IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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TABLE OF CONTENTS

Granted Issue....1

Statement of Statutory Jurisdiction....2

Statement of the Case....2

Statement of Facts....3

Summary of Argument....6

WHETHER THE MILITARY JUDGE AND THE ARMY COURT CORRECTLY APPLIED *UNITED STATES v. PIERCE*, 27 M.J. 367 (C.M.A. 1989) IN AWARDING CREDIT FOR APPELLANT'S TWO PRIOR INSTANCES OF NONJUDICIAL PUNISHMENT TO A SEGMENTED SENTENCE.....7

Standard of Review....7

Law....7

Argument....9

A. The Army Court's opinion is legally sound and should be affirmed.... 9

B. The Army Court's holding aligns with congressional intent.... 14

Conclusion....17

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

Middendorf v. Henry, 425 U.S. 25, 31–32 (1976) 11

COURT OF APPEALS FOR THE ARMED FORCES / COURT OF MILITARY APPEALS

United States v. Gammons, 51 M.J. 169. 179 (C.A.A.F. 1999) 8, 11, 12

United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) ..... passim

United States v. Spaustat, 57 M.J. 256, 260 (C.A.A.F. 2002) 7

SERVICE COURTS OF CRIMINAL APPEALS

United States v. Leese, 84 M.J. 748 (Army Ct. Crim. App. 2024) 3, 9

OTHER FEDERAL COURTS

Article 120, UCMJ 3, 4, 11

UNIFORM CODE OF MILITARY JUSTICE

Article 128, UCMJ 2, 4

Article 15, UCMJ 3, 7, 13, 15

Article 56(c), UCMJ 14

Article 66(d), UCMJ 2

Article 90, UCMJ 2, 3, 4, 5

RULES FOR COURTS-MARTIAL

R.C.M. 1002(d)(2) 5, 8, 9

R.C.M. 1003 5

MANUAL FOR COURTS-MARTIAL

MCM, App'x 12 4

OTHER SOURCES

Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook, Table 2-10 (29 February 2020) 8

Military Justice Review Group, Report of the Military Justice Review Group, Part I: UCMJ Recommendations (2015) 14

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United States Army,	)	
Appellant	)	

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

Granted Issue

WHETHER THE MILITARY JUDGE AND THE ARMY COURT CORRECTLY APPLIED *UNITED STATES v. PIERCE*, 27 M.J. 367 (C.M.A. 1989) IN AWARDING CREDIT FOR APPELLANT'S TWO PRIOR INSTANCES OF NONJUDICIAL PUNISHMENT TO A SEGMENTED SENTENCE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [CCA] had jurisdiction over this matter pursuant to Article 66(d), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On May 4, 2023, a military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas, of two specifications of willfully disobeying a superior commissioned officer and one specification of assault consummated by a battery in violation of Articles 90 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 890 and 928 [UCMJ]. (JA021–23, 040). The military judge sentenced Appellant to be reduced to the grade of E-2, to be confined for three months, and to be discharged from the service with a bad-conduct discharge. (JA021–23, 058). The military judge, after applying *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), credited Appellant with one rank credit against the sentence to reduction, fourteen days credit against the segmented sentence to confinement for Specification 1 of Charge I, fourteen days credit

[1] All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) [*2019 MCM*].

against the segmented sentence to confinement for Specification 2 of Charge I; and $1,142 against any automatic forfeitures. (JA059).

On August 29, 2024, the Army Court affirmed the findings and sentence.[2] (JA009). On December 30, 2024, this Court granted Appellant's petition for grant of review and ordered briefing on this matter. (JA001).

Statement of Facts

Appellant received nonjudicial punishment (NJP) under Article 15, UCMJ, on two occasions. On the first occasion, Appellant was reduced to private first class (E-3), forfeited $521.00 pay per month for two months, received extra-duty for fourteen days, and restricted for fourteen days. (JA031). On the second occasion, Appellant received fourteen days extra-duty and fourteen days restriction. (JA037).

Subsequently, Appellant was charged with two specifications of violating Article 90, UCMJ, and two specifications of violating Article 120, UCMJ, 10 U.S.C. § 920. (JA015). The underlying misconduct for the two specifications of violating Article 90, UCMJ, was the same misconduct underlying the two NJPs prior to trial.[3] (JA015; JA045–47).

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[2] *United States v. Leese*, 84 M.J. 748 (Army Ct. Crim. App. 2024).

[3] Appellee notes that the NJPs named CPT RL as the superior commissioned officer while the referred specifications referred to 1LT HH as the superior commissioned officer. However, all parties at trial agreed that the NJPs and

On April 27, 2023, appellant entered into a plea agreement with the convening authority. (JA017–20). Appellant agreed to plead guilty to the two specifications and charge of violating Article 90, UCMJ, and one specification and charge of violating Article 128, UCMJ. (JA017). In exchange, the convening authority agreed to dismiss the specification and excepted language for two specifications and charge of violating Article 120, UCMJ, that appellant pleaded not guilty to. (JA019).[4] The convening authority further agreed to the following sentence limitations on the court: a bad-conduct discharge must be adjudged; for Specification 1 of Charge I, a confinement range of zero to three months; for Specification 2 of Charge I, a confinement range of zero to three months; and for Specification 2 of Charge II, a confinement range of three to six months. (JA019). As specifically outlined in the terms of the pretrial agreement, all adjudged confinement was to run concurrently. (JA019).

During presentencing, the military judge and the parties discussed *Pierce* credit. (JA044–55). Although the parties agreed Appellant should receive twenty-eight total days of confinement credit, government and defense counsel disagreed

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referred specifications addressed the same misconduct and that *Pierce* credit was appropriate. (JA045–47).

[4] Prior to the plea agreement, and assuming one specification of the Article 120, UCMJ, would have been dismissed since it was charged in the alternative, Appellant faced a maximum sentence of reduction to E-1, total forfeiture of all pay allowances, confinement for seventeen years, and a dishonorable discharge. (JA015); *MCM*, App'x 12.

on whether the credit should apply to the aggregate term of confinement (i.e. total term of confinement of 90 days) or only the terms of confinement for the specifications which related to the NJPs.[5] (JA046–47). The military judge, recognizing that there was not a meeting of the minds between government and appellant, stated that he would issue a ruling and that whichever side the ruling was adverse to could walk away from the plea agreement. (JA051). The military judge then ruled that the NJPs related only to the two specifications of Charge I (Article 90, UCMJ) and not Charge II (Article 128, UCMJ); therefore, he would only apply the *Pierce* credit to Charge I. (JA053). The military judge subsequently provided Appellant with an opportunity to withdraw the guilty plea, but Appellant elected to continue with the guilty plea. (JA055–57).

After finding Appellant guilty, the military judge sentenced Appellant to be reduced to the grade of E-2; to be discharged from the service with a bad-conduct discharge; and to be confined for fourteen days for Specification 1 of Charge I, thirty days for Specification 2 of Charge I, and three months for Specification II of Charge II. (JA021–23, 040, 058). In accordance with the plea agreement, all sentences were to be served concurrently with one another. (JA019, 021–23, 058).

[5] R.C.M. 1002(d)(2) states that "all punishments other than confinement or fine available under R.C.M. 1003, if any, shall be determined as a single, unitary component of the sentence, covering all of the guilty findings in their entirety. The military judge shall not segment those punishments among the guilty findings."

The military judge, applying *Pierce* credit, credited Appellant with one rank credit against the sentence to reduction, fourteen days credit against the segmented sentence to confinement for Specification 1 of Charge I, fourteen days credit against the segmented sentence to confinement for Specification 2 of Charge I; and $1,142 against any automatic forfeitures. (JA045–46).

Summary of Argument

This Court should affirm the Army Court's ruling that *Pierce* credit is applied only to the segmented sentence for the offense previously punished under NJP, regardless of whether an accused's sentence runs consecutively or concurrently. "This ensures an accused is not punished twice for the same offense while also ensuring the accused does not receive credit when no credit is due." (JA007). Under Appellant's logic, an accused would receive both the benefit of a concurrent sentence and *Pierce* credit, with the *Pierce* credit applying to punishments for offenses that were wholly separate and of a different degree of criminality than the NJP offenses. Additionally, the Army Court's ruling aligns with congressional intent in creating segmented sentencing: to provide transparency, accurate information, and appropriate punishment when it comes to sentencing. (JA062, JA064).

WHETHER THE MILITARY JUDGE AND THE ARMY COURT CORRECTLY APPLIED *UNITED STATES v. PIERCE*, 27 M.J. 367 (C.M.A. 1989) IN AWARDING CREDIT FOR APPELLANT'S TWO PRIOR INSTANCES OF NONJUDICIAL PUNISHMENT TO A SEGMENTED SENTENCE.

Standard of Review

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

Law

In *United States v. Pierce*, the Court of Military Appeals [C.M.A.] addressed the issue of whether referral to a court-martial of an offense for which an appellant had previously been punished constituted a denial of due process and violated Article 13, UCMJ. 27 M.J. at 368. The court held that "imposition and enforcement of disciplinary punishment under [Article 15, UCMJ] for any act or omission *is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission*, and not properly punishable under this article[.]" *Id*. However, the court further held that "the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty." *Id*. An accused must be given "day-for-day, dollar-for-dollar, stripe-for-stripe" credit for NJP under Article 15, UCMJ.

Id. at 369.[6] The CMA suggested that a "Table of Equivalent Punishments," would be helpful in reconciling punishments adjudged at court-martial and those administered under NJP. *Id*. The U.S. Army Trial Judiciary utilizes a table of equivalent NJP in the Military Judge's Benchbook, Table 2-10. Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook, Table 2-10 (29 February 2020) [Benchbook].

In *United States v. Gammons*, this Court held that the accused is the "gatekeeper with respect to consideration of an NJP record during a court-martial involving the same act or omission." 51 M.J. 169, 179 (C.A.A.F. 1999). Normally, the government will be precluded from introducing or commenting on the NJP if the accused does not introduce evidence of the prior NJP. *Id*. at 180.

Rule for Courts-Martial [R.C.M.] 1002(d)(2)(A) requires a military judge, at a general or special court-martial, to "determine an appropriate term of confinement . . . , if applicable, for each specification for which the accused was found guilty." "If a sentence includes more than one term of confinement, the military judge shall determine whether the terms of confinement will run concurrently or consecutively. For each term of confinement, the military judge shall state whether the term of confinement is to run concurrently or consecutively

[6] In *Pierce*, the CMA also distinguished Article 13, UCMJ, credit from NJP credit, stating that "Article 13 ([p]unishment prohibited before trial) is inapplicable as appellant was not punished 'while [he was] being held for trial." 27 M.J. at 368.

with any other term or terms of confinement." R.C.M. 1002(d)(2)(B) . However, "[t]he terms of confinement for two or more specifications shall run concurrently. . . . when provided for in a plea agreement." R.C.M. 1002(d)(2)(B) . The military judge shall use unitary sentencing for other forms of punishment other than confinement or fine (to include reduction in grade and forfeitures). R.C.M. 1002(d)(2)(C) .

Argument

This case turns on a simple question: should *Pierce* credit apply only to the same offense(s) previously punished under NJP or to the total sentence when the accused is convicted of other offenses? The Army Court correctly answered that *Pierce* credit applies only to the same offense(s) previously punished. *Leese*, 84 M.J. at 752. So, too, should this Court.

A. The Army Court's opinion is legally sound and should be affirmed.

The Army Court in the instant case held that "confinement credit shall be applied only to the segmented sentence for the offense previously punished under NJP and not to the total sentence to confinement when the accused is convicted of other offenses." (JA007). The Army Court explained,

> This ensures an accused is not punished twice for the same offense while also ensuring the accused does not receive credit when no credit is due. Whether the military judge determines the sentence to confinement shall run concurrently or consecutively, the result is the same. The accused receives relief that is effective and meaningful

> towards the offense for which he has already been punished and not towards an offense for which he has not.

(JA007).

The Army Court's reasoning is in line with why *Pierce* credit was judicially created in the first place: to preclude an accused from being "twice *punished* for the *same offense*." *Pierce*, 27 M.J. at 369 (emphasis added). Thus, "*Pierce* credit is confinement credit tied to a *specific offense*." (JA007) (emphasis added). "In contrast, other types of confinement credit are not so easily parsed. If an accused is ordered into pretrial confinement, the confinement is related to all the offenses." (JA008).

If, as Appellant suggests, *Pierce* credit was applied towards the total adjudged sentence, regardless of what other crimes an accused was being punished for, the *Pierce* credit would no longer be tied to a specific offense. (Appellant's Br. 17). Instead, the accused would receive unearned credit towards other offenses that have nothing to do with the NJP offenses—in other words, a windfall.

Appellant argues that "the government controls the charge sheet and the specifications within it," and therefore the government can just choose not to punish an accused with both NJP and a court-martial. (Appellant's Br. 14–18). In so arguing, Appellant overlooks his fault and part in this situation—appellant is the one committing multiple crimes, including crimes worthy of a court-martial, and the government is merely capturing the full scope of his crimes. Moreover,

Appellant's assertion that the "government controls the charge sheet" is distorted at best in the context of a plea agreement. Appellant submitted a plea agreement that included pleading guilty to the offenses which he was already punished for via NJP in exchange for the convening authority dismissing a much more serious charge, converting an Article 120, UCMJ, charge to an Article 128, UCMJ, charge, capping the punishment for each charge Appellant would plead guilty to, and allowing each sentence of confinement to run concurrently. (JA015–20). And after all that, Appellant also had the opportunity to withdraw from the plea agreement after the military judge announced how he would apply the *Pierce* credit, but Appellant consciously chose not to do so. (JA055–57).

Appellant's windfall becomes even more apparent when considering the different natures of courts-martial and NJP. The Supreme Court has noted that NJP "is an administrative method of dealing with the most minor offenses." *Middendorf v. Henry*, 425 U.S. 25, 31–32 (1976). And as this Court has stated, "a proceeding under Article 15 is not a criminal prosecution." *Gammons*, 51 M.J. at 173–74. Further, "[t]he limitations on the degree of permissible punishment under Article 15 are consistent with the clear congressional intent to separate NJP from the criminal law consequences of a court-martial." . "While a court may transform the Article 15 punishment into a credit towards a sentence to

confinement, the nature of the punishment is vastly different from a soldier entitled to credit for confinement pending trial." (JA008).

For example, in Appellant's case, he twice received NJP for willfully disobeying a superior commissioned officer, a relatively minor offense. (JA003). However, "[t]he gravamen" of Appellant's courts-martial was an assault against a female servicemember, as reflected by Appellant's sentence of three months of confinement for the assault vice fourteen days and thirty days of confinement for the respective willful disobeying offenses. (JA003, 005). If Appellant's *Pierce* credit was applied to his total adjudged sentence, he would be receiving credit—which he earned for the minor offenses of willfully disobeying an officer—towards the punishment he received for assaulting a fellow servicemember, a crime that was deemed worthy of criminal prosecution and "criminal law consequences of a court-martial." *Gammons*, 51 M.J. at 177.

Appellant complains that applying *Pierce* credit to only the specific NJP offenses would deprive him of "meaningful" relief if the concurrent sentences for the other offenses are longer. (Appellant's Br. 16). Despite Appellant's complaint, he received "relief that is effective and meaningful *towards the offense for which he has already been punished and not towards an offense for which he has not*." (JA007) (emphasis added). Appellant also wholly ignores the fact that a concurrent sentence, in and of itself, is highly beneficial to him and precisely what

he bargained for per his pre-trial agreement. (JA019). In fact, despite knowing how the military judge would apply the *Pierce* credit, Appellant still wanted to plead guilty to keep the benefit of the pre-trial agreement. (JA057). By asking for "meaningful" relief, what Appellant is really asking for is a windfall: the benefit of a concurrent sentence plus *Pierce* credit.[7]

Appellant's flawed logic is highlighted by consecutive sentences. Under his adaptation, if an accused receives a consecutive sentence, *Pierce* credit would apply to the specific offense that was punished via NJP.[8] (Appellant's Br. 17). Yet, if an accused receives the benefit of a concurrent sentence, the accused would then receive an additional benefit of having the *Pierce* credit apply to all of his offenses.

Therefore, to ensure that "an accused is not punished twice for the same offense while also ensuring the accused does not receive credit when no credit is due," this Court should affirm the Army Court's holding that *Pierce* credit "should be applied only to the segmented sentence for the offense previously punished under Article 15, UCMJ." (JA007).

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[7] However, a future accused would likely end up in the same position that Appellant is currently in since the government would start requiring consecutive sentences in plea agreements when an accused has *Pierce* credit.

[8] The other alternative of applying *Pierce* credit to the total adjudged sentence, regardless of whether the sentence is concurrent or consecutive, would wholly ignore segmented sentencing and completely unmoor *Pierce* credit from any specific offense.

B. The Army Court's holding aligns with congressional intent.

When Congress amended Article 56(c), UCMJ, as part of the Military Justice Act of 2016, it drew heavily from the Military Justice Review Group's (MJRG) Report. Military Justice Review Group, Report of the Military Justice Review Group, Part I: UCMJ Recommendations (2015) [MJRG Report]. One of the many MJRG recommendations that Congress adopted was segmented sentencing. (JA061–64). The MJRG advocated for segmented sentencing for several reasons: "[t]he assignment of a specific sentence for each offense" would "provide additional transparency to the parties and the public," "provide practitioners and policy makers with more accurate information about punishments," and ensure that "an accused is not unfairly sentenced twice for what is essentially one offense." (JA062, JA064).

Applying *Pierce* credit to the total sentence of confinement, rather than the individual offense, would defeat the purposes of segmented sentencing. First, *Pierce* credit would be applied in the same way as under unitary sentencing, completely ignoring the new segmented sentencing requirement. Second, it would obscure the true sentences for each specific offense. Consider an example where an accused is convicted and sentenced to concurrent confinement terms for

distributing child pornography and failing to report to duty. Under Appellant's proposed system, if the accused had thirty days of *Pierce* credit for failing to report to duty, those thirty days of credit would essentially be applied to his child pornography sentence, artificially deflating the sentence for that crime. This is especially true when considering the nature of NJP: it would be a rare day indeed when an accused is punished via NJP for distributing child pornography. However, NJP for failing to report to duty is commonplace. If the *Pierce* credit is applied solely to the failing to report to duty offense, it would provide an accurate and transparent picture of what sentence that offense is worth.

Appellant argues that there are scenarios where the Army's method of applying *Pierce* credit "is likely to be applied inconsistently or without meaning," and he presents a parade of horribles in the form of five hypotheticals. (Appellant's Br. 11–12). However, Appellant's concern rings hollow. The change to segmented sentencing has made applying *Pierce* credit easier, not harder, as long as the credit follows the specific offense. If an accused is acquitted of a prior NJP offense, the accused would not receive *Pierce* credit. If an accused is found guilty of multiple NJP offenses, the military judge would allocate the *Pierce* credit among those multiple offenses.

This Court, in *Pierce*, recognized that "[t]he construction of Article 15(f) gives consistency to the congressional intent expressed throughout the Code that an

accused shall only be appropriately punished for his crimes and offenses." 27 M.J. at 369. The Army Court's holding of applying *Pierce* credit "only to the segmented sentence for the offense previously punished under Article 15, UCMJ and not to the total sentence to confinement when the accused is convicted of other offenses," is in line with the congressional intent behind Article 15(f), UCMJ, and segmented sentencing. (JA007).

Conclusion

WHEREFORE, the United States respectfully requests this honorable court affirm the Army Court's decision.

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CERTIFICATE OF COMPLIANCE WITH RULE 21

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 3,914 words.

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, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on February 11, 2025.

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