UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
R.E. VINCENT, E.C. PRICE, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JAVIER A. MORENO, JR.
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 200100715
GENERAL COURT-MARTIAL

Sentence Adjudged: 09 November 2007.
Military Judge: LtCol Paul McConnell, USMC.
Convening Authority: Commander, Marine Corps Base, Camp Smedley D. Butler, Okinawa, HI.
Staff Judge Advocate's Recommendation: Col S.D. Marchioro, USMC.
For Appellant: LT William Stoebner, JAGC, USN.
For Appellee: LCDR Paul Bunge, JAGC, USN.

23 June 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Senior Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for seven years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening

authority approved the findings, but approved only the portion of the sentence pertaining to the dishonorable discharge.[1]

We have carefully reviewed the record of trial, the appellant's seven assignments of error (AOE),[2] the Government's response, and the 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.

Background

On 29 September 1999, the appellant was tried and convicted of raping Lance Corporal (LCpl) [E] on or about 1 May 1999 in Okinawa, Japan. He was sentenced to six years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1 and a dishonorable discharge. On 13 May 2004, this court affirmed the findings and sentence. *United States v. Moreno*, No. 200100715, 2004 CCA LEXIS 118 (N.M.Ct.Crim.App. 13 May 2004). Subsequently, on 11 May 2006, the Court of Appeals for the Armed Forces (CAAF) set aside the findings and sentence after holding the military judge erred in denying a defense challenge for cause against a member of the court-martial. A rehearing was

[1] The Court of Appeals for the Armed Forces (CAAF) limited the maximum approved to a punitive discharge. *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006).

[2] I. THE MILITARY JUDGE RULED THAT CPL MORENO HAD BEEN PREJUDICED BY THE DEPRIVATION OF DUE PROCESS THAT OCCURRED IN HIS CASE WHERE THE GOVERNMENT HAD DESTROYED OR LOST EXCULPATORY EVIDENCE AND WAS UNABLE TO LOCATE WITNESSES TO THE ALLEGED CRIME IN 1999. DID THE MILITARY JUDGE ERR IN NEVERTHELESS CONCLUDING THAT THE DEPRIVATION OF DUE PROCESS AND SPEEDY TRIAL DID NOT WARRANT DISMISSAL?

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE CHALLENGE FOR CAUSE AGAINST CAPT M, WHO HAD A "VERY CLOSE" COUSIN WHO WAS THE VICTIM OF A RAPE IN WHICH THE PERPETRATOR WAS NEVER BROUGHT TO JUSTICE?

III. WHETHER CPL MORENO WAS DEPRIVED OF HIS FIFTH AND SIXTH AMENDMENT RIGHT TO CALL RELEVANT WITNESSES WHOSE TESTIMONY WOULD BE NECESSARY AND MATERIAL TO THE PRESENTATION OF HIS DEFENSE?

IV. WHETHER THE MILITARY JUDGE ERRED IN DENYING CPL MORENO'S MOTION TO REOPEN THE ARTICLE 32 INVESTIGATION WHEN THE EVIDENTIARY LANDSCAPE HAD SIGNIFICANTLY CHANGED IN THE INTERVENING SEVEN YEARS BETWEEN THE ORIGINAL ARTICLE 32 AND THE REHEARING?

V. WHETHER THE EVIDENCE IS FACTUALLY SUFFICIENT TO SUPPORT THE CONVICTION?

VI. WHETHER CPL MORENO'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN THE MILITARY JUDGE DENIED CPL MORENO'S MOTION TO COMPEL THE GOVERNMENT TO PROVIDE LT MIZER AS HIS DEFENSE COUNSEL EVEN THOUGH CPL MORENO HAD A TWO-AND-A-HALF YEAR, ONGOING ATTORNEY-CLIENT RELATIONSHIP WITH LIEUTENANT MIZER, WHO HAD ORIGINALLY BEEN DETAILED AS APPELLATE DEFENSE COUNSEL?

VII. WHETHER A GENERAL COURT-MARTIAL WITH A PANEL COMPRISED OF LESS THAN 6 MEMBERS VIOLATED CPL MORENO'S RIGHT TO DUE PROCESS?

authorized. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

In addition to ruling on the challenge for cause issue, the CAAF also held the appellant had been denied speedy post-trial review in violation of his Fifth Amendment right to due process. *Id.* at 141. The CAAF considered dismissing the charge and specification at that time, stating, in part, "[d]ismissal would be a consideration if the delay either impaired Moreno's ability to defend against the charge at a rehearing, or resulted in some other evidentiary prejudice." *Id.* at 143. Nevertheless, the CAAF found no such evidence in the record and did not dismiss the charge.

On 31 October 2006, Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan, directed a rehearing. The appellant was arraigned at a rehearing in Okinawa, Japan, on 8 November 2006. Subsequent Article 39(a), UCMJ, sessions were held in Okinawa on 1 December 2006, 3 January 2007 and 27 March 2007. On 13 February 2007, after considering the Government's Motion for Appropriate Relief seeking a change of venue and the appellant's trial defense counsel's written notation that he did not oppose the motion, the military judge, Colonel (Col) B.D. Landrum, USMC, granted the Government's motion to move the appellant's general court-martial to Quantico, Virginia. Appellate Exhibit XII. Subsequently, the appellant's case was transferred to the Northern Judicial Circuit for trial at Marine Corps Base, Quantico, Virginia.[3]

Following an Article 39(a), UCMJ, session on 16 April 2007, the Government filed an interlocutory appeal under Article 62, UCMJ, and the court-martial proceedings were stayed pending our decision. The Government challenged the military judge's ruling, which excluded expected Government evidence and argument relating to the possibility that the appellant administered a "date rape" drug to the victim on the night of the alleged rape. On 19 July 2007, we denied the Government's interlocutory appeal. *United States v. Moreno*, No. 200100715, 2007 CCA LEXIS 269, unpublished op. (N.M.Ct.Crim.App. 19 Jul 2007).

On 8 May 2007, the appellant filed a petition for extraordinary relief in the nature of a writ of mandamus, contending that he had been denied a speedy trial, and requesting that we order the Government to dismiss, with prejudice, the charge and specification pending against him. On 16 July 2007, we denied the petition "without prejudice to the petitioner's right to raise the issue before this court in the normal course

[3] Although Col Landrum ordered the change of venue on 13 February 2007, he presided over an Article 39(a), UCMJ, session held in Okinawa on 27 March 2007. Record at 87-164. The Chief Judge of the Navy-Marine Corps Trial Judiciary specifically detailed Col Landrum to the appellant's case in order to conduct this Article 39(a) session. *Id.* at 87-89.

of appellate review." *Moreno v. United States*, No. 200100715, unpublished op. (N.M.Ct.Crim.App. 16 Jul 2007).

From 5-9 November 2007, the appellant was retried and convicted of rape.

I. Speedy Trial

In his first assignment of error, the appellant contends the military judge erred in denying his right to a speedy trial because his ability to present a defense had been impaired. We disagree.

Military Judge's Ruling

Prior to the rehearing, the appellant filed a pretrial motion seeking dismissal of the charge and specification with prejudice based upon a denial speedy trial. AE VIII. During an Article 39(a), UCMJ, session held on 17 April 2007, the military judge denied the motion. Record at 272-73. In denying the motion, the military judge indicated that he applied "the *Barker versus Wingo* factors in the context of the" CAAF opinion in *Moreno*. While he considered all four factors, the military judge's findings of fact primarily focused on the fourth factor, prejudice to the appellant.

The military judge adopted the summary of facts contained in the appellant's motion, which outlined the procedural history of the appellant's initial court-martial. AE VIII. He also made the following findings of fact and conclusions of law:

> In addition the court also finds that all of the physical evidence obtained from the sexual assault examination of Corporal Moreno, Lance Corporal [O], and Lance Corporal [E] is no longer available.
>
> Investigator notes have been destroyed and are no longer available.
>
> The defense team's ability to conduct their own independent investigation has been hampered, specifically the ability to conduct a timely investigation of the Globe and Anchor Club, the ability to simply go to the barracks and interview the Marines who lived there. Obviously, they can go to the barracks now, but different Marines live there now. It would have before [*sic*] much easier back in 1999.
>
> There is an increased difficulty in locating and interviewing witnesses, for example, Lance Corporal Wanzar [*sic*].
>
> There has also been a loss or destruction of photos or other corroborating evidence related to

> photographs of hickie (sic) marks on Lance Corporal [O] that would impeach the contradiction - - impeach by contradiction the testimony of the alleged victim.
>
> As in nearly all rehearings, there is some degree of prejudice associated with this delay. The defense has shown some general prejudice as well as some specifics. However, on the whole and in consideration of all the *Barker* factors, the court finds that the accused has not met . . . his burden of establishing a constitutional violation by preponderance of the evidence, and the motion is denied.

Record at 272-73.

After both sides rested, the appellant's trial defense counsel renewed his speedy trial motion. He reiterated his earlier assertions that the lost evidence precluded testing of the appellant's, the victim's, and LCpl [O]'s blood. He also asserted that witnesses, including LCpl Wanzer and Mr. Hademik, were unavailable to testify for the defense. *Id.* at 697-700.

In denying the renewed request, the military judge again acknowledged "there is a certain amount of prejudice at any . . . rehearing, there is no such thing as a perfect trial in terms of having all evidence available" and noted that the court has attempted to "ameliorate any prejudice". *Id.* at 700-01.

Legal Requirements

The appellant asserts that the CAAF determined that he had "been denied Due Process before the rehearing even began." Appellant's Brief of 16 Jun 2008 at 26. In the appeal of his initial court-martial, the CAAF addressed the appellant's Fifth Amendment due process right to speedy post-trial review. *Moreno*, 63 M.J. at 135, 141. Regarding his Sixth Amendment right to a speedy trial, the CAAF noted that consideration of such a motion would "be an *ad hoc* determination based on the four factors of *Barker*." *Id.* at 141 n.19 (internal quotation marks and citation omitted).

We apply a *de novo* standard of review concerning the legal question of whether an accused received a speedy trial. *United States v. Cooper*, 58 M.J. 54, 57-58 (C.A.A.F. 2003). "Underlying findings of fact are given substantial deference and will be reversed only for clear error." *Id.* at 58 (internal quotation marks and citation omitted). We have reviewed the military judge's findings of fact, and finding no clear error, adopt them as our own.

Further, we are mindful that the four factors in determining whether a Sixth Amendment speedy trial violation has occurred provide an apt structure for examining the facts and circumstances surrounding an alleged Article 10 and Sixth

Amendment speedy trial violation. *Cooper*, 58 M.J. at 61. These four factors are: (1) length of the delay; (2) reasons for the delay; (3) assertion of the right to a speedy trial; and (4) prejudice. *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)(citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

Taking into consideration the extensive history of this case since 1 May 1999, we conclude that the first three factors weigh in favor of the appellant and, consequently, we will evaluate whether the appellant was prejudiced by the delay.

Prejudice should be assessed in the light of the appellant's interests, which the speedy trial right was designed to protect. The Supreme Court has identified three such interests: (1) to prevent oppressive pretrial incarceration; (2) to minimize the appellant's anxiety and concern; and (3) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of an appellant to adequately prepare his case skews the fairness of the entire system. *Barker*, 407 U.S. at 532.

The appellant was not in pretrial confinement and, furthermore, in accordance with the CAAF's decision in *Moreno,*[4] the appellant was aware prior to the rehearing that he could not receive any further confinement. In his motion to dismiss for lack of a speedy trial and on appeal, the appellant does not particularize anxiety or concern distinguishable from the normal anxiety experienced by servicemembers facing a rehearing, and we do not find any in our review of the record.

As noted above, in denying the motion to dismiss for lack of a speedy trial, the military judge provided findings of fact and indicated that the appellant had demonstrated general and specific prejudice. Recognizing that these determinations were made prior to presentation of evidence in this case, we have reviewed the record of trial and provide the following additional findings of fact and legal analysis for each instance of alleged specific prejudice.

Destroyed Evidence

As previously noted, the military judge excluded certain items of expected Government evidence related to the possibility the victim was drugged by the appellant on the night of the alleged rape and prohibited the Government from arguing the appellant administered a "date rape" drug to the victim. We denied the Government's interlocutory appeal of the military judge's ruling excluding this evidence.

The appellant asserts that destruction of toxicology samples from the victim, serology samples from the appellant, victim and LCpl [O], and a beer bottle seized by law enforcement officials

[4] 63 M.J. at 144.

from the appellant's barracks room on the night of the incident, prevented him from conducting additional chemical analysis of the samples and bottle. The appellant contends that additional chemical analysis was necessary to rebut the Government's theory that the appellant and LCpl [O] could have used date-rape drugs in order to incapacitate the victim. Appellant's Brief at 27.

We note that the toxicology report and serology report results were admitted into evidence at trial. Prosecution Exhibits 18 and 19. The toxicology report indicated that ethanol (alcohol) was present in the victim's blood and ethanol and two decongestants were present in her urine. Neither the toxicology nor serology reports indicated the presence of any date-rape drug.

At trial, the victim testified that she consumed a beer provided to her by the appellant while in his barracks room, lost consciousness, and then awoke to find the appellant and then LCpl [O] raping her. Record at 400-02. In our opinion, her testimony complied with the military judge's ruling that she could testify as to her perceptions of events, but could not tie her perceptions to the conclusion that she was drugged. *Id.* at 262-67. Our review of the record convinces us that the Government complied with the military judge's order and did not put on any evidence in its case in chief indicating that the appellant might have drugged the victim.

Dr. O'Neal, a forensic toxicologist, testified as an expert witness for the appellant. *Id.* at 564-82. She confirmed that the toxicology report tested for, but did not detect, the presence of date-rape drugs, including Gamma-Hydroxybutyrate (GHB). *Id.* at 569. She also testified that if the serum and urine samples had not been destroyed, they could have been tested for the presence of other potential date-rape drugs not tested for in 1999. *Id.* at 573, 577-78.

Additionally, Dr. O'Neal confirmed that the drug chemical report conducted on the seized beer bottle indicated that an extract found in the bottle revealed the presence of naproxen. *Id.* at 571-72; Defense Exhibit I. She also testified that the victim's testimony that she lost consciousness immediately after consuming a beer was "highly unlikely and nearly improbable." *Id.* at 568.

In rebuttal, the Government called Dr. O'Neal as its own expert witness. She testified that a negative date-rape test result does not "mean that there was no drug present. It depends on what the drug is and when the sample was collected." *Id.* at 675. She further testified that a heavy dose of GHB, a date-rape drug, could cause a person to lapse in and out of consciousness. *Id.* at 678. However, if such a large dose of GHB was administered, it was "more likely" to find the presence of GHB in a urine sample even if the sample was taken 6-7 hours after being administered to the person. *Id.* at 679-80. Finally, she again

noted that victim's tests results were negative for GHB and that there is no direct evidence that any date-rape drug was involved in this case. *Id.* at 678, 681.

It is apparent that the appellant, through the testimony of Dr. O'Neal, his expert witness, was able to impeach the credibility of the victim's testimony that she lost consciousness immediately prior to the rape. Her testimony confirmed the absence of any date-rape drugs in the victim's blood or urine. Moreover, she testified that, it would require a large dose of a date-rape drug, such as GHB, to cause a person to quickly lose consciousness, and she would expect to detect the presence of a date-rape drug in the person's urine.

Based on Dr. O'Neal's testimony, further testing of the destroyed samples might have ruled out the presence of other date-rape drugs and testing of the beer bottle might have revealed the presence of naproxen. However, the military judge's ruling did not permit the Government to offer any evidence that the appellant might have drugged the victim before raping her. The appellant raised the date-rape drug issue and, in so doing, provided evidence that no date-rape drugs were detected in the victim's blood or urine. Furthermore, the appellant presented expert witness testimony that impeached, by contradiction, the victim's testimony that she lost consciousness after consuming a beer provided to her by the appellant.

We conclude that the appellant's ability to impeach the victim's testimony and present a defense were not impaired by destruction of the toxicology and serology samples and the beer bottle.

Investigative Notes

The Government stipulated that, although law enforcement investigative notes were available at the first trial, they had subsequently been destroyed. *Id.* at 189. Additionally, Naval Criminal Investigative Service (NCIS) Special Agent (SA) Carlin testified that NCIS investigations are "routinely destroyed after a couple of years." *Id.* at 485. However, we note that SA Carlin and SA Blane, both of whom investigated the rape allegation against the appellant in 1999, testified at the rehearing. *Id.* at 484-524. The appellant's trial defense counsel was provided an opportunity to cross-examine both witnesses. Our review of the cross-examination reveals that the trial defense counsel did not question either witness concerning the location or contents of their investigative notes. We find the appellant's assertion that the agents' investigative notes may contain exculpatory or possible impeachment evidence speculative and unpersuasive without any attempt to pursue these issues with the witnesses who prepared the notes.

We note that the investigative notes belonging to Mr. D. M. Morgan, a former Marine Corps staff sergeant and law enforcement officer, are addressed in AOE III.

Photographs of Hickey Marks

On 1 May 1999, NCIS agents took photographs of LCpl [O], depicting fresh bite or "hickey" marks on his neck. Since the Government had destroyed or lost these photographs after the first trial, the parties entered into a Stipulation of Fact admitting the presence of the marks on LCpl [O]'s neck. *Id.* at 203. The Stipulation of Fact was subsequently provided to the members. *Id.* at 662-64; DE K. Accordingly, we conclude that the substitute evidence did not impair the appellant's ability to impeach the victim's testimony and present his defense.

Witness Requests

During a 27 March 2007 Article 39(a), UCMJ, session, the military judge denied the appellant's Motion for Production of LCpl Wanzer after noting that the defense had conceded that her testimony was cumulative with that of another witness, Santiago Cordova, ordered produced by the military judge. AE XXXI at 3; Record at 161-62. We note Mr. Cordova testified for the defense. Record at 583-91. We conclude that the military judge did not abuse his discretion because (1) the appellant conceded that LCpl Wanzer's testimony was cumulative and (2) the absence of her testimony did not prejudice the appellant.

The Government granted the appellant's request for the production of Mr. John Hademik. AE XV at 10. The defense rested its case on 7 November 2007 without calling Mr. Hademik as a witness. During an Article 39(a), UCMJ, session held the next day, LT Mizer, the appellant's trial defense counsel, first notified the military judge that Mr. Hademik had failed to comply with a subpoena to appear as a witness. Record at 700. The military judge noted that the appellant had not previously raised this issue before the court and agreed with the Government's argument that the appellant had not requested a writ of attachment to compel Mr. Hademik's attendance at trial. *Id.*

Our review of the record of trial convinces us that the appellant had not previously informed the military judge that Mr. Hademik had failed to appear for trial nor requested a writ attachment under R.C.M. 703(e)(2)(G). We conclude that the appellant's failure to raise this issue before the military judge in a timely manner and failure to request a writ of attachment constituted waiver of the issue.

Based on our review of the entire record of trial, we have determined that the appellant's defense at the rehearing was not impaired. The military judge acknowledged the appellant demonstrated general and specific prejudice; however, any such prejudice was minimal and, in most instances, mitigated by the

military judge's decisions and rulings. We conclude that the fourth *Barker* factor, prejudice, does not weigh in favor of the appellant and, furthermore, that he was not denied his Sixth Amendment right to a speedy trial.

II. Challenge for Cause

The appellant alleges the military judge abused his discretion when he denied the defense's challenge for cause of Captain (Capt) [M], who disclosed during *voir dire* that she had a close relationship with a cousin who was a rape victim. The appellant argues that the military judge failed to apply the liberal grant mandate and, therefore, failed to address implied bias when he denied the challenge for cause against Capt [M]. We disagree.

Background

During general *voir dire*, Capt [M] answered affirmatively that she had a relative or close friend who had been the victim of a sexual assault. When she returned for individual *voir dire*, the following exchanges took place:

> MJ: Okay. You answered affirmatively that you have a relative or a co-worker or a close personal friend that's been a victim of a sexual assault; is that right?
> MEM (Capt [M]): That is correct, sir.
>
> MJ: Can you tell us about that please.
> MEM (Capt [M]): My cousin was raped in college.
>
> MJ: Your cousin was raped in college. And how close were you to your cousin?
> MEM (Capt [M]): I'm very close to her, sir.
>
> MJ: Okay. And what is the age difference?
> MEM (Capt [M]): Five years, sir.
>
> MJ: She is...
> MEM (Capt [M]): Younger.
>
> MJ: Younger. And is this – did she share with you – you don't have to tell us about the experience, but did she share in detail what happened to her?
> MEM (Capt [M]): She did, sir. It was never – it never went to trial, sir.
>
> MJ: Okay. But she shared that experience with you?
> MEM (Capt [M]): Yes, sir.
>
> MJ: At the time or some...
> MEM (Capt [M]): At the time, sir.

MJ: At the time. But it never went to trial?
MEM (Capt [M]): No, sir.

MJ: Do you know why not?
MEM (Capt [M]): She never pressed any charges.

MJ: Was that based on your recommendation?
MEM (Capt [M]): No, sir.

MJ: Did you recommend to the contrary?
MEM (Capt [M]): I recommended that she discuss it with somebody who would be able --

MJ: Okay. Someone with more --
MEM (Capt [M]): Like a rape counselor.

MJ: Okay. Based on your relationship with your cousin and her experience, do you think that impacts your impartiality in any way to sit as a member in this case?
MEM (Capt [M]): I don't believe so, sir. I've also known women in college that I believed to be untruthful about alleging that they had been sexually assaulted.

MJ: Okay.
MEM (Capt [M]): So I've seen both sides, I believe.

MJ: All right. And so you're willing to wait and see what the evidence is in this case before reaching any judgments?
MEM (Capt [M]): Yes, sir.

MJ: And you'll hold the government to their burden?
MEM (Capt [M]): Yes, sir.

MJ: Okay. All right. Trial counsel, any questions?

TC: Yes, your honor. You mentioned that you knew some friends in college that you believed weren't truthful in alleging rape against someone?
MEM (Capt [M]): That was my belief having known the men that they were charging, yes, sir.

TC: So, obviously, you had a high opinion of the character of the men that were being charged or a low opinion of the girls that were doing the charging?
MEM (Capt [M]): It was probably a little bit of both, sir, yes.
TC: Did any of those cases go to trial?
MEM (Capt [M]): Not that I was aware of, at least not during the time that I was in college.

TC: How many friends?

MEM (Capt [M]): It was two, two instances. They were not friends. I mean, the ones in college that I say were gentlemen that I did not believe to actually have done what they had been accused, they weren't very close friends of mine. It was just the scenario. You know how people talk. And I knew them; they were in a couple classes. And from what I knew of them and from what I knew of the women involved, I thought that probably they hadn't done it.

TC: And that opinion was probably reinforced when there were no charges brought against the men?
MEM (Capt [M]): Yes, sir.

TC: No further questions.

MJ: Defense?

DC: Captain, taking into consideration the incident with your cousin and also these incidents that you knew about in college, can you put those out of the your mind and listen to the facts that you're going to hear today and decide this case on the evidence that is put before you as a member?
MEM (Capt [M]): Yes, sir.

DC: Nothing further, your Honor.

MJ: Anything else, government?

TC: No, your Honor.

Record at 338-40.

After individual *voir dire*, the defense challenged four members for cause, including Capt [M]. *Id.* at 359-65. The military judge granted three of the four challenges. *Id.* In ruling on the challenge against Capt [M], the military judge provided the following analysis:

MJ: Okay. The challenge as to Capt [M] is denied. In my view or the court's view it wasn't limited to her testimony related to her cousin, but she brought up on her own the acquaintances she had from college and the other people that she thought had made false allegations, and I just got the impression from her answering those questions and her demeanor and the way she wrestled with the answers to each of the questions that she will really be a fair and impartial member in this case. So that case -- or excuse me -- that challenge for cause is denied as to Captain [M].

Id. at 360.

Law/Standard of Review

A court member must be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial "free from substantial doubt as to legality, fairness, and impartiality." RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

R.C.M. 912 (f)(1)(N) encompasses challenges for actual bias as well as implied bias. *See United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999)(citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)). Accordingly, "military judges are required to test the impartiality of potential panel members on the basis of both actual and implied bias." *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). "Challenges for actual or implied bias are evaluated based on a totality of the circumstances." *Id.* (citing *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004)).

The applicable standard of appellate review of a military judge's challenge for cause decision is "'clear abuse of discretion.'" *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)(quoting *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005)). As we conduct our review, we recognize that "'military judges must liberally grant challenges for cause.'" *James*, 61 M.J. at 139 (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

Although they are not separate grounds for a challenge for cause, actual and implied bias are separate tests. *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003). "The test for actual bias is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions'". *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)(quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)). Actual bias is a question of fact that tests a challenged member's credibility and demeanor when expressing his views. *See Richardson*, 61 M.J. at 118. We review the test for actual bias subjectively extending the military judge a "high degree of deference on rulings involving actual bias" since we recognize that the military judge was afforded the opportunity to observe the demeanor of the challenged member. *Id.*

We review issues of implied bias for an abuse of discretion, but the objective nature of the inquiry affords less deference to the military judge. *United States v. Townsend,* 65 M.J. 460, 463 (C.A.A.F. 2008)(citing *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000) and *United States v. Napoleon,* 46 M.J. 279, 283 (C.A.A.F. 1997)). However, "[a] military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not." *United States v. Clay,* 64 M.J. 274, 277 (C.A.A.F. 2007).

Notwithstanding a member's disclaimer of bias, there is implied bias "'when most people in the same position would be prejudiced.'" *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)(quoting *Schlamer*, 52 M.J. at 92)(footnote omitted). We view implied bias objectively "'through the eyes of the public, focusing on the appearance of fairness.'" *Clay*, 64 M.J. at 276 (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)).

Analysis

We hold that the military judge did not abuse his discretion in denying the challenge of Capt [M]. Turning first to actual bias,[5] during *voir* dire, Capt [M] affirmatively responded that her close relationship with her cousin would not affect her ability to be impartial and she agreed to decide this case based on the evidence presented. The fact that a member has a family member, friend, or relative who is the victim of a crime is not a *per se* disqualification. *United States v. Jefferson,* 44 M.J. 312, 321 (C.A.A.F. 1996)(citations omitted). The military judge's statements on the record clearly demonstrate that he made a credibility determination, specifically commenting on Capt [M]'s demeanor and forthright discussion about other situations in which Capt [M] believed allegations of sexual assault were false. Accordingly, we find no abuse of discretion as to actual bias.

Furthermore, we do not believe the appearance of the proceedings was rendered unfair by Capt [M]'s presence on the panel. Capt [M]'s *voir dire* responses indicate that, although she had a close relationship with her cousin, she did not proactively involve herself in her cousin's situation. She appeared to respect her cousin's decision regarding how to handle the situation and did not attempt to influence that decision. Capt [M] also volunteered information about having known women in college who had alleged they were sexually assaulted, but whom she believed to be untruthful. Capt [M] discussed that she felt that the allegations were false based upon the credibility of the women and the men involved.

While the military judge did not expressly cite to the liberal grant mandate when he announced his findings, the liberal grant mandate was referenced by trial defense counsel during litigation of this motion and we are confident the judge considered it. Record at 359-60. Even granting no deference whatsoever to the military judge's determination, we nonetheless find that the military judge did not abuse his discretion when he denied the appellant's challenge for cause against Capt [M].

[5] We note the appellant only raised implied bias as an issue. However, due to our Article 66, UCMJ, mandate, we will evaluate actual bias as well.

III. Denial of Witnesses

In his third assignment of error, the appellant alleges that he was deprived of his Fifth and Sixth Amendment rights to call relevant witnesses on his behalf. We disagree.

Facts

When a rehearing in the appellant's cases was directed, Captain J.D. Rosen, USMC, was initially detailed as the appellant's trial defense counsel. Record at 4. Capt Rosen served as the appellant's trial defense counsel during the Article 39(a), UCMJ, sessions held on 8 November 2006, 1 December 2006, 3 January 2007, 27 March 2007, and 16-17 April 2007. When the court-martial reconvened on 5 November 2007, Capt Rosen was no longer detailed to the appellant's court-martial due to his separation from active duty. *Id.* at 276. LT Brian Mizer, JAGC, USN, was serving as the appellant's new detailed trial defense counsel. *Id.* at 276-77. Although the record of trial does not contain any documentation delineating the specific date that LT Mizer was detailed as the trial defense counsel, it is clear that he was serving as the appellant's defense counsel no later than late August 2007. *See* AE XXXV.

Initial Witness Requests

On 8 November 2006, the military judge, Col Landrum, with the agreement of counsel, established a trial schedule, which included a 29 November 2006 deadline for witness requests. *See* AE I; Record at 13-14. On 1 December 2006, Capt Rosen submitted an initial written request for 36 witnesses. AE XV at 7-9. On 26 February 2007, Capt Rosen submitted a request for 14 witnesses, all of whom were on the 1 December 2006 request. *Id.* at 5-6. On 12 March 2007, the Government filed a response to Capt Rosen's written request for the 14 witnesses, approving the production of four witnesses and denying the production of the remaining 10 requested witnesses. *Id.* at 10-11.

Capt Rosen filed an addendum to his original Motion for Appropriate Relief (Motion for Witness Production) on 14 March 2007, which specifically requested the production of five of the 10 witnesses denied by the Government. AE XV at 1-4; AE XXIII. The Government filed a response to the motion on 22 March 2007. AE XVI.

During an Article 39(a) session held on 27 March 2007, Col Landrum heard oral argument on the appellant's motion for the production of witnesses. Record at 142-62. On 5 April 2007, Col Landrum ordered the production of two of the requested defense witnesses. He denied two of the requests by determining that a stipulation of expected testimony was an adequate substitute and, as aforementioned, denied the request for LCpl Wanzer by noting that the defense had conceded that her testimony was cumulative with that of another witness. *Id.* at 161-62; AE XXXI at 3.

Subsequent Witness Request

After being detailed to the appellant's case, LT Mizer submitted new witness requests to the Government via e-mail and letters on 30 August and 7 September 2007. AE XXXV-XXXIX. He requested the production of 11 witnesses, most of whom were not previously requested by Capt Rosen. The 30 August 2007 list included a request for the production of Johna K. Cardenas, a former Marine Corps staff sergeant, and Joseph E. Krause, a former Marine Corps officer, both of whom testified as good military character witnesses at the appellant's original general court-martial. The 7 September 2007 list included a request for the production of Mr. Morgan, a former Marine Corps staff sergeant and law enforcement officer. *Id.*

During an Article 39(a), UCMJ, session held when the court-martial reconvened on 5 November 2007, LT Mizer apprised the military judge that the Government had just informed him, for the first time, that it had not produced numerous witnesses previously requested by the defense in late August and early September 2007. Record at 296. Regarding Mr. Cardenas and Mr. Krause, LT Mizer argued that he submitted the request for the production of these two witnesses in a timely manner, provided sufficient contact information to the Government in late August and early September, and informed the Government that they were military character witnesses. *Id.* at 297, 299-302. LT Mizer also informed the military judge that Mr. Cardenas and Mr. Krause testified at the appellant's initial court-martial. *Id.* at 300-01. The Government responded that it requested additional contact information as well as an explanation why their testimony was relevant and necessary, and did not receive any response from the appellant. *Id.* at 299-301.

Regarding Mr. Morgan, LT Mizer informed the court that he was the first law enforcement official to arrive on the scene after the victim alleged she had been raped. *Id.* at 303-04. LT Mizer indicated he now possessed Mr. Morgan's 1 May 1999 investigative notes, which were not available when the appellant's speedy trial motion was previously litigated. *Id.* at 303, 470; DE H; AE XL. He stated that the defense had not spoken with Mr. Morgan and did not have had any contact information for him, but wanted the Government to find and produce him. *Id.* at 303, 310. LT Mizer proffered that the investigative notes contained information inconsistent with the victim's testimony at the original trial. *Id.* The Government indicated that it had not made any attempt to locate Mr. Morgan because the appellant had not provided any contact information for him nor was the Government asked to locate him. *Id.* at 309.

At an Article 39(a), UCMJ, session held the next day, LT Mizer provided the military judge the e-mail and written requests for the production of witnesses he previously provided to the Government. *Id.* at 469-70; AE XXXV-XXXIX.

Military Judge's Ruling

The military judge determined that the production of witness requests made on 30 August and 7 September 2007 were untimely submitted because they exceeded the "court's previously established milestone and dates required for witness requests." Record at 311. Although acknowledging that LT Mizer was not originally assigned to represent the appellant, the military judge determined that the defense was accountable to the court ordered witness request deadlines and informed LT Mizer that he should have raised the witness request issue with the court earlier. *Id.*

The military judge noted that, notwithstanding the timeliness issue, he did not "want to see the accused prejudiced, but also the government has an interest in trying this case this week finally after numerous delays." *Id.* at 311; *see also* Record at 471. Accordingly, the military judge ordered the Government to produce Mr. Sandi, one of the military character evidence witnesses on the appellant's 30 August 2007 witness request. *See* AE XXXVI. He denied the witness requests for Mr. Cardenas and Mr. Krause, but noted that the appellant could present their testimony through use of their prior testimony in the initial court-martial. Record at 312.

Finally, the military judge determined that the appellant had not met his burden of providing relevant contact information for Mr. Morgan and further determined that the request was filed past the "trial deadline." *Id.* However, the military judge eventually allowed the appellant to present Mr. Morgan's investigative notes under MILITARY RULE OF EVIDENCE 102, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). *Id.* at 550-51.

Legal Requirements

In accordance with Article 46, UCMJ, "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." The President has set forth the prescribed regulations for the production of witnesses and evidence in R.C.M. 703. Pursuant to R.C.M. 703(b)(1), "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary."

"A military judge's ruling on a request for a witness is reviewed for abuse of discretion." *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000)(citations omitted). A military appellate court "will not set aside a judicial denial of a witness request 'unless (we have) a definite and firm conviction that the (trial court) committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Id.* (quoting *United States v. Houser*, 36 M.J. 393, 397 (C.M.A. 1993)).

In order to determine if a requested witness is necessary, the following factors must be weighed: "the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the case, whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as depositions, interrogatories, or previous testimony." *Id.* at 127 (citing *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978)). Additionally, it is appropriate for the trial judge to consider the timeliness of the witness request when evaluating whether it is necessary to produce the witness. R.C.M. 703(c)(2)(C).

Legal Analysis

At the outset, we note it is apparent from the record of trial that LT Mizer and the trial counsel did not discuss the status of the appellant's 30 August and 7 September 2007 witness requests until 5 November 2007, *the first day of trial*.[6]

We further note that this trial included many unique characteristics, such as a change of venue, change in detailed trial defense counsel, and a lengthy delay due to the Government's Article 62, UCMJ, appeal and the appellant's request for extraordinary relief in the nature of a writ of mandamus. Accordingly, it would have been prudent for the military judge to conduct either an Article 39(a), UCMJ, session or R.C.M. 802 conference prior to 5 November 2007 in order to reestablish trial milestones and deadlines and ensure that any outstanding issues, including witness request were resolved.

Request for the Production of Mr. Cardenas and Mr. Krause

As aforementioned, although the military judge denied the motions for production of these witnesses, he permitted the appellant to present their prior testimony. Thus, we are convinced that the military judge considered timeliness as only one of his factors in evaluating whether it was necessary to produce these two witnesses. In our evaluation of the relevant witness request factors, we conclude that military character evidence was an important part of the appellant's defense. We note that Mr. Sandi, one of the appellant's military character witnesses, personally appeared at the court-martial. We conclude that Mr. Cardenas' and Mr. Krause's military character evidence was cumulative with that provided by Mr. Sandi. We also conclude that use of their prior testimony was a suitable alternative. We conclude that the military judge did not abuse his discretion in

[6] Both parties should have communicated on a regular basis over this two-month period of time in order to ensure the witness request issue was resolved prior to the commencement of trial. Timely resolution of this request would have enabled the appellant to submit a written Motion to Compel the Production of Witnesses to the military judge well in advance of the trial date, rather than submitting a verbal request on the eve of trial.

denying the motion for the production of Mr. Cardenas and Mr. Krause.

Request for the Production of Mr. Morgan

In his 7 September 2007 request for the production of Mr. Morgan, the appellant was required to provide sufficient contact information and a synopsis of his expected testimony sufficient enough to show the relevancy and necessity of his testimony. R.C.M. 703(c)(2)(B)(i). In his request, the appellant simply noted that Mr. Morgan was a military policemen, who was the first member of the law enforcement team to speak with the victim both before and after she spoke with a chaplain. The request does not contain any contact information or synopsis of expected testimony.

During the Article 39(a), UCMJ, sessions held on 5 and 6 November 2007, LT Mizer indicated that he had never interviewed Mr. Morgan and that Mr. Morgan did not testify at the appellant's initial trial. He also indicated that he did not possess any contact information, but had made attempts to locate Mr. Morgan on the internet. Record at 303, 470. In his argument to the military judge, LT Mizer argued that the investigative notes contained information given to him by the victim that was inconsistent with what she said later that same day to a chaplain and NCIS, and with her testimony at the original trial. *Id.* at 303, 310.

We conclude that the appellant did not adequately comply with the requirements set forth in R.C.M. 703. However, our analysis does not end here. Based on the military judge's ultimate decision to permit the appellant to present Mr. Morgan's investigative notes as evidence under MIL. R. EVID. 102, we are convinced that he considered timeliness and adequacy of the request as only two factors in evaluating whether it is necessary to produce Mr. Morgan. Since neither party had an opportunity to interview Mr. Morgan, it is speculative to assert that his investigative notes either confirm or contradict the victim's version of the facts. The military judge properly admitted the evidence and allowed the parties to argue the weight of the evidence to the members. As a result, there was no prejudice to the appellant.

IV. Motion to Reopen Article 32

The appellant argues that the military judge erred in failing to reopen the Article 32, UCMJ, hearing prior to his rehearing. Specifically, the appellant argues that he was materially prejudiced by the cumulative changes in the availability of witnesses and evidence by the time of the rehearing, which required reopening the Article 32, UCMJ, hearing. Appellant's Brief at 37-39. We disagree.

Article 63, UCMJ, states that a rehearing is a continuation of the original proceeding. Therefore, charges need not be re-preferred or re-referred and, in the case of a general court-martial, there is no requirement to conduct a new Article 32, UCMJ, investigation. *United States v. Beatty*, 25 M.J. 311, 314-15 (C.M.A. 1987).

An Article 32, UCMJ, investigation was conducted prior to the appellant's first trial. AE IV; Record at 71-80. The CAAF set aside the findings and sentence of the appellant's first trial and authorized a rehearing, but did not dismiss the charge. *Moreno*, 63 M.J. at 143-44; Record at 72-74. At his rehearing, the appellant faced the same charge subject to the Article 32 investigation. Therefore, the appellant's rehearing was a continuation of the original proceeding and did not require a new Article 32 hearing. This assignment of error is without merit.

V. Factual Sufficiency

The appellant's fifth assignment of error asserts that the evidence is factually insufficient to sustain his rape conviction. We disagree.

Principles of Law

This court must determine both the factual and legal sufficiency of the evidence presented at trial. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see* Art. 66, UCMJ. The test for factual sufficiency is whether, after weighing all of the evidence in the record of trial and making allowances for the lack of personal observation, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. 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 all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *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). The term "reasonable doubt" does not mean the evidence must be free of conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). The fact-finder may "believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). The Government must, however, prove every element beyond a reasonable doubt, *United States v. Harville*, 14 M.J. 270, 271 (C.M.A. 1982), and the proof must be such as to exclude every fair and rational hypothesis except that of guilt. *United States v. Gray*, 51 M.J. 1, 56 (C.A.A.F. 1999); *United States v. Meeks*, 41 M.J. 150, 155-57 (C.M.A. 1994).

The offense of rape in May 1999 consisted of two elements: (1) that the accused committed an act of sexual intercourse; and (2) that the act of sexual intercourse was done by force and

without the consent of the victim. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 45b(1).

Discussion

The appellant asserts that the evidence is factually insufficient because the testimony of the alleged victim was inconsistent and lacked credibility. Specifically, the appellant contends the victim's allegation is highly improbable in light of the lack of evidence that a date-rape drug was used.

Since the appellant admitted at trial that he had sexual intercourse with the victim, the first element is met. We next evaluate whether we are satisfied beyond a reasonable doubt that the sexual intercourse occurred by force and without the consent of the victim. Considering that this was a "he said, she said" case, credibility of the witnesses was very important. LCpl [E] testified that on 30 April she went to a movie on base where she remembered eating popcorn. She could not remember if she had eaten anything else and that she frequently skipped meals. At about 0030, she and her boyfriend entered the enlisted club where she danced and drank about four beers before leaving at about 0245 when the club closed. Walking back to the barracks with a group that included the appellant and LCpl [O], LCpl [O] invited her to have another beer and that the appellant offered that they could have the beer in his room. After consuming the beer in the appellant's room, LCpl [E] testified that she lost consciousness. Although it is not clear from the record as to why LCpl [E] may have lost consciousness, she testified that she had taken cold medication that week. She further testified that when she regained consciousness the first time, the appellant was on top of her engaging in sexual intercourse without her consent.

The appellant testified that he and LCpl [E] were asleep on the floor of his room and she initiated sexual contact with him, which escalated into consensual sexual intercourse.

There is no requirement in the law that the evidence be free from all doubt. Taking both the appellant's and LCpl [E]'s testimony at face value, since we did not have the opportunity to observe their demeanor and the demeanor of the other witnesses to make a credibility judgment, LCpl [E]'s testimony that she was unconscious or not in control of her faculties at the time the appellant was having sex with her supports a finding that she lacked the capacity to consent and, therefore, satisfies us beyond a reasonable doubt that the act of sexual intercourse was by force and without consent.

After considering the evidence in the light most favorable to the Government, we are convinced that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *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 of the evidence in the record of trial and having

made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt that the appellant raped LCpl [E].

VI. Sixth Amendment Right to Counsel

The appellant asserts that his Sixth Amendment right to counsel was violated when the military judge denied his motion to appoint his appellate defense counsel, LT Mizer, as individual military counsel (IMC) with whom the appellant asserts he had an ongoing attorney-client relationship. We disagree.

Background Facts

In April 2004, after the appellant's first trial, LT Mizer was detailed to the appellant's case as appellate defense counsel pursuant to Article 70, UCMJ. On appeal, the appellant's case was set aside and a rehearing was authorized. *Moreno*, 63 M.J. at 144. On 15 and 29 September 2006, the appellant requested the assignment of LT Mizer to his case as IMC.[7] AE II at 8-9; AE III at 7-8. At the time of the IMC request, LT Mizer was assigned to the Navy-Marine Corps Appellate Defense Division, Code 45, as an appellate defense counsel. *Id.* On 16 October 2006, the appellant's IMC request for LT Mizer was denied by LT Mizer's commander. AE III at 9-12. On 22 November 2006, the appellant filed a Motion for Appropriate Relief in which he asked the trial court to prohibit the rehearing until LT Mizer was detailed to the case. AE II at 1-4. The military judge denied the motion and ruled that the IMC request had been properly denied. Record at 82-84.

Law

The ruling of a military judge on an IMC request, including whether such a ruling severed an attorney-client relationship, is a mixed question of fact and law. *United States v. Spriggs*, 52 M.J. 235, 244 (C.A.A.F. 2000). The military judge's legal conclusions are subject to *de novo* review and his findings of fact are reviewed under a clearly erroneous standard. *Id.* (citing *United States v. White*, 48 M.J. 251, 257 (C.M.A. 1998)).

Members of the armed forces are provided with counsel rights broader than those available to civilian counterparts under the Sixth Amendment. *Id.* at 237. A servicemember has the right to be represented by military counsel regardless of indigence and, under certain circumstances, has the right to select a particular military counsel. *Id.*

Article 38, UCMJ, permits an accused to be represented by individual military counsel of his own selection if that person

[7] We note the 15 September 2006 request, which was submitted by LT Mizer on behalf of the appellant, and the 29 September 2006 request, which was submitted by the appellant himself, appear to be identical.

is "reasonably available". A request for individual military counsel can be properly denied if the requested counsel is not "reasonably available" unless "the accused asserts that there is an existing attorney-client relationship regarding a charge in question or that the person will not . . . be among those so listed as not reasonably available. R.C.M. 506(b)(2).

Appellate defense counsel are deemed to be not "reasonably available" for purposes of IMC requests. R.C.M. 506 (b)(1); Judge Advocate General Instruction 5800.7D, § 131(b)(4)(22 Mar 2004). However, the Secretary of the Navy is permitted to create exceptions to this prohibition based upon the existence of an attorney-client relationship between the appellant and requested counsel regarding matters related to a charge in question. R.C.M. 506(b)(1). Nonetheless, R.C.M. 506(b)(1) states that if the attorney-client relationship between the appellant and requested counsel arose solely as a result of the requested counsel's representation of the accused on appeal under Article 70, UCMJ, an exception shall not apply.

Analysis

In reviewing the military judge's decision for error, the appellant specifically asks us to reinterpret Article 70 in light of the Sixth Amendment's application to servicemembers and argues that his Sixth Amendment right to a counsel with whom he had an ongoing attorney-client relationship should trump the R.C.M. 506 limitations on the scope of an attorney-client relationship. We decline to reinterpret Article 70 and hold the military judge did not err when he denied the appellant's IMC request.

At the time of the appellant's IMC request, LT Mizer was assigned as an appellate defense counsel. Although the appellant alleges that LT Mizer should have been allowed to represent him because an attorney-client relationship was formed between he and LT Mizer as a result of LT Mizer's representation of him on appeal, R.C.M. 506 (b)(1) expressly prohibits an exception to the rule regarding "reasonable availability" if the attorney-client relationship was formed as a result of the appellant's representation by the requested counsel on appeal. Therefore, regardless of whether an attorney-client relationship was formed between LT Mizer and the appellant, LT Mizer was not "reasonably available" at the time of the IMC request to represent the accused at his rehearing.[8] Accordingly, we agree with the military judge's denial of the motion.

[8] When the court-martial reconvened on 5 November 2007, LT Mizer had replaced Capt Rosen as the appellant's detailed defense counsel. From the record, it appears that LT Mizer had transferred out of the Appellate Defense Division and was assigned elsewhere when he appeared as counsel for the appellant. We are required to evaluate LT Mizer's status at the time the appellant's request was made. Therefore, LT Mizer's subsequent transfer out of the Appellate Defense Division and later assignment to the case as detailed defense counsel does not factor into our analysis.

VII. Panel of less than 6 members violated Due Process rights

The appellant contends that a five-member court-martial denies him Due Process as outlined in *Ballew v. Georgia*, 435 U.S. 223 (1978). We disagree.

There is no Sixth Amendment right to a jury trial in the military. *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004)(citing *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973)). The constitution of courts-martial is a matter determined by Congress. U.S. CONST. art.I, § 8, cl. 14. Congress affords service members the right to have a panel of members for a general court-martial pursuant to Article 16, UCMJ. Article 16, UCMJ, requires that general courts-martial consist of not less than five members.

The court-martial in this case consisted of five members. Therefore, the appellant was afforded his statutory right to a panel of not less than five members as required by Article 16, UCMJ.

VIII. Missing Document

On 9 April 2009, we ordered the Government to produce two missing pages from exhibits in the record. On 4 May 2009, the Government produced page 5 of Defense Exhibit H. However, the Government was unable to locate page 23 of Defense Exhibit N, which contains a portion of the victim's prior testimony at LCpl [O]'s trial. Record at 691. We conclude that this omission from the record does "not raise a presumption of prejudice or affect the record's characterization as a complete one." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000).

IX. Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Judge PRICE and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court