

No. \_\_\_\_\_

**In The  
Supreme Court of the United States**

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PRESTON L. DRANE,

*Petitioner,*

v.

STEPHANIA DRANE,

*Respondent.*

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**On Petition For A Writ Of Certiorari To The Fifth  
District Court of Appeal Of Florida**

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**PETITION FOR WRIT OF CERTIORARI**

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June 22, 2022

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**QUESTION PRESENTED**

In a dissolution of marriage proceeding, may a court disregard military documentation showing that a veteran is receiving payments for disability, which are not subject to equitable distribution under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(a)(4)(A), and instead rely on expert testimony to conclude that the payments are a pension that may be divisible upon divorce?

**PARTIES TO THE PROCEEDING  
AND RULE 29.6 STATEMENT**

Petitioner Preston L. Drane was the Appellant in the court below.

Respondent, who was the Appellee in the court below, is Mr. Drane's former wife, Stephania Drane.

Petitioner is not a corporation. No party is a parent or publicly held company owning 10% or more of any corporation's stock.

## STATEMENT OF RELATED PROCEEDINGS

- *Drane v. Drane*, Case No. 05-2017-DR-22905, Fla. 18th Jud. Cir. 2017). Supplemental Final Judgment of Dissolution of Marriage entered on December 16, 2020.
- *Drane v. Drane*, 333 So. 3d 1128 (Fla. 5th DCA 2022). Supplemental Final Judgment of Dissolution of Marriage per curiam affirmed on February 22, 2022.

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## **PETITION FOR WRIT OF CERTIORARI**

The Petitioner, Preston L. Drane, respectfully petitions the Court for a writ of certiorari to review the decision of Florida's Fifth District Court of Appeal, which affirmed a judgment holding that his military disability payments are subject to equitable distribution in dissolution of marriage proceedings.

### **DECISIONS BELOW**

The Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida, entered a Supplemental Final Judgment of Dissolution of Marriage. App. 3.

Florida's Fifth District Court of Appeal issued an order per curiam affirming that decision without a written opinion. That order is published at 333 So. 3d 1128 (Fla. 5th DCA 2022) and reproduced in the appendix. App. 1.

### **STATEMENT OF JURISDICTION**

The Fifth District Court of Appeal issued its order on February 22, 2022. App. 1. This Court extended the time for Mr. Drane to submit this petition until June 22, 2022. This petition is timely.

This Court has jurisdiction to review the decision of the Fifth District Court of Appeal under 28 U.S.C. § 1257(a), because the appellate court, the state court of last resort, ruled on Petitioner's claim that his permanent military disability benefits were

indivisible under a federal statute, 10 U.S.C. § 1408(a)(4)(A). *See Mansell v. Mansell*, 490 U.S. 581, 583 (1989) (reviewing similar question); *see also Florida v. Rodriguez*, 469 U.S. 1, 2 (1984) (granting petition for writ of certiorari to the Third District Court of Appeal of Florida to review per curiam affirmance on issue of federal constitutional law); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (jurisdiction lies where the decision in question “appears to rest primarily on federal law, or to be interwoven with the federal law,” or where the “adequacy and independence of any possible state law ground is not clear from the face of the opinion”).

### **STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED**

The Uniformed Services Former Spouses’ Protection Act, 10 U.S.C. § 1408(a)(4)(A), provides as follows:

The term ‘disposable retired pay’ means the total monthly retired pay to which a member is entitled less amounts which—

(i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(ii) are deducted from the retired pay of such member as a result of

forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(iv) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

The Supremacy Clause provides that the United States Constitution and all federal laws enacted pursuant to the federal constitution are "the supreme Law of the Land." U.S. Const. art. VI, § 2.

### **STATEMENT OF THE CASE**

Mr. Drane served in the Air Force for twenty-three years and attained the rank of Master

Sergeant. App. 10. He received multiple commendations for his service, including a “Meritorious Service Medal,” an “Air Force Commendation Medal with one oak leaf cluster,” an “Air Force Achievement Medal,” an “AF Outstanding Unit Award with 4 oak leaf clusters,” an “AF Good Conduct Medal with 7 oak leaf clusters” a “National Defense Service Medal with 1 service star,” a “Global War on Terrorism Service Medal,” and an “AF Longevity Service with 4 oak” award. App. 10.

During his service, Mr. Drane suffered a back injury that prevented him from “reasonably performing the duties of his office, grade, rank, or rating.” App. 9. The Air Force found this injury was sustained in the line of duty and constituted a permanent disability that required Mr. Drane to be relieved from further service under 10 U.S.C. chapter 61. App. 9, 32. Mr. Drane was placed on the “Permanent Disability Retired List” (PDRL) and granted retirement pay calculated based on a disability formula. App. 11, 14-16.

During “9.22 years” of his service in the Air Force, Mr. Drane was married to his former wife, Stephania Drane (“Former Wife”), who also served as an active-duty member of the Air Force during their marriage. App. 4, 6. In 2017, however, Mr. Drane petitioned the state trial court for dissolution of marriage. App. 6.

The parties entered a Marital Settlement Agreement, which was filed on February 14, 2020. In the agreement, each of the parties expressly waived the right to “receive any Survivor Benefits” from the estate of the other. The trial court ratified the Marital Settlement Agreement and Parenting Plan and incorporated its terms into the Final Judgment of Dissolution of Marriage. App. 23. The court reserved ruling on the type of pay Mr. Drane was receiving, its valuation and distribution of the parties’ retirement pay. App. 3.

The trial court convened a hearing on that issue. In opening statements, Mr. Drane emphasized that all the paperwork related to his discharge from the military characterizes his retirement as occasioned by his permanent disability. App. 19-20. And, he argued, under federal law, those permanent disability payments are not subject to equitable distribution. App. 20. The Former Wife argued in response that, notwithstanding the plain language of his discharge papers, Mr. Drane’s permanent disability pay was a pension and therefore subject to equitable distribution as regular Air Force retirement pay. App. 4.

To support her theory, the Former Wife called an expert, Timothy Voit, a “financial analyst” in a “forensic economics firm.” App. 4. Mr. Voit testified that the marital portion of monthly benefit was \$875.90. Mr. Voit did not use any military formula to

arrive at his figure. Nor did he attempt to reconcile his calculations with section 1408(a)(4)(A) of the Uniform Services Former Spouses Act, which precluded the equitable distribution of any portion of Mr. Drane's permanent disability pay.

Instead, he claimed that Mr. Drane's payments were not disability payments at all, but instead were retirement pay. *See App. 24, 32.* Mr. Voit based his determination primarily on the fact that a certain portion of the income of Mr. Drane was listed as taxable income. *See App. 25.* According to Mr. Voit, this meant that 100% of the payments, apart from other VA payments, constituted a disposable retired pay. *See App. 25.*

After Mr. Voit concluded his testimony, Mr. Drane testified regarding his disability and discharge from military service. *See App. 25.* Mr. Drane disputed the notion that all disability payments are non-taxable and referenced his exhibits, as well as Department of Defense regulation 7000.14-R. Mr. Drane testified that he had intimate experience with the regulations governing permanent disability payment because he helped author some of those regulations during his military service. *See App. 30.*

Mr. Drane introduced into evidence a series of documents related to his permanent disability retirement. His Air Force DD-214 form, the official paperwork documenting his separation from the Air

Force, states that he was medically discharged due to his permanent disability. App. 10.

In addition, Mr. Drane introduced a letter dated February 14, 2018, from the Defense Finance Accounting Service (“DFAS”) that stated that he was placed on the “Permanent Disability Retired List.” App. 11. That letter described the two different methods of calculating his disability retirement pay. “Method A” employed a calculation using his permanent disability rating of 40%, while “Method B” utilized the longevity of his service. Because Method B was more favorable to Mr. Drane, DFAS automatically used that calculation to arrive at the rate of his permanent disability pay. App. 11.

The Air Force determined that Mr. Drane was injured “in the line of duty.” App. 9. Mr. Drane’s medical report revealed a finding that his injury was permanent but was not a “direct result of a combat related injury” or a “disability that was the direct result of armed conflict or was caused by an instrumentality of war and incurred in the line of duty during a period of war.” App. 9.

According to a Special Order issued by the Air Force governing his discharge from the military, Mr. Drane was “relieved from active duty” and “permanently disability retired . . . with compensable percentage for physical disability” of 40%. App. 31. At the conclusion of the hearing, the lower court



reserved ruling on matter. The court held another hearing in December of 2020, where it announced its ruling. At the outset, the trial court announced that it was accepting Mr. Voit's "opinion as set forth in his opinion letter." App. 27. And it found, based on the testimony of Mr. Voit, that "taxable income is equivalent to the retirement pay and is not disability pay," and so it concluded that there was "no component of this that is disability pay." App. 28-29.

Despite the exhibits Mr. Drane introduced into evidence, the lower court found that there was "no evidence that there was some sort of separate 40 percent component to his disability." App. 28. Thus, it ruled that all the monthly payments Mr. Drane received from the Air Force were subject to equitable distribution. App. 29. The trial court entered a supplemental final judgment in accordance with those rulings. App. 3.

On appeal, Mr. Drane renewed his argument that his permanent disability payments were not subject to equitable distribution under section 1408(a)(4)(A) of the Uniform Services Former Spouses Act. He observed that, as a chapter 61 medical retiree, the disability components of his pay were exempted from the definition of "disposable retired pay" that is divisible upon divorce.

Mr. Drane also observed that the documents received in evidence established that payments he

received from the Air Force were not a retirement pension, but instead were payments for his permanent disability. Finally, Mr. Drane argued that the trial court erred when it ordered Mr. Drane to name the Former Wife as the beneficiary of survivor benefits after she expressly waived the right to receive those benefits in a marital settlement agreement.

The Fifth District Court of Appeal affirmed the judgment without a written opinion. App. 1. Mr. Drane now petitions this Court for a writ of certiorari to review that decision.

### **REASONS FOR GRANTING THE WRIT**

In 1981, this Court held that, under the Supremacy Clause of the United States Constitution, federal law precluded state courts from dividing military retirement pay under state community property or equitable distribution laws. *McCarty v. McCarty*, 453 U.S. 210, 211, 235 (1981). In response to this decision, Congress enacted the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. *See generally Howell v. Howell*, 137 S. Ct. 1400, 1403 (2017).

Under this statutory framework, Congress permitted states to treat veterans' "disposable retired pay" as divisible property, i.e., community property divisible upon divorce. *Id.* However, disability benefits were exempted from this definition. *See*

*Mansell v. Mansell*, 490 U.S. 581, 583 (1989); 10 U.S.C. § 1408(a)(4)(A).

Under 10 U.S.C. § 1408(a)(4)(A), “disposable retired pay” is defined as follows:

The term ‘disposable retired pay’ means the total monthly retired pay to which a member is entitled less amounts which—

(i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

**(iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member’s disability on the date when the member was retired (or the date on which the member’s**

**name was placed on the temporary disability retired list); or**

(iv) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

10 U.S.C. § 1408(a)(4)(A).

As the Court opined in *Howell v. Howell*, the “basic reasons *McCarty* gave for believing that Congress intended to exempt military retirement pay from state community property laws apply a fortiori to disability pay.” *Howell*, 137 S. Ct. at 1406.

In this case, the documentary evidence showed that Mr. Drane retired from the military because of a permanent disability under chapter 61. Mr. Drane's Form DD214 conclusively establishes that his “REASON FOR SEPARATION” was “DISABILITY, PERMANENT.” App. 10. And because Mr. Drane was “unfit to perform [his] duties” because “of physical disability,” 10 U.S.C. § 1201(a), he was placed on the Permanent Disability Retired List and awarded “compensable disability” pay. App. 17.

In addition to his DD214 form, Mr. Drane introduced a letter dated February 14, 2018, from

DFAS that stated that he was placed on the “Permanent Disability Retired List.” App. 11. That letter described the two different methods of calculating his disability retirement pay, “Method A” and “Method B.” App. 14. The calculation employed a formula derived from a federal statute governing the rate of military disability pay, 10 U.S.C. § 1401(a). Although the lower court suggested that there was “no evidence that there was some sort of separate 40 percent component to his disability,” Method A expressly refers to Mr. Drane’s “disability rating (40%)” in its calculation. App. 14-15.

So, too, does the Findings and Recommended Disposition of the Air Force Physical Evaluation Board, in which the board found Mr. Drane “unfit” and recommended “permanent retirement with a disability rating of 40%.” App. 9. Moreover, the Special Order from the Air Force stated that Mr. Drane was “relieved from Active Duty” and “permanently disability retired . . . with compensable percentage for physical disability of 040 percent.” App. 31.

Finally, in an October 2017 letter, DFAS stated that Mr. Drane remains “on the retired/retainer rolls of this center and has a compensable disability retirement rated at 40% effective September 4, 2010.” App. 17. If the trial court found “no evidence that there was some sort of separate 40 percent component to his disability,”

then it clearly disregarded most of the documents submitted by Mr. Drane.

In support of its decision, the trial court relied on expert testimony, along with a notation in Mr. Drane's Monthly Retiree Account Statement that showed his disability payments were taxable income. R. at 858. According to the lower court, "taxable income is equivalent to the retirement pay and is not disability pay," and so it found that there was "no component of this that is disability pay." App. 25.

This premise is flawed. While disability payments received from the Veteran's Administration are not taxable, *see Howell*, 137 S. Ct. at 1403, under Department of Defense regulations, disability pay from the individual branches of the military may be subject to federal income tax withholding. *See* DoD 7000.14-R, Vol. 7B, Chapter 24, § 240201 (August 2017). The applicable regulation, "Gross Retired Pay Not Subject to FITW" (Federal Income Tax Withholding), provides as follows:

The gross retired pay of a member is not subject to FITW if the member's retired pay is computed only on the basis of percentage of disability, and the member is on the temporary or permanent disability retired lists, if:

A. On or before September 24, 1975, the member was entitled to receive retired pay computed on the basis of percentage of disability Title 26, United States Code (U.S.C.), sections 104(a)(4) and 104(b)(2)(A);

B. On September 24, 1975, he or she was a member of the Armed Forces (or Reserve Component thereof) or under a binding written commitment to become such a member (26 U.S.C. § 104(a)(4) and § 104(b)(2)(B)); or

C. The member receives disability retired pay because of a combat-related injury. The term “combat-related injury” means personal injury or sickness incurred as a direct result of armed conflict, or while engaged in extra hazardous service, or under conditions simulating war, or caused by an instrument of war. This determination is made by the applicable Service at the time of discharge.

DoD 7000.14-R, Vol. 7B, Chapter 24, paragraph 240201 (August 2017).

With regard to the first two categories, Mr. Drane was not a member of the military on or before

September 24, 1975. He therefore could not possibly have been “entitled to receive retired pay computed on the basis of percentage of disability” at that point in time. And, according to the findings of the Air Force Physical Evaluation Board, Mr. Drane was found not to have suffered a “combat-related injury.” Thus, because Mr. Drane did not fit into any of those three categories, his disability pay was taxable income.

This conclusion is reinforced by the guidance provided on the website of DFAS, which states as follows:

TDRL/PDRL Exemption: If you retired under a disability law (Temporary Disability Retirement List or Permanent Disability Retirement List), your retired pay will be fully non-taxable if your pay is calculated based upon your military (not VA) disability percentage and you meet one of the following conditions:

- You were in the military or under a contractual obligation to join the military on September 24, 1975, or
- Your military disability rating is combat-related.



See Defense Finance and Accounting Service, Is it Taxable? *available at* <https://www.dfas.mil/retiredmilitary/manage/taxes/isittaxable/> (last visited June 15, 2022).

Once again, Mr. Drane was placed on the Permanent Disability Retirement List, but he was not in the military in 1975, and his military disability was deemed not to be “combat-related.” Notwithstanding the expert testimony to the contrary, Mr. Drane’s military retirement payments were both taxable income and designed to compensate him for his permanent disability sustained in the line of duty.

This Court should hold that trial courts in dissolution of marriage proceedings should not blindly accept the opinions of expert on pure issues of law, such as the proper categorization of military retirement pay, particularly when the documentary evidence from the military conclusively resolves the question.

Mr. Drane placed his body on the line during his military service. He paid a heavy price: Permanent Disability. Affirming the judgment below would not only contravene binding federal statutes that prohibit the division of disability pay as marital property, it would divest Mr. Drane of money he receives to compensate him for the physical sacrifice

he made for this Country. This Court should not countenance such an outcome.

### **CONCLUSION**

Based on the foregoing, this Court should grant this petition and review the decision below.

Respectfully submitted on this 22nd day of June, 2022.

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