

Revisiting *United States v. Allen*: Applying Civilian Pretrial Confinement Credit for Unrelated Offenses Against Court-Martial Sentences to Post-Trial Confinement Under 18 U.S.C. § 3585(b)(2)

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Appellant asserts the military judge erred by not awarding him pretrial confinement credit for the period civilian authorities confined him, prior to his court-martial, for unrelated state charges. Assuming arguendo 18 U.S.C. § 3585(b)(2) does apply, . . . trial judges lack the authority to calculate and apply pretrial confinement credit.¹

I. Introduction

Administrative sentence credit for pretrial confinement is a relatively modern concept in military law. Before the Court of Military Appeals (CMA) issued its 1984 opinion in *United States v. Allen*,² military accused were not automatically entitled to credit for the time they lawfully spent in jail awaiting their trials by court-martial.³ Unlike in the federal civilian system, where “credit for lawful pretrial detention is regarded as a matter ‘of legislative grace[,] and not a [C]onstitutional guarantee,’”⁴ neither the Uniform Code of Military Justice (UCMJ) nor the *Manual for Courts-Martial (MCM)* provide for credit for lawful pretrial confinement.⁵ In *Allen*, however, the CMA applied the then-existing federal pretrial-confinement-credit statute⁶ to trials by court-martial via Department of Defense Instruction (DODI) 1325.4.⁷ Thus, for the first time in military criminal jurisprudence, *Allen* mandated compulsory sentence credit for lawful pretrial confinement “in connection with the offense or acts for which sentence was imposed.”⁸

Later in 1984, Congress and the Executive Branch revised the statutory and regulatory authority upon which the CMA

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¹ *United States v. Gogue*, No. 20050650, slip. op. at 1 n.* (A. Ct. Crim. App. May 18, 2007) (en banc).

² 17 M.J. 126 (C.M.A. 1984).

³ *United States v. Davidson*, 14 M.J. 81, 83–84 (C.M.A. 1982) (stating that, unless an accused could show that pretrial confinement as a matter of military law [equated to] punishment of [post-trial] confinement at hard labor for purposes of Article 56, and therefore violated Article 13, an accused was not entitled to credit for otherwise lawful pretrial confinement); *United States v. Larner*, 1 M.J. 371, 374 n.11 (C.M.A. 1976) (“[C]onvicted accused in our system [are] not entitled by right to credit on [their] sentence[s] for pretrial confinement.”).

⁴ *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002) (quoting *Lewis v. Cardwell*, 609 F.2d 926, 928 (9th Cir. 1979)); see 18 U.S.C. § 3585(b) (2000).

⁵ *Smith*, 56 M.J. at 292 (“There is no provision in the UCMJ or the Manual for Courts-Martial that requires credit against an adjudged sentence for lawful pretrial confinement.”); *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999) (“Commonly referred to as ‘Allen’ credit, this apparently has not been incorporated into the Manual for Courts-Martial . . .”).

⁶ Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 214, 217 (codified as amended at 18 U.S.C. § 3568 (1982), but repealed and replaced in 1984). The relevant provision in this Act provided in pertinent part, “[A]ny . . . person [sentenced to confinement shall receive] credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.” *Id.*

⁷ Although § 3568 excluded “offense[s] triable by court-martial,” the Secretary of Defense “voluntarily incorporat[ed into the military justice system] the pretrial-sentence credit extended to other Justice Department convicts” through a Department of Defense Instruction. *Allen*, 17 M.J. at 127 (citing U.S. DEP’T OF DEFENSE, INSTR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES para. III.Q.6 (7 Oct. 1968) [hereinafter DODI 1325.4 (1968)]). As such, “*Allen* saw pretrial confinement credit computation in the armed forces as a creature of regulation.” *United States v. Spencer*, 32 M.J. 841, 842 (N.M.C.M.R. 1991).

⁸ Bail Reform Act of 1966 § 4, 80 Stat. at 217.

relied in *Allen*. Congress repealed 18 U.S.C. § 3568,⁹ and enacted 18 U.S.C. § 3585, which currently provides an expanded basis for granting sentence credit.¹⁰ Administrative credit is available not only for confinement “in connection with the offense for which the sentence was imposed,”¹¹ but also for “any other charge for which the defendant was arrested *after* the commission of the offense for which the sentence was imposed.”¹² Not having had this credit applied against another sentence is a precondition to credit eligibility.¹³ Furthermore, after a series of revisions, the Secretary of Defense reissued DODI 1325.4 (1968) as DODI 1325.7 (2001).¹⁴

In 2002, the Court of Appeals for the Armed Forces (CAAF)¹⁵ acknowledged these statutory and regulatory revisions. In its analysis in *United States v. Smith*, the CAAF observed that the regulatory basis for applying 18 U.S.C. § 3568 “was later revised and reissued,” but “without significant change to the provision at issue in this case.”¹⁶ After revalidating the underlying reasoning in *Allen*, the CAAF expressly found: “As written, 18 U.S.C. § 3585(b) and DODI 1325.7 apply only to prisoners serving [court-martial] sentences to confinement.”¹⁷ Thus, the CAAF preserved the executive decision to extend to all military accused the federal, civilian entitlement to credit for *lawful* pretrial confinement. In the wake of *Allen* and *Smith*, the service courts of criminal appeals continue to grant credit for lawful pretrial confinement in light of the broadened rules.¹⁸

Logically, when an accused is entitled to pretrial confinement credit for the time he lawfully spends in jail awaiting trial, there must be a comprehensive procedure at the trial level to claim the credit. Rules for Courts-Martial (RCM) 905 and 906 provide the accused with an avenue to claim sentence credit for lawful pretrial confinement, i.e., a motion for appropriate relief.¹⁹ Raising the claim in this way “promote[s] the efficiency of the entire justice system by requiring the parties to advance their claims at trial, where the underlying facts can best be determined.”²⁰ Therefore, at trial, military judges have the primary “responsibility for providing credit where credit is due . . . and for ensuring the fair and just administration of

⁹ On 12 October 1984, Congress enacted the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 2001. The relevant portion of this Act is codified at 18 U.S.C. § 3585(b) (2000), and replaces § 3568. Section 3585(b) became effective on 1 November 1987. See § 235(a)(1), 98 Stat. at 2031, amended by Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728 (mentioned at 18 U.S.C. § 3551 note).

¹⁰ See 18 U.S.C. § 3858(b)(1)–(2).

¹¹ *Id.* § 3858(b)(1) (previously provided for in § 3568).

¹² *Id.* § 3858(b)(2) (new provision) (emphasis added).

¹³ *Id.* § 3858(b).

¹⁴ U.S. DEP’T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (17 July 2001) (C1, 10 June 2003) [hereinafter DODI 1325.7 (2001)].

¹⁵ On 5 October 1994, Congress renamed the Court of Military Appeals the Court of Appeals for the Armed Forces. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a)(1), 108 Stat. 2663, 2831 (1994) (mentioned at 10 U.S.C. § 941 note).

¹⁶ *United States v. Smith*, 56 M.J. 290, 293 (C.A.A.F. 2002). The provision at issue states: “Procedures used to compute sentences shall conform to those established by the Department of Justice for Federal prisoners unless they conflict with this Instruction . . . or existing Service regulations.” DODI 1325.7 (2001), *supra* note 14, para. 6.3.1.5.

¹⁷ *Smith*, 56 M.J. at 293. The issue granted in *Smith* concerned whether *Smith* was entitled to pretrial confinement credit against a sentence that did not provide for confinement. *Id.* at 292–93. The *Smith* court answered the issue in the negative. *Id.* Based on *Allen*, and by logical and necessary implication, however, *Smith* would have been entitled to credit had his sentence provided for confinement.

¹⁸ *E.g.*, *United States v. Thompson*, No. 36943, 2007 CCA LEXIS 377, at *4 (A.F. Ct. Crim. App. Sept. 24, 2007) (“We order that the appellant receive a credit of three days against the confinement portion of his sentence.”); *United States v. Gilchrist*, 61 M.J. 785, 787 n.3 (A. Ct. Crim. App. 2005) (“[W]e will order one additional day of [pretrial confinement] credit, pursuant to *United States v. Allen*”); *United States v. Gonzalez*, 61 M.J. 633, 635 (C.G. Ct. Crim. App. 2005) (“We will grant [a]ppellant one day of credit for pretrial confinement”); *United States v. Simmons*, No. 200100335, 2002 CCA LEXIS 294, at *7 (N-M. Ct. Crim. App. Nov. 25, 2002) (“[W]e . . . order an additional 5 days of credit pursuant to *United States v. Allen*”); *cf.* *United States v. Flores-Muller*, No. S31183, 2007 CCA LEXIS 540, at *4–5 (A.F. Ct. Crim. App. Nov. 13, 2007) (finding that had appellant not already been awarded pretrial confinement credit against his civilian sentence, he would have been entitled to such credit against his military sentence pursuant to *Allen* and 18 U.S.C. § 3585(b) (2000)).

¹⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905, 906 (2008) [hereinafter MCM]. Rule for Courts-Martial 905(a) defines a motion as “an application to the military judge for particular relief.” Rule for Courts-Martial 906(a) defines a “motion for appropriate relief [as] a request for a ruling to cure a defect which deprives a party of a right.” The list of motions included in RCM 906(b) “is not exclusive.”

²⁰ *United States v. King*, 58 M.J. 110, 114 (C.A.A.F. 2003) (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), for the proposition that “our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact”); see also *United States v. Olano*, 507 U.S. 725 (1993).

justice.”²¹ Furthermore, if an accused fails to make the motion for appropriate sentence credit before the trial court adjourns, he “waives that issue on appeal.”²²

Based on the authority noted above, 18 U.S.C. § 3585(b)(2)—the federal pretrial-confinement-credit statute’s new prong—affords military accused credit for pretrial confinement based on offenses where civilian authorities placed them into official detention, and where they were not tried by court-martial. A condition precedent to receiving credit under this prong is that the offenses must have been committed *after* the date the accused committed the offenses for which a court-martial tried, convicted, and sentenced him. Under the reasoning in *Allen* and its progeny, § 3585(b)(2) applies to trials by court-martial. When an accused raises a timely motion at trial for appropriate relief for this type of sentence credit, the military judge is responsible for litigating the motion, and calculating and awarding appropriate administrative credit.

The most recent development in this area of the law occurred in May 2007. Contrary to established military sentence-credit jurisprudence, the Army Court of Criminal Appeals (ACCA), sitting en banc in *United States v. Gogue*,²³ summarily held that 18 U.S.C. § 3585(b)(2) does not apply to an accused tried by court-martial. In addressing any notion of the statute’s possible applicability, the ACCA briefly asserted “trial judges lack the authority to calculate and award pretrial confinement credit.”²⁴ Without any analysis—or deference to *Allen*, *Smith*, or DODI 1325.7 (2001)—the ACCA based its holding upon the U.S. Supreme Court’s opinion in *United States v. Wilson*, which determined a “district court[, i.e., trial court,] . . . cannot apply § 3585(b) at sentencing.”²⁵

This article argues that the ACCA incorrectly decided *Gogue* by finding § 3585(b)(2) inapplicable to military accused tried by court-martial. Section 3585(b)(2) is one part of the larger statute the CAAF and other service courts of criminal appeals have found applicable to military accused pursuant to the reasoning in *Allen*. Furthermore, by its holding, the court unnecessarily usurped from military trial judges their Congressionally- and Presidentially-granted—and judicially supported—power to adjudicate motions for appropriate relief claiming “unrelated crimes credit.”²⁶ The adverse decision in *Gogue* is a call to the CAAF to revisit *United States v. Allen*, and reapply old facts to a relatively certain, yet undeveloped, sentence-credit provision in military criminal practice.

The purpose of this article is to provide military justice practitioners with a comprehensive guide for litigating, and winning, motions for sentence credit stemming from lawful pretrial confinement imposed for unrelated state, federal, and foreign offenses for which credit has not otherwise been granted under 18 U.S.C. § 3585(b)(2). Part II.A provides a historical overview of pre-*Allen* pretrial confinement credit jurisprudence—when automatic credit for *lawful* pretrial confinement did not exist. Part II.B discusses *Allen*, 18 U.S.C. § 3568, and DODI 1325.4 (1968). Part II.C explains how § 3568 and its regulatory conduit have evolved, surveys key post-*Allen* court decisions, and demonstrates how case law has developed and extended the sentence credit originally provided by *Allen*. Part III.A takes a close look at the *Gogue* decision and its thirteen-page dissent. Parts III.B and III.C rebut the conclusions in *Gogue*, demonstrate that unrelated-crimes credit is available to military accused, and show that military trial judges are empowered to adjudicate *all* motions for appropriate

²¹ *King*, 58 M.J. at 116 (Baker, J., concurring in result) (“If indeed an appellant has been denied a liberty interest, which amounts to confinement, he should have his claim to credit adjudicated by competent *judicial* authority.”) (emphasis added).

²² *Id.* at 115 (majority opinion) (citing RCM 905(e) and holding that “failure at trial to seek . . . credit . . . waives that issue on appeal in the absence of plain error”). Rule for Courts-Martial 905(e) states:

Failure by a party to raise defenses or objections or to make motions or requests[,] which must be made before pleas are entered under [RCM 905(b),] shall constitute waiver. . . . Other motions, requests, defenses, or objections[, under RCM 906(b)(1)–(14), 907(b)(2)–(3), 915, and 917,] . . . must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

MCM, *supra* note 19, R.C.M. 905(e). Furthermore, RCM 801(g) states: “Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual[,] or by the military judge under authority of this Manual, . . . shall constitute waiver thereof.” *Id.* R.C.M. 801(g).

²³ No. 20050650, slip. op. at 1 n.* (A. Ct. Crim. App. May 18, 2007) (en banc), *rev. granted*, 66 M.J. 287 (C.A.A.F. 2008).

²⁴ *Id.*

²⁵ 503 U.S. 329, 333 (1992). The ACCA also cited the Federal Circuit Courts of Appeals to show strict adherence to the holding in *Wilson*. See *United States v. Peters*, 470 F.3d 907, 909 (9th Cir. 2006); *United States v. Tindall*, 455 F.3d 885, 888 (8th Cir. 2006); *United States v. Williams*, 425 F.3d 987, 990 (11th Cir. 2005); *United States v. Barrera-Saucedo*, 385 F.3d 533, 536 (5th Cir. 2004); *United States v. Morales-Madera*, 352 F.3d 1, 15 (1st Cir. 2003); *United States v. Rivers*, 329 F.3d 119, 122 (2d Cir. 2003); *Ruggiano v. Reish*, 307 F.3d 121, 133 (3d Cir. 2002); *United States v. Crozier*, 259 F.3d 503, 520 (6th Cir. 2001); *United States v. Ross*, 219 F.3d 592, 594 (7th Cir. 2000); *United States v. Gonzales*, 65 F.3d 814, 822 (10th Cir. 1995); see also *Virgin Islands v. Rivera*, 34 V.I. 98, 101–02 (1996) (consistent with *Wilson*).

²⁶ In *Gogue*, Judge Sullivan coined the term “unrelated crimes credit,” and used it in her dissent interchangeably with “credit pursuant to 18 U.S.C. § 3585(b)(2).” *Gogue*, No. 20050650, slip. op. at 3 (Sullivan, J., dissenting). The author will apply the same convention throughout this article.

relief for pretrial confinement credit.²⁷ Finally, Part IV discusses the suggested contents of a motion for appropriate relief for unrelated-crimes credit in accordance with § 3585(b)(2).

II. Background

A. No Automatic Credit for Lawful Pretrial Confinement

[P]re-conviction jail time credit is [a matter] of legislative grace.²⁸

Before the CMA's 1984 landmark opinion in *United States v. Allen*,²⁹ an accused did not automatically receive sentence credit for the time he lawfully spent in pretrial confinement awaiting trial by court-martial.³⁰ Prior to 1984, the prevailing view was that pretrial restraint—in the form of physical confinement—simply did not equate to post-trial punishment.³¹ Imposing post-trial punishment *before* trial was illegal.³² An accused, however, could claim and receive credit for pretrial confinement if he could show the nature of his confinement was “more rigorous than necessary to insure his presence at trial,”³³ or the conditions “were as onerous as those faced by prisoners serving [post-trial] sentences to confinement.”³⁴ Proof of pretrial confinement unnecessary in degree, or as burdensome as “punishment which a court-martial may direct for an offense,”³⁵ entitled an accused to credit for *unlawful* pretrial confinement. Otherwise, credit for lawful detention was unavailable.

Without proof of unduly rigorous or punitive pretrial confinement conditions, an accused was entitled only to a subordinate form of pretrial confinement *consideration* regarding sentence appropriateness.³⁶ As originally designed, military law provided for the convening authority—and no one else—to take into account an accused's pretrial confinement when he acted on the accused's sentence.³⁷ The convening authority, however, was not obligated to grant any credit.³⁸ After

²⁷ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; MCM, *supra* note 19, R.C.M. 801(a)(4), 905(a), 906(a); *United States v. King*, 58 M.J. 110, 116 (C.A.A.F. 2003) (Baker, J., concurring in result).

²⁸ *Gray v. Warden of Mont. State Prison*, 523 F.2d 989, 990 (9th Cir. 1975).

²⁹ 17 M.J. 126 (C.M.A. 1984).

³⁰ *United States v. Davidson*, 14 M.J. 81, 83–84 (C.M.A. 1982).

³¹ *Id.* at 84 (stating “a prisoner could not be legally punished until the convening authority acted” on the adjudged sentence) (citing G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 160–61, 189 (3d ed. rev. 1913), and WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 124–25 (2d ed. 1920 reprint) (“The arrest by confinement of an enlisted man with a view to trial and for the purposes of trial is wholly distinguished from a confinement imposed by sentence. It is a temporary restraint of the person, not a punishment . . .”).

³² On this point Winthrop stated: “The imposition upon soldiers, while confined in [pretrial] arrest, of disciplinary punishments is, in our service, wholly illegal.” WINTHROP, *supra* note 31, at 124. Seventy years after Winthrop's originally-penned 1886 treatise, the Honorable Robinson O. Everett similarly noted: “Pretrial confinement—or pretrial restraint of any type for that matter—cannot permissibly be imposed as punishment, for punishment requires a trial [and conviction].” ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 119 (1956).

³³ *Davidson*, 14 M.J. at 83 (citing UCMJ art. 13 (1982)). Article 13 provides:

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence . . .

UCMJ art. 13. The current version of this statute is unchanged. UCMJ art. 13 (2000); *United States v. Harris*, 66 M.J. 166 (C.A.A.F. 2008).

³⁴ *Davidson*, 14 M.J. at 83; *see United States v. Lerner*, 1 M.J. 371, 373 (C.M.A. 1976) (“[One] month served in illegal pretrial confinement ought to count the same as [one] month served after trial.”).

³⁵ UCMJ art. 56 (“The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.”); *see Davidson*, 14 M.J. at 83–84.

³⁶ *United States v. Blackwell*, 41 C.M.R. 196, 199 n.2 (C.M.A. 1970) (“[C]redit . . . for pretrial confinement . . . is a matter for the court-martial and the convening authority to consider in adjudging an appropriate sentence.”).

³⁷ *Davidson*, 14 M.J. at 85 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. XVIII, ¶ 87b (1949) [hereinafter 1949 MCM] (“The reviewing authority may properly consider as a basis for mitigation or remission not only matters relating solely to clemency, such as long confinement pending trial . . . but any other factors which may properly be considered in fixing the punishment.”); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. XVIII, ¶ 87b (1928) [hereinafter 1928 MCM] (stating same); MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. XVI, ¶ 401 (1921) (“When the reviewing or confirming authority takes final action upon the case[,] it is proper for him to consider any period of confinement served by the accused prior to and during the trial, and in a proper case[,] to make it the basis of mitigation of the sentence.”); MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. XVI, ¶ 401 (1917) (“It is appropriate for the appointing authority to consider, at the time of approval, confinement served by an accused prior thereto, and in a proper case make it the basis of mitigation of the sentence.”). Pretrial confinement was not among the factors the court-martial could consider in determining an appropriate sentence. *See, e.g.*, 1949 MCM, *supra*, pt. XV, ¶ 79, 80; 1928 MCM, *supra*, pt. XV, ¶ 79, 80. Simply put, “the court [could] not trench directly

Congress enacted the UCMJ, the President considerably broadened the scope of pretrial confinement consideration. In 1951, President Truman added a provision to the *MCM* that stated “pretrial confinement was a matter to be brought to the attention of the court-martial and to be considered by it in adjudging an appropriate sentence.”³⁹ This new provision aside, the convening authority retained his power to consider pretrial confinement when he later acted on the sentence.⁴⁰ Shortly thereafter, military judges were required to “‘particularly delineate’ factors such as pretrial confinement”⁴¹ when they instructed the members “to consider all matters in extenuation and mitigation.”⁴²

Despite the lack of automatic pretrial confinement credit, and notwithstanding a failed motion for appropriate relief from *unlawful* pretrial confinement, an accused could still have the court-martial and the convening authority consider his pretrial confinement time; the former during presentencing proceedings, and the latter at action.⁴³ This system, however, was less than perfect. Without an obligation to grant day-for-day credit, there was no way to determine—much less guarantee—how much weight, if any, a court-martial would give to pretrial confinement when it adjudged a sentence to post-trial confinement. The same held true for the convening authority, when he had to decide an appropriate sentence for the convicted servicemember’s crimes. Whether an accused would receive credit for all, some, or none of his lawful pretrial confinement rested solely upon the discretionary, deliberative processes exercised by the court-martial and convening authority. As we shall see in the next section, the *Allen* opinion radically changed the existing confinement-credit system, and brought certainty to the credit-determination process.

B. Entitlement to Pretrial Confinement Credit Under *Allen*

Private First Class (PFC) Allen pleaded guilty to robbery and assault consummated by a battery.⁴⁴ For these crimes, an officer panel sentenced PFC Allen to a bad-conduct discharge, confinement for twenty-four months, partial forfeitures, and

or indirectly upon the *remitting or mitigating power* of the commander [by inappropriately considering] the long confinement undergone by the accused while awaiting trial [and] . . . award[ing] no sentence.” WINTHROP, *supra* note 31, at 402.

³⁸ WINTHROP, *supra* note 31, at 124 (“[T]he fact of a prolonged arrest . . . could not be pleaded in bar of trial[, but] . . . would properly go to induce a mitigation [or remission] of the punishment . . . by the reviewing authority.”). Winthrop further explained:

[T]he period of an arrest in confinement before trial, or before final action upon the sentence, however unreasonably protracted, cannot legally be *credited* upon the term of imprisonment imposed by the sentence, [but] in executing the same, . . . the reviewing authority, if he thinks it just and proper that this period should be deducted from the term adjudged by the court, can do so only by a proportionate mitigation of the sentence . . . , or subsequently by a partial remission

Id. at 426.

³⁹ *Davidson*, 14 M.J. at 85–86 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. XIII, ¶ 75b(1) (1951) [hereinafter 1951 MCM] (“The trial counsel will read to the court from the first page of the charge sheet the data as to the age, pay, and service of the accused, and the duration and nature of any restraint imposed prior to trial.”); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. XIII, ¶ 75b(1) (1968) [hereinafter 1968 MCM] (stating same); MCM, *supra* note 19, R.C.M. 1001(b)(1) (stating same).

⁴⁰ *See* 1951 MCM, *supra* note 39, pt. XVII, ¶ 88b (“The convening authority may properly consider as a basis for approving only a part of a legal sentence not only matters relating solely to clemency, such as long confinement pending trial . . . , but any other pertinent factors.”); 1968 MCM, *supra* note 39, pt. XVII, ¶ 88b (stating same); *see also* MCM, *supra* note 19, R.C.M. 1107(b)(3)(A)(i) (“Before taking action, the convening authority shall consider . . . [t]he [report] of result of trial,” which indicates credit granted for pretrial confinement.); *id.* R.C.M. 1107(d)(2) discussion (“In determining what sentence should be approved the convening authority should consider all relevant factors including . . . all matters relating to clemency, such as pretrial confinement.”).

⁴¹ *United States v. Stark*, 19 M.J. 519, 527 (A.C.M.R. 1984) (quoting *Davidson*, 14 M.J. at 86).

⁴² *Davidson*, 14 M.J. at 86. With respect to the instruction in *Davidson*, the court found that “[n]o particular mention was made of the [143 days] appellant spent in pretrial confinement,” and held that “the military judge’s rote instructions . . . were inadequate as a matter of law.” *Id.* at 85 n.9, 86. The court also found the staff judge advocate’s advice to the convening authority similarly deficient. *Id.* at 85 n.10. In *United States v. Allen*, 17 M.J. 126, 127 (C.M.A. 1984), the court quoted from the record an example of an instruction that met “the demands of the law expressed in . . . *Davidson*.” That instruction provided the following:

[Y]ou should consider the nature and duration of the accused’s pretrial restraint. You will recall that the accused was confined at Pearl Harbor . . . and has continued in continuous pretrial confinement until this day. Now, you must take into consideration this pretrial confinement; however, you need not give credit for this pretrial confinement on a day for day basis[,] or . . . on the basis of any other formula or any mathematical computation, but you must consider it in arriving at an appropriate sentence.

Id. at 126–27 (first two alterations in original).

⁴³ “To be sure, prior to sentencing, a court-martial is informed of the period that an accused has spent in pretrial confinement . . . ; and this information may be given weight in imposing a sentence, and later by reviewing authorities who examine the appropriateness of the original sentence.” EVERETT, *supra* note 32, at 119.

⁴⁴ *Allen*, 17 M.J. at 126 n.*.

reduction to Private E1.⁴⁵ The convening authority approved and the court of military review affirmed the findings of guilty and the sentence.⁴⁶ Before the CMA, PFC Allen asserted he was entitled to eighty-one days of credit for the time he lawfully spent in pretrial confinement awaiting trial by court-martial.⁴⁷ The CMA agreed with PFC Allen, granted him eighty-one days of confinement credit, but otherwise affirmed the approved findings of guilty and the sentence.

The heart of PFC Allen's assertion was that "DOD Instruction 1325.4 (October 7, 1968) . . . states, *inter alia*, that procedures employed by the military services for computation of sentence[s] are to be in conformity with those published by the Department of Justice."⁴⁸ At the time, the Department of Justice (DOJ) followed the Congressional mandate found in 18 U.S.C. § 3568, which provided:

The Attorney General shall give any . . . [imprisoned] person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, . . . which is in violation of an Act of Congress and is triable in any court established by Act of Congress.⁴⁹

Despite language in § 3568 apparently exempting the military justice system from its application, PFC Allen argued "the Secretary of Defense . . . voluntarily adopted" this federal provision for awarding credit for lawful pretrial confinement by virtue of issuing "the foregoing instruction."⁵⁰ Therefore, PFC Allen argued he was entitled to eighty-one days of pretrial confinement credit based on the Defense Secretary's regulatory mandate. Having found no evidence of intent to the contrary,⁵¹ and having received none from the government,⁵² the court agreed with PFC Allen.

The *Allen* court began its analysis by looking at the history behind § 3568, and using the history as the contextual framework within which the Defense Secretary issued his instruction. When the Secretary first issued DODI 1325.4 in 1955,⁵³ neither military accused tried in district courts and confined in federal prisons, nor those tried by court-martial and then transferred to such facilities, received pretrial confinement credit.⁵⁴ Although the federal-civilian and military-justice systems did not provide credit for pretrial confinement, the Defense Secretary affirmatively expressed his intent that sentence uniformity be maintained among the military services,⁵⁵ and between the federal-civilian and military-justice systems

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 126.

⁴⁸ *Id.* The relevant part of this instruction states in its entirety: "Computation of Sentences. Procedures employed in the computation of sentences will be in conformity with those published by the Department of Justice, which govern the computation of sentences of federal prisoners and military prisoners under the jurisdiction of the Justice Department." DODI 1325.4 (1968), *supra* note 7, para. III.Q.6.

⁴⁹ *Allen*, 17 M.J. at 126–27 (citing Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 214, 217 (codified as amended at 18 U.S.C. § 3568 (1982), but repealed in 1984)).

⁵⁰ *Id.* at 127 (referring to DODI 1325.4 (1968), *supra* note 7).

⁵¹ *Id.* at 128 ("[W]e are unable to find any [contrary] supporting evidence that such was [not] the intention of the Secretary in this exercise of his instructional powers.").

⁵² *Id.* at 129 (Everett, C.J., concurring) ("According to the comments made by counsel during oral argument, any memoranda or correspondence which might have provided insight into the origins of this Instruction have been destroyed or, in any event, cannot be located.").

⁵³ U.S. DEP'T OF DEFENSE, INSTR. 1325.4, UNIFORM POLICIES AND PROCEDURES AFFECTING MILITARY PRISONERS AND PLACES OF CONFINEMENT (14 Jan. 1955) [hereinafter DODI 1325.4 (1955)].

⁵⁴ *Allen*, 17 M.J. at 127 (plurality opinion); *see supra* Part II.A. In 1932, Congress enacted the original legislation concerning sentence computation for federal prisoners. Act of June 29, 1932, Pub. L. No. 72-210, ch. 310, § 1, 47 Stat. 381 (codified at 18 U.S.C. § 709a (1934), revised 1948). The enactment dealt specifically with post-conviction sentence commencement dates, and any adjustments for interim post-conviction detention. *Id.* It did not provide for any credit for pretrial confinement. The Act of 1932 provided:

[T]he sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term.

Id.; *United States v. Jazorek*, 226 F.2d 693, 695 (7th Cir. 1955) (quoting 18 U.S.C. § 709a (1940)). In 1948, § 709a "was reformulated, without change . . . , and is now 18 U.S.C. § 3568." *Allen v. Ciccone*, 425 F.2d 989, 991 (8th Cir. 1970) (quoting 18 U.S.C. § 3568 (1970)); *United States v. Jazorek*, 226 F.2d 693, 694–95 (7th Cir. 1955); Act of June 25, 1948, Pub. L. No. 80-772, ch. 227, § 3568, 62 Stat. 683, 838 (codified at 18 U.S.C. § 3568 (1952)).

⁵⁵ DODI 1325.4 (1955), *supra* note 53, para. III.Q ("Sentence Operation. It is the purpose of the following provisions to provide uniform execution of sentences adjudged by courts-martial and other military tribunals of the Department of Defense.").

generally.⁵⁶ Credit for pretrial confinement first became available in 1960 to certain federal prisoners—those tried in district courts who received mandatory minimum sentences—pursuant to 18 U.S.C. § 3568.⁵⁷ In 1966, Congress enlarged the scope of § 3568 and provided pretrial confinement credit to all federal prisoners, the nature of their sentences notwithstanding.⁵⁸ The 1966 version of § 3568, however, applied only to offenses “other than . . . offense[s] triable by court-martial.”⁵⁹ This statutory language created an apparent disparity between the ways military accused were treated in the civilian-criminal and military-justice systems.

Against this backdrop, the *Allen* court next considered the Defense Secretary’s instruction. The court noted that in July 1968, Congress passed the Military Correctional Facilities Act,⁶⁰ which “[spoke] not of sentence computation, but of uniform military administration.”⁶¹ In all likelihood, this Act prompted the Secretary to rewrite and reissue DODI 1325.4 (1955); he did so in 1968, and retained “the paragraph on sentence computation procedures,”⁶² which stated:

Procedures employed in the computation of sentences will be in conformity with those published by the Department of Justice, which govern the computation of sentences of federal prisoners and military prisoners under the jurisdiction of the Justice Department.⁶³

Having considered this paragraph, the *Allen* court turned to the DOJ’s procedural rules regarding sentence computation. The court noted the U.S. Parole Commission issued the relevant rule on behalf of the DOJ, which provided, in relevant part:

[A]ny such [convicted] person shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.⁶⁴

⁵⁶ *Id.* para. III.Q.6 (“Computation of Sentences. Procedures employed in the computation of sentences will be in conformity with those published by the Department of Justice, which govern the computation of sentences of federal prisoners and military prisoners under the jurisdiction of that Department.”).

⁵⁷ *Allen*, 17 M.J. at 127. In 1960, Congress amended the original version of § 3568 and added a provision that afforded federal prisoners, who could not post bail, pretrial confinement credit to offset any mandatory minimum sentence. *Jonah v. Carmona*, 446 F.3d 1000, 1003 (9th Cir. 2006). The amendment stated, in relevant part:

[T]he Attorney General shall give any such [convicted] person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.

Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1, 74 Stat. 738. As amended, “[t]his statute covered only those [military accused] prosecuted in District Court who were unable to make bail,” *Allen*, 17 M.J. at 128, not those tried by court-martial because a system of “bail does not exist in the military.” *United States v. Rexroat*, 38 M.J. 292, 295 (C.M.A. 1993).

⁵⁸ *Allen*, 17 M.J. at 128. To eliminate a misunderstanding by some federal courts that “credit was required under § 3568 only for those defendants whose convictions carried mandatory minimum sentences,” *Jonah*, 446 F.3d at 1003, Congress again amended § 3568 in the 1966 Bail Reform Act to provide pretrial confinement credit for all federal prisoners. Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 214, 217 (repealed 1984). In relevant part, this amendment declared:

The Attorney General shall give any such [convicted] person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

Id.

⁵⁹ Bail Reform Act of 1966 § 4, 80 Stat. at 217.

⁶⁰ Pub. L. No. 90-377, § 1, 82 Stat. 287, 287–88 (codified as enacted at 10 U.S.C. §§ 951–954 (1970)). These sections cover generally: (1) the establishment, organization, and administration of military correctional facilities; (2) parole; (3) remission or suspension of sentences; (4) restoration to duty; (5) reenlistment; and (6) voluntary extension of service obligations for probation. The current version of the Act also provides for military prisoner transfers between the United States and foreign countries, and for using appropriated funds in connection with deserter apprehensions and confinement facility expenses. 10 U.S.C. §§ 955–956 (2000).

⁶¹ *Allen*, 17 M.J. at 128.

⁶² *Id.* “Department of Defense Instruction (DOD Inst) 1325.4 (Oct. 7, 1968) . . . [was] issued under a grant of authority from Congress contained in 10 U.S.C. §§ 951–55.” *United States v. Palmiter*, 20 M.J. 90, 92 n.2 (C.M.A. 1985).

Congress has conferred broad discretion upon service secretaries and commanders to establish and operate military correctional facilities. 10 U.S.C. 951–56 (2000). These statutes have been implemented by detailed guidance set forth by Department of Defense (DOD) Directive 1325.4 [May 19, 1988] . . . and DOD Instruction 1325.7 . . . (July 17, 2001).

United States v. Kreutzer, 60 M.J. 400, 401 (C.A.A.F. 2004) (summary disposition) (Crawford, J., dissenting).

⁶³ *Allen*, 17 M.J. at 127 (quoting DODI 1325.4 (1968), *supra* note 7, para. III.Q.6).

⁶⁴ *Id.* at 128 (quoting 28 C.F.R. § 2.10(a) (1980)). The court also noted the U.S. Bureau of Prisons—the agency responsible for implementing DOJ and U.S. Parole Commission rules and regulations—adopted this rule in “Policy Statement 7600.59, para. 4.b.(1).” *Id.*; *see also* *Hart v. Kurth*, 5 M.J. 932, 934 (N.M.C.M.R. 1978) (noting that “Bureau of Prisons Policy Statement 7600.59 of 27 May 1975 . . . [contains an] *Application* paragraph [that] specifically states: ‘Jail credit is controlled by Title 18, U.S. Code, Section 3568’”).

Based upon the foregoing analysis, the *Allen* court held:

[W]e must be judicially prudent and read the instruction as written, as voluntarily incorporating the pretrial-sentence credit extended to other Justice Department convicts. After all, . . . all other aspects of the Justice-Department system are more specifically mentioned and explicitly incorporated via this instruction. It is improbable that [DODI 1325.4 (1968)], adopting a unified system, would be promulgated without one of the foundation blocks[, i.e., automatic credit for lawful pretrial confinement].⁶⁵

In his concurring opinion, then-Chief Judge Everett put Judge Fletcher's opinion of the court into perspective, and highlighted the salient and prospective results of *Allen*. First, and most obvious, servicemembers tried by court-martial would now stand "in the same position as military or civilian defendant[s] . . . tried in . . . Federal District Court[s]." ⁶⁶ They would not suffer the risk of serving more than the maximum allowable sentence for the crimes they were convicted of—a result obtained by considering "the aggregate of pretrial and post-trial confinement,"⁶⁷ especially in cases of lengthy pretrial confinement. Furthermore, requiring full, day-for-day credit for pretrial confinement removed any uncertainty from the sentence-credit construct that resulted from a discretionary, credit-determination process.⁶⁸

Moreover, Chief Judge Everett noted that, from the government's perspective, mandatory, day-for-day credit places a convening authority in a better position to gauge at "what level of court-martial he should refer charges against an accused."⁶⁹ Similarly, from a defense perspective, an accused has a more informed and reasoned basis upon which to choose "what pleas to enter or what pretrial agreement to propose."⁷⁰ Lastly, the military judge can properly instruct any panel members on "how pretrial confinement is treated for sentencing purposes."⁷¹ In sum, the *Allen* court found the Defense Secretary's instruction consistent with the spirit of Congress' Military Correctional Facilities Act of 1968 and American Bar Association standards for criminal justice⁷² because the instruction required universal application of 18 U.S.C. § 3568 to all servicemembers facing trial by court-martial, and was in harmony with the larger federal, criminal-justice system.⁷³

C. Post-*Allen* Developments: Two Steps Forward

1. Statutory Changes

In October 1984—nine months after the opinion in *Allen*—Congress repealed the singled-pronged, pretrial-confinement-credit statute codified at 18 U.S.C. § 3568.⁷⁴ At the same time, Congress approved a new, double-pronged statute, codified at 18 U.S.C. § 3585, which became effective in November 1987.⁷⁵ As it did then, § 3585(b) currently states:

⁶⁵ *Allen*, 17 M.J. at 128.

⁶⁶ *Id.* at 129 (Everett, C.J., concurring).

⁶⁷ *Id.*

⁶⁸ *Id.* (noting the way the system was designed, "no one [could] foresee exactly what weight [would] be given to pretrial confinement by various sentencing authorities and convening authorities").

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² The court quoted the following standard in its opinion:

Credit against the maximum term and any minimum term should be given to a defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which a charge is based. This should specifically include credit for time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to arrival at the institution to which the defendant has been committed.

Id. at 128 (plurality opinion) (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES § 18-4.7(a) (2d ed. 1979)); ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING § 18-3.21(f)(i)–(iii) (3d ed. 1994) (restatement of former Standard 18-4.7).

⁷³ *Allen*, 17 M.J. at 128.

⁷⁴ See *supra* note 9 and accompanying text.

⁷⁵ *Id.*

Credit for prior custody. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

- (1) as a result of the offense for which the sentence was imposed; or
- (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.⁷⁶

By enacting § 3585(b), Congress effectively enlarged the grounds upon which a federal prisoner could claim credit for pretrial confinement; it combined the original ground in § 3568 with a new, additional ground. Credit remains available for pretrial confinement directly related to “the offense for which the sentence [is ultimately] imposed.”⁷⁷ Credit is now also available for pretrial confinement based upon “any other charge for which the defendant [is] arrested *after* the commission of the offense for which the sentence [is ultimately] imposed.”⁷⁸ In accordance with § 3585(b), a federal prisoner who has not received pretrial confinement credit—under either basis—against another sentence is entitled to receive such credit against his impending sentence.⁷⁹ More importantly, however, Congress omitted language previously contained in § 3568 that excluded from credit eligibility “any criminal offense . . . triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.”⁸⁰ Thus, by this omission, Congress specifically and statutorily included convicted servicemembers in the group of federal prisoners eligible for pretrial confinement credit. As a result, the statute’s military, regulatory counterpart discussed below also changed.

2. Regulatory Changes

Despite Congress having enacted 18 U.S.C. § 3585(b) in 1984, with a 1 November 1987 effective date, the Secretary of Defense revised DODI 1325.4 (1968).⁸¹ In May 1988, the Secretary reissued the revised instruction as a directive, which retained the same number as the instruction, and the sentence-computation mandate without significant change. The directive stated:

Computation of sentences. Procedures employed in the computation of sentences shall conform to those established by the Department of Justice (DoJ) for Federal prisoners unless they conflict with this Directive.⁸²

In September 1999, the Secretary amended Department of Defense Directive (DODD) 1325.4 (1988), but omitted “the language quoted above regarding computation of sentences.”⁸³ In December 1999, however, the Secretary issued DODI

⁷⁶ 18 U.S.C. § 3585(b) (2000).

⁷⁷ *Id.* § 3585(b)(1) (surviving provision).

⁷⁸ *Id.* § 3585(b)(2) (new provision) (emphasis added).

⁷⁹ *Id.* § 3585(b). Interpreting this new statute the same way, the U.S. Supreme Court opined:

Congress altered § 3568 in at least three ways when it enacted § 3585(b). First, Congress replaced the term “custody” with the term “official detention.” Second, Congress made clear that a defendant could not receive a double credit for his detention time. Third, Congress enlarged the class of defendants eligible to receive credit. Under the old law, a defendant could receive credit only for time spent in custody in connection with “the offense . . . for which sentence was imposed.” Under the new law, a defendant may receive credit both for this time and for time spent in official detention in connection with “any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed.”

United States v. Wilson, 503 U.S. 329, 337 (1992) (alteration in original).

⁸⁰ Compare 18 U.S.C. § 3568 (1982), with § 3585(b). Appendix A provides a chart tracking this statute’s development, as well as its regulatory progeny. See *infra* App. A.

⁸¹ DODI 1325.4 (1968), *supra* note 7; see *supra* note 9 and accompanying text.

⁸² U.S. DEP’T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES enclosure 1, para. H.5 (19 May 1988) [hereinafter DODD 1325.4 (1988)].

⁸³ United States v. Tardif, 55 M.J. 670, 671 (C.G. Ct. Crim. App. 2001) (discussing *Allen* credit and citing U.S. DEP’T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES (28 Sept. 1999) [hereinafter DODD 1325.4 (1999)]), *set aside on other grounds*, 57 M.J. 219 (C.A.A.F. 2002), *on remand at* 58 M.J. 714 (C.G. Ct. Crim. App. 2003), *aff’d*, 59 M.J. 394 (C.A.A.F. 2004).

1325.7 (1999)⁸⁴ to complement DODD 1325.4 (1999). The DODI 1325.7 (1999) revived the previous sentence-computation mandate, restating it in the following language:

Procedures used to compute sentences shall conform to those established by the Department of Justice for Federal Prisoners unless they conflict with this Instruction, [DODD 1325.4], or existing Service regulations.⁸⁵

In 2001, the Defense Secretary updated DODI 1325.7 (1999), and made further changes in 2003; however, the December 1999 sentence-computation mandate remains unaltered.⁸⁶ Therefore, in its current form, DODI 1325.7 (2001) still voluntarily incorporates federal sentence-computation procedures into military criminal law in exactly the same way its predecessor instruction did in 1955, despite the omission of specific statutory language from 18 U.S.C. § 3585(b) that previously excluded servicemembers tried by court-martial from eligibility for this credit.⁸⁷

While the federal sentence-credit statute and the military regulatory guidance underwent transformation, the sentence-computation rule promulgated by the U.S. Parole Commission,⁸⁸ as well as the U.S. Bureau of Prisons' adoption of that rule,⁸⁹ remained unchanged. As discussed in the next section, military courts have continued to grant *Allen* credit, and have expanded its applicability.

3. Key Post-Allen Court Opinions

Consistent with post-*Allen* (post-1984) statutory and regulatory changes to the pretrial-confinement-credit rubric, military courts have continued granting pretrial confinement credit in accordance with *Allen*. This practice has continued because the statutory changes affected by Congress did not fundamentally alter the previous rules adopted by the Secretary of Defense. The changes favorably augmented the rules for the benefit of military accused. The *Allen* opinion provided compulsory credit for lawful pretrial confinement directed solely by military authorities and carried out solely in military confinement facilities. The service courts of criminal appeals, however, expanded upon *Allen* and found credit entitlements where pretrial confinement was, for instance, imposed at the behest of federal or state authorities and served in non-military jails, or imposed at the behest of a foreign government and carried out overseas. What follows is a chronological survey of key post-*Allen* opinions.

a. Same-Crimes Credit Under 18 U.S.C. §§ 3568 and 3585(b)(1)

In *United States v. Huelskamp*,⁹⁰ a court-martial convicted Private E1 (PVT) Huelskamp of absence without leave (AWOL) and larceny, and sentenced him to a bad-conduct discharge, confinement for twenty months, and partial forfeitures. On appeal, PVT Huelskamp argued he was entitled to fifteen days of credit for the time “he spent in pretrial confinement in a

⁸⁴ U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (17 Dec. 1999) [hereinafter DODI 1325.7 (1999)].

⁸⁵ *Id.* para. 6.3.1.5.

⁸⁶ *United States v. Smith*, 56 M.J. 290, 293 (C.A.A.F. 2002) (“Defense Instruction (DODI) 1325.4 (Oct. 7, 1968) . . . was [ultimately] revised and reissued as DODI 1325.7 (July 17, 2001), without significant change to the provision at issue in this case.”); *see also* DODI 1325.7 (2001), *supra* note 14, para. 6.3.1.5 (C1, 10 June 2003) (“Procedures used to compute sentences shall conform to those established by the Department of Justice for Federal Prisoners unless they conflict with this Instruction, [DODD 1325.4], or existing Service regulations.”).

⁸⁷ Appendix B provides a chart tracking the development of DODI 1325.4 (1955), *supra* note 53; DODD 1325.4 (1988), *supra* note 82; and DODI 1325.7 (1999), *supra* note 84. *See infra* App. B.

⁸⁸ 28 C.F.R. § 2.10(a) (2008) (“[A]ny such [convicted] person shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.”).

⁸⁹ U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5880.28, SENTENCE COMPUTATION MANUAL (CCA of 1984) (19 July 1999) [hereinafter PROGRAM STATEMENT 5880.28]. The relevant rule states, in part:

Credit related to 18 U.S.C. § 3585(b)(2). Prior Custody Credit will be given for time spent in official detention as the result of any federal, state or foreign arrest which is not related to, yet occurred on or after the date of the federal offense (as shown on the judgment and commitment) for which the [federal] sentence was imposed; provided it has not been credited to another sentence.

Id. ch. I, para. 3c(1)(b); *see also* *Hughes v. Slade*, 347 F. Supp. 2d 821, 830 (D. Cal. 2004) (quoting and discussing an earlier, identical version of this rule dated 14 February 1997).

⁹⁰ 21 M.J. 509 (A.C.M.R. 1985) (discussing confinement directed by military authorities and served in a civilian jail).

civilian jail under the direction of military authorities, pending his return to his unit from AWOL status.”⁹¹ The Army Court of Military Review (ACMR) agreed, reasoning the pretrial confinement was “at the request of and solely to facilitate the administrative needs of military AWOL apprehension authorities.”⁹² Private Huelskamp’s pretrial confinement was clearly in connection with an offense for which he was convicted and sentenced by court-martial, i.e., AWOL. Thus, the ACMR’s award of *Allen* credit was consistent with the then-extant pretrial-confinement-credit statute, 18 U.S.C. § 3568.

In *United States v. Davis*,⁹³ military police arrested PFC Davis at the Fort Benning commissary while he was attempting to cash a forged check using a false military identification card. Because the military police could not verify PFC Davis’ military status at the time—and, therefore, presumed he was a civilian—they released him to federal law enforcement officers.⁹⁴ The federal authorities “held [PFC Davis] in the Muscogee County jail for further investigation and trial.”⁹⁵ When, one month later, an on-going, joint investigation revealed PFC Davis was an Army deserter, federal authorities returned him to military control; this resulted in his being placed into pretrial confinement at Fort Benning.⁹⁶

On appeal, PFC Davis asserted he was entitled—under *Allen*—to twenty-seven days of credit for the time he spent in civilian pretrial confinement at the direction of the United States Attorney.⁹⁷ The ACMR agreed, and explained that, “[h]ad [PFC Davis] been tried in a federal district court[,] he would have received sentence credit for the [twenty-seven] days of pretrial he spent in the Muscogee County jail at the instance [sic] of federal authorities.”⁹⁸ Therefore, the court held that Soldiers “tried by court-martial must be given sentence credit for time spent in pretrial custody at the instance [sic] of federal civilian authorities in connection with the ‘offense or acts’ for which a sentence to confinement by court-martial ultimately is imposed.”⁹⁹ In this case, PFC Davis’ pretrial confinement was in connection with the offenses for which he was convicted and sentenced by court-martial, i.e., check forgery and using a fake military identification card.

In *United States v. Dave*,¹⁰⁰ the ACMR expanded upon the holdings in *Allen*, *Huelskamp*, and *Davis*. At trial, Sergeant (SGT) Dave contested charges of carnal knowledge and sodomy.¹⁰¹ The court-martial, however, convicted SGT Dave on all counts, and sentenced him to a dishonorable discharge, confinement for thirty-six months, partial forfeitures, and reduction to Private E1.¹⁰² The charges arose from SGT Dave’s sexual misconduct with a friend’s thirteen-year-old daughter.¹⁰³ After the child’s mother confronted SGT Dave, he voluntarily “reported his ‘child molestation’ to the local police who placed him in confinement pending a decision by the Army on whether to take jurisdiction of the case.”¹⁰⁴ The local police released SGT Dave twenty-four days later when the Army took jurisdiction over the matter.¹⁰⁵

⁹¹ *Id.*

⁹² *Id.* at 509–10.

⁹³ 22 M.J. 557 (A.C.M.R. 1986) (discussing confinement directed by federal authorities and served in a civilian jail).

⁹⁴ *Id.* at 557–58.

⁹⁵ *Id.* at 558.

⁹⁶ *Id.*

⁹⁷ *Id.* at 557–58.

⁹⁸ *Id.* at 558.

⁹⁹ *Id.* (citing DODI 1325.4 (1968), *supra* note 7, para. III.Q.6). *Davis* affirmatively expanded the holding in *Huelskamp* by stating: “We do not construe *Huelskamp* to hold that pretrial credit is necessarily excluded in circumstances other than those encountered therein.” *Id.* at 558 n.1. The ACMR reaffirmed *Davis* in two subsequent cases. See *United States v. Peterson*, 30 M.J. 946, 950 (A.C.M.R. 1990) (stating, “pursuant to *United States v. Allen*,” an accused is entitled to pretrial confinement credit, despite having been “confined ‘solely through the impetus of civil authorities,’” for offenses for which he is later convicted and sentenced at trial by court-martial); *United States v. Ballesteros*, 25 M.J. 891, 893 (A.C.M.R. 1988) (“[S]oldiers tried by court-martial must be given *Allen* credit for . . . [lawful] pretrial confinement in state or federal civilian confinement facilities at the instance [sic] of federal authorities when served in connection with misconduct ultimately resulting in a sentence to confinement imposed by court-martial.”).

¹⁰⁰ 31 M.J. 940 (A.C.M.R. 1990) (discussing confinement directed by state authorities and served in a civilian jail).

¹⁰¹ *Id.* at 941.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

After trial, appellate defense counsel submitted SGT Dave's case to the ACMR without assigning error.¹⁰⁶ The court, however, on its own initiative, "specified the issue of whether appellant was entitled to [twenty-four days of] credit for pretrial confinement in the state facility."¹⁰⁷ Relying specifically on its previous holdings in *Huelskamp* and *Davis* in affirmatively answering this question, the ACMR held: "[A] soldier tried by court-martial *must* be given sentence credit for time spent in pretrial custody by local civilian authorities in connection with the offense or acts solely for which a sentence to confinement by a court-martial is ultimately imposed."¹⁰⁸ Sergeant Dave's pretrial confinement was in connection with his misconduct amounting to *child molestation*; he was tried and sentenced by court-martial for synonymous crimes: carnal knowledge and sodomy.¹⁰⁹ Therefore, SGT Dave was entitled to twenty-four days of credit.¹¹⁰

Huelskamp, *Davis*, and *Dave*, read together in light of *Allen*, reflect the judicial mandate that an accused is entitled to credit for pretrial confinement in any civilian facility, notwithstanding whether military, federal, or state authorities imposed the confinement. Credit shall be forthcoming where the accused is tried and sentenced by court-martial for the offenses that prompted the pretrial confinement. Because all of these opinions cite *Allen* exclusively as the source of their authority to grant relief, the logical conclusion is the ACMR awarded sentence credit based on DODI 1325.4 (1968) and 18 U.S.C. § 3568, despite DODD 1325.4 (1988) and 18 U.S.C. § 3585(b)(1) having taken effect after the 1986 *Davis* opinion.¹¹¹ In 1995, the Air Force Court of Criminal Appeals (AFCCA) took the lead as the first service court to expressly construe 18 U.S.C. § 3585(b) in a published opinion,¹¹² and apply the new statute to military accused tried by court-martial within the context of *Allen*.

In *United States v. Murray*,¹¹³ a panel convicted Senior Airman (SrA) Murray for raping, assaulting, and threatening his former girlfriend with a pistol. For these crimes, the members sentenced SrA Murray to a dishonorable discharge, confinement for ten years, partial forfeitures, and reduction to the grade E1.¹¹⁴ Initially, county deputies in Florida arrested SrA Murray for the alleged rape, and held him in pretrial confinement for forty-six days.¹¹⁵ When he posted bail, Air Force authorities assumed jurisdiction over the case, and immediately placed SrA Murray into military confinement—where he remained for an additional seventy-eight days.¹¹⁶ At trial, the military judge awarded SrA Murray seventy-eight days of credit for military pretrial confinement, but denied SrA Murray's motion for forty-six days of credit for the time he spent in civilian pretrial confinement in an Okaloosa County jail.¹¹⁷

On appeal, SrA Murray argued he was entitled to forty-six days of *Allen* credit for his civilian pretrial confinement.¹¹⁸ The AFCCA agreed after addressing two key issues: (1) whether DODD 1325.4 (1988) "still require[d] the military to follow Department of Justice sentence computation rules;" and (2) whether the "Department of Justice [was] required to credit state pretrial confinement to federal sentences."¹¹⁹ The court found that although DODD 1325.4 (1988) superseded

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 941 n.2.

¹⁰⁸ *Id.* at 942 (emphasis added).

¹⁰⁹ *Id.* at 941.

¹¹⁰ *Id.* at 942.

¹¹¹ *United States v. Belmont* appears to be the first service court opinion to specifically mention 18 U.S.C. § 3585(b) (1988). 27 M.J. 516 (N.M.C.M.R. 1988). *Belmont*, however, is inapposite to the point here because *Belmont* specifically addressed whether pretrial confinement credit in excess of adjudged confinement could offset other types of punishment in the sentence. *Id.* The court answered in the negative. *Id.* at 517–18; see *United States v. Smith*, 56 M.J. 290 (C.A.A.F. 2002) (reaffirming *Belmont* and holding an accused is not entitled to pretrial confinement credit, or any other offset, against a sentence to no confinement).

¹¹² *United States v. Murray*, 43 M.J. 507 (A.F. Ct. Crim. App. 1995); see Major Amy M. Frisk, *Military Justice Symposium: New Developments in Pretrial Confinement*, ARMY LAW., Mar. 1996, at 25, 32 (discussing the *Murray* opinion).

¹¹³ 43 M.J. at 507 (discussing confinement directed by state authorities and served in a civilian jail, and applying 18 U.S.C. § 3585(b) (1994)).

¹¹⁴ *Id.* at 510.

¹¹⁵ *Id.* at 513.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 514.

DODI 1325.4 (1968) after the CMA decided *Allen*, the later directive “contain[ed] the same requirement” to apply DOJ sentence computation rules in the military-justice system.¹²⁰

The court next examined 18 U.S.C. § 3585(b), and determined the statute required the DOJ to credit federal prisoners with state pretrial confinement time not otherwise applied against another sentence. The court came to this conclusion based on the following analysis:

The meaning of 18 U.S.C. § 3585(b) is plain—as long as a federal prisoner has not already received credit for pretrial confinement against another sentence, he receives credit against his pending federal sentence. The statute does not discriminate based on the sovereign responsible for the pretrial confinement. Rather, it readily appears Congress intended this statute to cover state-imposed pretrial confinement. Otherwise, why use broad terms like “official detention” and “any other charge . . . after the commission of the offense,” when Congress could have expressly narrowed the scope of the statute to federal custody? Moreover, we see the no-prior-credit proviso in the last line of the statute as including the scenario where a convict has committed crimes under both federal and state law. If a prisoner has been confined by the state after the commission of the offense, then he receives credit against his federal sentence—*unless* such custody already has been credited against a *state* sentence. The United States Sentencing Commission also shares this interpretation of the law.¹²¹

More important, the United States courts have construed . . . the broader language of the current statute [18 U.S.C. § 3585(b)] to require federal credit for state pretrial confinement. In *Wilson*, the Supreme Court . . . did not dispute the Sixth Circuit’s construction of the statute to require federal sentence credit for state pretrial confinement. Indeed, the Court expressly conceded the new statute had broadened the effect of its predecessor in three ways, including enlarging the class of defendants entitled to credit.¹²²

Therefore, we also answer the second part of this issue in the affirmative—if [SrA Murray] had been convicted and sentenced in United States District Court, the Attorney General would credit his sentence for the [forty-six] days of state pretrial confinement. Department of Defense Directive 1325.4 [(1988)] requires the military to do the same. In our decretal paragraph, we will direct that [SrA Murray] receive [forty-six] days of additional sentence credit.¹²³

Like the ACMR’s opinions in *Huelskamp*, *Davis*, and *Dave*—which applied *Allen* and § 3568—the AFCCA’s opinion in *Murray* reflects the same judicial mandate under 18 U.S.C. § 3585(b)(1), i.e., an accused is entitled to credit for pretrial confinement in any civilian facility, despite the nature of the sovereignty (military, federal, or state) that imposed the confinement. Credit is due the accused as long as he is tried and sentenced by court-martial for the offenses that prompted the pretrial confinement. The *Murray* Court, consistent with the analysis in *Allen*, relied upon § 3585(b)(1) and DODD 1325.4 (1988) as authority to grant credit for civilian pretrial confinement imposed for the alleged rape for which SrA Murray was ultimately convicted and sentenced by court-martial. Several other courts have followed the reasoning in *Murray*.¹²⁴

¹²⁰ *Id.*

¹²¹ *Id.* (alteration in original); see also PROGRAM STATEMENT 5880.28, *supra* note 89, ch. I, para. 3c(1)(b) (“Prior Custody Credit will be given for time spent in official detention as the result of any federal, state or foreign arrest”); cf. *Reno v. Koray*, 515 U.S. 50, 61, 63 n.5 (1995) (noting the Bureau of Prisons “often grants credit under § 3585(b) for time spent in *state* custody” pursuant to its “internal agency guideline, which is akin to an ‘interpretive rule,’” and, therefore, is “entitled to some deference . . . since it is a ‘permissible construction of the statute’”) (internal citations omitted).

¹²² *Murray*, 43 M.J. at 514–15 (referring to *United States v. Wilson*, 503 U.S. 329, 337 (1992) and recognizing the inclusion of servicemembers in the class of eligible defendants) (internal footnote and citations omitted).

¹²³ *Id.* at 515; see Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, ARMY LAW., Aug. 1999, at 1, 5–7 (discussing *Murray* and noting its “approach is superior”).

¹²⁴ *United States v. Rock*, 52 M.J. 154, 157 (C.A.A.F. 1999) (“[I]t is the Secretary of Defense himself who has mandated that the armed forces comply with federal practice and credit pretrial confinement.”); *United States v. Sarazine*, No. 20020321, slip. op. at 2 (A. Ct. Crim. App. Oct. 14, 2004) (“We agree that appellant is entitled to sentence credit ‘for time spent in pretrial custody by local civilian authorities in connection with the offense or acts solely for which a sentence to confinement by a court-martial is ultimately imposed.’”); *United States v. Tardif*, 55 M.J. 670, 673 (C.G. Ct. Crim. App. 2001) (“We agree with the analysis in *Murray*, and hold that an accused must receive day-for-day sentence credit for pretrial confinement by civilian authorities for an ‘offense for which the sentence was imposed,’ where that pretrial confinement has not been credited against any other sentence.”); *United States v. Smith*, 54 M.J. 783, 878–87 (A.F. Ct. Crim. App. 2001) (“[I]n accordance with our senior court’s guidance in *Allen*, we must continue to follow the Department of Justice (DOJ) provisions concerning credit for pretrial confinement.”), *aff’d*, 56 M.J. 290, 293 (C.A.A.F. 2002) (“As written, 18 U.S.C. § 3585(b) and DODI 1325.7 [(2001)] apply . . . to prisoners serving [court-martial] sentences to confinement.”); *United States v. Chaney*, 53 M.J. 621, 622–23 (N-M. Ct. Crim. App. 2000) (adopting the reasoning in *Murray* and finding the accused entitled to credit for initial pretrial confinement imposed by civilian authorities); *United States v. Gazurian*, No. 31372, 1997 CCA LEXIS 144, at *3 (A.F. Ct. Crim. App. Feb. 20, 1997) (citing *Murray* and stating “[s]ervice members are entitled to credit for pretrial confinement served in civilian confinement[,] provided they have not been previously credited for the same confinement[, under either

Thus far, the service courts have considered only whether accused servicemembers were entitled to sentence credit for pretrial confinement imposed by military, federal, and state authorities. In the following two cases, the AFCCA further expanded the entitlement to credit to cover pretrial confinement imposed by foreign governments.

In *United States v. Pinson*, the AFCCA decided whether an accused was entitled to sentence credit when “held in pretrial confinement by a foreign government.”¹²⁵ Finding an entitlement to credit existed, the *Pinson* Court reasoned that *Allen* afforded an accused credit for military pretrial confinement, and that *Murray* afforded an accused credit for civilian pretrial confinement.¹²⁶ Furthermore, since 18 U.S.C. § 3585(b) “does not limit this credit to time spent in facilities within the United States[,] . . . credit *must* [also] be given for pretrial confinement served at the hands of a foreign government.”¹²⁷ Consistent with *Murray*, the court noted § 3585(b)(1) speaks in terms of “official detention” and “offense[s] for which the sentence was imposed,” but is silent concerning the imposing sovereign.¹²⁸ Because Icelandic police held SrA Pinson while they investigated “related charges”¹²⁹ stemming from his misconduct, the court granted credit for foreign pretrial confinement.

In *United States v. Lenoir*,¹³⁰ the AFCCA expanded on *Pinson* and addressed whether an accused is entitled to credit for pretrial confinement directed by a foreign government when the command is unaware of that detention. Relying on *Allen*, *Murray*, and *Pinson*, and unaware of any exception for the command not knowing the accused’s plight, the *Lenoir* Court held “the matter falls squarely within the parameters of 18 U.S.C. § 3585(b).”¹³¹ While German police arrested Airman First Class (A1C) Lenoir for possessing cocaine, a court-martial convicted and sentenced him on the same charge.¹³² Therefore, the court awarded A1C Lenoir eight days of credit for foreign government pretrial confinement. In the following section, this article discusses § 3585(b)(2) credit for crimes unrelated to the court-martial process.

b. Unrelated-Crimes Credit Under 18 U.S.C. § 3585(b)(2)

While the law developed regarding the first prong of 18 U.S.C. § 3585(b), little development occurred regarding the statute’s second prong. When *Murray* was decided in June 1995, the service courts had not yet addressed 18 U.S.C. § 3585(b)(2)—pertaining to unrelated crimes credit.

In 1998, the ACCA issued an opinion in *United States v. Martin*,¹³³ wherein it discussed § 3585(b)(2). In *Martin*, PVT Martin went AWOL from his unit in Texas on 20 December 1996.¹³⁴ Over three months later, on 7 April 1997, local police arrested PVT Martin for offenses wholly unrelated to the AWOL offense for which he was tried by court-martial.¹³⁵ After notification on 8 April 1997 of PVT Martin’s civilian arrest and detention, on 10 April 1997 military authorities requested local police hold him for transfer to military control. The transfer to military pretrial confinement was completed on 14 April 1997—where PVT Martin remained until trial on 2 June 1997.¹³⁶ At trial, the military judge granted pretrial confinement credit only for the period 11 April to 1 June 1997.¹³⁷

prong of 18 U.S.C. § 3585(b)”; *cf.* *United States v. DeLeon*, 53 M.J. 658, 660 (A. Ct. Crim. App. 2000) (“Based on [18 U.S.C. § 3585(b) and DODD 1325.4 (1988)], we hold that any part of a day in pretrial confinement must be calculated as a full day for purposes of pretrial confinement credit under *Allen* . . .”). This apparent consensus among the service courts regarding credit for state pretrial confinement should allay any concern about the differing service-court approaches to awarding this credit that existed in the 1990s. *See* Seidel, *supra* note 123, at 6–7; Frisk, *supra* note 112, at 31–32.

¹²⁵ 54 M.J. 692, 694 (A.F. Ct. Crim. App. 2001) (pretrial confinement in Iceland).

¹²⁶ *Id.* at 694–95.

¹²⁷ *Id.* at 695.

¹²⁸ *Id.*

¹²⁹ *Id.* at 694.

¹³⁰ No. S30161, 2005 CCA LEXIS 100, at *1 (A.F. Ct. Crim. App. Mar. 22, 2005) (pretrial confinement in Germany).

¹³¹ *Id.* at *3–4.

¹³² *Id.* at *3.

¹³³ No. 9700900 (A. Ct. Crim. App. June 18, 1998).

¹³⁴ *Id.* at 2.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

On appeal, PVT Martin asserted he was entitled to additional credit for the first three days he spent in civilian pretrial confinement (7–10 April 1997) for the unrelated charges, and based his assertion upon *Allen*, DODD 1325.4 (1988), and 18 U.S.C. § 3585(b)(2).¹³⁸ The ACCA acknowledged “the apparent validity of [PVT] Martin’s legal argument, but avoid[ed] a [direct] decision on that issue”¹³⁹ based on a lack of facts supporting the claim for credit. The court did not expressly state, but very strongly implied, the statute’s second prong would have afforded PVT Martin relief had he been able to verify his claim. In its analysis, the ACCA reasoned:

The evidence of record establishes that appellant was arrested by Mississippi authorities on 7 April 1997 for “any other charge.” This arrest occurred “after the commission of the offense for which the sentence was imposed” (the court-martial charges). There is absolutely no evidence in this record that the appellant “has not been credited” with the days from 7-10 April 1997 “against another sentence.” For example, there is no evidence of record whether the Mississippi charges ever went to trial, the result of that trial, or whether the appellant received credit toward a sentence to confinement for the period 7-10 April 1997 that he spent in civilian pretrial confinement. The burden was on the appellant to present evidence supporting his claim for pretrial confinement credit. Without a factual predicate, the appellant is entitled to no relief on his claim of error.¹⁴⁰

The Coast Guard Court of Criminal Appeals (CGCCA) briefly commented on 18 U.S.C. § 3585(b)(2) in *United States v. Tardif*.¹⁴¹ In *Tardif*, the court relied on *Murray* and § 3585(b)(1) to grant credit for civilian-directed pretrial confinement for the same offense for which the accused was later tried by court-martial.¹⁴² After agreeing with the reasoning in *Murray*, the court acknowledged § 3585(b)(2) and stated: “This provision arguably grants [an accused] credit for pretrial official detention even if the detention bears no relationship to the offenses for which the [accused] was [tried and] sentenced [by court-martial].”¹⁴³ Although the CGCCA did not decide *Tardif* on § 3585(b)(2) grounds, it likely would have granted credit on that basis had *Tardif* been synonymous with *Martin* and contained evidence adequate to support granting credit.

In *United States v. Sherman*,¹⁴⁴ the AFCCA revisited the issue raised in *Martin*, and directly addressed the applicability of § 3585(b)(2) to a military accused tried by court-martial. On the night of 24–25 March 2000, Airman (Amn) Sherman went to a nightclub where he met two other airmen.¹⁴⁵ While there, Amn Sherman distributed ecstasy to one of the airmen and a club dancer named “Robbie.”¹⁴⁶ Robbie had “an adverse reaction to the ecstasy . . . [and] overdosed.”¹⁴⁷ Another club dancer described Amn Sherman to the local police, and told them he “had been dealing drugs at the club for the past three or four weeks.”¹⁴⁸ Later that same night, the police arrested Amn Sherman at the club, found ecstasy on his person, and charged him with “possession of a controlled substance.”¹⁴⁹ Airman Sherman spent five days in civilian pretrial confinement on the possession charge, which local authorities later decided not to prosecute.¹⁵⁰ Based on this misconduct, a court-martial tried and convicted Amn Sherman for “distribution and use [of ecstasy], both on divers occasions.”¹⁵¹ His sentence included a discharge and fifteen months’ confinement.¹⁵²

¹³⁸ *Id.*

¹³⁹ Major Michael J. Hargis, *Pretrial Restraint and Speedy Trial: Catch Up and Leap Ahead*, ARMY LAW., Apr. 1999, at 13, 16 (discussing the *Martin* opinion).

¹⁴⁰ *Martin*, No. 9700900, slip. op. at 3 (quoting 18 U.S.C. § 3585 (b)(2) (1994)).

¹⁴¹ 55 M.J. 670 (C.G. Ct. Crim. App. 2001).

¹⁴² *Id.* at 671, 673.

¹⁴³ *Id.* at 673 (dictum).

¹⁴⁴ 56 M.J. 900 (A.F. Ct. Crim. App. 2002).

¹⁴⁵ *Id.* at 901.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (emphasis added).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 900 (emphasis added).

¹⁵² *Id.*

On appeal to the AFCCA, Amn Sherman argued he was entitled to five days of credit for civilian pretrial confinement “for one of the offenses for which he was tried at his court-martial.”¹⁵³ In response to the assigned error, the court noted “the record [did] not support the contention . . . that [Amn Sherman] spent time in civilian confinement for *distribution* of ecstasy.”¹⁵⁴ However, after discussing the holdings in *Allen*, *Murray*, *Chaney*, *Pinson*, and *Tardif*, the court concluded:

In this case, as we noted, the appellant was arrested for possession of a controlled substance. The appellant’s sentence was imposed for four offenses, including distribution of ecstasy on divers occasions. One of those occasions was his distribution to the dancer, Robbie, in the early morning hours of 25 March, which preceded his arrest for possession. Given the circumstances in this case, we conclude the appellant was eligible for [five] days’ credit under 18 U.S.C. § 3585(b)(2).¹⁵⁵

The court’s conclusion here is consistent with the one in *United States v. Smith*.¹⁵⁶ In *Smith*, decided four months prior to *Sherman*, the CAAF expressly stated: “As written, 18 U.S.C. § 3585(b) and DODI 1325.7 apply only to prisoners serving [court-martial] sentences to confinement. We [will not] . . . extend the Secretary of Defense’s application of 18 U.S.C. § 3585(b) beyond its terms.”¹⁵⁷ One of those terms, § 3585(b)(2), provides an accused with credit for pretrial confinement imposed for “any other charge for which the defendant was arrested *after* the commission of the offense for which the sentence was imposed [by court-martial].”¹⁵⁸ In *Sherman*, the civilian authorities did not prosecute Amn Sherman for possessing ecstasy. His five days in pretrial confinement were therefore “not credited against another sentence.”¹⁵⁹ Having concluded Amn Sherman was eligible for credit, the AFCCA correctly applied § 3585(b)(2) and recognized his right to receive five days of credit.¹⁶⁰

With *Martin*, *Smith*, and *Sherman* leading the way, the CAAF and the service courts of criminal appeals commenced the forward-moving, judicial development of § 3585(b)(2). As we shall see in Part III below, however, the ACCA, in *United States v. Gogue*,¹⁶¹ issued a decision that appears to have halted that development and sent the area of unrelated-crimes credit in the Army into retrogression.

III. *United States v. Gogue*: Two Steps Back?

A. Anatomy of the Case

From August 2004 to February 2005, Specialist (SPC) Gogue regularly indulged in several controlled substances, which formed the basis for his court-martial for “illegal drug use.”¹⁶² After he committed most of the above misconduct, local police arrested SPC Gogue in January 2005 for unrelated drug activity, and charged him with “illegally *possessing* a controlled substance.”¹⁶³ Trial counsel decided not to refer a drug-possession charge to court-martial. Specialist Gogue remained in civilian pretrial confinement for four days for his state drug charge before making bail.¹⁶⁴ After failing to appear for a February 2005 hearing on the civilian charge, and then going AWOL for a brief period in March 2005, local police arrested SPC Gogue for the second time pursuant to a failure-to-appear bench warrant.¹⁶⁵ After the second arrest, he spent an additional eighty-five days in civilian pretrial confinement, which ended with his trial by court-martial.¹⁶⁶

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 900–01 (emphasis added).

¹⁵⁵ *Id.* at 902.

¹⁵⁶ 56 M.J. 290 (C.A.A.F. 2002).

¹⁵⁷ *Id.* at 293 (refusing to use otherwise creditable pretrial confinement time as an offset against parts of a sentence other than confinement).

¹⁵⁸ 18 U.S.C. § 3858(b)(2) (2000) (emphasis added).

¹⁵⁹ *Id.* § 3858(b).

¹⁶⁰ *United States v. Sherman*, 56 M.J. 900, 902 (A.F. Ct. Crim. App. 2002).

¹⁶¹ No. 20050650 (A. Ct. Crim. App. May 18, 2007) (en banc).

¹⁶² *Id.* at 4 (Sullivan, J., dissenting) (emphasis added).

¹⁶³ *Id.* (emphasis added).

¹⁶⁴ *Id.* at 4, 6 n.5 (confinement 18–21 January 2005).

¹⁶⁵ *Id.* at 4.

¹⁶⁶ *Id.* at 4–5, 6 n.5 (confinement 8 March to 31 May 2005).

At trial, SPC Gogue filed a written, 18 U.S.C. § 3585(b)(2) motion for civilian pretrial confinement credit for the period 9 March to 31 May 2005; he agreed with trial counsel that “the state failure-to-appear and drug possession offenses were unrelated to the . . . court-martial.”¹⁶⁷ The military judge denied the motion with the following explanation:

18 U.S.C. 3585 provides for credit when the accused is detained, “As a result of the offense for which the [court-martial] sentence was imposed.” It is true that detention need not be at the request of the military or even with the military’s knowledge in order for credit to be given. But here, when the detention is for an offense wholly unrelated and not charged by the government, no sentencing credit is warranted.¹⁶⁸

Apparently, the military judge based her decision solely on 18 U.S.C. § 3585(b)(1), which provides for traditional *Allen* or same-crimes credit. For reasons not obvious in *Gogue*, the military judge did not consider 18 U.S.C. § 3585(b)(2), which provides credit for unrelated crimes.

On appeal, SPC Gogue claimed the military judge erred by not awarding pretrial confinement credit.¹⁶⁹ Specifically, he argued the military judge failed to consider § 3585(b)(2) when she ruled on the motion, and that § 3585(b)(2) mandates credit because his pretrial confinement time did not offset any other sentence.¹⁷⁰ In an en banc, unpublished decision, the ACCA summarily affirmed the result at trial and refused to grant relief.¹⁷¹ Without deciding the issue, the majority tacitly opined in a footnote that § 3585(b)(2) does not apply to military accused tried by court-martial.¹⁷² The court also declared that even if the statute applies to accused servicemembers, “the Supreme Court has opined that trial judges lack the authority to calculate and apply pretrial confinement credit.”¹⁷³

Two dissenting judges found that 18 U.S.C. § 3585(b)(2) does apply to military accused tried by court-martial, and affords those servicemembers the opportunity to move the trial court for an award of unrelated-crimes credit.¹⁷⁴ The dissent, however, agreeing with the majority, declined to hold military judges responsible for awarding § 3585(b)(2) credit “in every case;” either the convening authority or the confinement facility commander would be responsible.¹⁷⁵ Undoubtedly, the unique facts of this case strongly influenced the second part of the dissent’s opinion.¹⁷⁶ In Parts III.B and III.C below, this article addresses various concerns of the court, and argues § 3585(b)(2) is applicable to military accused tried by court-martial, and that military judges have the authority to grant motions for, and award, unrelated-crimes credit.

B. 18 U.S.C. § 3585(b)(2) Applies to Trials by Court-Martial

Contrary to the result in *Gogue*, 18 U.S.C. § 3585(b)(2) applies to trials by court-martial, and entitles military accused to awards of uncredited civilian pretrial confinement time due to “any other charge for which the [accused] was arrested *after* the commission of the offense for which the sentence was imposed [by court-martial].”¹⁷⁷ Historically, the Secretary of Defense has included language in his confinement facility regulations that promotes uniformity in sentence computation between the military and civilian criminal-justice systems. That language appeared for the very first time in the 1955 version of DODI 1325.4, and has appeared in one form or another in subsequent versions of Defense Department sentence-computation directives or instructions since then, including the current version of DODI 1325.7 (2001).¹⁷⁸ Although 18

¹⁶⁷ *Id.* at 5.

¹⁶⁸ *Id.* (alteration in original).

¹⁶⁹ *Id.* at 6.

¹⁷⁰ *Id.* at 6–7. At the time of court-martial, the state offenses remained adjudicated. *Id.* at 5.

¹⁷¹ *Id.* at 1 (en banc).

¹⁷² *Id.* at 1 n.*.

¹⁷³ *Id.* (citing *United States v. Wilson*, 503 U.S. 329, 333 (1992)).

¹⁷⁴ *Id.* at 6 (Sullivan, J., dissenting) (“[O]ur superior court’s ruling in . . . *Allen* . . . compels such a conclusion.”).

¹⁷⁵ *Id.* at 3–4.

¹⁷⁶ Immediately following his trial by court-martial, SPC Gogue returned to civilian pretrial confinement to await his state trial. *Id.* at 5, 6 n.5 (1–23 June 2005). At the state trial, he pleaded guilty to, and was convicted of, the drug-possession charge, and received a sentence to probation without confinement. *Id.* Thereafter, SPC Gogue remained in civilian confinement until his transfer to military control and post-trial confinement. *Id.* (23–28 June 2005).

¹⁷⁷ 18 U.S.C. § 3585(b)(2) (2000) (emphasis added).

¹⁷⁸ DODI 1325.7 (2001), *supra* note 14, para. 6.3.1.5 (C1, 10 June 2003); *see infra* App. B.

U.S.C. § 3568 expressly did not apply to offenses “triable by court-martial,”¹⁷⁹ the Defense Secretary’s instruction made the statute’s sentence-credit provision mandatory for the military. The *Allen* Court held that by issuing DODI 1325.4 (1968), the Secretary of Defense “voluntarily incorporat[ed into the military justice system] the pretrial-sentence credit extended to other Justice Department convicts.”¹⁸⁰ Today, the *Allen* holding is strengthened by the lack of any exclusionary language in the statutory revision codified at 18 U.S.C. § 3585(b). If Congress did not want either prong of § 3585(b) to apply to convicted servicemembers sentenced to confinement, Congress could have specifically kept the exclusionary provision in the statute, but did not. Nevertheless, the CAAF reaffirmed *Allen* and its analysis in *Smith* wherein the court declared: “18 U.S.C. § 3585(b) and DODI 1325.7 apply only to prisoners serving [post-trial] sentences to confinement.”¹⁸¹

Furthermore, when the service courts of criminal appeals award what is traditionally known as *Allen* credit, they are really awarding pretrial confinement credit pursuant to 18 U.S.C. § 3585(b)(1) (same-crimes credit). Although the underlying basis for the credit has not changed, its codification is new. Subsection (b)(1) is one of two prongs of § 3585(b), in force since 1 November 1987.¹⁸² The *Allen* credit is no longer based upon the one-pronged § 3568, the section in effect when *Allen* was decided. Congress repealed § 3568 in October 1984, and replaced it with § 3585(b).¹⁸³ Thus, when the service courts grant *Allen* credit today, it is a foregone conclusion that § 3585(b) necessarily applies to trials by court-martial as the base statute via the DODI 1325.7 (2001) mandate. The disjunctive “or” between subsections (b)(1) and (b)(2) provides a choice between two permissive conditions of the base statute depending on the facts of each case. If § 3585(b)(1) is the applicable basis for granting traditional *Allen* credit, then, *a fortiori*, § 3585(b)(2) must be the applicable basis for granting unrelated-crimes credit. Both prongs apply to military trials because § 3585(b) does not specifically exclude courts-martial from its application as did its predecessor statute, § 3568. The contrary holding in *Gouge* is therefore unsupported by military law and misapplies the holding in *Wilson*.

As the cases discussed in Parts I and II have demonstrated, if an accused is otherwise qualified, he is entitled to pretrial confinement credit under § 3585(b)(1)–(2) depending upon the facts of his case. The statute is broad enough to cover confinement imposed by all sovereigns (military, federal, civilian, and foreign), carried out in both military and non-military facilities, and in the United States as well as overseas. The take-away here is that, according to *Allen*, *Murray*, *Martin*, *Smith*, and *Sherman*, DODI 1325.7 (2001) is a conduit for applying the sentence-computation rules enacted by Congress and implemented by the DOJ through the U.S. Sentencing Commission and the U.S. Bureau of Prisons. The current version of DODI 1325.7 (2001) states:

Procedures used to compute sentences shall conform to those established by the Department of Justice for Federal Prisoners unless they conflict with this Instruction, [DODD 1325.4], or existing Service regulations.¹⁸⁴

In accordance with 18 U.S.C. § 3585(b)(2), the DOJ implements the following sentence-computation procedure in the U.S. Bureau of Prisons’ sentence-computation manual:

Prior Custody Credit will be given for time spent in official detention as the result of any federal, state or foreign arrest which is not related to, yet occurred on or after the date of the federal offense (as shown on the judgment and commitment) for which the [federal] sentence was imposed; provided it has not been credited to another sentence.¹⁸⁵

To date, this sentence-computation procedure is not in conflict with either DODI 1325.7 (2001) or DODD 1325.4 (2001), or

¹⁷⁹ 18 U.S.C. § 3568 (1982).

¹⁸⁰ *United States v. Allen*, 17 M.J. 126, 127 (C.M.A. 1984) (citing DODI 1325.4, *supra* note 7, para. III.Q.6). The Defense Secretary promulgated DODI 1325.4 based upon the Congressional authority given him in the Military Correctional Facilities Act of 1968. *See United States v. Palmiter*, 20 M.J. 90, 92 n.2 (C.M.A. 1985); *United States v. Kreutzer*, 60 M.J. 400, 401 (C.A.A.F. 2004) (summary disposition).

¹⁸¹ *United States v. Smith*, 56 M.J. 290, 293 (C.A.A.F. 2002). The service courts of criminal appeals “should follow the case which directly controls, leaving the [CAAF] the prerogative of overruling its own decisions.” *United States v. Pack*, 65 M.J. 381, 385 (C.A.A.F. 2007) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

¹⁸² *See supra* note 9 and accompanying text.

¹⁸³ *Id.*

¹⁸⁴ DODI 1325.7 (2001), *supra* note 14, para. 6.3.1.5 (C1, 10 June 2003). In *United States v. Adcock*, the CAAF re-acknowledged the established principle “that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests.” 65 M.J. 18, 23 (C.A.A.F. 2007) (quoting *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980)).

¹⁸⁵ PROGRAM STATEMENT 5880.28, *supra* note 89, ch. I, para. 3c(1)(b).

any existing service regulations or sentence computation manuals.¹⁸⁶ Only where a conflict exists would this procedure not apply. Regulatory silence on this matter is not tantamount to regulatory conflict.¹⁸⁷ While this sentence-credit scheme is subject to change as soon as Congress and the Executive determine sentence credits should be added or taken away, 18 U.S.C. § 3585(b) constitutes the applicable sentence-credit law in the military justice system via DODI 1325.7 (2001).

C. Trial Judges' Power to Adjudicate Motions for Appropriate Relief

In *Gogue*, the dissent agreed with the majority that military judges were not empowered to grant unrelated-crimes credit. The dissent's concern on this issue stemmed from the U.S. Supreme Court's opinion in *Wilson* wherein the Court held: "Congress has indicated that computation of the credit must occur after the defendant begins his sentence. A district court, therefore, cannot apply § 3585(b) at sentencing."¹⁸⁸ The dissent—as did the majority—appears to have construed this language, at worst, as a talisman preventing military judges from awarding § 3585(b)(2) credit, or, at best, as a prohibition upon granting such credit unless it can be characterized as a functional equivalent to an award of same-crimes credit, as discussed below.

A close reading of the dissent reveals a struggle to harmonize *Wilson's* application of § 3585(b) with conventional military trial practice. With respect to applying § 3585(b)(2), the dissent expressed the notion that "[m]ilitary trial judges are in no better position than their federal civilian counterparts to determine the appropriate amount of unrelated crimes credit to be given an accused when . . . [such] offenses are pending adjudication."¹⁸⁹ The dissent further stated that granting this credit would be "untenable unless, prior to court-martial, an accused has [already] been convicted and sentenced in state [or federal] court and released from . . . confinement."¹⁹⁰ Under these precise circumstances, granting unrelated-crimes credit is analogous to granting traditional *Allen* credit, i.e., same-crimes credit. When a civilian prosecution is complete—or when civilian authorities decide not to prosecute and the military proceeds to trial—any time spent in civilian pretrial confinement "is necessarily defined" upon the accused's "release . . . from . . . custody," and is therefore known before trial by court-martial.¹⁹¹ Rather than letting military judges decide for themselves whether an accused has presented enough evidence at trial to warrant an award of pretrial confinement credit, the dissent pulled the matter from the province of the military judge and relegated it to the convening authority or confinement facility commander for adjudication.¹⁹²

Toward the end of its opinion, however, the dissent seemed to have shifted sides by stating that if an accused presents detailed information regarding his unrelated state or federal criminal matters to the military judge—of which the judge is "not

¹⁸⁶ See U.S. DEP'T OF DEFENSE, MANUAL 1325.7-M, DOD SENTENCE COMPUTATION MANUAL paras. C1.1, C1.2.1, C2.4.1, C2.4.2 (27 July 2004) (C2, 9 Mar. 2007) [hereinafter DOD MANUAL 1325.7-M]; U.S. DEP'T OF ARMY, REG. 190-47, MILITARY POLICE: THE ARMY CORRECTIONS SYSTEM para. 10-19f(2) (15 June 2006); U.S. DEP'T OF ARMY, REG. 633-30, APPREHENSIONS AND CONFINEMENT: MILITARY SENTENCES TO CONFINEMENT paras. 4a, 14b(25) (28 Feb. 1989) [hereinafter AR 633-30]; U.S. DEP'T OF AIR FORCE, INSTR. 31-205, THE AIR FORCE CORRECTIONS SYSTEM para. 5.7 (7 Apr. 2004) (C1, 6 July 2007); U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE para. 9.3 (21 Dec. 2007); U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR.1640.9C, DEPARTMENT OF THE NAVY CORRECTIONS MANUAL para. 9101 (3 Jan. 2006) [hereinafter SECNAVINST 1640.9C] (deferring to the procedures provided in DOD Manual 1325.7-M); U.S. DEP'T OF HOMELAND SECURITY, MANUAL M1000.6A, UNITED STATES COAST GUARD PERSONNEL MANUAL paras. 8.F.5.d., 8.F.6.c.5. (8 Jan. 1988) (C41, 18 June 2007). See generally U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1640.9B, DEPARTMENT OF THE NAVY CORRECTIONS MANUAL para. 9311 (2 Dec. 1996) (providing detailed historical sentence computation rules consistent with PROGRAM STATEMENT 5880.28, *supra* note 89, ch. I, para. 3c(1)(b), but canceled and superseded by SECNAVINST 1640.9C).

¹⁸⁷ *United States v. Gogue*, No. 20050650, slip. op. at 8 n.8 (A. Ct. Crim. App. May 18, 2007) (Sullivan, J., dissenting) ("[S]ilence on the specific issue of confinement for unrelated offenses by a separate sovereign [is not] a conflict which allows us to ignore the exhortation of DODI 1325.7 [(2001)].").

¹⁸⁸ *United States v. Wilson*, 503 U.S. 329, 333 (1992).

¹⁸⁹ *Gogue*, No. 20050650, slip. op. at 10.

¹⁹⁰ *Id.* at 11.

¹⁹¹ *Id.*

¹⁹² An important distinction must be made between a military judge's responsibility to *award* or *grant* pretrial confinement credit, and the confinement facility commander's responsibility to *implement* or *apply* that credit. Military judges are empowered to award credit as an appropriate form of relief for the time an accused has spent in pretrial confinement. See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; MCM, *supra* note 19, R.C.M. 801(a)(4), 905(a), 906(a); *United States v. King*, 58 M.J. 110, 116 (C.A.A.F. 2003) (Baker, J., concurring in result). Confinement facility commanders, however, are responsible for applying pretrial confinement credit against approved sentences to post-trial confinement; they do not alter those approved sentences, but administratively reduce them by the amount of granted credit. See DOD MANUAL 1325.7-M, *supra* note 186, para. C2.4.1 ("The [report of result of trial (RROT)] shall constitute the official notice of administrative and judicial credit. Correctional facility commanders shall ensure that each prisoner promptly receives the credit shown in the report."); *id.* para. C2.4.2 ("Each prisoner shall receive all sentence credit directed by the military judge, as shown in the RROT. The judge will direct credit for each day spent in pretrial confinement . . ."); see also Message, 181400Z Jan. 84, HQDA DAJA-CL, subject: Credit for Pretrial Confinement, U.S. v. Allen ("Credits must be applied at the confinement facility, and not through a reduction by the convening authority of the approved sentence, because of the graduated system of good time credits. See generally *United States v. Lerner*, 1 M.J. 371 (C.M.A. 1976).").

automatically privy”—the military judge is within his power to grant appropriate credit.¹⁹³ With “such a showing at court-martial, unrelated crimes, civilian pretrial confinement based upon them, and any [resulting] sentence . . . play a role . . . supporting a potential sentence credit.”¹⁹⁴ This latter approach is the better approach because, as discussed in Part III.C.2, it allows military judges to perform their statutory and regulatory obligations to decide all interlocutory legal questions.¹⁹⁵

One important aspect of *Wilson* cannot be overstated: it addressed a certain idiosyncrasy pervasive in the federal civilian system. When the Court issued its opinion, it fully realized that postponing grants of sentence credit until a prisoner actually started serving his sentence was a Congressional mandate resulting from the nature of the civilian criminal system.¹⁹⁶ Simply put, “[f]ederal defendants do not always begin to serve their sentences immediately.”¹⁹⁷ What works in the federal civilian system, however, does not necessarily work in the military justice system. While federal civilian sentences to confinement may begin to run on some future date after conviction, sentences to confinement in the military generally “begin[] to run from the date the sentence is adjudged,”¹⁹⁸ which is usually the date of conviction and when military accused are immediately transported to their place of post-trial confinement. Unlike a federal civilian defendant, a military accused only has a limited opportunity to submit to the convening authority a request for deferment of confinement.¹⁹⁹

In their analysis of the RCM, the drafters noted these and other differences between the military and civilian judicial systems. Specifically, “[s]entencing procedures in Federal civilian courts can be followed in courts-martial only to a limited degree.”²⁰⁰ For instance, the “military does not have . . . [a] judicially supervised probation service to prepare presentence reports.”²⁰¹ As a result, the drafters crafted RCM 1001, which provides trial counsel and trial defense counsel with an avenue for presenting similar evidence, including information about the accused’s pretrial confinement.

As discussed below—and contrary to the holding in *Wilson*—the UCMJ and RCM not only provide the mechanism, but require: (1) the government to present to the military judge all pretrial confinement information; and (2) the defense to raise any motion regarding such credit before the military judge. The UCMJ and RCM also require the military judge to litigate and resolve any such motions for appropriate relief. We will first look at how the matter of sentence credit presents itself at trial, and then at a military judge’s authority to decide the matter and grant credit.

1. *Interlocutory Question or Question of Law?*

Every time trial defense counsel raises a motion for appropriate relief seeking pretrial confinement credit for his client, he is asking the military judge to “cure a defect which deprives a party of a right.”²⁰² The defect is uncredited pretrial

¹⁹³ *Gogue*, No. 20050650, slip. op. at 11.

¹⁹⁴ *Id.*

¹⁹⁵ See *supra* note 192 and accompanying discussion *infra* Part III.C.2.

¹⁹⁶ *United States v. Wilson*, 503 U.S. 329, 333–34 (1992).

¹⁹⁷ *Id.* at 333.

¹⁹⁸ UCMJ art. 57(b) (2000); MCM, *supra* note 19, R.C.M. 1113(d)(2)(A); see also AR 633-30, *supra* note 186, para. 4a (“The date the sentence of a court-martial is adjudged will mark the beginning date of the sentence to confinement.”). In the federal civilian system, the guilt phase of a trial—resulting in a possible criminal conviction—often precedes the sentencing phase by weeks or even months. See *Journalist’s Guide to Federal Courts*, http://www.uscourts.gov/journalistguide/district_criminal.html (last visited Aug. 19, 2008) (“Sentencing is generally scheduled for a month or more after the plea hearing, to allow time for the staff of the court’s Probation Office to prepare a presentence investigation report.”).

¹⁹⁹ UCMJ art. 57a(a) (2000); MCM, *supra* note 19, R.C.M. 1101(c). Federal civilian defendants, however, have the option of filing a motion for release pending sentencing and pending appeal. See 18 U.S.C. § 3143(a)–(b) (2000); *Demore v. Hyung Joon Kim*, 538 U.S. 510, 578 (2003) (Breyer, J., concurring in part and dissenting in part).

Federal law makes bail available to a criminal defendant after conviction and pending appeal provided (1) the appeal is “not for the purpose of delay,” (2) the appeal “raises a substantial question of law or fact,” and (3) the defendant shows by “clear and convincing evidence” that, if released, he “is not likely to flee or pose a danger to the safety” of the community. 18 U.S.C. § 3143(b).

Demore, 538 U.S. at 578 (Breyer, J., concurring in part and dissenting in part); *United States v. Ingle*, 454 F.3d 1082, 1084 (10th Cir. 2006) (“Pending sentencing, the presumption is that a defendant will be detained. Most defendants, however, may be released upon a showing ‘by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community.’ 18 U.S.C. § 3143(a)(1).”).

²⁰⁰ MCM, *supra* note 19, R.C.M. 1001 analysis, at A21-71.

²⁰¹ *Id.*

²⁰² *Id.* R.C.M. 906(a).

confinement time, and the right is a statutory entitlement to this credit. Counsel, in essence, is asking the military judge to decide a matter interlocutory in nature and legal in kind.²⁰³

Motions for pretrial confinement credit are interlocutory matters because they bear neither upon the merits of the case, nor upon the findings of guilty or not guilty; they are purely collateral to prosecuting the charged offenses, i.e., proving the elements of the crimes.²⁰⁴ A military judge can decide whether an accused is entitled to pretrial confinement credit, and how much, without passing judgment upon the accused for his crimes.

Motions for pretrial confinement credit are also questions of law because they prompt the military judge to apply confinement credit law to a given set of facts.²⁰⁵ For example, the military judge will apply 18 U.S.C. § 3585(b)(2) to an agreed-upon or disputed time period an accused spent in confinement awaiting trial to determine his eligibility for the credit and the proper amount. Thus, a motion for pretrial confinement credit is an interlocutory question as well as a question of law. The next section examines a military judge's specific authority to adjudicate motions for sentence credit.

2. Power to Decide Interlocutory Questions and Questions of Law

When Congress passed the Military Justice Act of 1968,²⁰⁶ it “redesignate[d] the law officer of a court-martial as a military judge[,] and [gave] him functions and powers more closely aligned to those of Federal district judges.”²⁰⁷ For example, as federal civilian judge equivalents, military judges are required to preside over all general courts-martial,²⁰⁸ and “shall rule upon all questions of law and all interlocutory questions arising during the proceedings.”²⁰⁹ Questions of law and interlocutory questions present themselves in the form of motions at trial. Rule for Courts-Martial 905(a) defines a motion as “an application to the *military judge* for particular relief.”²¹⁰ Moreover, trial defense counsel are required to file motions for appropriate relief²¹¹ seeking credit for pretrial confinement at trial, else the matter will be waived absent plain error.²¹² Since motions for pretrial confinement credit are interlocutory questions of law that must be raised at trial, military judges have the primary responsibility for hearing these motions²¹³ and “for providing credit where credit is due.”²¹⁴

²⁰³ *Id.* R.C.M. 801(e)(5) discussion (“A question may be both interlocutory and a question of law.”).

²⁰⁴ *Id.* (“[I]nterlocutory questions include all issues which arise during trial other than the findings . . . , sentence, and administrative matters A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty.”); *see also* United States v. Berry, 20 C.M.R. 325, 329 (C.M.A. 1956) (stating interlocutory questions are not “concerned with disputed questions of fact regarding a matter which would bar or be a complete defense to the prosecution”); United States v. Ornelas, 6 C.M.R. 96, 100 (C.M.A. 1952) (stating an interlocutory question “does not bear on the ultimate merits of the case”).

²⁰⁵ MCM, *supra* note 19, R.C.M. 801(e)(5) discussion (“Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law”); United States v. Spaustat, 57 M.J. 256, 260 (C.A.A.F. 2002) (“The proper application of credit for illegal pretrial punishment and lawful pretrial confinement are questions of law”). “A ruling on an interlocutory [legal] question should be preceded by any necessary inquiry into the pertinent facts and law.” MCM, *supra* note 19, 801(e)(4) discussion.

²⁰⁶ Pub. L. No. 90-632, 82 Stat. 1335.

²⁰⁷ United States v. Norfleet, 53 M.J. 262, 267 (C.A.A.F. 2000) (noting Congress also “streamline[d] court-martial procedures in line with procedures in U.S. district courts”) (internal quotation marks omitted). *See generally* Jacob Hagopian, *The Uniform Code of Military Justice in Transition*, ARMY LAW., July 2000, at 1 (discussing significant changes to the UCMJ contained in the Military Justice Act of 1968).

²⁰⁸ UCMJ art. 26(a) (2000) (“A military judge shall be detailed to each general court-martial[, and] . . . shall preside over each open session of the court-martial to which he has been detailed.”).

²⁰⁹ *Id.* art. 51(b); MCM, *supra* note 19, R.C.M. 801(a)(4) (“The military judge shall . . . rule on all interlocutory questions and all questions of law raised during the court-martial.”); *see also* UCMJ art. 51(d) (“The military judge[, in trials without members,] shall determine all questions of law and fact arising during the proceedings”); UCMJ art. 39(a)(1)–(2) (2000) (“[T]he military judge may . . . call the court into session . . . [to] hear[] and determin[e] motions raising defenses or objections[, or to decide] . . . any matter which may be ruled upon by the military judge[,] . . . which are capable of determination without trial of the issues raised by a plea of not guilty.”). *See generally* Lieutenant Colonel Gary Holland & Major Clyde Tate, *An Ongoing Trend: Expanding the Status and Power of The Military Judge*, ARMY LAW., Oct. 1992, at 23 (discussing military judges’ increase in power and status comparable to that of their federal civilian counterparts).

²¹⁰ MCM, *supra* note 19, R.C.M. 905(a) (emphasis added).

²¹¹ *Id.* R.C.M. 906(a).

²¹² *Id.* R.C.M. 801(g), 905(e); United States v. King, 58 M.J. 110, 115 (C.A.A.F. 2003); *see* United States v. Spaustat, 57 M.J. 256, 268 (C.A.A.F. 2002) (Crawford, J., concurring in result) (stating that waiver under “the *Allen* rule” is grounded in “the fundamental principle that the accused is the gatekeeper of the evidence and director of the sentencing drama”).

²¹³ *King*, 58 M.J. at 114.

²¹⁴ *Id.* at 116 (Baker, J., concurring in result); United States v. DeYoung, 29 M.J. 78, 80 (C.M.A. 1989) (citing Article 51(b), UCMJ, and RCM 801(a)(1), and holding that “[w]ith such express congressional and presidential intent, . . . [h]is duty may not be evaded or ignored”); *see also* MCM, *supra* note 19,

Furthermore, if any state, federal, or foreign sovereignty, or military authority imposed pretrial restraint upon an accused, RCM 1001(b)(1) requires trial counsel to disclose that information to the military judge.²¹⁵ Pretrial restraint includes pretrial confinement.²¹⁶ Army regulations mirror this requirement to disclose,²¹⁷ which aids the military judge in making a determination regarding what type and amount of credit to award an accused. Moreover, after a court-martial concludes, sentence credit information is required in the trial report²¹⁸ and in the convening authority's initial action.²¹⁹ Logically, and according to law and regulation, a military judge must adjudicate the type and amount of credit before the credit can be included in these required documents.²²⁰

The majority in *Gogue* determined 18 U.S.C. § 3585(b)(2) does not apply to trials by court-martial, but—in any event—military judges are powerless to litigate and award unrelated-crimes credit. The better approach would have been to acknowledge § 3585(b)(2)'s applicability pursuant to the holdings in *Allen*, *Murray*, *Martin*, *Smith*, and *Sherman*, and grant relief in an opinion modeled on *United States v. Kovach*.²²¹ This result would have been consistent with the *military* sentencing jurisprudence. While this result may not have been attainable at trial in *Gogue*—even with the correct application of the law—trial defense counsel preserved the issue, and the record on appeal was fully developed with supplemental material.²²²

R.C.M. 1001(b)(1) (“If the defense objects to [any pretrial restraint] data as being materially inaccurate or incomplete, or containing specified objectionable matter, *the military judge shall determine the issue*. Objections not asserted are waived.”) (emphasis added).

²¹⁵ MCM, *supra* note 19, R.C.M. 1001(b)(1) (“Trial counsel shall inform the court-martial of . . . the duration and nature of any pretrial restraint.”); *Spaustat*, 57 M.J. at 256 (Crawford, C.J., concurring) (“Military sentencing procedures place a duty on the Government to present evidence which may result in either a lessening of punishment or credit to an accused.”).

²¹⁶ MCM, *supra* note 19, R.C.M. 304(a)(4) (“Pretrial confinement is physical restraint . . . depriving a person of freedom pending disposition of offenses.”).

²¹⁷ U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-25 (16 Nov. 2005) (“If the accused has been subjected to pretrial restraint, the trial counsel will . . . [d]isclose [such] on the record[, and, i]f necessary, . . . explain [its] . . . nature . . . [and] request the military judge to conduct an inquiry to determine the relevant facts and rule whether the restraint was tantamount to confinement.”).

²¹⁸ *Id.* para. 5-30a. (“[The report of result of trial] will include the total number of days credited against confinement adjudged whether automatic credit for pretrial confinement . . . , or judge-ordered additional administrative credit . . . , or for any other reason specified by the judge . . .”).

²¹⁹ *Id.* para. 5-32a. (“The convening authority will show in his or her initial action all credits against a sentence to confinement, either as adjudged or as approved, regardless of the source of the credit . . .”).

²²⁰ See DOD MANUAL 1325.7-M, *supra* note 186, para. C2.4.1 (“The [report of result of trial] shall constitute the official notice of administrative and judicial credit.”).

²²¹ No. 9800764 (A. Ct. Crim. App. Sept. 16, 1999). In *Kovach*, the ACCA acknowledged 18 U.S.C. § 3585(b)(1) applied to trials by court-martial pursuant to *Allen*. *Id.* at 2. The court granted sixty-nine days credit for civilian pretrial confinement because SGT Kovach “provided proof to the court that his state incarceration was for the same offenses for which he was ultimately court-martialed, and that he received no credit from state sentencing authorities for that confinement.” *Id.* As previously noted, however, *see* pp. 16–17, the *Gogue* opinion appears to have started a trend within the ACCA against further favorably developing the area of unrelated-crimes credits. In *United States v. Jacobson*, the ACCA refused to grant ninety-six days of unrelated-crimes credit because, at trial, defense counsel ostensibly waived the matter. No. 20050013, slip. op. at 2 (A. Ct. Crim. App. May 23, 2007). The ACCA further asserted that, on appeal, no credit was due because of “appellant’s failure to exhaust his administrative remedies,” *despite* “appellant’s own uncertainty of the duration of his civilian confinement.” *Id. Contra* *United States v. Thompson*, No. 36943, 2007 CCA LEXIS 377, at *3–4 (A.F. Ct. Crim. App. Sept. 24, 2007) (awarding three days of confinement credit despite appellant having foregone his opportunity to request credit at trial, but showing his credit entitlement on appeal). The CAAF has noticed this trend and, on 13 March 2008, granted review in *Gogue* on the following issues:

WHETHER, PURSUANT TO 18 U.S.C. § 3585, APPELLANT IS ENTITLED TO CREDIT TOWARD THE CONFINEMENT ADJUDGED BY A COURT-MARTIAL FOR CONFINEMENT AT STATE FACILITIES SERVED FOR CHARGES UNRELATED TO HIS COURT-MARTIAL SENTENCE AND NOT CREDITED AGAINST ANOTHER SENTENCE.

....

WHETHER, UNDER *UNITED STATES v. WILSON*, 503 U.S. 329 (1992), MILITARY JUDGES LACK THE AUTHORITY TO CALCULATE AND APPLY PRETRIAL CONFINEMENT CREDIT.

United States v. Gogue, 66 M.J. 287 (C.A.A.F. 2008). The CAAF also granted review on the issue: “WHETHER, UNDER 18 U.S.C. § 3585, APPELLANT IS ENTITLED TO CONFINEMENT CREDIT FOR A PERIOD OF INCARCERATION THAT HE SERVED IN A STATE FACILITY FOR A STATE OFFENSE UNRELATED TO THE COURT-MARTIAL.” *United States v. Owens*, 66 M.J. 288 (C.A.A.F. 2008).

²²² *United States v. Gogue*, No. 20050650, slip. op. at 4 n.2 (A. Ct. Crim. App. May 18, 2007) (Sullivan, J., dissenting) (“[T]he record was supplemented at the court’s request by appellate pleadings, an affidavit and supporting documents filed by the government, and matters subsequently filed by the defense.”); *see United States v. Yanger*, 66 M.J. 534, 538–39 (C.G. Ct. Crim. App. 2008) (discussing, without deciding, the issue of credit for civilian pretrial confinement, and inviting the parties to further develop the record on remand).

IV. Motion for Appropriate Relief—Claiming Unrelated Crimes Credit

Trial defense counsel should make a motion for unrelated-crimes credit at trial to avoid waiver.²²³ To be *effective*, however, the motion must contain all the necessary, fundamental components.²²⁴ The motion is a request to cure a particular defect, so defense counsel must articulate the precise relief he wants from the military judge, i.e., the exact amount of sentence credit in days, weeks, or months.²²⁵ Defense counsel must also provide the “legal basis” for the requested relief—any statute, rule, regulation, or case law that forms the legal foundation for the requested relief.²²⁶ Finally, defense counsel must present the military judge with “an offer of proof” detailing the specific facts upon which he is relying in support of his motion.²²⁷

At a minimum, the motion for sentence credit should clearly state the accused is seeking credit for civilian pretrial confinement imposed for an offense unrelated to his trial by court-martial. The motion must thereafter state that the legal basis for the requested relief rests upon the following authorities: 18 U.S.C. § 3585(b)(2); Program Statement 5880.28, ch. I, para. 3c(1)(b); RCM 905; RCM 906; DODI 1325.7 (2001); and the holdings in *Allen, Murray, Rock, Smith, and Sherman*.

Furthermore, the offer of proof must consist of the essential facts necessary for successfully adjudicating the motion. Based on the requirements in 18 U.S.C. § 3585(b)(2), as implemented by the DOJ, the accused should assert and substantiate as many of the following facts as possible:

- state, federal, or foreign law enforcement authorities held the accused in official detention during the pretrial confinement period alleged;
- state, federal, or foreign law enforcement authorities imposed the detention for one or more crimes the accused committed *after* he committed the crimes for which he is being tried by court-martial. In other words, the court-martial offenses precede the unrelated civilian offenses;
- the accused was not tried by court-martial for the subsequent, unrelated civilian crimes;
- the accused was not tried by any state, federal, or foreign court for the subsequent, unrelated civilian crimes; and
- the accused has not otherwise received credit for the lawful, civilian pretrial confinement against any other sentence.²²⁸

The linchpin of the accused’s motion is that he received no sentence credit for the unrelated crimes. Factors tending to show the accused received no credit for his civilian pretrial confinement include the following: (1) civilian authorities dismissed the unrelated charges; (2) the trial judge sentenced the accused to probation without confinement, a sentence against which he could not credit the pretrial confinement for the unrelated charges; and (3) the resulting sentence to confinement for the unrelated charges did not include “time served;” a sentence to “time served” indicates the judge credited the accused’s pretrial detention against his post-trial sentence.²²⁹

Providing an adequate factual basis upon which the military judge can ultimately base his decision can mean the difference between winning and losing the motion for sentence credit.²³⁰ Most important, trial defense counsel’s proffer is only a good start; an “offer of proof is not evidence, and is not sufficient standing alone to meet the factual standard of proof.”²³¹ Defense counsel must still present evidence of those facts to the military judge through legally competent means,

²²³ *United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003); *United States v. King*, 58 M.J. 110, 115 (C.A.A.F. 2003); *United States v. Spaustat*, 57 M.J. 256 (C.A.A.F. 2002).

²²⁴ Major Victor Hansen, *The Art of Trial Advocacy*, ARMY LAW., Feb. 2001, at 30 (discussing effective motions practice).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *See Hughes v. Slade*, 347 F. Supp. 2d 821, 825 (D. Cal. 2004).

²²⁹ *See* PROGRAM STATEMENT 5880.28, *supra* note 89, ch. I, para. 3c(1)(b); *see also Hughes*, 347 F. Supp. 2d at 826 n.7.

²³⁰ *Compare United States v. Kovach*, No. 9800764, slip. op. at 2 (A. Ct. Crim. App. Sept. 16, 1999) (“[Appellant] has provided proof to the court that . . . he received no credit from state sentencing authorities for [his pretrial] confinement[.] . . . and [we] will grant relief.”), *with United States v. Martin*, No. 9700900, slip. op. at 3 (A. Ct. Crim. App. June 18, 1998) (“There is absolutely no evidence in this record that the appellant ‘has not been credited’ with the days . . . ‘against another sentence. . . .’ Without a factual predicate, the appellant is entitled to no relief on his claim of error.”). Appendix C provides a sample motion that conforms to the *Rules of Practice Before Army Courts-Martial* para. 3 (1 May 2004) (current as of March 2007). *See infra* App. C.

²³¹ Hansen, *supra* note 224, at 31.

e.g., witness testimony,²³² self-authenticating records,²³³ or a stipulation of fact,²³⁴ and then marshal and apply the evidence in conjunction with the law in a persuasive argument upon the motion to support the requested relief.²³⁵

V. Conclusion

Allen credit is still available today despite the updated federal sentence-credit statute, and minor changes to the Defense Secretary's regulatory instruction. In the post-*Allen* era, however, credit for civilian pretrial confinement is available not only for the offenses for which a court-martial tries and sentences military accused (same-crimes credit), but also for all other offenses for which they are officially detained *after* they commit the court-martial offenses (unrelated-crimes credit). Credit on either basis is available to military accused provided they have not otherwise received that credit against another sentence. Despite the adverse decision in *Gogue*, the extant sentencing jurisprudence supports these conclusions. Moreover, when military judges are asked to litigate motions at trial for unrelated-crimes credit, they are fully and legally competent to do so. Based on the current version of 18 U.S.C. § 3585(b)(2) itself—and adopted into military criminal law pursuant to DODI 1325.7 (2001)—military accused are entitled to unrelated-crimes credit, and should move military trial judges for this credit at every available, non-frivolous opportunity.

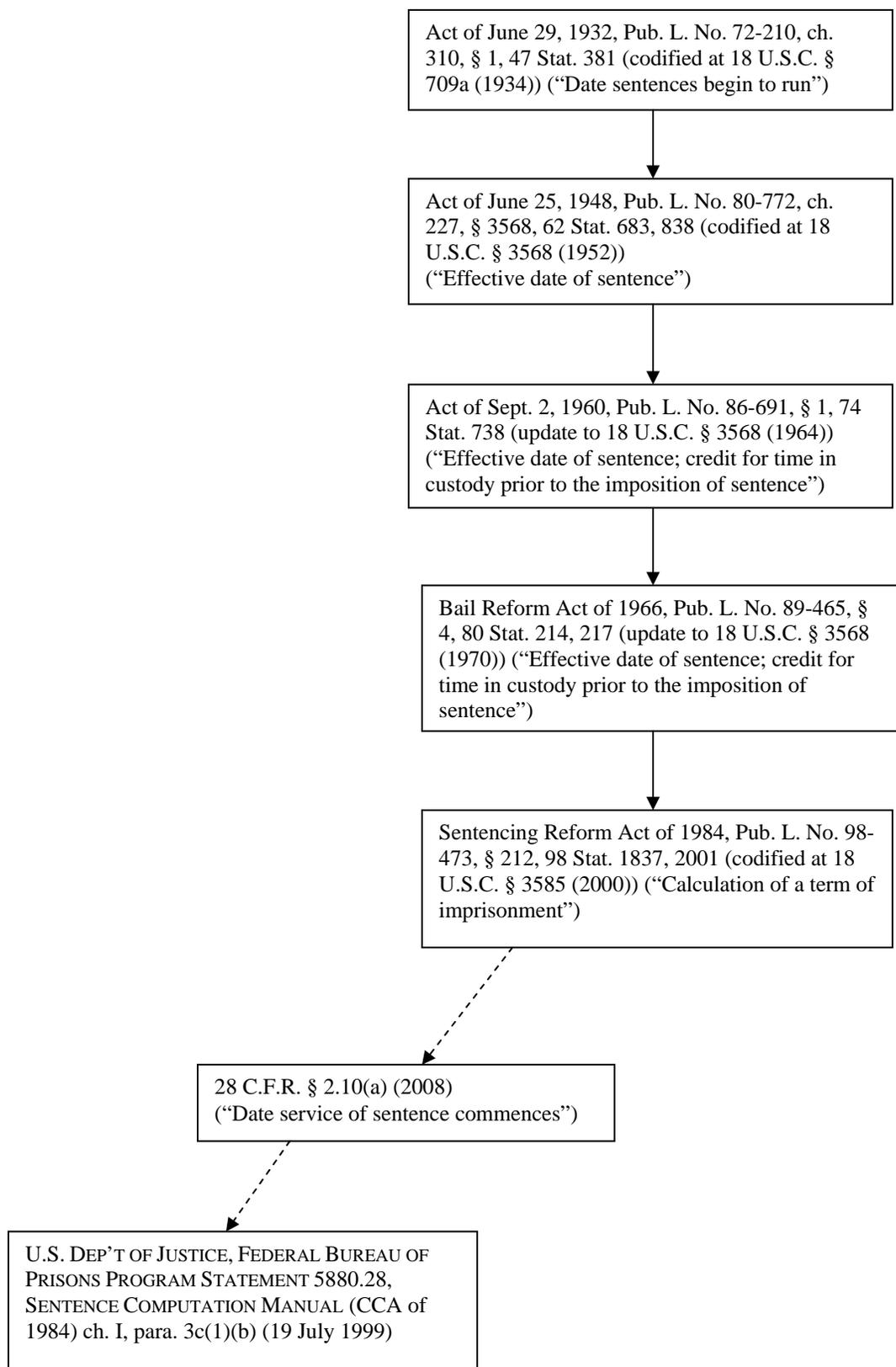
²³² MCM, *supra* note 19, MIL. R. EVID. 601–02.

²³³ *Id.* MIL. R. EVID. 902.

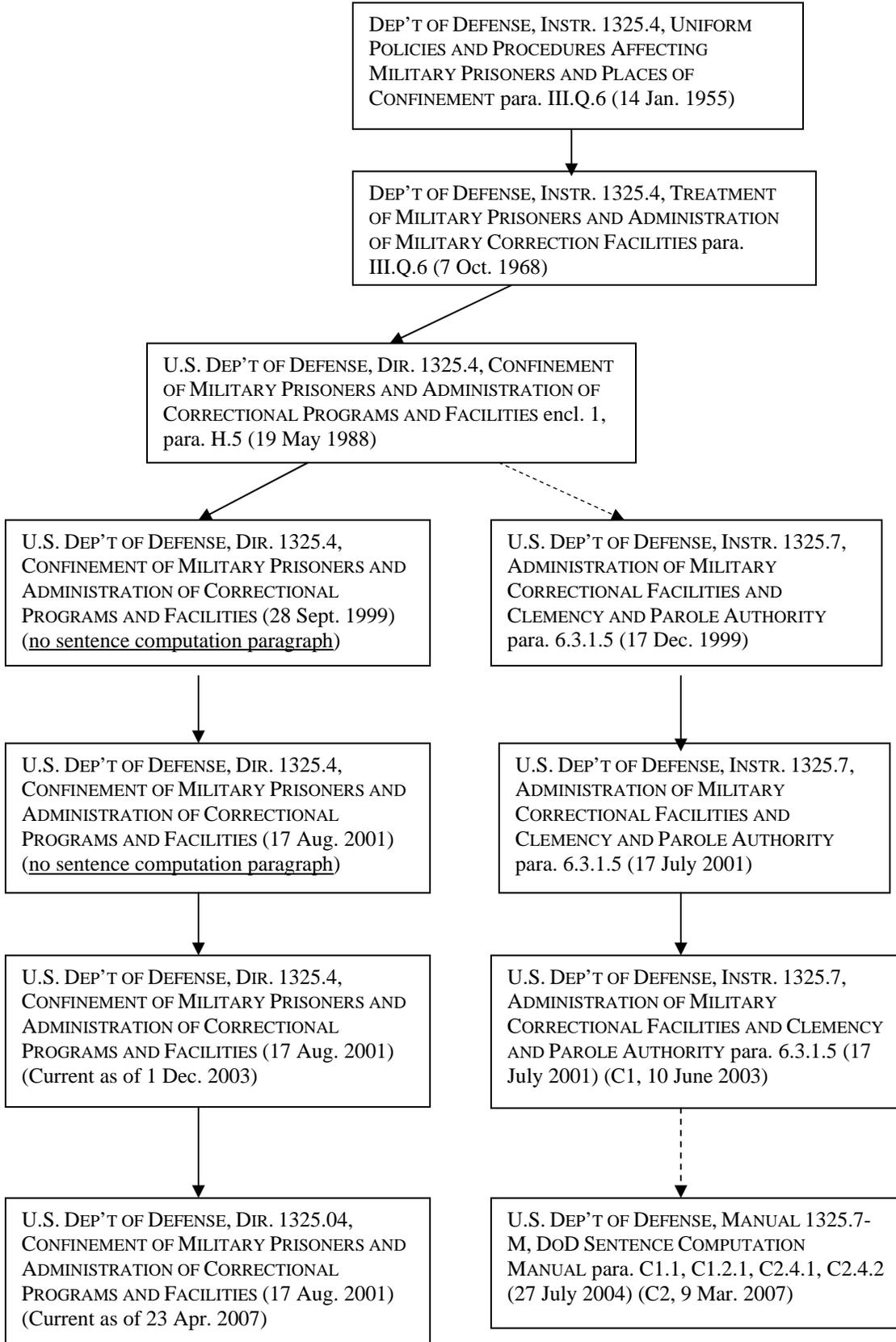
²³⁴ *Id.* R.C.M. 811.

²³⁵ Hansen, *supra* note 224, at 31.

Appendix A



Appendix B



Appendix C

Motion Format

UNITED STATES OF AMERICA)	
)	Defense Motion for
v.)	Appropriate Relief
)	
JONES, Igor L.)	
Private E1, U.S. Army, 123-45-6789)	
272d Chemical Company)	25 April 2008
42d Infantry Division (Mechanized))	
Fort Drum, New York 13602)	

RELIEF SOUGHT

The Defense in the above case requests that the Court grant the accused fourteen (14) days of administrative pretrial confinement credit pursuant to 18 U.S.C. § 3585(b)(2) for the time he spent in official, civilian detention in the Jefferson County Jail, Watertown, New York. The Defense requests oral argument on this matter.

BURDEN OF PROOF AND STANDARD OF PROOF

The burden or standard of proof on any factual issue the resolution of which is necessary to decide this motion shall be by a preponderance of the evidence. R.C.M. 905(c)(1). The burden of persuasion on any factual issue the resolution of which is necessary to decide this motion shall be on the moving party, the Defense. R.C.M. 905(c)(2)(A).

FACTS

The Prosecution and Defense, with the express consent of the accused, agree to stipulate to the following facts for the purposes of this motion.

On 4 January 2008, the 272d Chemical Company chain of command administered a 100% urinalysis inspection. This date coincided with the troops returning from holiday season block leave. Based on his drug use on 26 December 2007, and fearful of what the command might do if he tested positive, Private (PVT) Jones perpetrated an unauthorized absence from his unit (AWOL) on 28 January 2008.

On 3 February 2008, while still AWOL, Jefferson County Police arrested PVT Jones for stealing a six-pack of beer from a neighborhood convenience store in Watertown, New York. As a result, PVT Jones spent fourteen (14) days in civilian pretrial confinement in the Jefferson County Jail, 3–16 February 2008. On 17 February 2008, he pleaded guilty to robbery, and received a sentence to probation—a sentence that his pretrial confinement could not offset. Because the trial judge could not offset a sentence to probation, PVT Jones received no credit against that, or any other, sentence for the fourteen (14) days he spent in the Jefferson County Jail.

In a state of despair, PVT Jones returned to his unit on 1 March 2008 and faced only minor restriction to post. In mid-March 2008, the drug-testing laboratory informed the unit that PVT Jones tested positive for marijuana, cocaine, and ecstasy. On 1 April 2008, the government charged PVT Jones with illegal drug use and AWOL, but not with the convenience store robbery. These charges were later preferred, and referred to trial by court-martial on 15 April 2008.

LAW

The Defense relies on the following authorities in support of its motion:

18 U.S.C. § 3585(b)(2) (2000)

R.C.M. 905(a), (b) (2008)
R.C.M. 906(b) (2008)

United States v. Allen, 17 M.J. 126 (C.M.A 1984)
United States v. Murray, 43 M.J. 507 (A.F. Ct. Crim. App. 1995)
United States v. Rock, 52 M.J. 154 (C.A.A.F. 1999)
United States v. Sherman, 56 M.J. 900 (A.F. Ct. Crim. App. 2002)
United States v. Smith, 56 M.J. 290 (C.A.A.F. 2002)

U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY para. 6.3.1.5 (17 July 2001) (C1, 10 June 2003)

U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5880.28, SENTENCE COMPUTATION MANUAL (CCA of 1984) ch. I, para. 3c(1)(b) (19 July 1999)

WITNESSES/EVIDENCE

The Defense requests that the following witnesses and evidence be produced and present for this motion should the government later disagree with one or more of the stipulated facts, or withdraw from the stipulation in its entirety:

Sergeant James E. Glowacki, Jailor, Jefferson County Jail
Ms. Bertha B. Kool, Custodian of Records, Jefferson County Court Clerk's Office
Jefferson County Jail Prisoner Log Book
Jefferson County Court, Result of Trial for Igor L. Jones, dated 17 February 2008

ARGUMENT

Private Jones is entitled to fourteen days of administrative pretrial confinement credit for the time he spent in official, civilian detention in the Jefferson County Jail, Watertown, New York. This credit is based upon 18 U.S.C. § 3585(b)(2).

In *United States v. Allen*, the court considered the assertion that military accused were entitled to the same pretrial confinement credit federal civilian prisoners received under federal law. This claim was based on "DOD Instruction 1325.4 (October 7, 1968) . . . [, which] state[d], *inter alia*, that procedures employed by the military services for computation of sentence[s] are to be in conformity with those published by the Department of Justice." *United States v. Allen* 17 M.J. 126 (C.M.A. 1984). The *Allen* Court agreed, holding that "the instruction as written . . . voluntarily incorporat[es into the military justice system] the pretrial-sentence credit extended to other Justice Department convicts" pursuant to 18 U.S.C. § 3568. *Id.* at 128.

After the court decided *Allen*, however, § 3568 was replaced by 18 U.S.C. § 3585(b), and DODI 1325.4 was updated and reissued as DODI 1325.7. Despite these changes, the Court of Appeals for the Armed Forces (CAAF) revalidated the *Allen* analysis in two subsequent opinions. In *United States v. Rock*, 52 M.J. 154, 157 (C.A.A.F. 1999), the court stated: "One thing is clear[,] . . . it is the Secretary of Defense himself who has mandated that the armed forces comply with federal practice and credit pretrial confinement." Three years later, in *United States v. Smith*, 56 M.J. 290, 293 (C.A.A.F. 2002), the CAAF observed that the regulatory basis for applying repealed § 3568—DODI 1325.4—"was later revised and reissued [as DODI 1325.7]," but "without significant change to the provision at issue in this case." The CAAF again revalidated the *Allen* analysis and expressly found: "As written, 18 U.S.C. § 3585(b) and DODI 1325.7 apply . . . to prisoners serving [court-martial] sentences to confinement." *Id.* at 293. As such, DODI 1325.7 is the regulatory conduit through which § 3585(b) applies to the military justice system.

18 U.S.C. § 3585(b) currently states:

A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

Under § 3585(b)(2), PVT Jones is entitled to sentence credit for the pretrial confinement imposed in connection with the convenience store robbery—the so-called unrelated crime the government did not refer to trial by court-martial. Private Jones is eligible for unrelated-crimes credit under § 3585(b)(2) because his drug use and AWOL offenses predate the convenience store robbery. The civilian pretrial confinement imposed for that robbery has also not been credited against any other sentence to post-trial confinement. Specifically, the 3 February 2008 convenience store robbery qualifies as a “charge for which” PVT Jones “was arrested *after* the commission of” his 26 December 2007 drug use and 28 January 2008 AWOL “offense[s] for which” the court-martial may impose a sentence to confinement. 18 U.S.C. § 3585(b)(2).

In deciding whether civilian pretrial confinement could be credited against a federal post-trial sentence, the Air Force Court of Criminal Appeals (AFCCA) issued an opinion in *United States v. Murray*, 43 M.J. 507 (A.F. Ct. Crim. App. 1995). The AFCCA conducted the following analysis of § 3585(b) with a positive result:

The meaning of 18 U.S.C. § 3585(b) is plain—as long as a federal prisoner has not already received credit for pretrial confinement against another sentence, he receives credit against his pending federal sentence. The statute does not discriminate based on the sovereign responsible for the pretrial confinement. Rather, it readily appears Congress intended this statute to cover state-imposed pretrial confinement. Otherwise, why use broad terms like “official detention” and “any other charge . . . after the commission of the offense,” when Congress could have expressly narrowed the scope of the statute to federal custody? Moreover, we see the no-prior-credit proviso in the last line of the statute as including the scenario where a convict has committed crimes under both federal and state law. If a prisoner has been confined by the state after the commission of the offense, then he receives credit against his federal sentence—*unless* such custody already has been credited against a *state* sentence. The United States Sentencing Commission also shares this interpretation of the law.

More important, the United States courts have construed . . . the broader language of the current statute [18 U.S.C. § 3585(b)] to require federal credit for state pretrial confinement. In *Wilson*, the Supreme Court . . . did not dispute the Sixth Circuit’s construction of the statute to require federal sentence credit for state pretrial confinement. Indeed, the Court expressly conceded the new statute had broadened the effect of its predecessor in three ways, including enlarging the class of defendants entitled to credit.

Therefore, . . . if [SrA Murray] had been convicted and sentenced in United States District Court, the Attorney General would credit his sentence for the [forty-six] days of state pretrial confinement. Department of Defense Directive 1325.4 [(1988)] requires the military to do the same. In our decretal paragraph, we will direct that [SrA Murray] receive [forty-six] days of additional sentence credit.

Id. at 514–15; *see also* U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5880.28, SENTENCE COMPUTATION MANUAL (CCA of 1984) ch. I, para. 3c(1)(b) (19 July 1999) (“Prior Custody Credit will be given for time spent in official detention as the result of any federal, state or foreign arrest . . .”). Although the AFCCA decided *Murray* based on § 3585(b)(1), the court reached the same result, based on § 3585(b)(2) and analogous facts, in its opinion in *United States v. Sherman*, 56 M.J. 900 (A.F. Ct. Crim. App. 2002).

CONCLUSION

Based on the above, the Defense requests that the Court grant the accused fourteen (14) days of administrative pretrial confinement credit pursuant to 18 U.S.C. § 3585(b)(2) for the time he spent in official, civilian detention in the Jefferson County Jail, Watertown, New York.

Timothy J. Calhoun
CPT, JA
Defense Counsel

I certify that I have served or caused to be served a true copy of the above motion on the Trial Counsel on _____ 200__.

Timothy J. Calhoun
CPT, JA
Defense Counsel