IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Specialist (E-4) **TAYRON D. DAVIS** United States Army, Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** Docket No. ARMY 20220272 Tried at Kaiserslautern, Germany on 14 February 2022, 11 April 2022, 19 May 2022, 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

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

Argument

Colonel Charles (Jack) Pritchard removed himself on appellant's case as the military judge to avoid ruling favorably on appellant's motion for unanimous verdict [MFUV] and then refused to disclose this to the parties. Regardless of whether the ruling on appellant's MFUV was ultimately correct, this court cannot condone the ignoble process by which that ruling was reached in this case.

Contrary to the government's contentions, the issue is not waived, there is error, and there needs to be relief.

A. <u>The issue is not waived</u>.

The government asks this court to find this issue waived because defense counsel declined to challenge the military judge. (Gov't Br., p. 7, n. 4). However, the authorities the government cites concern errors that were *known* at the time counsel affirmatively declined to challenge. *United States v. Davis*, 79 M.J. 329, 331-32 (C.A.A.F. 2020); *United States v. Cunningham*, __ M.J. __, 2023 CAAF LEXIS 520, *13–14 (C.A.A.F. 2023). That is not the case here, and appellant is not aware of any case—nor does the government offer one—finding waiver predicated on the military judge's failure to disclose information.

Notwithstanding the absence of a challenge, appellant maintains this court should treat this issue as preserved because appellant was denied a meaningful opportunity to object. *See United States v. Rodriguez*, 919 F.3d 629, 635 (1st Cir. 2019); *see also United States v. Armendariz*, 82 M.J. 712, 724-25 (N-M. Ct. Crim. App. 2022) (rejecting plain error review for judicial disqualification where the trial court failed to disclose information); *see also United States v. Fazio*, 487 F.3d 646, 652 (8th Cir. 2007) (same); *In re M.C.*, 8 A.3d 1215, 1224 (D.C. Cir. 2010) (suggesting plain error review may not be appropriate for every failure to object to

judicial disqualification); *but see United States v. Springer*, 79 M.J. 756, 759 (Army Ct. Crim. App. 2020).[1]

However, because the government's response addresses Judge Pritchard's error through the lens of plain error, appellant's reply likewise addresses plain error.

B. <u>The judicial reassignment violated Due Process</u>.

The government contends that the record fails to show Judge Pritchard reassigned the case to influence the outcome of appellant's MFUV. (Gov't Br., pgs. 15-16). This contention fails.

For one, the government ignores the undisputed facts. By Judge Pritchard's own account, he removed himself as the military judge because he "recognized that if he continued to rule [favorably for the accused] on the [MFUVs], it would 'shut down at least half of the courts-martial in Europe and the Middle East[.]'" (Gov't Br., p. 13) (quoting Gov. App. Ex. 1, p. 2). The implication of this statement is obvious: Judge Pritchard desired a government-favorable outcome on the MFUVs,

[1] *Springer* reviewed judicial disqualification for plain error despite the military judge's failure to disclose an inappropriate relationship with a counsel's spouse. *Springer*, 79 M.J. at 759. There, however, the parties did not ostensibly dispute the applicability of plain error review, and *United States v. Martinez*, the case *Springer* cited for plain error, did not involve the failure to disclose. 70 M.J. 154, 156 (C.A.A.F. 2011) ("[a]lthough Martinez's defense counsel observed [the military judge's] conduct during the trial, he did not object.")

or, at the very least, the chance for that to happen. If this were not the case, then why did he remove himself at all?

For another, the government's contention places emphasis on irrelevant facts—namely, that the MFUV was not pending when the reassignment occurred. (Gov't Br., pgs. 14, 16). Whether the motion came before or immediately after Judge Pritchard's departure, he intentionally skirted the ruling on appellant's MFUV all the same.

Moreover, the government's contention rests, in part, on a "straw man" argument that Judge Pritchard did not pressure the incoming military judge, Lieutenant Colonel Tom Hynes—a "claim" nowhere in appellant's brief, and it attacks the straw man with the unsupported conclusion that "[t]he only evidence on this matter" indicates Judge Pritchard told Judge Hynes to remain impartial. (Gov't Br., p. 15). Putting aside that the government is referencing Judge Pritchard's conversation with Judge Hynes in a *different* case, (Gov. App. Ex. 1, p. 3), and that the incontrovertible evidence actually shows that Judge Hynes knew Judge Pritchard's motivation and stepped-in to "do [his] part," (Gov. App. Ex. 3), the bottom line is that the due process violation was complete (and obvious) the moment Judge Pritchard stepped-off appellant's case to avoid ruling favorably for him on the MFUV out of a desire to get it denied. *See Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987) ("[w]hile a defendant has no right to any particular

procedure for the selection of the judge. . . he is entitled to have that decision made in a manner free from bias or *the desire to influence the outcome of the proceedings*") (emphasis added);[2] *see also State v. Langford*, 735 S.E.2d 471, 479-80 (N.C. 2012) ("a state may use any method to select judges [under Due Process], so long as it is impartial *and not geared towards influencing the trial's outcome*) (emphasis added).

The government further argues that, even assuming error, this court "should find appellant failed to demonstrate any prejudice." (Gov't Br., p. 12). Specifically, the government suggests the result of the proceeding would not have changed because appellant "likely" would have been in the same position as the defendants in *United States v. Dial* and *United States v. Ferreira* had his MFUV been granted, (Gov't Br., p. 11-12), and he "fail[ed] to demonstrate—over even suggest—how any alleged bias he suffered . . . extended into the merits portion of his trial or impacted his forum selection." (Gov't Br., p.12).

The government forgets that it—not appellant—has the burden of prejudice here and must prove the error harmless beyond a reasonable doubt. *United States*

[2] The government's attempt to distinguish *Cruz* is not persuasive. While *Cruz*, like any case, may be distinguishable on some level, courts have applied its rule in the context of other judicial assignment cases. *See e.g.*, *United States v. Pearson*, 203 F.3d 1243, 1257 (10th Cir. 2000).

v. Cueto, 82 M.J. 323, 334 (C.A.A.F. 2022) ("[i]f a constitutional error is nonstructural, then . . . the [g]overnment must prove that the error was harmless beyond a reasonable doubt even on plain error review") (citing *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019)). The government offers no proof that the trial counsel would have pursued the writ *in this case*, and this court cannot be certain it would have.[3] A writ was most likely the only obstacle in the path of appellant receiving a unanimous verdict instruction, which impacted the merits, and the government's bare assertion that the same outcome was "likely" cannot suffice to satisfy its burden. Thus, there is prejudice.[4]

C. <u>The judicial reassignment created at least the appearance of bias</u>.[5]

The government claims that the judicial reassignment would not cause a reasonable person to question Judge Pritchard's or Judge Hynes' impartiality, and

[3] Whether a writ is sought is certainly dependent on a variety of factors unique to each case, such as an assessment of the strength of the evidence, command's desire for expediency, and the participants' own perspectives on procedural fairness.

[4] With respect to forum selection, the government is simply wrong in its assertion of the facts. Prior to the government's response, appellant filed an affidavit with this court attesting that, had he known the full details of the reassignment, he would have selected a different forum. (Def. App. Ex. D). This is prejudice in its own regard.

[5] Appellant stands on his brief for constitutional bias and addresses only the appearance of bias under Rule for Courts-Martial 902(a).

that, in any event, the reassignment would not risk undermining the public's confidence. (Gov't Br., pgs. 12, 18-21). These claims are without merit.

The government's arguments on the appearance of bias may be quickly dispatched. The government contends that the failure to challenge the military judge suggests the military judge was impartial, (Gov't Br., p. 19), but this, of course, ignores that Judge Pritchard kept counsel in the dark as to the nature of the reassignment. The government also contends that there was no "deep-seated favoritism" or "unequivocal antagonism," (Gov't Br., p. 19), but these standards apply when the disqualification stems from facts solely *within* the trial, in contrast to here where the facts supporting disqualification are "extrajudicial."[6] *See Liteky v. United States*, 510 U.S. 540, 555 (1994). And the government contends that "there is nothing in the record to suggest that Judge Hynes predetermined any matter as it relates . . . to his ruling on the MFUV," and that he "followed the law," (Gov't Br., p. 20), but this neglects both that Judge Hyne's asked for this case to "do [his] part" before appellant's MFUV was received and that there was no

[6] To this point, the government's repeated reliance on *United States v. Black*, 80 M.J. 570 (Army Ct. Crim. App. 2020), is misplaced. (Gov't Br., pgs. 18-20). *Black* concerned an allegation of bias stemming from a military judge's rulings, *id*. at 573, and allegations of bias stemming from facts within the trial "must meet [the] high bar of deep-seated antagonism." *United States v. Ciavarella*, 716 F.3d 705, 723 (3rd Cir. 2013). Thus, like the government's inapt general reference to this standard, its reliance on *Black* elsewhere in its brief is similarly inapt.

controlling precedent on unanimous verdicts at the time of appellant's trial. *See United States v. Bremers*, 195 F.3d 221, 227 (5th Cir. 1999) (finding judicial disqualification based on the facts as they existed at the time); *see also United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) ("Section 455 [of Title 28] relates to recusal based on circumstances existing prior to or at the time of the judge's participation in a case"). In short, a reasonable person would question the impartiality of both military judges, and the government puts forth no persuasive argument as to why this court should conclude otherwise.

As for the claim that no relief is necessary, in any event, because "[i]t is difficult to see how a military judge making a correct legal ruling . . . would pose a grave risk of undermining the public's confidence[,]" (Gov't Br., p. 12), the government misses the mark. Specifically, the government improperly focuses on the "ends" rather than the "means," and this misguided approach would deny a remedy even in the most egregious cases so long as an appellate body later agrees with the trial judge's legal analysis. This court must focus on the process, *see Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 864 (1988), and that "process" here warrants relief.

WHEREFORE, appellate defense counsel respectfully request that this court set aside the findings and the sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 1 November 2023.

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