

**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
) APPELLEE
)
)
) Crim. App. No. ARMY 20220231
)
) USCA Dkt. No. 24-0184/AR
)
)



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TREVON K. COLEY,)	USCA Dkt. No. 24-0184/AR
United States Army,)	
Appellant)	

**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.¹**

¹ This Court initially granted this issue on November 8, 2024, but did not require briefs under Rule 25 of this Court’s Rules of Practice and Procedure. On March 24, 2025, this Court ordered counsel for both parties to file briefs discussing the effect of *United States v. Davis*, __ M.J. __ (C.A.A.F. 2025) on this granted issue.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [CCA] had jurisdiction over this matter pursuant to Article 66(d), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866(d).² This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On May 6, 2022, a military judge, sitting as a general court-martial, convicted Appellant, pursuant to his pleas, of one specification of violating a general regulation and one specification of conspiracy to obstruct justice, in violation of Articles 92 and 81, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 892 and 881 (2019). (JA024). An enlisted panel, sitting as a general-court martial, convicted Appellant, contrary to his pleas, of one specification of involuntary manslaughter by culpable negligence and one specification of aggravated assault, in violation of Articles 119 and 128, UCMJ, 10 U.S.C. § 919 and 928 (2019).³ (JA024). The panel sentenced Appellant to be reduced to the grade of E-1, to be confined for eight years, total forfeitures, and a bad-conduct

² All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) [2019 MCM].

³ Appellant was acquitted of one specification of murder while engaging in an inherently dangerous act to another, in violation of Article 118, UCMJ, and one specification of leaving the scene of a vehicle accident as the driver, in violation of Article 111, UCMJ. (JA134).

discharge. (JA135; JA024). On June 1, 2022, the convening authority denied Appellant's request to defer confinement; the convening authority took no action on the adjudged findings and sentence. (JA136). On June 21, 2022, the military judge entered judgment. (JA137).

On March 13, 2024, the Army Court affirmed the findings and sentence.⁴ (JA019). On November 8, 2024, this Court granted Appellant's petition for grant of review but did not require briefs under Rule 25 of this Court's Rules of Practice and Procedure. (JA001). On February 13, 2025, this Court decided *United States v. Davis*, ___ M.J. ___ (C.A.A.F. 2025). On March 24, 2025, this Court ordered counsel for both parties to file briefs discussing the effect of *Davis* on this granted issue. (JA002).

Statement of Facts

A. Judge Pritchard found that 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 (Jack) Pritchard, Chief Judge of the Army's Fifth Circuit, ruled a military accused has a constitutional right to a unanimous verdict. (JA083). On 13 January 2022, he issued the same ruling in *United States v. Ferreira*. (JA083). The government filed petitions for writs for extraordinary relief in these cases, and this Court issued

⁴ *United States v. Coley*, ARMY 20220231, 2024 CCA LEXIS 127 (Army Ct. Crim. App. 13 Mar. 2024) (mem. op.). (JA003).

stays of proceedings in both cases. (JA083). The writs were resolved on June 9, 2022, after the Army Court found no equal protection basis for a right to unanimous verdicts. *See United States v. Pritchard*, 82 M.J. 686 (Army Ct. Crim. App. 2022). After the Army Court’s opinion in *Pritchard*, this Court decided *United States v. Anderson* on June 29, 2023, affirming that servicemembers did not have a right to unanimous verdicts. *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023); *see also Dial v. United States*, 82 M.J. 446 (C.A.A.F. 2022) (denying the appellant’s writ-appeal petition).

B. Judge Pritchard abstained from ruling on any other unanimous verdict motions.

After this court issued stays in *Dial* and *Ferreira*, but prior to the Army Court’s decision in *Pritchard*, Judge Pritchard detailed himself to and remained detailed on “bench trials and [decided] to move other cases toward trial.” (JA084). Judge Pritchard “decided not to rule on any further unanimous verdict motions until the Army Court issued an opinion on the issue,” which he assumed would “last around six months but could be shorter or longer.” (JA084).

Considering the Army Court’s stays in *Dial* and *Ferreira*, Judge Pritchard reasoned that if he continued to rule favorably on future unanimous verdict motions, “it would essentially shut down at least half of the courts-martial in Europe and the Middle East . . . for lengthy periods of time.” (JA084). Judge Pritchard believed “this result would be inconsistent with military justice.”

(JA084). Furthermore, Judge Pritchard was conscious that “every accused that filed a unanimous verdict motion in upcoming cases would have that issue reviewed by the Army Court whether a trial judge granted or denied the motion” and that “each accused would receive the benefit of the Army Court’s opinion.” (JA084).

C. After Appellant’s arraignment, Judge Smith replaced Judge Pritchard on Appellant’s case.

On the night of March 5, 2021, Appellant was driving back to his barracks room in Kaiserslautern, Germany, when he started racing with two of his friends, who were both driving their own vehicles. (JA004). Appellant was in the lead and headed toward a dangerous intersection, going approximately 107 miles per hour. (JA004). As he entered the intersection, Appellant collided with Specialist (SPC) MB, who was driving her vehicle with Private First Class (PFC) QJ as her passenger. (JA004). The collision was fatal—SPC MB was killed upon impact, and PFC QJ suffered grievous bodily injuries. (JA004). Appellant, who was largely unharmed, asked one of his friends with whom he had been racing to say she had been driving Appellant’s vehicle since Appellant had a suspended license. (JA004).

The convening authority referred six offenses against Appellant: one specification of murder, one specification of involuntary manslaughter by culpable negligence, one specification of aggravated assault inflicting grievous bodily harm,

one specification of drunken or reckless operation of a vehicle, one specification of failure to obey a general regulation, and one specification of obstructing justice.

(JA020). Judge Pritchard presided over appellant's arraignment on 6 January 2022. (JA083). Appellant filed a motion for unanimous verdict [MFUV] on 25 February 2022. (JA056). In March 2022, Judge Pritchard asked the Chief Trial Judge for assistance in finding another trial judge for this case. (JA085). In addition to delay considerations, Judge Pritchard planned on (and did) take leave in the United States during appellant's trial dates. (JA085). Since no Army trial judges were available at that time, the Chief Trial Judge coordinated with the Air Force Chief Trial Judge to cross-service detail a military judge from the Air Force to appellant's case. (JA085).

In early April 2022, Colonel (Col.) SP, the Air Force's Chief Circuit Military Judge for the European Circuit, and Judge Lance Smith's immediate supervisor, asked Judge Smith⁵ if he was willing to take on an Army case. (JA098). At that time, neither Col. SP nor Judge Smith "knew the nature of the charges in *Coley* let alone that a unanimous verdict remained outstanding." (JA100). Subsequently, Judge Smith learned that a change of judge in appellant's case was necessary because Judge Pritchard was scheduled to be on leave during the week of trial and no other Army military judge was available. (JA100).

⁵ Judge Smith is an Air Force lieutenant colonel. (JA101).

Because Col. SP was unavailable, and Judge Smith was “the only other Air Force military judge assigned in Germany, or Europe for that matter,” Judge Smith believed his selection was “more of a process of elimination than a handpicking.” (JA100).

On April 6, 2022, Judge Pritchard contacted Judge Smith via email to start the handoff of appellant’s case. (JA098). Judge Pritchard explained the procedural status of the case, including the fact that appellant’s MFUV remained pending. (JA103). Around this time, Judge Smith, along with Col. SP, met with Judge Pritchard at the Base Exchange food court on Ramstein Air Base. (JA099). During this in-person meeting, the topic of the MFUV came up, where Judge Pritchard “made a comment to the effect of, ‘You will deny the motion and move on.’” (JA099). Judge Smith “did not take [Judge] Pritchard’s comment to be any sort of an order, or expectation as to how [he] would rule.” (JA099). Instead, Judge Smith believed that Judge Pritchard “simply recognized” that Judge Pritchard was the only military judge they were aware of that had granted a defense MFUV, and Judge Pritchard assumed that Judge Smith would deny the motion. (JA099).

Judge Smith “did not leave that conversation feeling influenced by [Judge] Pritchard in any way.” (JA099). Further, Judge Pritchard followed up with Judge Smith in an email and explicitly told Judge Smith not to take his comment as an

attempt to influence Judge Smith in any way. (JA099).⁶ In his affidavit that he submitted to this court, Judge Smith stated the following:

I affirmatively state, neither [Judge] Pritchard's previous ruling nor his statement at lunch influenced my ruling on the Defense motion for unanimous verdict in this case. I ruled based on my understanding of the applicable law. Additionally, prior to this case, I denied a similar Defense motion, and after this case, I ruled the same way in several other cases as well.

(JA099–100).

On April 11, 2022, Judge Smith was officially detailed to appellant's case. (JA098). On April 14, 2022, Judge Smith held a telephonic R.C.M. 802 conference with the parties to address any questions or concerns regarding his detailing. (JA098–99). During the R.C.M. 802 conference, Judge Smith told the parties that “no one had explicitly or implicitly” told him that Judge Pritchard's previous MFUV rulings in other cases was the reason for the change of judge in this case. (JA098). After the R.C.M. 802, “neither side at any point raised an issue with [his] detailing or the fact that the unanimous verdict motion remained unresolved at the time of the change of judge.” (JA098). Furthermore, “[n]either side opted to question or challenge [him] at trial.” (JA099; JA048–50, JA053).

⁶ Judge Smith was unable to access a copy of the email to submit to this court. (JA099–100).

On April 18, 2022, Judge Smith provided the parties with notice that he intended to deny appellant's MFUV. (JA099).⁷ On May 2, 2022, Judge Smith announced his ruling on the record and denied the MFUV. (JA055).⁸

Summary of Argument

This Court should affirm the Army Court's ruling and find that the judicial reassignment in Appellant's case does not warrant reversal. This Court's decision in *United States v. Davis* is dispositive in this case, especially since the facts of this case are almost identical to that of *Davis*. As in *Davis*, Judge Pritchard reassigned Appellant's case out of a concern for the efficiency of his circuit, which as this Court held in *Davis*, was an improper reason for reassignment. However, Judge Smith, to whom Judge Pritchard reassigned Appellant's case to, was an impartial Air Force military judge, who did not have a "predetermined, inflexible intent to deny the unanimous verdict motion" and was therefore "not disqualified from handling [Appellant]'s case." *Davis*, 2025 CAAF LEXIS 112, at *18. Thus, the improper reassignment did not result in structural error, the error did not constitute a violation of Appellant's due process rights, and Appellant did not suffer

⁷ In his affidavit, Judge Smith states this occurred on August 18, 2022, but this appears to be a typographical error.

⁸ On May 6, 2022, Judge Smith provided a 24-page written ruling on appellant's MFUV. (JA056–79).

prejudice since, “in the final analysis, [Appellant] received a fair trial before an impartial military judge.” *Id.* at *25.

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

Standard of Review

In analyzing the judicial reassignment, this Court applies a de novo standard of review when deciding whether there was structural error. *Davis*, 2025 CAAF LEXIS 112, at *11 (citing *United States v. Paul*, 73 M.J. 274, 277 (C.A.A.F. 2014)). This Court also reviews for prejudice stemming from improper reassignment under a de novo standard of review. *Id.* at *20 (citing *United States v. King*, 83 M.J. 115, 120 (C.A.A.F. 2023)).

Law and Argument

Appellant’s case has an almost identical fact pattern as in *Davis*, and thus this Court’s analysis—and conclusion—should be the same: even if Judge Pritchard’s reassignment was improper, it did not violate Appellant’s due process rights, and he was not prejudiced by it. “Part of the role of a chief circuit judge is to detail military judges to cases, including those instances where a different military judge initially had been detailed to serve.” *Davis*, 2025 CAAF LEXIS 112, at *15 (citing Dep’t of the Army, Reg. 27-10, Legal Services, Military Justice, paras. 7-5, 7-6 (Nov. 20, 2020) and R.C.M. 505(E)(1)).

In *Davis*, this Court held that Judge Pritchard’s reasons for reassigning the case was improper because “[c]oncerns about court efficiency cannot arbitrarily trump a military judge’s duty to protect the rights of an accused.” *Davis*, 2025 CAAF LEXIS 112, at *16. However, this Court went on to find that the improper reassignment did not warrant a structural error approach because there was “nothing in the record demonstrating that [Appellant]’s trial in front of Judge Hynes was unfair or unreliable.” *Id.* at *20. Furthermore, in reviewing prejudice, this Court concluded that the improper reassignment “did not constitute a violation of [Appellant]’s due process rights because the record . . . does not demonstrate that Judge Pritchard wanted to influence the outcome of any aspect of [Appellant]’s case. *Id.* at *22.

Given the reassignment did not rise to a level of a constitutional violation, the test for prejudice is whether “there is a reasonable probability that, but for the error, the outcome of the proceedings would have been different.” *Id.* at *23 (citing *United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019)). Ultimately, this Court found that there was no prejudice because “in the final analysis, [Appellant] received a fair trial before an impartial military judge.” *Id.* at 25.

A. Judge Pritchard’s reassignment was improper.

As in *Davis*, Judge Pritchard gave the same reasoning for reassigning Appellant’s case was identical to the one he provided in *Davis*:⁹ “to improve the efficiency of his judicial circuit.” *Davis*, 2025 CAAF 112, at *13; JA083; JA131. And since this Court found that “his reason for reassigning the case was improper” in *Davis*, this Court should similarly find that Judge Pritchard’s reassignment was improper in this case as well.¹⁰ *Id.* at *17.

B. Judge Smith was an impartial judge.

As in *Davis* and like Judge Hynes, Judge Smith “did not disclose to the parties the behind-the-scenes actions of Judge Pritchard regarding the reassignment of this case” *Id.* at *17. But Judge Smith, during a R.C.M. 802 conference,¹¹ disclosed to the parties that “no one had explicitly or implicitly” told him that Judge Pritchard’s previous MFUV rulings in other cases was the reason for the change of judge in this case. (JA099). So, “there was no basis for Judge [Smith] to believe that Judge Pritchard was acting in an inappropriate manner in this case,

⁹ Judge Pritchard’s affidavits in both *Davis* and *Coley* are word-for-word identical in the paragraph explaining his reasoning. JA083; JA131.

¹⁰ Like this Court in *Davis*, *Davis*, 2025 CAAF 112, at *12, the Army Court treated Judge Pritchard’s detailing of Judge Smith in this case as a reassignment decision, rather than a removal, recusal, or disqualification. *Coley*, 2024 LEXIS 127, at *26–27.

¹¹ After the R.C.M. 802, “neither side at any point raised an issue with [his] detailing or the fact that the unanimous verdict motion remained unresolved at the time of the change of judge.” (JA099).

and thus Judge [Smith]’s nondisclosure does not demonstrate a lack of impartiality on his own part.” *Davis*, 2025 CAAF 112, at *17.

Like the appellant in *Davis*, Appellant has also argued that Judge Smith “did not have an open mind on the defense motion for a unanimous verdict.” *Id.* In particular, and admittedly unlike in *Davis*,¹² Judge Pritchard met with Judge Smith and Judge Smith’s supervisor at a food court, where Judge Pritchard “made a comment to the effect of, ‘You will deny the motion and move on.’” (JA099). Although Appellant has clung to those words like a lifeline, Judge Smith reiterated multiple times in his affidavit that it did not influence his decision regarding the MFUV. (JA098).

Judge Smith “did not take [Judge] Pritchard’s comment to be any sort of an order, or expectation as to how [he] would rule.” (JA099). Instead, Judge Smith believed that Judge Pritchard “simply recognized” that Judge Pritchard was the only military judge they were aware of that had granted a Defense MFUV, and Judge Pritchard assumed that Judge Smith would deny the motion. (JA099).

Judge Smith “did not leave that conversation feeling influenced by [Judge] Pritchard in any way.” (JA099). Further, Judge Pritchard followed up with Judge Smith in an email and explicitly told Judge Smith not to take Judge Pritchard’s

¹² Instead, in *Davis*, Judge Hynes stated in an email to Judge Pritchard that he would “do [his] part to mitigate any potential case backlog while *U.S. v. Dial* was pending appeal.” *Davis*, 2025 CAAF 112, at *18.

comment as an attempt to influence him in any way. (JA099). In his affidavit that he submitted to the Army Court, Judge Smith stated the following:

I affirmatively state, neither [Judge] Pritchard's previous ruling nor his statement at lunch influenced my ruling on the Defense motion for unanimous verdict in this case. I ruled based on my understanding of the applicable law. Additionally, prior to this case, I denied a similar Defense motion, and after this case, I ruled the same way in several other cases as well.

(JA099–100).

Although one difference between the instant case and *Davis* is that the appellant in *Davis* filed the MFUV *after* the reassignment, whereas Appellant's MFUV was filed *prior* to the reassignment, this fact does not affect the impartiality analysis here. Judge Smith denied Appellant's MFUV, but that fact in itself does not mean Judge Smith was impartial—rather, it just means Judge Smith was consistent since he had previously denied a MFUV on a prior case. (JA099). Regardless, when Judge Smith reviewed appellant's MFUV, it was with a clean slate since he “did not have any independent recollection as to whether [he] had ruled on any unanimous verdict motions prior to ruling on that motion” in this case. (JA099).

In addition to Judge Smith's affidavit, his impartiality was also objectively evident in his carefully written and detailed 24-page ruling on Appellant's motion. (JA056–79). The Army Court itself “pause[d] to highlight that Judge Smith provided a well cited decision on the unanimous verdict motion, did not appear to

commit any erroneous rulings or prejudicial errors at trial and appears to have fairly presided over appellant's trial with impartiality." *Coley*, 2024 CCA LEXIS 127, at *30.

Therefore, since "the record does not reflect a sufficient basis to conclude that Judge [Smith] sought to decide the issues presented to him in [Appellant]'s case in anything other than a fair and open-minded manner," this Court should find—as it did in *Davis*—that Judge Smith was not disqualified from handling Appellant's case. *Davis*, 2025 CAAF LEXIS 112, at *17–18.

C. There was no structural error.

Here, Judge Pritchard's reassignment of Appellant's case to Judge Smith did not constitute structural error. Errors are deemed "structural" in nature only in "a very limited class of classes," *Johnson v. United States*, 520 U.S. 461, 468 (1997), so that there is "a strong presumption that an error is not structural." *United States v. Bartlett*, 66 M.J. 426, 430 (C.A.A.F. 2008). Additionally, the Supreme Court has made it clear that an error is structural "only if it affects the entire conduct of the proceeding from beginning to end and renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Davis*, 2025 CAAF LEXIS 112, at *19–20 (quoting *Greer v. United States*, 593 U.S. 503, 513 (2021) (internal quotation marks omitted)).

However, “[b]ecause there is nothing in the record demonstrating that [Appellant]’s trial before Judge [Smith] was unfair or unreliable, Judge Pritchard’s improper actions do not meet this standard. Therefore, a structural error approach is not warranted under the circumstances.” *Id.* at *20 (citations omitted) (internal quotation marks omitted).

D. Appellant was not prejudiced by the reassignment.

As in *Davis*, this Court should conclude that the improper reassignment “did not constitute a violation of [Appellant]’s due process rights because the record . . . does not demonstrate that Judge Pritchard wanted to influence the outcome of any aspect” of Appellant’s case. *Id.* at *22. In making the decision to reassign Appellant’s case, Judge Pritchard maintained that he “was not attempting to arrange a particular result (i.e., a denial of the unanimous verdict motion), because [he] could not be certain how other military judges would rule . . . ; it was possible that another judge would grant the motion and the case would be stayed.” (JA084).

More importantly, if Judge Pritchard wanted to influence the outcome of Appellant’s case, common sense tells us that he would have stayed on the case as the military judge, rather than outsourcing it to another military judge from a different service. Certainly, he could have more effectively influenced the

outcome of the trial by presiding over it than he could by reassigning it. As discussed *supra* Judge Smith was impartial, and Appellant received a fair trial.

Since this Court can conclude that Judge Pritchard's improper reassignment of Appellant's case did not rise to a level of a constitutional violation, this Court must apply the Article 59(a), UCMJ, standard of prejudice for nonconstitutional errors and ask whether "the error materially prejudiced the substantial rights of the accused." *Davis*, 2025 CAAF LEXIS 112, at *23. In other words, the appropriate test for prejudice here is whether "there is a reasonable probability that, but for the error, the outcome of the proceedings would have been different." *Davis*, 2025 CAAF LEXIS 112, at *23 (citing *United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019)) (internal quotation marks omitted).

Here, "there is no basis to conclude that [Appellant] would have fared any better before Judge Pritchard" *Id.* First, the fact that Appellant "would have received a delay in his trial if, as anticipated, Judge Pritchard had ruled favorably on a motion for a unanimous verdict, and the ACCA then had stayed that decision, is not sufficient to meet the Article 59(a) standard." *Id.* Second, despite having multiple opportunities to question or challenge Judge Smith, Appellant chose not to do so—even after Judge Smith provided Appellant with advance notice of how he would rule on the MFUV. (JA083; JA049–50; JA053). Lastly, Appellant elected to be tried and sentenced by an officer panel; there is no evidence to show that

Appellant would not have made the same election if Judge Pritchard had remained on his case. (JA024).

Ultimately, like in *Davis*, this Court should find that there was no prejudice¹³ here because “in the final analysis, [Appellant] received a fair trial before an impartial military judge.” *Davis*, 2025 CAAF LEXIS 112, at *25. And even though Judge Pritchard’s reassignment was improper here, it does not warrant reversal, and this Court should affirm the Army Court’s holding. *Coley*, 2024 CCA LEXIS 127, at *31.

¹³ Appellant asserted that *Liljeberg* demands reversal here because of “a grave risk of undermining the public’s confidence in the military justice system” (JA017). However, the *Liljeberg* analysis “applies when there is a recusal or disqualification error” and neither of which are present here. *Davis*, 2025 CAAF LEXIS 112, at *25, n16. Since this Court should conclude that “the military judges were impartial in [Appellant]’s case, there is no need to engage in a *Liljeberg* analysis.” *Id.*

Conclusion

WHEREFORE, the United States respectfully requests this honorable court affirm the Army Court's decision.



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CERTIFICATE OF COMPLIANCE WITH RULE 21

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 4,622 words.
2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

A handwritten signature in black ink, reading "Stewart A. Miller". The signature is written in a cursive, slightly stylized font.

STEWART A. MILLER
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April 22, 2025

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court
(*efiling@armfor.uscourts.gov*) and contemporaneously served electronically
on appellate defense counsel, on April 22, 2025.

A handwritten signature in black ink, appearing to read "Daniel L. Mann", with a stylized, flowing script.

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