IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee,	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20110717
Private (E-1) **Rollan D. Mead,** United States Army, Appellant	)	USCA Dkt. No. 13-0459/AR

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IN THE UNITED STATES COURT OF APPEALS
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U N I T E D S T A T E S, Appellee v. Private (E-1) **ROLLAN D. MEAD,** United States Army, Appellant	**FINAL BRIEF ON BEHALF OF APPELLANT** Crim. App. Dkt.No. 20110717 USCA Dkt. No. 13-0459/AR

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

Issue Granted

WHETHER THE ARMY COURT INCORRECTLY RULED THAT *PIERCE* CREDIT MAY BE APPLIED AGAINST THE ADJUDGED SENTENCE WHERE THIS RESULTS IN NO RELIEF TO APPELLANT AND WHETHER THE ARMY COURT INCORRECTLY RULED THAT PAY LOST AS A RESULT OF PRIOR REDUCTION UNDER ARTICLE 15, UCMJ, NEED NOT TO BE RESTORED TO APPELLANT.

Introduction

The Army Court's decision materially prejudiced the appellant's substantive right to credit under *United States v. Pierce*, 27 M.J. 367, 369 (C.M.A. 1989). Its decision allows a court-martial to apply *Pierce* credit against an adjudged sentence in such a fashion as to render it meaningless, and denies to the appellant "complete" *Pierce* credit for lost pay. Furthermore, the Army Court has created a system which invites trial courts and convening authorities to apply *Pierce* credit in an arbitrary manner. This Court should establish a standard for

Pierce credit which ensures servicemembers are not punished twice for the same conduct in violation of the constitution's prohibition against double jeopardy.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On June 7, 2011, and August 15, 2011, a military judge sitting as a general court-martial tried Private (PVT) Rollan D. Mead, at Fort Hood, Texas. Consistent with his pleas, the military judge convicted the appellant of one specification of driving under the influence of alcohol, one specification of wrongful use of amphetamines and one specification of involuntary manslaughter in violation of Articles 111, 112a and 119, UCMJ, 10 U.S.C. §§ 911, 912a, 919 (2006).

The military judge sentenced PVT Mead to forfeit all pay and allowances, thirty-eight months confinement and a bad-conduct discharge. Pursuant to a pre-trial agreement, the convening authority approved only twenty-four months confinement and the remainder of the adjudged sentence.

On February 25, 2013, the Army Court affirmed the findings and sentence. (JA 7). On March 27, 2013, PVT Mead requested the Army Court's reconsideration. The Army Court denied that request on April 8, 2013. On August 5, 2013, this court granted PVT Mead's Petition for Grant of Review.

Statement of Facts

Private Mead previously received nonjudicial punishment pursuant to Article 15, UCMJ, for conduct which was the subject of Charge II and its specification—use of amphetamines. (JA 10, 40). Private Mead signed a stipulation of fact with government counsel pursuant to the requirements of his Offer to Plead Guilty (OTP). (JA 35). The stipulation discusses the prior Article 15, UCMJ, punishment, but does not discuss credit owed pursuant to *Pierce*, 27 M.J. at 369. (JA 37). In particular, the stipulation includes no agreement regarding how much *Pierce* credit PVT Mead was entitled to, or how that credit should be applied. Nothing in the stipulation requested the military judge to determine or apply *Pierce* credit.

In announcing his sentence, the military judge stated that pursuant to *Pierce*, he reduced PVT Mead's adjudged sentence to confinement by thirty days for the extra duty which PVT Mead performed and by thirty days for the loss of rank which PVT Mead suffered. (JA 31-33). The military judge applied both thirty

day credits against the sentence he adjudged, and sentenced PVT Mead to thirty-eight months of confinement. (JA 31).

As part of his post-trial clemency petition, PVT Mead, through counsel, specifically requested *Pierce* credit for the first time. (JA 47). Pursuant to a pre-trial agreement, the convening authority approved only twenty-four months confinement and the remainder of the adjudged sentence. (JA 45, 53). The convening authority did not provide any relief or credit for the punishments PVT Mead previously received.

Error and Argument

Summary of Argument

Private Mead is entitled to meaningful and "complete" *Pierce* credit. Meaningful *Pierce* credit cannot be applied against an adjudged sentence where that application results in no relief. Private Mead must receive *Pierce* credit for pay lost in consequence of prior non-judicial punishment because of *Pierce's* mandate for total and complete relief for that prior non-judicial punishment. The Army Court denied PVT Mead, and those similarly situated in the future, complete credit as mandated by *Pierce*.

Standard of Review

This Court reviews a military judge's ruling on sentencing credit de novo. *United States v. Spaustat*, 57 M.J. 256, 260 (C.A.A.F. 2002).

Law and Analysis

The Army Court incorrectly found that *Pierce* credit may be applied against an adjudged sentence, even where no relief to PVT Mead results. *United States v. Mead*, 72 M.J. 515, 518 (A. Ct. Crim. App. 2013) (JA 5). The Army Court also incorrectly found that there is no legal obligation to provide "complete" *Pierce* credit for forfeiture of pay that resulted from reduction in rank pursuant to Article 15, UCMJ. (JA 7).

1. The Army Court's decision that *Pierce* credit may be applied against an adjudged sentence, directly contradicts *Pierce's* mandate for real and total relief and will result in disparate treatment amongst similarly situated servicemembers.

This Court previously held that, in those rare cases where an accused is to be retried for an offense for which he was previously punished, his credit must be real, meaningful and complete. *Pierce*, 27 M.J. at 369. Here, the Army Court held that *Pierce* credit may be illusory and may confer no benefit whatever upon PVT Mead. *Mead*, 72 M.J. at 518. The Army Court relies on *United States v. Flynn*, 39 M.J. 774, 775 (A.C.M.R. 1994), and *United States v. Edwards*, 42 M.J. 381 (C.A.A.F. 1995), for the proposition that the convening authority is under no obligation to award *Pierce* credit to PVT Mead because the

military judge awarded *Pierce* credit, even though it resulted in no relief to PVT Mead. This proposition is faulty for several reasons.

In *Edwards*, the trial defense counsel specifically requested *Pierce* credit. 42 M.J. at 382. Furthermore, the relief granted by the military judge in *Edwards* provided actual relief to the accused. Here, the government introduced evidence of the prior non-judicial punishment in accordance with Rule for Courts-Martial [hereinafter R.C.M.] 1001(b)(2) and (b)(5). (JA 13-15, 39). Although trial defense counsel referred to the prior non-judicial punishment during sentencing as a matter in mitigation, it was only raised after the government had already introduced the record of the Article 15 punishment. Furthermore, he did not specifically request that the military judge grant *Pierce* credit as was done in *Edwards*. (JA 23-29).

An accused controls by whom *Pierce* credit is given and may introduce evidence of prior punishment for purposes of sentence mitigation without introducing it for purposes of sentence credit:

> The accused may: (1) introduce the record of the prior NJP for consideration by the court-martial during sentencing; (2) introduce the record of the prior NJP during an Article 39(a), UCMJ, 10 USC § 839(a), session for purposes of adjudicating credit to be applied against the adjudged sentence; (3) defer introduction of the record of the prior NJP during trial and present it to the convening authority prior to action on the

> sentence; or (4) choose not to bring the record of the prior NJP to the attention of any sentencing authority.

United States v. Gammons, 51 M.J. 169, 183 (C.A.A.F. 2005) (emphasis added).

Where the defense elects not "to raise the issue of *credit* for prior punishment during the court-martial," the convening authority must grant an appellant *Pierce* credit. *Ridgeway*, 48 M.J. 905, 906 (A.C.M.R. 1998) (emphasis added). However, even when an accused has previously been credited for prior non-judicial punishment, a military judge or panel must consider the prior punishment in mitigation when determining an appropriate sentence, independent of any specific credit. R.C.M. 1001(c)(1)(B).

Although the trial defense counsel here argued for mitigation of PVT Mead's sentence in light of the prior non-judicial punishment, he did not specifically request *Pierce* credit from the military judge. Absent this specific request, PVT Mead retains control over his *Pierce* credit. Here, PVT Mead merely requested consideration of the prior non-judicial punishment from the military judge after the government had already introduced evidence on the matter, and properly requested precise credit from the convening authority. (JA 47-49). Therefore, the convening authority was obligated to apply the *Pierce* credit to the approved sentence.

The Army Court's reliance on *Flynn* is also improper. In *Flynn*, prior to trial, the convening authority restored forfeited rank and pay. 39 M.J. at 775 n.1. Here, PVT Mead remained an E-1 as a result of his prior non-judicial punishment, unlike in *Flynn*. (JA 14). Also unlike *Flynn*, there is no evidence that appellant's lost pay was restored to him. Therefore, the court's reliance on *Flynn* is misplaced, because *Flynn* received real relief prior to trial, where PVT Mead has received none.

Furthermore, in *Flynn*, the appellant's pre-trial agreement required the convening authority to suspend confinement in excess of fifteen months. 39 M.J. at 775. When the military judge applied *Pierce* credit against the adjudged sentence, he provided real relief to Flynn because if the convening authority vacated the suspension under R.C.M. 1109, Flynn's reinstated sentence would be lessened. Here, PVT Mead had already fulfilled the conditions of his pre-trial agreement at the time of sentencing. (JA 42-44). Therefore, it was legally impossible to execute the adjudged sentence. By contrast, in *Flynn* a violation of the conditions of suspension under R.C.M. 1108(c) would trigger reinstatement of the adjudged sentence, as well as a reduction in that adjudged sentence as a result of the *Pierce* credit awarded to her.

This Court should not extend its holding in *United States v. Rock*, 52 M.J. 154 (C.A.A.F. 1999), to *Pierce* credit. In *Rock*, this court ruled that, in those rare cases where pre-trial punishment is unintentional and is not tantamount to confinement, credits for unlawful pre-trial punishment need not be applied against an approved sentence. *Id.* at 157. The facts in *Rock* are unusual, and inapposite to the case here. In *Rock*, a soldier suffered pre-trial punishment, although there was "no intent on the part of the company commander and first sergeant to punish the accused prior to trial" and despite their "commend(able) . . . actions to ameliorate the accused's situation . . . " and avoid pretrial punishment. *Id.* at 156.

Unlike in *Rock*, in which the pre-trial punishment which Rock suffered was unintentional, trial after previous non-judicial punishment is the result of the convening authority's deliberate choice to punish a soldier twice. This deliberate choice to twice punish requires that *Pierce* credit be "*complete* credit." *Pierce*, 27 M.J. at 369 (emphasis in original). In order to be complete, this credit must be applied against the approved sentence because otherwise, like in this case, it often results in no or incomplete relief.

Even at the time *Rock* was decided, there were concerns about its possible effects. In a concurring opinion, Judge

Effron agreed that in the absence of any precedent, the military judge did not err. However he went on to state:

> I note, however, that this result produces an anomaly where there has been a pretrial agreement limiting the maximum confinement that may be approved by the convening authority. If a servicemember has been subjected to illegal pretrial punishment consisting of (or tantamount to) confinement, the convening authority must apply the credit in a manner that provides effective relief. . . .
>
> . . . .
>
> There does not appear to be any significant policy reason that would explain why 8-months confinement credit in the case of one type of punishment should be applied against the maximum sentence that could be approved by the convening authority (i.e., the maximum imposable under a pretrial agreement), while the credit for another type of punishment is applied against the adjudged sentence without regard to a pretrial agreement. This anomaly is subject to further distortions if consideration of the potential initial release date is taken into account.
>
> I would hold, prospectively, that confinement credit be applied in the same manner for all types of pretrial confinement and pretrial punishment, and that it be applied against the sentence that may be approved by the convening authority, rather than the sentence adjudged at trial. This would eliminate speculation as to whether the court-martial actually granted relief, and would ensure that an adjudication of illegal pretrial punishment results in effective relief.

Rock, 52 M.J at 157-58 (Effron, J., concurring in part) (internal quotations omitted).

Shortly after *Rock*, this Court recognized the problems inherent in applying confinement credit towards an adjudged rather than approved sentence. In *United States v. Spaustat*, 57 M.J. 256, 263-64 (C.A.A.F. 2002), the military judge applied credit for both pretrial confinement and illegal pretrial confinement against the maximum sentence of the pretrial agreement, rather than the adjudged sentence. This Court not only affirmed this method, it directed that all future courts follow suit.

> This case illustrates that, even after *Rock*, there is some confusion about the application of confinement credits when a pretrial agreement is involved. Furthermore, we recognize that applying confinement credit against the adjudged sentence in cases where there is a pretrial agreement can produce anomalous results, and it can deprive an appellant of meaningful relief for egregious violations of Article 13 or RCM 305. If credits for such violations are applied against the adjudged sentence instead of the lesser sentence required by the pretrial agreement, then in some situations, an accused may not receive meaningful relief if the sentence reduction under the pretrial agreement is greater than the credit awarded for the violation. . . . Accordingly, in order to avoid further confusion and to ensure meaningful relief in all future cases after the date of this decision, this Court will require the convening authority to direct application of all confinement credits for violations of Article 13 or RCM 305 and all *Allen* credit against the approved sentence, i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement, as further reduced by any clemency granted by the convening

> authority, unless the pretrial agreement provides otherwise.

Spaustat, 57 M.J. at 263-64 (internal citations omitted).

There is no reason this Court should require military judges to apply credit for Article 13, UCMJ, violations against the approved sentence, yet allow them to apply *Pierce* credit against the adjudged sentence. These credits all result from the action of the government to deliberately place a soldier in pretrial confinement, to deliberately violate Article 13, UCMJ, deliberately restrict him, or enact some other type of punishment. This Court should require that *Pierce* credit be applied against the approved sentence because *Pierce* credit also results from the deliberate action of a convening authority to punish a soldier twice.

Indeed, there is an even stronger argument for applying *Pierce* credit against the approved sentence. Calculating Article 13, UCMJ, credit is less precise because the military judge is often trying to assign a number value to some wrong committed by the command. On the other hand, *Pierce* credit is far easier to determine because the soldier received specific, documented punishment. It makes no sense to mandate that if a soldier receives credit because his command did not provide him with the proper uniform for a court-martial his credit must be applied against his approved sentence, while if he received credit for specific and intentional punishment through Article

15, UCMJ, the judge may choose to apply his credit to an adjudged sentence even if that results in no real relief.

This court decided *Spaustat*, after *Flynn*, *Edwards*, and *Rock, supra*. Therefore, those cases did not have the benefit of this Court's explanation as to why at least some types of sentence credit must be applied against the approved rather than the adjudged sentences. Any holdings in those cases contrary to *Spaustat* should be disregarded. However, the Army Court completely ignored *Spaustat*, and relied on the earlier cases without even a discussion as to why they, or PVT Mead, should be treated differently than Spaustat.

The Army Court's decision will result in widely disparate application of *Pierce* credit. The Army Court held that because PVT Mead stipulated to the nonjudicial punishment as part of the stipulation of fact, it was before the military judge, who could then choose to apply it against the adjudged sentence. This decision allows a trial counsel to force a soldier to stipulate to the existence of nonjudicial punishment as part of the offer to plead guilty, and then argue that the soldier has raised the issue so that the military judge may eliminate any relief by applying credit against the adjudged sentence. This will result in some soldiers receiving no real credit for prior punishment simply because of the government's actions. This situation is all the more unfortunate because of how easy it would be to

avoid. A simple rule, that *Pierce* credit must be applied against the approved sentence, eliminates much of the potential for error.

2. The Army Court's decision here, that pay lost as a result of prior reduction need not be restored to PVT Mead, is contrary to *Pierce's* mandate for total relief, violates the Army Court's Article 66(c), UCMJ, mandate to ensure sentencing uniformity, and improperly incorporates former jeopardy jurisprudence to the dissimilar realm of *Pierce* credit.

The Army Court held, in previous cases, that an appellant's *Pierce* credit properly includes pay lost as a result of prior reductions in rank. *United States v. Santizo*, ARMY 20100146, 2011 WL 4036106 (Army Ct. Crim. App. 31 Aug. 2011)(mem. op.) (JA 61); *United States v. Piompino*, ARMY 20010126, 2002 WL 34571730 (Army Ct. Crim. App. 29 Mar. 2002)(mem. op.) (JA 54). Here, without rationalizing the departure from previous albeit unpublished opinions, the Army Court now holds that *Pierce* relief does not include pay lost in consequence of prior reductions in rank. *Mead*, 72 M.J. at 520. (JA 7).

The Army Court relies on former jeopardy jurisprudence for the proposition that forfeited pay cannot be converted to confinement credit. *Id.* (citing *United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003); *United States v. Rosendahl*, 53 M.J. 344 (C.A.A.F. 2000)). This premise is faulty because it fails to consider that *Josey* and *Rosendahl* received meaningful relief for former jeopardy. In both cases, the pay forfeited as a result of the automatic forfeitures required by Article 58(b),

UCMJ, was fully restored to the appellants. *United States v. Josey*, 2001 WL 629710 (A.F. Ct. Crim. App. 11 May 2001) (JA 57); *United States v. Rosendahl*, 47 M.J. 689, 695 (N.M. Ct. Crim. App. 1997). Additionally, the confinement served as a result of former jeopardy was credited against the forfeitures assessed during resentencing. *Josey*, 58 M.J. at 108; *Rosendahl*, 47 M.J. at 348. Unlike in *Josey* and *Rosendahl*, in which the appellants did receive monetary relief for former jeopardy, PVT Mead here received no relief at all.

Further, unlike former jeopardy credit, which is not the deliberate consequence of the convening authority's action, *Pierce* credit is the result of a convening authority's knowing decision to refer matters which were already the subject of non-judicial punishment. Trial, after previous non-judicial punishment, is a disfavored option which is reserved for rare cases. *Pierce*, 27 M.J. at 369. Meaningful credit which includes compensation for lost pay will help ensure that this practice remains rare.

Unlike former jeopardy credit, which is not the result of a deliberate decision by the convening authority, *Pierce* credit is the result of a considered decision to punish an accused twice. The convening authority or military judge must therefore grant "*complete* credit for any and all nonjudicial punishment

suffered." *Id.* (emphasis added). Failure to give credit for pay lost is not "complete" credit.

The use of former jeopardy jurisprudence here is also inappropriate because of the different due process considerations involved. *See Pierce*, 27 M.J. at 369. No other court has previously transplanted former jeopardy jurisprudence to the realm of *Pierce* credit. This Court should not allow this transplantation because of the evisceration of *Pierce's* mandate for total relief which would result. This application incentivizes a convening authority's use of nonjudicial punishment proceedings early in the investigative process because he will not have to later credit an accused for the pay lost as the result of a reduction in grade while an accused is awaiting completion of the investigation and trial. This may be even more tempting to commanders in complex cases which will likely take a significant amount of time to investigate.

In addition, allowing military judges and convening authorities to decide whether or not to give credit for loss of pay due to lost rank will result in highly disparate results. Combined with the Army Court's apparent authorization for the military judge to choose whether that credit will be credited towards the adjudged or approved sentence, actual *Pierce* credit will become extremely arbitrary.

The Army Court places *Pierce* credit for pay lost as a consequence of prior nonjudicial punishment solely within "the scope of either judicial or convening authority *discretion*." *Mead*, 72 M.J. at 519 (emphasis added). This grant of standardless discretion abrogates the Army Court's Article 66(c), UCMJ, responsibility to ensure that sentences are not disparate. "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). Closely related cases must receive the same treatment with regard to sentencing, *United States v. Washington*, 57 M.J. 394, 401 (C.A.A.F. 2002), and that should include soldiers who have received similar punishment under Article 15, UCMJ, even if their cases are on different installations covering different offenses.

The Army Court's grant of discretion to military judges and convening authorities establishes a system whereby two soldiers who lost pay as a result of prior nonjudicial punishment will receive extremely disparate treatment. Here, the military judge's arbitrary credit of thirty days to PVT Mead to compensate for pay lost as the result of prior nonjudicial punishment is highly disparate from the credit in *Santizo*, where the Army Court used a simple mathematical formula to arrive at

the appropriate credit.* *Compare Mead*, 72 M.J. at 519, *with Santizo*, 2011 WL 4036106, at *3. Other soldiers who lose pay as a result of prior nonjudicial punishment might receive no credit at all if the decision to grant credit is at the whim of individual military judges and convening authorities. Article 66(c), UCMJ, guards against this sort of arbitrary and unfair treatment of appellants and instead demands the precision, certainty, and equal treatment and "complete credit" mandated by *Pierce*, which the formula in *Santizo* provides.

Therefore, this Court should require "complete" credit, adopt *Santizo's* formula for *Pierce* credit for pay lost in consequence of prior punishment, and remand this case to the Army Court for a proper award of *Pierce* credit against PVT Mead's approved sentence.

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* The court in *Santizo* determined the total amount of money lost due to the reduction in rank. The court then determined the daily pay rate for the Soldier before he was reduced. The total lost pay was divided by the daily pay rate to determine how many days of credit the Soldier deserved. *Santizo*, 2011 WL 4036106, at *2-3 nn. 11, 14. Under a *Santizo* calculation, PVT Mead should have received 198 days of *Pierce* credit. (JA 63-64).

Conclusion

WHEREFORE, PVT Mead respectfully requests that this Honorable Court grant the relief requested above.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Mead*, Crim.App.Dkt.No. 20110717, USCA Dkt. No. 13-0459/AR, was electronically filed with both the Court and Government Appellate Division on August 29, 2013.

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