UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ANNAMARIE D. ELLIS
United States Air Force

ACM 38655

12 January 2016

Sentence adjudged 28 March 2014 by GCM convened at Joint Base San Antonio–Lackland, Texas. Military Judge: Donald R. Eller, Jr. (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Anthony D. Ortiz.

Appellate Counsel for the United States: Major Mary Ellen Payne; and Gerald R. Bruce, Esquire.

Before

MITCHELL, DUBRISKE, and BROWN
Appellate Military Judges

OPINION OF THE COURT

DUBRISKE, Judge:

In accordance with her pleas, Appellant was convicted by a military judge sitting alone of dereliction of duty, cruelty and maltreatment, secreting mail, obstruction of justice, and communication of threats, in violation of Articles 92, 93, and 134, UCMJ, 10 U.S.C. §§ 892, 893, 934.

Appellant was sentenced to a bad-conduct discharge, eight months of confinement, and reduction to E-1. The convening authority approved the sentence as adjudged.

Appellant raises three assignments of error on appeal. First, Appellant argues she is entitled to relief because the military judge erred in denying a motion for unreasonable multiplication of charges for both findings and sentencing. Second, Appellant alleges the military judge failed to provide her with proper sentencing credit for misconduct that was previously punished under Article 15, UCMJ, 10 U.S.C. § 815. Finally, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant claims her adjudged sentence is inappropriately severe when compared against her military service record and duty performance.

After receiving briefs from both parties, we specified a question surrounding the failure of the Government to include a victim impact statement as part of the staff judge advocate's recommendation (SJAR).

We find Appellant is due relief for unreasonable multiplication of charges in this case. We have also determined one attachment in the defense clemency submission contains personally identifiable information of other military personnel and direct that it be sealed.

Background

Appellant became a military training instructor (MTI) in November 2008. Shortly after completing her on-the-job training and being assigned her first basic military training flight, Appellant began to physically, verbally, and emotionally abuse trainees under her authority. In addition to her use of profane and degrading language to belittle trainees, Appellant was fond of using physical training exercises as a punishment tool. As one example, Appellant required trainees in one of her flights to strip naked and perform group exercises in the shower while under cold water. Appellant also withheld trainees' mail as a form of punishment.

Additionally, Appellant repeatedly threatened to physically harm trainees and, on multiple occasions, assaulted trainees. Appellant also invited trainees to engage her in a physical altercation when she believed they were not showing her the proper respect. She likewise promoted "street justice" within one of her flights, which resulted in a trainee being injured during a fight with another trainee in her presence. Appellant instructed the trainees who witnessed this fight that they should not disclose any information about the altercation, which eventually led to one of the obstruction of justice specifications alleged against Appellant.

In January 2010, Appellant received a letter of reprimand for her verbal abuse of a trainee. Then, approximately six months later, Appellant received nonjudicial punishment for abuse of trainees in the flight she was currently leading. Appellant was removed from her position as an MTI because of this investigation and returned to her

previous career field. However, during an investigation into inappropriate conduct by other basic training MTIs, the full extent of Appellant's abusive behavior of six basic training flights was uncovered and led to the charges subject to this appeal being preferred in August 2013.

Unreasonable Multiplication of Charges

The prosecution charged Appellant's abuse of trainees as both dereliction of duty under Article 92, UCMJ, and cruelty and maltreatment under Article 93, UCMJ. Both violations alleged misconduct against one of Appellant's training flights as a group, and not the individual trainees who were impacted by Appellant's actions.

Appellant was charged with 11 dereliction of duty specifications alleging misconduct against 6 basic training flights. The prosecution alleged Appellant both "maltreated" and "maltrained" 5 flights of trainees, and charged these theories in 10 separate specifications. The remaining specification alleged only maltreatment of a different flight.

In support of the different charging theories, the prosecution requested the military judge take judicial notice of the training instruction establishing policies and procedures for basic military training. This instruction defined three areas of unacceptable conduct for MTIs: (1) maltreatment, (2) maltraining, and (3) sexual harassment.

According to the training instruction judicially noticed by the military judge, maltreatment covers both physical and verbal abusive conduct by an MTI. Physical maltreatment includes, for example, acts such as hitting, grabbing, intimidation, and hazing, as well as threats of violence. Verbal maltreatment is defined as any language that degrades, belittles, demeans, ridicules, or slanders a trainee.

Maltraining, on the other hand, focuses on training practices not designed to meet a basic military training objective. Violations of this provision could include an MTI unnecessarily rearranging a trainee's property or assigning remedial training that is disproportionate to the disciplinary infraction. Maltraining also encompasses the assignment of group remedial training when the deficiencies to be corrected are the fault of an individual trainee or a small group of trainees.

Prior to pleas, the defense requested the military judge determine the prosecution's charging scheme was an unreasonable multiplication of charges under Rule for Courts-Martial (R.C.M.) 307(c)(4). The defense noted the charged offenses were not aimed at distinctly different criminal acts, but instead were only charging the same course of criminal conduct—the abuse of trainees—multiple ways. The defense requested the military judge dismiss and consolidate specifications as appropriate for findings and sentencing. Although unclear from the defense motion and argument during trial, it appears the defense alleged all of the specifications could be addressed in some form by a

consolidated Article 92, UCMJ, violation given the factual matters supporting the charges related to Appellant's abusive treatment of trainees while an MTI.

The prosecution, in its opposition to the motion, provided the military judge with a bill of particulars that listed the specific acts by Appellant that the prosecution believed supported each specification under Articles 92 and 93, UCMJ. The prosecution argued with regard to the dereliction of duty specifications that the maltreatment and maltraining specifications each addressed a separate theory of MTI misconduct. Similarly, although acknowledging the definitions they relied on could capture behavior supporting other specifications, the prosecution argued the cruelty and maltreatment specifications were distinguishable as the offenses, by definition, addressed more serious maltreatment that was truly abusive in nature.

In denying the defense motion, the military judge determined the prosecution, based on its bill of particulars, was charging distinctly criminal acts and, therefore, its charging scheme did not exaggerate Appellant's criminality. The military judge also noted the prosecution could have charged the misconduct by individual trainee instead of by flight, which provided some evidence against government overreaching in the charging of this case. The military judge deferred his ruling on unreasonable multiplication of charges for sentencing purposes until his rendering of findings. The defense was informed they could request the court reconsider its ruling depending on the evidence admitted at trial.

Thereafter, Appellant pled guilty to all charges and specifications. During sentencing proceedings, however, trial defense counsel again moved for the military judge to consolidate specifications for purposes of sentencing. The military judge declined to grant relief again finding the offenses addressed distinctly different criminal acts.

"[T]he prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Rule for Courts-Martial 307(c)(4) is the current regulatory expression of that prohibition, directing that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." The principle provides that the government may not needlessly "pile on" charges against an accused. *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994), *overruled on other grounds by United States v. Miller*, 67 M.J. 385, 388–89 (C.A.A.F. 2009).

Our superior court has endorsed the following non-exhaustive list of factors in determining whether unreasonable multiplication of charges has occurred:

> (1) Did the [appellant] object at trial that there was an unreasonable multiplication of charges and/or specifications?
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Quiroz, 55 M.J. at 338–39 (citations and internal quotation marks omitted).

While we would normally examine the military judge's ruling under an abuse of discretion standard, Appellant's unconditional guilty plea resulted in the forfeiture of the issue on appeal as it applies to her claim for unreasonable multiplication of charges during findings. *See United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997); *cf. United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009) (applying multiplicity waiver principles to the concept of unreasonable multiplication of charges). As such, Appellant's claim on appeal is reviewed for plain error. Under a plain error analysis, an appellant must demonstrate that "(1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the [appellant]." *United States v. Clifton*, 71 M.J. 489, 491 (C.A.A.F. 2013) (citing *United States v. Powell*, 49 M.J. 460, 464–65 (C.A.A.F. 1998)).

Applying this standard, we find no plain error with the military judge's determination that the dereliction of duty specifications alleging both maltreatment and maltraining did not amount to an unreasonable multiplication of charges. The offenses, by definition, required different actions by Appellant. While it could be argued that both theories seek to prevent the abuse of trainees, the maltraining theory is focused on the appropriate use of training tools, while the maltreatment theory simply restricts the personal conduct of the MTI. It is also arguable that the acts by Appellant supporting the maltreatment specifications would not meet the regulatory definition for maltraining. The opposite comparison is also true. As both theories serve different corrective purposes in the basic military training environment, we decline to grant relief as we find the *Quiroz* factors weigh against Appellant's claims.

We are also convinced the argument regarding the Article 134, UCMJ, offenses must fail for the same reason. Although this conduct was intertwined with Appellant's abuse of trainees, these specifications focus on different criminal purposes such as Appellant's deceitful conduct and her failure to properly perform her duties as a designated mail courier.

After examining the providence inquiry, however, we find plain error occurred given the cruelty and maltreatment specifications unreasonably exaggerated Appellant's criminality when compared against the dereliction of duty offenses as specifically charged in this case. In doing so, we acknowledge the definitions of maltreatment may be technically different between the two sets of specifications. However, similar to our analysis of forfeited multiplicity claims, we are not bound by a "literal application of the elements test." *See United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). Instead, we believe we are charged with making a "realistic comparison" of the challenged offenses, examining both the specifications themselves and the providence inquiry conducted by the military judge at trial. *See id.*

When viewed more broadly, it is clear—as acknowledged by the prosecution at trial—that the differences between the charged offenses are only one of degree. The different definitions do not punish separate wrongs or address distinct criminal purposes. *See United States v. Campbell*, 71 M.J. 19, 24 (C.A.A.F. 2012). On the contrary, the theories as charged by the Government both sought to prevent the abuse and maltreatment of Airmen under the authority of a responsible party. *Cf. United States v. Offutt*, Army 20120804, unpub. op. 3–4 (Army Ct. Crim. App. 22 October 2014) (dismissing maltreatment specifications as an unreasonable multiplication of charges given Article 92, UCMJ, violations for hazing encompassed the same conduct). Moreover, we note the challenged specifications overlap with respect to date of offense, place of commission, and victim. These facts, we believe, establish the Government's charging scheme violates the second *Quiroz* factor.

The Government claims on appeal that Appellant admitted to at least one additional act of maltreatment for the cruelty and maltreatment specifications as compared to the offenses alleging dereliction of duty. This may be true, but the vast majority of the providence inquiry focused on acts Appellant raised in conjunction with the dereliction of duty offenses. Thus, to the significant extent the military judge relied on the prosecution's bill of particulars to analyze this issue instead of Appellant's admissions during the providence inquiry, we believe the military judge erred.

When we examine the record and engage in a realistic comparison of the offenses, we believe the two maltreatment theories are clearly derivative of each other. The abusive activities that formed the basis for the cruelty and maltreatment convictions were also the same instances of misconduct supporting the dereliction of duty specifications. Although some of the abusive conduct may not, in and of itself, have arisen to an Article

93, UCMJ, violation, we do not believe these minor factual differences in any way prevent us from determining the military judge erred in determining the maltreatment offenses were not rationally derivative of the dereliction specifications.

It is also clear to us that the Government's charging scheme exaggerated Appellant's criminality. The gravamen of the case was Appellant's use of her position of authority as an MTI to physically, verbally, and emotionally abuse trainees under her charge. This criminality was adequately covered by the dereliction of duty specifications alleging maltreatment and maltraining; so we see no valid rationale for capturing the same course of conduct under another punitive article. The charging scheme also increased Appellant's punitive exposure. Given that four of the five *Quiroz* factors weigh heavily in favor of Appellant, we believe the charging scheme seriously affected the fairness of Appellant's trial and, therefore, find plain error. *See Powell*, 49 M.J. at 465. We direct the dismissal of Charge II and its four specifications to remedy this error.[1]

With regard to sentencing, the Government argues the issue was likewise forfeited by Appellant's unconditional plea. We reject this argument given the military judge effectively deferred his ruling on the sentencing impact of the prosecution's charging scheme until after findings. In any event, given our corrective action on findings, we do not believe the military judge erred in failing to grant relief for the remaining specifications given they address different criminal purposes.

Credit for Nonjudicial Punishment

During the presentencing portion of trial, trial defense counsel requested the military judge provide Appellant with credit towards her sentence due to the fact she previously received nonjudicial punishment (NJP) for some of the same acts she now stood convicted of at trial. The NJP action addressed Appellant's conduct towards only one of the six flights identified on the charge sheet at trial. Appellant's punishment from this NJP action consisted of a reduction in rank from staff sergeant (E-5) to senior airman (E-4) and suspended forfeitures of pay.[2] Trial defense counsel requested relief in the form of capping the maximum sentence for reduction in rank to airman (E-2).

The military judge determined, pursuant to *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), that Appellant was entitled to sentencing credit for her previous NJP action. Contrary to the defense's request, the military judge awarded Appellant a one-month confinement credit for the reduction in rank imposed by her NJP action. Trial

[1] Contrary to the concurrence, we decline to invoke our Article 66(c), UCMJ, 10 U.S.C. § 866(c), authority in this case given we find plain error. However, we acknowledge our ability to provide Appellant with the same relief using this broad statutory authority.

[2] Although reduced in rank through nonjudicial punishment, Appellant successfully tested for Staff Sergeant a second time and was promoted prior to the start of her court-martial.

defense counsel did not object to his remedy, or otherwise ask the military judge to reconsider his ruling.

We review claims for sentence credit de novo. *See United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005). In doing so, we note "an accused must be given *complete* credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe." *Pierce*, 27 M.J. at 369. However, the military judge has some discretion in fashioning an appropriate credit based on the facts of each case. *See United States v. Mead*, 72 M.J. 479, 481–82 (C.A.A.F. 2013); Article 15(f), UCMJ, 10 U.S.C. § 815(f). "In a judge-alone trial, . . . the military judge will state on the record the specific credit awarded for the prior punishment." *United States v. Gammons*, 51 M.J. 169, 184 (C.A.A.F. 1999).

Based on our review of the record of trial, we find the military judge awarded Appellant her complete *Pierce* credit and, therefore, she is not entitled to any further relief. *See Mead*, 72 M.J. at 482.

Sentence Appropriateness

Finally, pursuant to *Grostefon*, Appellant argues her sentence is inappropriately severe. Appellant specifically requests her bad-conduct discharge be set aside given her excellent duty performance over the course of her career.

This court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010).

We find Appellant's sentence is appropriate given the frequency and severity of her misconduct. Appellant's abuse of trainees impacted 6 flights over a 17 month timeframe. The abusive conduct was not sporadic during this timeframe. On the contrary, Appellant's own admissions, as well as the evidence in aggravation admitted at trial, established a routine pattern of abuse perpetuated by Appellant against her trainees.

Appellant's abuse was also severe. Although some of Appellant's conduct could be labeled as nothing more than a technical violation of basic military training regulatory guidance, many of her actions arose to the level of wanton abuse of trainees in her care. Appellant repeatedly required trainees to strip down naked (or to their underwear) and perform group physical training exercises while under cold running water. This activity served no purpose other than to humiliate trainees. Moreover, on at least one occasion,

Appellant required multiple trainees to roll around naked on the shower floor as punishment for some minor transgression.

Appellant also denied food to her trainees on multiple occasions, as well as withheld mail from family and friends as either punishment or a motivational tool. Appellant's faulty leadership of one flight also resulted in some members of the flight believing they were entitled to exercise "street justice" to improve teamwork and esprit de corps. This warped belief led to a fight between two trainees, resulting in injury to one of them. Instead of interceding, Appellant idly stood by and allowed the fight to continue for some period of time. Appellant then requested the members of the flight keep quiet about the incident if later asked how the trainee was injured. This deceitful conduct, which Appellant repeated with two other flights, violated the same Air Force Core Values that Appellant was charged with inculcating to her trainees.

While there was some evidence Appellant's actions were influenced by a wayward MTI culture at the time of her assignment, it does not excuse Appellant's egregious misconduct.[3] Appellant, as an MTI, was charged with "instill[ing] in each trainee leadership and followership skills, self-confidence, discipline, initiative, teamwork, esprit de corps, respect for authority, 'core values' and a positive attitude toward Air Force duty and service to the United States." Her gross failure to meet this charge convinces us the sentence imposed by the military judge and approved by the convening authority was appropriate for this Appellant and her crimes. We, therefore, decline to grant the requested relief.

Staff Judge Advocate's Recommendation

The issue specified by the court was driven by the Government's failure to attach a victim impact statement to the SJAR as required by R.C.M. 1106(d)(3).[4] We previously addressed this issue in detail with the same legal offices and convening authority in *United States v. Murray*, ACM 38993 (A.F. Ct. Crim. App. 4 November 2015) (unpub. op.). After reviewing the briefings from both parties on this question, we find, as we did in *Murray*, that Appellant suffered no material prejudice from any possible error in this case.

Appellant, in her answer to the specified issue, did not allege the victim impact statement was missing from her copy of the record of trial. As such, we choose to apply

[3] In rejecting this claim, we also note Appellant had been reprimanded for her abuse of a trainee, but continued to engage in conduct that resulted in the imposition of nonjudicial punishment and termination of her duties as a military training instructor.

[4] Rule for Courts-Martial 1106(d)(3) was amended by Executive Order 13,669 on 13 June 2014. Exec. Order No. 13,669, 79 Fed. Reg. 34,999 (18 June 2014). Before the executive order was signed, the requirement to inform victims of their right to submit an impact statement existed in Air Force Instruction (AFI) 51-201, *Administration of Military Justice* ¶ 9.9 (6 June 2013). Additionally, service of any victim impact statement on the accused and defense counsel was required by AFI 51-201, ¶ 9.10.

a presumption of regularity in this specific case and find the victim impact statement was contained in the copy of the record of trial provided to Appellant. *See United States v. Mark*, 47 M.J. 99, 101 (C.A.A.F. 1997). Although we disagree with the Government that Appellant forfeited this issue when she failed to identify the SJA's error or otherwise note the error in her clemency response, we agree Appellant was not materially prejudiced in any way.

Sentence Reassessment

As we have found Appellant's convictions as to Charge II and its four specifications constituted an unreasonable multiplication of charges warranting dismissal, we must consider whether we can reassess the sentence or whether this case should be returned for a sentence rehearing.

This court has "broad discretion" in deciding to reassess a sentence to cure error and in arriving at the reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). Our superior court has observed that judges of the Courts of Criminal Appeals can modify sentences "'more expeditiously, more intelligently, and more fairly' than a new court-martial." *Id.* at 15 (quoting *Jackson v. Taylor*, 353 U.S. 569, 580 (1957)). In determining whether to reassess a sentence or order a rehearing, we consider the totality of the circumstances with the following as illustrative factors: (1) dramatic changes in the penalty landscape and exposure, (2) the forum, (3) whether the remaining offenses capture the gravamen of the criminal conduct, (4) whether significant or aggravating circumstances remain admissible and relevant, and (5) whether the remaining offenses are the type with which we as appellate judges have the experience and familiarity to reliably determine what sentence would have been imposed at trial. *Id.* at 15–16.

Applying these factors to this case, we are confident that reassessment is appropriate. Appellant's penalty exposure from the dismissed charges has only been reduced by 4 years, which is a small change considering Appellant faced over 43 years of confinement. Appellant was also sentenced by a military judge, who noted in denying the defense's motion for unreasonable multiplication of charges that his sentence would not be influenced by the maximum sentence to confinement in this case.

The remaining offenses also adequately capture the gravamen of Appellant's criminal conduct—her physical, verbal, and emotional abuse of trainees under her charge. Likewise, all of the evidence surrounding Appellant's maltreatment of trainees remains relevant and admissible for purposes of determining Appellant's sentence. We are also confident we have the experience and familiarity with the remaining offenses to properly evaluate this issue during appeal.

Considering the totality of the circumstances in this case, we find we are able to "determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Having so found, we reassess Appellant's sentence to the same sentence that was approved by the convening authority: a bad-conduct discharge, confinement for 8 months, and reduction to E-1. We believe the military judge would have imposed no less than this sentence had the cruelty and maltreatment specifications been dismissed at trial.

Promulgating Order Error

Although not raised by the parties, we note the report of result of trial memorandum attached to the SJAR is erroneous in that it fails to address Additional Charge I and its specification alleging a violation of Article 92, UCMJ. This offense, which was dismissed by the military judge after arraignment based on defense motion, should have been addressed by the report of result of trial memorandum and captured on the initial court-martial promulgating order (CMO). *See* R.C.M. 1106(d)(3); R.C.M. 1114(c)(1); Air Force Instruction 51-201, *Administration of Military Justice*, ¶¶ 9.2.1, 10.8.2.2 (6 June 2013).

We also note the word "maltreating" in Specifications 2, 4, 7, 9, and 11 of Charge I on the CMO should be changed to "maltraining" to match the charge sheet. Additionally, the words "and maltraining" should be added to the specification of the Additional Charge. Although we find Appellant is not entitled to additional post-trial processing given she suffered no material prejudice from any errors, we direct completion of a corrected CMO to reflect all of the dismissed charges and specifications, as well as to correct the typographical errors identified in this case.

Sealing of Clemency Exhibits

As part of her extenuation and mitigation package during sentencing, Appellant submitted basic training records for over 250 trainees who had been in her charge. The records were presumably offered to show the success of her trainees during basic military training, especially in the area of physical fitness. These documents, which would normally contain the social security numbers of the trainees, were properly redacted to remove this personally identifiable information at trial.

Appellant submitted these same basic training records in clemency. Unfortunately, in this instance, the personally identifiable information for each trainee was not redacted. Accordingly, the Clerk of the Court is directed to seal Attachment 97 of the defense clemency submission in the original record of trial. The Government is also directed to remove these 252 pages from all other copies of the record of trial, as required by Air Force Manual 51-203, *Records of Trial*, ¶ 6.3.4 (27 June 2013).

Conclusion

The findings of guilty as to the four specifications of Charge II are set aside and dismissed as unreasonable multiplication of charges. The remaining findings and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred.[5] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings, as modified, and sentence, as reassessed, are **AFFIRMED.**

BROWN, Judge, concurring:

I concur with the majority opinion. I write separately, however, to address my belief that the four specifications of Charge II should be set aside and dismissed based on our authority under Article 66(c), UCMJ, 10 U.S.C. § 866(c), rather than concluding that the military judge committed plain error.

Although Appellant raised unreasonable multiplication of charges at the trial level, her unconditional guilty plea would normally result in the forfeiture of her claim for unreasonable multiplication of charges as to findings. *See United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001) (a guilty plea normally forfeits a claim of unreasonable multiplication of charges); *cf. United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009) (addressing whether failure to raise a claim of unreasonable multiplication of charges constitutes waiver or forfeiture of the issue when Appellant agreed to waive all waivable motions as part of a pretrial agreement). This court, however, in applying its Article 66(c), UCMJ, authority, can decline to recognize forfeiture of an unreasonable multiplication of charges claim on appeal. *Quiroz*, 55 M.J. at 338; *see generally United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991).

In determining whether there was an unreasonable multiplication of charges, the trial judge applied the correct law and provided a detailed explanation for his decision not to dismiss the specifications at trial. I do not believe that the trial judge's conclusion constituted plain error. I also do not believe it was plain error for the military judge to fail to sua sponte reconsider his earlier decision based upon Appellant's guilty plea. Nevertheless, for the reasons set forth in the majority opinion, I agree that four of the five *Quiroz* factors did weigh in favor of Appellant and it is appropriate for this court to provide relief.

[5] Although not raised as an issue on appeal, we note it took over 120 days after sentencing for the convening authority to take action. As such, the delay is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the short delay in this case was harmless beyond a reasonable doubt. *Id.* at 135–36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

As I believe the cruelty and maltreatment specifications unreasonably multiplied Appellant's criminality when compared against the dereliction of duty offenses, I would choose to invoke our authority under Article 66(c), UCMJ, to provide the same relief as provided by the majority in dismissing Charge II and its four specifications. I concur with the majority's reassessment of the sentence to the same sentence that was approved by the convening authority: a bad-conduct discharge, confinement for eight months, and reduction to E-1.

FOR THE COURT

LEAH M. CALAHAN
Clerk of the Court