

EX. 4

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8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,)		
)	CASE NO.	C153154
12 Plaintiff,)	DEPT NO.	V
)	DOCKET	H
13 vs.)		
)		
14 DONTE JOHNSON,)		
)		
15 Defendant.)		

16
17 REPLY TO STATE'S OPPOSITION TO MOTION TO SUPPRESS

18 DATE OF HEARING: 2-17-00
19 TIME OF HEARING: 9:00 A.M.

20 COMES NOW the Defendant, DONTE JOHNSON, by and through his attorneys, in reply to
21 the State's Opposition to his Motion to Suppress evidence. This Reply specifically incorporates

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27 ...

28

1 by reference the Motion already on file herein as well as any argument of counsel at the time set
2 for hearing on the Motion.

3 DATED this 16 day of February, 2000.

4 Respectfully submitted,

5 PHILIP J. KOHN
6 SPECIAL PUBLIC DEFENDER

7
8 
9 DAYVID J. EGLER

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12 309 S. Third Street, Fourth Floor
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15 ARGUMENT

16 The capital Defendant, Donte Johnson, filed the instant Motion to Suppress jeans illegally
17 seized from within an area of which he possessed a reasonable expectation of privacy. This
18 Honorable Court set hearing, whereupon the burden was upon the State to show that a Fourth
19 Amendment violation did not occur. As such, the State called witnesses to attempt to establish
20 facts in support of its Opposition to the Defendant's Motion. The Defendant also called witnesses.

21 Subsequent to the hearing, the State filed its Opposition. Herein, the Defendant
22 supplements the transcript citations offered by the State and in doing so points out the failure by
23 the State to produce any authority that a residential search of a specific bedroom was authorized
24 under the traditional precepts of the Fourth Amendment in this case.

25 THE HEARING

26 The State seems to take different positions as it suits the particular needs of the moment.
27 For example, in the opening statement of the related Sikia Smith trial, prosecutor Gary Guymon
28 expressed the State's stance on the issue of Donte Johnson's residency at the Everman address
in no uncertain terms, to wit:

1 "You will also learn that sometime in early July, Donte Johnson and Terrell Young moved
2 into the house there on Everman." (Attached Exhibit "A", Gary Guymon, Trial of Sikia
Smith, Transcript, 6-16-99, page 13).

3 It is also surprising that the State, in its opposition, relies heavily on the hearsay evidence
4 of Tod Armstrong. This particular position is peculiar as Tod Armstrong has long been considered
5 a suspect in the case at issue, as shown by the following commentary made by the State at the
6 trial of Sikia Smith:

7 "You will learn that Todd Armstrong has not been arrested yet, but you will learn he is a
8 suspect in this case and that he, too, may be subject to prosecution if and when the
evidence comes forward and is available." (Exhibit "A", Gary Guymon, Trial of Sikia Smith,
Transcript, 6-16-99, page 23).

9 Finally, the State oversimplifies the testimony given at the hearing, picking and choosing
10 only those parts that ostensibly support their erroneous position.

11 (A) Donte Johnson lived in the Everman house.

12 According to the live witness testimony of Charla Severs, she and Donte were living and
13 sleeping every night at the Everman residence for at least two to three weeks. (Charla Severs
14 testimony at pp. 83-84). Donte was paying rent, albeit in the form of providing drugs to Todd
15 Armstrong as evidenced by the following exchange:

16 "Q: Isn't it true that Donte Johnson was providing drugs to Tod Armstrong to stay in that
17 house, isn't that correct?

18 THE WITNESS: Yes.

19 Q: Okay. And that was a way of him paying rent, isn't that correct?

20 A. Yeah.

21 Q: So there was some kind of compensation that Donte Johnson was giving to Tod
22 Armstrong to stay in that house?

23 A. Yeah. (Charla Severs testimony, p. 85)

24 The fact the rent, however, was the provision of drugs to Todd Armstrong is of no
25 moment. For even if the contract could not be enforced per civil law, the implication of
26 compensation for other purposes, especially those of an evidentiary implication concerning the
27 Fourth Amendment, cannot be denied. See Guy v. State, 108 Nev. 770 (1992).

1 Finally, Donte Johnson testified that he was living at the Everman house on the night of
2 the illegal search and staying in the bedroom. (Donte Johnson's testimony, p. 102).

3 The State had the burden of establishing the facts to show that Donte Johnson did not live
4 at the Everman address on the night of the search. See U.S. v. Linn, 880 F.2d. 209 (9th Cir.
5 1989). However, they produced no credible evidence to show the Donte Johnson lived anywhere
6 but the Everman address. The following exchange reflects the actual knowledge of the Police
7 department on the night of the illegal search, to wit:

8
9 Q: Prior on 8/17/98, what information did you have to where Mr. Donte Johnson may be
residing?

10
11 A: I didn't know where he was residing, I just knew where he was supposed to be on that
particular day.

12
13 Q: Did anyone give you information that he was living in some other residence, other than
4815 Everman?

14
15 A: Not that I recall.

16
17 Q: Did anybody give you information that he may be found at some apartment?

18
19 A: No.

20
21 Q: Did he give you any information that you could find him sleeping on the side of the road
somewhere?

22
23 A: No.

24
25 Q: Did they give you any information on that date, that 8/17/98 he was living in some
hotel room.

26
27 A. No." (Testimony of Detective Thomas Thowsen, pp. 30-31)

28
The is no credibility, therefore, to the assertion by the same Detectives who knew Donte
Johnson would be at the Everman residence at 3 a.m. in the morning, would claim that they had

1 no knowledge that Donte Johnson was living there.

2 (B) Donte lived in the bedroom.

3 Charla Severs testified as to where Donte lived in the house as referenced in the following
4 exchange:

5 Q: And where would Donte Johnson stay while he was in that house?

6 A: In the bedroom.

7 Q: Which bedroom is that? Would that be the master bedroom?

8 A: Yes." (Testimony of Charla Severs, page 85).

9 (C) Donte had a reasonable expectation of privacy in his items in the bedroom.

10 Donte Johnson kept his personal effects in the bedroom as referenced by the following
11 testimony:

12 "Q: Did he have clothes in there?

13 A: Some of them. The clothes he had....

14 Q: So almost everything that he had was in that master bedroom?

15 A: Yes.

16 Q: Okay, There was a lock on that master bedroom?

17 A: Yes. (Testimony of Charla Severs, pp. 85-86)

18 Next, Charla testified that the Donte would lock the door.

19 "Q: So, when you guys were inside he may have been – he may lock the door?

20 A: Yeah.

21 Q: To keep other people out?

22 A: Yeah." (Testimony of Charla Severs, page 86).

1 Finally, Donte Johnson had a clear and unequivocal expectation of privacy in his personal
2 effects which he kept in the bedroom as evidenced in the following exchange:

3 "Q: Did you have any personal stuff in that bedroom?

4 A: Yeah.

5 Q: Okay. Personal clothes and maybe some makeup and things like that?

6 A: Yes.

7 Q: Okay. Would you allow anybody in that house to go thorough your personal stuff in that
8 room?

9 A. No, I wouldn't allow nobody to go through my stuff.

10 Q: Okay. If somebody was going through your personal stuff in that room you'd be upset?

11 A: Yeah.

12 Q: Okay. And you placed it in that – your personal stuff in that room why? Did you
13 consider it your space?

14 A: Yeah.

15 Q: And you were there with Johnson, Donte Johnson, at his request? He asked you to
16 come into the house?

17 A: Yeah. (Testimony of Charla Severs, pp. 87-88).

18 (D) The police did not act in accordance with the protections of the Fourth Amendment.

19 The easiest thing in the world for the police to have done in the night at subject was to get
20 a telephonic search warrant.

21 "Q: Have you ever in your years as a detective or as a police officer ever secured a search
22 warrant in the middle of the night?

23 A: Yes, often.

24 Q: Sometimes 1:00 or 2:00 in the morning?

1 A: Yes.

2 Q: Sometimes 3:00 in the morning?

3 A: Yes.

4 Q: And how do you go about doing that?

5
6 A: More recently it's done over the telephone with a telephonic search warrant, it's very
7 easily obtained. (Testimony of Detective Thomas Thowsen, pp. 27-28).

8 Further, the police were disingenuous regarding there desire to protect the Fourth
9 Amendment rights of an individual. On cross-examination, the defense tried to establish what it
10 would take for the police to seek a search warrant. The exchange was as follows:

11 Q: Okay. Last year with electronic devices being what they are how long does it take
12 normally to secure a search warrant?

13 A: I can get a telephonic search warrant very quickly, half hour -

14 Q: Okay.

15 A: - twenty minutes.

16 Q: On 8/17/98 or 8/18/98, how long would it have taken you to get a search warrant?

17 A: There again, probably around the same time frame.

18 Q: Okay. And if you had any inclination that Donte Johnson resided in that house you
19 indicated to the District Attorney that you would have secured a search warrant, correct?

20 A: Yes....

21 Q: ...Let me ask you this specifically, if the owner of the house was asking is there some
22 other people that are living there with you and his answer was: Off an on, yes, staying
23 there. They weren't really living there but they come in and out of the house? Okay.
24 Answer: Blank day (sic), I guess, considered living there. Would that give you an inclination
25 that these people may be living in that house?
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1 A: If that question were asked of me I would dwell further." (Testimony of Ken Hefner, pp.
2 77-78).

3 Finally, the police invaded Donte Johnson's residence with weapons and immediately
4 cuffed him. (Testimony of Thomas Thowsen, p. 18-19).

5 THE LAW

6 The United States Constitution and the Nevada Constitution both require that all
7 government searches and seizures be reasonable and that law enforcement agents acquire a
8 warrant based upon probable cause before proceeding with a search and/or seizure. United States
9 Constitution, Fourth Amendment; Nevada Constitution, Article I, section 18. The warrant
10 requirement stems from the need to have a neutral third party authorize and delineate the scope
11 of a potentially intrusive activity. See Arkansas v. Sanders, 442 U.S. 753, 759 (1979)(citations
12 omitted). While there are certainly exceptions to the warrant requirement, a search conducted in
13 a person's sole residence and specifically, the search at issue in this motion to suppress, does not
14 fall into any recognized exception regarding residential searches.
15

16 The United States Supreme Court has consistently maintained that the Fourth Amendment
17 strongly protects privacy interests in a residence. In Welsh v. Wisconsin, 466 U.S. 740, 748
18 (1984), the Court decreed that "it is axiomatic that the physical entry of the home is the chief evil
19 against which the wording of the Fourth Amendment is directed." See also, Parkhurst v. Trapp,
20 77 F.3d 707, 711 (3d Cir. 1996)(Freedom from intrusion into the home or dwelling is the
21 archetype of the privacy protection secured by the Fourth Amendment); Sheik-Abdi v. McCellan,
22 37 F.3d 1240, 1243 (7th Cir. 1994)(the court speaks of the "overriding respect for the sanctity
23 of the home"); Ayeni v. Motola, 35 F.3d 680, 684 (2d Cir. 1994) ("the home has properly been
24 regarded as among the most highly protected zones of privacy.").

25 With due respect to the position of the State, the body of case law regarding abandonment
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1 of personal property is not dispositive in the present matter. The State cites not one case where
2 a person even has the capacity to effectuate an "abandonment" of where they are staying and
3 living. In fact, the contrary is true in that a person will typically be afforded the benefit of the
4 doubt regarding their residence.

5 For example, in Matter of Welfare of D.A.G., 484 N.W.2d 787 (Minn. 1992), a short-
6 barreled shotgun which had been seized during a warrantless search of the house in which the
7 accused resided was properly suppressed by the trial judge since, although an absent cotenant
8 had consented to the search, the accused, present on the premises at the time the police entered
9 with weapons drawn, did not have a reasonable opportunity to object. The court, in so ruling,
10 commented that the reasons often given to support searches conducted to a third party's consent
11 when the accused is absent or unavailable regarding "waiver" or "assumption of the risk" do not
12 apply when the accused is in fact present. Id. That is, the court elaborated, an absent third
13 party's consent should not be used to waive another's constitutional rights when that individual
14 is present at the time of the search to give or withhold consent in his own right. Id.

15 The logic of the Minnesota court is particularly persuasive in the present case. At issue
16 is a third party, absent from the premises, essentially waiving the Constitutional rights of Donte
17 Johnson. Donte Johnson was present and actually extracted from his only residence by the police
18 at weapon point and then placed in handcuffs. It is unreasonable for the Court to entertain that
19 any reasonable "waiver" could have been effectuated under these circumstances. No rights were
20 related to Donte Johnson. No informed request was made by the police of Donte Johnson.

21 Whether or not Sgt. Hefner phrased the alleged question, "Do you live here?" or asked if
22 "This is your house" Hefner certainly was on notice that late at night Donte Johnson emerged
23 from the house in which he was sleeping. There was no attempt to ascertain where Donte
24 Johnson lived if not at the Everman address. There was no query of Donte Johnson to the effect
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1 "then you don't mind if we go through the items located inside do you?" or any words to that end.
2 Instead, there is limp effort by the Police to ostensibly justify a desire to sidestep the appropriate
3 measure of seeking the quick and available search warrant.

4 After the evidentiary hearing, it has been established that Donte Johnson and his girlfriend
5 had been living in that bedroom for a minimum of two weeks, but more like four weeks in
6 exchange for contraband compensation, that Donte Johnson kept all his effects in that bedroom,
7 and that Donte Johnson and his girlfriend had an expectation that no one else in the house would
8 go through their effects in that bedroom, especially the area in question around the mattress. The
9 police also knew that Donte Johnson had been staying at the Everman residence, or at a minimum
10 had a duty to inquire of Todd Armstrong exactly how long Donte Johnson had been staying. For
11 in the words of the testifying police officers, "if they had any inclination that Donte Johnson was
12 living in that residence, they would have sought the search warrant." (Testimony of Thomas
13 Thowsen, p. 18-19). In this case, the Police had ample information that required them to tread
14 carefully upon the Fourth Amendment rights of Donte Johnson. Weapons drawn and in cuffs, the
15 alleged response of Donte Johnson that he did not live there cannot under the traditional precepts
16 of voluntary waiver be considered in light of all the other information the Police knew or should
17 have known. Instead, the Police proceeded in this case to their own detriment.

20 Warrantless searches are presumptively illegal. Katz v. U.S., 389 U.S. 347 (1967). Only
21 a few specifically established exceptions, which have been "jealously and carefully drawn," will
22 justify the admission of evidence obtained from a warrantless search. Jones v. U.S., 357 U.S.
23 493, 499 (1958).

25 In the present case, the State argues three points to convince the Court that it should
26 override the Constitutional protections of Donte Johnson in the place of his residence. None
27 satisfy the State's burden.

1 (1) Standing

2 Again, the State only argues inapplicable automobile and luggage cases, nary a residence
3 case in sight. The facts, however, support that Donte Johnson lived in that residence. Under the
4 rubric of standing, the State attempts to suggest that Donte, even if a resident of the Everman
5 house, somehow waived or abandoned his Fourth Amendment rights with his alleged one word
6 response to the inquiry by Sgt. Hefner. As stated before, it is asserted that this on its face cannot
7 constitute a waiver. Nonetheless, if the Court is inclined to treat it as a waiver of Constitutional
8 rights, the Court must make a determination not only regarding the scope of waiver, but also the
9 voluntariness of the alleged waiver.
10

11 Assuming arguendo, that Donte Johnson was asked "do you live here" – and also
12 assuming the answer was, "no" – what did the police hope to then accomplish by searching the
13 Everman residence? What personal effects of Donte Johnson would they expect to find in the
14 Everman residence if Donte Johnson did not live there? Was the search limited to guns, or did the
15 Police seize clothing items – the same clothing items in the same place that support a finding that
16 Donte Johnson did in fact live there? The answer is, the Police knew Donte Johnson was living
17 or staying at the Everman residence, they went in the residence looking for Donte's clothing and
18 any alleged waiver given by Donte Johnson was a ruse by the Police to violate Donte's
19 constitutional rights and not spend the extra twenty minutes to get a search warrant.¹
20

21 Further, any alleged waiver was not voluntary.

22 "If the government exerts undue pressure or improper means to secure consent, instead
23
24

25 ¹ Not to say that a magistrate would have been a "rubber stamp." Quite the contrary, a
26 neutral and detached fact finder may not have felt that the representations of Todd Armstrong
27 were sufficient to search Donte's effects where Donte lived. As such, the Constitutional
28 interests would have been protected and the present motion would have been unnecessary. See
generally, U.S. v. Travisano, 724 F.2d 341, 345 (2d Cir. 1983).

1 of obtaining a warrant as it can easily do, it is going to lose cases." U.S. v. De Los Santos Ferrer,
2 999 F.2d 7, 11 (1st Cir. 1993). The court must determine whether considering the totality-of-
3 circumstances, the alleged consent was unequivocal, specific, and given without duress or
4 duration. U.S. v. Hathcock, 103 F.3d. 715 (8th Cir.), *cert denied*, 117 S.Ct. 2520 (1997); See also
5 Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
6

7 As with any totality-of-the-circumstances or consent analysis, courts must assess such
8 things as the education level, age, maturity, mental competence, impressionability and emotional
9 state of the person at the time alleged consent was given. Other factors which bear upon the
10 coerciveness of the encounter include: the number of officers present, whether they were armed
11 or displayed their weapons, whether the defendant was in custody, the circumstances of the
12 custody, and whether the "consent" was the product of custodial interrogation. Schneckloth, 412
13 U.S. at 218 (1973).
14

15 In the present case, 19-year old Donte Johnson was drawn out in the middle of the night
16 to the Las Vegas Metropolitan Police SWAT team as well representatives of the Homicide bureau.
17 He was immediately placed in custody and handcuffed— no Miranda warnings were given.
18 (Testimony of Sgt. Hefner, pp. 73-74; Testimony of Donte Johnson, pp. 102-103).

19 Based on the circumstances of the custodial inquiry by police of Donte Johnson, no
20 voluntary waiver or "abandonment" could have been made. In fact, under the conditions of the
21 custodial inquiry, no inference should be drawn from Donte's alleged response concerning whether
22 he lived in the home from which he had just emerged.
23

24 (2) Tod Armstrong's authority to give consent.

25 As stated before, this is a case of a non-present co-tenant giving alleged consent to vitiate
26 a present co-tenant's Constitutional rights. Common sense dictates that this argument is
27 disfavored. More importantly, however, numerous courts have agreed with the Defendant's
28

1 position.² In Tompkins v. Superior Court, 378 P.2d 113 (1968), a joint occupant who was away
2 from the premises was found to lack the ability to authorize police officers to enter and search the
3 premises when another joint tenant was present at the time of the attempted search (at least in
4 those situations where no emergency exists and the officer fails to disclose his purpose to the
5 occupant who is present or to inform him that he had the consent of the absent occupant to
6 enter). Id.

7
8 In Tompkins, the accused's co-tenant, subsequent to his arrest, was asked by the police
9 whether he had any contraband in his home. The co-tenant purportedly responded in the negative
10 and gave the officers his keys so that they could confirm his answer for themselves. The police,
11 without a search warrant, proceeded to the accused's apartment and once confronting the
12 accused entered the home without warrant and seized the contraband located after a search.

13 The Court in holding the search to be invalid, noted that a joint occupant's right of privacy
14 in the home is not completely at the mercy of another with whom he shares possession. Id.

15 Similarly, the Police failed to make any representations to Donte Johnson regarding the
16 interaction with Todd Armstrong. They did not inform Donte Johnson of the alleged consent by
17 Todd Armstrong, they did not announce their purpose in searching. If believed, the Police did
18 nothing better than make a custodial inquiry as to whether or not Donte Johnson would admit that
19 he lived in the Everman house.
20

21 In another case, State v. Matias, 451 P.2d 257 (Hawaii 1969), reh'g denied, 1969 WL
22 20091 (1969), the court, in a case involving the warrantless search of the bedroom of an
23 overnight guest consent to by the tenant of the premises, ruled that the guest had a right to
24

25
26 ² A sampling of State courts follows: Tompkins v. Superior Court of the City and County of San
27 Francisco, 59 Cal. 2d 65, 378 P.2d 113 (California 1963); Silva v. State, 344 So. 2d 559 (Florida 1977);
28 Nestor v. State, 221 A.2d 364 (Maryland 1966); Matter of Welfare of D.A.G., 484 N.W.2d 787 (Minnesota
1992); People v. Douglas, 213 N.W.2d 291 (Michigan 1973).

1 privacy in the apartment and that the consent of the tenant operated only to waive the tenant's
2 own right to protection from an unreasonable search and seizure. During the search in Matias,
3 the police seized a coat lying on the bed in a bedroom occupied by the accused with the
4 permission of the tenant which was subsequently used in a pre-arrest identification. The court,
5 on review, reversed and remanded, holding that the search was invalid. The court reasoned that
6 the Fourth Amendment may be waived only by the individual entitled to the right, such that a
7 search and seizure under a third party consent is unreasonable and thus violative of the spirit and
8 meaning of the constitutional prohibition. That is, the court explained, the guest had a right to
9 privacy in the apartment and therefore had standing to object. Id.

11 Todd Armstrong was not the owner of the house, but merely lived there. He further
12 subleased the property to Donte Johnson at least in the area of the bedroom. While not a
13 traditional relationship, Todd Armstrong did not have the authority to allow inspection of a room
14 that he relinquished to Donte Johnson. Certainly if an overnight guest can have a privacy
15 expectation, then someone who had been constantly and uninterruptedly living in the bedroom at
16 Everman would have greater rights.

18 The State sets forth Snyder v. State, 103 Nev. 275 (1987) for the proposition that a
19 person who possesses common authority or other sufficient relationship can consent to a search.
20 This case is readily distinguishable. First, the allegedly consenting individual is present at the
21 residence. Second, the accused is absent from the residence. Finally, the consenting individual
22 in Snyder was the brother of the accused confined to a wheelchair and therefore exhibited the
23 indicia that he living there.

25 The facts as they relate to Donte Johnson are exactly opposite. Todd Armstrong is not
26 present at the time of consent. Donte Johnson, the object of the Police investigation, is present.
27 Donte Johnson was the only one exhibiting indicia that he was living there.

28

1 Synder, in other words, follows the logic of an assumption of the risk, whereupon an
2 absent party risks that a present party who has access to the premises may give consent.

3 If the State wishes to analogize Synder as controlling, then Donte Johnson must take the
4 role of the wheelchair bound brother at home, and therefore, the request to search the premises
5 should have been made of Donte Johnson, especially as it related to the bedroom in which Donte
6 Johnson was exhibiting dominion and control. Further, the Police knew that he had this control,
7 yet are now trying to sidestep that obvious fact, in order to cure the defective search. They
8 cannot.

9
10 The State also cites Taylor v. State, 114 Nev. 1071 (1998). However this is another
11 distinguishable case on actual authority since it is a luggage case and does not take into account
12 any of the concerns of residence searches or Constitutional expectations of privacy of a person
13 present at his residence. Further, in Taylor, the defendant had given over actual control and
14 possession of the suitcase to the party searched. No such analogy would be appropriate in the
15 instant matter. In fact, using the logic of Taylor, the Defendant could argue that Todd Armstrong
16 abandoned his home in allowing Donte Johnson to have actual control and therefore lost all right
17 to consent. It is thereby untenable to define one person's real property interest by the actual
18 authority tenets of Taylor. The State's argument must fail.

19
20 (3) The "good faith" of the police.

21 There is no "good faith" or mistaken belief in the present case. Todd Armstrong did not
22 have the authority to waive Donte Johnson's expectation of privacy when Donte was home and
23 was in his room. The police cannot turn a blind eye to the obvious facts that Donte Johnson was
24 living in the residence and then gloat at the discovery of purportedly incriminating evidence found
25 in Donte Johnson's bedroom. The police were there to search Donte Johnson's bedroom, it is
26 disingenuous to state that they mistakenly believed that Todd Armstrong had authority to consent
27
28

1 to search that bedroom, when they knew or should have known it was Donte's.

2 The State again cites Synder for the proposition that apparent authority is sufficient, but
3 this does not hold in a residence where the resident **is home**. Any representations relied upon by
4 the Police which came from suspect Todd Armstrong cannot be used at this juncture to belie the
5 fact that the Police knew Donte was staying there, knew where in the house he was staying,
6 knew he was there when searching, and knew he had an expectation of privacy in his effects.
7 The police may have been able to turn the corner with a twenty minute investment.
8

9 In Derouen v. State, 85 Nev. 637, 640 (1969), the Nevada Supreme Court recognized
10 the well-settled principle that search warrants for *automobiles* should be obtained whenever
11 reasonably practicable. In State v. Parent, 110 Nev. 114 (1994), the Court, for the first and only
12 time to date, expressly approved the concept of anticipatory search warrants. In doing so, the
13 court stated:

14 "The purposes of the fourth amendment are best served by permitting government
15 agents to obtain warrants in advance if they can show probable cause to believe
16 that the contraband will be located on the premises at the time that the search
17 takes place. . . . Anticipatory search warrants . . . in the proper circumstances,
18 may be an effective tool, both to fight criminal activity, and to protect individual
19 fourth amendment rights."

20 Parent, 110 Nev. at 117, 867 P.2d at 1145 (quoting United States v. Garcia, 882 F.2d
21 699,703(2nd Cir.), cert denied sub nom., Grant v. United States, 493 U.S. 943, 107 L. Ed. 2d
22 336, 110 S. Ct. 348 (1989)).

23 If the Nevada Supreme Court has set these standards for *automobile* searches, then given
24 the heightened protections for individuals in the *places where they are living*, the police in the
25 present case must have failed to adequately acknowledge the Fourth Amendment interests of

26 ...

27 ...

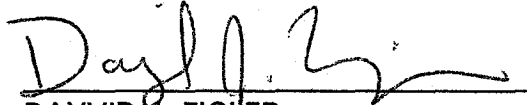
28

1 Donte Johnson. Foolhardy and illogically, they rushed into an illegal search, the fruits of which
2 must now be suppressed.

3 Dated this 16 day of February, 2000.

4 Respectfully submitted,

5 PHILIP J. KOHN
6 SPECIAL PUBLIC DEFENDER

7 

8 DAYVID J. FIGLER
9 Deputy Special Public Defender
10 Nevada Bar No. 4264
11 309 S. Third Street, Fourth Floor
12 Las Vegas, Nevada 89155
13 (702) 455-6265

14 **RECEIPT OF COPY**

15 **RECEIPT OF COPY** of the foregoing **REPLY TO STATE'S OPPOSITION TO MOTION TO**
16 **SUPPRESS** is hereby acknowledged this 16 day of February, 2000.

17
18 

19 STEWART L. BELL
20 District Attorney
21 200 S. Third Street
22 Las Vegas, NV 89155
23 Attorney for Plaintiff
24
25
26
27
28

EXHIBIT "A"

1 friends and roommates were Ace Hart, a young man that will
2 testify in this courtroom; a boy by the name of Brian
3 Johnson or B.J.

4 You will also learn that sometime in
5 the early July Donte Johnson and Terrell Young moved into
6 the house there at Everman.

7 These two young men moved in with Todd
8 Armstrong and with Ace Hart and B.J.

9 At one point in time there is about
10 five or six people living over there at the Everman
11 address.

12 Also a woman by the name of Charla
13 Severs or Lala, L-a, L-a.

14 You will learn that ultimately Mathew
15 Mowen, a boy who lived at Terra Linda, came over and would
16 visit the guy at the Everman address and, in fact, Mathew
17 Mowen, according to Ace Hart will tell you that Mowen came
18 over to Everman house three or four times and he would
19 purchase rock cocaine from Donte Johnson.

20 You will learn ultimately that in late
21 July Mathew Mowen came over to the Everman house and he
22 made a purchase of rock cocaine from Donte Johnson and that
23 Ace Hart was present when that purchase took place.

24 And ultimately Ace Hart will tell you
25 there at the Everman house was Donte Johnson and Terrell

1 You will learn that those boys died
2 from a single gunshot wound; that the cause of death is
3 that, a single gunshot wound and that the manner of death
4 is a homicide and that people or persons are going to be
5 held responsible for their death.

6 The wrongdoers, Terrell Young, Sikia
7 Smith and Donte Johnson, all run off like strangers in the
8 night leaving the Terra Linda residence with their ill-
9 gotten gains and they return over to the Everman residence
10 where Todd Armstrong lives.

11 You will learn that ultimately all
12 three of these kids have been arrested, all three of them
13 to be tried in separate trials.

14 You will learn Todd Armstrong has not
15 been arrested yet but you will learn he is a suspect in
16 this case and that he, too, may be subject to prosecution
17 if and when the evidence comes forward and is available.

18 But again, this is Sikia Smith's trial
19 and no one else's.

20 Ultimately, the crime is discovered.
21 No crime is going to be left undiscovered. Sooner or later
22 murderers are going to be caught and going to be prose-
23 cuted.

24 And it is Justin Perkins who ultimately
25 goes over to the house at 6:00 o'clock on Friday the 14th

EX. 5

MAR 16 00 P 2:56

1 **OPPS**
2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
9 Plaintiff,

10 -vs-

11 DONTE JOHNSON,
12 #1586283

13 Defendant.

Case No. C153154
Dept. No. V
Docket H

14
15 SUPPLEMENTAL POINTS AND AUTHORITIES IN OPPOSITION TO
16 MOTION TO SUPPRESS

17 DATE OF HEARING: 4/24/00
18 TIME OF HEARING: 9:00 A.M.

19 COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through
20 ROBERT DASKAS, Deputy District Attorney, and files this Supplemental Points and
21 Authorities In Opposition to Motion to Suppress.

22 This Supplemental Points and Authorities In Opposition to Motion to Suppress is made
23 and based upon all the papers and pleadings on file herein, the attached points and authorities

24 //

25 //

26 //

27 //

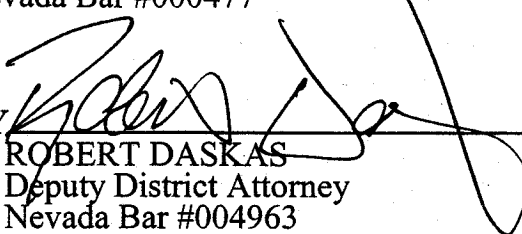
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1 in support hereof, and oral argument at the time of hearing, if deemed necessary by this
2 Honorable Court.

3 DATED this 16 day of March, 2000.

4 Respectfully submitted,

5 STEWART L. BELL
6 DISTRICT ATTORNEY
7 Nevada Bar #000477

8 BY 
9 ROBERT DASKAS
10 Deputy District Attorney
11 Nevada Bar #004963

12 POINTS AND AUTHORITIES

13 STATEMENT OF FACTS

14 Tod Armstrong and Ace Hart lived in a house located at 4815 Everman, Las Vegas,
15 Nevada, in the months preceding August 1998. Transcript of Evidentiary Hearing, January 6,
16 2000 (hereinafter "TR") at pp. 9, 58. The three bedroom home was owned by Cheryl Stevens,
17 the mother of Tod Armstrong. TR at pp. 9, 58. Tod possessed the only key to the residence. TR
18 at pp. 10, 58, 103.

19 There was no furniture or bedding in the master bedroom. TR at pp. 69-70. Both Tod
20 and Ace kept personal belongings in the master bedroom (even after Ace moved out of the
21 residence), as did Charla Severs and Terrell "Red" Young. TR at p. 93. Anyone who visited the
22 home was permitted to go into the master bedroom. TR at pp. 91, 93. Visitors would frequently
23 enter the master bedroom to listen to the stereo or simply "hang out." TR at p. 92. The door to
24 the master bedroom was never locked unless Defendant and his girlfriend were engaged in
25 sexual relations. TR at p. 86.

26 Detectives learned from Tod Armstrong that Donte Johnson and his associates "weren't
27 really living" at the Everman home, but that Johnson "would just show up sometimes." TR at
28 pp. 11, 24. Johnson did not pay rent. TR at p 11. This information was later corroborated by
Charla Severs, Donte's girlfriend, who indicated that Donte Johnson was not living in the

1 Everman home; rather, it was a place that "he'd just go chill out for awhile." TR at p. 88. In
2 fact, Johnson had to climb through a broken window to gain access to the residence. TR at pp.
3 15, 94. Moreover, Severs confirmed that the master bedroom was not considered Defendant's
4 bedroom. TR at 86.

5 Armstrong signed a consent-to-search card for 4815 Everman on August 18, 1998,
6 sometime prior to 3:30 a.m. TR at p. 43. The Las Vegas Metropolitan Police Department
7 SWAT team ordered all occupants out of the Everman residence to ensure the safety of everyone
8 involved. TR at p. 48. Donte Johnson, Charla Severs and Dwain Anderson exited the home.
9 TR at p. 48. Sgt. Hefner asked all three individuals if they lived at the Everman residence. TR
10 at pp. 63, 103. Donte Johnson responded that he did not live in the Everman home. TR at pp.
11 17, 64.

12 A consensual search of the Everman residence, including the master bedroom, was then
13 conducted by Sgt. Hefner. TR at p. 68. Significantly, there was no furniture or bedding in the
14 master bedroom and Sgt. Hefner believed it was a storage or junk room. TR at p. 69-70. Sgt.
15 Hefner located, *inter alia*, a pair of black jeans which had an apparent blood stain on a pant leg.
16 TR at p. 68-69. Subsequent DNA tests revealed that the blood belonged to one of the four
17 quadruple murder victims. Moreover, Detectives found on the zipper area of those same jeans
18 a white, crusty substance. The substance was later identified as semen, and DNA tests revealed
19 that the donor of the semen was Donte Johnson.

20 II.

21 PROCEDURAL HISTORY

22 On or about December 3, 1999, Defendant filed a Motion to Suppress Evidence Illegally
23 Seized. Specifically, Defendant sought to suppress jeans that were seized from the master
24 bedroom of 4815 Everman. The gist of Defendant's legal argument was that a "roommate of
25 a residence does not have the authority to allow a search of a bedroom in which another person
26 is residing." Motion to Suppress Evidence Illegally Seized at p. 4.

27 The State's Opposition to Motion to Suppress Evidence Illegally Seized was filed on or
28 about January 21, 2000. The Opposition was based on three grounds: (1) Donte Johnson lacked

1 standing to contest the search of the Everman home; (2) Tod Armstrong had actual, common
2 authority to consent to the search; and (3) officers reasonably relied on Tod Armstrong's
3 apparent authority to search the Everman home.

4 Defendant's Reply to State's Opposition to Motion to Suppress was filed on or about
5 February 16, 2000. Defendant relied on three cases to suggest that "an absent third party's
6 consent should not be used to waive another's constitutional rights when that individual is
7 present at the time of the search to give or withhold consent in his own right." Reply at 9.

8 This Court requested that the State provide Supplemental Points and Authorities to
9 Defendant's Reply to State's Opposition to Motion to Suppress.

10 III.

11 DISCUSSION

12 Defendant's Reply relies on three cases, none of which provide precedent to this Court,
13 to suggest either that Donte Johnson has standing to object to the search or that Tod Armstrong
14 lacked authority to consent to the search. All of the cases relied upon by the defense are readily
15 distinguishable from the facts of the matter before this Court.

16 A. THE CASES RELIED UPON BY DEFENDANT ARE INAPPLICABLE BECAUSE 17 DEFENDANT WAS NOT A CO-TENANT IN THE EVERMAN RESIDENCE

18 At the outset, it should be noted that all of the cases relied upon by Defendant involve a
19 *tenant* objecting to a *co-tenant* consenting to a search of a residence. In fact, Defendant suggests
20 to this Court that "this is a case of a non-present co-tenant giving alleged consent to vitiate a
21 present co-tenant's Constitutional rights." Reply at 12.

22 It is specious at best to suggest that Donte Johnson was a co-tenant in the Everman
23 household. He did not pay rent. TR at p. 11. He gained access to the bedroom through a broken
24 window. TR at pp. 15, 94. The master bedroom was *not* considered Defendant's bedroom. TR
25 at 86. In the words of his girlfriend, Donte Johnson "would just show up [at the Everman home]
26 sometimes." TR at pp. 16, 88. In fact, the following colloquy took place between Defendant's
27 attorney and Defendant's girlfriend during the evidentiary hearing:

28 Q. Okay. Did you consider that Donte Johnson was living there?

1 A. No, it was like a spot, where he'd just go chill out for awhile.

2 TR at pp. 16, 88. Clearly, therefore, any cases relied upon Defendant involving a tenant
3 objecting to a co-tenant's consent-to-search are inapplicable. Moreover, the cases relied upon
4 by Defendant are distinguishable in several other important respects.

5 1. THE MINNESOTA CASE CITED BY DEFENDANT IS INAPPLICABLE
6 BECAUSE THE POLICE IN THAT CASE WERE AWARE THE DEFENDANT
7 RESIDED IN THE PREMISES SEARCHED

8 In Matter of Welfare of D.A.G., 484 N.W.2d 787 (Minn. 1992), officers were contacted
9 by Thomas Charles Howard. Id. at 788. Howard informed officers that he had recently moved
10 into 1002 Hawthorne with D.A.G. and another individual. Id. Howard also informed officers
11 that there were two pounds of marijuana in the residence, and Howard consented to a search of
12 the residence. Id.

13 The officers failed to knock and announce their purpose and authority when they entered
14 the residence; rather, they walked in the home with their guns drawn. Id. D.A.G. was present
15 when officers entered. Id. D.A.G. never denied living in the home. See id. Officers founds
16 several baggies of marijuana and a sawed-off shotgun. Id. at 789. D.A.G. admitted he owned
17 the gun; therefore, he was charged with, *inter alia*, possession of a short-barreled shotgun. Id.
18 The trial court suppressed the shotgun on the basis of an unreasonable, warrantless search and
19 seizure and the Supreme Court of Minnesota affirmed.

20 The facts of this case are distinguishable from D.A.G. in at least one very important
21 respect. In that case, *officers were told by Howard that, in fact, D.A.G. lived in the home* they
22 were about to search. Id. at 788. Howard, the person whom consented to the search, informed
23 officers that D.A.G. lived in the home. Id. In the instant matter, on the other hand, Detectives
24 were told just the opposite -- Tod Armstrong informed officers that Donte Johnson did *not* live
25 in the Everman household. TR at pp. 11, 15, 16, 24, 88. Moreover, D.A.G. did not deny living
26 in the home as Donte Johnson did in this case. See D.A.G. at 788. In fact, officers in that case
27 never even inquired of D.A.G.'s nexus to the residence. Conversely, Donte Johnson was
28 specifically asked by Sgt. Hefner if he resided in the Everman home. TR at pp. 17-64. Johnson
responded that he did not live in the home. TR at pp. 17-64. Moreover, D.A.G. was in fact a

1 tenant in the residence, whereas Donte Johnson was not a tenant in the Everman home. Clearly,
2 therefore, the instant matter is distinguishable from D.A.G..

3 2. THE TOMPKINS CASE RELIED UPON BY DEFENDANT IS INAPPOSITE
4 BECAUSE DEFENDANT SOUGHT TO EXCLUDE THE OFFICERS FROM
5 THE HOME AND TOLD OFFICERS HE LIVED IN THE HOME

6 Defendant also relies on Tompkins v. Superior Ct., 59 Cal.2d 65, 378 P.2d 113, 27
7 Cal.Rptr. 889 (1963), to suggest that Johnson has standing in the instant matter to object to the
8 search of the Everman home. In that case, officers arrested Edward Nieman for possession of
9 marijuana following an automobile stop. Id. at 69. Nieman told officers that he lived at 700
10 Shotwell Street, Apt. No. 3. Id. The officers asked Nieman if he had any contraband in his
11 home; he answered "no" and gave officers the key to confirm his answer for themselves. Id.
12 Officers responded to the residence and attempted to open the door. Id. Tompkins was in the
13 residence and *slammed the door shut*. Id. Officers kicked in the door and found Tompkins in
14 the middle of the room and found marijuana and marijuana seeds. Id. Tompkins *told officers*
15 *that he lived in the apartment*. Id.

16 Tompkins sought to suppress the marijuana. The Supreme Court of California stated:

17 Accordingly, we hold that one joint occupant who is away from the premises may not
18 authorize police officers to enter and search the premises *over the objection of another*
19 *joint occupant who is present at the time*, at least where as in this case, no prior warning
20 is given, no emergency exists, and the officer fails even to disclose his purpose to the
21 occupant who is present or to inform him that he has the consent of the absent occupant
22 to enter.

23 Id. at 69 (emphasis added). Consequently, the marijuana was suppressed.

24 Tompkins, too, is readily distinguishable from the facts of the instant matter. Again, it
25 is undisputed that Tompkins was a tenant of the apartment whereas Donte Johnson was not a
26 tenant of the Everman home. Additionally, Tompkins clearly objected to the search of the
27 apartment when he slammed the door shut on the officers. Tompkins also told officers that he
28 lived in the apartment. Donte Johnson, on the other hand, did just the opposite; he specifically
denied living in the home and did not attempt to exclude the officers from the home as did
Tompkins. Thus, Johnson's reliance on Tompkins to support the notion that he has standing to
object to the search of the Everman home is misplaced.

1 More importantly, the Supreme Court of California very recently declined to follow the
2 thirty year old Tompkins case. In People v. Welch, 20 Cal.4th 701, 976 P.2d 754, 85 Cal.Rptr.2d
3 203 (1999), the defendant and his girlfriend broke down the door of Barbara Mabrey's home in
4 Oakland and killed six persons as they were sleeping in various rooms. Id. at 722. Following
5 the killings, defendant went to Beverly Jermany's residence. Id. at 724. Jermany was the second
6 cousin of the defendant. Id. Jermany eventually notified the police that the defendant was at her
7 house and he was apprehended. Id.

8 A warrantless search of the home and backyard revealed a pillowcase which contained
9 the murder weapons. Id. Burned clothing was recovered from the fireplace inside the home.
10 Id. Tennis shoes were also recovered from the residence; blood found on the shoes matched that
11 of a victim. Id.

12 The defendant moved to suppress the evidence. The defendant cited the same case relied
13 upon by Donte Johnson in this case, Tompkins v. Superior Court, 59 Cal.2d 65 (1963), to
14 suggest that he was a joint occupant of the home and had standing to object to the search. The
15 Supreme Court of California rejected his argument. Specifically, the Court recognized that
16 defendant lacked standing to assert his Fourth Amendment rights.

17 Defendant, however, was in no sense a joint occupant, but rather a transient guest, a
18 critical difference in defining his expectation of privacy. We conclude that Jermany's
consent rendered the search ... lawful.

19 Id. at 748.

20 Similarly, in the instant matter, Donte Johnson was in no sense a joint occupant of the
21 Everman home; at most, he, too, was a transient guest. Donte Johnson and his associates
22 "weren't really living" at the Everman home; rather, Johnson "would just show up sometimes."
23 Johnson did not pay rent. TR at pp. 11, 24. Charla Severs confirmed that Donte Johnson was
24 not living in the Everman home; instead, it was a place that "he'd just go chill out for awhile."
25 TR at p. 88. In fact, Johnson had to climb through a broken window to gain access to the
26 residence. TR at pp. 15, 94. As a transient guest, Johnson, like the defendant in Welch, does
27 not have standing to object to a search of the home. Consequently, the Motion to Suppress must
28 fail.

1 3. DEFENDANT'S RELIANCE ON MATIAS IS MISPLACED BECAUSE
2 MATIAS NEVER DENIED LIVING IN THE SEARCHED APARTMENT AS
3 DEFENDANT DID IN THE INSTANT MATTER

4 Finally, the defense also relies on State v. Matias, 51 Haw. 62, 451 P.2d 257 (1969), as
5 support for the notion that Johnson has standing to object to the Everman search. In that case,
6 police were looking for the defendant during their investigation of a robbery. Id. 63. Officers
7 saw defendant on a balcony of an apartment building. Id. Officers did not ask the defendant if
8 he lived in the apartment, nor did defendant deny living in the home. See id. Rather, officers
9 obtained permission to enter the apartment from another tenant. Id. Police seized a coat that
10 was subsequently used in a prearrest identification procedure. Id. The Supreme Court of Hawaii
11 held that Matias had a right to privacy in the premises of the apartment. Id. at 65.

12 Matias, much like D.A.G. and Tompkins, provides no support for Defendant's position
13 in this case. Unlike Sgt. Hefner in this case, officers did not ask Matias if he lived in the
14 apartment that was ultimately searched. Moreover, unlike Johnson in the instant matter, Matias
15 did not deny living in the apartment. Those key factors mandate a different result in the case
16 before this Court.

17 B. COURTS HAVE RECOGNIZED THAT A DEFENDANT DOES NOT HAVE ANY
18 EXPECTATION OF PRIVACY IN A RESIDENCE WHEN THE DEFENDANT
19 DENIES LIVING IN THAT RESIDENCE

20 In the State's Opposition to Motion to Suppress, the State cited a plethora of cases to
21 support the notion that a defendant who denies ownership interest in property abandons any
22 expectation of privacy in that property, thereby losing standing to contest the search. See e.g.,
23 U.S. v. Veatch, 674 F.2d 1217 (1981) (no standing to contest search of wallet where defendant
24 denied owning wallet); U.S. v. Sanders, 130 F.3d 1316 (1998) (defendant surrendered any
25 legitimate expectation of privacy and lacked standing where defendant denied ownership interest
26 in leather bag). Defendant, however, suggests that this Court must grant his Motion to Suppress
27 because "the State only argues inapplicable automobile and luggage cases, nary a residence case
28 in sight." Reply at 11.

 In State v. Banks, 364 S.E.2d 452 (NC 1988), however, the court recognized that a
 defendant's disclaimer of having a possessory interest in a residence served to undermine his

1 credibility regarding his expectations of privacy. There, the police arrested defendant at his
2 residence and he stated, "I don't have nothing on me. I don't live here." Id. at 453. A
3 warrantless search¹ revealed cocaine as well as items which connected defendant to the
4 residence. Id. At trial, defendant sought to suppress the cocaine. The court recognized that:

5 a defendant may object to the admission of evidence obtained through an illegal or
6 unreasonable governmental search only where defendant can demonstrate legitimate
7 expectations of privacy to the place or item searched. [citations omitted.] Determination
8 of whether defendant has sufficient privacy expectations to the area searched depends
9 upon whether defendant can show that his conduct indicated that he held an actual
10 expectation of privacy (subjective) and whether defendant sought to preserve an item or
11 place private and free from governmental invasion. [citations omitted.] And secondly,
12 defendant must show that his expectation is one society is willing to recognize.

13 Id. at 454 (citations omitted) (emphasis added). The court reasoned that the defendant's
14 disclaimers of a possessory interest in the residence undermined his claims regarding his
15 expectation of privacy. Id. at 454. Consequently, the court ruled that he lacked standing to
16 object to the admission of evidence seized from the residence during the warrantless search. Id.

17 Similarly, in the instant matter, Donte Johnson's conduct belies the argument that he held
18 an actual expectation of privacy in the Everman household. Johnson denied that he lived in the
19 Everman home when asked by police. He entered the room through a broken window. He paid
20 no rent. Any visitor was free to enter the master bedroom of the Everman household for a
21 variety of reasons. Consequently, Donte Johnson lacks standing to object to the search.

22 C. EVEN IF DONTE JOHNSON WERE CONSIDERED A CO-TENANT, TOD
23 ARMSTRONG HAD COMMON AUTHORITY OVER THE PREMISES TO
24 CONSENT TO THE SEARCH

25 Assuming, *arguendo*, that this Court found as a matter of fact that Donte Johnson was a
26 tenant of the Everman home, Defendant's Motion to Suppress still must fail. Defendant's
27 original argument was that a "roommate of a residence does not have the authority to allow a
28 search of a bedroom in which another person is residing." Motion to Suppress Evidence
Illegally Seized at p. 4. This is an incorrect statement of the law. In U.S. v. Matlock, 415
U.S. 164, 94 S.Ct. 988 (1974), officers recovered proceeds from a bank robbery from the master

¹ The warrant was ruled defective because it was not executed. Banks at 453.

1 bedroom of a home after defendant's wife consented to a warrantless search. Id. at 166. The
2 issue was whether the consenting party's relationship to the master bedroom was sufficient to
3 make her consent to the search valid against the defendant. Id. at 167. Unlike the matter before
4 this Court, however, it was undisputed that the defendant in fact lived in the home and occupied
5 the master bedroom.

6 The United States Supreme Court recognized that "the voluntary consent of any joint
7 occupant of a residence to search the premises jointly occupied is valid against the co-occupant."
8 Id. at 168. Thus, the prosecution may show that permission to search was obtained from a third
9 party who possessed common authority over or other sufficient relationship to the premises
10 inspected. Id. at 171.

11 The authority which justifies the third-party consent ... rests ... on mutual use of the
12 property by persons generally having joint access or control for most purposes, so that it
13 is reasonable to recognize that any of the coinhabitants has the right and that the others
have assumed the risk that one of their number might permit the common area to be
searched.

14 Id. at 171, fn. 7.

15 Certainly Tod Armstrong had a sufficient relationship to the 4815 Everman home,
16 including the master bedroom, to grant the officers permission to search. Tod's mother owned
17 the residence and Tod possessed the only key to the house. Tod (and Ace Hart) kept personal
18 belongings in the master bedroom, as did Charla Severs. Anyone who visited the home was
19 permitted to enter the master bedroom. Defendant gained access to the room through a broken
20 window. Defendant's girlfriend testified that the master bedroom was *not* considered
21 Defendant's bedroom, nor did she consider that Defendant lived in the home. TR at 86. These
22 facts clearly illustrate Tod's common authority over the premises. Accordingly, his voluntary
23 consent to search the premises is valid against Defendant. See Matlock, 415 U.S. 164. Thus,
24 Defendant's Motion to Suppress must fail.

25 IV.

26 CONCLUSION

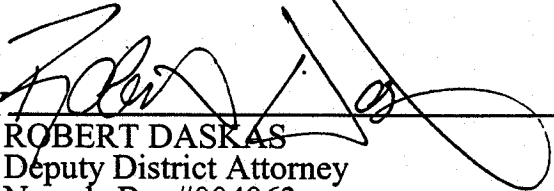
27 Each of the cases relied upon by Defendant is distinguishable from the instant matter.
28 In all of the cases relied upon by Defendant, the individuals who objected to the searches were,

1 in fact, tenants in the premises. Moreover, either (1) the officers were told that the defendant
2 lived in the residences, (2) the defendant did not deny to the police that he lived in the home that
3 was searched, or (3) the search was performed over the objection of the defendant. Surely the
4 result in each of the cases relied upon by Johnson would have been different had those suspects
5 denied living in the homes that were searched, as Donte Johnson did in the instant matter. Thus,
6 Defendant's reliance on these cases is misplaced. Accordingly, the State respectfully requests
7 that this Court deny Defendant's Motion to Suppress Evidence Illegally Seized.

8 DATED this 16 day of March, 2000.

9 Respectfully submitted,

10 STEWART L. BELL
11 DISTRICT ATTORNEY
12 Nevada Bar #000477

13 BY 
14 ROBERT DASKAS
15 Deputy District Attorney
16 Nevada Bar #004963

17 RECEIPT OF COPY

18 RECEIPT OF COPY of the above and foregoing SUPPLEMENTAL POINTS AND
19 AUTHORITIES IN OPPOSITION TO MOTION TO SUPPRESS is hereby acknowledged this
20 _____ day of March, 2000.

21 SPECIAL PUBLIC DEFENDERS OFFICER
22 ATTORNEY FOR DEFENDANT

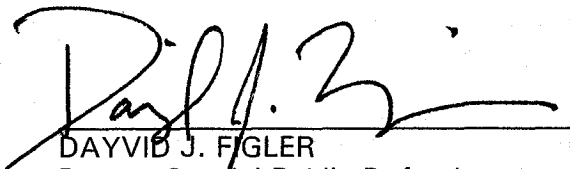
23
24 BY _____
25 309 S. Third Street, 3rd Flr.
26 Las Vegas, Nevada 89101
27
28

1 incorporates by reference the Motion and Reply already on file herein as well as any argument of
2 counsel at the time set for hearing on the Motion.

3 DATED this 29 day of March, 2000.

4 Respectfully submitted,

5 PHILIP J. KOHN
6 SPECIAL PUBLIC DEFENDER

7 
8 DAYVID J. FIDLER
9 Deputy Special Public Defender
10 Nevada Bar No. 4264
11 309 S. Third Street, Fourth Floor
12 Las Vegas, Nevada 89155
(702) 455-6265

13 ARGUMENT

14 Without belaboring the essence of the Defendant's argument that law supports a finding
15 in his favor, Defendant sets out, here, to point out the inaccuracies which exist within the
16 Supplemental Points and Authorities submitted by the State on March 16, 2000.

17 The Defendant does not simply rely on three State Supreme court cases set forth in the
18 original Reply in detail as precedent, but as is traditional in jurisprudence, avers that the analysis
19 set forth in these other cases is of interest when other courts have been presented with the
20 complicated area of Fourth Amendment protection. While the State painstakingly attempts to
21 factually distinguish the present matter from the scenarios in those cases, it does so without truly
22 giving credence to the underlying precepts of the Fourth Amendment. Additionally, there are
23 factual oversights that the State chooses simply to ignore.

24 (1) RENT – The State insists that Donte Johnson was not paying rent, and utilizes this fact
25 as the crux of their argument. ("It is specious at best to suggest that Donte Johnson was a co-
26 tenant in the Everman household. He did not pay rent." State's Supp. P & A, pp. 4, lines 22-23).
27 The Defendant has placed into evidence reliable testimony that in fact there was an exchange of
28 drugs to Tod Armstrong to stay in the Everman residence. (Trans. 01/06/00, pp. 85, lines 13-15).
The failure of the State to even address this issue of drugs-for-housing exposes the inability of the

1 State to challenge this fact. The State has presented no case law, no analysis regarding this issue
2 in the two written opportunities they have been given to address this point. As such, it should
3 properly be deemed that the State has conceded that drugs were exchanged to Armstrong for
4 consideration of housing. As such, the State concedes that there was a co-tenant environment
5 and they have failed to overcome the burden (which is on the State) that a Fourth Amendment
6 violation did not occur.

7 (2) EXPECTATION OF PRIVACY– The State offers that the only time Donte Johnson had
8 an expectation of privacy is when he was with his girlfriend in the master bedroom. (Supp. P &
9 A, pp. 2, lines 22-24). The State has missed the point, however, that on the night of the search,
10 Johnson was, in fact, there with his girlfriend at 3 a.m. in the morning. Todd Armstrong, Ace
11 Hart, B.J. Armstrong – they were all absent while Defendant and Charla Severs were sleeping in
12 the master bedroom, together, at 3 a.m. in the morning. The State offered no evidence that this
13 was not the EXACT scenario that they have already conceded exhibited an expectation of privacy
14 on the part of Defendant.

15 (3) "IT WAS LIKE A SPOT, WHERE HE'D JUST GO TO CHILL OUT A WHILE" - The State
16 repeats this phrase uttered by Charla Severs time and time again in their Oppositions by Charla
17 Severs. Apparently the State places great weight on this statement, however, it fails to
18 acknowledge the statement that came directly next in the testimony. When queried by Defense
19 counsel, the following exchange is edifying:

20 "MR. SCISCENTO: All right. For those 14 days prior to the 18th, how many nights
21 did Donte Johnson sleep in that house?

22 CHARLA SEVERS: Everyday, all those 14." (Trans. 01/06/00, pp. 88, lines 14-16)

23 In fact, it must be noted that when asked the general question if Donte Johnson was living
24 in the Everman house, Severs repeatedly answered "no", but when asked about specific facts,
25 Severs responded in ways that were indicia of a co-tenant relationship, to wit:

26 "MR. SCISCENTO: So, almost everything that he had was in that master bedroom?

27 A: Yes.

28 Q: Okay. Was there a lock on that master bedroom?

1 A: Yes.

2 Q: Would Donte Johnson ever lock that door?

3 A: No. Only just maybe like when we was doing something.

4 Q: So, when you guys were inside he may have been – he may lock the door?

5 A: Yeah.

6 Q: To keep other people out?

7 A: Yeah.

8 Q: Would you consider that – did you consider that Donte Johnson's bedroom?

9 A: No.

10 Q: Why not?

11 A: Because it wasn't his house." (Trans. 01/06/00, pp. 86)

12 Clearly, Ms. Severs was under the mistaken impression that since it was not Donte
13 Johnson's house, he was not living there. This interpretation is of no moment, and should not
14 properly be relied upon by the State. Ms. Severs testified that this was the only place Donte
15 Johnson lived during the salient time frame and that they often would exclude others from this
16 area. She also confirmed that drugs-for-housing compensation took place. While Donte Johnson
17 testified that he was living in the Everman residence for over 3 weeks, if the State wants to put
18 credence in Ms. Severs testimony, then Donte Johnson was living there for at least 2 weeks
19 including the night of the unlawful search.

20 (4) THE STATE CANNOT CHANGE POSITION – In their supplemental P & A, the State
21 elected not to respond to the charge that Deputy District Attorney Gary Guymon took the position
22 in an earlier proceeding that Donte Johnson moved into the Everman residence. It is no surprise
23 that this was the position taken as there is convincing authority that the State cannot change its
24 position on material matters to serve its purpose of the moment.

25 "It is well established that when no new significant evidence comes to light a prosecutor
26 cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts
27 regarding the same crime." Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) reversed on
28 other grounds 523 U.S. 538 (1998). In United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir.

1 1993), the 9th Circuit stated: "While lawyers representing private parties may - indeed, must - do
2 everything ethically permissible to advance their clients' interests, lawyers representing the
3 government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win,
4 but to win fairly, staying well within the rules." citing United States v. Kattar, 840 F.2d 118, 127
5 (1st Cir. 1988) (stating that the function of the prosecutor "is not merely to prosecute crimes, but
6 also to make certain that the truth is honored to the fullest extent possible"). In the present case,
7 it would improperly allow the prosecutors to change position in contravention of the truth if they
8 were to, here, advance the opinion that Donte Johnson had not moved into the Everman address.

9 Despite their Oppositions, the State has already conceded the issue.

10 (5) THE IMPACT OF DONTÉ JOHNSON "DENYING" HE LIVES AT EVERMAN – During the
11 one question inquiry of Donte Johnson after being withdrawn at gun point, handcuffed and not
12 Mirandized, the State indicates the Donte Johnson "abandoned" the premises and cites one case
13 for that proposition, State v. Banks, 364 S.E. 2d 452 (North Carolina State Appellate Court 1988).

14 The Banks decision, however, cites Jones v. United States, to wit:

15 "Further, Defendant must show that he has some control or dominion over the area
16 or thing searched, Jones v. United States, 362 U.S. 257 (1960)(as by having the
17 owner's permission to reside in place searched ***even when defendant resides there***
18 ***temporarily and does not pay rent*** – and in addition has key to premises) such may
19 be sufficient to confer standing to object. (Although the Jones "legitimately on the
20 premises" test has been significantly circumscribed, the defendant's authorized
21 presence on the premises searched and control factors are no less valid today)
22 citing Rakas v. Illinois, 439 U.S. 128 (1978). (emphasis added).

20 While there was admittedly only one key to the entire residence, it does not follow that
21 Donte Johnson was not residing at the Everman residence. Ace Hart and B.J. Armstrong were
22 considered by the State to be residing in the Everman residence and clearly they could not have
23 keys either. Further, Donte Johnson testified that sometimes he was given the key by Todd
24 Armstrong. (Trans. 01/06/00, pp. 104, lines 21-24).

25 More important, however, as indicia of an expectation of privacy is that Donte Johnson had
26 the ability to exclude others in this residence by locking the door so that he and Charla could be
27 alone and have security in their person and effects.

28 Finally with regard to the Banks decision, the Court standard in evaluating the propriety of

1 the search came to whether or not the defendant in that case had a reasonable expectation of
2 privacy in the "back room" where the contraband was found, when he was staying in the
3 "bedroom." Even this North Carolina Appellate Court would have agreed that a different ruling
4 would have resulted had the police conducted a warrantless search in the bedroom where the
5 Defendant in that case was staying. The State, however, cites Banks for the proposition that a
6 person can abandon a residence because of "disclaimers of a possessory interest." (Supp. P & A,
7 pp. 9, lines 9-12). In Banks, however, there were "several" disclaimers of interest in the *entirety*
8 of the house, and unlike the present case, there was no need for a Miranda analysis.

9 What seems to be lost in the shuffle is that the inquiry of Donte Johnson at 3 a.m. was
10 the product of a custodial interrogation. It is well settled that "prior to *any* (custodial) questioning,
11 the person must be warned that he has a right to remain silent, that any statement he does make
12 may be used as evidence against him, and that he has a right to the presence of an attorney..."
13 State v. Billings, 84 Nev. 55, 58 (1968) citing Miranda v. Arizona, 384 U.S. at 444, 445
14 (1966)(emphasis added). It would be hard to dispute that the handcuffed Johnson was not in
15 custody at the time of the inquiry. The record is further clear that no Miranda warnings were
16 given. (Trans. 01/06/00, pp. 74-75). The United States Supreme Court has repeatedly set high
17 standards of proof for the waiver of Constitutional rights, and those rights and standards have
18 been repeatedly reasserted as applied to in-custody interrogation. See Miranda at 475. Also, e.g.,
19 Tague v. Louisiana, 444 U.S. 469 (1980)(per curiam)(government failed to show that petitioner
20 had waived rights where arresting officer could not remember whether he had read rights from a
21 card, what those rights were, whether he asked petitioner if he understood the rights, or whether
22 he rendered any tests to determine whether petitioner was literate or otherwise capable of
23 understanding his rights).

24 The argument could continue how the Detective's one question custodial inquiry should
25 have no effect. Certainly, the Detective did not inform Donte Johnson the purpose of the question
26 or whether he was intelligently waiving any search of the premises. Defendant, however, feels
27 that such further argument would be superfluous. (1) There was no voluntary, informed waiver
28 of right to remain silent or search and (2) no discussion of waiver of rights is even necessary given

1 that the Police saw Donte and Charla exiting their residence at 3 a.m. in the morning and there
2 was no evidence in the possession of the police that Donte *lived anywhere but* the Everman
3 house. In either event, Donte did not exhibit any conduct which legally amounts to an
4 "abandonment" of a residence, if the concept of abandonment of room of residence is even
5 possible for these purposes.

6 In conformity with applicable caselaw, Donte Johnson has shown "some" dominion or
7 control over the bedroom at issue. As such, the burden has not been met by the State to show
8 that a warrantless search was authorized and the fruits thereof must be suppressed.

9 (6) TOD ARMSTONG HAD COMMON AUTHORITY TO CONSENT TO A SEARCH
10 IN THE DONTÉ JOHNSON BEDROOM

11 For its final argument, the State submits, arguendo, that if the proper caselaw is applied
12 and Donte Johnson is deemed by this Court that Donte was a co-tenant, that Tod Armstong's
13 position vitiates any reasonable expectation of privacy that Donte Johnson can invoke under the
14 Fourth Amendment. (Supp. P & A, pp. 9). Defendant vehemently disagrees.

15 The State cites the Supreme Court case of U.S. v. Matlock, 415 U.S. 164 (1974). The
16 Defendant had already set forth the distinguishing characteristics of Matlock and its progeny in
17 its original Reply brief. The glaring distinction being that in Matlock, both the defendant and the
18 co-tenant were present when the warrantless search took place. Id. at 166. Defendant sets forth
19 that this is the cornerstone fact that the United States Supreme Court relied upon in evaluating
20 the "reasonableness" of the expectation of privacy of a co-tenant. As the State correctly points
21 out, the Court has conducted a sort of "assumption of the risk" analysis. That assumption is
22 premised on the fact that "any of the co-inhabitants has the right to permit the inspection in his
23 own right and that the others have assumed the risk that one of their number might permit the
24 *common* area to be searched." Id. at 172. Another way to look at the situation is if the police
25 have the ability to walk in the shoes of the party giving consent, how far can the police go
26 without violating the Fourth Amendment. A good comparison would be the plain view doctrine
27 where it is generally held that if the police have a right to be where they are – was the seized
28 evidence within plain view. See generally, United States v. Hersh, 464 F.2d 228 (9th Cir.

1 1972)(plain view analysis).

2 If this Court looks at the Donte Johnson matter in terms of what did Tod Armstrong
3 actually have to consent to at 3 a.m., it will clearly rule in favor of Donte Johnson.

4 First, Tod Armstrong was not even present. Thus, Donte Johnson could not have assumed
5 that Tod Armstrong could have even come into his room.

6 Second, say Tod Armstrong was home at 3 a.m. He certainly could have given authority
7 to search the common areas, but what about the room where Donte and Charla were sleeping.
8 Would Tod Armstrong have gone directly into that room at 3 a.m. or would he have knocked first?
9 Is there a likelihood that the door would have been locked since Donte was in there with Charla?
10 Would Tod have been able to enter the room and go through Donte and Charla's effects, or as
11 Charla stated would she have protested. (See Trans. 01/06/00, page 87, lines 14-24).

12 Thus even if the State had provided authority that a *non-present* co-tenant could give
13 authority to search the bedroom of a present co-tenant (which they have not), it is unlikely that
14 Tod Armstrong's authority based on the evidence developed at the hearing provides sufficiency
15 for a finding that he had the actual authority to have his shoes in that bedroom in a place where
16 the police would be able to find the questioned pants. As such, suppression is mandated.

17 (7) POLICE CONDUCT – As stated in the original Reply, the easiest thing in the world for
18 the police to have done in the night at subject was to get a telephonic search warrant. The State
19 has opted to not address this issue in their Supplemental P & A. All parties have to agree,
20 however, that special protections are afforded to a person in the place where they live and that
21 has been the cornerstone of Fourth Amendment law since its inception. The law makes no
22 distinction in its remedy for the violation of this right between innocent citizens and the worst
23 offenders in the community, the law of suppression applies equally to all.

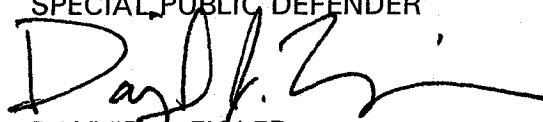
24 It is clear that suspect Tod Armstrong did not provide the police with the full circumstances
25 of Donte Johnson staying at his house for about a month. Most likely the reason is because Tod
26 Armstrong was involved with the drugs and the murder as pointed out by the prosecutors in the
27 co-defendant's trials. There is no authority for the proposition that the police can close their eyes
28 to the obvious facts of residence. They had no information that Donte was doing anything but

1 living in that residence at the time of their warrantless search. The part that must be most
2 frustrating for the State is that there were so many available means for the Police to attempt to
3 cure what has become an unlawful search. A neutral magistrate may very well have granted a
4 warrant. A fully informed and Mirandized Donte Johnson may or may not have given consent to
5 a specific search of his bedroom. However, none of the proper protections were afforded when
6 the Police entered that bedroom without a warrant. As loud as the State may protest the impact
7 of the loss, the one and only remedy in the present case is clear. The black jeans and all other
8 items found in that bedroom, must be suppressed.

9 Dated this 29 day of March, 2000.

10 Respectfully submitted,

11 PHILIP J. KOHN
12 SPECIAL PUBLIC DEFENDER

13 

14 DAYVID J. FIGLER
15 Deputy Special Public Defender
16 Nevada Bar No. 4264
17 309 S. Third Street, Fourth Floor
18 Las Vegas, Nevada 89155
19 (702) 455-6265
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ORIGINAL

EX. 7

FILED

APR 18 2 24 PM '00

Shirley E. Pangione
CLERK

DECS

JUDGE JEFFREY D. SOBEL
District Court Dept. V
200 South Third Street
Las Vegas, Nevada 89155
(702) 455-4655

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

Case No. C153154

Dept No. V

Docket No. H

DECISION AND ORDER

Defendant has moved to suppress evidence seized by police in a warrantless search of premises at 4815 Everman in August 1996.

The residence was owned by Todd Armstrong's mother and primarily but not exclusively occupied by Todd (Transcript of Hearing pp8-10; hereinafter "T"). The resolution of whether movant, Donte Johnson, was a person with an expectation of privacy with respect to the living room and master bedroom at Everman is dispositive of this motion.

Todd consented to the search in writing. T pp42-43. Johnson

1 had apparently spent parts of at least two to four weeks
2 immediately preceding the search, visiting and sometimes sleeping
3 at Everman. Compare T p84 with 103. Sometimes Johnson would sleep
4 in the master bedroom, sometimes on a couch. T p84, 87. Usually
5 the bedroom was a place other people would come in and out of;
6 several people had clothes in it. T p92.

8 Todd had the only key to Everman and Johnson and his
9 girlfriend would usually gain entry through a rear window. T
10 pp12;58;94;104.

12 No rent was paid by Johnson for his contact with Everman,
13 though he may have contributed drugs directly for the privilege of
14 using Everman as a place to chill and sleep. T p89.

16 When asked immediately prior to the search whether he lived
17 at Everman, he told two police detectives, unequivocally, that he
18 did not live at Everman. T p6;p65 Johnson appears not to recall
19 that question being posed, though he did not deny it could have
20 been. T p102.

22 The detectives testified if Johnson claimed to reside there
23 they would have gotten a search warrant for the already secured
24 premises. T pp19; 64.

26 If the law required a warrant to search premises where police
27 have consent to search from the only permanent resident; in

1 circumstances where the person now insisting on such a warrant was
2 first asserting his expectation of privacy in a motion to
3 suppress, after having denied living there when asked before the
4 search, and with reference to premises where that person usually
5 climbed in a window, over a very short period of time, paid no
6 rent (only occasionally contributing drugs) it would be a very
7 peculiar law.
8

9 I think Johnson's contacts with Everman are on the extreme
10 low end of a continuum one could construct. Surely, given the
11 passage of time and the different facts that time might have
12 brought, Johnson might have eventually moved along the continuum
13 to a point where he was a legitimate co-tenant (perhaps with a
14 key of his own). Those facts were not present here on August 18,
15 1998.
16

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1 Where the facts are as I find them, and Todd Armstrong
2 consents to a search of premises Johnson disclaims an interest in,
3 the police acted properly and the Motion to Suppress should be and
4 is denied. See United States v. Matlock, 415 US 164 (1974);
5 United States v. Sanders, 130 F3d 1316 (8th Cir.1998); United States
6 v. Mangum, 100 F3d 164 (CADC Cir. 1996); People v. Welch, 20 Cal
7 4th 701, 976 P2d 754 (1999); Snyder v. State, 103 Nev 275, 738 P2d
8 1303 (1997).
9

10 DATED and DONE this 18th day of April, 2000.
11

12 
13 _____
14 DISTRICT COURT JUDGE JEFFREY D. SOBEL
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28

1 RECEIPT OF A COPY of the foregoing Petition for Writ of
2 Prohibition is hereby acknowledged this 9th day of May, 2000.

3 JEFFREY R. SOBEL
4 DISTRICT COURT JUDGE, DEPARTMENT V

5 By Elena Pizarro
6

7
8
9 RECEIPT OF A COPY of the foregoing Writ of Prohibition is
10 hereby acknowledged this 9th day of May, 2000.

11 STEWART L. BELL
12 CLARK COUNTY DISTRICT ATTORNEY

13 By Adrian Mulkey
14
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● ORIGINAL ●

IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILIP J. KOHN,
CLARK COUNTY SPECIAL PUBLIC DEFENDER

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, COUNTY OF
CLARK, THE HONORABLE JEFFREY R.
SOBEL, DISTRICT COURT JUDGE,

Respondent.

DONTE JOHNSON aka JOHN WHITE,

Real Party in Interest.

Case No. **36093**
(Dist. Ct. No. C153154)

FILED

MAY 10 2000

BY *J. Smith*
JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

PETITION FOR WRIT OF MANDAMUS

COMES NOW the Petitioner, PHILIP J. KOHN, Clark County
Special Public Defender, by and through JOSEPH S. SCISCENTO and DAYVID
J. FIGLER, Deputy Special Public Defenders, and pursuant to NRS 34.320
et. seq., respectfully petitions this Court for a Writ of Mandamus
to direct the respondent District Court to dismiss the indictment or
in the alternative to hold an evidentiary hearing.

This Petition is based upon the Memorandum of Points and
Authorities and portions of the record relevant to the determination

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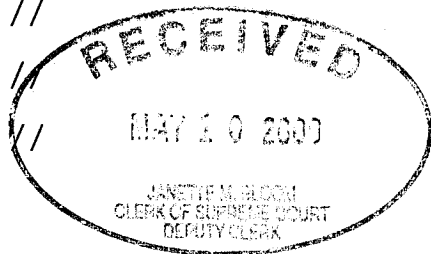
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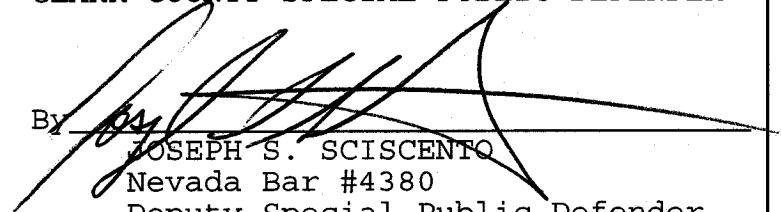
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1 of this Petition and any argument should this Honorable Court order
2 a hearing on this matter.

3 DATED this 9th day of May, 2000.

4 PHILIP J. KOHN
5 CLARK COUNTY SPECIAL PUBLIC DEFENDER

6
7 By  JOSEPH S. SCISCENTO
8 Nevada Bar #4380
9 Deputy Special Public Defender
309 South Third Street, 4th Floor
Las Vegas, Nevada 89155-2316
10 (702) 455-6265

11 VERIFICATION

12 STATE OF NEVADA)
) ss
13 COUNTY OF CLARK)

14 The undersigned being duly sworn, deposes and states as
15 follows:

16 1. That he is a duly licensed Attorney for the State of
17 Nevada, County of Clark;

18 2. That he represents the Defendant DONTE JOHNSON;

19 3. That MR. JOHNSON, has authorized and directed Mr.
20 SCISCENTO, to file the foregoing Writ of Prohibition;

21 4. That Mr. SCISCENTO, has read the foregoing Writ of
22 Mandamus and knows the contents therein and as to those matters they
23 are true and correct and as to those matters based on information and
24 belief he is informed and believes them to be true;

25 5. That Mr. JOHNSON has no other remedy at law available
26 to him and that the only means to address this problem is through this
27 Writ;

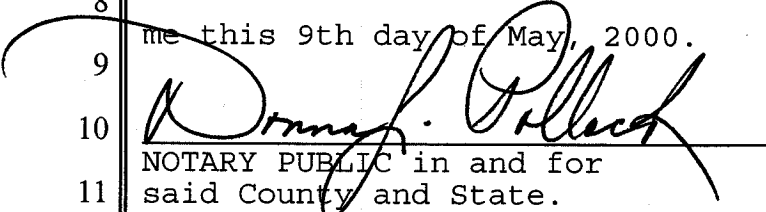
28 6. That Mr. SCISCENTO signs this Verification on behalf

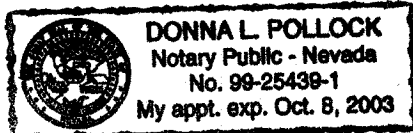
1 of MR. JOHNSON, under his direction and authorization and further that
2 MR. JOHNSON is currently in custody of the authorities of the CLARK
3 COUNTY DETENTION CENTER.

4 FURTHER YOUR AFFIANT SAITH NAUGHT

5
6 
JOSEPH S. SCISCENTO

7
8 SUBSCRIBED AND SWORN to before
9 me this 9th day of May, 2000.

10 
11 NOTARY PUBLIC in and for
said County and State.



13 POINTS AND AUTHORITIES

14 I.

15 STATEMENT OF THE ISSUES

16 1. Whether the District Court erred in Denying the
17 Defendants Motion to Suppress Evidence.

18 II.

19 STATEMENT OF FACTS AND PROCEDURAL HISTORY

20 Mr. Johnson is being charged by way of Indictment with the
21 following charges of; Murder, Robbery and Burglary. The alleged
crimes took place on August 13, 1998.

22 On or about August 17, 1998, Detective Buzack and Detective
23 Thowsen, interviewed Todd Armstrong and Ace Hart, in regards to the
24 crimes that occurred at the Terra Linda residence. The Detectives
25 were informed by both Ace Hart and Todd Armstrong, that Donte Johnson
26 stayed at the Everman residence, the same residence where Todd
27 Armstrong resided.

28 Both Ace and Todd gave information to the Detectives that

1 implicated Donte Johnson in the crimes that occurred at the Terra
2 Linda residence. Further the Detectives were given information that
3 there were weapons which may have been used in the crimes, still
4 located at the Everman house, and that these weapons might be found
5 in the bedroom of Donte Johnson.

6 On or about 18th day of August 1998, the police, pursuant
7 to a consent to search card signed by Todd Armstrong, searched the
8 residences located at 4815 Everman. The Police learned from Tod
9 Armstrong that the residence was owned by his mother and that Todd was
10 a co-tenant with Donte Johnson of the residence.

11 When the Police arrived at the residence they requested that
12 the occupants of the residence remove themselves from the residence.
13 Charla Severs was the first to exit the residence, and she was
14 immediately placed in handcuffs. Subsequently Dwain Anderson and
15 Donte Johnson exited from the residence and they were immediately
16 placed in handcuffs. The police, pursuant to the consent to search,
17 searched the Everman residence. At the residence the police located
18 a pair of black jeans, which appeared to have blood on them.

19 The black jeans with the alleged blood splatters were
20 located in the master bedroom located in the southwest area of the
21 house. This is the bedroom that Donte Johnson resided in.

22 Mr. Johnson was residing in the Southwest bedroom for a few
23 weeks prior to the search of the residence. At no time did Mr.
24 Johnson give any consent to have the bedroom searched.

25 On or about December 3, 1999, the Defendant filed a Motion to
26 Suppress the black jeans that were siezed. **SEE** a copy of the Motion
27 attached hereto as Exhibit "1" and incorporated by reference. On
28 January 6, 2000, an evidentiary hearing was held regarding the Mr.

1 Johnson's Motion to Suppress. **SEE** a copy of the hearing Transcript
2 attached hereto as Exhibit "2" and incorporated by reference.

3 On January 21, 2000, the State filed an Opposition to
4 Defendants Motion to Suppress. **SEE** a copy of the opposition attached
5 hereto as Exhibit "3" and incorporated by reference.

6 On February 16, 2000, Mr. Johnson, by and through his
7 attorneys filed a Reply to States Opposition. **SEE** a copy of the Reply
8 attached hereto as Exhibit "4" and incorporated by reference.

9 The District Court ordered that the State file additional
10 points and authorities on this issue, and on March 16, 2000, the State
11 filed additional points and authorities, **SEE** a copy attached hereto
12 as Exhibit "5" and incorporated by reference.

13 On March 30, 2000, Mr. Johnson filed a supplemental reply,
14 **SEE** a copy attached hereto as Exhibit "6" and incorporated by
15 reference.

16 On April 18, 2000, the District Court issued a written
17 decision and order, denying Mr. Johnson's Motion to Suppress, **SEE** a
18 copy attached hereto as Exhibit "7" and incorporated by reference.

19 A trial date has been set for June 5, 2000 on this case.

20 Donte Johnson, is currently being represented by the Clark
21 County Special Public Defenders Office, and is in custody on the above
22 charges.

23 **III.**

24 **ARGUMENT**

25 A. **MANDAMUS IS THE APPROPRIATE REMEDY FOLLOWING THE**
26 **DISTRICT COURT'S DENIAL OF THE DEFENDANTS MOTION**
TO DISMISS.

27 A writ is proper when there is not plain, speedy and
28 adequate remedy in ordinary course of law. **NRS 34.170.** While in most

1 cases a denial by a District Court judge of a motion must be appealed
2 after conviction, a Defendant can file a Writ when substantial injury
3 will occur.

4 The mere fact that other relief may be available
5 does not necessarily preclude the remedy of
6 mandamus. Armstrong v. State of Board Examiners,
78 Nev. 495, 376 P.2d 492.

7 Further this Court has held where the expense of trial can
8 be prevented a writ can be issued.

9 In Bowler v. Vannoy, 67 Nev. 80, 215 P.2d 248
10 although petitioners could have sought relief in
11 a replevin action, this court granted them relief
12 by mandamus, because otherwise "expensive and
13 prolonged litigation would probably have
14 resulted. Dzack v. Marshall, 80 Nev. 345 393
15 P.2d 610.

16 In the case at Bar, Mr. Johnson should have been granted the
17 Motion to Suppress the evidence. If Mr. Johnson must wait until the
18 time after trial, and this Court reviews the motion and orders that
19 the black pants should have been suppressed, then this Court will
20 order a new trial for Mr. Johnson, and additional expense and time
21 will be unnecessarily incurred.

22 A writ of mandamus is available to compel the
23 performance of an act which the law requires as
24 a duty resulting from an office, trust or
25 station, NRS 34.160, or to control an arbitrary
26 or capricious exercise of discretion. Round Hill
27 Gem. Imp. Dist v. Newman 97 Nev. 601, 637 P.2d
28 534 (1981).

1. The Defendant is entitled to suppress
the evidence because the police
violated his fourth amendment right
against unlawful search and seizure.

The Defendant filed three (3) briefs explaining his position
regarding the legality of the search. As not to belabour the issue
the Defendant will outline the issue here.

1 Donte Johnson was living at the residence on Everman for a
2 period of three weeks, prior to the warrentless search of the
3 residence. Charla Severs testified that Donte stayed at the residence
4 for 14 days prior to the execution of the search. SEE Pg 88 of
5 Exhibit "2". Todd Armstrong was residing at the Everman residence,
6 and his mother owned the residence. On August 18, 1998, Detectives
7 Thowsen and Detective Buzack spoke with Todd Armstrong, and gathered
8 information that Donte may be involved with the crimes alleged. Todd
9 gave permission for the Police to search the Everman residence. At
10 4:00 a.m. on the 18th, Metropolitan Police - S.W.A.T. converged on the
11 Everman residence, and inside in the Master bedroom Donte was
12 sleeping. The police had all occupants leave the house. The police
13 never asked Donte for permission to search the residence. The police
14 never had a search warrant to search the residence. The fact is that
15 Donte Johnson was residing at the residence at Everman and had an
16 expectation of privacy. The police should have secured a search
17 warrant prior to the unlawful search.

18 Donte Johnson had the expectation of privacy as to the
19 bedroom. The United States Supreme Court has held that an overnight
20 guest has an expectation of privacy.

21 We need go no further than to conclude, as we do,
22 that Olson's status as an overnight guest is
23 alone enough to show that he had an expectation
24 of privacy in the home that society is prepared
25 to recognize as reasonable. Minnosota v. Olson
26 at 495 U.S. 96 at 101

27 If the Supreme Court has determined that an overnought guest
28 has an expectation of privacy, then surly a person who has been
residing in a residence for over 14 days should also have an
expectation of privacy. Especially a person who was providing a

1 compensation for the rent. **SEE**, Exhibit "2" Page 85 Lines 13-15.

2 In the case at bar, Donte Johnson was more than an overnight
3 guest. He spent over 14 days at the residence.

4 **CONCLUSION**

5 The District Court failed to Suppress the Evidence that was
6 located at the Everman residence. Case law specifically holds that
7 Donte Johnson had an expectation of privacy and the Police violated
8 his consitutional rights when they failed to get a seacrh warrant.

9 **WHEREFORE** the Defendant Donte Johnson is requesting that
10 this Court order that the District Court suppress the evidence located
11 in the bedroom at the Everman residence, especially the black jeans.

12 Respectfully submitted,

13 PHILIP J. KOHN
14 CLARK COUNTY SPECIAL PUBLIC DEFENDER

15
16 By 

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Ex. 1

FILED

DEC 3 3 30 PM '99

Shirley S. Maguire
CLERK

0001
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Deputy Special Public Defender
Nevada Bar No: 4380
DAYVID J. FIGLER
Deputy Special Public Defender
Nevada Bar No: 4264
309 South Third Street, Fourth Floor
Las Vegas, NV. 89155-2316
Attorney for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

v.

DONTE JOHNSON, aka
John White, ID No. 1586283,
Defendant.

CASE NO: C153154
DEPT NO: V

MOTION AND NOTICE OF MOTION TO SUPPRESS
EVIDENCE ILLEGALLY SEIZED

Date of Hearing: December 27, 1999
Time of Hearing: 9:00 a.m.

COMES NOW, the Defendant, DONTE JOHNSON, aka John White, by and through his counsel of record PHILIP J. KOHN, Special Public Defender, JOSEPH S. SCISCENTO, Deputy Special Public Defender and DAYVID J. FIGLER. Deputy Special Public Defender, and moves this Court for an Order suppressing all evidence recovered from the bedroom at the Everman residence. This Motion is based upon the attached Memorandum of

...


...



1 Points and Authorities, the file herein, and any argument that this court may hear in
2 support of this Motion.

3 Dated this 3rd day of December, 1999.

4 PHILIP J. KOHN
5 SPECIAL PUBLIC DEFENDER

6
7 
8 JOSEPH S. SCISCENTO
9 Deputy Special Public Defender
10 Nevada Bar No. 004380
11 309 S. Third Street, Fourth Floor
12 Las Vegas, Nevada 89101
13 (702) 455-6265

14 **NOTICE OF MOTION**


15 TO: STATE OF NEVADA, Plaintiff; and

16 TO: STEWART L. BELL, District Attorney, Attorney for Plaintiff

17 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and
18 foregoing **MOTION AND NOTICE OF MOTION TO SUPPRESS EVIDENCE ILLEGALLY**
19 **SEIZED** on the 27th day of December, 1999, at the hour of 9:00 a.m., in Department No.
20 **V** of the above-entitled Court, or as soon thereafter as counsel may be heard.

21 DATED this 3rd day of December, 1999.

22 PHILIP J. KOHN
23 SPECIAL PUBLIC DEFENDER

24 
25 JOSEPH S. SCISCENTO
26 Deputy Special Public Defender
27 Nevada Bar No. 004380
28 309 S. Third Street, Fourth Floor
Las Vegas, Nevada 89101
(702) 455-6265

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1 located in the bedroom located in the southwest area of the house. This is the bedroom
2 that Donte Johnson used, but not Todd Armstrong.

3 Mr. Johnson was residing in the southwest bedroom for a few weeks prior to the
4 search of the residence. At no time did Mr. Johnson give any consent to have the
5 bedroom searched.

6 LEGAL ARGUMENT

7 THE POLICE VIOLATED MR. JOHNSON'S FOURTH AMENDMENT RIGHT TO PRIVACY

8 The United States Constitution Fourth Amendment states as follows:

9 "The right of the people to be secure in their persons, houses, papers and
10 effects, against unreasonable searches and seizures, shall not be violated
...".

11 A search of a persons effects without a warrant is generally "per se unreasonable"
12 under the Fourth amendment of the United States, Katz v. U.S., 389 U.S. 347 (1967).

13 An exception to the warrantless search is consent by a person with authority.
14 Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

15 1. A third-party's consent to search must be shown to have actual authority to
16 search the residence.

17 In order for a third-party to give consent to search a place in the residence the third-
18 party must have authority to allow the police to search the place being searched. In other
19 words the place being searched must be one that the third-party has consent to be in and
20 the defendant does not have an expectation to privacy as to that place.

21 A roommate of a residence does not have the authority to allow a search of a
22 bedroom in which another person is residing in.

23 When a third-party consents to a search of the defendant's property, the
24 consenting party must have joint access or control over the property for most purposes,
25 so that the third party can consent to the search in his own right. U.S. v. Matlock 415
26 U.S. 164 (1974).

27 In Matlock, the Supreme Court declared

28 "that common authority is not to be implied from mere property interest a

1 third-party has in the property, for the authority which justifies the third-
2 party consent does not rest upon the law of property, but rather on mutual
3 use of the property by persons generally having joint access or control for
4 most purposes so that it is reasonable to recognize that any of the co-
habitants has the right to permit the inspection in his own right and that the
others have assumed the risk that one of their number might permit the
common area to be searched." Matlock.

5 In the case of United States v. Duran, 957 F.2d 499 (7th Cir. 1992) the Court of
6 Appeals held:

7 "[I]t would be incorrect to treat spouses ... the same as any two individuals
8 sharing living quarters. Two friends inhabiting a two-bedroom apartment
9 might reasonably expect to maintain exclusive access to their respective
bedrooms, without explicitly making this expectation clear to one another.
... In the context of a more intimate marital relationship, the burden upon the
government [to prove common authority] should be lighter. U.S. v. Duran

10
11 Relationships involving roommates or cotenant generally receive more protection
12 than those involving intimate relationships like husband and wife and child parents.

13 In State v. Hacker 209 SE2d 569, (1974), the court held that an individual who
14 was presumably the landlord of the defendant, who had consented to the warrantless
15 search of the accused's bedroom in a house, was shown not to have common authority
16 over the bedroom searched and therefore could not properly consent to a search.

17 In State v. Warfield, 198 NW 854 (1924), the Court held that a warrantless search
18 of the accused's room in a rooming house and the seizure of a flashlight, reflector,
19 clothing, jewelry, and other articles of personal property were held to be invalid and the
20 evidence therefore inadmissible in a prosecution for burglary where the only authority the
21 officers had for searching the room was the rooming housekeepers consent. In State v.
22 Tucker, 574 P.2d 1295 (Ar. 1978), the Court held that a warrantless search was invalid
23 and the evidence seized therefore inadmissible at the Defendant's prosecution for murder,
24 where the accused had exclusive possession of the bedroom and the sole authority. The
25 police had to conduct the search emanated from the consent of the accused's cotenant.

26 In Tucker the Court recognized that the bedroom was used as a sleeping quarter
27 and a storage room by the accused; there was no evidence that it was used for any other
28 purposes. As such, the court related, even though the consenting cotenant was a co-

1 owner of the house, it could not be held that she had joint access or control within the
2 meaning of Matlock.

3 In the case of State v. Matias, 451 P.2d 257 (1969) the Court held that a
4 warrantless search of the bedroom of an overnight guest consented to by the tenant of
5 the premises, was invalid, and the consent of the tenant operated only to waive the
6 tenant's own right to protection from an unreasonable search and seizure.

7 In the case of People v. Douglas, 213 N.W.2d 291 (1973), the court held that a
8 confession was invalid when the confession was based upon illegally seized evidence
9 when the police searched a bedroom of a co-tenant based on the consent to search of the
10 co-tenant.

11 In the case at bar the police, upon the consent of Todd Armstrong, searched the
12 area of the bedroom where Donte Johnson resided. Mr. Armstrong did not have the
13 authority to allow a search of the bedroom and as a result the search violated Mr.
14 Johnson's right to privacy.

15 As a non-related co-tenant, Mr. Johnson had an expectation of privacy as to the
16 bedroom in which he resided.

17 CONCLUSION

18 Mr. Johnson, as a resident and co-tenant of the Everman house has an expectation
19 of privacy, as to the most secure place, that is his home and more specifically his
20 bedroom. The essence of the right of free people is to be secured in their homes. This
21 right is secured in the Fourth Amendment of the United States of America. This Fourth
22 Amendment right is one of the original ten Bill of Rights. A home may be no more than
23 a shack to one person but it is his home nonetheless. Mr. Johnson lived at Everman
24 address and considered his bedroom a sacred place and had the same expectation of
25 privacy as any other person.


26 The police violated Defendant Johnson's rights, when they relied upon the consent
27 of a co-tenant of the house who did not have the right to consent inasmuch as Mr.
28 Armstrong did not share Mr. Johnson's bedroom. Further, the police had an opportunity

1 to secure a search warrant yet they failed to do so. More easily they could have
2 requested consent from Mr. Johnson to search his bedroom.

3 For these above reasons Mr. Johnson requests that this Honorable Court suppress
4 all evidence seized from the bedroom at the Everman residence.

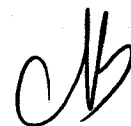
5 Dated this 3rd day of December, 1999.

6 PHILIP J. KOHN
7 SPECIAL PUBLIC DEFENDER

8
9 
10 JOSEPH S. SCISCENTO
11 Deputy Special Public Defender
12 Nevada Bar No. 004380
13 309 S. Third Street, Fourth Floor
14 Las Vegas, Nevada 89101
15 (702) 455-6265

16 RECEIPT OF COPY

17 RECEIPT OF COPY of the foregoing MOTION AND NOTICE OF MOTION TO
18 SUPPRESS EVIDENCE ILLEGALLY SEIZED is hereby acknowledged this 3 day of
19 December, 1999.

20
21 
22 STEWART L. BELL
23 District Attorney
24 200 S. Third Street
25 Las Vegas, NV 89101
26 Attorney for Plaintiff
27
28

EX. 2

TRAN

FILED

JAN 13 4 23 PM '00

DISTRICT COURT

CLARK COUNTY, NEVADA
CLERK

THE STATE OF NEVADA,)

Plaintiff,)

vs.)

DONTE JOHNSON, aka)
JOHN LEE WHITE,)

Defendant.)

CASE NO. C153154

DEPT. NO. V

BEFORE THE HONORABLE JEFFREY D. SOBEL, DISTRICT JUDGE

THURSDAY, JANUARY 6, 2000

RECORDER'S TRANSCRIPT RE:
DEFENDANT'S MOTIONS

APPEARANCES:

For the State:

ROBERT DASKAS, ESQ.
Deputy District Attorney

GARY GUYMON, ESQ.
Deputy District Attorney

For the Defendant:

DAYVID FIGLER, ESQ.
Special Public Defender

JOSEPH SCISCENTO, ESQ.

Recorded by: DEBRA VAN BLARICOM
Court Transcriber

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I N D E X
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W I T N E S S E S

**State's
Witnesses**

	Direct	Cross	Redirect	Recross
THOWSEN, Thomas	5	18	41	50
HEFNER, Ken	50	71	78	79

**Defendant's
Witnesses**

	Direct	Cross	Redirect	Recross
SEVERS, Charolette	82	88	96	--
JOHNSON, Donte	101	103	--	--

1 THE COURT: It'll be invoked. The exclusionary rule is in effect.

2 MR. SCISCENTO: And then also, your Honor, let also put a objection
3 on, a continuing objection as to hearsay as to the statement of Tod
4 Armstrong, BJ Hart and -- BJ Armstrong and Ace Hart. I understand that
5 they are going to rely upon the statements. I object as to the truth of the
6 matters of those statements. I understand that it goes to the knowledge
7 that the detectives had at the time that they interviewed him. I would allow
8 the statements to come in under that but as to the truth of the matter, I'm
9 objecting to that.

10 THE COURT: What are the statements? What would they say?

11 MR. SCISCENTO: Well, the statements would be whether or not
12 Johnson, Mr. Johnson lived there, whether or not he paid rent, whether or
13 not he had guns in there or things to that matter.

14 But what I'm objecting to is whether or not it's truthful, the
15 truthfulness of it? I understand that we have to show whether they had
16 knowledge and I'm asking, not that it be a truthful statement, we're
17 objecting that -- the truth of the matter, but understand it goes towards the
18 detective's knowledge at the time that they did the search.

19 THE COURT: Right. Okay. Call your first witness.

20 MR. DASKAS: State calls Detective Tom Thowsen.

21 **THOMAS THOWSEN**

22 having been called as a witness by the State, being first duly sworn, testified
23 as follows:

24 THE CLERK: Please state your name and spell your last name for the
25

1 record.

2 THE WITNESS: Thomas D. Thowsen, T-h-o-w-s-e-n.

3 MR. DASKAS: May I proceed, Judge?

4 THE COURT: Sure.

5 MR. DASKAS: Thank you, Judge.

6 **DIRECT EXAMINATION**

7 **BY MR. DASKAS:**

8 Q Mr. Thowsen, you're employed by the Las Vegas Metropolitan
9 Police Department, is that correct?

10 A Yes, sir, that's correct.

11 Q What's your job title?

12 A I'm a homicide detective.

13 Q How long have you been a homicide detective with Metro?

14 A Approximately eight years.

15 Q And how many years in total have you been employed by the
16 Metropolitan Police Department here in Las Vegas?

17 A Approximately 22 ½ years.

18 Q Prior to becoming a homicide detective eight years ago what
19 was your assignment with Metro?

20 A I was a robbery detective.

21 Q Let me direct your attention to the 14th day of August, 1998,
22 did you become involved in a homicide investigation that occurred at a
23 residence on 4825 Terra Linda here in Las Vegas, Clark County, Nevada?

24 A Yes, I did.

1 Q At some point did your investigation lead you to another address
2 at 4815 Everman here in Las Vegas, Clark County, Nevada?

3 A Yes, it did.

4 Q And what information, briefly, did you learn that led you to the
5 Everman residence since the homicide occurred at Terra Linda?

6 A I learned that there was an individual named Tod Armstrong that
7 lived at that location and that Mr. Armstrong had some knowledge of the
8 homicide and who the suspects were and where they could be located.

9 Q Do you recall the date on which you responded to that Everman
10 address at 4815 Everman?

11 A That would have been on the 18th.

12 Q Do you recall what time that was?

13 A I believe it was around 3:00 in the morning.

14 Q Okay. So, sometime around 3:00 a.m. on August 18th of '98
15 you respond to the Everman household?

16 A Yes.

17 Q And the information you had learned up to that point was that
18 Tod Armstrong lived in the Everman household?

19 A Yes.

20 Q Who had you spoken to prior to the 18th that led you to that
21 belief that Tod Armstrong lived at Everman?

22 A Tod Armstrong, Ace Hart and Bryan Johnson.

23 Q Did all three of those individuals tell you consistent information
24 about who lived at the Everman address?
25

1 MR. DASKAS: Judge, would the reflect the witness has identified the
2 defendant?

3 THE COURT: Yes.

4 MR. DASKAS: Thank you, Judge.

5 You mentioned that you actually spoke personally with Tod
6 Armstrong prior to August 18th, was anybody else present during that
7 conversation?

8 THE WITNESS: Yes.

9 Q (By Mr. Daskas) Who else was present?

10 A Detective Buczek.

11 Q And where did that conversation with Tod Armstrong take
12 place?

13 A At the Las Vegas Metropolitan Homicide office located on West
14 Charleston.

15 Q And did you specifically ask Tod Armstrong questions about
16 who owned the Everman residence?

17 A Yes.

18 Q Do you recall Tod Armstrong's responses to those questions?

19 A Yes.

20 Q What was his response?

21 A Basically, it was that his mother owned the property. She lived
22 in Hawaii and that he lived there.

23 Q In other words, Tod told you that Tod's mother owned the
24 residence on Everman?

25

1 A That's correct.

2 Q And Tod told you that Tod, however, lived at the Everman
3 residence?

4 A Yes.

5 Q Do you recall the name of Tod Armstrong's mother?

6 A Not off the top of my head.

7 Q Okay. Did you ask Tod Armstrong about whether he had a key
8 to that residence on Everman?

9 A Yes.

10 Q And what his response?

11 A He said that he had the only key to the residence.

12 Q At some point did he either provide you or at least show you the
13 key to the household?

14 A Not me, personally, no.

15 Q Do you know if he chose somebody else or provided the key to
16 somebody else with Metro?

17 A Sergeant Hefner.

18 Q When you talked with Tod Armstrong did Donte Johnson's
19 name ever come up in that conversation?

20 A Yes, it did.

21 Q Did Tod Armstrong mention to you that Donte Johnson had any
22 relation or any nexus to that Everman household?

23 A He said that he would sometimes come over.

24 Q In other words, Tod told you that Donte Johnson would
25

1 sometimes come over to the Everman household?

2 A That's correct.

3 Q Did Tod ever tell you that Donte Johnson paid rent at the
4 Everman household?

5 A No, he did not.

6 Q And let me see if I can clarify that, I apologize. Did Tod tell you
7 that Donte did not pay rent or did Tod Armstrong not even mention whether
8 Donte paid rent?

9 A Yes. At some point in our conversation with Tod on that
10 evening we specifically asked him if Donte Johnson paid rent at that location
11 and he said that he did not pay rent.

12 Q Okay.

13 THE COURT: Mr. Daskas --

14 MR. DASKAS: Yes.

15 THE COURT: -- this is a case where we're having this hearing and then
16 you're going to file points and authorities. So I can follow it easier, I take it
17 the State's position, at least at this point, is going to involve standing, are
18 there other things?

19 MR. DASKAS: Actually, Judge, the argument is really twofold.
20 Number one, is that Tod Armstrong had common authority over the premises
21 at Everman and so --

22 THE COURT: So, it's going to be both consent and --

23 MR. DASKAS: Yes, Judge.

24 THE COURT: -- lack of standing?
25

1 MR. DASKAS: And, thirdly, Judge, and just as importantly as that
2 even if Tod Armstrong didn't have the actual authority, certainly they could
3 rely on his apparent authority to search that house.

4 THE COURT: Those are the three?

5 MR. DASKAS: Yes, Judge.

6 THE COURT: Okay. Go ahead.

7 MR. DASKAS: Thank you, Judge.

8 You mentioned that Tod Armstrong said he had the only key to
9 the residence, is that right?

10 THE WITNESS: That's right.

11 Q (By Mr. Daskas) Did Tod tell you how it was that Donte
12 Johnson would come into the residence since he did not have a key?

13 A There was a window that they would use.

14 MR. SCISCENTO: Your Honor, I'm going to object to this. I'd ask the
15 District Attorney to refer specifically to the statement that Tod Armstrong
16 gives, the date and time --

17 THE COURT: What would be the objection, though?

18 MR. SCISCENTO: My objection is I don't believe that Mr. -- unless he
19 can show me that Mr. or Detective Thowsen was present at the hearing,
20 there were numerous times that Mr. Armstrong was interviewed. There was
21 one time when Detective Hefner and Detective Buczek were present and I
22 think Detective Thowsen is referring to those statements and, if such, I don't
23 think he has personal knowledge as to that. If they can direct me as to
24 where this statement was and you can show me that in fact Detective
25

1 Thowsen was present when this was said. He's referring to the statements
2 that Tod Armstrong gives.

3 THE COURT: Whether it was told to him or whether he actually heard
4 it, isn't there always collective knowledge in research situations?

5 MR. SCISCENTO: Well, then I would ask him or I direct -- ask you to
6 direct the District Attorney to lay some foundation as to how he gained
7 knowledge of this?

8 THE COURT: Okay. Go ahead, Mr. Daskas.

9 MR. DASKAS: Thank you, Judge.

10 Detective, my question to you was you learned from Tod
11 Armstrong that Tod had the only key to the residence, is that correct?

12 THE WITNESS: That's correct.

13 Q (By Mr. Daskas) Did you, personally, speak with Tod or hear
14 Tod tell somebody else about how Donte Johnson could gain access to the
15 Everman house since Donte didn't have a key?

16 MR. SCISCENTO: I'm going to object it as leading.

17 THE COURT: Overruled.

18 THE WITNESS: Because I've talked to Tod several different times and
19 read several different statements numerous times over the past two years to
20 refresh my memory. To see exactly where it was I heard it, I'd have to look
21 at a report.

22 Q (By Mr. Daskas) And my question isn't tell me the date and the
23 time that he told you this statement, my question is did Tod tell you how it
24 was that Donte Johnson could gain access to the Everman household since
25

1 Donte did not have a key?

2 A Yes.

3 Q What did Tod tell you about that?

4 MR. SCISCENTO: Your Honor, I'm going to object to this then because
5 I don't think there is proper foundation, what we're focusing on is the
6 knowledge --

7 THE COURT: But that's the question that Bob asked him, if he can
8 answer it, he can answer it, and you can pursue it on cross-examination.

9 MR. SCISCENTO: What I'm saying, though, your Honor, is I don't
10 know if at the time of the 18th we have to know the knowledge that they
11 had.

12 THE COURT: Right.

13 MR. SCISCENTO: And if they were directed to get some foundation as
14 to whether he had knowledge on the 18th --

15 THE COURT: Oh, maybe it was brought and I didn't hear it. Okay.

16 Q (By Mr. Daskas) Okay. And let me be very clear about this,
17 detective. What we're talking about is information you had prior to entering
18 or searching the Everman household, what information you had prior to
19 August 18th at 3:30 in the morning, you understand that?

20 A Yes.

21 Q Okay. And the question I just asked you that you were about to
22 answer, was that information you had gathered from Tod Armstrong prior to
23 August 18th at 3:30 in the morning?

24 A Yes, it was.

25

1 Q And what information did Tod tell you about Donte's ability to
2 access the Everman household since Donte did not have a key to the house?

3 A That he would have to climb in a window.

4 Q All right. Did Tod tell you anything specifically about the
5 window that enabled Donte to climb through that window at the Everman
6 household?

7 A As I recall, it was a window that was not able to be secured.

8 Q All right. Did Tod Armstrong tell you anything about whether
9 Donte Johnson kept any of his personal belongings in the Everman
10 residence?

11 A I believe that he did.

12 Q And did you learn information from Tod Armstrong about what
13 room specifically Donte Johnson may have kept some of his belongings in
14 the Everman residence?

15 A As I recall there were two areas, a living room area and a master
16 bedroom area.

17 Q Did Tod Armstrong ever indicate to you that the door to the
18 master bedroom remained locked when Donte was not in the master
19 bedroom?

20 A Not that I recall, no.

21 Q You mentioned that yourself and Detective Buczek was present
22 when Tod Armstrong conveyed this information to you, is that accurate?

23 A Yes.

24 Q Did you then pass on the information you learned from Tod
25

1 about the Everman household to somebody else at Metro?

2 A Yes.

3 Q And to whom did you pass that information?

4 A My direct supervisor, Sergeant Ken Hefner.

5 Q And was that prior to, in other words did you pass on that
6 information to Sergeant Hefner prior to August 18th at 3:30 a.m.?

7 A Yes.

8 Q Did Tod Armstrong ever tell you any information that led you to
9 believe Donte Johnson lived at the Everman household on a permanent
10 basis?

11 A No.

12 Q Did Tod Armstrong ever tell you any information to lead you to
13 believe that Donte Johnson lived in the Everman household on a temporary
14 basis?

15 A Not that he lived there at all, that he would just show up
16 sometimes.

17 Q Okay. Did you then actually go to the Everman household on
18 August 18th sometime around 3:30 a.m.?

19 A Yes.

20 Q And you mentioned that you saw Donte Johnson outside that
21 residence?

22 A Yes.

23 Q Okay. Were you present when Sergeant Hefner questioned
24 Donte Johnson about his living arrangement at the Everman household?
25

1 A Yes, I was.

2 Q And where did that occur?

3 A That occurred on the curb just around the corner from the
4 Everman house.

5 Q And Donte Johnson wasn't outside I take it?

6 A He was outside sitting on a curb.

7 Q Was anybody else, other than yourself and Sergeant Hefner
8 present in that general area?

9 A Detective Buczek and there was a patrolman whom I don't
10 know who it was.

11 Q Okay. Was anybody else present that had been taken out of the
12 Everman residence?

13 A Yes.

14 Q Who?

15 A Dwain Anderson and Charolette Severs.

16 Q Now, what was it that Sergeant Hefner asked of Donte Johnson
17 or the other two individuals regarding their living arrangements at the
18 Everman household?

19 A He asked them specifically if they lived there.

20 Q And do you recall the response of Donte Johnson?

21 A Yes.

22 Q What was Donte Johnson's response to the question about
23 whether Donte Johnson lived in the Everman residence?

24 A He said that he did not.

25

1 Q And you, personally, heard Donte Johnson say that?

2 A Yes, I did.

3 Q Did Sergeant Hefner ask the other two individuals the same
4 question?

5 A Yes, he did.

6 Q And what was Charolette Severs' response to Sergeant Hefner's
7 question about whether she lived at the Everman residence?

8 A She said that she did not live there.

9 Q And what about the third individual, Dwain Anderson?

10 A Dwain Anderson said that he did not live there also.

11 MR. DASKAS: I'll pass the witness, Judge.

12 THE COURT: Thank you. Cross?

13 **CROSS-EXAMINATION**

14 **BY MR. SCISCENTO:**

15 Q Detective Thowsen, let me ask you, on the 18th at 3:00 in the
16 morning you went over to 4815 Everman house --

17 A Yes.

18 Q -- the residence over there? What was your purpose in going
19 over there?

20 A We had SWAT meet us over there to determine if anybody was
21 inside the residence in a safe manner.

22 Q Who did you expect to find over there?

23 A We expect to find Donte Johnson.

24 Q Did you expect to find some guns in there?

25

1 A Yes.

2 Q And you guys went over there with the specific purpose of

3 putting Mr. Johnson in custody and searching the house?

4 A At least interviewing him at that point, yes.

5 Q And searching the house, is that correct?

6 A Yes.

7 Q And you had a consent to search by Tod Armstrong?

8 A That's correct.

9 Q Okay. So, with -- your purpose of going over there was, in fact,

10 to search the house, correct?

11 A That's correct.

12 Q And if Donte Johnson would have told you at that point that he

13 owned the house would you have stopped, or that he lived in the house and

14 had a expectation of privacy as to the bedroom, would you have stopped the

15 search?

16 A Absolutely.

17 Q Absolutely? With all those people over there you had no -- you

18 would have just stopped the search at that point?

19 A Yes.

20 Q Okay. Mr. Johnson was placed in handcuffs, is that correct?

21 A In flex cuffs, originally, yes.

22 Q And he was out on the curb?

23 A That's correct.

24 Q And during this time there were other people from the

25

1 Metropolitan Police Department which were inside the house, is that correct?

2 A That's correct. SWAT was going through the house to make
3 sure there were no other persons inside.

4 Q So, in fact, they were in the house searching already?

5 A No, they were not. They were making sure that the house was
6 clear and safe.

7 Q Well, they were searching for people, right?

8 A For safety reasons only, not searching for evidence.

9 Q You were present when Ace Hart was interviewed, is that
10 correct?

11 A Yes.

12 Q And that was on 8/17 and 1825 hours, is that correct?

13 A There were several different times that I spoke to him, there
14 was I think an earlier time that Sergeant Hefner was with Detective Buczek,
15 so I believe at that time, yes, I was present.

16 Q Okay. And that was probably six or seven hours prior to you
17 going over to the Everman residence, correct?

18 A That's correct.

19 Q And at that time do you remember making a statement or -- you
20 or Detective Buczek making a statement to Ace Hart which said: Okay.
21 Um, did there come a time when you met some people that eventually
22 moved into the house with you? Remember making that statement?

23 A I didn't believe I made that; or, I believe, Detective Buczek may
24 have asked that question.

25

1 Q Were you present when that statement was made?
2 A Yes.
3 Q And you heard the response?
4 A Yes.
5 Q And the response by Ace Hart was? Do you recall what the
6 response was?
7 A Not word for word --
8 Q Okay.
9 A -- without looking at.
10 Q If I may approach, your Honor. If I may -- thank you. Let me
11 just show you (indicating).
12 A The response is: Yeah.
13 Q Okay. So, the question that you asked or Detective Buczek
14 was: Okay. Um, did there come a time when you, you met some people
15 that eventually moved into the house with you? And Ace Hart's response
16 was: Yeah.
17 A That's correct.
18 Q And the house that you were speaking of was 4815 Everman --
19 A That's correct.
20 Q -- is that correct?
21 A Yes.
22 Q Further, on page 5 of that same statement there was a
23 question: All right. Um, could you tell me what happened when they moved
24 in? Do you remember that? You remember that statement -- question? If I
25

1 Q (By Mr. Sciscento) Did you gain knowledge of how long Donte
2 Johnson, prior to the 18th, was in that house? I mean the first time he
3 showed up.

4 A As I recall, and I don't recall there's so many of these
5 statements, from one of these statements it was that he first started
6 showing up around there about a month ago as I recall.

7 Q A month prior to the 18th?

8 A Yes.

9 Q And did you gain information that Donte Johnson would sleep
10 there?

11 A Occasionally, yes.

12 Q And would sleep in the master bedroom?

13 A I don't specifically remember that aspect of it.

14 Q Do you remember asking Tod Armstrong on 8/17 around the
15 hour of 1935 or prior to that, in a statement where you're present with
16 Detective Buczek, there was a question: Uh, is there -- is there some other
17 people that are living there with you? Do you remember what Tod
18 Armstrong's answer was?

19 A Again, I'd have to see the specific statement because there was
20 so many here.

21 Q And I'm going to refer to page 3.

22 A What was the question again, please?

23 Q Do you remember there was a question either by you or
24 Detective Buczek which said is there some other people that are living there
25

1 with you?

2 A Yes.

3 Q And do you remember Tod Armstrong's answer? If you want to
4 refresh your recollection, you can read (indicating).

5 A Off and on. They weren't really living -- off and on, yes.
6 Staying there. They weren't really living there, but they'd come in and out
7 of the house.

8 Q Okay. And is -- your next question, either you or Detective
9 Buczek was: Okay?

10 A Okay.

11 Q And then Tod Armstrong's answer to that was?

12 A Something that couldn't be understood, then it says: Day -- I
13 guess considered living there.

14 Q Okay. And he said -- the next question was: Okay. So, they'd
15 come and go as they please? And the answer was --

16 A Pretty much.

17 Q Okay. And the next question was: Okay. And who are they?
18 The answer is?

19 A Um, Deko and Red.

20 Q Okay. Deko, we understand, is Donte Johnson?

21 A Yes.

22 Q So, at that point Tod Armstrong indicates to you that there were
23 some people that he considered living there?

24 MR. DASKAS: Well, and again, Judge, I'll object to that
25

1 characterization that's not what the statement says.

2 MR. SCISCENTO: Well, the statement does say: Blank day, I guess
3 considered living there.

4 THE COURT: I'll let him ask in that form.

5 Q (By Mr. Sciscento) Is that correct?

6 A That's not my understanding from our total conversation with
7 Tod Armstrong, no.

8 Q Okay. Your question to him, though: Is there some other
9 people that are living there with you? And his answer is: On -- off and on,
10 yes, staying there. And I'll complete it: They weren't really living there but
11 they'd come and go out of the house. Is that correct?

12 A That's correct. But that was Detective Buczek's question again.

13 Q And you were present when this was --

14 A Yes, I was.

15 Q Do you know how many bedrooms were in the Everman house?

16 A I was only in there briefly, I believe it was a two bedroom home
17 as I recall.

18 Q Court's indulgence. Do you know if, in fact, there were three
19 bedrooms there?

20 A Like I said, I was in there just very briefly.

21 Q Do you know what statement that Tod made on that day -- on
22 page 14, I'm referring to -- on 8/17 that says: I don't know. I really don't.
23 I just go into my room or in Ace's room pretty much, now, 'cause my room
24 is flooded with water 'cause his bed is still, you know, you can lay on -- I
25

1 just go in my room and just nothing. I don't know. I don't want to know.
2 Do you remember Tod Armstrong making that statement?

3 A I would need you to refresh my memory with the statement, if
4 you wouldn't mind?

5 Q (Provides statement)

6 A That's correct.

7 Q Okay. Now, let's put this in perspective. Basically, the
8 question I guess from you, is TT, is you Tom Thowsen?

9 A That's me.

10 Q Do you know how they get around that night? And I'm
11 assuming you're saying Deko and Red? How they got around that night?

12 A Yes.

13 Q Okay. And Tod's answer was: I don't know. I really don't. I
14 just go in my room or in Ace's room pretty much now, 'cause my room is
15 flooded with water 'cause his bed is still, you know, you can lay on -- I just
16 go in my room and just uh, nothing. I don't know. I don't want to know.

17 Did Tod Armstrong ever indicate to you that he never stayed in
18 or that he didn't stay in the master bedroom, but he stayed in another
19 bedroom?

20 A I don't believe it was ever made clear in my mind whether his
21 room was the master bedroom or a different room.

22 Q Didn't you state earlier that the master bedroom was the one
23 where Deko or Donte Johnson stayed?

24 A I said that's where he could be found at times was in the master
25

1 bedroom or found in the living room.

2 Q Okay. So, he could be found in the master bedroom. And who
3 told you that?

4 A I believe it was Tod.

5 Q And that was told to you prior to the 18th at 3:00 in the
6 morning?

7 A Yes, sir, that's correct.

8 Q After you had this information you went over with the SWAT --
9 you were present when the SWAT arrived at 4815 Everman?

10 A Yes.

11 Q Okay. And your purpose was to secure the house and to search
12 the house?

13 A Yes.

14 Q Did you ever attempt to secure a search warrant for the house?

15 A No, I did not.

16 Q This was at 3:00 in the morning?

17 A Yes.

18 Q Have you ever in your years as a detective or as a police officer
19 ever secured a search warrant in the middle of the night?

20 A Yes, often.

21 Q Sometimes 1:00 or 2:00 in the morning?

22 A Yes.

23 Q Sometimes 3:00 in the morning?

24 A Yes.

25

1 Q And how do you go about doing that?

2 A More recently it's done over the telephone with a telephonic

3 search warrant, it's very easily obtained.

4 Q And how long does that take?

5 A About an hour.

6 Q You first gained this information on the 18th that Deko, also

7 known as Donte Johnson, may be present at the 4815 Everman residence,

8 you obtained that information about seven hours prior to going to the

9 residence?

10 A Yes.

11 Q And when you got to the residence was anybody outside?

12 A Initially?

13 Q Initially, when you first arrived?

14 A Just the SWAT officers that had the place surrounded.

15 Q Okay. All right. And people were inside the house?

16 A We didn't know at first until the people came out of the house.

17 Q Eventually, you learned that people were inside the house?

18 A Yes.

19 Q And that was Dwain Anderson, Charolette Severs and Donte

20 Johnson?

21 A Yes, sir, that's correct.

22 Q Did you do the initial search of the house?

23 A No, I did not.

24 Q Do you know who did?

25

1 A Sergeant Hefner. And that was only after confirming from Mr.
2 Johnson that he did not live there.

3 Q I'm sorry, your Honor. Let me ask you, there was a second time
4 that Tod Armstrong was interviewed on -- let me ask you this, at 8/17 you
5 mentioned something that Tod Armstrong told you there was a key? And
6 you said that he gave you that statement on 8/17, am I correct?

7 A That would be correct, yes.

8 Q Okay. Can you please -- and I'm showing you 8/17 in a
9 interview with Tod Armstrong -- the ending hour is 1935. I don't really see
10 beginning hour here. But can you show me in here where it says that Tod
11 Armstrong had the only key? That would be on 8/17.

12 MR. DASKAS: And I'll object to the characterization, Judge. I don't
13 believe the testimony was there was a recorded statement necessarily but
14 that he learned information from Tod Armstrong that Tod had the only key to
15 the residence.

16 THE COURT: We'll just let him answer it.

17 MR. DASKAS: Thank you, Judge.

18 THE WITNESS: That's absolutely true. These are merely taped state-
19 ments that we take from the individuals after having lengthy conversations
20 and trying to find out what they know. Everything that we glean from them
21 does not always get reflected back when we refer back to the taped
22 statement.

23 Q (By Mr. Sciscento) Okay. Well, can you show me if anywhere
24 in that statement it says that Tod Armstrong said that it was the only key.
25

1 That he had the only key.

2 A In this particular statement?

3 Q Yes.

4 THE WITNESS: Do you want me to read through this 21 page
5 statement now, your Honor?

6 THE COURT: Do you want to just agree that it's not in this or do you
7 know?

8 MR. GUYMON: Judge, we'll stipulate that I was not part of the taped
9 conversation.

10 THE COURT: Fine, fine. Thank you.

11 Q (By Mr. Sciscento) Prior, on 8/17/98, what information did you
12 have to where Mr. Donte Johnson may be residing?

13 A I didn't know where he was residing, I just knew where he was
14 supposed to be on that particular day.

15 Q Did anybody give you information that he was living in some
16 other residence, other than 4815 Everman?

17 A Not that I recall.

18 Q Did anybody give you any information that he may be found at
19 some apartment?

20 A No.

21 Q Did he give you any information that you could find him sleeping
22 on the side of a road somewhere?

23 A No.

24 Q Did they give you any information on that date, that 8/17/98 he
25

1 was living in some hotel room?

2 A No.

3 Q So, the only information that you had is that he most likely will
4 be found at 4815 Everman, correct?

5 A That's where they knew he was on that particular day.

6 Q Okay. And, basically, the reason they knew that is because Mr.
7 Armstrong had been there, I'm sorry, Mr. Johnson had been there for the
8 previous three weeks to a month?

9 MR. DASKAS: Objection, Judge, calls for speculation about what
10 those people knew.

11 MR. SCISCENTO: I'm asking what he --

12 THE COURT: I'm just going to let him answer.

13 THE WITNESS: That was based on as far as -- I understand that that's
14 where Mr. Johnson was when they left him there at the house that day.

15 Q (By Mr. Sciscento) Were you present when BJ Armstrong, I'm
16 sorry, when BJ gave a statement?

17 A Bryan Johnson?

18 Q Bryan Johnson?

19 A Yes, sir.

20 Q You were present?

21 A I believe so, yes.

22 Q Okay. It doesn't reflect that you were there, it was Detective
23 Buczek.

24 A I think if you look in there I think you see the TT portion where
25

1 it's -- my question is being asked and he just did not mention my name when
2 he started the tape.

3 Q Okay. So, on 8/17/98 at 2100 hours when the statement with
4 Bryan Christopher Johnson was made and it does reflect to -- that you were
5 present there?

6 A Yes, sir.

7 Q And this is a clerical mistake that your name wasn't there?

8 A Yes, sir.

9 Q Okay. In there that you heard the statements given by Bryan
10 Christopher Johnson?

11 A Yes, sir.

12 Q And there was a question -- you'll refer to page 2 -- okay, that
13 was given I'm assuming either by Detective Buczek or yourself that said:
14 Okay. And would that be during the time period where uh, uh, Deko and
15 Red were staying and Bryan Christopher Johnson's answer was yes sir. You
16 remember that?

17 A Might I refresh my memory?

18 Q Yeah.

19 A (Reviewing statement) That's correct. That's with the question
20 posed by Detective Buczek --

21 Q Okay.

22 A -- unless there a TT it would be Detective Buczek.

23 Q Okay.

24 THE COURT: Excuse me. David is Chip still out there?

25

1 MR. FIGLER: Yes, he is. He's going to stay, your Honor.

2 THE COURT: Maybe right after cross we can resolve why he would be
3 here.

4 Chip, you're just here to check on the status of Carla?

5 MR. SIEGEL: Yeah.

6 THE COURT: And she's here, right? Isn't she your third witness?

7 MR. DASKAS: She's here, Judge.

8 MR. SCISCENTO: I called Mr. Siegel indicating that we were going to
9 probably put Miss Severs on.

10 THE COURT: Oh, she's going to be your witness? Is that the one
11 witness you're talking about?

12 MR. SCISCENTO: Yes, yes.

13 THE COURT: Oh, okay.

14 MR. SCISCENTO: And I just let him know that, if he wanted to be
15 present during that.

16 MR. SIEGEL: Honoring her subpoenas, ready to appear.

17 THE COURT: Why don't you -- we can't hear you on the record for
18 this. Let's resolve -- she was supposed to be around the 4th and then that --
19 we didn't have a calendar that day. She's been in contact with you?

20 MR. DASKAS: Yes, Judge.

21 THE COURT: Okay. Let's just continue things the way they are with
22 her and so Chip can get out of here and just order that she be here in
23 addition on the calendar call on this case.

24 MR. SIEGEL: Is she still going to be subject to house arrest? That's
25

1 what she's on now.

2 THE COURT: Unless you file a motion, yeah.

3 MR. SIEGEL: Then it's my understanding you guys are calling her?

4 MR. SCISCENTO: Yes, we --

5 MR. SIEGEL: I don't know if I even need to be here for meeting
6 purposes.

7 MR. SCISCENTO: We talked to him about this. I talked to Mr. Siegel
8 about this indicating that because he represents Miss Severs he may want to
9 be present during the time that we cross-examine her.

10 MR. SIEGEL: Yeah, I don't know what for, I have no idea what --

11 THE COURT: It's up to you. And she's going to be your witness
12 (indicating), so she's not one of yours (indicating)?

13 MR. GUYMON: We do not plan on calling her, Judge.

14 THE COURT: Who are your witnesses?

15 MR. DASKAS: Actually, it'll just be Detective Thowsen and Sergeant
16 Hefner, Judge.

17 THE COURT: Oh, because I thought you had said three. So -- okay.
18 So, maybe another 20 minutes.

19 You're almost through, right Joe?

20 MR. SCISCENTO: Pretty much; yes, your Honor. I think a couple of
21 more questions.

22 THE COURT: Go ahead.

23 Q (By Mr. Sciscento) Let me refer back to Bryan Christopher
24 Johnson's statement on 8/17 at 2100 hours. There's a question posed:
25

1 Okay. Have you been over to Tod's house in the past -- page 2 -- is that
2 correct? And that was posed to BJ or Bryan Christopher Johnson?

3 A Yes.

4 Q Okay. And his answer was?

5 A A couple of times briefly, not for an extended period of time.

6 Q And the next question was, apparently from Detective Buczek
7 was?

8 A Okay. And would that be during the time period where uh, uh,
9 Deko and Red were staying there?

10 Q And the answer was?

11 A Yes, sir.

12 Q So, Bryan Christopher Johnson indicates on 8/17/98 at 2100
13 hours that Donte Johnson was staying at that residence, 4815 Everman, is
14 that correct?

15 A Based on that, yes.

16 Q Yes. And that was -- that information was given to you prior to
17 you going to the residence at 4815 Everman?

18 A Yes, it was.

19 Q In your years as a detective when you go to arrest or place
20 somebody in custody is it your belief that the people placed in custody
21 always give truthful answers?

22 A No.

23 Q So they, in fact, sometimes lie?

24 A Yes.

25

1 Q Most of the times they lie to cover up a crime they've
2 committed?

3 A Yes.

4 Q Okay. So, when Donte Johnson told you I don't live at this
5 house, you were assuming he was telling you the truth?

6 A Yes.

7 Q Why is that?

8 A Because we posed the question directly to him, that we weren't
9 asking him if he committed a crime only if lived there or not.

10 Q Okay. But if there was fruits of a crime inside there you expect,
11 on your knowledge as a police officer, you would expect these people to lie
12 to you?

13 MR. DASKAS: Objection, calls for speculation, Judge.

14 THE COURT: Overruled.

15 Q (By Mr. Sciscento) You would expect them to lie to you about
16 information?

17 A I can't guess what they're going to say on any given point.

18 Q Okay. But it's -- consider it human nature to try to hide a crime,
19 is that correct?

20 A I'd say that would be fair.

21 Q So, if he's telling you he doesn't live there so that you don't
22 apply the evidence you find in there to him, that may just be a lie to cover
23 up the fact that he was committing a crime?

24 A I guess that's one of the possibilities.
25

1 Q There's no --

2 THE COURT: Which, if any, of the weapons found in the search is
3 alleged to be the murder weapon?

4 MR. DASKAS: None of them, Judge.

5 THE COURT: These are in the bag, the satchel bag or the cloth bag
6 supposedly?

7 MR. DASKAS: Yes, Judge. And actually Sergeant Hefner can clarify
8 what was found in what room of that house, Judge, but none of those were
9 the murder weapon.

10 THE COURT: But the murder weapon was found somewhere else?

11 MR. DASKAS: The murder weapon has not been found, Judge.

12 THE COURT: I see. Okay.

13 Q (By Mr. Sciscento) There was information given to you on
14 8/17/98 that you may be locating a duffle bag containing weapons, is that
15 correct?

16 A That's correct.

17 Q And they told you that the duffle bag belonged to either Red or
18 Deko, that being Donte Johnson?

19 A Yes.

20 Q And that was given to you by Tod Armstrong?

21 A Yes, I believe so.

22 Q And he indicated to you that that would be found in the master
23 bedroom, correct? Is that correct?

24 A I don't recall specifically without referring.
25

1 Q BJ, I'm sorry, Ace Hart also indicated to you that he had viewed
2 a duffle bag containing weapons, is that correct?

3 A That's correct.

4 Q And he indicated that those duffle bags belonged to either Red
5 or Deko?

6 A As I recall, yes.

7 Q That being Donte Johnson?

8 A Yes.

9 Q And he indicated to you that they could be found inside the
10 master bedroom?

11 A Again, I'd need to refer to the statement because there are so
12 many.

13 Q If I could have the Court's indulgence for one moment, your
14 Honor?

15 Let me ask you, when you arrived there, when you arrived at
16 the house, that being at 4815 Everman at 3:00 in the morning, three people
17 are placed into custody, correct? Let me rephrase that, they were placed
18 into handcuffs?

19 A They were placed in flex cuffs, yes, sir.

20 Q Which is, basically, handcuffs; they weren't -- their hands
21 weren't free to --

22 A They were restrained, yes.

23 Q And they were placed on the curb --

24 A Yes.

25

1 Q -- in front of the house?

2 A Actually, it was around the corner on the adjacent street.

3 Q Okay. And during this time a SWAT team was inside the
4 house?

5 A Yes.

6 Q Okay. And was anybody else inside the house, other than
7 members of the SWAT team?

8 A Just the SWAT team.

9 Q Okay. And they were looking for?

10 A Any other persons that might be hiding in there.

11 Q Was there any audio tape of the statements that Mr. Johnson
12 gave regarding whether or not he lived in the house?

13 A No.

14 Q Was there any written statements that Donte Johnson gave
15 regarding whether or not he lived in the house?

16 A Only the written documentation done by Sergeant Hefner at the
17 time.

18 Q Who else present -- and the three people in handcuffs you said
19 were Dwain Anderson, Charolette Severs and Donte Johnson?

20 A Yes, sir.

21 Q Okay. And they were within earshot of each other?

22 A Yes.

23 Q And were probably a foot away from each other sitting on the
24 curb?

25

1 A Fair to say.

2 Q And when these questions were posed to them, they could all
3 hear the questions, assuming that they could hear?

4 A Yes.

5 Q Because they were close enough within earshot?

6 A Yes.

7 Q Who else was present when that statement is made that Donte
8 Johnson did not live in the house?

9 A I was present, Detective Buczek, Sergeant Hefner who was
10 asking the question and an unknown patrol officer.

11 Q Who else was present at the time of the search, other than the
12 members of the SWAT team? Other than the members that you just
13 mentioned, that being Detective Hefner, Detective Buczek, yourself, a patrol
14 officer I think you said and the SWAT team; was anybody else present?

15 A For the search of the house?

16 Q At that moment when you were talking to Donte Johnson, Carla
17 Severs or Dwain Anderson?

18 A At the moment that Sergeant Hefner was asking them that
19 question --

20 Q Yes.

21 A -- the SWAT team was still clearing the house making sure there
22 was nobody inside.

23 Q Okay. And the other -- the only other people present to hear
24 that conversation was Detective Buczek, yourself, detective --

25

1 A Sergeant Hefner.

2 Q -- Sergeant Hefner and you said a patrol officer?

3 A Yes, sir.

4 Q And anybody else?

5 A No, not that I recall.

6 THE COURT: The people in restraint were in an area where they could
7 have heard each other's answers?

8 THE WITNESS: That's correct. Yes, Your Honor.

9 Q (By Mr. Sciscento) And how far away from the front door were
10 these people placed, that being Donte Johnson, on the curb?

11 A It was a pretty good distance because the SWAT team had
12 actually taken them out front, put them in flex cuffs and put them around
13 the corner to a place where if there would have been somebody inside that
14 would have engaged with firearms these people would not have been in
15 danger. So, it was around the corner.

16 MR. SCISCENTO: No further questions, your Honor.

17 THE COURT: Any redirect?

18 MR. DASKAS: Yes, Judge. Thank you.

19 **REDIRECT EXAMINATION**

20 **BY MR. DASKAS:**

21 Q It's true, isn't it, that you did not obtain a search warrant for
22 4815 Everman?

23 A That's correct.

24 Q Why didn't you obtain the search warrant?
25

1 A Because we did not need one.

2 Q And --

3 MR. SCISCENTO: I would object to that, your Honor, that's a legal
4 conclusion.

5 THE COURT: Well, we'll make that legal conclusion one way or the
6 other later, I understand the purpose of the question. You were certainly
7 asking things like the expediency of getting one, I think it's at least a proper
8 question and a proper answer.

9 MR. DASKAS: Thank you, Judge.

10 THE COURT: I take it it's the beginning of something or are you going
11 to pursue it?

12 MR. DASKAS: That's correct, Judge.

13 You say you didn't need a search warrant and you say that
14 based on what?

15 THE WITNESS: Based on our conversations with Tod Armstrong and,
16 later, with Donte Johnson.

17 Q (By Mr. Daskas) And, in fact, Tod Armstrong gave consent to
18 search the Everman residence, is that correct?

19 A That's correct.

20 Q Is there some sort of a form that he signed that memorialized his
21 consent?

22 A Yes, he signed a consent to search card.

23 MR. DASKAS: May I approach the witness, Judge?

24 THE COURT: Sure.

25

1 MR. DASKAS: And let me show defense counsel --

2 THE COURT: And of course they refer to the consensual or alleged
3 consensual nature of it in their motion

4 MR. DASKAS: Judge, for the record I'm going to have a copy of that
5 consent to search card marked as State's Proposed Exhibit 1 for this
6 hearing. Judge, I've shown defense counsel what's been marked as State's
7 Proposed Exhibit 1.

8 And, detective, let me hand you what's been marked State's
9 Proposed Exhibit 1 and ask you if you recognize this document?

10 THE WITNESS: Yes. This is a Las Vegas Metropolitan Police
11 Department consent to search card dated 8/17/98, signed by Tod Armstrong
12 for the consent to search of 4815 Everman Street and witnessed by myself.

13 Q (By Mr. Daskas) And, again, this was signed by Tod Armstrong
14 sometime prior to August 18th at 3:30 in the morning?

15 A Yes, it was.

16 Q Is this a true and correct copy of the consent to search card
17 including Tod Armstrong's signature and the date that appears on that card?

18 A Yes, it is.

19 MR. DASKAS: Judge, I'd move for the admission of State's Proposed
20 1.

21 MR. SCISCENTO: No objection, your Honor.

22 THE COURT: Received.

23 MR. DASKAS: Thank you, Judge.

24 You were asked some questions about information you learned
25

1 from Tod Armstrong regarding the only key to residence, you recall those
2 questions?

3 THE WITNESS: Yes.

4 Q (By Mr. Daskas) And, in fact, defense counsel showed you a
5 transcript of a statement from Tod Armstrong dated August 17th and
6 established that that statement did not appear in the transcribed statement,
7 you recall that?

8 A Yes.

9 Q Despite the fact that there's nothing in the transcribed state-
10 ment from August 17th about the key, is it your testimony that you did learn
11 that information prior to August 18th at 3:30 in the morning?

12 A Yes.

13 Q In fact, you met with Tod Armstrong sometime after August
14 18th in Hawaii, is that correct?

15 A I did not. Detective Buczek and Sergeant Hefner met with him
16 in Hawaii.

17 Q Do you know if there was a conversation that was tape
18 recorded with Tod Armstrong during that meeting in Hawaii?

19 A Yes.

20 Q And have you reviewed that statement?

21 A Some time ago.

22 Q Do you know whether there was any discussion confirming the
23 information about the only key to the residence?

24 MR. SCISCENTO: Your Honor, I'm going to object to that, I think that
25

1 it calls for speculation as to whether they're confirming. Detective Thowsen
2 was not present there at that time. The question, the way it probably was
3 posed, is based on some knowledge that either Detective Hefner or
4 Detective Buczek, I think he was present there, had. I think he's going to
5 speculate as to that and, further, this was on 9/17.

6 MR. DASKAS: Judge, I'll clear it up with Sergeant Hefner.

7 THE COURT: Overruled.

8 MR. DASKAS: Thank you.

9 Had Donte Johnson told you that he actually lived in the
10 Everman residence when he was seated on the curb, what steps would you
11 have taken?

12 THE WITNESS: We would have obtained a search warrant prior to
13 searching the residence and Sergeant Hefner would have overseen that.
14 Detective Buczek and I would have continued on with what we were going
15 to do and interview the people that we had on the curb there.

16 Q (By Mr. Daskas) Is it common practice for a homicide detective
17 or sergeant with Metro to obtain search warrants?

18 A Yes, it is.

19 Q Fairly standard?

20 A Yes, it is. When needed, yes.

21 Q You were asked some questions about information you had
22 gleaned from Tod or, I'm sorry, from Ace Hart prior to August 18th, you
23 recall those questions?

24 A Yes.

1 A Yes.

2 Q And you refer to various portions of that statement and Tod's
3 answer. Do you recall Tod's answer to the first time you asked him who,
4 other than Tod Armstrong lived at the Everman house?

5 A His first answer --

6 Q Yes.

7 A -- time wise?

8 Q Yes.

9 A I would need to refresh my memory with the statement.

10 Q And would it refresh your memory if I showed you that
11 statement?

12 A Yes, it would.

13 MR. DASKAS: Counsel, I'm referring to page 3 of Tod Armstrong's
14 statement, 8/17/98.

15 MR. SCISCENTO: 1825, page -- what page?

16 MR. DASKAS: Page 3.

17 And let me direct your attention, detective, about seven lines
18 down. I don't want you to read it out loud but tell me if you read the
19 answer that Tod gave to the question about who else was living there, does
20 that refresh your memory about what Tod said?

21 THE WITNESS: Yes.

22 Q (By Mr. Daskas) All right. Let me take that back. Now, if you'll
23 tell me what Tod said in response to the question about who, other than
24 Tod, lived at the Everman residence?

25

1 A He said they weren't really staying there, they were just coming
2 and going.

3 Q Okay. And he, Tod, was referring to Donte Johnson and Red?

4 A Yes.

5 Q Court's indulgence. Detective, what was the purpose of having
6 SWAT at the Everman household prior to searching the house for evidence?

7 A Because we were dealing with a quadruple homicide we felt
8 there was a great chance of danger and/or shots being fired by potential
9 suspects.

10 Q Was SWAT's purpose on August 18th at 3:30 in the morning at
11 the Everman house to search for items of evidence?

12 A Not at all.

13 Q You mentioned that they were there to clear the house and for
14 safety purposes, is that true?

15 A That's correct.

16 Q Can you tell us what steps they took to ensure that the house
17 was cleared and that nobody was in danger?

18 A Yes. First what they did after maintaining or setting up on the
19 house in various positions of safety and to their advantage, they called into
20 the house to order anybody inside to come out. After three people came
21 out, the SWAT officers put those people in flex cuffs to make sure that there
22 were no weapons and nobody would go for any weapons, then took them
23 around the corner to us. That the SWAT officers went tactically room to
24 room, clearing each room as they went looking for any armed suspect that
25

1 may be hiding in there.

2 Q Now, while SWAT was inside the residence at Everman where
3 were you located?

4 A Right around the corner on the side street.

5 Q Outside of the residence?

6 A Outside of the residence.

7 Q Where was Detective Buczek?

8 A Right next to me.

9 Q Outside the residence?

10 A Yes.

11 Q And where was Sergeant Hefner?

12 A Same place, outside the residence.

13 Q Once SWAT cleared and secured the Everman residence did
14 they convey that information to you or Detective Buczek or Sergeant Hefner?

15 A Yes, they did.

16 Q To whom did they convey information?

17 A To all of us.

18 Q In the meantime, had you heard Sergeant Hefner ask Donte
19 Johnson if he lived in the residence?

20 A Yes.

21 Q And his response was?

22 A No.

23 Q Was it at that point that Sergeant Hefner began to search the
24 residence?

25

1 A Not that I ever seen, no.

2 Q You've never seen SWAT come out with anything at all?

3 A Absolutely not.

4 Q Okay. Not a gun, not a bag of contraband, nothing like that?

5 A Never when I've been there.

6 Q Okay. So, if they saw something like that what would they do?

7 MR. DASKAS: Objection, calls for speculation, Judge.

8 MR. FIGLER: Well, what's the process?

9 THE COURT: Don't ask what the procedure is, where's this leading

10 Dayvid?

11 MR. FIGLER: Well, I just want to just go into -- he says that he would

12 have sought a search warrant, I just want to know he would have gone

13 about doing it to see the reasonableness of it.

14 THE COURT: I think he's answered that. I think he's answered that.

15 You're now into this area of what the SWAT team might have done had they

16 seen something.

17 MR. FIGLER: Okay. I can move on.

18 Now, you said that you would have obtained a search warrant

19 had he said the simple word yes instead of no, that's your testimony?

20 THE WITNESS: That's correct.

21 Q (By Mr. Figler) Okay. Why is that?

22 A Because we want to make sure that we have all the bases

23 covered and if there's the slightest hint that he has standing there that is

24 reasonable then we'll get a search warrant. But after speaking to him

25

1 specifically and learning that he did not live there and after our interviews
2 specifically with Tod Armstrong, the person that truly lives in the house, and
3 verifying from him that Mr. Johnson did not live there, that he would merely
4 show up sometimes and hang out and he was too afraid to ask him to leave
5 because the guy had guns and talked about the things that he did to people.

6 Q Okay. Did you -- were you able, detective, to obtain information
7 from any of the people that you interviewed where Donte Johnson then was
8 staying?

9 A No.

10 Q If not the Everman house you didn't have any other information
11 of where his residence was, is that correct?

12 MR. DASKAS: Objection, asked and answered, Judge.

13 THE COURT: Certainly was the last line of questions by Joe, it's
14 exactly what you're now asking.

15 MR. FIGLER: Okay.

16 And you did -- it would be a fair characterization of your
17 testimony here today that you had at least conflicting evidence or
18 information with regard to who was and who wasn't residing in this house,
19 isn't that correct?

20 THE WITNESS: That's correct.

21 Q (By Mr. Figler) Final question, when you approached the
22 Everman residence you had in your hand this consent to search form that
23 was signed by Tod Armstrong, isn't that correct?

24 A Absolutely, yes, sir.

25

1 MR. FIGLER: Okay. I have no further questions.

2 THE COURT: Anything further?

3 MR. DASKAS: No, Judge. Thank you.

4 THE COURT: Thanks. You're excused. Call your next witness, please.

5 MR. GUYMON: Sergeant Hefner

6 THE WITNESS: May I leave this here for Sergeant Hefner, your Honor?

7 THE COURT: Sure.

8 MR. FIGLER: And this witness knows not to discuss testimony with --

9 THE COURT: I'll bet he does.

10 THE WITNESS: Yes, your Honor.

11 MR. FIGLER: Okay.

12 **KEN HEFNER**

13 having been called as a witness by the State, being first duly sworn, testified
14 as follows:

15 THE CLERK: Please state your name and spell your last name for the
16 record.

17 THE WITNESS: Ken Hefner, H-e-f-n-e-r.

18 THE COURT: Go ahead.

19 **DIRECT EXAMINATION**

20 **BY MR. GUYMON:**

21 Q Are you a sergeant with the Las Vegas Metropolitan Police
22 Department?

23 A Yes, I am.

24 Q And how long have you been a sergeant.

25

1 A Nine -- ten years now.

2 Q And can you tell us what division or bureau you're with
3 currently?

4 A I'm in the homicide section.

5 Q And how long have you been in the homicide section?

6 A Five years.

7 Q And prior to being in the homicide section where were you?

8 A I spent about four years in the robbery section, prior to that I
9 spent several years in property crimes.

10 Q And in total how long have you been with the Las Vegas
11 Metropolitan Police Department or law enforcement?

12 A This is my 20th year.

13 Q Now, then, directing your attention to August of 1998, did you
14 become involved in a quadruple homicide investigation?

15 A Yes.

16 Q Was this a homicide that occurred on August 14th, 1998, here
17 in Las Vegas, Clark County, Nevada?

18 A Yes.

19 Q As a result of your involvement did you gain information on the
20 17th during the late night hours of August, 1998, which brought you to the
21 address of 4815 Everman?

22 A Yes.

23 Q Now, can you tell me briefly was Detective Thowsen and
24 Buczek, detectives that worked under your supervision?

25

1 A Yes.

2 Q How many detectives in total work under your supervision?

3 A Right now, it's four.

4 Q And in August of 1998 how many was it?

5 A Four.

6 Q Was Detective Thowsen and Buczek specifically assigned to this
7 particular investigation, that is the homicide that occurred at the Terra Linda
8 residence?

9 A Yes.

10 Q And were you aware of the fact that they were conducting a
11 investigation relating to that quadruple homicide at the Terra Linda
12 residence?

13 A Yes.

14 Q Now, is it common for detectives who work under your
15 supervision to share information with you about their investigation?

16 A Yes.

17 Q Why is that?

18 A To keep me advised. To coordinate any other responses we
19 might want to bring to play, if we need more personnel, other resources, so
20 that I can monitor and evaluate the course of the investigation and supervise
21 it.

22 Q So, I take it by your answer you monitor and supervise
23 investigations?

24 A Yes.

25

1 Q Did you do that on the 17th of August, 1998?

2 A Yes.

3 Q All right. Now, then, taking you to the actual address of 4815
4 Everman did you, in fact, go to that particular address?

5 A Yes.

6 Q And why?

7 A We went there after interviewing several witnesses to hopefully
8 effect the arrest of several homicide suspects, including the defendant, and
9 perhaps to recover some property related to the crime that might be there.

10 Q Tell me specifically did you interview any persons associated
11 with this case on August 17th, 1998, prior to going to the Everman
12 residence?

13 A I did not participate in the interviews, no.

14 Q And do you have knowledge as to whether or not persons were
15 interviewed on the 17th prior to going to the Everman residence?

16 A Yes, I do.

17 Q All right. And who would have conducted those interviews?

18 A Detectives Thowsen and Buczek.

19 Q And they share the information that they receive from those
20 interviews to you --

21 A Yes.

22 Q -- or with you?

23 A Yes.

24 Q All right. Now, can you tell me what knowledge you had prior
25

1 to going to the Everman address on the late night -- I take -- was it the late
2 night hours of August 17th or was it the early morning hours of the 18th?

3 A It began the evening hours of the 17th and then carried on into
4 the early morning hours of the 18th.

5 Q Using the times and the dates of the 17th and 18th, can you tell
6 me what information you now have received from your detectives who you
7 supervise associated with this particular residence and what the purpose of
8 going there was?

9 MR. SCISCENTO: Your Honor, I'm going to object to this, it's hearsay
10 and cumulative. We had Detective Thowsen in here who's testified --

11 THE COURT: I take that it's going to be brief and it's collective, what
12 they told him, to his state of knowledge. Go ahead. Overruled.

13 THE WITNESS: We'd gathered information from several witnesses
14 regarding the identity of suspects that had been involved in the quadruple
15 homicide and a prospective possible current location for those individuals
16 staying in the house of Tod Armstrong and what evidence might perhaps be
17 in that house or in the surrounding area.

18 Q (By Mr. Guymon) Based on the information you had received
19 what was your belief as to who the owner of the house was?

20 A It was my belief, based on what I was told, and in a conversa-
21 tion with Tod Armstrong that the house belonged to Tod Armstrong's
22 mother. That he was living there, perhaps at that time with Ace Hart. He
23 provided me with a key to the residence. And when he gave me that key I
24 asked him if there were any other keys and he told me this was the one and
25

1 only key to the house.

2 MR. SCISCENTO: Your Honor, I'm going to object to this now as
3 hearsay.

4 THE COURT: Well, he was saying it as direct, overruled.

5 Q (By Mr. Guymon) Now, who told you that it was the one and
6 only key?

7 A Ace Hart, I'm sorry, Tod Armstrong.

8 Q All right. So, Tod Armstrong tells you that?

9 A Yes.

10 Q Was that an important piece of information to you?

11 A Yes.

12 Q Why?

13 A One, it established that perhaps the doors would not be locked
14 when we went up there. Two, it told me that nobody else would have
15 control or access to the house. Since he had the only key, if he left and
16 locked the doors, how would anybody else get in?

17 Q I might ask you was it important to you as to who the owner of
18 the house was and who was staying at the house?

19 A Yes. It solidified for me the information that his mom owned
20 the house but Tod was -- and she lived out of state -- Tod was the only one
21 here in this house -- in this city that had control and custody of the house
22 and the only key to the house, there were no other keys outstanding.

23 Q And tell me, based on the information you received, what was
24 your understanding as to who lived at that address on the date of the 17th
25

1 and 18th of August?

2 A Tod Armstrong and Ace Hart.

3 Q Now, then, was it important for you to determine who was
4 living at the house?

5 A Yes.

6 Q Why?

7 A Since the potential of recovering evidence was there if -- I
8 wanted to know exactly who had control of the house, who had access to
9 the house, perhaps who had any expectations there at the house and who
10 could give a valid consent to search the house.

11 Q Did you feel as though, based on the information you received,
12 that you learned who could give consent to search that house?

13 A Yes.

14 Q And who was it, based on the information you received as the
15 supervisor of this investigation, as to who could consent to search that
16 house?

17 A Tod Armstrong.

18 Q All right. Did you, in fact, receive consent to search that house?

19 A Yes.

20 Q Was that important to you?

21 A Yes.

22 Q Why?

23 A It allows us to proceed properly on a legal foundation and
24 footing to pursue our investigation and obtain evidence if it's there. It gives
25

1 us legal access to go to the house and allows us to perform our job.

2 Q And showing you what has been marked as State's Proposed
3 Exhibit 1, actually State's Exhibit 1, is this in fact a consent to search that
4 was signed by Tod Armstrong on the night in question?

5 A Yes.

6 Q All right. Now, with -- and were you aware of the fact that this
7 had been signed and the Las Vegas Metropolitan Police Department had
8 received this form and the consent of Tod Armstrong to search that house?

9 A Yes, I was aware of it.

10 Q Now, with consent to search that house and the form being
11 filled out by who you believed was the person that owned and lived at the
12 house, did you feel as though you needed a search warrant?

13 A No.

14 Q And tell me why?

15 A The person that could give valid consent did give a valid
16 voluntary consent to allow us to go to that house to potentially effect the
17 arrest of suspects that were there that we had probable cause to arrest and
18 to recover items in that house.

19 MR. SCISCENTO: Your Honor, I'm going to object to that, it calls for
20 legal speculation, I move to strike all of it.

21 THE COURT: Overruled.

22 Q (By Mr. Guymon) Now, let me ask you if you as a supervisor,
23 sergeant, believed that other persons lived at the house, what would you
24 have done?
25

1 A We have to take into account their interest and ultimately the
2 easiest way to deal with that is to get a search warrant.

3 Q Okay. Now, did you believe that anyone else lived at that house
4 when you approached the house on the 18th, I guess now of August, 1998?

5 A No.

6 Q All right. Were you satisfied that the detectives that you
7 supervised had been thorough in collecting the information associated with
8 who stayed at that house?

9 A Yes.

10 Q Can you tell me -- when you got to the house apparently SWAT
11 was there, is that correct?

12 A Yes.

13 Q All right. And what was the purpose of having SWAT there,
14 very briefly?

15 A To gain a tactical entry for safety purposes, to -- because of the
16 situation.

17 Q Were there safety concerns that you and your people had?

18 A Right. Safety concerns at the arrest of a homicide suspect or
19 suspects.

20 Q Now, then, when SWAT was there did they actually call either
21 into the house one way or another in order to get persons or people to come
22 out of the house?

23 A That's correct.

24 Q All right. And did persons come out of the house?
25

1 A Yes.

2 Q And how many?

3 A Three.

4 Q Do you know who those persons were?

5 A The defendant, Charolette Severs and a person who initially
6 identified himself as Willie Coleman who we later learned was Dwain
7 Anderson.

8 Q All right. And you say the defendant is he here in court today?

9 A Yes.

10 Q The person who walked out of the house?

11 A Yes.

12 Q Will you point to him, describe an article of clothing he's
13 wearing in court today?

14 A He's sitting to my right. He's wearing a blue jump suit from the
15 jail, he's got some handcuffs on his front.

16 MR. GUYMON: Record reflect the identification of the defendant, your
17 Honor.

18 THE COURT: It will.

19 MR. GUYMON: Thank you. Now, then, did you subsequently learn the
20 defendant's name on the night in question?

21 THE WITNESS: Yes.

22 Q (By Mr. Guymon) All right. And his name is Donte Johnson?

23 A Correct.

24 Q Now, then, did you have any information prior to going over to
25

1 the house that Donte Johnson lived at that residence?

2 A No.

3 Q Had you had that belief what would you have done?

4 A I would have gotten a search warrant.

5 Q All right. Now, did you have any conversation whatsoever with
6 Donte Johnson on the night in question?

7 A Yes.

8 Q And can you tell me how that came about?

9 A As the SWAT officers were making an announcement over the
10 public address speaker of their vehicle for anybody else to come out of the
11 house, all three of the people that were there sitting on the curb began to
12 chuckle. I then asked each one of these people, including the defendant --

13 MR. SCISCENTO: Your Honor, I'm going to object at this point and I'd
14 like to ask to take this sergeant on voir dire just to see whether or not my
15 client was placed in custody, whether or not he had the right to leave and
16 whether or not he was entitled to Miranda rights.

17 THE COURT: Pursue it in cross. Answer the question.

18 THE WITNESS: I asked all three of the people there if they lived in the
19 house and I asked each one individually and each one individually responded
20 to me in the negative that, no, they didn't live there.

21 Q (By Mr. Guymon) All right. Now, why would you ask Donte
22 Johnson if he lived at that house?

23 A Just -- I was double checking is about the best way to say it,
24 double checking just to make sure.

1 A Yes.

2 Q -- that address?

3 A Yes and he also said no.

4 Q Now, then, when you asked the question of Donte Johnson
5 where was Charolette Severs and Willie Coleman in relationship to Donte
6 Johnson?

7 A They were all sitting beside each other on the curb, if not
8 shoulder to shoulder, practically shoulder to shoulder. They were all next to
9 each other.

10 Q And who did you ask the question to first?

11 A I can't recall. I can't recall which one first. I asked them one
12 right after the other there, spoke to them.

13 Q Now, had any of the three of them indicated that they lived at
14 that address?

15 A No.

16 Q What if they had? If Donte Johnson, Charolette Severs or Willie
17 Coleman said I live at this address, what if anything would you have done?

18 A I would have evaluated the situation with them, determine their
19 concerns and more than likely based on the situation we were involved in I
20 would have obtained a search warrant.

21 Q And why? If Donte Johnson says, yes, I live here, why would
22 you get a search warrant?

23 A About the only other way we could continue our investigation
24 with the eye of recovering that property would be with his consent. It's
25

1 been my experience that I -- with a defendant -- I would not want to go
2 through the battle of determining whether that consent was free and
3 voluntarily given, it's easier in the long run to just get a search warrant.

4 Q Okay. So, I take it by that answer that even if Donte Johnson
5 would have said, I consent; I live here but I'll consent to you searching it,
6 would you accept that consent?

7 A I would have gotten a search warrant.

8 Q Okay. And why is that?

9 THE COURT: He just said.

10 Q Okay. Let me move on then. What assurance, if any, did Donte
11 Johnson with the other two saying, no, they don't live there, provide for you
12 as you were going to now proceed?

13 A That that wasn't where they were living.

14 Q Can you tell me what information -- now, you indicated that
15 there was only one key to the house, can you tell me what information, if
16 any you had received regarding how others that weren't living there but
17 would visit the place would actually make entry into that residence?

18 A I learned that they made entrance often through the --

19 MR. SCISCENTO: I'm going to object to this, your Honor. Now I think
20 the information he's relating comes later on, 9/17, when they interview Tod
21 Armstrong. I don't think, unless he can specifically say on the 18th --

22 THE COURT: Well, let's put it in context of what he knew at that
23 point.

24 MR. GUYMON: My apologies, Judge.
25

1 As a foundation, on the August 17th, 1998, what information,
2 if any, did you have as to how others that would visit the residence would
3 actually get into the residence if there was only one key?

4 THE WITNESS: I didn't have any specific knowledge regarding that and
5 I can't recall as to exactly when I did learn later on regarding the window.

6 Q (By Mr. Guymon) Okay. Now, then, once the three persons
7 that walked out of the residence told you they didn't live there did you
8 proceed with a search of the residence based on Tod Armstrong's consent
9 to search that house?

10 A Yes.

11 Q And can you tell me who then searched the house, based on the
12 consent to search?

13 A Myself and Crime Scene Analyst Washington, I believe his
14 supervisor, Perkins, was there; primarily the three of us.

15 Q And did you find any items that you believe had evidentiary
16 value in this case in the house?

17 A Yes.

18 Q Can you tell us briefly what items of evidence you found and
19 where those items were located?

20 A In the living room area of the house I found a gym bag
21 containing a partial roll of duct tape and a VCR and a handgun adjacent to
22 the television and a pair of black jeans.

23 In the bedroom, which would be the back left bedroom of the
24 house I found several other pair of jeans, including one that contained or had
25

1 what appeared to be a bloodstain on it, a rifle and some shoes, I believe.

2 THE COURT: And when you say a bedroom are we talking the master
3 bedroom, what it looked to be?

4 THE WITNESS: It would -- yes, it would be the master bedroom in that
5 it had a bathroom attached.

6 THE COURT: Go ahead.

7 Q (By Mr. Guymon) Okay. And tell me did you find a duffle bag
8 at any point in time in this particular residence?

9 A Yes. That's what I referred to as the gym bag, it was in the
10 living room.

11 Q All right. Can you tell me -- you say that was in the living room
12 next to the master bedroom. Can you tell me how many other bedrooms, if
13 any, there were in this house?

14 A The house had three bedrooms.

15 Q Now, could you tell whether or not the three bedrooms were
16 lived in in any way or any manner?

17 A Yes.

18 Q All right. Describe what you mean by that.

19 A Well, the two bedrooms that weren't the master bedroom
20 appeared to be lived in in that they had beds, furniture, clothing, which we'd
21 normally expect to find in a bedroom. The master bedroom, however, did
22 not have any furniture, no bedding and the things that were in there were
23 just -- it looked kind of like a storage room or a junk room. The stuff was
24 just in there and some of it was in the middle of the floor, some of it was
25

1 pushed over in the corner and clothes kind of strewn about. It just looked
2 like a storage room or a junk room.

3 Q Was that significant to you?

4 A Yes.

5 MR. SCISCENTO: I'm going to object to this, your Honor, again; now I
6 think that we're referring to after the time of the search. Once they go in
7 there, once they start searching, the issue -- the knowledge that they have is
8 insignificant.

9 THE COURT: We'll hear it and we'll reflect on that later when we get
10 points and authorities, overruled.

11 Q (By Mr. Guymon) And tell me why that was significant to you.
12 Once you make entry into the master bedroom and you see what you see,
13 what if anything does that either confirm for you or provide to you?

14 A It confirmed for me that no one was living in this bedroom. No
15 one was using it as a regular bedroom, as the other two appeared to be
16 being used regularly or normally.

17 Q Now, if it would have been the inverse, that is to say if you
18 enter into that bedroom and you find that it's set up, I guess based on your
19 observations as a bedroom with items that you don't identify with say Tod
20 Armstrong, what if anything would you have done?

21 MR. SCISCENTO: You know, again, your Honor, I'm going to object,
22 this all goes to after the fact.

23 THE COURT: I understand your point. It's not going to be of any major
24 significance, just let him answer the question, overruled.

1 THE WITNESS: I would have re-evaluated the situation if it appeared
2 that we'd been given bad information.

3 MR. GUYMON: Court's indulgence, your Honor. Pass the witness,
4 your Honor.

5 THE COURT: Any cross?

6 MR. SCISCENTO: Thank you.

7 **CROSS-EXAMINATION**

8 **BY MR. SCISCENTO:**

9 Q Sergeant Hefner, on the 18th, I'm sorry, on the 17th, most of
10 the information learned was either from Ace Hart, Tod Armstrong or a
11 person named BJ, right?

12 A Correct.

13 Q Bryan Christopher Johnson. You were not present during any of
14 those interviews, is that correct?

15 A I wasn't in the room when the interviews were conducted, I was
16 at the office when they were doing the interviews.

17 Q You indicated that you gained this information, though, through
18 your detectives, that being Detective Thowsen and Detective Buczek,
19 correct?

20 A Primarily through them, yes.

21 Q Okay. And you indicated that you said Ace Hart lived there at
22 the time of the 18th and the 17th, is that right?

23 A It was my understanding that Ace Hart and Tod Armstrong lived
24 at the house.

25

1 Q But, in fact, Ace Hart had told your detectives that he moved
2 out a few weeks earlier, isn't that correct?

3 A If he had told them that I was not aware of that.

4 Q You stated that based on the information that you had from Tod
5 Armstrong and Ace Hart that you were going over to the residence, the
6 4815 residence to arrest Mr. Johnson, is that correct?

7 A Mr. Johnson and/or Red as we knew him at that point.

8 Q Okay. You stated earlier that you had probable cause to arrest
9 Mr. Johnson as you were going over to the 4815 residence, isn't that
10 correct?

11 A Yes.

12 Q So, when you got there, prior to getting there Tod Armstrong
13 described what Mr. Johnson looked like, isn't that correct, to the detectives
14 or to you?

15 A I think so, yes, we knew --

16 Q Okay. You had a picture of Mr. Johnson which he picked out,
17 that being Armstrong?

18 A I don't recall. But, yes, I would agree we knew what he looked
19 like or had a description.

20 Q He described him, his physical build, his tattoos, is that correct?

21 A Here, again, I don't recall the specifics but I believe we had his
22 identification information.

23 Q And so you knew who you were looking for?

24 A Yes.

25

1 Q And when Donte Johnson came out of the house at that point
2 you knew it was Donte Johnson or Deko?

3 A Well, he identified himself as such.

4 Q Okay. And you had probable cause to arrest him and you
5 placed him in handcuffs at that point, correct?

6 A No. He was placed under arrest for some outstanding warrants
7 after we took custody of him from the SWAT officers.

8 Q Okay. So, the SWAT officers brought him out, brought him
9 where?

10 A To the curb.

11 Q And they -- then you placed him in flex cuffs?

12 A They placed him in flex cuffs.

13 Q Okay. So, he was in flex cuffs when he came to you --

14 A Yes.

15 Q -- when you first spoke to him? And your intention of going
16 over there that morning, at 3:00 in the morning, was to arrest Donte
17 Johnson, correct?

18 A Among other things, yes.

19 Q Because you had probable cause to?

20 A Among other things, yes.

21 Q And you were not going to let him go?

22 A Correct.

23 Q And Donte Johnson placed in those flex cuffs sitting on the curb
24 was not entitled to leave, was he?

25

1 A Well, at the point that we initially made contact with him the
2 discovery of the outstanding warrant happened about 10 or 15 minutes
3 later. There were some patrol officers there assisting us and SWAT, I
4 believe one of them ran Mr. Johnson so we could get an ID number or some
5 specifics on the ID. Then we learned that he had an outstanding warrant.

6 Q But your intention as you were driving over there on that
7 morning, at 3:00 in the morning on the 18th, was to locate and arrest Donte
8 Johnson based on the probable cause you had?

9 A Yes.

10 Q So, when he was placed in flex cuffs and he was in your
11 custody or your view, your intention was not ever to let him go at that
12 point?

13 A Well, like I said at that point we were going to take custody of
14 him, he had been detained by other officers.

15 Q So, he was, in fact, detained?

16 A Yes.

17 Q Was he ever read his Miranda rights?

18 A I don't know.

19 Q Were you present with him when he was brought by the SWAT
20 officers and placed on the ground?

21 A No. They had brought him out for some time, put him there,
22 then they asked us to come in so that they could relieve their man who was
23 watching them.

24 Q And you never read his Miranda rights, is that correct?
25

1 A I didn't, no.

2 Q The master -- there were three bedrooms, correct?

3 A Yes.

4 Q Tod Armstrong told you that he stayed in one bedroom, not the
5 master bedroom because the master bedroom was flooded, I think, isn't that
6 correct?

7 A I don't believe the master bedroom being flooded was the issue.
8 I think his bedroom at one time might have been flooded or perhaps he may
9 have even changed bedrooms because of some flooding problem. Here,
10 again, I wasn't involved directly in that conversation so I don't know. But
11 he was --

12 Q There were three bedrooms, though, and --

13 A Yes.

14 Q -- one of them contained -- the master bedroom contained some
15 clothes on there -- in there?

16 A There were some clothing items in there, yes.

17 Q There were some blankets laid on the ground, is that correct?

18 A I don't seem to recall any blankets, there was something in the
19 middle that I remember putting the pants on when we took a photograph, I
20 don't remember what made that pile.

21 Q Were there any blankets? You don't recall if there were any
22 blankets laying around?

23 A I don't recall anything -- no, no blankets; could have been but I
24 don't recall.

25

1 Q You went over there with a consent to search form signed by
2 Tod Armstrong with the intent of searching for evidence as to the murder
3 weapon, correct -- as to a murder, correct?

4 A Yes.

5 Q At what time did Tod Armstrong sign that consent form, do you
6 recall?

7 A It was before we left the office during the course of his
8 interview. I don't know when that happened, before, during or after the
9 interview.

10 Q Initially your first conversation with Tod Armstrong was on 8/17
11 at about ten hundred, is that correct?

12 A Sounds correct.

13 Q Around that time --

14 A Yes.

15 Q -- so about seven hours prior, five hours prior to you going to
16 the 4815 Everman residence?

17 A Right.

18 Q Okay. How long would it have taken -- how long have you been
19 a sergeant with the Metropolitan Police Department?

20 A Ten years.

21 Q Okay. Last year with electronic devices being what they are
22 how long does it take normally to secure a search warrant?

23 A I can get a telephonic search warrant very quickly, half hour --

24 Q Okay.

25

1 A -- twenty minutes.

2 Q On 8/17/98 or 8/18/98, how long would it have taken you to
3 get a search warrant?

4 A There, again, probably around the same time frame.

5 Q Okay. And if you had any inclination that Donte Johnson
6 resided in that house you indicated to the District Attorney that you would
7 have secured a search warrant, correct?

8 A Yes.

9 Q And any inclination that you had was so that you could preserve
10 the evidence, right?

11 A Yes.

12 Q So that you would follow the proper procedure?

13 A Correct.

14 Q So, what slight inclination would you need in order for you to
15 then get a search warrant? What would you consider slight inclination?

16 A Well, anything that would lead me to believe that I'd have to
17 protect somebody's Fourth Amendment rights.

18 Q Okay. So, if a statement of the person who lived there at the
19 house and owned the house said that they lived there, they stayed there for
20 a couple of weeks, would that be an inclination?

21 A If the defendant, you mean, in that regards? Yeah, if a
22 defendant told me that he lived in a particular place that we were intending
23 to search --

24 Q I'm sorry, let me strike that. My question really was the owner
25

1 of the house. Let me ask you this specifically, if the owner of the house
2 was asking is there some other people that are living there with you and his
3 answer was: Off and on, yes, staying there. They weren't really living there
4 but they come in and out of the house? Okay. Answer: Blank day, I guess,
5 considered living there. Would that give you an inclination that these people
6 may be living in that house?

7 A If that question were asked of me I would dwell further.

8 MR. SCISCENTO: Okay. No further questions, your Honor.

9 THE COURT: Anything further, Mr. Guymon?

10 **REDIRECT EXAMINATION**

11 **BY MR. GUYMON:**

12 Q Based on the totality of the information you received were the
13 suspects living at this particular house, the suspects that you were
14 interested in arresting?

15 A No.

16 Q Was there anyone associated with this case in the investigation,
17 based on the information you had, living at that house on the night in
18 question?

19 A No.

20 Q And based on the totality of the information you had who was it
21 that lived at that house?

22 A Tod Armstrong and Ace Hart.

23 Q And did you receive permission to search the house from the
24 person living or the owner of that house?
25

1 A Yes.

2 Q Court's indulgence. If I might ask, other than the one question
3 asked of Donte Johnson as he sat on the curb, was he asked any other
4 questions, other than whether or not he lived at that residence?

5 A I don't believe so, no.

6 Q Okay. Was he interrogated in any way about the facts of the
7 quadruple homicide --

8 A No.

9 Q -- in your presence --

10 A No.

11 Q -- while seated there?

12 A No, he wasn't.

13 THE COURT: Anything further, Mr. Sciscento?

14 MR. SCISCENTO: Very briefly, your Honor.

15 **RECROSS-EXAMINATION**

16 **BY MR. SCISCENTO:**

17 Q You had information on 8/18/98 at 3:00 in the morning that
18 when you arrived at 4815 Everman that you would, in fact, find Donte
19 Johnson present there, isn't that correct?

20 A That he might be there.

21 Q Yes.

22 A Or he was there several hours earlier.

23 Q And that he was there for the prior three weeks at some time?

24 A No, that's not correct.

25

1 Q You didn't have that information?

2 A No.

3 Q How did you come about even talking to Tod Armstrong or Ace
4 Hart regarding this case?

5 A I believe I talked to Tod that night when I asked for a key to the
6 residence, thinking that if -- when we left we'd have to secure it.

7 Q Let me go back a little further. How did it come about that Tod
8 Armstrong became involved in this investigation?

9 A In the first place?

10 Q In the first place.

11 A I'm not quite sure. One of the three young men that you've
12 named made mention to, I believe, his father regarding some information that
13 they had and then that father contacted a police officer, perhaps he knew
14 him or maybe just the police in general and then that culminated in the father
15 bringing the three young men down for interview.

16 Q Okay. And Tod Armstrong at one point indicated that there was
17 some people at his house who he believed were involved in the murder?

18 A Not to me.

19 Q But to one of your detectives?

20 A The information was is that while at his house people that were
21 visiting and talking to him, staying there, I don't know how he phrased it but
22 that he had come in contact with these people at his house and learned the
23 following information.

24 Q And on the 18th when you went over there you intended to find
25

1 some guns located there, correct, based on Tod Armstrong's statements?

2 A Based on what we'd been told, yes.

3 Q And they said that those guns first came into the house about
4 three weeks earlier?

5 A Not to my knowledge. I don't know.

6 Q Do you know that -- if Tod Armstrong is involved in this murder?
7 Do you have any inclination that he is?

8 MR. DASKAS: Objection, relevance, Judge.

9 THE COURT: Let him answer.

10 THE WITNESS: We're not quite sure at this point, it's an evolving
11 issue.

12 Q (By Mr. Sciscento) When you interviewed him on the 17th, a
13 month later after you searched the house, you indicated that you believed he
14 was lying, isn't that correct?

15 A I'm sorry?

16 Q You indicated to Mr. Armstrong that you believed he was lying?

17 MR. GUYMON: This is a month later, I'm going to object, Judge, what
18 does it have to do with a suppression hearing?

19 THE COURT: Sustained.

20 MR. SCISCENTO: One other question, your Honor, I'll be done.

21 Why did you wait until 3:00 in the morning to go over to the
22 4815 Everman residence?

23 THE WITNESS: Well, we finished up with the interviews and our things
24 at the office. We went down to the vicinity, then we had a delay for the
25

1 availability of SWAT and for them to deploy and do what they do.

2 Q (By Mr. Sciscento) What time did you -- how long was the
3 delay for?

4 A Several hours.

5 MR. SCISCENTO: Okay. No further questions, your Honor.

6 THE COURT: Anything further?

7 MR. GUYMON: (Nods)

8 THE COURT: Thank you, sir. You're excused.

9 That's your only witnesses?

10 MR. GUYMON: Yes, your Honor.

11 THE COURT: Call your witness, if you intend to.

12 MR. FIGLER: Court's indulgence for one second.

13 MR. SCISCENTO: We will call Charolette Carla Severs, your Honor.

14 Your Honor, I would make a motion to suppress any statements
15 given by Donte Johnson after he was placed in the handcuffs.

16 THE COURT: What, for the purposes of the search?

17 MR. SCISCENTO: Purposes of the search and the knowledge that they
18 have.

19 THE COURT: Okay. Well, I tell you what, after they file their points
20 and authorities you can make that a part of your reply, very interesting.

21 MR. SCISCENTO: Well, I don't know what else was said, I mean.

22 **CHAROLETTE SEVERS**

23 having been called as a witness by the Defense, being first duly sworn,
24 testified as follows:

1 THE CLERK: Please state your name and spell your last name for the
2 record.

3 THE WITNESS: Charolette Severs, S-e-v-e-r-s.

4 **DIRECT EXAMINATION**

5 **BY MR. SCISCENTO:**

6 Q Miss Severs, you know the address 4815 Everman?

7 A Yes.

8 Q Okay. You know the residence of 4815 Everman, is that
9 correct?

10 A Yes.

11 Q Yes?

12 A Yes.

13 Q Did you ever live there?

14 A I stayed there a couple of days, yeah.

15 Q How many days did you stay there?

16 A Like maybe 14 days.

17 Q Maybe 14 days. And what -- give me a time frame of the 14
18 days you were there.

19 A I forgot. I don't know.

20 Q You don't know

21 A Like in, I guess --

22 Q Was it -- well, let me give you a time frame. There was a time
23 that you were arrested. Well, there was a time that the SWAT team came in
24 and pulled everybody out of that house, correct?
25

1 A Yeah.
2 Q And that would be on the 18th of August of '98?
3 A Yeah.
4 Q Okay. Now, from that date backwards how many days?
5 A Fourteen days.
6 Q Fourteen days. Did you sleep there every night?
7 A Yeah.
8 Q Did somebody else sleep there with you? Was it -- Donte
9 Johnson stay there with you?
10 A Yeah.
11 Q Yes?
12 A Yes.
13 Q Yes. And for at least 14 days prior to that date, that being the
14 17th or 18th of August?
15 A Huh? What did you say?
16 Q Prior to the 18th, the 14 days that you're talking about, Donte
17 Johnson also stay there?
18 A Yes.
19 Q Okay. Donte Johnson was providing some kind of drugs to Tod
20 Armstrong to stay there?
21 MR. GUYMON: Objection, leading.
22 THE COURT: Most of these have been leading, if they're getting to
23 some important issue.
24 MR. SCISCENTO: Your Honor, but I -- your Honor, then I would say
25

1 that Miss Severs is a hostile witness. I intend --

2 THE COURT: Today or --

3 MR. SCISCENTO: Well, if I can have a little leeway here, your Honor. I
4 contacted Mr. Siegel indicating that I wanted to talk to her regarding this
5 case. I've been provided with a taped conversation of Carla Severs where,
6 in fact, she says she did not want to talk to me. So, I would ask her to be
7 treated as a hostile witness.

8 THE COURT: Okay. It'll also make it faster. Let him ask -- it's leading
9 questions. Because last time I saw Miss Severs she did seem sort of more
10 on their side then your side.

11 MR. SCISCENTO: You know, the world didn't end, so nothing has
12 changed.

13 It's true that Donte Johnson was providing drugs to Tod
14 Armstrong to stay in that house, isn't that correct?

15 THE WITNESS: Yes.

16 Q (By Mr. Sciscento) Okay. And that was a way of him paying
17 rent, isn't that correct?

18 A Yeah.

19 Q So, there was some kind of compensation that Donte Johnson
20 was giving to Tod Armstrong to stay in that house?

21 A Yeah.

22 Q And where would Donte Johnson stay while he was in that
23 house?

24 A In the bedroom.

25

1 Q Which bedroom is that? Would that be the master bedroom?
2 A Yes.
3 Q Did he have his clothes in there?
4 A Some of them. The clothes that he had.
5 Q Did he have --
6 A The clothes that he had, yeah, he had them there.
7 Q So, almost everything that he had was in that master bedroom?
8 A Yes.
9 Q Okay. There was a lock on that master bedroom?
10 A Yes.
11 Q Would Donte Johnson ever lock that door?
12 A No. Only just maybe like when me and him was doing
13 something.
14 Q So, when you guys were inside he may have been -- he may
15 lock the door?
16 A Yeah.
17 Q To keep other people out?
18 A Yeah.
19 Q Okay. Would he consider that -- did you consider that Donte
20 Johnson's bedroom?
21 A No.
22 Q Why not?
23 A Because it wasn't his house.
24 Q But that's where he was -- that's where he slept?
25

1 A Yes.

2 Q He sleep there every night?

3 A Some nights he sleep on the couch.

4 Q Okay. But most of the time he would sleep in that bedroom?

5 A Yeah.

6 Q Where would Tod Armstrong sleep?

7 A On the couch.

8 Q On the couch. And would he sleep anywhere else?

9 A No.

10 Q Is there another bedroom that Tod Armstrong would sleep in?

11 A No. It was busted because it was a water bed.

12 Q Were there three bedrooms there?

13 A Yeah.

14 Q Did you have any of your personal stuff in that bedroom?

15 A Yeah.

16 Q Okay. Personal clothes and maybe some makeup and things like

17 that?

18 A Yes.

19 Q Okay. Would you allow anybody in that house to go through

20 your personal stuff in that room?

21 A No, I wouldn't allow nobody to go through my stuff.

22 Q Okay. If somebody was going through your personal stuff in

23 that room you'd be upset?

24 A Yeah.

25

1 Q Okay. And you placed it in that -- your personal stuff in that
2 room why? Did you consider it your space?

3 A Yeah.

4 Q And you there with Johnson, Donte Johnson, at his request?
5 He asked you to come into the house?

6 A Yeah.

7 Q He asked you to come sleep with him?

8 A It wasn't -- it's not like he asked me --

9 Q I don't mean in a sexual way, I meant he meant for you to come
10 in and stay with him?

11 A Yeah.

12 Q Okay. Did you consider that Donte Johnson was living there?

13 A No, it was like a spot, where he'd just go chill out for awhile.

14 Q All right. For those 14 days prior to the 18th, how many nights
15 did Donte Johnson sleep in that house?

16 A Everyday, all those 14.

17 MR. SCISCENTO: No further questions, your Honor.

18 THE COURT: Who, if anyone from the State, wishes to pursue this?

19 MR. GUYMON: Thank you. Very briefly.

20 **CROSS-EXAMINATION**

21 **BY MR. GUYMON:**

22 Q Miss Severs, the -- back in August the police didn't know that
23 Donte was trading Tod Armstrong rock cocaine to use that spot, did they?

24 MR. SCISCENTO: I'm going to object, your Honor, it's total
25

1 speculation.

2 THE COURT: Yes, it is.

3 MR. GUYMON: Okay.

4 You said that that was like a spot to you, is that correct?

5 THE WITNESS: Yes.

6 Q (By Mr. Guymon) Place you go and just chill?

7 A Yeah.

8 Q Kick it?

9 A Yeah.

10 Q And do you recall last week on the 28th explaining to Mr.
11 Daskas and myself that you didn't consider yourself living at that residence?

12 MR. SCISCENTO: I'm going to object to this, your Honor, too.

13 THE COURT: On what basis?

14 MR. SCISCENTO: Well, this is information that comes out -- I just
15 received a copy of the transcript that she provided, I guess on the 21st, I
16 haven't had a chance to go over it. But I think we need to focus specifically
17 on the date of the 17th, what she thought at that time, not which has
18 occurred afterwards.

19 THE COURT: Well, let's get in this and we'll see about it later. Go
20 ahead.

21 Q (By Mr. Guymon) You indicated, did you not, that you didn't
22 consider yourself living at that place but rather that was just a flop place?

23 A Yeah.

24 Q A place where you and friends and others would visit?

25

1 A Yeah.

2 Q Is that correct?

3 A Yes.

4 Q And do you recall talking to the police on August 18th of 1998,
5 about whether or not you were living at the house or simply staying there?

6 A Do I recall talking to any of them?

7 Q Yes.

8 A Yeah.

9 Q Okay. And it's true on the 18th SWAT came and you were at
10 the house?

11 A Yeah.

12 Q Donte was at the house?

13 A Yeah.

14 Q And Scale (phonetic) was at the house?

15 A Yeah.

16 Q And that night after SWAT went into the house you were
17 questioned, were you not, by the police?

18 A Yeah.

19 Q And they tape recorded the statement?

20 A Yeah.

21 Q And do you recall being asked: Have you been staying over at
22 the house or just visiting? Do you recall that question?

23 A And I -- yeah.

24 Q Okay. And do you recall your answer?

25

1 A Yeah.

2 Q Okay. And do you recall what it was?

3 A I told them I stayed there a couple of nights.

4 Q Okay. That you'd stayed there a couple of nights?

5 A Yeah.

6 Q And in that interview the police said: You have a regular
7 address, do you not? And you said: Yes?

8 A Yeah.

9 Q And, in fact, you told them that the address that you were living
10 at was your mother's address?

11 A Yeah.

12 Q You referred to the Everman house as a house you had just
13 stayed at for a couple of nights, correct?

14 A Yeah.

15 Q And isn't it true that while you stayed at that house for a couple
16 of nights Donte Johnson stayed there?

17 A Yeah.

18 Q Other people would come and sleep there?

19 A Yeah.

20 Q Stay there one night or two nights?

21 A Yeah.

22 Q And leave?

23 A Yeah.

24 Q And isn't it true that the master bedroom -- all the persons that
25

1 would come into that house could go into the master bedroom, is that true?
2 A Yeah.
3 Q Tod Armstrong commonly went into that master bedroom?
4 A Yeah, he went in there.
5 Q Ace Hart commonly went into the master bedroom?
6 A Yeah.
7 Q Other persons that visited the house commonly went into the
8 master bedroom?
9 A Yeah.
10 Q People or persons would kind of hang out in the master
11 bedroom?
12 A Sometimes, yeah.
13 Q Use the stereo there?
14 A Yeah.
15 Q And come and go as they pleased in and out of that room?
16 A Yeah.
17 Q Sometimes Donte was there and sometimes he wasn't?
18 A That's right.
19 Q And it is also true that Tod Armstrong kept his clothing in the
20 master bedroom's closet --
21 A Yeah.
22 Q -- correct?
23 A Yeah.
24 Q Ace Hart kept his clothing in the master bedroom closet?
25

1 A Yeah.
2 Q Donte had a few things in the master bedroom?
3 A Yeah.
4 Q You had some things in the master bedroom?
5 A Yeah.
6 Q Red had some things in the master bedroom?
7 A Yeah.
8 Q It's also true that you all would leave stuff in say the living room
9 of the house too?
10 A Yeah.
11 Q You would --
12 A Not like -- not clothes or anything like that.
13 Q But say a pack of cigarettes or those kind of items?
14 A Yeah.
15 Q Donte might leave them in the living room and Red would?
16 A Yeah, everybody.
17 Q Now, Tod Armstrong was the owner of that house, is that
18 correct?
19 A I think his mother.
20 Q All right. His mother. But Tod was the one that was living
21 there and had the key --
22 A Yeah.
23 Q -- correct?
24 A Yeah.
25

1 Q Did you have a key?
2 A No.
3 Q Did Donte have a key?
4 A No.
5 Q Did Red have a key?
6 A No.
7 Q And how is it that you would come and go from that house?
8 A Sometimes I go through the back room window or some people
9 -- sometimes people -- Tod be at home a lot, so.
10 Q Excuse me?
11 A Tod was at home a lot, so it's not like you needed a key.
12 Q Okay. So, if Tod was home other people would come and go in
13 the house?
14 A Yeah.
15 Q Now, people that would come and go, would other people come
16 and go that didn't sleep there at all?
17 A Yeah.
18 Q Friends of Tod's?
19 A Yeah.
20 Q Friends of Red's?
21 A No.
22 Q How about Deko's friends --
23 A Yeah.
24 Q -- any of his friends come and go out of there?
25

1 A Yeah.

2 Q And tell me something. There was a door on the master
3 bedroom, was there not?

4 A Yeah.

5 Q It wasn't locked very often, was it?

6 A No.

7 Q Perhaps how often would it be locked and for what period of
8 time?

9 A Like maybe once. Like once a day or something like that.

10 Q Okay. And --

11 A Just when we be doing whatever we was doing.

12 MR. SCISCENTO: Your Honor, could we get a clarification of who we
13 were?

14 THE WITNESS: Me and Donte.

15 MR. SCISCENTO: Thank you.

16 Q (By Mr. Guymon) And when you and Donte were doing private
17 things it would be locked during that period of time?

18 A Yeah.

19 Q Other than that were people free to come and go in and out of
20 that room?

21 A Yeah.

22 Q And they commonly did that, didn't they?

23 A Yeah.

24 Q Okay. Court's indulgence. Night that SWAT came do you recall
25

1 being placed on the curb?

2 A Yeah.

3 Q And when Detective Hefner or Sergeant Hefner asked you if you
4 were staying there at that residence do you recall telling him no?

5 A I don't remember but I'm pretty sure I did.

6 Q Pretty sure you told him yes or no?

7 A That I didn't stay there.

8 Q Okay. And did he ask you if you lived there?

9 A Yeah.

10 Q And what do you believe you told him?

11 A That I didn't stay there.

12 Q Okay. And are you sure that he asked you that question?

13 A Yeah.

14 MR. GUYMON: All right. Pass the witness, your Honor.

15 THE COURT: Mr. Sciscento.

16 **REDIRECT EXAMINATION**

17 **BY MR. SCISCENTO:**

18 Q Tod Armstrong owned the house, correct, or his mother did?

19 A Yeah.

20 Q That's information you had?

21 A Yeah.

22 Q But you also had information that Donte Johnson was staying
23 there?

24 A Yes.

1 Q He was staying at the house?
2 A The same amount of time I was staying there.
3 Q Okay. And there were three bedrooms there?
4 A Yes.
5 Q One, Ace Hart used to live in --
6 A Yes.
7 Q -- or used to stay in?
8 A Yes.
9 Q But Ace Hart moved out, correct?
10 A I don't know. I don't know if he moved out.
11 Q But he stopped staying there, isn't that right?
12 A Yeah.
13 Q Okay. And Tod would sometimes sleep in that bedroom, isn't
14 that correct?
15 A I don't know. I don't recall. I just remember him laying on the
16 couch all the time.
17 Q Okay. When you would go to bed, when Donte would go to
18 bed, where would you most of the time sleep; you and Donte?
19 A On the little couch, sofa couch or whatever.
20 Q What about in the master bedroom?
21 A Yeah, we used to sleep there sometimes.
22 Q Would anybody else come in there and sleep? Would Tod
23 Armstrong come in there and sleep in that bedroom with you?
24 A No.
25

1 Q He would sleep somewhere else?

2 A Yes.

3 Q Okay. And so when you guys went into that bedroom to go to
4 sleep you would only be -- you'd be the only ones in there unless you or
5 Donte invited somebody else in, isn't that correct?

6 A Red come in there sometimes.

7 Q Okay. Because Donte asked him to come in?

8 A I don't know if he asked him.

9 Q Well, Donte asked Red to come into the house, correct?

10 A Oh, yes.

11 Q Okay. And, so, Donte also asked Red to come into -- he could
12 sleep in the bedroom, isn't that correct?

13 A I don't know if he said he could. I just know he came in there.

14 Q Who did you consider staying in that -- who did you consider at
15 that time on the 18th of August that would live in that bedroom?

16 MR. GUYMON: Objection, relevancy, Judge, because the standard
17 really is what the police had knowledge of and what they believed.

18 THE COURT: We'll let it in.

19 You recall the question?

20 THE WITNESS: Oh, no, I'm sorry.

21 THE COURT: Ask it again.

22 Q (By Mr. Sciscento) On the 18th of August, 1998, who did you
23 consider living in the back master bedroom?

24 A Me and Donte and Red.

25

1 Q You were staying there for about three weeks, isn't that
2 correct?

3 MR. GUYMON: It was asked and answered the first time and the
4 answer was two weeks.

5 THE WITNESS: Fourteen days I think is two weeks.

6 Q (By Mr. Sciscento) When Mr. Guymon asked you back on
7 December 21st, 1999, how long did you stay at the Everman residence your
8 answer was: For like three weeks. Is that correct?

9 A I don't remember.

10 MR. SCISCENTO: If I may approach, your Honor?

11 THE COURT: We'll assume she said it at that point. Ask your next
12 question.

13 MR. SCISCENTO: Have nothing further, your Honor.

14 THE COURT: Anything further, Mr. Guymon?

15 MR. GUYMON: Nothing else, your Honor.

16 THE COURT: Thank you, ma'am. We'll see you back here when you're
17 supposed to be. You have one more witness Mr. --

18 MR. SIEGEL: When is the next time she's supposed to be here?

19 THE COURT: Calendar call.

20 MR. SIEGEL: Which is?

21 THE COURT: Summerish.

22 MR. SIEGEL: Summerish, okay.

23 THE COURT: We'll get you an exact date.

24 THE CLERK: May 30th.
25

1 MR. SIEGEL: Well, we'll be back on calendar for -- okay. Thank you.

2 THE COURT: You think you will. We'll have some special blocking out
3 of the computer, disappoint you.

4 You have one more witness, Joe?

5 MR. SCISCENTO: Can we approach for a moment, Judge.

6 MR. FIGLER: I don't think we need --

7 MR. SCISCENTO: Well, I want to.

8 (Whereupon a bench conference
9 was held)

10 THE COURT: Call your next witness, please.

11 What we discussed at the bench was, of course, Mr. Johnson
12 has the right to testify in this hearing without the statements that he is
13 making in a motion to suppress hearing being used against him substantively
14 at trial. That was the seminal case maybe 30 years ago.

15 What I heard you saying at the bench was, Mr. Daskas, which I
16 wasn't aware of, that was the question in my mind, there is if he took the
17 stand the right of the State to use those statements in cross-examination to
18 impeach him, as you understand the law?

19 MR. DASKAS: That's our understanding, Judge, absolutely.

20 THE COURT: But you of course concede you couldn't use them other
21 than that?

22 MR. DASKAS: That's correct, Judge.

23 THE COURT: Okay. Go ahead.

24 Call your witness then Mr. Figler.

25

1 MR. FIGLER: Thank you, your Honor. The defense would call Donte
2 Johnson to the stand for purposes of this evidentiary hearing alone.

3 THE COURT: Thank you.

4 **DONTE JOHNSON**

5 the Defendant herein, having been called as a witness on his own behalf,
6 being first duly sworn testified as follows:

7 THE CLERK: Please state your name.

8 THE WITNESS: Donte Johnson, J-o-h-n-s-o-n.

9 THE COURT: Go ahead, Dayvid.

10 MR. FIGLER: Thanks.

11 **DIRECT EXAMINATION**

12 **BY MR. FIGLER:**

13 Q But is that the name that you were given at your birth?

14 A No.

15 Q And what was the name of your birth?

16 A John White.

17 Q Okay.

18 A John Lee White.

19 Q John Lee White. Okay. At -- do you recall August 18th, 1998,
20 that the day we've all been talking about?

21 A Yeah.

22 Q Okay. And were you arrested on that date by the police?

23 A Yes.

24 Q Okay. Now, I want to direct your attention to sitting outside on
25

1 the curb, do you remember that time frame?

2 A Yes.

3 Q Okay. This was after SWAT had entered this Everman
4 residence that we've all been talking about?

5 A Yes.

6 Q Okay. Now, can you tell me where your hands were at that
7 time that you were on the curb?

8 A Behind my back.

9 Q Okay. And were they free? Were they restrained? What was
10 the story?

11 A I was handcuffed.

12 Q Okay. Now, you heard testimony from Detective Thowsen and
13 Sergeant Hefner that they had made an inquiry of you, do you remember
14 that testimony?

15 A Yes.

16 Q Okay. What is your recollection from that evening? Do you
17 remember them asking you whether or not you lived in the house?

18 A No, I don't remember them asking me if I lived in the house or
19 not.

20 Q Okay.

21 A They was mostly asking me my name.

22 Q Okay. Were you, in fact, living at the Everman residence on
23 August 18th, 1998?

24 A Yes.

1 Q Okay. Was Ace Hart living there at that time or had he moved
2 out?

3 A He moved out.

4 Q Okay. And how long had you been staying at the Everman
5 residence?

6 A About close to a month.

7 MR. FIGLER: I have no further questions, your Honor.

8 THE COURT: Thank you.

9 MR. DASKAS: Very briefly, Judge.

10 **CROSS-EXAMINATION**

11 **BY MR. DASKAS:**

12 Q You were asked whether Sergeant Hefner asked you on August
13 18th if you lived in the Everman residence, you recall that question?

14 A Yeah.

15 Q Now, is it your testimony that you don't know if you were
16 asked that question or you were not asked that question?

17 A I don't remember being asked that question.

18 Q It's possible, though, that Sergeant Hefner did ask you on
19 August 18th if you lived in the Everman household, isn't it?

20 MR. FIGLER: Object as argumentative.

21 THE DEFENDANT: Yes. It's possible that he didn't.

22 THE COURT: Overruled.

23 Q (By Mr. Daskas) You say it's possible that he did ask you?

24 A It's possible that he didn't too.

25

1 Q Okay. Did you have a key to the Everman residence?
2 A Sometimes.
3 Q Sometimes?
4 A Yeah.
5 Q Who gave you that key?
6 A Tod Armstrong.
7 Q And how many keys were there to the Everman residence, if
8 you know?
9 A One.
10 Q Just one key?
11 A Yeah.
12 Q On August 18th at 3:30 in the morning who had the key to that
13 residence?
14 A I didn't have it.
15 Q You did not have it?
16 A No.
17 Q When was the last time you had seen the key to the residence,
18 say prior to August 18th at 3:30 a.m.?
19 A I don't remember when it was but it was a time when he went
20 to his girl friend's house.
21 Q You say it was a time when Tod went to his girl friend's house?
22 A Yeah.
23 Q And did Tod give you the key?
24 A Yeah.
25

1 Q Okay. At some point, though, you gave that key back to Tod,
2 didn't you?

3 A Right.

4 Q And that was prior to August 18th at 3:30 in the morning,
5 wasn't it?

6 A Yes.

7 Q You mentioned a few minutes ago that you were handcuffed as
8 you sat on the curb?

9 A Yeah.

10 Q Describe the handcuffs for me.

11 A They were --

12 Q Were they plastic or metal?

13 A Plastic.

14 Q Those were the cuffs that SWAT put on you, is that right?

15 A Right.

16 Q So, they ordered you out of the house and put those plastic
17 cuffs on you?

18 A Right.

19 MR. DASKAS: Nothing further.

20 THE COURT: Anything further, Dayvid?

21 MR. FIGLER: No, nothing.

22 THE COURT: Thanks, sir. You can return to your seat.

23 Any other witnesses?
24
25

1 MR. SCISCENTO: No, your Honor.

2 THE COURT: All right. How long will it take the State to get a
3 response to their motion or opposition to their motion on file with the goal of
4 having it decided the same day as 2/17 that we've got many of these other
5 motions?

6 MR. DASKAS: Judge, ten days would be fine.

7 THE COURT: All right. Ten days to file a opposition or, a response.

8 THE CLERK: That will be January 18th.

9 THE COURT: And how long for you gentlemen to get it to me at least
10 a week prior to the 2/17 hearing?

11 MR. FIGLER: 2/10.

12 MR. DASKAS: Well, Judge --

13 THE COURT: You may want something more on some other occasion
14 that you want to save this favor for, Mr. Figler.

15 MR. SCISCENTO: Well, I think the rule is five days but we were going
16 to have a little leeway on that.

17 THE COURT: What were you going to say?

18 MR. DASKAS: I was about to say that perhaps we should wait until
19 we have a transcript prepared of the testimony --

20 MR. FIGLER: Yeah, that would probably be --

21 THE COURT: Well, that's real quick, right?

22 THE RECORDER: (Nods)

23 MR. GUYMON: Yeah, we should be in dailys.

24 THE COURT: Yeah.

25

1 MR. DASKAS: Okay. Thank you, Judge.

2 THE COURT: So, you really want to use your one and only favor in the
3 course of this litigation now, Mr. Figler, for your reply?

4 MR. FIGLER: This is a vital motion, your Honor, and we want to make
5 sure that we get it correct. You know, it really depends on what type of
6 opposition is filed by the State. If it is consistent with some of the other
7 oppositions, it shouldn't take too much time. If it's a little more in depth,
8 then certainly we would want to take that extra time, so I want to be more
9 on the side of safety.

10 THE COURT: Let's -- what was their date?

11 THE CLERK: January 18th.

12 THE COURT: January 18th. So, let's make it two weeks from that.

13 MR. FIGLER: Thank you, your Honor.

14 THE CLERK: That's February 1st.

15 THE COURT: It's not Groundhog Day, that's the day before Groundhog
16 Day. Did you enjoy what will probably be your one and only opportunity to
17 cross-examine, Mr. Johnson?

18 MR. DASKAS: Absolutely, Judge.

19 THE CLERK: And then the continuance date will be February 7th.

20 (Whereupon the proceedings concluded)

21 * * * * *

22 ATTEST: I do hereby certify that I have truly and correctly transcribed the
23 sound recording of the proceedings in the above-entitled case.

24 
25 DEBRA VAN BLARICOM
Court Transcriber

EX. 3

1 **OPPS**
2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
9 Plaintiff,

10 -vs-

11 DONTE JOHNSON, aka John White,
12 #1586283

13 Defendant.
14

Case No. C153154
Dept. No. V
Docket H

15 STATE'S OPPOSITION TO MOTION TO SUPPRESS EVIDENCE
16 ILLEGALLY SEIZED

17 DATE OF HEARING: 02/17/00
18 TIME OF HEARING: 9:00 A.M.

18 COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through
19 ROBERT DASKAS, Deputy District Attorney, and files this State's Opposition To Motion To
20 Suppress Evidence Illegally Seized.

21 This Opposition is made and based upon all the papers and pleadings on file herein, the
22 attached points and authorities in support hereof, and oral argument at the time of hearing, if

23 ///

24 ///

25 ///

26 ///

27 ///

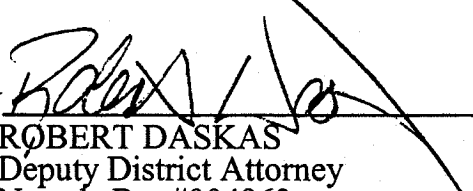
28 ///

1 deemed necessary by this Honorable Court.

2 DATED this 20 day of January, 2000.

3 Respectfully submitted,

4 STEWART L. BELL
5 DISTRICT ATTORNEY
6 Nevada Bar #000477

7 BY 
8 ROBERT DASKAS
9 Deputy District Attorney
Nevada Bar #004963

10 POINTS AND AUTHORITIES

11 STATEMENT OF FACTS

12 In the months preceding August of 1998, Tod Armstrong and Ace Hart resided at 4815
13 Everman Drive in Las Vegas, Nevada. The home was actually owned by Tod Armstrong's
14 mother, Cheryl Stevens. Transcript of Evidentiary Hearing (hereinafter "TR"), 1/6/00, pp. 9, 58.
15 Tod Armstrong possessed the only key to the residence. TR at pp. 10, 58, 103.

16 Sometime in August of 1998, Matthew Mowen visited the Everman residence to purchase
17 rock cocaine from Donte Johnson. Shortly after Mowen left the Everman residence, it was
18 suggested to Donte Johnson that Mowen and his roommates kept a large sum of cash and a large
19 amount of controlled substances in the Terra Linda home. Subsequently, Donte Johnson, Terrell
20 Young and Sikia Smith formulated a plan to rob the occupants of the Terra Linda residence.

21 On August 13, 1998, during the late evening hours, the conspirators executed their plan,
22 which culminated in the execution of Matthew Mowen, Tracey Gorringer, Jeffrey Biddle and
23 Peter Talamentez, all at the hands of Donte Johnson.

24 Detectives developed Donte Johnson as a suspect in the quadruple homicide after
25 speaking with several witnesses, including Ace Hart, Tod Armstrong and Bryan Johnson.
26 Detectives learned from these witnesses that in early August 1998, Donte Johnson, Charla
27 Severs (Donte's girlfriend) and Terrell Young occasionally visited the Everman residence, often
28 uninvited. See TR at p. 15. Moreover, officers were advised that Johnson and his associates

1 were possibly at the Everman house on August 18, 1998.

2 Detectives Thowsen and Buczek attempted to ascertain Donte Johnson's nexus to the
3 Everman home. Consequently, they questioned Tod Armstrong about the living arrangements
4 at Everman. Tod Armstrong informed the Detectives that Donte Johnson and his associates
5 "weren't really living there." TR at p. 24. Rather, Johnson would just "come in and out of the
6 house." TR at p. 24. This information was later corroborated by Charla Severs, who indicated
7 that Donte Johnson was *not* living in the Everman home; rather, it was a place that "he'd just go
8 chill out for awhile." TR at p. 88.

9 Moreover, Johnson did *not* pay rent. TR at p. 11. According to Armstrong, Johnson
10 "would just show up sometimes." TR at p. 16. In fact, Johnson had to climb through a broken
11 window to gain access to the residence. TR at p. 15. Tod Armstrong never gave officers any
12 information that led them to believe Donte Johnson lived at the Everman household, either on
13 a temporary or permanent basis. TR at p. 16.

14 Charla Severs would later confirm that "other people would come and sleep" at the house,
15 and anybody who visited the home was free to go into the master bedroom. TR at p. 91.
16 Moreover, both Tod Armstrong and Ace Hart kept personal belongings in the master bedroom.
17 TR at p. 93. Severs also confirmed that she and Johnson used a broken window to gain access
18 into the home. TR at p. 94. The door was rarely locked to the master bedroom; in fact, it was
19 only locked when she and Johnson were engaged in "private" relations. TR at p. 95. Severs also
20 confirmed that on August 18, 1998, Sgt. Hefner did in fact ask her, Johnson and Anderson if
21 they lived in the Everman residence. TR at p. 96. Severs' response was that she "didn't stay
22 there." TR at p. 96.

23 After speaking with Ace Hart, Bryan Johnson and Tod Armstrong, the officers were
24 satisfied that Donte Johnson did not live at the Everman home, and that Tod Armstrong had the
25 authority to consent to a search of the Everman household. TR at p. 62. Therefore, they
26 obtained from Armstrong his signature on a consent-to-search card for 4815 Everman, Las
27 Vegas, Nevada. TR at p. 43. The form was signed prior to 3:30 a.m. on August 18, 1998. TR
28 at p. 43. All of the information gathered by Detectives Thowsen and Buczek was conveyed to

1 Sgt. Ken Hefner. TR at pp. 15-16.

2 On August 18, 1998, at approximately 3:00 a.m., members of the Las Vegas Metropolitan
3 Police Department arrived at the Everman residence. The SWAT team, which was there to clear
4 the home to ensure the safety of officers, ordered all of the occupants of the Everman residence
5 out of the house. TR at p. 48. Donte Johnson, Charla Severs and Dwain Anderson exited the
6 home. TR at p. 48. They were placed in flex-cuffs and sat on a curb near the home. TR at p.
7 48.

8 Sgt. Hefner asked all three individuals if they lived at the Everman residence. TR at pp.
9 63, 103. Each responded that they did not. TR at pp. 17, 64. Donte Johnson was not
10 interrogated in any manner regarding the facts of the quadruple murder. TR at p. 79.

11 Donte Johnson was arrested and transported to the LVMPD Detective Bureau. A
12 consensual search of the Everman residence was then conducted by Sgt. Hefner with the
13 assistance of Crime Scene Analysts Marc Washington and Mike Perkins. TR at p. 68. Police
14 personnel located a gym bag in the living room area of the home which contained a partial roll
15 of duct tape. TR at p. 68. A VCR, handgun and black jeans were also found in the living room.
16 TR at p. 68.

17 Sgt. Hefner also searched the master bedroom. Significantly, there was no furniture or
18 bedding in the master bedroom. TR at p. 69. Sgt. Hefner believed it was a storage or junk room.
19 TR at p. 69-70. Sgt. Hefner located another pair of black jeans, a rifle and shoes in the master
20 room. TR at pp. 68-69. The jeans had an apparent blood stain on a pant leg. TR at p. 69.
21 Subsequent DNA tests revealed that the blood belonged to one of the four quadruple murder
22 victims. Moreover, Detectives found on the zipper area of those same jeans a white, crusty
23 substance. The substance was later identified as semen, and subsequent DNA tests revealed that
24 the donor of the semen was Donte Johnson.

25 DISCUSSION

26 Defendant Donte Johnson has filed the instant Motion to Suppress Evidence Illegally
27 Seized in which he seeks to "suppress all evidence seized from the bedroom at the Everman
28 residence." Motion to Suppress at p. 7. Defendant's argument is based on the notion that

1 Johnson did not "give any consent to have the bedroom searched." Motion to Suppress at p. 4.

2
3 Defendant's argument must fail because: (1) Johnson lacks standing to contest the search
4 of the Everman residence; (2) Tod Armstrong had authority to give consent to search; and (3)
5 officers reasonably relied on Tod Armstrong's apparent authority to search the home.

6
7
8 I. DONTE JOHNSON LACKS STANDING TO CONTEST THE SEARCH OF THE
9 EVERMAN RESIDENCE

10 Following the arrival of police personnel at the Everman household, Donte Johnson,
11 Charla Severs and Dwain Anderson were removed from the residence. TR at p. 48. Each was
12 placed in flex-cuffs for officers' safety and sat on a curb near the home. TR at p. 48. All three
13 individuals were asked specifically whether they lived in the Everman home. TR at pp. 63, 103.
14 Donte Johnson told Sgt. Ken Hefner, in the presence of Detective Tom Thowsen, that he, Donte
15 Johnson, did not live in the Everman house. TR at pp. 17, 64.

16 It is well settled that a denial of ownership or interest in property searched or seized
17 constitutes an abandonment of the property; consequently, a person has no standing to complain
18 of its search or seizure.

19 In U.S. v. Veatch, 674 F.2d 1217, 1219 (1981), for example, an automobile was stopped
20 after officers learned that one of its occupants was involved in a crime. Officers noticed in the
21 vehicle both a handgun and a wallet where Veatch had been sitting. Id. When asked by the
22 officer if the wallet was his, Veatch denied any ownership or interest in the wallet. Id. The
23 officer then examined the interior of the wallet and discovered a sales receipt which implicated
24 Veatch in the underlying crime. Id.

25 At trial, Veatch sought to suppress the search of the wallet and seizure of the sales receipt
26 because the officers did not obtain a warrant. Id. at 1220. The appellate court held that Veatch
27 had no standing to complain of the search or seizure. Specifically, the court held that Veatch's
28 denial of ownership and interest in the property constituted an abandonment of the property. Id.

1 Consequently, Veatch was left with no reasonable expectation of privacy in the wallet and he
2 could not object to its search. Id. at 1221.

3 Similarly, in U.S. v. Sanders, 130 F.3d 1316, 1317 (1998), Sanders was detained by
4 officers during a drug transportation investigation. During the investigation, Sanders disclaimed
5 any ownership in a brown leather bag officers had located. Id. Officers searched the bag and
6 found crack cocaine. Id.

7 Before his jury trial, Sanders moved to exclude all evidence discovered in the baggage
8 search. Id. The district court recognized that Sanders had no reasonable expectation of privacy
9 and no standing to challenge the search after he indicated he did not own it. Id. at 1317. The
10 appellate court also held that Sanders surrendered any legitimate expectation of privacy he had
11 in the bag when he disclaimed ownership. Id. at 1318. Finally, the court rejected Sanders'
12 argument that the finding of abandonment was erroneous because the officers knew Sanders was
13 lying when he claimed not to own the bag. Id.

14 When Sanders disclaimed ownership, he surrendered any legitimate expectation of
15 privacy he had in the bag. The fact that he forfeited his Fourth Amendment guarantee of
16 privacy was enough to discharge the officers' Fourth Amendment obligation to obtain a
17 search warrant. The Fourth Amendment only protects privacy. *It does not immunize
people who, finding themselves in a compromising situation, voluntarily trade their
interest in privacy for a chance to escape incrimination, no matter how unwise the
decision may seem in retrospect.*

18 Id. at 1318 (emphasis added). See also, U.S. v. Mangum, 100 F.3d 164 (1996) (defendant lacked
19 standing where he denied ownership of knapsack in response to officer's question); Bond v.
20 U.S., 77 F.3d 1009 (1996) (defendant who denied interest in or ownership of suitcase lacked
21 standing to contest search); U.S. v. Avila, 52 F.3d 338 (1995) (defendant lacked standing to
22 object to search of safe in room where defendant denied ownership of safe).

23 Likewise, in the instant case, Donte Johnson lacks standing to object to the search of the
24 Everman residence. Johnson voluntarily elected to distance himself from the residence. Johnson
25 was asked specifically by Sgt. Hefner if Johnson lived in the Everman household. Johnson
26 responded that he did not. He surrendered any legitimate expectation of privacy he had in the
27 home when he denied an interest in the residence. This is true even if Donte Johnson lied when
28 he told Sgt. Hefner he did not live in the home. Sanders, 130 F.3d at 1318. Johnson voluntarily

1 traded his interest in privacy for a chance to escape incrimination. Despite the fact that his
2 decision may seem unwise in retrospect, Johnson cannot now claim he had an expectation of
3 privacy in the home. Consequently, Defendant's Motion to Suppress must fail.

4 II. TOD ARMSTRONG HAD COMMON AUTHORITY OVER THE PREMISES AND
5 GAVE VALID CONSENT TO SEARCH THE HOME TO DETECTIVES

6 The Fourth Amendment prohibits unreasonable searches and seizures of individual's
7 effects. U.S. Const. Amend. IV. A search conducted without a search warrant issued upon
8 probable cause is considered unreasonable and unconstitutional unless the search falls within a
9 specific exception to the warrant requirement. See Katz v. United States, 389 U.S. 347, 357, 88
10 S.Ct. 507 (1967). One such exception is the valid consent of a third party who possesses actual
11 authority over the premises sought to be inspected. State v. Taylor, 114 Nev. 1071, 968 P.2d 315
12 (1998), citing United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988 (1974).

13 In Snyder v. State, 103 Nev. 275, 276, 738 P.2d 1303 (1987), for example, Ronnie Lee
14 Snyder ("Ronnie") robbed a victim of credit cards, cash and car keys. Days later, officers were
15 called to an apartment on an unrelated matter and found Larry Snyder ("Larry"), Ronnie's
16 brother, sitting on the curb with a gunshot wound. Id. Larry was transported to the hospital
17 where he told police they could find marijuana underneath the bed at the apartment. Id. Police
18 returned to the apartment, knocked on the door, and spoke to Gary Snyder ("Gary"), another of
19 the defendant's brothers. Id. The police asked if they could search the house and Gary said, "Go
20 ahead." Id. The police found marijuana as well as credit cards issued in the name of the robbery
21 victim. Id. Ronnie Snyder was ultimately arrested and charged with, *inter alia*, robbery. Id.

22 Ronnie filed a motion to suppress evidence obtained from the apartment, alleging it was
23 the product of an illegal search. Id. at 277. Ronnie's brothers -- Terry, Larry, and Gary -- each
24 filed affidavits stating that the apartment belonged to Ronnie, that they did not live there, and
25 that they did not have authority or permission to consent to a search. Id. The motion to suppress
26 was denied by the trial court.

27 On appeal, Ronnie argued that the evidence seized as a result of an illegal, warrantless
28 search of his apartment should have been suppressed because none of his brothers had the

1 authority to consent to a search of his apartment. Id. at 280. The Nevada Supreme Court
2 disagreed. It reasoned as follows:

3 The Fourth Amendment prohibits searches conducted without a
4 warrant unless they fall within a "few specifically established and
5 well-delineated exceptions." [citation omitted.] One such
6 exception is a search conducted pursuant to proper consent
7 voluntarily given. [citation omitted.] Valid consent to search can
8 be obtained from a third party who possesses common authority
9 over or other sufficient relationship to the premises. [citation
10 omitted.]

11 Id. at 280. The Court held that officers received valid consent from a third party, namely,
12 Ronnie's brother, Gary; consequently, the evidence was admissible. See also State v. Taylor, 114
13 Nev. 1071, 968 P.2d 315 (1998) (Court held that Gillis had actual authority over suitcase to give
14 consent to search where defendant gave Gillis sufficient custody and control over his suitcase
15 so as to assume the risk that Gillis might consent to a search of it).

16 In the instant case, Tod Armstrong possessed common authority over, or other sufficient
17 relationship to, the premises to give valid consent. Tod's mother owned the residence. TR at
18 pp. 9, 58. Tod kept his belongings in the master bedroom. TR at p. 93. Tod possessed the only
19 key to the residence. TR at pp. 10, 58, 103. In fact, Tod provided to Sgt. Ken Hefner the one
20 and only key to the household. TR at p. 58. Donte Johnson did not pay rent at the home. TR
21 at p. 11. Donte Johnson entered the home through a broken window. TR at p. 15. The Everman
22 home was simply a place for Johnson to "chill out for awhile." TR at p. 88. Clearly, therefore,
23 Armstrong had actual authority over the Everman premises to consent to its search.
24 Accordingly, the consensual, warrantless search of the home was valid and the evidence seized
25 is admissible.

26 III. THE OFFICERS REASONABLY RELIED ON TOD ARMSTRONG'S APPARENT 27 AUTHORITY TO SEARCH THE RESIDENCE

28 Assuming, *arguendo*, that Tod Armstrong did not possess actual authority to give consent
to search, the search was nevertheless valid. Many jurisdictions, including the Nevada Supreme
Court and the 9th Circuit, hold that a search is not invalidated where a police officer in good
faith relies on what reasonably, if mistakenly, appears to be a third party's authority to consent

1 to the search. Snyder v. State, 103 Nev. 275, 738 P.2d 1303 (1987). Whether an individual has
2 apparent authority to consent to a search must be judged against an objective standard, namely,
3 would the facts available to the officer at that moment warrant a person of reasonable caution
4 to believe that the consenting party had authority over the premises. State v. Taylor, 114 Nev.
5 at 322 *citing* Illinois v. Rodriguez, 497 U.S. 177, 188, 110 S.Ct. 2793 (1990).

6 Whether the basis for authority to consent to a search exists is the sort of recurring factual
7 question to which law enforcement officials must be expected to apply their judgment;
and all the Fourth Amendment requires is that they answer it reasonably.

8 Illinois v. Rodriguez, 497 U.S. at 186, 110 S.Ct. 2793.

9 For instance, in Snyder v. State, 103 Nev. 275, 738 P.2d 1303 (1987), the facts of which
10 are outlined above, Ronnie Snyder sought to suppress evidence that was seized as the result of
11 a warrantless search of his apartment. The search was conducted after officers received consent
12 to search the apartment from Gary Snyder, Ronnie's brother. *Id.* at 280. Gary Snyder filed an
13 affidavit indicating that the apartment belonged to Ronnie, that Gary did not live in the
14 apartment, and that Gary did not have authority or permission to consent to a search. *Id.* at 277.

15
16 The Nevada Supreme Court denied the suppression motion on two grounds, the first of
17 which is outlined above. The Court, however, further stated:

18 Many jurisdictions, including the 9th Circuit, hold a search is not invalidated where a
19 police officer in good faith relies on what reasonably, if mistakenly, appears to be a third
20 party's authority to consent to the search. [citations omitted.] Based upon the facts of this
21 case, we hold that the Las Vegas Metropolitan police officers reasonably relied on Gary
22 and Larry Snyder's apparent authority to consent to a search of the apartment. At 4:00
23 a.m. the police found Larry Snyder sitting outside the apartment where he had been shot.
24 He told them they could find marijuana in the apartment. When they returned to the
apartment that same morning, Gary Snyder opened the door, let them in, and consented
to a search. Gary was confined to a wheelchair. There is no indication that Gary told the
police he was just a guest or non-occupant. Under these circumstances, we hold that it
was *not* unreasonable for the police to assume that Larry and Gary occupied the house.
Therefore, the district court did not err in denying Ronnie's motion to exclude evidence
obtained as a result of the search.

25 *Id.* at 280-281 (emphasis added).

26 Similarly, in the instant case, it was reasonable for the officers to rely on Tod Armstrong's
27 apparent authority to consent to a search of the house, including the master bedroom. Officers
28 were told that the home belonged to Tod Armstrong's mother, who lived in Hawaii. TR at p.

1 9. Tod provided officers with the only key to the residence. TR at p. 10, 59. Officers were told
2 by Donte Johnson that Johnson did not live in the residence. TR at pp. 64-65. There was no
3 bedding in the master bedroom, which was consistent with the officers' belief that Johnson did
4 not live there. TR at p. 69. Tod Armstrong informed the Detectives that Donte Johnson and his
5 associates "weren't really living there." TR at p. 24. Rather, Johnson would just "come in and
6 out of the house." TR at p. 24. This information was later corroborated by Charla Severs,
7 Johnson's girlfriend, who indicated that Donte Johnson was *not* living in the Everman home;
8 rather, it was a place that "he'd just go chill out for awhile." TR at p. 88.

9 Moreover, officers were told that Johnson did *not* pay rent. TR at p. 11. According to
10 Armstrong, Johnson "would just show up sometimes." TR at p. 16. In fact, officers were
11 informed that Johnson had to climb through a broken window to gain access to the residence.
12 TR at p. 15. Tod Armstrong never gave officers any information that led them to believe Donte
13 Johnson lived at the Everman household, either on a temporary or permanent basis. TR at p. 16.

14 Armed with the information outlined above, it was certainly reasonable for the officers
15 to rely on Tod Armstrong's apparent authority to consent to the search of the Everman home,
16 including the bedrooms. Armstrong provided officers with the only key to the home and
17 consented in writing to a search. Johnson denied living in the home. Under these circumstances,
18 it was *not* unreasonable for the police to assume that Tod Armstrong was the sole occupant of
19 the house who possessed the authority to consent to a search. Therefore, the Motion to Suppress
20 should be denied.

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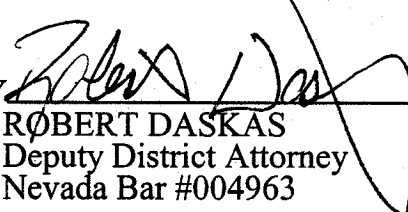
1 CONCLUSION

2 Based on the foregoing, the State of Nevada respectfully requests that this Court deny
3 Defendant's Motion to Suppress Evidence Illegally Seized.

4 DATED this 20 day of January, 2000.

5 Respectfully submitted,

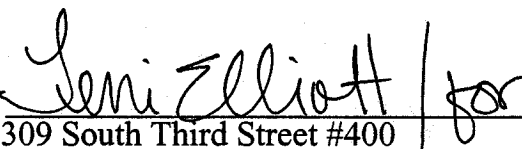
6 STEWART L. BELL
7 DISTRICT ATTORNEY
8 Nevada Bar #000477

9 BY 
10 ROBERT DASKAS
11 Deputy District Attorney
12 Nevada Bar #004963

13 RECEIPT OF COPY

14 RECEIPT OF COPY of the above and foregoing STATE'S OPPOSITION TO MOTION
15 TO SUPPRESS EVIDENCE ILLEGALLY SEIZED is hereby acknowledged this 21st day
16 of January, 2000.

17 SPECIAL PUBLIC DEFENDER'S OFFICE
18 ATTORNEY FOR DEFENDANT

19 BY 
20 309 South Third Street #400
21 Las Vegas, Nevada 89155

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