IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private First Class (E-3) **NATHAN G. LEESE,** United States Army Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20230250 USCA Dkt. No. 25-0024/AR

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

Sentence credit is meaningless to an Appellant who has spent twenty-eight days of his life being punished via extra duty and restriction under Article 15, UCMJ, credited for the punishment at court-martial, but then experiences no reduction in the time served in a jail cell because a lengthier sentence for a difference offense ensured that the sentence credit had no impact on the actual length of incarceration. This nonsensical outcome in the setting of concurrent sentences is no different than if the sentence credit had never been awarded and allows convening authority's or special trial counsel a mechanism to effectively nullify *Pierce* credit in any plea agreement situation. The only way to guarantee meaningful relief is to apply *Pierce* credit against the total adjudged confinement.

The Government suggests that it is a "windfall" for the Appellant to benefit from both current sentences to incarceration and having *Pierce* credit applied to the total adjudged sentence. This flawed notion confuses entirely different components of the court-martial proceedings and different decisions that the military judge must make. The sentencing determination found in R.C.M. 1002 is distinct and separate from application of Article 15(f), UCMJ and *Pierce*, which

involves how credits should be applied to an adjudged sentence.[1]

The discussion to R.C.M. 1002(b) states, "[w]hether a term of confinement should run concurrently with another term of confinement should be determined only after determining the appropriate amount of confinement for each charge and specification." Though the terms "adjudged sentence" and "approved sentence" are somewhat inconsistently used in prior opinions, *Pierce* and its progeny always apply the credit after the sentence has been determined. *See e.g., Pierce, 27 M.J. 367*; *United States v. Gammons*, 51 M.J. 169 (C.A.A.F. 1999); *United States v. Rock,* 52 M.J. 154, 156–57 (C.A.A.F. 1999) ("credit against confinement awarded by a military judge *always* applies against the sentence adjudged . . ."). Therefore, the sequence applied by the military judge is: 1) determine the appropriate sentence for each offense of conviction; 2) determine if the sentences shall run concurrently or consecutively consistent with RCM 1002(c); and then 3) apply the sentence (here *Pierce*) credit. This shows that the application of *Pierce* credit and the imposition of concurrent sentences are distinct and separate, and how it is done for every type of sentencing credit. The combination of the two is not a "windfall" but balances simplicity, consistency, and the government's charging choice.

[1] This is unless an accused presents evidence of the prior Article 15 punishment as evidence in mitigation. *See United States v. Gammons*, 51 M.J. 169, 184 (C.A.A.F. 1999).

This sequence of decisions also supports, through simplicity, the concept of applying *Pierce* credit to the total adjudged sentence. The Government suggests an alternative approach, and in what can be viewed as trying to explain its inconsistent approaches to sentencing credits, claims that other types of sentence credit are "not so easily parsed. If an accused is ordered into pretrial confinement, the confinement is related to all offenses." (Appellee's Br. 10; JA008). This flawed assertion ignores simple realities when it can be parsed out for other credits. For example,

> An accused is placed into pretrial confinement for two charges under Article 90, UCMJ. After twenty-eight days of confinement, a charge alleging a violation of Article 128, UCMJ is added. At trial the accused is convicted of all offenses and sentenced to concurrent periods of confinement.

Under this scenario and the Government's proposed interpretation of the law, the accused would have the pretrial confinement credit applied against the total adjudicated sentence, but the government does not claim this to be a "windfall." Yet, the Government inconsistently suggests this should not be the case when an accused is owed credit under *Pierce*.

There are other easy examples demonstrating that other credit could be "parsed out" undercutting the government's main counter. For example, a commander places heavy restrictions on an accused outlining the specific reason and suspected charges in his written order, but then 'other' charges are added at

preferral for different offenses on unrelated dates (up to 5 years away under the statute of limitations). It would be "easy" to assign which charges the *Mason* credit or Article 13 credit should be applied to in that scenario. But, in that scenario, both credits are currently applied to the total sentence and the government has never claimed that was a "windfall." Yet again, the Government inconsistently suggests this should not be the case when an accused is owed credit under *Pierce*.

While the government handwaves the multiple hypotheticals suggested in Appellant's Supplement away as a "parade of horribles" instead of addressing how the situations would actually be treated/trying to complete an analysis, the hypothetical scenarios in the Appellant's Supplement, and the scenarios above, present real problems with the Government's proposed method of applying *Pierce*. The Government's proposed method of application: 1) fails to account for problems that result from translating a unitary sentencing scheme under Article 15, UCMJ into a segmented sentencing scheme under R.C.M. 1002(b); 2) is inconsistent with the application of every other type of sentence credit as highlighted above; and 3) fails to provide meaningful relief across the full spectrum of potential court-martial sentences. Applying *Pierce* credit to the total adjudicated sentence remedies each of the problems that have been presented in the various hypotheticals, and it is simply easier to apply while recognizing that the

government created the situation by placing what *it* considered "minor" misconduct on a charge sheet.

The Government also suggests that to carry out the congressional intent of promoting transparency to the public, *Pierce* credit should only be applied to the segmented sentence. This suggests that it is okay to punish an accused twice for the same offense so long as it "provide practitioners and policy makers with more accurate information about punishments." (Appellee's Br. 14). This is absurd and as discussed below under unreasonable multiplication of charges, not even accurate. Transparency about the sentence(s) imposed and any confinement credit applied can be found on the Statement of Trial Results (JA021), the Sentencing Worksheet (JA023), the Convening Authority Action (JA026) and the Judgment of the Court (JA027). *Pierce* has been around for decades and the government can point to no public or congressional concern over its application or transparency.

The government's final argument suggests that because there was a concurrent sentence mandate in the plea agreement, it somehow makes *Pierce* less necessary as an appellant would obtain the concurrent sentence as a benefit in this one specific scenario. (App. Br. 12-13). Besides unitary/concurrent sentences being the norm before segmented sentencing, the government falsely assumes the military judge *would* sentence consecutively in this (and other) cases as a default. That is not a correct assumption as a judge has "broad discretion" to choose either

concurrent of consecutive sentences consistent with the guidance in R.C.M. 1002(c). *See* Discussion, R.C.M. 1002(b) (discussing the judge's "broad discretion" in choosing concurrent or consecutive sentencing). As the government's own distinction indicates, its rule could lead to different results depending on that highly discretionary ruling by a judge – and it would vary even farther if a case was contested vis-à-vis a guilty plea (or a 'naked plea') – two categories of cases the government never attempts to address.

There are, of course, even more scenarios the government cannot account for and undercut its "transparency" argument. For example, assume there were three related specifications at a guilty plea with only one being the subject of a prior Article 15 ("*Pierce* specification"), but a judge *sua sponte* finds the *Pierce* specification was an unreasonable multiplication of charges with another specification. In that scenario, under the government's theory, would an accused only get *Pierce* credit if the judge merged the two under the *Pierce* specification from the Article 15 even though they were from the same transaction? Would there be no *Pierce* credit if the judge merged them the other way? Or would it be the 'factual situation'/transaction as a whole and every charge that could fall under that situation that may receive *Pierce* credit? If so, would each specification receive total *Pierce* credit individually and be reflected that way at announcement and on the STR (and would that not create the government's "windfall" concern

since it would appear, for "transparency" purposes on the STR, that Appellant received full credit twice)? Moreover, would the credit apply as a whole to *both* those two specifications, despite the segmented sentencing, but the third specification remains untouched? And if so, what happens if that third specification received less punishment than the credit; so despite receiving a 'new' conviction that may warrant its own separate punishment, the concurrent sentence affectively cancels the other punishment (and is that not counter to the government's 'windfall' argument)? How, if at all, does it change if it was a ruling of UMC for findings and not just sentencing? What if the judge merged the two specifications, but the new specification contains additional facts not previously listed (or considered) in the Article 15; or the judge found an accused guilty by exceptions and substitutions where there is an argument it's not the exact same *Pierce* charge?

Appellant can go on listing examples and issues with the Government's test from that one scenario in the hundreds of cases that come through defense appellate each year, but the point is that despite the government's proposed rule creating these scenarios for judges to apply on the fly, the government offers a handwave without answering the very real scenarios judges and practitioners find themselves in daily. This demonstrates why Appellant's proposed (and continuing) rule is more predictable for judges and practitioners and will lead to

consistent results whether the case is contest or a plea (with or without agreement) and consistent with *Pierce*'*s* deeply rooted application.

Conclusion

Applying *Pierce* credit to the total adjudged sentence provides meaningful relief. This method also ensures simple and consistent application of the credit. Appellant respectfully requests this honorable court affirm appellant's convictions, apply twenty-eight days of *Pierce* confinement credit, and approve the remaining sixty-two days of confinement, reduction to E-2, and bad-conduct discharge.

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CERTIFICATE OF COMPLIANCE WITH RULES 21(B) AND 37

1. This combined petition/brief complies with the type-volume limitation of Rule 21(b) because it contains 1,704 words.

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

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