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	FINAL 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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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issues Presented

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 STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012). 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 November 4 and December 14, 2016, at Joint Base Lewis-McChord, a military judge sitting as a general court-martial convicted Private (PVT) Michael L. Haynes Jr., pursuant to his pleas, of one specification of abusive sexual contact, one specification of false official statement, two specifications of wrongful use of a controlled substance, one specification of assault consummated by battery, two specifications of failing to report to place of duty, three specifications of willful disobedience of a superior commissioned officer, and one specification of willful disobedience of a non-commissioned officer, in violation of Articles 86, 90, 91, 107, 112a, 120, and 128, UCMJ, 10 U.S.C. § 886, 890, 891, 907, 912a, 920 (2012), and 928.

The military judge sentenced appellant to thirteen months confinement and a bad-conduct discharge. (JA 184). The military judge also credited appellant with 107 days of pretrial confinement against the sentence to confinement. (JA 184). Pursuant to the pretrial agreement, the convening authority approved only so much of the sentence as provided for six months confinement and a bad conduct discharge. (JA 58). The convening authority also credited appellant with the 107 days of pretrial confinement against the sentence to confinement. (JA 58).[1]

[1] The convening authority also deferred automatic forfeitures until action.

On May 21, in an opinion of the court, the Army Court affirmed the findings and sentence while denying appellant's request for *Pierce* credit, holding that appellant waived this claim by not raising it earlier. (JA 1). Appellant filed a motion to the Army Court requesting En Banc reconsideration and on August 10, 2018, the Army Court denied that request. Appellant was notified of the Army Court's decision and, in accordance with Rules 19 and 30 of this Court's Rules of Practice and Procedure, petitioned this honorable Court to grant review of the lower court's decision on September 7, 2018. This Court granted appellant's petition for review on January, 2019, and specified the two issues presented. (JA 53).

STATEMENT OF FACTS

The government preferred charges against appellant on August 1, 2016. (JA 54). In Specification 2 of Charge III, the government charged appellant with wrongfully using marijuana "on divers occasions between on or about 7 May 2016 and on or about 24 June 2016." (JA 54). On August 8, 2016, appellant received nonjudicial punishment (NJP) for three offenses, including one specification stating: "In that you, did, at or near Joint Base Lewis-McChord, Washington, between on or about 14 June 2016 and on or about 14 July 2016, wrongfully use marijuana." (JA 192).

On November 17, 2016, appellant submitted an offer to plead guilty, which was accepted by the convening authority. (JA 197). Pursuant to the offer to plead guilty, the parties entered into a stipulation of fact. (JA 186, 197). The stipulation of fact included a section titled "Misconduct Subsequent to Preferral." (JA 190). This section listed a positive urinalysis for marijuana on July 14, 2016, but did not specify the date of the marijuana use that caused this positive result. (JA 190).

The stipulation of fact explained this positive urinalysis was adjudicated by nonjudicial punishment, along with two other "failure to report" offenses. (JA 190). For this nonjudicial punishment under Article 15, UCMJ, appellant received the maximum reduction in grade, maximum forfeitures, maximum extra duty, and an additional 45 days of restriction. (JA 190, 196).

During the providence inquiry for Specification 2 of Charge III, appellant admitted he smoked marijuana "every day" during the charged timeframe of May 7 to June 24, 2016. (JA 94). At one point, the military judge even clarified, "When I say 'this time period,' I mean the time period between 7 May 2016 and 24 June 2016 as described in Specification 2 of Charge III." (JA 96). The providence inquiry did not describe any marijuana use after June 24, 2016. (JA 87–89, 94–96).

During its sentencing case, the government moved to admit the nonjudicial punishment into evidence as Prosecution Exhibit 4. (JA 160). In line with a

provision in the stipulation of fact, appellant did not object to its admission. (JA 160, 186). Critically, the nonjudicial punishment included the language of the specification related to the positive urinalysis from July 14, 2016: "In that you, did, at or near Joint Base Lewis-McChord, Washington, between on or about 14 June 2016 and on or about 14 July 2016, wrongfully use marijuana." (JA 192).

As such, the charged timeframe for divers marijuana use was "between on or about 7 May 2016 and on or about 24 June 2016," while the prior nonjudicial punishment timeframe was "between on or about 14 June 2016 and on or about 14 July 2016." (JA 54, 192). The clear overlap between the dates was not identified or discussed during trial, and the military judge did not elicit any testimony regarding whether appellant wrongful use of marijuana at any time after June 24, 2016.

I.

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

1. Summary of Argument

An old proverb is, "If it ain't broke, don't fix it." In the twenty years since this Court decided *United States v. Gammons*, an appellant's inviolable right to raise *Pierce* credit for the first time on appeal has been wholly uncontroversial. In

the two decades since *Gammons*, there has not been a reported case that did not uphold this principle.

United States v. Gammons expressly sanctioned raising a claim for *Pierce* credit for the first time on appeal. 51 M.J. 169, 184 (C.A.A.F. 1999). It did so both in its "guidance" to lower courts—stating "if the issue is raised before the Court of Criminal Appeals, that court will identify any such credit"—and in its holding, directing the lower court to "adjust appellant's sentence to assure that he was not double punished" if such credit was not given by the military judge. *Id*. Appellant's right to request credit for the first time on appeal is fundamental to this Court's determination that the accused is the "gatekeeper" to the introduction of prior NJP evidence. If the right to *Pierce* credit could be waived, an appellant would be forced to either forfeit his statutory right to preclude the admission of the NJP or waive his right not to be double-punished.

During the two decades following *Gammons*, the parties and the judiciary have grown accustomed to the accused's role as gatekeeper, and this Court's holding has proven eminently workable. Both this Court and the CCAs have determined whether an appellant was in fact double-punished and, if so, the appropriate credit to afford the appellant. Nor has the government ever expressed any discontent over the current state of the law. Despite the repeated re-affirmation of an appellant's right to raise *Pierce* credit on appeal, this issue has

never been certified to this Court pursuant to Article 67(a)(2), UCMJ. Indeed, if the Army Court had not conflated two sections of this Court's *Gammons* opinion, this case would not currently be before this Court.

When an appellant has elected not to raise the issue of *Pierce* credit before reaching the CCA and failed to establish the facts necessary to prove double-punishment, such claims have fallen short. *See United State v. Bracey*, 56 M.J. 387 (C.A.A.F. 2002). But this is a far cry from finding such claims waived. Indeed, although this Court ultimately rejected Bracey's claim for *Pierce* credit, it resolved the claim on the merits—asking and answering the question of whether Bracey was double punished. Had the issue been waived, this Court would not even have had the authority to examine the claim. *See United States v. Hardy*, 77 M.J. 438, 440 (C.A.A.F. 2018).

An appellant's right to raise *Pierce* credit has been well-established precedent in military court's for two decades. "[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018) (internal quotation marks omitted) (quoting *United States v. Sills*, 56 M.J. 239, 241 (C.A.A.F. 2002) (per curiam)). Courts should not overturn long-established precedent "unless the most

cogent reasons and inescapable logic require it." *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (citing 20 Am. Jur. 2d Courts § 127, Westlaw (database updated May 2018)). No such compelling reasons exist here, especially when to do so would condone a "consequence" that "would violate the most obvious, fundamental notions of due process of law." *United States v. Pierce*, 27 M.J. 367, 369 (C.M.A. 1989).

2. Standard of Review

This court reviews claims for sentence credit *de novo*. *See United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005); *United States v. Globke*, 59 M.J. 878, 881 (N.M. Ct. Crim. App. 2004). For *Pierce* credit, an accused is the "gatekeeper" in determining when to raise the issue of credit for the prior nonjudicial punishment (NJP). *Gammons*, 51 M.J. at 179. An accused may raise this issue during an Article 39(a), UCMJ, during the merits phase of sentencing, to the convening authority, or "[l]ikewise, if the issue is raised before the Court of Criminal Appeals, that court will identify any such credit." *Id*. at 194. Once an appellant makes his request for credit, he is entitled to "complete credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe." *Pierce*, 27 M.J. at 369 (emphasis in original).

As the Coast Guard Court convincingly explained, nothing short of a *de novo* review is sufficient to vindicate an appellant's role as the gatekeeper. *United*

States v. Gormley, 64 M.J. 617 (C.G. Ct. Crim. App. 2007). "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." *Id*. at 620.

3. The *Pierce* and *Gammons* Principles: Credit and Admissibility

Since 1989, this Court has recognized that double-punishment "would violate the most obvious, fundamental notions of due process of law." *Pierce*, 27 M.J. at 369. Recognizing weighty consideration and the fact that Article 15(f), UCMJ "leaves it to the discretion of the accused whether the prior punishment will be revealed to the court-martial for consideration on sentencing[,]" this Court concluded "the duty to apply this credit cannot always be conferred on the court-martial." *Id*. Indeed, this Court presumed "the best place to repose the responsibility to ensure that credit is given is the convening authority." *Id*. Accordingly, from the inception of *Pierce* credit, this Court contemplated that the right to such credit was not contingent upon being raised at trial.

Pierce established two separate and distinct principles: credit (for NJP) and admissibility (of NJP). As *Pierce* explained:

> It does not follow that a service-member 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.

27 M.J. at 369 (emphasis in original).

> Furthermore, the nonjudicial punishment may not be used for *any* purpose at trial, such as impeachment (even of an accused who asserts he had no prior misconduct); to show that an accused has a bad service record; or any other evidentiary purpose, e.g., Mil. R. Evid. 404(b), Manual, supra. Under these circumstances, the nonjudicial punishment simply has no legal relevance to the court-martial.

Id. (emphasis in original).

In other words, an appellant has an inviolable right to "complete credit" for punishment imposed from NJP for the same offense (i.e., credit); and that NJP may not be used for any other purpose unless raised by the defendant first (i.e., admissibility). *Id*.

In further defining a framework to implement *Pierce*, *Gammons* further defined an appellant's role as the "the gatekeeper" per Article 15(f), UCMJ. 51 M.J. at 179 (C.A.A.F. 1999). In doing so, however, *Gammons* principally discussed admissibility, not the appropriate credit. The first certified issue clearly stated the nature of the lower court holding:

> I. WHETHER THE COAST GUARD COURT OF CRIMINAL APPEALS ERRED IN HOLDING, AS A MATTER OF LAW, THAT THE TRIAL COUNSEL'S USE OF A RECORD OF THE ACCUSED'S

> NONJUDICIAL PUNISHMENT (NJP) AMOUNTED TO PLAIN ERROR UNDER *UNITED STATES V. PIERCE*, EVEN THOUGH:
>
> (A) THE NJP WAS USED AS AN AGGRAVATING CIRCUMSTANCE OF A LATER SIMILAR CRIME FOR WHICH THE ACCUSED WAS CONVICTED;
>
> (B) THE DEFENSE STATED THAT IT HAD NO OBJECTION TO THE TRIAL COUNSEL'S USE OF THE NJP; AND
>
> (C) UNDER THE CIRCUMSTANCES THE INTRODUCTION OF THE RECORD OF NJP WAS THE EQUIVALENT OF AN INTRODUCTION BY THE DEFENSE.

Gammons, 51 M.J. at 172–73.

This Court's subsequent holding was equally clear that the relevant issue was admissibility, not credit: "We hold that *consideration* of appellant's nonjudicial punishment (NJP) record at sentencing was not error where the defense consented to its introduction and made the first substantive reference to the record during sentencing." *Id*. at 173 (emphasis added).

Consistent with the dichotomy between admissibility and credit, this Court specifically bifurcated its discussion into two separate categories: "Presentation of Evidence" and "Credit for Prior Punishment." *Id*. at 183–84. The analytical differences between these two categories are instructive. In the "Presentation of Evidence" section—which the Army Court relied on in finding waiver for the entirely distinct issue of credit—this Court wrote:

> 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. 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. Absent a collateral issue, such as ineffective assistance of counsel, 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.
>
> Each of the choices available to the accused has differing consequences with respect to the manner in which the prosecution may use the record of a prior NJP.

Id. at 183. In short, this section merely clarified that if an appellant does not raise prior NJP to the trial court's or convening authority's attention, the appellant cannot then claim they erred in failing to consider it. Credit, however, was instead addressed in the next section. *Id*.

In determining the appropriate credit, if any, to reward an accused who has been doubly punished, this Court provided "guidance to assist reviewing authorities."

> 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).

Gammons's key contribution was to clarify that while *Pierce* shielded a defendant from an undesired "Presentation of Evidence" of prior NJP, this issue is waived when the defense consents to its introduction. *Id*. at 180–84. *Gammons*, however, did nothing to disturb *Pierce's* other principles: the unqualified right to "complete credit" for prior punishment, and to wait to make this request at the CCA. Indeed, *Gammons* expressly reaffirmed these principle. *Id*. at 184.

Despite the fact Gammons never asked the trial court or convening authority for credit, this Court concluded it was "'appropriate' for the lower court 'to either (1) ascertain from the judge an explanation of what his consideration of the nonjudicial punishment implied; or (2) adjust appellant's sentence to assure that he was not twice punished.'" *Id*. (citing *Pierce*, 27 M.J. at 370). Accordingly, the CCA was fully vested with the authority and duty to ensure Gammons was not double-punished despite raising the issue for the first time on appeal.

The analysis undertaken by this Court in *United States v. Bracey* further underscores the conclusion that *Pierce* credit is not waived when raised to the CCA for the first time on appeal. 56 M.J. at 389. In *Bracey*, the appellant claimed his disobedience offense punished under NJP was for the same underlying misconduct as a disrespect offense for which he was punished at court-martial. *Id*. at 389. After examining the providence inquiry and stipulation of fact, this Court concluded, "The record indicates that these were separate actions." *Id*. The "disrespect offense at issue in the court-martial" was for the "failure to stand at parade rest." *Id*. The "earlier NJP was imposed for violation of a different order -- the order to stand at attention." *Id*.

In examining the merits of the appellant's claim that he was double-punished, this Court eschewed any possibility that the claim had been waived. *Id*. Had it been waived, this Court would have had no authority to entertain the merits of appellant's claim as it did in the first place. *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").

4. The CCAs have harmoniously interpreted *Gammons* to allow an appellant to raise *Pierce* credit for the first time one appeal.

In the nearly two decades since *Gammons* was decided, each service court

has examined claims for *Pierce* credit raised for the first time on appeal. Each court has unanimously concluded such credit is not waived and, without dissent, found such credit is not waived.

a. The Navy Court interpreted <u>Gammons</u> to preclude waiver.

In *Edwards*, an opinion of the court, the Navy Court unanimously rejected the government's argument that an accused waived *Pierce* credit:

> Citing *United States v. Gammons*, 51 M.J. 169 (1999) and *United States v. Fuson*, 54 M.J. 523 (N.M. Ct. Crim. App. 2000), the Government also argues that the appellant essentially waived any claim for NJP credit by failing to request it at trial or in any of his post-trial clemency requests. *We believe the Government is incorrect in its interpretation of these two cases*.

United States v. Edwards, 54 M.J. 761, 762 (N.M. Ct. Crim. App. 2000) (emphasis added).

> We interpret the doctrine of waiver to apply to alleged errors related to the consideration of an NJP; e.g., an accused's claim that the prosecution improperly introduced or commented on the NJP at trial when the accused failed to object or that the convening authority erred by failing to consider the NJP when the accused did not bother to bring it to the convening authority's attention *An accused's absolute entitlement to NJP credit under Pierce, however, is a separate issue to which waiver does not apply.*
>
> The broad language in the dicta of *Gammons* implies that an accused may request NJP credit at any time, including during appellate review by this court. Since the appellant has now made such a request, we are required to ensure that his sentencing interests are fully vindicated by

specifying the credit to be applied against his sentence.

Id. (emphasis added) (internal citations omitted).

The Navy Court reiterated this non-waiver principle in *Globke*. In *Globke*, the Navy Court explained that *Gammons* "establishes the framework concerning when and how an accused is to be afforded credit, dependent upon when the appellant raises the issue," and "the accused can wait, and raise the issue post-trial before either the convening authority or the appellate courts, in which case either the convening authority or the appellate court 'will identify any such credit.'" 59 M.J. at 881–82.

b. The Coast Guard Court interpreted <u>Gammons</u> to preclude waiver.

In *Gormley*, also an opinion of the court, the Coast Guard Court unanimously reached the same conclusion as the Navy Court:

> . . . [A]n accused's failure to object waives any allegation of error resulting from the Government's preemptive use of the record of prior NJP, but such failure does not foreclose the accused's entitlement to credit for NJP actually imposed and served. *See e.g., United States v. Edwards*, 54 M.J. 761, 762 (N.M. Ct. Crim. App. 2000).

64 M.J. at 620.

> The dicta in *United States v. Gammons* states that the timing of the decision to request credit for prior NJP remains with the accused – whether that request is raised at trial, before the convening authority, or before the Court of Criminal Appeals . . . . *We find that the accused has not*

> *waived his right to vindicate his sentencing interests and request Pierce credit on appeal*.

Id. (emphasis added).

c. A panel of the Air Force Court of Criminal Appeals interpreted Gammons to preclude waiver.

Even service courts critical of the reasoning underlying *Gammons* have nevertheless unanimously agreed that *Gammons* held that prior punishment credit cannot be waived.[2] For example, the Air Force Court stated such credit "should be deemed waived," but nevertheless reached the same conclusion as the Navy Court and Coast Guard Court regarding *Gammons*:

> Although not clear, it appears that an accused does not waive the issue of *Pierce* credit by failing to raise it at trial or before the convening authority. 51 M.J. at 184 ("Likewise, if the issue is raised before the Court of Criminal Appeals, that court will identify any such credit.").

United States v. Webb, 2002 CCA LEXIS 267, *16 (A.F. Ct. Crim. App. 8 Oct. 2002). The Air Force Court added:

> We believe that an appellant should not be able to raise this issue for the first time at our Court. If an accused fails to bring the prior NJP to the attention of the court-martial or the convening authority, the issue should be deemed waived on appeal. *Nevertheless, we are bound by what*

[2] In *Webb*, Judge Stone dissented with respect to the computation of credit but concurred in the judgment and the broad principle that *Pierce* credit could not be waived. 2002 CCA LEXIS 267, at *18–19 (Stone, J., dissenting).

> *appears to be our superior court's decision to the contrary*.

Id. (emphasis added).

d. Even the Army Court has previously interpreted <u>Gammons</u> to preclude waiver.

In *Piompino*, the Army Court reached the same conclusion as the other service courts regarding *Gammons*:

> Despite these two references to the Article 15, the appellant did not request *Pierce* credit from either the military judge or the convening authority . . .
>
> . . .
>
> *Regardless, the appellant now requests sentence credit, and we are obligated to calculate it and grant it. See generally Gammons*, 51 M.J. at 184 (stating that an appellant may raise the issue of credit for prior Article 15 punishment for the first time 'before the Court of Criminal Appeals, [and] that court will identify any such credit').

United States v. Piompino, 2002 CCA LEXIS 349, *4–6 (A. Ct. Crim. App. 29 Mar. 2002) (mem. op.) (emphasis added).

e. Stare Decisis

In *United States v. Andrews*, this Court rejected the government's claim that the failure to object to improper argument constituted waiver pursuant to R.C.M. 919(c). 77 M.J. at 398. Although the plain language of R.C.M. 919(c) would suggest such errors are waived by operation of law, this Court recognized that

holding as much would require it to abandon its line of cases dating back to 2005 wherein this Court applied plain error. *Id*. at 399. This Court declined to do so, citing the jurisprudential consideration of stare decisis. *Id*.

"[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id*. (citing *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018) (internal quotation marks omitted)). Although stare decisis is, "not an inexorable command" *Blanks*, 77 M.J. at 242, this Court will not overturn long-held, authoritative precedent "unless the most cogent reasons and inescapable logic require it." *Andrews*, 77 M.J. at 399 (citing 20 Am. Jur. 2d Courts § 127, Westlaw (database updated May 2018) (footnotes omitted)).

This Court considers the following factors when deciding whether to abandon long-established precedent: "[W]hether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Id*. (citations omitted). "Even if these factors weigh in favor of overturning long-settled precedent, we still require special justification, not just an argument that the precedent was wrongly decided." *Id*. (citations, internal quotations and brackets omitted).

5. Argument: There is no reason, let alone a special justification, to overturn what has become long-established precedent in the military justice system.

a. An appellant's right to raise Pierce credit for the first time on appeal has been well-established since 1999.

Since this Court decided *Gammons*, the right of an accused to raise *Pierce* credit for the first time on appeal has been wholly uncontroversial and adhered to across the military justice system. Although the CCA's have referred to the fact that *Gammons* made this pronouncement "in dicta," this is not actually the case. Instead, this finding was absolutely necessary to the result. *See Seminole Tribe of Fla v. Florida*, 517 U.S. 44, 67 (1996).

Gammons itself involved a servicemember whose claim to *Pierce* credit did not arise until his appeal. 51 M.J. at 175. Nevertheless, this Court concluded that because "the lower court was unable to discern whether either the military judge or the convening authority appropriately credited the prior NJP[,]" it was "appropriate for the lower court to either (1) ascertain from the judge an explanation of what his consideration of the nonjudicial punishment implied; or (2) adjust appellant's sentence to assure that he was not twice punished." *Id*. (citing *Pierce*, 27 M.J. at 370) (internal quotation marks omitted). In short, not only did *Gammons* expressly state that "if the issue is raised before the Court of Criminal Appeals, that court will identify any such credit[,]" this fact was necessary to its ultimate resolution of the case. *Id*.

There is nothing ambiguous or uncertain about the precedent established by this Court in *Gammons*. Indeed, both this Court's own subsequent cases and those of its subordinate courts indicate that *Gammons* is well-established, authoritative precedent and that an appellant's inviolate right to avoid double-punishment cannot be waived.

b. Gammons is well-reasoned and any decision to the contrary would necessarily undermine appellant's role as the "gatekeeper."

Gammons built on this Court's earlier pronouncement in *Pierce* that double punishment would "violate the most obvious, fundamental notions of due process of law." *Pierce*, 27 M.J. at 389. Accordingly, it unequivocally accorded an appellant the role of "gatekeeper" for the introduction of prior NJP for the same offense. *Gammons*, 51 M.J. at 179–80.

Although *Gammons* dealt with two principles—the admissibility of, and credit for—NJP, this Court recognized that they were fundamentally intertwined; an appellant's role as "gatekeeper" for the purposes of admissibility would be meaningless if waiver required him to introduce prior NJP if he were to have any chance of receiving credit. Waiver, in short, would force an appellant to do precisely what this Court said he could not be forced to.

While this reasoning is perhaps less persuasive when an appellant permits the government to introduce NJP at his court-martial but fails to invoke his right to

concomitant credit, *Gammons* itself did not find cause to carve out a separate rule to apply waiver under those circumstances. Predictability and doctrinal clarity—particularly in light of the "fundamental notions of due process" at issue—warranted a unified rule that regardless of when an appellant chooses to request credit, he "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.

c. History demonstrate Gammons is eminently workable and the system has reached homeostasis for over two decades.

The unanimity amongst the service courts over the last two decades—until the Army Court's opinion—belies any suggestion that *Gammons* is unworkable. Indeed, in the years since this Court decided *Gammons*, the military justice system has operated in perfect synchronicity, having reached a type of homeostasis undisturbed until the Army Court's decision in this case. Moreover, if government prosecutors follow this Court's admonition that instances of double-punishment should be "rare cases," it should be equally rare that CCA's should face this issue at all. *Pierce*, 27 M.J. at 369. And in those "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." *Id*.

Any suggestion of unworkability is further belied by the fact that although appellate courts have rejected waiver arguments for nearly two decades since

Gammons, no TJAG has ever certified the issue under Article 67(a)(2), UCMJ. This is particularly notable in light of cases like *Webb*, in which the Air Force Court thought the issue "should" be waived, but felt "bound by what appears to be our superior court's decision to the contrary." 2002 CCA LEXIS 267, at *16. Yet despite this language in *Webb*, the issue was not certified by the Air Force TJAG. In fact, prior to this case, there was a complete "uniformity of decision" for this issue, as every service court agreed on how to interpret *Gammons* and no TJAG had ever sought review of this uniform position.

To the extent difficulties arise from factual ambiguities as to whether NJP and a court-martial specification were actually for the same offense, this Court made plain this is not an impediment to resolving an appellant's claim and if necessary, denying *Pierce* credit. *Bracey*, 56 M.J. at 389. But this Court did so not because an appellant waived this right, but because he failed to establish he was eligible for credit in the first place. Should appellant fail to show that disrespect and failure to obey an order were actually for the same misconduct, the CCAs may determine that the appellant failed to "introduce the facts" necessary to substantiate his claim to *Pierce* credit. *Id*. Such is the balance that this Court found appropriate between an appellant's right to raise *Pierce* credit at *any* time and his right to actually prevail on the claim. Yet nothing about this makes this long-standing principle unworkable.

Finally, the CCA's have demonstrated that if anything, issues of double-punishment can be easily avoided through conscientious charging decisions by the government. For example, in *United States v. Velez*, the appellant's nonjudicial punishment involved multiple offenses, but only one of them related to his court-martial charges. 2012 CCA LEXIS 353, *15 n.7 (N-M Ct. Crim. App. 12 September 2012). In addressing the proper application of *Pierce* credit, the Navy Court stated, "We are sensitive that the appellant should not receive an unjustified windfall in sentencing credit," but noted, "[T]he Government might have avoided the dilemma of 'windfall' credit by simply making the tactical decision to not charge the same offense at court-martial." *Id*. The Navy Court further explained, "The Government is well-positioned to give early and complete consideration to the potential consequences of charging offenses that have been the subject of prior nonjudicial punishment." *Id.; see also Gormley*, 64 M.J. at 620 (using similar language to reject the government's "windfall" argument). Any suggestion, therefore, that a "windfall" makes *Gammons* unworkable places blame on the wrong party.

d. No intervening events warrant a departure from long-established precedent.

When a court is "clearly convinced that precedent...is no longer sound because of changing conditions and that more good than harm will come by

departing from precedent, the Court is not inexorably bound by its own precedents." *Andrews*, 77 M.J. at 400 (brackets and citation omitted). No such intervening event has occurred here. To the contrary, the CCAs have unanimously followed this decision. Any departure in this case would itself be the intervening event

e. Overturning Gammons would betray the reasonable expectations of servicemembers and risk undermining public confidence in the law.

Were this Court to overturn *Gammons*, it would betray appellant's expectation that he was entitled to raise his claim to *Pierce* credit for the first time on appeal. This expectation was exceptionally reasonable in light of *Gammons* and multiple Army Court opinions. *See Piompino*, 2002 CCA LEXIS 349; *see also United States v. Townsend*, 2000 CCA LEXIS 325, *2–4 (A. Ct. Crim. App. 4 May 2000) (mem. op.) (failing to apply or discuss waiver when the defense counsel did not affirmatively request *Pierce* credit during trial or in the post-trial clemency submissions).

"Just as overturning precedent can undermine confidence in the military justice system, upholding precedent tends to bolster servicemembers' confidence in the law." *Andrews*, 77 M.J. at 401 (citation omitted). The importance of public confidence in the law is uniquely important in the military justice system where "from the very nature of things, [civilian] courts have more independence in

passing on the life and liberty of people than do military tribunals." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). Accordingly, our Courts should be especially mindful of abandoning precedent when doing so inures to a servicemember's detriment.

This Court has made it clear that when an appellant raises *Pierce* credit for the first time on appeal, the "court *will* identify any such credit." *Gammons*, 51 M.J. at 184. The CCAs have followed suit and continued to apply this rule over the last twenty years. In an instance where appellant relied on that precedent to protect against a violation of "the most obvious, fundamental notions of due process of law[,]" *Pierce*, 27 M.J. at 389, overturning that precedent risks substantially undermining the public's perception of the administration of justice in the military. Conversely, to do otherwise and uphold the precedent—especially if this Court would hold otherwise in the absence of horizontal stare decisis—would undoubtedly "bolster servicemembers' confidence in the law." *Andrews*, 77 M.J. at 401.

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. Summary of Argument

No. The Army Court's "actual review" was woefully inadequate. Appellant was entitled, under well-established precedence, to a *de novo* review conducted pursuant to Article 66(c), UCMJ. The Army Court's analysis for waiver, relying on a mistaken reading of *Gammons*, is no substitute. The Army Court's mistakes were not limited to its understanding of *Gammons*; its factual analysis was equally wanting. Having afforded the Army Court one opportunity to vindicate appellant's privilege against double-punishment, this Court should afford appellant 73 days of *Pierce* credit. If, however, this Court declines to do so, it should remand this case for a new review pursuant to *Gammons* and Article 66(c).

2. Argument: The Army Court's "actual review" was obscured by a legally erroneous application of waiver and a haze of irrelevant and erroneous factual conclusions.

a. The Army Court's exercise of its plenary discretion to "notice" a waived issue is insufficient to protect appellant's inviolate right not to be double-punished.

Gammons was unequivocal: "[I]f the issue [of *Pierce* credit] is raised before the Court of Criminal Appeals, that court *will* identify any such credit." 51 M.J. at 184 (emphasis added). This mandate, rooted in the inherent inequity of double punishment recognized by *Pierce*, is insufficiently protected when considered instead through the wholly discretionary exercise of a CCA's authority to "notice" an otherwise waived issue. *See* Art. 66(c); *see also United States v. Claxton*, 32 M.J. 159, 162 (C.A.A.F. 1991).

The Army Court framed its analysis as such, "Should this court notice the waived *Pierce*-credit issue?" *Haynes*, slip. op. at *8. (JA 6). The remainder of its analysis, whatever the merits, is merely precatory because if the issue was truly waived, there was no issue to review in the first place. *See Hardy*, 77 M.J. at 440. "In even moderately close cases, the standard of review may be dispositive of an appellate court's decision." *News-Press v. United States Dep't of Homeland Sec.*, 489 F.3d 1173, 1187 (11th Cir. 2007). Where, as here, the Army Court applied waiver and proceeded at its whim to decline to notice the issue, its analysis is

facially insufficient to protect appellant's weighty interest against double-punishment.

Nor is the Army Court's one-sentence plain error analysis sufficient. (JA 6). In light of the well-established right to raise *Pierce* credit for the first time on appeal, *see Gammons*, 51 M.J. at 184, the failure to raise this issue earlier simply was not error.[3] Plain error analysis is simply inapt where the military judge and defense counsel acted in accordance with this Court's precedent explicitly sanctioning the right to raise *Pierce* credit for the first time on appeal.

b. Under any standard of review, the Army Court's actual review erroneously injects factual ambiguities based on wholly illusory arguments.

Appellant is entitled to *Pierce* credit, as his prior nonjudicial punishment overlapped with the charged dates in Specification 2 of Charge III. More specifically, the charged timeframe was "between on or about 7 May 2016 and on or about 24 June 2016," and the nonjudicial punishment timeframe was "between on or about 14 June 2016 and on or about 14 July 2016." (JA 54, 192). The providence inquiry did not describe any marijuana use after June 24, 2016 that also fell within the timeframe of Specification 2 of Charge III, (JA 87–89, 94–96), the

[3] However, even under a plain error analysis, a comparison to *Bracey*, *infra*, only illustrates why here, any error would be plain, obvious, and materially prejudicial to the substantial right not to be double-punished. Accordingly, the Army Court's one-sentence plain error analysis is irrelevant and erroneous.

clear overlap between the dates was not identified or discussed during trial, and the military judge did not elicit any testimony regarding the wrongful use of marijuana at any point after June 24, 2016.

The fact that the charged timeframes do not *entirely* overlap is not and should not bar relief under *Pierce* and *Gammons*. *See Piompino*, 2002 CCA LEXIS 349 at *3 (underlapping by three days on one end and one day on the other); *see also Webb*, 2002 CCA LEXIS 267 at *12–13 (NJP for striking wife on October 22, 2000; charged at court-martial with assaulting her on diverse occasions between on or about July 1, 2000 and January 1, 2001).

The Army Court itself has historically recognized that it is all too simple to avoid a *Pierce* credit issue. *See United States v. Morris*, 1999 CCA LEXIS 408, *4 (Army Ct. Crim. App. 23 August 1999); *see also United States v. Williams*, 1998 CCA LEXIS 572, *3 (A. Ct. Crim. App. 28 May 1998). When the government exercises the necessary caution and precision to avoid overlapping dates between a charged offense and nonjudicial punishment, there is no claim for *Pierce* credit. If the government fails to exercise appropriate caution and charges an offense at court-martial that has been previously punished by NJP, *Pierce* credit is warranted.

The sufficiency of the Army Court's actual review therefore turns on whether its opinion identified any evidence of appellant's conduct that: (1) occurred outside of the scope of the charged offense, *and* (2) occurred within the

scope of the nonjudicial punishment. Contrary to the Army Court's opinion, there is nothing ambiguous about an appellant charged for the same offense, for the same misconduct, in the same location, on the same dates. The Army Court, however, throws up its hands and suggests a factual "haze" renders appellant's claim "muddied at best." *United States v. Haynes*—ARMY 20160817, slip. op., *3. (JA 3). Any haze, however, is wholly illusory and dispelled by the application of simple logic to simple facts.

The Army Court's reliance on a single subsection heading in the stipulation of fact, titled "Misconduct Subsequent to Preferral," is entirely misguided, particularly in light of the timeline of events. *Haynes*, slip. op. at *6. (JA 6). Simply put, while the *results* of this urinalysis postdated preferral, the underlying misconduct did not. More specifically, the urinalysis occurred on July 14, 2016, the government preferred charges on August 1, 2016, and the results for the urinalysis arrived on August 3, 2016. (JA 54,190). Accordingly, despite the fact the test results arrived after preferral, this does nothing to change the fact that the language of the nonjudicial punishment specification: (1) addressed conduct occurring prior to preferral, and (2) explicitly overlapped with a charged offense.

The language of the Army Court opinion, itself, betrays its logical and factual shortcomings. Specifically, the Army Court states that the "misconduct" in the "subsequent misconduct" section of the stipulation of fact "included the fifth

positive test for marijuana." *Haynes*, slip. op. at *7. (JA 7). The misconduct, however, was not "the positive test" but use of marijuana of which the test was evidence. While the test results undoubtedly post-dated preferral, the underlying misconduct did not. This conflation itself undermines any argument that the Army Court's "actual review" was somehow sufficient.

The Army Court next cites—as evidence of a factual "haze"—the fact that during the providence inquiry, "appellant told the military judge that he was using marijuana on a near daily basis" and therefore, "even without the stipulation, a possible and reasonable reading of the record is that the [NJP] and the charged offense address different misconduct." *Haynes*, slip. op. at *7. (JA 7).

While perhaps a fair reading if considered in a vacuum, the military judge specifically and repeatedly circumscribed this inquiry to the charged timeframe of May 7, 2016 to June 24 2016. (JA 94). At one point, the military judge even clarified, "When I say 'this time period,' I mean the time period between 7 May 2016 and 24 June 2016 as described in Specification 2 of Charge III." (JA 96). Appellant's statement, read in context, was irrelevant to his drug use after June 24, 2016, and hardly a basis for any purported confusion.

Next, the Army Court suggests that "the parties were well aware of the [NJP] and the fifth positive test and chose to negotiate around this issue." *Id*. (JA

7). Appellant's negotiating position, however, would inevitably rest on the well-established right of an appellant to raise *Pierce* credit for the first time on appeal.

Finally, the Court cites *Bracey* to conclude that "to the extent these factual issues are debatable…it is because questions of *Pierce* credit are best resolved at the trial court." *Haynes*, slip. op. at *7 (citing *Bracey*, 56 M.J. at 389). (JA 7). *Bracey* is instructive for the same reasons that make it inapposite. *Bracey* specifically involved two *different* offenses (Articles 89 and 90, UCMJ) for two different acts (willfully disobeying an order and disrespect to a superior commissioned officer). 56 M.J. at 389. It was not until appeal that appellant contended that both the disobedience offense and the disrespect offense were based on the same underlying misconduct. *Id*.

In *Bracey*, therefore, the fact that appellant was double-punished for the same offense "was not obvious, given the textual differences between the NJP summary and appellant's court-martial charge." *Id*. (Baker, J., concurring) (suggesting he would apply plain error analysis to appellant's claim). No such "textual differences" are present here; the underlying misconduct is identical—use of marijuana. Nor was appellant charged with different offenses at NJP and court-martial. Instead, appellant was charged with the same offense, for the same misconduct, in the same location, on the same dates.

In sum, *Bracey* prudently placed the burden of persuasion on appellant to introduce facts at the trial-level that would establish a prima facie case that he was in fact doubly-punished. Indeed, *Bracey* places an important limiting principle on an appellant's right to raise *Pierce* credit at any time and functions as an important consideration for appellants who are otherwise inclined to wait until their appeal to raise this issue for the first time. The factual distinctions between *Bracey* and the case at hand also serve to underscore that appellant was not only entitled to raise *Pierce* credit for the first time on appeal, he was, and remains today, entitled to that credit.

c. Appellant is entitled to 73 days of Pierce credit.

In this case, appellant's nonjudicial punishment included two other offenses, but this does not preclude appropriate credit. As in *Velez* and *Gormley*, the government created this issue and was "well-positioned to give early and complete consideration to the potential consequences." *Velez*, 2012 CCA LEXIS 353 at *15 n.7; *Gormley*, 64 M.J. at 620. Therefore, like *Velez* and *Gormley*, appellant should be "entitled to complete credit to ensure that his sentencing interests are fully protected." *Velez*, 2012 CCA LEXIS 353 at *15 n.7; *Gormley*, 64 M.J. at 620.[4]

[4] This is especially true based on *Gormley*, where the lone offense warranting *Pierce* credit "was joined with *eight* other offenses at the prior NJP proceeding." 64 M.J. at 620 (emphasis added). Again, appellant only had two other offenses in

"Complete credit" is particularly important in this case, as appellant received nearly the maximum possible sentence for his nonjudicial punishment under Article 15, UCMJ. More specifically, appellant received the maximum reduction in grade (from E-4 to E-1), maximum forfeitures (of half of one month's pay for two months), maximum extra duty (of 45 days), and an additional 45 days of restriction.[5] (Pros. Ex. 4). In essence, appellant received the maximum possible amount of the harshest punishments under Article 15, UCMJ, which necessitates a corresponding level of *Pierce* credit.

For his reduction from E-4 to E-1, appellant should receive the same 30 days of confinement credit awarded by the military judge in *United States v. Mead*, which involved the exact same reduction in grade. 72 M.J. 515, 520 (A. Ct. Crim. App. 2013). If anything, such an amount of credit might be insufficient, as the Army Court has previously awarded 15 days of credit for a single reduction in grade from E-2 to E-1. *United States v. Gonzalez*, 2013 CCA LEXIS 876, *4 (A. Ct. Crim. App. 17 October 2013).

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his nonjudicial punishment, both of which related to a simple "failure to report." (Pros. Exs. 1, 4).

[5] Although as discussed below, appellant's extra-duty and restriction were cut short when he was sentenced to pretrial confinement.

For restriction and extra duty, appellant should receive at least 13 days credit.[6] While appellant began 45 days of extra duty and restriction on August 12, 2016, he was subsequently placed in pretrial confinement on August 31, 2016. *See id.* at *3–4 (providing 45 days of confinement credit for 45 days of extra duty and 45 days of restriction, after presuming that both punishments ran concurrently); *Piompino*, 2002 CCA LEXIS 349 at *6–7 (awarding "fifty two and one-half days" for the same amount of extra duty and restriction); *see also* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, Tables 2–6 and 2–7 (16 Sep. 2014). While appellant went into pretrial confinement before completing his adjudged extra duty and restriction, he still completed at least thirteen days of each.[7] As such, appellant is entitled to the remaining amount of potential confinement credit against his approved sentence.

Finally, for his forfeitures of half of one month's pay for two months, appellant should receive 30 days of credit, which comports with the guidance from

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[6] While appellant maintains he served 19 days of extra-duty and restriction, any more than 13 days of credit, when combined with other *Pierce* credit and pretrial confinement credit, would exceed his approved sentence of 180 days confinement.

[7] Failing to report to a 0630 accountability formation is distinct from failing to complete extra duty or violating restrictions. Notably, the stipulation of fact itself separated attending an accountability formation from performing extra duty. (*See* Pros. Ex. 1, paragraph 20, 23). While appellant failed to report to a 0630 accountability formation numerous times in this timeframe, he failed to report to his extra duty only one time, which was characterized as not being "on time" for this duty (as opposed to skipping it altogether). (Pros. Ex. 1). There is no evidence that appellant violated his adjudged restriction in this timeframe.

the "Table of Equivalent Punishments" referenced in *Pierce* and applied by the Navy Court in *Velez*. Under such an analysis, "one day of forfeitures is the equivalent to one day of confinement." *Velez*, 2012 CCA LEXIS 353 at *15.

Based on these calculations, appellant remains entitled to at least 73 days of confinement credit against his approved sentence to confinement of six months. Providing these final 73 days of confinement credit would satisfy the type of "complete credit" described in *Velez* and *Gormley*, while also accounting for the full circumstances of appellant's case.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court grant appellant "complete credit" necessary to cure his double-punishment.

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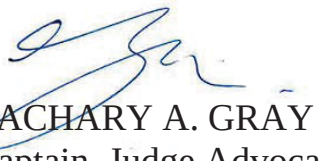
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Haynes*, Army Dkt. No. 20160817, USCA Dkt. No. 18-0359/AR, was electronically filed brief with the Court and Government Appellate Division on February 26, 2019. The Joint Appendix will be delivered via courier service.



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