

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In re

Private DWIGHT J. LOVING,

Petitioner.

AMICUS CURIAE BRIEF
OF NATIONAL INSTITUTE
OF MILITARY JUSTICE

USCA Misc. Dkt. No.

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April 17, 2003

INDEX

	<i>Page</i>
Interest of the Amicus.....	1
Jurisdiction, Statement of the Case and Facts.....	2
Argument.....	2
Conclusion.....	5

TABLE OF CITATIONS

Page

Cases:

Brice v. State, 815 A.2d 314 (Del. 2003).....2
 Garrett v. Lowe, 39 M.J. 293, 295 (C.M.A. 1994).....5
 Johnson v. Nevada, 59 P.3d 450 (Nev. 2002).....2
 Oken v. State, No. 117 (Md. Feb. 10, 2003).....2
 Ring v. Arizona, 122 S. Ct. 2428 (2002).....2, 3, 4
 State v. Gales, 265 Neb. 598 (Neb. 2003).....2
 United States v. Gray, 51 M.J. 1 (1999), *cert. denied*,
 532 U.S. 919 (2001).....4
 United States v. Murphy, 50 M.J. 4 (1998).....5
 Woldt v. People, 64 P.3d 256 (Colo. 2003).....2

Constitution and Statutes:

U.S. CONST. art. III4
 Uniform Code of Military Justice art. 871(a),
 10 U.S.C. § 871(a).....4

Rules of Court:

C.A.A.F.R. 26.....1
 C.A.A.F.R. 27(a) (3) (A).....1
 C.A.A.F.R. 28(b) (1).....1
 C.A.A.F.R. 30.....1

Miscellaneous:

129 CONG. REC. 34,312 (Nov. 18, 1983)3
 William N. Early, Lizann M. Longstreet & James S. Richardson,
USCMA and the Specified Issue: The Current Practice,
 123 MIL. L. REV. 9 (1989)3
 Eugene R. Fidell, *Guide to the Rules of Practice and Procedure
 for the United States Court of Appeals for the Armed
 Forces* (10th ed. 2001).....1, 2
 Manual for Courts-Martial, United States, 1984.....5
*Md. Court Orders Stay of Execution; Ruling May Shield
 Death Row Inmates*, WASH. POST, Feb. 12, 2003, at A1)1
 National Institute of Military Justice, *Annotated Guide to
 Procedures for Trials Before Military Commissions* (2002).....2
 National Institute of Military Justice, www.nimj.org.....1
 S. REP. No. 98-53 (1983)2
 S. REP. No. 101-81 (1989)2

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

In accordance with Rules 26 and 30, the National Institute of Military Justice ("NIMJ") respectfully submits this brief as *amicus curiae*. For the reasons explained below, the Court should enter an order under Rules 27(a)(3)(A) and 28(b)(1) directing respondent to answer the petition for a writ of error coram nobis.

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 popular website (www.nimj.org), and its publications program, including the unofficial *Guide to the Rules of Practice and Procedure* and *Annotated Guide to Procedures for Trials Before Military Commissions* (2002).

Jurisdiction, Statement of the Case and Facts

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

Argument

NIMJ takes no position on the correct resolution of petitioner's legal claims. We appear solely for the purpose of urging the Court to order respondent to answer the petition. The core issue asserted by petitioner is both important and recurring.

State supreme courts across the land are wrestling with the effect of *Ring v. Arizona*, 122 S. Ct. 2428, 2443 (2002), on their death penalty systems. *E.g.*, *Oken v. State*, No. 117 (Md. Feb. 10, 2003) (staying execution and setting oral argument) (discussed in *Md. Court Orders Stay of Execution; Ruling May Shield Death Row Inmates*, WASH. POST, Feb. 12, 2003, at A1); *Johnson v. Nevada*, 59 P.3d 450, 460 (Nev. 2002); *Woldt v. People*, 64 P.3d 256, 264-67 (Colo. 2003); *Brice v. State*, 815 A.2d 314, 320-23 (Del. 2003); *State v. Gales*, 265 Neb. 598 (Neb. 2003). In important respects this Court serves as "the functional equivalent of a state supreme court." EUGENE R. FIDELL, *GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES* 129 (10th ed. 2001) (citing, *inter alia*, S. REP. No. 101-81, at 171 (1989); S. REP. No. 98-53, at 35 (1983) (analogizing to state courts for purposes of establishing time limits for seeking certiorari)). Like the highest courts of those jurisdictions, it should conduct a careful

analysis of *Ring's* impact on the death penalty system for which, as "the primary civilian interpreter of the Uniform Code of Military Justice," see 129 CONG. REC. 34,312 (Nov. 18, 1983) (statement of Sen. Kennedy), it bears appellate responsibility.

Perhaps the key question is whether the Court should conduct that analysis sooner or later. Four death penalty cases are currently pending before the service Courts of Criminal Appeals, one of which might eventually provide this Court with an occasion to address *Ring*. Resolving *Ring's* implications now, through the vehicle of a petition for writ of error coram nobis, is the preferable route for three reasons:

First, such a decision would provide important guidance for any capital courts-martial tried during what experience teaches is likely to be a lengthy interval before another death penalty case reaches this Court on direct, mandatory review.

Second, deciding the *Ring* issue in the context of *Loving* would ensure uniform treatment for all of those on death row. It would certainly be anomalous for other cases further back in the appellate process to obtain the benefit of review of the issue here while denying that benefit to Private *Loving*, even though his case is not yet final. Whatever one's views on the question of specified issues, it is difficult to dispute the principle that this Court "should, as much as possible, attempt to ensure that justice is administered uniformly throughout the military community." William N. Early, Lizann M. Longstreet & James S. Richardson, *USCMA and the*

Specified Issue: The Current Practice, 123 MIL. L. REV. 9, 21 (1989). It would be anomalous for Private Loving's case to move to the Article III habeas corpus realm without this Court first deciding whether he is entitled to relief under *Ring*—an issue that this Court now knows exists but has not yet resolved. Even if the Court were to rule against him on the merits of his *Ring* claim, it would ill serve the congressional intent that this Court be the first stage of civilian appellate review of courts-martial (as well as the goal of thoughtful and mutually respectful interaction between it and the Article III courts) for so important an issue to be thrust upon the habeas forum without some expression of this Court's views. This is especially so because application of *Ring* to cases arising under the UCMJ is a matter as to which the judicial process would plainly benefit from the kind of intimate grasp of the structure of military justice system that is one of this specialized court's *raison d'être* (the other, of course, being vindication of the constitutional goal of civilian oversight of the military). A military death sentence is not final until the President has approved it. See Uniform Code of Military Justice art. 871(a), 10 U.S.C. § 871(a). Until that occurs, this Court remains the primary judicial body with jurisdiction over Private Loving's case as well as *United States v. Gray*, another capital case in which initial appellate review has been completed. See 51 M.J. 1 (1999), *cert. denied*, 532 U.S. 919 (2001).

Third, *coram nobis* is the correct procedural route where, as

here, an intervening decision of the Supreme Court has cast doubt over one of this Court's opinions. As this Court has observed, "[u]nlike the practice in United States Courts of Appeals and District Courts, neither the UCMJ nor the Manual for Courts-Martial, United States, 1984, provides procedures for collateral, post-conviction attacks on guilty verdicts." *United States v. Murphy*, 50 M.J. 4, 5 (1998). This Court has nevertheless "relied upon a variety of procedures to ensure that a military accused's rights are fully protected." *Id.* The writ of error coram nobis is one such procedure, and in our view—given the (from this perspective) imperfect framework within which it functions—the procedure best suited to the current situation. See *Garrett v. Lowe*, 39 M.J. 293, 295 (C.M.A. 1994).

Exercising this Court's extraordinary writ jurisdiction to consider Private Loving's petition is therefore appropriate.

Conclusion

For the foregoing reasons, respondent should be directed to answer the petition.

Respectfully submitted,

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April 17, 2003

CERTIFICATE OF FILING AND SERVICE

I certify that on April 17, 2003 an original and seven copies of the foregoing *Amicus Curiae* Brief were delivered to the Court and copies thereof mailed to Teresa L. Norris, Esq., Center for Capital Litigation, P.O. Box 11311, Columbia, SC 29211; Prof. John H. Blume, Cornell Law School, Myron Taylor Hall, Ithaca, NY 14853-4901; Colonel Robert D. Teetsel, JA, Defense Appellate Division, USALSA; and Colonel Lauren Leeker, JA, Government Appellate Division, USALSA.

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