

Appendix J

DuBay Hearing Procedure

NOTE: Scope of this appendix. When a record of trial is deficient on a particular issue, appellate courts sometimes order limited evidentiary hearings to assist them in performing their appellate duties. These hearings generally require the MJ to make specific findings of fact and conclusions of law on a particular issue, thus eliminating “the unsatisfactory alternative of settling [an] issue on the basis of ex parte affidavits, amidst a barrage of claims and counterclaims.” United States v. DuBay, 37 CMR 411, 413 (CMA 1967).

MJ: Please be seated. This limited hearing is called to order.

TC: This limited hearing was ordered by _____ in accordance with United States v. DuBay. Appellate Exhibit I () is the order from _____ returning the record of trial to The Judge Advocate General, for remand to a convening authority to order a limited hearing pursuant to United States v. DuBay. Appellate Exhibit II () is the memorandum from The Judge Advocate General to the Commander, _____, designating him/her as the convening authority authorized to order this limited hearing. Appellate Exhibit III () is the advice from the Staff Judge Advocate to the convening authority and the convening authority’s order to conduct this limited hearing. (Appellate Exhibit IV () is the docketing order for this hearing, with the written input from both sides attached.) A copy of these appellate exhibits, along with the record of trial in this case, have been furnished to the military judge, counsel, and the appellant.

NOTE: The MJ should also require any additional documents relating to the hearing be made Appellate Exhibits at this point. The record of trial of the prior trial ordinarily should not be marked as an Appellate Exhibit.

TC: The government is ready to proceed in this limited hearing.

MJ: Defense Counsel, do you have any challenges to the jurisdiction of this limited hearing?

DC: (Responds.)

TC: (I) (All members of the prosecution) have been detailed to this limited hearing by (name of detailing authority). (I am) (All members of the prosecution are) qualified and certified under Article 27(b), and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner that might tend to disqualify (me) (us) in this hearing.

TC: The appellant and the following persons detailed to this hearing are present: _____, Military Judge; _____, Trial Counsel; and _____, Defense Counsel. No voting members of the court are present or required. The following persons detailed to this court are absent: _____.

NOTE: Oaths for counsel. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the MJ: “Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?”

TC: _____ has been detailed reporter for this court and (has been previously sworn) (will now be sworn).

NOTE: When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of each opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

MJ: _____, you have the right to be represented by _____, your detailed military defense counsel. He/She is provided to you at no expense to you.

You also have the right to request a different military lawyer to represent you. If the person you request were reasonably available, he or she would be appointed to represent you free of charge. If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are entitled only to one military lawyer. You may ask his/her superiors to let you keep your detailed counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would have to be provided by you at no expense to the government.

If a civilian lawyer represents you, you can also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer. Do you understand that?

APP: (Responds.)

MJ: Do you have any questions about your rights to counsel?

APP: (Responds.)

MJ: By whom do you wish to be represented?

APP: (Responds.)

MJ: And by him/her/them alone?

APP: (Responds.)

NOTE: If the accused elects pro se representation, see applicable inquiry at paragraph 2-7-2, PRO SE REPRESENTATION. The MJ must be aware of any possible conflict of interest by counsel and, if a conflict exists, the MJ must obtain a waiver from the accused or order new counsel appointed for the accused. See applicable inquiry at paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

NOTE: *If the original defense counsel from trial is not present, the MJ should inquire or explain as applicable why the attorney-client relationship has ceased (Example: Former defense counsel left active duty or appellant is claiming ineffective assistance of counsel against former defense counsel). In any situation where it appears the appellant may have a legal right to the assistance of a former defense counsel, the MJ should obtain from the appellant an affirmative waiver of that former defense counsel's presence.*

MJ: _____ is no longer on active duty and cannot be detailed by military authority to represent you at this hearing. However, you could attempt to retain _____ as civilian counsel. Accordingly, _____ has been detailed to represent you at this hearing. Do you wish to proceed with this hearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this hearing?

MJ: Because you have made allegations after trial that _____ was ineffective in his/her former representation of you, he/she has not been detailed to represent you at this hearing. Accordingly, _____ has been detailed to represent you at this hearing. Do you wish to proceed with this hearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this hearing?

MJ: Defense Counsel will announce by whom he/she/they (was) (were) detailed and his/her/their qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this hearing by _____. (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense has) acted in any manner that might tend to disqualify (me) (us) in this proceeding.

(OATH FOR CIVILIAN COUNSEL:) **MJ:** Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?

MJ: I have been properly certified and sworn, and detailed (myself) (by _____) to this hearing. Counsel for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

TC: Your Honor, are you aware of any matter that might be a ground for challenge against you?

MJ: (I am not. I was the trial judge for the _____ portion of this case.) (I am not. I was not the trial judge for any prior proceedings in this case, whether pretrial, trial or post-trial.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Respond.)

MJ: Counsel, based on Appellate Exhibit(s) __, the purpose of this limited hearing is _____. Do both counsel agree?

TC/DC: (Respond.)

MJ: _____ has your defense counsel explained the nature of this hearing to you?

APP: (Responds.)

MJ: Defense Counsel, does the accused have in front of (him) (her) a copy of Appellate Exhibit I (___), the appellate court's order directing this hearing?

DC: (Responds.)

MJ: _____, look at page (___) of Appellate Exhibit I (___). The appellate court told me to determine _____. Do you see that portion of Appellate Exhibit I (___)? Do you understand that my sole purpose at this hearing is to listen to the matters presented by the parties and then make findings of fact and conclusions of law with respect to the issue(s) that the appellate court specified?

APP: (Responds.)

MJ: I have no authority to change anything that happened at your original trial. I cannot alter any prior ruling, finding, or sentence. When I provide my findings and conclusions, the appellate court will decide what happens in your case. Do you understand that?

APP: (Responds.)

MJ: Because the defense raised the matter at issue in this hearing, I will allow the defense to go first with opening statement, presentation of the evidence and argument. Does the defense have an opening statement?

DC: (Responds.)

MJ: Does the government have an opening statement?

TC: (Responds.)

MJ: Defense Counsel, you may present evidence.

NOTE: The TC administers the oath/affirmation to all witnesses. After a witness testifies, the MJ should instruct the witness along the following lines:

MJ: _____, you are excused (temporarily) (permanently). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and the accused. You

may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within ___ minutes).

DC: The defense has nothing further.

MJ: Trial Counsel, you may present evidence.

TC: The government has nothing further.

MJ: Defense Counsel, do you wish to present any rebuttal evidence?

DC: (Responds.)

MJ: Defense Counsel, you may present closing argument.

DC: (Responds.)

MJ: Trial Counsel, you may present closing argument.

TC: (Responds.)

MJ: I will prepare findings of fact and conclusions of law, which will be provided to counsel and attached to this record as Appellate Exhibit __ prior to my authentication of the record.

MJ: Is there anything further from either party?

TC/DC: (Respond.)

MJ: This hearing is adjourned.