

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

Specialist (E-4)

TAYRON D. DAVIS

United States Army,

Appellant

**MOTION FOR APPELLATE
DISCOVERY**

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**

COME NOW the undersigned appellate defense counsel, pursuant to Rule 23 of this court's Rules of Appellate Procedure, and move for appellate discovery of the following:

1. An affidavit from Colonel (COL) Judge Jack Pritchard a describing the reason(s) behind his decision to be replaced as the military judge in the above-captioned case and in *United States v. Coley*, *United States v. Stiff*, and *United States v. Velasquez*.
2. Any emails "to" or "from" Judge Pritchard relating to his decision to be replaced as the military judge in the aforementioned cases. The time period for this request is from 15 November 2021 to 30 June 2022 and from 29 March 2023 to the present.
3. Any emails, memoranda, or other records within the Office of The Judge Advocate General (OTJAG) relating to Judge Pritchard's decision to be

replaced as a military judge in the aforementioned cases during the time period of 15 November 2021 to 30 June 2022 and 29 March 2023 to the present.

4. An affidavit from COL [REDACTED], the Chief of the Trial Judiciary, detailing any information she knows of as to Judge Pritchard's decision to be replaced in the aforementioned cases.
5. An affidavit from Lieutenant Colonel (LTC) Judge Tom Hynes, Judge Pritchard's replacement in the above-captioned case, detailing any information he knows of as to why he replaced Judge Pritchard in the above-captioned case.

Statement of Facts

On 15 November 2021, trial defense counsel in *United States v. Dial* filed a motion for a unanimous verdict with Judge Pritchard, the presiding military judge and Chief Circuit Judge for the Fifth Circuit. (Appendix A). On 3 January 2022, Judge Pritchard granted the motion. (Appendix B). He ruled that Article 52, Uniform Code of Military Justice (UCMJ), was unconstitutional in light of the Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2019), where the Court held that the constitutional right to a unanimous verdict in a criminal trial applies to all felony criminal trials. (Appendix B). Ten days later, Judge Pritchard issued a similar ruling in *United States v. Ferreira*. (Appendix C). These rulings were controversial and led to a government writ in each case and subsequent litigation before this court that was not resolved until June of 2022. *See United States v. Pritchard*, 82 M.J. 686 (Army Ct. Crim. App. 2022).

In the months that followed Judge Pritchard’s rulings—and while the disposition of the government’s writs in *Dial* and *Ferreira* were still pending—Judge Pritchard was replaced on cases where the defense filed a motion for a unanimous verdict. With respect to appellant’s case, Judge Pritchard detailed himself and presided over the arraignment. (R. at 3). He was later replaced by Judge Hynes on 4 April 2022, hours before defense counsel filed its motion for a unanimous verdict. (R. at 14, 16–18; App. Ex. III). At that time, Judge Pritchard was aware that defense counsel intended to file this motion.¹

In short, appellant’s motion for a unanimous verdict was filed after Judge Prichard’s ruling in *Dial* and *Ferreira*, the replacement occurred while litigation in those cases was pending with this court, and the replacement judge denied the motion for a unanimous verdict. Notably, this same or similar sequence of events occurred in three other known cases—*United States v. Coley*, *United States v. Stiff*, and *United States v. Velasquez*. (Appendix D). In *Coley*, specifically, Judge

¹ The record suggests that Judge Pritchard was replaced after defense filed its motion, (R. at 14, 16–18; App. Ex. III), and, accordingly, this is how the undersigned styled its request for information to the government. Since then, trial defense counsel have clarified that the notification of Judge Pritchard’s replacement was received on 4 April 2022, the day motions were due and hours before the motion for unanimous verdict was filed, but that Judge Pritchard was nevertheless aware of the pending motion due to defense counsel’s notification of the motion in the electronic docketing request.

Pritchard's decision to be replaced necessitated a cross-servicing detail. (Appendix E).

In each of these cases, to include appellant's case, Judge Pritchard declined to provide a reason for his decision to be replaced, despite defense counsels' request, (Appendix F), and the requirement that the record reflect the reason why a military judge is replaced *whenever* it occurs. Rule for Courts-Martial [hereinafter R.C.M.] 813(c). A review of the court's docket during this timeframe reveals no scheduling conflicts, and the docket further reveals that Judge Prichard presided over no contested panel case after his ruling in *Ferreira* until after this court's decision in *Dial* in June of 2022. (Appendix G).

Recently, the undersigned counsel and the appellate counsel representing Private Coley requested information from the Chief of the Trial Judiciary and filed discovery requests with OTJAG, Criminal Law Division (CLD) and the Government Appellate Division (GAD) (Appendix H, I). The Chief of the Trial Judiciary indicated that Judge Pritchard was not directed to be removed but declined to speak with appellate defense counsel further on this matter. (Appendix J). The CLD and the GAD both declined to provide substantive responses absent an intervention by this court. (Appendix K, L).

Law and Argument

In *United States v. Campbell*, the Court of Appeals for the Armed Forces (CAAF) established a two-step process for appellate discovery. 57 M.J. 134, 138 (C.A.A.F. 2002). First, an appellant must meet a threshold showing that some appellate inquiry is warranted. *Id.* In doing so, the court should consider, among other factors:

- (1) whether the defense has made a colorable showing that the evidence or information exists;
- (2) whether or not the evidence or information sought was previously discoverable with due diligence;
- (3) whether the putative information is relevant to appellant's asserted claim or defense; and
- (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

Id. The threshold for this inquiry is low. *Cf. United States v. Bess*, 80 M.J. 1, 13 (C.A.A.F. 2020). If appellant meets this burden, the court must then determine what method of inquiry is warranted. *Campbell*, 57 M.J. at 138.

A. Appellate Inquiry is Warranted

Appellant satisfies the low threshold under *Campbell* for appellate inquiry. First, appellant is seeking information that exists—the reason(s) behind the decision for a replacement military judge in the aforementioned cases, to include appellant's case. Judge Pritchard knows his own reason(s), and because the rules

required this information be placed on the record, *see* R.C.M. 813(c), it is reasonable to conclude that he provided the reason(s), or otherwise discussed his reason(s), either orally or in email, to the military judges that replaced him. Moreover, considering Judge Pritchard's high-visibility ruling in *Dial* and *Ferreira* and his subsequent and prolonged absence from the docket on contested panel cases, which, at one point, necessitated the cross-service detailing of a military judge in *Coley* on the approval from The Judge Advocate General of the Air Force, *see* R.C.M. 503(b)(3), it is reasonable to conclude that the Chief of the Trial Judiciary and the OTJAG were aware of Judge Pritchard's reason(s) for being replaced in the aforementioned cases. Consequently, there is a *colorable* showing that this information exists.

Second, trial defense counsel exercised due diligence at trial to discover the information by directly engaging with Judge Pritchard to disclose his reason(s).

Third, the requested information is relevant to appellant's appeal. Based on the foregoing, it is possible that Judge Pritchard was replaced due to his decision to grant the accused's motion for a unanimous verdict in *Dial* and *Ferreira*. If Judge Pritchard was directed, or otherwise influenced, to replace himself and detail another military judge to appellant's trial, such action may constitute unlawful command influence (UCI) in violation of Article 37, UCMJ, and R.C.M. 104. *See United States v. Hamilton*, 41 M.J. 32, 36 (C.M.A. 1994) ("[t]he term 'unlawful

command influence’ has been used broadly . . . to cover a multitude of situations in which superiors have unlawfully controlled the actions of subordinates in the exercise of their duties under the UCMJ.”) (alterations in original) (citations omitted).

Alternatively, if Judge Pritchard decided on his own to replace himself and detail another military judge to avoid ruling for an accused, such action would have been improper, *see* Code of Judicial Conduct for Army Trial and Appellate Judges [hereinafter “the Judicial Code”], Rule 1.2, (16 May 2008), and potentially still constitute unlawful influence.² Such action may also constitute grounds for disqualification, *see* R.C.M. 902 and Rule 2.11 of the Judicial Code, potentially affecting Judge Pritchard’s detailing of any replacement judge. *See Walker v. United States*, 60 M.J. 354, 358 (C.A.A.F. 2004).

In either case, the replacement calls into question whether appellant’s significant interest in a trial that is fair in both fact and appearance has been violated and, accordingly, whether the findings and sentence in his case are correct

² By its plain terms, Article 37, UCMJ, provides, “no 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.”

in law and fact and should be approved. *See generally* Article 66, UCMJ.

Therefore, the information is relevant.³

That some of the requested information pertains to other cases is of no difference. Appellant's case is part of a larger pattern, and the replacement of Judge Pritchard (or the decision to do so) in *Coley*, *Stiff*, and *Velasquez* likely came before, or potentially contemporaneous to, his replacement here. Thus, the reason(s) in those cases may have impacted or otherwise explained the reason(s) here.

Finally, the last *Campbell* factor is inapplicable where, as here, part of the concern is of the appearance of a fair trial rather than the result itself. *See United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021) (noting that a meritorious claim of apparent UCI does not require prejudice); *United States v. Martinez*, 70 M.J. 154, 159 (C.A.A.F. 2011) (noting that a conviction's reversal for disqualification of a military judge does not require prejudice under Article 59(a), UCMJ); *see also Walker*, 60 M.J. at 358 (finding that where a disqualified military judge details another judge the "impact on the litigation is readily identifiable"); *United States v. Roach*, 69 M.J. 17, 20 (C.A.A.F. 2010).

³ Additionally, the decision for Judge Pritchard to be replaced may have impacted appellant's forum selection, since appellant's choice to go judge alone was based on who the judge was at the time appellant made the decision. *See* Article 16(b)(3), UCMJ, 10 U.S.C. § 816(b)(3).

B. The Appropriate Method of Inquiry

The undersigned counsel hereby request the following as the appropriate method of inquiry:

1. An affidavit from Judge Pritchard describing the reason(s) behind his decision to be replaced as the military judge in the aforementioned cases.
2. Any emails “to” or “from” Judge Pritchard relating to his replacement as a military judge in the aforementioned cases. The time period for this request is from 15 November 2021 to 30 June 2022 and from 29 March 2023 to the present.
3. Any emails, memoranda, or other records within the OTJAG relating to Judge Pritchard’s decision to be replaced as a military judge in the aforementioned cases during the time period of 15 November 2021 to 30 June 2022 and 29 March 2023 to the present.
4. An affidavit from COL [REDACTED], the Chief of the Trial Judiciary, detailing any information she knows of as to Judge Pritchard’s decision to be replaced in the aforementioned cases.
5. An affidavit from LTC Tom Hynes, Judge Pritchard’s replacement in the above-captioned case, detailing any information he knows of as to why he replaced Judge Pritchard in the above-captioned case.

The specified time frame of this request captures the time from defense’s motion for a unanimous verdict in *Dial* through this court’s disposition in *Dial*, and the time from when appellate defense counsel engaged the relevant individual or entities in administrative requests to the present day as this may have generated additional records on this matter.

WHEREFORE, appellate defense counsel respectfully request that this court grant the instant motion.

PANEL NO. 3

MOTION FOR APPELLATE
DISCOVERY



BRYAN A. OSTERHAGE
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division

GRANTED:  in part*(see below)



DENIED:  in part

JONATHAN F. POTTER
Senior Capital Defense Attorney
Appellate Defense Counsel
Defense Appellate Division

DATE: 9 May 2023

* Granted as to the affidavit from COL Pritchard describing the reason(s) for his replacement and subsequent detailing of another military judge for this case only. Granted as to the affidavit from LTC Hynes detailing any information he knows of as to why he replaced COL Pritchard for this case only.

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 14 April 2023.



BRÝAN A. OSTERHAGE
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division