IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS WILLIAM MOONEY, Appellant, v. THE STATE OF NEVADA, Respondent.	NO. 72736

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

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

The judgment of conviction was entered on the 1st day of March, 2017. The notice of appeal was filed on the 29th day of March, 2017. As such, the notice of appeal was filed in a timely manner pursuant to NRAP 4(b)(1)(A).

NRS 177.015(3) provides this Court jurisdiction to review the judgment of conviction that Thomas William Mooney appeals.

ROUTING STATEMENT

This case involves a direct appeal from a judgment of conviction based on jury verdicts of guilty to fourteen (14) category B felonies for Possession of a Component of an Explosive or Incendiary Device with the Intent to Manufacture an Explosive or Incendiary Device or Devices. However, this direct appeal also entails the appeal from a judgment of conviction based on pleas of guilty to three (3) counts of Possession of a Firearm by a Person Previously Convicted of a Felony Offense.

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Since this appeal involves "any direct appeal from a judgment of conviction based on a plea of guilty, guilty but mentally ill, or nolo contendere (Alford)" as this phrase appears in NRAP 17(b)(1), this case is presumptively assigned to the Court of Appeals. As such, Thomas William Mooney does not object to this case being assigned to the Court of Appeals.

STATEMENT OF THE ISSUE

Did the district court commit reversible error by denying Thomas William Mooney's motion to suppress evidence?

STATEMENT OF THE CASE

Mr. Mooney was arraigned in district court on June 13, 2016. *Joint Appendix (hereinafter abbreviated "App.") 1.* Mr. Mooney pled not guilty to Counts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 26, and 27 – fifteen (15) counts of Possession of a Component of an Explosive or Incendiary Device with Intent to Manufacture an Explosive or Incendiary Device or Devices, category B felonies. *App. 3-6.* Also, Mr. Mooney pled not guilty to alternative Counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, and 24 –

twelve (12) counts of Possession of an Explosive or Incendiary Device, category D felonies. *App. 3-6.* Finally, Mr. Mooney pled not guilty to Counts 28, 29, and 30 – three (3) counts of Possession of a Firearm by a Person Previously Convicted of a Felony Offense, category B felonies. *App. 6-7.*

On August 5, 2016, Mr. Mooney filed his "Motion to Suppress Evidence." *App. 9.* The State of Nevada opposed said motion on August 22, 2016. *App. 18.* Mr. Mooney replied to the opposition on September 2, 2016. *App. 28.*

A hearing on the suppression motion was held on September 7, 2016. *App. 32.* The district court filed its "Order Denying Motion to Suppress" on September 16, 2016. *App. 51.*

On October 7, 2016, a jury convicted Mr. Mooney of Counts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 26, and 27. *App. 119-120.* On October 25, 2016, a plea agreement was filed. *App. 73.* A change of plea hearing was held on October 31, 2016 as to the three counts of Possession of a Firearm by a Person Previously Convicted of a Felony Offense. *App. 92.* Mr. Mooney pled guilty

to Counts 28, 29, and 30.[1] *App. 95.* In the written plea agreement, Mr. Mooney retained the right to appeal the denial of the motion to suppress evidence. *App. 74.* The district court accepted those pleas. *App. 99.*

Mr. Mooney was sentenced on February 28, 2017. *App. 101.* The district court sentenced Mr. Mooney to twenty-eight to seventy-two (28-72) months on each of the following counts: Counts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 26, and 27. *App. 123-124.* The district court sentenced Mr. Mooney to twenty-four to sixty (24-60) months on each of the following counts: Counts 28, 29, and 30. *App. 124.* Counts 1-27 were ordered to be served concurrently to one another and Counts 28-30 were ordered to be served concurrently to one another. *App. 125.* The sentences for Counts 28-30 were ordered to be served consecutively to the sentences for Counts 1-27. *App. 125.* Mr. Mooney's aggregate

[1] A bifurcated trial was set whereby the three (3) counts of Possession of a Firearm by a Person Previously Convicted of a Felony Offense (Counts 28-30) would have been tried separately

sentence was fifty-two to one hundred thirty-two (52-132) months in the Nevada Department of Corrections with credit for three hundred sixty-one (361) days of time served. *App. 125.*

The judgment of conviction was filed on March 1, 2017. *App. 119.* Mr. Mooney's notice of appeal was filed on March 29, 2017. *App. 127.*

STATEMENT OF THE FACTS

Thomas William Mooney filed his "Motion to Suppress Evidence" on August 5, 2016. *App. 9.* Mr. Mooney asked the district court to suppress "all evidence obtained as a result of the search of the Defendant's bedroom by Elko County Sheriff's Deputy Brian Shoaf, and subsequent search of the bedroom by law enforcement pursuant to a search warrant obtained from observations made and evidence obtained by Deputy Shoaf during his initial search of the bedroom." *App. 9.*

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from the other twenty-seven (27) counts. *App. 95.* However, this plea agreement averted the need for a second trial.

On March 5, 2016, Elko County Sheriff's Deputy Brian Shoaf was dispatched to 260 Cliff Place in Spring Creek, Nevada on a report of "juveniles" using controlled substances and a female child who could be suicidal. *App. 10.* Deputy Shoaf met with Mr. Mooney's parents Aline and William Mooney. *App. 10.* Mr. Shoaf claimed that the "juveniles" left the residence ahead of time, although Mr. Mooney was an adult at this time. *App. 10.*

After having informed Deputy Shoaf of his frustration with the way Thomas was living, Mr. William Mooney attempted to open Thomas's bedroom but it was locked. *App. 10-11.* Both of Thomas's parents informed Mr. Shoaf that, as of late, they did not regularly go inside of Thomas's bedroom and that Thomas regularly keeps his bedroom door locked. *App. 11.* Mr. Shoaf informed Thomas's parents that Thomas had a reasonable expectation of privacy in his room, but notwithstanding, Mrs. Mooney returned with a key to this bedroom and opened the door. *App. 11.*

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Upon the opening of this door, Deputy Shoaf was 10 feet away and the lights to the room were off. *App. 11.* Only after walking inside Thomas's bedroom did Mr. Shoaf detect the scent of burnt marijuana. *App. 11.* Since it was between midnight and dawn, Mr. Shoaf had to turn his flashlight on to see what was inside the room. *App. 11.* During this search, Mr. Shoaf observed what he believed was contraband and thereafter sought and obtained a search warrant on the bedroom. *App. 11.*

Pursuant to the search warrant, firearms, homemade explosives, components for making explosive devices, and various pieces of literature were found. *App. 11.*

The State of Nevada filed its opposition to this suppression motion on August 22, 2016. *App. 18.* In this document, the State averred that law enforcement did not "request" to search Mr. Mooney's room and that Mr. Mooney's parents were not agents of the state. *App. 23.* Additionally, the State claimed that the parents were not "coerced" to allow Officer Shoaf inside their residence. *App. 23.*

In terms of the facts, the State went as far as to say that "William made it abundantly clear to Deputy Shoaf and at the preliminary hearing that it was his bedroom located in his residence. Defendant was just staying there." *App. 23.* William Mooney had not been in Thomas's bedroom for a period of time due to the condition of that room. *App.* 23. The State added that "[t]here was no indication that either William or Aline had been excluded from the bedroom by Defendant. Furthermore, Defendant did not pay rent in exchange for staying in the bedroom." *App. 23.* The State said that "Defendant was neither present when William and Aline invited Deputy Shoaf into the residence nor is there any evidence that he objected [*sic*] William and Aline's entry into the bedroom."[2] *App. 24.*

The State claimed that "United States Supreme Court cases 'firmly establish that police officers may search jointly occupied premises if one of the occupants consents.' See United States v.

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[2] Locking one's bedroom is typically not an invitation for the owners to search it.

Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), Fernandez v. California, 134 S. Ct. 1126, 1129 (2014)." *App. 24.*

A pretrial hearing was held on September 7, 2016 before District Court Judge Alvin R. Kacin. *App. 34.* Deputy Shoaf confirmed on the witness stand that he informed Thomas's parents "that Thomas had a reasonable expectation of privacy to that room." *App. 35.* Frustrated, Mr. William Mooney responded that it was his "goddamn house. I pay for it." *App. 35.* Mrs. Aline Mooney opened the door to the bedroom. *App. 35.*

Mr. William Mooney indicated to Mr. Shoaf that he wanted the officer to see the inside of the room to observe how Thomas was living. *App. 36.* Mr. Shoaf walked down the hallway to Thomas's room and stopped before entering. *App. 36.* Mr. Shoaf looked inside the room with the assistance of a flashlight, since was almost dark there. *App. 36.*

Mrs. Aline Mooney was called to the witness stand. *App. 41.* Mrs. Mooney confirmed that Thomas had "his own bedroom" inside her residence and that he regularly kept the room locked

without her or her husband having "regular access to that room." *App. 42.* Mrs. Mooney asserted that law enforcement did not ask her to get the key to Thomas's bedroom nor did law enforcement order her to open the door. *App. 42.* Mrs. Mooney did not feel compelled by law enforcement to open the door. *App. 42.* Mr. William Mooney did not object to Mrs. Mooney opening the door. *App. 44.*

The district court denied Mr. Thomas Mooney's motion to suppress following this pretrial hearing. *App. 59.* The district court found that although Thomas Mooney had an expectation of privacy in his own bedroom, Officer Shoaf was not conducting a Fourth Amendment search when he first observed firearms and explosive components and devices inside of Thomas Mooney's bedroom. *App. 54-57.*

Moreover, the district court concluded that Mr. Shoaf lawfully entered into Thomas Mooney's bedroom upon seeing explosive components/devices and firearms inside. *App. 57-58.*

As to the issue of authority of the parents to consent to a search of their adult son's bedroom, the district court ruled that Mr. and Mrs. Mooney had actual authority to consent to the search of their son Thomas's bedroom and also had apparent authority to do so, citing the fact that Thomas lived there "rent-free," the fact that his parents had a key to the room, and the fact that his parents "forcefully claimed a privilege to enter that room." *App. 58-59.*

SUMMARY OF ARGUMENT

Thomas William Mooney contends that the district court erred in denying his motion to suppress evidence. Mr. Mooney's parents had no actual authority or apparent authority to consent to a search of Thomas William Mooney's bedroom. Mr. Shoaf's act of remaining in the hallway to watch Mr. Mooney's mother open the bedroom door after informing Mr. Mooney's parents that Mr. Mooney had an expectation of privacy in his room constitutes a "search" that implicates the Fourth Amendment.

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ARGUMENT

1) The district court committed reversible error in denying Thomas William Mooney's motion to suppress evidence.

If, at a suppression hearing, findings of fact are supported by "substantial evidence," such findings will not be disturbed. State v. Miller, 110 Nev. 690, 694, 877 P.2d 1044, 1047 (1994), quoting Tomarchio v. State, 99 Nev. 572, 575, 665 P.2d 804, 806 (1983). Whether or not a private individual granted consent to search or acted as an agent for the police presents mixed questions of fact and law. Miller at 694, 1047, quoting Hayes v. State, 106 Nev. 543, 550 n.1, 797 P.2d 962, 966 n.1 (1990).

"Suppression issues present mixed questions of law and fact. While this court reviews the legal questions de novo, it reviews the district court's factual determinations for sufficient evidence." Camacho v. State, 119 Nev. 395, 399, 75 P.3d 370, 373 (2003), quoting Johnson v. State, 118 Nev. 79, 118 Nev. 787, 59 P.3d 450, 455 (2002).

In United State v. Matlock, 415 U.S. 164, 166, 94 S. Ct. 988, 990 (1974), law enforcement asked an occupant of a house named Gayle Graff for permission to search a bedroom that Mrs. Graff claimed was jointly occupied by her and the respondent Matlock. Four thousand nine hundred ninety-five dollars ($4,995) was found in the closet of that bedroom and Mr. Matlock was indicted for bank robbery. Id. at 166-67, 990-91. The U.S. Supreme Court found the evidence legally sufficient to conclude that Mrs. Graff had the authority to consent to a search of the bedroom. Id. at 177, 996.

Likewise, in Fernandez v. California, 134 S. Ct. 1126, 1130, 1137 (2014), the nation's high court held that when a person consents to a search of her residence when an absent co-habitant objects, the consent is effective. In so holding, the court majority refused to extend the ruling in Georgia v. Randolph, 547 U.S. 103, 126 S. Ct. 1515 (2006), which held that an occupant's consent to search premises is insufficient when a co-occupant is present and objects to a search. Fernandez at 1129-30.

The residence involved in Randolph was a home that was jointly occupied by a wife and husband and the wife was the party that consented to the search. Randolph at 107, 1519. Associate Justice David Souter, delivering the majority opinion, stated that, "in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." Id. at 106, 1519.

In the district court, the State of Nevada analogized Thomas Mooney's case with the cases of Matlock and Fernandez. Such a comparison is inapposite. In both of those cases, a romantic partner was consenting to the search of the premises. In Matlock, a co-habitant was consenting to a search of a bedroom that they shared. In Fernandez, the search was in an apartment that Mr. Fernandez and the co-habitant shared. The facts of these cases are starkly different from the facts of Thomas Mooney's case.

In neither Matlock nor Fernandez was there any separation of the co-habitants in different bedrooms. In the instant case,

Aline and William Mooney most certainly did not share a bedroom with their son Thomas. In fact, William Mooney had not been in the room for an extended period of time due to its condition. The idea that William Mooney can consent to a search of his **adult** son's bedroom because he owns it is just as absurd as saying that a landlord can consent to a search of his/her tenant's bedroom because he/she owns the house the room is in.

The State of Nevada repeatedly reminded the district court that there was no indication that Thomas Mooney objected to his parents entering into his room. The State would have a point except for the fact that the door to Thomas Mooney's bedroom was locked! Of course Thomas Mooney objected to his parents and police (and anyone else) going into his room. What other reason would there be for him to lock the door?

As for the State's emphasis on the fact that Thomas Mooney did not apparently pay any rent, the cases of Matlock and Fernandez did not hinge on that issue. The idea that an individual must pay at least some money towards rent to have a

Fourth Amendment interest in privacy in his/her bedroom is simply not supported in the case law.

A case on consent to search that is more analogous to Thomas Mooney's case is United States v. Peyton, 745 F.3d 546 (D.C. Cir. 2014). In that case, Mr. Peyton and his great-great-grandmother Martha Hicks shared a one-bedroom apartment in the District of Columbia whereby Ms. Hicks used the bedroom and Mr. Peyton kept his bed and personal effects in the living room. Id. at 549. The police asked Ms. Hicks for consent to search a shoebox in the living room, which Ms. Hicks granted. Id. That appellate court concluded that Ms. Hicks could not effectively consent to the search of the shoebox. Id. at 551.

The shoebox in Peyton is analogous to the **closed** bedroom in the instant case. Since the great-great-grandmother did not have the authority to consent to a search of Mr. Peyton's shoebox in Mr. Peyton's bedroom, Officer Shoaf did not have any more authority to have conducted a warrantless search of Thomas Mooney's bedroom without Thomas Mooney's consent.

A case that is even more instructive than Peyton is United States v. Whitfield, 939 F.2d 1071 (D.C. Cir. 1991). Mr. Whitfield was convicted for stealing $43,000 from a storage facility in the District of Columbia. Id. at 1072. FBI agents went to Mr. Whitfield's residence and were met at the door by Farrie Whitfield, the mother of Mr. Whitfield. Id. Although Ms. Whitfield claimed that Mr. Whitfield contributed to rent, the lower court was deemed justified in the finding that Mr. Whitfield was not paying rent. Id. When the agents asked Ms. Whitfield for consent to search her son's room, Ms. Whitfield gave oral consent but refused to given written consent. Id. at 1073. The agents proceeded to enter Mr. Whitfield's unlocked room and found $16,000 inside. Id.

The court of appeals in Whitfield stated as a matter of fact that "the agents could not reasonably have believed Mrs. Whitfield had authority to consent to this search" and added that the Matlock precedent rests on "*mutual use* of the property by persons generally having joint access or control for 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 numbers might permit the common area to be searched." Id. at 1074, quoting United States v. Matlock, 415 U.S. 164, 171 n.7, 94 S. Ct. 988, 993 n.7 (1974) (emphasis in original). Also, "[t]he agents could not infer such authority merely from her ownership of the house." Whitfield at 1075. Since the agents did not learn enough to show that Ms. Whitfield could consent to a search of her adult son's room, "then warrantless entry is unlawful *without further inquiry*." Id., quoting Illinois v. Rodriguez, 497 U.S. 177, 188-89, 110 S. Ct. 2793, 2801 (1990) (emphasis in original).

The Whitfield court elaborated by stating that "[a]n adult offspring who pays nothing to his parents might nevertheless enjoy exclusive use of a room within the home, while one who does make payments may have a quite different arrangement." Whitfield at 1075.

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In Thomas Mooney's case, the district court concluded that his parents had authority to consent to search Thomas Mooney's room because they possessed a key, were forceful in their claim of privilege, and that Mr. Mooney lived "rent-free." These limited facts do not establish apparent or actual authority to consent to the search of Thomas Mooney's bedroom. As we see in Whitfield, even when a person is not necessarily paying rent, that person does not automatically bequeath power upon the owner to consent to a search of his room. In Whitfield, the adult son's door was unlocked whereas in the instant case the door was locked. The fact that the door was locked goes heavily against the claim that the parents had any degree of authority to consent to Mr. Shoaf's search of Thomas Mooney's bedroom.

No matter how "forceful" Thomas Mooney's father was in asserting his authority to consent to a search of the bedroom, Deputy Shoaf knew better than to conclude that pure ownership of the house therefore gives this overbearing father such broad

authority. The father had not stepped foot into that room for an extended period of time.

It is beyond dispute that William and Aline Mooney did not use Thomas Mooney's bedroom as their own bedroom. Deputy Shoaf was well aware of that. The door was locked at the time Mr. Shoaf approached the door – another fact beyond dispute. There was no actual or apparent authority for the parents to consent to the search and, as such, the search of the room violated the Fourth Amendment.

The fact that Thomas Mooney's door was locked is significant when looking at persuasive authority from the State of Texas. In Hubert v. State, 312 S.W.3d 554, 556 (Tex. Crim. App. May 26, 2010), the grandfather of the appellant was deemed to have actual authority to consent to a search of the appellant's bedroom in a house they shared.

That court mentioned that some jurisdictions apply the "common authority" test whereby it is presumptive that when a defendant resides with a close relative or parent and that relative

consents to a search of the defendant's bedroom, that relative has sufficient common authority to so consent. Id. at 563, citing People v. Bliey, 232 Ill. App. 3d 606, 597 N.E.2d 830, 837, 173 Ill. Dec. 856 (Ill. Ct. App. 1992). See also State v. Cole, 706 S.W.2d 917 (Mo. Ct. App. 1986). That presumption can be overcome with evidence that defendant had "exclusive possession of the searched premises." Hubert at 563, quoting People v. Bliey, 232 Ill. App. 3d 606, 597 N.E.2d 830, 837, 173 Ill. Dec. 856 (Ill. Ct. App. 1992).

On the other hand, the court majority in Hubert noted that other jurisdictions apply an altogether different presumption:

> these courts have followed the view that, when two autonomous adults jointly occupy a dwelling and have separate bedrooms, each occupant generally has a higher expectation of privacy in his or her own bedroom. Absent some showing that one occupant has exercised control, retained control, or come to an understanding with other occupants that control will be shared over the others' bedrooms, these courts start from the presumption that an occupant exercises sole control over his own bedroom and has no joint access to others' bedrooms. The State can overcome this presumption by presenting facts that would support a finding that the third party who consented to the search of another's bedroom did, in fact, exercise some control over the bedroom. However, absent any facts to

> indicate that control over a separate bedroom was shared or somehow retained, or that a third party had joint access to the room, a finding of actual authority cannot be supported. Under this view, **even under circumstances in which the consenting third party is related to the person being searched, access and control are the paramount factors**.

Hubert at 563-64 (emphasis added). See generally 4 Wayne R. Lafave, Search and Seizure, § 8.5(c) (4th ed. 2004 & Supp. 2009); see also United States v. Jimenez, 419 F.3d 34, 40 (1st Cir. 2005); People v. Mullaney, 104 Mich. App. 787, 306 N.W.2d 347, 349 (Mich. Ct. App. 1981); Commonwealth v. O'Neal, 287 Pa. Super. 238, 429 A.2d 1189, 1190-91 (Pa. 1981); United States v. Kelley, 953 F.2d 562, 566 (9th Cir. 1992).

The facts of Mullaney involved a sister of the appellant consenting to a search of the appellant's bedroom. Mullaney at 791, 349. That court deemed such consent ineffective, concluding that the appellant's "sister could only consent to a search of the common areas of the house and to a search of her own bedroom. She could not consent to a search of defendant's bedroom, a place

where the defendant had a reasonable expectation of privacy." Id. at 792, 349.

In O'Neal, the ultimate question was whether a lessee has the authority to consent to a search of a "temporary gratuitous guest's" bedroom which that guest had exclusive access to. O'Neal at 1189. That court decided that the guest "had a protected, Fourth Amendment, reasonable expectation of privacy which the lessee could not legally waive by consenting to a warrantless search." Id. at 1191.

Whether or not the "common authority" test is applied, it is clear that neither William Mooney nor Aline Mooney had actual authority to consent to Officer Shoaf's search of Thomas Mooney's bedroom. Thomas Mooney can overcome any presumption that his parents has authority to consent to the search because he had "exclusive possession of the searched premises" as this phrase appears in Hubert v. State. The parents did not share this bedroom with Thomas Mooney in any way, shape, or form. The

door was locked. This was, for all intents and purposes, Thomas Mooney's bedroom and his alone to enjoy privately.

If this Court were to apply the presumption that the parents could not consent to a search of their son Thomas's bedroom, there is simply insufficient facts to overcome such a presumption. There was zero evidence that any arrangement existed to allow even the slightest latitude for the parents to intrude in the bedroom. The fact that the bedroom is locked makes such a presumption much harder to overcome.

In sum, this Court should rule that William and Aline Mooney lacked actual authority to consent to a search of Thomas Mooney's bedroom and overturn the district court's decision to allow evidence seized from the bedroom into evidence at the trial.

The State of Nevada believes that State v. Miller, 110 Nev. 690, 877 P.2d 1044 (1994), supports its position. In that case, a twelve-year-old babysitter observed several things inside the Millers' apartment: (1) suspected marijuana on a coffee table, (2) suspected drug sales on the premises, (3) a large portion of

suspected marijuana in 20-25 ziplock baggies, and (4) seeing Barry Miller smoke it in front of her. Id. at 691-92, 1045. When an officer arrived after the babysitter's 911 call, the babysitter obtained the opened grocery bag and handed it to the officer. Id. at 692, 1045-46.

This Court upheld the constitutionality of the seizure of the marijuana, stating that the babysitter was neither "a willing or unwilling agent of the police" and that this babysitter "initiated a private search for the contraband that violated neither the federal nor the Nevada Constitution." Id. at 697, 1049. Relevant to this discussion was the statement that

> society would receive a sad message indeed, if a child like Jennifer who sought to act responsibly after being exposed to what appeared to be the possession, sale and use of drugs at her place of employment, would be rebuffed by the law on grounds that her concerns were simply transmuted into an unlawful tool of the police whom she had called for assistance.

Id. at 696, 1048.

Moreover, this Court stated that the "United States Supreme Court has held that the Fourth Amendment 'is wholly

inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government **or** with the participation or knowledge of any government official.'" Id., quoting United States v. Jacobsen, 466 U.S. 109, 114, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984) (emphasis added).

The Ninth Circuit U.S. Court of Appeals has given guidance on how to determine whether or not a private citizen is to be considered an agent of the state. In United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982), quoting United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981), that court stated the following:

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

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The court in United States v. Miller went on to announce that the "two critical factors" in the analysis as to whether or not a private citizen is an agent of the state are "(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends." Miller at 657, citing United States v. Walther, 652 F.2d 788, 791-92 (9th Cir. 1981).

The facts of State v. Miller (not to be confused with United States v. Miller) are wholly distinguishable from the instant case. The babysitter had **already** discovered the contraband before law enforcement entered the Miller home. Certainly law enforcement was not supposed to turn a blind eye to illicit controlled substances that are practically being handed to them on a silver platter.

On the other hand, William and Aline Mooney had not the slightest inkling that there were bombs or the components thereof inside Thomas Mooney's bedroom. Instead, these parents not

only wanted to go on a fishing expedition to see what was in their son's room, but were doing this right alongside Officer Shoaf. Mr. Shoaf acquiesced to this intrusion.

Of course, the State puts heavy emphasis on the fact that William and Aline Mooney were not "coerced" to open Thomas Mooney's bedroom – a fact Thomas Mooney does not dispute on this appeal. That is not the end of the analysis. The other part of the analysis is whether or not Aline Mooney was a "willing" agent when she opened the door of her son's bedroom for Deputy Shoaf to conduct a search. She absolutely was. Officer Shoaf was called to the scene. The parents elected to call law enforcement **before** opening that door. The timeline is important. The idea that Aline was not opening the door for the benefit of law enforcement is absurd. She waited until Mr. Shoaf was present to open the door and she obviously wanted him to see the inside of the room.

Even if Aline Mooney were not technically an "agent" of the police, her act of opening the door with the active participation and knowledge of Officer Shoaf is sufficient to implicate the

Fourth Amendment pursuant to Jacobsen. As the United States Supreme Court noted in that case, the Fourth Amendment is inapplicable when a private party searches premises while "not acting as an agent of the government **or** with the participation or knowledge of any government official." How can the State of Nevada possibly argue on this appeal that Aline Mooney's actions were done without Officer Shoaf's knowledge or participation?

Unlike Miller, this was not a case where the occupant of the premises handed the contraband to authorities. In Miller, the babysitter had already done a private search of the residence in her capacity as a concerned citizen. That does not implicate the Fourth Amendment. On the other hand, when a law enforcement officer who acknowledges that an adult son as a reasonable expectation of privacy nevertheless elects to have the son's mother open the door for law enforcement's benefit, the Fourth Amendment is implicated.

Officer Shoaf was more than willing to go on a fishing expedition for illegal contraband. He had not the foggiest clue

what he would end up discovering there. He surely was not searching the bedroom under exigent circumstances prior to Aline Mooney opening the door.

The societal concerns for a preteen child discovering drugs and asking for the police's assistance are far removed for the societal concerns for parents who have a generalized distaste for their son's lifestyle. We should not discourage a juvenile from reporting law breaking that is occurring in very close proximity to her. However, we **should** discourage police from conducting searches of an adult's bedroom at the behest of parents without any probable cause or even reasonable suspicion of criminal wrongdoing.

This jurisdiction has held that a "warrantless search is valid if the police acquire consent from a cohabitant who possesses common authority over the property to be searched." Casteel v. State, 122 Nev. 356, 360, 131 P.3d 1, 3 (2006), citing Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). The burden is on the government to show consent by clear

and convincing evidence. Thurlow v. State, 81 Nev. 510, 515, 406 P.2d. 918, 921 (1965), quoting Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); United States v. Rutheiser, 203 F.Supp 891 (S.D. N.Y. 1962); United States v. Gregory, 204 F.Supp 884 (S.D. N.Y. 1962).

In the dissent in State v. Miller, Justice Young asserted that there are three ways in which a third party's consent can be effective. State v. Miller, 110 Nev. 660, 699-700, 877 P.2d 1044, 1050 (1994). Firstly, "the government can come forward with evidence of both joint access and shared use or control over the area that was searched." Id. at 699, 1050. See United States v. Matlock, 415 U.S. 164, 171 n.7, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974). Secondly, "it can show that the owner of the property to be searched expressly authorized the third party to give consent." Miller at 699, 1050. Thirdly, "the government may establish valid consent by means of the 'apparent authority doctrine.' There, a search is valid if the officer reasonably believes that the third party has actual authority to consent." Id. at 699, 1050-51, citing

Illinois v. Rodriguez, 497 U.S. 177, 188, 110 S. Ct. 2793, 2801, 111 L. Ed. 2d 148, 161 (1990).

The district court in Thomas Mooney's case found clear and convincing evidence that William and Aline Mooney had actual and apparent authority to consent to a search of their adult son's bedroom. On both counts, the district court was wrong.

As to actual authority, there was zero evidence that William and Aline Mooney had "joint access and shared use or control over the area that was searched" as that phrase appears in Miller. Neither of these parents was sharing the bedroom with his/her adult son. On top of that, William Mooney spent an extended period away from the room due to the way that Thomas Mooney treated it. That is affirmative evidence of William Mooney's **lack** of actual authority, since presumably William Mooney would have taken steps to keep the room in an orderly fashion if he had the actual authority to do so. He griped about how his son Thomas was living, yet he did not lift a finger to clean out the room. The only rational conclusion is that this was Thomas's room and not

his parents' room. Thomas's parents did not "use" this room nor did they have any degree of "control" over the room. As such, the evidence was nowhere in the realm of being "clear and convincing" that there was actual authority for the parents to consent to search Thomas Mooney's bedroom.

Moreover, Thomas Mooney never gave authority for either of his parents to consent to a search of that room. The fact that his room was locked upon Deputy Shoaf's arrival confirms this fact. The district court's assertion that Aline Mooney's possession of the key helps to establish her actual authority to search her son's room is unpersuasive. That same rationale could be used to give landlords vast powers to consent to the search of their tenants' premises. The district court's heavy reliance on the forcefulness in which Thomas Mooney's parents asserted their supposed privilege to enter the bedroom is puzzling. Either that privilege to enter exists or not – regardless of William Mooney's provocative language. On top of all that, the fact that Thomas lived "rent-free," as the district court stated, is irrelevant. The idea that

someone who pays at least one cent a month towards rent has a greater expectation of privacy that someone who does not is easy to reject. One's expectation of privacy in his/her bedroom is not abridged by one's lack of money. The State cannot cite any authority to the contrary.

The district court's finding that William and Aline Mooney possessed the "apparent authority" to consent to a search of Thomas Mooney's bedroom is belied by the record. One need not look further than Officer Shoaf's own words to see that there was zero such authority. Mr. Shoaf made it abundantly clear to William and Aline Mooney that Thomas had an expectation of privacy in his own bedroom. These parents never stated that they shared the bedroom with Thomas. The door to the room was locked.

Not surprisingly, neither the district court nor the State of Nevada cites to any case in the United States to indicate that parents who own premises have unfettered "apparent authority" to consent to a search of their adult child's bedroom on those

premises. Based on that, this court should reverse the district court's determination that William and Aline Mooney possessed any authority to consent to a search of Thomas Mooney's bedroom.

Suppression of evidence is the proper remedy here. "Under the fruit of the poisonous tree doctrine, 'evidence obtained from or as a consequence of lawless *official* acts is excluded.'" Toston v. State, 2016 Nev. App. LEXIS 202, 1 (Nev. Ct. App. May 17, 2016), quoting Osburn v. State, 118 Nev. 323, 325 n.1, 44 P.3d 523, 525 n.1 (2002) (emphasis in original) (citing Costello v. United States, 365 U.S. 265, 280, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961)). "Evidence will only be excluded if it is the result of *law enforcement's* unlawful actions." Toston at 1, citing Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (emphasis in original).

Officer Brian Shoaf's decision to utilize Aline Mooney as the means to conduct his suspicion-less, warrantless search of Thomas Mooney's bedroom constitutes official police action. It

constitutes wrongful police action. He had zero probable cause that any incriminating evidence would be found. He had no search warrant to search the bedroom until after he started his fishing expedition.

Exclusion of all the evidence found as a result or consequence of this illegal search is warranted. This kind of conduct needs to be deterred.

CONCLUSION

The district court committed reversible error by denying Thomas William Mooney's motion to suppress evidence. Aline Mooney was acting as an agent of law enforcement when she opened the door to her son Thomas Mooney's bedroom for the benefit of Officer Brian Shoaf to search without any probable cause. Officer Shoaf acquiesced to this action and the Fourth Amendment is implicated as a result. A search occurred when Officer Shoaf peered inside the bedroom. He did not have a search warrant at that point.

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William Mooney and Aline Mooney lacked both the actual authority and the apparent authority to consent to the search of the bedroom. That bedroom was Thomas Mooney's to enjoy. It was not the parents' bedroom. Officer Shoaf, knowing that, still searched Thomas Mooney's bedroom. No reasonable officer could have believed that the parents had such authority to consent to a search of their adult son's bedroom.

This Court should order the district court to suppress from evidence any and all evidence seized from Thomas Mooney's bedroom. To do otherwise would be to encourage officers to use private citizens as conduits to accomplish their warrantless, suspicion-less searches. Deterrence is necessary.

DATED this 17th day of August, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in size 14 Century Schoolbook font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 6,525 words; or

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further

certify that this brief complies with all the applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of August, 2017.

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CERTIFICATE OF SERVICE

(a) I hereby certify that this document was electronically filed with the Nevada Supreme Court on the 17th day of August, 2017.

(b) I further certify that on the 17th day of August, 2017, electronic service of the foregoing document shall be made in accordance with the Master Service List to Adam P. Laxalt, Nevada Attorney General; and Tyler J. Ingram, Elko County District Attorney.

(c) I further certify that on the 17th day of August, 2017, I mailed, postage paid at Elko, Nevada, one (1) copy to Thomas William Mooney, NDOC # 1174250, Southern Desert Correctional Center, P.O. Box 208, 20825 Cold Creek Road, Indian Springs, Nevada 89070-0208.

DATED this 17th day of August, 2017.

SIGNED: /s/ Benjamin C. Gaumond

Employee of the Elko County Public Defender