No. 99-1021

In the Supreme Court of the United States

ROBERTO LAUDERBAUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530
(202) 514–2217-0001

KEVIN M. SANDKUHLER
Colonel, U.S. Marine Corps
Director, Appellate Government Division

JAMES E. GRIMES
Lieutenant, JAGC
U.S. Naval Reserve
Navy-Marine Corps
Appellate Review Activity
Washington, D.C. 20374

QUESTION PRESENTED

Whether petitioner was subject to trial by court-martial while he was a member of the Individual Ready Reserve for offenses committed while he was on active duty in the United States Naval Reserve.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not yet reported. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 3a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1999. The petition for a writ of certiorari was filed on December 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trial by a general court-martial, respondent was convicted of the wrongful use of cocaine, larceny of military property, forgery, fraudulently making and uttering a check, and three counts of dishonorably failing to maintain sufficient funds in his checking account, in violation of Articles 112a, 121, 123, 123a, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a, 921, 923, 923a, and 934. He was sentenced to confinement for 22 months, forfeiture of all pay and allowance, a reduction to pay grade E-1, and a bad conduct discharge. The court of appeals affirmed. Pet. App. 1a-2a.

1. Article 2(a)(1) of the UCMJ provides that "[m]embers of a regular component of the armed forces * * * and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call * * * to obey it" are subject to court-martial jurisdiction. 10 U.S.C. 802(a)(1). Article 2(d) further provides that "[a] member of a reserve component who is not on active duty and who is made the subject of proceedings under * * * section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of * * * trial by court-martial" if the member is ordered to active duty "with respect to an offense committed while the member was * * * on active duty." 10 U.S.C. 802(d)(1)(B) and (2)(A). Similarly, Article 3(d) of the UCMJ provides that "[a] member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty * * *, relieved from amenability to the jurisdiction of this chapter for

an offense against this chapter committed during such period of active duty." 10 U.S.C. 803(d).

2. In September 1990, petitioner enlisted in the United States Naval Reserve for a period of eight years. He served on active duty for four years and was released from active duty on December 27, 1995 to serve the balance of his enlistment in the Individual Ready Reserve. Pet. App. 5a.[1]

On April 5, 1996, petitioner was recalled to active duty for the purposes of a pretrial investigation regarding offenses he allegedly committed before his release from active duty. Based on a subsequent investigation, the Commander of Naval Air Systems Command convened a general court-martial to dispose of the charges. Pet. App. 5a-6a.

3. The United States Navy-Marine Corps Court of Criminal Appeals affirmed petitioner's conviction. Pet. App. 3a-14a. It concluded that Articles 2(d), 3(a), and 3(d) of the UCMJ, 10 U.S.C. 802(d), 803(a) and (d), permitted petitioner's involuntary recall to active duty for offenses committed while he was on active duty as a reservist. Pet. App. 6a.[2]

4. The court of appeals summarily affirmed, stating that "[its] decision in *Willenbring* v. *Neurauter*, 48 M.J.

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[1] As a member of the Individual Ready Reserve, petitioner was required to be screened periodically to ensure availability for mobilization. 10 U.S.C. 10149.

[2] Article 3(a), 10 U.S.C. 803(a), provides that:

> [A] person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

152 (1998), supports the finding that the court-martial had personal jurisdiction over [petitioner]." Pet. App. 1a.

ARGUMENT

1. Petitioner contends (Pet. 12-17) that the military courts lack jurisdiction over his court-martial because he had obtained "civilian status" when he was released from active duty in the reserves. That contention lacks merit.

At the time petitioner committed his offenses, petitioner was on active duty in the reserves. And, at the time of his involuntary recall into active duty, petitioner was a member of the Individual Ready Reserve under his eight-year enlistment contract with the military. At no time did petitioner's military service end.[3] Thus, under the express terms of 10 U.S.C. 802(d)(1)(B) and (2)(A) he was subject to be ordered to "active duty involuntarily for the purpose of * * * trial by court-martial * * * with respect to an offense committed while [petitioner] was * * * on active duty."[4]

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[3] Petitioner simply transferred from being a member on active duty in the Navy's Ready Reserve to a member of the Individual Ready Reserve. See 10 U.S.C. 10141 ("There [is] in each armed force a Ready Reserve."); 10 U.S.C. 10144 ("Within the Ready Reserve of each of the reserve components there is an Individual Ready Reserve. The Individual Ready Reserve consists of those members of the Ready Reserve who are not in the Selected Reserve or the inactive National Guard.").

[4] Contrary to petitioner's assertion (Pet. 16), petitioner is not in "essentially the same position as the accused in *Toth* v. *Quarles*," in which the Court held Congress could not under its Article I power extend military jurisdiction to "civilian ex-soldiers who had severed all relationship with the military." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955). Here, petitioner has *not* severed all relationship with the military, since he was a member

2. Petitioner also asserts (Pet. 8-11) that this Court should grant certiorari to resolve a split between the Third Circuit's decision in *Murphy* v. *Dalton*, 81 F.3d 343 (1996), and *Willenbring* v. *Neurauter*, 48 M.J. 152 (1998), cited by the court of appeals below, Pet. App. 1a. *Murphy* and *Willenbring* have reached different conclusions regarding whether 10 U.S.C. 802(d)(2)(A) subjects a reservist to court-martial jurisdiction for offenses committed while on active duty in the *regular* component of the armed forces. Compare 81 F.3d at 351-352 (concluding that Congress did not intend Article 2(d)(2)(A) "to subject a reservist to court-martial jurisdiction for offenses committed on active duty while in the regular component") with 48 M.J. at 174-175 ("We do not find, in either the express words of the applicable statutes, the purposes of the legislation, or the legislative history of Article 2(d), an intent to create a haven from accountability for those reservists whose prior service was in a regular rather than a reserve component.").

That division of authority, however, has no relevance to this case, because petitioner was recalled into active duty with respect to offenses committed while on active duty in the *reserves*. Indeed, the Third Circuit in *Murphy* explicitly acknowledged that a reservist in petitioner's situation would be subject to court-martial jurisdiction under Article 2(d)(2)(A). *Murphy*, 81 F.3d at 352 ("[W]e hold that the term 'active duty' in 10 U.S.C. § 802(d)(2)(A) refers to those periods of active duty served by a reservist while performing such duty

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of the Individual Ready Reserves at the time of his recall into active duty and court-martial. See also *ibid.* (recognizing Congress's power "to subject persons actually in the armed forces to trial by court-martial").

in the reserves."). Thus, even under the Third Circuit's reading of Article 2(d), the military courts had court-martial jurisdiction to try petitioner for the offenses he committed while on active duty in the reserves.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

KEVIN M. SANDKUHLER
Colonel, U.S. Marine Corps
Director, Appellate Government Division

JAMES E. GRIMES
Lieutenant, JAGC
U.S. Naval Reserve
Navy-Marine Corps
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