IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim. App. Dkt. No. 20121026
Specialist (E-4) **LEVI A. KEEFAUVER** United States Army, Appellant	)	USCA Dkt. No. 15-0029/AR

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Issue Presented:

WHETHER THE ARMY COURT ERRED IN FINDING THE PROTECTIVE SWEEP WAS APPROPRIATE IN TOTAL.

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

Granted Issue

WHETHER THE ARMY COURT ERRED IN FINDING THAT THE PROTECTIVE SWEEP WAS APPROPRIATE IN TOTAL.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b). The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of possession with the intent to distribute marijuana, two specifications of violation of a lawful general order, and one specification of child endangerment, in violation of Articles

112a, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a, 892, 934 (2006) [hereinafter UCMJ]. (JA 19, 34). The military judge sentenced appellant to four years confinement, a reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (JA 36). The convening authority approved the adjudged sentence. (JA 27).

On 29 July 2014, the Army Court upheld the findings and sentence, finding that the military judge did not abuse his discretion when he denied defense's motion to suppress evidence obtained during a search of appellant's home. (JA 1). On 8 December 2014, this honorable court granted appellant's petition for review.

Statement of Facts

A. The Search of Appellant's Home

At approximately 0830 on 8 December 2011, Postal Inspector (PI) SL was notified that a package at the Louisville, KY processing center possibly contained marijuana based on a strong odor of marijuana coming from the package. (JA 41, 67-68, 141-43). After identifying that the package was addressed to appellant's home on Fort Campbell, PI SL contacted Criminal Investigation Command (CID) on Fort Campbell and transferred the package to their office. (JA 67-68, 144-45). CID agents presented the package, along with several other empty packages, to a military working dog (MWD) who alerted for the presence of

marijuana on the suspect package. (JA 39, 72, 149, 190, 231). Given the package's size and weight, PI SL and CID Special Agent (SA) SR strongly believed that the marijuana was likely intended for distribution, rather than personal use. (JA 85, 149).

After confirming the presence of marijuana with an MWD, SA SR contacted the military magistrate on duty, CPT MR, to request a search authorization based on the strong marijuana odor coming from the box. (JA 39-40, 93, 191-92). The plan was to conduct a controlled delivery of the package and to conduct a search of the home using an MWD after the box was taken into the home. (JA 39, 40, 71, 151-52, 192-93). CPT MR testified at the Article 39(a) session that he verbally authorized the agents to conduct the search and that they could do it with an MWD. (JA 85-86). The "actual limits on when the MWD could enter the home and where it could go were not clearly defined during the motion." (JA 3).[1] SA SR stated he understood the verbal authorization "was to search for the package inside the house and once the package was found, any additional search, if we had a K9 search the house and alerted to any other drugs inside the house, that we would have authorization to search the rest of the house." (JA 39-40, 105-06). After the search, a written authorization was executed to memorialize the verbal

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[1] During the Article 39(a) CPT MR provided approximately five different answers as to what the limits of the search with the MWD were. (JA 85-103).

authorization. The written warrant stated that the investigators could search the property for "any evidence of the criminal offense Wrongful Possession, distribution and/or Use of a Controlled substance." (JA 47-48, 99, 105, 492).[2]

After obtaining the verbal authorization, the package was then taken to the on-post postal facility, where it was scanned in as "arrived at" the post office at 1314. (JA 71; SJA 023). CID agents, military police (MP) officers, and PI SL then proceeded to appellant's home. (JA 151-52, 192-93). An undercover agent delivered the package to appellant's home at approximately 1436 hours and scanned it as being delivered.[3] (JA 73, 128, 152, 193). There was no answer when the agent knocked on the door, so he left it on the front porch and law enforcement established surveillance nearby. (JA 73, 152, 193). Approximately 44 minutes later at 1520, TC-D, appellant's stepson, arrived at the residence, picked up the package, and went inside. (JA 40, 128, 152-53, 193). The agents and police immediately moved into the home to secure the package. (JA 153, 193, 291). When TC-D realized why the agents and police were there, he threw "an ungodly tirade of obscenities" at the

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[2] After the initial search, CID also obtained separate search authorization for appellant's vehicle. (JA 99).

[3] SA SR says the package was delivered at approximately 1300. (JA 40). However, the electronic scanning is a more accurate way of measuring when the package was delivered. (JA 73, SJA 023). The military judge made the finding of fact that 1436 was the time the package was delivered. (JA 128).

agents, saying, "What the fuck? Get the fuck out of here. You fucking pigs. You police." (JA 74, 179, 223).

The home smelled of marijuana. (JA 195, 233; SJA 029). The officers discovered the package a few feet from the front door, sitting on a table in the foyer next to the staircase. (JA 53-55, 153, 194; SJA 013, 025). PI SL, who was certified as an expert in drug trafficking, testified that the initial package, once opened, contained approximately three to four pounds of marijuana. (JA 153). It was vacuum sealed and placed within a second box which was itself inside the first box. (JA 153-55). The box was reinforced with tape and filled with fabric softener sheets, likely in an attempt to mask the smell. (JA 153-55).

When the agents entered the house, SA SR and PI JT immediately conducted a security sweep of the residence in order to make certain no unknown persons were present in the residence who might present a danger to the officers. (JA 42, 62, 193). During his sweep of the premises, SA SR discovered a number of drugs and drug paraphernalia in plain view. (JA 43, 193-95). Downstairs, he discovered a marijuana smoking device on the counter in the kitchen in plain view. (JA 43, 194; SJA 022). Upstairs in TC-D's room he noticed a bag of marijuana on the bed

and a marijuana cigar figurine on a headboard bookcase,[4] as well as a bong-type device in the closet.[5] (JA 43, 194; SJA 016-018). When he checked for people in the hall closet, he discovered a shotgun and a rifle. (JA 43, 243). Finally, when he checked to make sure there was no one in the master bedroom, he spotted several boxes next to the bed, open and empty, that matched the characteristics of the box used in the controlled delivery, including the tape and the box within a box design. (JA 43-44, 155-60, 309; SJA 012).

Following the security sweep, agents conducted a search of the residence assisted by an MWD and recovered a large amount of drugs and drug related items beyond those that were already discovered in plain view by SA SR. (JA 40, 231). In TC-D's room they discovered little pieces of what appeared to be marijuana littered about the room and several more bags of marijuana. (JA 235, 247). They also discovered an ash tray with marijuana residue and a poster on the wall which read, "Reefer Road." (JA 236). The room of appellant's son, EK, had material to roll marijuana cigarettes in a drawer along with

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[4] Appellant's brief mistakenly claims agents looked "behind the headboard" for the figurine. (Appellant's Br. 13). SA SR inartfully describes the figurine as being "on the back of the headboard," however, the pictures of the figurine SA SR identified as being clear and accurate at the time of the protective sweep clearly shows a bookcase headboard with the figurine on the top shelf of that headboard. (JA 43, 45, SJA 017-018).

[5] SA SR said "[t]he closet door was open . . . with a smoking device up on the top shelf." (JA 43). The smoking device is in plain view from the middle of the bedroom. (JA 44; SJA 014).

marijuana, as well as a clear container of marijuana on the floor in plain view. (JA 45, 239).

In the master bedroom investigators found a bag containing a few grams of marijuana in a dresser, as well as a number of empty ziplock bags. (JA 240, 325). There was also a vaporizer, which can be used to smoke marijuana, and a scale, along with approximately $2,000 in cash. (JA 240-41). Back downstairs, the MWD alerted on the closet adjacent to the stairs, near the front of the residence, in the living room where appellant primarily resided. (JA 242, 363-64). In this closet was a bag of marijuana hidden in a bin of toy cars and two unregistered pistols. (JA 242). In another downstairs closet adjacent to the living room, the MWD alerted on a black briefcase which, although it did not contain marijuana, held $4,000 in cash. (JA 242). A search of the garage turned up a glass pipe and another water pipe or bong. Finally, inside the garbage cans outside were four plastic baggies with dollar amounts written on them: $1,000; $2,000; $8,000; and $8,300. (JA 258).

Sometime during or after the search, appellant came home. (JA 224-25). Appellant and his son EK were taken to the CID office, where they were searched as part of in-processing. (JA 281-82, 286-87). During the search, it was discovered that appellant had $900.00 in cash in his pocket. (JA 281-82). Furthermore, EK, who was only thirteen at the time, had $692.00

on his person. (JA 286-87). Appellant invoked after being read his rights. (JA 376). Later that evening, appellant approached PI JT and indicated that he wanted to make a statement. (JA 293-94). Appellant stated to PI JT, "All of that stuff in the house is mine. I don't want my family to get in trouble." (JA 225-27, 293-94).

B. Suppression Motion

Prior to trial, on 5 June 2012, defense submitted a motion to suppress all of the evidence found in the home. (JA 485). The Government submitted a written reply on 11 June 2012. (SJA 001). At the Article 39(a) session on 22 June 2012, the magistrate, CPT MR, and law enforcement officials PI SL, SA SR, and SPC James Johnson testified. (JA 38-110; SJA 029).[6] The military judge ruled that the search authorization for the box of marijuana was a valid search authorization. (JA 131). Regarding the protective sweep, the military judge stated the following:

> After executing that valid portion of the search authorization, the agents were authorized to conduct a protective sweep;
>
> Under the particular facts of this case, the law enforcement agents had reasonable suspicion to believe that an individual or individuals who posed a danger to the agents may have been hiding in the residence;

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[6] The Article 32(b) summarized testimony of the MWD dog handler, SPC James Johnson, was also considered. (SJA 029).

> They believed that the residents of that home received a box with approximately 8 pounds of marijuana;
>
> From that amount of marijuana, one can reasonably infer that residents of the home were involved in distributing drugs;
>
> It is common knowledge that drug trafficking involves violence, including the use of weapons;
>
> The reaction of the high school aged male supported this belief;
>
> The sweep was properly conducted in a quick manner in places where individuals may be hiding;
>
> Everything that the agents saw during the protective sweep was in plain view from a place in which the agents were lawfully situated;

(JA 131).

The military judge made the following findings regarding the items found after the protective sweep was conducted. These items include those that the MWD found when it went through the home.

> Based on the way the verbal authorization was issued and executed, the continued search of the house after that was beyond what the magistrate had authorized;
>
> However, everything that was discovered during those later searches would have inevitably been discovered;
>
> At that time, there was reason to believe that approximately 8 pounds of marijuana was delivered to that residence and that there was already marijuana, drug paraphernalia, and weapons in that residence;

> The next immediate step for any reasonable law enforcement officer would have been to request a search authorization of the whole residence based on all of the information;
>
> Based on the totality of the circumstances, there was overwhelming evidence to support a request for search authorization, and any magistrate would have authorized a search of the residence for evidence of drug distribution and use, such as drugs, drug paraphernalia, weapons;
>
> In summary, all the evidence at issue in this motion was obtained either pursuant to a lawful search authorization or would have inevitably been discovered.

(JA 131-32).

The Army Court rendered an opinion on 29 July 2014 upholding the search under the grounds of a protective sweep and inevitable discovery. (JA 1-18).

Granted Issue

> WHETHER THE ARMY COURT ERRED IN FINDING THAT THE PROTECTIVE SWEEP WAS APPROPRIATE IN TOTAL.

Summary of Argument

The evidence found at the home was properly admitted. The protective sweep was proper and any additional contraband that was found during the protective sweep would have been inevitably discovered based upon probable cause arising from the controlled delivery and items seen in plain view during the protective sweep.

Standard of Review

A military judge's ruling on a motion to suppress evidence is reviewed for an abuse of discretion. *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000). Findings of fact are reviewed under the clearly erroneous standard while findings of law are reviewed de novo. *Id.* In reviewing a motion to suppress, the court considers the evidence in the light most favorable to the prevailing party. *United States v. Leedy*, 65 M.J. 208, 212-13 (C.A.A.F. 2007).

Law and Analysis[7]

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend IV. The Fourth Amendment protects soldiers. *See generally*, Military Rules of Evidence (Mil. R. Evid.) 311, 314, and 315.

A. The protective sweep performed in this case was proper, and the evidence observed during the sweep was properly admitted.

A protective sweep is a "quick and limited search of premises . . . conducted to protect the safety of police

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[7] The Government addresses whether appellate courts can consider any evidence presented in the trial of the case for a pre-trial motion following its protective sweep and inevitable discovery arguments.

officers or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990). "[A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. Beyond that, the standard is whether the searching officer possesses a reasonable belief based on "specific and articulable facts" which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the area swept harbored an individual posing a danger to the officer or others." *Id.* at 327-28. A protective sweep may be performed of areas from which officers may be attacked even though the suspect is already in custody. *United States v. Billings*, 58 M.J. 861, 864-65 (Army Ct. Crim. App. 2003)(finding protective sweep of interior of apartment reasonable even though suspect was arrested outside and remained in custody). "[A]n in-home arrest puts the officer at the disadvantage of being on his adversary's turf." *Buie*, 494 U.S. at 333. Evidence observed in plain view during a lawful protective sweep may be seized and used without constitutional violation as long as there is probable cause to believe it is evidence of a crime. *Id.* at 330; *see also United States v. Jackson*, 34 M.J. 1145, 1149 (C.M.R. 1992).

Regarding the issue of safety, agents conducting a protective sweep may do so in places where "a person may be found" to prevent any further instances that may cause danger on the premises. *Billings*, 58 M.J. at 864. Any evidence found in plain view may be seized so long as it is discovered within the reasonable scope of securing the area where a person may be found. *Id.* Safety has been found to be at risk in cases involving the possession of large quantities of drugs. *United States v. Cash,* 378 F.3d 745, 748-749 (8th Cir. 2004)(finding protective sweep justified for nervous woman who was served a warrant and there was a tip that there were large quantities of drugs in the home despite officers being in the residence for 10 minutes).

The military judge did not abuse his discretion by holding that a protective sweep of appellant's home was authorized because the facts of the case warranted a reasonably prudent officer to sweep the premises in order to ensure the safety of those present. See *Cash,* 378 F.3d at 748-749. Eight pounds of marijuana addressed to appellant's residence had been brought into the home. (JA 42, 62, 193).[8] Officers knew that the

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[8] The fact that the officers testified that it was standard operating procedure to do the sweep does not in itself make it an invalid search. (JA 20-21). "[T]he legality of searches and seizures under the Fourth Amendment depends not on the subjective modifications of the police, but on whether there was an objectively reasonable basis for the search and seizure." *United States v. Hauk,* 412 F.3d 1179, 1187 (10th Cir. 2005)(*citing United States v.*

residence was a multi-tiered three bedroom home where more than one individual resided. (JA 42); *See United States v. Starnes*, 741 F.3d. 804, 808 (7th Cir. 2013). No one had been seen leaving the residence. (JA 73). Upon entering the premises to retrieve the box, an "irate" TC-D was openly hostile towards the officers, yelling "what the fuck," "get the fuck off my property," and "[c]ops can all die." (JA 59, 179, 224). This aggression could have alarmed others in the house either to retaliate or destroy evidence. (JA 59, 74, 223); *See Billings*, 58 M.J. at 864 (*citing United States v. Oguns*, 921 F.2d 442, 446-47 (2d Cir. 1990)). Moreover, there was a "strong odor" of marijuana in the house when standing at the front door, so it was unclear at the time whether someone was smoking marijuana or not, indicating another person might be present in the home. (JA 195; SJA 029).

Further, as the military judge found, it is common knowledge that drug trafficking involves violence. (JA 132). Appellate courts regard drug trafficking as a factor in determining whether a protective sweep is proper. *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993); *Hauk*, 412 F.3d. at 1187; *Cash*, 378 F.3d 745, 748-49(finding possession of large quantities of drugs to be a "significant factor" for the

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Whren, 517 U.S. 806, 813 (1996)); United States v. *Martins*, 413 F.3d 139, 149 (1st Cir. 2005).

protective sweep); *United States v. Patrick*, 959 F.2d 991, 996 (D.C. Cir. 1992); *Starnes*, 741 F.3d at 806 (stating that weapons are generally used in the drug trade). The combination of all of these specific and articulable facts demonstrate that the officers possessed a reasonable belief that a protective sweep was necessary to protect those executing the controlled delivery.

Further, the protective sweep that occurred was proper. It lasted a couple of minutes and was done in a thorough fashion in order to look for anyone posing a danger to law enforcement personnel. (JA 64, 132). The agents only looked where individuals could potentially hide. (JA 64). Additionally, agents had reasonable and articulable facts to search not only the first floor but the second floor as well. Multiple bedrooms were located upstairs. (JA 42). The box of marijuana was right next to the staircase. (SJA 013, 025). The staircase was not on the other end of the home, therefore the upstairs presented an advantageous position to attack intruders in the foyer.

The military judge did not abuse his discretion when he denied appellant's motion to suppress on the basis of a protective sweep being valid.

B. The evidence was properly admitted because it would have been inevitably discovered.

Inevitable discovery is an exception to the exclusionary rule that serves to prevent a windfall to appellants in situations of constitutional violation by the police. *Nix v. Williams*, 467 U.S. 431, 444 (1984). The rule serves to admit evidence despite a constitutional violation "when the routine procedures of a law enforcement agency would inevitably find the same evidence . . . even in the absence of a prior or parallel investigation." *United States v. Owens*, 51 M.J. 204 (C.A.A.F. 1999)(finding inevitable discovery of items seized from car after owner withdrew search permission because the items seized with permission would have supported probable cause for a warrant); *United States v. Alexander*, 540 F.3d 494, 503-504 (6th Cir. 2008)(finding inevitable discovery during a controlled delivery even if appellant's Fifth Amendment rights were violated). The Government must demonstrate by a preponderance of the evidence "that when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012)(quoting *United States v. Kozak*, 12 M.J. 389, 394 (C.M.A. 1982)). The

inevitable discovery doctrine "cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant." *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014); *United States v. Wallace*, 66 M.J. 5, 11 (C.A.A.F. 2008)(Baker, J. concurring). The purpose of the inevitable discovery rule is to balance society's interest in seeing fully informed justice take place in court against the necessity of discouraging police misconduct. *Nix*, 467 U.S. at 442-43. The Government is not to be put in a worse position than it would have been had there been no illegal conduct; instead, the purpose of the rule is to equalize the playing field, nothing more. *Id.*

The military judge properly admitted the evidence in this case pursuant to the rule of inevitable discovery because the police had already gathered more than enough evidence to have sufficient probable cause to search the entire house based on the controlled delivery and protective sweep. The box delivered to the home contained a large amount of marijuana, which was properly retrieved as a part of the search authorization. During the protective sweep of the first floor, officers smelled the presence of marijuana and found a bong on the kitchen counter in plain view. (JA 43, 195, 233; SJA 022, 029). On this alone, the officers would have had sufficient probable

cause to obtain a warrant to search the entire home. On the second floor, officers found in plain view a bag of what appeared to be marijuana, a marijuana cigar, two weapons, and boxes similar to the one used in the controlled delivery. (JA 43-44, 155-60, 194, 243). Based on the protective sweep finding drugs, drug paraphernalia, and weapons throughout the entire home, it is clear the officers had sufficient probable cause for a valid warrant.

The Government also presented sufficient evidence that the officers would have obtained a warrant. *Wicks*, 73 M.J. at 103; *United States v. Lamas*, 930 F.2d 1099 (5th Cir. 1991)(finding inevitable discovery where police officer who left to prepare affidavit for search warrant for house but stopped because appellant consented, albeit later it was determined to be involuntary consent); *United States v. Souza*, 223 F.3d 1197, 1203 (10th Cir. 2000)(finding inevitable discovery where postal employee opened a package suspected of narcotics while law enforcement had taken steps to prepare search warrant). SA SR went to CPT MR to get a warrant for a controlled delivery and to use an MWD to search the home. (JA 39-40). Based on the magistrate's verbal authorization, SA SR believed that he already had a valid search warrant: "The authorization was to search for the package inside the house and once the package was found, any additional search, if we had a K9 search the house

and alerted to any other drugs inside the house, that we would have had authorization to search the rest of the house." (JA 39-40, 105-06).[9] The magistrate's repeated explanations of what he authorized for the verbal search warrant are unclear. (JA 13). Further, CPT MR's first explanation at the Article 39(a) mirrors what SA SR thought he was authorized to do:

> He asked if they delivered the marijuana to the house, at that point, can they search the house. And I said if the box—the package goes into the house, you may search the room, depending on if you go in right after it, you can search that immediate area that you find the package, and that's the limit of your search. And he said that they were going to have K9s with them, and he asked if the K9s indicate that there's marijuana in other places of house [sic], may we search, and I said, yes, if the K9s indicate that there is marijuana [in] other places in the house, you have probable cause and you have my authorization to search those locations.

(JA 85-86).

Further, SA SR stated that if he did not believe he already had the right to search the house, he would have contacted the magistrate following the protective sweep. (JA 110). The officers even obtained a search warrant for the vehicle. (JA 99). The officers in this case did take steps to obtain a search warrant. They thought they already had obtained one.

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[9] *See generally United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001).

Thus, it is clear that they took steps to obtain a warrant to search the home with MWDs.

In *Wicks*, a Soldier took the appellant's phone and gave it to CID. *Wicks*, 73 M.J. at 96. Despite speaking with legal counsel three times, the Government failed to even explore the ramifications of searching the phone. *Id.* at 104. The phone was searched three separate times without obtaining a warrant. *Id.* at 98. This court held that the inevitable discovery doctrine did not apply and determined that there was no evidence that the officers would have sought a warrant. *Id.* at 104. The present case is different because SA SR did pursue a search warrant and had already sought a warrant to search the home with an MWD. The agents entered the home with an MWD because they believed they already got verbal authorization from the magistrate. It is clear that had they not believed they already had proper authorization, that they would have pursued a valid search warrant following the protective sweep. (JA 109-10).

C. The Army Court did not err in using evidence presented at trial as a basis for finding the search and seizure proper.

The Army Court correctly found that on a motion to suppress, appellate courts "may consider any evidence presented in the trial of the case." *United States v. Cordero*, 11 M.J.

210, 215 n.3 (C.M.A. 1981)(*citing Carroll v. United States*, 267 U.S. 132, 162 (1925)).[10]

Appellant relies primarily upon *United States v. Grant* and *United States v. Cowgill* to argue that considering the trial record on appeal for a suppression motion is inappropriate. 49 M.J. 295 (C.A.A.F. 1998); 68 M.J. 388 (C.A.A.F. 2010); (Appellant's Br. 8). *Grant* dealt with appellant raising new issues on appeal that were not raised anywhere on the record to overturn the military judge's ruling denying Rules of Courts-Martial (R.C.M.) 412 evidence that the victim was a homosexual. *Id.* at 297. The *Grant* appellant brought up on appeal for the first time that the proffered evidence would have been admissible to show the victim's motive to lie. *Id.* In *Cowgill*, this court determined that when reviewing a magistrate's finding of probable cause one looks at the information known to the magistrate at that time. 68 M.J. at 391. Neither *Grant* nor *Cowgill* directly address supporting a military judge's ruling on a suppression issue. *Grant* dealt with a proffer not raised on the record of trial. *Cowgill* dealt with a probable cause determination, not a pre-trial motion. In the present case, as was the case in *Cordero*, the court is dealing with a suppression

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[10] Appellant lists 11 facts in its appendix that were cited in the Army Court's opinion that were not raised at the Article 39(a). (Appellant's Br. at Appendix). Many of these facts are only found in the court's "FACTS" section. (JA 2-6). Additional analysis of appellant's facts are addressed below.

motion. *Cordero*, 11 M.J. at 211. The additional findings of fact merely support a previous ruling by the military judge.

The Army Court notes in its published opinion for this case that, in addition to *Cordero*, other appellate courts have ruled that trial facts can be used to support a pretrial motion. *United States v. Canieso*, 470 F.2d 1224, 1226 (2d Cir. 1972) ("It is settled law that the validity of an arrest or search can be supported by evidence which was adduced at trial even though this was not presented at the pretrial suppression hearing."); *United States v. Pearson*, 448 F.2d 1207, 1210 (5th Cir. 1971)("Evidence adduced at trial may be considered even though the evidence on the motion to suppress was insufficient to justify the search."); *United States v. Hinojosa*, 606 F.3d 875, 880 (6th Cir. 2010) ("This court is not restricted to considering only the evidence presented at a suppression hearing, and it may consider evidence offered at trial to uphold the denial of a motion to suppress.");*United States v. Gray*, 491 F.3d 138, 148 (4th Cir. 2007); *United States v. Martins*, 413 F.3d 139, 144 (1st Cir. 2005); *United States v. Villabona-Garnica*, 63 F.3d 1051, 1056 (11th Cir. 1995); *Rocha v. United States*, 387 F.2d 1019, 1021 (9th Cir. 1967)).

Even if this court does not consider the testimony raised on the merits to support the military judge's findings, the military judge did not abuse his discretion. In the Army

Court's ruling on the protective sweep, the trial facts merely support the testimony that arose at the Article 39(a). The Army Court found the following facts relevant to the protective sweep:

> At the time SA SR conducted the sweep, investigators were aware that: 1) an eight-pound box containing marijuana had just been delivered to the home; 2) in addition to TC-D, appellant, his wife, and EK lived in the home; 3) although no one was seen entering the home during the time it was under surveillance, no one was seen leaving it either; thus the agents did not know the whereabouts of the adults who lived in the home and it was not unreasonable to believe they could still be in the home;[fn. 10] and most important, 4) upon discovery that the police were at his home, TC-D became "irate" and combative, shouting, "I hate pigs. I hate cops. Cops can all die," or words to that effect and he had to be placed in handcuffs and moved away from the front entryway.[] It was soon after this incident that SA SR conducted his protective sweep.
>
> fn.10: Appellant testified at trial that his wife spent a significant amount of time at home in her room.

(JA 8-9).

All four of the facts the court lists as justifying the protective sweep arise from facts elicited at the Article 39(a). (JA 39-40, 42, 73-74; SJA 023). The court footnotes the fact that appellant's wife spent substantial amount of time in her bedroom to support the fact that multiple people resided in the home. While this fact only arises at trial, SA SR testified at the Article 39(a) that appellant's home was a multi-tiered

dwelling with "3 bedrooms upstairs" where one would assume would have at least three occupants. (JA 42). The Army Court also refers to specific phrases TC-D said to the police while they are entering the home which come from trial testimony. However, the testimony at the Article 39(a) captures the essence of why this is an important fact justifying the protective sweep, that TC-D is "irate" and combative toward the cops. (JA 74, 179).

In determining whether there was inevitable discovery, the Army Court found that there were three things investigators knew immediately prior to the MWD search:

> 1) an eight-pound box containing marijuana had been delivered to the home; 2) the home smelled strongly of marijuana apart from the box; and 3) the home contained additional marijuana, drug paraphernalia, weapons, and boxes very similar to the hone delivered that day.

(JA 14).

Each of these facts is supported by Article 39(a) testimony. As for the second fact, the smell of marijuana in the home, the summarized transcript of SPC James Johnson's testimony describes the smell of marijuana when he was conducting the search with the MWD. "When I entered the home there was a smelled [sic] of Marijuana I know how marijuana smells because I am signed for some that I have to maintain." (SJA 029). Even if this court disregards the second fact, there was probable cause to search the entire residence based on the

first and second facts. The prevalence of narcotics and drug paraphernalia was overwhelming.[11] This alone would have been sufficient probable cause to search the entire home.

[11] At the Article 39(a), the agents did not testify to all the items they found in the home, like the handguns and the marijuana found in the downstairs closet. (Appellant's Br. at Appendix). However, Appellate Exhibit VI, introduced at the Article 39(a) does provide a generalized description of the items and where they were found in the residence. (JA 54; SJA 025). Regardless, the agents described enough of what they found during the protective sweep to have sufficient probable cause to search the entire home.

Conclusion

Wherefore, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and uphold the findings and sentence.

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CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on February 4, 2015.

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