IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellant v. Specialist (E-4) **TAYRON D. DAVIS** United States Army Appellee	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. ARMY 2022072 USCA Dkt. No. 24-0152/AR

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UNITED STATES Appellee v. Specialist (E-4) **TAYRON D. DAVIS** United States Army Appellant	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 20220272 USCA Dkt. No. 24-0152/AR

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

Certified Issues

I.

WHETHER THE ARMY COURT ERRED IN FINDING THE REASSIGNMENT OF APPELLANT'S CASE RESULTED IN STRUCTURAL ERROR.

II.

WHETHER THE ARMY COURT ERRED IN FINDING THE REASSIGNMENT OF APPELLANT'S CASE RESULTED IN PREJUDICE AND THUS DISMISSING THE CASE WITH PREJUDICE.

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). The Government asserts there is a statutory basis for this Court's jurisdiction under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2). Appellee

contests jurisdiction for the reasons put forth in *United States v. Downum*, USCA Dkt. 24-0156/AR where the matter is currently pending.

Statement of the Case

On May 24, 2022, a military judge sitting as a general court-martial convicted Specialist Tayron Davis, Appellee, contrary to his pleas, of two specifications of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920. (JA 069, 118). The military judge sentenced Appellee to be confined for 120 days and to be dishonorably discharged. (JA 069, 122).

On June 28, 2022, the convening authority elected to take no action. (JA 074). On June 30, 2022, the military judge entered judgment. (JA 075).

On March 27, 2024, the Army Court rendered its opinion, dismissing the findings and sentence. (JA 019).

On May 13, 2024, the Judge Advocate General of the Army filed a certificate of review for the two certified issues in this case.[1] (JA 001).

[1] The objection to this Court's jurisdiction concerns this certificate of review. The Government subsequently sought to amend this certificate. This Court is presently holding the Government's motion in abeyance "pending its resolution of the motion to amend the certificate for review in *United States v. Downum*, 24-0156/AR (C.A.A.F. May 22, 2024)."

Statement of Facts

A. Judge Pritchard reassigns the case to Judge Hynes to avoid ruling favorably for Appellee on a constitutional issue.

On January 3, 2022, Colonel Charles Pritchard, Chief Judge of the Army's Fifth Circuit, ruled that an accused had a constitutional right to a unanimous verdict in *United States v. Dial*. (JA 190). Ten days later, he issued the same ruling in another case. (JA 190). The Government filed writs for extraordinary relief in both cases which were not resolved until five months later in June of 2022. *See United States v. Pritchard*, 82 M.J. 686 (Army Ct. Crim. App. 2022).

From the docketing of the second government writ in late January to the resolution of the matter in June, Judge Pritchard all but disappeared from contested trials in his judicial circuit. (JA 200-05). In Appellee's case specifically, Judge Pritchard detailed himself and presided over the arraignment, (JA 190), but on April 4, 2022, the day motions were due, and only hours before Appellee filed his previously noticed Motion for a Unanimous Verdict [MFUV], Judge Pritchard's subordinate, Lieutenant Colonel Tom Hynes, was detailed by Judge Pritchard as his replacement. (JA 194-95). Judge Hynes' first order of business was to deny the MFUV, which he "dispens[ed] with . . . quickly . . . ." (JA 097). In *at least* three other cases, Judge Pritchard came off the case as the military judge came after defense filed a MFUV. (JA 207-11).

Judge Pritchard later admitted to removing himself from these cases to intentionally avoid ruling on the MFUVs. (JA 216). If he continued to rule favorably for the accused, the Government would continue to seek writs, which he claimed would "essentially shut down at least half of the courts-martial in Europe and the Middles East[.]" (JA 216). He believed the stay of any additional cases to await a decision on the applicability of a constitutional right of the accused would be "inconsistent with military justice." (JA 216).

For his part, Judge Hynes knew exactly what Judge Pritchard was doing. The two had discussed *Dial* and Judge Pritchard's concerns about a potential "case backlog," and Judge Hynes took Appellee's case to "do my part to mitigate any potential case backlog while [*Dial*] was pending appeal." (JA 195). Judge Pritchard then detailed Judge Hynes, who swiftly denied the MFUV.

However, Judge Pritchard's plan was never revealed to the Appellee. Indeed, the reasons for the reassignment were purposely kept from Appellee, and from every other accused, for the months that *Dial* remained pending. Not only did Judge Pritchard (and Judge Hynes) fail to affirmatively disclose the reasons on the record, but Judge Pritchard refused defense counsels' collective request to provide his reasons. (JA 212-13).

With the MFUV denied, and unaware of the reasons for Judge Pritchard's replacement, Appellee chose trial by military judge alone, (JA 189), proceeded to trial with Judge Hynes as factfinder, (JA 189), and was subsequently found guilty

of sex assault. (JA 118). Had Appellee known of the reasons, he would not have chosen to go judge alone with Judge Hynes. (JA 214).

B. The Government solicits Judge Hynes to become its witness on appeal.

On June 6, 2023, in response to a court order on appeal, the Government attached affidavits from Judge Pritchard and Judge Hynes. Despite numerous substantive filings and oral argument occurring over the span of the next seven months, the Government never indicated it needed more information from Judge Hynes.

It was not until after oral argument in January of 2024 that the Government decided it had to have more from Judge Hynes. When the Army Court denied a belated request for a court-ordered affidavit, (JA 253), the Government unilaterally contacted Judge Hynes to see if he would voluntarily provide one anyway. (JA 256). He did. (JA 260).

Offering more than context for "do my part," Judge Hynes' voluntary supplemental affidavit specifically "addresse[d] appellate defense counsel's suggestions of improper motives," openly accused the undersigned counsel of "unfairly twist[ing]" his words, and ostensibly referred to the merits of Appellee's claim as "baseless allegations." (JA 263-64). Moreover, Judge Hynes personally appealed to the Army Court to attach his affidavit to the record, presumably knowing the Army Court had already denied the Government's request.

The Army Court attached the affidavit. (JA 286).

C. The Army Court Opinion

On March 27, 2024, the Army Court issued its decision dismissing the case. (JA 009). The Army Court found that once Judge Pritchard took himself off the case, he was disqualified and without authority to detail Judge Hynes. (JA 016). But beyond its "ultra vires nature," the detailing was not for a lawful reason because Judge Pritchard was arranging a "particular result on an anticipated issue." (JA 017).

Turning to Judge Hynes, the Army Court found that he failed to approach Appellee's case with impartiality. The court interpreted Judge Hynes' statement of "do my part" as a "predetermined intent to deny a likely motion in [Appellee's] case." (JA 017).

Distinguishing *United States v. Roach*, 69 M.J. 17 (C.A.A.F. 2010), the Army Court found that "[t]his sub rosa episode" violated due process and was structural error. (JA 017).

Alternatively, the Army Court held that even if the error was not structural, the result was the same under *Liljeberg v. Health Servs. Acquisition Corps*., 486 U.S. 847 (1988), due, in part, to the Government's ex parte exchange with Judge Hynes and Judge Hynes' "adversarial tenor" in his second affidavit. (JA 019).

The Army Court dismissed the case with prejudice. (JA 019).

I.
WHETHER THE ARMY COURT ERRED IN FINDING THE REASSIGNMENT OF APPELLANT'S CASE RESULTED IN STRUCTURAL ERROR.

Standard of Review

The interpretation of, and a military judge's compliance with, the Rules for Courts-Martial [R.C.M.] are questions of law reviewed de novo. *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012).

Due Process claims are generally reviewed de novo. *See United States v. Lewis*, 69 M.J. 379, 383 (C.A.A.F. 2011). This includes claims concerning judicial reassignment, *see In re Marshall*, 721 F.3d 1032, 1039 (9th Cir. 2013), and judicial bias. *See Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 921, 925 (9th Cir. 2007).

Claims of judicial disqualification under R.C.M. 902 are reviewed for an abuse of discretion. *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021). For unpreserved claims of judicial disqualification under R.C.M. 902, this Court reviews for plain error. *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011).

Law and Argument

A. The reassignment violated Due Process.

Judges have an obligation "to guard and enforce every right [of an accused] secured by the Constitution." *Smith v. O'Grady*, 312 U.S. 329, 331 (1941). As this Court has recognized, "[t]he duty of the judges is to uphold the law in

constitutional context." *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008). "This includes the constitutional and statutory duty to ensure than an accused receives a fair trial." *Id*. The Army Court has also observed, "we must avoid any suggestion that the military judge must for the sake of expediency abdicate his sworn duty to preside over the court-martial and when required, to determine facts and apply the law in deciding issues such as in this case." *United States v. Keenan*, 39 M.J. 1050, 1055 (A.C.M.R. 1994).

Judge Pritchard's honest and good faith interpretation of the law *at that time* was that Appellee was entitled to a fundamental right of a unanimous verdict. *See generally Ramos v. Louisiana*, 590 U.S. 83 (2019). He was, therefore, obliged to guard and protect that right (as he saw it) in the cases over which he presided.

What he could not do is what he did here: removing himself from the case to avoid ruling favorably for Appellee to keep the case moving. Indeed, Appellee is aware of *no* authority suggesting that orchestrating the denial of fundamental right for the sake of speed and expediency where the defendant has made a timely request satisfies a judge's obligation to "guard and enforce" that right. The constitution that Judge Pritchard was supposedly upholding "recognizes higher values than speed and efficiency."[2] *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

[2] To be sure, Judge Pritchard's actions *might seem* at first glance to be palatable because there is the benefit of hindsight. This Court has since said, long after Appellee's trial, that there is no right to a unanimous verdict. *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023). But a judge's decision is not tested by

The end result was a due process violation.[3] *See Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987) (noting an improper reason for judicial reassignment that would violate due process is "the desire to influence the outcome of the proceedings."). In short, Judge Pritchard had to arrange for judges to do what he could not do himself.

B. The military judges were disqualified under R.C.M. 902.

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). Both judges meet this test.

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hindsight; it is tested on the facts and circumstances known to the judge at the time. *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000); *see also United States v. Bremers*, 195 F.3d 221, 227 (5th Cir. 1999); *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989). And at that time, and without controlling precedent, Judge Pritchard believed Appellee had a fundamental right.

[3] The fact that R.C.M. 505(e) permits military judges to reassign before assembly without "cause" does not alter the result. That rule, like every rule, is subject to the constitutional constraints. *See United States v. Gaddis*, 70 M.J. 248, 260 (C.A.A.F. 2011) (Effron, C.J., concurring in part) (discussing the court's obligation to interpret rules in accordance with the Constitution); *see also United States v. Smith*, 3 M.J. at 490, 492, n. 5 (C.M.A. 1975) (noting that while no cause is required for reassignment before assembly, it "in no way condones the replacement of a military judge before assembly of the court for improper motives," and that such circumstances would "warrant severe remedial action.")

1. Judge Pritchard was disqualified.

For Judge Pritchard, the Army Court indicated he was disqualified because the act of removal was a recusal. This Court need not go that far. More simply, a reasonable person would question his impartiality because, from his perspective, he was depriving Appellee of a fundamental right in order to advance another interest—moving the case—and the fact he refused to disclose what he was doing, even when asked by the defense, could leave a reasonable person to conclude he knew what he was doing was unjust.[4] *See* R.C.M. 813(c) (requiring that reasons for the replacement of the military judge be placed on the record); *see also United States v. Quintanilla*, 56 M.J. 37, 78 (C.A.A.F. 2001) ("The fact that the judge failed to perform his duty to fully disclose the events on the record after the events clearly became an issue at trial could cause a reasonable person to question the judge's impartiality in the proceedings."); *see also United States v. Synder*, ACM 39470, 2020 CCA LEXIS 117, *59 (A.F. Ct. Crim. App. Apr. 15, 2020) (suggesting there would be doubts about a trial's legality, fairness, or impartially where a judge boasts of his "expediency in moving cases as a trial judge").

[4] The Government spends much energy explaining why *Roach* is distinguishable. Even if that were so, that does not explain why Judge Pritchard is not disqualified.

2. Judge Hynes was disqualified.

Judge Hynes also meets the disqualification standard for R.C.M. 902. This is so for two reasons. First, because he was aware of what Judge Pritchard was doing, and likewise did not disclose what was occurring, his impartiality can be questioned for the same reasons Judge Pritchard's impartiality can be questioned.

Second, one could reasonably question whether Judge Hynes had an open mind to the defense motion. He took the case to, in his own words, "do my part to mitigate any potential case backlog while *Dial* was pending appeal," which the Army Court reasonably concluded showed a predetermined intent to deny the motion. As the Army Court explained, Judge Hynes confirmed that he made this statement while fully aware of Judge Pritchard's unanimous verdict rulings and the potential backlog. Importantly, this was *before* he was assigned the case and *before* any pleadings were even received on the MFUV. Thus, he ostensibly committed to a particular result on a significant, disputed issue in a *future* case. Moreover, Judge Hynes "did [his] part" to obviate the concerns of his supervisor. That Judge Hynes was helping manage Judge Pritchard's docket concerns would have placed him in a dilemma had he later decided to change his mind on the merits of the MFUV. Consequently, one could reasonably question whether he ever had an open mind.

The Government complains that the Army Court ignored Judge Hynes' second affidavit, which shows why he is impartial. This complaint fails for several reasons.

First, according to the Government, Judge Hynes's second affidavit puts his first affidavit in the appropriate context, but the Government fails to explain how. The *Dial* "backlog" referred to stays resulting from writs filed after favorable rulings of unanimous verdict motions. Judge Hynes now claims he was referring to "any available cases" that Judge Pritchard did not want to take, "for whatever reasons he did not want to take them." (JA 288). These two statements are hard to reconcile.

Second, the affidavit, itself, demonstrates clear partisanship. The Government reached out to Judge Hynes, who agreed to voluntary weigh in on the matter. *See United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007) ("the military judge must take care not to become an advocate for either party"); *United States v. Thomas*, 18 M.J. 545, 557 (A.C.M.R. 1984) ("The judge must, *at all times*, remain impartial, judicious, and responsive to the needs of the . . . the defendant. [ ] Above all, he must . . . not assume the role of a partisan or an advocate.") (emphasis added) (internal citations omitted); *see also* United States Army Judiciary, Code of Judicial Conduct for Army Trial and Appellate Judges [hereinafter CJC], Rules 1.2, 2.8, and 2.10 (16 May 2008).

As described earlier, Judge Hynes' second affidavit addressed suggestions of improper motives, accused counsel of twisting words, and ostensibly referred to the merits of Appellee's claim as "baseless allegations." Thus, just as he failed to appreciate the gravity of pitching in when Colonel Pritchard sought to avoid ruling favorably for Appellee at trial, he failed to appreciate the gravity of pitching in to help the Government on appeal after the Army Court denied the government motion. Judge Hynes decided to become embroiled in this "disputed matter of significant importance." More concerning still, one could reasonably perceive his statements as an attack on appellate defense's ethics. *See* United States Army Judiciary, Code of Judicial Conduct for Army Trial and Appellate Judges [hereinafter CJC], Rule 2.10 (16 May 2008).

Third, to the extent that Judge Hynes' affidavit discusses the substance of his rulings, this is generally impermissible. The deliberative process of judge's should be protected from disclosure, and the reasoning and ruminations of the military judge "should generally be free from consideration in post-judgment proceedings." *United States v. Matthews*, 68 M.J. 29, 35-36 (C.A.A.F. 2009). But here, the Government, and indeed the military judge, disregarded this general rule.

C. The Errors were Structural.

A due process violation resulting from the failure of a judge to recuse occurs where "likelihood of bias on the part of the judge is '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)) (alterations added). Importantly, this analysis does not turn on actual, subjective bias, but instead an unacceptable "potential for bias," *Id.* at 8 (quoting *Caperton*, 446 U.S. at 881); *see also Ward v. Monroeville*, 409 U.S. 57, 60 (1972) (finding bias where "a possible temptation to the average man as a judge [that] might lead him not to hold the balance nice, clear, and true between the State and the accused."); *see also Withrow v. Larkin*, 421 U.S. 35, 57 (1975) (suggesting that the risk of bias would be "too high" where an adjudicator was psychologically wed to a position such that he or she would avoid even the appearance as to even having erred or changed).

Such a due process violation is structural error. *Williams*, 579 U.S. at 14.

Appellee submits that the very same reasons why these judges were disqualified also satisfy the constitutional requirement. Because the Army Court

II.
WHETHER THE ARMY COURT ERRED INFINDING THE REASSIGNMENT OF APPELLANT'S CASE RESULTED IN PREJUDICE AND THUS DISMISSING THE CASE WITH PREJUDICE.

Standard of Review

This Court conducts its review for prejudice de novo. *United States v. Sigrah*, 82 M.J. 463, 467 (C.A.A.F. 2022).

Law and Argument

There is prejudice in two respects. First, had Appellee known of the circumstances, he would not have gone judge alone with Judge Hynes.

As to this first point, the Government is wrong to suggest that Judge Hynes' second affidavit "moots" this claim. (Gov't Br. at 24). If anything, his second affidavit reinforces Appellee's concerns. Moreover, contrary to the Government's assertions, Appellee would not have been "in the exact same position" with a panel. (Gov't Br. at 25). Lastly, the Government misstates who has the burden. (Gov't Br. at 24). Because a due process violation occurred from the reassignment itself (independent of disqualification), the Government must prove this harmless beyond a reasonable doubt. *United States v. Tovarchavez*, 78 M.J. 458, 462-63 (C.A.A.F. 2019).

Second, there is prejudice under *Liljeberg*. This case concerned a chief judge orchestrating the outcome of a motion in *several* others cases, where the other judges knew, including the Chief of the Trial Judiciary, while the accused in this case and those other cases did not. It had serious implications on how he exercised his rights during trial.

Moreover, Judge Hynes' second affidavit only served to further erode public confidence in the judicial process, demonstrating *additional* prejudice under the third prong of *Liljeberg*. *See Martinez*, 70 M.J. at 160 (noting that a court "does do not limit [its] review [of *Liljeberg*'s third prong] to facts relevant to recusal, but rather [it] review[s] the entire proceedings," to include appellate proceedings). For one, the fact that the Government would procure *ex parte* and attach Judge Hynes' partisan affidavit as a means to resolve the error only further undercuts confidence in the administration of justice in this case. Unfortunately for the Government, "two wrongs do not make a right." *Gray v. Mississippi*, 481 U.S. 648, 662 (1987) ("we cannot condone the 'correction' of one error by the commitment of another"). For another, the fact that Judge Hynes does not, himself, appreciate the clear partisan nature of his supplemental affidavit, which, ironically, he submitted to prove his impartiality, "leave[s] a wider audience to wonder if [he] lack[ed] the same [impartiality] when applying the law [in other matters]." *United States v. Roach*, 69 M.J. 17, 21 (C.A.A.F. 2010).

Wherefore, Appellee respectfully requests this Court affirm.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Davis,* Crim. App. Dkt. No. 20220272, USCA Dkt. No. 24-0152/AR was electronically filed with the Court and Government Appellate Division on July 15, 2024.

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