

BRIEF FOR APPELLEES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 10-6400

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

BRIEF OF APPELLEES

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STATEMENT OF JURISDICTION

Appellant sought the jurisdiction of the district court by filing a petition pursuant to 28 U.S.C. § 2241. Jurisdiction to this Court is provided by 28 U.S.C. § 1291 given that Appellant has appealed from the district court's dismissal of his petition.

STATEMENT OF ISSUE

Whether the district court erred in denying Appellant's 28 U.S.C. § 2241 petition, in not intervening in Appellant's pending proceedings in the military justice system, and in finding that abstention is proper.

STATEMENT OF CASE

Appellant Timothy Hennis filed a writ of habeas corpus pursuant to 28 U.S.C. § 2241 on December 28, 2009, and filed an amended writ on January 14, 2010. (J.A. 8-27, 48-117).¹ As part of this writ, Appellant sought a stay of military court-martial proceedings pending against him. (J.A. 26). On January 28, 2010, Appellees moved to dismiss Appellant's writ or, in the alternative, for summary judgment. (J.A. 120-97). Following additional briefing, the district court heard oral argument on the pending motions on February 26, 2010. (J.A. 659-713). Both parties submitted additional briefing in response to issues raised by the district court at oral argument. (J.A. 713-68). On March 16, 2010, the district court granted the Appellees' motion for summary judgment and dismissed Appellant's petition. (J.A. 805-14). Specifically, the district court held that "[a]ttempting to resolve" any of Appellant's arguments "would be inappropriate at this time with a court martial in progress." (J.A. 813). The district court also noted that Appellant's arguments could be raised at the court-martial and as "appealable issues if the outcome ends in conviction." (J.A. 813).

¹Prior to filing this matter, Appellant unsuccessfully sought to dismiss and enjoin his military proceedings through direct motions and a motion for extraordinary relief filed within the military justice system. (J.A. 805-14).

Appellant filed a timely notice of appeal with the district court on March 17, 2010. (J.A. 816-17).

STATEMENT OF FACTS²

On or about May 9, 1985, Kathryn Eastburn and two of her three young daughters were brutally murdered in their home. (J.A. 806). The Eastburn home was located less than a mile from the gate to Fort Bragg, North Carolina. (J.A. 806). At the time of the murder, Appellant was an enlisted soldier who was on active duty stationed at Fort Bragg as a Sergeant. (J.A. 806). The Cumberland County Sheriff's Office arrested Appellant on May 16, 1985, in connection with these offenses. (J.A. 806).

Appellant was convicted on July 4, 1986, in North Carolina Superior Court in Cumberland County on three counts of premeditated murder and one count of rape. (J.A. 806). Appellant was sentenced to death on July 9, 1986. (J.A. 806). On October 6, 1988, the North Carolina Supreme Court reversed Appellant's conviction and ordered a new trial. (J.A. 806). On retrial, Appellant was acquitted of the rape and murders on April 19, 1989. (J.A. 806).

On April 21, 1989, Appellant returned to the Army and reported to Fort Knox, Kentucky. (J.A. 806). In June 1989, Appellant re-enlisted for four years which was subsequently extended in 1992, 1996, and 2001. (J.A. 806). Appellant retired from the Army on July 13, 2004. (J.A. 806).

² Facts are largely taken from the district court's order granting summary judgment, denying Appellant's motion for a stay, and dismissing his petition. (J.A. 805-14).

In 2006, after a cold case review, the North Carolina State Bureau of Investigation determined DNA evidence, obtained from the sperm fraction of the vaginal swab of the victim, matched the DNA profile of Appellant. (J.A. 806-07). The Army recalled Appellant on September 14, 2006, from retired status to active duty to face court-martial charges. (J.A. 807). On November 10, 2006, Appellant was charged with three counts of premeditated murder. (J.A. 807). After Appellant unsuccessfully attempted, through direct motions and a motion for extraordinary relief, to dismiss his court-martial, the court-martial commenced on March 2, 2010. (J.A. 807). The court-martial convicted Appellant of all three charges on April 8, 2010, and sentenced Appellant to death on April 15, 2010. (Brief at 8).

SUMMARY OF ARGUMENT

Appellant challenges the district court's grant of summary judgment by advancing three interrelated arguments. First, Appellant contends that the court should not have granted summary judgment because the parties dispute several material facts. Second, Appellant argues that the district court erred in applying Schlesinger v. Councilman, 420 U.S. 738 (1975). Third, Appellant claims that the district court erred in not granting his 28 U.S.C. § 2241 petition. (Brief 10-30). All three arguments fundamentally address whether the district court correctly concluded that it should abstain from considering Appellant's petition. The district court granted summary judgment after concluding that resolving Appellant's arguments "would be inappropriate at this time with a court martial in progress" and that Appellant could pursue his arguments on direct appeal within the military justice system, if necessary. (J.A. 813). Appellant's second and third arguments also center around the appropriateness of applying Councilman in this case.

The district court properly determined that it should first allow the military justice system to consider Appellant's arguments. Requiring Appellant to pursue and exhaust his arguments through the available military justice channels is consistent with precedents of the Supreme Court and this Court. Given that Appellant's complex and fact-based arguments rely on issues tied to

military procedures and practices, those who possess the relevant experience—that is, those in the military justice system—should first consider those arguments. In the alternative, this Court may affirm the district court's decision to dismiss Appellant's petition by holding that the military justice system has jurisdiction over Appellant.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S 28 U.S.C. § 2241 PETITION, IN NOT INTERVENING IN APPELLANT'S PENDING PROCEEDINGS IN THE MILITARY JUSTICE SYSTEM, AND IN FINDING THAT ABSTENTION IS PROPER.

A. Standard of Review.

This Court reviews de novo an award of summary judgment, "viewing the facts and inferences drawn therefrom in the light most favorable to the non-moving party." E.E.O.C. v. Navy Federal Credit Union, 424 F.3d 397, 405 (4th Cir. 2005). An award of summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).

In analogous circumstances, however, this Court has reviewed a district court's decision to abstain for abuse of discretion. See, e.g., Nivens v. Gilchrist, 444 F.3d 237, 240 (4th Cir. 2006). Given that the district court dismissed Appellant's petition to allow for the full exhaustion of military remedies, this Court should apply the more deferential review standard for abstention. This Court may affirm the judgment of the district court "on any grounds apparent from the record." Suter v. United States, 441 F.3d 306, 310 (4th Cir. 2006) (internal quotation marks omitted).

B. Discussion of Issue.

1. The District Court Properly Denied Appellant's 28 U.S.C. § 2241 Petition and Found that Abstention Was Proper.

As the Supreme Court held in Schlesinger v. Councilman, "the balance of factors governing exercise of equitable jurisdiction by federal courts normally weighs against intervention, by injunction or otherwise, in pending court-martial proceedings." 420 U.S. 738, 740 (1975). In reaching its decision, the Court compared the reasons for abstaining in pending state and administrative proceedings to the reasons for abstaining in pending court-martial proceedings. Id. at 755-56 (discussing "considerations of comity [and] the necessity of respect for coordinate judicial systems"). For example, the Court noted that administrative abstention "allow[s] agencies to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions." Id. at 756; see also id. at 755 ("State courts are quite as capable as federal courts of determining the facts, and they alone can define and interpret state law."); id. at 756 (noting that abstention "avoids duplicative proceedings").

As the Court held, such "considerations apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings." Id. at 757. Indeed,

"something more" inherent in military matters "counsels strongly against the exercise of equity power even where . . . intervention might be appropriate." Id. Specifically, after describing the unique nature and function of the military, the Court held that Congress, in enacting the Uniform Code of Military Justice, "attempted to balance these military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted." Id. at 757-58.

Of particular importance to Appellant, the Court also noted that the military defendant in Councilman was "threatened with [no] injury other than that incidental to every criminal proceeding brought lawfully and in good faith." Id. at 754 (internal quotation marks omitted) (alteration in original). As a result, the Court identified "nothing that outweighs the strong considerations favoring exhaustion of remedies or that warrants intruding on the integrity of military court processes." Id. at 761. Thus, as the Court held, principles of comity, respect for the expertise of the military judges, and judicial economy weigh against interfering in pending court-martial proceedings and in favor of requiring the military defendant to exhaust his remedies within the military system of justice.

Other courts have similarly found "strong considerations" to abstain from enjoining or interfering with pending court-martial proceedings. Even before the Supreme Court issued its opinion in Councilman, this Court held that a defendant service member "must exhaust available military remedies, especially fact-finding remedies, before he may properly resort to a district court" for collateral relief. Dooley v. Plogar, 491 F.2d 608, 614 (4th Cir. 1974). The Dooley panel emphasized that "it is important to respect the orderly processes of the military court system, to avoid needless friction, and to have the facts developed and the law interpreted by the expert adjudicatory tribunals charged in the first instance with responsibility for offenses of members of the armed services." Id. at 613.³

Similarly, the United States Court of Appeals for the Fifth Circuit has held, in response to arguments extremely similar to those of Appellant, that it was "comfortable having the military courts address first" whether a military defendant was discharged on a particular day and the impact of that alleged discharge on the jurisdiction of the military court system. Lawrence v. McCarthy, 344 F.3d 467, 473 (5th Cir. 2003). In support of its decision, the McCarthy panel stated that it has "permit[ted] many tribunals to make an initial determination regarding the scope of their

³The Supreme Court cited Dooley favorably in its Councilman opinion. Councilman, 420 U.S. at 760 n.34.

jurisdiction[,]" id. that it "trust[s] that the military courts are equally up to the task of considering [the defendant's] claims fully and fairly[,]" id. and that "[c]ourts-martial face challenges to their jurisdiction often, and have upheld the claims and dismissed the charges when appropriate." Id. at n.13.

Other circuits have similarly required exhaustion of available remedies before entertaining a petition for collateral relief. See, e.g., Winck v. England, 327 F.3d 1296, 1300 (11th Cir. 2003) (noting, in the context of a service member who sought a discharge, the "importance of the doctrines of abstention and exhaustion, as well as their application to the military context"); New v. Cohen, 129 F.3d 639, 645 (D.C. Cir. 1997) ("In Councilman, the Supreme Court made clear that military courts are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction over disciplinary proceedings."); Bowman v. Wilson, 672 F.2d 1145 (3d Cir. 1982). District courts have even applied Councilman abstention in situations where foreign nationals are prosecuted before military tribunals. See, e.g., Al Odah v. Bush, 593 F.Supp. 2d 53, 57 (D.D.C. 2009).

The considerations articulated in the opinions of the Supreme Court and the Courts of Appeals apply directly to Appellant. Although the court-martial has considered, reached a verdict, and imposed a sentence in Appellant's case, he still may challenge the jurisdiction of the court-martial, as well as its decision, in

post-conviction litigation before the convening authority and in the applicable military appeals courts, as discussed in Section B.2 below. Specifically, military courts may provide insight into Appellant's service dates, discharge dates, and re-enlistment dates, as well as the significance of those dates to his susceptibility to court-martial.

Appellant's arguments that this Court should entertain his collateral challenge at this time (Brief at 22-23), ignore or minimize the force of Councilman and the other opinions of the Courts of Appeals. As an initial matter, Appellant claims that his "harm"—being recalled to duty, being made subject to a court-martial, sentenced to death for a second time, having to pursue a lengthy appellate process, and being imprisoned in "spartan" prison conditions—is not "ordinary" and goes beyond an "injury . . . incidental to every criminal proceeding brought lawfully and in good faith." Councilman, 420 U.S. at 754; (Brief at 20-22). Appellant's alleged injuries, however, fit perfectly within the universe of harms one might face as the result of a trial or criminal prosecution. Indeed, the Court crafted its abstention and exhaustion holdings after acknowledging "there is inevitable injury—often of serious proportions—incident to any criminal prosecution." Id. at 754. Thus, the Councilman Court recognized that criminal prosecutions may cause problems—the kinds of problems of which Appellant complains—for those who are prosecuted. Such

complaints do not trigger an exception to the abstention requirement.

In support of his arguments, Appellant cites to several Supreme Court decisions—e.g., McElroy v. U.S. ex rel. Gaugliardo, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957); U.S. ex rel. Hirshberg v. Cooke, 336 U.S. 210 (1949)—that predate Councilman's holding regarding the "strong considerations" favoring abstention and exhaustion in pending court-martial proceedings. Indeed, neither the Supreme Court nor any Court of Appeals since Councilman has applied Hirshberg, on which Appellant relies, to interfere with or enjoin a pending court-martial. McElroy, which concerned civilian employees of the military, and Reid, which concerned civilian dependents of members of the armed forces, are readily distinguishable from Appellant's situation.

Appellant cites Priest v. Secretary of the Navy, 570 F.2d 1013, 1016 (D.C. Cir. 1977), to argue that this Court "has jurisdiction to collaterally review plaintiff's court-martial conviction." (Brief at 24). In Priest, however, the service member defendant pursued his remedies through the military justice system before collaterally attacking his conviction. Priest, 570 F.2d at 1015-16. Priest does not suggest that a district court may enjoin or interfere with pending military justice proceedings. Appellant's citation to United States v. Clardy, 13 M.J. 308 (C.M.A. 1982), also does not overcome Councilman's holdings, as

Clardy was simply a direct appeal within the military justice system rather than a collateral attack on a pending court-martial proceeding.

Moreover, Appellant's cases did not require the specialized expertise of the military courts. In discussing several of the cases Appellant cites, the Dooley panel noted that those cases "involved no disputed questions of fact and no questions on which the expert opinion of the military courts would be helpful." Dooley, 491 F.2d at 614. By contrast, in this appeal, "[e]xpert understanding of the special circumstances of military life obviously would influence what facts are found from the evidence and what significance is attached to them." Id. (emphasis added).⁴ Such expertise may be useful in considering issues such as discharge dates, re-enlistment dates, military code and regulations, and the impact of such issues on the military's jurisdiction over Appellant. See also New, 129 F.3d at 644 (noting that, with respect to McElroy, Reid, and other cases, "it has been undisputed that the persons subject to the court-martials either

⁴In his pleadings before the district court, Appellant attempted to distinguish his case from Dooley by asserting that he has already developed the relevant facts in the military justice system and that he "filed a request for extraordinary relief" to the military appellate courts. (J.A. 202). Even assuming, for the purposes of argument, that the facts have been developed in the way appellant believes, the military system has not completely considered the significance of those facts. Additionally, as discussed infra, Appellant still has several opportunities to pursue his arguments within the military system of justice.

never had been, or no longer were, in the military").

Thus, precedents of this Court and of the Supreme Court hold that Appellant must exhaust his arguments within the military justice system before he may pursue this petition. The district court did not err in dismissing Appellant's petition.

2. Appellant May Pursue His Arguments in the Military System.

As discussed previously, Councilman and its related cases emphasize the need for individuals, such as Appellant, to exhaust their available remedies within the military justice system. That exhaustion requirement applies to both factual and legal arguments. Councilman, 420 U.S. at 760; Dooley, 491 F.2d at 614 (holding that "exhaustion applies as long as there is an available, unused remedy which may result in relief"); Lawrence, 344 F.3d at 473; New, 129 F.3d at 645.

Recently, this Court emphasized this general exhaustion requirement in the context of civil commitment proceedings undertaken pursuant to 18 U.S.C. § 4248. See Timms v. Johns, ___ F.3d ___, 2010 WL 4925395 (4th Cir. Dec. 6, 2010) ("As a general rule, in the absence of exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent, courts require[] exhaustion of alternative remedies before a prisoner can seek federal habeas relief.") (internal citation and quotation marks omitted). "While habeas corpus is 'always available to safeguard the fundamental rights of persons wrongly

incarcerated,' it 'is the avenue of last resort.'" Id. (quoting Martin-Trigona v. Shiff, 702 F.2d 380, 388 (2d Cir. 1983)). The Timms panel also quoted Martin-Trigona favorably as holding that "'habeas corpus traditionally has been accepted as the proper vehicle to challenge the constitutionality of an order of imprisonment from which there is no route of appeal."' Timms, 2010 WL 4925395, *5 (emphasis added).

Appellant has not fully exhausted his available avenues of relief within the military justice system. Indeed, he is currently at the beginning of the post-trial process. After a sentence is adjudged in a court-martial, the accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. Rules for Courts Martial (RCM) 1105(a) and (b) (2008), available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf> (last accessed January 7, 2010). The record of trial, together with the accused's submissions and the staff judge advocate's ("SJA") recommendation, are forwarded to the convening authority for action. RCM 1107(b) (3) (A).

The convening authority takes action on the findings and sentence and may, in his sole discretion, change any guilty finding to a lesser included offense, or even set aside the finding of

guilty. 10 U.S.C. § 860. The convening authority may also disapprove a sentence in whole or in part, mitigate the sentence, or change a punishment to one of a different nature, as long as the severity of the punishment is not increased. Id.

In the armed forces, the Uniform Code of Military Justice provides the accused with the right to appeal a court-martial finding or sentence. Appellant may appeal the findings and sentence approved by the convening authority to the Army Court of Criminal Appeals ("ACCA"). 10 U.S.C. § 866(b). Any Army case that involves imprisonment for more than one year is automatically appealed to the Army Court of Criminal Appeals, unless the service member chooses to waive that right. Id.⁵ Further, pursuant to 10 U.S.C. § 867, appeal then may be made to the Court of Appeals for the Armed Forces ("CAAF"). In cases where the death sentence has been imposed, such an appeal is mandatory. 10 U.S.C. § 867(a)(1). Parties may also petition for certiorari with the United States Supreme Court. 10 U.S.C. § 867(a); 28 U.S.C. § 1259.

Moreover, in exceptional circumstances, service members may petition ACCA and CAAF for extraordinary relief as an interlocutory appeal. ACCA and CAAF have the discretion to entertain extraordinary writs pursuant to the All Writs Act. 28 U.S.C. § 1651.

⁵In circumstances where the death sentence is imposed, such an appeal may not be waived. 10 U.S.C. § 866(b)(2).

The record of trial in Appellant's court-martial has not yet been submitted to the convening authority. Indeed, Appellant complains (Brief at 21) that he will "expect a long appellate process" in connection with his military trial and appeal. Consequently, Appellant has the meaningful opportunity to pursue many avenues on direct appeal through the military justice system.

3. Military Courts Should Have the Opportunity to Apply Their Expertise to the Factual and Legal Determinations That Appellant Seeks.

As noted previously, federal courts have recognized the expertise military courts have over matters in their jurisdiction. Appellant's arguments before the district court and before this Court center on a military issue—whether he was discharged from military service such that the military justice system no longer has jurisdiction over him.

The key factual issues turn on expiration of terms of service (ETS) dates, whether there was a break in Appellant's service with the Army, and the consequences, if any, of such a break. Both parties have argued at length before the district court as to these issues. (J.A. 138-47; 216-20). The determinations as to those issues center on Army regulations, precedents from military courts, re-enlistment contracts, and other military personnel papers. As the district court noted, "the question is one of material fact mired in time lines, expiration of term of service dates ("ETS"), discharge dates, re-enlistment dates, the military code, and

military regulations.” (J.A. 813). The military justice system should have the first opportunity to pass judgment on these issues and to apply its expertise.

4. In the Alternative, This Court Should Find That Court-Martial May Take Jurisdiction Over Appellant.

Alternatively, if this Court wishes to consider Appellant’s arguments, the military has jurisdiction over Appellant because he had no relevant break in service. Appellant contends that the military lost jurisdiction over any acts he may have undertaken in 1985 because of a break in service that occurred in 1989. (Brief at 13, 16). As an initial matter, 10 U.S.C. § 803(a) provides for military jurisdiction over Appellant. Additionally, no gap in service took place with respect to Appellant. Finally, pursuant to this Court’s precedent, any minimal gap between Appellant’s discharge and re-enlistment does not affect the military court system’s jurisdiction over him.

Title 10 U.S.C., Section 803(a) provides the military justice system with jurisdiction over Appellant. (J.A. 539-41). At the time of the relevant criminal offenses, Section 803(a) (1985) stated:

Subject to [statute of limitations], no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of

Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

Based on this statute, an individual, such as Appellant, may be tried in the military justice system if: (1) he is charged with committing an offense against the Uniform Code of Military Justice ("UCMJ") at a time when he was subject to the UCMJ; (2) the offense alleged to have been committed is punishable by confinement for five years or more; (3) Appellant cannot be tried in another court; and (4) prosecution of the crimes is not barred by the applicable statute of limitations.

The Appellant satisfies all four requirements. Appellant does not contest that he was subject to the UCMJ at the time the offense was committed. The military offenses for which he has been charged carry a greater sentence than five years, as evidenced by his capital sentence. As the North Carolina state system has already acquitted Appellant of these charges, he cannot be tried in any other court. (J.A. 672-73). Finally, no statute of limitations applies to individuals charged with capital offenses. 10 U.S.C. § 843(a) (1985). As a result, Section 803(a) provides a basis for military jurisdiction over Appellant.

Additionally, Appellant experienced no break in military service. Army Reg. 635-200 (1982), para. 1-23, available at <http://www.whs.mil/library/mildoc/AR%20635-200,%201%20October%20>

982.pdf at 54 (last accessed January 11, 2010),⁶ governs the calculation of the adjustment of the ETS date when a soldier is unavailable to work for reasons such as desertion, absence without leave, or, as in Appellant's case, civilian confinement; see also 10 U.S.C. § 972(a)(2). When a soldier is not able to work because he is in civilian confinement, the actual ETS date is no longer the contractually binding date. (J.A. 704-05). Instead, it is only used to calculate the amount of time that is remaining on the soldier's enlistment contract which will be added when he returns to duty. (J.A. 704-05).

When the soldier returns to duty, the time owed on the contract is added to the date the soldier returns, and a new ETS date is established. This procedure was followed with respect to Appellant on several occasions. (J.A. 140-41). Appellant's ETS was extended both times he returned to military control from civilian confinement. When Appellant was released from pre-trial confinement in December 1985, and when he returned to Fort Bragg, North Carolina, his ETS date was adjusted by adding the seven months he spent incarcerated to his ETS date, changing the ETS date from January 1986 to August 1986. (J.A. 140-41). The same procedure was followed when Appellant returned to Fort Knox, Kentucky in April 1989, by extending his ETS to account for the

⁶Although the 1984 version of Army Reg. 653-200 would be closer in time to the actions relevant to Appellant's claims, this version contains the same language.

time he spent incarcerated. (J.A. 141, 705).

With respect to the gap between June 12, 1989, and June 13, 1989, (Brief at 13), Appellant signed a re-enlistment application on June 1, 1989, where he agreed to adjust his ETS date to June 17, 1989. (J.A. 621). As a result, the military did not lose jurisdiction over Appellant because Appellant re-enlisted prior to his ETS date.

Finally, as Appellant was discharged in June of 1989 solely to re-enlist immediately, any gap between June 12, 1989, and June 13, 1989, is not a discharge for purposes of military jurisdiction. As this Court has held, a "discharge, in military terms, is generally understood to be a complete termination of military service, but does not include a discharge conditioned upon acceptance of further military service." Willenbring v. United States, 559 F.3d 225, 231 (4th Cir. 2009) (internal quotation marks omitted). Indeed, Appellant concedes in his brief that he "received no final pay check" during his re-enlistment "because he was not leaving the Army." (Brief at 14) (emphasis added). Thus, even assuming, for the sake of argument, that Appellant has a one-day discharge between June 12 and June 13, Willenbring prevents that gap from affecting the military justice system's jurisdiction over Appellant.

Thus, the military has not lost jurisdiction to try Appellant for the murders that took place in 1985. This Court may affirm

the district court's dismissal of Appellant's petition on this basis.

CONCLUSION

For the foregoing reasons, the United States respectfully submits that the judgment of the district court should be affirmed.

Respectfully submitted, this 19th day of January, 2011.

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