**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| **UNITED STATES,** | ) | |
| *Appellee,* | ) | BRIEF OF *AMICI CURIAE* ROBERT |
| | ) | GIFFORD AND GAURI NAUTIYAL |
| v. | ) | IN SUPPORT OF APPELLEE |
| | ) | |
| | ) | Crim. App. Dkt. No. ACM 37748 |
| Airman First Class (E-3) | ) | |
| **PABLO P. IRIZARRY,** | ) | USCA Dkt. No. 12-0451/AF |
| USAF, | ) | |
| *Appellant.* | ) | |

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| Airman First Class (E-3) **PABLO P. IRIZARRY,** USAF, *Appellant.* | ) | USCA Dkt. No. 12-0451/AF |

## ISSUE PRESENTED

WHETHER THE MILITARY JUDGE PROPERLY DENIED A DEFENSE MOTION TO SUPPRESS AN ITEM SEIZED BY APPELLANT'S FIRST SERGEANT DURING A WARRANTLESS ENTRY INTO APPELLANT'S OFF-BASE HOME.

## STATEMENT OF STATUTORY JURISDICTION

*Amici Curiae* adopt Appellee's Statement of Statutory Jurisdiction as set forth on page 1 of Appellee's brief.

## STATEMENT OF THE CASE

*Amici Curiae* adopt Appellant's Statement of the Case as set forth on page 2 of Appellant's brief.

## STATEMENT OF THE FACTS

*Amici Curiae* adopt Appellee's Statement of the Facts as set forth on pages 1-8 of Appellee's brief. Additional facts in the record will be referenced where appropriate.

## SUMMARY OF ARGUMENT

The Fourth Amendment does not provide an unconditional right to privacy. Voluntary consent by one who has authority effectively opens the door for government entry into an individual's home. In the context of a landlord-tenant relationship, a landlord has actual authority to consent to another's presence when, based upon the conduct of the tenant, certain lease provisions and state landlord-tenant law is triggered. The landlord's authority in this circumstance defeats the individual's expectation of privacy in the leased premises. Because the MSgt Saganski and TSgt Zenor stood "in the shoes" of Cedar Creek Apartments management ("CCA") while in the apartment, any incriminating evidence seen in plain view – including the AVVI - was visible from a lawful vantage point. Accordingly, the AVVI is admissible evidence in trial.

Similarly, Irizarry assumed the risk, by setting off certain provisions in the lease through his acts and omissions, that the landlord would enter his apartment, and subsequently consent to another's presence in the apartment to assist in her administrative tasks. Because of his conduct, Irizarry had a diminished expectation of privacy in his leased dwelling, and cannot invalidate his landlord's, or another's, lawful presence.

## ARGUMENT

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. At the very core of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States,* 365 U.S. 505, 511 (1961). This right is available to the members of the armed forces. *United States v. Jacoby*, 29 C.M.R. 244, 246-67 (C.M.A. 1960).

Yet, this right is not absolute. The Supreme Court has carved out various exceptions to the warrant requirement, including consent and assumption of risk. If the government enters the home based upon the consent of an authorized person, the search of the home is constitutionally reasonable. *United States v. Matlock,* 415 U.S. 164 (1974); *Illinois v. Rodriguez*, 497 U.S. 177 (1990). And, where a third party has actual authority for a limited access to an individual's premises, that right of entry is sufficient to include plain sight of the incriminating evidence as he has assumed the risk in permitting the entry of a third party. *Matlock*, 415 U.S. 164; *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

These doctrines, further developed in various federal circuits, effectively open the door for government entry into an individual's home.

## I. Irizarry assumed the risk that his landlord might consent to his military supervisors' entry into his home.

### A. *Irizarry's landlord had actual authority to consent to MSgt Saganski and TSgt Zenor's entry.*

The Fourth Amendment generally proscribes against the warrantless entry of a person's home. *Rodriguez*, 497 U.S. at 181. But, where an officer obtains valid voluntary consent, either from the individual whose property is searched or from a party who possesses common authority over the property, the entry is permissible. *Id.*

The Supreme Court clarified the definition of consent in the Fourth Amendment context in *United States v. Matlock*, 415 U.S. 164. The *Matlock* Court held that consent by a person who possesses common authority over the area sought to be searched is valid against an absent, non-consenting person with whom that authority is shared. *Id.* at 169. This concept of "common authority" is based upon mutual use of the property by those having joint access or control for most purposes, so that each person has the right to permit inspection. *Id.; see id.* at 171 n.7 (noting it is reasonable to recognize where "others have

assumed the risk that one of their number might permit the common area to be searched"); *see also* Mil. R. Evid. 314(e).

The Supreme Court further developed this line of reasoning in subsequent decisions, including *Illinois v. Rodriguez*, 497 U.S. 177. In *Rodriguez*, the Court recognized that the woman who gave consent did not have common authority, yet, deemed the police entry as reasonable. *Id.* at 187. In determining whether an "apparent authority" existed, consent must be judged against an objective standard: whether the facts available to the officer, at that moment, warrant a man of reasonable caution in the belief that the consenting party had authority over the premises. *Id.* at 188; *see also United States v. Clow*, 26 M.J. 176 (C.M.A. 1988) (finding that the husband had apparent authority, if not common authority, over an apartment shared with his wife, to consent to a police investigation for evidence of a crime even though he had not lived in the apartment for several months).

What authority, then, does a landlord have to permit the government to enter a tenant's dwelling and search the premises? The answer to this question depends largely upon the context of the entry. In *Chapman v. United States*, 365 U.S. 610 (1961), the Supreme Court concluded that the landlord could not consent to a search of the rented premises in the absence of the tenant. There, the landlord called the police explicitly for the purpose

of investigating for evidence of a crime. *Id.* at 611; *see also Stoner v. California*, 376 U.S. 483 (1964) (holding that the warrantless search of the defendant's hotel room without his consent, though with the consent of the hotel clerk, was unlawful in an instance where the police are searching for evidence of a crime).

The Supreme Court has not visited the scope of a landlord's authority to give consent for the government's entry into a home for a non-investigative purpose. But, the Court of Military Appeals directly addressed this very issue more than twenty years ago in *United States v. Jacobs*. 31 M.J. 138 (C.M.A. 1990). In *Jacobs*, the court firmly stated that because the defendant's flight chief was in the defendant's apartment to assist in making emergency repairs and entered the apartment "in the shoes" of the landlord, the landlord had authority to permit his entry. *Id.* at 144. This degree of authority is a lesser degree than is required to establish common authority for the purpose of consenting to a police investigation of a crime. *Id.* The court found the lease terms and California law persuasive in determining the scope of the landlord's authority – both permitted a landlord and his agents to enter a tenant's apartment in his absence to make emergency repairs. *Id.*

The combination of the lease and state landlord-tenant law effectively created a sphere of authority under which the

landlord could enter and potentially consent to a third-party's presence. *Id.; see United States v. Smith*, 353 Fed. Appx. 229, 230 (11th Cir. 2009) ("Certainly, a defendant can "knowingly and voluntarily contractually agree to allow third parties to enter a space where the defendant has an expectation of privacy"*)*. The *Jacobs* court recognized that, in certain circumstances, the rights of the landlord under the lease and state law defeat the defendant's privacy expectations. *Jacobs*, 31 M.J. at 144. Indeed, members of the armed forces, in particular, have a different, lesser degree of expectation of privacy in constitutionally protected areas.[1] A typical civilian employee would not normally have their employer show up at his home to check on his welfare, but the military is a "specialized society separate from civilian society" with "laws and traditions of its own [developed] during its long history." *Parker v. Levy*, 417 U.S. 733, 743 (1973).

Through the development of the warrant-exception of consent, courts interpreting the Fourth Amendment have gradually opened the door to an individual's home by permitting the government to show their entry was reasonable. By authorizing the government

[1] Some military scholars take the position that the protections of the Fourth Amendment do not apply to service members in general, in that "[t]he often smaller, if not *de minimis*, expectation of privacy held by military personel, coupled with the substantial social policy justification for privacy intrusion in the military framework, would at least justify a sharply different manner of Fourth Amendment application when compared to its civilian application." Frederic I. Lederer & Frederic L. Borch, Does the Fourth Amendment Apply to the Armed Force?, 3 Wm. & Mary Bill Rts. 219, 227 (1994).

to be present "in the shoes" of the landlord, having been given consent by one who has authority, or reasonably appears to have authority, the precedent for the issue at bar certainly makes clear that MSgt Saganski and TSgt Zenor acted in accord with the proscriptions of the Fourth Amendment. *See Smith*, 353 Fed. Appx. at 231 (affirming denial of motion to suppress where rental agreement gave storage unit facility manager actual authority to allow entry of officers to "make repairs" or ensure safety of the unit).

The Cedar Creek Apartment complex is located in Abilene, Texas. (J.A. at 051.) In the context of landlord authority to enter a tenant's leased premises, Texas does not have a statute on point. Accordingly, the lease agreement between the landlord and tenant controls. *See Jacobs*, 31 M.J. at 143.

Paragraph 13 of the lease provision allows management to access the apartment, if rent is delinquent, and "remove and/or store all property subject to lien." (J.A. at 052.) Paragraph 28 of the lease, (J.A. at 054), permits management to enter the apartment for a variety of reasons, including "estimating repair or refurbishing costs; [and] preventive maintenance."

There is no doubt that Appellant had failed to pay his rent for both January and February. (J.A. at 043, 045.) Because of Appellant's failure to pay rent, CCA entered his apartment to determine if it was still occupied and to potentially exercise

their lien rights. (J.A. at 123.) Determining that it was still occupied, but in a "disgusting" state, CCA found it necessary to make various repairs to the property. (J.A. at 166.) These purposes fall squarely within the ambit of the lease provisions set forth above. Accordingly, CCA had authority to enter the rented premises. *See United States v. Brown*, 961 F.2d 1039, 1041-42 (2d Cir. 1992) (noting likely "plausible argument" that the defendant-tenant "who had stopped paying rent" had no remaining Fourth Amendment interest in the premises).

Because CCA had authority, CCA could consent to MSgt Saganski and TSgt Zenor's presence for a limited purpose. It is clear in the record that Saganski and Zenor did not enter the apartment with the intent to search for incriminating evidence. (J.A. at 093, 097, 103.) MSgt Saganski testified that he went to the apartment to "inspect the damage." (J.A. at 093, 103.) Further, CCA did not request their presence for the purpose of a criminal investigation. (J.A. at 128.) Ms. Norwood contacted Appellant's supervisors solely with the intent to assist Appellant in rectifying the situation without taking the issue to civil court. (J.A. at 128.)

This situation is nearly identical to the scenario in *Jacobs*. The landlord in *Jacobs* had authority to enter the apartment to make emergency repairs, and to consent to the flight chief's presence to assist in effectuating those repairs.

*Jacobs*, 31 M.J. at 139. Here, CCA also lawfully entered Appellant's apartment because he had failed to pay rent for over forty-five days and the apartment was in a state of deterioration. (J.A. at 045, 166.) MSgt Saganski and TSgt Zenor's presence was merely an addition, "in the shoes" of the landlord, to assist in the landlord's administrative tasks. Most importantly, while standing "in the shoes" of the landlord, MSgt Saganski and TSgt Zenor saw the AVVI in plain view on the floor of the apartment. (J.A. at 106.)

Even if CCA did not have actual authority to enter Appellant's apartment, MSgt Saganski and TSgt Zenor had an objectively reasonable good faith belief that CCA could enter the apartment. MSgt Saganski testified that CCA never discussed with him the authority to enter Appellant's apartment. (J.A. at 115.) Naturally, he assumed there was a lease provision that permitted the landlord to enter the apartment when there was significant damage to the property. (J.A. at 107.) And, TSgt Zenor testified he assumed that CCA was legally permitted to enter the apartment and consent to his presence. (J.A. at 149.)

Applying the test set forth in *Rodriguez*, MSgt Saganski and TSgt Zenor acted reasonably in believing CCA could consent to their presence. The facts they had available to them, at that moment, led them to believe CCA had authority to enter: the apartment was in a less than ideal state, the rent had not been

paid for two months, and CCA was having issues communicating with Appellant. (J.A. at 095.) Indeed, cumulatively, these facts would warrant a man of reasonable caution that the landlord had authority, under the lease, to consent to their presence in assisting in the process of securing rent and repairing the Appellant's apartment.

### B. ***Through his conduct, Irizarry assumed the risk of landlord entry into his apartment.***

By failing to pay rent for over forty-five days and severely damaging the leased apartment, Appellant assumed the risk that the landlord may enter his home pursuant to the authority in the lease agreement. In *Katz v. United States*, the Supreme Court declared that a violation of a privacy expectation, upon which the defendant justifiably relied, was a Fourth Amendment search. 389 U.S. 347, 354 (1967). An individual may, however, compromise this expectation of privacy in several manners, including assumption of risk. *See Smith v. Maryland*, 442 U.S. 735 (1979).

In *Smith v. Maryland*, the Supreme Court defined reasonable expectations not empirically in terms of typical belief or normatively in terms of levels of intimacy, but by risk assumption. *Id.* at 743-44. The Court held that a person who exposes private information to a third party custodian must assume the risk that the third party will share it with the

government. *Id.* at 744. As a result, the government is permitted to obtain such information directly and contemporaneously. *Id.* at 745.

Various circuit courts of appeal have further developed this concept as applied to the search of personal property or homes. In *United States v. Sledge*, the Ninth Circuit Court of Appeals justified the warrantless search of the defendant's apartment on the ground that the police reasonably concluded that the premises had been abandoned so that the landlord had authority to permit entry. 650 F.2d 1075 (9th Cir. 1981). The officer conducted his own factual inquiry, determining that the defendant had abandoned the apartment. He was then entitled to believe that the defendant had no expectation of privacy.[2] *Id.* at 1079. The court noted that this search may also be viewed through the "assumption of risk" doctrine. *Id.* at n.10, 1083. The court endorsed the reasoning that where a third party has limited access to the defendant's premises, the police has authority to stand in the shoes of that party and seize any visible evidence located where they are lawfully allowed. *Id.*; *see also United States v. Hersh*, 464 F.2d 228 (9th Cir. 1972)

[2] As the Appellee's Brief states, at n. 1, p. 14, the military judge in the case at bar did not make a legal finding of abandonment as a basis for his ruling. If Appellant had legally abandoned his apartment, there would certainly be no expectation of privacy – it is sound law that abandonment by the owner or possessor of property ends his reasonable expectation of privacy. *Abel v. United States*, 362 U.S. 217 (1960).

(concluding that because the roof repairman had limited authority to be on the premises and viewed incriminating evidence through the open window of the defendant's home, the police could also stand from the vantage point of the roof repairman and view the evidence within the bounds of the Fourth Amendment); *United States v. Cruz*, 470 Fed. Appx. 91 (3d Cir. 2012) (holding that the defendant assumed the risk that the owner of the home in which he was staying would consent to a search of the home by leaving his belongings exposed in the bedroom and unlocked in the closet).

Where the courts in these cases have validated the government's presence on the defendant's property for the express purpose of looking for incriminating evidence, the scenarios present in *Jacobs* and the case at bar differ in one large aspect – the government's presence was simply as a substitute for the party giving access. In the present case, CCA made multiple attempts to contact Appellant about his past-due rent and electricity bills. (J.A. at 120.) CCA contacted Appellant on January 8th, January 15th, February 4th, February 5th, February 12th, and February 15th. (J.A. at 124-26.) Only on one of those dates was CCA able to reach Appellant. (J.A. at 121.) Despite Appellant's verbal assurances that he would take care of the delinquent rent and utility bills, over seven days passed without any follow-up. (J.A. at 123.)

Thus, taking into consideration all the circumstances, and pursuant to the landlord's authority to enter Appellant's premises in paragraphs 13 and 28 of the lease agreement, (J.A. at 052, 054.), Appellant had a diminished expectation of privacy in his rented premises. He had triggered the lease provisions permitting the landlord's entry by his conduct and his failure to effectively communicate with apartment management, thereby assuming the risk that the landlord would lawfully enter the apartment. Further, the landlord invited MSgt Saganski and TSgt Zenor solely for the purpose of recognizing and assessing the damage in the apartment. (J.A. at 128.) Under the doctrine of "assumption of risk," and in light of this court's conclusion in *United States v. Jacobs*, Appellant did not have an objectively reasonable expectation of privacy that the landlord, or one acting "in the shoes" of the landlord, would not enter his apartment.

## CONCLUSION

The AVVI was in plain view when seized. By failing to pay his rent and utilities, and by causing severe damage to the leased apartment, Irizarry assumed the risk that the landlord would lawfully enter the apartment, pursuant to her authority in the lease agreement, and consent to MSgt Saganski and TSgt Zenor's presence in the apartment. Because MSgt Saganski and TSgt Zenor acted within the scope of their authority, under

*United States v. Jacobs*, they viewed the AVVI from a lawful vantage point. As such, the military judge properly denied the defense motion to suppress.

For the foregoing reasons, we ask this court to affirm the decision of the Air Force Court of Criminal Appeals.

Respectfully submitted,

_____/s/_____

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**CERTIFICATE OF COMPLIANCE WITH RULE 24(d)**

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing brief was electronically filed with the Court, and that a copy of the foregoing brief was electronically sent to the following persons on October 29, 2012:

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