

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

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

**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 Error¹

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

Statement of the Case

On 24 May 2022, appellant was found guilty, contrary to his pleas, of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920. The military judge sentenced appellant

¹ Appellant has raised matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that are contained in the Appendix.

to 120 days of confinement and a dishonorable discharge. (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. (Entry of Judgement).

Statement of Facts

On 3 January 2022, Chief Judge of the Army's Fifth Circuit, Colonel Charles (Jack) Pritchard, issued a ruling in *United States v. Dial*, in which he found a military accused has a constitutional right to a unanimous verdict. (Gov. App. Ex. 1). Ten days later, he issued the same ruling in *United States v. Ferreira*. (Gov. App. Ex. 1). The government subsequently filed writs for extraordinary relief in these cases, which were resolved in June of 2022. *See United States v. Pritchard*, 82 M.J. 686 (Army Ct. Crim. App. 2022).

From the docketing of the writ in *Ferreira* in late January to this court's resolution of the matter in June, Judge Pritchard all but disappeared from contested trials in his judicial circuit. (Def. App. Ex. A). In appellant's case specifically, Judge Pritchard detailed himself and presided over appellant's arraignment, (R. at 5), but on 4 April 2022, the day motions were due and only hours before appellant filed his previously noticed motion for a unanimous verdict [MFUV], Judge Pritchard's subordinate, Lieutenant Colonel Tom Hynes, replaced him as judge. (Gov. App. Ex. 1). In *at least* three other cases, Judge Pritchard's replacement as the military judge came after defense filed a MFUV. (Def. App. Ex. B).

In an affidavit ordered by this court, Judge Pritchard confirmed he had removed himself from cases with MFUVs because the government would have likely continued to seek extraordinary relief so long as he continued to rule favorably for the accused, which he surmised would have “essentially shut down at least half of the courts-martial in Europe and the Middles East[.]” (Gov. App. Ex. 1). While confident the disposition of the *Dial* and *Ferreira* writs would establish precedent, Judge Pritchard nonetheless believed the stay of any additional cases to await a decision on the applicability of a constitutional right would be “inconsistent with military justice.” (Gov. App. Ex. 1). Thus, he reassigned these cases to other judges.

Despite this arrangement, Judge Pritchard insisted he was “not attempting to arrange . . . a denial of the unanimous verdict motion,” since he did know how the other military judges would necessarily rule. (Gov. App. Ex. 1). Yet, according to Judge Hynes’ account, he and Judge Pritchard discussed *Dial* and the concerns about the potential “case backlog,” and Judge Hynes took appellant’s case to “do [his] part to mitigate any potential case backlog while [*Dial*] was pending appeal.” (Gov. App. Ex. 3). Judge Pritchard then detailed Judge Hynes, (R. at 16), and his first order of business was to deny the MFUV, which he “dispens[ed] with . . . quickly” (R. at 18).

The reasons for the reassignment were purposely kept from appellant, and from every other accused, for the months *Dial* remained pending. Not only did Judge Pritchard (and Judge Hynes) fail to affirmatively disclose the reasons on the record in this case, but Judge Pritchard refused defense counsels' collective request to disclose his reasons. (Def. App. Ex. C).

With the MFUV denied, and unaware of the reasons for Judge Pritchard's replacement, appellant chose trial by military judge alone, (App. Ex. XXI), proceeded to trial with Judge Hynes as factfinder, (App. Ex. XXI), and was subsequently found guilty of sex assault. (R. at 369). Had appellant known of the reasons for Judge Pritchard's replacement, he would have not waived

Standard of Review

Due Process claims are reviewed de novo. *See e.g., United States v. Lewis*, 69 M.J. 379, 383 (C.A.A.F. 2011). This includes constitutional claims concerning judicial bias. *See In re Marshall*, 721 F.3d 1032, 1039 (9th Cir. 2013). Claims of judicial bias under Rule for Courts-Martial [R.C.M.] 902 are reviewed for an abuse of discretion. *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021).

Although courts review unpreserved errors for plain error, plain error review is not appropriate where a party did not have a "fair opportunity" to object. *See United States v. Rodriguez*, 919 F.3d 629, 635 (1st Cir. 2019); *see also* Fed. R. Crim. P. 51(b) ("[i]f a party does not have an opportunity to object . . . the absence

of an objection does not later prejudice that party”). Here, because neither Judges Pritchard nor Hynes disclosed the reasons for the replacement in contravention to R.C.M. 813(c), appellant did not have of a fair opportunity to object, and therefore, plain error review is not appropriate.²

Law

Under Article 26, UCMJ, a military judge shall be detailed to each general court-martial, who “shall preside over each open session.” 10 U.S.C. § 826(a). However, in accordance with R.C.M. 505(e), a military judge may be replaced, and if the replacement occurs before the court has assembled, no cause is necessary. R.C.M. 505(e)(1). This provides “the needed flexibility to facilitate the administration of military justice[.]” *United States v. Smith*, 3 M.J. 490, 492 (C.M.A. 1975).

Critically, however, the rule does not permit the replacement of a military judge before assembly for *any* reason. Specifically, the replacement is subject to the constraints of Due Process.

This conclusion is consistent with *United States v. Smith*, the case that served as the genesis for R.C.M. 505(e). *Manual for Courts-Martial* [MCM], Analysis for the Rules for Courts-Martial, App. 21-28 (2016 ed.). There, the Court

² In any event, appellant has established plain error.

of Military Appeals [CMA] made clear that while no cause was required, it “in no way condon[ed] the replacement of a military judge before assembly of the court for improper motives,” and that such circumstances would “warrant severe remedial action.” *Smith*, 3 M.J. at 492, n.5. While *Smith* did not explicitly reference “Due Process,” the court’s citation to cases concerning unlawful command influence [UCI] as examples, *id* (citing *Petty v Moriarty*, 20 U.S.C.M.A. 438 (1971); *United States v Knudson*, 4 U.S.C.M.A. 587 (1954)) more than suggests Due Process limitations. See *United States v. Bergdahl*, 80 M.J. 230, 246 (C.A.A.F. 2020) (Sparks, J., concurring in part and dissenting in part) (describing that the court has “long recognized” the relationship between UCI and Due Process).

Moreover, the conclusion is consistent with federal court decisions finding that judicial reassignments, while largely unfettered, are constrained by Due Process. For example, in *Cruz v. Abbate*, the Ninth Circuit held that “even the broadest discretion” afforded to courts in reassigning cases is “capable of abuse if exercised in a manner that impairs the rights guaranteed by the Constitution.” 812 F.2d 571, 574 (9th Cir. 1987). Ultimately, *Cruz* “recogniz[ed] a Fifth Amendment right against the assignment of cases by judicial officers for improper reasons.” *United States v. International Bhd. Of Teamsters*, 697 F. Supp. 710, 713 (S.D.N.Y. 1988). Important here, *Cruz* identified as an improper reason “the *desire* to

influence the outcome of the proceedings.” *Cruz*, 812 F. 3d at 574 (emphasis added).

In assessing prejudice, courts have looked to three factors. First, whether the reassignment resulted in a biased judge. *See United States v. Pearson*, 203 F.3d 1243, 1263 (10th Cir. 2000) (assessing prejudice from a claim of judicial reassignment by asking whether the judge was biased “applicable law”); *see also re Marshall*, 721 F.3d at 1040 (finding no prejudice where the reassignment procedure did not result in a judge who was “biased in fact or in appearance”). In the military, two authorities protect against judicial bias: Due Process and R.C.M. 902. *See generally United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001).

Under the former, the test for bias is whether the “likelihood of bias on the part of the judge is ‘too high to be constitutionally tolerable.’” *Williams v. Pennsylvania*, 579 U.S. 1, 4 (2016) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009)). Importantly, this analysis does not turn on an actual, subjective bias, but instead an unacceptable “potential for bias.” *Id.* at 8 (quoting *Caperton*, 446 U.S. at 881); *see also Ward v. Monroeville*, 409 U.S. 57, 60 (1972) (finding bias where “a possible temptation to the average man as a judge [that] might lead him not to hold the balance nice, clear, and true between the State and the accused.”); *Withrow v. Larkin*, 421 U.S. 35, 57 (1975) (suggesting that the risk of bias would be “too high” where an adjudicator was psychologically wed to a

position such that he or she would avoid even the appearance as to even having erred or changed).

Under the latter, the test for bias is whether a reasonable person might reasonably question the judge's impartiality. R.C.M. 902(a). "Impartiality" is broadly defined as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before a judge." United States Army Judiciary, Code of Judicial Conduct, *Terminology* (16 May 2008). Bias has been presumed where a judge is detailed to a case, present for duty, and otherwise capable to sit, but refuses to hear the case. *See United States v. Witt*, 75 M.J. 380, 385 (C.A.A.F. 2016).

Second, courts have looked to whether a judge decided any substantive issue "in a manner more favorable to the government than the other judges in the district." *Pearson*, 203 F.3d at 1263.

Third, the Tenth Circuit in *Pearson*, applying *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), looked to the risk of injustice to the parties, the risk to other litigants, and the risk undermining the public's confidence in the judicial process. *Id.* at 1264–65. Notably, *Pearson* applied *Liljeberg* despite finding no bias or other prejudice, as "the elimination, if possible, of even the appearance of impropriety [in reassignment] is desirable." *Id.* at 1264.

Argument

A. The errors

The reassignment resulted in three errors. First, the reassignment was an impermissible attempt to influence the outcome of the proceedings, violating Due Process. Believing appellant had a fundamental right to a unanimous verdict but anticipating a government writ if he ruled in appellant's favor, Judge Pritchard replaced himself to orchestrate a ruling that denied appellant that right, contrary to his own legal judgment, to keep appellant's case moving, and he detailed Judge Hynes, who volunteered to "do [his] part." While Judge Pritchard insisted he was "not attempting to arrange . . . a denial of the unanimous verdict motion," his very purpose of reassigning cases was to avoid the automatic stays triggered by government writ petitions seeking relief from rulings that *granted* these motions. Thus, even assuming Judge Pritchard truly did not know whether Judge Hynes would ultimately deny appellant's motion, he reassigned the case because he *desired* that outcome. His actions, therefore, were impermissible. *Cruz*, 812 F. 3d at 574.

That Judge Prichard purportedly acted out of concern for the docket does not absolve the violation. While the reassignment of a military judge can occur for legitimate administrative considerations, *see Smith*, 3 M.J. at 492, the need to mitigate the docket concerns here could not have come at the cost of appellant's

perceived right to a unanimous panel. *Link v. Wabash R. Co.*, 370 U.S. 626, 648 (1962) (Black, J., dissenting) (“the laudable objective [of reducing docket congestion] should not be sought in a way which undercuts the very purposes for which courts were created -- that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties.”) (alteration added); *see also Brown v. Crawford County*, 960 F.2d 1002, 1008, n. 7 (11th Cir. 1992) (“procedural rights cannot be sacrificed in the interests of moving busy dockets”); *State v. Madsen*, 229 P.3d 714, 720 (Wa. 2009) (“[c]ourts must not sacrifice constitutional rights on the altar of efficiency.”). A contrary conclusion is antithetical to the concept of any system of “justice.”

Second, the reassignment resulted in a “likelihood of bias” on the part of Judge Hynes that was “too high to be constitutionally tolerable.” *Williams*, 579 U.S. at 4 (2016) (quoting *Caperton*, 556 U.S. at 872). Judge Hynes *knew* why Judge Pritchard detailed him to the case and functionally served as Judge Prichard’s surrogate. Had Judge Pritchard remained on appellant’s case and deliberately misapplied the law (as he interpreted it) solely to rule favorably for the government to avoid a stay, Due Process would have compelled his

disqualification. While Judge Pritchard did not personally rule on the motion, he did so by proxy by detailing Judge Hynes.³

Moreover, Judge Hynes committed to “do [his] part”—that is, rule for the government—*before* he was assigned the case and *before* any pleadings were even received on the MFUV. Thus, he ostensibly committed to a particular result on a significant, disputed issue in a *future* case. Adding to this, Judge Hynes “did [his] part” to obviate the docket concerns of his supervisor, which would have placed him in a dilemma had he later decided to change his mind on the merits of the MFUV. *See Ward*, 409 U.S. at 60. Consequently, appellant was deprived of a fair *opportunity* to make his case on the MFUV because Judge Hynes was likely wedded to its denial. *See Withrow*, 421 U.S. at 57.

Third, and finally, the reassignment resulted in a “appearance of bias” that infringed on appellant’s regulatory right to an impartial judge. With respect to

³ Judge Pritchard’s claim he was not “certain” how Judge Hynes would rule should be approached with skepticism. He and Judge Hynes had at least one previous discussion on the ruling in *Dial*, and Judge Hynes volunteered for the case after Judge Pritchard discussed his concerns of a case backlog. Thus, he likely had some degree of certainty as to how Judge Hynes would rule. Additionally, the affidavits have notable discrepancies. According to Judge Pritchard, he and Judge Hynes discussed *Dial* with respect to another case with Judge Hynes as the military judge and suggested Judge Hynes volunteered as he was “eager to gain experience.” (Gov. App. Ex. 1). According to Judge Hynes, he and Judge Pritchard discussed *Dial* in the context of Judge Pritchard’s docket concerns, and thereafter, he volunteered to “do [his] part.” (Gov. App. Ex. 3).

Judge Pritchard, his refusal to hear the case amounts to a disqualification. *Witt*, 75 M.J. at 385. Alternatively, given his reason for the reassignment—to favor expediency over fundamental rights—and his refusal to disclose his reason to defense in contravention to the rules, a reasonable person might question his impartiality.⁴ Similarly, with respect to Judge Hynes, a reasonable person might question his impartiality for the reasons discussed above.

B. Prejudice

Three grounds warrant reversal of appellant's conviction. First, there was bias, both constitutionally and under R.C.M. 902. *See Williams*, 579 U.S. at 14 (discussing the constitutional error as structural).

Second, Judge Pritchard would have ruled differently on the MFUV, and the denial of this motion was critical to appellant's original decision to waive his right to a panel. *Pearson*, 203 F.3d at 1263. However, had appellant known *why* it was denied, he would have exercised his right to a panel.

Third, the *Liljeberg* factors warrant reversal irrespective of the other reasons. Applying *Liljeberg*, there is a risk of injustice to appellant—his forum selection. Second, with respect to the rights of future parties, the fact that such an error

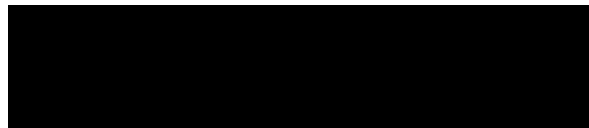
⁴ Judge Pritchard remained subject to disqualification even after reassigning the case. *See United States v. Martinez*, 70 M.J. 154, 158 (C.A.A.F. 2010) (applying disqualification to a chief judge who had previously acted on the case and still maintained supervisory authority).

occurred in multiple cases, and with the implicit approval of the Chief of the Trial Judiciary, (Gov. App. Ex. 1), suggests that this court's "willingness to enforce" appellant's rights would encourage judges in future cases to more carefully examine reasons for reassignment. *In re Al-Nashiri*, 921 F.3d 224, 239 (D.C. Cir. 2019) (citing *Liljeberg*, 486 U.S. at 868. Third, there is grave risk of undermining public confidence in the *process* of the military justice system. This reassignment process centered on the perceived fundamental right of the accused, in multiple cases, which was sacrificed for the sake of expediency.

WHEREFORE, appellate defense counsel respectfully request that this court grant appropriate relief.



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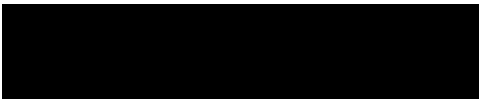


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THE APPENDIX

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 20 June 2023.



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