IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. Private First Class (E-3) **NATHAN G. LEESE,** United States Army Appellant	**BRIEF OF SPECIFIED ISSUE ON BEHALF OF APPELLANT** Docket No. ARMY 20230250 Tried at Fort Liberty, North Carolina,[1] 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. 1989) 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 Private First Class Nathan G. Leese of two specifications of willfully disobeying a superior commissioned officer, Specifications 1 and 2 of Charge I, and one

[1] On 2 June 2023, Fort Bragg was redesignated as Fort Liberty. The Record of Trial uses both names.

specification of assault, Specification 2 of Charge II in violation of Articles 90 and 128 of the Uniform Code of Military Justice, 10 U.S.C. §§ 890 and 928 (2019) [UCMJ]. The military judge sentenced appellant to reduction to E-2, fourteen days confinement for Specification 1 of Charge I, thirty days confinement for Specification 2 of Charge I, three months confinement for Specification 2 of Charge II, and a bad-conduct discharge. The plea agreement provided the sentences would run concurrently, resulting a total adjudged confinement of three months.

Pursuant to *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), the military judge indicated that because appellant was subject to non-judicial punishment relating to Specifications 1 and 2 of Charge I, he was giving appellant the following credit: (1) a one rank credit against the sentence to reduction; (2) a fourteen-day credit against the segmented sentence to confinement for Specification 1 of Charge I; (3) a fourteen-day credit against the segmented sentence to confinement for Specification 2 of Charge I; and (4) $1,142 against any automatic forfeitures.[2]

On 25 May 2023, the convening authority took no action on the findings or sentence and approved defense counsel's request for a thirteen-day deferment of automatic forfeitures effective 18 May 2023 in order to provide relief for the

[2] The military judge incorrectly used $571 instead of $521 for two months in his calculations. R. at 85.

$1,042 forfeited through nonjudicial punishment. (Action). Neither the SJA Clemency Advice nor the Convening Authority's Action explain the decision to credit appellant with $100 less than the military judge and government agreed was appropriate.

On 12 October 2023, appellant filed his brief with no specific assignments of error. On 29 November 2023, this court issued an order specifying one issue. This is appellant's brief on the Specified Issue.

Statement of Facts

In December 2021 and March 2022, appellant received nonjudicial punishment for disobeying a no contact order on 13 November 2021 and 14 January 2022. (Def. Ex. A). The punishment imposed for the first violation was reduction of one rank, forfeiture of $521.00 pay for two months, extra duty for fourteen days, and restriction for fourteen days. (Def. Ex. A). The punishment imposed for the second violation was extra duty for fourteen days and restriction for fourteen days. (Def. Ex. A).

In August 2022, the government charged appellant with two specifications of violating Article 90, UCMJ, for the same conduct, disobeying the no contact order, and two additional specifications of violating Article 120, UCMJ, all for conduct with appellant's then girlfriend. (Charge Sheet). In March 2023, appellant accepted the government's offer to plead guilty to both Article 90

specifications and one Article 128 specification. (App. Ex. III at 1). The plea agreement specified the agreed sentence range was zero to three months' confinement for each Article 90 specification and three to six months' confinement for the Article 128 specification, with all sentences to run concurrently. (App. Ex. III at 3). Neither the plea agreement nor existing case law addressed how credit for the nonjudicial punishment should be applied by the military judge to the segmented concurrent sentence. (App. Ex. III at 3).

Early in appellant's plea hearing, the military judge mentioned discussing *Pierce* credit during a Rule for Courts-Martial [R.C.M.] 802 session:

> Counsel informed me that [] there may be a basis for *Pierce* credit. I said that I would take that up at the appropriate time and that time will be in pre-sentencing should we reach pre-sentencing. But I did make the comment that when it comes to *Pierce* credit, the Soldier is entitled to dollar-for-dollar, day-for-day, and stripe-for-stripe. So it's not one of those credits you can deal away, frankly, to a lesser amount. If he's entitled to any *Pierce* credit, he's going to get all of that coming to him . . . . should we reach that issue and if *Pierce* credit is appropriate, [] they need to check their math on that. That's all we had to discuss on that issue.

(R. at 19-20). The record does not indicate if it was government counsel or defense counsel who raised the *Pierce* issue.

After the providence inquiry and discussion of the maximum punishment, the miliary judge asked about *Pierce* credit. (R. at 83). Specifically, he stated, "This is where I usually have to ask if there's any sentencing credits . . . We might just need to clear the air on this now." (R. at 83). Defense counsel provided

documentation of both instances of nonjudicial punishment as Def. Ex. A, and then there was a ten-minute recess. (R. at 84).

When the plea hearing resumed, the military judge stated:

> During that recess, I stayed on the bench and had a conversation with counsel about this *Pierce* math. Let me make it clear to the record that *Pierce* is one of those black and white issues that the court is going to get right. This isn't one of those squishy, if you will, sentencing credits that parties can agree to, maybe some number that feels about right. No, *Pierce* means day-for day, dollar-for-dollar, stripe-for-stripe. And we're going to get the math right. But I was doing the math. We did the math some more when I was off the record, and I talked with counsel about the math. And here is--before coming on the record, everybody told me that this math is correct.
>
> Here's how I get there. We have two Article 15s at Defense Exhibit A for identification. Both of them are company grade Article 15s. The first imposed on the 9th of December 2021 had a suspended sentence of: reduction to E3, so one rank loss; forfeiture of $571 for two months, suspended; extra duty for 14 days, suspended; and restriction of 14 days, suspended. However, there's a vacation action, meaning the suspension was vacated, meaning that all of those sentences were executed.
>
> Then we had another company grade Article 15 on the 28th of March with only two sentencing components: 14 days of extra duty and 14 days of restriction, neither of which was suspended.
>
> To get to the math, you've got to apply table 2-10 from the military judge's Benchbook. For the reduction component, that's pretty simple. Between the two company grade Article 15, he was reduced one rank. So, should the court adjudge a rank reduction, he's going to get a one rank credit.
>
> When it comes to forfeitures, that's also fairly simple as well. Two months times $571 is $1142. He's getting that back if that's part of the sentence.

> When it comes to restriction, the conversion formula is one day of confinement is two days of restriction. So if you've got 14 days of restriction, that's seven days of confinement credit. He had 28 days of restriction, meaning he gets 14 days of confinement credit for that component of the Article 15s.
>
> And then, finally, with regard to extra duty. There's an asterisk in the column for calculating credit due when there is extra duty. It's basically one-and-a-half days if it's a field grade Article 15. But if it's a company grade Article 15, it's two days. So since he had, between the two company grade Article 15s, 28 days of extra duty, half of that or the conversion that we're on of two would be 14 days. So for that component of these two Article 15s, he's also entitled to 14 days of confinement credit.
>
> So when you add it up all together, my math--and push back if you think I'm wrong--is that he's getting 28 days of confinement credit against any sentence to confinement, $1,142 against any forfeiture adjudged, and also one rank credit, if the court were to adjudge a reduction.
>
> Do counsel agree with the court's math?

(R. at 84-86).

The government agreed with the math, but added, for the first time, "given the breakdown of the sentence agreement in the plea agreement, the government also believes this would only apply to the sentences for the Article 90s." (R. at 86). Defense counsel agreed with the math, but disagreed with the government's suggestion about how the *Pierce* credit should be applied. (R. at 87).

The military judge explained he was "not aware of any case that has come out since there's been segmented sentencing that gets to this particular issue," and when *Pierce* was decided in 1989, there was no segmented sentencing, just a total

adjudged sentence, so "you didn't have this issue." (R. at 88). "What am I to make of the case law that is clear as can be under the pre-segmented system regime? Clear as can be. He gets it all back. What am I to do with that against this new sentencing scheme where I've got to announce a segmented sentence?" (R. at 89).

The government responded:

> *Pierce* credit is distinct from other credits. And as far as it's very black and white, it is charged specific and the language of the case says--it notes that it applies to the same offense, a specific offense in the charge. These Article 15s, they pertain only to Specifications 1 and 2 of Charge I, and that's independent of Charge II. Charge II can stand on its own from Charge I, Your Honor. So the government's position is that it does apply only to Specifications 1 and 2 of Charge I.

(R. at 89). Defense counsel's position was that an important part of negotiating plea agreements in the new segmented sentencing regime is agreeing on whether the sentences will be concurrent or consecutive. Appellant was expecting to be sentenced to three to six months of confinement total, and to get all the *Pierce* credit "coming to him," which was twenty-eight days. (R. at 19).

At this late stage in the plea hearing, the military judge realized "there was certainly no meeting of the minds on this issue before you all walked in here today . . . So whoever loses this particular litigation can just simply choose to walk away . . . I'll give the losing party an opportunity to withdraw from the plea agreement." (R. at 91). The military judge took a seventeen-minute recess and, when back on

the record, explained he was in a rare position where he had "no guidance whatsoever," and was weighing on the one hand "blindly follow[ing] *Pierce*" and arguably giving appellant "credit where credit is not due," or, on the other hand, jumping into "uncharted waters having to apply what used to be black-and-white sentencing credit principles to a regime without the input of Congress or the President." (R. at 92-93).

The military judge decided to do the latter, ruling that:

> If the accused choses to continue with his guilty plea and we find ourself [sic] after an adversarial sentencing proceeding and the court announces a sentence, this *Pierce* credit will only be applied to Specifications 1 and 2 of Charge I, that is, for the confinement credit. I don't segment rank reduction and I don't segment forfeiture. So this discussion doesn't pertain to those two sentencing components.

(R. at 93).

Nothing in the record indicates appellant was aware he had the option explained in *United States v. Gammons*, 51 M.J. 169, 183-84 (C.A.A.F. 1999), to have the convening authority apply the *Pierce* credit, as calculated by the military judge, against the approved sentence to confinement.

Standard of Review

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

Law

In 1989, the Court of Military Appeals (CMA) examined Article 15, UCMJ, and concluded:

> Absent some sinister design, evil motive, bad faith, etc., on the part of military authorities, it is not a violation of military due process to court-martial a servicemember for a serious offense, even though he has already been punished nonjudicially. That, however, is *all* Article 15(f) implies. It does not follow that a servicemember can be twice *punished* for the same offense or that the *fact* of a prior nonjudicial punishment can be exploited by the prosecution at a court-martial for the same conduct. Either consequence would violate the most obvious, fundamental notions of due process of law. Thus, in these rare cases, an accused must be given *complete* credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe.

Pierce, 27 M.J. at 369. This "day-for-day, dollar-for-dollar, stripe-for-stripe" credit is now known as *Pierce* credit. In *Pierce*, the CMA acknowledged that, "[b]ecause the types of punishments administered nonjudicially and those adjudged by courts-martial are not always identical, there may be some difficulties in reconciliation," and suggested a "Table of Equivalent Punishments" would be helpful. *Id.*

Military courts have addressed how to calculate confinement credit for forfeitures. For example, the Navy Court of Criminal Appeals [Navy Court] cited *Pierce* and *Gammons* in utilizing "the Table of Equivalent Punishments . . . as a

useful guide" [3] in how to apply credit. *United States v. Velez*, 2012 CCA LEXIS 353, *15 (N.M. Ct. Crim. App. 12 September 2012). This table "states that one day of forfeitures is the equivalent to one day of confinement," and an appellant who received a forfeiture of one-half month's pay for two months is "entitled to 30 days of credit." *Id*. In another case, the Navy Court used the same table and their "own assessment of an appropriate credit where an equivalent punishment is not listed in the table, [and] determined that the appellant is entitled to . . . (2) 30 days for the forfeiture of one-half month's pay for two months." *United States v. Edwards*, 54 M.J. 761, 763 (N.M. Ct. Crim. App. 2000).

The CMA concluded that, like credit for legal pretrial confinement pursuant to *United States v. Allen*, 17 MJ 126 (CMA 1984):

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Table 2-10

Table of Equivalent Nonjudicial Punishments

Kinds of Punishment	Upon Commissioned and Warrant Officers (to be used only by an officer with GCM jurisdiction, or by a flag officer in command or his delegate)	Upon Other Personnel
Arrest in Quarters	1 day	---
Restriction	2 days	2 days
Extra Duties	---	1 ½ days*
Correctional Custody	---	1 day
Forfeiture of Pay	1 day's pay	1 day's pay

*The factor designated by asterisk in the table above is 2 instead of 1 ½ when the punishment is imposed by a commanding officer below the grade of major or lieutenant commander. The punishment of forfeiture of pay may not be substituted for the other punishments listed in the table, nor may those other punishments be substituted for forfeiture of pay.

> [I]t appears that the duty to apply this credit cannot always be conferred on the court-martial. This is because Article 15(f) leaves it to the discretion of the *accused* whether the prior punishment will be revealed to the court-martial for consideration on sentencing. Presumably**,** *the best place to repose the responsibility to ensure that credit is given is the convening authority*.

Pierce, 27 M.J. at 369 (emphasis added). Before recent changes to the military justice system, a substantial difference existed between an adjudged sentence imposed by the military judge and an approved sentence that is ultimately approved by the convening authority. *See United States v. Gregory*, 21 M.J. 952, 957 (A.C.M.R. 1986). Along those lines, when the military justice system did not allow the military judge to know a plea agreement's sentence limitations until after adjudging a sentence, Judge Effron explained:

> I would hold, prospectively, that confinement credit be applied in the *same manner for all types of pretrial confinement and pretrial punishment, and that it be applied against the sentence that may be approved by the convening authority, rather than the sentence adjudged at trial*. This would eliminate speculation as to whether the court-martial actually granted relief, and would ensure—under *United States v. Suzuki*, [14 M.J. 491 (CMA 1983)]—that an adjudication of illegal pretrial punishment results in *effective relief*.

United States v. Rock, 52 M.J. 154, 158 (C.A.A.F. 1999) (emphasis added) (Effron, J., concurring in part and in the result). In *Spaustat*, the CMA's successor, the Court of Appeals for the Armed Forces (CAAF) explained, "when there is a

pretrial agreement,[4] credit[s] . . . must be applied against the lesser of the adjudged sentence and the maximum sentence provided for in the pretrial agreement, unless the pretrial agreement provides otherwise." *Spaustat*, 57 M.J. at 261 (*citing Rock*, 52 M.J. at 157).

The CAAF explained:

> The accused, as gatekeeper, may choose whether to introduce the record of a prior NJP for the same act or omission covered by a court-martial finding and may also choose the forum for making such a presentation. The accused may:
>
> (1) introduce the record of the prior NJP for consideration by the court-martial during sentencing;
> (2) introduce the record of the prior NJP during an Article 39(a), UCMJ, 10 USC § 839(a), session for purposes of adjudicating credit to be applied against the adjudged sentence;
> (3) defer introduction of the record of the prior NJP during trial and present it to the convening authority prior to action on the sentence; or
> (4) choose not to bring the record of the prior NJP to the attention of any sentencing authority.

Gammons, 51 M.J. at 183-84.

It appears the "adjudged" was unartfully used[5] in the second option instead of "approved," given that the CAAF goes on to explain that, when the appellant

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[4] In that iteration of military justice, the typical clause was that "the convening authority would disapprove any confinement adjudged in excess of" a given adjudged sentence. Whereas the relevant term in appellant's pretrial agreement is, "Confinement: Must be adjudged as follows. . . ." (App. Exhibit III at 3).

[5] The court in *Gregory*, 21 M.J. at 957, noted a similar problem with respect to other sentencing credits:

raises the *Pierce* credit issue during an Article 39(a), UCMJ, session, "the military judge will adjudicate the specific credit to be applied *by the convening authority*." [6] *Id*. at 84 (emphasis added).

A few years after *Rock and Gammons*, the CAAF stated:

> This case illustrates that, even after *Rock*, there is some confusion about the application of confinement credits when a pretrial agreement is involved. Furthermore, we recognize that *applying confinement credit against the adjudged sentence in cases where there*

> Unfortunately, RCM 305(k) is not a model of legislative drafting. A cursory reading of this subsection could lead to the erroneous conclusion that RCM 305(k) credit is to be applied only against an "adjudged sentence." In the military a substantial difference exists between an adjudged and an approved sentence. The former is the sentence imposed by the military judge or court-martial members. The latter is the sentence ultimately approved by the convening authority. An approved sentence can never be more than, and, as in the case at bar, is often substantially less than the adjudged sentence. If we were to apply the RCM 305(k) credit to appellant's adjudged sentence, he would receive no meaningful RCM 305(k) credit at all. This we decline to do, especially because *lex non patitur absurdum*.
>
> Furthermore, a close reading of RCM 305(k) reveals that it is at best ambiguous concerning this matter. If we were to interpret this provision to apply RCM 305(k) credit solely against appellant's adjudged sentence, we would render meaningless that portion of the rule which provides that "[t]his credit is to be applied *in addition* to any other credit the accused may be entitled. . . ." (emphasis added.)

[6] This reading is supported, for example, by a Navy-Marine Corps Court of Criminal Appeals case that noted, "it is normally in an accused's best interest to raise the matter in an Article 39a, UCMJ, session before the military judge to determine the amount of credit due and then have the credit applied by the convening authority, rather than the military judge." *United States v. Globke*, 59 M.J. 878, 884-85 (N.M. Ct. Crim. App. 2004).

> *is a pretrial agreement can produce anomalous results, and it can deprive an appellant of meaningful relief . . .*
>
> If credits for such violations are applied against the adjudged sentence instead of the lesser sentence required by the pretrial agreement, then in some situations, an accused may not receive *meaningful relief* if the sentence reduction under the pretrial agreement is greater than the credit awarded for the violation. *See Rock*, 52 M.J. at 157-58 (Effron, J., concurring in part and in the result). This Court's *Suzuki* decision contemplates effective, meaningful relief. 14 M.J. at 493.
>
> Accordingly, in order to avoid further confusion and to ensure *meaningful relief* in all future cases after the date of this decision, this Court will require the convening authority to direct application of all . . . credit against the approved sentence, i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement, as further reduced by any clemency granted by the convening authority, unless the pretrial agreement provides otherwise.

Spaustat, 57 M.J. at 263-64 (emphasis added).

While focused on confinement credits for violations of Article 13 or R.C.M. 305 and *Allen* credit, the clear intent of the *Spaustat* decision is to provide "meaningful relief," which should apply to *Pierce* credit as well. *See United States v. Haynes*, 77 M.J. 753, 755 (Army Ct. Crim. App. 2018) (emphasis added) ("The purpose of sentencing credits is to ensure appellant is not punished twice for the same offense. There are many types of sentencing credit, but the purpose of each is to make the accused whole and to ensure against double punishment."); *see also, Globke*, 59 M.J. at 882 ("With respect to confinement credit, applied post-trial, there are no rational or logical reasons to apply *Allen* and *Pierce* credits differently.").

Notably, military courts have previously addressed concerns related to providing full *Pierce* credit for a nonjudicial punishment. In addressing the proper application of *Pierce* credit, the Navy Court stated, "We are sensitive that the appellant should not receive an unjustified windfall in sentencing credit," but noted, "[T]he Government might have avoided the dilemma of 'windfall' credit by simply making the tactical decision to not charge the same offense at court-martial." *Id*. The Navy Court explained, "The Government is well-positioned to give early and complete consideration to the potential consequences of charging offenses that have been the subject of prior nonjudicial punishment." *Id.*

In *United States v. Gormley*, the Coast Guard Court of Criminal Appeals [Coast Guard Court] used almost identical language in rejecting the government's "windfall" argument. 64 M.J. 617, 620 (C.G. Ct. Crim. App. 2007). Like the Navy Court in *Velez*, the Coast Guard Court pointed out the government could have avoided this "dilemma" and found the appellant was "entitled to complete credit to ensure that his sentencing interests are fully protected." *Id.*

Where there is ambiguity, Courts of Appeal should "refuse to enforce the ambiguity against the appellant, and [should] afford him the benefit of his bargain," "*Pierce* credit, like *Allen* credit, applies against the sentence to confinement that can be approved under the terms of the pretrial agreement. Then, when taking action, the convening authority must afford the accused the benefit of

the sentencing cap. Any other application of this credit would be meaningless." *See e.g., Globke*, 59 M.J. at 882.

The convening authority's ability to take action was significantly curtailed by the Military Justice Act of 2016 for cases referred after 1 January 2019. Under R.C.M. 1109, a convening authority is very limited in his or her ability to take action on the findings and sentence in most cases. Additionally, as of January 1, 2019, R.C.M. 1002(d)(2) requires that a "military judge at a general or special court-martial shall determine an appropriate term of confinement and fine, if applicable, for each specification for which the accused was found guilty," and "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."[7] R.C.M. 1002(d)(2)(A), (B).

Argument

The military judge improperly applied appellant's *Pierce* credit to his concurrent adjudged sentence over defense objection and this error rendered the credit meaningless and ineffective, contrary to CAAF's intent in *Spaustat* and *Rock*. The military judge's forfeiture provision was also inappropriate. Additionally, appellant was denied his right to pick from the options given in

[7] "The terms of confinement for two or more specifications shall run concurrently . . . when provided or in a plea agreement." R.C.M. 1002(d)(2)(B)(ii).

Gammons, which included the option to have the convening authority apply the credit calculated by the military judge.

1. Appellant was Deprived of Meaningful and Effective Relief.

The military judge acknowledged that in this case of first impression he had no guidance whatsoever from Congress or the President about how *Pierce* credit would apply in the new realm of segmented sentencing. (R. at 92-93). But nothing about the changes to the sentencing regime changed the importance of giving meaningful credit for pre-trial punishment or reduced the options an accused has under *Gammons* (though the changes may impact the calculus involved in a defense counsel's advice to his or her client about plea negotiations and which *Gammons* option is recommended). Nearly all the other pretrial credits have historically been applied to the approved sentence by the convening authority. *See* [redacted], *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, ARMY LAW. 1 at 14 (August 1999) [[redacted], *A Review of Sentencing Credit*] (Proposing uniformity to bring Article 13 pretrial punishment in line with the rest of the sentence credits such that all Article 13 sentence credit, instead of just Article 13 confinement credit, be administratively applied against the approved sentence to confinement and pointing out that *Pierce* credit is an exception because "*Pierce* credit presents an option to the service member."); *see also Coyle v. Commander*, 47 M.J. 626, 630

(Army Ct. Crim. App. 1997) ("While credit for illegal pretrial confinement must always be assessed against the approved sentence to confinement, credit for illegal pretrial punishment must, at a minimum, be assessed against the adjudged sentence and may, under some circumstances, be assessed against the approved sentence to confinement.").

A simple-to-apply rule that credits are to be applied against the sentence as a whole rather than individual segments is the more reasonable course of action.[8] The purpose of all sentencing credits is to make a defendant whole and there is no basis to exclude *Pierce* credit from the requirement to provide a defendant effective, meaningful relief for pretrial credit. *See Haynes*, 77 M.J. at 755; *Spaustat*, 57 M.J. at 263-64; *Suzuki*, 14 M.J. at 493; *see also, Globke*, 59 M.J. at 882 ("With respect to confinement credit, applied post-trial, there are no rational or logical reasons to apply *Allen* and *Pierce* credits differently."). Implicit in the holding in *Pierce*, "is the principle that the convening authority must, whenever possible, grant credit which gives meaningful relief to the appellant, not credit which only confers an illusory benefit on him." *United States v. Ridgeway*, 48 M.J. 905, 907 (Army Ct. Crim. App. 1998).

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[8] *See also* [redacted], *A Review of Sentencing Credit*, ARMY LAW. at 20 (Explaining how a uniform administrative approach "yields certainty and simplicity," removes "uncertainty at the outset," because "[b]efore key decisions are made or any pretrial agreements are reached, both the convening authority and the accused would know in advance" that the accused will be "credited in full against any sentence to confinement.").

Here the adjudged sentence to confinement was confinement for fourteen days for the first specification of disobeying a superior officer, confinement for thirty days for the second specification of disobeying a superior officer, and confinement for three months for the specification of assault. Because, per the plea agreement, these sentences were to all run concurrently, defendant's effective adjudged sentence to confinement was three months. By automatically applying the calculated *Pierce* credit against just two specifications of the adjudged sentence, the credit was rendered entirely meaningless.

2. The Military Judge Should Have Applied the *Pierce* Credit to Appellant's Sentence as a Whole.

The military judge correctly noted he was jumping into "uncharted waters having to apply what used to be black-and-white sentencing credit principles to a regime without the input of Congress or the President." (R. at 92-93). This is a case of first impression because of the recent changes to military sentencing. This court should refuse to enforce the ambiguity created by these changes against appellant. Instead, the ambiguity should be interpreted in appellant's favor.

Pierce cautions against allowing nonjudicial punishment to be exploited by the prosecution, and it should be rare that a service member is subjected to nonjudicial punishment and court-martial for the same acts. 27 M.J. at 369. But when this occurs, fundamental notions of due process of law demand an accused be given complete credit for any and all nonjudicial punishment suffered. *Id.* An

adjudication of illegal pretrial punishment should result in effective relief. *Rock*, 52 M.J. at 158. Sentence credit should be applied in a way that would result in meaningful relief because otherwise the result would be an absurdity. *Gregory*, 21 M.J. at 957. The CAAF has warned against producing anomalous results that deprive an appellant of meaningful relief. *Spaustat*, 57 M.J. at 263-64. *Suzuki* contemplates effective, meaningful relief. 14 M.J. at 493. The purpose of sentencing credits is to make the accused whole and to ensure against double punishment. *Haynes*, 77 M.J. at 755.

It is not "an unjustified windfall in sentencing credit" to have the military judge apply *Pierce* credit against the adjudged sentence as a whole, given that it is the government who created a dilemma impacting fundamental notions of due process of law. *Velez*, 2012 CCA LEXIS 353 at *15; *Pierce*, 27 M.J. at 369. The government has the option to punish a Soldier via nonjudicial punishment or, alternatively court-martial, thereby making credit not an issue. The third option is to do both, but with the understanding due process requires credit to prevent double punishment. 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.

Furthermore, nothing indicates the change from unitary to segmented sentencing for judge-alone sentencing was intended to adversely affect an appellant's right to sentencing credits. Indeed, the stripping of the convening authority's ability to impact the findings or sentence in the majority of cases places a greater obligation on military judges to protect the rights of the accused and ensure they receive all the meaningful credit provided by law. Here, the military judge failed to do so, which this court can and should remedy.

The discussion of R.C.M. 1109(a)(2)(B) also supports the notion that the relevant sentence to be considered is "the total amount of confinement to be served," taking into consideration whether the sentences are to run concurrently or consecutively. *See* R.C.M. 1109(a)(2)(B) discussion. A rule that grants credit differently to an accused sentenced by a panel (for the time period that is permissible) from an accused sentenced by a military judge is unnecessary, unsupported, and would be more difficult to manage than the rule suggested by Judge Effron—to apply all confinement credit in the same manner. *Rock*, 52 M.J. at 158.

In the absence of guidance from Congress or the President, 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.

3. The Military Judge Should Have Converted the Prior Forfeiture to an Equivalent Punishment for Purposes of *Pierce* Credit.

The military judge's attempt to give appellant credit in the amount of $1,142 against any automatic forfeitures was not appropriate (in addition to being overstated by $100). Because there were no adjudged forfeitures, the military judge should have converted the $1,042 forfeiture into an equivalent punishment for purposes of his recommendation to the convening authority. *See e.g. United States v. Snearl*, No. NMCCA 201300446, 2014 CCA LEXIS 438, at *4 (N.M. Ct. Crim. App. July 22, 2014) (appellant's nonjudicial punishment included forfeiture of half months' pay for two months [$2,114.00], while the government agreed the appellant was entitled to thirty days confinement credit for these forfeitures, the military judge indicated he was giving credit for the forfeitures but did not specify his calculations as to the forfeitures and reduction, so the court "resolve[]d the doubt in the appellant's favor and order[ed] credit to ensure that he is not punished twice for the same offense."

Thus, for appellant's forfeiture of half of one month's pay for two months, he should receive thirty days of credit, which comports with the guidance from the "Table of Equivalent Punishments" referenced in *Pierce* and applied by the Navy Court in *Velez*. "[O]ne day of forfeitures is the equivalent to one day of confinement." *Velez*, 2012 CCA LEXIS 353 at *15; *see also United States v. Edwards*, 54 M.J. 761, 763 (N.M. Ct. Crim. App. 2000).

4. Appellant Has the Right to Decide How and When *Pierce* Credit is Considered, Calculated, and Applied.

Even if the military judge did not err in picking between the two options before him, Article 15(f) and *Pierce* make clear that an accused has the right to decide if the court-martial or the convening authority will apply credit for prior nonjudicial punishment. Appellant did not have that opportunity, and this is error. *Gammons* explained an accused's options in exercising that discretion. *Gammons,* 51 M.J. at 183-84. Though the accused is supposed to be the gatekeeper of the issue of *Pierce* credit, there is no indication in this case of which counsel brought the issue of to the attention of the military judge during the R.C.M. 802 session before the providence inquiry.

Unlike other cases where the parties agreed the credit would apply to the adjudged rather than the approved sentence,[9] here the nonjudicial punishment was not mentioned in the plea agreement or stipulation of fact.[10] Additionally, when

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[9] *See e.g. United States v. Mead*, 72 M.J. 515, 517-18 (Army Ct. Crim. App. 2013), which predated MJA 2016 and was a unitary sentencing case where an Article 15 was included in the stipulation of fact and admitted without defense objection as a government exhibit, the military judge did a detailed accounting of what sentence he would have given without consideration of the Article 15 and what credit he was giving for the Article 15, and the parties agreed the credit would apply to the adjudged rather than the approved sentence.

[10] The absence of a provision in the plea agreement prevents this disagreement between the parties from being one that would invalidate the agreement. Additionally, the military judge gave the parties the opportunity to withdraw from the plea agreement and neither was interested in doing so. (R. at 91, 96).

the issue was eventually discussed, the parties disagreed about how the credit would apply.

If it was government counsel who initially brought up the nonjudicial punishment, that would have improperly preempted appellant's right to be the gatekeeper of this information. *See e.g., United States v. Gibson*, No. ARMY 9700619, 1998 CCA LEXIS 587, at *5 (Army Ct. Crim. App. July 1, 1998) (holding, "Appellant's discretion was preempted in this case by the improper action of the trial counsel in introducing the inadmissible evidence of prior Article 15 punishments and by the military judge in applying the *Pierce* credit without the appellant's specific request that he do so."). To prevail, however, appellant need not show this improper preemption occurred because even if it was defense counsel who brought up the issue of *Pierce* credit to the military judge, appellant still should have had the first three *Gammons* options available to him.

Government counsel argued to the military judge that, "*Pierce* credit is distinct from other credits," and the way in which this is most true is that the accused is the gatekeeper of the introduction of this credit and makes the decision about who will apply the credit. *See Pierce*, 27 M.J. 369; *Ridgeway*, 48 M.J. at 906 (accused "requested credit in a post-trial clemency submission to the convening authority, relying on *Pierce* for the proposition that the ultimate responsibility to ensure that credit is properly awarded is with the convening

authority."); *see also* Seidel, *A Review of Sentencing Credit and Its Application*, 1 at 14 ("Service members can elect to have this credit applied against either their adjudged sentence at trial or against the sentence approved by the convening authority."). Here, appellant was entitled to raise the *Pierce* credit issue during an Article 39(a), UCMJ, session, for the sole purpose of having the military judge adjudicate the specific credit to be applied by the convening authority. *Gammons*, 51 M.J. at 184.

In this case, after all three specifications had been covered in detail, the military judge calculated the amount of *Pierce* credit due to appellant. Where this case went wrong—likely because of the distraction caused by the relatively recent changes from unitary sentencing to segmented judge-alone sentencing and diminution in a convening authority's power in many cases—is that rather than the military judge automatically applying the *Pierce* credit, appellant should have been informed he was able to request that the convening authority grant him that credit against the approved sentence to ensure the credit was meaningful and effective, especially given the military judge's ruling of how he would apply the credit. *See Gammons*, 51 M.J. at 183-84. Appellant had the right to decide how and when *Pierce* Credit was considered, calculated, and applied, but this did not occur. *Id*.

The military judge should have either applied the *Pierce* credit against the three-month sentence appellant would be serving or made recommendations to the

convening authority as to the calculation of *Pierce* credit due, so the convening authority could have provided appellant with meaningful, effective relief by reducing the three-month sentence to confinement by twenty-eight days for the extra duty and restriction and thirty days for the forfeitures, for a total of fifty-eight days.

Conclusion

The deprivation of appellant's right to meaningful and effective *Pierce* credit is contrary to *Spaustat*, *Rock*, and *Suzuki*. Given that a good criminal justice system should value even one day of excessive confinement,[11] the specified issue should be answered in the negative. The military judge did not correctly apply *Pierce* to the adjudged segmented sentence. Appellant respectfully requests this honorable court affirm appellant's convictions but approve only as much of his sentence that provides for thirty-two days of confinement, reduction to E-2, and bad-conduct discharge.

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[11] *See United States v. McCarthy*, 47 M.J. 162, 168 (C.A.A.F. 1997) (Sullivan, J., concurring).

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on December 29, 2023.

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