IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS WILLIAM MOONEY,

Appellant,

vs.

CASE NO.72736

THE STATE OF NEVADA,

Respondent.

Appeal from the Fourth Judicial District Court

Of The State of Nevada

In And For the County Of Elko

RESPONDENT'S ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO.

Cases

I. STATEMENT OF THE ISSUE

Whether the District Court erred by denying Appellant's (Mooney's) Motion to Suppress.

II. STATEMENT OF FACTS

Deputy Shoaf served in the United States Marine Corps for fourteen (14) years prior to his employment as a Deputy for the Elko County Sheriff's Department. *App.* 36-37. As a Marine, Deputy Shoaf received training and is experienced with various types of explosives, including but not limited to homemade explosive devices. *Id.* That training included the identification of the various components of explosive devices such as the explosive materials, housings, shrapnel, and wiring. *Id.* Deputy Shoaf also came into contact with homemade explosive devices in the course of deployments to Iraq and Afghanistan. *Id.*

On March 5, 2016, at approximately 1:44 AM Deputy Shoaf was dispatched to 260 Cliff Place, in Spring Creek, Nevada on the report of a suicidal female. *App.* 34. Upon arrival Deputy Shoaf was met by William Mooney (William), and Aline Mooney (Aline), and invited into the residence. *App.* 35. Deputy Shoaf, William and Aline engaged in a pleasant, friendly conversation. *App.* 37. Deputy Shoaf did not make any demands to enter the residence. *Id.* William informed Deputy Shoaf that

the suicidal female and Mooney had been using drugs in the house; however, both the female and Mooney had since departed the residence. *Id.* In the normal course of his duties, Deputy Shoaf asked William where in the house Mooney and the suicidal female where using drugs. *Id.* Deputy Shoaf felt he had a duty to ascertain where the drug use had occurred. *Id.*

William indicated that the drug use occurred in Mooney's bedroom. *Id.* William also informed Deputy Shoaf that the former was extremely upset about the way Mooney lived, the things that Mooney was doing, the condition in which Mooney kept the room and Mooney's destructive behavior relating to William's house. *App.* 35. William emphatically stated to Deputy Shoaf that the latter had to see how Mooney was living, stating words to the effect of "look at this damn room ... look what he's done to *my* room." *App.* 38. Emphasis added by State.

Deputy Shoaf did not request to see the bedroom, nor did he order William and Aline to allow him to inspect the bedroom. *App.* 37. Likewise, Deputy Shoaf did not ask or instruct William or Aline to open the bedroom door. *App.* 38. Instead Deputy Shoaf told William and Aline that Mooney had a reasonable expectation of privacy in the room; and, asked William and Aline about the use of the bedroom. *App.* 35. William and Aline informed Deputy Shoaf that the bedroom door was normally shut and locked; that

they had gone in and out of the room at will, but had not been in the room for a little while due to its condition; and, in no uncertain terms, Williams stated that it was his house and his room. *App.* 35; 37; 44.

Shortly thereafter, Aline produced a key to the bedroom and opened the door. *App.* 35. Deputy Shoaf was approximately ten (10) feet away from the door when Aline unlocked the room. *Id.* Aline testified that law enforcement did not ask her to retrieve the key; nor did law enforcement ask, order or otherwise compel her to open or unlock the bedroom door. *App.* 42. Aline retrieved the key, unlocked and opened the door on her own free will with her own key. *Id.*

Aline testified that William wanted a lock on the bedroom door and caused it to be installed; and, that it was William's idea to have it installed. *Id.* Further, Aline testified that Mooney did not pay rent to live at her and William's home. *Id.*

After Aline opened the bedroom door William again indicated to Deputy Shoaf that he wanted him to see the conditions in which Mooney was living. *App.* 36. Given the circumstances Deputy Shoaf felt that he had a duty as a law enforcement officer to observe the bedroom. *App.* 38. And Deputy Shoaf, based on the totality of circumstances, believed it was permissible for Aline and William to be in the bedroom. *Id.*

The first thing Deputy Shoaf noticed when Aline opened the door, *prior to entry into the room* and prior to using a flashlight to see into the room, was the faint odor of marijuana emanating from the bedroom[1]. *App.* 38. Deputy Shoaf then used a flash light to illuminate the room. *Id.* Upon doing so Shoaf observed rolling papers; a tourniquet; the stock of what he believed to be a Kalashnikov/AK-47 rifle; cold compress packs – which Deputy Shoaf knows from training and experience to be a material used in the construction of homemade explosive devices; a shotgun; drug paraphernalia; and, homemade explosives and/or antipersonnel devices, all of which were in plain sight. *App.* 38-40. Subsequently, William turned on the bedroom lights. *App.* 36; 39.

Thereafter, Deputy Shoaf entered the room, observed additional explosive devices and closed the bedroom window. *App.* 40-41. Law enforcement then applied for and was granted a search warrant. *App.* 40-41.

Mooney now claims that neither actual nor apparent authority existed for William and Aline to consent to a search of Mooney's bedroom. Mooney's Brief (Brief), pg. 11, lines 15-26.

The District Court made a finding of clear and convincing facts, and concluded: 1) that Mooney had a reasonable expectation of privacy in the

[1] Event occurred on March 5, 2016, prior to the legalization of recreational marijuana.

bedroom at issue; 2) Deputy Shoaf was not conducting a search when he first observed the firearms and explosive devices/components; 3) Deputy Shoaf thereafter lawfully entered the bedroom; and, 4) Assuming *arguendo* that Deputy Shoaf's initial actions constituted a "search," William and Aline lawfully consented, as they had actual authority to do so. *App.* 54; 59.

The District Court found, alternatively, that there was clear and convincing evidence of apparent authority. *App.* 59. The District Court further observed that "[a]ny reasonable deputy in Shoaf's position would conclude that parents who had a key to a bedroom in which they permitted their adult son to stay, and who so forcefully claimed a privilege to enter that room after summoning authorities to their home, retained actual authority to consent to law enforcement's entry therein." *App.* 59.

III. STANDARD OF REVIEW

"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 (2003).

IV. SUMMARY OF ARGUMENT

Deputy Shoaf did not perform a search of the bedroom. While in a lawful position he observed items which he had probable cause to believe

were associated with criminal activity. Prior to observing the evidence he did not know the items were contained in the bedroom.

In the event the Court finds that Deputy Shoaf's actions constitute a search, William and Aline had actual authority to consent to a search of the room given the facts and circumstances of the case. Alternatively, Deputy Shoaf reasonably relied on William and Aline's apparent authority to consent to a search of the bedroom.

If the Court finds that William and Aline lacked authority (actual or apparent) to consent to a "search" of the bedroom the extreme sanction of the exclusionary rule is unwarranted. Any Fourth Amendment violation which is alleged to have occurred was neither flagrant nor deliberate.

V. ARGUMENT

A. Deputy Shoaf did not conduct a search of the bedroom.

It is well established that when law enforcement officers "are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Minn. V. Dickerson*, 508 U.S. 366, 375 (1993). The "plain view doctrine" has three components which must be satisfied:

First, the police officer must lawfully make an "initial

> intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain view doctrine only as a pretext. Finally, it must be "immediately apparent to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.

Koza v. State, 100 Nev. 245, 254 (1984), citations omitted. The United States Supreme Court has clarified the third component of the plain view doctrine to mean that there is "probable cause to associate the property with criminal activity." *Id.* at 255.

The District Court observed in its Order Denying Mooney's Motion to Suppress that ample authority exists in support of the proposition that "Shoaf did not violate [Mooney's] right to be free from an unreasonable search by using a flashlight to make a plain view observation that during daylight would not constitute a search under the Fourth Amendment." *App.* 56-57. The State agrees. In addition to numerous state court precedent cited by the District Court in support of the afore stated proposition the United States Supreme Court held that "the officers' use of the beam of a flashlight, directed through the essentially open front of [a] barn, did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment." *United States v. Dunn*, 480 U.S. 294, 305

(1987). In so holding the United States Supreme Court observed that "it is 'beyond dispute' that the action of a police officer in shinning his flashlight to illuminate the interior of a car, without probable cause to search the car, 'trenched upon no right secured ... by the Fourth Amendment.'" *Id.*, citing *Texas v. Brown*, 460 U.S. 730, 739-740 (1983). The Nevada Supreme Court has noted that "[c]ases are replete where similar procedures have been held not to be contrary to the fourth amendment." *Rose v. State*, 86 Nev. 923, 925 (1970).

The cases cited by Mooney are distinguishable from the instant case in that those cases centered on *law enforcement requesting consent to search* a particular area. Here Deputy Shoaf was summoned to the residence, invited into the residence and in no way made any request, command or suggestion that he should be allowed to observe the bedroom.

Similar to *State v. Miller,* 110 Nev. 690 (1994) William and Aline were not acting as agents of the State. Deputy Shoaf "did not make [William and Aline] 'the hands and feet of the police' or a police agent by responding to" William's summon of law enforcement to their residence. *Id.* at 697. The record does not support any claim that Deputy Shoaf coerced or intimidated William and Aline into opening the door to the bedroom. *Id.* William and Aline were not "willing or unwilling agent[s] of

the police." *Id.*

Further, there is no indication that Deputy Shoaf "knew of and acquiesced in the intrusive conduct" and, no indication that William, Aline or Deputy Shoaf was aware that the bedroom contained illegal firearms and explosives. *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982). Thus, William's insistence that Deputy Shoaf observe the bedroom and Aline's act of unlocking and opening the bedroom door with her own key were not to further their own ends." *Id.* Likewise, there are absolutely no facts that support the proposition that the government was "involved either directly as a participant or indirectly as an encourager of" William and Aline's actions. *Id.*

Deputy Shoaf was invited into William and Aline's residence; and, was urged by William, to the extent Deputy Shoaf felt obliged to do so as a law enforcement officer, to observe the condition of Mooney's bedroom. Prior to entering the bedroom, from a lawful position, Deputy Shoaf smelled the odor of marijuana; observed rolling papers; a tourniquet; the stock of what he believed to be a Kalashnikov/AK-47 rifle; cold compress packs – which Deputy Shoaf knows from training and experience to be a material used in making homemade explosive devices; a shotgun; drug paraphernalia; and, homemade explosives and/or antipersonnel devices, all

of which were in plain sight. Accordingly, Deputy Shoaf's actions do not constitute a "search."

B. William and Aline had actual authority to consent to a "search."

In the event the Court finds that Deputy Shoaf's actions constitute a search it is the State's position that William and Aline had actual authority to enter the bedroom, and had the actual authority consent to a search of the bedroom.

"[T]he search of property, without a warrant and without probable cause, but with proper consent validly given, is valid under the Fourth Amendment." *United States v. Matlock*, 415 U.S. 164 (1974). This exception extends to situations where "police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of the evidence so obtained." *Georgia v. Randolph*, 547 U.S. 103, 107 (2006). 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. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), *Fernandez v. California*, 134 S.Ct. 1126, 1129 (2014).

In *Georgia v. Randolf*, 547 U.S. 103 (2006) the Court observed

To the Fourth Amendment rule ordinarily prohibiting the

> warrantless entry of a person's house as unreasonable per se, *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), one "jealously and carefully drawn" exception, *Jones v. United States*, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514, 1958-2 C.B. 1005 (1958), recognizes the validity of searches with the voluntary consent of an individual possessing authority, *Rodriguez*, 497 U.S., at 181, 110 S. Ct. 2793, 111 L. Ed. 2d 148. That person might be the householder against whom evidence is sought, *Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), or a fellow occupant who shares common authority over property, when the suspect is absent, *Matlock*, supra, at 170, 94 S. Ct. 988, 39 L. Ed. 2d 242; and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant, *Rodriguez*, supra, at 186, 110 S. Ct. 2793, 111 L. Ed. 2d 148.

Id. at 109.

Actual authority exists in two general situations: "(1) where defendant and a third party have mutual use of and joint access to or control over the property at issue, or (2) where defendant assumes the risk that the third party might consent to a search of the property." *State v. Taylor*, 114 Nev. 107, 1079 (1998). In situations where "a person cohabits with another and takes no special steps to secure a privacy interest in his ... property or explicitly denies the cohabitant all access to the property, the cohabitant may consent to the search of the entire premises." *Casteel v. State*, 122 Nev. 356, 359

(2006).

As persuasive authority *State v. Carsey*, 59 Ore. App. 225 (1982) is instructive. Therein, law enforcement requested consent from defendant's grandmother to search the defendant's bedroom located in her home. Notably, defendant paid "$60.00 a month for room and board, and his grandmother had an understanding with him that his room was under his exclusive control." *Id.* at 231. The court observed that

> To uphold a search based on third party consent, it must be shown that the third party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected," *United States v. Matlock*, supra, 415 U.S. at 171, in such a manner that the nonconsenting party must have either assumed the risk that the third party would consent to the search or that he retained no reasonable expectation of privacy in the premises or property searched. *State v. Williams*, 48 Or App 293, 297, 616 P2d 1178 (1980).

Id. at 230. Additionally, "cases upholding a parent's authority to consent to the search of the minor child's room involve considerations not present ..., such as ... the child not paying room and board. *Id.* at 231.

In *United States v. Harrison*, 1993 U.S. App. LEXIS 30141, 30145 (9th Cir. 1993), the United States Court of Appeals for the Ninth Circuit found the third party consent to the search valid. In so finding the court reasoned that in addition to willingly consenting to the search, "Harrison's grandmother, as owner of the home, had joint access and control over his

bedroom as evidenced by the absence of a lock, the open door, and the lack of any rent charge." *Id.* As such, the grandmother "had common authority over the bedroom and could give effective consent to its search." *Id.*

Mooney cites *Hubert v. State*, 312 S.W.3d 554 (2010), in support of his argument that William and Aline lacked actual authority to consent to a search. The court in *Hubert* held that Hubert's grandfather had actual authority to consent to a search of Hubert's bedroom. In reaching that decision the court stated

> It is more reasonable to conclude, on the particular facts of this case (viewed in the light most favorable to the trial court's ruling), that the appellant, lacking any proprietary interest in the house, or even any possessory right other than by the grace of his grandfather, assumed the risk that his grandfather might permit the search of any area of the house that he might reasonably suspect the appellant was using for criminal purposes, even including appellant's bedroom – at least in the absence of ... some ... obvious indicium of exclusion, such as a lock on the door ...

Id. at 564.

Mooney also cites *People v. Mullaney*, 104 Mich. App. 787 (1981) in support of his argument. Importantly, the court in *Mullaney* seems to reach its decision based on a voluntariness inquiry. And the court found it "unclear from [its] review of [the] case whether the trial judge relied upon the purported consent of the defendant's sister or upon the plain view exception to the warrant requirement." *Id.* at 792. While the opinion is

sparse with facts, the court stated "the facts of [the] case indicate that the defendant's sister's consent to the search was not voluntary, but given under circumstances which indicated that her refusal would be futile." *Id.* As such, Court went on to hold "that neither consent nor the plain view exception to the warrant requirement justified the search." *Id.* at 793.

In the instant case Mooney did not have exclusive access to the room. William made it crystal clear that the bedroom and house were his property. Mooney was just staying there. Mooney had no proprietary interest in the residence and no possessory right other than by the grace of his parents. Although William and Aline had not entered the bedroom for some time due to its condition, they had entered the room at will in the past and never informed, explicitly or implicitly, that they were not permitted to do so. It was William, *not Mooney*, who caused the lock to be placed on the bedroom door. Aline possessed her own key to the bedroom; and, Mooney did not pay rent. Also, there is no claim that William and Aline's consent to the search was involuntary. All of the above stated facts establish that William and Aline had actual authority to consent to a search of the bedroom.

C. Deputy Shoaf reasonably believed that William and Aline had apparent authority to consent to a "search."

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If the Court finds that William and Aline lacked the actual authority to provide access to the bedroom to law enforcement, Deputy Shoaf reasonably believed that they had authority to consent to a search. The "issue when a claim of apparent consent is raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*." *Ill. v. Rodriguez*, 497 U.S. 177, 187 (1990). Emphasis in original. A number of "jurisdictions, including the 9th Circuit, hold 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 to the search." *Snyder v. State*, 103 Nev. 275, 280 (1987).

In *Ill. v. Rodriguez*, supra, the United States Supreme Court considered the issue of "[w]hether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not ..." *Id.* at 179. Therein, the United States Supreme Court observed that the Court has "not held that the Fourth Amendment requires factual accuracy." *Id.* at 184. Instead, the Fourth Amendment requires reasonableness. *Id.* at 185.

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Furthermore,

> in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government -- whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement -- is not that they always be correct, but that they always be reasonable. As we put it in *Brinegar v. United States*, 338 U.S. 160, 176, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949):
>
> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.
>
> We see no reason to depart from this general rule with respect to facts bearing upon the authority to consent to a search. Whether the basis for such authority exists is the sort of recurring factual 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. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape. See *Archibald v. Mosel*, 677 F.2d 5 (CA1 1982).

Id. at 185-186.

The Court in *Matlock*, supra, stated "shared tenancy is understood to include an "assumption of risk," on which police officers are entitled to

rely[.] *Georgia v. Randolph*, 547 U.S. at 111 (2006). Law enforcement is not required to "investigate a particular household's rules before accepting an invitation to come in." *Id.* at 111-112 (2006). However, "an officer should not act without further inquiry where the surrounding circumstances evince some degree of doubt in the mind of a reasonable person's to the consent-giver's authority to consent to a search." *State v. Taylor*, 114 Nev. at 1080 (1998).

The "apparent authority to consent to a search must be judged against an objective standard, namely, would the facts available to the officer at that moment warrant a person of reasonable caution to believe that the consenting party had authority over the property." *Id.* In determining if apparent authority exists a three part analysis is required:

> First, did the searching officer believe some untrue fact that was then used to assess the extent of the consent-giver's use of and access to or control over the area searched? Second, was it under the circumstances objectively reasonable to believe that the fact was true? Finally, assuming the truth of the reasonably believed but untrue fact, would the consent-giver have had actual authority?

Id.

Mooney analogizes the instant case to that of *United States v. Peyton*, 745 F.3d 546 (D.C. Cir. 2014). It is the State's position that *Peyton* is materially distinguishable to the facts and circumstances in Mooney's case.

Peyton involved the search of a shoebox belonging Peyton which was stored in a common area (living room) of the home, in the course of law enforcement's investigation into the sales of controlled substances. In its analysis the court in *Peyton* observed "[w]hile authority to consent to search a common area extends to most objects in plain view, it does not automatically extend to the interiors of every enclosed space within the area." *Id.* at 552. Moreover, there was no evidence that Ms. Hicks (Peyton's grandmother with whom he shared the residence) "either shared use of the shoebox with Peyton or had permission to do so and the government [did] not argue that she had actual authority." *Id.* What the court found to be the "most [critical]" factor was that Ms. Hicks informed law enforcement "that Peyton kept his 'personal property' in the area around the bed, where the shoebox was found." *Id.* at 554. And, "[i]n light of [that] clear statement that there was an area of the room that was not hers, it was not reasonable for the police to believe that Hicks shared the use of the closed shoebox." *Id.*

United States v. Whitfield, 939 F.2d 1071 (1991) is likewise distinguishable. The court concluded that apparent authority did not exist because "[a]s a factual matter, the agents could not have believed Mrs. Whitfield had authority to consent to the search." *Id.* at 1074. "The agents

simply did not have enough information to make that judgment." *Id.*

It is the State's position that it was reasonable for Deputy Shoaf to believe that William and Aline had authority to enter Mooney's bedroom and consent to a search thereof. In questioning William regarding the use of the bedroom William made it abundantly clear to Deputy Shoaf that it was William's bedroom located in William's residence. Mooney was just staying there. Aline had her own key to the bedroom; and, while William had not been in the bedroom for a period of time he stated it was due to the condition of the room. In the past William and Aline had entered the bedroom at will. There is no indication that either William or Aline had been excluded – implicitly or explicitly - from the bedroom by Mooney.

As such it was reasonable for Deputy Shoaf to believe that William and Aline had the authority to consent to a search.

D. Suppression of the evidence is unwarranted.

Finally, assuming for the sake of argument that an unconstitutional search occurred, suppression of the evidence is not appropriate in this case. The United States Supreme Court recently revisited the exclusionary rule and emphasized its limited application. In *Herring v. United States*, 555 U.S. 135 (2009), the Supreme Court reiterated that suppression of evidence is an "extreme sanction" and should be applied only in instances of flagrant

and patently obvious violations of the Fourth Amendment. The Court stated, "[t]he fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. Indeed, exclusion has always been our last resort, not our first impulse..." *Herring v. United States*, 555 U.S. at 140 (2009) (citations omitted).

The Court further stated that it has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." *Id.* at 141. The primary objective of the exclusionary rule is deterrence of police misconduct, and where a violation is not deliberate, obvious, and flagrant, no purpose is served by applying the exclusionary rule.

In the instant case, Deputy Shoaf was summoned to William and Aline's residence on the report of a suicidal individual. When he arrived he was invited into the residence by William and Aline, and thereafter learned from William that Mooney had been using controlled substances in the bedroom. It was only after William's insistence that Deputy Shoaf observe the condition of the room, and after Aline unlocked the door with her own key without any prompt or request by Deputy Shoaf did he observe the room believing that he had a duty to do so as a law enforcement officer; and,

believing that William and Aline had authority to enter the room. Then from a lawful position outside the bedroom, Deputy Shoaf smelled marijuana and observed firearms, drug paraphernalia, explosive devices and components of explosive devices.

If the Court finds that a Fourth Amendment violation occurred it is the State's position that Deputy Shoaf's actions were in good faith, and the violation was neither deliberate nor flagrant.

IV. CONCLUSION

Deputy Shoaf did not conduct a search within the meaning of the Fourth Amendment. He was invited into William and Aline's home. There is no indication at all that William and Aline were acting as agents of the state. Only after William's insistence did he observe, from a lawful position, evidence of a variety of crimes: drug paraphernalia, explosive devices and components of explosive devices. Thereafter, he entered the room to close a window in an effort to secure the crime scene which, based on Deputy Shoaf's training and experience contained weapons and dangerous explosive devices.

Assuming, *arguendo*, Deputy Shoaf's actions constitute a search, Thomas and Aline had actual authority to consent to a search of the bedroom. William and Aline were the owners of the residence in which

they allowed their adult son to live in rent free. William and Aline had unfettered access to the bedroom although they chose not to enter it for some time given the condition of the room. Although the door was locked, William caused the lock to be installed on the bedroom door and Aline had her own key to the room.

In the event the Court finds that William and Aline lacked actual authority to consent to a search of the bedroom, Deputy Shoaf reasonably relied on their apparent authority to lawfully consent to a search. In addition to the facts above, William forcefully insisted multiple times that Deputy Shoaf see the bedroom, and that it was *William's house and William's room.* Thereafter, Deputy Shoaf observed the condition of the bedroom.

Deputy Shoaf was acting in good faith. He did not deliberately or flagrantly violate Mooney's Fourth Amendment rights. Application of the extreme sanction of the Exclusionary Rule would not serve to deter police misconduct given the facts and circumstances of this case.

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The State respectfully requests Mooney's appeal be denied.

RESPECTFULLY SUBMITTED this 2 day of October, 2017

TYLER J. INGRAM
Elko County District Attorney

By: #11819 FOR:
DAVID A. BUCHLER
~~Deputy~~ District Attorney
State Bar Number: 11070

CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's Answering 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). This Respondent's Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

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 Respondent's Answering Brief exempted by NRAP32(a)(7)(C), because it contains 5,104 words.

I hereby certify that I have read the Respondent's Answering 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 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 2 day of October, 2017.

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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of October, 2017. Electronic Service of the Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

Honorable Adam Paul Laxalt

Nevada Attorney General

and

Benjamin C. Gaumond

Attorney for Appellant

SHYANN C. RAUSCH
CASEWORKER

DA#: AP-17-00696