23-595

No. 23-_____

IN THE

Supreme Court of the United States

DAVID J. RUDOMETKIN
Petitioner,

v.

KEVIN PAYNE ET AL.,
Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States ex rel. Toth v. Quarles*, this Court held that the armed forces could not constitutionally court-martial "civilian ex-soldiers had had severed all relationship with the military and its institutions," 350 U.S. 11, 14 (1955), even for offenses committed while on active duty. In *Schlesinger v. Councilman*, this Court held "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." 420 U.S. 738, 758 (1974). Petitioner is a former officer involuntarily discharged from the U.S. Army as mandated by the non-discretionary requirements in 10 U.S.C. § 632 and was later tried and convicted by a court-martial without military status for alleged offenses committed while on active duty. The court-martial findings and sentence was later set aside by the Army Court of Criminal Appeals, and appealed by the U.S. Army Judge Advocate General pursuant to 10 U.S.C. § 867(a)(2) (Article 67(a)(2), Uniform Code of Military Justice (UCMJ)) to the Court of Appeals for the Armed Forces. Petitioner requested a continued confinement hearing as matter of right pursuant to 10 U.S.C. § 857a(c) (Article 57a(c) UCMJ) and *United States v. Miller*, 47 M.J. 356 (CAAF, 1997) to present facts showing he was involuntarily discharged prior to the court-martial, but was denied this hearing. Petitioner filed a writ of habeas corpus, 28 U.S.C. § 2241 and requested injunctive relief at the federal court to compel the Secretary to

QUESTION PRESENTED (continued)

conduct the continued confinement hearing so the Secretary determine whether to release Petitioner on the basis of having no military status prior a court-martial, or in the alternatively Petitioner requested the federal court to conduct an evidentiary hearing to determine Petitioner's legal status. The lower courts denied any relief based on the "*Councilman* abstention" although Petitioner substantiated a claim he is not a servicemember.

The question presented is:

Whether the *Councilman* abstention applies to former servicemembers who were statutorily discharged prior to court-martial charges and proceedings

RELATED PROCEEDINGS

Rudometkin v. Payne et al,. No. 22-3250, U.S. Court of Appeals for the Tenth Circuit, judgment entered on May 25, 2023

Rudometkin v. Johnston et al., No. 22-3094, U.S. District Court, District of Kansas, judgment entered on October 21, 2022

United States v. Rudometkin, No. 20180058, Army Court of Criminal Appeals, judgment entered on November 9, 2021

United States v. Rudometkin, No. 22-0205/AR, Court of Appeals for the Armed Forces, judgment entered on August 15, 2022

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David J. Rudometkin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 2023 U.S. App. LEXIS 12894 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-3a. The decision from the district court is reported at 2022 U.S. Dist LEXIS 192728 and reprinted at Pet. App. 4a-5a. The decision from the army court of criminal appeals is reported at 2021 CCA LEIX 596 and reprinted at Pet. App. 6a-15a. The unpublished order of the court of appeals denying rehearing en banc is reprinted at Pet. App. 16a.

JURISDICTION

The court of appeals entered its judgment on May 25, 2023, Pet. App. 1a and denied a timely petition for rehearing en banc on July 12, 2023, id. at 16a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Make Rules Clause authorizes Congress "[t]o make rules for the government and regulation of the land and naval forces." U.S. CONST. art. I, § 8, cl. 14.

The Due Process Clause of the Fifth Amendment prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." Id. Amend V.

Article 2(a)(1) UCMJ, 10 U.S.C. § 802(a)(1), provide that, "members of the 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 or order to obey it" are subject to the UCMJ—and to court-martial for the offenses prescribed therein.

Article 57a(c) (2016) 10 U.S.C. § 857a(c), provides, "In any case in which a court-martial sentences a person to confinement and the sentence to confinement has been ordered executed, but in which review of the case under section 867(a)(2) of this title (article 67(a)(2) is pending, the Secretary concerned may defer further service of sentence to confinement which that review is pending."

Article 67(a)(2) UCMJ, 10 U.S.C. § 867(a)(2), provides that "[t]he court of Appeals for the Armed Forces shall review the record in all cases review by a Court

of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

10 U.S.C. § 632, provides that:

> (a) each officer...on the active-duty list...who has failed of selection for promotion to the next higher grade for the second time and whose name is not a list of officers recommended for promotion shall:
>
> (1) except as provided in paragraph (3) and in subsection (c), be discharged on the date requested by him and approved by the Secretary concerning, which date shall be not later than the first day of the 7th calendar month beginning after the month in which the President approves the report of the board which considered him for the 2nd time;
>
> (2) if he is eligible for retirement under any provision of law, be retired under that law on the date requested by him and approved by the Secretary concerned, which date shall be not later than the first day of the seven calendar month beginning after the month in which the President approves the report of the board which considered him for the second time; or
>
> (3) if on the date on which he is to be discharged under paragraph (1) he is within two years of qualifying for retirement under section 7311, 8323, or 9311 of this title...be retained on active duty until he is qualified for retirement under that section, unless he is sooner retired or discharged under another provision of law."
>
> (b) The retirement or discharge of an officer pursuant to this section shall be considered to be an involuntary retirement or discharge for purposes of any other provision of law.

INTRODUCTION

Since *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955) this Court held the Constitution forbids the court-martial of a servicemember after his discharge—even for crimes committed while on active duty. Also, this Court held in *Schlesinger v. Councilman* "when a **serviceman** [emphasis added] charged with crimes by the military authorities...the federal district courts must refrain from intervention, by

way of injunction or otherwise." Id. However, this Court has not clarified when former servicemembers are "charged with crimes by the military authorities" any standard for the lower courts to apply the "status" exception in *Councilman.*

This petition presents an exceptionally important case that warrants review because of the lack of precedential foundation concerning the application of the *Councilman* "status" exception for millions of former servicemembers. Simply put, since *Toth* the lower courts have deferred judgment to the military courts to determine the military status of a petitioner to challenge jurisdiction of a court-martial to try them at all. This common practice by the lower courts is stunning in its breadth; Not only do the lower courts blatantly ignore the "status" exception mentioned in *Councilman* which did not advise that military courts have exclusive jurisdiction to determine military status, but it means millions of former servicemembers can be charged with alleged crimes by the military and thereafter remain in military custody for years until the military court-martial system is exhausted and final (10 U.S.C. § 876). In summary, the lower courts have rendered the *Councilman* "status" exception into a hollow and empty gesture by openly defying the spirit of *Toth* by closing the door to persons having colorable claims they have no military status.

Petitioner is one of thousands of former officers affected by a Congressional "up or out" promotion philosophy encoded in personnel statutes that "requires [officers] be discharged when they are considered as having failed of selection for

promotion...for the second time" and where, "similar selection-out rules apply to officers in different ranks who are twice passed over for promotion." *Schlesinger v. Ballard,* 419 U.S. 498, 503 (1975). After Petitioner twice failed for selection to promotion in July 2015, the non-discretionary provisions of 10 U.S.C. § 632 came into effect which, "provides that certain officers shall be discharged, be retired, or be retained...until qualified for retirement and be retired. The actor in each of these three scenarios is not the officer, and the language is not voluntarily, regardless of whether the officer is discharged, retired, or retained and then later retired." *Rigsbee v. United States* 226 F.3d 1376 (Fed. Cir. 2000). The terms of 10 U.S.C. § 632(b) are non-discretionary and, "declares a [discharge] retirement involuntary, then that is the end of the matter, and neither the officers subjective intent nor the formalities of his retirement papers can have any influence on that conclusion." *Ricks v. United States,* 278 F.3d 1360 (Fed. Cir. 2002). Furthermore, the "up-or-out" promotion statutes, "contemplates a definite date [of discharge] and provides for its computation. This provides finality and certainty." *United States v. Nettles* 74 M.J. 289 (C.A.A.F. 2015). The finality and certainty of a discharge is presumably achieved by non-discretionary language "shall" to prevent a service secretary from circumventing the fixed and final dates when officers must be discharged, "'shall' usually connotes a requirement" and that "when a statute distinguishes between 'may' and 'shall' it is generally clear that 'shall' imposes a mandatory duty. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016).

Indeed, administrative records from authoritative data sources from the U.S. Army Human Resources Command (HRC) verify the Secretary of the Army complied with the non-discretionary statutory duty to involuntarily to discharge Petitioner pursuant to 10 U.S.C. § 632. However, while one part of the U.S. Army administratively discharged Petitioner, another forced him to remain in the Army in direct violation of 10 U.S.C. § 632, for the purpose of convening a court-martial against him.

Later, this court-martial was overturned by the U.S. Army Court of Criminal Appeals but appealed by the U.S. Army Judge Advocate General pursuant to 10 U.S.C. § 867(a)(2). During the pendency of this appeal, Petitioner was entitled to a continued confinement hearing through Article 57a(c) UCMJ (10 U.S.C. § 857a(c)) (2016) as interpreted through *United States v. Miller,* 47 M.J. 356 (CAAF, 1997) and *United States v. Katso,* 77 M.J. 247 (CAAF, 2018) where a, "relevant secretary [could] determine whether to release [a] prisoner" pending appellate review, *Katso,* 77 M.J. at 251. Petitioner sought a hearing to present evidence to justify his release from a military confinement facility on the basis he is not a servicemember because he was discharged prior to the court-martial. However, he was denied due process by the Secretary of the Army. Petitioner then filed a writ of habeas corpus, 28 U.S.C. § 2241 and sought injunctive relief through the U.S. District Court (Case No. 22-cv-3094-JWL (D. Kan. 2022)) to compel the Secretary to conduct the continued confinement hearing, or alternatively the District Court should conduct an

evidentiary hearing to make a determination as to Petitioner's lack of military status. The District Court and the Court of Appeals denied relief on the principles of *Noyd v. Bond,* 395 U.S. 683(1969); *Gusik v. Schilder*, 340 U.S. 128 (1950); and *Schlesinger v. Councilman*, 420 U.S. 738 (1974).

Petitioner asserts not only should the SECARMY have granted a request for a continued confinement hearing so as to permit Petitioner to present reasons to discontinue his confinement on the basis Congress mandated him discharged before any charges were served by the military, but also the federal courts should have recognized Petitioner's claim for injunctive relief to either compel the SECARMY to conduct the continued confinement hearing or alternatively retain jurisdiction in appreciation that Petitioner is not a servicemember. The failure to grant Petitioner any venue to collaterally challenge UCMJ jurisdiction constitutes an abuse of discretion subject to the correcting power of the appellate court and of this court.

STATEMENT

A. Legal Background

1. "Up or Out" Officer Promotion Statutes.

Congress in the Officer Personnel Act of 1947 embraced an "up or out" promotion philosophy for officers in the armed services. In *Schlesinger v. Ballard,* 419 U.S. 498, 503 (1975) this Court described the purpose of Congress codifying the "up-or-out" promotion system was not merely for administrative convenience, but a requirement:

> [A]ccordingly, a basic "up or out" philosophy was developed to maintain effective leadership by heightening competition for the higher ranks while providing junior officers with incentive and opportunity for promotion. It is for this reason and not merely because of administrative or fiscal policy considerations that [ ] **requires** [officers] be discharged when they are 'considered as having failed of selection for promotion...for the second time.' Similar selection-out rules apply to officers in different ranks who are twice passed over for promotion. 419 U.S. at 503

In 1980 Congress revised military officer personnel law in the Defense Officer Personnel Management Act (DOPMA), P. L. 96-513, 94 Stat. 2898 (December 12, 1980) and explicitly maintained the "up-or-out" system. Section 632 codified active duty captains and majors who twice fail for selection for promotion "shall be involuntarily discharged or retired." Id. Later in 1994, in the Reserves Act (P. L. 103-337, 108 Stat. 2950, Oct 5, 1994) Congress overhauled military reserve officer personnel law and applied the same "up-or-out" language for captains and majors, "shall be separated separated...not later than the first day of the seven month after the month in which the President approves the report of the board which considered the officer for the second time." 10 U.S.C. § 14505.

Against this background, most cases concerning mandatory officer retirements or separations are adjudicated at the U.S. Court of Federal Claims and the Court of Appeals for the Federal Circuit. Section 632 was first interpreted in *Rigsbee v. United States* 226 F.3d 1376 (Fed. Cir. 2000) and found that "§ 632(b) could hardly be more clear" and interpreted the same for § 632(a) that "provides that certain officers shall "be discharged," "be retired," or "be retained ... until... qualified for retirement and [be] retired." 10 U.S.C. § 632(a)(1)-(3). The actor in each of these

three scenarios is not the officer, and the language is not voluntarily, regardless of whether the officer is discharged, retired, or retained and then later retired." See id.

There is no case history or precedential ruling on the fixed point in time when the non-discretionary mandates in 10 U.S.C. § 632 terminate an officer's military status along with UCMJ jurisdiction in cases when an active duty officer does not retire, but is wholly discharged from service. However, recently the Court of Appeals for the Armed Forces, established a precedential foundation for an Air Force Reserve Officer who was subject to the "up-or-out" promotion statute, 10 U.S.C. § 14505. The *Nettles* case established precedent the non-discretionary provisions of a personnel statute which commands the discharge of a service member is controlling when court-martial jurisdiction (Article 2(a)(1) UCMJ) must terminate, "Instead we think it is more appropriate to apply the statute that actually discharged Appellant...the statue contemplates a definite date and provides for its computation. This provides finality and certainty....because [10 U.S.C. 14505] commanded that Appellant be discharged...Appellant's discharge became effective on the date ordered...No military jurisdiction therefore existed over his person at the time of his arraignment or his court martial the following year." Id. The statute in *Nettles* mandating officers 'shall be separated' after they twice fail for promotion like 10 U.S.C. § 632 imposes statutory non-discretionary duties upon the Secretary of the Army involuntarily discharge officers.

2. Continued Confinement Hearing.

In *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990) the Court of Military Appeals granted a writ of habeas corpus and released a service member pending completion of appellate review in a case referred pursuant to Article 67(a)(2) UCMJ. The court held that a, "servicemember must be released from confinement, unless and until the government shows reasons, such as risk of flight, obstruction of justice, that warrant keeping him in confinement." Id at 249. In response to this case Congress enacted Article 57a(c) UCMJ. Case law is sparse concerning the application of Article 57a(c) UCMJ, but clear — as per *United States v. Miller,* 47 M.J. 356 (CAAF, 1997) when there is a favorable appellate decision by military Court of Criminal Appeals (CCA), that upon a TJAG's certification of an issue to the Court of Appeals for the Armed Forces (CAAF), "[a]n accused's interest in the favorable decision of the court below [CCA] (even if inchoate) requires that the accused be released in accordance with that decision or a hearing on continued confinement be conducted under R.C.M. 305." Id. at 362. To date, *Miller* has not been overturned, but reaffirmed in *United States v. Katso,* 77 M.J. 247 (CAAF, 2018). However, despite Petitioner was entitled to this hearing after his case was overturned in *United States v. Rudometkin,* CCA LEXIS 596, 2021 Army No. 20180058, the Secretary refused to honor any such request and waited over six months to deny the continued confinement hearing — until the day before the CAAF rendered its decision *United States v. Rudometkin,* 82 M.J. 396 (C.A.A.F., 2022).

B. Proceedings Below

1. On July 2015, the President approved the findings of a Board which denied Petitioner for promotion a second time; on August 13, 2015 the Secretary of the Army ordered Petitioner involuntarily retired or discharged pursuant to 10 U.S.C. § 632 not later than December 31, 2015; on August 21, 2015 an administrative order was issued to facilitate Petitioner's discharge/retirement not later than January 31, 2016; on 9 October 2015, Petitioner reached 20 years of active service; on 31 November 2015, Petitioner administratively cleared all tasks to depart from the Army; and on 7 December relocated with his family to the State of Oregon.

2. On or about February 7, 2016, Petitioner was verbally recalled by an officer of the U.S. Army who was not in Petitioner's then-military chain of command and claimed that Petitioner's involuntarily retirement/discharge order was made void due to an allegation of misconduct while on active duty. Almost six months later on 22 July 2016, Petitioner was served a charge sheet by an officer, who was not in the Petitioner's military chain of command, nor at any time did Petitioner receive a military order which recalled him to active duty or place him under the command of the officer who presented the charge sheet. Petitioner was charged with long-delayed and uncorroborated allegations concerning his two ex-wives and conduct unbecoming of an officer by having a consensual sexual relationship with his first ex-wife for an entire year of 2014-2015 which was after he allegedly sexually assaulted her.

3. Almost two years later, Petitioner was tried by a military judge alone (bench trial) at a general court-martial from 31 January 2016 – 2 February 2018, found guilty of multiple offenses of the UCMJ based on the uncorroborated testimony of , and was sentenced to 25 years confinement and a dismissal. Later on 4 April 2018, two charges were dismissed for statute of limitations and Petitioner's sentence was reduced to 17 years.

4. Petitioner appealed to the Army Court of Criminal Appeals. As relevant here, the findings and sentence of the court-martial were set aside due to the substantiated misconduct of the military trial judge and jury who had an inappropriate relationship with the wife of a junior officer who served before him, which occurred before, during, and after Petitioner's court-martial trial. The decision was appealed by the U.S. Army Judge Advocate General pursuant to Article 67(a)(2). During the pendency of this appeal, Petitioner requested to the Secretary of the Army a continued confinement hearing through Article 57a(c) UCMJ (10 U.S.C. § 857a(c)) (2016) as interpreted through *United States v. Miller,* 47 M.J. 356 (CAAF, 1997) and *United States v. Katso,* 77 M.J. 247 (CAAF, 2018). Petitioner sought this hearing to present evidence to justify his release from a military confinement facility on the basis he is not a servicemember because he was discharged prior to the court-martial pursuant to 10 U.S.C. § 632, as reflected in authoritative records maintained by the U.S. Army Human Resources Command. However, Petitioner was denied due process by the Secretary of the Army.

5. Petitioner then filed a writ of habeas corpus and sought injunctive relief through the U.S. District Court to compel the Secretary of the Army to conduct the continued confinement hearing or alternatively, for the District Court conduct a hearing to make findings of fact as to Petitioner's lack of military status. The District Court and the Court of Appeals (*Rudometkin v. Payne et al.,* Case No. 22-3250, (10th Cir. 2022) denied any relief based on the non-intervention or "abstention" principles in *Noyd v. Bond,* 395 U.S. 683 (1969); *Gusik v. Schilder*, 340 U.S. 128 (1950); *Schlesinger v. Councilman*, 420 U.S. 738 (1974).

6. Petitioner sought rehearing en banc explaining the *Councilman* abstention is not applicable because Petitioner is not a servicemember and substantiated this claim to the court by providing a plethora of authoritative administrative records from U.S. Army Human Resources Command reflecting Petitioner was discharged from the U.S. Army pursuant to 10 U.S.C. § 632 prior to the court-martial trial (an extract of the administrative records reflecting the undersigned was discharged are provided in Appendix E). Based on the authoritative records as to the lack of Petitioner's military status, and the fact that the Secretary of the Army denied Petitioner due process by denying a full and fair hearing concerning his continued confinement in a military prison, he requested as a form of equitable relief to either order the army court of criminal appeals to conduct an evidentiary hearing or remand the case to the district court to conduct an evidentiary hearing for finding of fact. The rehearing was denied without comment.

REASONS FOR GRANTING THE PETITION

The lower courts have rendered the *Councilman* "status" exception hollow, empty, meaningless, and farcical by the common practice of invariably deferring to the military courts when questions arise challenging military "status." This de facto rule is stunning in its breadth; it gives the military permission to charge any and all former servicemembers with alleged crimes with impunity, presumptively denies access to the federal district courts to challenge UCMJ jurisdiction, and unnecessarily forces former servicemembers into military custody for years until the military court-martial system was exhausted and final (10 U.S.C. § 876).

This practice of the lower courts abdicating judicial responsibilities when a substantiated claim is made a former service member —is a former servicemember—is contrary to the reasoning and guidance in *Councilman* that outlined the exceptional circumstances for intervention. It is also contrary to this Court's guidance in *Parisi v. Davidson*, 405 U.S. 34 (1972) that wisely noted, "Civil liberty and the military regime have an 'antagonism' that is 'irreconcilable. (quoting *Exparte Milligan*, 4 Wall at 124, 125). When the military steps over those bounds, it leaves the area of expertise and forsakes its domain, the matter then becomes one for civilian courts to resolve consistent with the statutes and the Constitution." 405 U.S. 55. This Court also wisely observed in this same case a, "District Court would have been wrong in not proceeding to an expeditious consideration of [a] Petitioner's claim. For the writ of habeas corpus has long been recognized as the appropriate

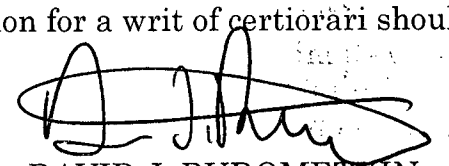
remedy for servicemen who claim to be unlawfully retained in the armed forces." Id. at 39. The circumstances of Petitioner's case is similar or comparable to PVT Parisi where a legal issue did not, "concern a federal district court direct intervention in a case arising in the military court system" and both cases concern an administrative discharge that "antedated and was independent of the military criminal proceedings." Id. at 41. The Court in *Parisi* ultimately determined, "the pendency of a court-marital proceeding must not delay a federal district court's prompt determination of a conscientious objector claim of a servicemen, who should have been discharged prior to a court-martial." Id. at 45. Certainly, in light of the *Parisi* decision, Petitioner should be given consideration to a claim he was actually discharged prior to a court-martial as mandated by the non-discretionary terms of a military personnel statute.

A decision to remand this case for a determination will send a clear message to the lower courts and refresh their conscientious application of the *Councilman* "status" exception.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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