

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

v.

Kenneth G. PARKER
Lance Corporal (E-3)
U. S. Marine Corps

Appellant

NMCCA No. 9501500

GENERAL COURT-MARTIAL

O R D E R

By Order dated 28 June 2007, this Court returned the record of trial in this capital case to the Judge Advocate General for return to an appropriate convening authority for the purpose of conducting a mental health examination and a hearing in accordance with *United States v. Dubay*, on the issue of mental retardation. The Judge Advocate General set a due date for return of the record of 10 November 2007. On 6 January 2009, Colonel Timothy Dunn, USMCR, a reserve judge within the Navy-Marine Corps Trial Judiciary, was assigned as Hearing Officer due to impending retirement of the officer initially assigned to conduct the hearing.

By Order dated 12 May 2010, the Court ordered that the Government either deliver the complete record of trial, with the record of the *DuBay* Hearing and Judge Dunn's findings of fact and conclusions of law, to the Navy-Marine Corps Appellate Review Activity for delivery to the Court on or before 17 May 2010 or, by that date, provide the Court with certain additional information. The 12 May 2010 Order further provided that in the event Judge Dunn had not yet submitted these documents to the Convening Authority, the Government was to request that Judge Dunn provide a date certain by which he expected that he would make his submission and, if the projected date was later than 24 May 2010, request that the judge provide a written explanation of any obstacles preventing him from completing his assignment by that date.

On 21 May 2010, Judge Dunn submitted directly to the Court via email and facsimile his response to the request submitted to him pursuant to the Court's 12 May 2010 Order. In that response, Judge Dunn stated that after reviewing certain additional information submitted by Trial Defense Counsel on 26 April 2010, he personally "contacted the government expert in this case, Dr. Roger Moore, to request that he provide additional materials, not previously disclosed, for [Judge Dunn's] review." At Dr. Moore's request, Judge Dunn issued an Order on 21 May 2010 directing the production of the information Judge Dunn had requested verbally. Later that day, Dr. Moore advised Judge Dunn by telephone that the materials should be received by Judge Dunn not later than 26 May 2010. Judge Dunn concluded his correspondence to the Court

ENCLOSURE (2)

by requesting "until 9 June 2010 . . . to submit all documents to the convening authority."

On 25 May 2010, the Government filed a consent Motion to Reopen *DuBay* Hearing "in order to place on the Record a potential *ex parte* communication between the Military Judge and a Government expert." More particularly, the Government requested that "the Military Judge be directed, *inter alia* to put on the record the contents of his communications with the Government expert, as well as any documents and related matters provided to him by the expert; to provide the Appellant with the opportunity to *voir dire* the Military Judge regarding the contents of any such conversations; and to allow the Appellant the chance to present evidence on the question." On 25 June 2010, the Government filed a Non-Consent Motion for Expedited Decision of its 25 May 2010 motion.

By Order dated 13 July 2010, the Court granted Judge Dunn a final extension to 13 August 2010, by which time he was to deliver the authenticated record of the *DuBay* Hearing along with his findings of fact and conclusions of law in this matter to the Convening Authority in the manner outlined in this Court's *DuBay* Order. The Court held the Government's Motion to Reopen *DuBay* Hearing in abeyance pending resolution of other provisions of that Order and denied the Government Motion for Expedited Decision.

The record of *DuBay* Hearing was delivered to the Court on 26 August 2010 and was docketed on 31 August 2010. The record was administratively assigned to Panel 2 of the Court. For this case, that Panel will consist of Senior Judges Mitchell, Maksym, and Carberry.

It is, by the Court, this 31st day of August 2010,

ORDERED:

1. That the Government's consent Motion to Reopen *DuBay* Hearing is denied.
2. That the record of *DuBay* Hearing is returned to the Judge Advocate General for remand to an appropriate convening authority to order a new *DuBay* hearing for the limited purpose of establishing the nature and extent of the personal contact between Judge Dunn and the Government expert in this case, Dr. Roger Moore, outside the presence of the parties during the period April 2010 to August 2010. The military judge will gather all related documentary materials, to include the "additional materials, not previously disclosed" by Dr. Moore which were then provided to Judge Dunn, and the 21 May 2010 Order issued by Judge Dunn. The military judge will also determine whether the additional matters submitted by Dr. Moore, either verbally or by document, were considered by Judge Dunn in his resolution of the

issues before him and, if they were considered, what impact the additional matters had on the findings of fact and conclusions of law reached by Judge Dunn.

3. That by copy of this Order, the Chief Judge, Navy-Marine Corps Trial Judiciary is requested to make an experienced military judge available to the convening authority so that the hearing may be conducted within 30 days of the date of this Order, and the record, to include the military judge's findings of fact and conclusions of law, can be delivered to the Court on or before 15 October 2010.

4. That upon return of the record of DuBay Hearing conducted by Judge Dunn and the record of DuBay Hearing directed by this Order, the appellant will have 60 days to file a new, consolidated brief and assignments of error. That consolidated brief will replace the pleadings filed by the appellant between three and eleven years ago.¹ The Government will then have 30 days to file its new, consolidated Answer, which will replace the pleadings filed by the Government between three and nine years ago.² The Court's page limit is lifted for briefs of up to 250 pages. Motions for leave to file briefs in excess of this limit may be filed.

For the Court

R.H. TROIDL
Clerk of Court
31 August 2010



Copy to:
NMCCA (51.2)
Code 45
Code 46
Code 02
Code 05
Code 52

¹ In particular, it will replace the Brief filed on 23 July 1999, the Reply filed on 14 April 2003, the Specified Issue Brief filed on 14 April 2006, the Reply Brief filed on 26 September 2006, the Brief and Supplemental Assignments of Error filed on 28 December 2006, and the Reply Brief filed on 1 June 2007.

² In particular, it will replace the Answer filed on 10 May 2001, the Specified Issue Answer filed on 13 June 2006, and the Answer to the Brief and Supplemental Assignments of Error filed on 27 April 2007.