

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,  
Appellee

**BRIEF ON BEHALF OF  
APPELLEE**

v.

Docket No. ARMY 20220272

Specialist (E-4)  
**TAYRON D. DAVIS,**  
United States Army,  
Appellant

Tried at Kaiserslautern, Germany on  
14 February, 11 April, 19 May, and  
23–24 May 2022, before a general  
court-martial convened by  
Commander, Headquarters, 21st  
Theater Sustainment Command,  
Colonel Charles Pritchard and  
Lieutenant Colonel Tom Hynes,  
Military Judges, presiding.

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

**Assignment of Error<sup>1</sup>**

**WHETHER JUDICIAL REASSIGNMENT OF  
APPELLANT’S CASE WARRANTS REVERSAL OF  
HIS CONVICTION.<sup>2</sup>**

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<sup>1</sup> The government has reviewed appellant’s *Grosteefon* matters and agrees with the appellate counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. The government recognizes this court’s authority to elevate *Grosteefon* matters deserving of increased attention. *United States v. Grosteefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant’s *Grosteefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

<sup>2</sup> Panel 4 of this court is currently examining a nearly identical assignment of error in *United States v. Coley*, Docket No. ARMY 20220231.

### **Statement of the Case**

On 24 May 2022, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ]. (Statement of Trial Results [STR]; R. at 369). The military judge acquitted appellant of attempted sexual assault in violation of Article 80, UCMJ, 10 U.S.C. § 880. (STR; R. at 369). The military judge sentenced appellant to be confined for 120 days and dishonorably discharged. (STR; R. at 433). On 28 June 2022 the convening authority elected to take no action. (Action). On 30 June 2022, the military judge entered judgment. (Judgment).

### **Statement of Facts**

#### **A. Appellant sexually assaulted Sergeant [REDACTED] twice in one evening.**

Appellant and SGT [REDACTED] became friends in 2016 while the two were stationed in Germany and remained close friends for nearly five years prior to appellant sexually assaulting her. (R. at 120–23, 180). On 24 November 2020, SGT [REDACTED] confided in appellant that she was having a difficult time. (R. at 138). Appellant and SGT [REDACTED] continued talking, and appellant offered to meet SGT [REDACTED] at her apartment. (R. at 138–39). SGT [REDACTED] agreed to appellant coming to her apartment because she did not want to be alone. (R. at 138–39).

Appellant arrived at SGT [REDACTED]'s apartment sometime around 2000–2100 with a bag containing bottles of alcohol. (R. at 138–39). The two began consuming alcohol in the apartment, and, as the evening progressed, appellant began to make what SGT [REDACTED] perceived as sexual advances, which she rejected. (R. 139–46, 160–61). Eventually, appellant and SGT [REDACTED] went to sleep on the living room couch. (R. 164–65). SGT [REDACTED] woke up a short time later as appellant was removing her pants and attempting to perform oral sex on her. (R. at 165). Appellant pulled SGT [REDACTED]'s pants down far enough to expose her genitalia and placed his mouth on her vulva. (R. at 167–68).

SGT [REDACTED] tried to stop appellant by pushing his head away from her genitalia, but he ignored her and continued to perform oral sex over her verbal and physical demonstrations of lack of consent. (R. at 168). SGT [REDACTED] was finally able to stop the first sexual assault by pulling up her pants and pushing appellant away with enough force to cause him to stumble backwards. (R. at 173). Appellant and SGT [REDACTED] then went back to sleep on the couch. (R. at 173). SGT [REDACTED] awoke later to appellant digitally penetrating her vulva. (R. at 174). SGT [REDACTED] stopped the second sexual assault by getting up from the couch, returning to her bedroom, and putting on a second pair of pants. (R. at 174–75).

**B. Judge Pritchard found 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) Pritchard, 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. Pritchard*, 82 M.J. 686 (Army Ct. Crim. App. 2022).

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

After this 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." (Gov. App. Ex. 1, p. 2). Judge Pritchard "decided not to rule on any further unanimous verdict motions until the Army Court issued an opinion on the issue," which he assumed would "last around six months but could be shorter or longer." (Gov. App. Ex. 1, p. 2).

Considering this 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." (Gov. App. Ex. 1, p. 2). Judge Pritchard believed "this result would be inconsistent with military justice." (Gov. App. Ex. 1, p. 2). 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." (Gov. App. Ex. 1, p. 2).

**C. Judge Hynes replaced Judge Prichard on appellant's case.**

On 4 April 2022, Judge Pritchard reassigned appellant's case to Lieutenant Colonel Tom Hynes, the only other military judge in the Army's Fifth Circuit. (Gov. App. Ex. 1, p. 2–3; Gov App. Ex. 3). 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. (App. Ex. I; Gov. App. Ex. 1). Later that day, after the case had been reassigned to Judge Hynes, appellant filed his Motion for a Unanimous Verdict (MFUV). (Appellant's Br., p. 2; App. Ex. III; Gov. App. Ex. 5).

On 11 April 2022, Judge Hynes placed his appearance on the record during a 39(a) session and afforded the parties an opportunity to question or challenge him; defense counsel elected to do neither. (R. at 14–16). During the same 39(a), Judge Hynes informed the parties he denied the MFUV and that a written ruling would follow. (R. at 18). A written ruling was issued by the military judge on 14 April 2022. (App. Ex. XIV).

On 22 April 2022, eight days after the court’s written ruling on his MFUV, appellant entered a plea of not guilty to all charges and specifications and requested trial by enlisted panel. (App. Ex. XVII). On 19 May 2022, one duty day prior to the start of trial, appellant requested to be tried by a military judge alone. (App. Ex. XXI). On 23 May 2022, prior to the start of trial that day, the military judge conducted a colloquy with appellant regarding his change in forum selection and confirmed appellant’s desire to be tried by military judge alone. (R. at 111–13; App. Ex. XXI).

### **Assignment of Error**

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

### **Standard of Review**

“The interpretation of UCMJ and [Rule for Courts-Martial] 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). A military judge’s decision not to disqualify himself is reviewed for an abuse of discretion.<sup>3</sup> *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 the claim under the plain error standard of review.<sup>4</sup>

*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) (citing *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)). “[T]he burden of establishing

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<sup>3</sup> 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.

<sup>4</sup> Appellant argues that “because neither Judge Pritchard nor Judge Hynes 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., 4–5). On the day of the motions hearing, in his first appearance on the record, Judge Hynes asked whether any party wanted to challenge or question him. (R. at 14). However, neither party did. (R. at 14). Appellant later elected to be tried by a military judge alone knowing Judge Hynes would be the judge for his case. (R. at 111–13). Although this court has the discretion to pierce waived issues, 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).

entitlement to relief for plain error is on the defendant claiming it.” *Id.* (citation omitted). “[F]ailure to establish any one of the prongs is fatal to a plain error claim.” *Id.* (citing *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006)). “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.* (citation omitted).

## **Law**

### **A. Judicial Reassignment.**

In *Smith*, the Court of Military Appeals 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. If the replacement occurs once the court has been assembled, however, good cause must still be demonstrated and made a matter of record.” *United States v. Smith*, 50 C.M.R. 774, 775 (C.M.A. 1975). The holding in *Smith* is entirely consistent with the plain language of the current applicable Rule for Court-Martial [R.C.M.]. “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.” R.C.M. 505(e)(1).

### **B. Judicial Bias.**

As this court recognized in *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. *United States v. Black*, 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:

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, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (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, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

*Id.*

In *Quintanilla*, the CAAF discussed challenges to a military judge’s partiality, and how appellate courts examine claims involving an appearance of bias “[o]n appeal, the test is objective, judged from the standpoint of a reasonable person observing the proceedings.” *United States v. Quintanilla*, 56 M.J. 37, 78 (C.A.A.F. 2001). 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.” *Quintanilla*, 56 M.J. 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 Pritchard’s reassignment of appellant’s case to avoid automatic stays was an impermissible attempt to influence the proceedings which violated appellant’s due process rights; (2) Judge Hynes was actually biased, or there was at least a risk of actual bias, because Judge Hynes “knew why Judge Pritchard detailed him to the case and functionally served as [his] surrogate”;<sup>5</sup> and (3) Judge Hynes being detailed created an appearance of bias, because Judge Pritchard’s refusal to hear appellant’s case “would cause a reasonable person to question his impartiality,” (Appellant’s Br., 9–12). However, appellant’s arguments should be rejected by this court.

In *Anderson*, the CAAF held unequivocally that a military accused is not entitled to a unanimous verdict under the Sixth Amendment, Fifth Amendment due

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<sup>5</sup> Appellant uses the term “likelihood of bias” throughout his argument. (Appellant’s Br., 10) citing *Williams v. Pennsylvania*, 579 U.S. 1 (2016). This court should recognize the clarity offered by the holding in *Williams*, which examined the “risk of actual bias.” *Id.* at 16. As such, this court should find that a “likelihood of bias” is fundamentally the same thing as a “risk of actual bias.”

process, or Fifth Amendment equal protection. *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023). Thus, even if Judge Pritchard had stayed detailed to appellant's case, appellant would still be in the same position as he is now. Ultimately, the only difference would have been a delay in appellant's case—precisely the result Judge Pritchard 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 Hynes was likely wedded to its denial.” (Appellant's Br., 11). Yet, the record supports the opposite conclusion: appellant had multiple opportunities, such as when Judge Hynes held a telephonic R.C.M. 802 conference with both parties; when Judge Hynes asked on the record if either party desired to question or challenge him; and when Judge Hynes provided advance notice of his ruling on the MFUV. (R. at 14–18).

Moreover, Judge Hynes clearly reviewed appellant's MFUV and the arguments raised therein, as he outlined in his written ruling the reasons for denying the MFUV. (App. Ex. XIV). Further, even if this court finds 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., 11). For example, assuming, *arguendo*, that Judge Hynes had granted appellant's MFUV, appellant would have likely been 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 the incorrect ruling.

In regards to appellant's *Liljeberg* prejudice argument, even if, assuming *arguendo*, Judge Pritchard implicitly suggested to Judge Hynes that he deny appellant's MFUV, the end result is that he would have suggested to Judge Hynes to find that appellant was not entitled to a unanimous verdict—which is, in fact, a right appellant did not have. *Anderson*, 83 M.J. at 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., 12–13).

Appellant 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 Pritchard’s reassignment of appellant’s case was not an attempt to influence the outcome of the proceedings and complied with R.C.M. 505.**

Judge Hynes replaced Judge Pritchard after appellant’s arraignment but prior to assembly of the court; as such, no showing of good cause was required, and the judicial reassignment was executed in accordance with the applicable R.C.M. (R. at 14, 113); *Smith*, 50 C.M.R. at 775–76; R.C.M. 505(e)(1).

The appellate record, through the affidavits of Judge Pritchard and Judge

Hynes, clearly establishes the basis for judicial reassignment.<sup>6</sup> (Gov. App. Ex. 1, p. 2–3; Gov. App. Ex. 3). Judge Pritchard granted motions for unanimous verdicts in two earlier cases; as such, those cases were stayed pending a decision on the government’s petition for a writ of prohibition with this court. (Gov. App. Ex. 1, p. 1). Judge Pritchard, following this court’s issuance of a stay in those other cases, decided he would no longer rule on motions for unanimous verdicts 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 Pritchard noted that he anticipated defense would continue to request relief in the form of motions for unanimous verdicts, and that he did not know how other military judges might rule; however, he recognized that if he continued to rule on such motions, it would “shut down at least half of the courts-martial in Europe and the Middle East (Army 5th Judicial Circuit) for lengthy periods of time.” (Gov. App. Ex. 1, p. 2).

Judge Pritchard clarified 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

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<sup>6</sup> Appellant directs this court should view “Judge Pritchard’s claim he was not ‘certain’ how Judge Hynes would rule should be approached with skepticism.” (Appellant’s Br., p. 11, n. 3). Appellant’s suggestion that Judge Pritchard’s response to this court lacks complete candor to the court is unsupported by the record.

grant the motion and the case would be stayed.” (Gov. App. Ex. 1, p. 2).

Importantly, Judge Pritchard 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, p. 2). Thus, regardless of how Judge Hynes 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.

At the time the case was reassigned to Judge Hynes, the court had not received any motions from the parties, even though 4 April 2022 was the motions filing deadline. (Appellant’s Br., 2; App. Ex. I; Gov. App. Ex. 1, p. 2). There is no factual dispute that the reassignment of the military judge in appellant’s case occurred after arraignment (R. at 11), prior to the motions filing deadline (App. Ex. I), prior to hearing on any motions (R. at 17), prior to appellant’s notice of forum and pleas (App. Ex. XVII; App. Ex. XXI), and prior to the court being assembled (R. at 113); when Judge Hynes took over, the only events that had occurred in appellant’s case were procedural.

Appellant alleges that Judge Pritchard attempted to influence the proceedings by reassigning the case to another judge and cites to, *inter alia*, *Cruz v. Abbate* for support.<sup>7</sup> 812 F.2d 571, 574 (9th Cir. 1987). *Cruz*, however, is

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<sup>7</sup> Appellant also cites to three cases to support his proposition “the need to mitigate the docket concerns here could not have come at the cost of appellant’s perceived right to a unanimous panel.” (Appellant’s Br., p. 9–10). These cases are irrelevant

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 Pritchard hand-picked Judge Hynes for appellant’s case. Rather, Judge Hynes was the only other military judge in the Army’s Fifth Circuit.

There is no persuasive evidence to support appellant’s claim that Judge Pritchard and Judge Hynes discussed the merits of the MFUV or that Judge Pritchard pressured Judge Hynes to rule any particular way. The only evidence on the matter in the record indicates Judge Pritchard told Judge Hynes to remain impartial in his consideration of such motions, and that he should not be swayed by Judge Pritchard’s previous rulings. (Gov. App. Ex. 1, p. 3).

Appellant has failed to demonstrate how Judge Pritchard attempted to influence the proceedings by reassigning the case to Judge Hynes. Given the

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to the assignment of error before this court. Appellant first cites a dissent in *Link v. Wabash R. Co.*, a civil case involving the District Court dismissing an action “for failure of the plaintiff’s counsel to appear at the pretrial conference.” Appellant next cites *Brown v. Crawford County*, from the 11th Circuit, highlighting dicta from a footnote addressing the “procedures” used in a civil case regarding summary judgment. Finally, appellant cites to *Madsen v. State*, from the Supreme Court of Washington, where a trial court improperly denied a defendant’s petition to proceed pro se in a criminal trial.

absence of any motions at the time of judicial reassignment, the only pending proceeding in appellant's case was the trial itself. This court should find that the judicial reassignment here was proper, timely, and avoided the type of last-minute changes the Court of Military Appeals was concerned about in *Smith*.

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. Judge Hynes did not violate R.C.M. 902 by serving as the military judge in appellant's case.**

**1. There was no actual bias, or risk thereof.**

Appellant does not cite any enumerated provision within R.C.M. 902(b) the military judge violated; however, he alludes to a violation under R.C.M. 902(b)(1) by claiming Judge Hynes "functionally served as Judge Pritchard's surrogate." (Appellant's Br., 10–11). Appellant contends, with no support from the record, that when Judge Pritchard reassigned appellant's case to Judge Hynes for the purpose of managing the circuit docket there was an implied task for Judge Hynes to deny appellant's MFUV and keep the case moving to trial. (Appellant's Br., 10). Appellant's allegation that Judge Pritchard placed undue influence on Judge Hynes to deny the MFUV, and that Judge Pritchard "reassigned the case because he *desired* that outcome[,]" is unsupported by the record. (Appellant's Br., 9). Appellant's MFUV had not even been filed when Judge Hynes took over.



Appellant suggests *Williams* is a case supporting his position. (Appellant's Br., 10, citing *Williams v. Pennsylvania*, 579 U.S. 1 (2016)). 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 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 State Supreme Court, nearly thirty years later, 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, "[w]here 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 Hynes's performance of judicial duties. The record, specifically with respect to the affidavits completed by Judge Pritchard and Judge Hynes 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; Gov. App. Ex. 3). Appellant has failed to demonstrate how Judge Hynes had actual bias, or how his service as the military judge in appellant's case created a risk of actual bias. There are no facts in the record to support this court finding otherwise.

Appellant also fails to demonstrate how Judge Hynes had actual bias, or how his service as the military judge in appellant's case created a risk of actual or apparent bias. Judge Hynes correctly ruled on appellant's MFUV. *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."). Appellant does not argue, or even suggest, Judge Hynes's misapplied the law in denying his MFUV.

## **2. There was no 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. With respect to that issue, this court held, “We find no error, plain or otherwise. Even assuming the military judge plainly erred by failing to *sua sponte* recuse himself, appellant identifies no prejudice flowing from the military judge's Mil. R. Evid. 414 rulings and we find none.” *Id.* at 576.

In the instant case, a reasonable person observing the proceedings would have no reason to doubt the court-martial's legality, fairness, and impartiality. Judge Hynes inherited a case with no pending motions, before notice of forum and pleas were provided by appellant, and before the court made any rulings. Additionally, defense counsel did not raise the issue of disqualification and, in fact, requested to be tried by this judge after he had ruled on all motions. (R. at 111–13). This suggested defense counsel at trial believed the judge remained impartial. *See United States v. Hill*, 45 M.J. 245, 249 (C.A.A.F. 1996) (inferring that the lack of defense objection to numerous questions by the members “suggests that the defense believed as we now hold: The members remained impartial, notwithstanding their zealous participation in the search for evidence.”).

Additionally, Judge Hynes acquitted appellant of one the two charges. (STR; R. at 369). This shows Judge Hynes did not have any “deep-seated favoritism” or “unequivocal antagonism” against appellant as to make it impossible for him to give appellant a fair trial. *See, e.g., Liteky v. United States*,

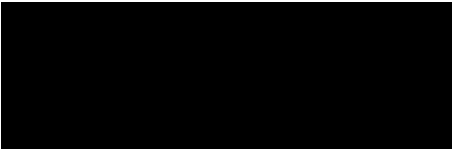
510 U.S. 540, 555 (1994) (citation omitted). There is nothing in the record to suggest Judge Hynes predetermined any matter of factual or legal significance as it related to the merits portion of the trial, or as to his ruling on the MFUV. Rather, Judge Hynes “knew and followed the law” by denying appellant’s MFUV; it is illogical to think that “a reasonable person” would “question his impartiality” because Judge Hynes “followed the law.” *Black*, 80 M.J. at 576; (Appellant’s Br., 12). As such, there was no legitimate reason for Judge Hynes to recuse himself in appellant’s case.

Lastly, appellant cites to *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.” *United States v. Witt*, 75 M.J. 380 (C.A.A.F. 2016); (Appellant’s Br., 8). *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.” *Witt*, 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.’” *Id.* *Witt* is completely inapplicable


here, and there is no bias to be “presumed.”<sup>8</sup> (Appellant’s Br., 12). 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.

### **Conclusion**

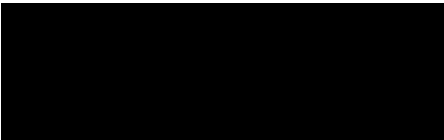
WHEREFORE, the government respectfully requests this honorable court deny appellant’s request for relief and affirm the findings and sentence.



STEWART A. MILLER  
CPT, JA  
Appellate Attorney, Government  
Appellate Division



CHASE C. CLEVELAND  
MAJ, JA  
Branch Chief, Government  
Appellate Division



CHRISTOPHER B. BURGESS  
COL, JA  
Chief, Government Appellate  
Division

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<sup>8</sup> Appellant is simultaneously suggesting Judge Pritchard was required to remain on the case, and Judge Hynes should have recused himself or been disqualified due to bias, neither of those propositions are supported by *Witt*.

**CERTIFICATE OF SERVICE, U.S. v. DAVIS (20220272)**

I certify that a copy of the foregoing was sent via electronic submission to the  
Defense Appellate Division at [REDACTED]  
[REDACTED] on the 18th day of October, 2023.

[REDACTED]  
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