IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

AIRMAN FIRST CLASS (E-3)
PABLO P. IRIZARRY,
UNITED STATES AIR FORCE,
Appellant.

Crim. App. No. ACM 37748

USCA Dkt. No. 12-0451/AF

Appellant's Reply Brief

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Pablo P. Irizarry Airman First Class (E-3) United States Air Force, Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW Appellant, pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, and replies to the Government's brief.

Additional Facts

The apartment lease contract that Appellant, his wife, and the landlord signed included a section governing who may enter the apartment. Apartment Lease Contract, ¶ 28, J.A. 026, 054. That provision allowed the landlord to enter when the tenant was not present in certain circumstances, none of which apply here. Additionally, that provision authorized the landlord to allow government representatives and law officers to enter the apartment in certain circumstances, none of which apply here:

> 28. WHEN WE MAY ENTER. If you or any guest or occupant is present, then repairers, servicers, contractors, our representatives, or other persons listed in (2) below may peacefully enter the apartment at reasonable times for the purposes listed in (2)

below. If nobody is in the apartment, then such persons may enter peacefully and at reasonable times by duplicate or master key (or by breaking a window or other means when necessary) if:

(1) written notice of the entry is left in a conspicuous place in the apartment immediately after the entry; and

(2) entry is for responding to your request; making repairs or replacements; estimating repair or refurbishing costs; performing pest control; doing preventive maintenance; checking for water leaks; changing filters; testing or replacing detection device batteries; retrieving unreturned tools, equipment, or appliances; preventing waste of utilities; exercising our contractual lien; leaving notices; delivering, installing, reconnecting, or replacing appliances, furniture, equipment, or security devices; removing or rekeying unauthorized security devices; removing unauthorized window coverings; stopping excessive noise; removing health or safety hazards (including hazardous materials), or items prohibited under our rules; removing perishable foodstuffs if your electricity is disconnected; removing unauthorized animals; cutting off electricity according to statute; retrieving property owned or leased by former residents; inspecting when immediate danger to person or property is reasonably suspected; allowing persons to enter as you authorized in your rental application (if you die, are incarcerated, etc.); allowing entry by a law officer with a search or arrest warrant, or in hot pursuit; showing apartment to prospective residents (after move-out or vacate notice has been given); or showing apartment to government representatives for the limited purpose of determining housing and fire ordinance compliance, and to lenders, appraisers, contractors, prospective buyers, or insurance agents.

Id.

Argument

I.

Under *United States v. Jones*, the noncommissioned officers' entry into Appellant's off-base home violated the Fourth Amendment on two bases.

In *United States v. Jones*, 132 S. Ct. 945, 949 (2012), the Supreme Court observed that the "Government physically occupied private property for the purpose of obtaining information." MSgt Saganski said that he entered Appellant's residence for the purpose of obtaining information: "It was just to gather information to report back to the commander and to deal with the situation." J.A. 105. In *Jones*, the Court concluded that "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.*; *see also id.* at 950 n.3 ("Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."). The same is true here.

United States v. Jones held that a search can be unconstitutional either because government agents committed a trespass or because government agents violated a reasonable expectation of privacy recognized by society. *Jones*, 132 S. Ct. at 951. The two noncommissioned officers' entry into Appellant's off-base residence to gather information violated both of those prongs.

A. The noncommissioned officers' entry into Appellant's residence was a trespass

Under Texas law, "'every unauthorized entry upon land of another is a trespass' even if no damage is done and 'the intent or motive prompting the trespass is immaterial.'" *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819 (Tex. 1997) (quoting *McDaniel Bros. v. Wilson*, 70 S.W.2d 618, 621 (Tex. Civ. App. 1934)). For purposes of "the tort of trespass, . . . the only relevant intent is that of the actor to enter the property. The actor's subjective intent or awareness of the property's ownership is irrelevant." *Id.*

In this case, the apartment lease contract did not permit Cedar Creek Apartments to invite government representatives into Appellant's apartment for the purpose of showing them damage. *See* Apartment Lease Contract, ¶ 28, J.A. 026, 54. The lease authorized the landlord to allow government representatives into the apartment while the tenant was absent for specified "limited purpose[s]": "if . . . entry is for . . . showing apartment to government representatives for the limited purpose of determining housing and fire ordinance compliance . . . ." *Id.* Additionally, the lease authorized the landlord to "allow[] entry by a law officer with a search or arrest warrant, or in hot pursuit." *Id.* Under Texas law, the maxim "*expressio unius est exclusio alterius*" applies to the construction of contracts.

See, e.g., *CKB & Associates, Inc. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653, 655 (Tex. 1987). By specifying limited instances in which the landlord was allowed to permit government representatives to enter the apartment when the tenant was absent, the lease excluded authorizing government representatives to enter for other purposes. The two noncommissioned officers' entry into Appellant's apartment was thus unauthorized and, therefore, a trespass. Government agents trespassing into a residence to gather information – as the two noncommissioned officers did in this case – violates the Fourth Amendment. *Jones*, 132 S. Ct. at 949-51.

The entry was unauthorized, and thus a trespass, for a second reason: it did not fall within any of the justifications for entry set out in paragraph 28 of the lease. The government argues that Mr. Marquette, "MSgt Saganski and TSgt Zenor entered the apartment for a purpose specifically provided in the lease." Government's Brief at 14. Not so. Echoing the military judge, *see* J.A. 217, the government argues that the lease allowed entry "to effectuate repairs upon the property." Government's Brief at 14. But the lease does not use the term "effectuate"; rather, it allows entry for the purpose of "making repairs or replacements." J.A. 026, 054. Thus, the lease does not permit entry for the purpose of persuading a government agent to encourage a tenant to make repairs; rather, it authorizes entry

to make such repairs. And that was not the noncommissioned officers' purpose, as they both testified. J.A. 105, 156; *see also* J.A. 133. Nor were they there to estimate repair costs or remove health or safety hazards, as the government seems to suggest. *Compare* J.A. 105, 156 *with* Government's Brief at 14. Nor did their entry fall within paragraph 28's inspection clause, which is limited to "inspecting when immediate danger to person or property is reasonably suspected." *See* J.A. 026, 054. There was no such immediate danger, as reflected by the fact that MSgt Saganski did not enter the apartment until the week after he was first contacted. *See* J.A. 094. Moreover, Mr. Marquette had already inspected the apartment. J.A. 116. His purpose in allowing the noncommissioned officers into the apartment was not to inspect it again, but to have them exert influence on Appellant.

Nor was the entry authorized under the contractual lien paragraph. *See* Apartment Lease Contract, ¶ 13, J.A. 023, 052. That paragraph provides, in relevant part: "Removal After We Exercise Lien for Rent. If your rent is delinquent, our representative may peacefully enter the apartment and remove and/or store all property subject to lien."[1] No such removal of

[1] The Government's brief quoted a truncated portion of the second sentence from this part of paragraph 13 without indicating that the sentence continued after the phrase, "our representatives

property by the apartment management company occurred. Hence, even Mr. Marquette's entry into the apartment for the purpose of showing the damage to the two noncommissioned officers was unauthorized and thus a trespass. The two noncommissioned officers' accompanying entry was a trespass as well.

The Government misreads the lease as including a blanket provision that the landlord's agents could enter the apartment in "instances of delinquent rent payments." Government's Brief at 11; *see also id.* at 8. As noted above, however, the lease actually allowed the landlord to enter an apartment on this basis only after the exercise of a lien for rent for the purpose of removing and/or storing property subject to a lien. Apartment Lease Contract, ¶ 13, J.A. 022, 50. Contrary to the government's interpretation, it did not authorize the landlord to enter the property – much less invite others along to enter as well – at any time for any purpose if a rent payment was late.

The actual terms of the apartment lease contract distinguish this case from the federal case law the Government cites. *See* Government's Brief at 15 n.2. For example, in *United States v. Smith*, 353 Fed. Appx. 229 (11th Cir. 2009), the rental agreement for the storage facility at issue "provided

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may peacefully enter the apartment," thereby changing its meaning. Government's Brief at 2.

that the owner's agents and other representatives, including police, could enter his storage unit in order to make repairs to, and ensure the safety and preservation of, the unit." *Id.* at 231. The contract in Appellant's case, on the other hand, limited authority to allow law officers to enter the apartment to instances where they had a search or arrest warrant or were in hot pursuit. J.A. 026, 54. In *United States v. Griffin*, 555 F.2d 1323 (5th Cir. 1977), the defendant entered into an agreement with the Texas State Department of Welfare that required him "to permit state officials to examine the prescription records of welfare recipients." *Id.* at 1324. No similar agreement allowing inspection by government officials exists here. Nor are the two intermediate state court decisions upon which the government relies, both of which involve a storage locker lessor's right to allow law enforcement agents to enter the locker under the specific terms of the rental contract, apposite. *See* Government's Brief at 15 n.2 (citing *Salpas v. State*, 642 S.W.2d 71 (Tex. Ct. App. 1982); *Ferris v. State*, 640 S.W.2d 636 (Tex. Ct. App. 1982)).

B. The noncommissioned officers' entry into Appellant's residence violated a reasonable expectation of privacy recognized by society

Even if there was no trespass, the search was still unconstitutional. The Fourth Amendment prohibits government representatives from entering a home for the purpose of gathering information if their entry violates a reasonable expectation of privacy recognized by society. Even if it was permissible for an employee of Cedar Creek Apartments to enter Appellant's residence, it was impermissible to allow government representatives to enter as well.

The government argues that the noncommissioned officers were permitted to enter the apartment "in the shoes of the landlord." Government's Brief at 8, 12. But Supreme Court case law rejects such a concept unless the individual allowing government agents to enter exercises common authority over the premises.

A tenant has a reasonable expectation of privacy against governmental intrusions onto the rented property even where the landlord is allowed to enter the premises for some limited purpose. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 112 (2006) (citing *United States v. Jeffers*, 342 U.S. 48, 51 (1951), for the proposition that where hotel staff allow access to a room for purpose of cleaning and maintenance, they have no authority to admit the police). Thus, even if a landlord is

justified in entering a leased property for a purpose such as making an emergency plumbing repair, the landlord is not permitted to bring along government agents to view the inside of the property. If the landlord's agent were to enter an apartment for a permissible purpose and then see evidence of a crime within the apartment and report that to law enforcement agents, then those law enforcement agents could attempt to secure a warrant to enter the residence or, in some instances, might even enter to secure evidence under an exigent circumstances theory supported by probable cause. The entry in this case, however, was supported by no such rationale. Rather, it was an unreasonable – and hence impermissible – search of Appellant's home.

II.

The noncommissioned officers' entry into Appellant's off-base home was not justified by the good faith exception to the exclusionary rule.

The government maintains that MSgt Saganski and TSgt Zenor entered the apartment "based 'on facts leading sensibly to their conclusions of probability' that the landlord was entitled to enter." Government's Brief at 12. That argument, however, is problematic both factually and legally.

While TSgt Zenor's testimony regarding his assessment of the landlord's authority to allow him to enter Appellant's apartment was inconsistent at times, at one point he testified:

"I didn't know – honestly, I didn't know if we were not allowed in there or not." J.A. 151. The government is thus wrong when it asserts, echoing the military judge, that "MSgt Saganski and TSgt Zenor . . . certainly believed they had the authority to enter Appellant's apartment." Government's Brief at 18; J.A. 217. TSgt Zenor himself was not certain that he held such a belief.

Additionally, the government refers to a good faith belief "that the landlord was entitled to enter." Government's Brief at 12. But that is not the issue. Regardless of whether they believed the landlord was entitled to enter, the noncommissioned officers had no basis to believe that the landlord exercised common authority over the premises. *See Randolph*, 547 U.S. at 112.

The government once again applies the wrong test when it argues that "it was not unreasonable for MSgt Saganski and TSgt Zenor to believe the landlord had the authority to permit them entry." Government's Brief at 19. The Fourth Amendment's protections are not overcome by a government agent's reasonable mistake as to what property law allows. Rather, the good faith exception applies only where the government agent reasonably but mistakenly believes that the individual giving consent exercises common authority, *see Randolph*, 547 U.S. at 112, which is defined as joint access or control over the property for most

purposes. *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). Neither MSgt Saganski nor TSgt Zenor believed that Mr. Marquette exercised joint access over the property with Appellant and his wife. Nor would such a belief have been reasonable. *See Randolph*, 547 U.S. at 112.

III.

Government representatives' entry into Appellant's residence was not justified under an abandonment rationale.

The Government concedes that "the record indicates the apartment was not abandoned under Texas state law or the terms of the lease at the time MSgt Saganski and TSgt Zenor viewed the apartment." Government's Brief at 6. In a footnote, the Government nevertheless argues that "Appellant did not retain a reasonable expectation of privacy in the apartment." Government's Brief at 15 n.1. When the noncommissioned officers entered the apartment, Appellant was still its tenant. He was on leave out of the area at the time, scheduled to return three days after the search occurred. J.A. 143-44. Mr. Marquette, MSgt Saganski, and TSgt Zenor all believed Appellant still lived in the apartment. *See* J.A. 099, 100, 144, 169, 172; *see also* J.A. 138. As the tenant, Appellant maintained a reasonable expectation of privacy in his apartment.

Conclusion

For the foregoing reasons, as well as those set out in Appellant's opening brief, this Honorable Court should set aside the findings and sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on September 20, 2012.

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