**Sentencing Credit: How to Set the Conditions for Success**

*Major M. Patrick Gordon*[*]

*The presumption of innocence is one of the principles our Armed Forces exist to defend. The apprehension of Soldiers . . . in any manner designed to humiliate, ridicule or harass them is inconsistent with that principle and will not be tolerated.*[1]

## I. Introduction

You are a defense counsel stationed at Ft. Hidden Gem, Louisiana. The Senior Defense Counsel just detailed you a new client, Private (PVT) Joe Tentpeg. He shuffles into your office shackled at the waist and wearing a prison jumpsuit. You quickly discover that PVT Tentpeg was recently absent without leave (AWOL) for six months. The absence ended when he was stopped for speeding by the local police, who jailed him on a military warrant when they discovered he was AWOL. PVT Tentpeg spent a week in jail before his unit retrieved him a month ago. Since that time, PVT Tentpeg claims that he has spent every night in a supply room, has been restricted to the unit area, and has been required to sign in at the staff duty desk hourly. Private Tentpeg has not been paid since returning to the unit. Unfortunately, PVT Tentpeg was caught off-post this past weekend and is now facing court-martial for AWOL and breaking restriction.

Is PVT Tentpeg entitled to credit off any eventual court-martial sentence for what happened before trial? What type(s) of credit? How much? What steps should the defense counsel take? When? Conversely, if a trial counsel were handed this file, what steps should she take to address the issue?

It is remarkable how frequently counsel fail to recognize these questions or, at least, address them in a manner that will secure the best result for their clients. One need only review the case summaries on the military appellate court websites to quickly gain an appreciation of how many counsel critically under-serve their clients in this frequently encountered area of court-martial practice. For example, many times defense counsel fail to request appropriate sentencing credit at trial,[2] or the facts suggest that government counsel could have mitigated or eliminated the issue if they had been more vigilant prior to trial. This primer seeks to prevent the reader from adding to this body of case law. First, the primer will examine the available sources of sentencing credit, in the context of cases illustrating how courts determine whether credit is awarded. At the same time, the primer will examine common issues with each type of sentencing credit, and what practical steps should be taken to set the conditions for success. Next, sentencing credit motion practice will be examined. Finally, the primer will provide practice tips for counsel, with the goal of stimulating advocates to move beyond merely reacting to issues and into a proactive mode that best serves the client,[3] whether that be the Army or PVT Tentpeg.

## II. Background

Formal sentencing credit has existed in the federal criminal justice system since 1960, when Congress passed an amendment to 18 U.S.C. § 3568, requiring that any person convicted of a criminal offense shall be given "credit toward service of his sentence for any days spent in custody prior to the imposition of sentence."[4] Congress expressly exempted courts-martial from the statute's coverage, but in 1968 the Secretary of Defense promulgated Department of Defense Instruction 1325.4, which required that "[p]rocedures employed in the computation of [court-martial] sentences will be in conformity with those published by the Department of Justice,"[5] presumably including 18 U.S.C. § 3568. Despite this apparent adoption of the statute, military courts did not grant formal sentencing credit until the 1984 case of *United States v. Allen*, which simply held that a servicemember would receive one day's credit against his court-martial sentence for each day spent

---

[*] Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 4th Infantry Brigade Combat Team, 3d Infantry Division (Mechanized), Fort Stewart, Georgia. The author thanks Lieutenant Colonel Jonathan Howard and Major Jay Thoman, the Judge Advocate General's Legal Center and School, for their guidance in the completion of this article.

[1] United States v. Stamper, 39 M.J. 1097, 1100 (A.C.M.R. 1994) (quoting a policy letter written by General Crosbie E. Saint while serving as a division commander, following "an incident wherein a brigade-level commander publicly humiliated soldiers by a public and demeaning apprehension").

[2] *See, e.g.*, United States v. Inong, 58 M.J. 460, 461 (C.A.A.F. 2003) (accused alleged illegal pretrial punishment for the first time on appeal). *Inong* reversed long-standing precedent by holding that claims of illegal pretrial punishment are waived on appeal if not raised at trial. Citing a line of cases where claims of illegal pretrial punishment were raised for the first time on appeal, the Court of Appeals for the Armed Forces (CAAF) explained that such a system was "unworkable" because usually a great deal of time had passed since trial and witnesses dissipated, making adjudication inefficient and difficult. *Id.* at 463–65. Thus, the onus is squarely upon trial defense counsel to thoroughly resolve any claims of illegal pretrial punishment at the trial stage.

[3] *See* United States v. Scalarone, 54 M.J. 114, 119 (C.A.A.F. 2000) (Crawford, C.J., dissenting) ("Trial defense counsel are expected to be active advocates for their clients in the pretrial confinement determinations and throughout the duration of pretrial confinement.").

[4] This language is now found in 18 U.S.C. § 3585(b) (2006).

[5] U.S. DEP'T OF DEF., INSTR. 1325.4, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (Oct. 7, 1968).

in pretrial confinement. The *Allen* court reasoned that while Congress exempted 18 U.S.C. § 3568's applicability to courts-martial, the Secretary of Defense later adopted it, and thus military accused must be afforded the credit it provides.[6]

Prior to *Allen*, a military accused was not automatically entitled to any credit for pretrial confinement—he merely received "consideration" by the convening authority at post-trial action.[7] Not surprisingly, this system of "consideration" was highly subjective and lent itself to a great deal of perceived and actual inequity in the treatment of servicemembers.[8] The holding in *Allen* eliminated that inequity by establishing a clear-cut rule.

Since *Allen*, the courts and the Uniform Code of Military Justice (UCMJ) have set forth four other categories of sentencing credit (*Mason*, *Pierce*, Rule for Court-Martial (RCM) 305(k), and Article 13 credit), all centered upon the idea of ensuring that servicemembers are treated fairly and credited with any pretrial confinement or punishment. These categories of sentencing credit also serve as a mechanism whereby courts can hold the government accountable for mistreatment of the accused before trial. While the five categories of sentencing credit share a common purpose, each presents its own unique concerns and analytical framework. Thus, they will be examined in turn.

## III. Categories of Sentencing Credit

### A. Lawful Pretrial Confinement (*Allen* Credit)

As noted above, *United States v. Allen* held that military accused are entitled to day-for-day sentencing credit for lawful pretrial confinement served as a result of the offenses for which the sentence was imposed. *Allen* credit is calculated in a straightforward manner, with the accused receiving a day's credit for every day spent in lawful pretrial confinement. The day pretrial confinement is imposed counts as one day, even if the accused is not in pretrial confinement the entire day. The day sentence is imposed is not counted, as any confinement served on this day instead counts as a day of post-trial confinement.[9] When the pretrial confinement credit exceeds the adjudged period of confinement,[10] the court is not required to award any credit for the excess pretrial confinement.[11]

The Court of Appeals of the Armed Forces (CAAF) recently expanded the scope of *Allen* credit to provide day-for-day sentencing credit not only for pretrial confinement spent as a result of the court-martial charges, but also for any civilian pretrial confinement served as a result of another offense, for which sentencing credit had not otherwise been awarded.[12] Thus, the general rule is that an accused will be credited for all lawful pretrial confinement served, which has not otherwise been credited to another sentence. The lesson is clear: a judge should never refrain from awarding credit based on the belief that the accused will obtain it at a later trial.[13]

### B. Restriction Tantamount to Confinement (*Mason* Credit)

*Mason* credit is another judicially created sentencing credit that provides day-for-day credit when an accused's pretrial liberty is restricted so much that the restrictions have the same effect as pretrial confinement.[14] This "restriction

---

[6] United States v. Allen, 17 M.J. 126, 128 (C.M.A. 1984). For more details of the history of sentence credit before *Allen*, see Major Michael L. Kanabrocki, *Revisiting* United States v. Allen*: Applying Civilian Pretrial Confinement Credit for Unrelated Offenses Against Court-Martial Sentences to Post-Trial Confinement Under 18 U.S.C. § 3585(b)(2)*, ARMY LAW., Aug. 2008, at 1, 4-5.

[7] United States v. Davidson, 14 M.J. 81, 85–86 (C.M.A. 1982); United States v. Blackwell, 41 C.M.R. 196, 199 n.2 (C.M.A. 1970) (explaining that pretrial confinement credit "is a matter for the court-martial and the convening authority to consider in adjudging an appropriate sentence").

[8] *See Allen*, 17 M.J. at 129. In his concurring opinion, Chief Judge Everett lists "several benefits" that the rule set forth in *Allen* confers, namely: (1) it ensures court-martial accused who have served pretrial confinement are treated equally with defendants tried in Federal District Court; (2) it confirms that combined pretrial and posttrial confinement does not exceed the maximum authorized confinement; and (3) it eliminates uncertainty about the consideration afforded pretrial confinement by sentencing and convening authorities.

[9] United States v. DeLeon, 53 M.J. 658, 660 (A. Ct. Crim. App. 2000) (holding that "any part of a day in pretrial confinement must be calculated as a full day for purposes of pretrial confinement credit under *Allen* except where a day of pretrial confinement is also the day the sentence is imposed").

[10] In the author's experience, this scenario most frequently occurs when an accused spends several months in pretrial confinement awaiting trial on serious charges, and shortly before trial the prosecution case deteriorates. This usually results in the parties entering into a plea agreement whereby the accused pleads guilty to relatively minor offenses that do not call for lengthy confinement (e.g., accused pleads guilty to indecent acts instead of rape). Consequently, the accused serves more pretrial confinement than can be offset by the sentence. An administrative separation in lieu of court-martial is also a frequent outcome under these circumstances.

[11] United States v. Smith, 56 M.J. 290, 293 (C.A.A.F. 2002) (Where the accused served ninety-four days of lawful pretrial confinement, but was sentenced to no confinement, the court held that there were no grounds for applying pretrial confinement credit to any other element of the sentence, stating that "there is no legal requirement that appellant be given credit for his pretrial confinement."). The rule is different for *illegal* pretrial confinement. *See infra* Part III.C.2.

[12] United States v. Goodwin, No. 20080463, 2009 WL 6827248 (A. Ct. Crim. App. Feb. 18, 2009) (citing United States v. Gogue, 67 M.J. 169 (C.A.A.F. 2008) (order, no published opinion)); United States v. Yanger, 68 M.J. 540, 542 (C.G. Ct. Crim. App. 2009).

[13] *See, e.g.*, United States v. Gardner, No. 200900545, 2010 WL 2990756, at *2 (N-M. Ct. Crim. App. July 29, 2010) (holding that the military judge erred by not crediting the accused with thirty-five days of pretrial confinement credit for an uncharged offense, where the military judge speculated "at his peril" that the accused would receive the credit at a future trial that never occurred).

[14] United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (summary disposition).

tantamount to confinement" is calculated as is *Allen* credit, one day of credit per day of restriction.[15] *Mason* credit is much more frequently litigated, however, as parties often disagree as to what is tantamount to confinement. Restraint that is not tantamount to confinement does not trigger credit, but must still be listed in Box 8 of DD Form 458 (charge sheet) and given appropriate consideration by the sentencing authority and convening authority upon action.[16]

When determining whether *Mason* credit is warranted, courts consider where the accused's pretrial circumstances fall on the spectrum between "restraint" and "confinement."[17] When the restrictions are equivalent to confinement, *Mason* credit is awarded.[18] This is an intensely factual determination based upon the totality of the circumstances,[19] such as the nature and scope of the restraint, types of duties performed (or prohibition against performing regular duties), and the degree of privacy enjoyed within the area of restraint. Courts will also look to the conditions which might affect those factors, such as whether the accused was required to sign in periodically; whether escorts were required to leave the restricted area; whether and to what degree visitation and outside communication was allowed; the availability of religious, recreational, educational, and other support facilities; the location of the accused's sleeping accommodations; and whether the accused was allowed to use his personal property (e.g., whether the accused could wear civilian clothing).[20] Courts perform a similar analysis when identifying whether restraint has been imposed for speedy trial purposes,[21] and counsel must consider both confinement credit and speedy trial issues when analyzing the accused's pretrial restrictions.

### *1. What Restrictions are Tantamount to Confinement?*

There are few bright-line rules for *Mason* credit because the restrictions are viewed under the totality of the circumstances.[22] Counsel must therefore carefully discover and document all curtailments of liberty and why they were imposed, and then determine whether they are the functional equivalent of being in jail. For example, locking a Soldier in a room twenty-four hours a day with a guard posted is almost certainly tantamount to confinement, while revoking a Soldier's off-post pass privileges (with no other restrictions) will probably not reap any credit.[23] As a rule, pretrial restrictions must be heavy to merit *Mason* credit. Sign-in requirements are not likely to trigger *Mason* credit unless they have the practical effect of tethering the Soldier to the staff duty desk (e.g., signing in more than once an hour for most or all of the waking hours).[24] Restriction to

---

[15] United States v. Chapa, 53 M.J. 769, 772 (A. Ct. Crim. App. 2000).

[16] *See* United States v. Smith, 20 M.J. 528, 533 (A.C.M.R. 1985) ("[W]hen an accused has been subjected to any form of pretrial restraint, the government must disclose this fact on the record."). Rule for Court-Martial (RCM) 304 defines the types of pretrial restraint (i.e., conditions on liberty, restriction in lieu of arrest, arrest, and confinement) and the rules under which they may be imposed. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 304 (2008) [hereinafter MCM].

[17] *Smith*, 20 M.J. at 531; *see also* United States v. King, 58 M.J. 110, 113 n.2 (C.A.A.F. 2003) (holding that "[p]retrial restriction that is not tantamount to confinement is permissible under Rule for Court-Martial 304(a)(2) . . . and does not give rise to credit against confinement").

[18] *Smith*, 20 M.J. at 531 ("If the level of restraint falls so close to the 'confinement' end of the spectrum as to be tantamount thereto, an appellant is entitled to appropriate and meaningful credit against his sentence.").

[19] *Id*. at 530.

[20] *Id*. at 531.

[21] *Id*. at 530 (observing that "[m]any cases addressing this issue concern restriction as the equivalent of pretrial confinement for speedy trial purposes"). There are four "speedy trial" provisions in military jurisprudence—the RCM 707 "120 day" rule, Article 10, Uniform Code of Military Justice (UCMJ), and case law based on the Fifth and Sixth Amendments to the United States Constitution. The RCM 707 "120-day" speedy trial clock starts when the accused is subjected to preferral of charges, entry onto active duty, arrest, restriction in lieu of arrest, or pretrial confinement. MCM, *supra* note 16, R.C.M. 707. The Sixth Amendment speedy trial guarantee is triggered by the same events, but is not tied to the 120-clock and is not subject to the time exclusions of RCM 707. *See* United States v. Grom, 21 M.J. 53, 55–56 (C.M.A. 1985). Article 10 is triggered when the accused is placed under pretrial arrest or confinement. United States v. Schuber, 70 M.J. 181, 184 (C.A.A.F. 2011). Of these three, note that Article 10 has the most stringent standard and the court may find a violation of Article 10 even before 120 days have elapsed, if the government has not moved the case along with "reasonable diligence." *See* MCM, *supra* note 16, art. 10; United States v. Simmons, No. 20070486, 2009 WL 6835721 (A. Ct. Crim. App. Aug. 12, 2009) (In a detailed opinion that eviscerated several excuses for pretrial delay, the court found the military judge erred when he failed to dismiss the charges with prejudice for a violation of Article 10.). Note also that the remedy for an Article 10 or Sixth Amendment violation is dismissal with prejudice, while an RCM 707 violation may be remedied by a dismissal with or without prejudice. *See id*.; United States v. Dooley, 61 M.J. 258 (C.A.A.F. 2005) (discussing whether dismissal with or without prejudice was appropriate for a case where the military judge found an RCM 707 violation). Fifth Amendment speedy trial case law is sparse, and is not triggered by restraint or confinement, but rather by deliberate governmental delays that prejudice the accused's ability to mount a defense. *See* United States v. Vogan, 35 M.J. 32, 33–34 (C.M.A. 1992).

[22] *Smith*, 20 M.J. at 530 ("The determination [of] whether the conditions of restriction are tantamount to confinement must be based on the totality of the conditions imposed."). In *United States v. Gregory*, 21 M.J. 952, 956 n.12 (A.C.M.R. 1986), *overruled on other grounds*, United States v. Rendon, 58 M.J. 221, 225 (C.A.A.F. 2003), the Army Court of Criminal Review cited three cases as examples to help courts determine whether restriction was tantamount to confinement: *Smith*; *Washington v. Greenwald*, 20 M.J. 699 (A.C.M.R. 1985), discussed *infra* note 23, and Wiggins v. Greenwald, 20 M.J. 823 (A.C.M.R. 1985).

[23] *See Smith*, 20 M.J. at 530; United States v. King, 58 M.J. 110, 113 n.2 (C.A.A.F. 2003) (holding that "[p]retrial restriction that is not tantamount to confinement is permissible under Rule for Court-Martial 304(a)(2) . . . and does not give rise to credit against confinement"), *abrogated on other grounds*, United States v. Rendon, 58 M.J. 221, 225 (C.A.A.F. 2003).

[24] *See, e.g.*, Washington v. Greenwald, 20 M.J. 699 (A.C.M.R. 1985) (holding that pretrial restriction was not tantamount to confinement where accused was restricted to the company area, place of duty, dining facility, and chaplain's office; performed regular duties; restricted to barracks room after 2200; hourly sign-in requirement when not on duty; had access to rest of post without escort during duty hours or with escort after duty hours); *but see Smith*, 20 M.J. at 528 (Trial court found restriction tantamount to confinement where accused was restricted to barracks unless escorted, prohibited from performing normal duties, required to sign in every thirty

the unit area (workplace, dining facility, company area, barracks, chaplain's office), and other parts of post with an escort, will rarely be found to be tantamount to confinement.[25] Permitting the accused to wear the normal duty uniform and perform rank- and MOS-appropriate work weighs against awarding *Mason* credit.[26] Restrictions are measured against "the circumstances of duty at [the Soldier's] time and place," so that even stricter restrictions may not be tantamount to confinement in a deployed environment.[27]

*2. Pretrial Admission to Mental Health or Drug Treatment Facility*

The accused is sometimes admitted to a mental health or drug treatment facility before trial. Often, he is locked inside the facility twenty-four hours a day. When this occurs, the question arises whether the accused is entitled to *Mason* credit. Generally, courts do not grant *Mason* credit for time spent at such a facility absent unusual circumstances, e.g., an accused is given a choice between inpatient drug rehabilitation or pretrial confinement[28]; accused is sent to an inpatient mental health facility by civilian law enforcement personnel for military offenses and the unit does not immediately take charge of the accused.[29] Otherwise, the CAAF has declared that "[t]he assistance one receives during an inpatient drug treatment program is far different than the physical restraint imposed when an individual is placed in pretrial confinement."[30]

C. Rule for Court-Martial 305(k) Credit

Rule for Court-Martial 305 sets forth the process by which an accused is ordered into pretrial confinement. The U.S. Armed Forces, like American society as a whole, have a general aversion to confining individuals before they have been adjudged guilty and sentenced.[31] Also, military pretrial confinement does not allow bail, and so is rightly held to a stricter standard than its civilian counterpart.[32] Thus, RCM 305 requires a series of reviews of the pretrial confinement decision to ensure servicemembers are confined before trial only when absolutely necessary.[33] These reviews are required when a servicemember is placed into military pretrial confinement,[34] or confined by civilian authorities solely for a military offense and with the notice and approval of military authorities.[35] When the government fails to scrupulously follow these procedures, RCM 305(k) provides a remedy in the form of sentencing credit.

---

minutes during non-duty hours, and remain in his barracks room after 2200.); *compare* United States v. Guerrero, 28 M.J. 223, 225 (C.M.A. 1989) (denying sentencing credit for a Soldier required to sign in every thirty minutes at the charge of quarters desk, among other restrictions). Although not explicitly stated, the *Guerrero* court appears to have denied sentencing credit relief because the issue was essentially waived at trial. Indeed, the court summarily denied credit without any factual analysis but, rather, noted that Private First Class Guerrero first raised the matter on appeal and that at trial, his defense counsel asserted the opposite, stating that "we do not claim it was tantamount to confinement." *Guerrero*, 28 M.J. at 225.

[25] This is true even if the accused is reassigned to a special unit that processes servicemembers pending adverse action. *See, e.g.*, United States v. Gerwick, No. 200900547, 2010 WL 2600636 (N-M. Ct. Crim. App. June 29, 2010) (declining to award *Mason* credit where the appellant was assigned pretrial to the Barracks Support Platoon, wherein he performed daily details and was restricted to the barracks area except for one hour per day); United States v. Delano, No. 37126, 2008 WL 5333565 (A.F. Ct. Crim. App. Dec. 22, 2008) (no *Mason* credit for appellant who assigned pretrial to the "Transition Flight"); United States v. Glaze, No. S31588, 2009 WL 2997009, at *5 (A.F. Ct. Crim. App. Sept. 14, 1999) (Another "Transition Flight" case where the court found the circumstances to be non-creditable "conditions on liberty" or "administrative restraint" under RCM 304(h)). Even considering the foregoing, defense counsel should nevertheless consider requesting sentencing credit for accused who are restricted to an area that is so limited in amenities that the accused's daily life is practically equivalent to being in jail, or significantly different from that of other servicemembers in the unit.

[26] *See, e.g.*, *Greenwald*, 20 M.J. at 699 (holding that pretrial restriction was not tantamount to confinement where accused was restricted to the company area, place of duty, dining facility, and chaplain's office; performed regular duties; restricted to barracks room after 2200; hourly sign-in requirement when not on duty; had access to rest of post without escort during duty hours or with escort after duty hours).

[27] *See* United States v. Richardson, 34 M.J. 1015, 1016–17 (A.C.M.R. 1992). In that case, a Soldier deployed to Saudia Arabia for Operation Desert Storm was ordered to stay in his Platoon Sergeant's tent, and not to leave it without a noncommissioned escort. He was disarmed and prevented from performing normal duties, though he was still allowed to go to the dining facility and post exchange. The court found these restrictions not to be tantamount to confinement "under the circumstances of duty at that time and place."

[28] United States v. Regan, 62 M.J. 299, 302 (C.A.A.F. 2006) (affirming trial court that granted *Mason* credit where the accused's commander gave her a choice between an inpatient drug rehabilitation program and pretrial confinement, but declined to grant additional RCM 305(k) credit for additional restrictions imposed by the hospital that served a legitimate medical purpose).

[29] United States v. Torres, No. 31551, 1995 WL 788700 (A.F. Ct. Crim. App. Dec. 13, 1995).

[30] *Regan*, 62 M.J. at 302.

[31] MCM, *supra* note 16, R.C.M. 305, at A21-16. When drafting RCM 305, "[t]he Working Group proceeded from the premise that no person should be confined unnecessarily." The analysis also explains that the pretrial confinement review process was "weighed in striking a balance between individual liberty and protection of society." *See also* United States v. Heard, 3 M.J. 14, 20 (C.M.A. 1977) ("[U]nless confinement prior to trial is compelled by a legitimate and pressing social need sufficient to overwhelm the individual's right to freedom . . . restrictions unnecessary to meet that need are in the nature of intolerable, unlawful punishment. Thus, the Government must make a strong showing that its reason for incarcerating an accused prior to his trial on the charged offense reaches such a level, for otherwise the right to be free must be paramount.").

[32] Courtney v. Williams, 1 M.J. 267, 270–71 (C.M.A. 1976).

[33] MCM, *supra* note 15, R.C.M. 305.

[34] *Id.* Restrictions tantamount to confinement do not trigger the requirements of RCM 305(k), unless they involve actual physical restraint. United States v. Rendon, 58 M.J. 221, 224 (C.A.A.F. 2003); Major Elizabeth A. Harvey, *Sentencing Credit for Pretrial Restriction*, ARMY LAW., Oct. 2008, at 27, 39–41.

[35] United States v. Lamb, 47 M.J. 384, 385 (C.A.A.F. 1998).

*1. Types of Rule for Court-Martial 305(k) Credit*

There are two types of RCM 305(k) credit. The first is a remedy for the government's noncompliance with sections (f), (h), (i), and (j) of RCM 305 (i.e., the procedural rights related to the pretrial confinement decision). This type provides one day's credit for each day of confinement served as a result of the noncompliance,[36] even if multiple sections are simultaneously violated.[37] All RCM 305(k) credit is awarded in addition to any *Allen* or *Mason* credit.[38]

Second, the military judge may award additional credit for "each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances."[39] The amount of credit awarded is left to the discretion of the military judge, who may award multiple days' credit for each day of confinement in egregious cases[40] or less than a day's credit for each day of a less serious violation.[41] While this credit has some overlap with Article 13 credit (illegal pretrial punishment), which will be discussed in the next section, it is most frequently asserted when the government violates its own regulations to the detriment of the pretrial confinee. The CAAF set forth the guidelines for such a scenario in *United States v. Adcock*[42] and recently reaffirmed them in *United States v. Williams*.[43] In *Adcock*, the accused (an Air Force officer) was held before trial in a civilian facility because there was no military confinement facility nearby. Conditions there did not conform to the Air Force Instruction governing pretrial confinement. For example, the pretrial confinee was not permitted to wear her uniform and rank, she was commingled with post-trial confinees, and she suffered other deprivations in violation of the Air Force Instruction.[44] The trial court refused credit under RCM 305(k),[45] but, the CAAF reversed, holding that:

> Violations of service regulations prescribing pretrial confinement conditions provide a basis for a military judge, in his or her discretion, to grant additional credit under the criteria of R.C.M. 305(k). *They do not independently trigger a per se right* to such credit enforceable by the servicemember. Accordingly, a military judge should consider violations of service regulations as a basis for pretrial confinement credit under R.C.M. 305(k) when those regulations reflect a long-standing concern for the prevention of pretrial punishment and the protection of servicemembers' rights.[46]

[36] The credit applies to the sentence of confinement first. If the credit exceeds the sentence to confinement, any remaining credit "shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, using the conversion formula under R.C.M. 1003(b)(6) and (7)." MCM, *supra* note 15, R.C.M. 305(k).

[37] United States v. Plowman, 53 M.J. 511, 514 (N-M. Ct. Crim. App. 2000) (reasoning that multiple simultaneous violations do not warrant multiple days of credit for each day spent in pretrial confinement because "[n]oncompliance with separate requirements occurring simultaneously does not cause the accused to spend multiple days confined for each instance of noncompliance"); *see also* United States v. Neece, No. 20020090, 2004 WL 5866702 at *3 (A. Ct. Crim. App. 2004) (following holding of *Plowman*).

[38] MCM, *supra* note 15, at A21-16 (RCM 305 analysis).

[39] *Id.* R.C.M. 305(k).

[40] *Id.*; *see infra* note 54 and accompanying text.

[41] Rule for Court-Martial 305(k) gives the military judge great deference in determining the appropriate amount of credit to award, stating generally that "[t]he military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances." MCM, *supra* note 15, R.C.M. 305(k). While the rule does not appear to contemplate awarding a partial day's credit for a minor violation, courts will often award a few day's credit for a less serious violation that persists over a long period of time. For example, the author served as defense counsel in a case where the accused was not paid for several months, and therefore requested sentencing credit. The military judge awarded ten days' credit to remedy the deficiency, under the rationale that the initial failure to pay the accused was an honest mistake made without punitive intent, but the problem should have eventually been remedied after repeated requests to do so. United States v. Puerto (Maneuver Center of Excellence, Fort Benning, Georgia, Dec. 16, 2009). Thus, government counsel should consider arguing that a few day's credit is adequate to remedy a minor violation that persists over a long period of time.

[42] 65 M.J. 18, 22–24 (C.A.A.F. 2007).

[43] 68 M.J. 252, 256 (C.A.A.F. 2010) (emphasizing that "[i]t is well-settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests," while reiterating that "confinement in violation of service regulations does not create a per se right to sentencing credit under the UCMJ") (quoting United States v. Dillard, 8 M.J. 213 (C.M.A.1980), *in turn quoting* United States v. Russo, 1 M.J. 134, 135 (C.M.A. 1975) (further citations omitted)).

[44] *Adcock*, 65 M.J. at 20.

[45] *Id*. The appellant also argued that the violations of Air Force Instruction (AFI) 31-205 "independently constitute a violation of Article 13, UCMJ, and R.C.M. 304(f), both of which prohibit pretrial punishment and provided a separate basis for sentencing relief." *Id*. at 21. Alternate theories of relief are discussed further *infra* Part IV.D.

[46] *Adcock*, 65 M.J. at 21, 25 (emphasis added). Counsel litigating potential credit for regulatory violations should examine the following CAAF case, as well as a line of unpublished Air Force cases, where regulatory violations were found, but no credit was awarded, which underscores the premise that there is no *per se* right to credit for every regulatory violation. *See* United States v. Williams, 68 M.J. 252 (C.A.A.F. 2009) (confinement conditions that violate service regulations do not trigger a *per se* right to sentencing credit); United States v. Belton, No. 37484, 2010 WL 2265605, at *3–4 (A.F. Ct. Crim. App. May 19, 2010) (no credit awarded for minor violations of AFI 31-205 (e.g., lack of vegetarian meals, denied physical training, subjected to mold) because there was no intent to punish or unduly harsh confinement conditions); United States v. Vogler, No. 37231, 2009 WL 2996991, at *3 (A.F. Ct. Crim. App. Sept. 3, 2009) (no credit for minor violations of AFI 31-205 that were "done to achieve legitimate, non-punitive, governmental objectives."); United States v. Durbin, No. 36969, 2008 WL 5192441, at *7 (A.F. Ct. Crim. App. Dec. 10, 2008) (no credit for post-trial violations of AFI 31-205 alleged in clemency matters that did not amount to cruel and unusual punishment); United States v. McIntyre, No. S31286, 2008 WL 4525359, at *2–3 (A.F. Ct. Crim. App. Sept. 26, 2008) (no credit for minor violations of AFI 31-205 (i.e., cell smaller than

The court held that the confinement officials' knowing and deliberate violations of a regulation "designed to protect the rights of presumptively innocent servicemembers," under the circumstances of that case, entitled the servicemember to relief under R.C.M. 305(k).[47] Thus, trial and defense counsel are well-advised to review their applicable service regulations, visit their local confinement facilities, and compare the conditions to the service standard.[48]

*2. Application of Rule for Court-Martial 305(k) Credit*

Rule for Court-Martial 305(k) credit for *illegal* pretrial confinement is fundamentally different from *Allen* and *Mason* credit for *lawful* pretrial confinement, because of what happens if the credit exceeds the sentence.[49] Essentially, any lawful pretrial confinement the accused serves in excess of the adjudged confinement is lost. Not so with RCM 305(k) credit for illegal pretrial punishment, because if this credit exceeds the adjudged confinement, it will then be applied to: (1) hard labor without confinement, (2) restriction, (3) fine, and (4) forfeiture in that order of precedence.[50] When appropriate to provide meaningful relief, it may even be applied against "any other form of punishment" (i.e., punitive discharge or reduction in rank).[51]

D. Article 13 Credit

Article 13, UCMJ, proscribes two things: (1) pretrial punishment and (2) conditions of pretrial restraint that are "more rigorous than necessary to ensure the accused's presence for trial."[52] These two prohibitions often overlap. The military judge can remedy Article 13 violations by awarding confinement credit under RCM 305(k), which provides additional sentencing credit for abuse of discretion or unusually harsh circumstances.[53] The military judge has considerable latitude in determining the amount of credit, and may grant as much as he deems appropriate.[54] Indeed, a military judge can even dismiss a case to remedy egregious pretrial punishment.[55] An accused may be awarded Article 13 credit without having been subject to pretrial restrictions.[56] Motions for Article 13 credit must be raised at trial, or they are waived on appeal.[57]

*1. Pretrial Punishment*

Allegations of illegal pretrial punishment are usually leveled against the servicemember's command for maltreatment at the unit. The military judge resolves the issue by determining whether the conditions were imposed to punish, or for some legitimate government purpose.[58] Thus, the matter often turns on the imposing official's intent.[59] The CAAF has adopted four factors to apply when

required) because there was no evidence of intent to punish and there were legitimate governmental reasons for deviation from the standard).

[47] *Adcock*, 65 M.J. at 25-26.

[48] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM (15 June 2006). A review of the applicable service regulation, along with any local requirements, coupled with a tour of the local confinement facility, should be an annual block of training for every installation legal office. Counsel must also ensure that pretrial confinees are not confined with foreign nationals, in violation of Article 12, UCMJ. Recently, the Air Force Court of Criminal Appeals found error where the convening authority did not grant two-for-one RCM 305(k) credit to compensate the appellant for each day he spent in pretrial confinement commingled with foreign nationals. *See* United States v. Spinella, No. ACM S31708 2010 WL 8033026, at *1–2 (A.F. Ct. Crim. App. Dec. 17, 2010); *but see* United States v. Wise, 64 M.J. 468, 473–77 (C.A.A.F. 2007) (holding that appellant's post-trial confinement conditions did not violate Article 12 or otherwise merit relief where he was separated from Iraqi enemy prisoners of war by only a single strand of concertina wire).

[49] United States v. Smith, 56 M.J. 290, 292 (C.A.A.F. 2002) ("There is no provision in the UCMJ or the Manual for Courts-Martial that requires credit against an adjudged sentence for lawful pretrial confinement."); *see supra* note 11 and accompanying text.

[50] MCM, *supra* note 15, R.C.M. 305(k).

[51] *Id.*; *see* United States v. Zarbatany, 70 M.J. 169, 170 (C.A.A.F. 2011). This case holds that while "[c]onversion of confinement credit to forms of punishment other than those found in R.C.M. 305(k) is generally inapt," particularly when "the qualitative differences between punitive discharges and confinement are pronounced," confinement credit may nevertheless be applied to punishments not listed in RCM 305(k) when such is required to provide meaningful relief for Article 13 violations. This relief "can range from dismissal of the charges, to confinement credit or to the setting aside of a punitive discharge." *Id.*

[52] 10 U.S.C. § 813 (2006), *quoted in* United States v. King, 61 M.J. 225, 227 (C.A.A.F. 2005). This prohibition is echoed in RCM 304(f), which directs that "[p]retrial restraint is not punishment and shall not be used as such. No person who is restrained pending trial may be subjected to punishment or penalty for the offense which is the basis for that restraint."

[53] United States v. Crawford, 62 M.J. 411, 414 (C.A.A.F. 2006) (citiations omitted).

[54] MCM, *supra* note 15, RCM 305(j)(2), (k) (stating that judge may grant credit but not specifying amount); United States v. Adcock, 65 M.J. 18, 24 (C.A.A.F. 2007) (judge's decision in response to motion for 305(k) credit is reviewed for abuse of discretion). *See also* United States v. Tilghman, 44 M.J. 493, 494 (C.A.A.F. 1996). In that case, the command disobeyed a court order to not confine the accused overnight between findings and sentencing, and the trial judge awarded 10-for-1 credit to remedy the noncompliance, even though the defense counsel requested only 1-for-1 credit. Two months later, the Chief Circuit Military Judge detailed himself to the case, conducted a post-trial Article 39(a) session, and awarded an additional eighteen months' credit against the sentence, based on the command's "cavalier disregard for due process and the rule of law."

[55] United States v. Fulton, 55 M.J. 88, 89–90 (C.A.A.F. 2001) ( "[W]here no other remedy is appropriate, a military judge may, in the interest of justice, dismiss charges because of unlawful pretrial punishment," but "[d]ismissal of charges is an extraordinary remedy" that is rarely appropriate.) (internal quotations omitted).

[56] United States v. Combs, 47 M.J. 330, 332 (C.A.A.F. 1997).

[57] United States v. Inong, 58 M.J. 460, 461 (C.A.A.F. 2003).

[58] United States v. Gilchrist, 61 M.J. 785, 796–97 (A. Ct. Crim. App. 2005).

[59] *Id. See* Major John M. McCabe, *How Far Is Too Far? Helping the Commander to Keep Control Without Going Over the Line; The Trial Practicioner's Guide to Conditions on Liberty and Article 13 Credit*, ARMY

determining whether pretrial restraint has risen to the level of pretrial punishment:

> 1. What similarities, if any, in daily routine, work assignments, clothing attire, and other restraints and control conditions exist between sentenced persons and those awaiting disciplinary disposition?
>
> 2. If such similarities exist, what relevance to customary and traditional military command and control measures can be established by the government for such measures?
>
> 3. If such similarities exist, are the requirements and procedures primarily related to command and control needs, or do they reflect a primary purpose of stigmatizing persons [a]waiting disciplinary disposition?
>
> 4. If so, was there an "intent to punish or stigmatize a person [a]waiting disciplinary disposition?"[60]

When a pretrial condition is reasonably related to a legitimate governmental objective and is reasonable under the circumstances, Article 13 credit will not be awarded.[61]

*a. Public Humiliation or Degradation*

Any intentional humiliation or displaying the accused as an "example" to other troops is likely to bring swift condemnation from the court in the form of substantial Article 13 credit.[62] For example, in the infamous case of *United States v. Cruz*, the accused and about forty other Soldiers were segregated into a "Peyote Platoon," called out in front of mass formations, and otherwise humiliated because they were pending adverse action for drug use. The Court of Military Appeals issued a strong rebuke, holding that the "public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute[s] unlawful pretrial punishment prohibited by Article 13."[63] While many trial counsel may assume that a scenario such as *Cruz* would never occur in their units, constant vigilance is key. For example, many rear detachments separate their daily accountability formations into a platoon of "medically" nondeployable Soldiers and a platoon of "legally" nondeployable Soldiers. Defense counsel may be able to argue that a "legal nondeployable" platoon is akin to the "Peyote Platoon." Trial counsel must remain vigilant.

*b. Preventing Accusations of Pretrial Punishment*

Given the nature of Article 13 motions, trial counsel must carefully analyze why the commander is imposing a particular condition and whether it is reasonably related to the objective.[64] With careful thought and planning at the outset, trial counsel can often avoid unpleasant Article 13 motions. For example, in a deployed environment, commanders sometimes seek to remove an accused's weapon before trial. All forward-deployed personnel, however, are required to carry a weapon. Thus, a servicemember without a weapon is usually presumed to be in trouble. At a minimum, the servicemember will frequently be stopped to explain why he is not carrying a weapon. Given the likely embarrassment this would cause, a motion for Article 13 credit would not be surprising.[65] With a little creativity, however, the command could eliminate this concern by simply removing the bolt assembly from the servicemember's weapon instead, thus rendering the weapon unusable, yet sparing the servicemember any stigma associated with not having a weapon. Thus, thoughtful trial counsel can often prevent an Article 13 motion or, at a minimum, ensure they are armed with favorable facts if an allegation arises.

*2. Unduly Harsh Pretrial Conditions*

Allegations of unduly harsh pretrial conditions are often directed toward the local confinement facility.[66] Such was

---

LAW., Aug. 2007, at 46, 60. Major McCabe concludes that "the purpose behind the [command's] action, and the action itself will speak volumes in determining proper conditions on liberty and appropriate Article 13 credit."

[60] United States v. Smith, 53 M.J. 168, 172 (C.A.A.F. 2000) (quoting FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 4-90.00, at 136–37 (2d ed. 1999)).

[61] *Gilchrist*, 61 M.J. at 797; United States v. McCarthy, 47 M.J. 162, 165 (C.A.A.F. 1997).

[62] *See, e.g.*, United States v. Fulton, 55 M.J. 88, 89 & n.1 (C.A.A.F. 2001) (trial court awarded three-for-one sentencing credit for an accused who was forced to refer to himself as "bitch" or "jackass" and parade about naked, and was threatened with rape, among other outrages); United States v. Tilghman, 44 M.J. 493, 494 (C.A.A.F. 1996) (ten-for-one credit, over eighteen months total, for an accused who was confined between findings and sentencing, in violation of the military judge's order); United States v. Stamper, 39 M.J. 1097, 1100 (A.C.M.R. 1994) (The appellate court granted 145 days' sentencing credit to remedy the company commander's "totally inexcusable" disparaging comments about the accused.).

[63] United States v. Cruz, 25 M.J. 326, 328–30 (C.M.A. 1987).

[64] *See* McCabe, *supra* note 59, at 59. Major McCabe provides suggestions to trial counsel on how to assist commanders with crafting conditions on liberty that are unlikely to run afoul of Article 13.

[65] *Id*. at 56–58. Major McCabe describes a motion that arose in the case of *United States v. Graner* (Abu Ghraib detainee abuse case). There, the military judge reluctantly granted a small amount of credit for the accused not being able to carry a weapon for several months at a large Forward Operating Base in Iraq.

[66] They may also be lodged against a mental health facility or confinement facility that places an accused on "suicide watch," thus greatly limiting his freedom of movement. *See, e.g.*, United States v. Williams, 68 M.J. 252, 257–58 (C.A.A.F. 2010) (No Article 13 credit granted where accused was placed on suicide watch and denied access to books, radio, CD player, and

the case in *United States v. Crawford*. Captain (Capt.) Crawford was awaiting court-martial for stealing and selling military ammunition and explosives. He was held in pretrial confinement at a local Navy brig. During the first week, Capt. Crawford was segregated from other confinees for "observation," and he then spent nine months in "maximum custody," with greatly reduced movement and recreation. He requested Article 13 credit, on the grounds that these conditions were unduly harsh and more rigorous than necessary to secure his presence at trial. The CAAF found, however, that the government had demonstrated that Capt. Crawford was particularly dangerous, because he had told undercover agents he was willing to teach terrorists how to build bombs, among other things.[67] Given that, the CAAF was "reluctant to second-guess the security determinations of confinement officials" when there is a reasonable factual predicate.[68] Thus, the court denied Article 13 credit.[69] Even so, the CAAF was careful not to open the floodgates, declaring that:

> [W]e do not wish to convey the impression that we condone arbitrary policies imposing "maximum custody" upon pretrial prisoners. We will scrutinize closely any claim that maximum custody was imposed solely because of the charges rather than as a result of a reasonable evaluation of all the facts and circumstances of a case. Where we find that maximum custody was arbitrary and unnecessary to ensure an accused's presence for trial, or unrelated to the security needs of the institution, we will consider appropriate credit or other relief to remedy this type of violation of Article 13, UCMJ.[70]

Thus, the outcome of Article 13 motions will usually turn on the reason why a particular restraint is imposed, and its reasonableness under the circumstances.

### *3. Nonreceipt of Pay*

Servicemembers in pretrial confinement are entitled to pay, unless their terms of service expire during the confinement period.[71] Sometimes, however, the government fails to pay those awaiting trial, particularly those who have recently returned from a nonpay status, because they were AWOL or in civilian confinement.[72] When those pay problems go unresolved, they can be viewed by the court as illegal pretrial punishment.[73]

In almost all cases, the failure to pay a Soldier awaiting trial is the result of a clerical error or misapplication of pay regulations.[74] Once the parties identify the issue, there will normally be no disagreement as to whether the servicemember should have been paid. The tension will lie in whether the failure to pay resulted from an intent to punish, thus triggering Article 13 credit. Defense counsel hoping to prevail on such motions must develop facts to show that the government's failure went beyond mere error and crossed over into blatant indifference. A defense counsel whose client is entitled to pay, but is not receiving it, should contact the trial counsel and commander to request that the problem be resolved. These communications should be memorialized in e-mail for easy documentation later at trial. Then, if the pay problem is not resolved, defense counsel can credibly argue the government's indifference or punitive intent toward the accused. Absent such evidence a bald motion for credit is likely to be denied.

Conversely, trial counsel must ensure that servicemembers awaiting trial are properly paid, particularly those who are returning from a nonpay status. Verification of an accused's pay status should be one of the first steps in the court-martial process. When a servicemember does "slip through the cracks" and erroneously goes unpaid for some period before trial, trial counsel should take two steps: (1)

---

compelled to wear a suicide gown, because there was a non-punitive reason for the conditions—mental health. The accused did, however, receive two weeks of Article 13 credit for a separate decision to arbitrarily place him in a segregated environment for two weeks.).

[67] United States v. Crawford, 62 M.J. 411, 415 (C.A.A.F. 2006).

[68] *Id*. at 414.

[69] *Id* at 417.

[70] *Id*. (footnotes and citations omitted).

[71] United States v. Fischer, 61 M.J. 415, 417–20 (C.A.A.F. 2005) (Over vigorous dissent, the court approved of the policy set forth in DoD Financial Management Regulation, vol. 7A, ch. 1, subpara. 010302.G.4 (2005), directing that "[i]f a member is confined awaiting court-martial trial when the enlistment expires, pay and allowances end on the date the enlistment expires. If the member is acquitted when tried, pay and allowances accrue until discharge."); *see also* 37 U.S.C. § 204(a)(1) (2006) ("[A] member of the uniformed service who is on active duty" is entitled to basic pay.).

[72] In the author's experience, unit S-1 shops and installation finance offices often confuse how to correctly process a Soldier confined by civilian authorities (*not* entitled to pay) and Soldiers serving military pretrial confinement in a civilian facility pursuant to a local contract (Soldier entitled to pay unless expiration of term of service (ETS) date has passed).

[73] *See, e.g.*, United States v. Jauregui, 60 M.J. 885, 888–89 (A. Ct. Crim. App. 2004) (implying that pay issue could have led to Article 13 credit, but denying relief on grounds of waiver).

[74] Such was the issue in *Jauregui*. Private First Class (PFC) Jauregui returned to his unit after being AWOL and was not paid for the seventy-seven days he performed ordinary duties before his court-marital. Private First Class Jauregui was not paid because a finance officer at the installation erroneously determined that he was not entitled to pay. The court found that even though the finance officer did not intend to punish PFC Jauregui, "his determination of nonpayment was inconsistent with precedent, and . . . [t]he government's failure to pay appellant while he was performing military duties because he was 'just awaiting court-martial' was not reasonably related to a legitimate government objective." *Id*. at 888. The court therefore granted sentence relief pursuant to Article 66(c), UCMJ, but declined to grant Article 13 credit because the issue was not raised at trial and therefore waived. *Id*. at 889. This remarkable result, where the court granted relief even though the issue was waived, sends a clear message that the appellate courts will hold the government to a reasonable standard of professionalism in carrying out its duties to pay servicemembers awaiting trial.

personally ensure the servicemember's pay is corrected as soon as possible, and (2) if possible, resolve the issue in the pretrial agreement

### E. Credit for Previous Nonjudicial Punishment (*Pierce* Credit)

A servicemember is entitled to sentencing credit when he is convicted of an offense for which he previously received nonjudicial punishment.[75] This credit is not automatic and the accused must request it.[76] For tactical reasons, the defense may elect to raise the matter during sentencing or an Article 39(a) session, or wait and present it to the convening authority on action.[77] Of course, the defense may decline to raise the matter altogether.[78] In any event, the credit is "day-for-day, dollar-for-dollar, stripe-for-stripe."[79] When the punishments adjudged at court-martial do not precisely match those meted out at the prior nonjudicial punishment (e.g., extra duty is frequently dispensed at Article 15s, but cannot be adjudged at court martial), courts or the convening authority should utilize the Table of Equivalent Punishments contained in the *Military Judges' Benchbook*.[80]

[75] United States v. Pierce, 27 M.J. 367, 369 (C.M.A. 1989); *see also* United States v. Porter, No. 20090974, 2010 WL 4140591, at *1 (A. Ct. Crim. App. Oct. 20, 2010) ("*Pierce* credit is only granted if the court-martial offense for which an accused is sentenced is substantially identical to the prior Article 15 punishment offense.") (citing United States v. Bracey, 56 M.J. 387, 389 (C.A.A.F. 2002)).

[76] *Bracey*, 56 M.J. at 388.

[77] *Id.* The accused is the "gatekeeper" for determining when credit for nonjudicial punishment will be applied—either at sentencing or the post-trial stage. United States v. Gammons, 51 M.J. 169, 179 (C.A.A.F. 1999); United States v. Rice, No. 200700208, 2007 WL 2340613 (N-M. Ct. Crim. App. Aug. 8, 2007). In the author's experience, this determination is often based upon whether raising the Article 15 at trial enhances or detracts from the defense sentencing case. For example, prior nonjudicial punishment can show that the accused lacks rehabilitative potential if further offenses were committed after the nonjudicial punishment was imposed. *Id.* at *5. In general, unless some circumstance surrounding the nonjudicial punishment engenders considerable leniency, it is more prudent to raise the issue post-trial, since at that juncture there is no doubt that the accused will get the full benefit of any credit against his sentence.

[78] *Bracey*, 56 M.J. at 388.

[79] *Pierce*, 27 M.J. at 369; *see* United States v. Gormley, 64 M.J. 617, 620–21 (C.G. Ct. Crim. App. 2007) (holding that either the military judge or convening authority must state on the record the exact credit awarded for prior nonjudicial punishment).

[80] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-7-21, tbls.2-6 & 2-7 (1 Jan. 2010). Table 2-7 provides that two days of restriction are equivalent to one day of confinement, the forfeiture of one day's pay is equivalent to one day of confinement, and three days of extra duty are equivalent to two days of confinement. Pay lost due to a reduction in rank also counts against sentence credit; however the total pay lost should be divided by the pay rate at the prior (higher) rank, rather than the pay at the new (lower) rank, to avoid improperly inflating this credit. United States v. Santizo, No. 20100146 2011 WL 4036106, at *3 (A. Ct. Crim. App. Aug. 31, 2011).

If one considers anew the opening hypothetical, it becomes apparent that Private Tentpeg may be entitled to four types of sentencing credit: (1) *Allen* credit for each day spent in pretrial confinement (either military or on behalf of the military); (2) *Mason* credit for each day spent at the unit if the conditions were tantamount to confinement; (3) RCM 305(k) credit for the unit's failure to immediately retrieve Private Tentpeg from the local jail and perform the required pretrial reviews; and (4) Article 13 credit for illegal pretrial punishment (i.e., sleeping in the supply room, not being permitted to wear a uniform, and nonreceipt of pay). The remaining sections of this article discuss how counsel for both sides should act to obtain the best outcome for their respective clients.

## IV. Motions for Sentencing Credit

Motions for sentencing credit can be time-consuming and embarrassing for the command, as they often involve accusations of maltreatment. Further, it is often difficult to predict whether a military judge will award sentencing credit, and if so, in what amount. Given that, the parties will often agree to a specified amount of sentencing credit before trial, which provides efficiency and a certain result. When there is no agreement, the defense controls if and how the issue is raised, with the only limitation being that the matter is waived if not raised at trial.[81] The defense bears the burden of proving by a preponderance of the evidence that the requested credit is warranted.[82] Any sentencing credit awarded is applied to the approved sentence, e.g., the lesser of the adjudged sentence or any sentence limitation specified in a pretrial agreement (unless the pretrial agreement specifies otherwise).[83]

### A. Form

Motions for sentencing credit can be made orally or in writing, although given that well-developed motions are usually fact-intensive, a written motion is almost always preferable. When the written motion contains well-drafted facts, the court will sometimes adopt them as its findings (provided they are established by appropriate proof).[84] Of course, it is not unheard of for trial counsel to be surprised

[81] United States v. Inong, 58 M.J. 460, 461 (C.A.A.F. 2003).

[82] MCM, *supra* note 15, R.C.M. 905(c); *see also* United States v. Crawford, 61 M.J. 411, 414 (C.A.A.F. 2006).

[83] United States v. Spaustat, 57 M.J. 256, 263–64 & n.6 (C.A.A.F. 2002) (specifically noting that a pretrial agreement can require sentence credit to be deducted from the adjudged sentenced instead of the approved sentence).

[84] Bear in mind that statements of fact in a motion are not evidence. Counsel must either stipulate to the facts or call witnesses to establish the facts on the record. Often, defense counsel must prepare the accused to testify for the limited purpose of the motion in order to get facts on the record. Additionally, counsel should consider submitting a digital copy of the motion to the court, to facilitate transcribing the facts in the ruling.

with an oral motion for sentencing credit immediately before trial. When that occurs, trial counsel should not jettison their duties to advocate zealously on behalf of their client in exchange for getting a case done the same day. Unless the matter is simple or insignificant, trial counsel should request any delay necessary to prepare a response. They should use the accused's failure to raise the issue before as evidence he was not really punished.[85]

B. Timing

Ordinarily, defense counsel will become aware of a sentencing credit issue first. The next consideration is when and how to raise the matter. In most cases, defense counsel should request the government correct any unlawful condition as soon as possible, both because doing so may obtain relief and because failing to do so will reduce the chance for judicial relief.[86] If "JAG diplomacy"—talking to the trial counsel—fails, the defense should consider other avenues, such as talking directly to the commander, or making a request for redress under Article 138, UCMJ. If the government continually fails to correct the condition, then the defense can more credibly argue that the government failed to live up to its obligations. If the government fixes the problem, then the client's predicament has been improved, without waiving prior claims.

In cases where the government cannot or will not fix the deficiency (e.g., client is being restricted in a manner tantamount to confinement, and the government failed to conduct pretrial confinement reviews in accordance with RCM 305), the defense is often best served by raising the matter after a pretrial agreement is in place. If the defense raises the matter before that, the government will usually insist the defense waive or settle any claim as part of the pretrial agreement. Once the pretrial agreement is signed by the convening authority, the defense can raise the motion and the government will be unable to withdraw from the pretrial agreement in response.[87] Raising the matter after the pretrial agreement is signed ensures the client receives the full benefit of both his plea agreement and sentencing credit motion.

In cases where there is no plea agreement, the defense should usually raise any motion for sentencing credit in accordance with the military judge's instructions.[88] At a minimum, a well-supported motion for sentencing credit may persuade the government to offer a favorable plea agreement (or alternative disposition of the case). An oral motion for sentencing credit (other than on the most elementary matters such as *Allen* credit) on the eve of trial is almost always the wrong answer. It suggests a lack of preparation at best, and "litigation by ambush" at worst, and is unlikely to put the judge in the right frame of mind for granting relief.[89]

C. Support

Motions for sentencing credit are centered on facts. The court has great discretion in granting credit; thus, it is particularly important to give the military judge a thorough understanding of what occurred. Both trial and defense counsel must be creative and diligent when seeking out witnesses and evidence that will convincingly establish the facts.

Trial counsel can largely control whether they will work with good or bad facts. Careful attention to detail in the pretrial confinement process can eliminate RCM 305(k) motions that procedures were not followed. Careful implementation of pretrial conditions on liberty and restrictions can largely preclude motions for *Mason* credit. Article 13 motions are minimized by monitoring of servicemembers awaiting trial. A good working relationship with commanders ensures that the trial counsel will learn about these issues early and be able to give the right advice to fix them. When claims for sentencing credit do surface, trial counsel must focus their efforts upon preparing witnesses to explain what they did and why it was necessary.

Defense counsel must remember that they carry the burden of proof,[90] and thus must usually go beyond unsupported assertions made by the accused, which are almost certain to be contradicted by a government witness. This requires diligent investigative work. For example, when a servicemember claims to be living in squalid

[85] United States v. Combs, 47 M.J. 330, 332 (C.A.A.F. 1997) (citing United States v. Palmiter, 20 M.J. 90, 97 (C.M.A. 1985)) ("[T]he failure to voice a contemporaneous complaint of the alleged mistreatment is powerful evidence that it was not unlawful."); *see also* United States v. Starr, 53 M.J. 380, 382 (C.A.A.F. 2000), United States v. McCarthy, 47 M.J. 162, 166 (C.A.A.F. 1997) (both using accused's failure to complain to the command about treatment later claimed as punishment as evidence that this treatment was not, in fact, punishment).

[86] *See supra* note 84.

[87] *See* MCM, *supra* note 15, R.C.M. 705(d)(4)(B) (listing the conditions under which a convening authority can withdraw from a pretrial agreement).

[88] The defense counsel's duty to his client can supersede docketing instructions issued by the court. If he could not or did not request relief on time, but now sees that his client is entitled to it, he should request permission to file a late motion requesting that relief, and offer an explanation justifying the request, if possible.

[89] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS cmt. to r. 3.1 (1 May 1992) [hereinafter AR 27-26]. "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." Fortunately, under most circumstances, these two duties do not conflict.

[90] MCM, *supra* note 15, R.C.M. 905(c)(2); United States v. Fischer, 61 M.J. 415, 418 (C.A.A.F. 2005).

conditions at her unit, defense counsel and a paralegal[91] should immediately go to the unit to take pictures, interview witnesses, and otherwise document the scene. Witnesses and photographs will paint the picture for the military judge far better than the accused's description, watered down by the contradictory testimony of a unit leader. In cases where the servicemember claims maltreatment at a confinement facility, the defense counsel should interview other confinees[92] and employees at the facility and then compare the actions to any standard operating procedures (SOPs) and the service regulation governing pretrial confinement.[93] The goal is to paint a vivid picture and give the military judge concrete facts upon which he can make findings that support an award of sentencing credit.

### D. Alternate Theories of Relief

Often, a pretrial condition will give rise to multiple sources of sentencing credit. When this occurs, defense counsel should assert all credible alternative theories, as one can never be certain which theory will resonate with the judge. Thus, when preparing a motion for sentencing credit, defense counsel must consider each source of sentencing credit and whether it applies.[94] Pretrial confinement that leads to *Mason* or *Allen* credit may warrant additional credit for illegal pretrial punishment under Article 13, if the conditions are unduly harsh or not reasonably related to some legitimate government purpose.[95] Violation of service regulations to the detriment of the accused's rights during confinement may warrant additional sentencing credit under RCM 305(k).[96] The key point is that the same period of pretrial restraint may warrant credit from multiple sources—possibly even multiple days of credit for each day of pretrial restriction under some circumstances. The motion should assert all the ones that apply.[97]

## V. Practice Tips Regarding Sentencing Credit Issues

An essential requirement for sentencing credit success is situational awareness. When all parties are thoroughly aware of the conditions under which servicemembers awaiting trial are living, there are fewer disputes over sentencing credit. When trial counsel are in regular contact with unit leaders and defense counsel are in frequent communication with their clients, abuses are much less likely to occur, and are quickly corrected when they do. When both parties are aware of all of the attendant facts in the case, sentencing credit issues can often be resolved efficiently as part of pretrial negotiations, as opposed to surprise motions on the eve of a guilty plea.

All parties must ensure that the rules for placing a Soldier into pretrial confinement are scrupulously complied with. To that end, every counsel should have a pretrial confinement binder containing the Part-Time Military Magistrate SOP, the applicable service regulation governing confinement (along with any local supplements),[98] and any other related policies. Whenever an accused is placed in pretrial confinement, counsel should review the procedure and verify that all required steps have been executed.

### A. Specific Advice for Trial Counsel

Motions for sentencing credit usually spring from an allegation of mistreatment or that the government has failed to perform some required task. Trial counsel should minimize the possibility of such allegations by taking three steps. First, trial counsel should educate unit leaders on the court-martial process, with a focus on the pretrial portion. Unit leaders should be strongly encouraged to contact their trial counsel any time they seek to restrict a servicemember.[99] The second step, as noted above, is situational awareness. Trial counsel should track every servicemember pending adverse action and have detailed knowledge about that servicemember's living conditions and

---

[91] Ideally, the defense counsel will have a paralegal or some other person take photographs or gather other evidence so that neither the accused nor defense counsel need to testify for the purposes of giving evidence or laying an evidentiary foundation for an exhibit (i.e., a photograph).

[92] Recall that these other confinees are probably represented by counsel and, therefore, prior coordination is appropriate before conducting any interviews regarding the conditions of their confinement. *See* AR 27-26, *supra* note 88, r. 4.2 (Communication with Person Represented by Counsel).

[93] *See supra* note 47.

[94] Appendix A summarizes these sources.

[95] *See, e.g.*, United States v. DiMatteo, 19 M.J. 903, 904 (A.C.M.R. 1985) (In a case where the appellant was incarcerated in a dirty basement storage room under extremely harsh circumstances, the court noted that the appellant was entitled to not only the *Mason* credit he requested at trial, but probably additional sentencing credit for illegal pretrial punishment, had he requested such.); *see also* United States v. Smith, 20 M.J. 528, 532 (A.C.M.R. 1985) ("We find that the conditions of the appellant's restriction were lawful, as they related to the need to ensure the appellant's presence at trial, the legitimate military interest in protecting the five–year–old dependent victim from further molestation, and the legitimate military interest in precluding appellant's exposure to the temptations of further aberrant sexual misconduct.").

[96] United States v. Williams, 68 M.J. 252, 256 (C.A.A.F. 2010) (holding that "R.C.M. 305(k) provides an independent basis for the award of additional confinement credit where there has been a violation of service regulations 'when those regulations reflect long-standing concern for the prevention of pretrial punishment and the protection of servicemembers' rights'") (quoting United States v. Adcock, 65 M.J. 18, 25 (C.A.A.F. 2007)).

[97] Recall that the same conditions giving rise to confinement credit may also provide the basis for a speedy trial motion. *See supra* note 20 and accompanying text.

[98] *See supra* note 47.

[99] Trial counsel should assist commanders in devising pretrial conditions on liberty or restraint, centered upon the legitimate purpose behind the action. The Pretrial Restraint Quick Reference Sheet found at Appendix C provides a handy reference when discussing various possible measures with the commander.

restrictions. Trial counsel should likewise train their paralegals to monitor conditions at their units. Third, trial counsel must ensure strict compliance with regulations when a servicemember is restricted. These three steps will minimize the likelihood that the command will be summoned to court to respond to allegations of mistreatment.

### B. Specific Advice for Defense Counsel

As with trial counsel, situational awareness paves the way to success for defense counsel. Defense counsel likewise must do three things to effectively represent a client who has been subject to pretrial restriction. First, defense counsel must communicate with the client from the outset and continually throughout the pretrial process to identify potential issues. The day before trial is not the ideal time to first broach the issue. Second, defense counsel must thoroughly document pretrial restrictions to support any motion for sentencing credit, as discussed above. Defense counsel must document any pretrial deprivations with photographs, detailed sworn statements, memoranda, counseling statements, staff duty logs (for Soldiers required to sign in periodically), etc. Third, defense counsel must determine how the pretrial restrictions can otherwise affect the case. The concerns here are usually speedy trial and sentencing. For example, at sentencing defense counsel may be able to demonstrate that the client has rehabilitative potential by his compliance with onerous pretrial restrictions. Similarly, defense counsel should request leniency at sentencing due to pretrial deprivations, regardless of whether formal confinement credit is awarded.

## VI. Conclusion

Sentencing credit issues can have a tremendous impact on the outcome of a case, particularly at guilty pleas involving relatively minor offenses. Indeed, a motions hearing could take more time and effort than the guilty plea itself, and a substantial award of sentencing credit could wipe out an entire sentence to confinement. What counsel should appreciate after reading this primer is that sentencing credit is an area of trial practice where individual initiative can greatly influence whether and how the issue is raised, and whether the result will be obtained with difficulty or ease. For trial counsel, the goal is to prevent, or at least minimize, the issue through training, vigilance, and incorporation of any sentencing credit issues into a pretrial agreement. For defense counsel, the goal is to properly discover and document the issues, and obtain the maximum credit.

Counsel can set the conditions for success when addressing sentencing credit issues. The best result rarely falls into the lap of the counsel who never leaves the office—it is obtained through knowledge of the law backed up by diligent legwork. That is what often separates a mediocre trial advocate from one who is truly outstanding. It is this higher level of advocacy that every client deserves, and that this primer seeks to encourage.

## Appendix A

## Sentence Credit Considerations

**Types of Sentence Credit**

**Allen** (PTC including civilian PTC in some cases)
**Article 13** (Pretrial—punishment or unduly rigorous conditions)
**Pierce** (prior NJP for same offense)
**RCM 305(k)** (PTC—failure to comply w/PTC safeguards, abuse of discretion or unusually harsh PTC conditions) (also called *Suzuki* credit)
**Mason** (restriction tantamount to confinement)

**Article 13 Credit**
- Two bases for credit: (1) pretrial punishment; and (2) unduly rigorous conditions. *King*, 61 M.J. 225 (CAAF 2005). Analysis turns upon whether gov't action was reasonable and for a non-punitive purpose. *Gilchrist*, 61 M.J. 785 (ACCA 2005); *James*, 28 M.J. 214 (CMA 1989) (conditions so excessive that they constituted punishment).
- Remedy—MJ can award more or less than day-for-day credit. *Tilghman*, 44 M.J. 493 (CAAF 1996). MJ can dismiss in egregious cases. *Fulton*, 55 M.J. 88 (CAAF 2001).
- Waiver? No need for affirmative waiver—failure to raise at trial is waiver on appeal. *Inong*, 58 M.J. 460 (CAAF 2003).
- Credit?— applied against adjudged sentence or any maximum sentence set forth in a pretrial agreement. *Spaustat*, 57 M.J. 256 (CAAF 2002).

**Allen Credit**
- *Allen*, 17 MJ 126 (CMA 1984); 18 U.S.C. § 3585.
- Day-for-day credit for PTC. (Note—any partial day in PTC = a full day's credit. Do not count the day sentence imposed.) *Deleon*, 53 M.J. 658 (ACMR 2000).
- Waiver? Yes, *Ecoffey*, 23 M.J. 629 (ACMR, 1986).
- Credit? Against approved sentence. See *Rock*, 52 M.J. 154 (1999) and key below.

Civilian Confinement Credit (under *Allen*)
- *Goodwin*, 2009 WL 6827248 (ACCA 2009) (credit for all civilian pretrial confinement that has not been credited to another sentence, regardless of whether it is related to court-martial offenses).
- Waiver? Yes, like *Allen* credit, *Ecoffey*, 23 M.J. 629 (ACMR, 1986); but see *Yanger*, 68 M.J. 54 (CG CCA 2009) (claim for credit not untimely if submitted to convening authority after trial).
- Credit? Against approved sentence. See *Rock*, 52 M.J. 154 (1999) and key below. Credit in excess of sentence to confinement cannot be credited to other elements of sentence. *Smith*, 56 M.J. 290 (CAAF 2002).

**Pierce Credit**
- *Pierce*, 27 M.J. 367 (CMA 1989) sm being tried after being given NJP for same offense. May be tried, but must get complete credit for any prior punishment. Credit—by CA at initial action unless sm reveals NJP to ct and asks MJ to apply credit (bench trial or member trial) or members to consider in sentencing, *Southwick*, 53 M.J. 412 (2000). Use the instructions and tables at para. 2-2-21 of the *Military Judge's Benchbook* to apply credit.

**RCM 305(k) Credit**
- Two major types—(1) failure to comply with PTC safeguards; and (2) abuse of discretion/unusually harsh circumstances of PTC.
- PTC safeguards (right to counsel—RCM 304(f); Cdr's review—RCM 305(h); 48-hr review and military mag's review - RCM 305(i); MJ's review (if any)—RCM 305(j); and return to PTC w/o new evidence/misconduct—RCM 305(l)). Violation = day-for-day credit (cannot obtain multiple days' credit for simultaneous violations of these provisions). *Plowman*, 53 M.J. 511 (N-M CCA 2000).
- Abuse of discretion or unusually harsh circumstances—mechanism for awarding Article 13 credit. Also covers violations of service regulations that represent a long-standing concern for the prevention of punishment and protection of servicemembers' rights. *Adcock*, 65 M.J. 18 (CAAF 2007) (but no per se right to credit for every regulatory violation). Violation = MJ may give more or less than day-for-day credit. *Suzuki*, 14 M.J. 491 (CMA 1983).
- Civilian confinement—only if held for military, *Lamb*, 47 M.J. 384 (1998).
- Waiver? Yes *Chapa*, 53 M.J. 769 (ACMR 2000).
- Credit? Against approved sentence. See *Rock*, 52 M.J. 154 (1999) and key below. Credit in excess of sentence to confinement can be credited to other elements of the sentence, as described in RCM 305(k).

**Mason Credit**
- *Mason*, 19 M.J. 274 (CMA 1985) Derives from *Allen* credit, credit for pretrial restraint tantamount to confinement.
- Factors—totality of circumstances. *Smith*, 20 M.J. 528 (ACMR 1985) (summary of factors and cases).
- Waiver? Yes, *Ecoffey*, 23 M.J. 629 (ACMR, 1986).
- Credit? Against approved sentence. See *Rock*, 52 M.J. 154 (1999) and key below.

**KEY**
PTC = pretrial confinement
*Rock*, 52 M.J. 154 (2000) Credit for PTC (*Allen* and *Mason* credit) always comes off of the sentence approved by the CA at action. *Spaustat*, 57 M.J. 256 (CAAF 2002), "This court will require the convening authority to direct application of all confinement credits for violation of Article 13 or RCM 305 and all *Allen* credit against the approved sentence; i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement."
Footnote: This chart was originally distributed at a Trial Defense Service Conference by an unknown author and has merely been updated since then.

**Appendix B**

**Pretrial Restraint Checklist**

Case:_____
TC/DC:_____Phone/Email:_____
CDR/1SG:_____Phone/Email:_____
Supervisor:_____Phone/Email:_____

**Time Frame** **SPEEDY TRIAL CLOCK START**
**DATE:_____**
Date of earliest misconduct:_____ Date command became aware of misconduct:_____
Date first pretrial restraint imposed:_____ Date charges referred:_____
Date defense submitted speedy trial demand (if any):_____
Defense delays:_____

**Pretrial Conditions/Actions**
*Has the Soldier had any pay stoppages since getting into trouble?_____
Reason:_____
Dates:_____
Corrective Action Taken:_____
*Has the Soldier been restricted in any way since the first act of misconduct?_____
What restrictions?_____ Dates:_____
Reason for Restrictions:_____
*Has the Soldier been limited in any way from performing his/her normal duties?_____
What limitations?_____ Dates:_____
Reason for Limitations:_____
*Has the command changed the Soldier's living conditions or daily routine in any other way?_____
What changes?_____ Dates:_____
Reason for Changes:_____
*Does the Soldier claim to have been embarrassed, harassed, or otherwise mistreated due to the pending court-martial?_____
Incidents:_____
Dates:_____
Witnesses/Evidence:_____ Corrective Action Taken:_____
*Any prior nonjudicial punishment for court-marital offenses?_____
Date:_____
Punishment adjudged and executed:_____
Likely impact of nonjudicial punishment on case:_____

**Pretrial Confinement Procedure (RCM 305)**
Officer Ordering Confinement:_____
Date and place Soldier first confined by military or on behalf of military:_____
Date Soldier received pretrial confinement advice (RCM 305(e)):_____
Date the commander prepared a memorandum or other document determining that the Soldier meets the requirements for pretrial confinement contained in RCM 305(h)(2)(B)._____ Are all facts in the memo accurate?____
Did commander reasonably consider lesser forms of restraint?_____
Date the government conducted the 48-hour probable cause determination (RCM 305(i)(1)._____
Was the 48-hour probable cause determination conducted by a neutral and detached officer?_____
Date the commander prepared the 72-hour memorandum (RCM 305(h)(2)(C))._____
Are all facts in the memo accurate?_____
(For Defense) Is it in the client's best interest to argue against continued pretrial confinement?_____
Date of 7-day pretrial confinement review:_____ Reviewing Officer:_____
Is reviewing officer neutral and detached?_____ Properly appointed?_____

Any defense objections overruled by the reviewing officer:_____
Did reviewing officer abuse his/her discretion?_____
Date reviewing officer completed review (no more than 7 days after confinement or 10 days with good cause):_____
Date reviewing officer's memorandum received:_____ Factually accurate?_____
Any new information warranting a request for 7-day reviewing officer to reconsider confinement decision?_____
What information?_____ Date and result of reconsideration:_____
Are all potential sentencing credit issues incorporated into any pretrial agreement?_____

**Trial**

Date of Motion for Release from Pretrial Confinement (can make after referral):_____
How did reviewing officer allegedly abuse discretion?_____
Result:_____ Post-motion restraint on Soldier:_____
Any Motions for Sentencing Credit:_____
Will any Pierce credit be applied at sentencing or post-trial?_____
Sentencing impact of pretrial restraint/confinement/punishment:_____
Impact of pretrial restraint/confinement/punishment on defense post-trial submissions:_____

## Appendix C

### Pretrial Restraint /Conditions Quick Reference Sheet

**PURPOSE:** to provide judge advocates and commanders with a quick guide as to the likely sentencing credit impact of commonly encountered pretrial restraint measures and conditions.

**CAVEAT:** Pretrial conditions are viewed under the totality of the circumstances to determine whether credit should be awarded. Thus, several pretrial conditions that may not warrant credit in isolation may warrant credit when imposed simultaneously. The key determination is usually the imposing authority's intent.

**PRETRIAL CONDITIONS NOT LIKELY TO GENERATE SENTENCING CREDIT:**

- Revocation of off-post pass privileges. *Washington*, 20 M.J. 699.
- Sign-in requirements < hourly. *Washington*, 20 M.J. 699.
- No-contact orders with victim(s).
- Commitment of servicemember to mental health or drug treatment facility. *Regan*, 62 M.J. 299
- Requirement of an escort to leave unit area or assignment of a "battle buddy." *Washington*, 20 M.J. 699.
- Denial of leave or pass (can be denied on the basis the servicemember is flagged).

**PRETRIAL CONDITIONS THAT MAY GENERATE SENTENCING CREDIT:**

- Requirement to remain in uniform at all times (usually if servicemember is a flight risk).
- Restriction to unit area. *Washington*, 20 M.J. 699.
- Failure to pay servicemember. *Jauregui*, 60 M.J. 885.
- Order to not drink alcoholic beverages. *Blye*, 37 M.J. 92.
- Taking away of car keys or order not to drive personally owned vehicle (usually related to flight risk).
- Restriction to barracks after 2200. *Washington*, 20 M.J. 699; *Smith*, 20 M.J. 528.
- Taking away of weapon in combat zone.

**PRETRIAL CONDITIONS THAT ARE LIKELY TO GENERATE SENTENCING CREDIT:**

- Restriction to a single room or building. *Smith*, 20 M.J. 528.
- Sign-in requirements > hourly. *Smith*, 20 M.J. 528.
- Taking away of rank, other unit insignia, or uniform. *Cruz*, 25 M.J. 326.
- Name-calling, singling out of servicemember, or parading in front of troops. *Fulton*, 55 M.J. 88, *Cruz*, 25 M.J. 326; *Stamper*, 39 M.J. 1097.
- Shackling of the servicemember or any other form of physical restraint. *Gilchrist*, 61 M.J. 785; *Cruz*, 25 M.J. 326.
- Failure to immediately take charge of servicemember in civilian confinement on behalf of the military (based on R.C.M. 305(k) requirements to perform pretrial confinement reviews).
- Requiring servicemember to live under unnecessarily difficult conditions (e.g., sleeping in a supply room, conference room, or at the staff duty desk when barracks rooms are available). *Gilchrist*, 61 M.J. 785; *Hoover*, 24 M.J. 874.
- Restriction from visiting family or friends (when not for some legitimate pretrial purpose).
- Requirement to perform extra duties or unusually menial duties that display an intent to punish (e.g., cutting the grass while wearing a helmet and body armor, excessive janitorial duties).
- Exclusion from unit activities, information flow, leadership, or any kind of intentional isolation.
- Restriction from performing normal MOS (unless reasonably necessary due to the pending charges—e.g., many MOS's cannot be fully performed if the servicemember's security clearance is suspended)
- .