IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Private DWIGHT J. LOVING, *Petitioner,* *v.* UNITED STATES, *Respondent.*	*AMICUS CURIAE* BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE USCA Misc. Dkt. No. 06-8006/AR Crim. App. Dkt. No. 1989-1123

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TO THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

In accordance with Rule 26 of this Court's Rules of Practice and Procedure, the National Institute of Military Justice ("NIMJ") respectfully submits this brief as *amicus curiae*, solely addressing Specified Issue I. For the reasons explained below, the Court should decide the ineffective assistance of counsel question without remanding to the convening authority or the Army Court of Criminal Appeals.

SPECIFIED ISSUE

WHETHER THE RECORD OF THE EVIDENTIARY HEARING ORDERED PURSUANT TO *UNITED STATES v. DUBAY*, 17 C.M.A. 147, 37 C.M.R. 411 (1967), SHOULD BE RETURNED TO THE JUDGE ADVOCATE GENERAL OF THE ARMY FOR REMAND TO THE CONVENING AUTHORITY AND/OR THE ARMY COURT OF CRIMINAL APPEALS FOR REVIEW PRIOR TO REVIEW BY THIS COURT.

Interest of the Amicus

NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States. NIMJ participates actively in the military justice process, through such means as the filing of *amicus* briefs, rulemaking comments, its website (www.nimj.org), and its publications program, including the unofficial *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* and *Annotated Guide to Procedures for Trials Before Military Commissions*.

Jurisdiction, Statement of the Case, and Facts

Petitioner has submitted statements of the case and of the facts which require no comment.

Argument

THIS COURT SHOULD NOT RETURN THE *DUBAY* FINDINGS TO THE CONVENING AUTHORITY OR THE ARMY COURT OF CRIMINAL APPEALS.

NIMJ takes no position on the correct resolution of petitioner's legal claims. NIMJ appears for the purpose of urging the Court to delineate the circumstances in which this Court will review the findings determined in a hearing held pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), without sending the case back to either the convening authority or the relevant service court of appeals.

This is an important issue that recurs with some frequency, given the constraints of the military justice system's rules governing post-trial procedure. In accordance with R.C.M. 1102(d), the military judge has jurisdiction over a court-martial until the record of trial is authenticated, and the convening authority's jurisdiction ends when he or she takes action on the case, unless a reviewing authority later authorizes the convening authority to take further action. Given the limited functions of both the trial judge and the convening authority, there is no jurisdiction for the trial court to perform a collateral review within the military justice system. *See Denedo v. United States*, 66 M.J. 114, 124 (C.A.A.F. 2008), *pet. for cert. filed* (U.S. Aug. 29, 2008)(No. 08-267); *United States v. Murphy*, 50 M.J. 4, 5-6 (C.A.A.F. 1998).

In addition, the service courts of criminal appeals lose jurisdiction over a case when one of the parties files a Petition at the Court of Appeals for the Armed Forces. *See* C.C.A.R. 19. Therefore, the Army Court lost jurisdiction over Private Loving's case years ago.

As has been stated before in the appellate history of Private Loving's case, a military death sentence is not final until the President has approved it. *Loving v. United States*, 64 M.J. 132, 135 (C.A.A.F. 2006)("The procedural posture of this case has not changed since our most recent opinion; therefore, this Court still has collateral review jurisdiction over this

case.") *See also* Arts. 71(a), 71(c)(1), 76, UCMJ; *Loving v. United States*, 62 M.J. 235, 255-56 (C.A.A.F. 2005). Until that occurs, this Court remains the primary judicial body with jurisdiction over Private Loving's case.

While most issues reach this Court via direct appeal, it is not uncommon for cases in which ineffective assistance of counsel is alleged to be pursued via collateral litigation. In fact, even the United States Supreme Court has acknowledged the logic of collateral litigation regarding such claims. In *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986), the Supreme Court found that

> Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation.

See also Withrow v. Williams, 507 U.S. 680, 688 (1993). In *United States v. Johnson*, 43 M.J. 192, 194 (C.A.A.F. 1995), this Court made similar observations that hold true to this day:

> We often receive claims that counsel have been ineffective, and they are extremely difficult to resolve on direct appeal. *United States v. McGillis*, 27 M.J. 462 (Daily Journal 1988)(summary disposition). Contrary to state and federal practice, these claims do not come to us through post-conviction attacks on the verdict and sentence, where hearings are held and evidence is heard, upon which judges make factual findings and conclusions of law for an appellate court to review and consider. See 28 USC § 2254. Claims come to us instead in the form of affidavits or even unsworn allegations. There is no mechanism set out in the Uniform Code of Military Justice for this Court or the Courts of Military Review to evaluate such post-conviction claims.

See also United States v. Lovett, 63 M.J. 211, 214-215 (C.A.A.F. 2006)(noting that pleadings were supported by extra-record material because issue of cruel and unusual punishment arose post-trial).

It is not uncommon for ineffective assistance of counsel claims to require a *DuBay* hearing to sort out the facts. Indeed, *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997), clarified that the fact-finding authority which Article 66, UCMJ, confers upon service courts of criminal appeals does not permit those courts to decide post-trial issues regarding disputed questions of fact based on conflicting affidavits. *DuBay* hearings are required to establish the facts. *Id*. *See* Art. 66(c), UCMJ. When ineffective assistance of counsel claims are made, a *DuBay* hearing is often convened in order for the trial defense counsel to testify as to what he or she did or did not do in preparing the appellant's case. *See, e.g., United States v. Singleton*, 60 M.J. 409, 411 (C.A.A.F. 2005); *United States v. Sales*, 56 M.J. 255, 259 (C.A.A.F. 2002). Ordering the *DuBay* hearing is not in question here. What is in question is what to do with the case once these additional facts have been established on the record. The answer is: "It depends on the case."

Fifteen years ago, this Court's predecessor sent a case back to the Air Force Judge Advocate General with instructions that he could convene a *DuBay* hearing in order to ferret out facts

regarding a claim of multiple representation. *United States v. Smith*, 36 M.J. 455, 457 (C.M.A. 1993). In his concurrence, Judge Wiss discussed the question addressed in this brief. He noted that the majority in *Smith* and the Court in *DuBay* itself held that, if the facts found during the post-trial hearing were adverse to the accused, then the case should "perk back up" the Article 66 judicial chain of review. *Smith*, 36 M.J. at 458-59 (Wiss, J., concurring). He also noted that there were other cases, including those in which ineffective assistance of counsel was alleged, in which this Court had directed that that case come straight back to this Court after a *DuBay* hearing. *Id.*, *citing United States v. Giambra*, 33 M.J. 331, 335 (C.M.A. 1991); *United States v. Payton*, 23 M.J. 379, 382 (C.M.A. 1987); *United States v. Killebrew*, 9 M.J. 154, 162 (C.M.A. 1980).

Having acknowledged precedent on both sides of the issue, Judge Wiss continued:

> It seems to me that a rational argument can be made in favor of the latter option. This case, for instance, has received its full, orderly appellate review provided by statute up to this point. On appellant's petition in this Court, we granted review of an issue of law in which *we* now find that more factual development of the record is necessary for *our* resolution. In this posture, it might seem logical that, once that supplementation of the record is accomplished, it then will be this Court's responsibility to resolve the issue of law that led to the hearing in the first place.

Smith, 36 M.J. at 458 (Wiss, J., concurring).

In pondering the possible return of all *DuBay* hearing

records to the convening authority or the service courts of criminal appeals, Judge Wiss observed that only the court of criminal appeals could determine facts in accordance with Article 66, UCMJ. He wondered how far the "do over" should go in recognizing the jurisdictional difference between this Court and those of the service appellate courts:

> I am not logically or legally opposed to permitting review in the Court of Military Review in the interim between the *DuBay* limited hearing and this Court's consideration. This route, however, does raise a number of questions that, at some point, might face this Court (and possibly, even earlier, the Court of Military Review). Those questions all, in one way or another, relate to the scope of review powers of the Court of Military Review at that stage.
>
> For instance, may appellant raise in that court any legal, factual, or sentence-appropriateness issue that he could have raised the *first* time in that forum? Or, instead, is appellant limited to issues related to the factual hearing ordered here? If the latter, what is the language in Article 66 to support such a limited review by that court; if the former, what is the logic in an appellate process that permits an appellant two full-blown opportunities to attack his conviction or his sentence?
>
> Moreover, what, if any, restrictions exist at that stage on the Court of Military Review's factfinding powers under Article 66? Does that court's power to review facts de novo extend to *all* facts, even those relating only to satellite litigation like the limited hearing ordered here (or, indeed, to satellite litigation at an *original* trial, such as evidentiary objections or motions)? Or, instead, does Article 66 empower that court with such authority only as to facts relating directly to an accused's guilt?

Judge Wiss's response to his own questions was prescient:

> These questions are difficult ones, and they are questions that seemingly inevitably will arise, either at some stage of this case's further development or in

some similar case.

As to the case before him, Judge Wiss concurred with the majority that *Smith* was to be returned to the Judge Advocate General of the Air Force after the *DuBay* hearing. *Smith*, 36 M.J. at 457-58. But even as he did so, he presciently "[r]ecogniz[ed] the potential for future litigation of these issues." *Id.* at 459.

That future litigation presents itself here. As Judge Wiss recommended early in his concurrence, this Court should adopt the view that, in cases in which this Court has already spoken on an issue, there is no need for the issue to "perk back up" through the military court system before this Court takes action on the case after a *DuBay* hearing. Following this approach would limit the possibility of a never-ending circle of appellate review. Moreover, this Court ordered the *DuBay* hearing to aid its own review of the case, not as a means to aid the convening authority or the Army Court. *Loving*, 64 M.J. at 153.

To be sure, there are times when the factual determinations made at a *DuBay* hearing should be considered by the service court. This Court has certainly sent cases back to the lower courts or the convening authority after a *DuBay* hearing. *See, e.g., United States v. Key*, 65 M.J. 172 (C.A.A.F. 2007); *Singleton*, 60 M.J. at 413; *United States v. Quintanilla*, 56 M.J. 37, 85 (C.A.A.F. 2001). In many cases, particularly in those in which this Court has not yet ruled on an issue, the convening authority may well be in the best position to determine the

practicality of having a post-trial fact-finding hearing. *See United States v. Beatty*, 64 M.J. 456 (C.A.A.F. 2007); *United States v. Sonego*, 61 M.J. 1, 4 (C.A.A.F. 2005).

We do not propose short-circuiting such settled procedures. But "[a] convening authority is not usually a party to appellate litigation under the Uniform Code of Military Justice and certainly is not a party in this litigation." *Singleton*, 60 M.J. at 415 (C.A.A.F. 2005)(Erdmann, J., concurring). Nor is it desirable for the Court to undertake in this case to decide once and for all which other cases should be returned to a convening authority following a *DuBay* hearing.

Here, it is this Court's decision itself that petitioner seeks to influence through the facts determined at the *DuBay* hearing the Court ordered in 2006. It is not the decision of the convening authority or the Army Court that is at issue. Even in cases in which this Court sends a case back to a service court for further fact-finding, it has the authority to limit the scope and means of the fact-finding. *See United States v. Romanelli*, 28 M.J. 184, 186-87 (C.M.A. 1989)(on remand solely for hearing pertaining to sentencing, lower court not authorized to address findings); *United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989)(on remand, court is limited by the terms of the remand). In Private Loving's case, when this Court sent the case back for a fact-finding hearing, it specified that the case was to be returned directly to this Court upon completion of the *DuBay*

hearing. *Loving*, 64 M.J. at 153. Given that order, neither the convening authority nor the service court has authority to act in light of the *DuBay* hearing.

This Court has authority to adjudicate original petitions for extraordinary relief, including writs of habeas corpus. *See* 28 U.S.C. § 1651(a); C.A.A.F.R. 4(b), 18(b), 27(a), 28. Exercising its extraordinary writ jurisdiction to consider Private Loving's petition without sending the case back to the convening authority or the Army Court is therefore appropriate.

Furthermore, Private Loving chose to seek extraordinary relief in this Court, not at another level of appellate review. That he chose to seek a writ of habeas corpus at this Court is entirely logical. Although not of exactly the same nature, the writ sought here is similar to that of error coram nobis. This Court has recently discussed that the writ of error coram nobis should be brought before the court that rendered the judgment. *Denedo*, 66 M.J. at 124; *Loving*, 62 M.J. at 251 (*citing* Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 Va. J. Soc. Pol'y & L. 1, 9 (2003); 2 Steven Childress & Martha Davis, Federal Standards of Review, § 13.01, at 13-4 (3d ed. 1999)). The same premise should apply to writs of habeas corpus, so that the court whose previous decision is at issue receives the first opportunity to reconsider the issue. *Denedo*, 66 M.J. at 124, *citing Lowery v. McCaughtry*, 954 F.2d 422, 422-23 (7th Cir. 1992)("[c]oram nobis arose as a device

to extend the period . . . in which the judge who rendered a decision could reexamine his handiwork").

It is inappropriate for the convening authority and the service court to second-guess this Court's holding based on the newly-developed facts. Doing so would put subordinate officials in a position of revisiting a decision of this Court, and in effect stand on its head the post-trial structure established by Congress. This Court should be loath to invert the Code's appellate hierarchy.

Conclusion

For the foregoing reasons, the specified issue should be answered in the negative, and the record should not be returned to the Judge Advocate General for review by either the convening

authority or the Army Court. Rather, this Court should act directly on the findings of the *DuBay* hearing.

Respectfully submitted,

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September 25, 2008

CERTIFICATE OF FILING AND SERVICE

I certify that on September 25, 2008, an original and seven copies of the foregoing *Amicus Curiae* Brief were hand-delivered to the Court and copies thereof mailed to Teresa L. Norris, Esq., Blume, Weyble, and Norris, P.O. Box 11744, Columbia, SC 29211; Lieutenant Colonel Mark Tellitocci, Chief of Defense Appellate Division, USALSA, 901 N. Stuart Street, Arlington, VA 22203; and Colonel Denise Lind, Chief of Government Appellate Division, USALSA, 901 N. Stuart Street, Arlington, VA 22203.

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