IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private (E-2) **TREVON K. COLEY** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. ARMY 20220231 USCA Dkt. No. 24-0184/AR

PATRICK MCHENRY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF Bar No. 37900

ROBERT W. RODRIGUEZ
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 37706

PHILIP M. STATEN
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 33796

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

Granted Issue

WHETHER THE JUDICIAL REASSIGNMENT OF APPELLANT'S CASE WARRANTS REVERSAL.

Statement of Jurisdiction

The Army Court of Criminal Appeals [Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866 (2019). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2019).

Statement of the Case

On May 6, 2022, a general court-martial composed of officers convicted Appellant, Private (E-2) Trevon K. Coley, contrary to his pleas, of one specification each of involuntary manslaughter and aggravated assault, in violation

of Article 119 and Article 128, UCMJ, 10 U.S.C. §§ 919, 928. (JA024, JA234). Consistent with his pleas, Appellant was convicted of one specification each of conspiracy to obstruct justice and violation of a lawful general regulation, in violation of Article 81 and Article 92, UCMJ, 10 U.S.C. §§ 881, 892. (JA025-026).

The panel sentenced Appellant to a bad-conduct discharge, eight years of confinement, reduction to E-1, and total forfeiture of all pay and allowances. (JA135). On June 1, 2022, the convening authority took no action on the findings or sentence. (JA136). On June 21, 2022, the military judge entered Judgment. (JA137). Appellant is still in confinement.

On June 14, 2024, appellate defense counsel timely filed a Petition for Grant of Review with this Court, and on July 19, 2024, filed the Supplement to the Petition. This Court granted review of one issue on November 8, 2024: whether the judicial reassignment of Appellant's case warrants reversal. (JA001). On March 24, 2025, this Court ordered concurrent briefing by the parties to address the effect of *United States v. Davis*, 2025 CAAF LEXIS 112; __M.J. __ (C.A.A.F. 2025) on the granted issue. (JA002).

Summary of Argument

In *Davis*, this Court first looked to whether Judge Pritchard's "act of detailing" another judge to the case was "a reassignment, a removal, a recusal, or a

disqualification." *Davis*, 2025 CAAF LEXIS 112, at *12. If Judge Pritchard was disqualified, the newly detailed judge would also be disqualified.

This Court discussed three reasons why Judge Pritchard was not disqualified. First, this Court found Judge Pritchard "viewed his action as a reassignment and acted in accordance with his belief." *Id*. He possessed the requisite authority and had routinely reassigned cases to the newly detailed judge. *Id.* Second, Judge Pritchard was not removed by the Chief Trial Judge. *Id.* Third, this Court found nothing would call into Judge Pritchard's impartiality in Davis's case. "[W]e are not persuaded by [Davis's] argument that Judge Pritchard's impartiality could reasonably be questioned and that he therefore was automatically recused/disqualified from this case." *Id.* This Court found Judge Pritchard had a "benign" albeit "misguided" intent in reassigning Davis's case.

In Appellant's case, Judge Pritchard was disqualified. His impartiality could be reasonably questioned. As explained below, he told the judge assuming responsibility for Appellant's case, Air Force Judge Smith, how to proceed: resolve the outstanding motion for unanimous (MFUV) first. He met in public with Judge Smith and Judge Smith's supervisor, and told Judge Smith he would deny the motion and move on. Neither Air Force judge raised nary a peep in protest. Judge Pritchard realized he had gone too far and emailed Judge Smith to disregard his

earlier directive. But the damage was done. Judge Pritchard was disqualified, as was Judge Smith.

Other factors, also explained below, further demand Appellant be afforded a new trial.

Statement of Facts

1. Judge Pritchard finds a military accused has a constitutional right to a unanimous verdict.

On January 3, 2022, in the case of *United States v. Dial*, Colonel Charles Pritchard, Chief Judge of the Army's Fifth Circuit, ruled Dial had a constitutional right to a unanimous verdict. *Davis*, at *3. Ten days later, he issued a similar ruling in *United States v. Ferreira*. *Id*. The government filed writs for extraordinary relief in both cases. *See United States v. Pritchard*, 82 M.J. 686 (Army Ct. Crim. App. 2022).

2. Judge Pritchard removes himself from contested panel cases.

Before the Army Court ruled on the constitutional right to a unanimous verdict, but after his rulings in *Dial* and *Ferreira*, Judge Pritchard removed himself from all contested panel trials between January and June 2022. (JA083-085; JA131-133). He sat on cases only when the accused elected trial by military judge alone or when the accused pleaded guilty. (JA083-085; JA131-133).

Judge Pritchard's stated rationale for removing himself from contested panel trials was that if he were to rule in accordance with his understanding of the law,

"the ruling would result in every case over which [he] presided being stayed for a lengthy period." (JA084). In other words, favorable rulings on motions for unanimous verdicts [MFUVs] would "be inconsistent with military justice," (JA084), ostensibly because the court-martial process would take longer.

Judge Pritchard presided over Appellant's arraignment on January 6, 2022. (JA083). Appellant filed a motion for a unanimous verdict (MFUV) on February 25, 2022. (JA056).

Judge Pritchard followed the same or a similar sequence of events—removing himself once the accused filed a MFUV—in several other cases, to include *Davis*. Despite requests by the defense for an explanation (JA098), and the requirement, per Rules for Courts-Martial [R.C.M.] 813, that the record "reflects the change and the reason for it," Judge Pritchard did not give a reason for his decision to remove himself, despite discussing such reason with the Army Chief Trial Judge.

In Appellant's case, Judge Pritchard's decision to remove himself resulted in the need to detail a judge from a different service branch. (JA085). Judge Pritchard discussed the reasons he should remove himself: because he would find for Appellant and thus clog the judicial docket. (JA083-084). The Army Chief Trial Judge coordinated with the Air Force Trial Judiciary to get a judge from that service to hear Appellant's case. (JA086-090).

In *Davis*, Judge Pritchard detailed LTC Thomas Hynes, a junior judge from the same circuit. (JA131). When Judge Hynes replaced Judge Pritchard in *Davis*, Judge Hynes said that he took the case to "do [his] part to mitigate any potential case backlog." (Brief for Appellee at 4, *United States v. Davis*, No. 24-0152 (C.A.A.F. July 15, 2024)).

But with the Air Force trial judge, COL Pritchard took a more hands-on approach.

3. Judge Pritchard is replaced by Judge Smith.

Air Force Lieutenant Colonel Lance Smith, who was also stationed in Europe, presided over Appellant's case. (JA098). On April 11, 2022, Judge Smith was detailed to Appellant's case by the Air Force's Chief Trial Judge, and on April 14, 2022, Judge Smith first held a telephonic R.C.M. 802 hearing with the parties at the request of trial defense counsel. (JA129; JA098).

Judge Pritchard reached out to Judge Smith to handoff Appellant's case, letting Judge Smith know that the MFUV was pending, with a suggestion that Judge Smith make a ruling on the motion his "first order of business." (JA098).

4. "You will deny the motion and move on."

Around the same time Judge Smith assumed responsibility for Appellant's case, Judge Pritchard and Judge Smith met publicly to discuss Appellant's case at the Base Exchange food court on Ramstein Air Base, Germany. (JA099). Colonel

Sterling Pendleton was also present. (JA099). Colonel Pendleton was chief of the Air Force circuit to which Judge Smith was assigned and his immediate supervisor. (JA098).

At this meeting, Judge Pritchard told Judge Smith "you will deny the motion and move on." (JA099). After returning to his office, Judge Pritchard followed up with an email to Judge Smith. (JA099). In that email, Judge Pritchard wrote that Judge Smith should not take his words at the food court meeting to be "an attempt to influence" Judge Smith in any way. (JA099).

Judge Pritchard did not disclose the nature of this meeting at the food court in Ramstein in his affidavit to the Army Court. (JA083-085). Nor did he disclose that he told Judge Smith he would "deny the motion and move on," even though he was concerned enough about how that might be perceived to send a follow up email about it afterward. And he also did not disclose the fact he sent the follow-up email, despite being ordered to do so by the Army Court. (JA083-085).

5. Judge Smith does not disclose the food court meeting.

Judge Smith did not recall when he learned of Judge Pritchard's decision not to sit on contested panel cases and that this was why he informed Appellant that the change was attributable to Judge Pritchard taking leave. (JA099-100). But after assuming responsibility for Appellant's case, Judge Smith never disclosed the food court meeting, the discussion that occurred at that meeting, Judge Pritchard's

advice to take up the MFUV first, his directive that Judge Smith would deny the motion, or the e-mail Judge Pritchard sent to Judge Smith after the food-court meeting to Appellant at trial. (JA083-085).

Judge Smith denied the MFUV on May 6, 2022. (JA079).

WHETHER THE JUDICIAL REASSIGNMENT OF APPELLANT'S CASE WARRANTS REVERSAL.

Standard of Review

Per *Davis*, this Court applies a *de novo* standard of review when deciding whether the improper judicial reassignment in this case was structural error. *Davis*, at *11 (citing *United States v. Paul*, 73 M.J. 274, 277 (C.A.A.F. 2014). Absent structural error, this Court applies a *de novo* standard of review when deciding whether military judges are disqualified under R.C.M. 902. *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F 2012). This Court reviews prejudice determinations *de novo*. *Davis*, at *20 (citing *United States v. King*, 83 M.J. 115, 120 (C.A.A.F. 2023).

Law and Argument

Unlike in *Davis*, (1) Judge Pritchard told Judge Smith how Judge Smith would rule, indicating he sought a particular result in Appellant's case; (2) Judge Pritchard realized his conduct was improper; (3) Judge Smith realized Judge Pritchard's conduct and subsequently his own conduct was at best questionable; (4)

the conduct tainted the Trial Judiciary of two Armed Forces: the Army and the Air Force; and (5) none of the conduct was disclosed to the Appellant.

1. Unlike in *Davis*, Judge Pritchard was disqualified because he intended to obtain a particular result in removing himself.

In *Davis*, this Court found Judge Pritchard did not tell any other military judge how to rule "either expressly or impliedly." *Davis*, at *5; JA099. But in Appellant's case, Judge Pritchard, the military judge who improperly had Appellant's case reassigned, specifically told Judge Smith to "deny the motion and move on." Thus, Judge Pritchard's "impartiality reasonably could be questioned, and he was therefore automatically recused/disqualified from [Appellant's] case." *Davis*, at 10. Indeed, he indicated he realized his statement called into question his impartiality when he tried to clean up his error, later telling Judge Smith in an email to rule as Judge Smith thought was appropriate.

But Judge Pritchard already made his goal clear: to have Judge Smith deny the motion and move on. Judge Pritchard's reason in having the case reassigned was improper.

Unlike in *Davis*, Judge Pritchard's actions in Appellant's case are not reflective of a routine reassignment within the scope of his own authority as Chief Circuit Judge. Rather, Judge Pritchard needed to discuss Appellant's case with the Chief Trial Judge of the Army and to involve the Air Force Judge Advocate

General in authorizing the cross-detailing of Judge Smith by the Air Force Chief Trial Judge. (JA83, JA127, JA129).

Judge Pritchard's intent, as evidenced by the record, went beyond judicial efficiency to include a foreordained denial of Appellant's motion by Judge Smith – a motion that Judge Pritchard's words and actions indicate he would have granted had he stayed on the case. It also would appear Appellant was deprived of a fair opportunity to make his case on the motion because Judge Smith was likely more wedded to its denial after the meeting with his boss and Judge Pritchard. *See Withrow v. Larkin*, 421 U.S. 35, 57 (1975).

2. Judge Pritchard realized his conduct would appear improper.

After returning to his office, Judge Pritchard followed up with an email to Judge Smith. (JA099). In that email, Judge Pritchard wrote that Judge Smith should not take his words at the food court meeting to be "an attempt to influence" Judge Smith in any way. (JA099). In any event, the disqualification of Judge Pritchard – styled as a reassignment – resulted in a "likelihood of bias" on the part of Judge Smith that was 'too high to be constitutionally tolerable.'" *Williams v. Pennsylvania*, 579 U.S. 1, 4 (2016) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009)).

3. Judge Smith realized the conduct might call into question his impartiality.

Under R.C.M. 902, a military judge is disqualified when a reasonable person "might question the judge's impartiality." R.C.M. 902(a). "Impartiality" is broadly defined as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before a judge." United States Army Judiciary, Code of Judicial Conduct, Terminology (16 May 2008).

Even assuming Judge Pritchard did not intend to order Judge Smith to deny the motion, and even assuming Judge Pritchard truly did not know if Judge Smith would deny appellant's motion, Judge Smith realized the conduct of the judges might call into question the appearance of his impartiality. Judge Smith acknowledged in his affidavit that, "[i]n complete candor, when I discovered the case was being handed off to me from COL Pritchard with an outstanding unanimous verdict motion, I assumed litigation of some sort at the trial level would follow." (JA100).

Despite this, Judge Smith did not disclose the unusual circumstances behind Judge Pritchard's removal of himself or the judges' cross-service food court meeting, concluding that "[u]ltimately, the Defense did not file any motions, or challenge me at trial." (JA100). Judge Smith's surprise at defense's failure to challenge him ignores that trial defense counsel was unaware of any of the

underlying impropriety and the food court meeting in the first place because both Judge Smith and Judge Pritchard failed to disclose it.

Judge Smith knew that "the change of judge might spark some sort of litigation at the trial level," but the defense did not have an opportunity to pursue such litigation at the trial level because they were kept in the dark by the machinations of two service's trial judiciaries. (JA101). Judge Smith stated that, at "some point later – I do not know whether this was before or after the *Coley* trial – COL Pritchard told me that he was not detailing himself to any cases pending the [ACCA's] review of his ruling granting a Defense motion for unanimous verdict." (JA100).

4. The conduct tainted the trial judiciary of two armed forces.

To further create an appearance of bias, the judges discussed the disposition of Appellant's case in a public place—a military base's food court. A reasonable member of the public viewing this meeting involving three military judges discussing a case in litigation would question the impartiality of all three judges. And when Judge Pritchard told Judge Smith he would "deny the motion and move on," with Judge Smith's boss looking on but remaining silent, the public would further question not only the propriety of the actions in Appellant's case, but also the integrity of the entire military justice system.

In *Davis*, this Court ascribed substantial weight to the fact that Judge Pritchard "did not state or imply how he wanted Judge Hynes to decide this matter." *Davis*, at *14. In Appellant's case, Judge Pritchard *did* so state, in a public place, in the presence of judges from a separate service, and with no protest from those other judges, a bell that could not be unrung.

5. None of the judicial machinations were disclosed to the defense.

With respect to Judge Pritchard, his refusal to disclose his reason to defense in contravention of the rules would cause a reasonable person to question his impartiality. *United States v. Witt*, 75 M.J. 380, 385 (C.A.A.F. 2016).

Judge Smith acknowledged in his affidavit he "assumed litigation of some sort at the trial level would follow." (JA100). Nevertheless, he did not disclose at trial the circumstances behind Judge Pritchard's removal of himself or the judges' food court meeting. (JA100). Judge Smith's surprise at the defense's failure to challenge him is telling. He thought he would be challenged, maybe even thought he should be challenged, based on the meeting and Judge Pritchard's statement. But he still did not disclose the meeting or its content to the parties at trial.

Judge Smith also met the disqualification standard for R.C.M. 902 because he did have an understanding of what Judge Pritchard was doing and he did not disclose it. Therefore, his impartiality can reasonably be questioned for the same reasons Judge Pritchard's impartiality can be questioned – choices were made to

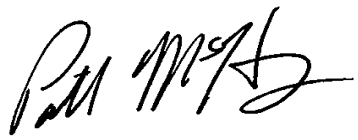
affect the outcome of the MFUV motion and to keep the parties in the dark. Contrary to *Davis*, Judge Smith as the replacement judge acknowledged in his affidavit that he, "was not oblivious" to Judge Pritchard's prior MFUV rulings. (JA099).

6. Prejudice

In the event this Court does not find the judges here were disqualified, Appellant was still prejudiced under *Liljeberg*. This case concerned a military judge planning the outcome of a motion and discussing it with his replacement. Judge Pritchard transferred Appellant's case to Judge Smith while intending it would almost certainly change the outcome of Appellant's motion. *Liljeberg* demands reversal because there is a grave risk of undermining the public's confidence in the military justice system where military judges can change the outcomes of pending motions by transferring cases to other judges, and then tell that judge how to rule on the motion. *See* R.C.M. 902; *see also United States v. Uribe*, 80 M.J. 442, 450 (C.A.A.F. 2021); *In re Al-Nashiri*, 921 F.3d 224, 239 (D.C. Cir. 2019) (citing *Liljeberg*, 486 U.S. at 868).

Conclusion

WHEREFORE, Appellant respectfully requests this Court reverse the Army's Court's decision and set aside the findings and sentence in Appellant's court-martial.



PATRICK MCHENRY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
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Branch Chief
Defense Appellate Division
USCAAF Bar Number 37706

PHILIP M. STATEN
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 33796

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Coley Crim App. Dkt. No. 20220231, USCA Dkt. 24-0184/AR was electronically with the Court and Government Appellate Division on April 24, 2025.

PATRICK MCHENRY
Captain, Judge Advocate
Defense Appellate Attorney
Defense Appellate Division
(703) 693-0725