IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Jordan R. MULLER Airman First Class (E-3) United States Air Force, Appellant	BRIEF OF AMICUS CURIAE NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION IN SUPPORT OF APPELLANT Crim. App. Dkt. No. 39323 USCA Dkt. No. 19-0230/AF

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Pursuant to Rule 26 of this Honorable Court's Rules of Practice and Procedure, the Navy-Marine Corps Appellate Defense Division (Code 45) respectfully submits this brief in support of the Appellant. Specifically, Code 45 addresses the first issue presented:

> WHETHER RULE 15.5 OF THE AIR FORCE COURT OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE IS INVALID BECAUSE IT CONFLICTS WITH THE UNIFORM CODE OF MILITARY JUSTICE, THIS COURT'S PRECEDENT, THE JOINT COURTS OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE, THE RECENTLY UPDATED JOINT RULES OF APPELLATE PROCEDURE, AND THE PRIOR AND CURRENT APPELLATE RULES OF THE OTHER SERVICE COURTS OF CRIMINAL APPEALS.

Interest of Amicus Curiae

Code 45 represents Sailors and Marines in all aspects of case review before the Navy-Marine Corps Court of Criminal Appeals (NMCCA), this Court, the Supreme Court, and in some cases, the Naval Clemency and Parole Board. Our representation includes several clients similarly situated to the Appellant in this case. We seek a judicial resolution that will provide precedent for these clients.

Our clients are similarly situated because, as the Appellant noted, Rule 5.2 of the NMCCA Rules of Appellate Procedure (NMRAP) conflicts with the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (JRAP). However, unlike the Air Force Court of Criminal Appeals (AFCCA) rule that reduced the

time to file a brief, the offending NMCCA rule remains in effect.[1] NMRAP Rule 5.2 establishes rules for "[c]ases under continuing jurisdiction."[2] It gives an appellant thirty days to file a brief in three instances involving remanded cases:

> "5.2(b). . . . When a case is remanded directly to the Court by CAAF. . . within 30 days after docketing of the record to the Court, appellate defense counsel will file a brief . . . .
>
> 5.2(c). . . . When CAAF sets aside, in whole or part, this Court's decision in a case and returns the record to the Judge Advocate General for remand to the convening authority, with the provision that the record will ultimately be returned to the Court of Criminal Appeals for further review . . . appellate defense counsel will, within 30 days after redocketing of the record in this Court, . . . file a brief and assignments of error . . . .
>
> 5.2(d) . . . . When a case returned by the Court to the Judge Advocate General for remand to the convening authority is again before the Court, appellate defense counsel will, within 30 days of redocketing of the record in this Court . . . file a brief and assignments of error . . . ."[3]

By contrast, Rule 18 of the JRAP provides: "*Any* brief for an accused shall be filed within sixty days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court."[4]

Given the conflict between the NMRAP and the JRAP, resolving the conflict between the JRAP and the AFCCA Rules of Practice and Procedure (AFRAP) in

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[1] JA 146-47.
[2] JA at 146 (of note, Rule 18.1 of the NMRAP mirrors Rule 18 of the JRAP and provides 60 days for an "appellant's *initial* Brief and Assignments of Error").
[3] JA at 146-47. The previous version of the NMRAP listed identical requirements under Rule 2.2. JA at 133.
[4] JA at 138 (emphasis added).

the Appellant's favor is important for the administration of appellate review before the NMCCA.

Argument

RULE 15.5 OF THE AIR FORCE COURT OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE IS INVALID AND CONFLICTS WITH SETTLED CASELAW AND THE JOINT RULES OF APPELLATE PROCEDURE.

This Court has already answered the question of law this case raises.[5] In *United States v. Gilley*, this Court addressed whether a CCA may create and enforce rules of appellate procedure that conflict with the joint rules proscribed by the Judge Advocates General. This Court held that a CCA may not.[6]

The NMCCA acknowledged this Court's holding in 2007.[7] In *United States v. Campbell*, the NMCCA emphasized that the procedural rules for the service CCAs shall be *uniform*, and may not conflict with the jointly enacted CCA rules prescribed by the Judge Advocates General of the armed forces.[8] The NMCCA cited this Court's determination that a service CCA filing deadline that varied from the jointly enacted CCA Rules filing deadline was invalid.[9]

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[5] *See United States v. Gilley*, 59 M.J. 245 (C.A.A.F. 2004).
[6] *Id*.
[7] *United States v. Campbell*, No. 200400093, 2007 CCA LEXIS 107, at *8-9 (N-M. Ct. Crim. App. Mar. 29, 2007) (emphasis in original).
[8] *Id*.
[9] *Id*. at *9-10.

Despite clear language from this Court regarding a CCA's left and right lateral limits in 2004, and the NMCCA's 2007 acknowledgement of the *Gilley* holding, both the AFCCA[10] and the NMCCA[11] established rules that conflict with the JRAP and this Court's *Gilley* holding:

Number of Days Appellant has to Submit a Brief in Remand Cases		
Jurisdiction	**2018**	**2019**
Joint Rules	60 days	60 days
Air Force	10 days	60 days
Army	60 days	60 days
Navy-Marine Corps	30 days; 60 with a rehearing	30 days; 60 with a rehearing
Coast Guard	60 days	60 days

Under *Gilley*, those rules are invalid.

Conclusion

The AFRAP are contrary to applicable precedent. This Court should therefore grant Appellant's request for relief and hold that Rule 15.5 of the AFRAP is invalid.

[10] JA at 122.
[11] JA at 146-47.

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Appendix

1. *United States v. Campbell*, No. NMCCA 200400093, 2007 CCA LEXIS 107 (N-M. Ct. Crim. App. Mar. 29, 2007) (unpublished).

Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court, and that a copy was electronically delivered to counsel for Appellant and Appellee on September 9, 2019.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(c)

This brief complies with the type-volume limitation of Rule 26(f) because this brief contains 887 words.

This brief complies with the typeface and type style requirements of Rule 37.

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United States v. Campbell

United States Navy-Marine Corps Court of Criminal Appeals

March 29, 2007, Decided

NMCCA 200400093

Reporter
2007 CCA LEXIS 107 *; 2007 WL 1709498

UNITED STATES v. Hawan T. Campbell, Yeoman Third Class (E-4), U. S. Navy

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Motion granted by *United States v. Campbell, 2007 CAAF LEXIS 891 (C.A.A.F., June 29, 2007)*

Prior History: Sentence adjudged 05 April 2002. Military Judge: R.K. Fricke. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Region Hawaii, Pearl Harbor, HI.

Campbell v. Navy-Marine Corps Court of Crim. Appeals, 63 M.J. 261, 2006 CAAF LEXIS 573 (C.A.A.F., 2006)

Case Summary

Procedural Posture

A general court-martial composed of officer members convicted appellant servicemember of premeditated murder, in violation of Unif. Code Mil. Justice art. 118, *10 U.S.C.S. § 918*. The members sentenced the servicemember to a dishonorable discharge, confinement for life with the possibility of parole, total forfeitures, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, and the servicemember appealed.

Overview

The servicemember was charged with premeditated murder after another person (victim) was shot several times while he was on Pearl Harbor Naval Station, Hawaii. Although witnesses did not see the servicemember shoot the victim, they saw a person who fit his description fleeing the scene, and the servicemember subsequently confessed to killing the victim. The court of criminal appeals held that (1) the servicemember's appellate rights were not violated because it limited the length of his appellate brief to 50 pages, pursuant to former U.S. Navy-Marine Corps Ct. Crim. App. R. 4-4.h; (2) the facts supported the military judge's conclusion that the servicemember voluntarily confessed to killing the victim; (3) there was enough evidence to corroborate the servicemember's confession, and the military judge did not abuse his discretion when he admitted the confession over the servicemember's objection; and (4) the military judge did not abuse his discretion when he denied the servicemember's motion for a mistrial and his motion for a continuance after the servicemember informed the judge that he no longer wanted his civilian counsel to represent him in the courtroom.

Outcome

The court of criminal appeals affirmed the findings and sentence.

Counsel: LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel.

LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel.

Judges: BEFORE J.D. HARTY, W.M. FREDERICK, R.G. KELLY. Judge KELLY and Judge FREDERICK concur.

Opinion by: J.D. HARTY

Opinion

HARTY, Senior Judge

A general court-martial, composed of officer members, convicted the appellant, contrary to his pleas, of premeditated murder, in violation of Article 118, Uniform Code of Military Justice, *10 U.S.C. § 918*. The members sentenced the appellant to total forfeiture of pay and allowances, reduction to pay grade E-1, a dishonorable discharge, and confinement for life with the possibility of parole. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

We have reviewed the record of trial, the appellant's 10 assignments of error, [1] and the Government's answer. We conclude **[*2]** 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*.

[*3] Background

During the early morning hours of 4 May 2001, a verbal and physical confrontation occurred between the appellant and the victim near the victim's on-base housing. Following this altercation, the appellant drove to his off-base apartment and retrieved his Glock .40 caliber hand gun and returned to confront the victim. When the victim saw

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[1] I. RULE 4-4h OF THIS COURTS (SIC) RULES AND PROCEDURES IS IN DIRECT CONFLICT WITH THE RULES OF PROCEDURE ADOPTED BY THE JUDGE ADVOCATES GENERAL AND IT'S (SIC) APPLICATION TO APPELLANT IS ERRONEOUS.II. THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO FILE AN INITIAL BRIEF IN EXCESS OF FIFTY PAGES WHERE HE WAS CONVICTED OF PREMEDITATED MURDER, SENTENCED TO LIFE IN PRISON AND HIS RECORD OF TRIAL IS 4739 PAGES IN LENGTH.III. APPELLANT'S CONVICTION FOR PREMEDITATED MURDER IS FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THE EVIDENCE THE GOVERNMENT PRESENTED AT TRIAL FAILS TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT SHOT AND KILLED SEAMAN BALLARD.IV. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE REFUSED TO GRANT THE APPELLANT'S MOTION FOR INDEPENDENT INVESTIGATIVE ASSISTANCE.

V. THE MILITARY JUDGE ERRED WHEN HE ADMITTED THE APPELLANT'S UNCORROBORATED CONFESSION OVER THE OBJECTION OF TRIAL DEFENSE COUNSEL IN VIOLATION OF MILITARY RULE OF EVIDENCE 304(g).

VI. THE MILITARY JUDGE ERRED IN FAILING TO SUPPRESS APPELLANT'S STATEMENTS TO NCIS AGENTS WHERE STATEMENTS WERE MADE IN VIOLATION OF *ARTICLE 31(D)* AND THE *FIFTH AMENDMENT* PROHIBITION AGAINST COMPULSORY SELF-INCRIMINATION.

VII. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS *SIXTH AMENDMENT* RIGHT TO COUNSEL WHEN CIVILIAN DEFENSE COUNSEL TOLD THE MEMBERS THAT APPELLANT WOULD TESTIFY WHEN APPELLANT WAS NOT PREPARED TO MAKE THAT DECISION UNTIL THE GOVERNMENT HAD RESTED ITS CASE AND WHEN MR. CAVE FAILED TO INTERVIEW AND PREPARE FOR ONE-THIRD OF THE WITNESSES.VIII. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN REFUSING TO GRANT A MISTRIAL WHERE CIVILIAN DEFENSE COUNSEL PROMISED THE MEMBERS THAT APPELLANT WOULD TESTIFY CONTRARY TO APPELLANT'S WISHES AND WHERE CIVILIAN DEFENSE COUNSEL FAILED TO ADVANCE DEFENSE THEORIES INSTEAD ADVANCING THEORIES THAT THE DEFENSE WAS NOT PREPARED TO MEET IN HIS OPENING STATEMENT.IX. THE MILITARY JUDGE ERRED WHEN HE DENIED TRIAL DEFENSE COUNSEL'S REQUEST FOR A CONTINUANCE SO THAT COUNSEL COULD PROPERLY PREPARE FOR TRIAL AFTER APPELLANT REMOVED CIVILIAN COUNSEL FROM ANY FURTHER IN COURT PARTICIPATION IN HIS CASE DURING CROSS-EXAMINATION OF A KEY WITNESS.X. THE CUMULATIVE ERRORS IN THIS CASE COMPEL REVERSAL OF THE FINDINGS.

that the appellant came back with a hand gun, he dared the appellant to shoot him. The appellant responded by shooting the victim multiple times. One of the rounds struck the victim in the chest and one round was fired into the back of the victim's head.

Gate security at Pearl Harbor radioed a report of shots fired at approximately 0400 on 4 May 2001. Base police arrived within a few minutes and found the victim and five shell casings around the victim's body. The crime scene was secured, and paramedics determined the victim was dead. Special Agent (SA) Sakowski of the Naval Criminal Investigative Service (NCIS) took jurisdiction over the crime scene at approximately 0523, and assigned agents to begin interviewing witnesses.

Witnesses stated they heard shots fired outside their barracks just before 0400. One of those witnesses stated **[*4]** that after hearing shots in the parking lot outside his barracks, he saw a dark-skinned male with a bald head, wearing long dark shorts and a button down shirt that was light blue with a pattern, running from the scene. During these interviews, SA Sakowski received a call from the Naval Station's executive officer stating that one of his yeomen, the appellant, had been with the victim the night before the shooting. SA Sakowski dispatched an agent to interview the appellant while additional information was gathered at the scene.

SA Sakowski learned from another witness that the murder victim had called him during the early morning hours stating that he had been in an argument with the appellant. This witness also retrieved two voice messages from the appellant; the first message was received at approximately 0330 telling the witness to inform the murder victim that the appellant had something for him, and the second message, received at approximately 0400, stating that the appellant had beaten the victim in a video game and that he, the appellant, was now the champ. Based on this information, SA Sakowski interrupted the appellant's interview to ask the agent to find out what the appellant **[*5]** was wearing the night before the shooting. When the clothing description matched that given by the witness who saw someone run from the scene, SA Sakowski instructed the agent to terminate the interview until she arrived.

Upon arrival at the appellant's duty station, SA Sakowski took over the appellant's interview at approximately 1100. She advised the appellant that he was suspected of murder and went over his rights with him. The appellant initialed each right, signed the rights waiver form, and agreed to speak with the agent. During the course of the interrogation, the appellant agreed to permissive searches of his car and his apartment. Upon completion of these searches, the agent and the appellant arrived at the NCIS office for additional interrogation at approximately 1700.

At the NCIS office, SA Warshawsky was assigned to conduct the interrogation with SA Sakowski sitting in and taking notes. The interrogation began at 1806 and the appellant signed a written statement at approximately 2206, denying any involvement in the murder. Shortly thereafter, and in front of the appellant, SA Warshawsky tore up what the appellant thought was his original statement, but which was actually **[*6]** a copy, claiming the statement was a lie, and continued the interrogation. The appellant finally confessed to the murder at approximately 2315 and signed his written confession at approximately 0130 on 5 May 2001.

Forensic evidence determined that the victim's injuries were caused by .40 caliber rounds fired from a Glock handgun. Experts testified that "blow back" would have occurred from the short-range shot to the back of the victim's head, usually resulting in the victim's blood and brain matter getting on the weapon and the person firing the weapon. Neither the victim's blood nor brain matter was found on the clothing or jewelry the appellant claimed he worn the night he was out with the victim. The murder weapon was never located.

Court Rules

At issue in the appellant's first assignment of error is the validity of N.M.Ct.Crim.App. Rule 4-4.h (now N.M.Ct.Crim.App. Rule 4-3.f), which places a 50-page limit on principal briefs absent good cause shown. [2] Pursuant

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[2] "Except by permission of the Court, principal briefs shall not exceed 50 pages and reply briefs shall not exceed 25 pages, exclusive of indexes and appendices. Requests to file briefs in excess of specified limits will be granted only in the most extraordinary cases." N.M.Ct.Crim.App. Rule 4-4.h.

to this rule, the appellant's request to file a 115-page brief was denied, and the appellant claims he was prejudiced by that denial. [3] The appellant asks this court to amend its rules to be consistent with Court **[*7]** of Criminal Appeals (CCA) Rule 15 which, by silence, does not place page limits on briefs, and to reconsider our decision rejecting the appellant's 115-page brief. Alternatively, in his second assignment of error, the appellant claims that this court abused its discretion by rejecting the appellant's brief, and seeks the same remedy. The Government argues that where CCA Rules are silent, service Courts of Criminal Appeals may properly act. We must decide what rule-making authority a Court of Criminal Appeals has, and whether N.M.Ct.Crim.App. Rule 4-4.h (now N.M.Ct.Crim.App. Rule 4-3.f) falls within that authority.

[*8] *Article 66(f), UCMJ*, states: "The Judge Advocates General shall prescribe *uniform rules* of procedure for Courts of Criminal Appeals. . . ." (Emphasis added). Pursuant to that Article, the Judge Advocates General of the armed forces jointly enacted the CCA Rules on 1 May 1996. *See* 44 M.J. LXIII (1996). Among these rules is CCA Rule 15(a), which covers assignments of error and briefs generally. This uniform rule requires the appellant's brief to be in the format prescribed by Attachment 2 to the CCA Rules, and be "typed or printed, doubled-spaced on white paper, and securely fastened at the top." The rule, however, is silent on how many pages a brief may be.

A service Court of Criminal Appeals' rule making authority is addressed by CCA Rule 26, which states that "the Chief Judge of [each service Court of Criminal Appeals] has the authority to prescribe *internal rules* for the Court." (Emphasis added). Our superior court has determined that "internal rules" means those rules that apply to persons belonging to the court, and not to persons external to the court, such as the parties. Internal rules established pursuant to CCA Rule 26, however, cannot conflict with any CCA **[*9]** Rule. ***United States v. Gilley, 59 M.J. 245, 247 (C.A.A.F. 2004)***.

At issue in *Gilley* was A.F.Ct.Crim.App. Rule 2.2, which dictated that briefs in remand cases be filed within seven days after the party is notified the record had been received by the Appellate Records Branch of the Military Justice Division, and if not filed within that time, the court would treat the case as a merits submission without assignment of error. That filing deadline, however, varied from the filing deadline established by CCA Rule 15(b), which provides: "Any brief for an accused shall be filed within 60 days after appellate counsel has been notified of the receipt of the record in the Office of the Judge Advocate General." Our superior court found that our sister court's rule was invalid because: (1) it was at variance with CCA Rule 15(b); [4] **[*10]** and, (2) it applied to persons external to the court - the parties - and therefore was in violation of CCA Rule 26. [5] ***Id. at 247-48***.

The narrow question before us is whether an individual Court of Criminal Appeals may create its own exclusive rule that has both internal and external impact, when that rule does not vary with, or logically conflict with, a CCA Rule. The appellant's theory is: (1) that service Courts of Criminal Appeals may not impose page limits on principal briefs because the failure of the CCA Rules to address this issue means that no limitations were intended by those rules; and, (2) that placing page limits on principal briefs is an external rule controlling the parties and therefore in violation of CCA Rule 26. Following the appellant's logic, service Courts of Criminal Appeals must accept any brief of any length as long as it is in the proper format and "typed or printed, doubled-spaced on white paper, and securely fastened at the top." CCA Rule 15(a).

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[3] Upon this court's rejection of his 115-page brief, the appellant petitioned our superior court for extraordinary relief in the form of a writ of mandamus, and filed motions for a stay of proceedings and to attach his 115-page brief to the record of trial. Our superior court denied the appellant's petition for extraordinary relief and motion for stay of proceedings, and granted his motion to attach, without discussion. *See* ***Campbell v. Navy-Marine Corps Court of Criminal Appeals, 63 M.J. 261 (C.A.A.F. 2006)***(summary disposition).

[4] "Because the seven-day deadline for filing briefs in cases on remand under AFCCA Rule 2.2 *varies* from the 60-day timeline in the uniform rule, it is invalid." ***Gilley, 59 M.J. at 247*** (emphasis added).

[5] "Because AFCCA Rule 2.2 applies to external, not internal, entities, and because it *logically conflicts* with the uniform guidance of CCA Rule 15(b), it is outside the scope of CCA Rule 26." ***Gilley, 59 M.J. at 248*** (emphasis added).

[*11] We believe it illogical to conclude that the Judge Advocates General intended, by their silence, that appellants can file any size pleading, and that service Courts of Criminal Appeals are without authority to control such measures. We realize that rules controlling page limits impact persons external to the court, and may result in different rules being imposed by different service Courts of Criminal Appeals. However, a page limit rule, unlike the challenged rule in *Gilley*, also impacts those persons internal to the court who must receive, store, and review the pleadings.

CCA Rule 26 reserves to the "Chief Judge [of each service Criminal Court of Appeals]" the authority to "prescribe internal rules for [that] court." We do not interpret this rule as limiting service Courts of Criminal Appeals to internal rule-making only. Instead, we conclude that CCA Rule 26 expresses a clear intent by the Judge Advocates General not to micromanage the internal operation of service Courts of Criminal Appeals, and to reserve to each court the right to prescribe its own internal rules. CCA Rule 26 should not be interpreted as completely prohibiting service Courts of Criminal Appeals from **[*12]** enacting rules that have some external impact.

CCA Rules are silent on many issues, including page limits for appellate pleadings. Any rule concerning page limits will have both internal and external impact. It is more logical to conclude that when CCA Rules are silent on an issue, individual service Courts of Criminal Appeals may act on those issues as long as any rule created has some internal impact and does not vary from or logically conflict with an existing CCA Rule. We believe this result is consistent with our superior court's holding in ***Gilley***, which addressed an individual service Court of Criminal Appeals' rule that was purely external and in direct conflict with an existing CCA Rule.

Absent specific guidance from our superior court to the contrary, we conclude that N.M.Ct.Crim.App. Rule 4-4.h (now N.M.Ct.Crim.App. Rule 4-3.f) is a valid exercise of this court's authority, and that its enforcement in this case was not an abuse of discretion. Even if, however, our rule limiting the length of appellate pleadings is an invalid exercise of authority, or we abused our discretion in enforcing that rule whether it is valid or not, the appellant has not been prejudiced by **[*13]** our rejection of his 115-page brief. Our superior court granted the appellant's motion to attach the previously rejected brief to the record of trial, and the appellant cites to and incorporates large portions of that brief throughout his second brief, filed on 1 May 2006. Therefore, the rejected brief is part of the record of trial. Because the appellant has not been prejudiced, he is not entitled to any relief. *See* Art. 59(a), UCMJ ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.").

Abuse of Discretion

For his fourth through sixth, eighth and ninth assignments of error, the appellant claims that several of the military judge's rulings were an abuse of discretion. We will address the abuse of discretion standard generally, and then address each challenged ruling specifically. [6]

[*14] On the issue of abuse of discretion, our superior court has stated:

> An abuse of discretion means that "when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993)(citation omitted). We have also stated, "We will reverse for an abuse

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[6] We have considered the appellant's third assignment of error challenging the legal and factual sufficiency of the evidence. Considering the evidence in the light most favorable to the prosecution, we conclude that a reasonable factfinder could have found all the essential elements of premeditated murder beyond a reasonable doubt. *See* United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006)(citing United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)). After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *See* Turner, 25 M.J. at 325. Both standards have been met. This assignment of error is without merit.

> of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995)*. Further, the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range. (Citation omitted).

United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004).

1. Investigative assistance.

For his fourth assignment of error, the appellant claims that the military judged abused his discretion by denying the appellant's motion **[*15]** for independent investigative assistance. We disagree.

An accused has a right to investigative assistance at the Government's expense if he demonstrates the necessity for such assistance. *United States v. Gray, 51 M.J. 1, 30 (C.A.A.F. 1999)*(quoting *United States v. Robinson, 39 M.J. 88 (C.M.A. 1994))*. In order to carry his burden of demonstrating necessity, an appellant must show that a reasonable probability exists that: (1) an expert would be of assistance to the defense; and, (2) that denial of the requested expert assistance would result in a fundamentally unfair trial. *United States v. Lee, 64 M.J. 213, 217 (C.A.A.F. 2006)*(quoting *United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005)*(citation omitted)).

> To test the adequacy of this showing of necessity, we apply a three-part test: "[t]he defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." *Id*. (footnotes omitted) (citations omitted).

[*16] *Lee, 64 M.J. at 217*.

The appellant submitted a request to the convening authority for an independent investigator to interview potential witnesses. That request was denied and the request was renewed as a written motion for appropriate relief. Appellate Exibit V. Within the written motion, the defense claimed that an independent investigator was primarily necessary because "there are approximately fifteen pertinent witnesses that have not been interviewed." AE V at P 4. At trial, the defense team requested the military judge to consider the motion's written enclosures, [7] but otherwise did not present evidence on the motion. Record at 13.

When questioned by the military judge, the trial defense counsel and assistant trial defense counsel described their combined case loads, not including the appellant's case, as six general courts-martial at various procedural stages, two **[*17]** special courts-martial, and two administrative separation boards. Trial defense counsel had been assigned to the case for four months and the assistant trial defense counsel had been assigned for three months. [8] Their administrative support consisted of one legalman who served four defense counsel.

The defense team argued that an independent investigator is better suited for locating and interviewing witnesses and that the investigator could testify at trial. Without that assistance, the defense team would have to have a third party present for each interview in order to have someone who could later testify if necessary. This, they argued, would deplete their office resources. Trial defense counsel also argued that the murder victim was a drug dealer and some of the potential witnesses are not comfortable coming on base to be interviewed, and counsel was not comfortable going to those witnesses. The defense team did not feel that an NCIS agent would **[*18]** be suitable, because NCIS had already made up its mind that the appellant committed the murder and was not interested in looking for an alternate suspect. Ultimately, the defense team requested an independent investigator from the Army or Air Force, rather than a paid investigator.

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[7] The enclosures consisted of the defense request to the convening authority and the response denying the request.

[8] Civilian defense counsel had not yet entered his appearance.

The military judge denied the appellant's motion, finding as fact the defense team's current case load, administrative staffing, and length of time on the case as previously stated by counsel. Applying the proper three-pronged standard for evaluating a showing of necessity, the military judge found that the appellant failed all three prongs. First, the defense wanted investigative assistance for the purpose of interviewing witnesses and testifying at trial. Second, interviewing witnesses is a basic function of trial work that does not require an expert, and the investigator is bound by the same hearsay rules of evidence as any third party who would sit in on a witness interview. Therefore, an independent investigator would not accomplish anything in addition to what the defense team could do for themselves. Third, the defense team's combined case load was nothing extraordinary, and interviewing 15 witnesses **[*19]** was not a significant task given the amount of time left before trial. The military judge later reconsidered the defense request and again denied the request.

We find that the military judge's findings of fact are supported by the record, are not clearly erroneous, and we adopt them as our own. His legal conclusions are based on the correct application of pertinent case law, and therefore are not influenced by an erroneous view of the law. We find no abuse of discretion. This assignment of error is without merit.

2. Uncorroborated confession

For his fifth assignment of error, the appellant claims the military judge abused his discretion by admitting the appellant's uncorroborated confession into evidence, in violation of Military Rule of Evidence 304(g), Manual for Courts-Martial, United States (2000 ed.).

Mil. R. Evid. 304(g) provides: "An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if *independent evidence* . . . has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." (Emphasis added). Independent evidence is evidence **[*20]** that is not based on or derived from the accused's extrajudicial statements. *United States v. Arnold, 61 M.J. 254, 256 (C.A.A.F. 2005)*(citing *Opper v. United States, 348 U.S. 84, 93, 75 S. Ct. 158, 99 L. Ed. 101 (1954))*.

The corroborating evidence requirement is intended to guard against convictions based on false or coerced confessions. Each element of an offense, however, does not have to be confirmed. *Id. at 257*. The required inference of truth may be drawn from a quantum of corroborating evidence that "may be very slight." *United States v. Melvin, 26 M.J. 145, 146 (C.M.A. 1988)*(citing *United States v. Yeoman, 25 M.J. 1 (C.M.A.1987))*. We review a military judge's decision to admit the appellant's confession under an abuse of discretion standard. *United States v. Seay, 60 M.J. 73, 77 (C.A.A.F. 2004)*(quoting *United States v. McCollum, 58 M.J. 323, 335 (C.A.A.F. 2003))*.

We will address the essential facts admitted and the evidence that corroborates those facts.

a. The appellant went out with the victim the night before the murder.

The appellant's confession states that the appellant planned to meet with **[*21]** the victim around 2200 on 3 May 2001 but he was running late. The appellant's roommate testified that the appellant left their apartment at 2245 to 2250 to meet with the victim.

b. The appellant had a verbal and physical confrontation with the victim.

The appellant's confession states that the appellant was involved in a verbal and physical confrontation with the victim around 0300 on 4 May 2001 in the Environmental Center parking lot on board the Pearl Harbor Naval Station. A friend of the murder victim testified that the victim called him at approximately 0300 and told him he had been in an argument with the appellant and had pushed the appellant down. Another witness testified that he observed two African-American males engaged in a verbal and pushing confrontation in the Environmental Center parking lot at approximately 0300 on 4 May 2001. Another witness testified that at 0258 on 4 May 2001 he was awakened in his barracks room at Grabunas Hall by two African-American males arguing in the Environmental Center parking lot. Evidence showed that the Environmental Center parking lot was next to the Grabunas Hall barracks, and that both the appellant and the murder victim were African-American **[*22]** males.

c. The appellant drove home to get his handgun.

The appellant's confession states that he left the base at about 0300 and drove to his off-base home where he retrieved his Glock .40 caliber handgun, put it into his pants' front right pocket and returned to the base. The appellant's roommate testified that the appellant arrived home at approximately 0300, got his gun from the closet, put it into his pants' front right pocket and left again. The range master for the base armory testified that the appellant shot at the range twice and that he brought a Glock .40 handgun each time.

d. How the appellant was dressed and his personal appearance.

The appellant's confession states that he was wearing long black shorts, a white t-shirt under a sky blue button shirt, and beige shoes with white ankle socks when he left to go out with the victim. The appellant's roommate testified that the appellant was wearing black shorts, a light blue shirt with a white t-shirt underneath, and tan shoes with white ankle boots when he left to go out with the victim, and that the appellant had a shaved head. A witness who heard the gun shots outside Grabunas Hall described the person running from the **[*23]** scene as a dark-skinned male who had a shaved head or really short hair, wearing a light blue button up plaid shirt, long dark shorts, and white tennis shoes. The witness could not identify the appellant's shirt in a photograph nor identify the appellant.

e. The appellant shot the victim.

The appellant's confession states that he arrived back at the base around 0340 and proceeded to the parking lot where he and the victim had the earlier argument. The appellant waited for the victim to return and proceeded on foot to where he could intercept the victim. The appellant confronted the victim, fired one round and watched the victim fall. The appellant closed his eyes and continued to fire his weapon at the victim. The appellant believed he fired three or four times and then ran from the scene while placing the hand gun back in his pants' right front pocket. The autopsy established that there were multiple bullet wounds; however, the most significant wounds resulted from a bullet that struck the victim in the chest and lodged in his spine, and one bullet that struck the victim in the back of the head. Witnesses from the barracks testified that they heard multiple gunshots at approximately **[*24]** 0350. The witness who saw someone run from the scene testified that the person was either placing a gun in his pants' front right pocket or was holding his shorts up with his right hand as he ran.

f. The victim was shot with a Glock .40 caliber handgun.

The appellant's confession states that he retrieved his Glock .40 caliber handgun and put it in his pants' front right pocket. When he confronted the victim, he drew his handgun from his pants' front right pocket and shot the victim. Expert forensics established that the casings found near the victim's body had been fired from a Glock .40 caliber handgun.

Based on the above, we conclude that the Government submitted substantial independent evidence to establish the trustworthiness of the appellant's statement. *See* *Opper, 348 U.S. at 93*. That independent evidence "corroborates the essential facts admitted to justify sufficiently an inference of their truth." Mil. R. Evid. 304(g). Under these circumstances, we conclude that the military judge did not abuse his discretion by admitting the appellant's confession into evidence. This assignment of error is without merit.

3. Motion to Suppress Confession

For his sixth **[*25]** assignment of error, the appellant contends the military judge abused his discretion by denying the appellant's motion to suppress his oral and written statements to NCIS. The appellant claims his statements were coerced in violation of *Article 31(d), UCMJ*, and the *Fifth Amendment* prohibition against compulsory self-incrimination. We disagree.

The *Fifth Amendment* provides that "no person … shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law…." *U.S. Const. amend. V*. That constitutional standard has been mandated in *Article 31(d), UCMJ*, which prohibits the admission of any statement

into evidence that is "obtained … through the use of coercion, unlawful influence, or unlawful inducement…." *See* United States v. Ellis, 57 M.J. 375, 378 (C.A.A.F. 2002). An accused's confession, therefore, must be voluntary to be admissible against him. *Id*. (citing Dickerson v. United States, 530 U.S. 428, 433, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000)).

Voluntariness of a confession is a question of law that an appellate court independently reviews *de novo*. United States v. Cuento, 60 M.J. 106, 108 (C.A.A.F. 2004) **[*26]** (quoting United States v. Bubonics, 45 M.J. 93, 94-95 (C.A.A.F. 1996)). The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker. *Id*. Ploys intended to mislead a suspect or lull him into a false sense of security do not render a statement involuntary provided the ploys do not rise to the level of compulsion or coercion. United States v. Jones, 34 M.J. 899, 907 (N.M.C.M.R. 1992)(citation omitted). To be voluntary, a confession must be the product of the suspect's own balancing of competing considerations. *Id.* If, however, the suspect's will was overborne and his capacity for self-determination was critically impaired, the use of his confession would offend due process. Cuento, 60 M.J. at 108.

Whether the confession is voluntary requires the examination of the "totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." Ellis, 57 M.J. at 378 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)(internal quotation marks omitted)). In describing the "totality **[*27]** of circumstance" test, our higher court stated:

> In examining the totality of circumstances, we do not look at "cold and sterile lists of isolated facts; rather, [we] anticipate[] a holistic assessment of human interaction." United States v. Martinez, 38 M.J. 82, 87 (C.M.A. 1993). The totality of the circumstances include the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions.

Id.at 379.

We review a military judge's ruling on a motion to suppress for abuse of discretion. United States v. Monroe, 52 M.J. 326, 330 (C.A.A.F. 2000). "We review factfinding under the clearly-erroneous standard and conclusions of law under the *de novo* standard." United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995). "In reviewing a ruling on a motion to suppress, we consider the evidence 'in the light most favorable to the' prevailing party." United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996) **[*28]** (citations omitted). The military judge made 69 specific findings of fact followed by seven pages of conclusions of law. [9] We find that the military judge's findings are supported by the record, are not clearly erroneous, and we adopt them as our own.

Here, the appellant was 23 years old and a high school graduate. He had been on active duty for just under two years and was promoted to yeoman third class. The appellant possessed low average intelligence; however, his performance evaluations reflect a capable Sailor who was recommended for a program designed to promote the transition of enlisted personnel to commissioned officers. He had recently been **[*29]** entrusted with the high-visibility position of duty driver for the commanding officer, executive officer, and command master chief of Naval Station, Pearl Harbor. The appellant was no stranger to adversarial situations with law enforcement. Prior to enlisting, the appellant had been arrested and convicted multiple times. Some of the law enforcement encounters resulted in custodial interrogations.

The appellant had been out all night consuming alcohol the night before his interrogation, and had little more than three hours of sleep prior to reporting for duty that morning. His initial contact with NCIS on 4 May 2001 was during a witness interview, followed by an interrogation beginning at approximately 1100 in the command master chief's

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[9] In response to this court's order of 15 February 2007, the Government filed a document captioned "United States v. Hawan T. Campbell" and entitled "Findings of Fact and Conclusions of Law on the Defense Motion to Suppress Oral and Written Statements Made by the Accused to NCIS Agents" dated 7 April 2003, and bears the military judge's name but not his signature.

office. At that time the appellant was informed that he was suspected of murder and was advised of his rights orally and in writing. The appellant signed his rights statement at 1125 and he was interrogated until 1135 and again from 1200 until 1220, including the time to fill out a form authorizing a consent search of his apartment.

The appellant was transported by NCIS to his apartment, arriving at 1240. There, he remained in the NCIS car until the **[*30]** search began at 1425, with a short break when he was taken to a local business to use the bathroom. The car was running with the air conditioning on for a short period of time, but the car was later turned off with a car door or window left open. The apartment search continued until 1616. During the search, the appellant was in the apartment watching television, was allowed to obtain food and drink if desired, and was allowed to use the bathroom. After the apartment search, the appellant rode with NCIS to another location to search his roommate's car, which lasted from 1634 to 1638.

The appellant arrived at the NCIS office at 1700, where he remained alone in an interrogation room for more than one hour before the interrogation began at 1806. He was then interrogated until 1943, at which time the appellant agreed to make a written statement denying his involvement in the murder. The NCIS agents and the appellant worked on the statement until it was approved and signed by the appellant at 2208. The parties took a break until 2225, during which time pizza was brought in for everyone, including the appellant. Another round of interrogation began at 2225 resulting in the appellant's oral **[*31]** admission at 2315 that he had shot the victim. The parties again began work on a written statement that was eventually approved and signed by the appellant at 0131 the next morning.

During the course of the interrogation, the NCIS agents tried to convince the appellant that it was hopeless to deny his involvement in the murder and tried to convince him that his only way out was to confess and hope that his commanding officer would be lenient. In response to the appellant's inquiry into potential sentences, the NCIS agents advised the appellant that the maximum penalty for premeditated murder was "the needle." The NCIS agents tried to convince the appellant that the murder victim's brain matter or blood was found on the appellant's clothing. [10] The interrogators also tore up what the appellant thought was his first written statement in front of him, called it a lie, and continued the interrogation. The appellant felt hung over and dehydrated from his prior alcohol consumption, and tired as a result of his lack of sleep. Although offered food and beverage throughout the entire 14-hour custody period from 1100 to 0131, the appellant declined the majority of the offers.

[*32] When evaluating the totality of circumstances, we look not only to what occurred but also to what did not occur, such as threats or physical harm. *Ellis, 57 M.J. at 379* (citing *Payne v. Arkansas, 356 U.S. 560, 566, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958)*). There is no evidence of threats or physical harm. Here, as in *Ellis*, the questioning "did not continue for days; there was no incommunicado detention, and no isolation for a prolonged period of time." *Id*.

Viewing all the facts taken together, we find that the appellant was old enough and intelligent enough to make an informed waiver of his rights, and that his waiver was voluntary. We further conclude that the NCIS agents' interrogation tactics were not inherently coercive and did not overcome the appellant's will to resist. We therefore conclude that the appellant's statements were voluntary. *See United States v. Washington, 46 M.J. 477, 482 (C.A.A.F. 1997)*(accused's confession held voluntary when he had been continuously interrogated for more than two days and subjected to mistreatment). Under these circumstances, we conclude that the military judge did not abuse his discretion by denying the appellant's **[*33]** motion to suppress his statements to NCIS. This assignment of error is without merit.

4. Motion for Mistrial

For his eighth assignment of error, the appellant claims that the military judge abused his discretion by denying the appellant's motion for mistrial. We disagree.

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[10] The appellant, however, knew that it was his own blood on his clothing and he told the interrogators it was his own blood. Forensic evidence ultimately proved the appellant correct; therefore, we do not see how the appellant could have been misled by the interrogators' assertions.

During a break in the civilian defense counsel's cross-examination of a key Government witness, the appellant and his detailed counsel had an *ex parte* conference with the military judge pursuant to R.C.M. 802. The purpose of that *ex parte* conference was to discuss the appellant's desire to terminate his civilian defense counsel's participation in the courtroom proceedings. When the parties came back on the record, the military judge summarized the R.C.M. 802 conference and agreed to hold an *ex parte* Article 39(a), UCMJ, session on the issue. [11] When all the parties returned on the record, the appellant announced that he wanted his civilian defense counsel to remain on the case but outside the courtroom in an advisory capacity only. The appellant chose to proceed with his detailed trial defense counsel and assistant defense counsel in the courtroom. The military judge granted that request after **[*34]** a full inquiry.

As part of the civilian defense counsel's removal, the defense team orally moved for a mistrial in order to remove any taint from the civilian defense counsel's opening statement and cross-examination of the Government witness. Specifically, the defense team moved for a mistrial because: (1) the civilian defense counsel stated in his opening statement that the appellant would testify, thereby stripping the appellant of his right to remain silent when no decision had been made as to whether the appellant would take the stand; (2) the civilian defense counsel provided ineffective assistance of counsel during his opening statement by making several promises that the defense will not be able to keep, including that the members will be able to write down the name of the true killer at the end of the trial; (3) the civilian defense counsel provided ineffective assistance of counsel during his opening **[*35]** statement by advancing theories that the defense cannot and will not be advancing in its case-in-chief or in rebuttal; (4) the civilian defense counsel provided ineffective assistance of counsel during his opening statement by misrepresenting the evidence, and referring to evidence that the defense was not going to use at trial; (5) the civilian defense counsel and the appellant have a difference of opinion as to the appellant's guilt; (6) the civilian defense counsel stated that his heart was not in the appellant's case and acknowledged that other circumstances have taken priority over the appellant's case; and, (7) the civilian defense counsel failed to prepare his assigned one-third of the defense witnesses for trial. [12]

[*36] In the alternative, trial defense counsel asked for remedial measures in the form of: (1) an instruction concerning the civilian defense counsel's absence from the defense table; (2) an instruction that the appellant is not required to testify, and that the appellant is not required to prove anything; (3) that the civilian defense counsel's opening argument be stricken from the record and members be instructed to disregard it; (4) an opportunity to present a brief opening statement to advance their theory of the case and present the facts of the case as the remaining defense team sees them; (5) striking the Government witnesses' cross-examination, or wide latitude in continuing the cross-examination; and, (6) a continuance to find a proper division of labor among the remaining defense team.

A military judge's decision to grant or deny a mistrial is reviewed on appeal for abuse of discretion. Gore, 60 M.J. at 187. Our superior court has long held that declaring a mistrial is a drastic remedy and that courts must look to see whether alternative remedies are available. *Id*. (citing *United States v. Cooper, 35 M.J. 417, 422 (C.M.A. 1992)*; *see also* **[*37]** United States v. Pinson, 56 M.J. 489, 493 (C.A.A.F. 2002)(citing United States v. Morrison, 449 U.S. 361, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981)(concluding that any action taken "had to be 'tailored to the injury suffered'")). When an error can otherwise be rendered harmless, dismissal is not an appropriate remedy. United States v. Mechanik, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986). A mistrial is appropriate, however, when an accused would be prejudiced by proceeding with the trial or no useful purpose would be served by continuing with the proceedings. United States v. Green, 4 M.J. 203, 204 (C.M.A. 1978)(citing United States v. Gray, 22 C.M.A. 443, 47 C.M.R. 484, 486 (C.M.A. 1973)).

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[11] The "ex parte" hearing was transcribed, sealed, and made a part of the record of trial. AE CCXXI.

[12] In his seventh assignment of error, the appellant claims these same facts establish ineffective assistance of counsel. We disagree. Absent prejudice, there cannot be ineffective assistance of counsel. United States v. Quick, 59 M.J. 383, 386 (C.A.A.F. 2004). The appellant has failed to meet his burden to demonstrate prejudice. This assignment of error is without merit.

The military judge initially denied the motion for mistrial with little comment. On reconsideration, the military judge again denied the defense motion for a mistrial, but announced findings that: (1) the civilian defense counsel's opening statement presented the same theory of the case that the defense had asserted throughout the trial - the appellant's confession is false, involuntary and coerced, and that combined with the lack of scientific evidence and rush to judgment, that the appellant **[*38]** is not the perpetrator; (2) opening statements are not evidence; (3) while certain promises were made in the opening statement, the defense had extensively *voir dired* the members regarding the appellant's right to remain silent, including scenerios where the appellant did and did not testify; (4) the defense team had made a tactical choice to change courtroom counsel; and, (5) civilian defense counsel did not provide ineffective assistance in his opening statement or cross examination of the Government's witness.

As remedial measures, the military judge allowed the defense more latitude than usual in finishing the cross examination of the Government witness, and agreed to give a modified version of the defense-proposed instruction concerning civilian defense counsel's absence from the courtroom. That instruction was given before cross-examination of the Government witness continued, and the members indicated they could follow that instruction, as follows:

> There's one item I'd like to bring to your attention first off this morning. You'll notice that Mr. Phil Cave is not present in the courtroom today. Mr. Cave will not be present for part or all of the remainder of this trial. **[*39]**
> Now, let me instruct you that you should not in any way draw any adverse inference against the remaining in-court defense team due to Mr. Cave's absence. Mr. Cave's absence shall in no way be used to reflect negatively on Petty Officer Campbell or on his case.
> Do all members understand and agree to abide by that instruction? Indicate affirmative response from all members.

Record at 2403.

We agree with the military judge's findings and concur with the remedial measures he took to render harmless any prejudice that may have occurred. The instruction given to the members rendered civilian defense counsel's absence from the courtroom harmless. As to cross-examination, we note that the civilian defense counsel was relieved early morning on a Friday with cross-examination of the Government witness scheduled to resume on the following Monday, giving trial defense counsel more than a full weekend to prepare for cross-examination. The trial defense counsel who eventually conducted the remaining cross-examination also cross-examined the same witness during motions involving the same factual area. As for civilian defense counsel's statement that the appellant would testify, we note **[*40]** that the appellant did testify. He does not claim that, but for civilian defense counsel's opening statement, he would not have testified. In addition, the military judge gave the standard findings instruction concerning the presumption of innocence, advising the members that the burden never shifts to the appellant.

Under all of the circumstances, any prejudice that could have stemmed from the civilian defense counsel's opening statement, cross-examination of the Government witness, or being absent from the courtroom was rendered harmless through proper remedial measures. We therefore conclude that the military judge did not abuse his discretion by denying the appellant's motion for mistrial. This assignment of error is without merit.

5. Defense motion for continuance

For his ninth assignment of error, the appellant claims that the military judge abused his discretion by denying the defense continuance requests. Trial defense counsel made several motions for continuance after the civilian defense counsel was released from in-court responsibilities. Those requests were made in order to gain additional time to prepare for witnesses who had been assigned to the civilian defense **[*41]** counsel.

We review a military judge's decision to deny a request for continuance for an abuse of discretion. *United States v. Wiest, 59 M.J. 276, 279 (C.A.A.F. 2004)*(citing *United States v. Weisbeck, 50 M.J. 461, 464-66 (C.A.A.F. 1999))*. In determining whether the judge abused his discretion, we consider the following factors:

> [S]urprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.

United States v. Miller, 47 M.J. 352, 358 (C.A.A.F. 1997)(citations omitted). Applying the relevant factors to the appellant's case, we conclude that the military judge did not abuse his discretion.

As for surprise, the only real surprise was the appellant changing his civilian defense counsel's status from in-court to out-of-court representation. The appellant claims this change of status resulted from civilian defense counsel's opening **[*42]** statement and cross-examination of a key Government witness.

We do not see how the appellant was surprised by the civilian defense counsel's assertion of the defense theme that had permeated the entire defense case from the beginning - the appellant's confession was false, it was coerced by NCIS interrogation tactics, and that someone else committed the murder. Nor do we understand how the appellant was surprised by the Government witness' cross-examination when that witness testified at the *Article 32, UCMJ*, hearing, and on the motions concerning the same issues. The appellant may have been surprised by the civilian defense counsel stating that the appellant will testify, however, he did eventually testify.

While the appellant's continuance requests were timely, were for a reasonable amount of time, and not made in bad faith, the appellant was not denied access to or the ability to present any evidence as a result of the military judge's rulings. Trial defense counsel and the assistant trial defense counsel may not have had as much time as they wanted to prepare to cross-examine Government witnesses and prepare their own witnesses, however, that did not affect the cross-examination **[*43]** that they conducted or the evidence they presented. Review of the record shows that each Government witness was thoroughly cross-examined, and each defense witness was well-prepared to testify, thus demonstrating that the defense team was able to adequately prepare in the time they had available. The appellant does not suggest what additional cross-examination his team would have conducted or additional evidence they would have presented if the continuances had been granted.

"Where 'no harmful consequence resulted from denial of a continuance, there is no ground for complaint, and where the withdrawing or discharged counsel was adequately replaced and the defense properly presented, it is generally held that refusal of a postponement was not prejudicial to the accused.'" *Miller, 47 M.J. at 358-59* (quoting *United States v. Kinard, 21 C.M.A. 300, 45 C.M.R. 74, 80 (C.M.A. 1972)*(citations omitted), quoting *17 Am Jur 2d, Continuance, § 35*, Withdrawal or discharge of counsel, at 158.). Here, there is no showing of prejudice flowing from the military judge's ruling. We conclude that the military judge did not abuse his discretion. This **[*44]** assignment of error is without merit. [13]

Conclusion

The findings and sentence are affirmed as approved below.

Judge KELLY and Judge FREDERICK concur.

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[13] We conclude that the appellant's tenth assignment of error claiming cumulative error is without merit. "The implied premise of the cumulative-error doctrine is the existence of errors, 'no one perhaps sufficient to merit reversal, [yet] in combination [they all] necessitate the disapproval of a finding' or sentence. *United States v. Banks, 36 M.J. 150, 170-71 (C.M.A. 1992)*. Assertions of error without merit are not sufficient to invoke this doctrine." *United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999)*. We have found no merit in appellant's assertions of error.