IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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 THE ISSUE UNDER ITS ARTICLE 66(C), UCMJ, AUTHORITY STILL SUFFICIENT?

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STATEMENT OF STATUTORY JURISDICTION

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

STATEMENT OF THE CASE

On 4 November and 14 December 2016, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of abusive sexual contact in violation of Article 120(d), UCMJ, 10 U.S.C. § 920(d) (2012), one specification of a false official statement in violation of Article 107, UCMJ, two specifications of the wrongful use of controlled substances in violation of Article 112a, UCMJ, one specification of assault in violation of Article 128, UCMJ, two specifications of failing to go to his appointed place of duty in violation of Article 86, UCMJ, three specifications of willfully disobeying a superior commissioned officer in violation of Article 90, UCMJ, and one specification of insubordinate conduct towards a noncommissioned officer in violation of Article 91, UCMJ. (JA 54-57, 64, 152).

The military judge sentenced appellant to a bad conduct discharge and confinement for thirteen months. (JA 184). Appellant was credited with 107 days of pretrial confinement (PTC) against the sentence. (JA 184). Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence as provided for six months' confinement and the discharge as adjudged. (JA 58). The convening authority also deferred automatic forfeitures until Action and credited appellant with 107 days confinement against his sentence of confinement. (JA 58).

On 21 May 2018, in an opinion of the court, the Army Court affirmed the findings and sentence. *United States v. Haynes*, 77 M.J. 753 (Army Ct. Crim. App. 2018). As an initial matter, the Army Court held that appellant waived any claim to *Pierce*[1] credit. *Id*. at 755. To support this finding, the Army Court noted that the defense never requested *Pierce* credit, appellant agreed with the judge's grant of 107 days of confinement credit in total at trial, and appellant never requested the convening authority award additional credit. *Id*. at 755-56.

The Army Court also addressed whether it should notice the waived issue under its Article 66(c) authority "to do justice." *Id*. at 756-58. The Army Court declined to exercise its discretion to notice the waived issue because it concluded that the misconduct proved at trial was distinct from that addressed by appellant's prior Article 15. *Id*. at 757-58. Additionally, the Army Court questioned whether appellant even completed his punishment. *Id*.

Appellant requested the Army Court to reconsider its decision on 20 June 2018 which was denied on 10 July 2018. Appellant filed a Petition for Grant of Review on 10 September 2018. This Court granted appellant's petition on 7 January 2019, specifying the two issues discussed below. Appellant requested an

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[1] *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989).

enlargement of time to submit his brief which was granted by this Court on 5 February 2019. Appellant submitted his brief on 26 February 2019.

STATEMENT OF FACTS

Appellant's court-martial was the culminating event after months of misconduct encompassing a multitude of UCMJ violations. (JA 54-57). In April 2016, he committed abusive sexual contact upon a fellow soldier while she was asleep. (JA 72-79, 187). Then, he gave a false sworn statement to criminal investigators about it. (JA 82-87, 187-88).

While under investigation for the sexual misconduct, appellant physically assaulted another soldier. (JA 95-105, 188). Thereafter, he committed multiple subsequent offenses to include failing to report for duty twelve times, all between 22 June – 14 July 2016. (JA 105-14, 189-90). Defying military authority, appellant willfully disobeyed orders three times and was insubordinate to his superiors. (JA 114-34, 189-90).

The Court-Martial Charges

In addition to multiple UCMJ violations ranging from assault to insubordination, appellant continually used illegal drugs. (JA 94, 188, 190). Consequently, he tested positive for marijuana six times between April – August

2016.[2] (JA188, 190). Appellant was charged with two specifications of the wrongful use of marijuana that encompassed use identified by the first four drug tests.[3] (JA 56, 188). (See attached Chart at Appendix *infra*, summarizing positive drug tests, the corresponding charges, and nonjudicial punishment (NJP)). He admitted guilt to all of the above-stated infractions.[4]

The Article 15

After charges were preferred,[5] appellant tested positive for marijuana a fifth and sixth time. (JA 190). He also violated two more articles of the UCMJ in addition to the illegal drug use. (JA 190, 192-93). Rather than prefer additional charges, appellant received a Field Grade Article 15.[6] (JA 190, 192-96). He was never charged with nor received NJP for the sixth positive drug test. At NJP,

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[2] Appellant tested positive for marijuana on 8 April 2016, 31 May 2016, 7 June 2016, 24 June 2016, 14 July 2016, and 13 August 2016. (JA 188, 190).

[3] Specification 1 of Charge III alleged the wrongful use of marijuana between on or about 8 March 2016 - 8 April 2016. (JA 56). Specification 2 of Charge III alleged the wrongful use of marijuana between on or about 7 May 2016 - 24 June 2016. (JA 56).

[4] Appellant voluntarily entered into a stipulation of fact and was advised the judge would use it to determine his guilt. (JA 66-69). Appellant read the stipulation, agreed that everything contained in it was true, and affirmed there was nothing contained within the stipulation that he did not want to admit as true. (JA 68-69).

[5] Charges were preferred 1 August 2016. (JA 54).

[6] The Article 15 occurred 11 August 2016 for the following charges: (1) failing to go to his appointed place of duty on 2 August 2016; (2) failing to go to his appointed place of duty on 3 August 2016; and (3) wrongfully using marijuana between on or about 14 June – 14 July 2016. (JA 192-96).

appellant received a reduction from E-4 to E-1, forfeiture of 1/2 pay per month for two months, extra duty for forty-five days, and restriction for forty-five days. (JA 196).

Appellant never completed the punishment imposed by the NJP. After the Article 15, appellant's escalating misconduct, disrespect, and blatant disobedience "spiraled out of control,"[7] which resulted in his pretrial confinement.[8] (JA 154-55, 190-91).

Drug Use

Appellant admitted he smoked marijuana daily with the specific intent to be expelled from the Army. (JA 188, 89-96). During the providence inquiry, appellant testified he was guilty of Specification 2 of Charge III "Because I never stopped smoking [marijuana]. I continually kept smoking." (JA 94). Appellant affirmed he used drugs "Every day, Your Honor" between 7 May 2016 – 24 June 2016. (JA 94).

Alleged Overlap

Specification 2 of Charge III alleged the wrongful use of marijuana between on or about 7 May 2016 - 24 June 2016. (JA 56). Under the Article 15 NJP, appellant was found guilty of illegal drug use from on or around 14 June 2016 – 14

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[7] *Haynes*, 77 M.J. at 755.
[8] Appellant was placed in pretrial confinement 31 August 2016. (JA 154).

July 2016. (JA 192-96). Thus, the eleven-day overlap between 14 June 2016 – 24 June 2016 serves as the basis for appellant's allegation for *Pierce* credit.

At trial, "neither party argued that the military judge should consider the Article 15 during sentencing." *Haynes*, 77 M.J. at 755-56. When the military judge addressed the amount of PTC to award to appellant, "he agreed with the military judge that the total confinement credit was 107 days." *Id*. at 755. Appellant "never requested that the [convening authority] award sentencing credit when taking action." *Id*. at 756.

SUMMARY OF ARGUMENT

This Court delineated four pathways for an appellant to introduce and/or address *Pierce* credit. *United States v. Gammons*, 51 M.J. 169, 183 (C.A.A.F. 1999). These are: (1) introduction of the NJP during sentencing at court-martial; (2) introduction of the NJP during an Article 39(a) session for credit consideration; (3) deferring introduction at the trial level in favor of presentation to the convening authority prior to action; or (4) do not bring the NJP to the attention of any sentencing authority. *Id*.

Waiting until appeal to ask for *Pierce* credit for the first time is not one of the options specified by this Court. *Id*. However, there are two exigent circumstances contemplated by this Court which would allow an appellant to raise

Pierce credit for the first time on appeal: (1) presenting a collateral matter; and (2) requesting a CCA to notice his waiver in order to "do justice." *Id*. at 181-83.

The concept of waiver provided in *Gammons* was followed in subsequent case law by this very Court and is consistent with the Rules for Courts-Martial [hereinafter R.C.M.]. *See United States v. Bracey*, 56 M.J. 387, 389 (C.A.A.F. 2002) ("If appellant wanted to introduce facts and obtain a ruling that the NJP and the court-martial conviction were for the same offense, the time to do so was at trial, not on appeal."); R.C.M. 907 (listing "[p]rior punishment under Articles 13 or 15 for the same offense" as "waivable grounds" if not raised by the accused.).

As gatekeeper, appellant allowed the Article 15 to come in to his trial via the stipulation of fact. (JA 66-69, 190). Despite the admission of his NJP before the trier of fact (JA 190), appellant elected not to ask for *Pierce* credit at any point. (JA 154-55). Thus, he should be found to have waived the issue. *Gammons*, 51 M.J. at 183 ("failure to raise the issue . . . based upon the record of a previous NJP . . . prior to action by the convening authority waives an allegation that the court-martial or convening authority erred.").

Appellant did not raise any collateral matter which would properly bring his *Pierce* claim within the Army Court's purview under *Gammons*. (Appellant's Br.). Thus, his only remaining option was to request review by the Army Court under noticed waiver. The Army Court so declined. *Haynes*, 77 M.J. at 757.

The Army Court properly determined that appellant waived the issue and provided succinct evidentiary and policy reasons for doing so. Even assuming the Army Court erred in finding waiver, its subsequent review of appellant's claim sufficiently resolved the issue. The Army Court provided a number of reasons why appellant's claim failed, including evidence that the Article 15 and charged offense addressed separate misconduct, NJP was imposed *after* preferral of charges, appellant *agreed* that the NJP addressed misconduct *subsequent to* preferral, and there was no sound proof that appellant was *doubly punished*. *Id*. at 757-58 (emphasis added).

<u>ISSUE I</u>

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

STANDARD OF REVIEW

Whether an accused has waived an issue is a question of law reviewed de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). "While this Court reviews forfeited issues for plain error [under] *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009), [it] do[es] not review waived issues because a valid waiver leaves no error to correct on appeal." *Id*. (citing; *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting another source)).

LAW AND ARGUMENT

A. WITHIN LIMITED CIRCUMSTANCES, AN APPELLANT MAY REQUEST A COURT OF CRIMINAL APPEALS TO REVIEW FOR *PIERCE* CREDIT.

1. In General Terms, If An Appellant Wants to Avail Himself of *Pierce* Credit, He Must Raise the Issue Prior to Action on the Sentence.

This Court laid the groundwork and methodology for an appellant to address potential *Pierce* credit by providing four paths:

> 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 U.S.C. § 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.

Gammons, 51 M.J. at 183. In *United States v. Mead*,[9] this Court affirmed the Army Court's opinion of the court which echoed the same methodology, stating: "[m]ore specifically, in that role as gatekeeper, the accused governs whether *Pierce* credit will be calculated and applied [1] by the panel, [2] the military judge, or [3] the convening authority." *United States v Mead*, 72 M.J. 515, 518 (Army Ct.

[9] 72 M.J. 479 (C.A.A.F. 2013).

Crim. App. 2013) (citing *Gammons*, 51 M.J. at 183), *aff'd* 72 M.J. 479 (C.A.A.F. 2013).

With the exception of exigent circumstances (discussed in Part 2. *infra*), the option to forgo choices (1)-(4) and then present the issue for the first time on appeal is not supported by this Court's decision in *Gammons*. Notably, in *Gammons*, the CCA had indeed reviewed for *Pierce* credit where the issue had already been discussed before the judge at the trial level.[10]

2. An Appellant May Raise *Pierce* Credit for the First Time on Appeal If He Provides A Collateral Issue.

Acknowledging the appellant's vital role when deciding whether to open the gate and introduce his claim for *Pierce* credit for prior NJP, this Court provided an alternative for bringing such claims for the first time on appeal.

> The decision as to whether a prior NJP should be introduced depends on circumstances highly particular to the offenses at issue and the full range of issues involved in the sentencing proceeding.

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[10] Appellant's insinuation that "Gammons never asked the trial court or convening authority for credit" is a stretch of the facts. (Appellant's Br. 13). While the appellant in *Gammons* may not have outright requested *Pierce* credit, the issue was plainly before the trial judge during the courts-martial, a fact that appellant in this case cannot claim, due to his own waiver in requesting *Pierce* credit. *See Gammons*, 51 M.J. at 175 ("The military judge then sought to ensure that defense counsel was aware of the content of the documents, particularly in view of the apparent relationship of the NJP records to the present proceeding . . . 'MJ: [Reviews the documents.] Defense Counsel, I'm looking at Prosecution Exhibit 3 that appears to be coinciding with at least one of the charges, if not several. Are you aware of that?'").

> Should the advice of counsel be so defective that it affects the fairness of the proceedings, it can be tested under the standards applicable to ineffective assistance of counsel.

Gammons, 51 M.J. at 181. Thus, an appellant may have a method to claim *Pierce* credit for the first time on appeal, but only within very narrow constructs.

Noting that "an accused may have sound reasons for not presenting the record of the prior NJP to any sentencing authority," this Court's message to an accused following such a course of action is clear:

> 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 NJP.

Id. at 183 (emphasis added). Therefore, if an appellant raises a collateral issue supporting why he did not raise *Pierce* credit prior to action, he may assert it for the first time on appeal. *Id*. Without such an issue, appellant's claim for *Pierce* credit is waived.[11]

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[11] Appellee understands the term "waive" as applied in *Gammons* to truly mean waiver, and not forfeiture as discussed in *Harcrow*. *See Gladue*, 67 M.J. at 313 ("The granted issue arises out of the failure of military courts to consistently distinguish between the terms 'waiver' and 'forfeiture.'") (citing *United States v. Harcrow*, 66 M.J. 154, 156 n.1 (C.A.A.F. 2006)); *accord United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) ("Waiver can occur either by operation of law [] or by the intentional relinquishment or abandonment of a known right [].") (internal citations omitted); *see also United States v. Smith*, ___ M.J. ___, 2019 CAAF LEXIS 186, at *1-*2 (C.A.A.F. 2019) (observing that the language of a particular

3. An Appellant May Raise *Pierce* Credit for the First Time on Appeal By Asking A Court of Criminal Appeals to Notice His Waiver.

When an appellant chooses not to raise claims for *Pierce* credit at the trial level or to the convening authority, he relegates any review at the appellate level to a different power. Courts of Criminal Appeals are charged with affirming "only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66 (c), UCMJ. Thus, an appellant may raise *Pierce* credit for the first time on appeal, but in doing so for the first time, necessarily requires a CCA to notice his waiver under their awesome, plenary, de novo power to do justice. *Accord*, *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Appellant's reliance upon the dicta in *Gammons* stating: "if the issue is raised before the Court of Criminal appeals, that court will identify any such credit,"[12] is improperly placed. (Appellant's Br. 6). This language is not located within the opinion where this Court specifically delineated the methods for an

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rule can mean waiver and not forfeiture when it held "that Military Rule of Evidence (M.R.E.) 311 (d)(2)(A) unambiguously establishes that failure to object is waiver, and is not a rule that uses the term 'waiver' but actually means 'forfeiture.'") (citing *United States v. Robinson*, 77 M.J. 303, 307 (C.A.A.F. 2018) (internal quotation marks omitted)).

[12] *Gammons*, 51 M.J. at 184.

appellant to exercise his right as gatekeeper for NJP.[13] Rather, this language is found when this Court offered "guidance to assist reviewing authorities in determining whether appropriate credit has been provided." *Gammons*, 51 M.J. at 184. Interestingly, although two cases city by appellant interpreted *Gammons* differently than the Army Court (e.g., waiver absent plain error), they each referenced this language in *Gammons* as "dicta" when trying to determine the appropriateness of *Pierce* credit requests.[14]

It follows that an accused must first have asked for credit at the lower level in order for appellate authorities to review, as a matter of law, whether credit was appropriately given. That is, an appellant cannot raise for the first time on appeal that *Pierce* credit is *appropriate*.

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[13] *Compare Gammons*, 51 M.J. 183 (stating four specific methods with which an appellant can introduce or treat his NJP) *with*, *Gammons*, 51 M.J. at 184 (providing guidance on how to ensure that credit previously raised was appropriately given).

[14] *Accord United States v. Edwards*, 54 M.J. 761, 762 (N.M. Ct. Crim. App. 2000) ("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."); *United States v. Gormley*, 64 M.J. 617, 620 (C.G. Ct. Crim. App. 2007) ("The dicta in *United States v. Gammons* states that the timing of the decision to request credit for prior NJP remains with the accused."). Notably, the issue in *Gormley* was not the timing of when appellant asked for *Pierce* credit, but whether the military judge failed to state the specific *Pierce* credit he gave to the appellant at trial. *Id*. 64 M.J. at 618.

But, an appellant may raise on appeal, and the Courts of Criminal Appeals may address, whether appropriate credit was in fact *provided*, meaning his sentence may be affirmed in law and fact. The Army Court agreed:

> Reading *Gammons* as a whole, it appears to [the Army Court] that the Court of Appeals for the Armed Forces (CAAF) is addressing two different legal issues. First, there is the question of whether a court was required, as a matter of law, to award *Pierce* credit. Second, there is the question of whether the Court of Criminal Appeals, using its authority under Article 66(c) "to do justice" could notice the waived issue and grant the appellant relief irrespective of the waiver . . . . Although we have not always been as clear as we might desire, this court should try to follow the guidance in *Gammons* and separate (both in our reasoning and our opinions) instances where we decide a case based on questions of law, and when we decide issues under our broader mandate under Article 66(c) to "do justice."

Haynes, 77 M.J.at 756; *Id.* at 756, n.4. In application, if a reviewing court determines that the military judge did not give proper consideration to NJP that an appellant raised, it may "reassess the sentence or order that the case be returned to the convening authority for further action." *Gammons*, 51 M.J. at 184. Consequently, appellant is not without remedy, but his relief must fall under the Courts of Criminal Appeals' broader power of justice.[15]

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[15] In 2012, the Navy-Marine Court seemingly provided this very type of relief when conducting its Article 66(c) review and granted *Pierce* credit when it was never requested, even at appeal. *United States v. Velez*, NMCCA 201100456, 2012 CCA LEXIS 353, at *1, *14 (N.M. Ct. Crim. App. 12 Sept. 2012) ("Although not

4. The Rules for Courts-Martial Support Waiver.

An appellant's declination to raise the issue of *Pierce* credit satisfies waiver under both *Gammons* and the Rules for Courts-Martial. Under R.C.M. 907 (b)(2)(D)(iv), which implements Article 15(f), a defense motion to dismiss a charge for prior punishment under Article 15 for the same offense is also "waived if not asserted by the accused at trial." *Gammons*, 51 M.J. at 174.

5. Policy Reasons Support the Finding that *Pierce* Credit Is Required to Be Requested Before Action.

Appellant's claim that "the military justice system has operated in perfect synchronicity, having reached a type of homeostasis undisturbed" regarding *Pierce* credit on appeal oversells appellant's position that there is unanimity among the service courts. (Appellant's Br. 22). There is not a universal understanding by the service courts of criminal appeals on how to interpret *Gammons*. While the Coast Guard and Navy-Marine Courts reference *Gammons* dicta and interpret it broadly,[16] the Air Force Court too struggles with *Gammons*' applicability. *United States v. Webb*, ACM 34598, 2002 CCA LEXIS 267, at *16 (A.F. Ct. Crim. App. 2002) ("We believe that an appellant should not be able to raise this issue for the

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assigned as error, we note that during the sentencing proceedings, the appellant made an unsworn statement indicating he previously had been punished at NJP.").

[16] *Gormley*, 64 M.J. at 620 (citing to "dicta" in *Gammons*); *Edwards*, 54 M.J. at 762 (referencing a broad reading of *Gammons* "dicta" to form their analysis).

first time at our Court . . . *the issue should be deemed waived* on appeal. Nevertheless, we are bound by *what appears to be* our superior court's decision to the contrary.") (emphasis added).[17]

Although the discretion rests with the accused "whether the prior punishment will be revealed to the court-martial,"[18] an appellant should not be allowed to wield this provision as both a sword and a shield. This Court was cognizant of a similar notion when reviewing *Pierce* credit's applicability. *See Gammons*, 51 M.J. at 180 ("[W]here the accused -- as gatekeeper -- has allowed the NJP to become an issue in the sentencing proceeding, the *Pierce* dicta could be used to transform the shield of Article 15(f) into a sword that misinforms or misleads the court-martial.").

The above warning demonstrates exactly what occurred in appellant's case. By electing not to raise the matter before the trial court, he effectively limited the record of discussion of any alleged overlap between his convictions and his Article 15. To now claim an entitlement of credit means that he misinformed the military judge when he agreed on the record to 107 days of confinement credit he should receive. (JA 154-55).

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[17] *Contra Haynes*, 77 M.J. at 756 ("[I]n *Gammons*, our superior court appears to have determined that an accused waives the issues of *Pierce* credit when it is raised for the first time on appeal.").
[18] *Pierce*, 27 M.J. at 369.

Because appellant elected, as the gatekeeper, not to request credit at trial or before the convening authority, he necessarily foreclosed the government from developing the record with facts that demonstrated he was not entitled to credit under *Pierce*. Accordingly, he should not benefit from his actions. This Court previously noted that designating the accused as the gatekeeper does not "require [the CAAF] to permit an accused to provide inaccurate or misleading information to the court-martial or to *preclude the prosecution from making a fair comment on matters reasonably raised or implied by the defense references to the NJP*." *Id*. (emphasis added).

This fear could be well-realized if this Court opines that an appellant can wait and raise his request for *Pierce* credit for the first time on appeal, particularly in guilty-plea cases, where the record of trial is not always as fully developed as a contested courts-martial. If an appellant raises *Pierce* credit at the trial level, the prosecution can ensure accuracy of appellant's claim.[19] Likewise, if appellant raises *Pierce* credit before the convening authority takes action, the government is

[19] An appellant's trial is the most opportune moment to present such an argument as the military judge is in the best position to develop the record, resolve discrepancies, and craft a remedy. *Cf. Gammons*, 51 M.J. at 179 ("[T]he fact that a disciplinary punishment has been enforced may be shown by the accused *upon trial*.") (emphasis added).

still provided with an opportunity to opine and make a fair comment on the matters raised via the Staff Judge Advocate's Recommendation and its Addendum.[20]

Appellant's contention that "[i]f 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" is without merit. (Appellant's Br. 6). The above-stated choices are not mutually exclusive. Offering the NJP during an Article 39(a) session would not necessarily require it to be formally admitted as evidence but would still allow for an appellant to receive consideration for sentencing. Similarly, offering the NJP for consideration by the convening authority allows an appellant to preclude admission of the NJP at trial and yet still protects his "right not to be double-punished."

Conversely, if an appellant waits until his appeal to raise the *Pierce* credit, the government is precluded from the ability to adequately comment on the matters implied by the defense. The result is an improper windfall to appellant as the government is handicapped to respond with an underdeveloped record due to appellant's stall tactic. As the Army Court forewarned, "[w]e are cautious about

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[20] Appellee is cognizant that raising *Pierce* credit for the first time with the convening authority has its own limitations under the recently revised Article 60, UCMJ powers. Nevertheless, if an appellant raises the issue to the convening authority, thus comporting with *Gammons*, a convening authority can notice the issue to the CCA and request sentence reassessment based upon the same.

incentivizing raising *Pierce* credit issues for the first time on appeal." *Haynes*, 77 M.J. at 758.

B. THE ARMY COURT PROPERLY DETERMINED THAT APPELLANT WAIVED THE ISSUE.

1. As the Gatekeeper for Claims of *Pierce* Credit, Appellant Proactively Chose Not to Open the Gate.

Pierce credit is not automatic; appellant thus bears the responsibility to properly raise it.[21] Despite the NJP being readily available as evidence via the stipulation of fact, appellant chose not to request *Pierce* credit consideration at his trial. (JA 154-55).

The most obvious explanation for his failure to request sentence credit is because appellant did not believe he was entitled to it. This argument becomes more evident after considering trial defense counsel's proactive argument for sentence credit for both Article 13 punishment and credit for pre-trial confinement. (JA 63, 154-55). Defense counsel's advocacy for his client demonstrates that he was aware of possible credit and sought it where appropriate. (JA 63, 154-55). Here, appellant did not "open the gate" for sentence credit from the military judge

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[21] "[W]e adhere to the conclusion in *Pierce* that Article 15(f) establishes the accused as the gatekeeper with respect to consideration of an NJP record during court-martial involving the same act or omission." *Gammons*, 51 M.J. at 179. *Accord Mead*, 72 M.J. at 518 ("It is similarly well-settled that the accused is the gatekeeper regarding if, when, and how prior [NJP] for the same offense will be presented, considered, and credited.").

or from the convening authority as required under *Gammons* because he was simply ineligible for it.

2. Appellant Affirmatively Waived Any Entitlement to *Pierce* Credit.

Appellant was aware of his Article 15 yet chose not to seek *Pierce* credit. Accordingly, his request should be deemed waived. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Gladue*, 67 M.J. at 313 (citations omitted). Further, when an appellant "intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." *Id*. (citation omitted). Simply put, appellant declined to argue that his Article 15 overlapped with the courts-martial charges; thus, he should be found to have waived any right to *Pierce* credit.

Here, "the defense never requested that the military judge award *Pierce* credit." *Haynes*, 77 M.J. at 755. After discussing credits for which appellant claimed he was entitled, the military judge clarified whether there was anything further to be considered. (JA 154-55). "Appellant agreed with the military judge that the total confinement credit was 107 days." *Id*.; JA 155. This is factually similar to another case in which this Court declined relief for *Pierce* credit. *See Mead*, 72 M.J. at 480 ("Although offered the opportunity to contradict or add anything, the defense specifically declined to do so."). Moreover, the "[u]se of a

prior NJP at sentencing, while raising important issues, is not so critical as to require a detailed inquiry by the military judge and affirmative responses by the accused concerning waiver." *Gammons*, 51 M.J. at 181.

Based upon the appellant's own affirmative admissions to the military judge, the Army Court correctly concluded "appellant waived any entitlement to *Pierce* credit when he affirmatively told the military judge that he was not entitled to any additional confinement credit and stipulated [] that the Article 15 addressed post-preferral misconduct." *Haynes*, 77 M.J. at 757. At the time of trial, appellant seemingly knew he was not entitled to further credit and waived his right to claim so on appeal.

C. APPELLANT IS NOT ENTITLED TO A POTENTIAL WINDFALL BECAUSE HE FAILED TO RAISE A CLAIM FOR *PIERCE* CREDIT AT THE APPROPRIATE TIME.

If an appellant waits to allege a claim for *Pierce* credit for the first time on appeal, the reviewing court is disadvantaged from fully developing the facts necessary to address the issue. Such is the case here. Accordingly, appellant's own delay risks that he will receive credit to which he is not entitled.

As the Army Court highlighted, if an appellant elects to remain silent during his courts-martial as to *Pierce* credit, remains silent in submitting *Pierce* credit matters for consideration by the convening authority, and only alleges *Pierce* credit for the first time on appeal, it could improperly incentivize an accused. *Id*. at 758.

"To the extent that these factual issues are debatable . . . it is because questions of *Pierce* credit are best resolved at the trial court." *Id* Further, "If appellant wanted to introduce facts and obtain a ruling that the NJP and the court-martial conviction were for the same offense, the time to do so was at trial, not on appeal." *Bracey*, 56 M.J. at 389. As evident in Issue II, Part A.(1.) *infra*, *Pierce* credit can be highly factual and technical. Waiting until appeal to raise the issue creates a risk that the factual predicate for *Pierce* credit is developed in error.

ISSUE II

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

STANDARD OF REVIEW

To the extent that appellant argues the Army Court erred as a matter of law, the standard of review by this Court is de novo. Article 67(c), UCMJ.[22]

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[22] The undersigned could not find a controlling case directly on point that provided this Court's standard of review for claims of *Pierce* credit; however, this Court appears to take the approach of de novo review. *E.g.*, *Pierce*, 27 M.J. at 369 (providing an extensive analysis of the case without stating a standard of review); *Gammons*, 51 M.J. at 173-74 (reviewing the facts of the case without stating a standard). To the extent that *Pierce* credit is treated similarly as Article 13 credit, though they are distinct principles, this Court stated the review is de novo. *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005).

LAW AND ARGUMENT

A. THE ARMY COURT ANALYZED APPELLANT'S *PIERCE* CREDIT CLAIM DESPITE FINDING WAIVER. THE ARMY COURT'S REVIEW UNDER ARTICLE 66(C) WAS SUFFICIENT.

Although the Army Court stated there were two factual issues not fully developed in the record, the court nevertheless reviewed both issues and addressed each accordingly. *Haynes*, 77 M.J. at 755-58. This Court was able to do the same analysis in a similarly situated case. *See Bracey*, 56 M.J. at 389 (reviewing appellant's claim for *Pierce* credit alleged for the first time on appeal considering "the record," "[t]he providence inquiry and the stipulation of fact indicat[ions]").

The fact that evidentiary issues were not completely developed in the record is wholly attributable to appellant's failure and/or refusal to raise them at the trial level or pose them to the convening authority. Both parties could have sufficiently explored the issue if appellant had raised it. Despite the lack of an extensive record, the Army Court nevertheless addressed whether appellant was entitled to *Pierce* credit sufficiently.

1. The Article 15 and the Charged Offense Addressed Different Misconduct.

While *Pierce* protects a soldier from being punished twice for the same offense,[23] *Gammons* shows this credit only applies when the conviction for the

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[23] *Pierce*, 27 M.J. at 369.

charged offense is the same as the offense punished through NJP.[24] It follows, that if NJP occurs after court-martial charges for different offenses on different dates, *Pierce* does not apply.[25] In other words, although *Pierce* mandates complete credit for all NJP suffered,[26] it is only appropriately granted when the court-martial offense is substantially identical to the Article 15 punishment.[27] Here, appellant's conviction for drug use and his NJP for drug use resulted from violating Article 112a, UCMJ on different dates and are thus, separate offenses. This is true for four reasons.

Most convincingly, appellant agreed that the Article 15 addressed "*misconduct subsequent to preferral*." (JA 190) (emphasis added). The Army Court agreed: "our reading of the stipulation of fact indicates the Article 15 and the charged offense addressed separate misconduct." *Haynes*, 77 M.J. at 757.

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[24] *See Gammons*, 51 M.J. at 180 ("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.") (emphasis added).

[25] This Court did not specify in its grant, and the Army Court did not address, whether the NJP was further distinguished because it encompassed two additional non-related charges completely distinct from the Charges and conviction at appellant's court-martial. Appellant concedes the same dilemma: "appellant's nonjudicial punishment included two other offenses." (Appellant's Br. 34).

[26] An accused should be given credit for previous NJP suffered "day-for-day, dollar-for-dollar, stripe-for-stripe." *Pierce*, 27 M.J. at 369.

[27] *See Bracey*, 56 M.J. at 389 (affirming no entitlement for *Pierce* credit when Article 15 NJP was for subsequent misconduct that related to previous disobedience against the same person).

Paragraph 11 of the stipulation describes a urinalysis (UA) sample appellant provided 24 June 2016, serving as the basis for Specification 2 of Charge III. (JA 188). Paragraphs 19 and 22 of the stipulation describe an entirely different UA sample from an entirely different date-14 July 2016-that admittedly served as the basis for NJP. (JA 190). By his own admissions, appellant describes how these two acts were separate and distinct. (JA 188, 190).

Second, appellant's NJP is distinct from his conviction because "[t]he Article 15 was imposed after the preferral of charges." *Id.* Charges were preferred 1 August 2016; the results of appellant's (fifth positive) drug test from 14 July 2016 were not even received until 3 August 2016, meaning the government was unaware of an additional charge for this crime when it preferred charges against appellant three days prior.[28] (JA 190). Appellant's NJP occurred 11 August 2016, capturing his own self-admitted "misconduct subsequent to preferral." (JA 190-96). Thus, under the stipulation of fact, appellant concurs that the drug use on or about 14 June 2016 – 14 July 2016 punished under NJP was different from the misconduct that was charged at trial. (JA 190).

Third, appellant admitted he knowingly smoked marijuana nearly every day in an attempt to be administratively separated from the Army and continued to do

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[28] "At the time of preferral, the government had not even received the lab report that was the basis for the NJP." *Haynes*, 77 M.J. at 757.

so well past the dates of both the charged misconduct and NJP.[29] (JA 94, 188-91). "Thus, even without the stipulation, a possible and reasonable reading of the record is that the Article 15 and the charged offense address different misconduct." *Id.* This contention is supported by the fact that appellant's positive drug tests continuously rose in nanogram levels, even after the 24 June 2016 test,[30] and by the fact that appellant was still testing positive for marijuana as late as 13 August 2016. (JA 190).

Contrary to appellant's assertions,[31] appellant's own admissions, stipulation of fact, and corresponding drug tests clearly demonstrate appellant continued to use illegal drugs into August 2016. Notably, the last drug use appellant admitted to in the stipulation of fact was on 13 August 2016 and resulted in appellant's highest drug positive results yet, yielding 794 nanograms of marijuana, indicating continued use even while serving punishment under NJP. (JA 190).

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[29] When counseled for failing to report for duty, appellant stated, "I have brutally failed to adapt to the Army's way of life [and] I recommend myself for a Chapter 3- failure to adapt." (JA 189). In another instance of counseling, appellant stated, "Just send me home I don't want any benefits or anything the Army has to offer please [and] thank you." (JA 189).

[30] *Compare* JA 188, Para. 11. (showing a nanogram level of 33 from a drug test 24 June 2016), *with* JA 190, Para. 19 (demonstrating a nanogram level of 306 from a drug test 14 July 2016).

[31] "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." (Appellant's Br. 29).

Finally, "it is a fair read of the record that the parties were well aware of the Article 15 and the fifth positive test and chose to negotiate around the issue."[32] *Id.* The Army Court found it persuasive that the pretrial agreement "prohibit[ed] the government from charging additional misconduct that occurred after preferral . . . based on the information included in the stipulation of fact" by which the parties agreed to be bound even on appeal. *Id.* (internal quotation marks omitted).

Because of the unusual amount of information contained in the record, despite appellant's waiver, the Army Court's review is detailed. In sum, the Army Court read the stipulation of fact to describe subsequent misconduct and noted that appellant admitted to smoking marijuana on a near daily basis. *Id.* The facts underscored that the NJP and charged offense addressed different misconduct. *Id.* Accordingly, it found that the negotiated pretrial agreement between the parties was strategically made on the basis of allowing different misconduct to be addressed in different manners (courts-martial vs. NJP). *Id.* Surveyed within the context of the entire record, appellant's testimony, the charging pattern of the government,[33] and the stipulation, there is clarity that appellant's NJP administered

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[32] *See Gammons*, 51 M.J. at 17 ("One of the hallmarks of the military justice system is the broad discretion vested in commanders to choose the appropriate disposition of alleged offenses.").

[33] The government's charging pattern demonstrates that it charged a thirty-day time period applied retroactively from each drug offense for which appellant tested positive. In example, when appellant tested positive for marijuana 8 April 2016,

11 August 2016 was for a positive drug UA appellant provided 14 July 2016, wholly outside of the dates on the charge sheet. The Army Court's review is sufficient.

2. Appellant Did Not Serve His Punishment Under the Article 15 NJP.

Pierce is clear that an appellant must be given "credit for any and all nonjudicial punishment *suffered*." *Pierce*, 27 M.J. at 369 (emphasis added). If appellant did not suffer NJP as approved, he is not entitled to *Pierce* credit notwithstanding a finding of overlap. "The purpose of sentencing credits is to ensure appellant is not *punished twice* for the same offense." *Haynes*, 77 M.J. at 755 (emphasis added).

The most glaring oversight in appellant's argument (other than the fact that his NJP was for different misconduct) is the omission of the fact that he never "suffered" punishment. (Appellant's Br. 34-36). Though it is true "appellant *received* the maximum reduction in grade [and associated penalties]" at his NJP (Appellant's Br. 35), the harsh truth is that appellant never *fulfilled* such extra

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the government charged him wrongful use from 8 March-8 April. (JA 56, 188). Similarly, when appellant tested positive for marijuana 14 July 2016, the government charged him with wrongful use from 14 June – 14 July 2016. (JA 190, 192-96).

duties and restrictions due to his own spiraling misbehavior which necessitated pretrial confinement, nineteen days after the NJP.[34]

"[E]ven assuming the Article 15 and the charged offense both addressed the same conduct, it [was] not clear [to the Army Court] that appellant was, in fact, doubly punished." *Id.* "There is support in the record that the punishment adjudged at [appellant's] Article 15 was never fully executed." *Id.* at 755.

Appellant's NJP on 11 August 2016 resulted in a reduction from E-4 to E-1, forfeiture of 1/2 months' pay for two months, forty-five days extra duty, and forty-five days restriction. (JA 192-96). However, appellant failed to report for duty on 12 August 2016. (JA 190). Thereafter, he subsequently failed to report seven more times.[35] (JA 190-91). "[A]ppellant was placed in PTC (for which he did receive credit) before he could have completed the Article 15 punishment." *Id.* at 757 (parenthesis in original). Of the forty-five days of extra duty and forty-five days of restrictions, appellant was only present to "suffer punishment" for nineteen

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[34] It appears that appellant's loss of rank remained as he was referred to as a Private during his courts-martial. (JA 64).
[35] Appellant failed to report for duty 15 August 2016, 16 August 2016, and 17 August 2016. (JA 190). He failed to return for duty after lunch 20 August 2016. (JA 191). He failed to report for duty 22 August 2016 and 23 August 2016. (JA 190). Additionally, he reported late for extra duty 13 August 2016. (JA 190).

days, eight of which he violated.[36] (JA 154, 190-91). "[R]eceiving *Pierce* credit for punishment never actually served would be a windfall." *Id*. at 758.

B. APPELLANT'S REQUEST FOR CREDIT IS MISCALCULATED.

Appellant's request for seventy-three days is flawed. (Appellant's Br. 34-37). First, there is no complete overlap between the dates from NJP versus dates charged at trial, as was present in *Pierce, Gammons*, and *Mead*.[37] Second, appellant aggregates his request for relief, compounding thirty days for rank reduction, thirteen days for extra duty and restrictions, and thirty days for forfeitures. (Appellant's Br. 35-37).

As an initial matter, it is without dispute that *Pierce* credit for rank reduction is not required whatsoever upon appellate review. *Mead*, 72 M.J. at 519 ("While

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[36] If appellant had served his NJP punishment, it would have ended approximately 26 September 2016. However, Appellant was placed in pretrial confinement 31 August 2016. (JA 154).

[37] In *Pierce*, the appellant received NJP for a July larceny of an aviator kit. *Pierce*, 27 M.J. at 367. In August, that appellant's commander "forwarded *this charge* and the others for which appellant now stands convicted" to a general court-martial. *Id.* (emphasis added). In *Gammons*, the government's sentencing argument admitted that appellant was "taken to Captain's Mast for marijuana use on numerous occasions, including while underway on board the Coast Guard Cutter MORGANTHAU." *Gammons*, 51 M.J. at 175. When defense counsel addressed the charges for which appellant plead guilty, including four specifications of marijuana use, it stated "The Captain of the MORGANTAU punished [appellant] at Captain's Mast *for that marijuana use*." *Id*. at 172, 176 (emphasis added). In *Mead*, NJP previously rendered for one charge of the wrongful use of amphetamine was exactly duplicated under Charge II at a subsequent court-martial, and no other NJP charges remained. *Mead*, 72 M.J. at 516.

we certainly do not hold that consideration of pay lost as a result of a prior reduction is beyond the scope of either judicial or convening authority discretion, *there is no legal obligation to provide credit for such a consequence*.") (emphasis added), *aff'd* 72 M.J. 479. Moreover, this Court previously stated, "we conclude . . . reductions in rank . . . are so qualitatively different from other punishment that conversion is not required as a matter of law." *United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003).

Considering the remaining extra duty, restrictions, and forfeitures, appellant's equation calculating seventy-three days leads "to an outcome that bears little resemblance to the starting point." *Mead*, 72 M.J. at 519. To assert seventy-three days of credit for NJP where the maximum punishment allowable under any circumstance is sixty days defies logic-not to mention the fact that appellant only received forty-five days and barely served eleven.[38] "After all, the maximum punishment authorized by Article 15, UCMJ, can only deprive one's liberty for up to sixty days. Surely a fraction should not subsume the whole." *Id.*

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[38] Calculations provided *supra*, at Issue II.(A.)(2.).

CONCLUSION

Gammons is clear that *Pierce* credit may only be raised for the first time on appeal when there is a valid collateral issue, such as ineffective assistance of counsel. *Gammons*, 51 M.J. at 183. Otherwise, it can be waived. *Id.*; *Cf. Bracey*, 56 M.J. at 387 ("If appellant wanted to introduce . . . NJP . . . the time to do so was at trial, not on appeal."). An appellant who raises *Pierce* credit for the first time on appeal may only obtain relieve upon such a showing of a collateral issue, or if the Court of Criminal Appeals chooses to notice the waiver under its broad Article 66(c) powers.

Even assuming appellant is appropriately allowed to raise *Pierce* credit for the first time on appeal, it is inapplicable to him based upon the facts in his case. The Army Court found, through appellant's own testimony and stipulation, details sufficient enough to delineate between separate dates of illegal drug use, and thus, evidence to distinguish separate and distinct offenses between the court martial charges and NJP offenses.

Appellant never "suffered punishment" from the NJP because he spiraled out of control and was placed in pretrial confinement, for which he received full credit at sentencing. (JA 155). Appellant was never twice punished for the same offense.

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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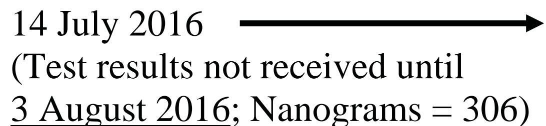
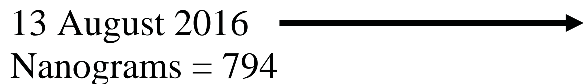
APPENDIX

APPELLANT'S DRUG USE & CORRESPONDING CHARGES

DATES TESTED POSITIVE FOR MARIJUANA	CHARGED WITH MISCONDUCT
8 April 2016 Nanograms =498	Courts-Martial, Charge III, Specification 1 ". . . o/a 8 March 2016 – 8 April 2016"
31 May 2016 Nanograms = 593 7 June 2016 Nanograms = 521 24 June 2016 Nanograms = 33 (Test results received 8 July 2016)	Courts-Martial, Charge III, Specification 2 ". . . o/a 7 May 2016 – *24 June 2016"[1]
1 August 2016	**CHARGES PREFERRED**
14 July 2016 (Test results not received until <u>3 August 2016</u>; Nanograms = 306)	Article 15, NJP on <u>11 August 2016</u> ". . . o/a *14 June 2016 – 14 July 2016"
13 August 2016 Nanograms = 794	No punishment issued
31 August 2016	**PLACED IN PRETRIAL CONFINEMENT**





* = Basis of alleged overlap for *Pierce* claim

[1] Consistent with the government's charging pattern, the government charged a thirty-day block timeframe despite evidence of separate instances of drug use.

CERTIFICATE OF COMPLIANCE WITH RULE 24(c)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 8,065 words and 785 lines of text.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court, at ***efiling@armfor.uscourts.gov***, and contemporaneously served electronically on appellate defense counsel, on March 28, 2019.

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