this act and it appears that actual and substantial injustice and prejudice has resulted or will result to a party in consequence of the failure, the court shall stay the proceedings pending the selection of the jury in conformity with this act, quash an indictment, or grant other appropriate relief.

(3) The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the state, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this act.

STATEMENT OF THE CASE

The defendant-appellant, Jason Thomas Genovesi ("Genovesi"), was charged by Information with criminal homicide, murder, a first degree felony, alleging that on or about March 20, 1992, Genovesi intentionally and knowingly caused the death of Gavin Adams, his step-son. This is a violation of Utah Code Ann. § 76-5-203 (1992) (R.7). By a motion to suppress, Genovesi objected prior to trial to the use of evidence which he claimed resulted from an unlawful search of his residence. The motion was denied (R.112-113). On October 6th through 8th, 1992, Genovesi was tried before a jury. At trial, Genovesi objected that the jury panel had not been drawn from a cross-section of the population as required by law, but from only a portion of the alphabet, particularly surnames beginning with letters "S" and "T".¹ The district court overruled the objection (Tr.17-18). On October 8, 1992, the jury eventually found Genovesi guilty of manslaughter, a lesser included offense (R.217, 224). He was thereafter sentenced to an indeterminate

¹ See Trial Transcript of 10/6/92, hereinafter "Tr.," at 12, attached to this Brief as Addendum IV.

term in prison of one to fifteen years on November 16, 1992 (R.224).² This appeal then ensued (R.228).

STATEMENT OF THE FACTS

Genovesi was charged by Information alleging that on or about March 20, 1992, Genovesi intentionally and knowingly caused the death of Gavin Adams. This is a violation of Utah Code Ann. § 76-5-203 (1992) (R.7). Genovesi filed a motion to suppress evidence, claiming the evidence gathered was a fruit of an unlawful search of his residence (R.30-31).³ The district court denied the motion (R.112-113).

At trial, it appeared from the roster of qualified jurors that the venire had not been drawn from a cross-section of the community, but from only a portion of the alphabets (Tr.5). The jury clerk for the district court testified that the computer had initially selected 4,000 prospective jurors at random from the master jury list. Out of that number 2,900 names were qualified for jury service. *See* Utah Code Ann. § 78-46-12 (1992). Then, the computer was asked to select a smaller pool of jurors to serve in this case. However, rather than selecting a pool consisting of surnames beginning with letters "A" through "Z", the computer erroneously selected names in blocks, with significant number of names beginning with letters "S" and "T" and excluding most other alphabets (Tr.7-9). Genovesi

² Record Document #224 is "Judgment," attached to this Brief as Addendum II.

³ The facts relative to the suppression issue are set in detail *infra*, POINT I.

timely objected to that procedure, *see* Utah Code Ann. § 78-46-16(1) (1992); Utah R. Crim. P. 18(c); *State v. Harrison*, 805 P.2d 769, 776 (Utah Ct. App. 1991), which objection was overruled by the district court (Tr.17-18). Genovesi then went to trial and was found guilty of manslaughter by a jury in Salt Lake County on October 8, 1992 (R.217).

Thereafter, Genovesi was sentenced to an indeterminate term in prison of one to fifteen years on November 16, 1992 (R.224). A Notice of Appeal was then timely filed in the district court (R.228). There are no prior or related appeals in this matter.

SUMMARY OF THE ARGUMENT

Because the district court's findings of fact and conclusions of law are inadequate to allow meaningful appellate review, this Court should remand the case for further findings and conclusions. In the event this Court finds the record sufficient enough for review, Genovesi urges this Court to conclude that Mrs. Genovesi's consent to search was involuntary and not a valid waiver of a constitutional right.

No exigent circumstances justified the warrantless search of the Genovesi residence under either the state or federal constitution.

The warrantless search of the Genovesi residence independently violated article 1, section 14, of the Utah Constitution because there was no valid waiver of the right to refuse consent to search.

Genovesi was deprived of his constitutional right to a jury representing the cross-section of the community when the district court excluded from the venire persons with surnames beginning with letters "A" through "R".

ARGUMENT

Standard of Review

This Court reviews a district court's factual findings on a motion to suppress for clear error. However, the court's ultimate legal conclusions based on the underlying facts, such as whether consent was properly obtained, or the magnitude of protection afforded by the state constitution, are reviewed *de novo*, for correction of error. *See State v. Strickling*, 844 P.2d 979, 981 (Utah Ct. App. 1992); *State v. Lopez*, 831 P.2d 1040, 1043 (Utah Ct. App. 1992); *State v. Vigil*, 815 P.2d 1296, 1301 (Utah Ct. App. 1991). *See generally State v. Thurman*, 846 P.2d 1256, 1270-71 (Utah 1993).

POINT I

THE DISTRICT COURT'S FACTUAL FINDINGS AND CONCLUSIONS OF LAW ARE INADEQUATE AND CLEARLY ERRONEOUS.

1. Facts:

The following facts were developed at the hearing on Genovesi's motion to suppress: On March 20, 1992, paramedics were dispatched to a residence at 5459 West Balsa Avenue, Kearns, Utah, to investigate injury to, and possible death of, a two-year old

child.⁴ After the paramedics had left the residence, sheriff deputies from Salt Lake County arrived. When they arrived, the deputies were satisfied that there were no other persons in the residence who could be in danger. The emergency that necessitated their presence at the residence had been taken care of at this point (Mtr. 13).

Later that afternoon, Gavin Adams was pronounced dead at the Pioneer Valley Memorial Hospital. Sheriff deputy Kenneth Patrick ("Patrick"), who was on the scene that day testified that the deputies conducted a warrantless, consentless search of the residence, took pictures of the scene and removed a wash rag therefrom (Mtr. 7, 10, 14). Thereafter, the deputies arrested Genovesi (Mtr. 14).

Subsequently, Patrick went back to the residence the following day, March 21, 1992, again without a warrant. This time, he claimed to have telephonically contacted and obtained permission to "look for evidence and tak[e] measurements" from Lisa Genovesi, Gavin Adams' mother and Genovesi's wife (Mtr. 7-8, 16). Prior to the search, Patrick did not inform Mrs. Genovesi that she did not have to consent (Mtr. 8). Mrs. Genovesi told patrick that the residence key was with a friend, Randy Beagley. Patrick then contacted Beagley and told him to bring the key to the residence (Mtr. 9-10). While in the residence, Patrick and other sheriff deputies removed hair samples, cut out a piece

⁴ See Transcript of Motion to Suppress, 8/19/92, hereinafter "Mtr.," at 6, 12. The transcripts have been redesignated in the record index as items 236-291. For clarity purposes, Genovesi will reference the original page numbers of the transcripts.

of the wall and sections of the carpet, and took photographs and measurements (Mtr. 10-11).

2. The District Court's Findings and Conclusions:

The district court found that Patrick had permission from Mrs. Genovesi to conduct the warrantless search. Order ¶ 1.⁵ The court then went on to conclude that the law in Utah "allows one spouse to consent to the search of property owned or used jointly with the other spouse." *Id.* ¶ 2.

3. The District Court Clearly Erred:

Genovesi is aware that "[a]n appellant raising issues of fact on appeal must . . . marshal all the evidence supporting the trial court's findings, and then show that evidence to be insufficient." *State v. Drobel*, 815 P.2d 724, 734-735 (Utah Ct. App.), *cert. denied*, 836 P.2d 1383 (Utah 1991). *Accord*, *State v. Gallegos*, 210 Utah Adv. Rep. 49, 51 (Ct. App. 1993). The district court's factual findings are reviewed for clear error and its legal conclusions are reviewed for correction of error. *See State v. Thurman*, 846 P.2d 1256, 1270-71 (Utah 1993).

a. The March 20th Search:

Marshalling the evidence, if Patrick had in fact testified that he had the permission of Mrs. Genovesi prior to conducting the March 20th search, the court's

⁵ "Order" is Record Document # 112, attached to this Brief as Addendum I.

findings will be credible. As the record vividly demonstrates, however, Patrick testified that at no point on March 20 did he did request or receive permission to search. *See* Mtr. 14, 18. *See, e.g., Thompson v. Louisiana*, 469 U.S. 17, 22, 105 S. Ct. 409, 412 (1984) (no consent where both officers "explicitly testified that they had received no consent to search.") Consequently, the district court's factual findings are "against the clear weight of the evidence," *State v. Rochell*, 210 Utah Adv. Rep. 40, 43 (Ct. App. 1993) (Bench, J., concurring), because erroneous and not supported by the evidence, *see State v. Walker*, 743 P.2d 191, 193 (Utah 1987).

b. The March 21st Search:

The district court's finding that Patrick obtained permission from Mrs. Genovesi to conduct the March 21st search is also erroneous. It is true that Patrick testified that he telephonically contacted Mrs. Genovesi and told her that he wanted to go into the residence to obtain measurements and Mrs. Genovesi responded "yes." Mtr. 8-9. This testimony could conceivably support the district court's consent finding. However, Patrick also testified that he did not explain to Mrs. Genovesi that he would be conducting a thorough search for criminal evidence. Neither did he inform her that she could withhold consent to his request to search. In addition, Patrick could not have determined, and the district court made no finding, that Mrs. Genovesi's consent was specific and unequivocal, particularly where the alleged consent was obtained over the telephone. *See* Mtr.15-16. Thus, Mrs. Genovesi's response could not be characterized as spontaneous and specific;

rather, it is a mere acquiescence to the demands of a police officer. *See State v. Sims*, 808 P.2d 141, 151 (Utah Ct. App. 1991). *See generally State v. Carter*, 812 P.2d 460, 468-469 n.8 (Utah Ct. App.) *cert. denied*, 836 P.2d 1383 (1992) (ultimate conclusion of this nature by trial court defeats purpose of appellate review).

More important, the district court's conclusion of law on the consent issue clearly is incorrect. *See Thurman*, 846 P.2d at 1270-71 (trial court's ultimate determination of consent is reviewed for correctness). *Accord, Rochell*, 210 Utah Adv. Rep. at 41; *Godina-Luna*, 826 P.2d at 654. The district court made neither a finding nor conclusion regarding whether Mrs. Genovesi's alleged consent was voluntary and of free will, and not a mere acquiescence to lawful authority. The court merely concluded that Mrs. Genovesi consented to the search. Order ¶ 2. *But see State v. Marshall*, 791 P.2d 880, 888 (Utah Ct. App. 1990) (conclusory finding that defendant "consented" to search and there was no evidence of coercion "not particularly helpful in determining whether . . . consent was 'unequivocal and specific'"). *Cf. State v. Ramirez*, 817 P.2d 774 (Utah 1991).

Further, Genovesi contended below that the alleged consent search independently violated Article 1, Section 14, of the Utah Constitution (Mtr. 22-27). *See State v. Buford*, 820 P.2d 1381, 1384 (Utah Ct. App. 1991) (argument for independent state constitutional analysis should begin in trial court). The district court made no finding or conclusion on whether the search independently ran afoul the state constitution. *See Order.*

Consequently, the district court's findings and conclusions are "very sketchy and entirely failed to address critical issues," *Lovegren*, 798 P.2d at 770, thus leaving this Court with no "determination to review." *Carter*, 812 P.2d at 465. *Accord*, *Lopez*, 831 P.2d at 1043-44, 1050; *Marshall*, 791 P.2d at 882. Because this Court lacks the necessary information to undertake meaningful review of the issues raised by Genovesi, this case must be remanded to the district court for a detailed findings of fact and conclusions of law. *See generally State v. Strain*, 779 P.2d 221, 227 (Utah 1989); *Lovegren*, 798 P.2d at 771 n.11; *Lopez*, 831 P.2d at 1050. In the event this Court were to review the district court's findings and conclusions, Genovesi submits the following argument.

POINT II

MRS. GENOVESI'S CONSENT TO SEARCH THE RESIDENCE WAS INVALID BECAUSE IT WAS INVOLUNTARY AND NOT A VALID WAIVER OF A KNOWN CONSTITUTIONAL RIGHT.

A. Standard of Review:

This Court reviews the factual findings on a trial court's determination of voluntariness of consent under the clearly erroneous standard. *State v. Vigil*, 815 P.2d 1296, 1301 (Utah Ct. App. 1991). However, the ultimate conclusion of the district court on whether there was a valid consent, a legal question, is reviewed *de novo*. *Id.* *See generally State v. Thurman*, 846 P.2d 1256, 1270-71 (Utah 1993)(finally resolving the split in this Court on appropriate standard of reviewing consent issue).

B. Lack of Adequate Factual Findings Requires A Remand:

The district court concluded that Mrs. Genovesi consented to the search of the Genovesi residence. See Order ¶ 1. This decision, as assailed in POINT I, *supra*, is insufficient and not particularly helpful in examining voluntariness of Mrs. Genovesi's consent. The court made no finding on whether the consent was free, equivocal, specific, and therefore voluntary. See *Thompson v. Louisiana*, 469 U.S. 17, 105 S. Ct. 409 (1984)(any claim of consent to search in death scene cases measured against traditional consent standards). Nor did the court determine if the consent was a valid waiver of a known constitutional right, in comport with the state constitutional requirements. See *Ramirez*, 817 P.2d at 876; *Marshall*, 791 P.2d at 888 (conclusory finding on consent insufficient in determining whether consent was unequivocal or specific).

Rule 12(c) of the Utah Rules of Criminal Procedure provides in pertinent part:

A motion made before trial shall be determined before trial Where factual issues are involved in determining a motion, the court shall state its findings on the record.

Fed. R. Crim. P. 12(c)(emphasis added). In addition, this Court consistently has required detailed findings of fact when the State presents consent to search as an issue. See *Vigil*, 815 P.2d at 1296, 1300; *State v. Lovegren*, 798 P.2d 767, 777 n.11 (Utah Ct. App. 1990). *Accord*, *Burks v. State*, 706 P.2d 1190, 1191 (Alaska Ct. App. 1985).

Because the district court's findings in this case do not address issues of significance, this Court lacked the necessary tool to undertake meaningful review of the

factual and legal issues raised in Genovesi's motion to suppress. Under these circumstances, Genovesi urges this Court to remand this case to the district court for detailed findings of fact and conclusions of law.

C. Lack of Consent Requires Reversal:

Were this Court to review the district court's cursory denial of the motion to suppress, Genovesi submits that the district court erred.

1. Federal Constitutional Analysis

The Fourth Amendment to the United States Constitution requires that all searches be conducted pursuant to a warrant based on probable cause. *See* U.S. Const. amend. IV. A warrantless search of a citizen's residence is per se unreasonable unless the government shows that the search falls within a recognized exception, *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971), such as a valid consent, *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). The government has the burden of proving that consent was given freely, voluntarily, without duress or coercion,⁶ and that burden must be shouldered by clear and convincing testimony. *United States v. Butler*, 966 F.2d 559, 562 (10th Cir.

⁶ Interpreting the Fourth Amendment, the Utah Supreme Court provided guidance as to

[f]actors which may show a lack of duress or coercion includ[ing] 1) absence of a claim of authority to search by the officers; 2) absence of an exhibition of force; 3) a mere request to search; 4) cooperation by the owner; and 5) the absence of deception or trick on the part of the officer.

State v. Whittenback, 621 P.2d 103, 106 (Utah 1980).

1992).⁷ In addition, even in homicide cases, any claim of consent to search is measured against the traditional consent standards. *Thompson v. Louisiana*, 469 U.S. 17, 22, 105 S. Ct. 409, 412 (1984).

Genovesi does not question his wife's authority to consent to the search of their residence. See *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993 (1974); *State v. Elder*, 815 P.2d 1341, 1343 (Utah Ct. App. 1991). However, the district court made no findings regarding whether Mrs. Genovesi freely and voluntarily consented to the officers' entry into the residence without duress or coercion and, if so, for what purpose. As such, the record before this Court clearly does not support the district court's cursory conclusion that the warrantless search was in comport with the Fourth Amendment to the United States Constitution. If the court finds the record sufficient, Genovesi submits the following argument.

In *State v. Valdez*, 748 P.2d 1050 (Utah 1987), a homicide case, the supreme court held that the defendant's girlfriend properly consented to the search of the residence she shared with the defendant. In *Valdez*, the girlfriend not only physically handed to the officers the key to the residence, but also consented to the search upon the advice and in

⁷ Federal courts no longer indulge every reasonable presumption against waiver of right to refuse consent. See *Bulter*, 966 F.2d at 562; *United States v. Price*, 925 F.2d 1268, 1271 (10th Cir. 1991). But see, e.g., *State v. Sterger*, 808 P.2d 122, 127 (Utah Ct. App. 1991)(courts indulge every reasonable presumption against waiver of right to refuse consent and waiver must be proven by convincing evidence); *State v. Carter*, 812 P.2d 460, 467 (Utah Ct. App.) (same), cert. denied, 836 P.2d 1383 (Utah 1992).

the present of her attorney. *See Valdez*, 748 P.2d at 1056. In *Thurman*, also a homicide case, prior to searching Thurman's vehicles and storage units, the officers read Thurman his Miranda rights and also read verbatim to him a consent to search form. Thurman then signed the form. The Utah Supreme Court held that Thurman's consent was voluntary. *See Thurman*, 846 P.2d at 1273. These cases obviously are distinguishable. Mrs. Genovesi signed neither a consent form nor did she consent in the presence of an attorney.

In *Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S. Ct. 1788 (1968), the United States Supreme Court found involuntary and equivocal the defendant's statement, "come on in and go ahead and search." *See also United States v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir. 1990)(judicial concern to protect sanctity of home is so elevated that free and intelligent consent may not be shown by mere acquiescence to lawful authority).

In this case, Patrick testified that Mrs. Genovesi gave him permission to go into the residence to look and take measurements. *See Tr.* at 7. Mrs. Genovesi's alleged consent is defective in the constitutional sense for two reasons. First, the consent, like *Bumper's*, was involuntary and equivocal in that it merely represents acquiescence to lawful authority, rather than a free and intelligent response. *See Bumper*, 391 U.S. at 550. Second, the "consent," if any, was a limited permission to allow the officers to enter the residence to take measurements, not an authorization to tear up walls and carpets. *See United States v. Price*, 925 F.2d 1268, 1270 (10th Cir. 1991); *United States v. Dewitt*, 946 F.2d 1497, 1500 (10th Cir.), *cert. denied*, 112 S. Ct. 1233 (1992). Therefore, even if Mrs.

Genovesi voluntarily permitted the officers to enter the residence, the permission was a limited one, which they clearly exceeded by conducting a full blown search.

Further, knowledge by a suspect of his or her right to refuse consent is highly relevant in determining whether consent is valid. *See United States v. Medenhall*, 446 U.S. 544, 558-59 (1980); *United States v. Child*, 944 F.2d 491, 496 (9th Cir. 1991). Here, the officers did not inform Mrs. Genovesi that she could refuse to allow them into his apartment to conduct a warrantless search. *Compare United States v. Stallings*, 810 F.2d 973, 976 (10th Cir. 1987)(finding valid consent where officers "repeatedly told defendant that he was not required to consent to the search") with *United States v. Laymon*, 730 F. Supp. 332 (D. Colo. 1990)(finding invalid consent where, *inter alia*, officer did not advise defendant that he could refuse consent). Therefore, under the totality of the circumstances, the State failed to carry the burden of showing voluntary consent.

Because the State has not by clear and convincing evidence show that Mrs. Genovesi voluntarily consented to the warrantless entry and search of his apartment, the district court's cursory conclusion to the contrary is erroneous and should be reversed. *Cf.*, *e.g.*, *United States v. Ruminer*, 786 F.2d 381, 383 (10th Cir. 1986)(credible evidence supported district court's conclusion that search warrant was properly executed).

2. State Constitutional Analysis

A determination of consent is fact-sensitive and "cannot rest on . . . a cursory observation," but must be made from the totality of the surrounding circumstances. *State*

v. Sterger, 808 P.2d 122 (Utah Ct. App. 1991). To sustain its burden, (1) the State must show by clear and convincing evidence that consent was intelligently and voluntarily given, (2) without duress or coercion, and (3) the courts indulge every reasonable presumption against waiver of fundamental constitutional rights. *See id.*; *State v. Small*, 829 P.2d 129, 130 (Utah Ct. App. 1992); *State v. Carter*, 812 P.2d 460, 467 (Utah Ct. App. 1991).⁸ In examining the surrounding circumstances, "a court must take into account both the details of police conduct and the characteristics of the accused, . . . which include 'subtly coercive police questions as well as the possibly vulnerable subjective state of the person who consents.'" *State v. Robinson*, 797 P.2d 431, 437 (Utah Ct. App. 1990) (citing *State v. Arroyo*, 796 P.2d 684 (Utah 1990), and quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973)).

In addition, article 1, section 14, of the Utah Constitution, which should be interpreted more broadly than the fourth amendment,⁹ requires the State to prove validity of consent by demonstrating that a suspect was made aware of his or her right to refuse

⁸ *But see supra* note 7. Genovesi submits that article 1, section 14 of the Utah Constitution, which provides broader protection than the Fourth Amendment, requires the courts to indulge every reasonable presumption against waiver of fundamental rights. *See* POINT III, *infra*.

⁹ *See* POINT III, *infra*. *See generally* *Cooper v. California*, 386 U.S. 58, 62, 87 S. Ct. 788 (1967)(each state can interpret its constitution more broadly than federal constitution); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040 (1980)(same).

consent, i.e., overcome the presumption that citizens do not lightly waive fundamental constitutional rights. The so-called voluntariness/totally-of-circumstances test articulated in *Schneckloth*, which had proven itself elusive and "unworkable" in the confession setting until *Miranda*,¹⁰ has roundly been criticized.¹¹ Clearly, the validity of a consent to search is called into doubt if one is unaware of the right to refuse consent.¹² Only by requiring that a suspect be made aware of the right to refuse consent can a consent be deemed intelligent and voluntary in the constitutional sense.¹³ Thus, Genovesi suggests that a *Miranda*-type warning should be *sine qua non* to validity of consent to search under the Utah Constitution.¹⁴

¹⁰ Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the "Old" Voluntariness Test*, 65 Mic.L.Rev. 59, 99-104 (1966).

¹¹ See *Reck v. Pate*, 367 U.S. 433, 448, 81 S. Ct. 1541, 1550 (1961) (Clark, J., dissenting); LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2, at 175 (2d ed. 1987 & Supp. 1993); Weinreb, *Generalities of the Fourth Amendment*, 42 U.Chi.L.Rev. 47, 57 (1974).

¹² See generally Rotenberg, *An Essay on Consent(less) Police Searches*, 69 Wash.U.L.Q. 175, 193 (1991); Wilberding, *Miranda-Type Warnings for Consent Searches*, 47 North Dak.L.Rev. 281, 284 (1971); Model Code of Pre-Arrest Procedure § SS 240.2 (1975). Cf. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938) (defining waiver of constitutional rights as an "intentional relinquishment or abandonment of a known right or privilege").

¹³ See *State v. Johnson*, 68 N.J. 349, 346 A.2d 66, 67 (1975).

¹⁴ Genovesi suggests a person asked to consent should be advised thus: You have a right to refuse permission for any search. If you withhold consent, we would be required to request a search warrant from a judge, which warrant would only issue if we could show the judge probable cause to believe [the item sought] will be found. If you

This argument is not radical or novel. For example, in *Zerbst*, the Supreme Court held that a citizen should be made aware of his or her constitutional right before the right is considered waived.¹⁵ Almost three decades ago, the New Jersey Supreme Court read its state constitution as requiring the State to show validity of consent in terms of waiver:

[U]nder . . . our State Constitution the validity of a consent to search, even in a non-custodial situation, must be measured in terms of waiver, i.e., where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent.

State v. Johnson, 68 N.J. 349, 346 A.2d 66, 67 (1975)(interpreting Article 1, Paragraph 7 of the New Jersey Constitution, which is fourth amendment verbatim). Realizing the hollowness of the claim that a suspect "consented" to a search without having been informed that she could refuse consent, other state courts have also interpreted their state constitution as requiring the State to demonstrate voluntariness of a consent to search by a knowing waiver. *See, e.g., Penick v. State*, 440 So.2d 547, 551 (Miss. 1983)(interpreting Article 3, Section 23 of the Mississippi Constitution), *reiterated, Longstreet v. State*, 592

consent to the search, any incriminating evidence found can and will be used against you.

¹⁵ *See Zerbst*, 304 U.S. at 464, 58 S. Ct. at 1023. *Cf. Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966)(Fifth Amendment privilege against self-incrimination prohibits admitting statements given by suspect during custodial interrogation without benefit of warning that statements might be used against suspect).

So.2d 16, 19 (Miss. 1991).¹⁶ Genovesi urges this Court to hold that article 1, section 14, similarly requires that a suspect's knowledge of the right to refuse consent is a condition precedent to finding a consent valid.

A. Was the Consent Freely and Intelligently Given?

Patrick testified that he requested consent to look for evidence and take measurements from Mrs. Genovesi over the telephone. He claimed Ms. Genovesi said "yes". At no time, however, did Patrick specifically ask Mrs. Genovesi if he could remove a piece of the wall and carpet (Mtr. 15-16). Moreover, because the alleged consent was obtained over the phone, Patrick could not have assessed Mrs. Genovesi's demeanor to determine if she was in fact consenting to the search. Thus, consent could not have been freely and intelligently given under these circumstances. *See Thompson*, 469 U.S. at 22, 105 S. Ct. at 412 (call for help was not an invitation to conduct warrantless search). *Cf. United States v. DiChiarante*, 445 F.2d 126 (7th Cir. 1971).

In addition, at the time the consent was obtained, Mrs. Genovesi's two-year old child had just died. Looking at the "vulnerable subjective state of [Mrs. Genovesi,] the person who consents," *Robinson*, 797 P.2d at 437, there is no question that her will was

¹⁶ Section 23 of the Mississippi Constitution provides:

The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

Miss. Const. art. III, § 23.

overborne by the police officers and, therefore, she could not have given a voluntary and intelligent consent.¹⁷

Moreover, Mrs. Genovesi was not informed of the right to refuse consent. Knowledge by a suspect of his or her right to refuse consent, though merely a relevant factor in determining whether consent is intelligent and voluntary under the federal constitution,¹⁸ is a *sine qua non* under the Utah Constitution. See POINT III, *infra*. Here, Mrs. Genovesi was never informed of her right to refuse Patrick's request to enter, remain in, or search the residence. See *Johnson*, 68 N.J. at 349, 346 A.2d at 66 (an essential element of proving validity of consent is showing suspect had knowledge of right to refuse consent).¹⁹ Thus, her consent, if any, was obtained in violation of Utah Constitution, article 1, section 14.

¹⁷ See LaFave, § 8.2(e) ("It is equally appropriate to take account of the individual's mental or emotional state at the time the consent was given"); *cf. United States v. Guzman*, 864 F.2d 1512, 1520-1521 (10th Cir. 1988) (fact that defendant's wife was pregnant at time of illegal stop by officers should be a factor to consider in analyzing voluntariness of defendant's consent to search).

¹⁸ See *United States v. Mendenhall*, 446 U.S. 544, 558-590 (1980); *United States v. Stallings*, 810 F.2d 973, 976 (10th Cir. 1987); *Carter*, 812 P.2d at 468.

¹⁹ Compare *Robinson*, 797 P.2d at 438 (consent involuntary where "[t]here is no evidence that Robinson was aware or was informed that he did not have to accede to the trooper's request [to search]") with *State v. Hargraves*, 806 P.2d 228, 231 (Utah Ct. App. 1991) (consent voluntary where defendant read and signed consent form) and *State v. Webb*, 790 P.2d 65, 82-83 (Utah Ct. App. 1990) (consent voluntary where defendant in residential search was given consent form to sign and told if she did not consent to warrantless search one would not be conducted).

B. Was The Consent A Product Of Coercion?

In *State v. Whittenback*, 621 P.2d 103, 106 (Utah 1980), the Utah supreme court, interpreting the fourth amendment, held that the absence of coercion or claim of authority by the police could aid the trial court in finding voluntary consent. Here, the district court made no finding on whether Mrs. Genovesi was under duress or felt coerced by Patrick. Without the assistance of such a critical finding, the district court inadvertently invited a remand, because there is no determination for this Court to review. *State v. Marshall*, 791 P.2d 880, 889 (Utah Ct. App. 1990).

Moreover, the evidence clearly implied, and Mrs. Genovesi could reasonably have believed, that the officers had the authority to enter and search the residence. Mere acquiescence in the face of show of police authority does not constitute voluntary consent. *See Bumper v. North Carolina*, 391 U.S. 543 (1968) (consent involuntary where police officer told defendant's grandmother, and the latter reasonably believed, that the officer had authority to enter and search defendant's residence). Simply because Patrick did not draw a weapon or use a commanding tone of voice does not support a non-coercive encounter. *See United States v. Ward*, 961 F.2d 1526, 15, 34 (10th Cir. 1992); *United States v. Bloom*, 975 F.2d 1447, 1455 & n.9 (10th Cir. 1992).

C. Was The Scope Of Consent Transcended?

Even if a citizen voluntarily consents, the ensuing search must be limited in scope to the particular area agreed to. "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." *Marshall*, 791 P.2d at 888 (quoting *United States v. Gay*, 774 F.2d 368, 375 (10th Cir. 1985)). *Accord*, *State v. Dunn*, _____ P.2d _____, 1993 WL 79651, at 13 (Utah 1993); *State v. Grovier*, 808 P.2d 133, 137 (Utah Ct. App. 1991). For example, in *People v. Thiret*, 685 P.2d 193 (Colo. 1984), the Colorado Supreme Court concluded:

What the defendant agreed to was to permit the officers to "look around" the house. A "look around" connotes a casual observation of the premises. The "look around," however, consisted of a search of the defendant's house by four officers over a period of forty-five minutes, including an inspection of piles of clothes and debris, and an examination of drawers, boxes and other closed containers. This extensive type of search was far in excess of the "look around" authorized by the defendant[.]

Thiret, 685 P.2d at 201. In *Robinson*, this Court cited and made references to *Thiret* as an example of a case where a search was conducted in excess of the scope of consent. *See Robinson*, 791 P.2d at 888.

In the instant case, Patrick asked Mrs. Genovesi if he could look around and take measurements. This, however, turned into a major search and seizure by the officers. Indeed, they literally took over the Genovesi residence, tore up walls and carpets as if they had been authorized to seize it. Under those circumstances, there is no question that the officers exceeded the scope of Mrs. Genovesi's consent, if a consent was in fact voluntarily given. *See Thiret*, 685 P.2d at 201.

POINT III

THIS COURT SHOULD INDEPENDENTLY INTERPRET ARTICLE I, SECTION 14, OF THE UTAH CONSTITUTION FROM THE INTERPRETATION GIVEN THE FOURTH AMENDMENT BY THE UNITED STATES SUPREME COURT AND CONCLUDE THAT A CONSENT SEARCH IS VALID UNDER THE UTAH CONSTITUTION ONLY IF THE SUSPECT MAKES A KNOWING WAIVER OF HIS OR HER CONSTITUTIONAL RIGHTS.

Although Article I, Section 14, of the Utah Constitution is Fourth Amendment verbatim, this court should independently interpret that provision from the interpretation given the amendment by the United States Supreme Court.²⁰ Pursuant to the primacy model of constitutional interpretation,²¹ the Utah constitution should be the primary source for protecting citizens' rights. Secondly, independent interpretation by this court will foster predictability and "insulate[s] the states' citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts."²² Thirdly, such independent interpretation will positively reinvigorate the state's sovereignty

²⁰ See *State v. Earl*, 716 P.2d 803, 806 (Utah 1986) (imploring Utah lawyers to brief Utah courts on state constitutional issues); *State v. White*, 210 Utah Adv. Rep. 59, 60 (Ct. App. 1993); *State v. Bradford*, 839 P.2d 866, 868 n.2 (Utah Ct. App. 1992) (same).

²¹ The primacy model posits that, because several state constitutions predate the federal constitution, "state constitutions should be looked to first in developing protections for individual rights." Comment, *The Utah Supreme Court and the Utah State Constitution*, 1986 Utah L. Rev. 319, 326 n.34. See also Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 380 (1980).

²² *State v. Watts*, 750 P.2d 1219, 1221 n.8 (Utah 1988).

under our federal system of government.²³ More importantly, Article I, Section 14 of the Utah Constitution should be interpreted differently from the fourth amendment because of the following reasons:

A. Utah's Unique History

No other territory experienced the difficulties encountered by Utah before obtaining statehood. The difficulties stemmed mainly from the settlers' practice of slavery and polygamy, the twin "sins" that made Congress look unfavorably towards granting statehood to the territory.²⁴

Utahns drafted seven constitutions before the state was admitted into the Union. The first, the Constitution of Deseret of 1849, served as the model for other Utah constitutions.²⁵ There is disagreement, however, on whether the 1849 Constitution was patterned after the Illinois Constitution of 1818²⁶ or the Iowa Constitution of 1846.²⁷

²³ See Linde, *supra* note 21, at 383.

²⁴ See E. Firmage and R. Mangrum, *Zion in the Courts* 127 (Univ. Illinois Press 1988); Flynn, *Federalism and Viable State Government--The History of Utah's Constitution*, 1966 Utah L. Rev. 311, 316; Hickman, *Utah Constitutional Law* 45 (1954) (unpublished thesis in University of Utah Library).

²⁵ See Flynn, *supra* note 24, at 315; Hickman, *supra* note 24, at 42.

²⁶ See *id.* (arguing Illinois).

²⁷ See Crawley, *The Constitution of the State of Deseret*, 29 B.Y.U. Studies 7, 15 (1989), stating that several articles in the 1849 Constitution were copied "word for word" from the Iowa Constitution, which today is federal and Utah constitutions verbatim.

Nevertheless, it is undisputed that the last Utah constitution, adopted in 1896, borrowed heavily from the constitutions of Nevada, Washington, Illinois and New York.²⁸

Utah's constitutions, like many other state constitutions drafted in the nineteenth century, reflect the prevailing sentiment of deep mistrust of the government.²⁹ Article 8 of the 1849 Constitution, for example, prohibited unreasonable searches and seizures,³⁰ and subsequent Utah constitutions similarly prohibited such searches. Historically, Utah judges have never hesitated in finding unconstitutional searches conducted on less than probable cause or statutes authorizing them.³¹

The utmost devotion by these judges to constitutionally sound searches stemmed apparently from their unique experience as citizens of the Utah territory.³² As mentioned earlier, the settlers widely practiced polygamy, a "relic[] of barbarism" that

²⁸ See generally Flynn, *supra* note 24, at 323.

²⁹ See *id.* at 314.

³⁰ See Crawley, *supra* note 27, at 16. Unfortunately, as of today, research has not discovered a contemporaneous legislative debate on the adoption of this provision. Nonetheless, it is well documented that residents of the Utah territory were generally familiar with unconstitutional searches and the constitutions of other states prohibiting unreasonable searches and seizures. See Ivins, *A Constitution for Utah*, 25 Hist. Q. 95, 100 (1957); Flynn, *supra* note 24.

³¹ See generally Hickman, *supra* note 24, at 386-390.

³² It is no longer folklore that early Mormon settlers were intolerantly driven to the territory from New York, Illinois, Missouri and Pennsylvania. See Firmage and Mangrum, *supra* note 24, at 125-27.

Congress was determined to stamp out.³³ Therefore, it is not uncommon for federal marshals, in blatant violation of the fourth amendment, to break into churches and homes during the day or at night in search of polygamists.³⁴ To the dismay of early Utahns, night time search, "the evil in its most obnoxious form,"³⁵ was conducted with great frequency and without probable cause.³⁶ A frustrated and weary Mormon leader once decried these searches as a "perversion of the Constitution."³⁷ Article I Section 14, thus, is not a wholesale adoption of the search and seizure provisions of other state constitutions, but a

³³ Hickman, *supra* note 24, at 45; Firmage and Mangrum, *supra* note 24, at 127, 160.

³⁴ See Bradley, *Hide and Seek: Children on the Underground*, 51 Utah Hist. Q. 133, 142 (1983) (recounting how the home of a polygamist was searched 100 times in four years). See also "How They Do It," *Deseret News Weekly*, Jan. 20, 1886, at 1 (recounting how federal marshals clearly engaged in unconstitutional search of a polygamist's home by breaking the door with an axe without the authority of a warrant).

Professor Firmage similarly observes that during the nineteenth century "federal attempts to simplify and expedite the conviction of polygamists routinely denied Mormons of many of their fundamental rights." Firmage, *Religion and the Law: The Mormon Experience in the Nineteenth Century*, 12 Cardozo L. Rev. 765, 781 (1991).

³⁵ *Monroe v. Pape*, 365 U.S. 167, 210 (1961) (Frankfurter, J., dissenting). See also *State v. Lindner*, 592 P.2d 852, 857 (Idaho 1979) ("entry into an occupied dwelling in the middle of the night is clearly a greater invasion of privacy than entry executed during the daytime").

³⁶ See *Deseret News Weekly*, Jan 20, 1886, at 1; Jan. 27, 1886, at 26; June 10, 1885, at 1.

³⁷ First Presidency Message to General Conference of the Church of Jesus Christ of Latter-Day Saints, *Deseret News Weekly*, April 13 & 14, 1886, at 196 (quoted in Wallentine, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article 1, Section 14*, 17 J. Contemp. Law 267, 279 n.80 (1991).

reflection of the deep distrust of Utahns for government and for unreasonable searches or those conducted without probable cause.³⁸

B. Propriety of Independent Review under the Federal System

In our federal system, it is entirely proper for a state court to interpret its constitution in a manner different from the United States Supreme Court's interpretation of a similar federal provision.³⁹ In the recent past, state courts have been interpreting their own constitutions differently from federal interpretation to provide broader protections to their citizens.⁴⁰

³⁸ See Hickman, *supra* note 24, at 386-90.

³⁹ See *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *Jankovich v. Indiana Toll Rd. Comm.*, 379 U.S. 487, 489 (1965); see also *State v. Marsalla*, 579 A.2d 58, 63 (Conn. 1990) (in interpreting its own constitution, a state court sits as "a court of last resort, subject only to the qualification that [its] interpretations may not restrict the guarantees accorded the national citizenry under the federal charter"). See generally Durham, *Employing the Utah Constitution*, 2 Utah B.J. 25 (Nov. 1989). But cf. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (admonishing state courts to make a clear and concise statement of the independent state ground of their decision).

⁴⁰ See Collins, *Reliance on State Constitutions--Away From A Reactionary Approach*, 9 Hastings Const. L. Q. 1, 2-3 (1981); Wilkes, *The New Federalism in Criminal Procedure: State Courts Erosion of the Burger Court*, 62 Ky. L. J. 421, 425 (1974).

The Utah Supreme Court has not been hesitant in independently interpreting the Utah Constitution in a broad range of issues.⁴¹ In *State v. Larroco*, 794 P.2d 460 (Utah 1990), the court departed from confusing and irreconcilable federal automobile search and seizure jurisprudence.⁴² It held that under Article I, Section 14, a warrantless automobile search is per se unconstitutional except when effectuated with probable cause and to "protect safety of police or the public or to prevent the destruction of evidence." *Id.* at 470. More recently, the Court similarly held that the exclusionary rule applies under the Utah Constitution in quasi-criminal tax stamp cases. See *Zissi v. State Tax Comm. of Utah*, 842 P.2d 848, 859 (Utah 1992) ("Utah Constitution's exclusionary rule prevent[s] the Commission from admitting in evidence drugs [illegally] taken from [the suspect's] car").

C. The Consent Search in This Case Lacked A Valid Waiver

As pointed out above, Mrs. Genovesi was not informed of the right to refuse consent. Knowledge by a suspect of his or her right to refuse consent, though merely a relevant factor in determining whether consent is intelligent and voluntary under the federal constitution, is a *sine qua non* under the Utah Constitution. Here, Mrs. Genovesi

⁴¹ See Comment, *supra* note 21, at 320 (chronicling independent interpretation by the Utah Supreme Court on right of access to preliminary hearings, parental rights, separation of power, self-incrimination and standing).

⁴² See also *People v. P.J. Video, Inc.*, 508 N.Y.S.2d 907 (New York 1986) ("fourth amendment rules governing police conduct have been muddled and, and judicial supervision of the warrant process diluted").

was never informed of her right to refuse Patrick's request to enter, remain in, or search the residence. *See Johnson*, 68 N.J. at 349, 346 A.2d at 66 (an essential element of proving validity of consent is showing suspect had knowledge of right to refuse consent).⁴³ As such, she could not have intelligently waived her constitutional right. Thus, consent, if any, was obtained in violation of Mrs. Genovesi's rights under Utah Constitution, article 1, section 14.

POINT IV

THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING THE WARRANTLESS SEARCH OF THE GENOVESI RESIDENCE

A. Federal Constitution:

The Fourth Amendment to the United States Constitution requires that all searches be conducted pursuant to a warrant based on probable cause. *See* U.S. Const. amend. IV. A warrantless search of a citizen's residence is per se unreasonable unless the government shows that the search falls within a recognized exception, *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S. Ct. 2022, 2032 (1971), such as when a life may be in

⁴³ Compare *Robinson*, 797 P.2d at 438 (consent involuntary where "[t]here is no evidence that Robinson was aware or was informed that he did not have to accede to the trooper's request [to search]") with *State v. Hargraves*, 806 P.2d 228, 231 (Utah Ct. App. 1991) (consent voluntary where defendant read and signed consent form) and *State v. Webb*, 790 P.2d 65, 82-83 (Utah Ct. App. 1990) (consent voluntary where defendant in residential search was given consent form to sign and told if she did not consent to warrantless search one would not be conducted).

danger or evidence destroyed, *Schrember v. California*, 384 U.S. 757, 770-71, 86 S. Ct. 1826, 1835-36 (1966); *Mincy v. Arizona*, 437 U.S. 385, 391, 98 S. Ct. 2408, 2412 (1978).

In *Mincy*, narcotics officers were attempting to purchase drugs at the defendant's residence. When the officers attempted to effectuate an arrest, a shootout ensued in which an undercover officer was killed. Without a warrant, the officers searched the defendant's residence for four days, ripping up carpets and walls to uncover incriminating evidence. *Id.* at 385, 98 S. Ct. at 2409. The Supreme Court held that the police may respond to emergency of life threatening situations without a warrant. However, once the emergency dissipates, the police no longer have the authority to conduct a warrantless search of a homicide scene. The Court specifically rejected the notion that a possible homicide inevitably presents an emergency situation as to create a "murder scene exception" to the warrant requirement of the Fourth Amendment. *See id.* at 386, 98 S. Ct. at 2413-14.⁴⁴

In *State v. Northrup*, 756 P.2d 1288 (Utah Ct. App. 1988), after making several controlled drug buys, police officers entered and searched the defendant's residence without a warrant, upon a believe that the money given the defendant by the informant could be destroyed. This Court similarly recognized that preservation of evidence is an exigent

⁴⁴ *Accord*, *Thompson v. Louisiana*, 469 U.S. 17, 105 S. Ct. 409 (1984); *Commonwealth v. Lewin*, 407 Mass. 617, 555 N.E.2d 551 (1990); *State v. Hockenhull*, 525 A.2d 926 (R.I. 1987); *State v. Jennings*, 461 A.2d 361 (R.I. 1983).

circumstance that makes a search imperative. However, this Court found no exigent circumstance where the controlled buy had already taken place, there was no known danger, and the officers could have easily obtained a telephonic warrant. *See id.* at 1291-92. *See also State v. Case*, 752 P.2d 356 (Utah Ct. App. 1987)(no exigent circumstance justified warrantless entry where emergency had dissipated before police arrival).

The warrantless search in this case took place one day after the alleged emergency. There no longer present any exigent circumstance preventing the officers from obtaining a warrant, including a telephonic warrant. All occupants of the Genovesi residence had been removed and the residence secured at this point. Thus, all the evidence seized pursuant to the warrantless search should have been suppressed by the district court. *See Hockenhull*, 525 A.2d at 926 (after apartment secured, officer returned with investigative equipment to photograph and take measurements; Court found search illegal because "exigency that justified the entry onto the premises [had] terminated").

B. State Constitution:

1. The Home As A Castle

A citizen's home is his or her castle and it is a place where he or she should be free from unreasonable governmental intrusion. *See Northrup*, 756 P.2d at 1290 (warrantless entry into home is evil in its most obnoxious form)(citing *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S.Ct. 2091, 2097 (1984). *Accord, State v. Ramirez*, 814 P.2d 1131, 1133 (Utah Ct. App. 1991). Consequently, "the warrant requirement is an important check

upon the power of the State to subject individuals to unreasonable searches and seizures and is not to be lightly disregarded." *State v. Banks*, 720 P.2d 1380, 1382 (Utah 1986) (emphasis added). *Accord*, *State v. Dunn*, _____ P.2d _____, 1993 WL 79651, at 13 (Utah 1993). The corollary being the judiciary, rather than the executive branch, shall determine reasonableness of a search after a showing of probable cause. *State v. Griffin*, 626 P.2d 478, 481 (Utah 1981) (Wilkins, J., concurring).

In that context, Utah law has pervasive regard for the sanctity of the home. *See, e.g.*, Utah Const. art. 1, § 6 (right to bear arm to protect one's residence); Utah Const. art. 1, § 14 (prohibiting warrantless residential searches) *State v. Banks*, 720 P.2d 1380, 1382 (Utah 1986)(warrantless residential searches are per se unreasonable); Utah Const. art. 1, § 22 (private property shall not be taken without just compensation); Utah Code Ann. § 76-2-405 (1992) (authorizing use of deadly force in defense of one's residence) *State v. Gardiner*, 814 P.2d 568, 577 (Utah 1987) (Stewart, J. dissenting) (citizen can use force even against a police officer if officer violates Constitution by making warrantless entry into residence).

The Utah appellate courts have also been exceptionally critical of warrantless residential searches.⁴⁵ Thus, when the State, as here, conducts a warrantless residential

⁴⁵ *See State v. Ashe*, 745 P.2d 1255 (Utah 1987); *State v. Banks*, 720 P.2d 1380 (Utah 1986); *Ramirez*, 814 P.2d at 1133; *State v. McIntire*, 768 P.2d 970 (Utah Ct. App. 1989); *State v. Northrup*, 756 P.2d 1288 (Utah Ct. App. 1988); *cf. State v. Case*, 752 P.2d 356 (Utah ct. App. 1987); *see generally Gardiner*, 814 P.2d at 580 (Bench, J. dissenting)

search, "the burden on [it becomes] particularly heavy" "to show both probable cause and exigent circumstances." *Ramirez*, 814 P.2d at 1133. Consequently, the maxim in this state, particularly when it comes to residential searches, remains, "warrants-when-practicable is the best policy." *State v. Elder*, 815 P.2d 1341, 1345 n. 5 (Utah Ct. App. 1991). Enforcing that maxim more bluntly, the Utah Supreme Court has concluded: "[W]arrantless searches will be permitted only where they satisfy their traditional justification, namely, to protect the safety of police or the public, or to prevent destruction of evidence." *State v. Larocco*, 794 P.2d 460, 469 (Utah 1990); *see also Ashe*, 745 P.2d at 1255 (warrantless residential searches are permitted only upon exigent circumstances); *Northrup*, 756 P.2d at 1288 (the exigency of a warrantless search must be imperative).

The instant case involves a warrantless residential search, and the State has made no such claim of exigent circumstances. *See* Plaintiff's Response to Defendant's Motion to Suppress, R.88 (attached herein as Addendum III). Indeed, the State has maintained all along that this search was consensual. *See id.* In addition, Patrick testified that the exigency had dissipated at the time the officers arrived at the Genovesi residence. Moreover, the officers had sufficient time to apply for a warrant to search the residence. Thus, anticipating an exigent circumstances claim by the State in this Court, Genovesi urges

(general warrants and writs of assistance used under British Colonial rule have no place in modern day Utah).

this Court to conclude that the warrantless search conducted at his residence independently violated article 1, section 14, of the Utah constitution.

POINT V

GENOVESI WAS DENIED THE RIGHT TO A JURY REPRESENTING THE CROSS-SECTION OF THE COMMUNITY WHEN THE DISTRICT COURT ELIMINATED FROM THE VENIRE PERSONS WITH SURNAMES BEGINNING WITH LETTERS "A" THROUGH "R".

A. Standard of Review

Whether the facts on the record before this Court show a violation of Genovesi's constitutional and statutory rights to a jury representing the cross-section of the community is a question of law reviewed for correction of error. *See Castaneda v. Partida*, 430 U.S. 482, 482, 97 S. Ct. 1272, 1274 (1977); *State v. Thomas*, 830 P.2d 243, 245 (Utah 1992); *State v. Paz*, 798 P.2d 1, 7 (Idaho 1990).

B. The District Court's Decision is Incorrect

The jury clerk for the district court testified in this case that the computer had initially selected 4,000 prospective jurors at random from the master jury list. Out of that number 2,900 names were qualified for jury service. *See Utah Code Ann. § 78-46-12* (1992). Then, the computer was asked to select a smaller pool of jurors to serve in this case. Rather than selecting a pool consisting of surnames beginning with letters "A" through "Z", the computer erroneously selected names in blocks, with significant number of names beginning with "S" and "T" and excluding most other alphabets (Tr.7-9). Genovesi

timely objected to that procedure. Utah Code Ann. § 78-46-16(1) (1992); Utah R. Crim. P. 18(c); *State v. Harrison*, 805 P.2d 769, 776 (Utah Ct. App. 1991). After hearing arguments from the parties, Judge Young acknowledged that people whose surnames began with letters "S" and "T" predominate the venire. Tr. 17. He concluded, however: "But I don't see anything in this that would cause me to believe that any particular cognizable group has been systematically left out of the pool. Therefore, [defendant's] objection is denied." Tr. 17-18.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a trial by an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 148-49, 88 S. Ct. 1444, 1446-47 (1968); *Ristaino v. Ross*, 424 U.S. 589, 592 n.6, 96 S. Ct. 1017 (1976). Article 1, Section 12 of the Utah Constitution similarly provides the right to an impartial jury. See Utah Const. art. 1, § 12; *State v. Anderson*, 65 Utah 415, 237 P. 941, 942 (1925); *State v. Woolley*, 810 P.2d 440, 443 (Utah Ct. App.), *cert. denied*, 826 P.2d 651 (Utah 1991). See also Utah Code Ann. § 78-46-12 *et seq.* (1992). This guarantees require that the jury be selected from among a cross-section of those persons eligible in the community for jury service. *Hoty v. Florida*, 368 U.S. 57, 59, 82 S. Ct. 159, 161 (1961); *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668 (1979); *State v. Bankhead*, 727 P.2d 216, 217 (Utah 1986).

To establish a *prima facie* violation of the right to an impartial jury selected from a cross-section of the community, the movant must show:

(1) That the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364, 99 S. Ct. at 668. See generally *Redd v. Negley*, 785 P.2d 1098, 1100 (Utah 1989)(citing *Duren* with approval).

1. Distinctiveness of Group⁴⁶

A particular group "must be of sufficient numerosity and distinctiveness to be cognizable for fair cross-section purposes." *Tillman*, 750 P.2d at 575-766 (citing *Taylor v. Louisiana*, 419 U.S. 522, 531, 95 S. Ct. 692, 698 (1975) and *Duren*, 439 U.S. at 364, 370, 99 S. Ct. at 668, 671). See also *Partida*, 430 U.S. at 494, 97 S. Ct. at 1280. "This standard certainly implies a factual determination which turns upon the relevant characteristics of the particular community." *Tillman*, 750 P.2d at 576.⁴⁷ "The distinctiveness and homogeneity of a group under the sixth amendment depends upon the time and location of the trial." *Wills v. Zant*, 720 F.2d 1212, 1216 (11th Cir. 1983).

⁴⁶ Because this case involves a sixth amendment fair cross-section challenge, as opposed to an equal protection challenge, Genovesi has standing to attack the jury selection process regardless of his race or class. See *State v. Tillman*, 750 P.2d 546, 575 n.126 (Utah 1987).

⁴⁷ Mere statistical underrepresentation of a group is sufficient to demonstrate discrimination against the group under the sixth amendment. See *State v. Span*, 819 P.2d 329, 341-42 (Utah 1991).

The issue before this Court is one of first impression. However, Genovesi's argument --that the exclusion from the venire of a significant number of persons whose surnames began with letters "A" through "R" is violative of the state and federal constitutions' cross-section requirement -- is not novel. Applying the cross-section analysis, numerous courts have upheld claims of groups identified by age, religion, economic status and occupation. See Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 Calif.L.Rev. 1555, 1562 (1985). See, e.g., *Paz*, 798 P.2d at 7 (People with Hispanic surnames represent distinct group in the community).⁴⁸

There is no question that persons whose surnames start with letters "A" through "R" in Salt Lake County and who qualify for jury service are of "sufficient numerosity and distinctiveness as to be cognizable for fair cross-section purposes." *Tillman*, 750 P.2d at 575-76.⁴⁹ Moreover, in his influential study of surnames, Dr. Trevor

⁴⁸ But cf. *State v. Cantu*, 750 P.2d 591, 596 n.3 (Utah 1988) ("We reserve judgment on whether Hispanics are a distinctive group under sixth amendment fair cross-section analysis.").

⁴⁹ Genovesi urges this Court to take judicial notice of this fact. Utah R. Evid. 201. Further, the use of judicial notice in this case is not an attempt to circumvent the rule against raising issues for the first time on appeal. *Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451 (Utah Ct. App.), cert. denied, 769 P.2d 819 (Utah 1988). This issue was raised and ruled upon below. See Tr. 17-18. In addition, counsel for Genovesi urged the district court clerk to provide him with the number of prospective jurors whose surnames began with letters "A" through "R" and who were eliminated from the venire by computer error. When the clerk refused to provide the statistics, counsel filed a motion in this Court on May 28, 1993, for an Order compelling the district court clerk to provide the information requested. As of the day of filing this Brief, this Court has

Weston found that those whose surnames start with letters "A" through "R" are 50% less likely to have a condition called "alphabetic neurosis" than those with surnames beginning with letters "S" through "Z". See Autry and Barker, *Academic Correlates of Alphabetical Order of Surname*, 8 J. Sch. Psychology 22, 22 (1970). As such, the venire assembled in Genovesi's case, consisting predominantly of people with alphabetic neurosis, clearly excludes a distinct group -- those who are less likely to have the neurosis. Therefore, the district court's decision that a distinct group had not been excluded for fair cross-section purposes is incorrect and should be reversed.

2. Fair and Reasonable Representation of Group

The next criteria of the *Duren* test is whether representation in the jury pool of persons with surnames beginning with letters A through R was "fair and reasonable in relation to the number of such persons in the community." *Duren*, 439 U.S. at 364, 99 S. Ct. at 668. Accord, *Tillman*, 750 P.2d at 576.

By comparing a benchmark percentage of a cognizable group appearing in the population with the percentage of the group appearing on jury panels, it is possible to obtain some measure of whether panels are being constituted in a manner representative of a fair cross-section of the community.

not ruled on the motion for an Order; nor has the Court granted counsel an extension to file the Brief. The statistics requested by counsel are virtually indispensable in establishing that the jury that convicted Genovesi did not represent a cross-section of the community. See *Tillman*, 750 P.2d at 576-77 and n. 138 (illustrating how statistical data are vital in these type of cases); *Negley*, 785 P.2d at 1100 (same); *Paz*, 798 P.2d at 8 (same).

Id.(citing *Duren*, 439 U.S. at 364, 99 S. Ct. at 668). As of July 1, 1992, the estimate population of Salt Lake County is 765,399. See Utah Office of Planning and Budget, Demographic and Economic Analysis, *Utah Data Guide*, Vol. 12, No. 1 (Jan. 1993).

However, because Genovesi has been unable to obtain the numbers of prospective jurors whose surnames began with letters "A" through "R," who were erroneously eliminated from the venire, *see supra* note 49, an absolute benchmark comparison is impossible in this case. Suffice it to say that a significant number of people with surnames beginning from "A" through "R" were not fairly represented on the jury that convicted Genovesi. Because the jury "is not representative of the community, the process is constitutionally defective *ab initio*." *People v. Wheeler*, 583 P.2d 748, 759 (Cal. 1978). Cf. *State v. Bates*, 22 Utah 65, 61 P. 905 (1900)(trial before unlawful jury rendered conviction void). The jury pool in this case was "made up of only special segments of the populace," thereby violating the constitutional requirement that a jury be broadly representative of the community as to guard against arbitrary power of the State." *Taylor*, 419 U.S. at 530-3, 95 S. Ct. at 697-98.

3. Systematic Exclusion

The third prong of the *Duren* test is whether underrepresentation of this group in the jury selection is due to systematic exclusion. See *Duren*, 439 U.S. at 364, 99 S. Ct. at 668; *Tillman*, 750 P.2d at 575-76. Systematic exclusion means that the disparity

complained of is "inherent in the particular jury selection process utilized." *Duren*, 439 U.S. at 366, 99 S. Ct. at 669. Explicit in Genovesi's claim is that the jury panel in this case was devoid of people whose surnames began with letters "A" through "R," and therefore inherently not representative of the cross-section of the community.

Granted the exclusion of this group was due to computer, rather than human, error. That distinction, however, is of no constitutional significance. In a fair cross-section case, "a defendant is not required to show bad faith, and a prima facie showing of systematic exclusion may not be rebutted by proof of a non-discriminatory intent." *Tillman*, 750 P.2d at 575 n. 126 (citation omitted).

Thus, Genovesi urges this Court to hold that the exclusion from the venire of persons whose surnames began with letters "A" through "R" denied him the right to a jury representing a cross-section of the community.

CONCLUSION AND PRECISE RELIEF REQUESTED

Because the district court's findings and conclusions are inadequate, this Court should remand the case for further findings and conclusions. In the alternative, this Court should reverse the district court's decision refusing to suppress the evidence seized from Genovesi. In addition, this Court should reverse the district court's decision on the jury selection issue and hold that the procedure utilized violated Genovesi's constitutional right to an impartial jury.

REQUEST FOR ORAL ARGUMENT

This case is fact-sensitive and counsel believes oral argument will aid the Court in disposing the issues.

RESPECTFULLY SUBMITTED this ____ day of June, 1993.

BRADLEY P. RICH
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed/delivered a true and correct copy of the foregoing Brief of Appellant, this ____ day of June, 1993, to Janet C. Graham, Utah Attorney General, 235 State Capitol Building, Salt Lake City, Utah, 84114.

ADDENDUM I

~~Salt Lake County Attorney~~
JAMES M. COPE, 0726
THOMAS P. VUYK, 3342
Deputy County Attorneys
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 363-7900

SALT LAKE COUNTY
By CP Dec 11 Clerk

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

THE STATE OF UTAH,)	
Plaintiff,	)	FINDINGS AND ORDER
v.	)	Denying DEFENDANT'S
JASON THOMAS GENOVESI,	)	MOTION TO SUPPRESS
Defendant.	)	Case No. 921900681FS
	)	Judge David S. Young

Defendant's Motion to Suppress evidence acquired by a search of defendant's residence came on regularly for hearing the 19th day of August 1992. The court heard the testimony of Kenneth Patrick, considered the arguments of counsel, and finds that:

1. Officer Patrick believed, prior to beginning the search of defendant's residence, that he had obtained permission from defendant's wife to do so.

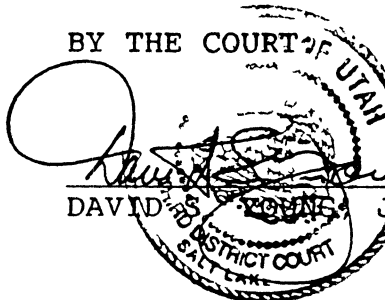
2. The law in Utah allows one spouse to consent to the search of property owned or used jointly with the other spouse.

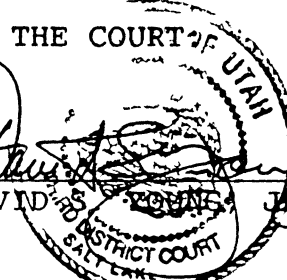
3. Lisa Genovesi, the wife of defendant, did tell Kenneth Patrick, in a 21 March 1992 telephone conversation, that he could go to defendant's and her residence to search for and collect evidence pertinent to the death of Gavin Adams.

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Defendant's Motion to Suppress is therefore DENIED.

DATED this 2nd day of September, 1992.

BY THE COURT OF UTAH


DAVID S. EVANS, Judge


CERTIFICATE OF SERVICE

I certify that on the _____ day of September, 1992, I delivered a true and correct copy of the foregoing Findings and Order to G. Fred Metos, attorney for defendant, 72 East 400 South, Suite 330, Salt Lake City, Utah 84111.

ADDENDUM II

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

2178888

11-19-92 8:4801

THE STATE OF UTAH,

Plaintiff,

/s.

Jason T. Genuveri
(Gail)

Defendant.

JUDGMENT, SENTENCE
(COMMITMENT)

Case No. 921900681
Count No. 1
Honorable David S. Young
Clerk C. Porter
Reporter E. Ambrose
Bailiff D. Swanson
Date 11/16/92

The motion of _____ to enter a judgment of conviction for the next lower category of offense and propose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☒ a jury; ☐ the court; ☐ plea of guilty; ☐ plea of no contest; of the offense of Manslaughter, a felony of the 2nd degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by J. Mutes, and the State being represented by J. Cope, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a maximum mandatory term of _____ years and which may be for life;

☐ not to exceed five years;

☒ of not less than one year nor more than fifteen years;

☐ of not less than five years and which may be for life;

☐ not to exceed _____ years;

☒ and ordered to pay a fine in the amount of \$1250 plus \$1062.50 surcharge for a total of \$2312.50

☐ and ordered to pay restitution in the amount of \$_____ to _____

such sentence is to run concurrently with _____

such sentence is to run consecutively with _____

upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.

Defendant is to be given credit for time served

Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.

Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.

Commitment shall issue forthwith

DATED this 16 day of November, 1992

PROVED AS TO FORM:

DISTRICT COURT JUDGE

Defense Counsel

Deputy County Attorney

Page 1 of 1

ADDENDUM III

AUG 12 1992

DAVID E. YOCOM
Salt Lake County Attorney
JAMES M. COPE, 0726
THOMAS P. VUYK, 3342
Deputy County Attorneys
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 363-7900

[Signature]
County Clerk

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

THE STATE OF UTAH,)	
Plaintiff,	)	PLAINTIFF'S RESPONSE
	)	TO DEFENDANT'S MOTION
v.	)	TO SUPPRESS
JASON GENOVESI,	)	Case No. 921900681FS
Defendant.	)	Judge David S. Young

The plaintiff urges the court deny defendant's motion to suppress on the grounds and for the reason that the facts of this case clearly show police officers obtaining the evidence in question after a search authorized by defendant's wife, Lisa Genovesi. The plaintiff has provided the defendant with a transcript of the March 21, 1992 telephone conversation between Lisa Genovesi and Detective Ken Patrick. At the conclusion of this conversation, Detective Patrick, in good faith, believed that Lisa Genovesi had given him permission to enter defendant's home and search for evidence without a warrant.


The court should deny defendant's motion to suppress because the evidence was legally obtained.

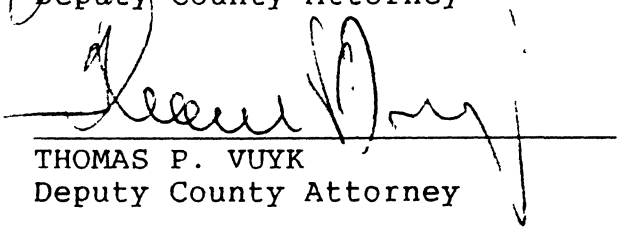
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PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION TO SUPPRESS
Case No. 921900681FS

DATED this 12 day of August, 1992.

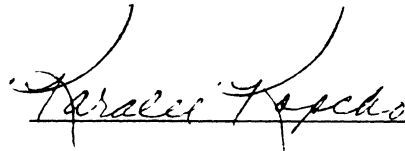
DAVID E. YOCOM
Salt Lake County Attorney


JAMES M. COPE
Deputy County Attorney


THOMAS P. VUYK
Deputy County Attorney

CERTIFICATE OF SERVICE

I certify that on the 12th day of August, 1992, I mailed
a true and correct copy of the foregoing to G. Fred Metos,
attorney for defendant, 72 East 400 South, Suite 330, Salt Lake
City, Utah 84111.


Karalee Kopcho

ADDENDUM IV

P R O C E E D I N G S

JUDGE YOUNG: THE RECORD MAY SHOW THAT WE'RE
CONVENED IN REGARD TO THE CASE OF THE STATE VERSUS JASON
THOMAS GENOVESI. THE CASE NUMBER IS 92-1900681.

THIS IS THE DATE SET FOR A JURY TRIAL IN THE
DISTRICT COURT. MR. GENOVESI IS PRESENT IN THE CHAMBERS
OF THE COURT.

COUNSEL, I'LL ASK YOU EACH TO STATE YOUR APPEAR-
ANCES AS WELL.

MR. METOS: FRED METOS ON BEHALF OF THE DEFEN-
DANT.

MS. HORNAK: KIM HORNAK FOR THE STATE.

MR. COPE: JAMES COPE FOR THE STATE.

JUDGE YOUNG: THE COURT HAS RECEIVED INFORMATION
WHICH I CALLED COUNSEL ABOUT YESTERDAY, THAT DUE TO A CIR-
CUMSTANCE THAT I DON'T KNOW THAT THERE IS AN EXPLANATION
FOR, THE RANDOM COMPUTER PROGRAM THAT HAS PICKED THE POOL
OF PROSPECTIVE JURORS HAS, FOR SOME REASON, FAVORED THE
"S'S" AND "T'S" OF THAT POOL. AND WE HAVE HERE THE JURY
CLERK FOR THE DISTRICT COURT. AND I WILL ASK YOU FIRST,
IF YOU WILL, TO STATE YOUR NAME FOR THE RECORD AND, SECOND,
WOULD YOU EXPLAIN WHAT YOU KNOW ABOUT HOW THIS HAPPENED
AND WHAT HAPPENED.

MS. MEYER: JANE M. MEYER.

MR. METOS: EXCUSE ME, YOUR HONOR. WOULD IT

1 BE APPROPRIATE TO PUT HER UNDER OATH?

2 JUDGE YOUNG: I DON'T MIND HAVING HER PLACED
3 UNDER OATH IF YOU'D LIKE.

4 EILEEN, WILL YOU SWEAR HER IN, PLEASE.

5

6 JANE MEYER,

7 CALLED AS A WITNESS, WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

8

9 JUDGE YOUNG: MS. MEYER, WOULD YOU TELL US WHAT
10 HAS HAPPENED WITH THE PROGRAM AS YOU UNDERSTAND IT?

11 THE WITNESS: WHAT HAS HAPPENED IS THE DISTRICT
12 COURT AND THE CIRCUIT COURTS ARE COMBINING THEIR COURTS
13 TOGETHER AND THE JURY POOL IS THE FIRST ITEM THAT IS
14 TOGETHER. SO WHAT WE HAVE DONE IS WE HAVE TAKEN OVER THE
15 WHOLE SALT LAKE COUNTY FOR JURORS AND WE'VE COMBINED THOSE
16 LISTS TOGETHER, WHICH WE GET A LARGER POOL. SO WE HAVE
17 4,000 EXTRA JURORS FOR THE SALT LAKE COUNTY. SO WE ARE
18 DEALING WITH A LARGER POOL THAN USUAL IN THE DISTRICT COURT.
19 SO WE HAVE FOR THE MONTH OF OCTOBER 4,000 JURORS AND IT
20 IS THE FIRST MONTH WE HAVE STARTED THIS POOL.

21 THE NAMES ARE DRAWN FROM THE STATE ADMINISTRATOR'S
22 OFFICE AND ARE AT RANDOM SELECTION. THESE NUMBERS ARE RAN-
23 DOMLY SELECTED FROM THE SALT LAKE COUNTY. THEY ARE GIVEN
24 COMPUTER NUMBERS AND THEN ARE PULLED RANDOMLY, THE 4,000
25 NAMES ARE PULLED RANDOMLY FROM THIS JURY WHEEL, AND THEN

1 I QUALIFY AND DISQUALIFY--OR THE DISTRICT COURT QUALIFIES
2 AND DISQUALIFIES JURORS AND WE COME UP WITH QUALIFIED JURORS.
3 WE HAVE ABOUT 2,963 JURORS THAT ARE QUALIFIED AND THEN THE
4 REST ARE EXCUSED AND POSTPONED AND SO FORTH. OUT OF THESE
5 2,000 SOME NUMBER WE HAVE A LARGER POOL.

6 WHAT HAPPENS IS THE COMPUTER HAS PLACED THESE
7 RANDOM NAMES IN A COMPUTER THAT I HAVE DOWNSTAIRS LOCATED
8 ON MY DESK. I'M THE ONLY ONE THAT HAS ACCESS TO THIS PARTI-
9 CULAR COMPUTER. AND WHAT WE DO IS WE PULL QUALIFIED JURORS
10 FOR THE SALT LAKE COUNTY. I'VE PULLED 50 JURORS FOR THE
11 WEST VALLEY COURT, 250 FOR OUR COURT HERE AND 20 FOR THE
12 SANDY. AND WHAT HAS HAPPENED, WHEN WE REALIZED THIS, IT
13 IS PULLING OUT OF BLOCKS. IT IS A RANDOM SELECTION BUT
14 NOT ENOUGH OF A RANDOM, ANOTHER RANDOM MIX.

15 AND SO WHAT WE'RE DOING IS WE'RE PULLING--OUT
16 OF THE RANDOMNESS WE ARE PULLING OUT BLOCKS OF "S'S." AND
17 WHAT THE COMPUTER HAS RANDOMLY DONE HAS TAKEN A NUMBER,
18 STOPPED, AND THEN PICKED SOME NAMES AND THEN JUMPED AGAIN
19 AND PICKED SOME MORE NAMES OUT OF BLOCKS.

20 JUDGE YOUNG: DO YOU HAVE ANY IDEA HOW MANY BLOCKS
21 THERE ARE?

22 THE WITNESS: I DON'T.

23 JUDGE YOUNG: ARE THE BLOCKS DIVIDED BY ALPHA-
24 BETICAL LETTER?

25 THE WITNESS: NO. THEY ARE JUST A RANDOM NUMBER

1 THAT THE COMPUTER PROGRAMMER PUT IN AND HE, HIMSELF, DIDN'T
2 KNOW THAT NUMBER.

3 JUDGE YOUNG: HE DIDN'T REALIZE THAT PROGRAM
4 CONTAINED THOSE BLOCKS OR DIFFERENT SUBDIVISIONS WITHIN
5 THE 2,900 PLUS JURORS?

6 THE WITNESS: THEY DIDN'T REALIZE IT WOULD BE
7 A PROBLEM SINCE THEY ARE RANDOMIZED ALREADY. SINCE I AM
8 THE LARGEST DISTRICT COURT POOLING NAMES, THE SMALLER
9 COUNTIES DIDN'T HAVE THIS PROBLEM. WE HAVE SUCH A LARGE
10 AMOUNT OF PEOPLE THAT ARE IN THE DISTRICT COURT THAT WE
11 HAVE OVER 250 "S'S" IN OUR LIST.

12 JUDGE YOUNG: 250 TOTAL "S'S"?

13 THE WITNESS: MORE THAN THAT BECAUSE I PULLED
14 250 NAMES FOR THIS PARTICULAR LISTING THIS WEEK, THE 5TH
15 THROUGH THE 9TH.

16 JUDGE YOUNG: SO WHAT YOU'RE SAYING IS, OUT OF
17 THE 2,900 TO HAVE QUALIFIED YOU HAVE MORE THAN 250 THAT
18 ARE "S'S." I NOTICE, FOR INSTANCE, IN OUR SELECTED NUMBER
19 PROPOSED HERE I HAVE ONE, TWO, THREE, FOUR, FIVE, SIX, SEVEN,
20 EIGHT, NINE, TEN, ELEVEN, TWELVE, THIRTEEN, FOURTEEN, FIF-
21 TEEN, SIXTEEN, SEVENTEEN "S'S." NOW YOU'RE SAYING OUT OF
22 THOSE 17 "S'S" THERE WERE 250 "S'S" AND IT HAS RANDOMIZED
23 WITHIN THE "S'S?"

24 THE WITNESS: GIVE OR TAKE THE BLOCKS, IT HAS
25 TAKEN GROUPS OF THE "S'S." WE DO HAVE SOME "T'S." WEST

1 VALLEY GOT "R'S" IN THE RANDOM MIX BECAUSE WE HAVE A MAN-
2 DATORY SUMMONS AND IT PULLS THOSE NAMES RANDOMLY BECAUSE
3 THEY HAVE A VAST NUMBER TO BE SET FOR THAT PARTICULAR WEEK
4 AND IT HAS RANDOMLY SELECTED THOSE FOR WEST VALLEY. THEY
5 WERE FINE BUT SANDY HAD "W'S." THEY ENDED UP WITH THE BLOCK,
6 JUMPED THAT MUCH, AND GOT "W'S." I HAVE NO WAY OF KNOWING--
7 THEY ARE RANDOM. THEY ARE QUALIFIED RANDOMIZED JURORS.

8 JUDGE YOUNG: SO WHAT YOU'RE SAYING THEN IS OF
9 THE INITIAL POOL OF 4,000 YOU QUALIFIED NEARLY THREE, 2,900
10 PLUS, THEN FROM THAT 2,900 YOU ASK THE COMPUTER TO MAKE
11 A RANDOM SELECTION BUT IT HAD DIFFERENT BLOCKS WITHIN ITS
12 PROGRAM THAT YOU DIDN'T KNOW ABOUT AND WITHIN THAT BLOCK
13 IT HAS RANDOMLY SELECTED THE "S'S" OR THE "T'S" OR THE
14 "R'S" OR WHATEVER.

15 THE WITNESS: YES.

16 JUDGE YOUNG: ALL RIGHT. NOW LET ME ASK EITHER
17 OF YOU IF YOU HAVE ANY QUESTIONS OF THE JURY CLERK AS TO
18 THAT SELECTION SYSTEM.

19 MR. METOS: I AM A LITTLE BIT CONFUSED BY THE
20 BLOCK SYSTEM. HOW MANY POTENTIAL JURORS WOULD BE IN A BLOCK?

21 THE WITNESS: WE HAVE NO WAY OF KNOWING.

22 MR. METOS: AND YOU HAVE NO WAY OF KNOWING HOW
23 THESE BLOCKS ARE SELECTED, WHETHER IT'S THROUGH THIS NUMBER-
24 ING SYSTEM OR ARE ALPHABETICALLY--

25 THE WITNESS: I'M GUESSING. THE WAY IT WAS

1 LOOKING TO ME ON THE SHEET WAS THAT IT WAS GOING BY ALPHA-
2 BETIZING BUT THE COMPUTER PROGRAMMER TOLD ME THEY WOULD
3 SOMETIMES ALSO PULL 'EM BY COMPUTER NUMBER.

4 JUDGE YOUNG: IS THAT AN INDIVIDUAL ASSIGNED
5 JUROR NUMBER TO AN INDIVIDUAL QUALIFIED JUROR?

6 THE WITNESS: YES. AND THEY WILL KEEP THAT FOR
7 THE REST OF THEIR LIVES.

8 MR. METOS: YOU SAID THERE'S SOME 2,900 PLUS
9 QUALIFIED JURORS IN THE COMPUTER. NOW IS THAT RIGHT?

10 THE WITNESS: YES, AFTER THE INITIAL--WE PULLED
11 JURORS FOR THE LAST TWO WEEKS, WHICH WE STILL HAVE THE SAME
12 PROBLEM OF COMBINING. NOW, NEXT MONDAY, OR NEXT WEEK, WE
13 HAVE ALL "M'S."

14 MR. METOS: NO, MY QUESTION IS, YOU START OUT
15 WITH 4,000, YOU SEND OUT THE QUESTIONNAIRE, THEY BRING IT
16 BACK, YOU ELIMINATE 1,030 SOMETHING--

17 THE WITNESS: THROUGH DISQUALIFYING, UNABLE TO
18 LOCATES AND SO FORTH, YES.

19 MR. METOS: OF THOSE 2,900 THAT WERE LEFT IN
20 THE QUALIFIED JURORS, LEFT IN THE POOL, IN THE LAST WEEK
21 YOU'VE PULLED OUT A NUMBER OF JURY PANELS; IS THAT RIGHT?

22 THE WITNESS: MM-HMM. (YES).

23 MR. METOS: AND YOU'RE SAYING OF THOSE YOU PULLED
24 OUT SOME 250 PEOPLE WITH LAST NAMES THAT BEGIN WITH "S"?

25 THE WITNESS: NO. THERE IS ABOUT, I DON'T HAVE

1 MY MATERIAL WITH ME, A ROUGH 170.

2 MR. METOS: LAST NAMES?

3 THE WITNESS: AND THEN WE HAVE "T'S" AND "U'S"
4 AND "V'S" ON THAT LIST.

5 MR. METOS: BUT SO WHAT YOU'RE SAYING IS THE
6 PEOPLE WHOSE NAMES ARE PULLED HAVE NAMES BEGINNING SOME-
7 WHERES AROUND "S" AND MAYBE GO TOWARDS THE END OF THE ALPHA-
8 BET.

9 THE WITNESS: RIGHT.

10 MR. METOS: AND VERY FEW FROM THE FIRST PART
11 OF THE AL--

12 THE WITNESS: LET ME HAVE YOU IMAGINE THIS.
13 WE HAVE A GROUP OF NAMES HERE, "A" TO "Z." WHAT THE COMPUTER
14 HAS DONE IS TAKEN A BLOCK THAT IT'S KIND OF SHIFTED DOWN,
15 AND WHAT IT DOES IS IT TAKES THOSE NAMES DOWN AND THE COM-
16 PUTER HAS ALPHABETIZED THOSE SO IT'S STARTING--THE COMPUTER
17 HAS TO HAVE SOME KIND OF ORGANIZATION SO IT HAS ALPHABETIZED
18 IT. AND THE WAY THE COMPUTER PROGRAMMER HAD INDICATED IT
19 IT WAS BLOCKS. NOW THAT WE HAVE CHANGED THAT IT WILL GO
20 ONE PERSON AT A TIME AND RANDOMLY SELECT THEM OUT. AND
21 THAT'S WHAT WE USED TO HAVE. WE DIDN'T REALIZE THIS PROBLEM
22 EXISTED UNTIL IT WAS TOO LATE.

23 MR. METOS: SO WHAT YOU'RE SAYING IS BY SELECTING
24 BLOCKS OF PEOPLE YOU THINK THAT'S WHERE WE CAME UP WITH
25 THE PROBLEM OF HAVING THEM ALL CENTRALIZED IN SEVERAL LETTERS

1 OF THE ALPHABET?

2 THE WITNESS: YES.

3 MR. METOS: AND IT WAS A RESULT OF A COMPUTER
4 PROGRAM THAT WAS USED TO GENERATE THE NAMES OF THE POTENTIAL
5 JURORS?

6 THE WITNESS: YES.

7 MR. METOS: OKAY.

8 JUDGE YOUNG: ANY OTHER QUESTION?

9 MR. COPE: COULD I ASK A QUESTION, YOUR HONOR?

10 JUDGE YOUNG: CERTAINLY.

11 MR. COPE: THE 2,900 NAMES THAT ARE QUALIFIED--
12 A GUESS A BETTER QUESTION WOULD BE, THE 4,000 JURORS THAT
13 WERE ON THE ORIGINAL LIST, FROM WHICH YOU TOOK THE 2,900,
14 DOES THAT INCLUDE PEOPLES' SURNAMES BEGINNING WITH "A"
15 THROUGH "Z" OR IS THAT ONLY PEOPLE WHOSE SURNAMES BEGIN
16 WITH "S," "T" AND "U"?

17 THE WITNESS: THE 4,000 WAS "A" TO "Z."

18 MR. COPE: OKAY. AND THAT WAS A RANDOM SELECTION.
19 THE ORIGINAL 4,000 NAMES WERE RANDOMLY SELECTED FROM SEVERAL
20 TENS OF THOUSANDS THAT WOULD HAVE BEEN AVAILABLE IN SALT
21 LAKE COUNTY; IS THAT CORRECT?

22 THE WITNESS: YES. FOR ONE MONTH, YES.

23 MR. COPE: OKAY.

24 JUDGE YOUNG: ALL RIGHT. ANY OTHER FACTUAL
25 EXPLANATION OR INQUIRY EITHER SIDE HAS? MR. COPE, DO YOU

1 HAVE ANYTHING FURTHER?

2 MR. COPE: NO, YOUR HONOR.

3 JUDGE YOUNG: DO YOU HAVE ANYTHING FURTHER, MR.
4 METOS, OF THE JURY CLERK?

5 MR. METOS: OKAY. NOT OF THE JURY CLERK, NO.

6 JUDGE YOUNG: THANK YOU. YOU MAY BE EXCUSED.

7 (WHEREUPON, THE JURY CLERK LEAVES CHAMBERS).
8

9 JUDGE YOUNG: I WILL ASK YOU EACH THEN WHETHER
10 YOU HAVE ANY OBJECTION TO UTILIZING THE JURORS THAT WE HAVE
11 BROUGHT FORWARD FOR THIS CASE. WHAT'S THE STATE'S POSITION
12 FIRST?

13 MR. COPE: YOUR HONOR, THE STATE HAS NO OBJEC-
14 TION. THE STATUTE, 78-46-12, INDICATES THAT THE ONLY
15 REQUIREMENT FOR RANDOMNESS IS THAT THE PROSPECTIVE JURORS,
16 THE 4,000, BE RANDOMLY SELECTED. THAT APPARENTLY HAS
17 OCCURRED. THE FACT THAT THE COMPUTER, OR WHATEVER OTHER
18 MECHANISM THAT IS UTILIZED HAS SELECTED IN A SPECIFIC MANNER,
19 DOESN'T SEEM TO ME TO IMPINGE UPON THE FAIRNESS OF EITHER
20 THE POLICY OR THE REQUIREMENTS OF THE STATUTE. AND FOR
21 THAT REASON THE STATE HAS NO OBJECTION.

22 AND I BELIEVE THAT 78-46-16 INDICATES THAT THE
23 PROCEDURES THAT ARE TO BE USED BY ANYONE WHO OBJECTS TO
24 THE WAY THE JURY IS SELECTED, THAT I DON'T SEE THAT THE
25 DEFENDANT HAS ANY GROUNDS FOR AN OBJECTION ON THE FACTS

1 AS I UNDERSTAND THEM.

2 JUDGE YOUNG: WHAT IS THE STATUTE AGAIN?

3 MR. COPE: 78-46-16. THAT STATUTE INDICATES
4 THAT THE PROCEDURES OUTLINED THERE ARE THE EXCLUSIVE MEANS
5 BY WHICH A PERSON ACCUSED OF A CRIME MAY CHALLENGE A JURY
6 ON THE GROUNDS THAT THE JURY WAS NOT SELECTED IN CONFORMITY
7 WITH THE ACT.

8 I DON'T BELIEVE ANY EVIDENCE HAS BEEN PRESENTED
9 BY THE DEFENDANT, OR ANYONE ELSE FOR THAT MATTER, OR BY
10 THE COURT SUA SPONTE THAT WOULD INDICATE THAT THE JURORS
11 ARE NOT QUALIFIED AND THIS PANEL SPECIFICALLY SHOULD NOT
12 BE UTILIZED BY THIS COURT.

13 JUDGE YOUNG: ALL RIGHT. SO THE STATE HAS NO
14 OBJECTION TO THIS METHOD OF SELECTION AND, IN FACT, BELIEVES
15 THAT IT IS CONSISTENT WITH LAW.

16 MR. COPE: YES.

17 JUDGE YOUNG: MR. METOS?

18 MR. METOS: MY POSITION IS THAT THE SELECTION,
19 AFTER THE NAMES GET INTO THE COMPUTER, AFTER SELECTION OFF
20 THE JURY WHEEL, VIOLATES MR. GENOVESI'S RIGHT TO A FAIR
21 AND IMPARTIAL JURY AS GUARANTEED BY THE 6TH AMENDMENT AND
22 ARTICLE 1 SECTION 12. SEVERAL CASES HAVE DISCUSSED THIS,
23 NOT THIS PARTICULAR TYPE OF SITUATION, BUT CLAIMS THAT JURY
24 PANELS FAIL TO BE COMPRISED OF A FAIR CROSS SECTION OF THE
25 COMMUNITY. THE CIVIL CASE REDD, R-E-D-D, V. NEGLEY,

1 N-E-G-L-E-Y, 785 P2D 1098, ESTABLISHED A THREE-PART TEST
2 FOR THE COURT TO USE IN DETERMINING WHETHER OR NOT A FAIR
3 CROSS SECTION OF THE COMMUNITY IS REPRESENTED IN THE JURY
4 PANEL.

5 THE COURT FIRST HAS TO DETERMINE IF THERE'S A
6 COGNIZABLE GROUP THAT'S BEEN EXCLUDED; SECONDLY, IF THE
7 REPRESENTATION ON THE PARTICULAR PANEL, THAT IS THE PANEL
8 OF POTENTIAL JURORS FOR A PARTICULAR CASE, IS NOT FAIR AND
9 REASONABLE IN RELATION TO PERSONS IN THE COMMUNITY AND;
10 THIRDLY, WHETHER THE UNDER REPRESENTATION IS DUE TO A
11 SYSTEMMATIC EXCLUSION FROM THE GROUP.

12 WITH RESPECT TO WHAT IS A COGNIZABLE GROUP,
13 STATE V. SPAN ADDRESSED THAT IN TERMS OF THE FAIR CROSS
14 SECTION ISSUE UNDER THE 6TH AMENDMENT, AND ARGUABLY, UNDER
15 ARTICLE 1 SECTION 12. THAT CASE IS FOUND AT 819 P2D 329.
16 THERE THE COURT DISTINGUISHED BETWEEN A COGNIZABLE GROUP
17 FOR PURPOSES OF EQUAL PROTECTION WHICH IS LIKE PROTECTED
18 CLASSES BASED ON THINGS LIKE RACE OR GENDER AS OPPOSED TO
19 SIMPLY A GROUP THAT YOU CAN RECOGNIZE AS BEING A DISTINCT
20 GROUP. UNDER EQUAL PROTECTION YOU HAVE THESE PROTECTIVE
21 CLASS SITUATIONS UNDER THE 6TH AMENDMENT. THE COURT RECOG-
22 NIZED A COGNIZABLE GROUP CAN BE ANYTHING. AND I SUBMIT
23 THAT WHEN YOU EXCLUDE A LARGE PART OF PEOPLE--A LARGE PART
24 OF THE COMMUNITY, BASED ON THE FIRST LETTER OF THEIR LAST
25 NAME, YOU'VE CREATED A COGNIZABLE GROUP. AND I THINK THE

1 COURT CAN TAKE JUDICIAL NOTICE OF THE FACT THAT THERE ARE
2 MANY PEOPLE IN THIS COMMUNITY WHOSE NAMES DON'T BEGIN WITH
3 THE LETTERS "S" THROUGH "W," OR WHERE WE'RE AT, AND THEY
4 DO COMPRISE A SUBSTANTIAL PART OF THE COMMUNITY, AND THEY'RE
5 NOT REFLECTED IN THIS PARTICULAR JURY PANEL.

6 WITH RESPECT TO--I THINK I JUST ADDRESSED THE
7 SECOND ISSUE, WHETHER THE REPRESENTATION IS FAIR AND REASON-
8 ABLE AS TO WHETHER THE PERSONS IN THE COMMUNITY, THAT IS,
9 WE'VE GOT A LARGE GROUP OF PEOPLE WHO SIMPLY AREN'T REPRE-
10 SENTED JUST SIMPLY BASED ON THEIR ALPHABETICAL LISTING OF
11 THEIR LAST NAME.

12 FINALLY, ON THE QUESTION OF WHETHER THE UNDER
13 REPRESENTATION IS DUE TO A SYSTEMATIC EXCLUSION OF THE GROUP,
14 IT APPEARS THAT THE SYSTEMATIC EXCLUSION COMES IN THROUGH
15 THE WAY THE COMPUTER GENERATED THESE NAMES. I DON'T THINK
16 WE NEED TO, IN DETERMINING THIS ISSUE YOU DON'T NEED TO
17 ASSESS FAULT AND SAY, YOU KNOW, THIS WAS DONE BY NEGLIGENCE
18 OR INTENTIONALLY OR WHATEVER, IT'S JUST THAT IN THIS DAY
19 AND AGE OF COMPUTERS AND COMPUTER PROGRAMS SOMEBODY PROGRAMED
20 THIS COMPUTER AND THE RESULT OF THAT PROGRAM WAS THAT IT
21 CUT OUT THIS LARGE GROUP OF PEOPLE FROM THE COMMUNITY OR
22 FROM THIS PARTICULAR POLL THAT REPRESENT A DIFFERENT GROUP
23 IN THE COMMUNITY AND THEY'RE NOT REPRESENTED ON THE JURY
24 PANEL. SO IT'S BASED ESSENTIALLY ON A COMPUTER PROGRAM,
25 WHICH I SUBMIT, IS A SYSTEMMATIC METHOD OF EXCLUSION. AND

1 BASED ON THAT I'D MOVE TO STRIKE THE JURY PANEL AS HAS BEEN
2 SELECTED FOR THIS CASE.

3 JUDGE YOUNG: ALL RIGHT. DO YOU WISH TO RESPOND?

4 MR. COPE: I JUST NOTE THAT MR. METOS DID NOT
5 TALK ABOUT THE THIRD FACTOR AND, THAT IS, THE DEMONSTRATION
6 OF SOME SORT THAT THE DEFENDANT IS SOMEHOW GOING TO BE PRE-
7 JUDICED BY THIS PROCEDURE, WHATEVER IT IS.

8 ALSO, I DON'T THINK THAT THE SYSTEMMATIC EXCLU-
9 SION CAN BE ARGUED BY THE WAY A COMPUTER WAS ASSIGNED OR
10 GIVEN A PROGRAM AT RANDOMLY SELECT NUMBERS WHICH CORRESPONDS
11 TO PEOPLE IN AN ALPHABETIZED LIST. AND I'D LIKE TO ASK
12 THE COURT TO TAKE JUDICIAL NOTICE FOR PURPOSES OF THIS MATTER
13 OF THE ACTUAL NAMES ON THE LIST. I HAVE NOT YET SEEN THE
14 LIST BUT APPARENTLY THERE ARE PEOPLE ON THERE WHOSE NAMES
15 DO NOT BEGIN WITH "S" OR "T" OR "W" AND SO, THEREFORE, I
16 THINK THAT UNDERCUTS HIS NOTION THAT PEOPLE ARE UNDER REPRESENTED
17 WHOSE NAMES DO NOT BEGIN WITH "S" OR "W." THE COURT
18 WELL KNOWS THAT ON OCCASION THE NAMES GET DRAWN OUT OF A
19 BOX IN SUCH A FASHION THAT IT IS VIRTUALLY IMPOSSIBLE TO
20 SEAT A FEMALE ON THE JURY, OR SOMETHING LIKE THAT. THAT
21 TYPE OF THING IS WHAT'S GOING ON HERE WITH THE COMPUTER.
22 THAT'S JUST ONE OF THE WAYS THAT IT HAPPENED. AND I BELIEVE
23 THAT THE COURT WOULD HAVE AN APPROPRIATE JURY PANEL EVEN
24 IF ALL OF THE NAMES THAT BEGAN WITH "A" AND "B," IF THE
25 POPULATION OF SALT LAKE COUNTY IS LARGE ENOUGH TO ALLOW

1 SOMETHING LIKE THAT TO HAPPEN, AND STILL DEMONSTRATE RANDOM-
2 NESS, I THINK THAT'S PERFECTLY OKAY.

3 JUDGE YOUNG: ALL RIGHT. THANK YOU.

4 MR. METOS: CAN I BRIEFLY RESPOND TO A COUPLE
5 OF THINGS SAID? PARTICULARLY HE RAISED THE ISSUE OF PREJU-
6 DICE.

7 JUDGE YOUNG: BRIEFLY, BUT WE ARE NOT GOING TO
8 GO BACK AND FORTH ON THIS FURTHER.

9 MR. METOS: NO. SINCE IT WAS MY OBJECTION--

10 JUDGE YOUNG: GO AHEAD.

11 MR. METOS: MR. COPE RAISED THE ISSUE OF PREJU-
12 DICE. I DON'T BELIEVE UNDER THE LAW, AS IT NOW STANDS,
13 THAT WE NEED TO MAKE A SHOWING OF PREJUDICE. WHEN YOU'RE
14 TALKING ABOUT JURY SELECTION YOU'RE TALKING ABOUT FAIRNESS
15 IN THE FACT FINDER IN THE TRIAL AND NOT WHETHER THERE'S
16 ANY PREJUDICE WITH RESPECT TO WHAT EVIDENCE WAS BROUGHT IN.

17 WITH RESPECT TO THE ISSUE OF OTHER NAMES FROM
18 OTHER PARTS OF THE ALPHABET THEY MAY BE THERE, BUT ONCE
19 AGAIN I DON'T THINK, AND I THINK THE COURT CAN TAKE NOTICE,
20 THAT DOESN'T REALLY REPRESENT A REAL CROSS SECTION OF THE
21 COMMUNITY IN TERMS OF ALPHABETICAL LISTING OF LAST NAMES.

22 JUDGE YOUNG: ALL RIGHT. WELL, RESPONDING FROM
23 MY PERSPECTIVE TO YOUR ARGUMENT, MR. METOS, IT SEEMS TO
24 ME THAT THE ATTEMPT OF THE COURTS IN RECOGNIZING THAT THERE
25 COULD BE TAINTED PANELS HAS BEEN TO RECOGNIZE THAT ON THE

1 BASIS THAT THERE MAY BE A PARTICULAR GROUP OF THE COMMUNITY,
2 I.E., THE POOR, OR THE HISPANIC, WHATEVER THE IDENTIFIABLE
3 GROUP IS, THAT COULD BE EXCLUDED, THAT THERE MAY BE PROBLEMS
4 IF ANY OF THOSE PARTICULAR GROUPS WERE EXCLUDED. AND THE
5 COURT FINDS IN THIS CASE THAT THERE IS NO EVIDENCE TO BELIEVE
6 THAT ANY RECOGNIZABLE GROUP HAS BEEN EXCLUDED, BECAUSE I
7 DON'T THINK THAT THE COURT COULD RECOGNIZE, SAY, FOR
8 INSTANCE, "A" THROUGH "C" TO BE A PARTICULAR GROUP OF PEOPLE.
9 SURNAMES BEGIN WITH MULTIPLE LETTERS OF THE ALPHABET, "A"
10 THROUGH "Z" PRESUMABLY, AND THE INITIAL GROUP QUALIFIED
11 WAS TOTALLY RANDOM, THE 2,900 WAS THEREAFTER, 2,900 PLUS,
12 THE JURY CLERK MENTIONED, WERE THEREAFTER SELECTED AT RANDOM
13 PLUS EXCUSES OR CONFLICTS OR WHATEVER ELSE SHE SAID WERE
14 REASONS FOR HER TO PUT SOMEBODY INTO A LATER POOL OR TAKE
15 THEM OUT OF THIS POOL. I DON'T FIND ANYTHING THAT WOULD
16 INDICATE TO ME THAT THIS ISN'T A GOOD CROSS SECTION OF THE
17 COMMUNITY, EVEN THOUGH IT HAPPENS TO BE THE "S'S" THROUGH
18 PRINCIPALLY THE "U'S."

19 AND SO THE RECORD IS CLEAR, I HAVE A DAVIES,
20 A JENSEN, A PAULK, AND THEN WE GO INTO THE "S'S" AND THE
21 "T'S." AND THE PRINCIPAL NUMBERS OF THESE ARE BY FAR THE
22 "S'S" AND "T'S." THERE'S ULIBARRI AND UNANDER, U-N-A-N-D-E-R,
23 BUT I DON'T SEE ANYTHING IN THIS THAT WOULD CAUSE ME TO
24 BELIEVE THAT ANY PARTICULAR COGNIZABLE GROUP HAS BEEN
25 SYSTEMATICALLY LEFT OUT OF THE POOL. THEREFORE, YOUR

1 OBJECTION IS DENIED. THE COURT WILL PROCEED WITH THE TRIAL
2 WITH THOSE PERSONS SELECTED IN OUR COMPUTER SYSTEM. ALL
3 RIGHT?

4 SO LET'S GO INTO THE COURTROOM. WE'LL BRING
5 UP THE PROSPECTIVE JURORS AND BEGIN A JURY SELECTION.

6 MR. COPE: YOUR HONOR, COULD WE HAVE THE BENEFIT
7 OF THE COURT'S TIME AND THE RECORD FOR JUST A MOMENT ABOUT
8 SOME HOUSEKEEPING MATTERS?

9 JUDGE YOUNG: YES.

10 MR. COPE: WE HAVE A COUPLE OF FAMILIES, MAYBE
11 MORE THAN THAT, HERE, WHO HAVE, TO US, I THINK, EXHIBITED
12 A TENDENCY TO MAYBE WANT TO INTERFERE OR HELP OUT WITH THE
13 PROCEEDINGS A LITTLE BIT MORE THAN THE COURT WOULD ASK THEM
14 TO. WE HAVE AN EX-HUSBAND'S FAMILY OF ONE OF OUR MATERIAL
15 WITNESSES, THE MOTHER OF ONE OF THE VICTIMS, WHO HAS
16 EXPRESSED SOME CONCERN, AND I THINK IT IS A VERY REAL CONCERN
17 THAT PEOPLE MIGHT WANT TO APPROACH HER OR TALK TO HER, DO
18 THINGS IN COURT THAT WILL DISTRACT HER FROM TESTIFYING.
19 AND WE'D JUST LIKE TO ASK--I THINK BOTH OF US ARE AWARE
20 OF THIS AND WORRIED ABOUT IT A LITTLE BIT. WE'D LIKE TO
21 ASK THE COURT TO SORT OF WATCH--WE CAN'T SEE THEM BECAUSE
22 THEY'RE BEHIND OUR BACKS--IF THE COURT WOULD SORT OF PAY
23 ESPECIAL ATTENTION TO THAT AND SEE IF THERE'S ANYTHING FUNNY
24 GOING ON AND SORT OF KEEP THE BAILIFF ADVISED TO KEEP THAT
25 UNDER CONTROL.