No. _____

In The
Supreme Court of the United States

TAMI L. MITCHELL,

Petitioner,

v.

THOMAS M. DILLAHUNT,

Respondent.

On Petition For A Writ Of Certiorari To The Minnesota Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

TAMI L. MITCHELL, *Pro Se*
5390 Goodview Drive
Colorado Springs, CO 80911
(719) 426-8967
tamimitchell@militarydefense.com

QUESTIONS PRESENTED

1. Did the Minnesota District Court's division of petitioner's military retired pay violate the Uniformed Services Former Spouses' Protection Act?

2. Did the Minnesota District Court's failure to hold an evidentiary hearing regarding the parties' disputes over the enforceability of the Court's April 2, 2008 Order with respect to the dollar value of the divisible portion of her military retired pay violate her due process rights under the Fourteenth Amendment?

RELATED PROCEEDINGS

The following is a list of all proceedings related to this case:

Dillahunt v. Mitchell, No. 27-FA-06-4968, Hennepin County District Court. Judgment entered on Sept. 10, 2018.

Dillahunt v. Mitchell, No. A18-1651, Minnesota Court of Appeals. Judgment entered on June 24, 2019.

Dillahunt v. Mitchell, No. A18-1651, Minnesota Supreme Court. Judgment entered on Sept. 17, 2019.

Mitchell v. Dillahunt, No. 19A-620, United States Supreme Court. Application for extension of time to file petition for a writ of certiorari up to and including Feb. 14, 2020 granted on Dec. 6, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTION, STATUTES AND RULES

TABLE OF AUTHORITIES – Continued

OTHER SOURCES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Minnesota Court of Appeals in this case.

OPINIONS BELOW

The Minnesota District Court's Order dividing Petitioner's military retired pay was issued on September 10, 2018, attached as Appendix at 12a. In an unpublished opinion, the Minnesota Court of Appeals denied Petitioner's appeal on June 24, 2019, attached as Appendix at 1a. *Dillahunt v. Mitchell*, 2019 Minn. App. Unpub. Lexis 590 (Minn. Ct. App. Jun. 24, 2019) (unpub. op.). The Minnesota Supreme Court denied her petition for review on September 17, 2019, attached as Appendix at 41a. *Id*., 2019 Minn. Lexis 548 (Minn. Sep. 17, 2019).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS

10 U.S.C. §§ 1407, 1408, and 1409; 130 Stat. 2164, Public Law 114–328, Section 641 (Dec. 23, 2016); Minn. Stat. §§ 518.003 and 518.58.

STATEMENT OF THE CASE

This case concerns the applicability of the 2016 amendment of 10 U.S.C. § 1408, commonly known as the Uniformed Services Former Spouses Protection Act (USFSPA), to Petitioner's case. In the decision below, the Minnesota Court of Appeals suggested that the 2016 amendment did apply because the court order dividing Petitioner's Military Retired Pay (MRP) was not final until 2018. The Court of Appeals' decision contradicted not only the District Court's ruling, but also contradicts other state courts, which hold the 2016 amendment applies only to cases in which the order granting the divorce is final after December 23, 2016. This division of authority with respect to a recurring question of federal law warrants this Court's review.

A. Statutory Framework

The federal government provides MRP for members of the armed forces who retire after serving a minimum period, generally 20 years, as was the case for Petitioner. The amount of MRP to which a servicemember is entitled to receive is calculated by multiplying that servicemember's "retired pay base" by that servicemember's "retired pay multiplier." 10 U.S.C.

§ 1408(a)(4)(B)(i). Pet. App. 45a. For servicemembers who first joined the armed forces after September 7, 1980, like Petitioner, the "retired pay base" is the average of the servicemember's highest 36 months of base pay. 10 U.S.C. § 1407. Pet. App. 42a. The "retired pay multiplier" is 2.5% multiplied by the years of creditable service the servicemember accrues, with additional credit for whole months served in increments of 1/12 of a year. 10 U.S.C. § 1409. Pet. App. 48a.

Initially, this Court held MRP was not divisible as property in divorce proceedings. *McCarthy v. McCarthy*, 453 U.S. 210 (1981). Congress subsequently overrode the *McCarthy* decision in part by codifying the USFSPA at 10 U.S.C. § 1408. "A court may treat disposable retired pay payable to a member . . . as property of the member and [her] spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1). In Minnesota, the law established the cut-off date for valuing the marital portion of Petitioner's MRP was August 24, 2006. Minn. Stat. §§ 518.003, Subd. 3b(d) and 518.58, Subd. 1. Pet. App. 28a, 51a-53a.

Congress subsequently amended the USFSPA in 2016. 130 Stat. 2164, Public Law 114–328, Section 641 (Dec. 23, 2016). Pet. App. 49a-50a. The amendment includes a specific "hypothetical retired pay" formula for calculating the dollar value of MRP the servicemember would have been entitled to receive on the day of legal separation or divorce, or in Minnesota, the "valuation date," when the event occurs before the servicemember retires. 10 U.S.C. § 1408(a)(4)(B). This is the amount that is subject to division in a divorce proceeding as

property. The amendment provides for cost of living adjustments (COLAs). "Thus, the amendment freezes a spouse's interest in the service member's military retirement as of the date of divorce. Subsection 10 U.S.C. § 1408(a)(4)(B) preempts states from considering military service or pay increases after the date of divorce," thereby preventing the former spouse from receiving a windfall from promotions or pay increases accruing during nonmarital periods of military service by the servicemember. *Fulgium v. Fulgium*, 203 A.3d 33, 40 (Md. Ct. Spec. App. 2019); *Starr v. Starr*, 828 S.E.2d 257, 261 (Va. Ct. App. 2019).

B. Proceedings Below

Petitioner and Respondent married in El Paso, Texas, on August 15, 1997. At the time of their marriage, Petitioner was a Captain in the United States Army Judge Advocate General's Corps (JAG Corps), having joined on September 28, 1996. Respondent initiated dissolution proceedings in Hennepin County, Minnesota in 2006, shortly after Petitioner returned from a deployment to South Korea. Their initial case management conference was held on August 24, 2006. This is the date used in Hennepin County to establish the "cut off" date for valuing marital property. Minn. Stat. §§ 518.003, Subd. 3b(d) and 518.58, Subd. 1. Pet. App. 51a-53a; *see also* Pet. App. 28a. On August 24, 2006, Petitioner was a Major with 9 years and 10 months of active duty service. Her "retired pay base" was $4,772, and her "retired pay multiplier" was 24.583%. Petitioner would have been entitled to receive

$1,173/month in MRP on August 24, 2006. Adjusted for COLAs, the divisible portion of Petitioner's MRP was $1,412/month.

In March of 2008, the parties generally agreed to divide Petitioner's military retired pay so as to award "one-half of the marital portion" to Respondent, who was responsible for drafting the order dividing Petitioner's retired pay. The parties were divorced on March 19, 2008. Petitioner continued to serve in the U.S. Army JAG Corps until her retirement on September 30, 2016. Petitioner retired as a Major with 20 years of service. Her "retired pay base" was $7,392 and her "retired pay multiplier" was 50%. She began receiving her retired pay of $3,696/month on November 1, 2016. Pet. App. 19a.

Respondent did not seek a court order dividing Petitioner's military retired pay until May of 2018. Respondent argued that the parties' 2008 agreement was subject to different interpretations, and there was no finality. Pet. App. 59a-61a, 80a. The District Court awarded Respondent 22.5% based on Petitioner's final retired pay of $3,696/month, Pet. App. 33a-34a, as opposed to what she would have been entitled to receive on August 24, 2006, adjusted for COLAs. The District Court did not hold an evidentiary hearing on the merits regarding the parties' arguments. Pet. App. 76a. The District Court held that the 2016 amendment to the USFSPA did not control because the parties' divorce was final in 2008. Pet. App. 31a-32a. However, the Minnesota Court of Appeals suggested the 2016

amendment *did* apply because the division of Petitioner's MRP was not final until 2018. Pet. App. 6a.

REASONS FOR GRANTING THE PETITION

I. State Courts are Divided over the Application of the 2016 Amendment to the Uniformed Services Former Spouses Protection Act (USFSPA).

The plain language of 130 Stat. 2164, Public Law 114–328, Section 641(b), states, "The amendments made by subsection (a) *shall* apply with respect to *any division of property* as part of a final decree of divorce . . . or legal separation . . . *that becomes final after [December 23, 2016]*" (emphasis added). This means that the amendment applies if there is a final division of property *after* December 23, 2016 as part of a final divorce decree, regardless of whether the divorce decree was final before December 23, 2016. Although the parties' divorce was final before December 23, 2016, the parties' division of Petitioner's MRP was not. Pet. App. 6a. Because Respondent did not seek a court order dividing Petitioner's MRP until May of 2018, there was no final division of property before December 23, 2016. Therefore, the 2016 amendment to the USFSPA, limiting the value of the marital portion to the "hypothetical retired pay" as of August 24, 2006, applied.

The Minnesota Court of Appeals suggested the 2016 amendment to the USFSPA applies because the court order regarding division of Petitioner's MRP did

not become final until 2018. *Id*. However, other states have concluded that the 2016 Amendment only applies to division of MRP as property when the final order of divorce occurs after December 23, 2016. *Fulgium*, 203 A.3d at 44; *Starr*, 828 S.E.2d at 260. The Minnesota Court of Appeals' decision conflicts with *Fulgium* and *Starr*. It also conflicts with the District Court's order that determined the 2016 amendment did not apply because the final dissolution decree was issued in 2008. Pet. App. 31a.

II. This Case Presents an Issue of First Impression on an Issue of National Importance.

This Court's review is warranted because, given the recency of the 2016 amendment to the USFSPA, the first question presented regarding its interpretation and application to the case at bar is one of first impression. It is not unusual for a final court order dividing MRP to occur after the final court order dissolving the marriage, even in cases where the parties entered into an agreement to divide MRP in the future. *See*, *i.e.*, *Hargis v. Hargis*, 561 S.W.2d 336 (Ark. Ct. App. 2018); Pet. App. 59a. Additionally, given that virtually all states consider MRP to be marital property, *Krapf v. Krapf*, 786 N.E.2d 318, 320 n.4 (Mass. 2003), the issue regarding the proper division and valuation of MRP recurs frequently in the state courts and therefore is of vital importance to both the Nation's veterans and their former spouses. As of 2018, almost 3.5 million people received MRP. Office of the Actuary, U.S. DEP'T

OF DEFENSE, *Statistical Report on the Military Retirement System, Fiscal Year Ending Sept. 30, 2018*, at 17.

III. The Decisions Below were Incorrect.

It is well settled that "federal law preempts state law purporting to recognize a vested interest in military retirement pay." *Howell v. Howell*, 137 S.Ct. 1400, 1406 (2017) (citing *Mansell v. Mansell*, 490 U.S. 581, 589 (1989)). Yet multiple states have flouted both the USFSPA and this Court's guidance on the division of MRP as property: Alaska, Arizona, Maine, Maryland, Massachusetts, Rhode Island, Tennessee, and Texas. *Glover v. Ranney*, 314 P.3d 535, 539-540 (Alaska 2013); *Howell*, 137 S.Ct. 1400; *Black v. Black*, 842 A.2d 1280 (Me. 2004); *Dexter v. Dexter*, 661 A.2d 171, 175 n.4 (Md. Ct. Spec. App. 1995), *cert. denied*, 341 Md. 27 (1995); *Krapf*, 786 N.E.2d at 325-326; *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006); *Johnson v. Johnson*, 37 S.W.3d 892, 897-898 (Tenn. 2001); *Rudolph v. Jamieson*, 2018 Tex. App. LEXIS 3983 (Tex. App. Jun. 5, 2018) (unpub. op.).

Minnesota has joined this list. First, the District Court and Minnesota Court of Appeals flouted the plain language of §§ 1407 and 1409 to calculate the divisible portion of Petitioner's MRP using her "retired pay base" and "retired pay multiplier" for August 24, 2006 instead of September 30, 2016. On August 24, 2006, her "retired pay base" was $4,772, not $7,392, and her "retired pay multiplier" was 24.583%, not 50%. Second, the District Court and Minnesota Court of Appeals flouted the plain language of the amended

USFSPA, to limit the award to the amount of MRP that would have been earned as of August 24, 2006. Third, the District Court and Minnesota Court of Appeals flouted their own state statute limiting the dollar value of the award to the amount of MRP that would have accrued as of August 24, 2006. Minn. Stat. § 518.003, Subd. 3b(d); *see also Guggisberg v. Guggisberg*, 2011 Minn. App. Unpub. LEXIS 229 (Minn. App. Mar. 15, 2011) (unpub. op.), *pet. rev. denied*, 2011 Minn. Lexis 289 (Minn. May 25, 2011).

In dividing the value of Petitioner's MRP accrued as of the date of her retirement, September 30, 2016, instead of August 24, 2006, the District Court's order was contrary to Minn. Stat. § 518.003, Subd. 3b(d). Therefore, the District Court's Order was also contrary to 10 U.S.C. § 1408(c)(1), which requires states to divide MRP "in accordance with the law of the jurisdiction of such court." Minn. Stat. § 518.003, Subd. 3b(d) limits the value of MRP to that which accrued as of the date of valuation, August 24, 2006, which was $1,173/month. Pet. App. 51a-52a. Instead, the District Court awarded Respondent a percentage of the entirety of Petitioner's MRP, which was $3,696/month. This was contrary to the intent of both federal and state legislative bodies for the former spouse to not receive a windfall from the servicemember's pay increases resulting from continued, nonmarital military service. *Fulgium*, 203 A.3d at 40; *Starr*, 828 S.E.2d at 261.

The District Court relied on *Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983), to award Respondent

22.5% of the *entirety* of Petitioner's MRP, even though Respondent did not contribute to her pay increases after August 24, 2006. Pet. App. 31a-32a. The District Court's reliance on *Janssen* was misplaced because *Janssen* relied on Illinois, not Minnesota, law to divide a pension paid by the City of Minneapolis, not the federal government. 331 N.W.2d at 753, 756. Because the District Court's Order conflicted with Minn. Stat. § 518.003, Subd. 3b(d), its Order was not "in accordance with the law of the jurisdiction," and therefore contrary to 10 U.S.C. § 1408(c)(1).

Additionally, the District Court did not address whether the parties' 2008 agreement was ambiguous with respect to "one-half of the marital portion." No trial was ever held on this issue. Pet. App. 76a-77a. "A stipulated property settlement is a binding contract that cannot be repudiated or withdrawn by one party without consent of the other, except by leave of the court for cause shown." *Shirk v. Shirk*, 561 N.W.2d 519, 521-22 (Minn. 1997). The lack of an evidentiary hearing denied Petitioner the ability to show "good cause" for the District Court to allow her to withdraw from the 2008 agreement. Respondent provided three different dates of valuation, which impacted not only the percentage of the award, but also the dollar value of the percentage award. Pet. App. 61a, 66a. Given Respondent's claim that the date of valuation was open to "multiple interpretations," Pet. App. 80a, the District Court was obligated to apply contract law to first address whether an enforceable agreement existed between the parties in 2008, due to ambiguity. *Northern*

Assurance Co. v. Grand View Bldg. Assoc., 183 U.S. 308, 331 (1902); *Voicestream Minneapolis, Inc. v. RPC Props. Inc.*, 743 N.W.2d 267, 272 (Minn. 2008); *Toughill v. Toughill*, 609 N.W.2d 634, 638 n.2 (Minn. App. 2000); *Johnson v. Johnson*, 2007 Minn. App. Unpub. Lexis 640, *5-6 (Minn. App. Jun. 19, 2007) (unpub. op.). This required an evidentiary hearing. *Id*. This would have enabled Petitioner to have her "day in court" by introducing parole evidence to resolve the ambiguity and cross-examining Respondent's witnesses.

If, at the end of an evidentiary hearing, the agreement was still so ambiguous that the parties' intent in 2008 could not be determined, then the agreement was unenforceable. *King v. Dalton Motors, Inc.*, 109 N.W.2d 51, 52 (Minn. 1961); *Hartung v. Billmeier*, 66 N.W.2d 784, 788 (Minn. 1954); *Druar v. Ellerbe & Co.*, 24 N.W.2d 820, 826 (Minn. 1946). Petitioner could have then argued that the District Court was required to apply the 2016 amendment to the USFSPA to her case, due to the lack of an enforceable agreement. The denial of an evidentiary hearing deprived Petitioner of having her "day in court," thus denying Petitioner her due process rights under the Fourteenth Amendment. *Toughill*, 609 N.W.2d at 638 n.2; *Johnson*, 2007 Minn. App. Unpub. Lexis 640 at *5-6. The denial of due process also results in the District Court's Order not being "in accordance with the law of the jurisdiction," contrary to 10 U.S.C. § 1408(c)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TAMI L. MITCHELL, *Pro Se*
5390 Goodview Drive
Colorado Springs, CO 80911
(719) 426-8967
tamimitchell@militarydefense.com