

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHRISTOPHER J. KLEIN,

Petitioner,

v.

WARDEN, FEDERAL CORRECTIONAL
INSTITUTION at Oxford, Wisconsin,

Respondent.

ORDER

99-C-667-C

Judgment was entered in this case on July 17, 2000, denying petitioner Christopher Klein's petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2241 in which he challenged his conviction by general court-martial of murder in the second degree. I denied petitioner's petition because he had received full and fair consideration by a military court of some of the issues he raised in his petition and because he had failed to raise the remaining issues in a military court before bringing them to federal court and he had not shown cause for his failure to do so. Now petitioner has filed a "motion for reconsideration," which I construe as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59.

Motions pursuant to Rule 59 must be made within ten days of the date of entry of the

judgment in a case, excluding weekends and holidays. Fed. R. Civ. P. 6(b) explicitly precludes enlargement of the time for filing Rule 59(e) motions. Ten working days from the July 17, 2000 date of entry of the judgment in this case was July 31, 2000. Petitioner did not sign his motion until August 16, 2000, and did not file it until August 18, 2000. Because petitioner missed the deadline for filing his Rule 59 motion, he is precluded from filing such a motion at this or any other future time.

Even if petitioner's motion had been filed within the time allowed, it would have been denied. Motions to alter or amend a judgment pursuant to Rule 59(e) may be granted to (1) take account of an intervening change in controlling law; (2) take account of newly discovered evidence; (3) correct clear legal error; or (4) prevent manifest injustice. See 12 Moore's Federal Practice, § 59.30[5][a][i] (Matthew Bender 3d ed.). None of these circumstances is present.

Petitioner argues that I erred in denying his petition because he did not need to show cause and prejudice for his challenge to the jurisdiction of the court-martial. In support of his argument, petitioner points to Kelly v. United States, 29 F.3d 1107, 1113 (7th Cir. 1994), a case in which the Court of Appeals for the Seventh Circuit held that "a jurisdictional defect cannot be procedurally defaulted" because "the court has an independent duty to assure itself that its jurisdiction is properly had, and as a result parties can raise jurisdictional defects at any

time.” (discussing a motion under 28 U.S.C. § 2255). It is not clear whether the Seventh Circuit's decision in Kelly applies to a challenge under § 2241 to a court-martial conviction; nonetheless, petitioner's claim that the court-martial lacked jurisdiction is without merit.

In his original petition, petitioner argued that the court-martial that tried and convicted him lacked jurisdiction over him and his offense because (1) the charge sheet and convening order were not entered into the trial record properly; (2) the charges were not properly forwarded; (3) the court-martial was not convened by competent authority or constituted properly; and (4) he was not informed of the charge against him, in violation of Rule of Court Martial 308. In his traverse, respondent argued that jurisdiction was proper for two reasons. First, pursuant to 10 U.S.C. § 802, petitioner was subject to the Uniform Code of Military Justice because he was on active duty in the United States Navy at the time of his offense. Second, the court-martial had jurisdiction over petitioner's offense because 10 U.S.C. § 818 states that “general courts-martial have jurisdiction to try persons subject to [the Uniform Code of Military Justice] for any offense made punishable by [the code],” which includes the offense of unpremeditated murder, see 10 U.S.C. § 918(2). Respondent also pointed out that following petitioner's conviction, the staff judge advocate reviewed the record of petitioner's trial pursuant to 10 U.S.C. § 864 and determined that jurisdiction was proper. Petitioner does not dispute that he was subject to the Uniform Code of Military Justice or that the court-martial

had jurisdiction to try him for unpremeditated murder. Instead, in his motion for reconsideration, petitioner argues that the court-martial lacked jurisdiction because of violations of his rights protected by the Fifth and Sixth Amendments. Petitioner tried to raise claims under the Fifth and Sixth Amendments in his original petition. He cannot attempt to characterize these claims as jurisdictional in order to avoid the requirement that he show cause and prejudice for having failed to raise them in the military court. Petitioner's motion will be denied.

ORDER

IT IS ORDERED that petitioner's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59 is DENIED as untimely.

Entered this 23rd day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge