IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Certified Issues[1]

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 Statutory Jurisdiction

The Army Court of Criminal Appeals [Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2019)

[1] Given the procedural posture of this case, Specialist Davis is the appellee and not the appellant. The references to "Appellant's case" in the certified issues are the result of a scrivener's error and should read "Appellee's case."

[UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

On May 24, 2022, a military judge sitting as a general court-martial convicted 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 acquitted Appellee of one specification of attempted sexual assault. (JA 069, 118). The military judge sentenced Appellee to be confined for 120 days and dishonorably discharged. (JA 069, 127). 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 June 20, 2023, Appellee filed his appeal with the Army Court pursuant to Article 66, UCMJ. (JA 020). On October 18, 2023, the government filed its answer brief. (JA 037). On October 26, 2023, the Army Court ordered oral argument in the case. (JA 230). On January 25, 2024, oral argument was held before the Army Court. On March 27, 2024, the Army Court rendered its opinion, wherein the findings and sentence were dismissed with prejudice. *United States v. Davis*, ARMY 20220272, 2024 CCA LEXIS 144 (Army Ct. Crim. App. Mar. 27,

2024); (JA 009). The Judge Advocate General of the Army certified two issued to this Court on May 13, 2024.[2] (JA 001).

Statement of Facts

A. Appellee sexually assaulted Sergeant LT.

Appellee was convicted of sexually assaulting Sergeant LT (hereinafter, "the victim") twice in one evening. (JA 069). The first sexual assault involved Appellee removing the victim's pants while she was asleep far enough to expose her genitalia and place his mouth on her vulva. (JA 106–09). The victim tried to stop Appellee, but he ignored her and continued to perform oral sex over her verbal and physical demonstrations of lack of consent. (JA 106–09). The second sexual assault also began while the victim was asleep, and she awoke to Appellee digitally penetrating her vulva. (JA 069, 114–17).

B. Judicial reassignment of Appellee's case.

On January 3, 2022, in the case of *United States v. Dial*, Colonel Charles Pritchard, Chief Judge of the Army's Fifth Judicial Circuit, ruled a military accused had a constitutional right to a unanimous guilty verdict. (JA 195). On January 13, 2022, Judge Pritchard issued an identical ruling in *United States v. Ferreira*. (JA 195). The government filed petitions for writs of prohibition in both

[2] The government motioned to amend the Certificate for Review, with the amended certificate reflecting a certification date of May 20, 2024. (JA 005). That motion is currently pending with this Court.

cases, and the Army Court issued stays of proceedings in each. (JA 195). After the Army Court issued stays in *Dial* and *Ferreira*, Judge Pritchard detailed himself to, and remained detailed on, "bench trials and [decided] to move other cases toward trial." (JA 196).

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 take "around six months but could be shorter or longer." (JA 196). 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." (JA 196). Judge Pritchard believed "this result would be inconsistent with military justice." (JA 196). 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." (JA 196).

On April 4, 2022, Judge Pritchard reassigned Appellee's case to Lieutenant Colonel Thomas Hynes, the only other military judge in the Army's Fifth Judicial Circuit. (JA 196–98, 200). The judicial reassignment occurred on the motions filing deadline outlined in the court's pre-trial order, and at the time the judicial

reassignment was completed, there were no motions pending before the court. (JA 128, 195). Later that day, after the case had been reassigned to Judge Hynes, Appellee filed his Motion for a Unanimous Verdict [MFUV]. (JA 023, 133, 204).

On April 11, 2022, Judge Hynes placed his appearance on the record during an Article 39(a) session and afforded the parties an opportunity to question or challenge him; defense counsel elected to do neither. (JA 093–96). During the same 39(a), Judge Hynes informed the parties he denied the MFUV and that a written ruling would follow. (JA 097). Judge Hynes issued his written ruling on April 14, 2022. (JA 185). Appellee did not request reconsideration.

On April 22, 2022, eight days after the court's written ruling on his MFUV, Appellee entered a plea of not guilty to all charges and specifications and requested trial by enlisted panel. (JA 193). On May 19, 2022, one duty day prior to the start of trial, Appellee requested to be tried by a military judge alone. (JA 194). On May 23, 2022, prior to the start of trial that day, Judge Hynes conducted a colloquy with Appellee with respect to his change in forum selection and confirmed Appellee's desire to be tried by him alone. (JA 098–100, 194).[3]

[3] The writs were resolved in June 2022, when 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). In *United States v. Anderson*, this Court held a military accused is not entitled to a unanimous verdict under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. 83 M.J. 291 (C.A.A.F. 2023).

C. Relevant post-trial procedural history.

On May 12, 2023, in response to a motion for appellate discovery filed by Appellee, the Army Court ordered Judge Pritchard and Judge Hynes to provide affidavits regarding the reassignment of Appellee's case. On June 6, 2023, the judges provided their affidavits. (JA 195, 200). On June 7, 2023, the Army Court granted the government's motion to attach the affidavits. On October 5, 2023, Appellee filed a motion with this court requesting approval to attach affidavits, to include an affidavit from Appellee. (JA 219). Appellee stated in his affidavit, dated 4 October 2023:

> Had I become aware that Judge Pritchard was being replaced as the military judge in my court-martial to avoid ruling on my unanimous verdict motion, and that Judge Hynes was being detailed who would "do [his] part," I would not have requested a judge alone trial with Judge Hynes. I would have also asked Judge Hynes to be recused.

(JA 219).

On January 25, 2024, at 10:29 a.m., the Army Court sent an email to counsel arguing this case, asking them to be prepared to address *United States v. Roach*, 69 M.J. 17 (C.A.A.F. 2010) and *Walker v. United States,* 60 M.J. 354 (C.A.A.F. 2004), which were not cited by either party in their briefs. On January 25, 2024, at 1:00 p.m., the parties presented oral argument. On January 26, 2024, based on questions by the panel regarding *Roach* and *Walker*, to include a question regarding matters raised personally by Appellee pursuant to *United States v.*

Grostefon, 12 M.J. 431, 437 (C.M.A. 1982), the government filed a motion with the Army Court requesting leave to file a memorandum of argument, in accordance with Rule 25.5 of the Army Court's Rules of Practice and Procedure. (JA 232). The Army Court denied the government's motion on February 2, 2024, without explanation. (JA 240).

On February 6, 2024, based upon the language from Appellee's affidavit, specifically Judge Hynes's "do my part," the briefs of the parties, and along with matters discussed during the oral argument, undersigned counsel motioned the Army Court to order Judge Hynes to provide a supplemental affidavit.[4] (JA 244). On February 7, 2024, the Army denied the motion without explanation. (JA 258). Following Army Court's denial, the government contacted Judge Hynes, and asked if he would like to voluntarily provide a supplemental affidavit to clarify his initial affidavit. On February 13, 2024, Judge Hynes provided a supplemental affidavit. (JA 203). On March 3, 2024, the Army Court granted the government's motion to attach Judge Hynes's second affidavit. (JA 271, 291).

[4] The government previously requested the audio recording of the oral argument from the Army Court and were told due to technical issues the argument was not recorded. The government sought the recording from oral argument to support its request to submit a memorandum of argument and request for the court to order a supplemental affidavit from Judge Hynes.

Summary of Argument

Judge Pritchard reassigned Appellee's case in accordance with Rule for Courts-Martial [R.C.M.] 505(e) and his authority as a Chief Circuit Judge, and the Army court erred in its application of *Roach*, *Walker*, and R.C.M. 902 to the judicial reassignment. Judge Pritchard was not disqualified and did not recuse himself, nor was his recusal required. Additionally, Judge Pritchard's decision to reassign Appellee's case rather than preside over it himself was not tantamount to disqualification.

Judge Hynes was impartial. Judge Hynes was detailed to Appellee's case prior to the trial court receiving any motions, issuing any rulings, or holding any motions hearings. The only event Judge Hynes did not preside over in Appellee's case was arraignment. The record demonstrates Judge Hynes knew and applied the law correctly, was fair and impartial during all portions of Appellee's trial, and he took Appellee's case because of his desire to take any cases the Chief Circuit Judge did not want to take, regardless of the reason.

Judge Hynes was not improperly influenced to rule on any matters in Appellee's case, and his presiding over the case did not prejudice Appellee or create any appearance issues under the third factor outlined in *Liljeberg* v. *Health Servs. Acquisition Corp.,* 486 U.S. 847 (1988).

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

Standard of Review

"The interpretation of UCMJ and R.C.M. provisions and the military judge's compliance with them are questions of law, which we review de novo." *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012). This Court reviews a military judge's decision not to recuse himself for an abuse of discretion. *United States v. Sullivan*, 74 M.J. 448, 454 (C.A.A.F. 2015). Where an appellant does not raise the issue of judicial disqualification until appeal, the court reviews the claim under the plain error standard of review. *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011).[5]

Law

A. Reassignment.

In *United States v. Smith*, the Court of Military Appeals held "a military judge may be replaced prior to the assembly of a court by a convening authority without a showing of good cause. If the replacement occurs once the court has been assembled, however, good cause must still be demonstrated and made a matter of record." 23 U.S.C.M.A. 555, 556, 50 C.M.R. 774, 775 (1975). The holding in *Smith* was subsequently codified in R.C.M. 505. "Before the court-

[5] The Army Court declined to find forfeiture but applied a plain error analysis, nonetheless. *Davis*, 2024 CCA LEXIS 144 at *9.

martial is assembled, the military judge or military magistrate may be changed by an authority competent to detail the military judge or designate the military magistrate, without cause shown on the record." R.C.M. 505(e)(1).

B. Disqualification and bias.[6]

A "military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). "There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle . . . ." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). "A judge should be disqualified only if it appears that he or she harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside when judging the dispute." *Liteky v. United States*, 510 U.S. 540, 557 (1995) (Kennedy, J., concurring).

"'[W]hen a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions." *Martinez*, 70 M.J. at 157 (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)) (alteration in original). "[T]he test is objective, judged from the

[6] "The terms 'disqualification' and 'recusal' are closely related. Whereas disqualification refers to the basis for a judge not to be able to sit on a case, 'recusal' refers to the judge's refusing to sit on grounds of disqualification." *United States v. Witt*, 75 M.J. 380, 384 n.12 (C.A.A.F. 2016).

standpoint of a reasonable person observing the proceedings." *Quintanilla*, 56 M.J. at 78.

> There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings. *See* [Richard E. Flamm, Judicial Disqualification] § 4.6.4 at 136–37 [(1996)] (suggesting that only extraordinary circumstances involving pervasive bias warrant disqualification when the alleged bias is based upon judicial actions). The Supreme Court, in a case involving the extra-judicial source doctrine and the appearance of bias, has noted that remarks, comments, or rulings of a judge do not constitute bias or partiality, "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.

Id. at 44. Additionally, "[a] conclusion that a judge should have disqualified himself or herself does not end appellate review. Neither RCM 902(a) nor applicable federal, civilian standards mandate a particular remedy for situations in which an appellate court determines that a judge should have removed himself or herself from a case." *Id.* at 80.

C. Structural error.

This Court has recognized "[s]tructural errors are those constitutional errors so 'affect[ing] the framework within which the trial proceed[s].'" *United States v. McMurrin*, 70 M.J. 15, 19 (C.A.A.F. 2011) (citing *United States v. Wiechmann*, 67 M.J. 456, 463 (C.A.A.F. 2009)). In determining whether to find an error structural, this Court offered:

> Like the Supreme Court, this Court has indulged a "strong presumption" against structural error, and has declined to find it unless the error is of such a nature that its effect is "difficult to assess" or harmlessness is irrelevant. *See United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008); *see also Rose*, 478 U.S. at 579–80.

Id. at 19. "The touchstone of structural error is fundamental unfairness and unreliability. Automatic reversal is strong medicine that should be reserved for constitutional errors that 'always' or 'necessarily,'[] produce such unfairness." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 159 (2006) (Alito, J., dissenting) (quoting *Neder v. United States*, 527 U.S. 1 (1999)) (internal citations omitted). This Court has recognized "not *all* structural errors merit automatic reversal." *United States v. Hasan*, 84 M.J. 181, 2024 CAAF LEXIS 127, at *39 (C.A.A.F. 2024).

Argument

A. There was no error in the judicial reassignment of Appellee's case.

The Army Court found "once [Judge Pritchard] took himself off [Appellee's] case, under R.C.M. 902 Judge Pritchard was disqualified from taking any further action regardless of his stated reason. As such, he clearly erred in detailing the case to Judge Hynes after he made the decision to 'remove' himself." *Davis*, 2024 CCA LEXIS 144 at *12 (citing *Roach*, 69 M.J. at 19; *Walker*, 60 M.J. at 358). The Army Court's analysis begins by finding procedural error in the reassignment of Appellee's case based upon its finding Judge Pritchard was

disqualified at the time he reassigned the case to Judge Hynes. *Id*. at *13–14. The Army Court, moving past any procedural error, reasoned "Judge Pritchard's decision to detail Judge Hynes was not for a lawful reason; instead, it was in pursuit of a particular result on an anticipated issue in the case." *Id*.

This Court should find the Army Court erred in its application of *Roach*, *Walker*, and R.C.M. 902, to the reassignment of Appellee's case. The judicial reassignment here was proper, timely, avoided the type of last-minute changes the Court of Military Appeals was concerned about in *Smith*, and complied with R.C.M. 505(e)(1).

1. Judge Pritchard did not recuse himself pursuant to R.C.M. 902, nor was he required to.

In *Walker*, this Court found non-structural error when the Chief Judge of the Navy and Marine Corps Court of Criminal Appeals [NMCCA] recused himself from a case but simultaneously generated a policy for replacing disqualified judges on panels. 60 M.J. at 358. The Chief Judge's policy, which he created after his recusal from appellant's case, was used to determine his replacement on that very same case. *Id*. Notably, the Chief Judge recused himself on the case because he had previously been a litigant to the matter while assigned as the Director of the Government Appellate Division. *Id*. at 355. Ultimately, this Court sent the case back to the NMCCA to be reconsidered by a properly designated panel. *Id*. at 359.

In *Roach*, this Court found non-structural error when the Chief Judge of the Air Force Court of Criminal Appeals [AFCCA] recused himself but subsequently recommended to the service's TJAG that a specific senior judge should be appointed to replace him on the panel considering the case. 69 M.J. at 20. The Chief Judge recused himself after making public statements about the appellant's case in the time between the AFCCA's opinion and the CAAF's remand of the case. *Id*. The appellant, as a result of the public statements, moved for the recusal of the entire AFCCA panel; however, only the Chief Judge recused himself. *Id*. Following his recusal, the Chief Judge contacted the Air Force TJAG to recommend his replacement on the panel, and the Air Force TJAG followed the Chief Judge's recommendation. *Id*.

This Court cited three reasons the appointment of the replacement appellate judge, at the recommendation of the recused Chief Judge, was concerning:

> Chief Judge Wise's recommendation to TJAG to appoint Senior Judge Francis was problematic for a number of reasons. First, and foremost, he took a procedural step after his recusal. Whether directly controlled by Walker or not, his actions were inconsistent with the spirit of Walker. While Chief Judge Wise was not promulgating a new policy, at a minimum his actions created the appearance of directly impacting a case from which he was recused. Second, Senior Judge Francis not only sat on the case, he authored it. Third, concerns about perceptions of impartiality in the military justice system are heightened where a court of criminal appeals is asked to review not only the decision of a trial court, but as in this case, the actions taken by a panel of the same court.

Id. Ultimately, this Court vacated the decision of the AFCCA and remanded the case to be considered by a new panel. *Id*. at 21.

At the threshold, the facts of *Walker* and *Roach*, and the procedural posture of those cases being at the CCA when errors arose, present circumstances that are fundamentally distinguishable from the instant case, where the judicial reassignment occurred prior to the assembly of the trial court.[7] Judge Pritchard had not previously been a party to the litigation, like the NMCCA Chief Judge in *Walker*. Judge Pritchard had not publicly commented on Appellee's case, like the AFCCA Chief Judge in *Roach*. The Army Court itself even acknowledges that Judge Pritchard, as a Chief Circuit Judge, had the authority to detail cases to other trial judges. *Davis*, 2024 CCA LEXIS 144 at *13.

Distinguishing the instant case with *Roach* and *Walker*, this Court should find Judge Pritchard did not recuse himself, nor was he required to under the plain language of R.C.M. 902; certainly, his decision not to recuse himself did not amount to an abuse of discretion. Additionally, examining *Smith* and R.C.M. 505(e), because Judge Pritchard was not recused or otherwise disqualified, this Court should find his reassignment of Appellee's case to Judge Hynes was proper, and based on the timing of the reassignment—prior to assembly of the court—no

[7] As this Court knows, CCAs are standing courts with multiple panels of appellate judges; in contrast, trial courts are convened by statute to handle individual cases in judicial circuits where there may only be a single military trial judge.

cause was required to be placed on the record. 23 U.S.C.M.A. at 556, 50 C.M.R. at 775; R.C.M. 505(e)(1).

2. Judge Hynes was impartial.

In addition to finding the reassignment itself was improper, the Army Court found error because Judge Hynes "did not approach appellant's case impartially" and had "a predetermined intent to deny a likely motion in appellant's case[.]" *Davis*, 2024 LEXIS 144 at *13–14. The Army Court based this finding on its reading of Judge Hynes's affidavit, wherein he stated, "I asked to take *U.S. v. Davis* to do my part to mitigate any potential case backlog while *U.S. v. Dial* was pending appeal." (JA 200). The Army Court's finding of a lack of impartiality is not supported by the evidence in the record.

The Army Court summarily used only a portion of the language in Judge Hynes's first affidavit to support its finding of some improper "predetermined intent." *Davis*, 2024 CCA LEXIS 144, at *13–14. Importantly, however, the Army Court failed to consider or even acknowledge the portion of Judge Hynes's second affidavit that clarified his use of the phrase:

> The phrase do my part to mitigate any potential case backlog while *U.S. v. Dial* was pending appeal refers only to my desire to take any available cases in my circuit that my chief trial judge did not want to take, for whatever reasons he did not want to take them. That statement was not in reference to *U.S. v. Davis* or any other case specifically; I would have been happy to take any case(s).

(JA 203–04). The Army Court ignored this language despite granting the government's motion to attach and supplementing the appellate record with Judge Hynes's second affidavit.

The record makes clear Judge Hynes was impartial and had no "predetermined intent" in Appellee's case. He inherited a case with no pending motions, before notice of forum and pleas were provided by Appellee, and before the court made any rulings. There is no factual dispute that the reassignment of the military judge occurred after arraignment (JA 098), prior to the motions filing deadline (JA 128), prior to hearing on any motions (JA 102), prior to Appellee's notice of forum and pleas (JA 193–94), and prior to the court being assembled (JA 100); when Judge Hynes took over, the only events that had occurred in Appellee's case were procedural.

At trial, Appellee did not voir dire or challenge Judge Hynes, did not raise the issue of disqualification, and ultimately requested to be tried by Judge Hynes in a judge-alone trial. (JA 093–96; 098–100). Judge Hynes independently—without having predetermined any outcome after being detailed by Judge Pritchard—denied Appellee's motion for a unanimous verdict.[8] Appellee's motion focused entirely on a claimed legal right to a unanimous verdict, a question of law, and did

[8] It is worth noting this ruling was legally correct. *Pritchard*, 82 M.J. at 694; *Anderson*, 83 M.J. at 302.

not require Judge Hynes hear a single witness or review any evidence, and there were no factual disputes in the motion for Judge Hynes to address.[9]

There is nothing in the record to suggest Judge Hynes predetermined any matter in Appellee's case; rather, the record shows he knew and followed the law. Appellee does not argue Judge Hynes misapplied the law, had an erroneous view of the facts, or even rendered convictions that were legally or factually insufficient. Judge Hynes acquitted Appellee of one the two charges, indicating he did not have any "deep-seated favoritism" or "unequivocal antagonism" against Appellee as to make it impossible for him to give Appellee a fair trial. *See Liteky*, 510 U.S. at 555 (citation omitted). Judge Hynes then adjudged the exact sentence Appellee requested.[10] (JA 069, 124–27).

The Army Court relies entirely on the reassignment of Appellee's case and the denial of his MFUV to find Judge Hynes was not impartial. The Army Court fails to discuss how any "predetermined intent" infected Appellee's court-martial or contributed to his subsequent conviction. A reasonable person observing the proceedings would have no reason to doubt the court-martial's legality, fairness,

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[9] The fact section of Appellee's MFUV was a single sentence: "[Appellee] is charged with one specification of attempted sexual assault without consent in violation of Article 80, UCMJ, and two specifications of sexual assault without consent in violation of Article 120, UCMJ." (JA 134).

[10] At presentencing, Appellee requested a sentence of 120 days, while the government requested a sentence of two years. (JA 119, 124).

and impartiality. The Army Court's alternate conclusion falls far short of the "high hurdle" this Court described in *Quintanilla*, and ignores the presumption this Court outlined that a military judge is presumed to be impartial. 56 M.J. at 44.

B. Assuming *arguendo* there was error in the reassignment of Appellee's case, any such error was non-structural and should be tested for harmlessness.

The Army Court found structural error mandating reversal "because the improper conduct of both trial judges 'affected the framework within which the trial proceed[ed.]'" *Davis*, 2024 CCA LEXIS 144 at *15. The Army Court relied on *Roach* and *Walker* to find impropriety in the reassignment of Appellee's case but deviated from those cases to find structural error:

> *Roach* found non-structural error, but appellant's case is different in several material respects: neither party has conceded this issue, the trial judge was not detailed in accordance with applicable law, and the trial judge was not impartial.

Id. at *14–15. The Army Court erred in at least two ways.

First, the Army Court seems to justify its abandonment of this Court's precedent by accumulating perceived errors to find structural error, rather than focusing its analysis on the constitutional right that was purportedly violated. This is not the appropriate framework for analyzing when an error is structural.

> For most constitutional errors at trial, we apply the harmless error test set forth in *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), to determine whether the error is harmless beyond a reasonable doubt. *See United States v. Moran,* 65 M.J. 178, 187 (C.A.A.F. 2007). We apply the Supreme Court's structural error analysis, requiring mandatory reversal, when the error affects "the

> framework within which the trial proceeds, rather than simply an error in the trial process itself."

United States v. Upham, 66 M.J. 83, 86 (C.A.A.F. 2008).

Additionally, the court's reasoning is built on a false premise—namely, the putative errors underlying its finding are not errors at all. As discussed *supra*, the reassignment of this case complied with *Smith* and R.C.M. 505(e); Judge Hynes was impartial; and the remainder of the Army Court's analysis blends together *Liljeberg* considerations that, in addition to not being germane to the structural error analysis,[11] are refuted by the affidavits of Judges Pritchard and Hynes.[12]

If there was error in this case, it was not structural. As the Supreme Court has reasoned:

> A "structural" error, we explained in *Arizona* v. *Fulminante*, is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," 499 U.S. at 310. We have found structural errors only in a very limited class of cases: See *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) (a total deprivation of the right to counsel); *Tumey* v. *Ohio,* 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927) (lack of an impartial trial judge); *Vasquez* v. *Hillery,* 474 U.S. 254, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle* v. *Wiggins,* 465 U.S. 168, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984) (the right to self-representation at trial); *Waller* v. *Georgia,* 467

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[11] These issues are discussed below in the government's analysis of *Liljeberg*.
[12] The Army Court also reasoned neither party conceded that any error would be non-structural. While this is technically correct, Appellee didn't argue structural error in their briefs to the Army Court, and the Army Court denied the government's request to distinguish *Roach* in a supplemental filing, even though the case citation was provided to counsel the morning of oral argument. (JA 227, 235).

> U.S. 39, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984) (the right to a public trial); *Sullivan* v. *Louisiana,* 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993) (erroneous reasonable-doubt instruction to jury).

Johnson v. United States, 520 U.S. 461, 468-69 (1997). Any error in the present case falls well short of the types of cases cited by the Supreme Court.[13]

Indeed, even in cases where the error would appear to affect the framework in which the trial proceeds far more than the instant case, this Court has found such errors non-structural. For example, in *United States v. Bartlett*, this Court held the Secretary of the Army "impermissibly contravened the provisions of Article 25, UCMJ[.]" 66 M.J. 426, 427 (C.A.A.F. 2008). Despite this Court's holding that the error impacted the composition of panels, this Court found the matter did not overcome "[the] strong presumption that an error is not structural." *Id*. at 430 (citations omitted). This Court found the appropriate analysis was to determine if the error prejudiced the appellant. *Id*.

This Court likewise did not find structural error in *Roach* or *Walker*. In each of those cases, Chief Judges of service CCAs affirmatively recused themselves in cases and subsequently selected their own replacements. In *Roach*, the AFCCA Chief Judge effectively hand-picked his replacement following his affirmative

[13] This case is a far cry from *Tumey v. Ohio*, where a mayor sitting as a village judge had a pecuniary interest in the outcome of the appellant's case because the village received revenue when defendants were convicted and required to pay fines. 273 U.S. 510, 535 (1927). The Supreme Court found under these circumstances the judge had an "official motive to convict." *Id*.

recusal. In *Walker*, the NMCCA Chief Judge developed a policy for replacing judges on panels, which he created after his recusal from the appellant's case but was then used to determine his replacement on that very same case.

Here, the circumstances surrounding any error—if there is error at all—are far more innocuous. Judge Pritchard reassigned Appellee's case to the only other Army Judge in the 5th Judicial Circuit; in contrast to *Roach* and *Walker*, Judge Pritchard did not hand-pick Judge Hynes from a population of multiple judges. This Court should recognize *Roach* and *Walker* did not implicate structural error, and neither does this case.

II. WHETHER THE ARMY COURT ERRED IN FINDING 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). The standard this Court applies "depends on whether the defect amounts to a constitutional error or a non-constitutional error." *Id*. (citing *United States v. Clark*, 79 M.J. 449, 455 (C.A.A.F. 2020)). For constitutional errors, the government has the burden of demonstrating the error was harmless beyond a reasonable doubt. *United States v. Tovarchavez*, 78 M.J. 458, 462–63 (C.A.A.F. 2019).

Law and Argument

Assuming *arguendo* Judge Pritchard improperly detailed Judge Hynes to Appellee's case, this Court should recognize: (1) none of Appellee's substantial rights were materially prejudiced by transferring the case from Judge Pritchard to Judge Hynes; and (2) the reassignment does not warrant dismissal with prejudice under *Liljeberg*. "We have long held that dismissal is a drastic remedy and courts must look to see whether alternative remedies are available." *United States v. Lewis*, 63 M.J. 405, 416 (C.A.A.F. 2006) citing *United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992). "As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a)." *Liljeberg*, 486 U.S. at 862 (citing 28 U.S.C. § 455).[14]

A. There was no prejudice to any right.

The Army Court asserts this case is not about the right to a unanimous verdict but rather the right to an impartial judge, and public perception of judicial conduct. *Davis*, 2024 CCA LEXIS 144 at *14. The Army Court fails to acknowledge, however, that central to this case—and the spark for Appellee's sole

[14] "Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455. This language mirrors R.C.M. 902(a), which states "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned."

assigned error in his Article 66, UCMJ, appeal to the Army Court—is the loss of a "favorable" ruling as a result of the reassignment of his case. (JA 027, 031). The Army Court instead found Judge Hynes, upon reassignment, was influenced to get the case to trial without delay by Judge Pritchard and Judge Hynes's efforts to move Appellee's case expeditiously to trial came at the cost of his impartiality. *Id*. at 14–15.

The Army Court, in its opinion, and Appellee, in his briefs to the Army Court, failed to demonstrate—or even suggest—how any alleged bias demonstrated by the denial of Appellee's MFUV extended into the merits portion of his trial or impacted his forum selection. Appellee offered in his affidavit, which was completed between the timing of Judge Hynes's initial and supplemental affidavits, that had he known Judge Hynes's took the case "to do [his] part" he would not have requested to be tried by him alone and would have requested Judge Hynes recuse himself. (JA 219). This assertion—however speculative it may be—is rendered moot by Judge Hynes's supplemental affidavit, which provides context to the language at issue. (JA 203–04). Additionally, even if Appellee would have requested Judge Hynes recuse himself, Judge Hynes had no reason to, because he was impartial. Certainly, his denial of such a recusal motion would not be an abuse of discretion. Thus, Appellee would have been in

the exact same position he found himself in this case: with Judge Hynes, an impartial judge, sitting on his court-martial.

Furthermore, the Army Court's conclusion that Judge Pritchard pressured Judge Hynes to rule a particular way is based entirely on speculation,[15] is not supported by the record before the Army Court and this Honorable Court, and requires a finding that two military judges have been deceptive and dishonest through the trial process and again on appeal. The direct evidence available indicates Judge Pritchard told Judge Hynes to remain impartial and that he should not be swayed by Judge Pritchard's previous rulings. (JA 196–97). Further, Judge Hynes demonstrated in his supplemental affidavit he retained judicial autonomy, independence, and was never improperly influenced in any manner. (JA 203–04).

For this Court to find prejudice, it would need to find Judge Hynes was not impartial, and resultantly, that both Judges Pritchard and Hynes have been dishonest in their sworn declarations. Even if Judge Pritchard's decision not to sit on Appellee's case was tantamount to disqualification that prevented him from being involved in the reassignment to Judge Hynes, the government has shown

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[15] "Beyond its ultra vires nature, Judge Pritchard's decision to detail Judge Hynes was also not for a lawful reason; instead, it was in pursuit of a particular result on an **anticipated** issue in the case." *Davis*, 2024 CCA LEXIS 144, at *13 (emphasis added). "[A]n already-recused judge detailed a non-impartial replacement judge to hear the case because the recused judge expected the replacement judge would **likely** rule a certain way on an **anticipated** motion." *Id*. (emphasis added).

beyond a reasonable doubt there is no material prejudice. As discussed *supra*, Judge Hynes was impartial, and Appellee received a fair trial.

B. Reversal is not warranted under *Liljeberg*.

The Army Court noted that "even if we were to find that the error was non-structural and that there was no material prejudice to appellant's rights, for all of the same reasons, we would reach the same result under *Roach* and the third prong of the *Lilj[e]berg* test: the risk of undermining the public's confidence in the judicial process." *Davis*, 2024 CCA LEXIS 144, at *15. The Army Court reasoned:

> [T]hese facts present obvious prejudice to our military justice system's credibility: an already-recused judge detailed a non-impartial replacement judge to hear the case because the recused judge expected the replacement judge would likely rule a certain way on an anticipated motion therein and, therefore, avoid possible interlocutory appellate stay; the replacement judge requested to take the case in order to reach a certain result on the anticipated motion and avoid delay; the recused judge failed to explain his reasons for recusal but instead improperly indicated the reassignment was for routine administrative reasons under R.C.M. 505; and neither judge disclosed these facts until we ordered it.

Id. The Army Court, in its discussion of why reversal with prejudice is appropriate under *Liljeberg*, specifically takes issue with Judge Hynes providing a second affidavit. *Id*. at *17–18. The Army Court is critical of Judge Hynes for voluntarily offering a clarifying affidavit, at the invitation of the government, after denying the government's request to order one. *Id*. at *15. The court's analysis under *Liljeberg* is erroneous.

"[N]ot every judicial disqualification requires reversal," and this court "ha[s] . . . adopted the standards announced by the Supreme Court in *Liljeberg* to determine whether a military judge's conduct warrants that remedy to vindicate public confidence in the military justice system." *Martinez*, 70 M.J. at 158. "In furtherance of that purpose, the Supreme Court held that in determining whether a judgment should be vacated 'it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.'" *Id*. at 159 (quoting *Liljeberg*, 486 U.S. at 864).

The Army Court erred in its analysis of the third *Liljeberg* factor[16] in at least two ways. First, the Army Court ignored the substance of Judge Hynes's second affidavit. See *Martinez,* 70 M.J. at 160 ("In the remedy analysis we do not limit our review to facts relevant to recusal, but rather review the entire proceedings, to include any post-trial proceeding, the convening authority action, the action of the Court of Criminal Appeals, or other facts relevant to the *Liljeberg* test."). The Army Court references "the content, nature and circumstances" of Judge Hynes's second affidavit being detrimental to the government case and suggests that Judge Hynes should not have communicated with the government after the Army Court

[16] The Army Court did not analyze the first two *Liljeberg* factors, *Davis*, 2024 CCA LEXIS 144, at *15, and neither of them provide a basis for relief in this case.

denied the request for a supplemental affidavit. In *Roach*, however, the appellant recognized "his claim . . . warranted some communication between Chief Judge Wise and the Government[] and led to the generation of an affidavit from Chief Judge Wise." 69 M.J. at 21. Likewise, here, Appellee's arguments and the comments of the Army Court at oral argument warranted additional communication between Judge Hynes and the government. There was nothing improper about Judge Hynes's willingness to provide a supplemental affidavit, or its contents.

This Court should examine the "content, nature and circumstances" of both affidavits provided by Judge Hynes. Judge Hynes, in his first affidavit, responded to the Army Court's order to answer a narrow question about his recollection in the detailing of Appellee's case. The Army Court's order and Judge Hynes's affidavit pre-date Appellee's brief to the Army Court; as such, at the time Judge Hynes completed his first affidavit there had been no allegations of impropriety for him to respond to. Judge Hynes's second affidavit comes after Appellee's brief, reply brief, and oral argument, where both Appellee and the Army Court subsequently suggested impropriety.[17]

[17] "Judge Hynes *knew* why Judge Pritchard detailed him to the case and functionally served as Judge Prichard's surrogate." (JA 029). "[T]he incontrovertible evidence actually shows that Judge Hynes knew Judge Pritchard's motivation and stepped-in to "do [his] part." (JA 064).

Instead of considering Judge Hynes's second affidavit in toto, as it should have done, the Army Court focused on one portion thereof and stated it was "concerned by Judge Hynes's adversarial tenor, and his solicitous remarks about the defense in this case and the defense function in general." *Davis*, 2024 CCA LEXIS 144 at *18. The portion of Judge Hynes's second affidavit the Army Court references involves his response to the allegations being made generally:

> I understand that appellate counsel are allowed to make baseless allegations in the course of client advocacy, including attribution of "nefarious" motives or intentions to impugn the integrity of military judges in the hope of receiving some relief for their client.

(JA 204). A reasonable person, knowing all the facts, would disagree with the Army Court's characterization of this language after considering the "content, nature and circumstances" of Judge Hynes's supplemental affidavit, and the manner in which it was provided. This is especially true when, in the very next sentence, Judge Hynes clarifies:

> However, I have never been influenced by anyone, other than the motions and arguments of litigants, in any way, in this case, or in any other, on any decision I have ever made as a military judge.

(JA 204). The Army Court, which selectively chose portions of Judge Hynes's affidavit to "further support" its position, ignores this clarification. *Davis*, 2024 CCA LEXIS 144, at *8. This Court should not commit the same error.

The remaining circumstances cited by the Army Court in its brief *Liljeberg* discussion are all built on false premises. As discussed *supra*, Judge Pritchard was not "already-recused," Judge Hynes was not a "non-impartial replacement judge," and Judge Pritchard did not know how Judge Hynes was going to rule *if* Appellee filed a MFUV. The Army Court's conclusion that public confidence would be threatened by the actions of Judges Pritchard and Hynes is erroneous, and the reasoning offered in support of that conclusion fails to consider all the facts presented in the affidavits provided by Judges Pritchard and Hynes. As discussed *supra*, Judge Hynes was impartial, and Appellee received a fair trial.[18] If anything, *reversal* of this case poses the greater risk of undermining public confidence in the military justice system. *See United States v. Uribe*, 80 M.J. 442, 450 (C.A.A.F. 2021) ("To the contrary, a decision to reverse the findings and sentence would increase the risk 'that the public will lose faith in the judicial system.'") (citation omitted).

C. Dismissal with prejudice is an inappropriate remedy.

If this Court finds error in the reassignment of Appellee's case, and that such error warrants reversal, this Court should authorize a rehearing. It appears the

[18] Notably, this Court has recognized during its analysis of the third *Liljeberg* factor that a military judge's acquittal of a specification "gives some assurance that an objective observer would still have confidence in the military justice system." *Uribe*, 80 M.J. at 450. Here, the military judge acquitted Appellee of attempted sexual assault. (JA 069, 118).

majority of case law from courts of criminal appeals supports authorizing a rehearing when finding errors for judicial disqualification, as opposed to dismissing with prejudice as the court did in this case. *See, e.g.*, *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) (authorizing a rehearing where a military judge abused her discretion when she affirmatively stated her service on a case presented the appearance of bias under R.C.M. 902(a) but refused to recuse herself).[19]

[19] *See also United States v. Springer*, 79 M.J. 756 (Army Ct. Crim. App. 2020) (the Army Court authorized a rehearing after it found error when a military judge failed to disclose his relationship with the spouse of one of the prosecutors on the case); *Cf. United States v. Rudometkin*, 82 M.J. 396 (C.A.A.F. 2022) (this Court found reversal not warranted).

Conclusion

The United States respectfully requests that this Honorable Court reverse the judgment of the Army Court.

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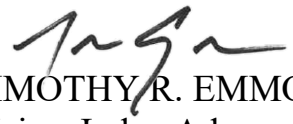

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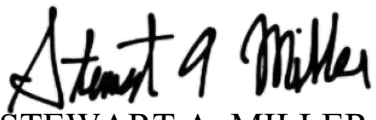

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CERTIFICATE OF FILING AND SERVICE

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 June 13, 2024.

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