

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**MOTION TO ATTACH DEFENSE
APPELLATE EXHIBITS D, E, AND
F**

v.

Docket No. ARMY 20220272

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

Appellant

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

COMES NOW the undersigned appellate defense counsel, under Rule 23 of
this court's Rules of Appellate Procedure, and moves to attach Defense Appellate
Exhibits D, E, and F to the record, which are enclosed in the appendices.

Defense Appellate Exhibit D is an affidavit from appellant attesting to the
fact that he would not have selected a judge alone trial with Lieutenant Colonel
(Judge) Tom Hynes had he been made aware of the complete facts as to why Judge
Hynes was replacing Colonel (Judge) Jack Pritchard.

Defense Appellate Exhibits E and F are affidavits from Judge Pritchard
and Lieutenant Colonel (Judge) Lance Smith, respectively, in the case of *United*

States v. Coley. *Coley* involves the very same issue as the briefed issue in appellant's case, and the facts of *Coley* served to establish a pattern of the replacement of Judge Pritchard in cases involving a motion for unanimous verdict. These affidavits are relevant in two respects. First, the affidavits more completely demonstrate the intent and actions of Judge Pritchard with respect to his decision to be replaced in cases where counsel submitted (or planned to submit) a motion for a unanimous verdict. Second, Judge [REDACTED]'s affidavit, like the affidavit from Judge Hyne's in this case, undermines Judge Pritchard's account. Specifically, it discloses details not previously provided by Judge Pritchard and contradicts his statement that he did not know how the judge's replacing him would rule.

Because Judge Pritchard was detailed to appellant's case, and the record failed to address the reasons for his replacement as required by Rule for Courts-Martial 813(c), the propriety of the replacement has been raised by the record. As such, attaching these exhibits is consistent with precedent. *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020) (discussing that courts may attach extra-record documents "when doing so is necessary for resolving issues raised by materials in the record"); *see also United States v. Quintanilla*, 56 M.J. 37, 81 (C.A.A.F. 2001) (remanding for further fact-finding to resolve issues concerning a military judge's disqualification of matters he did not originally disclose).

Conclusion

WHEREFORE, appellate defense counsel respectfully requests that this court grant the instant motion, and attach Defense Appellate Exhibits D, E, and F.

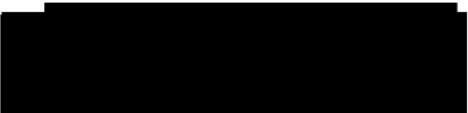
Panel No. 3

MOTION TO ATTACH DEFENSE APPELLATE EXHIBIT D:

GRANTED: ☐

DENIED: ☐

DATE: 25 January 2024


Bryan A. Osterhage
Major, Judge Advocate
Defense Appellate Attorney
Defense Appellate Division

MOTION TO ATTACH DEFENSE APPELLATE EXHIBIT E:

GRANTED: ☐

DENIED: ☐

DATE: 25 January 2024

MOTION TO ATTACH DEFENSE APPELLATE EXHIBIT F:

GRANTED: ☐

DENIED: ☐

DATE: 25 January 2024

**DEFENSE APPELLATE
EXHIBIT D**

AFFIDAVIT

I, Tayron Davis, on 4 October 2023, declare under the penalty of perjury that the information contained herein is the truth.

Had I become aware that Judge Pritchard was being replaced as the military judge in my court-martial to avoid ruling on my unanimous verdict motion, and that Judge Hynes was being detailed who would “do [his] part,” I would not have requested a judge alone trial with Judge Hynes. I would have also asked Judge Hynes to be recused.

In accordance with 28 U.S. Code §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4 October 2023.

A black rectangular box redacting the signature of Tayron Davis.

Tayron Davis

**DEFENSE APPELLATE
EXHIBIT E**

AFFIDAVIT

The undersigned, being duly sworn, provides the following information pursuant to an Order of the Army Court of Criminal Appeals in United States v. PV2 Trevon K. Coley, Army 20220231, which information is true and accurate to the best of his knowledge and belief.

1. On 22 December 2021, I detailed myself to United States v. Coley. I was the docketing judge for all of the Army's 5th Judicial Circuit (Europe, Africa, and the Middle East) except Bavaria, Germany. This case fell within my docketing jurisdiction.

2. On 6 January 2022, I arraigned PV2 Coley.

3. On 3 January 2022 and 13 January 2022, I issued rulings in United States v. LTC Andrew J. Dial and United States v. MSG Keith Ferreira, respectively, granting defense motions for appropriate relief to require unanimous guilty findings. I had ordered additional briefing on Court-specified issues in those cases on 17 December 2021 and 5 January 2022, respectively. The Government petitioned the Army Court of Criminal Appeals for Writs of Prohibition in both cases on 24* and 25 January 2022 respectively; the Army Court issued stays of the proceedings in both cases on 5 January 2022 and 28 January 2022, respectively.

4. After the Army court issued the stays, I decided not to rule on any further unanimous verdict motions until the Army Court issued an opinion on the issue. Before making that decision, I sought the advice of the Chief Trial Judge, Colonel Tyesha Smith, and we discussed the positive and negative aspects of such a decision on the phone. Colonel Smith did not express or intimate that I should pursue any specific course of action, and she explicitly said the decision was entirely mine. I did not tell her what decision I was going to make during that phone call. In making this decision, I concluded the following:

a. Given my grants in Dial and Ferreira, it was likely the defense would continue to file such motions in all future cases regardless of the presiding judge.

b. Given the Government's consecutive briefs in Dial and Ferreira, including their briefs on the Court-specified issues, it did not appear likely that the Government would provide any new or different law or reasoning in response to future unanimous verdict motions and that my future rulings would likely (but not certainly) be the same until the Army Court issued an opinion on the issue.

c. Given the Government's writ-petitions and the Army Court's issuance of stays in Dial and Ferreira, it was likely that the same would occur in future cases if I granted unanimous verdict motions.

* On 3 January 2022, the Government in US v. Dial separately requested the Army Court stay the proceedings.

d. Based on my research of past cases in which the Army Court issued opinions in response to writs, it appeared likely the stays of proceedings would last around six months but could be shorter or longer.

e. Given the above, if I 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 (Army 5th Judicial Circuit) for lengthy periods of time. I believed this result would be inconsistent with military justice. Given that the Army Court was actively reviewing the unanimous verdict issue, I reasoned 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. In either case, it was apparent that the trial judge could not effectuate the defense-requested relief; only the Army Court could do that either through interlocutory or final appellate review. I was confident that, given the constitutional dimension of my rulings, the Army Court would issue a published opinion and establish binding law on this issue where none previously existed (which it did in June 2022). I also reasoned (based on the Supreme Court's discussion in Ramos v. Louisiana, 140 S. Ct. 1390, 1406 (2020), about the effect of that decision on cases still pending direct appellate review) that if the Army Court upheld my rulings it would do so before any current or future case would complete its Article 66, UCMJ appeal and each accused would receive the benefit of the Army Court's opinion. Finally, I was not attempting to arrange a particular result (i.e., a denial of the unanimous verdict motion), because I could not be certain how other military judges would rule on unanimous verdict motions; it was possible that another judge would grant the motion and the case would be stayed. I could not tell another judge what to do in his or her independent rulings, and I did not do so either expressly or impliedly. However, I could be relatively certain how I would rule and that such a ruling would result in every case over which I presided being stayed for a lengthy period.

f. I decided I would only detail myself to or remain detailed on bench trials and to move other cases toward trial. In this latter capacity, I determined to handle arraignments and any motions for which the parties needed rulings significantly before trial in order to properly prepare (e.g., compel experts, compel discovery, compel witnesses, etc.) and to defer other motions, including unanimous verdict motions, to the trial judge for resolution. I believed that removing myself completely from all cases would invite judicial delay (i.e., finding other judges who were available to preside over entire courts-martial in Europe and the Middle East would likely delay pretrial orders, arraignments, motions sessions, and trial dates) and be inconsistent with the Discussion to Rule for Courts-Martial 801(a), Manual for Courts-Martial (2019); Comment 3 to Rule 2.5 of the Code of Judicial Conduct (16 May 2008); and Chapter 12, paragraph 2.a. of the Trial Judiciary Standard Operating Procedures (12 February 2018).

There are no emails or other writings that reflect the reasoning in paragraph 4, above.

5. On 2 March 2022, I cancelled an Article 39(a), UCMJ, session in United States v. Coley, docketed for 4 March 2022, after both parties indicated it was unnecessary for

the Court to rule on the two defense motions—a motion for appropriate relief to compel an expert assistant and a motion for appropriate relief to require unanimous guilty findings. On 4 March 2022, I issued a ruling regarding the expert.

6. In March 2022, I requested assistance from the Chief Trial Judge to find a trial judge for this case. In addition to my decision set forth in paragraph 4, above, I was planning to (and did) take CONUS leave during the Coley trial dates. As of 30 March 2022, the Chief Trial Judge determined that no Army judges were available. I asked the U.S. Air Force Chief Circuit Military Judge for Europe (stationed in Kaiserslautern, Germany where this trial would be held) whether either of the two local Air Force judges would be available on the docketed trial dates. He indicated that Judge (Lt. Col.) [REDACTED] was available. I relayed that information to the Chief Trial Judge, who worked with the Air Force Chief Trial Judge to accomplish the cross-service detailing of Judge [REDACTED]. I am providing the emails regarding that process separately.

7. On 11 April 2022, I informed the parties that Judge [REDACTED] was the presiding judge.

[REDACTED]

Charles L. Pritchard, Jr.
Colonel, Judge Advocate
Military Judge

Subscribed to and sworn before me, MAT [REDACTED], an officer authorized to administer oaths pursuant to 10 U.S.C. § 936(a)(1), this 29 day of May, 2023.

[REDACTED]

Signature

**DEFENSE APPELLATE
EXHIBIT F**

AFFIDAVIT

The undersigned, having first been duly sworn, provides the information contained herein pursuant to an Order of the United States Army Court of Criminal Appeals in the case of *United States v. Private Trevon K. Coley* (Army 20220231), dated 10 August 2023. This information is true and accurate to the best of his knowledge and belief.

1. On 11 August 2023, I received an email from Captain [REDACTED] (USA), an appellate attorney at the Government Appellate Division, U.S. Army Legal Services Agency. Attached to that email was the Order referenced above from the Army Court of Criminal Appeals. This affidavit is respectfully submitted in response to that order.

2. BACKGROUND: I was selected to be a military judge and was assigned to what was then referred to as the European Circuit in July 2021. The European Circuit was located on Ramstein Air Base, Germany. In early April 2022, I was approached by my immediate supervisor, Colonel Sterling Pendleton (USAF), Chief Circuit Military Judge – European Circuit, and asked if I was willing to take on an Army case. Not knowing anything else about the case at the time, I responded in the affirmative. After that I was essentially told to stand by and that there would be more to follow.

3. On 6 April 2022, I received an email from Colonel Charles L. Pritchard (USA), Chief Circuit Judge, 5th Judicial Circuit, the military judge detailed to the case that I had been approached about taking over shortly before. (Attachment 1). As the email will be attached to this affidavit, I will not detail every word of that email. Suffice it to say, this email was sent prior to the Air Force TJAG approving the cross-service detailing, and my specific detailing to the case by the Air Force Chief Trial Judge. In short, the email from COL Pritchard was the first step in handing the case off to me. Of note, COL Pritchard informed me that he had previously ruled on a Defense motion to compel an expert, but that a Defense motion for unanimous verdict remained pending and he suggested that I make ruling on that motion my first order of business.

4. On 11 April 2022, Ms. [REDACTED] (USAF), Clerk, United States Air Force Trial Judiciary, sent me an email. (Attachment 2). The TJAG-approved cross-service appointment memorandum, and the confirmation memorandum detailing me to the case of *United States v. Coley* were attached. These two documents were marked as Appellate Exhibits and are included in the record of trial. After that email went out, COL Pritchard sent an email to the parties in the *Coley* case, informed them of the change of judge and provided copies of the cross-service detailing documents. (Attachment 3).

5. The same day, I followed up COL Pritchard's email conducting an initial RCM 802 with the parties via email. (Attachment 3). On 13 April 2022, Mr. [REDACTED], PVT Coley's civilian defense counsel, provided a joint response to my initial RCM 802 email. (Attachment 4). In that email, Mr. [REDACTED] requested a telephonic RCM 802 to discuss my detailing and the outstanding unanimous verdict motion.

6. On 14 April 2022, I held the requested telephonic 802 with the parties. (Attachment 5). During that RCM 802, the Defense questioned me about my detailing. I informed them that I had been

informed that COL Pritchard had approved CONUS leave the week of *Coley*. Additionally, I was told that the Army Judiciary had attempted to find an available Army military judge, but when one could not be identified, the Army Judiciary reached out to Colonel [REDACTED], the Chief Trial Judge of the Air Force, seeking assistance in covering the docketed trial. I told them that Colonel [REDACTED] had sought and received approval for the cross-service detailing from the Air Force TJAG and that my detailing followed.

7. The Defense also asked me about the pending unanimous verdict motion. I relayed to the parties that COL Pritchard had informed me that he had ruled on one motion, but that the unanimous verdict motion remained outstanding. I told the parties that I was not oblivious to COL Pritchard's previous ruling on a unanimous verdict motion in a different case, but also told the parties that no one had explicitly or implicitly told me that was the reason for the change of judge in *Coley*.

8. After that RCM 802, neither side at any point raised an issue with my detailing or the fact that the unanimous verdict motion remained unresolved at the time of the change of judge. As it is my common practice to summarize RCM 802s on the record at trial, I am almost certain I summarized this RCM 802 on the record prior to asking both sides whether they desired to question or challenge me. Neither side opted to question or challenge me at trial.

9. On 18 August 2022, I sent the parties a notice of ruling on the Defense motion for unanimous verdict and both sides acknowledged receipt the following day. (Attachment 6). At some point during the week of trial, or in any case before entry of judgment in this case, I completed my written ruling on the Defense motion for unanimous verdict, had it marked as an Appellate Exhibit and it was included in the record of trial.

10. When ordered to produce this affidavit, I did not have any independent recollection as to whether I had ruled on any unanimous verdict motions prior to ruling on that motion in the *Coley* case. I did, however, look back through my files and it appears I did in fact rule on a unanimous verdict motion in September 2021. As I did in *Coley*, I denied the Defense's motion in that other case.

11. In addition to exchanging emails with COL Pritchard around the time the case was handed off to me, I also met with him in person. We met at the Base Exchange food court on Ramstein Air Base, Germany. Colonel [REDACTED] was also present. I do recall the topic of the unanimous verdict motion did come up. COL Pritchard made a comment to the effect of, "You will deny the motion and move on." I did not take COL Pritchard's comment to be any sort of an order, or expectation as to how I would rule. Instead, I believe COL Pritchard simply recognized that he was the only military judge that we were aware of that had granted a Defense motion for unanimous verdict, and he assumed I would deny the motion. Even though I did not leave that conversation feeling influenced by COL Pritchard in any way, COL Pritchard did follow up with me via email and explicitly told me that I should not take his comment as an attempt to influence me in any way, or words to that effect. Unfortunately, while I have been able to recover many emails from the *Coley* case, there were several between COL Pritchard and I that I was not able to access for some reason. Regardless, I affirmatively state, neither COL Pritchard's 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.

12. ORDER. In my review of the Army Court of Criminal Appeals order, I was ordered to answer five distinct questions. Having provided the background above, I will answer the Court's questions now.

13. First, appellate government counsel was ordered to obtain this affidavit from me describing, to the best of my knowledge and belief at the time, the reason(s) for my detailing as the replacement military judge in the *Coley* case. When I was first approached by Colonel Pendleton, I was simply asked if I had any issues picking up an Army court-martial. I believe Colonel Pendleton told me at the time that he would have taken it but for the fact that he was already scheduled to be in another trial that same week. At that time, neither of us knew the nature of the charges in *Coley* let alone that a unanimous verdict motion remained outstanding. At some later point, I learned a change of judge in *Coley* was necessary because COL Pritchard was scheduled to be on CONUS leave during the week of trial and no other Army military judge was available. I believe I was selected and ultimately detailed because the location of the *Coley* court was near my duty station in Germany and Colonel [REDACTED] was not available. As the only other Air Force military judge assigned in Germany, or Europe for that matter, I believe my selection was more of a process of elimination than a handpicking.

14. Second, I was ordered to provide information as to the substance of any conversations and/or emails, if any, about the basis for Judge Pritchard's recusal from the above-captioned case. At the time of my detailing, I was not privy to any discussion on this matter other than what I have described above (i.e., COL Pritchard was scheduled to be on CONUS leave the week of the *Coley* trial). At some point later – I do not know whether this was before or after the *Coley* trial – COL Pritchard told me that he was not detailing himself to any cases pending the Army Court of Criminal Appeals review of his ruling granting a Defense motion for unanimous verdict.

15. Third, I was ordered to provide information as to the substance of any conversations and/or emails, if any, about the history of Judge Pritchard's rulings on motions for unanimous verdicts. Prior to being approached about picking up the *Coley* case, I was aware of COL Pritchard's ruling granting a Defense motion for unanimous verdict. I believe COL Pritchard's ruling was shared among Air Force judges to provide an alternative perspective and to generate conversation. Not surprisingly, following COL Pritchard's ruling, Defense Counsel in the Air Force began citing to it and even attaching it to similar motions. In complete candor, when I discovered the case was being handed off to me from COL Pritchard with an outstanding unanimous verdict motion, I assumed litigation of some sort at the trial level would follow. That is why I answered Trial Defense Counsel's questions as honestly and as best I could during the initial telephonic RCM 802. Ultimately, the Defense did not file any motions, or challenge me at trial.

14. Fourth, I was ordered to provide information as to the substance of any conversations and/or emails, if any, about whether there were any expectations as to how I would rule on any motion for unanimous verdict. There was never any expectation communicated to me in any way as to

how I would rule on a motion for unanimous verdict. While I was aware the change of judge might spark some sort of litigation at the trial level, I did not feel any pressure from any source as to how I would ultimately rule on the outstanding unanimous verdict motion.

15. Fifth, I was ordered to provide information as to the substance of any conversations and/or emails, if any, about whether I was detailed as the military judge in appellant's case because of any prior rulings I had historically made on motions for unanimous verdicts. If I was detailed for that reason, it was not communicated to me by any means. As noted above, prior to *Coley*, I had only ruled on one unanimous verdict motion and in that case, as I did in *Coley*, I denied the motion.

I declare under penalty of perjury under the laws of the United States of America that the facts contained in the foregoing affidavit are true and correct to the best of my knowledge and belief.

[REDACTED]

LANCE R. SMITH, Lt Col, USAF
Military Judge

Attachments:

- 1 – Email from COL Pritchard to Lt Col Smith, dated 6 Apr 22 (2 pages).
- 2 – Email from Ms. [REDACTED] to Lt Col Smith, dated 11 Apr 22 (1 page).
- 3 – Email from COL Pritchard to the parties, dated 11 Apr 22 (2 pages).
- 4 – Email from Mr. [REDACTED] to Lt Col Smith, dated 13 Apr 22 (3 pages).
- 5 – Lt Col Smith's Notes (14 Apr 22 Telephonic RCM 802), dated 14 Apr 22 (2 pages).
- 6 – Email Notice of Ruling – Unanimous Verdict, dated 18 Apr 22 (1 page).

WITH THE ARMED FORCES AT TRAVIS AFB, CA, USA

On 18th day of August, 2023, I, [REDACTED],
a Military Paralegal and Notary Public under the provisions of Title 10, United States Code, Section 1044a, certify that the person who signed this instrument is entitled to legal assistance within the meaning of Title 10, United States Code, Section 1044, and did personally appear before me and sign this instrument and acknowledge doing so freely and voluntarily.

[REDACTED]

Name of Paralegal: [REDACTED]
Grade and Branch of Service: E-5 / USAF
Command or Organization: 60 Air Mobility Wing (60 AMW/JA), Travis AFB, CA



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals and the Government Appellate Division on 5 October 2023.

A large black rectangular redaction box covering the signature of the Major, Judge Advocate.

B7

Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division