

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Staff Sergeant (E-5)
KEVIN GAY,
USAF,
Appellant.

USCA Dkt. No. 15-0742/AF

Crim. App. No. 38525

BRIEF IN SUPPORT OF PETITION GRANTED

LAUREN A. SHURE, Capt, USAF
Appellate Defense Counsel
USCAAF Bar No. 34723
Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road
Joint Base Andrews NAF, MD 20762
(240) 612-4770

TABLE OF CONTENTS

Table of Authorities.....ii

Issue Specified.....1

Statement of Statutory Jurisdiction.....1

Statement of the Case.....1

Statement of Facts.....3

Argument

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ERR BY NOT REMANDING APPELLANT'S CASE FOR A HEARING PURSUANT TO *UNITED STATES v. DUBAY*, 17 C.M.A. 147, 37 C.M.R. 411 (1967), TO DETERMINE THE FACTS SURROUNDING APPELLANT'S POST-TRIAL SOLITARY CONFINEMENT. *SEE UNITED STATES v. GINN*, 47 M.J. 236 (1997).....6

Conclusion10

TABLE OF AUTHORITIES

Court of Appeals for the Armed Forces

United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967) 1, 6, 9

United States v. Fagan, 59 M.J. 238, 240 (C.A.A.F. 2004). 7, 8, 9

United States v. Ginn, 47 M.J. 236 (1997)..... passim

United States v. Sales, 56 M.J. 255, 258 (C.A.A.F. 2002)..... 7

Air Force Court of Criminal Appeals

United States v. Gay, 74 M.J. 736 (A.F. Ct. Crim. App., 12 June 2015)..... 1, 6

Statutes

Article 12, UCMJ, 10 U.S.C. §812 (2012)..... 4, 5

Article 55, UCMJ, 10 U.S.C. §855 (2012)..... 2, 4

Article 66, UCMJ, 10 U.S.C. §866 (2012)..... 1

Article 67, UCMJ, 10 U.S.C. §867 (2012)..... 1

Constitutional Provisions

Eighth Amendment..... 2

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,)	BRIEF IN SUPPORT OF
<i>Appellee,</i>)	PETITION GRANTED
)	
v.)	USCA Dkt. No. 15-0742/AF
)	
Staff Sergeant (E-5))	Crim. App. No. 38525
KEVIN GAY,)	
USAF,)	
<i>Appellant.</i>)	
)	

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

Issue Specified

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FAILING TO REMAND APPELLANT'S CASE FOR A HEARING PURSUANT TO *UNITED STATES v. DUBAY*, 17 C.M.A. 147, 37 C.M.R. 411 (1967), TO DETERMINE THE FACTS SURROUNDING APPELLANT'S POST-TRIAL SOLITARY CONFINEMENT. *SEE UNITED STATES v. GINN*, 47 M.J. 236 (1997).

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this matter pursuant to Article 66, UCMJ. *United States v. Gay*, 74 M.J. 736 (A.F. Ct. Crim. App., 12 June 2015 JA at 1. Accordingly, this Court has jurisdiction to review this matter pursuant to Article 67, UCMJ.

Statement of the Case

On 28-30 May 2013, Appellant was tried at a general court-martial by officer members at Joint Base McGuire-Dix-Lakehurst, New Jersey. JA at 26. Contrary to his pleas Appellant was convicted of two specifications of larceny, in violation of

Article 121, UCMJ; two specifications of wrongful appropriation, in violation of Article 121, UCMJ; one specification of wire fraud, in violation of Article 134, UCMJ. JA at 34-35. Appellant was acquitted of the remaining specifications. *Id.* Appellant was sentenced to a reduction to E-3, 6 months confinement, total forfeitures of all pay and allowances, and a bad conduct discharge. JA at 32. On 3 January 2011, the convening authority only approved 5 months and 21 days of confinement; however the rest of the sentence adjudged was approved. JA at 35.

After ordering additional briefs on specified issues, on 12 June 2015, the Air Force Court issued a published decision in which they held that Appellant's time in solitary confinement during his post-trial confinement did not rise to the level of a violation of the Eighth Amendment or Article 55, UCMJ. *Gay*, 74 M.J. 736, 742; JA at 7. However, the Air Force Court determined that Appellant's sentence was inappropriately severe as a result of both the post-trial confinement conditions and the government's delay in forwarding the record of trial for AFCCA review, the Court granted Appellant relief under their broad authority from Article 66(c), UCMJ. JA at 8-9. The Air Force Court only approved so much of the sentence as called for reduction to the grade of E-3, three months confinement, and a bad conduct discharge. JA at 12.

The Appellate Records Branch notified the Appellate Defense Division that a copy of the Air Force Court's decision was deposited in the United States mail by first-class certified mail to the last address provided by Appellant on 13 July 2015. On 6 August 2015, through counsel, Appellant filed a Petition for Grant of review with this Court, and contemporaneously filed a Motion to file the Supplement Separately from the Petition. That motion was granted on 10 August 2015.

On 11 August 2015, The Judge Advocate General (TJAG) certified the following issue to this Court:

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ABUSED ITS DISCRETION AND COMMITTED LEGAL ERROR BY REACHING ITS DECISION THAT ARTICLE 66, UCMJ, GRANTS IT THE AUTHORITY TO GRANT SENTENCE APPROPRIATENESS RELIEF FOR POST-TRIAL CONFINEMENT CONDITIONS EVEN THOUGH THERE WAS NO VIOLATION OF THE EIGHTH AMENDMENT OR ARTICLE 55, UCMJ, IN DIRECT CONTRAVENTION OF THIS COURT'S BINDING PRECEDENT.

Certificate of Review, 11 Aug 15. The Government filed their brief in support of the certified issue on 10 September 2015; Appellant answered that brief (as Appellee) on 7 October 2015. On 24 November 2015, this Court granted Appellant's Petition for Review on the issue specified.

Statement of Facts

Following announcement of his sentence, Appellant was transferred to Monmouth County Correctional Institution (MCCI) on 30 May 2013 and was assigned to Pod F-1. JA at 54-55. While

there he was housed with a foreign national. *Id.* As a result of his clemency request, Appellant was awarded 9 days credit off of his sentence to confinement as day-for-day credit for the time he was housed with a foreign national. JA at 35, 42. On 7 June 2013, Appellant was placed in solitary confinement without explanation. JA at 55. "Upon entering solitary [Appellant] was stripped, searched, placed in irons, put on 23 hour lockdown, denied phone calls and visitation and forced to use an open caged shower and bathroom." *Id.*

Appellant was not released from solitary until 13 June 2013. *Id.* From what Appellant learned, the only reason he was placed in solitary confinement was because someone from McGuire Air Force Base verbally instructed the MCCI staff to place him in solitary. *Id.* On 19 June 2013, Appellant filed an Article 138 complaint detailing the violations of Article 12, UCMJ and Article 55, UCMJ. JA at 54. Although Appellant received some relief for the violation of Article 12, UCMJ, no relief was granted by the convening authority for the violation of Article 55, UCMJ. JA at 35, 42.

On 25 September 2013, in response to the complaint regarding segregated confinement, the legal office forwarded a Memorandum for Record (MFR) detailing conditions of segregated confinement at MCCI. JA at 91. Within this MFR, the Chief of Military Justice for the 87 Air Base Wing, legal office, Capt

M.L. details the conditions of standard segregation at MCCI, but does not dispute the allegations made by Appellant in either his clemency request or his Article 138 complaint. *Id.* Capt M.L., in fact, confirms that prisoners kept in segregation are on lock down in their cells for 23 hours per day, are shackled during any transportation throughout the facility, and that Appellant was held in segregation. *Id.* The only contradictory fact contained within this MFR is that the bathrooms have curtain materials over them, although there is no information regarding whether such curtains were in place while Appellant was improperly held in segregation. *Id.* This MFR is not sworn; there are no other sworn statements or affidavits from the government in the record.

The MFR, and thereby the government, does not dispute, or even acknowledge: the contentions that the shackles were wholly unnecessary; the legal office acted in error in demanding Appellant be placed in segregation; there were other ways to ensure there were no further Article 12, UCMJ, violations; 23 hour lock down was not necessary; the strip search was not necessary; Appellant was prohibited from calling his trial defense counsel (TDC); Appellant was refused all visitors; Appellant should have been given the same privileges as other prisoners in the facility, but was not; and, prison officials apologized for the error and humiliation. *Id.* This memorandum

did not dispute the assertion that it was legal office personnel that directed the prison officials to place [Appellant] into solitary confinement, and it did not offer any reason for why [Appellant] was placed in solitary confinement. *Id.* See also, *Gay*, 74 M.J. at 741 (A.F. Ct. Crim. App. 2015).

In response to the Addendum to the Staff Judge Advocate's Recommendation, both Appellant and TDC submitted memorandums clarifying and detailing further the violations that occurred. JA at 95-97. No additional fact-finding or investigation was done on this issue.

Argument

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ERR BY NOT REMANDING APPELLANT'S CASE FOR A HEARING PURSUANT TO *UNITED STATES v. DUBAY*, 17 C.M.A. 147, 37 C.M.R. 411 (1967), TO DETERMINE THE FACTS SURROUNDING APPELLANT'S POST-TRIAL SOLITARY CONFINEMENT. SEE *UNITED STATES v. GINN*, 47 M.J. 236 (1997).

Standard of Review

This Court reviews *de novo* the issue of whether the lower court properly applied the *Ginn* framework. *United States v. Fagan*, 59 M.J. 238, 240 (C.A.A.F. 2004) *citing* *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002).

Law and Analysis

In *Ginn* this Court laid out a framework which the Courts of Criminal Appeals are to use in determining whether further fact finding proceedings are warranted. Specifically, this Court

held the following principles apply when evaluating whether an issue can be decided with or without further fact finding proceedings:

First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis.

Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.

Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.

Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

Sixth, the Court of Criminal Appeals is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a *DuBay* proceeding. During appellate review of the *DuBay* proceeding, the court may exercise its Article 66 factfinding power and decide the legal issue.

United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997).

In *United States v. Fagan*, 59 M.J. 238, 242 (C.A.A.F. 2004), this Court held that the principles established in *Ginn* were applicable to a much "broader range of affidavit-based, post-trial collateral claims." Specifically, and identical to this case, *Fagan* dealt with the collateral issue of post-trial confinement treatment.

Unlike the federal system, the military justice system has no separate mechanism for dealing with post-conviction collateral issues. See, *Fagan*, 59 M.J. at 241. In light of that, this Court has long recognized the need for a separate fact-finding hearing on these types of issues and established that process in *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967). *Id.* This Court's decision in *Ginn* focused on when "a *DuBay* hearing is required to resolve a post-trial claim that is framed by conflicting affidavits." *Id.*

Appellant has never opposed a *DuBay* hearing in this case. In fact, in Appellant's initial Assignment of Error to the Air Force Court Appellant requested either for them to set aside his bad conduct discharge or remand the case for a *DuBay* hearing. However, Appellant does not believe a *DuBay* hearing is required or necessary in order to resolve the issue before the Court. If this Court feels a *DuBay* hearing should be held, Appellant

stands ready to participate.

Appellant does not feel the Air Force Court erred in failing to order a *DuBay* hearing. The Air Force Court looked at the entire record and determined no *DuBay* was necessary because this is not a case of dueling affidavits. As this Court said in *Ginn*,

[I]f the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.

Ginn, 47 M.J. at 248. The Air Force Court looked at the record and determined that the sworn affidavits combined with the Article 138 complaint and the clemency submissions were sufficient to state a claim of legal error. The government did not contest the relevant facts and offered an MFR that expressly agrees with those facts. Therefore, it was not error for the Air Force Court to proceed with its decision and "decide the legal issue on the basis of those uncontroverted facts." *Id.*

This Court can also decide this case on the basis of the record because the uncontroverted facts state a claim of legal error, and there exist no disagreement with regard to what occurred to Appellant in confinement. The government has never disagreed that the facts as established in the record of trial occurred, they have only disagreed that the facts demanded

relief. In such a circumstance, there is nothing further a *DuBay* would uncover. The government has already had their opportunity to explain why they took the actions they did by improperly ordering Appellant into punitive solitary confinement and they have failed to offer any explanation different than what is included in the sworn affidavits submitted by Appellant. However, Appellant understands this Court may feel further information is needed in deciding the issues presented in this case.

Conclusion

Appellant does not believe the Air Force Court erred in failing to grant a *DuBay* hearing because the record is fully developed, states a legal error and the facts are uncontroverted. However, Appellant understands this Court may feel additional information is needed and Appellant stands ready to participate in any *DuBay* this Court may order.

WHEREFORE, Appellant requests this Honorable Court set aside the bad conduct discharge for the government's illegal imposition of punitive solitary confinement.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Lauren A. Shure".

LAUREN A SHURE, Capt, USAF
Appellate Defense Counsel
USCAAF Bar No. 34723
Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road
Joint Base Andrews NAF, MD 20762
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to this Honorable Court and the Appellate Government Division on 15 December 2015.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Lauren A. Shure".

LAUREN A SHURE, Capt, USAF
Appellate Defense Counsel
USCAAF Bar No. 34723
Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road
Joint Base Andrews NAF, MD 20762
(240) 612-4770