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

REPLY BRIEF OF APPELLANT

Eric Jonathan Allen
THE LAW OFFICE OF ERIC J. ALLEN, LTD
713 South Front
Columbus, OH 43206
(614) 443-4840
eric@eallenlaw.com

Counsel for Appellant

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LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
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REPLY ARGUMENT

I. ABSTENTION WAS NOT PROPER IN THIS MATTER UNDER SCHLESINGER

a. *Appellant exhausted all available military appellate remedies*

Appellant exhausted all military remedies prior to the court martial in this matter.

On **December 21, 2007**, Trial Counsel for Appellant filed a motion to dismiss the charges against the Appellant on the basis of loss of in personam jurisdiction. On **April 28, 2008**, the trial court denied said motion.

On **May 15, 2008**, Appellant filed a pair of 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. The military has decided not to enter a ruling on this matter. Appellant has ma de every effort to have the military court hear this matter and they have declined.

b. *Disposition of this matter requires no specific military expertise*

Appellee claims that," Such(military) expertise may be useful in considering issues such as discharge dates, re-enlistment dates, military codes and regulations, and the impact of such issues on the Military's jurisdiction over the Appellant." *Appellee's brief at page 16.*

Appellant respectfully disagrees with Appellee's contention that this matter requires an in depth understanding of military law. In fact only two United States Supreme Court cases are necessary to make a determination in this matter.

U.S. ex rel Hirshberg v Cooke 336 US 210, 217 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*

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. vs. Clardy, 13 M.J 308, 316*

Due to the fact Appellant's case falls squarely within the holding of *Hirschberg v United States* and not under the so-called *Clardy* exception there are only two dates that need to be known: Appellants expiration of termination of service of his contract with the military and discharge date. If the expiration of termination of service is before the discharge date, the army loses jurisdiction.

There is no layer of complexity that needs to be examined other than the two dates. Certainly any federal court comprised of intelligent, thoughtful jurists can apply *Hirschberg* to this matter and make a determination. Abstention is not necessary.

c. Harms are not ordinary

The United States Supreme Court has stated "execution is the most irremediable and unfathomable of penalties; death is different," *Ford v. Wainwright,* 477 U.S. 399, 411, 106 S.Ct. 2595, 2603, 91 L.Ed.2d 399 (1986); see also, *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). It is irreversible. Therefore, specific protections need to be in place to ensure that due process has been afforded and the condemned knows he is dying having been protected by our constitution.

Councilman does state a court should not intervene if the serviceman is, "threatened with injury other than that incidental to every criminal proceeding brought lawfully and in good faith." *Councilman at 754*. The harm in Appellant's case is much different than one imposed for a non-capital criminal offense in the military brought lawfully and in good faith : *discharge, confinement, hard labor or a reduction in pay grade. 858a. ART. 58a*. One must presume that death is different, even under the code of military justice.

This is no ordinary harm. Appellant doesn't lose money or benefits. He doesn't spend time at the USDB for a period of years. He doesn't get a discharge

preventing his employability. He dies strapped to a gurney. One cannot possibly equate the two harms in good faith.

Appellee can point to no matter where a federal court has found that death is not different and that its harm is the same as being imprisoned, fined or discharged from the Armed Forces.

The *Lawrence* case cited by the Appellee deals solely with a non-capital disposition and is not applicable in Appellants instant appeal. The Fifth Circuit doesn't even specify what offenses *Lawrence* committed in its ruling. Comparing a non-capital offense to a capital one demeans the seriousness of the punishment.

II. APPELLANT SHOULD NOT HAVE TO EXHAUST REMEDIES

a. *Long Appellate Process*

Appellee correctly points out that Appellant complains of a long appellate process. Appellant complains of this process because if his legal arguments are correct, and he believes they are, then he must settle for form over substance. Quietly he must work his way up the appellate chain of command until he finds a court willing to end this nightmarish ordeal for him. A discussion of his cellmates at the USDB is in order to illustrate how long this process may take.

The last person executed in the military system was on April 13, 1961 for the rape and murder of a Austrian girl. *http://www.deathpenaltyinfo.org/us-military-death-penalty.*

Private Ronald Gray has been on death row since 1988, twenty three years. President Bush signed his execution warrant on July 29, 2008 but has not been executed while the United States Supreme Court hears his appeal.

Kenneth Parker, a marine, has been on death row since 1995. Dwight Loving has been there since 1998 and an execution is not eminent for him. Hasan Akbar has been on death row since 2003 for a combat related incident in Iraq. Andrew Witt joined them in 2005 for a double homicide on an air force base. Appellant joined these men in 2010.

For someone sentenced to death, this lengthy process should be welcomed, even encouraged. However, when a man is innocent and when the process by which he was convicted is perverted any period of time spent waiting for justice is too long.

Appellee claims Appellant must patiently wait as his son becomes a man, his marital bond strains and the years pass by him to have the military court tell him that he is right. Appellant can then take great solace in the fact that he pursued the proper channels in securing his freedom.

Given the role of the Great Writ throughout our history, and even long before, we should be loath to impose procedural rules that might impede a prisoner's effort to seek that remedy. *See Harris v. Nelson,* 394 U.S. 286, 291, 89 S.Ct. 1082, 1086, 22 L.Ed.2d 281 (1969) ("The very nature of the writ demands

that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.")

b. *Habeas relief should be ordered*

Appellee claims that Appellant can raise this issue in a 18 U.S.C. § 2255 petition to the federal district court in the District where he resides upon exhaustion of military remedies. No exceptions.

However, this is not what *Councilman* says. *Councilman* states that a court should look at these matters on a case by case basis. It is not an absolute bar like other forms of abstention: *Colorado River, Rooker Feldman, etc*.

Rooted in "immemorial antiquity" predating the Magna Carta, the Great Writ of habeas corpus has preserved human liberty in the face of illegitimate governmental restraints upon our most precious freedoms. *Fay v. Noia,* 372 U.S. 391, 400, 83 S.Ct. 822, 828, 9 L.Ed.2d 837 (1963) (quoting *Secretary of State for Home Affairs v. O'Brien,* [1923] A.C. 603, 609 (H.L.)). "Its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Fay v. Noia,* 372 U.S. at 401-02, 83 S.Ct. at 838-29. For federal courts, "there is no higher duty than to maintain it unimpaired." *Id.* at 400, 83 S.Ct. at 828 (quotations and citations omitted).

If the great writ cannot be granted here to correct a court that has no jurisdiction, then there should never be a cause to grant it. A Federal court can

intervene and provide Appellant with his efforts to find a remedy for his illegal confinement.

III. MILLITARY EXPERTISE IS NOT NECESSARY

a. *Appellant and Appellee entered into a contract*

Appelle claims that an in depth knowledge of military law is necessary to make a decision in this matter. In reality only a cursory knowledge of contract law is needed to decide this matter.

In 1980, Appellant and Appellee entered into a contract. Appellant offered to serve in the military placing himself in harm's way and Appellee agreed to train and pay him. In 1984, this contract was extended so that Appellant could participate in training. Appellant offered and Appellee agreed to extend the term of the contract for one year.

In 1985, Appellant was charged with capital murder. Appellant extended his contract so that he may be paid thru the end of the trial. If the conviction was made final, Appellant was not owed anything in terms of payment or benefits for that time spent in prison. If the conviction was overturned, Appellant was owed payment and benefits. Once convicted Appellee began proceedings to end their payment and benefits obligation to Appellant for a breach of contract, his conviction.

By the terms of the contract these proceedings could not come to an end until the conviction had been made final. Upon acquittal and release, Appellant was reinstated automatically by the terms of the contract. According to the terms of the original contract it expired in 1986. Appellant was not in fact discharged until 1989. No more analysis or military expertise is needed beyond these facts. Appellant finished his obligation in 1986. The contract was mute as to what happens if the soldier serves more time than is allotted for in the contract prior to discharge.

IV. THE MILITARY DOESN'T HAVE JURISDICITON OVER APPELLANT

a. *Appellant was not subject to the USMJ for the murders in 1986*

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."(Emphasis added) *State v McKenzie, 232 S.E. 2d. 424.*

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. Another court can try him for the offense of capital murder, taking it out of the purview and jurisdiction of the military.

b. *There is a break in military service between June 12, 1989 and June 13, 1989*

Appellant established that he begin 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 **July 4, 1986**, he was convicted of three counts of capital murder and one count of rape. He is sentenced to death. At that time his expiration of term of service was **August 27,** on **July 8, 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 as a result of Appellant's pre and post-trial incarceration was made good. Further, all bad time 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. At this point the Army has 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 reenlists on **June 13, 1989**.

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. The Army was required to discharge Appellant following that five day period. Appellant does not

have to ask, does not have to file paperwork. He is no longer an active duty soldier following that five day period. By function of the army's own rules he was discharged. Appellant reenlists on **June 13, 1989**.

V. CONCLUSION

This matter is far more simple than the government has presented in its brief. It does not require extensive military training or expertise. If the jurist can read a contract then it understands the issue in Appellant's case. The jurist then has to be able to place two dates in sequence: the expiration of the contract and the date of the discharge. If the expiration is before the discharge, *Hisrchberg* applies. If the soldier reenlists prior to the expiration of the term of service, there is the so called *Clardy* exception. Appellant fits squarely within *Hirshberg*.

Councilman does not require the Federal Judiciary to abstain from hearing every case. The District Court judge has to make a determination between allowing deference to the military justice system and the harm caused to the petitioner.

This is no ordinary harm. While the government may argue that death is a normal penalty, there is a number of United States Supreme Court cases that state a different precedent. Death is irreversible. Death signifies the governments ultimate power over its citizens, the difference between life and death.

Appellant would request this court to view this matter through the prism of life and death and not just the run of the mill court martial where only money and freedom are at stake.

Respectfully submitted,

/s/ Eric J Allen

____

Eric J Allen(0073384)
713 South Front
Columbus, Ohio 43206
Tele No. 614.443.4840
Fax No. 614.445.7873
Attorney for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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March 29, 2011

/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 29th day of March, 2011, filed the required copies of the foregoing Reply Brief of Appellant in the Office of the Clerk of the Court, via hand delivery and have electronically filed the Reply 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:

Seth Wood
Office of the US Attorney
310 New BernAvenue, Suite 800
Raleigh, North Carolina 27601
Matthew.fesak@usdoj.gov
Rudy.renfer@usdoj.gov

March 29, 2011

/s/ Eric J. Allen
Eric J Allen, Esquire
713 South Front Street
Columbus, Ohio 43206
Tele No. 614.443.4840
Fax No. 614.445.7873
Admitted in the Fourth Circuit
Attorney for Petitioner-Appellant