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Admitted to Practice in the United States Supreme Court, Sixth Circuit Court of Appeals, United States Courts for the Eastern and Western Districts, and the State of Michigan

February 12, 2019

Via First Class Mail or As Directed

Scott S. Harris, Esq.
Clerk of the United States Supreme Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Attn: Honorable Clarence Thomas, Circuit Justice for the Eleventh Circuit Court of Appeals and Including the State of Alabama

Re: Application to Extend Time to File Petition for a Writ of Certiorari to the Alabama Supreme Court

Our File No.: 8201-020619

Dear Sir:

I enclose an application for an extension of time to file a petition for a writ of certiorari to the Alabama Supreme Court in the above-mentioned matter for presentation to Justice Thomas along with the necessary attachments and a certificate of service of same upon counsel for respondent.

The Petition for a Writ of Certiorari is due on March 7, 2019. In the enclosed application, undersigned counsel respectfully requests a 60-day extension.

Please do not hesitate to contact me if you have any questions or require additional information regarding this filing.

Sincerely,

Carson J. Tucker, JD, MSEL

Enclosure(s)

APPLICATION NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH H. HOLMES, PETITIONER,
v.
ALABAMA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT.

ON APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

PETITIONER'S APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Clarence Thomas, Circuit Justice for the 11th Circuit Court of Appeals and including the State of Alabama:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.5, Petitioner Joseph H. Holmes, for good cause, respectfully requests an extension of 60 days to file a Petition for a Writ of Certiorari to the Alabama Supreme Court in the above-captioned case from the latter court's December 7, 2018 denial of a writ of certiorari from the decision of the Alabama Court of Civil Appeals in Case No. 2170798, issued on December 7, 2018.

The petition for a writ of certiorari in this Court is due on or before Thursday, March 7, 2019. The Alabama Supreme Court's Denial of the Petition for Writ of Certiorari to the Court of Civil Appeals and the decision of the latter court are attached for this Court's reference. (Attachments 1 and 2, respectively).

Pursuant to the Rules of the Supreme Court, Rules 13.5 and 22, Petitioners are filing this Application on or before a date 10 days prior to Thursday, March 7, 2019.

JURISDICTION OF THE COURT

This Court has jurisdiction over this Application and over the Petition for Writ of Certiorari to the Supreme Court of the State of Alabama pursuant to 28 U.S.C. § 2101(c) and 28 U.S.C. § 1257, from its December 7, 2018 order denying the Petition for Certiorari to the Alabama Court of Civil Appeals.

SUMMARY

Petitioner is a disabled veteran. He served in the United States Navy from September 1973 to 1976. In 2017, the Veterans Administration (VA) determined he was 100 percent disabled due to a service-connected condition. The VA determined Petitioner had been disabled since December 2010.

Petitioner received a lump sum payment of Veterans Administration (VA) disability benefits in March 2017. Respondent, the Alabama Department of Human Resources (DHR), served a notice of levy of these benefits in July 2017, which had been deposited into his credit union account, to satisfy a past due child support obligation. Petitioner sought a stay of the levy, but DHR seized $46,035 in VA disability pay on October 25, 2017. DHR concluded that Petitioner's VA disability benefits were not exempt from lien, levy or legal process and declined to release the levy of these benefits from his account.

In August 2017, Petitioner timely sought administrative review from DHR challenging its decision to levy his VA disability benefits. DHR denied Petitioner's request on grounds that no hearing was required where "protective or child support services are provided as required by law or by court order". Petitioner then filed a timely notice of appeal with DHR and a petition for judicial review in the Circuit Court for the County of Montgomery.

In his initial brief in the Circuit Court, Petitioner argued that 38 U.S.C. § 5301(a)(1) exempts his VA disability benefits from "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Petitioner conceded that certain VA benefits may be subject to income withholding, garnishment, or other legal process brought by a state agency seeking to enforce payment of a child-support obligation, but only with respect to those VA disability benefits received in lieu of retirement or retention benefits. *Cf.* 42 U.S.C. § 659(a), (h)(1)(A)(ii)(V), and (h)(1)(B)(iii). Because Petitioner's VA disability was not received in lieu of retirement pay or retention pay, DHR could not lawfully seize them and they were off limits under 38 U.S.C. § 5301 as a personal entitlement. See *Howell v. Howell*, 137 S. Ct. 1400, 1405-1406 (holding state courts cannot vest that which under governing federal law they lack the authority to give, citing 38 U.S.C. § 5301, which provides that disability benefits are

generally non-assignable, while noting that for military retirement pay, the state courts are allowed to take account that some retirement or retainer pay may be waived and calculate or recalculate the need for child support or spousal support, citing *Rose v. Rose*, 481 U.S. 619, 630-634, and n. 6, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987), but reserving the questions concerning the scope and breadth of allowing the use of VA disability pay for spousal support and child support). Petitioner also made a claim under 42 U.S.C. § 1983, alleging DHR had, by its actions, deprived him of his constitutional rights to his property, to wit, his VA disability pay.

DHR countered that Petitioner's VA disability benefits were, in fact, subject to levy or attachment under federal law. DHR relied on *Rose v. Rose*, *supra*, in which this Court, in 1987, determined that a state court could hold a child-support obligor in contempt for refusing to pay child support out of his VA disability benefits, and Nelms v. Nelms, 99 So. 3d 1228, 1232-33 (Ala. Civ. App. 2012), in which the Alabama Court of Appeals concluded that a trial court could consider VA disability benefits in determining the amount of alimony to award. Based on those cases, DHR concluded, DHR was entitled to levy Petitioner's disability benefits

The Circuit Court affirmed DHR's decision. Petitioner then filed an appeal in the Court of Appeals, arguing several bases for reversal. First, DHR violated federal statutory and constitutional provisions, including 38 U.S.C. § 5301(a)(1) and 42 U.S.C. § 659(h)(1)(A)(ii)(V), and that its decision was clearly erroneous, arbitrary and capricious. Petitioner also claimed that DHR had violated his rights under the due process clause of the 14th Amendment to the United States Constitution. Petitioner also argued that DHR's "policy" that VA disability benefits are not exempt from lien or levy influenced its decision not to provide him an administrative hearing and it was axiomatic that denial of an administrative hearing is a fundamental violation of minimal due process under the 14th amendment.

The Court of Appeals affirmed. The Court of Appeals undertook its review of DHR's decision based on Section 41-22-20(k) of the Alabama Code of 1975, which, *inter alia*, authorizes the court to reverse a state agency action if it finds the agency's action "is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) in violation of any agency rule; (4) made upon unlawful procedures; (5) affected by other error of law; (6) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (7) unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

The Court of Appeals ruled that while Petitioner was correct that VA disability benefits do not fall within the exception from direct levy while those benefits are in the possession of the VA, citing 42 U.S.C. § 659(h)(1)(A)(ii)(V), this fact did not prevent DHR from seizing Petitioner's benefits. The Court of Appeals reasoned that 42 U.S.C. § 659(a) only creates a "limited waiver of sovereign immunity" of the United States, citing *Rose*, 481 U.S. at 635, and, therefore, the requirement in § 659(a) that the benefits to be seized be "based upon remuneration for employment" did not prevent the states from enforcing child-support orders by ordering that payment be made from VA disability benefits.

While glossing over the sweeping language of 38 U.S.C. § 5301, which prohibits *any legal process* from being used by states to assert rights to VA disability benefits that are deemed by preemptive federal law to be off limits, the Court of Appeals reasoned that the fact that VA disability benefits are intended to support not only the veteran, but the veteran's family, required the Court in *Rose*, *supra* at 634, to "[r]ecogniz[e] an exception to the application of § 3101(a)'s

prohibition against attachment, levy, or seizure in this context [to] further, [and] not undermine, the federal purpose in providing these benefits." The Court of Appeals followed *Rose* and held the anti-assignment provision, now 38 U.S.C. § 5301, does not extend to protect VA disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support.

The Court of Appeals concluded that neither the anti-assignment provision, 38 U.S.C. § 5301 nor the requirements of 42 U.S.C. § 659 were relevant to determining whether DHR could seize, or otherwise prevent Petitioner from accessing his VA disability benefits from his credit union account. The Court of Appeals dismissed Petitioner's argument that DHR's policy that VA disability benefit are not exempt from lien or levy had influenced its decision not to provide him with an administrative hearing and was in violation of the 14th Amendment's guarantee of minimal due process. The Court of Appeals however went on to further reason that DHR was justified in its denial of a hearing based on its determination that it had been providing "child support services as required by law." Citing Ala. Admin. Code (DHR) Rule 660-1-5-.05(f).

The Court of Appeals affirmed the judgment of the circuit court affirming DHR's decision to levy Holmes's VA disability benefits to satisfy his child-support obligation. On December 7, 2018, the Alabama Supreme Court denied Petitioner's writ of certiorari to the Alabama Court of Appeals. Petitioner seeks to file a Petition for a Writ of Certiorari in this case and by way of this application requests an extension of 60 days to file said petition for the following reasons.

REASONS FOR GRANTING EXTENSION OF TIME

1. Petitioner is a disabled veteran of the Vietnam war who suffers PTSD and other service-connected disabilities.

2. Undersigned counsel is a solo practitioner and assists veterans in *pro bono* and *low bono* representation in trials and appeals throughout the United States, including in this case. See *Foster v. Foster*, 919 N.W.2d 272 (Mich. 2018) (appeal granted and pending, representation of disabled veteran by undersigned counsel); *Carpenter v. Carpenter*, Michigan Court of Appeals, Docket No. 344512 (appeal of right pending in the Court of Appeals, *pro bono* representation of a disabled veteran by undersigned counsel); *Miller v. Miller*, Case No. MC-CH-CV-DI-11-121, Chancery Court for the 19th Judicial District of Montgomery County, Tennessee (trial pending, undersigned counsel admitted pro hac vice (Attachment 3), low bono representation of a disabled veteran); *Alwan v. Alwan*, Virginia Court of Appeals, Record No. 1711-18-4 (appeal of right pending, pro hac vice admission pending, low bono representation of disabled veteran).

3. No prejudice would arise from the requested extension. If the petition were granted, the Court would likely not hear oral argument until after the October 2019 term.

4. This case raises issues concerning the absolute preemption of federal law over state courts in the disposition of VA disability benefits. Under its enumerated Article I "Military Powers", Congress provides veterans disability benefits as a personal entitlement to the veteran. The Supremacy Clause provides that federal laws passed pursuant to Congress' enumerated Article I powers absolutely preempt all state law. Under this power, Congress has prohibited *any legal process* from being used to deprive veterans of their disability benefits. 38 U.S.C. § 5301.Unless Congress has *lifted* the absolute preemption provided by federal law in this area, state courts and state agencies simply have no authority, or jurisdiction, to direct that such benefits be seized or

paid over to someone other than their intended beneficiary. Congress has lifted this absolute preemption in a small subset of cases: (1) for marital property through the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408; and (2) spousal support and child support, through the Child Support Enforcement Act (CSEA), 42 U.S.C. § 659. 42 U.S.C. § 659 was amended to specifically *exclude* VA disability benefits that are paid to non-retiree disabled veterans – those veterans who had not retired, and therefore could not have waived retired or retention pay to receive disability benefits. See also *Howell v. Howell*, 137 S. Ct. 1400 (2017).

Where a state court is preempted by controlling federal law, the state court has no authority to issue an order that exceeds its jurisdictional control. When federal law, through the Supremacy Clause preempts state law, as it does in the area of divorce in regard to veterans' benefits, then a state court lacks jurisdiction to issue a contrary award. "State courts may exercise jurisdiction and authority over veteran's disability pay to satisfy a child support and/or spousal support award, *but only up to the amount of his or her waiver of retired pay*." *In re Marriage of Cassinelli*, 20 Cal App 5th 1267, 1277; 229 Cal Rptr 3d 801 (2018). See also 42 U.S.C. §§ 659(a), (h)(1)(A)(ii)(V), (B)(iii); 5 C.F.R. § 581.103 (2018) (emphasis supplied). *Cassinelli* was a decision on remand from this Court after *Howell*, *supra*.

VA disability benefits have also been deemed constitutionally protected property rights under the Fifth and Fourteenth Amendments to the Constitution. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009) and *Robinson v. McDonald*, 28 Vet. App. 178, 185 (U.S. 2016) (federal veterans' benefits are constitutionally protected property rights). See also *Morris v Shinseki*, 26 Vet. App. 494, 508 (2014) (same).

Petitioner has presented the arguments that demonstrate federal law preempts state law, and that his constitutional rights have been infringed upon by Respondent, DHR's seizure of his property.

Finally, *Rose* was wrongly decided, and it is an outdated case that does not even apply to the factual circumstances of this case because Congress amended 42 U.S.C. § 659 to add subsection (h)(1)(B)(iii) after *Rose*.

Finally, and most importantly, all of the issues of law presented by this case are of national significance due to the increasing number of disabled veterans whose main or only source of income are disability benefits. Petitioner is not the only disabled veteran whose disability pay is a sole means of subsistence and who relies on these benefits to survive.

The purpose of Congress in enacting 38 U.S.C. § 5301 was to "prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income." *Rose*, 481 U.S. at 630. For a very limited time (after *Rose v. Rose*), the *judicial* allowance to state courts to force veterans to use their disability pay for child support and spousal support appears to have applied across the board to all disabled veterans. However, this worked an inequitable result on a certain subset of disabled veterans; namely those, like Petitioner in this case, who had been injured and rendered disabled and unable to serve before they had acquired years in service sufficient to also have the financial support and economic security of retirement pay. Now, this subset of veterans, especially due to the last 3 decades of up-tempo, high-volume deployment and military operations in which the U.S. military has been involved represents the largest population of disabled veterans in existence. The significance of this cannot be understated. See Trauschweizer, 32 International Bibliography of Military History 1 (2012), pp. 48-49 (describing the intensity of military operations commencing in the 1990's culminating in full-scale military

involvement in Iraq and Afghanistan during the past three decades). See also VA, Trends in Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4 at: http://www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL.pdf.

Indeed, the country is no longer only faced with the waning population of disabled veterans from the post-Vietnam era and prior. *Rose* was, as noted, a 1987 case, and it necessarily addressed an entirely different population of aging and disabled veterans. Since 1990, there has been a 46 percent increase in disabled veterans, placing the total number of veterans with service-connected disabilities above 3.3 million as of 2011. VA, Trends, *supra*. By 2014, the number of veterans with a service-connected disability was 3.8 million. See U.S. Census Bureau, Facts for Features at: http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff23.html. As of March 22, 2016, the number of veterans receiving disability benefits had increased from 3.9 million to 4.5 million. *Id*. See also VA, National Center for Veterans Analysis and Statistics, What's New at: https://www.va.gov/vetdata/veteran_population.asp. Also, since 1990, there has been a remarkable increase in veterans with disability ratings of 50 percent of higher, with approximately 900,000 in 2011. VA, Trends, *supra* at slide 6. That same year, 1.1 million of the 3.3 million total disabled veterans had a disability rating of 70 percent or higher. *Id*.

Finally, the disability numbers and ratings for younger veterans has markedly inclined. Conducting an adjusted data search, 570,400 out of 2,198,300 non-institutionalized civilian veterans aged 21 to 64 had a VA service-connected disability at 70 percent or higher in the United States in 2014. See Erickson, W., Lee, C., von Schrader, S. Disability Statistics from the American Community Survey (ACS) (2017). Data retrieved from Cornell University Disability Statistics website: www.disabilitystatistics.org. Thus, according to this data analysis, half of the total number of veterans with a disability rating greater than 70 percent are between 21 and 64 years of age.

The National Veterans Foundation found that over 2.5 million Marines, Sailors, Soldiers, Airmen and National Guardsmen served in Iraq and Afghanistan. Of those, nearly 6,600 were killed, and over 770,000 have filed disability claims. See http://www.nvf.org/staggering-number-of-disabled-veterans/. Yet another study shows nearly 40,000 service members returning from Iraq and Afghanistan have suffered traumatic injuries, with over 300,000 at risk for PTSD or other psychiatric problems. These veterans face numerous post-deployment health concerns, sharing substantial burdens with their families.

These staggering numbers are, in part, a reflection of the nature of wounds received in modern military operations, modern medicine's ability to aggressively treat the wounded, and modern transportation's ability to get those most severely wounded to the most technologically advanced medical treatment facilities in a matter of hours. Fazal, Dead Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise, 39:1 International Security 95 (2014), pp. 95-96, 107-113. Physical injuries in these situations are understandably horrific. *Id*. See also Kriner & Shen, Invisible Inequality: The Two Americas of Military Sacrifice, 46 Univ. of Memphis L. Rev. 545, 570 (2016). However, many veterans also suffer severe psychological injuries attendant to witnessing the sudden arbitrariness and indiscretion of war's violence. Zeber, Noel, Pugh, Copeland & Parchman, Family perceptions of post-deployment healthcare needs of Iraq/Afghanistan military personnel, 7(3) Mental Health in Family Medicine 135-143 (2010). As one observer has stated: "assignments can shift rapidly from altruistic humanitarian work to the delivery of immense deadly force, leaving service members with confusing internal conflicts that are difficult to integrate. During deployment, even medical personnel are at times compelled to use deadly force to protect themselves, their patients, and their fellow soldiers." Finley, Fields of

Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan (Cornell Univ. Press 2011).

Combat-related post-traumatic stress symptoms (PTSS), with or without a diagnosis of post-traumatic stress disorder (PTSD) can negatively impact soldiers and their families. These conditions have been linked to increased domestic violence, divorce, and suicides. Melvin, Couple Functioning and Posttraumatic Stress in Operation Iraqi Freedom and Operation Enduring Freedom – Veterans and Spouses, available from PILOTS: Published International Literature On Traumatic Stress. (914613931; 93193). See also Schwab, et al., War and the Family, 11(2) Stress Medicine 131-137 (1995).

Such conditions are exacerbated when returning veterans must face stress in their families caused by their absence. Despite the amazing cohesion of the military community and the best efforts of the larger military family support network, separations and divorces are common. Families, already stretched by this extraordinary burden, are often pushed beyond their limits causing relationships to break down. Long deployments, the daily uncertainty of not knowing whether the family will ever be reunited, and the everyday travails of civilian life are difficult enough. A physical disability coupled with mental and emotional scars brought on by wartime environments make the veteran's reintegration with his family even more challenging. Finley, *supra*.

This younger population of disabled veterans are not entitled to retirement pay because they were injured or wounded during the first few years of their service to the country. Like Petitioner, who only served for approximately 3 years, many disabled veterans in this population do not and will never have the financial security and economic assurances of a retirement pension and all the other benefits that come with being classified as retired. When it became apparent that this growing

subset of disabled veterans were also being subjected to having their disability benefits taken by state courts to satisfy support orders in domestic relations cases, Congress acted to differentiate this class of veterans by amending the CSEA and adding 42 U.S.C. § 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii) distinguishing the two subsets of veterans and the two classes of disability benefits, those which are available to former spouses and minor children from the former group of retiree veterans and those that are not from the latter group of non-retiree veterans.

Because federal law has always preempted state law in this very specific circumstance, any state-court domestic relations order awarding support (child and/or spousal) would be void and unenforceable, both going forward and retroactively. In this case, Petitioner's federal disability benefits are specifically excluded from consideration as remuneration for employment, and therefore as income, by 42 USC 659(a); (h)(1)(A)(ii)(V); and (h)(1)(B)(iii). As such, these benefits are jurisdictionally protected from *any legal process* whatever by 38 U.S.C. § 5301. Federal law is very clear and has been changed since *Rose v. Rose*. Yet, state courts across the country continue to blindly cite *Rose* for the proposition that states have unfettered access to these disability benefits no matter what the income and status of the disabled veteran. This has caused a systemic destruction of the ability of disabled veterans to sustain themselves and their families. The greatest tragedy, of course, is the effect that this has had on the veteran community as a whole. Homelessness, destitution, alcoholism, drug abuse, criminality, incarceration and, in too many cases, suicide, are a direct result of the consequences of a blind adherence to outdated and no longer viable federal law that fails to take account of the reality of current circumstances.

A state court that rules incorrectly on a matter preempted by federal law acts in excess of its jurisdiction. Such rulings, and the judgments they spring from, including all subsequent contempt and related orders (which would cover the sanctions award here) are *void ab initio* and exposed to

collateral attack. The United States Supreme Court has said as much: "That a state court before which a proceeding is competently initiated may – by operation of supreme federal law – lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system." *Kalb v. Feurstein*, 308 U.S. 433, 440, n 12 (1940). "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Id*. at 439. "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436; 4 L Ed 579 (1819) (MARSHALL, CJ) (emphasis added). Absent such power, any attempt by state courts to impede the operation of federal laws must be considered a nullity and void. *Kalb*, *supra*.

CONCLUSION

For the foregoing reasons, undersigned counsel requests additional time to prepare a full exposition of the important legal issues at the heart of this dispute.

WHEREFORE, for the reasons stated herein, Petitioners apply to Your Honor and respectfully requests an extension of 60 days from the March 7, 2019 due date to file a Petition for a Writ of Certiorari to the Alabama Supreme Court, so that this Court may consider said petition and Petitioner's appeal on or before Monday, May 6, 2019.

Respectfully submitted,

Carson J. Tucker
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Dated: February 12, 2019

Attachment 1

IN THE SUPREME COURT OF ALABAMA

December 7, 2018

1180067

Ex parte Joseph H. Holmes. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Joseph H. Holmes v. Alabama Department of Human Resources) (Montgomery Circuit Court: CV-17-901808; Civil Appeals : 2170798).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on December 7, 2018:

Writ Denied. No Opinion. Wise, J. - Stuart, C.J., and Bolin, Shaw, and Sellers, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 7th day of December, 2018.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

Attachment 2

REL: October 5, 2018

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170798

Joseph H. Holmes

v.

Alabama Department of Human Resources

Appeal from Montgomery Circuit Court
(CV-17-901808)

THOMAS, Judge.

In August 2017, Joseph H. Holmes sought an administrative review from the Alabama Department of Human Resources ("DHR") seeking to challenge DHR's intent to levy United States Veterans' Administration ("VA") disability benefits that had

been deposited into Holmes's credit-union account to pay Holmes's child-support obligation. According to the information contained in the administrative record, which contains only filings by Holmes and his counsel and replies by DHR, Holmes is a disabled veteran who received a lump-sum payment of VA disability benefits in March 2017. Holmes contended that, pursuant to 38 U.S.C. § 5301(a)(1), his disability benefits were not subject to levy either before or after his receipt of those benefits. DHR concluded its administrative review, sending notice to Holmes of its decision that "VA benefits are not exempt from lien/levy process" and declining to release the levy of the benefits.

Holmes timely requested an administrative hearing from DHR. However, DHR denied Holmes's request, citing Ala. Admin Code (DHR), Rule 660-1-5-.05(f), which allows the request for an administrative hearing to be denied "[w]hen protective or child support services are provided as required by law or by court order." In compliance with Ala. Code 1975, § 41-22-20, a part of the Alabama Administrative Procedure Act, codified at Ala. Code 1975, § 41-22-1 et seq., Holmes then filed a

timely notice of appeal with DHR and a petition for judicial review in the Montgomery Circuit Court ("the circuit court").[1]

In his petition for judicial review, Holmes set out the following facts. He explained that he had served in the United States Navy between September 1973 and 1976; that, in March 20, 2017, the VA determined that Holmes had been 100% disabled since December 3, 2010, as the result of a service-connected condition; and that, on March 23, 2017, the VA deposited a lump-sum VA disability benefit into Holmes's credit-union account. According to Holmes, DHR served a notice of levy of those benefits on him on July 27, 2017. Holmes also stated that he had sought a stay of the seizure of his benefits but that DHR had seized $46,035 in VA disability benefits from his account on October 25, 2017.

The parties filed briefs before the circuit court, laying out their respective positions. In his initial brief before the circuit court, Holmes argued that § 5301(a)(1) exempts his VA disability benefits from "attachment, levy, or seizure by or under any legal or equitable process whatever, either

[1]Holmes later amended his petition to include claims under 42 U.S.C. § 1983. However, in his brief to the circuit court, he withdrew his § 1983 claims, and, thus, the circuit court did not address them.

before or after receipt by the beneficiary." He admitted that federal law provides that certain benefits may be subject to income withholding, garnishment, or other legal process brought by a state agency seeking to enforce payment of a child-support obligation. See 42 U.S.C. § 659(a). However, he contended that only those VA disability benefits received in lieu of retirement or retention benefits may be subject to attachment or levy for payment of child support. See 42 U.S.C. § 659(h)(1)(A)(ii)(V). Thus, he argued, because his disability benefits were not received in lieu of retirement or retention pay, DHR could not lawfully seize his VA disability benefits.

In response, DHR, relying first on § 659(a), argued that Holmes's VA disability benefits were, in fact, subject to levy or attachment under federal law. DHR further relied on Rose v. Rose, 481 U.S. 619 (1987), in which the United States Supreme Court determined that a state court could hold a child-support obligor in contempt for refusing to pay child support out of his VA disability benefits, and Nelms v. Nelms, 99 So. 3d 1228, 1232-33 (Ala. Civ. App. 2012), in which this court concluded that a trial court could consider VA

disability benefits in determining the amount of alimony to award. Based on those cases, DHR concluded, DHR was entitled to levy Holmes's VA disability benefits. DHR also noted that it had, in compliance with 42 U.S.C. § 666, properly sought to enforce Holmes's child-support obligation under Ala. Code 1975, § 30-3-192, which requires DHR to seek out information from financial institutions regarding the account balances of noncustodial parents with past-due child-support obligations, and Ala. Code 1975, § 30-3-197 and -198, which permit DHR to impose liens against the personal or real property owned by noncustodial parents with child-support arrearages.[2]

[2]The full text of § 30-3-197(a)(6) reads:

> "In cases in which there is a support arrearage, [certain agencies, including DHR, are permitted] to secure assets to satisfy the arrearage by intercepting or seizing periodic or lump-sum payments from a state or local agency, including unemployment compensation, worker's compensation, and other benefits; by attaching judgments, settlements, and lottery winnings and other lump-sum payments; attaching and seizing assets of the obligor held in financial institutions; attaching public and private retirement funds; and imposing liens in accordance with [Ala. Code 1975,] Section 30-3-198 and, in appropriate cases, to force sale of property and distribution of proceeds."

Holmes filed a reply brief in the circuit court, in which he argued that DHR had ignored relevant provisions of § 659. Holmes contended that his VA disability benefits were not subject to legal process under § 659 because his benefits were not "based upon remuneration for employment." He explained that § 659(h)(1)(A)(ii)(V) provided:

> "(h) moneys subject to process (1) Subject to paragraph (2), moneys payable to an individual which are considered to be based upon remuneration for employment, for purposes of this section -- (A) consist of -- (ii) periodic benefits (including a periodic benefit as defined in section 428(h)(3) of this title) or other payments -- (V) by the Secretary of Veterans Affairs as compensation for a service connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation."

(Emphasis in original.) Based on this argument, Holmes again argued that his VA disability benefits could not be levied by DHR.

On April 16, 2018, the circuit court entered a one-line order affirming DHR's decision to seize Holmes's VA disability benefits. Holmes filed a timely notice of appeal. In his appellate brief, Holmes argues that DHR's decision to seize his VA disability benefits violated statutory or

constitutional provisions, including § 5301(a)(1), was clearly erroneous, and was arbitrary and capricious. He also complains that DHR violated his rights under the due-process clause of the 14th Amendment to the United States Constitution. We disagree.

The circuit court's review of a decision of a state agency is governed by § 41-22-20(k), which provides:

> "Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:
>
> > "(1) In violation of constitutional or statutory provisions;
> >
> > "(2) In excess of the statutory authority of the agency;
> >
> > "(3) In violation of any pertinent agency rule;

> "(4) Made upon unlawful procedure;
>
> "(5) Affected by other error of law;
>
> "(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."

Our standard of review of the agency's decision is the same as the standard employed by the circuit court. Alabama State Pers. Bd. v. Clements, 161 So. 3d 221, 227 (Ala. Civ. App. 2014) (quoting Alabama State Pers. Bd. v. Dueitt, 50 So. 3d 480, 482 (Ala. Civ. App. 2010)) ("'The standard of appellate review to be applied by the circuit courts and by this court in reviewing the decisions of administrative agencies is the same.'").

On appeal, Holmes again relies on § 5301(a)(1) and § 659(h)(1)(A)(ii)(V) to contend that his VA disability benefits, because they were not "based upon remuneration for employment," are exempt from all legal process. Although Holmes is correct that his VA disability benefits, because he did not waive a portion of his retired or retainer pay to receive them, do not fall within the exception from direct

levy while those benefits are in the possession of the VA, see § 659(h)(1)(A)(ii)(V), this fact does not prevent DHR from seizing Holmes's benefits from his credit-union account. This is so because § 659(a) creates a "limited waiver of sovereign immunity" of the United States, Rose, 481 U.S. at 635, and, therefore, the requirement in § 659(a) that the benefits to be seized be "based upon remuneration for employment" does not prevent the states from enforcing child-support orders by ordering that payment be made from VA disability benefits.

The appellant in Rose, Charlie Rose, was a totally disabled United States military veteran living in the State of Tennessee. Rose, 481 U.S. at 622. When Charlie divorced his wife, the Tennessee court calculated his child-support obligation based upon his income, which was composed entirely of VA disability benefits. Id. Charlie did not pay child support as ordered, and the Tennessee court held him in contempt for his failure to comply with the child-support order. Id. at 623. Charlie appealed the contempt judgment, arguing that Tennessee could not order that he pay child support out of his VA disability benefits, relying in large part on the idea that federal law governing VA benefits,

which, at that time included the precursor to § 5301(a)(1), namely, 38 U.S.C. § 3101, and the provisions of the Child Support Enforcement Act, codified at 42 U.S.C. § 651 et seq., preempted Tennessee's authority over his VA benefits. Id. at 625.

The United States Supreme Court explained that former § 3101 (which exists currently in similar form in § 5301(a)(1)) "provide[d] that '[p]ayments of benefits ... under any law administered by the Veterans' Administration ... made to, or on account of, a beneficiary ... shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.'" Rose, 481 U.S. at 630. However, the Rose Court concluded that requiring Charlie, through a contempt proceeding, to pay his child-support obligation out of his VA disability benefits did not run afoul of that anti-assignment provision. Id. at 635. The Court explained that the anti-assignment provision had two purposes: "to 'avoid the possibility of the Veterans' Administration ... being placed in the position of a collection agency' and to 'prevent the deprivation and depletion of the means of subsistence of

veterans dependent upon these benefits as the main source of their income.'" Id. at 630 (quoting S. Rep. No. 94-1243, pp. 147-48 (1976)). Because the VA was neither made a party to the contempt proceedings nor required to pay Charlie's VA benefits directly to Charlie's ex-wife, the Rose Court noted, the first purpose was not frustrated by the state court's assertion of its contempt or enforcement powers over Charlie. Id. at 635.

Regarding the second purpose -- protecting the "'means of subsistence'" for disabled veterans -- the Rose Court came to the same conclusion: "the exercise of state-court jurisdiction over [Charlie's] disability benefits [did not] deprive [Charlie] of his means of subsistence contrary to Congress' intent, for these benefits are not provided to support [Charlie] alone." Rose, 481 U.S. at 630. The Rose Court noted that

> "[v]eterans' disability benefits compensate for impaired earning capacity, H.R. Rep. No. 96-1155, p. 4 (1980), U.S. Code Cong. & Admin. News 1980, p. 3307, and are intended to 'provide reasonable and adequate compensation for disabled veterans and their families.' S. Rep. No. 98-604, p. 24 (1984) (emphasis added), U.S. Code Cong. & Admin. News 1984, pp. 4479, 4488."

Id. The fact that VA disability "benefits are intended to support not only the veteran, but the veteran's family," said the Rose Court, required the Court to "[r]ecogniz[e] an exception to the application of § 3101(a)'s prohibition against attachment, levy, or seizure in this context [to] further, [and] not undermine, the federal purpose in providing these benefits." Id. at 634. Thus, the Rose Court concluded that the anti-assignment provision "does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support." Id.

Regarding Charlie's argument that the requirement in § 659(a) that benefits be "based upon remuneration for employment" prevented the Tennessee court from "diverting [his VA disability benefits] for child support," the United States Supreme Court explained in Rose that

> "§ 659(a) does not refer to any legal process. The provision was intended to create a limited waiver of sovereign immunity so that state courts could issue valid orders directed against agencies of the United States Government attaching funds in the possession of those agencies:
>
> > "'The term "legal process" means any writ, order, summons, or other similar process in the nature of garnishment ...

> issued by [a state court] ... and ... directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support....' § 662(e) (emphasis added).
>
> "See also 5 CFR § 581.102(f) (1986); S. Rep. No. 93-1356, pp. 53-54 (1974). Waivers of sovereign immunity are strictly construed, and we find no indication in the statute that a state-court order of contempt issued against an individual is precluded where the individual's income happens to be composed of veterans' disability benefits. In this context, the Veterans' Administration is not made a party to the action, and the state court issues no order directing the Administrator to pay benefits to anyone other than the veteran. Thus, while it may be true that these funds are exempt from garnishment or attachment while in the hands of the Administrator, we are not persuaded that once these funds are delivered to the veteran a state court cannot require that veteran to use them to satisfy an order of child support."

Rose, 481 U.S. at 635.

Like Charlie's VA disability benefits in Rose, the VA disability benefits in the present case have been delivered to Holmes. The purpose of those benefits is to support Holmes and his family, i.e., his dependent children. DHR has not attempted to direct the VA to make any payment of Holmes's benefits to it or to any other person. Thus, according to

Rose, neither the anti-assignment provision now found in § 5301(a)(1) nor the requirements of § 659(a) are relevant to determining whether the state can seize, or prevent DHR from seizing, Holmes's VA disability benefits from his credit-union account.[3]

Holmes also contends that this court's decision in J.W.J. v. Alabama Department of Human Resources ex rel. B.C., 218 So. 3d 355 (Ala. Civ. App. 2016), supports a conclusion that his VA disability benefits are not subject to being seized for the payment of child support. In J.W.J., we determined that an order requiring a father to pay his child-support arrearage from his Supplemental Security Income ("SSI") benefits under threat of contempt violated federal law. We construed 42

[3]Furthermore, the existence of 42 U.S.C. §§ 654 and 666 and Ala. Code 1975, § 30-3-190 et seq., undercuts Holmes's argument that DHR has no authority to levy against his credit-union account. States are required to establish and provide services relating to the enforcement of child-support obligations, including locating parents, accessing financial information relating to noncustodial parents with outstanding child-support obligations, and establishing liens on real and personal property of parents with overdue support obligations. To require the state to go to great lengths to secure the payment of child-support obligations certainly supports the conclusion that benefits intended to serve as income to support a veteran's family can be attached to serve that purpose.

U.S.C. § 407(a), which prevents the transfer, assignment, levy, attachment, or garnishment of Social Security benefits. We also considered the effect of § 659(a) on § 407, determining that, because § 659(a) permitted withholding of federal benefits for payment of child-support or alimony obligations when "the entitlement to [those benefits] is based upon remuneration for employment," § 659(a) did not permit the use of SSI, which was not based upon remuneration for employment, to meet child-support obligations. We also relied on Department of Public Aid ex rel. Lozada v. Rivera, 324 Ill. App. 3d 476, 479, 755 N.E.2d 548, 550, 258 Ill.Dec. 165, 167 (2001), which had held "that section 407(a) forbids ordering child support that burdens any SSI benefits, even those that the beneficiary has already received."

What Holmes fails to recognize is the distinction between his VA disability benefits and SSI benefits. SSI is a means-tested public-assistance program that has as one of its purposes to provide a subsistence allowance to those meeting certain eligibility requirements. See J.W.J., 218 So. 3d at 356-57. Unlike Holmes's VA disability benefits, SSI benefits are not intended to be used as a means of support for the

families of its recipients. See Rose 481 U.S. at 630; Becker County Human Servs., Re Becker Cty. Foster Care v. Peppel, 493 N.W.2d 573, 576 (Minn. Ct. App. 1992) ("SSI benefits are designed to provide for the minimum needs of the individual recipient, and should not be considered income for any other purpose."); and Tennessee Dep't of Human Servs. ex rel. Young v. Young, 802 S.W.2d 594, 599 (Tenn. 1990) ("SSI payments are for the benefit of the recipient alone."). Thus, the holding of J.W.J. is inapplicable in the context of VA disability benefits.

Insofar as Holmes challenges DHR's denial of his request for an administrative hearing as violating of his due-process rights, we must disagree. First, we note that Holmes's brief relies on only general principles of law regarding due process; he does not develop an argument tailored to the specific denial of an administrative hearing in the present case. White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008) ("Rule 28(a)(10)[, Ala. R. App. P.,] requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position."). He simply argues that DHR's "policy" that VA

disability benefits are not exempt from lien or levy influenced its decision not to provide him an administrative hearing, and, he states, "[i]t is axiomatic that denial of [an administrative] hearing is a fundamental violation of minimal due process under the 14th amendment." Thus, we may affirm the judgment of the circuit court on this issue without further considering Holmes's due-process argument.

Were we to consider Holmes's due-process argument further, we would still affirm the judgment of the circuit court. DHR denied Holmes's request for a hearing based on its determination that it had been providing "child support services as required by law." See Rule 660-1-5-.05(f). Because the facts are not in dispute, the only question presented by Holmes's request for a hearing was a legal one: whether federal law prevented the seizure of his VA disability benefits. A hearing would have been of no benefit to any party, and DHR was permitted to deny the request for a hearing because it had seized Holmes's VA disability benefits in compliance with both state and federal law. In addition, Holmes was permitted to seek further review of the seizure of his VA disability benefits through his petition for judicial

review and his appeal to this court, which afforded him additional due process. Thus, even were we to consider the merits of Holmes's due-process argument, we would reject his claim that he was denied due process.

Holmes's arguments regarding § 5301(a)(1) and § 659 do not compel reversal. DHR's seizure of his VA disability benefits does not violate federal law, and, therefore, DHR's decision in Holmes's case was not in violation of law, clearly erroneous, or arbitrary and capricious. In addition, Holmes's due-process argument was not sufficiently developed for our consideration. Having considered and rejected each of Holmes's arguments, we affirm the judgment of the circuit court affirming DHR's decision to levy Holmes's VA disability benefits to satisfy his child-support obligation.

AFFIRMED.

Thompson, P.J., and Pittman, Moore, and Donaldson, JJ., concur.

Attachment 3

IN THE CHANCERY COURT FOR THE 19TH JUDICIAL DISTRICT OF MONTGOMERY COUNTY, TENNESSEE AT CLARKSVILLE

JEREMY N. MILLER Plaintiff	§	
vs.	§	Docket No.: MC-CH-CV-DI-11-121
	§	Judge Ted A. Crozier, Jr.
CASI A. MILLER Defendant	§	

A TRUE COPY ATTEST
FILED 11-5 2018
MICHAEL W. DALE, C&M

ORDER

THIS CAUSE came on to be heard on the 5th day of November, 2018, upon the Motion for the *Pro Hac Vice Admission* of Attorney Carson J. Tucker in the above-captioned case, and the Court, having found said Motion well taken,

IT IS THEREFORE ORDERED, that Carson J. Tucker, is admitted to practice before this Honorable Court, pursuant to Tennessee Supreme Court Rule 19.

ENTER this the 5th day of November, 2018.

/s/ Ted A Crozier Jr
JUDGE TED A. CROZIER, JR.

APPROVED FOR ENTRY:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the Defendant, **CASI ANNE MILLER**, by sending same via U.S. Mail, postage paid, to her attorney of record, Sharon T. Massey, at her mailing address of 221 South Third Street, Clarksville, TN 37040; and to Melissa King, Attorney at Law, by placing same in her court box, on this the 5 day of November, 2018.

Deborah S. Evans

APPLICATION NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH H. HOLMES, PETITIONER,
v.
ALABAMA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT.

ON APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29 undersigned counsel sent on the below date by first class mail a copy of Petitioner's Application for an Extension of Time to File a Petition for Writ of Certiorari to the Alabama Supreme Court in the above-captioned case to counsel for Respondent as follows:

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Dated: February 12, 2019