RECORD NO. 10-6400

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

TIMOTHY HENNIS,

Petitioner-Appellant,

v.

FRANK HEMLICK; PATRICK PARRISH, COLONEL;
LLOYD J. AUSTIN, III, GENERAL;
JOHN MCHUGH, HONORABLE,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
AT RALEIGH

OPENING BRIEF OF APPELLANT

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Petitioner-Appellant states that:

(i) Subject matter jurisdiction in this cause was vested in the United States District Court for the Eastern District of North Carolina upon the filing of an application for a writ of habeas corpus pursuant to 28 USC § 2241 by virtue of 18 U.S.C. § 3231, which grants original jurisdiction to the District Court over all original actions (J.A. 9);

(ii) Appellate jurisdiction in this cause was vested in this court upon filing of a notice of appeal by Petitioner-Appellant on (J.A. 816-817), from the judgment and commitment journalized (J.A. 815), by virtue of 28 U.S.C § 1291 which grants the Circuit Court of Appeals jurisdiction to review all final decisions of the District Courts;

(a) This appeal is from a judgment disposing of all claims with respect to all parties.

STATEMENT OF THE ISSUES

1. Did the District Court err in granting Appellee's Motion for Summary Judgment?

2. Did the District Court properly apply the *Councilman* abstention doctrine?

3. Did the district court err in denying a habeas corpus petition pursuant to 28 USC § 2241?

STATEMENT OF THE CASE

On **May 15, 1985**, Appellant was arrested and charged with three counts of capital murder and one count of rape. On **July 4, 1986**, Appellant was convicted of three counts of murder and one count of rape and sentenced to death on **July 8, 1986**. On **October 6, 1988**, Appellant's conviction and sentence were set aside by the North Carolina Supreme Court and a new trial ordered, citing numerous incidents of prosecutorial misconduct and judicial overreaching.

Appellant was granted a change of venue from Fayetteville, North Carolina to Wilmington, North Carolina. On **April 19, 1989**, a hearing was being held regarding the prosecutorial misconduct which occurred in the first state trial. During this hearing, the jury acquitted the Appellant of three counts of capital murder and one count of rape.

On **September 14, 2006**, Appellant was recalled from retirement to active duty solely for prosecution under the Uniform Code of Military Justice. On **August 17, 2007**, Appellant's case was referred to court-martial and alleging three counts of capital murder. On **December 21, 2007**, Counsel for Appellant filed a motion to dismiss the charges against the Appellant because the armed forces had lost jurisdiction. On **April 28, 2008**, the trial court denied said motion. On **May 15, 2008**, Appellant filed two Writs to have the Military Appellate Courts hear this matter: first

to the Army Court of Criminal Appeals and later to the Court of Appeals for the Armed Forces. Neither Appellate Court would hear the matter prior to trial.

On **December 28, 2009**, Appellant filed a petition for a writ of habeas corpus pursuant to 28 USC § 2241 in the Eastern District of North Carolina where his case was assigned to the Honorable Judge Boyle. (J.A. 8-117). The basis for the petition was that the military lacked jurisdiction to court martial Appellant because of federal Supreme Court precedent of *United States ex rel Hirshberg v Cooke.* Appellant requested emergency relief from the District Court in the Petition and again in a renewed motion. Appellees were given until **January 28, 2010** to respond to the Petition. An oral argument was held on **February 26, 2010** in Raleigh. (J.A. 659-713). Following that hearing, the judge ordered that the Appellees brief four issues: double jeopardy, abstention, exhaustion, and the merits. (J.A. 717-771). Appellant further filed a response to Appelees brief on **March 3, 2010.** (J.A. 781-801). On **March 16, 2010**, Judge Boyle denied the petition. (J.A. 805-815). A timely notice of appeal was filed on **March 17, 2010**. (J.A. 816-817). Appellant was convicted of three counts of capital murder on **April 8, 2010** and sentenced to death on **April 15, 2010.** The record in this matter was filed on **July 7, 2010.** Several extensions of time were sought by the Appellant and granted until **December 17, 2010.**

STATEMENT OF THE FACTS [1]

The Murders

Kathryn Eastburn and two of her daughters were found brutally murdered in their home in the Summer Hill neighborhood of Fayetteville, North Carolina, on **May 12, 1985**. Kathryn Eastburn had her throat slashed and was stabbed. The two young Eastburn children also had their throats slashed. The youngest daughter Jana was left in her crib, unharmed. Appellant is innocent of these heinous crimes. (J.A. 7-117

Crime Scene Investigation

Investigators processed the crime scene and found forensic evidence. DNA evidence was found under the fingernails of Katherine Eastburn. Male DNA was found on a towel in the bathroom of the Eastburn home. Neither sources of DNA match Appellant. In Appellant's court-martial, the Defense was denied the ability to conduct its own independent DNA testing on these items. (J.A. 7-117)

Although investigators found no sign of forced entry, they did find a number of items missing from the home including a bank card.

The crime scene became contaminated as dozens of reporters, gawkers and police officers moved through unmonitored. The lab that processed most of the forensic evidence was the SBI lab in Raleigh, North Carolina. [2]

[1] The statement of facs in taken from the Petition and amended petition contained in the Joint Appendix.

Appellant is investigated

Detectives learned from the Appellant that he had adopted a small dog from Kathryn Eastburn. To the police, this meant Appellant had some contact with the decedent. Appellant voluntarily came down to the police station and gave samples of his hair and saliva. Appellant also gave a full statement without a lawyer and denied all wrongdoing in the murder of the Eastburn Family. Appellant explained that he had been working for the US Army on the evening the murders occurred.

After Appellant voluntarily cooperated for over six hours without counsel present, Appellant and his family left the Sheriff's Department. Appellant was later arrested at his home and charged with three counts of capital murder and rape. Investigators procured a search warrant and searched Petitioner's home and car. No forensic evidence was found in either Appellant's home or car

that tied Appellant to the crime.

[2] http://images.bimedia.net/documents/SBI+Report.pdf. This is a report commissioned by the North Carolina Attorney General outlining the problems at the SBI lab, including problems with forensic testing conducted by Brenda Bissette Dew, who performed forensic testing in this case and testified as an expert in forensic serology at Appellant's court-martial..

Alternate Suspects

Patrick Cone

Law enforcement learned that Patrick Cone, who was out walking on the night of the crime, saw a white male with a military style haircut and stocky build walking near the crime scene. However, Patrick Cone's description has changed numerous times during the investigation and subsequent three trials. He was Appellee's star witness in all three trials of Appellant.

Investigators further learned from bank records that Kathryn Eastburn's bank card had been used twice: once at 10:53 P.M. on May 10, 1985 and again at 8:55 A.M. on May 11, 1985.

Investigators learned that Patrick Cone was a maintenance worker at Methodist College in Fayetteville. Further, they learned that the bank card had been used at the automatic teller on Ramsey Road near Methodist College.

Patrick Cone's maintenance shed was less than two hundred yards away from the ATM machine where Kathryn Eastburn's card was used.

John Raupach

Investigators also found out that Patrick Cone's description met the description of, John Raupach, a stock boy at a nearby grocery store that was also out walking that evening. Mr. Raupach admitted that he was out walking the evening Patrick Cone claimed he saw Appellant near the crime scene.

Manager at the Grocery Store

Another worker at the local grocery store, an assistant manager, came to work with scratches on his face around the time of the murders but could not adequately explain these scratches.

Eastburn's Neighbor

Neighbors also noted that the evening before she was murdered Kathryn Eastburn was seen in a heated argument with a neighbor.

Alleged New Forensic Evidence

Twenty five years later, Appellees found DNA on a slide buried deep in the Cumberland County Sherriff's Department. This evidence was stored with Appellant's samples that were voluntarily given to the Sheriff's Department. The slide was sent for comparison to the SBI lab. Appellees claim it matches the Appellant. However, serious concerns about the match and statistical analysis remain.

Court Martial

Appellant's court martial hearing began on **March 2, 2010** with voir dire. Opening statements occurred on **March 17, 2010.** Appellant was convicted on **April 8, 2010** and sentenced to death on **April 15, 2010.**

SUMMARY OF THE ARGUMENT

I. The District Court erred in granting Appellee's Motion for Summary Judgment.

II. The District Court did not apply the *Councilman* abstention doctrine properly in this matter.

III. The trial court abused its discretion in denying a habeas corpus petition pursuant to 28 USC § 2241.

ARGUMENT

I.

THE DISTRICT COURT ERRED BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

APPLICABLE STANDARD OF REVIEW

The Circuit Court of Appeals reviews *de novo* the District Court's grant of summary judgment to the moving party. *See Hill v. Lockheed Martin Logistics Mgmt.,* 354 F.3d 277, 283 (4th Cir. 2004) *(en banc). See Hill v. Lockheed Martin Logistics Mgmt.,* 354 F.3d 277, 283 (4th Cir. 2004*)*.

Summary judgment is appropriate, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c) ; *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). The Appellate Courts construe the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Moreover, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.... Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) . (emphasis in original).

DISCUSSION

District Court Findings

The District Court found the court must abstain due to *Schlesinger v Councilman*, 420 U.S. 738 (1975). Once the District Court determined the abstention issue, Appellee's Motion for Summary Judgment was granted. (J.A. 813-814).

ANALYSIS

There are a number of questions of material fact that are left unanswered by the District Court's decision. These issues are genuine and material to the determination of this habeas petition.

I. **Question of material fact-Does the Army possesses jurisdiction?**

After a hotly contested hearing in Raleigh there remains a central issue: *Whether the Appellant's service record falls squarely with the United States Supreme Court ruling in Hirshberg or the Clardy exception*. This matter, unequivocally, falls under the precedent of *Hirshberg*.

Appellant established that he began his active duty service in **January, 1981** for a four year term of service. On **February 1, 1984**, Appellant extended his term of service for one year. This made his end of service date or "expiration of term of service" (ETS) **January, 1986**. On **May 15, 1985**, he was arrested for triple homicide and released on bail **December, 1985**. In **January 1986**, Appellant reenlisted for seven months, extending his ETS to August, 1986. On J**uly 4, 1986**, he was convicted

of three counts of capital murder and one count of rape. On **July 8, 1986,** Appellant was sentenced to death. At that time his expiration of term of service was **August 27, 1986.** The following November, the Army began discharge proceedings against him, which were never made final.

On **October 8, 1988**, he was awarded a new trial and was ultimately acquitted on **April 19, 1989**. By law, all of the "bad" or "lost" time incurred that was as a result of Appellant's pre and post-trial incarceration was made good. Further, all bad time that was incurred while he was sent to death row. This time spent incarcerated and unavailable for duty was made good by the commanding officer at Fort Knox. The relevant Army Regulations at that time required that Appellant be given credit for this so- called bad time. See Army Regulation (AR) 635-200, para. 1-23 and 1-33 (J.A. 772). At this point the Army had no authority to hold him for more than five days. *Id.* Although his term of service expired by law in August of 1986, He is given a discharge certificate dated **June 12, 1989**. Appellant's reenlistment on **June 13, 1989** is known as an unauthorized absence. Any unauthorized absence extends the term of service.

The expiration of term of service for the initial contract is **August 27, 1986.** The army begins discharge proceedings against him, which cannot be made final until the conviction is final in state court. On **October 8, 1988**, he is awarded a new trial and is ultimately acquitted on **April 19, 1989**.

All bad time incurred while he is incarcerated and unavailable for duty is made good by the commanding officer at Fort Knox. Army Regulations require that Appellant be given credit for this so called bad time. AR 635-200, 1-33. The date the "Unauthorized Absence" was reclassified to "Unavoidable Absence" is May **22, 1989.** At this point the Army has no authority to hold him for more than five days. *Id.* This date is **May 27, 1989**. Appellant is mistakenly discharged on **June 12, 1989** past that five day period described in AR 635-200. Appellant reenlists on **June 13, 1989**.

Appellant states that this scenario falls squarely under the "*Hirshberg* doctrine" which says that if your expiration of term of service predates your discharge date then the military loses jurisdiction to court martial you for anything prior to that discharge date. *United States ex rel Hirshberg v Cooke*, 336 U.S. 210 (1949).

II. Question of material fact- Does final pay and accounting matter when determining a final discharge from the Army?

There is no indication that Congress intended for the Armed Forces to be able to retain jurisdiction based on a variable for which they have complete control, final pay.

It is true that Appellant reenlisted in the army. It is true he had not yet received his final payment. It is also true that he received awards for being a good, loyal soldier. None of this is relevant to the analysis this court must do in granting or denying relief.

The fact that is not in conflict here is the exact termination of service date. The judge presiding in the case set it at **August 27, 1986**. Petitioner's discharge date is **June 12, 1989**. The expiration of term of service is prior to the discharge date.

Appellant received no final pay check because he was not leaving the Army. Appellant was discharged and re-enlisted the next day. It seems illogical that he must be paid a final pay for a job which he still holds. The *Hirshberg* analysis does not include any discussion or any consideration of final pay Under *Hirshberg*; the only relevant facts are the expiration of the term of service and the discharge date. Final pay and accounting is irrelevant and Appellee cannot point to any regulation, statute or any case law that requires a final pay and accounting in order to trigger the protections of *Hirshberg.*

Therefore, there is no indication that congress intended for the Armed forces to be able to retain jurisdiction based on a variable for which they have complete control, final pay.

III. Question of material fact-Does "bad" or "lost" time matter when determining a final discharge from the Army?

Under the version of 10 U.S.C. § 972, in existence when the Appellant was finally released from jail, an enlisted member who spends time in jail awaiting trial or in prison is considered to have "lost time." 10 U.S.C. § 972 (a). If a person is acquitted the service "shall" waive liability for those days of confinement. *Id.*

Appellant was arrested and spent time in pretrial confinement before bonding out in the first state trial. Upon conviction he spent time on death row in North Carolina. This was, at the time, considered bad time.

Upon acquittal, Appellant went voluntarily to Camp Lejuene in North Carolina. Appellant requested and received stragglers orders to Fort Knox in Kentucky. While at Fort Knox, the commanding officer of the base signed a waiver of liability for the days spent incarcerated. This means the time spent incarcerated does not count against the Appellant's time owed to the military. Appellant enlisted in **1980** for a period of four years. He extended this enlistment for a period of one year in **1984**. During his trial, he extended this period for seven months. While Appellant was in jail he could not perform any service for the Army. This so called "bad or lost time" was added to the end of his term of service. Following his conviction the Army approved his discharge, less than honorably, from the Army, with that finding stayed pending appeal.

Appellant was successful in his direct appeal to the North Carolina Supreme Court. Under the United States Code at the time, "lost time" could be added to a term of enlistment only after a conviction became "final." As Appellant's conviction was overturned on his first appeal, it never became "final" under 10 USC Section 972. Similarly, all of Appellant's time in pre-trial confinement prior to his second trial,

which resulted in his acquittal, could not be properly counted as "lost time and added to his term of enlistment under 10 USC § 972."

The version of 10 USC § 972 at the time of Appellant's trial, arrest and acquittal stated:

> An enlisted member of an armed force who-
>
> **(1)** deserts ;
> **(2)** is absent from his organization, station, or duty for more than one day without proper authority, as determined by competent authority;
> **(3)** is confined for more than one day while awaiting trial and disposition of his case, and whose conviction has become final;
> **(4)** is confined for more than one day under a sentence that has become final ; or
> ***(5)*** is unable for more than one day, as determined by competent authority, to perform his duties because of intemperate use of drugs or alcoholic liquor, or because of disease or injury resulting from his misconduct; is liable, after his return to full duty, to serve for a period that, when added to the period that he served before his absence from duty, amounts to the term for which he was enlisted or inducted.
>
> *10 USC § 972*

Thus, the discharge was never executed. The expiration of his term of service, absent the "lost time" improperly added to his term of service, was **August** of **1986**. The new honorable discharge became final on **June 12, 1989**. Military law recognizes there was a break in service between the time the Appellant was discharged and when he reenlisted. On **June 13, 1989**, he reenlisted.

Appellant's uncontested expiration of term of service was **August 27, 1986**.

No one, including the judge presiding over Appellant's capital murder trial, disputes this fact. Under the law of the day, *Hirshberg*, this break in service stripped the military of its jurisdiction. Without jurisdiction, the Army is precluded from holding a court-martial against the Appellant for capital murder.

IV. Question of material fact- Can the Army still court martial Appellant under the UCMJ?

The sole potential exception that exists and existed in 1989, under Article 3 of the UCMJ allows a court-marital if two inclusive factors are met:

1. Potential sentence carries more than five years;
2. Serviceman could not be tried in any other court at any time.

Article 3 (a) UCMJ, 1989 Version

Appellant can be tried again in the State of North Carolina. The North Carolina Supreme Court stated, "if defendant is to take advantage of defense of double jeopardy on appeal, he must first properly raise it before the trial court; failure to do so precludes reliance on the defense on appeal." *State v McKenzie,* 232 S.E. 2d. 424 (1977).

First, the Appellant was tried and acquitted in state court – he was tried by another court for the same offense. Additionally, the state is not barred from convening a grand jury, indicting the defendant and bringing him before the court. Appellant would then need to take an affirmative step to protect himself from North

Carolina. Based on North Carolina law, he can be brought to trial, although he may then affirmatively assert double jeopardy.

Appellant, if he does not raise the double jeopardy issue, can be tried a third time in state court in North Carolina. The second criteria under the Code of Military justice cannot be satisfied.

V. Question of material fact - Can the military reactivate a retired non-commissioned officer only to court martial him?

Until 2004, Appellant served his country as an active duty soldier. An active duty solider is defined as," full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include fulltime National Guard duty." 10 U.S.C. § 101. In 2004, A DD214 was issued to the Appellant and he was placed on retired reserve status.

The Retired Reserve includes the following Reserves: **(1)** Reserves who are or have been retired under section 3911, 6323, or 8911 of this title or under section 291 of title 14. 10 U.S.C. § 10154. Appellant retired after twenty plus years in the military.

Under 10 U.S.C § 688, a retired reserve status soldier can be returned to active duty at any time. 10 U.S.C. § 688. This is arguably only for matters related to

national security. *Id.* It does not confer jurisdiction over events that occurred prior to the retirement and discharge of the soldier.

WHEREFORE, Appellant requests the District Court's grant of summary judgment be reversed and this matter remanded to the Eastern District of North Carolina for further proceedings.

II.

THE DISTRICT COURT DID NOT PROPERLY APPLY THE *SCHLESINGER V COUNCILMAN* ABSTENTION DOCTRINE.

APPLICABLE STANDARD OF REVIEW

A District Court's decision to abstain is reviewed for an abuse of discretion. *Richmond, F. & P. R.R. v. Forst,* 4 F.3d 244, 250 (4th Cir. 1993).

A district court abuses its discretion when it makes an error of law. *See Koon v. United States,* 518 U.S. 81, 100 (1996); *United States v. Ebersole,* 411 F.3d 517, 526 (4th Cir. 2005.

DISCUSSION

District Court Findings

The District Court stated:

> the issues Hennis has raised before this court may be plausible defense at the court martial, as well as, appealable issues if the outcomes ends in a conviction. Attempting to resolve any of these questions would be inappropriate at this time with a court martial in progress. Therefore, as the circumstances are set out, this court, like that in *Councilman* ," discerns nothing that outweighs the strong

> considerations favoring exhaustion of remedies or that warrants intruding on the integrity of the military court process. (JA 813)

ANALYSIS

I. ***Councilman*** **abstention is not mandatory.**

Schlesinger v Councilman abstention requires a federal court to stand down in matters best handled by the military. This abstention, unlike *Younger, Colorado River and Buford*, is not mandatory.

Justice Powell stated in his decision in *Schlesinger*, "We have no occasion to attempt to define those circumstances, if any, in which equitable intervention into pending court-martial proceedings might be justified. In the circumstances disclosed *here*, we discern nothing that outweighs the strong considerations favoring exhaustion of remedies or that warrants intruding on the integrity of military court processes." *Schlesinger v. Councilman*, 420 U.S. 728, 761(1975). Emphasis added.

II. ***Councilman*** **abstention is not warranted in this matter.**

i. *The harm to Appellant is not ordinary*

The Schlesinger Court states

> It therefore appears that Councilman was 'threatened with (no) injury other than that incidental to every criminal proceeding brought lawfully and in good faith.' *Douglas v. City of Jeannette*, 319 U.S. 157, 164, 63 S.Ct. 877, 881, 87 L.Ed. 1324 (1943).

Schlesinger v Councilman, 420 U.S. 728, 754 (1975)

Appellant was living in the State of Washington when he was recalled to active duty by the Army. At this point he was forced to move back to North Carolina to stand trial without his family or any of his belongings. This trial process took years. Years that he lost from his family and friends. Years that cannot be brought back.

Appellant suffered through a third capital murder trial and was sentenced to death by lethal injection a second time. When this method is used:

> The condemned person is usually bound to a gurney and a member of the execution team positions several heart monitors on this skin. Two needles (one is a back-up) are then inserted into usable veins, usually in the inmate's arms. Long tubes connect the needle through a hole in a cement block wall to several intravenous drips. The first is a harmless saline solution that is started immediately. Then, at the warden's signal, a curtain is raised exposing the inmate to the witnesses in an adjoining room. Then, the inmate is injected with sodium thiopental - an anesthetic, which puts the inmate to sleep. Next flows pavulon or pancuronium bromide, which paralyzes the entire muscle system and stops the inmate's breathing. Finally, the flow of potassium chloride stops the heart. Death results from anesthetic overdose and respiratory and cardiac arrest while the condemned person is unconscious.
>
> *Source http://www.deathpenaltyinfo.org/descriptions-execution-methods*

While awaiting this death by the Federal government, the Appellant can expect a long appellate process. The military has not executed a soldier since April 13, 1961, when U.S. Army Private John A. Bennett was hanged after being convicted of rape and attempted murder. This lengthy respite from killing does not foreclose the

possibility that the military could begin executing again. The possibility that the military will execute the Appellant is a real one, not imaginary or ordinary.

Conditions at the United States Disciplinary barracks are spartan at best. Appellant can only move while chained and all movement must stop while he is being shuffled outside of his cell. He is alone twenty three hours of the day and his only source of contact is with his jailers. He may use the phone and write but the existence is hardly ideal.

If Appellant is correct and he is being held by an entity without jurisdiction over him, this harm is far from ordinary. The fact that he is being sent to death row for a second time by a different sovereignty makes it unparalleled in the annals of American jurisprudence.

ii. *The exhaustion requirement*

The *Schlesinger* case discussed jurisdiction and the exhaustion requirement:

> Respondent seeks to avoid this result by pointing to the several military habeas cases in which this Court has not required exhaustion of remedies in the military system before allowing collateral relief. *Toth v. Quarles*, 350 U.S. 11 (1955), supra; *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L.Ed.2d 1148 (1957); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281, 80 S. Ct. 305, 4 L.Ed.2d 282 (1960). In those cases, the habeas petitioners were civilians who contended that Congress had no constitutional power to subject them to the jurisdiction of courts-martial. The issue presented concerned not only the military court's jurisdiction, but also whether under Art. I Congress could allow the military to interfere with the liberty of civilians even for the limited purpose of forcing them to answer to the military justice system. In each of these cases, the disruption caused to petitioners' civilian lives and the

> accompanying deprivation of liberty made it 'especially unfair to require exhaustion . . . when the complainants raised substantial arguments denying the right of the military to try them at all.' *Noyd v. Bond*, supra, 395 U.S., at 696 n. 8, 89 S.Ct., at 1884, n. 8 (1969). The constitutional question presented turned on the status of the persons as to whom the military asserted its power. As the Court noted in Noyd, it 'did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented.' Ibid.
>
> *Schlesinger v. Councilman*, 420 U.S. 728, 758-759 (1975)
> https://web2.westlaw.com/result/%09%09%09%09%09%09 - B034331975129764

iii. *Cases cited in Councilman as not requiring exhaustion*

In *Reid v Covert*, a military wife was convicted of murdering her husband by court martial. The Federal court intervened and stated they could not court martialher because they had no jurisdiction to prosecute her for murder. *Reid v. Covert*, 354 U.S. 1 (1957)

In *McEllroy v Guagliardo*, the United States Supreme Court found that the armed forces could not court martial civilian employees. *McElroy v. United States ex rel. Guagliaro*, 361 U.S. 281 (1960).

Schlesinger indicates that to circumvent exhaustion one must show an inherent unfairness.

iv. *The exhaustion requirement is unfair in this matter*

To require exhaustion of military remedies in this matter is fundamentally unfair to the Appellant. Simply put, the military lacks the jurisdiction to court martial him at all.

The Supreme Court stated in *U.S. ex rel Hirshberg v Cooke:*

> Except in cases of offenses in violation of Article 14 of the Articles for the Government of the Navy, there is no authority of law giving jurisdiction to a court-martial to try an enlisted man for an offense committed in a prior enlistment from which he has an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such reenlistment at the time the jurisdiction of the court was asserted.
>
> *U.S. ex rel Hirshberg v Cooke,* 336 US 210, 217 (1949).

Appellee Parrish has made a finding that Appellant's expiration of term of service was in **August** of **1986**. This in uncontested by either party. Appellant was discharged on **June 12, 1989**. Appellant reenlisted on **June 13, 1989**. The expiration of term of service (ETS) occurred prior to the discharge. Once this occurred, the army lost jurisdiction.

Personal jurisdiction is an essential prerequisite to the exercise of power by any court, such a defect would absolutely void the judgment of the court-martial. *See International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Therefore, the Court has jurisdiction to collaterally review plaintiff's court-martial conviction. *Priest v. Secretary of the Navy,* 570 F.2d 1013, 1016 (D.C.Cir.1977). *See also* 28 U.S.C. 1346(a)(2) (district courts have jurisdiction over any civil action or claim against the United States founded upon the Constitution).

Applying the *Hirshberg* decision to the facts in this case it is clear that the Army does not have jurisdiction. Without jurisdiction there is no rational basis to

require Appellant to exhaust his remedies in military court before seeking habeas relief in the District Court.

WHEREFORE, Appellant requests that this court find that *Councilman* abstention was improper and remand this matter to the Eastern District of North Carolina for further proceedings.

III.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2241.

APPLICABLE STANDARD OF REVIEW

The Appellate Court reviews *de novo* the district court's denial of 28 U.S.C § 2241 petition. *Trowell v Beeler,* 135 Fed Appx 590 (4th Cir. 2005), *citing Selgeka v. Carroll,* 184 F.3d 337, 342 (4th Cir. 1999).

This court has stated, "by definition, *de novo* review entails consideration of an issue as if it had not been decided previously." *United States v George*, 971 F.2d 1113, 1118 (4th Cir. 1992); *see Betty B Coal Co. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor,* 194 F.3d 491, 499 (4th Cir. 1999) ("The sum of a *de novo* review and a *de novo* process is a new adjudication.")

DISCUSSION

District Court Findings

The District Court found that," the matter is dismissed without prejudice to allow for the full exhaustion of remedies within the military court." (J.A. 814).

ANALYSIS

I. ***Hirshberg v Cooke.***

U.S. ex rel Hirshberg v Cooke, 336 US 210, 217 (1949). stated :

> Except in cases of offenses in violation of Article 14 of the Articles for the Government of the Navy, there is no authority of law giving jurisdiction to a court-martial to try an enlisted man for an offense committed in a prior enlistment from which he has an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such reenlistment at the time the jurisdiction of the court was asserted.

U.S. ex rel. Hirshberg v. Cooke, 336 U.S. 210,217(1949)

II. ***U.S. v Clardy.***

The ruling in *Clardy* merely explains or clarifies the ruling in *Hirshberg.*

The Court stated in *Clardy:*

> *We do not question that under Hirshberg military jurisdiction is terminated by a discharge at the end of an enlistment or period of service even though the service member immediately reenters service. The break in "status", irrespective of length of time between discharge and reenlistment, is sufficient to terminate jurisdiction.*

U.S. v. Clardy, 13 M.J 308, 316 (CMA 1982)

III. ***Appellant falls squarely within Hirshberg***

i. Appellant's expiration of term of service

The Military Judge in this matter, Respondent Parrish, found the ETS is August 27, 1986. This ruling was not appealed on an interlocutory basis. There was no

motion to reconsider and this is the *first* time the Respondents have raised these arguments to counter that ETS date.

ii. *1986 discharge*

The adverse administrative discharge approved and suspended on **October 3,1986** became null and void. Execution of the discharge was conditioned upon Appellant being convicted and losing all his appeals. He was ultimately acquitted. winning all of his appeals.

iii. *Appellant's 1989 discharge*

Appellant's discharge on **June 12, 1989,** long after his **August 27,1986** ETS, was not conditional. In other words, the Army had no basis to hold Appellant on active duty after his acquittal if he did not reenlist. *See Clardy and Willenbring,* Appellant was granted a discharge that post dated his expiration of term of service through no fault of his own.

iv. *Appellant's reenlistment*

Appellant reenlisted on June 13 1989.

v. *Appellant's status from 27 August 1986, his ETS date, until 19 April 1989, the day of his acquittal*

Because Appellant was in civilian confinement and not present for duty, this time was not being applied against his period of enlistment. Thus, Appellant's enlistment commitment was involuntarily extended during this period. In other words, this period of time was temporarily considered presumptive "time lost" or

"bad time." 10 U.S.C. § 972; AR 635-200, July 20 1984. However, upon Appellant's acquittal, by operation of law, that time could not be considered "lost" or "bad" time.

For an extension is to be valid, there must be a valid order extending the term of service. Without that order, there is no valid extension.

vi. *Acquittal and bad time*

As a matter of law, the presumptive time lost or bad time was converted to good time on the date of the acquittal, because there was no "final" conviction. 10 U.S.C. § 972. As a result, Appellant voluntarily returned to the Army and became entitled to back pay solely because he had never been discharged by statute.

The United States Supreme Court stated that, "A soldier's entitlement to pay is dependent upon statutory right." *Bell v. United States*, 366 U.S. 393, 401, 81 S.Ct. 1230, 1235, 6 L.Ed.2d 365 (1961) (*Bell*). A member's pay is defined by act of Congress and is not a quid pro quo for services rendered to the military. Id.

Appellees cannot forward the argument that because they withheld his back pay, they also retained jurisdiction.

vii. *Army's Legal Authority over Appellant*

The Army had no legal basis to hold Appellant on active duty as of **April 20,1989**, because he was well past his **August 27, 1986** ETS date.

viii. *Army Regulations*

AR 635-200, July 20 1984, governs the situation where a soldier is involuntarily held beyond his ETS for "court-martial" purposes and is acquitted. *Id*., paragraphs 1-24, 1-33. The Regulation requires discharge within five days after announcement of the acquittal. *Id*., paragraph 1-33a. No regulation could be found, however, that governs when a soldier is held beyond his ETS based upon presumptive bad time and is then acquitted in a civilian criminal proceeding.

Following the logic of AR 635-200, paragraph 1-33, Appellant likewise should have been entitled to a discharge within five days after his acquittal. It is fair to infer that because this unique scenario was not addressed in or contemplated by AR 635-200, due to its unique nature, Army administrative personnel did not know what to do upon the acquittal and made mistakes.

AR 635-200 para 1-33(a) states "A soldier who has no lost time to make good..., if acquitted after ETS, be discharged within 5 days after date of announcement of acquittal. " This would make a discharged owed to Appellant on **April 24, 1989**. Appellant owed no more time to the Army and should have been discharged on that date.

Appellant's factual situation falls squarely under the matter of *Hirshberg v Cooke*. The expiration of service predated his discharge by some three years. United

States Supreme Court precedent states he is no longer subject to court martial jurisdiction for any offense that occurred prior to **June 12, 1989**.

WHEREFORE, Appellant requests that this court find that a constitutional violation occurred and grant the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

CONCLUSION

For the foregoing reasons, defendant-appellant requests that this court reverse the judgment of the District Court of the Eastern District of North Carolina and remand this cause back for proceedings consistent with this court's decision.

Respectfully submitted,

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant-Appellant states that oral argument should be heard in this case because the issues raised in this appeal require further explanation beyond the realm of the written brief, and oral argument will facilitate the decision making process. Wherefore, Defendant-Appellant prays that this Court grant oral argument pursuant to Local Rule.

December 17, 2010

/s/ Eric J. Allen
Eric J. Allen, Esquire

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the Type-volume limitation of Fed. R. App. 32(a)(7)(B) because:

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December 17, 2010

/s/ Eric J. Allen
Eric J. Allen, Esquire

CERTIFICATE OF SERVICE

In accordance with Rule 25 of the Rules of the United States Court of Appeals for the Fourth Circuit, I hereby certify that I have this 17th day of December, 2010, filed the required copies of the foregoing Opening Brief of Appellant in the Office of the Clerk of the Court, via hand delivery and have electronically filed the Opening Brief of Appellant using the Court's CM/ECF system which will send notification of such filing to the following counsel, and have mailed a copy via U.S. Postal Service, First Class Mail, postage paid to:

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