

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**SUPPLEMENTAL BRIEF ON
BEHALF OF APPELLEE**

v.

Docket No. ARMY 20220231

Private (E-2)
TREVON K. COLEY,
United States Army,
Appellant

Tried at Kaiserslautern, Germany, on
6 January and 2–6 May 2022, before a
general court-martial convened by the
Commander, 21st Theater
Sustainment Command, Colonel
Charles L. Pritchard, Jr. and
Lieutenant Colonel Lance R. Smith,
Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Supplemental Assignment of Error I

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

Supplemental Assignment of Error II

**WHETHER UNLAWFUL COMMAND INFLUENCE
RESULTED IN THE IMPROPER MANIPULATION OF
THE CRIMINAL JUSTICE PROCESS IN THIS CASE.**

On 5 September 2023, appellant submitted a supplemental brief. The government's responses to the two supplemental issues are below.

Statement of Facts

A. Judge [REDACTED] found that a military accused has a constitutional right to a unanimous verdict.

On 3 January 2022, in the case of *United States v. Dial*, Colonel Charles (Jack) [REDACTED] Chief Judge of the Army's Fifth Circuit, ruled a military accused has a constitutional right to a unanimous verdict. (Gov. App. Ex. 1, p. 1). On 13 January 2022, he issued the same ruling in *United States v. Ferreira*. (Gov. App. Ex. 1, p. 1). The government filed petitions for writs for extraordinary relief in these cases, and this court issued stays of proceedings in both cases. (Gov. App. Ex. 1, p. 1). The writs were resolved in June 2022, finding no equal protection basis for a right to unanimous verdicts. *See United States v. [REDACTED]* 82 M.J. 686 (Army Ct. Crim. App. 2022).

B. Judge [REDACTED] abstained from ruling on any other unanimous verdict motions.

After this court issued stays in *Dial* and *Ferreira*, Judge [REDACTED] detailed himself to and remained detailed on "bench trials and [decided] to move other cases toward trial." (Gov. App. Ex. 1, p. 2). Judge [REDACTED] "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.” (Gov. App. Ex. 1, p. 2).

Considering this court’s stays in *Dial* and *Ferreira*, Judge [REDACTED] 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.” (Gov. App. Ex. 1, p. 2). Judge [REDACTED] believed “this result would be inconsistent with military justice.” (Gov. App. Ex. 1, p. 2). Furthermore, Judge [REDACTED] 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.” (Gov. App. Ex. 1, p. 2).

C. Judge [REDACTED] replaced Judge [REDACTED] on appellant’s case.

Judge [REDACTED] presided over appellant’s arraignment on 6 January 2022. (Gov. App. Ex. 1, p. 1). Appellant filed a motion for unanimous verdict [MFUV] on 25 February 2022. (App. Ex. 3). In March 2022, Judge [REDACTED] asked the Chief Trial Judge for assistance in finding a trial judge for this case. (Gov. App. Ex. 1, p. 3). In addition to delay considerations, Judge [REDACTED] planned on (and

did) take leave in the United States¹ during appellant's trial dates. (Gov. App. Ex. 1). 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. (Gov. App. Ex. 1, p. 3).

In early April 2022, Colonel (Col.) Sterling [REDACTED] the Air Force's Chief Circuit Military Judge for the European Circuit, and Judge Lance [REDACTED] immediate supervisor, asked Judge [REDACTED] if he was willing to take on an Army case. (Gov. App. Ex. 6, p. 1). At that time, neither Col. [REDACTED] nor Judge [REDACTED] "knew the nature of the charges in *Coley* let alone that a unanimous verdict remained outstanding." (Gov. App. Ex. 6, p. 3). Subsequently, Judge [REDACTED] learned that a change of judge in appellant's case was necessary because Judge [REDACTED] was scheduled to be on leave during the week of trial and no other Army military judge was available. (Gov. App. Ex. 6, p. 3). Because Col. [REDACTED] was unavailable, and Judge [REDACTED] was "the only other Air Force military judge assigned in Germany, or Europe for that matter," Judge [REDACTED] believed his selection was "more of a process of elimination than a handpicking." (Gov. App. Ex. 6, p. 3).

¹ Judge [REDACTED] was stationed in Germany and was the docketing judge for all the Army's 5th Judicial Circuit (except Bavaria, Germany). (Gov. App. Ex. 1, pp. 1, 3).

² Judge [REDACTED] is an Air Force lieutenant colonel. (Gov. App. Ex. 6, p. 4).

On 6 April 2022, Judge [REDACTED] contacted Judge [REDACTED] via email to start the handoff of appellant's case. (Gov. App. Ex. 6, p. 1). Judge [REDACTED] explained the procedural status of the case, including the fact that appellant's MFUV remained pending. (Gov. App. Ex. 6, encl. 1).

Around this time, Judge [REDACTED] met with Judge [REDACTED] at the Base Exchange food court on Ramstein Air Base. (Gov. App. Ex. 6, p. 2). Colonel [REDACTED] was also present. (Gov. App. Ex. 6, p. 2). During this in-person meeting, the topic of the MFUV came up, where Judge [REDACTED] "made a comment to the effect of, 'You will deny the motion and move on.'" (Gov. App. Ex. 6, p. 2). Judge [REDACTED] "did not take [Judge] [REDACTED] comment to be any sort of an order, or expectation as to how [he] would rule." (Gov. App. Ex. 6, p. 2). Instead, Judge [REDACTED] believed that Judge [REDACTED] "simply recognized" that Judge [REDACTED] was the only military judge they were aware of that had granted a Defense MFUV, and Judge [REDACTED] assumed that Judge [REDACTED] would deny the motion. (Gov. App. Ex. 6, p. 2). Judge [REDACTED] "did not leave that conversation feeling influenced by [Judge] [REDACTED] in any way." (Gov. App. Ex. 6, p. 2). Further, Judge [REDACTED] followed up with Judge [REDACTED] in an email and explicitly told Judge [REDACTED] not to take Judge [REDACTED] comment as an attempt to influence

Judge [REDACTED] in any way. (Gov. App. Ex. 6, p. 2).³ In his affidavit that he submitted to this court, Judge [REDACTED] stated the following:

I affirmatively state, neither [Judge] [REDACTED] 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.

(Gov. App. Ex. 6, pp. 2–3).

On 11 April 2022, Judge [REDACTED] was officially detailed to appellant’s case. (Gov. App. Exs. 3, 5). On 14 April 2022, Judge [REDACTED] held a telephonic Rule for Courts-Martial [R.C.M.] 802 conference with the parties to address any questions or concerns regarding his detailing. (Gov. App. Ex. 6, pp. 1–2). During the R.C.M. 802 conference, Judge [REDACTED] told the parties that “no one had explicitly or implicitly” told him that Judge [REDACTED] previous MFUV rulings in other cases was the reason for the change of judge in this case. (Gov. App. Ex. 6, p. 2). 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.” (Gov. App. Ex. 6, p. 2). Furthermore, “[n]either side opted to question or challenge [him] at trial.” (Gov. App. Ex. 6, p. 2; R. at 15–17, 20).

³ Judge [REDACTED] was unable to access a copy of the email to submit to this court. (Gov. App. Ex. 6).

On 18 April 2022, Judge [REDACTED] provided the parties with notice that he intended to deny appellant's MFUV. (Gov. App. Ex. 6, p. 2).⁴ On 2 May 2022, Judge [REDACTED] announced his ruling on the record and denied the MFUV. (R. at 22).⁵

Supplemental Assignment of Error I

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

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 [appellate courts] review de novo." *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012). A military judge's decision not to disqualify himself is reviewed for an abuse of discretion.⁶ *United States v. Sullivan*, 74 M.J. 448, 454 (C.A.A.F. 2015). However, where an appellant does not raise the issue of disqualification until appeal, the court reviews

⁴ In his affidavit, Judge [REDACTED] states this occurred on 18 August 2022, but this appears to be a typographical error.

⁵ On 6 May 2022, Judge [REDACTED] provided a 24-page written ruling on appellant's MFUV. (App. Ex. XXXII).

⁶ There are several issues raised by appellant, two of which are more accurately categorized as reassignment concerns, rather than disqualification or recusal of a military judge. However, the standard of review should be the same.

the claim under the plain error standard of review.⁷ *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011).

Under plain error review, appellant has the burden of: “establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights.” *United States v. Lopez*, 76 MJ 151, 154 (C.A.A.F. 2017) (quoting *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)) (internal quotation marks omitted). “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it.” *United States v. Dominguez Benitez*, 542 U.S. 74, 82

⁷ Appellant argues that “because neither Judge [REDACTED] nor Judge [REDACTED] disclosed the reasons for the replacement (contrary to R.C.M. 813(c)), appellant did not have a fair opportunity to object, and plain error review is not appropriate.” (Appellant’s Br. 7). However, when Judge [REDACTED] notified the parties that Judge [REDACTED] was replacing him, neither party objected. (Gov. App. Ex. 6, Encl. 4). Further, the same day Judge [REDACTED] replaced Judge [REDACTED] Judge [REDACTED] asked the parties whether they wanted an R.C.M. 802 conference; after the parties indicated that they did, Judge [REDACTED] held a telephonic conference the following day. (Gov. App. Ex. 6, Encls. 4, 5). During the conference, Judge [REDACTED] told the parties that “no one had explicitly or implicitly told [him] that [the MFUV] was the reason for the change of judge” in this case. (Gov. App. Ex. 6, p. 2). On the day of trial, Judge [REDACTED] summarized this R.C.M. 802 conference on the record and asked whether any party wanted to challenge or question him. (R. at 20). However, neither party did. (R. at 20). Although this court has the discretion to pierce waivers, this court should decline to do so and find the reassignment issue waived. *United States v. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020) (finding waiver where trial defense counsel “did not just fail to object,” but “affirmatively declined to object” when answering “no” to the military judge’s question); *see also United States v. Cunningham*, __ M.J. __, 2023 CAAF LEXIS 520, *13–14 (C.A.A.F. 2023) (holding that trial defense counsel’s answer of “no” constituted express waiver).

(2004). “[F]ailure to establish any one of the prongs is fatal to a plain error claim.” *Lopez*, 76 MJ at 154 (quoting *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006)) (internal quotation marks omitted) (alteration in original). “In other words, the appellant ‘must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different.’” *Id.* (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 195 (2016)).

Law

A. Military Judge Reassignments.

In *United States v.* [REDACTED] the Court of Military Appeals (CMA) held that “a military judge may be replaced prior to the assembly of a court by a convening authority without a showing of good cause. 3 M.J. 490, 492 (C.M.A. 1975). If the replacement occurs once the court has been assembled, however, good cause must still be demonstrated and made a matter of record.” *Id.* As the CMA explained:

Although the matters capable of resolution at a preliminary session are many and varied, ranging from accepting pleas to ruling on speedy trial or suppression motions, they possess one common characteristic: they are divisible from the other issues in a case. There is no logical or legal necessity for the same judge both to rule on each and every pretrial matter and to sit as military judge at trial. After trial begins, of course, good cause must be shown for relieving a military judge, Article 29(d), UCMJ; but before trial a requirement to show good cause for the assignment of different judges to sit in Article 39(a) sessions would needlessly hamper the administration of justice at the local level.

Id. at 491–92; *see, e.g., United States v. Hawkins*, 24 M.J. 257, 258 (C.M.A. 1987)

(“[T]he critical point for substitution—after which showing of good cause is

required—is ‘assembly of a court.’”) (citing ██████ 3 M.J. at 492); *United States v. Laramie*, 2021 CCA LEXIS 354, at *7 (Army Ct. Crim. App. 20 July 21) (sum. disp.) (noting ██████ holding allows for “wide latitude in the substitution of military judges and supports the trial judiciary with ‘the needed flexibility for the timely assignment of military judges to facilitate the administration of military justice in a highly effective and efficient manner and yet avoid any unlawful interruption or interference with the trial proper’”) (citing *United States v. Dixon*, 18 M.J. 310, 313 (C.M.A. 1984)).

The holding in ██████ is entirely consistent with the plain language of the R.C.M. 505(e)(1), which controls the change of military judges or military magistrates prior to assembly: “Before the court-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.” *See also, Manual for Courts-Martial, United States* (1984 ed.), Rule 505(e), analysis at A21-26 (citing ██████

B. Bias in Fact or in Appearance.

As this court recognized in *United States v. Black*, the two bases under R.C.M. 902 which call for the disqualification of a military judge are (1) the appearance of bias, and (2) actual bias. 80 M.J. 570, 573 (Army Ct. Crim. App. 2020). In *Black*, this court discussed actual bias, “A military judge shall disqualify

himself when the military judge ‘has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.’” *Id.* at 574 (citing R.C.M. 902(b)(1)). This court outlined some of the controlling precedent on the issue:

“To be disqualifying under R.C.M. 902(b)(1) the judge’s bias must be based upon extra-judicial, personal knowledge, not knowledge gained through performance of judicial duties.” *United States v. Wiggers*, 25 M.J. 587, 592 (A.C.M.R. 1987) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 580–83, (1966); *In re International Business Machines Corp.*, 618 F.2d 923, 928 (2d Cir. 1980)). “[P]ersonal’ means the bias or prejudice ‘must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.’” *United States v. Harvey*, 67 M.J. 758, 764 (A.F. Ct. Crim. App. 2009) (quoting *United States v. Kratzenberg*, 20 M.J. 670, 672 (A.F.C.M.R. 1985)); see *Liteky v. United States*, 510 U.S. 540, 549–51 (1994).

Id.

In *United States v. Quintanilla*, the Court of Appeals for the Armed Forces (CAAF) discussed challenges to a military judge’s partiality, and how appellate courts examine claims involving an appearance of bias on appeal: “[T]he test is objective, judged from the standpoint of a reasonable person observing the proceedings.” 56 M.J. 37, 78 (2001) (quoting *United States v. Burton*, 52 M.J. 223, 226 (2000)) (internal quotation marks omitted). 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.

Argument

A. Appellant cannot demonstrate plain error or prejudice.

Appellant argues that he is entitled to relief for the following reasons: (1) Judge ██████ reassignment of appellant’s case to avoid automatic stays was impermissible because it denied appellant’s due process rights; (2) there was at least an appearance of bias, because Judge ██████ refusal to hear appellant’s case “would cause a reasonable person to question his impartiality”; and (3) Judge ██████ was biased, or there was at least an appearance of bias, because Judge ██████ “directed” him to deny the MFUV. (Appellant’s Br. 12–14). However, appellant’s arguments should be rejected out of hand because, despite his conclusory statement that the reassignment prejudiced him, appellant simply cannot demonstrate error or prejudice.⁸ (Appellant’s Br. 15).

In *United States v. Anderson*, the CAAF held unequivocally that 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 (2023). Thus, even if Judge ██████ had stayed detailed to appellant’s case,

⁸ By describing Judge ██████ actions as “manipulating the recusal process,” appellant implies that Judge ██████ actions may implicate ethical concerns. (Appellant’s Br. 14). However, the record simply does not support this assertion.

appellant would still be in the same position as he is now: being tried by a panel with no requirement that the panel reach a unanimous verdict. Judge ██████ rightly assumed that appellant's case would follow the pattern in *Dial* and *Ferreria*: he would have granted the MFUV, the government would have filed a writ petition, and this court would have stayed appellant's case⁹ until it issued the writ of prohibition in ██████ or the CAAF decided *Anderson*. Ultimately, the only difference would have been a delay in appellant's case—precisely the result Judge ██████ sought to avoid. (Gov. App. Ex. 1, p. 2).

Appellant complains that he was “deprived of a fair *opportunity* to make his case on the MFUV because Judge ██████ was likely wedded to its denial.”¹⁰ (Appellant's Br. 14). Yet, the evidence says otherwise: appellant had multiple opportunities, such as when Judge ██████ held a telephonic R.C.M. 802 conference with both parties; when Judge ██████ asked on the record if either party desired to question or challenge him; and when Judge ██████ provided an advance notice of ruling on the MFUV. (Gov. App. 6; R. at 16–17, 20). Moreover, Judge ██████ clearly reviewed appellant's MFUV and the arguments raised therein, since Judge

⁹ Appellant also acknowledges that an automatic stay would have resulted if Judge ██████ granted his MFUV. (Appellant's Br. 12).

¹⁰ Appellant speculates as to Judge ██████ state of mind without any evidence to support his statement. On the contrary, the evidence demonstrates that Judge ██████ was not “wedded” to any decision; instead, Judge ██████ applied the law as he knew it. (Gov. App. Ex. 6, p. 3).

█████ issued a detailed, twenty-four page ruling addressing appellant’s argument and detailing Judge █████ reasons for denying the MFUV. (App. Ex. XXXII). Further, even if appellant was deprived of an opportunity “to make his case on the MFUV,” there is still no prejudice because appellant simply does not have a right to a unanimous verdict. (Appellant’s Br. 14). For example, assuming, *arguendo*, that Judge █████ had granted appellant’s MFUV, appellant would still be in the exact same position as the appellants in *Dial* and *Ferreira*: his trial would have been stayed while this court and the CAAF sorted out that Judge █████ ruling granting appellant’s MFUV was incorrect in law.

In regards to appellant’s *Liljeberg* prejudice argument, even if, assuming *arguendo*, Judge █████ had directed Judge █████ to deny appellant’s MFUV,¹¹ the end result is that he would have directed Judge █████ to find that appellant was not entitled to a unanimous verdict—which is, in fact, a right appellant did not have. 83 M.J. 291. It is difficult to see how a military judge making a correct legal ruling—consistent with every Court of Criminal Appeals (CCA) and CAAF opinion—would pose a “grave risk of undermining the public’s confidence in the military justice system.” (Appellant’s Br. 15–16).

¹¹ As discussed *supra*, p. 5, and *infra*, p. 27–28, there can be no question that Judge █████ did *not* direct Judge █████ to make *any* findings.

Simply put, there is no reasonable scenario where a military judge, regardless of who the judge was, could have found a right to a unanimous verdict where appellant actually went to trial and was entitled to a unanimous verdict. Appellant also fails to demonstrate—or even suggest—how any alleged bias he suffered in the denial of his MFUV extended into the merits portion of his trial or impacted his forum selection. Accordingly, there can be no harm, and this court should find appellant has failed to demonstrate any prejudice.

B. Judge [REDACTED] reassignment of appellant’s case was not an attempt to influence the outcome of the proceedings and complied with R.C.M. 505.

In the instant case, Judge [REDACTED] replaced Judge [REDACTED] after appellant’s arraignment but prior to the assembly of the court; therefore, no showing of good cause was required, and Judge [REDACTED] reassignment was proper. (R. at 2–11, 84, 89); [REDACTED] 3 M.J. at 492; R.C.M. 505(e)(1).

Yet, appellant argues that Judge [REDACTED] attempted to influence the proceedings by reassigning the case to another judge and cites to *Cruz v. Abbate* for support. 812 F.2d 571, 574 (9th Cir. 1987). *Cruz*, however, is inapposite. In *Cruz*, the judge at issue was the Presiding Judge of the Superior Court of Guam who “assign[ed] each case to the judge of his choice.” *Id.* at 572. The petitioners in that case claimed that “this method was, or at least gave the appearance of being, arbitrary and unfair, and should be replaced by a random assignment system.” *Id.* Here, however, there is no evidence that Judge [REDACTED] hand-picked Judge [REDACTED]

for appellant's case. In fact, the evidence clearly demonstrates the opposite. Judge [REDACTED] appropriately contacted the Air Force Chief Circuit Military Judge for Europe, Col. [REDACTED] only after exhausting his options for an Army military judge. (Gov. App. Ex. 1, p. 3). Even then, Judge [REDACTED] did not select Judge [REDACTED] himself to effectuate what appellant refers to as "manipulation" of the court-martial behind "closed doors"; rather, Col. [REDACTED] identified Judge [REDACTED] as being available for appellant's trial dates. (Appellant's Br. 16, 22); (Gov. App. Ex. 1, p. 3). Judge [REDACTED] also believed that his selection "was more of a process of elimination than a handpicking" since Col. [REDACTED] was unavailable to take the case himself, and Judge [REDACTED] was the only other Air Force military judge assigned in Europe. (Gov. App. Ex. 6, p. 3). At that time, neither Col. [REDACTED] nor Judge [REDACTED] "knew the nature of the charges in *Coley* let alone that a unanimous verdict motion remained outstanding." (Gov. App. Ex. 6, p. 3).

The premise underlying appellant's entire argument—that Judge [REDACTED] reassigned appellant's case in an attempt to influence the outcome of his case—is fundamentally flawed. (Appellant's Br. 8, 14). There was no guarantee that Judge [REDACTED] would have denied appellant's MFUV. (Gov. App. Ex. 6). More importantly, appellant's premise is unmoored from reality and simply not supported by the record before this court: if Judge [REDACTED] wanted to influence the outcome, 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 removing himself from it.

Moreover, Judge [REDACTED] and Judge [REDACTED] affidavits clearly establish the basis for judicial reassignment. (Gov. App. Ex. 1; Gov. App. Ex. 6). Judge [REDACTED] granted MFUVs in two earlier cases; as such, those cases were stagnant pending a decision on the government's petition for a writ of prohibition with this court. (Gov. App. Ex. 1, p. 1). Judge [REDACTED] following this court's issuance of a stay in those other cases, decided he would no longer rule on MFUVs and would only preside over cases where the forum requested was trial by military judge alone. (Gov. App. Ex. 1, p. 1). In making this decision, Judge [REDACTED] noted that he anticipated defense would continue to request relief in the form of MFUVs, but 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." (Gov. App. Ex. 1, p. 2). Importantly, Judge [REDACTED] reasoned that if this court upheld his ruling on unanimous verdicts in *Dial* or *Ferreira*, "each accused would receive the benefit of the Army Court's opinion." (Gov. App. Ex. 1). Thus, regardless of how Judge [REDACTED] ruled on the

MFUV, the result of the proceedings in appellant's case would be the same: appellant would not have been entitled to a unanimous verdict.

Additionally, Judge [REDACTED] was “planning to (and did)” take leave back in the United States during appellant's trial date. (Gov. App. Ex. 1, p. 3). Simply put, Judge [REDACTED] was unavailable for appellant's trial dates, whereas Judge [REDACTED] was available. As the [REDACTED] court noted, “[t]here is no logical or legal necessity for the same judge both to rule on each and every pretrial matter and to sit as military judge at trial,” especially when it would “needlessly hamper the administration of justice at the local level.” [REDACTED] 3 M.J. at 491–92.

Therefore, this court should find that the judicial reassignment here was proper and timely under [REDACTED]. Additionally, this court should find that the judicial reassignment complied with the plain language of R.C.M. 505(e)(1), and appellant's due process rights were not violated.

C. Appellant fails to demonstrate how Judge [REDACTED] service as military judge created a risk of actual bias.

As a threshold matter, appellant has failed to cite any enumerated provision within R.C.M. 902(b) Judge [REDACTED] violated. Instead, appellant alleges—ipse dixit—that Judge [REDACTED] “functionally served as Judge [REDACTED] surrogate” to deny appellant's MFUV. (Appellant's Br. 13–14). However, appellant's accusations that Judge [REDACTED] “manipulat[ed] the recusal process” is grounded neither in logic nor fact. (Appellant's Br. 14).

When Judge [REDACTED] started the handoff process for this case, Judge [REDACTED] simply told Judge [REDACTED] that since “[n]either party wanted to present evidence or be heard on that motion,” Judge [REDACTED] could rule on the briefs themselves. (Gov. App. 1, Encl. 1). Judge [REDACTED] also recommended that the MFUV be Judge [REDACTED] “first order of business.” (Gov. App. 1, Encl. 1). Aside from those sparse comments, the MFUV briefly came up again when Judge [REDACTED] met with Judge [REDACTED] and Col. [REDACTED] at a food court and said something to the effect of, “You will deny the motion and move” to Judge [REDACTED] (Gov. App. 6, p. 2). However, Judge [REDACTED] “did not take COL [REDACTED] comment to be any sort of an order, or expectation” as to how he would rule. (Gov. App. 6, p. 2). Rather, it appeared to be a passing comment by Judge [REDACTED] who simply assumed Judge [REDACTED] would deny the MFUV since Judge [REDACTED] was the only military judge that had granted a defense MFUV at that time. (Gov. App. 6, p. 2). Moreover, after the food court meeting, Judge [REDACTED] followed up with an email to Judge [REDACTED] and explicitly told him that he “should not take his comment as an attempt to influence [him] in any way.” (Gov. App. 6, p. 2). This is a far cry from appellant’s assertion—which this court should reject outright—that Judge [REDACTED] “ensur[ed] Judge [REDACTED] knew he was meant to deny the MFUV.” (Appellant’s Br. 14).

Appellant suggests *Williams* is a case supporting his position. (Appellant’s Br. 13) (citing *Williams*, 579 U.S. at 4). In *Williams*, the Supreme Court held Chief Justice Ronald Castille, a Pennsylvania State Supreme Court Justice, violated a defendant’s due process rights by serving as an appellate judge in a case where he had previously served as the District Attorney. *Id.* at 16. Chief Justice Castille, while serving as the District Attorney, authorized the prosecutor assigned to the defendant’s case to seek the death penalty. *Id.* at 5. The defendant was convicted and sentenced to death. *Id.* When a stay of execution was appealed to the Pennsylvania State Supreme Court, nearly thirty years later, the defendant motioned for Chief Justice Castille to recuse himself due to his prior involvement as the District Attorney, but Chief Justice Castille denied his request. *Id.* at 7. The Supreme Court held, “Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant’s case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level.” *Id.* at 16.

Neither appellant’s brief—nor the record—offer any facts for this court to liken the instant matter in any way to *Williams*. Appellant fails to cite any extra-judicial, personal knowledge, not gained through Judge [REDACTED] performance of judicial duties. The record, specifically with respect to the affidavits completed by Judge [REDACTED] and Judge [REDACTED] in response to this court’s order, establishes that

the only discussions that occurred between the two were related to their performance of judicial duties. (Gov. App. Ex. 1, 6).

Appellant also fails to demonstrate how Judge [REDACTED] had actual bias, or how his service as the military judge in appellant's case created a risk of actual or apparent bias. Judge [REDACTED] correctly ruled on appellant's MFUV based on his "understanding of the applicable law." (Gov. App. Ex. 6, p. 3); *see, e.g., United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000) ("A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence."); *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary."). He did not feel pressured to rule a certain way, nor did he feel like there was an expectation as to how he should rule. (Gov. App. Ex. 6, pp. 3–4).

D. Appellant fails to demonstrate how Judge [REDACTED] service as military judge created any appearance of bias.

In *Black*, this court found the appellant failed to demonstrate plain error in support of a claim regarding the appearance of bias under R.C.M. 902(a). *Black*, 80 M.J. at 577. The appellant argued the appearance of bias based upon the military judge's rulings and argued the military judge had predetermined the credibility of witnesses prior to the close of the merits. *Id.* at 575–77. However,

this court found “[n]othing in the record” that the military judge had either predetermined the credibility of the witnesses or judged the appellant prior to the close of merits. *Id.* at 576. “In other words, the record is devoid of ‘clear evidence’ to rebut the presumption that the military judge knew and followed the law.” *Id.* (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007)).

Similarly, here, a reasonable person observing the proceedings in this case would have no reason to doubt the court-martial’s legality, fairness, and impartiality. Judge █████ ruled on appellant’s MFUV based on his “understanding of the applicable law.” (Gov. App. Ex. 6, p. 3). There is nothing to indicate that Judge █████ had predetermined to deny appellant’s MFUV, even after his meeting with Judge █████ in the food court. (Gov. App. Ex. 6, pp. 2–3). Nor would a reasonable person believe that an Army colonel could influence or direct an Air Force lieutenant colonel to surrender his sense of impartiality and fairness as a military judge, especially when that Air Force’s immediate supervisor, also a colonel, was present. (Gov. App. Ex. 6). Rather, Judge █████ “knew and followed the law” by denying appellant’s MFUV; it is illogical to think that “a reasonable person” would “question his impartiality” because Judge █████ “followed the law”. *Black*, 80 M.J. at 576; (Appellant’s Br. 15).

Lastly, appellant cites to *United States v. Witt* for the proposition that “[b]ias is presumed where a judge is detailed to a case, present for duty, and otherwise

capable to sit, but refuses to hear the case.”¹² 75 M.J. 380 (C.A.A.F. 2016); (Appellant’s Br. 10). *Witt* says no such thing and does not even mention bias. Instead, *Witt* states: “The refusal of a judge who is present for duty and not disqualified to participate amounts to disqualification. Once disqualified, the judge is prohibited from further participation in the case.” 75 M.J. at 384. Moreover, the actual holding of *Witt* was that “participation of disqualified judges in the reconsideration process produced a significant ‘risk of undermining the public’s confidence in the judicial process’”. *Witt* is completely inapplicable here, and there is no bias to be “presumed.” (Appellant’s Br. 10).

Thus, since “the record is devoid of ‘clear evidence’ to rebut the presumption that the military judge knew and followed the law,” this court should find the absence of any appearance of bias. *Black*, 80 M.J. at 577.

Supplemental Assignment of Error II

WHETHER UNLAWFUL COMMAND INFLUENCE RESULTED IN THE IMPROPER MANIPULATION OF THE CRIMINAL JUSTICE PROCESS IN THIS CASE.

Standard of Review

¹² Appellee is unaware of any case with facts similar to this case that support the proposition made by appellant. To the extent appellant is relying on *Witt* for the court’s reference to judicial codes of conduct, these references in *Witt* are not relevant for resolution of the assignments of error in this case.

Courts review allegations of unlawful command influence (UCI) de novo. *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) (citing *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013)).

Law

Article 37, UCMJ, provides that “[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case” Article 37, Uniform Code of Military Justice, 10 U.S.C. § 837 (2020) [UCMJ]. Traditionally, military courts have recognized two types of UCI: actual and apparent UCI. *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017). Actual UCI occurs when there is an “improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case,” while apparent UCI is simply the appearance of such influence. *Id.*

An appellant bears the initial burden of demonstrating “some evidence” of UCI, which must be “more than mere allegation or speculation.” *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). For actual UCI, an appellant must establish: “(1) facts, which if true, constitute unlawful influence; (2) unfairness in the court-martial proceedings (i.e., prejudice to the accused); and (3) that the unlawful influence caused that unfairness.” *Boyce*, 76 M.J. at 248. Once an appellant meets his initial burden, the burden shifts to the government to rebut the

allegation “by persuading the Court beyond a reasonable doubt that: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence.” *Salyer*, 72 M.J. at 423.

Unlike actual UCI where prejudice is required, military courts have not required such a showing for apparent UCI. *Boyce*, 76 M.J. at 248. Instead, if the government could not meet its burden of proving beyond a reasonable doubt that the predicate facts did not exist or that the facts as presented did not constitute UCI, the government had to prove beyond a reasonable doubt that the UCI did not place “an intolerable strain upon the public’s perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.” *Id.* at 250 (cleaned up).

However, effective 20 December 2019, Congress amended Article 37, UCMJ, to provide: “No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section *unless the violation materially prejudices the substantial rights of the accused.*” 10 U.S.C. § 837(c) (emphasis added); see National Defense Authorization Act for Fiscal Year 2020

(FY20 NDAA), Pub. L. No. 116-92, § 532, 133 Stat. 1360 (2019).¹³ Although the CAAF has yet to address how this amendment alters its prior doctrine on apparent UCI, three Courts of Criminal Appeals [CCAs], including two panels of this court, have noted that the amendment “would seem to vitiate the current apparent UCI ‘intolerable strain/disinterested observer’ jurisprudence.” *United States v. Alton*, ARMY 20190199, 2021 CCA LEXIS 269, at *13–14 n.5 (Army Ct. Crim. App. 2 June 2021) ([mem. op.](#)), pet. denied, 82 M.J. 42 (C.A.A.F. 2021); *United States v. Garrett*, ARMY 20210298, 2022 CCA LEXIS 638, at *17 (Army Ct. Crim. App. 21 Oct. 2022) ([mem. op.](#)), aff’d on other grounds, ___ M.J. ___, 2023 CAAF LEXIS 491 (C.A.A.F. 18 July 2023); *see also United States v. Burnett*, ACM 39999, 2022 CCA LEXIS 342, at *58 (A.F. Ct. Crim. App. 10 June 2022) ([unpub. op.](#)), pet. denied, 83 M.J. 73 (C.A.A.F. 2022); *United States v. Gattis*, 81 M.J. 748 (N.M. Ct. Crim. App. 2021), pet. denied., 82 M.J. 189 (C.A.A.F. 2022); *United States v. Horne*, 82 M.J. 283, 291 (C.A.A.F. 2022) (Ryan, J., dissenting).

Argument

A. There was no unlawful command influence.

¹³ The effective date of this amendment was 20 December 2019; since the alleged influence occurred after this date, the amendment applies here. FY20 NDAA, § 532(c), 133 Stat. 1361 (“The amendments made by subsections (a) and (b) . . . shall take effect on the date of the enactment of this Act and shall apply with respect to violations of section 837 of title 10, United States Code (article 37 of the Uniform Code of Military Justice), committed on or after such date.”).

Appellant fails to demonstrate “some evidence” of UCI that is “more than mere allegation or speculation.” *Biagase*, 50 M.J. at 150. The thrust of appellant’s argument is that Judge ██████ statement, “You will deny the motion and move on,” to Judge ██████ constituted a directive, rather than an unartfully stated assumption. (Appellant’s Br. 20).

Appellant takes Judge ██████ comment to Judge ██████ out of context and distorts it. (Appellant’s Br. 20). Judge ██████ affidavit clearly states that he did not take Judge ██████ comment “to be any sort of an order, or expectation as to how [he] should rule.” (Gov. App. Ex. 6, p. 2). Instead, Judge ██████ correctly interpreted Judge ██████ comment as a passing assumption, as to how Judge ██████ would rule, since Judge ██████ was the only military judge who had thus far granted a MFUV. (Gov. App. Ex. 6, p. 2). Judge ██████ even clarified his intention behind his comment by following up with Judge ██████ via email and telling Judge ██████ “not [to] take his comment as an attempt to influence [him] in any way.” (Gov. App. Ex. 6, p. 2). Judge ██████ himself affirmatively stated in his affidavit that “neither COL ██████ previous ruling nor his statement at lunch influenced [his] ruling on the [MFUV] in this case. [He] ruled based on [his] understanding of the applicable law.” (Gov. App. Ex. 6, pp. 2–3). Judge ██████ further reiterated that there “was never any expectation communicated to [him] in any way as to how [he] would rule” and that he “did not

feel any pressure from any source as to how [he] would ultimately rule” on the MFUV. (Gov. App. Ex. 6, pp. 3–4).

Even if this court were to find Judge [REDACTED] passing comment was intended to be a directive, it defies logic and is simply not supported by the record to believe that Judge [REDACTED] an Air Force military judge, decided to deny appellant’s MFUV because an Army military judge told him to do so. (Appellant’s Br. 20). This is especially true since Judge [REDACTED] supervisor, Col. [REDACTED], who is of equal rank to Judge [REDACTED] was present at this meeting. (Gov. App. Ex. 6).

Simply put, there was no evidence of UCI—actual or apparent—here, and accordingly, appellant fails to meet his burden of providing “some evidence” of UCI. *Biagase*, 50 M.J. at 150.

B. Even if appellant could provide “some evidence” of UCI, appellant cannot show prejudice.

Assuming *arguendo* that appellant could provide “some evidence” of UCI, appellant is still not entitled to any relief. *Biagase*, 50 M.J. at 150. Appellant fails to illustrate how any alleged UCI “materially prejudiced” him. 10 U.S.C. § 837(c). “Without prejudice to the substantial rights of the accused from an error—hitherto defined as ‘a reasonable probability that, but for the error, the outcome of the proceeding would have been different,’—Article 59(a), UCMJ, prohibits [this court] from affording relief.” *Boyce*, 76 M.J. 242 at 254 (Ryan, J., dissenting)


(citing *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) and *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016)).

Appellant's sole averment is that his MFUV was denied. (Appellant's Br. 23). Yet, as discussed previously, *supra* Supplemental Assignment of Error 1, Judge [REDACTED] denial of appellant's MFUV was correct in law, so there was no prejudice nor harm. *See Anderson*, 82 M.J. at 691. Even if, assuming for argument's sake, that Judge [REDACTED] denied appellant's MFUV due to Judge [REDACTED]'s alleged influence, there is no reasonable scenario where appellant would be in a better position: regardless of whether any military judge approved or denied appellant's MFUV, appellant would still not be entitled to a unanimous verdict. *See Anderson*, 82 M.J. at 691.

Since appellant has failed to provide evidence of any actual prejudice, this court can find beyond a reasonable doubt that any alleged UCI did not affect the findings and sentence in this case. Accordingly, this court should find that appellant is not entitled to relief under Article 37, UCMJ.

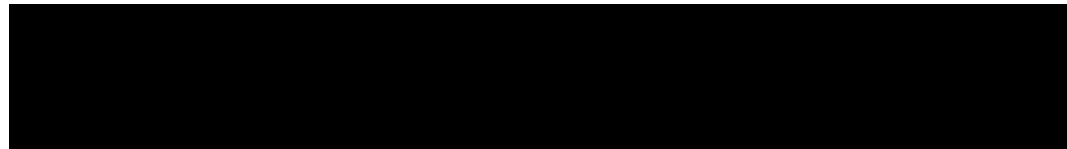
Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence and deny relief.



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CERTIFICATE OF SERVICE, U.S. v. COLEY (20220231)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [REDACTED]

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