

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
EASTERN DIVISION

TIMOTHY HENNIS, : Case No.: **5:2009hc02169**  
Petitioner, : Honorable Judge Boyle  
Vs. :  
FRANK HELMICK, ET AL :  
Respondents, :

**PETITIONER'S RESPONSE BRIEF**

Now comes the Petitioner and timely responds to the Respondents brief filed **March 8, 2010**. A memorandum in support is attached and is incorporated as if fully typed herein.

*Respectfully submitted,*

**/s/ William O Richardson**

**/s/ Eric J Allen**

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## **MEMORANDUM IN SUPPORT**

This Honorable Court has requested that the parties brief the following issues:

1. application of the double jeopardy clause;
2. application of the abstention or comity doctrine;
3. exhaustion of military remedies;
4. Petitioner's status between his ETS and reenlistment.

Accordingly, Petitioner will address each of these in order and also address the request for emergency relief.

### ***I. Double Jeopardy***

#### **a. Constitutional standard**

The Fifth Amendment to the United States Constitution commands that, “no person shall...be subject for the same offence to be twice put in jeopardy of life or limb...”*U.S. Const. Amend V.*

#### **b. Sham prosecution exception**

The United States Supreme Court has recognized an exception to this right where successive prosecutions are carried out by separate sovereigns. *United States v Lanza, 20 U.S. 377.* “The rationale behind the dual sovereignty doctrine is that an accused whose conduct violates the laws of two sovereigns, has committed two different offenses by the same act, and thus a conviction by a court of one sovereign of the offense against that sovereign is not a conviction of the different offense against the other sovereign and so is not double jeopardy.” *Id at 382.*

This doctrine was clarified in *Bartkus v Illinois, 359 U.S. 121.* This case held that states were not barred by the Fourteenth Amendment from prosecuting an accused

regarding the same offense for which he had been prosecuted by the federal government. *Id.* The United States Supreme Court stated further in *Abbate v United States* that the federal government is not barred from prosecuting individuals for the same offense for which they were already tried in state court. *Abbate v United States*, 359 U.S.187.

The Federal Supreme Court also determined that if one of the prosecutions was a sham that the dual sovereignty doctrine did not apply. *Bartkus v Illinois* at 123-124. This sham doctrine has been recognized by all of the Federal Circuit Courts of Appeal<sup>1</sup>.

The Department of Justice has sought to reduce the number of so called sham prosecutions by delineating the number of successive prosecutions. The DOJ prohibits successive transactions unless the state prosecution has left a “substantial interest...demonstrably un-vindicated.” *Department of Justice Manual tit. 9-2.031(A)*. Prosecutions of service members following acquittals in state court are meant to be used only sparingly. *U.S. Department of Army, Reg. 27-10, Military para. 4-2*. It is only by regulation that there are not more “sham prosecutions”. Respondent would wish you to believe the Federal Government never attempts to hijack a state prosecution. The implementation of strict regulations subject to FOIA requests keeps this from happening, not the inherent goodness of prosecutors.

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<sup>1</sup> *United States v Guzman*, 85 F.3d 823, 827 (1<sup>st</sup> Circuit); *United States v Certain Real Property and Premises Known as 38 Whalers Cove, Babylon, New York*, 954 F. 2d 29, 38 (2<sup>nd</sup> Circuit); *United States v Berry*, 164 F 3d 844, 855 (3<sup>rd</sup> Circuit); *In re William Kuntsler*, 914 F. 2d 505, 517 (4<sup>th</sup> Circuit); *United States v Moore*, 958 F. 2d 646,650 (5<sup>th</sup> Circuit); *United States v Carr*, 1996 U.S. App Lexis 8118 (6<sup>th</sup> Circuit); *United States v Tirrell*, 120 F 3d 670,677 (7<sup>th</sup> Circuit); *United States v Moore*, 822 F 2d 35, 38 (8<sup>th</sup> Circuit); *United States v Bernhardt*, 831 F. 2d 181-182-183(9<sup>th</sup> Circuit); *United States v Trammell*, 133 F. 3d 1343(10<sup>th</sup> Circuit); *United States v Liddy*, 542 F. 2d 76,79 (11<sup>th</sup> Circuit).

The United States District Court for the Western District of Virginia dismissed an indictment after finding that the state and federal prosecutions were impermissibly intertwined. *United States v Belcher*, 762 F Supp 668.

The four dissenting justices in *Bartkus v Illinois* found that the Federal government was so involved in the second, state trial that they believed it was actually a second federal prosecution. *See dissent by Brennan, Douglas, Warren and Black.*

**c. Petitioner's case**

The charges in this case were brought by the military based almost entirely on the work of the local state investigators and prosecutors. The bulk, if not the entirety, of the Respondent's case will rely on the testimony of state officials and investigators. The players at the state court trial are almost identical to the witnesses in the military court martial. This case is intertwined.

However, the difficulty is showing that this second retrial of Petitioner is a "sham." This is a question of fact that hinges upon who is in fact, in charge. This can only be shown by overt activity or discovery of covert activity. Petitioner has no first hand knowledge this has occurred. To be clear, this does not *concede* that the State Officials are not running the prosecution, only that he cannot prove it.

In *Bartkus*, the federal agents solicited the indictment, secured key witnesses, and generally prepared and presented the states case. Here, the state did most of the work initially, but are only involved tangentially in the preparation of the case at the military level.

Petitioner did not concede this point during argument, but honestly asserted that the dual sovereignty principle would be a difficult claim to prove.

Further, Petitioner did not concede that North Carolina could not indict him again for capital murder. Double Jeopardy is an affirmative defense in North Carolina which must be raised or waived. This is what was said in argument in both paper and in court. This “concession” seems to be brought up because of the government’s argument that UCMJ Art 3 (a) applies. The fact is that North Carolina can indict Petitioner for capital murder and if he does not raise double jeopardy, he waives the defense. He could be, in fact, executed if he were convicted by the State Court.

Respondent fails to inform the court that *State v McKenzie*, 232 S.E. 2d 424, is a North Carolina State Supreme Court case. This is not some radical intermediate court of appeals or superior court; it is the ultimate arbiter of North Carolina law. If there is a stretch of North Carolina Criminal Procedure it is being done by the State’s highest court. 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.” *Id.*

## ***II. Abstention***

### **a. Abstention defined**

The noted scholar Erwin Chemirinsky noted, “abstention refers to judicially created rules whereby federal courts may not decide some matters before them even though all jurisdictional and justiciability requirements are met.” *Federal Jurisdiction, Erwin Chemerinsky, 2<sup>nd</sup> Edition, Aspen Publishers, at page 685.*

**b. Traditional Types of Abstention**

There are generally four types of abstention:

1. *Pullman abstention*
  - a. Pullman abstention is required when state law is uncertain and a state court's clarification of state law might make a federal court's constitutional ruling unnecessary. *Federal Jurisdiction, Erwin Chemerinsky, 2<sup>nd</sup> Edition, Aspen Publishers, at page 687*
2. *Younger abstention*
  - a. This presents a bar to federal courts enjoining pending state court criminal proceedings. *Id at 721*
3. *Burford/Thibbeduex*
  - a. Allows federal courts sitting in diversity jurisdiction to abstain from matters where the state courts may have a greater area of expertise.
4. *Colorado River abstention*
  - a. The United States Supreme Court has held that federal courts should not stay or dismiss proceedings merely because of a pending state court matter. Only in extraordinary cases will the court abstain. *Id at 760.*

**c. Councilman abstention**

Respondent claims that *Younger* and *Councilman* are both mandatory abstention.

This is incorrect. Petitioner would point this court to footnote 29 of the *Councilman* decision. It states, "It has been suggested that the continuing subordination of equitable to legal remedies is justified 'under our Constitution, in order to prevent erosion of the

role of the jury and avoid a duplication of legal proceedings . . .” *Younger v. Harris*, 401 U.S., at 44, 91 S.Ct., at 750. See *O. Fiss, Injunctions 12 (1972)*. **Whatever relevance the first of these justifications has in the Younger context, it has none here.**” *Emphasis added. Footnote 29, Schlesinger v Councilman.*

*Councilman* does state that the Federal Court should tread lightly into the affairs of the military. To be clear, while *Pullman* and *Younger* abstention are mandatory, it is obvious *Councilman* is discretionary. *Councilman* does not *require* this court to stand down. It requires this court to determine if extraordinary circumstances exist and if they do, decide whether to intervene.

*Councilman* allows intervention by the Civilian Federal Court System only in extraordinary circumstances. *Councilman*, however, does not address the definition of those extraordinary circumstances.

Justice Powell stated, “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. *Emphasis added.*

*Councilman* is not an absolute bar to intervention, only a balancing test to be done by the Federal Court Judge. If an extraordinary reason does not exist, the Federal Court cannot intervene. Respondent does not believe that standing trial a *third* time for the capital murder of a woman and her two children warrant extraordinary circumstances. No where else has anyone been convicted of capital murder, spent years on death row, been

acquitted, and then tried for the same crime almost twenty-five years later on the same evidence as the last trial. This matter stands alone in the annals of Military Jurisprudence. This matter stands alone in the annals of American Jurisprudence.

If those were not enough, Respondents do not possess jurisdiction. However, they would want Petitioner to stand trial for a third time, be convicted, and go to death row. Anyone who claims this is not a hardship has not spent time as a visitor or an inhabitant of death row.

### ***III. Exhaustion***

#### **a. Double Jeopardy issue**

Petitioner had not sought relief from the military appellate court via an extraordinary writ on the issue of double jeopardy.

Normally, the issue of double jeopardy does not require exhaustion of remedies prior to taking the matter to federal court. Petitioner's counsel seeking the dual sovereign doctrine as applied herein warranted extraordinary relief at this time. If the court would grant the petition on that ground certainly Petitioner would request leave to amend the petition.

#### **b. Jurisdiction issue**

The United States Supreme Court has held federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted. *Gusik v. Schilder*, 340 U.S. 128, 71 S.Ct. 149, 95 L.Ed. 146 (1950).

In *Gusik v. Schilder*, 340 U.S., at 131-132, 71 S.Ct., at 151-152, the Court drew an explicit analogy to the exhaustion requirement for federal habeas attacks on state

criminal convictions. *See Gosa v. Mayden*, 413 U.S., at 711-712, 93 S.Ct., at 2952-2953 (Marshall, J., dissenting)

Petitioner has exhausted *all available* military remedies in regard to his single ground for relief contained in this petition.

Specifically, Petitioner filed a motion to dismiss with Respondent Parrish claiming the court lacked jurisdiction. This was denied.

Petitioner filed an application for an extraordinary writ with the Army Court of Criminal Appeals. This was denied. The Army Court of Criminal Appeals is an intermediate court of appeals similar to the Circuit Courts.

Petitioner filed an application for an extraordinary writ with the Court of Appeals for the Armed Forces. This was denied. The Court of Appeals for the Armed Forces is a court of last resort for military personnel, similar to a state supreme court.

Petitioner has sought relief from all available sources in this matter prior to filing in the Federal District Court.

*c.*        **Watada and Petitioner**

The case of *Watada v Head* from the Western District of Washington is illustrative regarding the interplay between federal courts and military courts.

*Watada* sought Federal District Court intervention based on denial of a pretrial motion (double jeopardy) that would bar trial by court-martial. Petitioner seeks Federal District Court intervention based on denial of a pretrial motion (jurisdiction) that would bar trial by court-martial. Respondent again bangs the drum that Petitioner did not raise the double jeopardy issue, so *Watada* does not apply. Courts, as a matter of practice, will

apply case law by analogy and similarity. While Petitioner did not raise double jeopardy, certainly the analysis done by the jurist can be used to settle Petitioner's claim.

*Watada* filed a petition for extraordinary relief before the military appellate courts and was denied relief without prejudice, subject to the normal course of appellate review.

Petitioner filed a petition for extraordinary relief before the military appellate courts and was denied relief without prejudice, subject to the normal course of appellate review.

*Watada* named the Army as a Respondent. Petitioner named the Army as a Respondent. In *Watada*, the Federal District Court intervened with a stay and emergency preliminary injunction, granted relief on the petition and the Army did not appeal at any point.

This court, despite the Respondent's instruction, can look at *Watada* for guidance in dealing with this case. In an extraordinary case, the court can step in and protect the constitutional rights of its citizens.

**d. Distinguishing *Dooley v. Ploger***

Like *Dooley v. Ploger*, which involved a jurisdictional challenge in a court-martial, Petitioner seeks Federal District Court intervention. The jurisdictional issue in *Dooley*, however, focused on the concept of "service connection" which was a different type of jurisdictional issue in existence at that time. Like "break in service", service connection is no longer a basis for challenging military court-martial jurisdiction. They differ, however, in one key aspect. When service connection was a viable basis for challenging jurisdiction, the facts supporting jurisdiction had to be included in the pleadings and had to be proven in the findings phase of a trial.

This is not so with respect to break in service. Thus, when service connection was raised as an issue, a jury was required to make findings with respect to jurisdiction, whereas, with break in service a jury was not permitted to resolve this factual issue. The factual basis for break in service was considered only in a pretrial motion hearing presided over by the judge, who entered a ruling before pleas were entered. Therefore, in Petitioner's case no trial is needed before all remedies have been exhausted for the purpose of seeking Federal intervention.

e. **Floodgates of litigation**

Respondent states, "If this Court entertains Petitioner's jurisdictional challenge prior to the completion of the court-martial and appellate process, the Court would create another exception which will swallow the exhaustion and abstention rules. Such a ruling would open the floodgates for service members accused of crimes to file habeas petitions claiming their independent factual circumstances warrant intervention as well."

*Respondent's brief at page 18.*

Petitioner is not requesting this court to over turn *Councilman*. Petitioner is requesting this court to carefully ponder the facts and issues in this case and determine if it is extraordinary. Petitioner does not believe that the floodgates will open for persons convicted of capital murder, acquitted of capital murder and then brought back for another re-trial almost thirty years later. This case fits within the *Councilman* exception and will not cause an increase in soldiers running to the District Courts for relief.

f. **Petitioner should not have to stand trial to assert these rights**

Respondent states "If convicted and denied relief by ACCA and CAAF through the normal appellate process, Petitioner will have an opportunity to collaterally attack the

court-martial and bring all of his jurisdictional and non-jurisdictional claims to federal court at once.” *Respondent’s*” *Respondents brief at 18.*

Petitioner would state that if he is right, as a matter of formality and procedure, he has to sit in a trial, be convicted, sent to Fort Leavenworth, and hope he doesn’t end up in Terre Haute. This is certainly choosing form over substance.

Respondent commented in oral arguments that Petitioner was tugging at the court’s heartstrings to order relief in this case. Petitioner is not appealing to the courts’ emotions or feelings. Petitioner merely wants a jurist to look at the settled law in this case and make a determination based on stare decisis. If asking this court to decide this case on the law is an emotional plea, so be it.

#### ***IV. Petitioner’s status***

Respondent’s entire argument is built on a faulty premise, i.e., that Petitioner’s ETS must be determined by adding in “time lost” which has also been called “bad time”, (as more fully explained below). They fail to state or address the correct premise, which is established by the governing Federal statute in effect in 1989, 10 U.S.C. §972, which states in pertinent part:

***§972. Enlisted members: required to make up time lost***

*“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 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.”

(Emphasis added, App. Ex. XXIV<sup>2</sup>).

Under this statute, contrary to Respondent’s argument, Petitioner did not accrue any lost time because his conviction was never “final.” At best, there was only presumptive lost time, pending the outcome of his initial appeal and subsequent trial. Once Petitioner was acquitted, the statute clearly did not provide any basis by which to characterize the time he spent in civilian confinement as lost time. Once this is understood, Respondent’s entire argument falls apart. Perhaps this is why they failed to cite 10 U.S.C. §972 in their argument. What follows is an analysis of the facts and law based on the correct premise.

**a. Petitioner’s expiration of term of service**

Petitioner’s ETS was 27 August 1986, as calculated by the military judge in paragraph 1 of his ruling. (App. Ex. 70).

The 17 June 1989 ETS date, referenced in Respondent’s brief and shown in the Reenlistment document is not supported by any testimony or documentary evidence outside the document itself. (App. Ex. XVII, encl. 5). The date appears to have been arbitrarily entered by an administrative clerk without reference to any source document or other authority. Regardless, there is no evidence in the record explaining how or why this 17 June 1989 date was selected. Simply put, Respondent’s arguments are built on speculation, and a misapplication of 10 U.S.C. §972.

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<sup>2</sup> All Appellate exhibits referenced here can be found in the supplemental documents filed on February 26, 2010 by Petitioner. While unlikely, if any are missing from the supplement the missing documents can be produced for the court and opposing counsel.

Furthermore, the Reenlistment document reflects Petitioner began his enlistment on “810129” for five years. There were two periods of extension for 12 months and 7 months, respectively. Added together, they do not explain an ETS date of 17 June 1989. In the absence of any source document extending Petitioner’s enlistment to 17 June 1989, signed or otherwise acknowledged by Petitioner, this 17 June 1989 ETS date has no factual or legal significance.

The Military Judge overhearing 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.

**b. 1986 discharge**

The adverse administrative discharge approved and suspended on 3 October 1986 became null and void. Execution of the discharge was conditioned upon Petitioner being convicted and losing all his appeals. (App. Ex. XVII, encl. 16). He was ultimately acquitted.

**c. Petitioner’s 1989 discharge**

The Petitioner’s discharge on 12 June 1989, long after his 27 August 1986 ETS, was not conditional. In other words, the Army had no basis to hold Petitioner on active duty after his acquittal if he did not reenlist. *See Clardy and Willenbring on the topic of conditional discharges.*

**d. Petitioner’s reenlistment**

Petitioner immediately reenlisted on 13 June 1989.

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

Petitioner was in a non-pay extended enlistment status. Because he was in civilian confinement and not present for duty, this time was not being applied against his period of enlistment. Thus, Petitioner's enlistment commitment was involuntarily extended during this period. In other words, this period of time constituted what can be called presumptive "time lost" or "bad time." 10 U.S.C. § 972; AR 635-200, 20 July 1984, paragraphs 1-23 and 1-24 (App. Ex. XXIII).

f. **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. (App. Ex. XXIV). As a result, Petitioner was returned to the Army and became entitled to back pay because he had never been discharged.

g. **Army's Legal Authority over Petitioner**

On April 19, 1989, because Petitioner had not been discharged, he was still subject to Army authority. However, if Petitioner elected to be discharged the Army had no legal basis to hold Petitioner on active duty as of 20 April 1989, because he was past his 27 August 1986 ETS date.

h. **Army Regulations**

No known Army regulation governs this scenario. AR635-200, 20 July 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 (App. Ex. XXIII). 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 AR635-200, paragraph 1-33, Petitioner 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, Army administrative personnel did not know what to do upon the acquittal.

*i. **Hirshberg***

In conclusion, *Hirshberg* controls the outcome in this scenario because it held that there is a jurisdictional break in service when a soldier immediately reenlists after fulfilling his term of service and being unconditionally discharged. This is consistent with the holdings in *Clardy* (a 1982 decision) and *Willenbring* (a 2009 decision).

**V. Injunctive relief**

Petitioner has both in the petition and in a renewed motion requested this court stop the court martial currently underway at Fort Bragg. Respondents filed a lengthy response. Petitioner feels it necessary to answer this lengthy response.

Petitioner will address both a preliminary injunction and a permanent one. A preliminary injunction is necessary if the court needs more time to consider the issue. A permanent one is necessary if the court issues the writ and wishes to keep the Army from continuing its prosecution of the Petitioner.

*a. **Standard-Preliminary injunction***

First, the likelihood of irreparable harm to the Petitioner if the injunction is refused must be balanced against the likelihood of irreparable harm to the Respondents if

it is granted. Second, the court should consider the likelihood that the Petitioner will succeed on the merits. The more the balance of harms leans away from the plaintiff, the stronger his showing on the merits must be. Finally, the court must consider the public interest. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir.1977).

*“When reviewing a denial of a preliminary injunction, this court applies an abuse of discretion standard”*. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 814 (4th Cir.1991). *“[T]he grant of interim relief [is] an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it.”* *Id.* at 811 (internal quotation marks omitted).

**b. Analysis**

i. *balance the likelihood of harm to the parties*

Respondent cannot claim any harm at delaying the rest of the trial until a decision is made. They waited seventeen years to bring these charges to a convening authority. A small delay does not injure them in any way.

Petitioner could face the death penalty and other dire circumstances should he be required to continue this trial. The prospect of Petitioner losing his wife, his son, and a life in Washington State has taken its toll for the last three plus years.

ii. *succeed on the merits*

Petitioner should prevail on the merits in this case. A military judge found that his ETS date was August 27, 1986. This is not reasonably contested by Respondent. Further, Petitioner was discharged on June 12, 1989. This is undisputed.

Respondent wishes to lead the court down a paper trail that leads it to a denial of the great writ. The problem is this paper trail is not based on fact or law.

*Hirshberg* states unequivocally that if an unconditional discharge follows ETS, the military loses jurisdiction. If Respondents wish this not to be the case, they need to get the United States Supreme Court to accept jurisdiction and reverse itself.

iii. public interest

Public interest is served in granting a preliminary injunction so that this court can take its time in determining what the best result is to this question. A real issue of law and fact that is cognizable in habeas exists in this case.

The public interest is served by the Federal Court ensuring that the law is applied uniformly and not only to litigants we like or embrace. *Hirshberg* says what it says and the fact there are three victims, while tragic, makes no difference in this analysis.

Respondent claims, “it is in the public’s interest for the military to proceed with the court martial and ensure that justice is done.” *Respondent’s response to request for relief at page 19*. A prosecutor’s duty is to seek justice. A jury’s job is to determine that justice (whatever that means) is done. The personal stake the JAG prosecutors may have in this case has no bearing on whether or not their client, the US Army, will be harmed.

c. Standard-Permanent injunction

A party must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the petitioner and respondent, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

*d.*     **Analysis**

*i.*       *Petitioner has suffered irreparable harm*

The Supreme Court of the United States has found that reasonable apprehension of threatened injury will suffice. 15 U.S.C. § 26; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969).

Petitioner has been removed from civilian life and placed back in the military for purposes of being tried for three counts of capital murder. Petitioner is currently being tried at Fort Bragg. At present, the parties are in the process of voir dire.

The emotional, financial, mental and physical toll this process has taken on the Petitioner is staggering. The possibility that Petitioner will be found guilty and sentenced to death is an unbelievable stress. Respondents argue this is no more stressful than fighting a speeding ticket.

*ii.*      *Remedies available at law are inadequate*

As discussed in the section regarding abstention, Petitioner should not have to sit through a court martial, appeal through the military courts and face execution a second time in order to get relief. This court can stop the court martial and in fact, should stop the court martial.

*iii.*     *Balance of the equities favors Petitioner*

It would be disingenuous for the government to state that they are harmed more than the Petitioner in this case. Petitioner was acquitted in 1989 of three counts of capital murder. The Army failed to bring court martial charges against him. Petitioner reenlisted and served honorably, then retired. At no time in that seventeen years did the JAG Prosecutor's division dust off the unsolved Eastburn murder case against Petitioner.

Respondents wait until he is retired and then reactivate him to try him on three counts of capital murder. The evidence has not changed. It was dusted off and is still in possession of the Cumberland County Sherriff. The forensics may have changed but they do not hold a smoking gun that makes conviction in this trial an absolute certainty.

iv. *Public interest would be served by granting the injunction*

It may be over cited by many pundits, conservatives, and other assorted talking heads but the maxim, “we are a nation of laws, not men”, is still true. We look to our rules for guidance. We have courts to interpret those rules. When the highest court in the country proclaims a ruling, we follow it.

Once we allow the government the latitude to disregard settled law in order to attempt to convict someone accused of a heinous crime, our republic becomes a nation of men. The public expects this court to enforce the law of the United States.

**VI. Conclusion**

Unlike many matters brought before this court, this case is simple. Petitioner’s ETS was August, 1986. Petitioner was discharged in 1989. The Army lost jurisdiction.

All the talk of time lost, final pay, signed extensions, and awards are meant to confuse the court. The facts established in the trial stage of the military court are uncontested.

This court has the duty to follow established law. No exceptions to *Hirshberg* exist here and the Petitioner is entitled to habeas relief.

If Petitioner is right, and the Army Court of Criminal Appeals reverses, who will restore him for the years he spends in confinement.

**WHEREFORE**, Petitioner requests:

1. grant the petition in its entirety;
2. or in the alternative, enjoin the court martial proceeding at Fort Bragg of the Petitioner.

*Respectfully submitted,*

**/s/ William O Richardson**

**/s/ Eric J Allen**

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*Admitted to the Eastern District*

*LR 83.1 Counsel*

**Certificate of Service**

I hereby certify that on **March 10, 2010**, a copy of the Foregoing Response was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

**/s/ William O Richardson**

**/s/ Eric J Allen**

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