IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	) REPLY BRIEF ON BEHALF) OF APPELLANT
v.	) Crim. App. Dkt. No. 20110416
	) USCA Dkt. No. 14/0453/AR
Private First Class (E-3) **James S. Piren**, United States Army, Appellant	)

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

Appellant hereby replies to the government's answer brief, filed in this Court on August 12, 2014.

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.

Government argues in its answer to appellant's brief that by testifying, PFC Piren "'opened the door' to relevant questions about his version of events." (Appellee's Br. at 24). The government is mistaken in that PFC Piren never testified on direct examination about his interactions with the Sexual Assault Nurse Examiner (SANE), LTC Alumbaugh. (JA at 216-37). Lieutenant Colonel's testimony during the government's case in

chief focused on the collection of forensic evidence and chain of custody. (JA at 105-30).

When defense counsel properly objected, she preserved the objection for any questions asked of PFC Piren during cross-examination concerning the medical exam and any statements during that exam. (JA at 257). Even if the defense counsel could have objected on other grounds, she properly preserved any error in the judge's allowing trial counsel to cross-examine PFC Piren on the medical exam and any statements he made to LTC Alumbaugh. *See United States v. Datz*, 61 M.J. 37 (C.A.A.F. 2005). Defense counsel also filed a pretrial motion to suppress any statements made by PFC Piren to LTC Alumbaugh and offered by the government *for any purpose*. (JA at 372-3). Once the military judge ruled definitively on the defense counsel's objections, defense counsel need not object further. *See United States v. Marshall*, 67 M.J. 418 (C.A.A.F. 2009) *citing United States v. Richardson*, 1 C.M.A. 558, 567 (1952).

The government also argues that impeachment by omission is a "subcategory of impeachment by contradiction." (Appellee's Br. at 27). The Supreme Court held that the use of prearrest silence for impeachment purposes does not deny an accused the fundamental fairness guaranteed by the Fourteenth Amendment. *Jenkins v. Anderson*, 447 U.S. 231 (1980). However, the Court in *Jenkins* also held also made it clear that the various

jurisdictions had great flexibility in determining whether impeachment by silence is more probative that prejudicial. *Id.* at 240. Military rank structure, discipline, and countless other distinctions make military culture separate from the civilian world, and these differences necessarily impact the behavior of those who are a part of this separate society. The Uniform Code of Military Justice (UCMJ) specifically recognizes these societal differences. The most significant of these is Article 31(b), UCMJ, which gives servicemembers' greater protections than their civilian counterpart. *See United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000). This Court should follow the Supreme Court's guidance and uphold a rule for military courts where prearrest silence may not be used to impeach by omission an accused's testimony.

Should this Court find that PFC Piren's consent to search (and thus any statements made) was knowing and voluntary, then any impeachment by omission by the trial counsel is nevertheless improper under *Doyle v. Ohio*, 426 U.S. 610 (1976). (Appellee's Br. at 33). The Supreme Court in *Doyle* held that a prosecutor's use of defendant's post-arrest and post-*Miranda* silence to impeach by omission violates due process. *Id.* at 611.

In either circumstance, the government is mistaken that the trial counsel properly impeached PFC Piren by omission at the time of his testimony. (Appellee's Br. at 25-27). Lieutenant

Colonel Alumbaugh did not testify on the merits as to any statements made by PFC Piren. (JA at 104-38). Thus, during PFC Piren's cross examination, trial counsel improperly attempted to impeach PFC Piren's by his interactions with LTC Alumbaugh. The attempted use of impeachment was inappropriate because there had not yet been any contradictory statements or non-statements, in regards to LTC Alumbaugh, presented at the time of PFC Piren's cross-examination.

Nor is the government's claim that defense counsel made the wrong objection compelling, because trial counsel attempted to cross-examine PFC Piren on a matter that he had not testified to on direct, namely his interaction with LTC Alumbaugh. (Appellee's Br. at 25). The time was not yet ripe for any inquiry about impeachment by silence because trial counsel was eliciting PFC Piren's testimony which was in no way contrary to LTC Alumbaugh's merits testimony. When the government attempted to recall LTC Alumbaugh, the defense appropriately objected. (JA at 571). *See generally*, David A Schlueter et al., *Military Evidence Foundations*, § 5-9 (4th ed. 2010).

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

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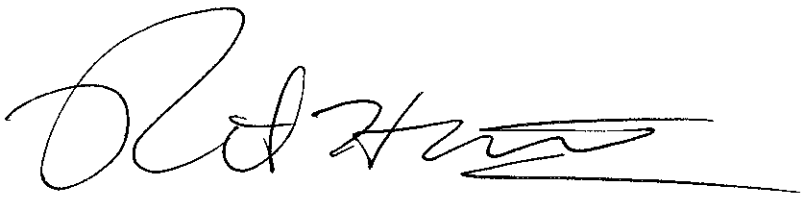
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing reply brief on behalf of appellant 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 August 22, 2014.



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