IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **V.S. COUCH**

UNITED STATES

v.

Ronald L. JOHNSON
Sergeant (E-5), U. S. Marine Corps

NMCCA 200501043 Decided 6 December 2006

Sentence adjudged 17 December 2004. Military Judge: J.A. Wynn. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

LT J.L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
LT A.M. SOUDERS, JAGC, USNR, Appellate Defense Counsel
LCDR EVELIO RUBIELLA, JAGC, USNR, Appellate Defense Counsel
CDR JEFFREY MCCRAY, JAGC, USNR, Appellate Defense Counsel
LtCol JOHN F. KENNEDY, USMCR, Appellate Government Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

CARVER, Senior Judge:

A general court-martial comprised of a military judge convicted the appellant, in accordance with his pleas, of attempted distribution of cocaine, conspiracy to distribute cocaine, unauthorized absence, violation of a general order by wrongfully possessing drug paraphernalia, wrongful possession of marijuana and cocaine, and wrongful use of cocaine, in violation of Articles 80, 81, 86, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 892, and 912a. The appellant was sentenced to confinement for 18 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. Pursuant to a pretrial agreement, adjudged forfeitures were suspended for a period of 12 months, and automatic forfeitures were waived for six months and payment directed to the appellant's dependent children.

The appellant alleges that his conviction of two offenses constitutes an unreasonable multiplication of charges and that the staff judge advocate erred in his recommendation to the convening authority. In addition, we specified the issue of whether the Government failed to comply with a material term of the pretrial agreement. We have carefully considered the record of trial, the appellant's assignments of error, the specified issue, and the Government's responses. We conclude that the findings are correct in law and fact, but we find prejudicial error regarding the sentence and will order relief in our decretal paragraph. After correction, we find no error that is materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Breach of a Material Term of the Pretrial Agreement

Although not raised by the appellant, we specified the following issue:

> WHETHER THE GOVERNMENT FAILED TO COMPLY WITH TERMS OF THE PRETRIAL AGREEMENT TO SUSPEND ADJUDGED FORFEITURES AND WAIVE AUTOMATIC FORFEITURES AND, IF SO, WHAT REMEDY IS APPROPRIATE?

N.M.Ct.Crim.App. Order of 11 Jul 2006 (citations omitted). Since we find prejudicial error regarding the specified issue, we will discuss this issue first.

A. Background

The terms of the appellant's pretrial agreement required the convening authority to defer the application of the adjudged forfeitures and to suspend them for 12 months from the date of the convening authority's action. Further, the convening authority agreed to defer the application of the automatic forfeitures and to waive them for 6 months from the date of his action. The waived automatic forfeitures were to be paid to the appellant's two dependents. Appellate Exhibit VIII at ¶ 3.

The appellant's active duty contract expired shortly after the sentence was announced, placing him in a no-pay status at that time and preventing the convening authority from fulfilling the obligation to pay the waived automatic forfeitures to the appellant's dependents. Although the charge sheet accurately reflected that the appellant's end of active service (EAS) was 23 January 2005, some 37 days after trial, apparently none of the parties either noticed the EAS date or realized its implications as to the waiver of automatic forfeitures. During the providence inquiry, the military judge briefly mentioned the law regarding automatic forfeitures of pay, then added:

> However, the convening authority may waive those forfeitures for a period up to six months as an aspect

> of your pretrial agreement or otherwise in which case the pay and allowances would be given to a dependent.

Record at 168. After the findings of guilty were announced, the military judge asked both sides if the personal data regarding the appellant were correctly stated on the charge sheet. Both the trial counsel and trial defense counsel agreed that the data (which included the appellant's EAS) were correct. *Id.* at 173. After he announced the sentence, which included a sentence which invoked the automatic forfeiture rule, the military judge went over the terms of the pretrial agreement as it applied to the adjudged sentence. In respect to automatic forfeitures, the military judge explained:

> Under this same provision it [the pretrial agreement] indicates further that automatic forfeitures will be deferred and the provisions for that indicate how that will come into play, in so far as, the deferment of automatic forfietures, [sic] as we discussed in Article 58b(a) subsection (1) of the UCMJ.

Id. at 186. Although the military judge's post-sentencing explanation was brief, he referred the parties back to his earlier discussion of the automatic forfeiture rule. The sum of both comments and the terms of the pretrial agreement gave the impression to all parties that the automatic forfeitures would be waived and paid to the appellant's dependents. In other words, the military judge had the necessary facts before him, but failed to correct the misunderstanding that the automatic forfeitures would be paid to the dependents. *See United States v. Bedania,* 12 M.J. 373, 376 (C.M.A. 1982).

On 22 April 2005, 3 months after trial, the staff judge advocate (SJA) signed his recommendation to the convening authority. Under the personal data section, the SJA accurately stated that the appellant's active duty contract began 24 January 2001 for a term of 4 years. He also correctly stated the sentence and the terms of the pretrial agreement. But, without regard to the fact that the appellant's service contract had expired by the time of the recommendation, the SJA advised the convening authority that he must waive the automatic forfeitures for a period of six months in favor the appellant's two dependents. In his response, dated 23 May 2005, the trial defense counsel requested that the convening authority reduce the adjudged confinement from 18 months to 10 months for three reasons: 1) the appellant pled guilty and assisted the Government in the investigation of related cases, 2) the appellant saved the Government time and effort when he waived the pretrial investigation and agreed to be tried by military judge alone, and 3) the convening authority could not comply with a term of the negotiated term of the pretrial agreement regarding payment of the automatic forfeitures to the appellant's dependents:

> As further consideration to plea [sic] guilty, Sergeant Johnson negotiated with the Government to waive any and all automatic forfeitures to be paid to his dependent children. However, because Sergeant Johnson approached (and passed) his end of active service obligation, he is no longer receiving pay to be forfeited; and, hence there is no pay to be provided to his dependent children in accordance with the pre-trial [sic] agreement. Since the Pre trial [sic] agreement (which he negotiated and by which he abided) promised to provide support to his children, Sergeant Johnson loses the benefit of the pretrial agreement even after he has kept his part of the bargain. Thus to ease the economic burden now suffered by his two minor children, Sergeant Johnson will need to assume his place as income earner as soon as possible and is thus requesting a reduction in his sentence [to confinement].

Request for Clemency of 23 May 2005 at 1. Nonetheless, when the SJA forwarded his recommendation to the convening authority two days later, he mentioned that the appellant submitted a clemency request, but he failed to state that the automatic forfeitures could not be waived and paid to the appellant's dependents as required by a term of the pretrial agreement. On 8 June 2005, the convening authority took action on the case, approving the sentence, but suspending all forfeitures and waiving the automatic forfeitures, with no indication that since the appellant was no longer receiving pay, such action would be of no effect.

This is, unfortunately, not the first time this issue has come before the appellate courts. *See United States v. Perron,* 58 M.J. 78 (C.A.A.F. 2003); *United States v. Smith*, 56 M.J. 271, 279 (C.A.A.F. 2002); *United States v. (GK) Williams,* 55 M.J. 302 (C.A.A.F. 2001); *United States v. Hardcastle*, 53 M.J. 299 (C.A.A.F. 2000); *United States v. (GE) Williams*, 53 M.J. 293 (C.A.A.F. 2000); *United States v. Mitchell,* 50 M.J. 79 (C.A.A.F. 1999); *United States v. Albert*, 30 M.J. 331 (C.M.A. 1990). *See also, United States v. Smead,* 60 M.J. 755 (N.M.Ct.Crim.App. 2004).

B. Applicable Law

In a recent case, the Court of Appeals for the Armed Forces succinctly stated the applicable law

> "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971). If the Government does not fulfill its promise, even through inadvertence, the accused "is entitled to the benefit of any bargain on which his

> guilty plea was premised." *United States v. Bedania*, 12 M.J. 373, 375 (CMA 1982).
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> . . . .
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> In an appeal that involves a misunderstanding or nonperformance by the Government, the critical issue is whether the misunderstanding or nonperformance relates to "the material terms of the agreement." *See* RCM 910(h)(3). When the issue is whether the collateral consequences of a court-martial constitute a material component of an agreement, a guilty plea may be withdrawn "only when the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding." *Bedania*, *supra* 12 M.J. at 376.
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> Whether a particular collateral consequence amounts to a material matter depends upon the circumstances of the case. *See, e.g.,* [*United States v.*] *Olson*, 25 M.J. [293,] 297 [CMA 1987] (misunderstanding regarding administrative matters affecting restitution); *United States v. Williams*, 53 M.J. 293 (2000)(misunderstanding regarding relationship between the accused's pay status and waiver of automatic forfeitures of pay under Article 58b, UCMJ, 10 USC § 858b); *United States v. Hardcastle*, 53 M.J. 299 (2000)(same); *United States v. Albert*, 30 M.J. 331 (CMA 1990)(no relief warranted where the accused's misunderstanding did not result from representations by the convening authority, trial counsel, or the military judge).

Smith, 56 M.J. at 272-73.

C. Discussion

The facts are very similar to those in recent cases decided by the U.S. Court of Appeals for the Armed Forces (CAAF). The CAAF has granted relief in many of these cases, but denied relief in two cases due to a difference in the law or in distinguishing facts. We will discuss them in chronological order. In *Albert* (decided in 1990), the pretrial agreement required the convening authority to suspend adjudged forfeitures over $250.00 pay per month, but since the appellant was past his EAS at the time of trial, he was not entitled to any pay after he was sentenced, thus preventing the convening authority from fulfilling that part of the bargain. Since the automatic forfeiture rule was not yet in effect at the time of trial, there was no provision to pay a portion of the forfeitures to the appellant's dependents.

Despite the inability of the convening authority to comply with a term of the pretrial agreement, the CAAF ruled that the pleas of guilty were provident and affirmed.

Ten years later in 2000, after the automatic forfeiture rule had come into effect, the Court came to the opposite conclusion in two cases released on the same day, *Hardcastle* and *GE Williams.* Both decisions were decided by a unanimous court (5-0) with a separate concurring opinion by Chief Judge Crawford. In *Hardcastle*, the convening authority agreed to suspend adjudged forfeitures in excess of $400.00 pay per month for 6 months and waived automatic forfeitures in excess of $400.00 pay per month for 6 months. However, the appellant's term of enlistment ended 11 days after trial, terminating his entitlement to pay. During trial, the military judge carefully, but inaccurately, stated the effect of the pretrial agreement on the forfeitures. On appeal, the Government conceded that the pleas of guilty were improvident based upon a misunderstanding of a material term of the pretrial agreement. The plurality opinion reviewed the facts and agreed that the Government properly conceded the issue and set aside the findings and sentence. Chief Judge Crawford concurred in the result separately only on the basis of the Government concession.

In *GE Williams,* the convening authority agreed to suspend all adjudged forfeitures and to waive automatic forfeitures for 6 months. During trial, the military judge also carefully but inaccurately explained the effect of the pretrial agreement on the forfeitures. Since the appellant was past his EAS and on legal hold at the time of trial, his entitlement to pay ended on the day he was sentenced. Again, the appellate Government counsel conceded error. The plurality reviewed the facts and accepted the concession. The plurality also stated that *Albert* was not controlling because the automatic forfeiture rule was not yet in effect at the time of that trial. Chief Judge Crawford concurred in the result separately, but said that, absent the Government concession, the conviction should have been affirmed, citing *Albert.*

The next year, the Court unanimously affirmed *GK Williams* and denied relief on facts that initially appear to be quite similar to those in *Hardcastle* and *GE Williams*, but there were a few differences that set this case apart. The pretrial agreement required the convening authority to defer execution of all forfeitures of pay and allowances until action was taken and to waive all forfeitures of pay and allowances for six months to be paid to the appellant's two children. The convening authority did defer the automatic forfeitures until his action and then waived them for 6 months. But, since the appellant's term of service ended 7 months after the appellant was sentenced, the automatic forfeitures were not imposed and no pay could be provided to the appellant's dependents. During the post-sentencing inquiry, the military judge told the accused that the pretrial provision regarding the adjudged forfeitures would have no effect since he did not adjudge any forfeitures. Further, the

military judge told the appellant to discuss "what happens to your pay upon ETS [(expiration of term of service)] date and the operation of any other provision of law that will come into play while you serve your confinement." The appellant and the trial defense counsel agreed. *GK Williams,* 55 M.J. at 306. Some 23 months after trial, the trial defense counsel notified the convening authority that the appellant was denied the benefit of his pretrial agreement due to the termination of his pay. The CAAF distinguished this case from *Hardcastle* and *GE Williams* by stating that, in *GK Williams,* the Government did not concede that the pleas of guilty were improvident and the appellant had no reason to rely upon discussions with the military judge during trial that would indicate that the appellant's dependents would receive part of the forfeitures.

Just 6 months later, a unanimous CAAF opinion granted relief on another case involving this issue, remanding it back to the Court of Criminal Appeals for appropriate relief. In *Smith,* the appellant and the convening authority entered into a pretrial agreement that required the convening authority to suspend all adjudged forfeitures for 1 year and to defer and waive all automatic forfeitures for 6 months with payment going to the appellant's wife and child. But since the appellant's contract had expired prior to trial, his pay ended when he was sentenced. After the sentence was announced, the military judge explained in great detail how the waived forfeitures would be paid to the appellant's dependents. Shortly after discovering the pay stop after trial, the trial defense counsel complained to the staff judge advocate and convening authority and requested that confinement in excess of 18 months be suspended for one year so that the appellant could get a job and financially assist his dependents as soon as possible. The convening authority reduced the sentence to confinement by 4 months more than called for by the pretrial agreement, but he did not explain the reason for the reduction. The CAAF held that there was no evidence that the convening authority reduced the confinement to make up for the failure to provide waived forfeitures to the dependents.

Finally, in *Perron*, a divided CAAF (4-1) held that prejudicial error occurred when the convening authority could not comply with a material term of the pretrial agreement regarding waiver of automatic forfeitures and that a Court of Criminal Appeals could not unilaterally impose sentence relief of its own choosing. Instead, where specific performance was not available, the Court must either set aside the findings and sentence and authorize a rehearing or fashion an alternative remedy agreeable to the appellant. One provision of the pretrial agreement in *Perron* required that all automatic forfeitures be waived with payment directed to his family. However, since the appellant's term of service ended prior to trial, his right to pay ended when he was sentenced. After trial, the trial defense counsel complained to the convening authority and requested immediate release from confinement as an alternative remedy. The convening authority denied the request. The U.S. Coast Guard Court of

Criminal Appeals found that there was a mutual misunderstanding of a material term of the pretrial agreement and remanded either to set aside the findings of guilty or to fashion alternative relief. The convening authority disapproved all confinement, which allowed the appellant to recoup the amount of money that he would have received if the automatic forfeitures had been waived. But the appellant complained that the payment was untimely and not satisfactory. The CAAF reversed and set aside the findings and sentence. In dissent, Chief Judge Crawford argued that the choice of remedy properly lies with the courts and not with the appellant.

In the case *sub judice*, the Government contends that the appellant's pleas of guilty were provident and that there was no substantial misunderstanding of a material term of the pretrial agreement, relying primarily on *Albert* and *GK Williams* and distinguishing *Hardcastle, GE Williams,* and *Smith.* The Government asserts that this case is similar to *Albert* in that "no representations had been made to the appellant that he would have been paid." Answer on Behalf of the Government to Specified Issue of 11 Sep 2006 at 4. The Government states that this case is also similar to *GK Williams* because the appellant's EAS ended after trial, thus allowing the appellant some pay until the term of service ended. The Government also distinguishes *Hardcastle* and *GK Williams* because in both cases the Government conceded that the pleas of guilty were improvident, while the Government does not concede error in this case. Finally, the Government also argues that the military judge incorrectly advised the appellants in both *Hardcastle* and *Smith* that their dependents would be receiving pay while the military judge made no such incorrect statement in this case.

We are convinced that *Albert* is not applicable because, as the Court said in *GE Williams,* the automatic forfeiture rule was not yet in effect at that time. Thus, there was no mechanism for providing a portion or all of the forfeitures to the appellant's dependents. Admittedly, it is more difficult to reconcile *GK Williams* with *Hardcastle*, *GE Williams, Smith,* and *Perron.* But, we find that in *GK Williams*, unlike the present case, all parties were aware of the upcoming ETS and, further, the appellant received the benefit of his bargain for some seven months after trial. In the case before us, on the other hand, we find that all parties misunderstood the appellant's entitlement to pay at least until the trial defense counsel's post-trial plea for clemency. Further, the appellant's entitlement to pay ended only 37 days after trial, much more akin to the other cases than to *GK Williams.* After a thorough review of the facts, the briefs of counsel, and the law, we are convinced that the pleas of guilty were improvident due to a mutual misunderstanding of a material term of the pretrial agreement.

D. Remedy

Having found that the Government failed to comply with a material term in the PTA, we must next consider the proper remedy.

> [W]here there is a mutual misunderstanding regarding a material term of a pretrial agreement, resulting in an accused not receiving the benefit of his bargain, the accused's pleas are improvident. *See United States v. Hardcastle*, 53 M.J. 299, 302 (C.A.A.F. 2000); *United States v. Williams*, 53 M.J. 293, 296 (C.A.A.F. 2000). In such instances, we have held that remedial action, in the form of specific performance, withdrawal of the plea, or alternative relief, is required. *See United States v. Smith*, 56 M.J. 271, 279 (2002); [*United States v.] Mitchell*, 50 M.J. [79,] at 82 [C.A.A.F. 1999].

Perron, 58 M.J. at 82 (footnote omitted). But appellate courts may not impose alternative relief without the appellant's consent.

> We therefore hold that imposing alternative relief on an unwilling appellant to rectify a mutual misunderstanding of a material term in a pretrial agreement violates the appellant's Fifth Amendment right to due process. An appellate court may determine that alternatives to specific performance or withdrawal of a plea could provide an appellant with the benefit of his or her bargain--and may remand the case to the convening authority to determine whether doing so is advisable -- but it cannot impose such a remedy on an appellant in the absence of the appellant's acceptance of that remedy.

Id. at 86 (footnote omitted). We cannot help but comment that once placed on notice that a term of the pretrial agreement could not be fulfilled and that the appellant had offered a "settlement" by reducing the confinement, "the staff judge advocate and convening authority missed a golden opportunity to rectify any mutual misunderstanding" before forwarding the record for appellate review. *Smith,* 56 M.J. at 281 (Crawford, C.J., concurring in part and in the result).

Here, there is no evidence of a written post-trial agreement between the appellant and the convening authority or the appellate Government counsel representing the convening authority. But, we do have agreement by the parties as to the proper remedy. In response to our specified issue, the appellant requests as relief that we disapprove the bad-conduct discharge or, alternatively, set aside the findings and sentence and authorize a rehearing. Appellant's Brief on Specified Issue of 10 Aug 2006 at 6. The Government, while not conceding that prejudicial error occurred, agrees that if we find remedial action required, we should disapprove the bad-conduct discharge. Answer on Behalf of

the Government to Specified Issue of 11 Sep 06 at 8-9. Since we find prejudicial error, we are left with the two choices requested by the appellant, disapproval of the bad-conduct discharge or setting aside the findings and sentence and authorizing a rehearing. We will take remedial action in our decretal paragraph consistent with the requests of both the appellant and the Government.

Unreasonable Multiplication of Charges

In his first assignment of error, the appellant contends that violation of a lawful general regulation, to wit: Secretary of the Navy Instruction (SECNAVINST) 5300.28C by possessing drug paraphernalia is, under the facts of this case, an unreasonable multiplication of the charge of possession of marijuana. It is undisputed that the marijuana residue possessed by the appellant was contained within the drug paraphernalia which was the basis for the Article 92, UCMJ, charge. We deny relief.

In *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), the Court of Appeals for the Armed Forces approved five non-exclusive factors this Court had developed to determine whether there is an unreasonable multiplication of charges or specifications in any particular case. These factors are:

> (1) Did the accused 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?
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> (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?
>
> *Id*. *See also United States v. Quiroz*, 53 M.J. 600, 608 (N.M.Ct.Crim.App. 2000)(en banc), *set aside and remanded on other grounds*, 55 M.J. 334 (C.A.A.F. 2001).

Initially, we note that the appellant did not raise this issue at trial, even though the trial defense counsel made a similar motion with respect to two other charges. "The failure to raise the issue at trial suggests that the appellant did not view the multiplication of charges as unreasonable . . . [and] the lack of objection at trial will significantly weaken the appellant's argument on appeal." *Quiroz*, 53 M.J. at 607.

We further find that the two offenses are aimed at distinctly separate criminal acts and do not misrepresent or exaggerate the appellant's criminality. *See United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). Possession of drug paraphernalia, regardless of whether it is actually used, presents a tangible threat to good order and discipline in the military. It would defeat the purpose of SECNAVINST 5300.28C, and defy logic, if the presence of drug residue on the paraphernalia was a proper basis to dismiss the charge of possessing one or the other. *See also United States v. Cage*, 22 M.J. 204 (C.M.A. 1986)(summary disposition).

With regard to the fourth factor, the appellant faced more than 40 years of confinement for the other charged offenses. Neither the marijuana possession, nor the orders violation, significantly increased his punitive exposure in this case. The attempted distribution of several hundred dollars worth of cocaine was clearly the most serious of the charged offenses. Finally, the appellant has not alleged, let alone established, any prosecutorial overreaching, nor do we find any evidence of it in the record. Accordingly, all of the *Quiroz* factors weigh against the appellant.

Even assuming *arguendo* that this situation was an unreasonable multiplication of charges, we would not modify the adjudged sentence. Under the facts and circumstances of this case, we are convinced that the adjudged sentence would not have been any lighter even if the appellant had not been charged with the orders violation. We further find that the adjudged sentence is appropriate for this offender and these offenses. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Staff Judge Advocate's Recommendation

In his second assignment of error, the appellant contends that the staff judge advocate erred in his recommendation by not advising the convening authority that two offenses were held by the military judge to be one offense for sentencing purposes. We deny relief.

At trial, the military judge ruled that the attempted distribution charge would be considered one offense with the possession of cocaine with intent to distribute. Record at 174. This ruling was not included as part of the staff judge advocate's recommendation (SJAR) and the appellant now asserts this was error.

Upon motion by the appellant after the findings of guilty were announced, and without objection by the Government, the military judge announced that the two offenses noted above were to be considered as but one offense for sentencing purposes. *Id.*

The military judge further announced that the maximum confinement authorized was reduced from 57 years and seven months to 42 years and seven months. After being advised of the reduced maximum confinement, the appellant stated that he still desired to plead guilty. *Id.* at 175. The staff judge advocate did not mention the military judge's ruling in his SJAR.

The appellant did not object to the SJAR prior to the convening authority's action, so we test for plain error. *United States v. Capers*, 62 M.J. 268, 269 (C.A.A.F. 2005). To prevail under a plain error analysis, the appellant must persuade this court that: "'(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)(quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)); *United States v. Powell*, 49 M.J. 460, 463, 465 (C.A.A.F. 1998). "The threshold is low, but there must be some colorable showing of possible prejudice." *Scalo*, 60 M.J. at 437 (citing *Kho*, 54 M.J. at 65.

The appellant has not alleged "how the omission potentially affected [his] opportunity for clemency." *Id.* We disagree with the appellant that the SJAR did not accurately reflect the findings of the court; rather, the military judge took action to eliminate a potential unreasonable multiplication of charges. He did not, however, dismiss any of the findings. Record at 174. We also note that the convening authority, in his action, indicated that he had considered the record of trial, which included the defense motion and the military judge's ruling. *See United States v. Williams*, 47 M.J. 593, 595 (N.M.Ct.Crim.App. 1997). On these facts, we can find no colorable showing of possible prejudice, and we decline to grant the requested relief.

Conclusion

Accordingly, the findings of guilty are affirmed. We affirm only so much of the sentence as provides for confinement for 18 months and reduction to pay grade E-1.

Senior Judge VOLLENWEIDER and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court