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

BEFORE

J.D. HARTY **R.G. KELLY** **W.M. FREDERICK**

UNITED STATES

v.

David M. BROOKS
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200501266 Decided 16 May 2007

Sentence adjudged 18 October 2004. Military Judge: M.J. Griffith. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, U.S. Marine Forces Atlantic, Camp Lejeune, NC.

LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FREDERICK, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, in a mixed-plea case, of two specifications of violating an order, assault, two specifications of adultery, six specifications of obstructing justice, and unlawful entry in violation of Articles 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928, and 934. The appellant was sentenced to confinement for 93 months, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, and except for the dishonorable discharge, ordered it executed.

We have reviewed the record of trial, the appellant's four assignments of error,[1] the Government's response, and the

[1] I. AN OFFER TYPE ASSAULT REQUIRES THAT THE ACT CAUSED REASONABLE APPREHENSION BY THE VICTIM OF RECEIVING IMMEDIATE BODILY HARM. THE VICTIM TESTIFIED THAT, WHILE STARTLED, AT THE TIME HE DID NOT BELIEVE APPELLANT INTENDED TO HARM HIM BY REVVING A CHAINSAW IN ORDER TO WAKE HIM. SHOULD APPELLANT'S CHARGE III ASSAULT CONVICTION BE SET ASIDE AS FACTUALLY AND LEGALLY INSUFFICIENT?

appellant's reply. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

I. Legal and Factual Sufficiency

In his first assignment of error, the appellant argues there is insufficient evidence to support his conviction of the charge of assaulting his stepson, TT, to which he plead not guilty, because there was insufficient evidence of immediate apprehension of harm. Appellant's Brief of 31 Mar 2006 at 6. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c). Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *Reed*, 51 M.J. at 562.

To obtain a conviction under Article 128, UCMJ, for simple assault, the Government must prove the following elements: "That the accused attempted or offered to do bodily harm to a certain person; and, that the attempt or offer was done with unlawful force or violence." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 54b(1). Here, we are dealing with an "offer" type assault.

> An "offer" type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of

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II. THE GOVERNMENT DENIED APPELLANT HIS RIGHT TO A SPEEDY TRIAL IN VIOLATION OF ARTICLE 10, UCMJ, AND RULE FOR COURT[sic]-MARTIAL 707 BY WAITING EIGHT MONTHS TO OBTAIN RELEVANT DISCOVERY AND BY ARRAIGNING APPELLANT ON DAY 127, RESPECTIVELY.

III. THE MILITARY JUDGE ERRED BY FAILING TO ABATE THE PROCEEDING AGAINST THE APPELLANT UNTIL THE GOVERNMENT COULD COMPLY WITH DISCOVERY RULES AND BY DECLINING TO GRANT APPELLANT CREDIT FOR ILLEGAL PRETRIAL CONFINEMENT.

IV. WHILE IN CONFINEMENT, APPELLANT IS NOT PERMITTED TO SPEAK ON THE PHONE TO HIS APPELLATE DEFENSE COUNSEL REGARDING HIS APPEAL TO THIS COURT WITHOUT BRIG REPRESENTATIVES PRESENT. ACCORDINGLY, APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL HAS BEEN VIOLATED.

> receiving immediate bodily harm. Specific intent to inflict bodily harm is not required.

MCM, Part IV, ¶ 54c(1)(b)(ii).

The victim described the appellant, his step-father, as "a little scary." Record at 652. When asked whether the appellant ever did anything to scare him, TT said he had. TT described an incident that occurred in the early fall of 2000, when he was approximately 9 years old. He was lying in bed, taking an afternoon nap, when he heard the sound of an engine being started. He awoke to see the appellant holding a chainsaw, the engine revving and the blade moving, approximately one foot above him. The victim's mother corroborated the incident. She described TT as looking "shocked, scared, his eyes was [sic] really wide" when he awoke to the running chainsaw. *Id*. at 388.

TT testified that he was scared when he saw the chainsaw. *Id*. at 690. TT stated that he didn't believe the appellant was going to deliberately apply the running chainsaw to his body, but "anything could happen" with the chainsaw revved, blade moving, and hovering one foot above him. *Id.* at 690, 691. TT's testimony, coupled with his mother's, showed that he was frightened by the operating chainsaw held by the appellant, and was in immediate apprehension of being accidentally injured.

Considering the evidence adduced at trial in the light most favorable to the Government, we find that a rational trier of fact could have found beyond a reasonable doubt that the appellant committed an offer type assault on TT. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Art. 66(c), UCMJ. In addition, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

II. Speedy Trial Issues

In his second assignment of error, the appellant argues he was denied his right to a speedy trial in violation of Article 10, UCMJ, and RULE FOR COURTS-MARTIAL 707(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). These motions were litigated at trial and denied by the military judge.[2] Because these two speedy trial theories have different standards, we will discuss them separately.

[2] The appellant entered an unconditional guilty plea to Charge IV, Specification 1 (Adultery). The appellant's guilty plea did not, however, waive his right to appellate review of the litigated speedy trial motion. *See United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005).

A. Article 10, UCMJ

Whether an appellant was denied his right to a speedy trial in violation of Article 10, UCMJ, is a legal issue we review *de novo*.[3] *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003). In making that determination, we give substantial deference to the findings of fact made by the military judge, and will reverse those findings only if they are clearly erroneous. *Id.* at 58. We find the military judge's findings of fact are supported by the record and adopt them as our own. *See* Appellate Exhibit XXXI adopting the chronology contained in Appellate Exhibit XXIII. In conducting our *de novo* review, "we do not demand constant motion, but reasonable diligence in bringing the charges to trial. . . . We inquire whether the Government moved toward trial with reasonable diligence. . . . Brief inactivity is not fatal to an otherwise active, diligent prosecution." *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007)(internal citations and quotation marks omitted).

Our superior court has determined that the four factors articulated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), provide an appropriate and effective framework for analyzing the facts and circumstances surrounding Article 10, UCMJ, claims. *Cossio*, 64 M.J. at 256. Those four factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005)(citing *Barker*, 407 U.S. at 530). When those factors are applied here, we conclude that they weigh and balance in favor of finding that the appellant was not denied his right to a speedy trial under Article 10, UCMJ.

1. Length of delay

Article 10, UCMJ, speedy trial protections run from the imposition of pretrial confinement "until the actual trial commences." *Cooper*, 58 M.J. at 60. A criminal trial commences when evidence of guilt or innocence is presented.[4] *Id*. If the length of delay appears unreasonable on its face, a full *Barker* analysis is triggered. *Cossio*, 64 M.J. at 257.

Here, the appellant was placed in pretrial confinement on 16 October 2003. The appellant's speedy trial motion was litigated on 5 August 2004, day 294, and the actual trial began on 23

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[3] Article 10, UCMJ, states in part, "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

[4] "On its face then, Article 10 seems to impose on the Government a duty that extends beyond arraignment to at least the taking of evidence." *Cooper*, 58 M.J. at 59-60.

September 2004, day 343. This delay, on its face, is sufficient to trigger a full *Barker* speedy trial analysis. *Id.*

2. Reasons for Delay

The time it took to bring the appellant to trial was due, in no small part, to the serious nature, complexity, and number of offenses charged. The appellant was charged with violating six different articles of the UCMJ as set forth in thirty-two specifications. The charges included allegations of rape, child molestation, obstruction of justice, fraud, assault, orders violations, wrongful appropriation, impeding an investigation, and communicating a threat. The complexity of these offenses is evidenced by the 32 witnesses, including many civilians, who testified during the motions and merits stages of the court-martial. Many of these witnesses came from out-of-state, and one from overseas.

The initial Article 32 investigating officer (IO) was appointed on 18 November 2003. Defense continuances pushed back the opening of the initial Article 32 hearing until 9 January 2004. The IO's report was completed on 14 January 2004. Discovery of additional misconduct by the appellant led to additional charges being preferred on 13 February 2004. On 18 February 2004, the defense requested a continuance until 5 March 2004, at which time the second Article 32 was held. Following the completion of the second IO's report on 11 March 2004, additional charges were referred on 18 March 2004, and the appellant was arraigned on 26 March 2004.

On 26 March, a trial schedule was agreed upon by both parties with an Article 39a, UCMJ, session set for 8 June 2004, and trial set to begin on 13 July 2004. On 2 June 2004, the defense requested a continuance in the Article 39(a), UCMJ, session until 20 July 2004, and trial until 17 August 2004. The speedy trial issues were litigated by the parties on 5 August 2004.

It was not unreasonable for the Government to fully investigate all allegations against the appellant and attempt to refer all known charges to a single court-martial in this case.[5] *See* R.C.M. 601(e)(2), Discussion ("Ordinarily all known charges should be referred to a single court-martial."). By the time the appellant finally employed the power of the court to resolve his discovery issues, the Government had already moved to locate and subpoena the appropriate records custodians in several states for the medical, school, and social service records of various victims as requested by the defense. The testimony of Corporal D, Camp Lejeune Legal Services Support Section Legal Services Specialist, as well as records submitted by the Government in response to the appellant's motion at trial, attest to the fact

[5] The final additional charges against the appellant were referred on 7 July 2004.

that the Government had, on the whole, moved continuously and with reasonable diligence to bring this case to trial. Record at 57-66; AE XVIII. Although the Government's actions did involve some delay, on balance, the reason for delay in this case weighs heavily in favor of the Government.[6] *See Cossio*, 64 M.J. at 257.

3. Assertion of the Right to a Speedy Trial

The appellant did not assert his right to a speedy trial. Although the appellant filed a motion to dismiss the charges based on a denial of his speedy trial rights, AE XVII, he ultimately requested confinement credit for speedy trial violations rather than dismissal of charges. *See* AE XXIV. The motion was filed on 28 July 2004, day 286, and litigated on 5 August 2004. The appellant did not ask for an earlier trial date than the one previously set by the court.[7]

The appellant argued that the appellant served unnecessary additional time in pretrial confinement because the Government was dilatory in providing discovery, and when it was provided, it did so in a "patchwork" fashion, thus forcing defense requests for continuances. Record at 140. In response to the military judge's questions concerning whether a speedy trial demand had been made, trial defense counsel stated that he had not done so, because demanding speedy trial before discovery was received would be detrimental to his ability to defend the appellant. Trial defense counsel stated in his motion that he "refuse[d] to make a speedy trial demand that would amount to nothing more than a subterfuge in an attempt to satisfy a factor for consideration of alleged Article 10 violations." AE XVII at 7; *see also* Record at 100.

Although the trial defense counsel may have felt that he had a valid reason for not demanding a speedy trial for his client, the fact is that a demand was not made. "[F]ailure to assert the right [to a speedy trial] will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532. Instead of demanding a speedy trial, the defense waited silently rather than seeking the military judge's intervention to speed the case along. "An accused cannot be responsible for or agreeable to delay and then turn around and demand dismissal for that same delay." *United States v. King*, 30 M.J. 59, 66 (C.M.A.

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[6] The appellant ignores the role defense continuances played in delaying his trial date. At the time the speedy trial motion was litigated, defense continuance requests were responsible for delaying the trial date by 97 days. Investigating Officer's Report of 14 Jan 2004 at IE 3, 8; Investigating Officer's Report of 8 Mar 2004; AE XVIII; AE XXXI.

[7] On 5 August 2004, the date the motion was litigated, the trial date had been continued from 13 July 2004 to 17 August 2004, per defense counsel's request. AE XXXI; AE XVIII at 13.

1990). "[T]the right to speedy trial is a shield, not a sword."[8] *Id*.

4. Prejudice

The test for determining whether the appellant suffered material prejudice in the context of Article 10, UCMJ, was articulated by the Supreme Court in *Barker*:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. 532 (footnote omitted); s*ee also Cossio*, 64 M.J. at 257; *Mizgala*, 61 M.J. at 129.

Here, there was no evidence presented to the military judge of oppressive pretrial incarceration. There was no indication the appellant's "anxiety and concern" exceeded that experienced by most pretrial confines or that the delays in this case negatively impacted the ability of the appellant to prepare his case for trial. Finally, the appellant was credited with all time spent in pretrial confinement (total 368 days) against his 93 month sentence. CA's Action of 20 May 2005 at 3.

5. Balancing of *Barker* Factors

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[8] We reject the appellant's argument that the military judge erred when he "attributed the delay to the defense's failure to move the court for production of these documents." Appellant's Brief of 31 Mar 2006 at 9. The court made no such "finding" but instead made the following observations:

> It is of some concern that the prosecutors involved in this case failed to make earlier efforts to retrieve important defense requested records that may contain impeachment or other evidence bearing on the credibility of the original allegations. Equally concerning, however, is that the litigation progressed as far as it did without a request to a trial judge for a court order for such records. As previously noted, the defense never asked the court for the documents until the 39a session held on 20 July 2004. This court is not willing to elevate the discovery dispute between the parties to a rationale for dismissal with prejudice.

AE XXXI at 3.

"Considering the fundamental command of Article 10, UCMJ, for reasonable diligence and balancing the Barker factors" we conclude that the appellant was not denied his right to a speedy trial under Article 10, UCMJ, as the Government exercised reasonable diligence in discharging its duty by taking immediate steps to try the appellant. *Cossio*, 64 M.J. at 258; *Cooper*, 58 M.J. at 59. Therefore, we decline to grant relief.

B. Rule for Courts-Martial 707

The appellant's second argument associated with his right to a speedy trial is that R.C.M. 707(a) was violated when the Government failed to bring him to trial within 120 days of his being placed in pretrial confinement.[9] The rule is not, however, without exception. Delays are permissible, hence excludable, when approved by the military judge, convening authority or (prior to referral, and when authority is delegated) the Article 32 IO. R.C.M. 707(c) and 707(c)(1), Discussion. *See also*, *United States v. Lazauskas*, 62 M.J. 39, 41 (C.A.A.F. 2005). The issue is not which party is responsible for the delay, but whether the officer approving the delay had the authority to grant the delay and, if so, whether the approval of the delay was an abuse of discretion. *Lazauskas*, 62 M.J. at 41-42. We review this issue *de novo*. *Id*.

The appellant was placed in pretrial confinement on 16 October 2003, and arraigned 162 days later on 26 March 2004. The record clearly establishes that the IO was authorized to grant delays.[10] The IO granted two defense delays for continuances, together postponing the Article 32 investigation from 24 November 2003 until 9 January 2004, a total of 46 days.[11] Again, on 17 February 2004, the defense requested a 16-day delay in re-opening the Article 32 from 18 February 2004, to 5 March 2004.

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[9] An "accused shall be brought to trial within 120 days after . . . [t]he imposition of restraint . . . ." R.C.M. 707(a).

[10] The appointing order states "you are specifically delegated the authority to act on any delay requests submitted by either party." Investigating Officer's Report of 14 Jan 2004, IE 1. The IO, who testified telephonically during the motions phase of the court-martial on this issue, indicated that he inadvertently failed to annotate all continuance requests in his report as required by the appointing letter. Record at 14, 86. He did, however, include both continuance requests as attachments to his report. Investigating Officer's Report of 14 Jan 2004, IE 3 and IE 28.

[11] In its first request dated 21 November 2003, the defense requested additional time to conduct further discovery, interview witnesses and consult with the appellant as a result of additional preferred charges. They did not agree the delay should be attributed to the defense. *Id*. at IE 3. In the second request dated 16 December 2003, the defense requested additional time to conduct further discovery, conduct witness interviews, obtain witness statements and investigative reports, and to consult with the appellant. The appellant was also awaiting approval of an individual military counsel request. The defense agreed that this delay was excludable for the purposes of R.C.M. 707. *Id*. at IE 28.

During the motions phase of trial, the IO who presided over the original Article 32 investigation on 14 January 2004, was called as a witness. He testified he had authorized the two original delays requested by defense counsel on 21 November and 18 December 2003, pursuant to authority delegated to him by the CA.[12] The IO testified that he specifically informed counsel at the Article 32 hearing that he considered all the requested defense delay to be excludable. The military judge found that the granted defense delays were properly excluded, that the IO did not abuse his discretion, that the total amount of excludable delay was 62 days, and that the appellant was arraigned on day 100.[13] AE XXXI.

Based on our *de novo* review, we conclude that the defense requested delays were properly excluded and that the appellant was brought to trial within 120 days of his being placed in pretrial confinement as required by R.C.M. 707. Therefore, there was no R.C.M. 707 violation and no relief is warranted.

III. Article 13, UCMJ, and Abatement

In his third assignment of error, the appellant argues that rights afforded him by Article 13, UCMJ, were violated by the Government's failure to provide relevant discovery to the defense. The appellant also argues that the military judge abused his discretion when he failed to abate the proceedings and release the appellant from pretrial confinement. For the following reasons, we disagree.

A. Article 13, UCMJ

On appeal, and during the motions phase of the court-martial, the appellant offered no tenable analysis to support his request for relief under Article 13, UCMJ.[14] Instead, the appellant

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[12] The initial IO, Colonel (Col). W., did not preside over the second Article 32 Investigation held on 8 March 2004. That IO, Major B., was appointed on 28 February 2004, ten days after the defense request for continuance was submitted to Col W. Investigating Officer's Report of 8 Mar 2004 at IE 1.

[13] E-mail correspondence between the chief trial counsel and detailed defense counsel indicates the re-opening of the Article 32 investigation was scheduled for 18 February 2004. The chief trial counsel's e-mail stated, "Based on today's discussions, we will be rescheduling the reopening of the Art. 32 for 05 March 2004. I have notified the IO and will forward the defense continuance request to him as soon as I get it. (Please note that the delay will be excludable under RCM 707 and Art 10). Thanks." AE XVIII at 11. The record also includes detailed defense counsel's signed continuance request asking that the reopening of the Article 32 investigation be delayed until 5 March 2004. The request acknowledges that all delay "is excludable under Rule For Courts-Martial 708, Article 10, UCMJ, and any other applicable speedy trial authorities." Investigative Officer's Report of 8 Mar 2004.

[14] Article 13, UCMJ, provides, in part, that "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him. Nor shall the arrest or

relies on the protections provided by Article 13, UCMJ, in an effort to gain relief for alleged discovery violations. His reliance on Article 13, UCMJ, is misplaced.

Article 13, UCMJ, has been interpreted by our superior court as prohibiting: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial, i.e., illegal pretrial punishment; and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement. *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005); *see also*, *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003). The "punishment prong" of Article 13, UCMJ, "'entails a purpose or intent to punish an accused before guilt or innocence has been adjudicated.'" *Fischer*, 61 M.J. at 418 (quoting *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). The "rigorous circumstances" prong focuses on conditions of pretrial restraint. *See United States v. Pryor*, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003).

> The question of whether Appellant is entitled to credit for an Article 13 violation is reviewed *de novo*. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). It is a mixed question of law and fact, and the military judge's findings of fact will not be overturned unless they are clearly erroneous. *Id*. Appellant bears the burden of proof to establish a violation of Article 13. *Id*.

Fischer, 61 M.J. 418[15]

On appeal, the appellant argues that the appellant's "indefinite retention at the Camp Lejuene Brig as the government negligently and sluggishly meted out discovery was intended to be punishment." Appellant's Brief of 31 Mar 2006 at 13. The appellant offers no evidence of any nefarious Government intentions with regard to the appellant's pretrial confinement, and we find no basis for overturning the military judge's findings that the Government was not engaged in any spiteful tactics of delay to ensure the appellant remained in pretrial confinement longer than necessary.[16] AE XXXII.

Similarly, the military judge found no evidence of "rigorous circumstances" or conditions that were unnecessarily imposed to ensure the appellant's presence at trial. Despite an invitation

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confinement imposed upon him be any more rigorous than the circumstances required to insure his presence . . ."

[15] Here, we find the military judge's findings of fact were supported by the record and adopt them as our own. AE XXXII.

[16] During the motions phase of the court-martial, the appellant's counsel specifically noted that they were "not alleging any spiteful or purposeful tactics on the part of the government and timing of the turnover of the materials to the defense." Record at 99.

from the military judge to do so, the appellant offered no evidence regarding the conditions at the Camp Lejeune Brig.[17] Instead, the appellant merely argued that the pretrial confinement legitimately imposed crossed a line into illegal pretrial punishment because of the conduct of the discovery practices in this case. Record at 171. The appellant's reliance on Article 13, UCMJ, is misplaced and his argument for relief is rejected.

B. Abatement

The military judge's decision to not abate the proceedings is reviewed for an abuse of discretion. *United States v. Gallagher*, __ M.J. ___, No. 200400151, 2007 CCA LEXIS 53 at 3 (N.M.Ct.Crim.App. 28 Feb 2007)(citing *United States v. Ivey*, 55 M.J. 251, 256 (C.A.A.F. 2001)). When the appellant motioned the court for abatement of the proceedings, all discovery issues were resolved save one set of documents, and the case was proceeding to trial on the time-line requested by the appellant in his continuance request dated 2 June 2004, and approved by the military judge. We find the military judge did not abuse his discretion in refusing to abate the proceedings.

IV. POST-TRIAL GRIEVANCES

In his final assignment of error, the appellant claims that procedures in place at the Camp Lejeune Brig have chilled his ability to communicate freely with his appellate counsel in preparation of his appeal in violation of the Sixth Amendment's right to assistance of counsel. "'[A] prisoner must seek administrative relief prior to invoking judicial intervention. In this regard, appellant must show us, absent some unusual or egregious circumstance, that he has exhausted the prisoner-

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[17] The appellant failed to offer any evidence of conditions at the Camp Lejeune Brig that equate to pretrial punishment. In fact, in response to a question by the military judge, the appellant's counsel stated that:

> . . . I guess I am not arguing the conditions of special quarters themselves constitute illegal pretrial confinement. My argument is that pretrial confinement legitimately imposed crossed a line into illegal pretrial punishment because of the conduct of the discovery practices in this case. This case would have been resolved a long time ago but for the discovery. So it is not necessarily special quarters or general population itself. The defense believes that while we are waiting for the discovery to be produced as it was ordered by the court that it has become punishment for Lance corporal Brooks to have been in confinement for this extended period of time and that a lesser form of restraint is adequate to ensure his presence at trial.

Record at 171.

grievance system of the [brig] and that he has petitioned for relief under Article 138 UCMJ, 10 U.S.C. § 938.'" *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997)(quoting *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993)).

We find that the issue is not ripe for our review in that the appellant has failed to exhaust his available administrative remedies.[18] Therefore, we decline to grant relief. Even assuming this issue was ripe for our review, the evidence before us fails to show how the alleged improper brig practices have negatively impacted the appellant's ability to actively participate with his appellate counsel in the appellate process.

Conclusion

The findings, and the sentence as approved below, are affirmed.

Senior Judge HARTY and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court

[18] That the appellant is aware of these available administrative remedies is evidenced by an Article 138, UCMJ, Complaint of Wrongs, not associated with this assignment of error, that he filed while in the brig. Defense Motion to Attach of 4 Aug 2006, App. F. Additionally, we note the appellant submitted a request mast chit to speak with the Commanding General, Marine Corps Base, Camp Lejeune, regarding issues associated with counsel communications, which he later withdrew, apparently after reaching successful resolution at an intermediate stage of the process. Defense Motion to Attach of 19 Jun 2006, App. E.