AMICUS BRIEF

FILED WITH THE U.S. SUPREME COURT

THIS BRIEF IS BEIGE IN COLOR

No. 00-919

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER S. STEVENSON, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The National Institute of Military Justice ("NIMJ") and the National Veterans Legal Services Program ("NVLSP") respectfully submit this brief as *amici curiae* in support of the petitioner.

INTEREST OF THE *AMICI CURIAE*

NIMJ is a District of Columbia nonprofit corporation organized in 1991.[1] Its overall purpose is to advance the fair administration of justice in the Armed Forces of the United States. NIMJ fosters improved public understanding by such

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than the *amici* made a monetary contribution to the preparation or submission of this brief.

means as publication of the *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* and the monthly *Military Justice Gazette*, and the sponsorship of seminars and training programs. NIMJ has also commented on and proposed changes to military procedural rules, testified before Congress, and appeared as an *amicus curiae* at the petition stage in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and *Gray v. United States*, No. 00-607. NIMJ's directors include law professors, private practitioners and other experts in the field, none of whom is currently on active duty, but nearly all of whom have served as active duty military lawyers, up to and including flag and general officer ranks. NIMJ is entirely independent of the government and relies exclusively on voluntary contributions for its programs.

NVLSP is a veterans service organization recognized by the Department of Veterans Affairs ("DVA") under 38 U.S.C. § 5902. For more than 20 years, NVLSP has been helping veterans who, because of the effects of military service, have been unable to share in opportunities available to most Americans. NVLSP serves these forgotten veterans through advocacy, education, litigation, training, and publications.

At issue in this case is whether the armed forces may conduct involuntary non-probable-cause searches of retired personnel through the use of DVA's facilities and staff. The facts of the case, the nature of the issue, and the effect of the decision below on the confidence of military retirees that DVA and the armed services will respect their privacy rights all strongly counsel in favor of a grant of certiorari.

Counsel for the parties have consented to the filing of this brief. Copies of their letters have been lodged with the Clerk.

ARGUMENT

1. The facts are highly disturbing. Stevenson, who had been on disability retirement from the Navy since 1994,[2] was receiving medical care from DVA. Suspecting him of rape, the Naval Criminal Investigative Service ("NCIS") wished to obtain a DNA sample to aid in its investigation. As a retired regular entitled to pay, Stevenson remained technically subject to the Uniform Code of Military Justice ("UCMJ"). UCMJ art. 2(a)(4), 10 U.S.C. § 802(a)(4) (1994).

Stevenson was being seen for a psychiatric condition and diabetes at the DVA Medical Center in Memphis, Tennessee. As part of his care, DVA periodically took blood samples from him. Unbeknownst to him (and perforce without his consent), NCIS prevailed upon DVA personnel to take an additional vial of blood (beyond that needed for the purpose of medical treatment) the next time Stevenson appeared as an outpatient. NCIS's sample was taken using the needle that was already in his arm. NCIS lacked probable cause for a search, and no search warrant was sought or issued in connection with the procurement of NCIS's sample.

Military charges ensued, and Stevenson moved to suppress. A Navy captain serving as a military judge granted the motion, and, on interlocutory government appeal, the appellate military judges of the United States Navy-Marine Corps Court of Criminal Appeals affirmed. The Judge Advocate General of the Navy certified the case to the United States Court of Appeals for the Armed Forces, which reversed and remanded for trial on the merits, and determination of whether leaving the needle in Stevenson's arm to take NCIS's blood sample was "a *de minimis* intrusion with respect to the Fourth Amendment and Mil. R. Evid. 312(f)."

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[2] From 1994 to 1999, Stevenson was on the temporary disability retired list. In 1999 he was transferred to the permanent disability retired list.

2. Stevenson's petition properly identifies the legal errors in the decision of the Court of Appeals. NIMJ and NVLSP submit this brief for the limited purpose of indicating (a) the nature and scope of the effect of the decision on review, (b) the process by which the Military Rule of Evidence at issue was developed, and (c) why certiorari should be granted despite the interlocutory nature of the decision below.

a. DVA operates the Nation's largest medical care system. It serves an enormous number of veterans. Military retirees are among the veterans who are eligible for DVA medical care. As of September 30, 1998, there were 1,462,448 military retirees, of whom 112,400 were either temporarily or permanently retired for disability. Dep't of Defense, *Defense Almanac* (1999). Retired regulars who are entitled to pay, as well as retired reservists who receive hospitalization from an armed force remain subject to court-martial jurisdiction under Article 2 of the UCMJ. 10 U.S.C. §§ 802(a)(4)-(5) (1994); *see McCarty v. McCarty*, 453 U.S. 210, 222 (1981).

For many years, military retirees were eligible for and typically received medical care from the separate system of facilities operated by the armed services, such as the National Naval Medical Center or Walter Reed Army Medical Center. This care can also be provided at DVA facilities. 10 U.S.C. § 1074(b) (1994). Under recent policy changes, military medical facilities have increasingly been limited to treating active duty personnel, much to the consternation of military retirees and career active duty personnel who had expected lifetime care from the military itself (as opposed to DVA). *See generally Sebastain v. United States*, 185 F.3d 1368 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1669 (2000). This shift is directly pertinent to the case at bar because it means that retirees will increasingly be forced to resort to DVA for medical attention. The class of which Stevenson is a member

is therefore not only already sizable, but will continue to expand.

There is no need to elaborate on the corrosive effects of the decision below beyond observing that it is difficult to imagine a course of conduct better calculated to erode the confidence of military retirees in the disinterestedness and candor of DVA personnel on whom they must increasingly rely for care. Beyond this, to the extent that it involves the commandeering of a public health care system for a non-health-related seizure, there is no ambiguity as to purpose, as was arguably the case in *Ferguson v. City of Charleston*, No. 99-936. Rather, the case involves an admittedly non-probable-cause, unconsented search for core law enforcement purposes, as in *City of Indianapolis v. Edmond*, 121 S. Ct. 447 (2000). Indeed, it is an a fortiori case to both *City of Indianapolis* and *City of Charleston* because it does not arise from an established, generic program, but rather, so far as the record shows, was entirely *ad hoc* and suspect-specific. Core Fourth Amendment principles are therefore clearly implicated.

b. The petition explains (at 10-12) that the armed forces lack a vital interest that would even arguably support the seizure of a retiree's blood under Mil. R. Evid. 312(f) in the absence of probable cause. In our view, in applying that rule—or, more fundamentally, in determining whether a reasonable expectation of privacy is implicated or whether a particular search and seizure is unreasonable—a distinction must be drawn between those who are on active duty and those who, like Stevenson and other retirees, are subject to the UCMJ in only an attenuated or technical sense.[3] While

[3] Analogous issues arise in other contexts under the UCMJ. For example, would language that was disrespectful of the President and therefore clearly punishable under Article 88, 10 U.S.C. § 888 (1994), if uttered by an officer on active duty also be punishable if uttered by a

Rule 312(f) cannot, of course, trump the Fourth Amendment, we assume the Court will explore whether the case can be disposed of through analysis of the rule rather than by reference to the Constitution. *See Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). In doing so, the Court should be mindful that the Military Rules of Evidence are not the product of anything resembling the kind of broad-based rule making process it is familiar with in connection with the rules of procedure and evidence that are developed through the Judicial Conference of the United States. *See generally* Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000).

c. Certiorari is ordinarily disfavored with respect to interlocutory decisions in criminal cases, but that policy is not inflexible. *E.g., Solorio v. United States*, 483 U.S. 435 (1987).[4] Because of the importance of the Question Presented from the standpoint of Fourth Amendment doctrine and the public policy implications noted above, as well as the unusual characteristics of the military criminal appellate process, a departure from the Court's ordinary approach is warranted.

The statutory framework for this Court's review of courts-martial is unlike that applicable to either state or civilian federal convictions. All federal criminal cases are appealable as of right to the courts of appeals, 28 U.S.C. §§ 1291-92 (1994), and in state cases, certiorari runs to "the

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retired officer? *See* 1 Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 2-22.30, at 64-65 & n.163 (2d ed. 1999).

[4] This case lies outside the Solicitor General's policy stated in the last sentence in Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 196 n.60 (7th ed. 1993), because the initial and second-stage appeals of the order granting Stevenson's motion to suppress were initiated by the government, not Stevenson. The Solicitor General has waived opposition in this case.

highest court of a State in which a decision could be had." 28 U.S.C. § 1257 (1994). Most military convictions, in contrast, are not subject to direct review in any court, *see generally* Eugene R. Fidell, *Military Rights of Appeal*, 8 DIST. LAW. No. 6, at 42 (July-Aug. 1984), and, more importantly, Congress made no provision for direct review by this Court of cases that either do not meet the sentencing threshold for review in the military judicial system or in which the Court of Appeals denies discretionary review. *See generally* Bennett Boskey & Eugene Gressman, *The Supreme Court's New Certiorari Jurisdiction Over Military Appeals*, 102 F.R.D. 329, 336 (1984).

The extraordinary constraints on appellate review of courts-martial in general and the absence of provision for certiorari to reach cases insulated from or refused review by the higher military courts make it urgent that this Court take a "hard look," as it did in *Solorio*, before concluding that the policy against certiorari in interlocutory criminal appeals should be invoked. Because the case may never return to the Court of Appeals and, even if it does, that court can deny review, there can be no assurance that Stevenson will ever be able to have the important issue present addressed here on direct review. *Cf. Garrison v. Hudson*, 468 U.S. 1301 (Burger, Circuit Justice 1984) (granting stay).[5]

Finally, the Court need have no concern that granting review in this case will open floodgates. Interlocutory appeals by the government under Article 62 of the UCMJ, 10 U.S.C. § 862 (1994), represent only a small fraction of the docket in the Court of Appeals.

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[5] Collateral review is unlikely if Stevenson is convicted since the military does not furnish free counsel for that purpose and public defender programs do not extend to military personnel. In any event, collateral review is not a substitute for direct review in an Article III court. *Guam v. Olsen*, 431 U.S. 195, 202 (1977). This Court is the only Article III tribunal with appellate jurisdiction over the Court of Appeals for the Armed Forces.

CONCLUSION

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

Respectfully submitted,

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