IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20110416
Private First Class (E-3) **James S. Piren,** United States Army, Appellant	)	USCA Dkt. No. 14-0453/AR

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

Issues Presented

I.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY OVERRULING THE DEFENSE COUNSEL'S SCOPE OBJECTION DURING THE GOVERNMENT'S CROSS-EXAMINATION OF THE APPELLANT.

II.

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE MOTION TO SUPPRESS RESULTS OF THE DNA ANALYSIS.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012)[hereinafter

UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On May 23 to 25, 2011, Private First Class (PFC), E-3, James S. Piren (appellant) was tried at Vilseck, Federal Republic of Germany (Germany), before an officer panel sitting as a general court-martial. Contrary to his plea, appellant was convicted of abusive sexual contact, in violation of Article 120 of the Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 920. The panel sentenced appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, confinement for twelve months, and a bad-conduct discharge. The military judge credited PFC Piren with fifteen days toward the sentence to confinement. On March 8, 2012, the convening authority approved the adjudged sentence and credited appellant with fifteen days toward the sentence to confinement. On January 7, 2014, the Army Court of Criminal Appeals summarily affirmed the findings and sentence.

Statement of the Facts

Appellant's court-martial arose out of events that occurred in a hotel room in Nürnberg, Germany. (JA at 3, 53). Specialist (SPC) KW, the alleged victim, traveled to Nürnberg with her boyfriend, sister, and other friends to attend a Volksfest. (JA at 43-44). At about 2200 hours she met her sister and friends

at a bar called the "Green Goose." (JA at 46). She started to drink Red Bull and vodka from a large glass and then shared more Red Bull and vodka from a bucket with her friends. (JA at 47-48). At some point during the night PFC Piren and his friend started talking with KW and her friends. (JA at 50). They had never met before, and they did not talk that much while at the bar. (JA at 50-51).

Later in the evening PFC Piren was discovered drunk and passed out in the street in front of the bar. (JA at 51). KW and her friends were on their way back to their hotel room and decided to help PFC Piren back to the hotel. (JA at 52). Once they arrived back at the hotel, KW's boyfriend decided to let PFC Piren sleep in the hotel room and encouraged KW to stay at the hotel to sleep. (JA at 54, 97-99). KW testified that she was intoxicated when she arrived at the hotel. (JA at 53). Her boyfriend said she was about a six on a scale of one to ten. (JA at 97).

Once both PFC Piren and KW were in the hotel room and everyone else left, their version of events diverge. According to KW, she fell asleep and woke up sometime later with the appellant kissing her stomach about "two inches above her vagina." (JA at 58). She screamed "you're not Zac," kicked him, and yelled at him to get out. (JA at 59-60). After he left, she went down to the lobby of the hotel, told the receptionist that

she had been raped, and waited for the German police and her friends to arrive. (JA at 62-63).

At trial, PFC Piren testified. (JA at 216-277). According to his testimony, at some point during the night he woke up to go to the bathroom. (JA at 221). When he was in the bathroom he removed his jeans, urinated, and washed his hands. (JA at 221-22). As he left the bathroom he heard a noise, looked over to the bed, and saw KW holding out her hand to him. (JA at 223). When he took her hand she pulled him to her and started kissing him. (JA at 223). As he returned her kiss she responded positively and started touching his body with her hands and kissing his ear and neck. (JA at 225). No one spoke or made any loud noises. (JA at 226-27). He then slid his hand under her bra and caressed the small of her back as she moaned with pleasure. (JA at 227-28). She then slipped her hand into his boxers and started to rub his penis vigorously for about five minutes. (JA at 228). He rolled her on her back and started kissing her from her bra line, down her stomach, to her bikini line. (JA at 230). She helped him remove her underwear and he kissed her inner thighs and right above her vagina. (JA at 231). He kissed her for a few seconds until she screamed, kicked him off, and yelled "you're not Zac." (JA at 232). At that point he realized that she may have thought he was her boyfriend, so he

apologized and offered to explain the situation to her boyfriend. (JA at 234).

The government's case relied heavily on the testimony of KW and the results of DNA analysis conducted on various items secured as a result of sexual assault forensic examinations of both PFC Piren and KW. Lieutenant Colonel (LTC) Ilse Alumbaugh (a Major at the time of the exam) was the nurse practitioner who performed the sexual assault examinations. (JA at 108-16). Prior to trial, the defense unsuccessfully moved to suppress the results of the DNA testing because they were derived in part from statements PFC Piren made to LTC Alumbaugh during her examination, where she failed to advise him of his Article 31(b), UCMJ, rights. (JA at 30-32, 397). The defense also moved to suppress the statements themselves, and the government did not oppose the motion. (JA at 5, 31, 372).

The government called as a witness the expert who had conducted the DNA analysis on the items contained in the sex assault examination kits. (JA at 145). He concluded that KW's DNA was found on PFC Piren's penis and that he could not exclude KW as the source of DNA found in his underwear. (JA at 163-65). The expert also concluded that PFC Piren could not be excluded as the source of DNA found on KW's leg. (JA at 160-62). Semen was found on the swabs taken from KW's labia, and the DNA of the semen matched KW's boyfriend's DNA. (JA at 159, 163).

During cross-examination the government expert admitted that none of the boyfriend's DNA was found on the swab taken from PFC Piren's penis. (JA at 199). He also admitted that if intercourse occurred it was possible that the boyfriend's DNA would be transferred to PFC Piren's penis. (JA at 199). The defense conducted extensive cross-examination of the expert to establish possible theories of how the DNA transfer from KW to PFC Piren's penis occurred, other than vaginal intercourse. (JA at 171-203). Ultimately, the defense theory prevailed, as the panel found PFC Piren not guilty of aggravated sexual assault. (JA at 366).

The government extensively cross-examined appellant at the court-martial. The cross-examination focused on PFC Piren's alleged failure to tell his version of what happened to various people, including law enforcement and LTC Alumbaugh. (R. at 251-52, 253-55, 257-62, 267-69). During this line of questioning, the defense made a number of objections, including that the assistant trial counsel's (ATC) questions were an impermissible comment on the appellant's exercise of his right to remain silent, were irrelevant, and were outside the scope of direct examination. (JA at 252, 254, 257). The military judge sustained the relevance objection, but overruled the scope and impermissible comment on the right to remain silent objections. (JA at 252, 254, 258). Despite overruling the objection, and

after reviewing *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011) during a recess, the military judge agreed to give an amended curative instruction related to PFC Piren's right to remain silent. (JA at 278-87).

After the defense rested, the government recalled KW, her boyfriend, and LTC Alumbaugh. (JA at 306, 312, 317). Prior to these witnesses' testimony the military judge conducted a lengthy Article 39(a), UCMJ, session outside of the presence of the panel. (JA at 296-305). During that session, the defense requested that the military judge clarify which statements the government was going to elicit from these witnesses that it believed constituted impeachment by contradiction. (JA at 296). The government claimed a number of inconsistencies, and the military judge separated out those she believed were merely impeachment by omission, not really contradictions, or statements not disclosed to the defense prior to trial. (JA at 298-302). The military judge asked the defense if it had any objection at that time to a list of statements the government would use to impeach PFC Piren's testimony, and the defense did not to those specific statements. (JA at 302-03).

When the government recalled LTC Alumbaugh, she denied that the accused ever told her that KW kissed him, that she kissed him on the ear, that she grabbed his penis, and that she

masturbated his penis for five minutes as he claimed during cross-examination. (JA at 306).

Those additional facts necessary for a resolution of the assigned errors are contained below.

Errors and Argument

I.

THE MILITARY JUDGE ABUSED HER DISCRETION BY OVERRULING THE DEFENSE COUNSEL'S SCOPE OBJECTION DURING THE GOVERNMENT'S CROSS-EXAMINATION OF THE APPELLANT.

Summary of Argument

The ATC's questions on cross-examination of PFC Piren relating to the sexual assault examination were impermissible given the scope of PFC Piren's direct testimony and the fact that the nurse examiner did not warn PFC Piren of his right to remain silent or consult with counsel under Article 31(b), UCMJ. Such impermissible questions allowed the government to improperly impeach PFC Piren and to present improper rebuttal testimony.

Law

This Court reviews the military judge's ruling on the admissibility of evidence under an abuse of discretion standard. *United States v. Dewrell*, 55 M.J. 131, 137 (C.A.A.F. 2001).

All parties to the court-martial agreed that the statements the appellant made to LTC Alumbaugh were inadmissible because they were the result of questioning in violation of Article 31(b), UCMJ. (JA at 31, 403). Unwarned statements may only be used for impeachment by contradiction or for subsequent prosecution for veracity offenses. Military Rule of Evidence [hereinafter Mil. R. Evid.] 304(b)(1). This Court has held,

> [T]he accused is the gatekeeper as to admission of the unwarned statement and that only an inconsistent or perjurious statement by an accused who testifies at trial opens the gate. The accused, in deciding whether to testify, must consider whether he or she will thereby risk impeachment by contradiction or a "later prosecution." Mil. R. Evid. 304(b). The rule is based on the premise that Article 31(d) provides a shield when the prosecution seeks to use an unwarned statement as a sword against the accused, but does not shield an accused from cross-examination or a later prosecution when it is the accused, not the Government, who opens the door to questioning the veracity of his or her testimony at trial.

United States v. Swift, 53 M.J. 439, 450 (C.A.A.F. 2000).

Argument

In this case, the direct examination of the appellant covered the events of the night in question as well as the subsequent events at the train station and the Polizei station. (JA at 216-37). The defense limited the scope of the testimony to avoid opening the door to the government's use of the unwarned statements to LTC Alumbaugh. Mil. R. Evid. 611(b).

Despite previously agreeing that these statements were inadmissible, the ATC cross-examined the accused on the unwarned statements he made to LTC Alumbaugh, with the intent to impeach by omission. Impeachment by omission is not one of the permissible uses of unwarned statements recognized in Mil. R. Evid. 304(b)(1). *See also* Mil. R. Evid. 304(h)(3). When the government exceeded the scope of examination, eliciting testimony in an area the defense specifically avoided on direct examination, the government laid the groundwork for the impermissible impeachment by contradiction by using the unwarned statements the appellant made to LTC Alumbaugh. By doing so, the government elicited additional statements, knowing that the appellant had not been properly read his rights, and then used those statements to set the appellant up for impeachment by contradiction.

The defense counsel objected to the ATC's cross-examination of the appellant with respect to the statements he made to LTC Alumbaugh on grounds that they were outside the scope of direct examination. (JA at 257). The government responded to the objection,

> It's not outside the scope. This goes toward directly[sic] the comments that he may or may not have made. It also goes toward the events that occurred on that day and the investigation on that day.

(JA at 257). In response the defense counsel stated,

> On direct he testified as to the events that occurred that night in the train station. We did not go into further events.

(JA at 258). The military judge overruled the objection. (JA at 258).

This objection properly preserved the issue now raised by appellant on appeal.[1] "Rule 611 complements Rule 403 and seeks to assure that trials are fair and efficient and that witnesses are fairly treated." 2 Stephen A. Saltzburg, et al., Military Rules of Evidence Manual, §611.02[1] (7th ed. 2011). "Rule 611 is a primary vehicle for military judges to use in conducting proceedings in a manner that is both fair and conducive to ascertaining the truth." *Id.* (citing *United States v. Castro*, 813 F.2d 571 (2d Cir. 1987)(trial court appropriately used its judgment to redact statements)); *see also United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009) (the motion to dismiss "placed the fundamental issue . . . squarely before the military judge as a trier of fact."). When the appellant's

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[1] Even if this Court finds that this objection did not properly preserve the issue and applies a plain error analysis, the appellant is still entitled to relief. The military judge was aware that all parties had agreed that the statements appellant made to LTC Alumbaugh were inadmissible and the government was not attempting to impeach appellant at this time with contradictory statements. Military Rule of Evidence 103(a)(1) requires counsel for an accused to "state[e] the specific ground of objection, if the specific ground was not apparent from the context." *See also United States v. Sweeney*, 70 M.J. 296, 303 n. 16 (C.A.AF. 2011). As such, the military judge should have recognized that this line of questioning was plainly and obviously improper.

trial defense counsel recognized where the government was heading with cross-examination, the defense counsel objected.

"When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination *with respect to the matters concerning which he or she so testifies.*" Mil. R. Evid. 301(e) (emphasis added). The military judge failed to ensure that the ATC complied with this proscription. The ATC's cross-examination went beyond the matters elicited during direct, utilized statements that the government previously agreed were inadmissible, and asked questions with the intent to highlight appellant's alleged failure to tell his side of the story, an impermissible comment on the accused's right to remain silent.[2]

In the federal civilian system, "once a defendant testifies, he exposes himself to full cross-examination concerning matters relevant to his testimony." *United States v. King*, 200 F.3d 1207, 1216-17 (9th Cir. 1999), *citing Brown v.*

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[2] The defense counsel previously objected on this ground when the ATC was cross-examining the appellant with respect to spontaneous statements the appellant allegedly made to the German police who originally detained the appellant. (JA at 254). The ATC was attempting to highlight for the panel that the appellant had not told his version of what happened to others, even when he had the opportunity to do so. The military judge improperly overruled this objection. *See* Mil R. Evid. 304(h)(3). Importantly, this demonstrates that the military judge should have been on notice and prepared for this line of questioning with respect to the inadmissible statements the appellant allegedly made to LTC Alumbaugh.

United States, 356 U.S. 148 (1958) *and United States v. Panza*, 612 F.2d 432 (9th Cir. 1980). In *Brown*, Justice Frankfurter explained that a defendant cannot claim "an immunity from cross-examination on the matters *he himself has put in dispute.*" *Brown*, 356 U.S. at 155-56 (emphasis added). The Ninth Circuit in *Panza* interpreted *Brown* as allowing cross-examination "on any matter reasonably related to the subject matter of his direct testimony." *Panza*, 612 F.2d at 436-37.

The Supreme Court recently decided *Salinas v. Texas*, where it held that a defendant's pre-*Miranda* warnings silence may be used by the prosecution. __ U.S. ___, 133 S.Ct. 2174 (2013). However, *Salinas* did not overrule *New Jersey v. Portash*, where the Court held that a defendant's silence may not be used even for impeachment purposes, if the testimony is "compelled." 440 U.S. 450 (1979). In *Salinas*, the defendant had voluntarily accompanied police to the police station to answer questions. After answering numerous questions, the defendant looked down and remained silent in response to a question that could have led to an incriminating answer. *Id.* at 2178.

Nor should this Court apply the recent rational of *Salinas*. The nature of the military, both in mission and rank structure, afford servicemembers additional protections beyond only the Fifth Amendment. *See United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011). When PFC Piren was alone in a room with a

Major (O-4) nurse examiner, silence was not an option and he felt compelled to answer the questions posed by the superior officer. The government then should not be able to argue that PFC Piren failed to tell a complete story when he was answering direct questions.

The appellant's decision to testify did not open the door to any and all lines of cross-examination limited only by the government counsel's imagination. *See United States v. Williams,* 23 M.J. 362, 367-78 (C.M.A. 1987). When the ATC exceeded the scope of direct, he inappropriately set the appellant up for subsequent rebuttal testimony utilizing the unwarned statements to impeach by contradiction the appellant's statements the government improperly elicited on cross-examination. In failing to sustain the defense objection to what the appellant said to LTC Alumbaugh, the military judge abused her discretion.

In a close case, where the panel rejected much of the government's theory of the case (and acquitted PFC Piren of the more serious charge), the credibility of the only two eyewitnesses to the alleged assault was critical. The alleged victim escaped virtually any attack on her credibility by claiming to be asleep during the bulk of the alleged assault. The defense, after all, could not test her credibility as to events of which she claimed she was not aware. On the other

hand, the government set the appellant up for impeachment by contradiction by asking him questions on cross-examination about statements that he made during a conversation with LTC Alumbaugh. The defense did not open the door to these questions. The appellant never testified on direct about the sexual assault examination, or anything else, for that matter, after he accompanied the German police back to their station.

Using such improper questioning was an impermissible method for the government to attack the appellant's credibility in front of the panel. But for the military judge's error, there was every reason for the panel to find reasonable doubt as to the abusive sexual contact charge as well. The panel did not completely believe the government's theory of the case and found him not guilty of Specification 1 of The Charge (aggravated sexual assault). Therefore, PFC Piren asks this Court to disapprove the finding of guilty, dismiss Specification 2 of The Charge, and set aside the sentence.

II.

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE MOTION TO SUPRESS THE RESULTS OF THE DNA ANALYSIS.

Summary of Argument

Because PFC Piren's consent to the sexual assault examination was not voluntary, any evidence relating to PFC

Piren's DNA evidence and testimony relating to the examination must be excluded.

Law

This Court reviews a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Gallagher*, 66 M.J. 250, 253 (C.A.A.F. 2008), *citing United States v. Khamsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002). Findings of fact are reviewed for clear error (clearly erroneous) and conclusions of law are reviewed de novo. *Id., citing United States v. Flores*, 64 M.J. 451, 454 (C.A.A.F. 2007).

Military courts determine the voluntariness of consent from the totality of the circumstances. Mil. R. Evid. 314(e)(4), *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Voluntariness of consent is evaluated on the basis of six factors: (1) degree to which liberty was restricted, (2) the presence of coercion or intimidation, (3) awareness of his right to refuse based on inferences of [the suspect's] age, intelligence, and other factors, (4) mental state at the time, (5) consultation, or lack thereof, with counsel; and (6) the coercive effects of any prior violations of the suspect's rights. *United States v. Wallace*, 66 M.J. 5, 9 (C.A.A.F. 2008), *adopting the test from United States v. Murphy*, 36 M.J. 732 (A.F.C.M.R. 1992).

In determining whether a defendant's will was overborne in a particular case, the Supreme Court has long assessed the

totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included: the youth of the accused, *Haley v. Ohio*, 332 U.S. 596 (1948); his lack of education, *Payne v. Arkansas*, 356 U.S. 560 (1958); or his low intelligence, *Fikes v. Alabama*, 352 U.S. 191 (1957); the lack of any advice to the accused of his constitutional rights, *Davis v. North Carolina*, 384 U.S. 737 (1966); the length of detention, *Chambers v. Florida*, 309 U.S. 227 (1948); the repeated and prolonged nature of the questioning, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); and the use of physical punishment such as the deprivation of food or sleep, *Reck v. Pate*, 367 U.S. 433 (1961). In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. *Culombe v. Connecticut*, 367 U.S. 568 (1961).

Additional Facts

Prior to the entry of pleas, the defense made a motion to suppress "all evidence and derivative evidence obtained as a result of PFC Piren's involuntarily given consent." (JA at 397). Defense also filed a motion to suppress statements made by PFC Piren to the nurse examiner because the examiner did not advise

him of his rights under Article 31(b), UCMJ. (JA at 372). That motion was uncontested by the government. (JA at 5).

In support of its contested motion, defense called Special Agent (SA) Jeffery Harris and PFC Piren as witnesses. (JA at 7-25). Special Agent Harris testified that PFC Piren was in handcuffs when he met him at the Vilseck Health Clinic after requesting that the Military Police (MP) transport him there. (JA at 8). Special Agent Harris also never told PFC Piren that he was free to leave now that he was no longer in handcuffs, (JA at 12, 22). When asked by SA Harris for permission to conduct a "sexual assault examination," PFC Piren asked if he "should speak with a lawyer." (JA at 9). Special Agent Harris then told PFC Piren that "when he came to the CID office later that day, [SA Harris] would advise him of his legal rights." (JA at 9). Special Agent Harris also testified that he advised PFC Piren that any consent to search was of his own free will twice. (JA at 9).

At the time he asked for consent, approximately 1700 hours, SA Harris was wearing a civilian suit with a sidearm. (JA at 10). Another CID agent had obtained a search authorization from a military magistrate at approximately 0600 or 0700 earlier that same day. (JA at 13). Special Agent Harris also stated that immediately before signing the consent form, PFC Piren hesitated and asked if he should see a lawyer. (JA at 15). According to

SA Harris, if PFC Piren did not consent to the consent search, SA Harris would have proceeded under the authority gained from the military magistrate nine hours earlier. (JA at 30).

Private First Class Piren also testified regarding defense's motion. His testimony only substantively diverged from SA Harris on the point of what would happen if PFC Piren did not consent. (JA at 22). Private First Class Piren admitted to signing the form because SA Harris had told him he could "sign it and get the form over with. If not, [SA Harris] would attempt to obtained consent from my command." (JA at 22). Private First Class Piren also testified that at first he asked "should I have a lawyer," then after SA Harris stated "we'll get to that later," PFC Piren stated he "didn't want to do anything until he had a lawyer." (JA at 23). Private First Class Piren stated he felt like SA Harris "understood. . . . and was just ignoring [PFC Piren.]" (JA at 23).

Argument

The military judge abused her discretion when she held that "the government has met its burden to show that the accused's consent to the search was voluntarily given." (JA at 31). She further abused her discretion when she denied defense's motion to suppress all evidence and derivative evidence obtained as a result of PFC Piren's consent to search. (JA at 32).

1. First *Murphy* Factor

Private First Class Piren had been in police custody and in handcuffs for at least the previous twelve hours. (JA at 22). During those twelve hours, it is unknown how much PFC Piren slept, ate, stood, sat, went to the bathroom, or maintained other normal comforts associated with a person not in police custody. He had been transferred from the German Polizei, to the Military Police, to SA Harris from the middle of the previous night, to at least 1700 the next day. (JA at 8). Although SA Harris had removed the handcuffs on PFC Piren, the nurse examiner found it noteworthy to report the marks still left on his wrists from twelve hours of being in handcuffs. (JA at 412). Although PFC Piren's hands had been physically freed, his state of mind was still objectively and subjectively confined.

2. Second *Murphy* Factor

Although SA Harris said that he did not "use any kind of pressue or interrogation techniques to get [PFC Piren] to consent," the presence of a CID agent with his sidearm at a health clinic would be an intimidating sight for an eighteen year old junior enlisted soldier. (JA at 10). The effect of spending the previous twelve hours in handcuffs cannot be overlooked as an intimidating action. Private First Class Piren also stated that he felt like SA Harris was ignoring his

questions about seeing an attorney, and that SA Harris said that he could "sign the consent form and get the search over with." (JA at 22).

3. Third *Murphy* Factor

Special Agent Harris testified that he advised PFC Piren twice that he could refuse to consent to the examination; however, one of those messages was conveyed after PFC Piren had already signed the consent form. (JA at 15).

4. Fourth *Murphy* Factor

Only fifteen minutes prior to signing the consent form, he had been in handcuffs for the previous twelve hours. (JA at 22). Private First Class Piren was also an eighteen year old junior enlisted soldier with a high school education who had arrived in Germany to his first duty station only one month prior. (JA at 237-38). Private First Class Piren was hesitant before signing the form, all while asking SA Harris if it would be advisable to speak with an attorney. (JA at 14).

5. Fifth *Murphy* Factor

Despite asking if speaking with an attorney would be advisable, at no time prior to signing the consent form did PFC Piren consult with any counsel.

6. Sixth *Murphy* Factor

The final *Murphy* factor also closely relates to Assignment of Error I. At no time prior to or during the examination did

anyone advise PFC Piren of his rights under Article 31(b), UCMJ, despite his being suspected of a crime. The omission of Article 31(b) rights advisement multiplied the coercive effect on PFC Piren, causing him to submit to SA Harris' authority and to make unwared statements to LTC Alumbaugh. *See Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002).

Because PFC Piren's consent to search was not voluntary, any evidence derived from such a search is inadmissible. *United States v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006); *citing Nardone v. United States*, 308 U.S. 338 (1939). Excluding such fruit of the poisonous tree would gut the government's DNA evidence and expert witness on the merits as well as LTC Alumbaugh's testimony on rebuttal.

Conclusion

Each of the above matters show prejudice and warrant relief. However, should this Court find no prejudice warranting relief for each matter separately, defense argues pursuant to *United States v. Flores*, that "there is a reasonable possibility that, taken cumulatively, those errors might have contributed to the conviction." 69 M.J. 366, 373 (C.A.A.F. 2011). Defense request this Court purge this court-martial of all improperly obtained and admitted evidence, and dismiss Specification 2 of The Charge and set aside the sentence.

Wherefore, appellant respectfully requests that this Honorable Court grant the requested relief.

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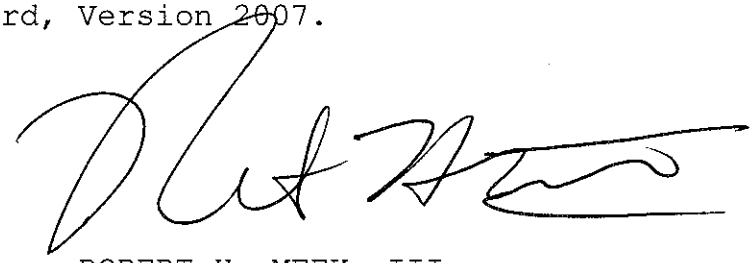

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Piren*, Army Dkt. No. 20110416, USCA Dkt. No. 14-0453/AR, was electronically filed with both the Court and Government Appellate Division on July 14, 2014.

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