10 September 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Airman First Class (E-3) PABLO P. IRIZARRY, USAF, *Appellant.*	)))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES USCA Dkt. No. 12-0451/AF Crim. App. Dkt. ACM 37748

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED BY DENYING 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

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF THE FACTS

On 10 July 2009, Appellant signed a 12-month lease with Cedar Creek Apartments (hereinafter, "CCA") to rent an apartment located outside Dyess Air Force Base, Texas. (J.A. at 023, 051.) By the explicit terms of the lease, the CCA was permitted to enter the

apartment to “make repairs,” “estimate repair or refurbishing costs,” and to “do preventive maintenance.” (J.A. at 026, 054.) In addition, the lease permitted the CCA to enter the apartment to remove “health or safety hazards,” and “perishable food stuffs if your electricity is disconnected.” (Id.) The CCA Lease also permitted entry for the purpose of “inspecting when immediate danger to the property is reasonably suspected.” (Id.) Finally, the CCA Lease stated that “if your rent is delinquent our representatives may peacefully enter the apartment.” (J.A. at 024, 052.)

Due to a failure to pay rent for the month of January, the CCA posted a notice for Appellant to vacate the apartment by 11 January 2010. (J.A. at 062, 063.) On 4 February 2010, the CCA Manager, Ms. Lora Norwood, posted another Notice to Vacate as a result of unpaid rent for both January and February. (J.A. at 065.) The second notice requested that Appellant vacate the apartment by 7 February 2010. (Id.) On 5 February 2010, Ms. Norwood spoke with Appellant about his failure to pay rent for January and February. (J.A. at 121-22.) At the time, Ms. Norwood was new to the property and wanted to make sure that no errors existed concerning Appellant’s non-payment of rent. (J.A. at 122.) Appellant stated that he had paid January’s rent and had the money order receipts. (Id.) He promised that he would trace the money orders for January immediately, and he would pay

February's rent on 15 February 2010. (Id.)

The next week, Ms. Norwood had not heard from Appellant regarding the traced money orders for January. (J.A. at 122-23.) Concerned that Appellant may have abandoned the property, Ms. Norwood had one of the maintenance crewmen, Mr. Charles Marquette, do a "skip check" to see if Appellant was still occupying the apartment. (J.A. at 123.) A "skip check" is a walkthrough of the apartment to determine if the tenant has "skipped" town and abandoned the property. (Id.) The "skip check" was conducted in accordance with the clause of the lease that allows CCA to inspect if rent is delinquent. (J.A. at 124.)

Mr. Marquette reported to Ms. Norwood that the apartment had large amounts of trash and animal feces scattered across the apartment floor, and the overall condition of the apartment was unsanitary. (J.A. at 125, 165.) He also reported that all the flooring would have to be replaced to make it livable for the next tenant. (J.A. at 167.) On 12 February 2010, the CCA delivered a Final Demand for Non-payment of Electricity due to Appellant's failure to pay his electric bill for two months. (J.A. at 125-26.) This notice informed Appellant that his electricity would be disconnected on 19 February 2010. (J.A. at 066.) The record indicates the electricity to Appellant's apartment was disconnected on approximately 24 February 2010. (J.A. at 168.)

On 15 February 2010, the CCA hoped Appellant would provide

the information regarding the alleged January money orders and February's rent, as promised, but he did not. (J.A. at 126.) So, the CCA decided to call Appellant's place of employment. (Id.) Ms. Norwood desired assistance in receiving past due rent, repairing current damage to the apartment, and preventing further damage to the apartment. (J.A. at 128.) She did not want to have to evict Appellant, as she knew the negative consequences it could have for him as a military member who frequently moves. (Id.) Instead, she wanted him to comply with the terms of his lease and clean and repair the apartment. (Id.) Mr. Marquette had prior service in the Navy, and based on his experiences, he believed that Appellant's military supervision could talk to Appellant and get him to make the necessary repairs and pay the rent without civil legal action. (J.A. at 169.)

Appellant's first sergeant, Master Sergeant (MSgt) Matthew Saganski, was contacted by Appellant's landlord, Ms. Norwood, on at least two occasions to seek assistance with collecting Appellant's rent and causing repairs to be made to Appellant's apartment. (J.A. at 095-096, 119, 125, 128.) From his conversation with the CCA, it was clear to MSgt Saganski that Ms. Norwood or her employee had entered Appellant's residence and concluded that Appellant's squalid living conditions had caused extensive damage the apartment. (J.A. at 119, 125, 128,

165-68.) Ms. Norwood invited MSgt Saganski to see the state of the apartment and, after two invitations, MSgt Saganski agreed. (J.A. at 096.) Appellant was on leave at the time MSgt Saganski accepted the landlord's invitation to view the property. (J.A. at 101, 127, 143.)

On 23 February 2010, MSgt Saganski and Technical Sergeant (TSgt) Charles Zenor, Appellant's supervisor, went to Appellant's apartment complex to view the damage Appellant allegedly caused to his apartment. (J.A. at 096.) Before viewing the apartment, MSgt Saganski discussed his trip to the apartment with his commander, and told his commander he would report back with his findings. (Id.) Their purpose of visiting to the property was to protect Appellant against a potentially malicious landlord, to show the community that the Air Force cared about the situation, and to determine if Appellant should be counseled about the issue. (J.A. at 114, 147-48.) MSgt Saganski and TSgt Zenor took a camera with them to take pictures of the apartment. (J.A. at 147.) TSgt Zenor brought the camera along to document the alleged damage for both administrative purposes and potentially to protect Appellant if the damage was not what the CCA portrayed it to be. (J.A. at 147-48.) The record indicates both non-commissioned officers were acting in their official capacity at the time of the visit; though neither was acting in a law enforcement capacity. (J.A. at 096.)

Shortly after MSgt Saganski and TSgt Zenor arrived, they were taken by Charles Marquette, the landlord's employee, to view the apartment. (J.A. at 173.) Before entering the apartment, the CCA discussed with MSgt Saganski and TSgt Zenor their intent to post an "Abandonment" sign on the apartment door, (J.A. at 098); however, 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. (J.A. at 133-34.) When Mr. Marquette opened the apartment door, MSgt Saganski and TSgt Zenor immediately observed the type of damage accurately described by the landlord. (J.A. at 154.) TSgt Zenor took photographs of the unsanitary condition of the apartment, including the large amount of trash strewn about the apartment, and the damage to both the carpet and the bathroom door hinge. (J.A. at 069-81, 154.)

During the tour of the apartment, MSgt Saganski and TSgt Zenor noticed a B-1 aircraft instrument, namely, an Altitude Vertical Velocity Indicator (AVVI), on the floor of Appellant's bedroom. (J.A. at 102, 106, 153.) The aircraft instrument was partially covered by an article of clothing. (J.A. at 102, 153.) TSgt Zenor immediately recognized the part as the same one that was missing from the B-1 repair shop at the base. (J.A. at 102, 153, 158-59.) MSgt Saganski testified that he seized the equipment to ensure its safekeeping because Ms. Norwood had stated

she planned to post the abandonment notice. (J.A. at 067, 098, 160.)

At trial, defense counsel filed a motion to suppress the evidence resulting from the search of Appellant's apartment, claiming the search violated the 4th Amendment. (J.A. at 015-043, 086.) In consideration of the motion to suppress, the military judge made extensive and well-supported findings of fact, and announced the following conclusion of law:

> By clear and convincing evidence, CCA had the authority to consent to walking Master Sergeant Saganski and Technical Sergeant Zenor through the accused's apartment. Their purpose was to effectuate repairs upon the property, a purpose specifically listed in the lease at Paragraph 28.
>
> Even if CCA did not have that authority, Master Sergeant Saganski and Technical Sergeant Zenor certainly believed they had that authority. Both of them knew that CCA had been in the apartment a number of times while the accused was on leave and thus reasonably believed that they had the authority to allow them in.

(J.A. at 217-18.) Accordingly, the military judge denied the defense motion to suppress.

The Air Force Court of Criminal Appeals held that the military judge did not abuse his discretion in denying the motion to suppress. Following United States v. Jacobs, 31 M.J. 138 (C.M.A. 1990), the Court found the entry by the landlord complied with the lease that permitted entry to make repairs,

and the military supervisor and first sergeant lawfully entered the premises in the shoes of the landlord for the purpose of encouraging Appellant to make the necessary repairs. (J.A. at 001-04.)

Additional facts necessary to the disposition of the case are set forth in the argument below.

SUMMARY OF THE ARGUMENT

The military judge did not abuse his discretion in denying the motion to suppress because MSgt Saganski and TSgt Zenor's entry with the landlord's employee was lawful. Appellant's lease contract clearly permitted the landlord and her agents to enter a tenant's apartment for the purpose of effectuating repairs and in instances of delinquent rent payments. MSgt Saganski and TSgt Zenor entered the apartment in the shoes of the landlord, while acting in their official capacity, but not for a law enforcement purpose, in order to inspect Appellant's apartment for the purpose of viewing damage and arranging necessary repairs. (*See* J.A. at 044-081; *see also* J.A. at 096, 114, 147-46.) Consistent with the holding in United States v. Jacobs, 31 M.J. 138 (C.M.A. 1990), this Court should find the military judge did not err in denying the motion to suppress. However, even if the landlord did not have authority to consent to search, the first sergeant and supervisor reasonably relied upon the landlord's assurance that

she had such authority, and no violation of the Fourth Amendment occurred under the auspices of apparent authority.

ARGUMENT

THE MILITARY JUDGE PROPERLY ADMITTED EVIDENCE SEIZED BY APPELLANT'S FIRST SERGEANT FROM APPELLANT'S OFF-BASE APARTMENT PURSUANT TO VALID CONSENT FROM THE LANDLORD.

Standard of Review

"A military judge's evidentiary ruling is reviewed for abuse of discretion. Findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record. Conclusions of law are reviewed de novo. In reviewing a ruling on a motion to suppress, [this Court] considers the evidence 'in the light most favorable to the' prevailing party. '[This Court] will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law.'" United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996) (quoting United States v. Sullivan, 42 M.J. 360, 363 (1995)).

Law and Analysis

The function of the Fourth Amendment is to protect people from unreasonable government intrusions into their legitimate expectations of privacy. Katz v. United States, 389 U.S. 347, 351 (1967). The requisites for judicial recognition of a reasonable expectation of privacy that are to be given Fourth Amendment

protection are: (1) that the person involved exhibit an actual subjective expectation of privacy; and (2) that the expectation was one to be recognized by society as reasonable. Kyllo v. United States, 533 U.S. 27, 33 (2001). While the Fourth Amendment rule prohibits the warrantless entry of a person's house as unreasonable per se, it does recognize the validity of searches with the voluntary consent of an individual possessing authority. Georgia v. Randolph, 547 U.S. 103, 109 (2006); United States v. Matlock, 415 U.S. 164, 170-71 (1974). When one grants to others a possessory right in a place where he would normally have an expectation of privacy, he assumes the risk that the third party will allow someone else to look inside. Matlock, 415 U.S. at 171.

The Supreme Court has addressed the issue of whether authorities may rely on the consent of a third party to search an area of shared control, or one where another party may have a greater possessory interest, in a number of different contexts. *See* Randolph, 547 U.S. 103; Illinois v. Rodriguez, 497 U.S. 177 (1990); Matlock, 415 U.S. 164. Specifically, in Matlock, the Supreme Court found a third party has authority to consent to a search when he possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." 415 U.S. at 171. Similarly, under Military Rule of Evidence 314(e)(2), a person who "exercises control over" property "may grant consent to search."

Consistent with this precedent, this honorable Court has held that a third party has authority to consent to a search "when he possesses 'common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" United States v. Rader, 65 M.J. 30, 32 (C.A.A.F. 2007) (quoting Matlock, 415 U.S. at 171) (finding the appellant's roommate had sufficient access to and control over the appellant's computer to give valid consent to its search where neither the computer nor any of its files were password protected, encrypted, or protected by any other technological impediment.) Relevant to the case at hand, this Court has also specifically examined the issue of consent in the context of searches by the military acting in a non-law-enforcement capacity. United States v. Jacobs, 31 M.J. 138 (C.M.A. 1990). This Court has determined that a military member, acting in a non-law-enforcement capacity, may properly enter an accused's rental unit based upon a landlord's consent in some circumstances. Id. Such is the case here.

Based on these principles, further discussed below, MSgt Saganski and TSgt Zenor's entry with Mr. Marquette, the landlord's employee, was lawful. Appellant's lease contract clearly "permit[ed the] landlord and [her] agents to enter a tenant's apartment" for the "non-law-enforcement purpose" of effectuating repairs and instances of delinquent rent payments. *See* Jacobs, 31 M.J. at 144; *see also* J.A. at 044-081.

MSgt Saganski and TSgt Zenor entered the apartment, while acting in their official capacity, in order to inspect Appellant's apartment for the purpose of arranging necessary repairs. (*See* J.A. at 044-081; *see also* J.A. at 096, 114, 147-46.) However, even if this Court were to conclude that the landlord's entry was somehow unlawful, MSgt Saganski and TSgt Zenor entered based "on facts leading sensibly to their conclusions of probability" that the landlord was entitled to enter. *See* Rodriguez, 497 U.S. at 186 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

In Jacobs, this Court addressed the question of "whether appellant's landlord could lawfully invite...[appellant's sergeant]...to inspect appellant's apartment for the purpose of arranging necessary repairs." 31 M.J. at 143. This honorable Court stated that in order to establish valid consent for a criminal search, "the landlord or third party must have common authority or appear to have common authority over the premises." Id. This authority must go "beyond a mere right to enter to make emergency repairs." Id. However, "the same degree of authority in the landlord is not required when the police enter the apartment 'in the shoes' of the landlord to assist him in making emergency repairs." Id. (citation omitted). Relying on the decision of United States v. Clow, 26 M.J. 176 (C.M.A. 1988), this Court held that "the landlord lawfully authorized access for a non-law-enforcement purpose" as both the lease agreement and the

state's real estate laws "permit a landlord and his agents to enter a tenant's apartment." Id. at 143.

In Jacobs, this Court specifically distinguished the facts in Chapman v. United States, 365 U.S. 610 (1961), finding "[s]uch an entry is materially different." 31 M.J. at 144. Chapman held that police had illegally entered a tenant's room to search for evidence under the guise of exercising the landlord's right to enter and view waste. 365 U.S. at 616-617. The true purpose of the law enforcement officers' entry in Chapman was to search for incriminating evidence, rather than view waste. Id. This is a key distinction between Chapman and the facts in both Jacobs and this case. In this case and in Jacobs, the military officials entered the apartment at the behest of the landlord for the purpose of inspecting for damage and arranging for repairs. This is materially different than a law enforcement officer requesting consent from a landlord to search a tenant's apartment for evidence of a crime.

Although MSgt Saganski and TSgt Zenor were acting in their capacity as Appellant's supervisors, neither was a law enforcement officer. They went to Appellant's property at the behest of the landlord in an effort to protect Appellant, to determine if Appellant should be counseled about his living situation, and also, to maintain good relations between the Air Force and the civilian community. (J.A. at 114, 147-48.) Further tracking

Jacobs, Paragraph 28 of Appellant's lease clearly allowed the landlord to enter Appellant's apartment in order to effectuate repairs upon the property, estimating repair costs, and removing health or safety hazards. (J.A. at 054.) The landlord, MSgt Saganski and TSgt Zenor entered the apartment for a purpose specifically provided in the lease. It is uncontroverted in the record that the pair did not suspect Appellant of stealing the equipment, nor did they indicate any intent to take criminal action against Appellant at the time they entered the apartment. (J.A. at 093, 094, 097, 114, 147-48, 157-58.) The record clearly indicates the purpose of the non-commissioned officer's entry was for administrative purposes and civil in nature rather than for the purposes of a criminal investigation. (Id.) Moreover, by failing to pay rent and his electricity bill, and leaving the apartment in a filthy and damaged condition, Appellant should not have been surprised at the landlord's entry into the apartment.[1]

[1] Though the military judge did not make a legal finding of abandonment as a basis for his evidentiary ruling, evidence exists demonstrating Appellant did not retain a reasonable expectation of privacy in the apartment and lacked standing to contest the reasonableness of the search. It is settled law that one has no standing to complain of a search or seizure of property he has voluntarily abandoned. *See* Abel v. United States, 362 U.S. 217, 240-241 (1960); *see also* McDuff v. State, 939 S.W.2d 607, 616 (Tex. Crim. App. 1997) (stating the issue of whether a defendant has abandoned a reasonable expectation of privacy in the area searched is conceptually indistinguishable from "standing" to contest an illegal search.) The test of abandonment subsumes both a subjective and an objective component: "[w]hether a party has manifested a subjective expectation of privacy is a question of fact, reviewed under the clearly erroneous standard. Whether that subjective expectation is objectively reasonable is a matter of law subject to de novo review." United States v. Maxwell, 45 M.J. 406, 417 (C.A.A.F. 1996); United States v. Gomez, 276 F.3d 694, 697 (5th Cir. 2001); United States v. Garzon, 119 F.3d 1446, 1449 (10th Cir. 1997). The test of whether an individual

The landlord's limited access provided under the lease is sufficient to provide lawful authority to enter and for the military members to view the state of the apartment and assess the damage.[2] Jacobs, 31 M.J. at 143; *see also* United States v. Sledge, 650 F.2d 1075, 1080, n. 10 (1981). That limited right to entry is also sufficient to include viewing incriminating evidence in plain sight. Id. Based on the foregoing, the landlord's entry with the request of the presence of MSgt Saganski and TSgt Zenor for the purpose of causing Appellant to repair the property was legal and the inquiry need go no further.

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abandoned property, for Fourth Amendment purposes, is whether the individual "voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973) (en banc). The issue is not whether the apartment was abandoned in the "strict property-right sense." Id. The intent of the individual to abandon the property "may be inferred from words spoken, acts done, and other objective facts." Id. In this case, the government asserts no objectively reasonable expectation of privacy remained where Appellant failed to pay rent and electricity for two months and where two notices to vacate were posted and delivered to Appellant for his non-payment of rent. Even after being confronted in person by the landlord, Appellant failed to pay his overdue rent by 15 February 2010 as required. In addition, Appellant's electricity was ultimately turned off as a result of his failure to pay. Moreover, Appellant left the apartment in a damaged and entirely unsanitary and uninhabitable condition with trash and animal feces scattered across the floor. Finally, the lease clearly gave the landlord authority to enter Appellant's apartment in the aforementioned circumstances. Based on the foregoing facts, Appellant did not retain a reasonable expectation of privacy in the apartment.

[2] Some persuasive authority exists, including Texas case law, supporting the proposition that an appellant can knowingly and voluntarily contractually agree to allow third parties to enter a space where the appellant has an expectation of privacy, or that the entry was within the reasonable contemplation of the parties to the contract. United States v. Griffin, 555 F.2d 1323, 1324-25 (5th Cir. 1977); Salpas v. State, 642 S.W.2d 71, 73 (Tex. Ct. App. 1982); Ferris v. State, 640 S.W.2d 636, 638 (Tex. Ct. App. 1982); United States v. Smith, 353 Fed. Appx. 229, 230 (11th Cir. 2009) (finding no Fourth Amendment violation where the owner of a storage facility invited police into lessor's storage unit, where rental agreement allowed the owner to make repairs, and where the owner observed contraband in violation of the terms of the agreement.)

Georgia v. Randolph, does not disrupt the holdings in Rodriguez or Matlock. 547 U.S. at 120-22. Noting "the Rodriguez defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant," the Court explicitly decided to draw "a fine line" to not undercut Rodriguez. Id. "This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it." Id. The Court made it clear that the case hinged on the presence of both co-tenants, including a husband who vociferously objected to the search of his residence over the acquiescence of his wife at the time consent was requested. Id. In such blatant situations, “widely shared social expectations” demand that law enforcement question the validity of consent. Id. Contrary to Appellant’s assertions, the Randolph holding does not extend to situations where a tenant is not present -- to include the search in Appellant’s case.[3]

[3] Both this Court and several circuit courts have held Randolph is a narrow

Nonetheless, "[a] search may be [still be] reasonable under the Fourth Amendment even though the person purporting to give consent lacks actual authority to consent, if, viewed objectively, 'the facts available ...at the moment [would] warrant a man of reasonable caution [to believe] that the consenting party had authority over the premises' or effects." United States v. Gallagher, 66 M.J. 250, 253 (C.A.A.F. 2008) (citing Rodriguez, 497 U.S. at 188). The scope of apparent authority is defined by what is objectively reasonable under the circumstances. Gallagher, 66 M.J. at 253 (citing Florida v. Jimeno, 500 U.S. 248, 251 (1981)).

In Rodriguez, a woman used a key in her possession to open the door to a residence she had recently vacated. 497 U.S. at 180-81. She consented to its search, which revealed evidence used against Rodriguez. Id. The lower court refused to apply a "reasonable belief" of "common authority" over the property to the officers who conducted the search. Id. at 189. On appeal, the Supreme Court held such "reasonable belief" could validate a search based on consent by an individual who lacked actual authority over the place to be searched. Id. at 188. In reaching its holding, the Supreme Court reasoned: "As we put in Brinegar

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exception to the general Matlock rule and applies only to searches conducted in the face of a present and objecting cotenant. United States v. Weston, 67 M.J. 390, 393 (C.A.A.F. 2009) (rejecting expansion of the holding of Randolph at the expense of Matlock and declining to look more generally to society's widely shared social expectations in determining the reasonableness of consent searches); United States v. Cooke, 674 F.3d 491, 498-99 (5th Cir. 2012); United States v. Hudspeth, 518 F.3d 954, 959 (8th Cir. 2008); United States v. Reed, 539 F.3d 595 (7th Cir. 2008).

v. United States, 338 U.S. 160, 176 (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."

Id. at 186.

If this Court were to find that the facts here are contrary to the principles of Jacobs, the Sergeants' entry was still proper under Rodriguez and Gallagher. MSgt Saganski and TSgt Zenor, non-law-enforcement officers, certainly believed they had the authority to enter Appellant's apartment. (J.A. at 107, 113, 115-16, 149, 218.) "Both of them knew that [the landlord and her employee] had been in the apartment a number of times while the accused was on leave and thus reasonably believed that they had the authority to allow them in" for the specific purpose requested by the landlord. (J.A. at 217-18.) The facts in this case demonstrate the very type "reasonable belief" capable of validating a search that was at the heart of the Supreme Court's decision in Rodriguez. This is not a case where the landlord

merely unlocked Appellant's door to permit law enforcement to search for evidence of a crime. In this case, the first sergeant and the supervisor were informed that Appellant had failed to pay the rent and had damaged the apartment. (J.A. at 095, 107, 128, 145-46, 156.) They also knew that the landlord had entered the apartment previously to view the damage, and the landlord was preparing to post an abandonment notice. (J.A. at 098, 115-16, 157, 160.) Based on the specific facts presented to them, particularly in light of their limited purpose to view and assess the condition of the apartment, it was not unreasonable for MSgt Saganski and TSgt Zenor to believe the landlord had the authority to permit them entry.

Consistent with Jacobs, this Court should find the landlord's entry with the request of the presence of MSgt Saganski and TSgt Zenor for the purpose of causing Appellant to repair the property was lawful. Assuming arguendo that the landlord did not have authority to consent to the entry, the military judge properly concluded that MSgt Saganski and TSgt Zenor's entry and subsequent seizure of the stolen item was proper under the auspices of apparent authority. Therefore, the military judge's evidentiary ruling should be upheld and Appellant's conviction left intact.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court uphold AFCCA's ruling affirming the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Appellate Defense Division, on 10 September 2012.

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