

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS WILLIAM MOONEY, )  
Appellant, )  
vs. )  
THE STATE OF NEVADA, )  
Respondent. )

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Appeal from the Judgment of Conviction  
Fourth Judicial District Court, Elko  
The Honorable Alvin Kacin, District Judge

APPELLANT'S REPLY BRIEF

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1 I. LEGAL ARGUMENT

2  
3 a. The plain view doctrine does not apply.

4 Under Koza v. State, 100 Nev. 245, 253, 681 P.2d 44, 49  
5 (1984), quoting Texas v. Brown, 103 S. Ct. 1535, 1540 (1983),  
6 quoting Coolidge v. New Hampshire, 403 U.S. 443, 465-68, 470  
7 (1971) (internal citations omitted), the plain view doctrine is as  
8  
9 follows:  
10

11  
12 First, the police officer must lawfully make an "initial  
13 intrusion" or otherwise properly be in a position from  
14 which he can view a particular area. Second, the  
15 officer must discover incriminating evidence  
16 "inadvertently," which is to say, he may not "know in  
17 advance the location of [certain] evidence and intend to  
18 seize it," relying on the plain view doctrine only as a  
19 pretext. Finally, it must be "immediately apparent" to  
20 the police that the items they observe may be evidence  
21 of a crime, contraband, or otherwise subject to seizure.

22 The State asserts that the evidence that Deputy Shoaf  
23 initially discovered was in plain view, notwithstanding the fact  
24 that the door to Thomas Mooney's bedroom was closed at the time  
25 Deputy Shoaf arrived and notwithstanding the fact that Deputy  
26  
27

1 Shoaf remained outside the bedroom door to have Aline Mooney  
2 open the door. This analysis overlooks the second prong of this  
3 test. There was nothing inadvertent about the discovery of the  
4 items inside Thomas Mooney's bedroom. This was a fishing  
5 expedition from its inception.  
6  
7

8  
9 The instant case is to be distinguished from a case where an  
10 officer is walking along the street and just happens to be looking  
11 to his/her left and sees explosive devices just inside of a clear  
12 window. The officer is not necessarily looking that way to try to  
13 find incriminating evidence. Rather, it was just by happenstance  
14 that the officer sees such devices.  
15  
16  
17

18  
19 Happenstance does not apply to the instant case. Aline  
20 Mooney opened the door to Thomas Mooney's room with Deputy  
21 Shoaf's tacit approval. Shoaf stays there for one purpose and one  
22 purpose only – to look for evidence inside. Thus, the plain view  
23 doctrine does not apply at all.  
24  
25

1                   **b. Aline Mooney was an agent of the police.**  
2

3           The State, in its Answering Brief, cites United States v.  
4 Miller, 688 F.2d 652 (9th Cir. 1982). In that case is the following  
5  
6 passage:

7  
8           While a certain degree of governmental participation is  
9 necessary before a private citizen is transformed into  
10 an agent of the state, *de minimis* or incidental contacts  
11 between the citizen and law enforcement agents prior  
12 to or during the course of a search or seizure will not  
13 subject the search to fourth amendment scrutiny. The  
14 government must be involved either directly as a  
15 participant or indirectly as an encourager of the  
16 private citizen's actions before we deem the citizen to  
17 be an instrument of the state. . . .

18 Id. at 657, quoting United States v. Walther, 652 F.2d 788, 791  
19 (9th Cir. 1981).

20           Moreover, the court in Miller stressed that "two critical  
21 factors in the 'instrument or agent' analysis are: (1) whether the  
22 government knew of and acquiesced in the intrusive conduct, and  
23  
24  
25 (2) whether the party performing the search intended to assist

1 law enforcement efforts or to further his own ends.” Miller at 657,  
2  
3 quoting Walther at 791-92.

4  
5 There cannot be any reasonable debate that Deputy Shoaf  
6 knew of Aline Mooney’s intrusive conduct. He was present when  
7 it happened. *App. 11*. The tougher question is whether or not Mr.  
8 Shoaf “acquiesced” to this conduct. The answer is yes.

10  
11 Deputy Shoaf made the conscious decision to stay where he  
12 was when Ms. Mooney opened the door. He offered no objection.  
13 He was more than willing to flash a light inside shortly after the  
14 door was opened. He and Ms. Mooney jointly went on this fishing  
15 expedition. They worked in concert. Just because it was Ms.  
16 Mooney’s hand that opened the door does not mean that there was  
17 no state action in this intrusion. Ms. Mooney did this for Mr.  
18 Shoaf’s benefit. If it were purely for Ms. Mooney’s benefit, this  
19 intrusion could have been done long before Mr. Shoaf arrived on  
20 the scene. After all, Thomas Mooney’s parents had a key to  
21 Thomas Mooney’s bedroom. *App. 11*.

1 On page 9 of the State's Answering Brief, counsel for the  
2 State of Nevada asserted that "there is no indication that Deputy  
3 Shoaf 'knew of and acquiesced in the intrusive conduct'." If Mr.  
4 Shoaf flashing a light into a room without probable cause right  
5 after Aline Mooney opens the door is not acquiescence to the  
6 intrusion, the defense cannot conceive of the State's definition of  
7 the word "acquiescence." In sum, Aline Mooney's actions were  
8 that of an agent and the Fourth Amendment applies to her  
9 actions.  
10  
11  
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14

15 **c. Thomas Mooney's parents lacked actual**  
16 **authority to consent to the search.**  
17

18 The State, on page 10 of the Answering Brief, cites two U.S.  
19 Supreme Court decisions to support the proposition "that police  
20 officers may search jointly occupied premises if one of the  
21 occupants consents." United States v. Matlock, 415 U.S. 164, 94  
22 S. Ct. 988, 39 L. Ed. 2d 242 (1974); Fernandez v. California, 134  
23 S. Ct. 1126, 1129 (2014).  
24  
25  
26  
27

1 To support its view that Thomas Mooney's bedroom was also  
2 his father's, the State, on page 14 of its Answering Brief,  
3 reminded this Court that the parents owned the property. On  
4 page 2 of that Brief, the State of Nevada uses the word "my" to  
5 describe what the father William Mooney thought about Thomas  
6 Mooney's bedroom.  
7  
8  
9

10 Furthermore, on page 3 of the Answering Brief, the State  
11 says that William wanted the lock put on the bedroom door and it  
12 was William who decided to have it installed. The State seems to  
13 believe that this fact, among others, establish that William  
14 Mooney had joint access to the bedroom. Thomas Mooney  
15 disagrees. Landlords install locks on their properties all the time.  
16 Suffice it to say, it was be an extreme rarity for a landlord to defer  
17 the task of installing a lock upon his/her tenant. But the mere  
18 fact that a landlord installs a lock on a bedroom does not mean  
19 that individual has any authority to consent to a search of his/her  
20 tenant's bedroom. Likewise, William does not have that authority  
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22  
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1 over his son's bedroom. It would be absurd to extrapolate from  
2 William's actions that he was installing the lock to keep Thomas  
3 out of his own bedroom.  
4

5  
6 Of all the cases cited in the Answering Brief, precisely zero  
7 stand for the proposition that an owner becomes a joint occupant  
8 to a bedroom purely based on his/her proprietary interest in the  
9 premises where the defendant has a bedroom. This obviously  
10 makes sense.  
11  
12

13  
14 As such, Deputy Shoaf violated the Fourth Amendment  
15 when he searched Thomas Mooney's bedroom on the mistaken  
16 belief that Aline and William Mooney had actual authority to  
17 consent to a search. No exception to the warrant requirement  
18 could allow for such an intrusion into Thomas Mooney's bedroom.  
19  
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21

22 **d. Thomas Mooney's parents lacked apparent**  
23 **authority to consent to the search.**  
24

25  
26 We need look no further than Deputy Shoaf's own words to  
27 realize that he could not have thought that Thomas Mooney's  
28  
29

1 parents had apparent authority to consent to a search of Thomas  
2 Mooney's bedroom. Mr. Shoaf told the parents "that Thomas had  
3 a reasonable expectation of privacy to that room." *App. 35.*  
4

5  
6 The State of Nevada and Deputy Shoaf have a fundamental  
7 difference of opinion. Unlike Mr. Shoaf, the State of Nevada does  
8 not take the position that Thomas Mooney had a reasonable  
9 expectation of privacy to that room. If we are to believe the  
10 State's position on this appeal, Thomas Mooney's bedroom was  
11 also the father William's room, too. This position is easy to reject.  
12  
13

14  
15 There is no evidence that William Mooney or Aline Mooney  
16 regularly used that room to sleep in. The context in which  
17 William claimed that it was "my" room was purely to show Mr.  
18 Shoaf that William owned the house. If propriety interest in itself  
19 provided sufficient apparent authority for an owner to consent to  
20 a search of a bedroom, even landlords would have the ability to  
21 consent to a search of their tenants' bedrooms. This position of  
22 the State stretches the apparent authority doctrine way too far.  
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1           **II. CONCLUSION**  
2

3           Aline Mooney was acting as an agent of law enforcement  
4 when she opened the door of Thomas Mooney's bedroom. Her  
5 actions were for law enforcement's benefit and with the  
6 knowledge as well as tacit approval of law enforcement. As such,  
7 the Fourth Amendment is violated.  
8  
9

10  
11           The Fourth Amendment was further violated when Deputy  
12 Shoaf, knowing that Thomas Mooney had a reasonable  
13 expectation of privacy in the bedroom, looked inside in an attempt  
14 to find something. This was a fishing expedition. His discovery of  
15 the bomb-making components was far for inadvertent. As such,  
16 this was not a plain view discovery.  
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27

1 Finally, William and Aline Mooney lacked any degree of  
2 authority to consent to Deputy Shoaf's search of the bedroom. It  
3 was Thomas Mooney's bedroom. To call it Williams Mooney's  
4 bedroom because he owns the residence is the height of absurdity.  
5  
6

7 DATED this 31st day of October, 2017.  
8

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17 CERTIFICATE OF COMPLIANCE

18 1. I hereby certify that this brief complies with the  
19 formatting requirements of NRAP 32(a)(4), the typeface  
20 requirements of NRAP 32(a)(5) and the type style requirements of  
21 NRAP 32(a)(6) because this brief has been prepared in a  
22 proportionally spaced typeface using Microsoft Word 2013 in size  
23 14 Century Schoolbook font.  
24  
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27 2. I further certify that this brief complies with the page or  
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1 type-volume limitations of NRAP 32(a)(7) because, excluding the  
2  
3 parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

4 [ x ] Proportionately spaced, has a typeface of 14 points or  
5  
6 more, and contains 1,537 words; or

7 [ ] Monospaced, has 10/5 or fewer characters per inch,  
8  
9 and contains \_\_\_\_ words or \_\_\_\_ lines of text; or

10 [ x ] Does not exceed 15 pages.

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12 3. Finally, I hereby certify that I have read this appellate  
13 brief, and to the best of my knowledge, information, and belief, it  
14 is not frivolous or interposed for any improper purpose. I further  
15 certify that this brief complies with all the applicable Nevada  
16 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which  
17 requires every assertion in the brief regarding matters in the  
18 record to be supported by a reference to the page and volume  
19 number, if any, of the transcript or appendix where the matter  
20 relied on is found.  
21  
22  
23  
24  
25

26 Elko County  
27 Public Defender

1 I understand that I may be subject to sanctions in the event  
2  
3 that the accompanying brief is not in conformity with the  
4 requirements of the Nevada Rules of Appellate Procedure.  
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6 DATED this 31st day of October, 2017.  
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18 (a) I hereby certify that this document was electronically  
19 filed with the Nevada Supreme Court on the 31st day of October,  
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22 (b) I further certify that on the 31st day of October, 2017,  
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1 Nevada Attorney General; and Tyler J. Ingram, Elko County  
2  
3 District Attorney.

4 (c) I further certify that on the 31st day of October, 2017, I  
5  
6 mailed, postage paid at Elko, Nevada, one (1) copy to Thomas  
7 William Mooney, NDOC # 1174250, Southern Desert Correctional  
8 Center, P.O. Box 208, 20825 Cold Creek Road, Indian Springs,  
9 Nevada 89070-0208.  
10

11  
12 DATED this 31st day of October, 2017.

13 SIGNED: /s/ Benjamin C. Gaumond

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