IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Private (E-1) MICHAEL L. HAYNES JR. United States Army, Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20160817 USCA Dkt. No. 18-0359/AR

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

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Issues Granted

I.

WHETHER AN APPELLANT IS AUTHORIZED TO REQUEST PIERCE CREDIT FOR THE FIRST TIME AT A COURT OF CRIMINAL APPEALS.

II.

IF THE ARMY CCA ERRED IN HOLDING THAT THE FAILURE TO REQUEST PIERCE CREDIT BELOW CONSTITUTED WAIVER, WAS ITS ACTUAL REVIEW OF THIS ISSUE UNDER ITS ARTICLE 66(C), UCMJ, AUTHORITY STILL SUFFICIENT.

STATEMENT OF THE CASE

On January 7, 2019, this Court granted appellant's petition for review. On February 26, 2019, appellant submitted his final brief to this Court. The government responded on March 28, 2019. This is appellant's reply.

I.

WHETHER AN APPELLANT IS AUTHORIZED TO REQUEST PIERCE CREDIT FOR THE FIRST TIME AT A COURT OF CRIMINAL APPEALS.

1. The government brief makes the same mistake the Army Court makes by conflating *Gammons's* principles of admissibility and credit.

The government brief begins by asserting that in *Gammons*, "This Court delineated four pathways for an appellant to introduce *and/or address* Pierce credit[.]" (Gov't Br. 7) (emphasis added). The government points out that these "pathways" do not include raising the issue for the first time on appeal. However, when the government collapses "introduce and/or address Pierce credit," it mistakenly conflates two discrete concepts that this Court carefully delineated in *Gammons*—admissibility of prior NJP *with* credit for that prior punishment. (Appellant's Br. 11).

In fact, the language immediately preceding these four "pathways," not cited by the government, bears this distinction out. These "four pathways" only described an appellant's choice with respect to "whether to introduce the record of a prior NJP." *United States v. Gammons*, 51 M.J. 169, 183 (C.A.A.F. 1999). In *this* section, this Court said nothing about these four options with respect to an appellant's right to receive credit.

The government also overlooks the fact that *after* this Court discussed the four pathways governing *admissibility* of prior NJP, it expressly stated, "In that

regard, we note that an accused may have sound reasons for not presenting the record of the prior NJP to any sentencing authority." *Id*. Recognizing this fact, this Court explicitly addressed "Credit for Prior Punishment" in the next section of the opinion, *id*. at 183–84, and there—unlike the *admissibility* section cited by the government—this Court expressly permitted an appellant to raise *Pierce* credit for the first time on appeal as one of the "pathways" to *credit*:

> If the accused chooses to raise *the issue of credit* for prior punishment during an Article 39(a) session rather than on the merits during sentencing, the military judge will adjudicate the specific credit to be applied by the convening authority against the adjudged sentence in a manner similar to adjudication of credit for illegal pretrial confinement. If the accused chooses to raise *the issue of credit* for prior punishment before the convening authority, the convening authority will identify any credit against the sentence provided on the basis of the prior NJP punishment. *Likewise, if the issue is raised before the Court of Criminal Appeals, that court will identify any such credit.*

Id. at 184 (emphasis added).

The government argues that "this language is not located within the opinion where this Court specifically delineated the methods for an appellant to exercise his right as gatekeeper for NJP." (Gov't Br. 13–14). This is correct but, as discussed above, this only bolsters appellant's argument. The section outlining appellant's role as gatekeeper is the "admissibility" section and is distinct from the

"credit" section that subsequently makes clear an appellant can receive credit when the issue is raised for the first time on appeal. (Appellant's Br. 11).

Finally, both the government, (Gov't Br. 12), and the Army Court, *United States v. Haynes*, Army 20160817, slip op. *4 (A. Ct. Crim. App. May 21, 2018), cite language in *Gammons* stating "failure to raise the issue of *mitigation* based upon the record of a previous NJP for the same offense prior to action by the convening authority waives an allegation that the court-martial or convening authority erred by failing to consider the record of the prior NJP" as the basis for concluding *Pierce* credit can be waived. *Gammons*, 51 M.J. at 183 (emphasis added). This is not, however, what it says—*Gammons* said any error based on failure to consider NJP as *mitigation*, not *credit*, is waived.

Mitigation is wholly distinct from credit. *United States v. Carter*, 74 M.J. 204, 208 (C.A.A.F. 2015) ("As is the case with Article 15, UCMJ, credit for NJP, the military judge should, as necessary, give tailored instructions to the panel members to distinguish between Article 13, UCMJ, credit addressed to the government's conduct, and the use of such evidence in mitigation."); *see also* Dep't of Army, Pam. 27-9, Legal Services, Military Judges' Benchbook ch. 2, § V, para. 2-7-21 (2017) (permitting defense counsel to request the panel be instructed on prior NJP as mitigation without requesting credit.) Mitigation is the process of

lessening the punishment to be imposed; credit is a determination of how much of the sentence imposed has already been effectively served.

Instead, this language can only be interpreted as a reiteration of the uncontroversial principle of invited error: An appellant cannot preclude NJP from coming into evidence at trial and then allege that it was error for the court not to consider it as mitigation under R.C.M. 1001(c)(1)(B). Any ambiguity left, to the extent there is any, is further resolved by recognizing that this language does not fall in the "Credit for Prior Punishment" section of the opinion. To read this language any other way would render *Gammons* internally inconsistent.

2. The right to raise *Pierce* credit for the first time on appeal is fundamental to *Gammons's* principle of the appellant as "gatekeeper."

The Army Court's and the government's interpretation that these portions of *Gammons* mean *Pierce* credit can be waived if not raised before appeal is not only inconsistent with the express language of the opinion, it is also fundamentally at odds with the appellant's role as "gatekeeper." (Appellant's Br. 21). In rejecting a similar government argument that the appellant had waived the right to request *Pierce* credit, the Coast Guard Court recognized that doing so was antithetical to *Gammons*:

> The Government cannot force an accused at trial to concede to an ill-timed disclosure of prior non-judicial punishment or risk forfeiting his right to request sentence credit at the time of the defense's choosing. We find that

> the accused has not waived his right to vindicate his sentencing interests and request Pierce credit on appeal.

United States v. Gormley, 64 M.J. 617, 620 (C.G. Ct. Crim. App. 2007). Waiver, in short, would force an appellant to do precisely what this Court, in *Gammons*, said he could not be forced to do.

3. The government's concession regarding this Court's analysis in *Bracey* is dispositive to this issue, *Gammons* is consistent with R.C.M. 907(b)(2)(D), and the service-courts have unanimously interpreted *Gammons* to preclude waiver.

The government's concession that "[t]his Court was able to do the same analysis in a similarly situated case," *i.e.*, review and resolve the issue of *Pierce* credit in *Bracey* is dispositive to the issue of waiver. (Gov't Br. 24). *See United States v. Bracey*, 56 M.J. 387, 389 (C.A.A.F. 2002). If this Court had intended *Gammons* to hold *Pierce* credit is waived if not raised before appeal, no issue would remain for this Court in *Bracey* to analyze. *See United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) ("While this Court reviews forfeited issues for plain error, we do not review waived issues because a valid waiver leaves no error to correct on appeal.") Indeed, the government concedes as much with its citation to *Ahern* for the same principle. (Gov't Br. 9).[1]

[1] To the extent the government argues it was waived, not by operation of law, but, because appellant intentionally relinquished or abandoned a known right, (Gov't Br. 20–21), the existing case law unanimously permitting *Pierce* credit to be raised for the first time on appeal makes this argument meritless.

Nor is the government's assertion that waiver is consistent with R.C.M. 907 persuasive. (Gov't Br. 8). Rule for Courts-Martial 907(b)(2)(D)(iv) makes a motion to *dismiss* a specification previously punished under Article 15, UCMJ, waivable if that offense was *minor*. Here, this offense is neither minor, *MCM*, App'x. 12-3 (2016 ed.), nor is appellant alleging it should have been dismissed. Indeed, *Gammons* itself recognized that credit and R.C.M. 907 work in consonance:

> The purpose of Article 15(f) is to prevent the accused from being punished twice for the same offense as a matter of statutory law even though such successive punishment is otherwise permissible as a matter of constitutional law. Article 15(f) provides an accused with two means of enforcing this statutory purpose: (1) a motion to dismiss the charge on the grounds of former punishment for a minor offense; and (2) as the gatekeeper on the question as to whether an NJP for a serious offense will be brought to the attention of the sentencing authority.

51 M.J. 180. Thus, a motion to dismiss a minor offenses is waivable, in part, because an appellant can still claim credit at a later time. And while major offenses are not subject to a motion to dismiss, an appellant is still protected "from being twice punished for the same offense" by *Gammons's* unequivocal right to claim *Pierce* credit at any time.

Finally, the government argues that appellant "oversells" the fact that the service-courts have unanimously interpreted *Gammons* to preclude waiver. (Gov't Br. 16). Yet the government's failure to cite any cases to the contrary merely

underscores that unanimity. Instead, the government wholly relies on the statement of the Air Force Court stating, "We believe that an appellant should not be able to raise this issue for the first time at our Court[.]" *United States v. Webb*, 2002 CCA LEXIS 267, *16 (A.F. Ct. Crim. App. Oct. 8, 2002). Nevertheless, even that court concluded *Gammons* must be read to permit an accused to raise *Pierce* credit for the first time on appeal. If ever there was evidence of *Gammons's* clarity, this is it.

4. *Gammons* has been the law for two decades and the dire consequences predicted by the government have not materialized.

The government predicts dire consequences should this Court re-affirm that *Pierce* credit can be raised for the first time on appeal. (Gov't Br. 18). These falling-sky fears are unfounded for four reasons.

First, it is the government, not appellant, asking for a departure from the existing law. For two decades the CCAs have interpreted *Gammons* to allow *Pierce* credit raised for first time on appeal and the system has managed to survive. At the very least, it has not proven problematic enough to warrant certification to this Court under Article 67(a)(2), UCMJ.

Second, to the extent the government asserts that *Pierce* credit claims raised for the first time on appeal preclude the government from the ability to adequately "comment" on the matter implied by the defense[,]" (Gov't Br. 19), the

government is in no better position to "comment" on *Pierce* credit claims on appeal than they are when such matters are raised to the convening authority for the first time. Indeed, there is no meaningful difference between commenting via the Staff Judge Advocate's Recommendation and its Addendum and the government's response brief on appeal. As such, there is simply no reason to distinguish claims raised to the convening authority and those raised on appeal.[2]

Third, the government's concern that if *Pierce* credit claims are entertained for the first time on appeal it would be "handicapped to respond with an underdeveloped record due to appellant's stall tactic," *Bracey* rendered any such fears baseless. (Gov't Br. 19). If the record is not sufficiently developed to support a claim for credit, an appellant does not receive an "improper windfall" because he does not receive credit. *Bracey*, 56 M.J. at 389. Indeed, *Bracey* serves as an effective backstop to any claims of unmanageability and effectively hedges against any incentive to "stall" by appellants. This is the balance this Court struck in 2002 between an appellant's right to wait to serve as the "gatekeeper" and the system's need to adjudicate claims fairly and expeditiously. And there is no evidence that this balance has become unworkable.

[2] Appellant disagrees with the government's assertion that the 2014 amendment to Article 60, UCMJ, rendered the convening authority unable to grant *Pierce* credit. (Gov't Br. 19 fn 20). Accordingly, *Gammons*, in its entirety, remains a viable framework for raising *Pierce* credit.

Finally, the government overlooks the greatest policy issue at play—stare decisis and the system's interest in "upholding precedent…to bolster servicemembers' confidence in the law." *United States v. Andrews*, 77 M.J. 393, 401 (C.A.A.F. 2018) (citation omitted). Absent "the most cogent reasons and inescapable logic" requiring this departure from existing precedent, policy dictates this Court should stay the course. *Id*. at 399.

II.

IF THE ARMY CCA ERRED IN HOLDING THAT THE FAILURE TO REQUEST PIERCE CREDIT BELOW CONSTITUTED WAIVER, WAS ITS ACTUAL REVIEW OF THIS ISSUE UNDER ITS ARTICLE 66(C), UCMJ, AUTHORITY STILL SUFFICIENT.

1. The Army Court's opinion did not apply the correct standard of review and is otherwise ambiguous.

The Army Court opinion takes pains to make clear that it did not reach the underlying issue:

- Before reaching the merits of appellant's claim, we first address whether appellant waived any claim to *Pierce* credit. We determine he has. *Haynes*, slip op. at *4.

- Having reviewed the entire record, we determine that this is not appropriate case to notice any waived *Pierce* credit. *Haynes*, slip op. at *6.

- Again, we choose not to notice the waived issue but these weigh against noticing a waived issue. *Haynes*, slip op. at *7 fn 9.

If this error was truly waived, as the Army Court unambiguously asserts, it can do something or nothing, and in this case the Army Court was equally clear "this is not appropriate case to notice any waived Pierce credit." *Haynes*, slip op. at *6. In short, the resolution of this case is predicated on the Army Court being wrong over waiver, which they were.

To the extent the Army Court, at times, appears to address the underlying issue, the opinion is at best muddied. Parts of the opinion appear to say they don't think appellant was doubly-punished; others say they will not reach the issue. Accordingly, insofar as the Army Court discusses the underlying issue, its decision is entirely ambiguous. As the decision of the Army Court is not free from ambiguity, it should be clarified on remand. *See United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994) ("The appropriate remedy for incomplete or ambiguous rulings is a remand for clarification."); *see also United States v. Israel*, 75 M.J. 314 (C.A.A.F. 2016) (summary disposition); *United States v. Mohamed*, 67 M.J. 202 (C.A.A.F. 2008) (summary disposition).

2. The Army Court failed to recognize appellant's court-martial specification was charged as "on or about" between May 7 and June 24, 2017 and thereby encompasses the NJP timeframe.

Remand, at minimum, is also necessary given the Army Court's failure to take into account the fact that the government charged the court-martial specification as occurring on "divers occasions" and "on or about" between May 7

and June 24, 2017. By overlooking this fact, the Army Court erroneously concluded the overlap was a mere eleven days when, in fact, the court-martial offense nearly wholly subsumed the NJP. *Haynes*, slip op. at *2.

The phrase "on or about" has been interpreted by this court as meaning "a few weeks" of the charged window. *United States v. Brown*, 34 M.J. 105, 110 (C.M.A. 1992). And more specifically, this Court has interpreted "on or about" to permit the government to prevail on variances up to three weeks. *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993). Accordingly, when the government charged appellant at court-martial with use "on or about" between May 7 through June 24, 2017, the charge actually covered conduct through July 14, 2017, which also happens to be the end-date of the conduct covered by the NJP offense.

What is good for the goose is good for the gander. If the government is going to charge an expansive window, allege that the accused used marijuana on divers occasions throughout that window, and argue on appeal that "appellant admitted he knowingly smoked marijuana nearly every day" during this timeframe (Gov't Br. 26, 28), then one of the rare benefits to inure to an appellant is that if the government has also charged marijuana use by NJP within this expanded window, the appellant must receive *Pierce* credit.

3. The government's factual analysis also overlooks its charging decisions at trial and repeats the same factual errors asserted by the Army Court.

The government brief, like the Army Court, is also predicated on overlooking the fact appellant's court-martial charge was specified as occurring "on or about" and otherwise merely reiterates the same dubious arguments deployed by the Army Court.

Even without the "on or about" language of Specification 2 of Charge III, the charging decisions employed at appellant's court-martial stand in stark contrast to those in other prosecutions where service-courts have concluded *Pierce* credit was not warranted. *E.g.*, *United States v. Morris*, 1999 CCA LEXIS 408, *4 (A. Ct. Crim. App. Aug. 23, 1999) (mem. op.); *United States v. Williams*, 1998 CCA LEXIS 572, *3 (A. Ct. Crim. App. May 28, 1998) (mem. op.). In such cases, "It is obvious that the government carefully charged the appellant . . . during specific periods of time so as to exclude the dates for which the appellant had been previously punished under Article 15, UCMJ." *Morris*, 1999 CCA LEXIS 408 at *4 (quoting *Williams*, 1998 CCA LEXIS 572 at *3). The government's concession that this case was an example of the government's rote practice of charging "a thirty-day time period applied retroactively from each drug offense" merely underscores its insouciance in the case at hand and undermines any argument that *Pierce* credit is a windfall for appellant. (Gov't Br. 28 fn 33).

The government concedes that *Pierce* credit is warranted when the two court-martial offense and the Article 15 offense are "substantially identical." (Gov't Br. 25). In light of the fact the government's "on or about" language effectively charged appellant at court-martial with using marijuana on divers occasions through July 14, 2017, appellant plainly demonstrated the court-martial offense and the NJP offense are "more likely than not" substantially identical. *See Carter*, 74 M.J. at 208 (citation omitted) (affirming the preponderance of the evidence standard for Article 13, UCMJ, credit). The only question, then, is whether the government sufficiently rebutted this by demonstrating, not only that the record is ambiguous and should be returned to the Army Court, but that appellant's claim is so patently undeveloped that this case should be disposed of as this Court did in *Bracey*. In attempting to do so, the government's arguments are unpersuasive in at least five respects.

First, the government cites as it "most convincing" fact, the NJP came in a section of the stipulation of fact entitled "Misconduct Subsequent to Preferral." (Gov't Br. 25). While it is true that appellant received the NJP after preferral, receipt of NJP is not the "misconduct" at issue. This Court need only look to the language of the NJP specification—stating the offense took place between on or about June 14 and July 14—to see that the entirety of the offense took place before preferral. (JA 193).

Second, and related, the government argues that because the results of the fifth UA were received after preferral, "the government was unaware of an additional charge for this crime when it preferred charges against appellant three days prior." (Gov't Br. 26). The Army Court opinion cites this same fact. *Haynes*, slip op. at *2. However, both the government and the Army Court ignore the fact that when the government preferred charged on August 1, 2017, it did so knowing that appellant had submitted his specimen for the fifth UA and that—after four previous positive UAs in a row—the government had good reason to suspect it would come back positive. By then charging Specification 2 of Charge III as taking place on divers occasions through "on or about" June 24, 2017, the government gave itself the flexibility to include the fifth UA results if they came back positive, or disregard them if they did not.

Third, the government cites the stipulation of fact as evidence that different UAs formed the basis of the court-martial offense and the NJP specifications. (Gov't Br. 26). The UA, however, is evidence of an offense, not the offense itself.

Fourth, for the first time on appeal, the government argues that a rise in the nanogram levels of THC reflected in the UAs demonstrates a separate marijuana use after June 14, 2017. (Gov't Br. 26-27). Again, this overlooks the fact that trial counsel knew about the fifth UA, had reason to suspect it would come back positive, and *subsequently* preferred the charge at issue as taking place "on or

about" through June 14, 2017. In short, any marijuana use resulting in this rise in nanogram levels would also be covered by the divers occasions charged in Specification 2 of Charge III.[3]

Fifth, and finally, the government adopts the Army Court's argument that the parties decided to "negotiate around the issue." (Govt's Br. 28; *Haynes*, slip op. at *7). This argument is belied by the sequence of events. Specifically, appellant received the NJP on August 8, 2016, (JA 192); the offer to plead guilty, however, was not submitted until November 17, 2016, (JA 197). Accordingly, the NJP was plainly not a product of the negotiation, nor does the offer to plead guilty contain any language that would expressly disclaim appellant's right to request *Pierce* credit on appeal as unanimously upheld by every CCA at the time of appellant's trial.

[3] Moreover, as noted above, appellant's nanogram levels were wholly overlooked by the Army Court opinion and, as such, is yet further evidence that any review undertaken by the Court pursuant to its plenary authority to pierce waiver was insufficient to constitute the de novo review to which appellant was entitled.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court grant appellant "complete credit" necessary to cure his double-punishment or in the alternative, remand this case to the Army Court for review pursuant to Article 66(c), UCMJ, and in accordance with this Court's decision in *United States v. Gammons*.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of *United States v. Haynes*, Crim App. Dkt. No. 20160817, USCA Dkt. No. 18-0359/AR was electronically filed brief with the Court and Government Appellate Division on April 18, 2019.

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