

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**APPELLEE SPECIFIED ISSUE
BRIEF**

v.

Docket No. ARMY 20230250

Private First Class (E-3)
NATHAN G. LEESE,
United States Army,
Appellant

Tried at Fort Bragg,¹ North Carolina,
on 19 January and 4 May 2023, before
a general court-martial appointed by
the Commander, 82nd Airborne
Division, Colonel J. Harper Cook,
Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Specified Issue

**WHETHER THE MILITARY JUDGE CORRECTLY
APPLIED *UNITED STATES V. PIERCE*, 27 M.J. 367
(C.M.A. 1980) IN AWARDING CREDIT FOR
APPELLANT’S TWO PRIOR INSTANCES OF
NONJUDICIAL PUNISHMENT TO THE
SEGMENTED SENTENCE**

Statement of the Case

On 4 May 2023, a military judge sitting as a general court-martial convicted
appellant, in accordance with his pleas, of two specifications of willfully

¹ At the time of trial, the installation was named Fort Bragg. On 2 June 2023, Fort Bragg was officially redesignated as Fort Liberty.
<https://www.armytimes.com/news/your-army/2023/06/02/fort-bragg-officially-renamed-fort-liberty/>

disobeying a superior commissioned officer and one specification of assault consummated by a battery in violation of Articles 90 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 890 and 928 [UCMJ]. (R. at 119; Statement of Trial Results [STR]). The military judge sentenced appellant to be reduced to the grade of E-2, to be confined for three months, and to be discharged from the service with a bad-conduct discharge. (R. at 166; STR). The military judge, after applying *U.S. v. Pierce*, 27 M.J. 367 (C.M.A. 1989), credited appellant with one rank credit against the sentence to reduction, fourteen days credit against the segmented sentence to confinement for Specification 1 of Charge I, fourteen days credit against the segmented sentence to confinement for Specification 2 of Charge I; and \$1,142 against any automatic forfeitures. (R. at 167).

Statement of Facts

A. Appellant's Misconduct.

On or about 13 June 2021, appellant committed an assault consummated by a battery on a fellow Soldier he was dating. (R. at 42–48; Pros. Ex. 1). Appellant and the victim broke up approximately forty-five days later. (Pros. Ex. 1). After being given an order by his commander on 3 November 2021 to not contact the victim, appellant contacted her by email on 13 November 2021 and 14 January 2022. (R. at 57–63; Pros. Ex. 1).

B. Appellant's Article 15s.

On 9 December 2021, appellant was found guilty at an Article 15 proceeding for violating the no-contact order given to him on 13 November 2021. (Def. Ex. A). The company commander imposed the following punishment: reduction to private first class (E-3), forfeiture of \$521.00 pay per month for two months, extra-duty for fourteen days, and restriction for fourteen days. (Def. Ex. A). The company commander suspended the entire punishment for six months. (Def. Ex. A). On 14 February 2022, the company commander vacated the suspension of all punishments based on the additional misconduct addressed in appellant's second Article 15. (Def. Ex. A).

The same company commander issued a second company grade Article 15 on 28 March 2022 for appellant violating the no-contact order on 14 January 2022. (Def. Ex. A). After finding him guilty of the misconduct, the company commander imposed a punishment of fourteen days extra-duty and fourteen days restriction. (Def. Ex. A).

C. Charges and Plea Agreement.

Charges were preferred against appellant on 25 August 2022. (Charge Sheet). Appellant was charged with two specifications of violating Article 90, UCMJ, and two specifications of violating Article 120, UCMJ, 10 U.S.C. § 920. (Charge Sheet). The underlying misconduct for the two specifications of violating

Article 90, UCMJ, were the same as the misconduct appellant received the two prior Article 15s for prior to trial.² (Charge Sheet; Def. Ex. A).

On 27 April 2023, appellant entered into a plea agreement with the convening authority. (App. Ex. III). Appellant agreed to plead guilty to the two specifications and charge of violating Article 90, UCMJ, and one specification and charge of violating Article 128, UCMJ. (App. Ex. III). In exchange, the convening authority agreed to dismiss the specification and excepted language that appellant pleaded not guilty to. (App. Ex. III). The convening authority further agreed to the following sentence limitations on the court: a bad-conduct discharge must be adjudged; for Specification 1 of Charge I, a confinement range of zero to three months; for Specification 2 of Charge I, a confinement range of zero to three months; and for Specification 2 of Charge II, a confinement range of three to six months. (App. Ex. III). As specifically outlined in the terms of the pretrial agreement, all adjudged confinement was to run concurrently. (App. Ex. III).

The plea agreement was silent regarding any type of confinement credits – to include *Pierce* credit – forfeitures or rank reduction. (App. Ex. III). However, the plea agreement did contain a provision that appellant understood he could

² Appellee notes that the Article 15s named CPT [REDACTED] as the superior commissioned officer while the referred specifications referred to 1LT [REDACTED] as the superior commissioned officer. However, all parties at trial agreed that the Article 15s and referred specifications addressed the same misconduct and that *Pierce* credit was appropriate.

withdraw from the agreement at any time before it was accepted by the military judge, and the convening authority could withdraw from the agreement if an inquiry by the military judge disclosed a material disagreement as to any of the outlined terms. (App. Ex. III).

D. Military Judge's Calculation of *Pierce* Credit.

The military judge inquired about *Pierce* credit during the plea agreement colloquy with appellant. (R. at 83). The military judge took a recess and discussed the *Pierce* credit with both counsel then came back on the record and discussed the credit further. (R. at 84–86). The military judge used Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, Table 2-10 (29 Feb. 2020) [Benchbook] in calculating appellant's credit. (R. at 85). On the record, the military judge stated that he calculated appellant was entitled to credit for one rank reduction, \$1,142 of forfeitures,³ and twenty-eight days of confinement credit. (R.

³ The military judge incorrectly stated that appellant's forfeitures were \$571 for two months, for a total of \$1,142. (R. at 85). Appellant forfeited \$521 dollars for two months, for a total of \$1,042. (Def. Ex. A). The error likely stems from the Article 15 Punishment Worksheet where the issuing commander wrote that the appellant must forfeit \$571 pay per month for two months. (Def. Ex. A). This number comes from the amount appellant would forfeit as an E-4; however, the amount of forfeiture is to be computed at the reduced grade, even if suspended. (Def. Ex. A). Appellant uses the correct amount in his R.C.M. 1106 submission and this is the amount the convening authority provided relief for in his action by deferring thirteen days of automatic forfeitures. (Action).

at 85–86). Government and defense counsel both agreed the amount of credit was correct. (R. at 86–87).

E. Military Judge’s Ruling on Application of *Pierce* Credit.

After agreeing to the calculation of *Pierce* credit, government and defense counsel disagreed on whether the credit should apply to the aggregate term of confinement (i.e. total term of confinement of 90 days) or only the terms of confinement for the specifications which related to the Article 15s.⁴ (R. at 87–91). Government counsel stated that the credit is distinct from other credits and should apply to the same offenses that appellant received the Article 15s. (R. at 88–89). Defense counsel disagreed with the Government and argued that with concurrent, segmented sentencing, appellant’s *Pierce* credit should apply to the total confinement, irrespective of the offenses. (R. at 89–90). The military judge, recognizing that there was not a meeting of the minds between government and appellant, stated that he would issue a ruling and that whichever side the ruling was adverse to could walk away from the plea agreement.⁵ (R. at 89–90).

⁴ R.C.M. 1002(d)(2) states that “all punishments other than confinement or fine available under R.C.M. 1003, if any, shall be determined as a single, unitary component of the sentence, covering all of the guilty findings in their entirety. The military judge shall not segment those punishments among the guilty findings.”

⁵ It is unclear why the Military Judge stated the Government may withdraw from the agreement since the terms of the pre-trial agreement do not address any type of credits and is silent to the Government’s authority to withdraw from the agreement based on the issue of *Pierce* credit.

Before issuing his ruling, the military judge acknowledged that he is not aware of any case law that addresses the issue of applying *Pierce* credit to concurrent sentences under segmented sentencing.⁶ (R. at 92). He also pointed out that “[c]ongress has not weighed in on it, nor has the President.” (R. at 92). The military judge then ruled that the Article 15 punishments relate only to the two specifications of Charge I and not Charge II, the assault consummated by a battery offense. (R. at 93). Appellant was then given a chance to withdrawal or continue with the guilty plea; he elected to continue with the guilty plea. (R. at 94–96).

F. Sentence.

After finding appellant guilty, the military judge sentenced appellant to be reduced to the grade of E-2; to be discharged from the service with a bad-conduct discharge; and to be confined for fourteen days for Specification 1 of Charge I, thirty days for Specification 2 of Charge I, and three months for Specification II of Charge II. (R. at 166; STR). In accordance with the plea agreement, all sentences were to be served concurrently with one another. (R. at 166; STR; App. Ex. III).

⁶ While not addressed by the court, in *United States v. Armentaruiz* the record of trial reveals the military judge applied *Pierce* credit to concurrent sentences of confinement as required by the plea agreement. *United States v. Armentaruiz*, ARMY 20220610, 2023 CCA LEXIS 389 (Army Ct. Crim. App. 13 Sep. 2023) ([summ. disp.](#)). See also *United States v. Jacobs*, 2024 CCA LEXIS 1 (N.M. Ct. Crim. App. 3 Jan. 2024) (mem. op.) (appellant was awarded thirty days of *Pierce* credit applied to his adjudged sentence to confinement).

The military judge, after applying *U.S. v. Pierce*, 27 M.J. 367 (C.M.A. 1989), credited appellant with one rank credit against the sentence to reduction, fourteen days credit against the segmented sentence to confinement for Specification 1 of Charge I, fourteen days credit against the segmented sentence to confinement for Specification 2 of Charge I; and \$1,142 against any automatic forfeitures. (R. at 167).

G. Post-Trial.

On 15 May 2023, appellant submitted post-trial matters for the convening authority to consider. (R.C.M. 1106 Matters). Appellant requested that the convening authority vacate the adjudged bad-conduct discharge and defer automatic forfeiture of pay and allowances for thirteen-days to award appellant the \$1,042 he was entitled to for *Pierce* credit. (R.C.M. 1106 Matters). On 25 May 2023, the convening authority took no action on the findings and sentence and approved appellant's request for the thirteen-day deferment of automatic forfeitures to provide relief for the \$1,042 forfeited through non-judicial punishment and awarded to appellant by the military judge. (Action).

Specified Issue

WHETHER THE MILITARY JUDGE CORRECTLY APPLIED *UNITED STATES V. PIERCE*, 27 M.J. 367 (C.M.A. 1989) IN AWARDING CREDIT FOR APPELLANT'S TWO PRIOR INSTANCES OF NONJUDICIAL PUNISHMENT TO THE SEGMENTED SENTENCE.

Standard of Review

The proper application of *Pierce* credit is a question of law reviewed de novo. *United States v. Spaustat*, 57 M.J. 256, 260 (C.A.A.F. 2002).

Law

In *United States v. Pierce*, the Court of Military Appeals [C.M.A.] addressed the issue of whether referral to a court-martial of an offense for which an appellant had previously been punished constituted a denial of due process and violated Article 13, UCMJ. 27 M.J. at 368. The court held that “imposition and enforcement of disciplinary punishment under [Article 15, UCMJ] for any act or omission *is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission*, and not properly punishable under this article[.]” *Id.* However, the court further held that “the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty. *Id.* An accused must be given “day-for-day, dollar-for-dollar, stripe-for-stripe” credit for nonjudicial punishment under Article 15, UCMJ. *Id.* at 369.⁷ The CMA suggested that a “Table of Equivalent

⁷ In *Pierce*, the CMA, also distinguished Article 13, UCMJ, credit from nonjudicial punishment credit, stating that “Article 13 ([p]unishment prohibited before trial) is inapplicable as appellant was not punished ‘while [he was] being held for trial.’” 27 M.J. at 368.

Punishments,” would be helpful in reconciling punishments adjudged at court-martial and those administered under Article 15, UCMJ. *Id.* The U.S. Army Trial Judiciary utilizes a table of equivalent nonjudicial punishments in the Benchbook, Table 2-10.

In *United States v. Gammons*, the C.A.A.F. held that the accused is the “gatekeeper with respect to consideration of an NJP record during a court-martial involving the same act or omission.” *United States v. Gammons*, 51 M.J. 169, 179 (C.A.A.F. 1999). Normally, the government will be precluded from introducing or commenting on the non-judicial punishment if the accused does not introduce evidence of the prior non-judicial punishment. *Id.* at 180.

Rule for Courts-Martial [R.C.M.] 1002(d)(2)(A) requires a military judge, at a general or special court-martial, to “determine an appropriate term of confinement...,if applicable, for each specification for which the accused was found guilty.” “If a sentence includes more than one term of confinement, the military judge shall determine whether the terms of confinement will run concurrently or consecutively. For each term of confinement, the military judge shall state whether the term of confinement is to run concurrently or consecutively with any other term or terms of confinement. The terms of confinement for two or more specifications shall run concurrently...when provided for in a plea agreement.” R.C.M. 1002(d)(2)(B). The military judge shall use unitary

sentencing for other forms of punishment other than confinement or fine (to include reduction in grade and forfeitures). R.C.M. 1002(d)(2)(C).

Summary of Argument

The military judge appropriately applied *Pierce* credit. Appellant could have bargained for the *Pierce* credit to apply against the total term of confinement. However, it was not addressed in the plea agreement. Should the court find that appellant did not receive meaningful relief, the court should hold that the *Pierce* credit should be applied to appellant's approved sentence to confinement.

A. *Pierce* Credit Was Properly Applied and Appellant Received Meaningful Relief.

Appellant pleaded guilty to three distinct offenses.⁸ (Charge Sheet; R. at 23, 119). He had previously received nonjudicial punishment under Article 15, UCMJ, for two of those offenses (Def. Ex. A; R. at 83–91), and the military judge gave him appropriate sentencing credit for the punishments he received for those two separate offenses. (R. at 166–67). The three months of confinement for the Article 128 violation was the minimum required confinement for that offense as

⁸ “Pretrial agreements are a product of a bargaining process between an accused and a convening authority[,]” and “operate separately and apart from sentences of courts-martials[.]” *Rock*, 52 M.J. at 156 (citing *United States v. Acevedo*, 50 M.J. 169, 172 (1999)). Further, as noted in R.C.M. 705, a military judge is not a party to a pretrial agreement and does not have the authority to alter them. *Id.* In this case, the plea agreement was silent as to the application of *Pierce* credit. (App. Ex. III; R. at 91–96).

bargained for in the plea agreement. (App. Ex. III; R. at 166). Appellant further bargained for all terms of confinement to run concurrently. (App. Ex. III).

Appellant argues that this court should require military judges to “grant meaningful relief for nonjudicial punishment by applying the credit to the overall adjudged sentence rather than the portions rendered ineffective by a concurrent sentence. (Appellant’s Br. 21). Appellant cites to several cases in support of his position. (Appellants Br. 16–20). However, this appears to be a case of first impression and *Pierce* was decided many years prior to the change in the law allowing for segmented and concurrent sentences. *See United States v. Spaustat*, 57 M.J. 256 (C.A.A.F. 2002) (requiring the convening authority to direct application of all confinement credits for violations of Article 13 or R.C.M. 305 and all *Allen* credit against the approved sentence); *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983) (holding that the military judge had authority to order more than day-for-day credit for illegal pretrial confinement and a convening authority cannot unilaterally ignore a military judge’s ruling); *United States v. Rock*, 52 M.J. 154 (C.A.A.F. 1999) (credit against confinement awarded by a military judge always applies against the sentence adjudged unless a pretrial agreement requires otherwise); and *Globke*, 58 M.J. at 878. Appellant further argues that “[a] rule encouraging the government to punish a Soldier via both nonjudicial punishment and court-martial but avoid meaningful credit via concurrent sentences, goes

against decades of precedent and fundamental notions of fairness and due process.” (Appellant’s Br. 20).

A concurrent sentence, in and of itself, is highly beneficial to an accused, and this is precisely what appellant bargained for based on the clear terms of his pre-trial agreement that the convening authority accepted, without any changes to the terms of the agreement. By having the two offenses that appellant received *Pierce* credit for run concurrent with the Article 128 offense, the confinement terms for those two offenses were essentially subsumed by the Article 128 offense. Furthermore, appellant bargained for the range of concurrent sentences and did not address *Pierce* credit in the plea agreement. (App. Ex. III). Moreover, appellant’s argument that he did not have a choice which forum to address the *Pierce* credit is belied by the record. Appellant states in his brief that there is no indication in this case of which counsel brought the *Pierce* credit to the attention of the military judge. (Appellant’s Br. 23–24). However, when the military judge inquired about the credit, he did not direct his question at any particular party, and the defense counsel answered the military judge’s question first and stated that the defense had marked the two previous Article 15s as exhibits. (R. at 84; Def. Ex. A). Furthermore, when the military judge was applying the credit after announcing the sentence, he stated, “Given the motion raised by the defense, the court concludes that the accused is entitled to sentence credit under the *United States v. Pierce*.”

(R. at 166). Based on defense counsel responding first to the military judge's question, the military judge's statement that it was a defense motion, and the fact that defense counsel had marked both Article 15s as defense exhibits, the record supports that the timing of the request for *Pierce* credit originated with appellant. Additionally, there is no evidence in the record that appellant ever complained of or objected to the government or military judge first introducing evidence of his prior Article 15s for *Pierce* credit. The record is clear that appellant chose to have the military judge adjudicate the application of *Pierce* credit.⁹ Therefore, the military judge properly applied the credit, and appellant received meaningful relief.

B. If No Meaningful Relief, The *Pierce* Credit Should Be Applied To The Approved Sentence.


If the court finds that appellant did not receive meaningful relief and any credit he received was illusory, the government agrees with appellant that *Pierce* credit should be applied to the total term of confinement under the facts of this case. However, the Government does not agree appellant's request relief of fifty-eight days of *Pierce* credit is proper. All parties agreed that the military judge's *Pierce* "math" was correct. R. at 84–87. Where the Government and defense

⁹ Appellant's argument does not suggest appellant's defense counsel was ineffective for requesting the military judge apply *Pierce* credit. Appellee agrees there is simply no evidence of ineffective representation based on Appellant's decision to have the military judge adjudicate the proper application of *Pierce* credit. *See Gammons*, 51 M.J. 169.


counsel disagreed was whether the credit for the segmented portion of the sentence (i.e. confinement) was to be applied to the total term of confinement or the segmented sentences of confinement that were to run concurrently. Appellant's requested relief of an additional thirty days confinement credit for his Article 15 forfeitures would be an unwarranted windfall to appellant since the convening authority approved his requested deferment of automatic forfeitures of pay and allowances for thirteen days. (R.C.M. 1106 Matters; Action). If the Court does grant relief, it should approve the sentence of ninety days confinement, credit appellant with twenty-eight days of *Pierce* credit, and apply the twenty-eight days of confinement credit to the total term of ninety days confinement (i.e. appellant's total term of confinement as approved by this court would be sixty-two days).

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence. Alternatively, if the Court finds appellant was not provided meaningful relief, the Court should affirm the findings and grant appellant twenty-eight days confinement credit to the total term of ninety days confinement resulting in a total term of confinement of sixty-two days.



CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government
Appellate Division



CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate
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CERTIFICATE OF SERVICE, U.S. v. LEESE, ARMY 20230250

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]
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