IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

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

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 20230250

USCA Dkt. No. 25-0024/AR

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Table of Contents

Granted Issue.....3

Statement of Statutory Jurisdiction.....3

Statement of the Case.....3

Summary of Argument.....6

Statement of Facts.....6

Granted Issue.....8

Standard of Review.....8

Law.....8

A. *Pierce* Credit's Steadfast and Consistent Application.....8

B. *Pierce* Credit is Intended to Provide "Meaningful Relief" when an Accused has been Previously Punished to Avoid Due Process Concerns.....11

C. *Pierce* Credit with Segmented Sentences and Limits on the Convening Authority's Post-Trial Powers.....13

Argument.....**15**

A.Appellant was Deprived of Meaningul and Effective Relief.....16

B. The Army Court and Military Judge's Application of *Pierce* creates a complex and inconsistent system that is prone to error.....17

Conclusion.....19

Table of Authorities

CASES

Middendorf v. Henry, 425 U.S. 25 (1976)……………………………………......…6
United States v. Larner, 1 M.J. 371 (C.M.A. 1976)……………………………......9
United States v. Suzuki, 14 M.J. 491(1983)………………..……………………9
United States v. Allen, 17 MJ 126 (CMA 1984)………………………………8, 9
United States v. Pierce, 27 M.J. 367 (C.M.A. 1989)………...…2, 7, 8, 9, 10, 13, 15
United States v. Rock, 52 M.J. 154 (C.A.A.F. 1999)…………………………...10
United States v. Gammons, 51 M.J. 169 (C.A.A.F. 1999)……………...8, 9, 11, 12
United States v. Spaustat, 57 M.J. 256 (C.A.A.F. 2002)…….……………..6, 10, 12
United States v. Gormley, 64 M.J. 617 (C.G. Ct. Crim. App. 2007)………… …..16
United States v. Morton, 69 M.J. 12 (C.A.A.F. 2010)…………….………...…16
United States v. Velez, 2012 CCA LEXIS 353 (N.M. Ct. Crim. App. 12 September 2012) (unpublished)……………………………………………..15
United States v. Reese, 76 M.J. 297 (C.A.A.F. 2017)…………………………….16
United States v. Richard, 82 M.J. 473 (C.A.A.F. 2022)…………………………15
United States v. Smith, __M.J.__, 2024 (C.A.A.F. 26 November 2024)…………15

STATUTES

Article 13, UCMJ……………………………………………………………....10
Article 15, UCMJ ……………………………………………………………7, 8
Article 67(a)(3), UCMJ…………………………………………………………1
Articles 90, UCMJ……………………………………………………………….2, 5
Article 60, UCMJ (2014)…………………………………………………………11
Article 60(a), UCMJ…………………………………..………………11, 12
Article 128, UCMJ……………………………………………………………2, 5

RULES

R.C.M. 305……………………………………………………………10
R.C.M. 1002(d)(2)…………………………………………………6, 11
R.C.M. 1109(d)(3)………………………………………………………16

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

Granted Issue

I. WHETHER THE MILITARY JUDGE AND THE ARMY COURT OF CRIMINAL APPEALS CORRECTLY APPLIED *UNITED STATES V. PIERCE*, 24 M.J. 367 (C.M.A. 1989) IN AWARDING CREDIT FOR APPELLANT'S TWO PRIOR INSTANCES OF NONJUDICIAL PUNISHMENT TO THE SEGMENTED SENTENCE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2022). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2021).

Statement of the Case

On May 4, 2023, a military judge sitting as a general court-martial convicted appellant, Private First Class Nathan G. Leese, in accordance with his pleas, of two

specifications of willfully disobeying a superior commissioned officer (Specifications 1 and 2 of Charge I), and one specification of assault (Specification 2 of Charge II) in violation of Articles 90 and 128 of the Uniform Code of Military Justice, 10 U.S.C. §§ 890 and 928 (2019) [UCMJ].[1] (JA015-16; JA040). On May 4, 2023, the military judge sentenced appellant to a be reduced to the grade of E-2, to be discharged from the service with a bad-conduct discharge and to a total adjudged period of confinement of three months.[2] (JA058-60).

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

[1] Specification 1 and 2 of Charge II alleged abusive sexual contact in violation of Article 120 UCMJ, 10 U.S.C. § 920. Specification 1 of Charge II was dismissed pursuant to a plea agreement.

[2] The military judge sentenced appellant as follows:

Charge I, Specification 1	14 days
Charge I, Specification 2	30 days
Charge II, Specification 1	*Dismissed*
Charge II, Specification 2	3 months

The military judge ordered all sentences to confinement to run concurrently. (JA058-60).

sentence to confinement for Specification 2 of Charge I; and (4) $1,142 against any automatic forfeitures.[3] (JA059).

On May 25, 2023, the convening authority took no action on the findings or sentence and approved defense counsel's request for a thirteen-day deferment of automatic forfeitures effective May 18, 2023, to provide relief for the $1,042 forfeited through non-judicial punishment, "and [to] address the military judge's *Pierce* credit ruling." (JA026). On May 31, 2023, the military judge entered Judgment. (Judgment of the Court). The military judge further supplemented the Statement of Trial Results by including the following within the Judgment of the Court:

> To clarify the impact of the *Pierce* credit ruling on the adjudged sentence: (1) The one-rank adjudged reduction is offset by a one rank credit, resulting in no reduction; and (2) the 14 day confinement credit for I.1 completely offsets the adjudged confinement for I.1; and (3) the 14-day confinement credit for I.2 offsets the adjudged confinement for I.2 from 30 to 16 days. After applying those credits and then running the segmented confinement sentences concurrently, the total adjudged sentence to confinement *remains* 3 months.

---

[3] The military judge incorrectly stated that appellant's forfeitures were $571 for two months, for a total of $1,142. (JA045). Appellant forfeited $521 dollars for two months, for a total of $1,042. (JA029). The error likely stems from the Article 15 Punishment Worksheet where the issuing commander wrote that the appellant must forfeit $571 pay per month for two months. (JA029). This number comes from the amount appellant would forfeit as an E-4; however, the amount of forfeiture is to be computed at the reduced grade, even if suspended. (JA029). Defense counsel used the correct amount in her R.C.M. 1106 submission. (JA024-25). This correction was later incorporated into the Convening Authority Action and Judgment of the Court - although it should be noted the convening authority was not required to do so by the judge's 'suggestion.' (JA026; JA027).

> Regarding *Pierce* credit for automatic forfeitures, the $1,042 credit has been applied to automatic forfeitures through the convening authority's deferment action above.

Id. (emphasis added).

On August 29, 2024, the Army Court affirmed the findings and sentence. (JA002-09). This Court granted appellant's petition for grant of review on December 30, 2024 on the issue above and ordered briefing under Rule 25. (JA001).

Summary of Argument

The military judge improperly applied appellant's *Pierce* credit to his concurrent adjudged sentence, rendering the credit meaningless and ineffective. To ensure that credit is readily and consistently applied with meaningful effect now that sentences may be segmented, *Pierce* credit must be applied against the total adjudged sentence. This is consistent with past practice, the awarding of other forms of sentence credit, ensures all portions of the sentence receive meaningful relief, and recognizes that the government controls the charge sheet.

Statement of Facts

Appellant's commander imposed nonjudicial punishment twice, once in December 2021 and once in March 2022. This prior punishment stemmed, respectively, from no contact order violations on November 13, 2021 and January 14, 2022. (JA028-38). The punishment imposed at the first nonjudicial punishment

was reduction of one rank, forfeiture of $521.00 pay for two months, extra duty for fourteen days, and restriction for fourteen days. (JA029). The punishment imposed for the second was extra duty and restriction for fourteen days. (JA035).

In August 2022, the government made the tactical decision to charge those same two violations as two specifications of violating Article 90, UCMJ along with two additional specifications of violating Article 120, UCMJ. All charges involved appellant's then girlfriend. (JA015-16). In March 2023, the parties entered into a plea agreement whereby appellant agreed to plead guilty to both Article 90 specifications and one Article 128 specification. (JA017-20).

The plea agreement specified a sentence range of zero to three months confinement for each Article 90 specification and three to six months confinement for the Article 128 specification, all sentences to run concurrently. (JA019). The plea agreement did not address how credit for the nonjudicial punishment should be applied by either the military judge or the convening authority to a segmented concurrent sentence.

The military judge applied sentence credit to the segmented sentence, not the overall sentence. The Court "ordered" credit for automatic forfeitures even though this decision is part of the convening authority's exclusive discretion since there were no adjudged forfeitures. (JA059). The convening authority, based on his SJA's advice, used his discretion to grant the forfeiture relief. (JA026).

Granted Issue

I. WHETHER THE MILITARY JUDGE AND THE ARMY COURT OF CRIMINAL APPEALS CORRECTLY APPLIED *UNITED STATES V. PIERCE*, 24 M.J. 367 (C.M.A. 1989) IN AWARDING CREDIT FOR APPELLANT'S TWO PRIOR INSTANCES OF NONJUDICIAL PUNISHMENT TO THE SEGMENTED SENTENCE.

Standard of Review

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

Law

On January 1, 2019, R.C.M. 1002(d)(2) was implemented and the new rule requires that a "military judge at a general or special court-martial shall determine an appropriate term of confinement and fine, if applicable, for each specification for which the accused was found guilty," and "if a sentence includes more than one term of confinement, the military judge shall determine whether the terms of confinement will run concurrently or consecutively."[4] R.C.M. 1002(d)(2)(A), (B).

A. *Pierce* Credit's steadfast and consistent application.

Non-judicial punishment "is an administrative method of dealing with the most minor offenses." *Middendorf v. Henry*, 425 U.S. 25, 31–32 (1976). Congress

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

recognized the need for credit in the Article itself,

> (f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown *shall* be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

Article 15, UCMJ. (emphasis added). In *Pierce*, this Court's predecessor reviewed whether a servicemember could be sentenced by a court-martial for an offense that was previously punished under non-judicial punishment, and if so, how to apply credit for that prior punishment. *Pierce*, 27 M.J. at 368-69. The Court also considered what connection exists between punishment imposed as part of non-judicial punishment and a later sentence by a court-martial for the same misconduct. *Id.*

The court in *Pierce* noted, "[a]bsent some sinister design," military due process is not violated when a Soldier is tried for a serious offense even if he had previously received an Article 15 for the same conduct. 27 M.J. at 369. But being twice punished is a different matter. *Id.*

> It does not follow that a servicemember can be twice *punished* for the same offense or that the *fact* of a prior nonjudicial punishment can be exploited by the prosecution at a court-martial for the same conduct. Either consequence would violate the most obvious, fundamental notions of due process of law. Thus, in these rare cases, an accused must be given *complete* credit for any and all

> nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe.

Pierce, 27 M.J. at 369. This "day-for-day . . . stripe-for-stripe" credit is now known as *Pierce* credit.

In *Pierce*, the CMA acknowledged that "[b]ecause the types of punishments administered nonjudicially and those adjudged by courts-martial are not always identical, there may be some difficulties in reconciliation," and suggested a "Table of Equivalent Punishments" would be helpful.[5] *Id.* Finally, the *Pierce* Court held that, like credit for legal pretrial confinement pursuant to *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), Article 15(f) leaves it to the discretion of the accused whether the prior punishment will be revealed to the court-martial for consideration on sentencing. *Pierce*, 27 M.J. at 369. Additionally, the convening authorities *had* the responsibility for ensuring credit is given. *Pierce*, 27 M.J. at 369.[6]

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[5] That table is included at JA039. It was used by the judge. (JA045).

[6] This Court in *Gammons* found an accused could apply *Pierce* credit by: (1) introducing the NJP for consideration by the court-martial during sentencing (i.e. mitigation); (2) introducing it in an Article 39(a) hearing to receive credit against an approved sentence; (3) deferring introduction and presenting it to the convening authority prior to action, and (4) not bringing it up at all. *United States v. Gammons*, 51 M.J. 169 (C.A.A.F. 1999). The *Gammons* Court used the word "adjudged" in the second option instead of "approved," but explained when an appellant raises a *Pierce* credit issue at an Article 39(a), UCMJ, session, "the military judge will adjudicate the specific credit to be applied by the convening authority." *Id*. at 184.).

B. *Pierce* Credit is Intended to Provide "Meaningful Relief" When an Accused has Been Previously Punished to Avoid Both Due Process Concerns.

The essential pillar undergirding all forms of sentencing credit is that the credit provide "meaningful" relief. As far back as 1976, before *Pierce*, this Court's predecessor reiterated the need for sentence credit to be meaningful. For example, in *United States v. Larner,* 1 M.J. 371 (C.M.A. 1976), the CMA set aside sentence credit when the application of the credit resulted in the accused serving more time due to the "good time" calculations in place at the time. *Id.* at 372-75. The *Larner* court established that sentence credit must "truly afford[] full credit for time actually served" even if the on-paper calculation would have led to a different result. *Id*. at 373.

That administrative credit needs to be "meaningful" was reiterated by the CMA in *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983). There, the Court stressed the need for administrative credit to "be effective." *Id.* at 493. The *Suzuki* court found that Suzuki "merit[ed] *meaningful* relief with respect to the remainder of his sentence." *Id.* (emphasis added).[7]

Like *Allen*, *Larner*, and *Suzuki*, *Pierce* similarly mandated meaningful sentence credit with its demand that an accused be given complete credit for any

[7] Though *Larner* and *Suzuki* dealt with illegal pretrial confinement and its processes, this court in *Gammons* explained that *Pierce* credit should be adjudicated "in a manner similar to [the] adjudication of credit for illegal pretrial confinement." *Gammons*, 51 M.J. at 184.

and all nonjudicial punishment suffered: “day-for-day, dollar-for-dollar, stripe-for-stripe.” *Pierce*, 27 M.J. at 369.

This Court has consistently reiterated the need for meaningful credit. In *Spaustat*, it stated:

> This case illustrates that, even after *Rock*, there is some confusion about the application of confinement credits when a pretrial agreement is involved. Furthermore, we recognize that applying confinement credit against the adjudged sentence *in cases where there is a pretrial agreement can produce anomalous results, and it can deprive an appellant of meaningful relief* . . .
>
> If credits for such violations are applied against the adjudged sentence instead of the lesser sentence required by the pretrial agreement, then in some situations, an accused may not receive *meaningful relief* if the sentence reduction under the pretrial agreement is greater than the credit awarded for the violation. *See Rock*, 52 M.J. at 157-58 (Effron, J., concurring in part and in the result). This Court’s *Suzuki* decision contemplates *effective, meaningful relief*. 14 M.J. at 493.

57 M.J. 263-64 (*emphasis added*). While focused on confinement credits for violations of Article 13, R.C.M. 305 and *Allen* credit, the common thrust is to provide simple, consistent, and “meaningful relief.” *Id. Pierce* is not and should not be an exception to this simple and consistent rule, especially where the government, as in every other type of credit, sets the conditions requiring the awarding of credit.

C. *Pierce* Credit with Segmented Sentences and Limits on the Convening Authority's Post-Trial Powers.

Beginning on January 1, 2019, R.C.M. 1002(d)(2) required military judges to segment sentences for confinement and fines, and determine whether those segmented sentences should be implemented concurrently or consecutively. R.C.M. 1002(d)(2)(A), (B). No service secretary or other legislative or executive action has addressed the applicability of *Pierce* credit prior to or after January 1, 2019.

Furthermore, Congress has also substantially limited the convening authority's power to act on the findings and sentence, thus undercutting the third *Gammons*' option and making the judge's 'solution' in this case questionable for other cases. *Compare* Article 60, UCMJ, 10 U.S.C. § 860 (2014) *with* Article 60(a), UCMJ, 10 U.S.C. § 860 (2019) [hereinafter Article 60(a)].

Article 60(a), subsections (b) and (c) provide when a convening authority may reduce, commute, or suspend periods of confinement. If the total confinement (consecutively) is greater than six months or there is a punitive discharge, the convening authority is without power to reduce a sentence even under the third *Gammons* situation noted *supra* (note 6 – *Gammons* part (c)). However, if the sentence is not one of those noted above or if a military judge recommends, the convening authority *may* have the ability to modify the sentence. *Id*. at 60(a)(c).

These new limits can produce anomalous results. For example, if a servicemember did not request *Pierce* credit during at trial but later made a request to the convening authority, the convening authority may have no power to e award proper *Pierce* credit in cases involving a sentence where the total period of confinement is greater than six months. Article 60(a) §(b)(1); R.C.M. 1109(c)(2). Similarly, a convening authority's power to include *Pierce* credit within a plea agreement, which may be premature and is not an option presented in *Gammons*, is similarly limited to sentences where the total period of confinement is less than six months. Likewise, similar to here, a judge may know credit for forfeitures is necessary and order it, but if there are no adjudged forfeitures, it will be left to the convening authority's discretion – who may or may not be amenable to granting it based on R.C.M. 1109(d)(3) along with victim's input in other cases.

As those three non-exhaustive examples demonstrate, an accused often cannot seek *Pierce* credit through the convening authority, as contemplated in *Gammons*. And in those circumstances where an accused can, there is a high likelihood of varying results depending on whether a plea agreement applies consecutive versus concurrent sentences, a judge's recommendation, or the

individual terms of confinement actually adjudged (versus the ranges in the plea agreement) added together to see if they are consecutively below six months.[8]

Argument

The military judge improperly applied appellant's *Pierce* credit to his concurrent adjudged sentence and this error rendered the credit meaningless and ineffective. The correct application, one that affords day-for-day, dollar-for -dollar, and stripe-for-stripe credit and is simple to apply is for a military judge to apply any *Pierce* credit to the total adjudged sentence. This recognizes that the government *chooses* to resurrect charges that were deemed "minor" and thus appropriate for an Article 15. Applying *Pierce* credit to the total adjudged sentence will provide clarity to the parties and the military judge, and avoid the mathematical exercise that had to be undertaken in this case. (JA046; *see also* JA051) ("there was certainly no meeting of the minds on this issue").

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[8] This also applies to the methods discussed in this Court's *Spaustat* opinion, where the court held:

> Accordingly, in order to avoid further confusion and to ensure *meaningful relief* in all future cases after the date of this decision, this Court will require the convening authority to direct application of all . . . credit against the approved sentence, i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement, as further reduced by any clemency granted by the convening authority, unless the pretrial agreement provides otherwise.

57 M.J. at 263-64.

1. Appellant was Deprived of Meaningful and Effective Relief.

Nothing about the changes to the sentencing regime in the Rules for Courts-Martial diminished the importance of giving meaningful credit under the Due Process Clause. *Pierce*, 27 M.J. at 369.

In appellant's case, any relief he "received" was ephemeral, not meaningful. Because appellant's sentences for Specifications 1 and 2 of Charge I, the Article 15 conduct, were less than the three-month concurrent sentence imposed for Specification 2 of Charge II, appellant served the full three-month period of confinement and really received no confinement credit. The application of *Pierce* credit had *zero* impact on the length of the sentence that the appellant served. The judge provided hollow credit inconsistent with the Due Process concerns that built *Pierce* and ignored the fact it was the government's choice to re-litigate these otherwise "minor" offenses.

For almost fifty years, this Court's precedent has focused on providing meaningful relief when applying *any* sentencing credit. The method of applying *Pierce* credit used by the military judge and adopted by the Army Court results in relief that is pure legal fiction and deviates from the steadfast application of "meaningful" relief. While appellant's sentence was shortened on paper, it was not reduced in reality. He did not receive day-for-day, dollar-for-dollar, stripe-for-

stripe credit; he received no compensatory time for the time he *actually served* vis-a-vis extra-duty and restriction.

This Court should adopt a simple-to-apply principle that requires *Pierce* credit be applied against the total adjudged sentence, even when sentences to confinement for offenses involving *Pierce* credit are adjudged to run concurrent with non-*Pierce*-credit sentences to confinement.[9] This need only to apply to the sentences involving concurrent periods of confinement. This proposal is easy to apply, easy to understand, and ensures consistency of application across the services and potential sentences.

This adaptation of *Pierce* credit to segmented sentences encourages the greatest possible level of uniformity amongst the different varieties of court-martial sentences. Every type of punishment, other than concurrent periods of confinement or fines, is combined and totaled into a total adjudged sentence.

Applying *Pierce* credit to the total adjudged period of confinement does not result in a windfall in sentencing credit. This is especially so given that the government creates the undesirable situation impacting fundamental notions of Due Process. *Pierce*, 27 M.J. at 369; *see also United States v. Velez*, 2012 CCA LEXIS 353 at *15 n.7 (N.M. Ct. Crim. App. September, 12 2012) (unpub.). As this

[9] This rule would also make the application of *Pierce* credit consistent to *Pierce* credit for reductions in rank and forfeitures and all other credits.

Court has recognized on numerous occasions, the government controls the charge sheet and the specifications within it. *United States v. Smith*, __M.J.__, 2024 CAAF LEXIS 759, at *8 (C.A.A.F. 26 November 2024) (reasoning the Government chose how to charge the appellant and could have made other choices); *United States v. Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *2, n.1 (same); *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017); *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) ("It is the Government's responsibility to determine what offense to bring against an accused."); *United States v. Gormley*, 64 M.J. 617, 620 (C.G. Ct. Crim. App. 2007) (noting that the government should be prohibited from exploiting prior non-judicial punishment and that the appellant was "entitled to complete credit to ensure that his sentencing interests are fully protected.").

The government has a choice: punish an accused via nonjudicial punishment; via court-martial; or do both. When it does both, an accused must be afforded credit to prevent double punishment and for that credit to be applied against the total adjudged sentence. The government should not be permitted to charge prior non-judicial punishment and then hide behind the shield of concurrent sentences to punish the appellant twice for the same misconduct while gaining a tactical advantage by pre-viewing an accused's defense at the Article 15 hearing or using statements against him from that hearing later at trial.

Conclusion

Applying *Pierce* credit to the total adjudged sentence will provide clarity to the parties and the military judge, and avoid the mathematical exercise that had to be undertaken in this case. Sentence credit must be applied to provide meaningful relief. Otherwise the result would be pure legal fiction. *Gregory*, 21 M.J. at 957.

Appellant respectfully requests this honorable court affirm appellant's convictions, apply twenty-eight days of *Pierce* confinement credit, and approve the remaining sixty-two days of confinement, reduction to E-2, and bad-conduct discharge.

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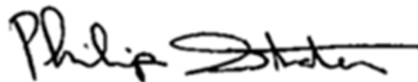

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Defense Appellate Division and the Government Appellate Division on January 21, 2024.

CERTIFICATE OF COMPLIANCE WITH RULES 21(B) AND 37

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 4,231 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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