IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Joshua D. Fry Private (E-1) U.S. Marine Corps, Appellant.	APPELLANT'S BRIEF USCA Dkt. No. 11-0396/MC Crim.App. No. 201000179

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIAN L. MIZER
LCDR, JAGC, USN
Bar No. 33030
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
716 Sicard Street, SE, Suite 1000
Washington Navy Yard, D.C. 20374
(703) 600-0840

Issue Presented

I

APPELLANT PURPORTEDLY ENLISTED IN THE MARINE CORPS AFTER A JUDICIAL DETERMINATION OF HIS INCAPACITY TO CONTRACT, WHICH REMAINS IN EFFECT. WAS HIS ENLISTMENT VOID *AB INITIO*?

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Statement of Statutory Jurisdiction

Appellant received a sentence that included a punitive discharge, bringing his case within the lower court's jurisdiction. 10 U.S.C. § 866(b)(1) (2006). Following the lower court's review, Appellant timely filed a petition for grant of review with this Court, bringing his case within this Court's jurisdiction. 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

On July 20, 2009, a military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas, of one specification of fraudulent enlistment, two specifications of unauthorized absence, and four specifications of possessing child pornography in violation of Articles 83, 86, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 918(1) and 934 (2006).

Appellant was sentenced to confinement for four years, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed. General Court-Martial Order No. 1-09. In accordance with a pre-trial agreement, the convening authority suspended all confinement in excess of twelve months for a period of twelve months.

The lower court affirmed the findings and sentence on

January 27, 2011.[1] Appellant petitioned this Court for review on March 22, 2011. This Court granted review on May 26, 2011.

Statement of Facts

Joshua Fry was born to drug addicted parents who lived on the streets of Los Angeles. (R. at 316.) His father supported the couples' drug habit by shoplifting; his mother contributed through prostitution. (R. at 316.) Joshua was one-year-old when his father's arrest for shoplifting resulted in him being placed in foster care. (R. at 316.) His father would later die of a drug overdose. (R. at 317.) At age three, Joshua went to live with his paternal grandmother, Mary Beth Fry. (R. at 317.) Before he arrived at her home, the California Department of Social Services informed Ms. Fry that her grandson was mentally retarded and that he was unable to talk. (R. at 317.) Testing revealed that Joshua had an IQ of 70. (R. at 318.) Joshua was later diagnosed with autism. (R. at 319; A.E. II at 3.)

Dr. Julie E. Schuck, a licensed psychologist, began treating Joshua in 2000, when he was twelve-years-old. (R. at 316.) When she began treating Joshua, he had difficulty maintaining eye contact and with maintaining conversations with his peers. (R. at 311.) And he had a repetitive interest in being a policeman,

[1] *United States v. Fry*, No. NMCCA 201000179(N-M. Ct. Crim. App. January 27, 2011).

firefighter, and a soldier. (R. at 311.) Eventually, Joshua was able to make eye-contact, have facial expressions, and properly greet people. (R. at 311.) But his fixation with being either a policeman or a soldier continued. (A.E. XIV.) He would lie or steal in order to obtain fake guns, badges, and holsters and, on at least one occasion, he was found publicly impersonating policemen and soldiers. (A.E. XIV.)

In 2006, Dr. Nida Nicasio, a licensed psychiatrist working with the Orange County Mental Health care Services Agency, again diagnosed Joshua with autism. (A.E. II at 3; A.E. II Exhibit 1.) After Joshua was arrested in January 2006, for possessing stolen I-Pods and a knife at Newport Harbor High School, she recommended that he be sent to a residential treatment facility. (A.E. II at 4; A.E. II Exhibit 1.)

Ms. Fry petitioned the Superior Court sitting in Orange County California for an order appointing her as a limited conservator over Joshua. (A.E. II at 4; A.E. II Exhibit 3.) Joshua was represented by the Orange County Public Defender. (A.E. II at 58.) Among other things, Ms. Fry petitioned the court to control and limit the right of Joshua to contract. (A.E. II at 49.) According to the petition, Joshua is "impulsive and lacks ability to comprehend the terms of a contract." *Id.*

After a hearing on April 10, 2006, the Superior Court of California in Orange County granted the petition for limited conservatorship over Joshua, who was then eighteen and otherwise legally considered to be an adult. (A.E. II at 6; A.E. II Exhibit 4; 5.) The Court's order allowed Ms. Fry to fix Joshua's residence, make decisions regarding his education, and it gave her exclusive authority to enter into contracts and to make medical decisions on his behalf. (A.E. II at 6; A.E. II Exhibit 4; 5.) The Court found that Joshua was developmentally disabled as defined in California Probate Code § 1420, and that he was unable to provide for his needs for physical health, clothing, food, and shelter. (A.E. II at 6; A.E. II Exhibit 4; 5.) The conservatorship was in place at the time of trial, and it remains in effect as of this filing.

Using her new authority as Joshua's conservator, Ms. Fry enrolled Joshua in the Devereux Cleo Wallace Treatment Facility in Denver, Colorado. (A.E. II at 9; A.E. II Exhibit 6.) The institution is a lock down facility advertised as "Colorado's premier facility for the treatment of psychiatric, emotional, and behavior problems in children and adolescents ranging from 8 to 21." (A.E. II at 9; A.E. II Exhibit 6.) Devereux provided the highly intensive inpatient therapy recommended by Dr. Nicasio. After fifteen months at Devereux, Joshua returned to Irvine,

California, where he lived in an adult group home for the mentally disabled.

On Saturday, January 5, 2008, Gunnery Sergeant Matthew M. Teson, a Marine Corps recruiter, picked Joshua up at the group home and enlisted him in the Marine Corps. (R. at 146-47.) The two had met at a Young Marines function two years earlier before Joshua was expelled from Newport Harbor High School, and they had kept in contact with one another. (R. at 141; A.E. XXI at 3.) The military judge found that, at the time of Joshua's enlistment, Gunnery Sergeant Teson knew or should have known Joshua had been arrested and that he had been expelled from Newport Harbor High School. (A.E. XXI at 3.) He also found that Gunnery Sergeant Teson knew or should have known that Joshua graduated high school at an institution for children and adolescents with psychiatric, emotional, or behavioral problems. (A.E. XXI at 3.)

Gunnery Sergeant Teson also ran a criminal background check on Joshua that reflected that he had been charged with vehicle burglary, receiving stolen property, and carrying a dirk or dagger. (A.E. XXI at 3-4.) He had also been advised that Ms. Fry was Joshua's conservator and that she did not want Joshua to join the Marine Corps. (A.E. XXI at 4.) "Without investigating the conservatorship further, GySgt Teson advised the accused that the conservatorship and his grandmother's opposition to him joining the

Marine Corps were irrelevant in that he was over 18 years of age." (A.E. XXI at 4.)

On January 7, 2008, Joshua passed his physical and the Armed Services Vocational Aptitude Battery at Military Entrance Processing Station, Los Angeles, California. (A.E. XXI at 4.) A hospital corpsman who later examined Joshua was surprised to see that the record of the physical exam conducted that day did not reference Joshua's previous appendectomy or the resulting scar on his abdomen. (R. at 50.)

A week later, Private Fry entered bootcamp. He was counseled for missing training and for being on bed rest and light duty. (A.E. XXI at 5.) He stole peanut butter from the chow hall and kept it in a sock. (A.E. XXI at 5; R. at 34, 75.) He urinated in his canteen. (A.E. XXI at 5; R. at 40.) He refused to shave and lied about having shaved. (A.E. XXI at 5.) On one occasion he refused to eat his food and, when he was confronted by his drill instructors in the mess hall, he attempted to escape bootcamp. (R. at 38-39; 78-79.) One of his drill instructors testified he was in the bottom twenty-five percent of recruits in his platoon. (R. at 45.)

During one of his many visits to medical, he told Hospital Corpsman First Class Erin Lawlor that he had autism. (R. at 49-50.) Because his medical record contained nothing to substantiate

Private Fry's claims, she called Ms. Fry. (R. at 55.) Ms. Fry verified that he had been diagnosed with autism, and told HM1 Lawlor that she wanted the Marine Corps to send him home. (R. at 55.) Ms. Fry informed HM1 Lawlor that he was medically disabled and receiving Social Security Disability Insurance as a result of his mental condition. (R. at 58.) HM1 Lawlor had never encountered a Marine with autism or a Marine who was medically disabled and receiving Social Security Disability Insurance. (R. at 58; A.E. IX at 4.)

HM1 Lawlor contacted her supervisor, Lieutenant Phelps, a physician's assistant. (R. at 58.) Lieutenant Phelps never examined Private Fry. (R. at 58.) Lieutenant Phelps told her that there was nothing in Private Fry's medical record diagnosing him with autism and that Private Fry was therefore fit for duty. (R. at 57-58.)

HM1 Lawlor informed Private Fry's drill instructors he was fit for duty. Private Fry's training record indicates, "SNR stated that he had been diagnosed with having asthma and as being autistic. SNR was sent to medical to be evaluated on training day 15 and was sent back as full duty. I [Senior Drill Instructor] spoke with HM1 [Lawlor] personally and she told me there was nothing wrong with the recruit." (A.E. XXI at 5.)

After receiving a phone call from Ms. Fry, Gunnery Sergeant Teson called Private Fry's Senior Drill Instructor, Staff Sergeant Louis L. Jenkins. (R. at 156.) Staff Sergeant Jenkins told him that Private Fry was a substandard recruit and that he was on the verge of being dropped because he was missing so much training. (R. at 156.) But Staff Sergeant Jenkins also informed him that he was going to take a "special interest" in Private Fry's success. (R. at 156.) There would be no additional negative entries in Private Fry's training record. (A.E. XXI at 6.) Staff Sergeant Jenkins would later testify that Private Fry was his most improved recruit. (R. at 69.) Private Fry graduated from recruit training on April 11, 2008.

While awaiting training at the School of Infantry, Private Fry succeeded in twice absenting himself from his unit. During the first of his brief periods of unauthorized absence he slept on a bench across from the Post Exchange while wearing his uniform. (R. at 269.) During the second, he was apprehended on another bench at Camp Talega. (R. at 274.) A search of his cellular phone and computers revealed child pornography.

Before the trial, the government requested that Captain Bruce T. Reed examine Private Fry. Captain Reed was a naval reservist and a licensed psychologist in California. (R. at 113.) Captain Reed testified that he was familiar with "parts of" Private Fry's

medical history and his medical record, "what there was of it." (R. at 115.) When the prosecutor asked if Private Fry had the capacity to understand the effect of enlisting in the Marine Corps he replied, "I would say that's a partial yes." (R. at 115.) When asked if Private Fry was able to appreciate the nature and quality of his conduct Captain Reed replied, "I would believe yes, Mostly, yes." (R. at 116.) When asked again by the prosecutor if he understood the means and effect of being enlisted and enlisting in the armed forces Captain Reed replied, "Well, let me-I'm going to hedge that a bit." (R. at 117.) The prosecutor then asked Captain Reed if "by a 51 percent standard do you believe he was able to understand the effect of being enlisted in the armed forces?" (R. at 117.) Captain Reed replied, "Well, when you ask me 51 percent or more, I would have to say yes." (R. at 117.)

Captain Reed conceded he did not have Private Fry's full medical history when he made his diagnosis that Private Fry could more likely than not understand the effect of enlisting in the armed forces. (R. at 122.) He also had no knowledge that Private Fry was a conservatee. (R. at 123.) He described his reaction to later learning that Private Fry was a conservatee. (R. at 123.) "I was aghast in that I did not-I have never seen anybody on active duty that was also having a conservator assigned to them." (R. at 123.) Captain Reed, who in his civilian capacity had worked with

California's probate courts establishing conservatorships, testified that a conservatee can't perform "certain financial or otherwise obligations." (R. at 123.) "I don't necessarily see that he could go and buy a car or something like that." (R. at 124.)

Captain Reed was correct; at the time of his enlistment Joshua Fry could not have purchased a car in California. Philip Gold, the attorney who drafted Ms. Fry's petition for a limited conservatorship over Joshua, explained in a sworn declaration that Joshua had no capacity to contract. (A.E. X at 4.) In granting the petition for a limited conservatorship, the Superior Court relied on a sworn declaration of Dr. Schuck, who had treated Joshua for a decade. (A.E. II at 47; A.E. XIV.) In a later affidavit, she stated Joshua did not have the "mental capacity to understand the significance of his enlistment in the military." (A.E. XIV at 4.) And, as a result of the Superior Court's order, federal law prohibits Joshua from possessing firearms or ammunition. 18 U.S.C. 922(g)(4); *United States v. B.H.*, 466 F. Supp. 2d 1139 (N.D. Iowa 2006).

But the military judge found he could enlist in the Marine Corps. (A.E. XXI.) The military judge based his ruling on Private Fry's *de facto* capacity to contract, which was evidenced by his ability to pass the ASVAB, graduate from recruit training, and

stand watch at the School of Infantry. (A.E. XXI at 9.) Alternatively, the military judge found Ms. Fry authorized Private Fry's constructive enlistment by failing to object to the contract. (A.E. XXI at 12-13.)

The lower court affirmed the rulings of the military judge citing the fact that Private Fry "lived in an organized society." *United States v. Fry,* No. NMCCA 201000179(N-M. Ct. Crim. App. January 27, 2011). The Court concluded the "California court's issuance of a conservatorship did not mean that the appellant did not have the capacity to understand the significance of his enlistment." *United States v. Fry,* No. NMCCA 201000179(N-M. Ct. Crim. App. January 27, 2011).

Summary of Argument

Due to Appellant's mental disabilities, a California court found there was clear and convincing evidence Appellant's right to contract should be restricted and that his grandmother and conservator should be given control of that right. (A.E. II at 59.) Additionally, the very establishment of a conservatorship is a judicial determination of the incapacity of the conservatee. Cal. Civ. Code § 40 (2011); 15 Cal. Jur. Contracts § 60 (2011). Under California law, as well as federal law and the Supreme Court's holding in *In Re Grimley*, 137 U.S. 147 (1890), Appellant's incapacity to contract rendered his enlistment *void*

ab initio, and he was never properly subject to court-martial jurisdiction.

Argument

I.

PRIVATE FRY'S ENLISTMENT IN THE MARINE CORPS WAS VOID *AB INITIO*.

Enlistment contracts are governed by principles of contract law. *In re Grimley*, 137 U.S. 147 (1890); *Santiago v. Rumsfeld*, 407 F. 3d 1018 (9th Cir. 2005); *Winch v. England*, 327 F. 3d 1296 (11th Cir. 2003); *Peavy v. Warner*, 493 F. 2d 748 (5th Cir. 1974). Under traditional conflict-of-law rules, capacity to contract is to be determined by the law of the place of contracting. 16 AM JUR. 2d Conflict of Laws § 97 (2010); *Irving Trust Co. v. Day*, 314 U.S. 556 (1942). Under California law, where Appellant's enlistment contract was signed, "[t]he establishment of a conservatorship under Probate Code §§ 1400-2893 constitutes a judicial determination of incapacity." California Law of Contracts, 2.26 (citing California Civil Code § 40(b)); 14 Ca. Jur. Contracts §§ 59-60 (2011); *Hogan v. Robinson*, 2007 U.S. Dist. LEXIS 11705 (E.D. Cal. 2007)(Continuation of conservatorship under California law established lack of legal capacity to join federal lawsuit.)

In the case of developmentally disabled adults, California law provides for a limited conservatorship. Under a limited

conservatorship, disabled adult conservatees retain all legal and civil rights not restricted by a court order. Cal. Prob. Code § 1801(d). California Probate Code states that conservatees shall retain seven powers or controls unless those powers or controls are restricted by court order on a petition from the limited conservator:

> (1) To fix the residence or specific dwelling of the limited conservatee;
> (2) Access the confidential records and papers of the limited conservatee;
> (3) To consent or withold consent to the marriage of, or the entrance into a registered domestic partnerhsip by, the limited conservatee;
> (4) The right of the limited conservatee to contract;
> (5) The power of the limited conservatee to give or withhold medical consent;
> (6) The limited conservatee's right to control his or her own social and sexual contacts and relationships;
> (7) Decisions concerning the education of the limited conservatee.

Upon a showing of clear and convincing evidence, the Court restricted Appellant's right to contract, and gave Ms. Fry control of that right. (A.E. II.); *Conservatorship of Sanderson*, 106 Cal. App. 3d 611, 620 (Cal. App. 1980)(Setting forth clear and convincing burden for conservatorships because "to allow many of the rights and privileges of everyday life to be stripped from an individual under the same standard of proof applicable to run-of-the mill automobile negligence actions cannot be tolerated.") In fact, of the seven rights listed in California's Probate Code,

Appellant retained only the right to marry or enter into a domestic partnership and control his social and sexual relationships.

Once a court has adjudged one to be incompetent, his contract is deemed to be void, "not because he is unable, unassisted, properly to care for his property, or lacks understanding of the nature and effect of the particular transaction, but because the decree of incompetency was notice to the world of his incapacity to make a valid contract." *Hellman Commercial Trust & Sav. Bank. v. Alden*, 275 P. 794 (Cal. 1929); *O'Brien v. Dudenhoeffer*, 16 Cal. App. 4th 327 (Cal. App. 1993); 14 Cal. Jur. 3d Contracts § 59 (2011). Agreements between incompetent persons, after a guardian has been appointed, are void. *O'Brien v. United Bank & Trust Co.*, 100 Cal. App. 325 (Cal. App. 1929). Where a guardian has been appointed for an incompetent person, he can only be restored to capacity by the procedures established in the California Probate Code § 1470. *Estate of Kay*, 181 P. 2d 1 (Cal. 1947).

The lower court held that "California did not determine that the appellant was incapable of managing his own affairs, incompetent, or insane." *United States v. Fry*, No. NMCCA 201000179(N-M. Ct. Crim. App. January 27, 2011). The court further held Appellant fully retained his right to enter into contracts, and that his contracts were merely voidable by his conservator, Ms. Fry. *Id.* For this proposition, the lower court cited, Cal. Prob.

Code § 1801(d), which states limited conservatees retain all rights not judicially designated as legal disabilities and specifically granted to the conservator. *Id.* But the court failed to explain how Appellant retained the right to contract when the Superior Court, acting pursuant to §§ 1801(d) and 2351.5 of the Probate Code, expressly limited Appellant's right to enter into contracts on his behalf and gave Ms. Fry control of that right. (A.E. II at 65-66.)[2]

The lower court cited no authority for its interpretation of the California Probate Code, which would effectively render the appointment of a conservator all but meaningless given that "[t]he purpose of a conservatorship is to protect persons who are unable to make reasonable financial decisions about their resources." *Young v. Thomas*, 210 Cal. App. 3d 812 (Cal. App. 1989). In fact, any authority for the lower court's holding was abrogated in 1979, when the California legislature amended its probate code to reverse *Board of Regents v. Davis*, 14 Cal. 3d 33 (Cal. 1975), a judicial decision finding that limited conservatees retained some capacity to contract. 14 Ca. Jur. Contracts § 60 (2011). And its interpretation conflicts not only with the decisions of the California courts cited above, but also of other federal courts

[2] The word "limited" is a term of art under California law, and it constitutes a revocation of the conservatee's right to contract. (A.E. X.); 14 Ca. Jur. Contracts § 60 (2011).

that have addressed the impact of a conservatorship on a conservatee's capacity to enter into binding legal agreements. *See e.g., Bacher v. Patencio*, 368 F. 2d 1010, 1011 (9th Cir. 1966)(Chambers, J., concurring)("The existence of this conservator deprived the [conservatee] of his personal right to make California contracts about his land in California, just as if he were wildly insane."); *Bank of America v. Saville*, 416 F. 2d 265 (7th Cir. 1969)(Invalidating gifts of stock because conservatee lacks capacity to make an effective gift.).

Like California, Congress has codified the longstanding rule that incompetent persons cannot enlist in the armed forces. 10 U.S.C. §§ 504; 802. The lower court correctly noted that Article 2, UCMJ, was intended to codify *In Re Grimley*, 137 U.S. 147 (1890), which invalidated enlistment contracts "where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations." *Grimley*, at 153.

This Court has also recognized that lack of capacity to contract or a lack of voluntariness may void an enlistment contract. *United States v. Valadez*, 5 M.J. 470, 474 (C.M.A. 1978). When Congress amended Article 2, UCMJ, to abrogate this Court's recruiter-misconduct jurisprudence in 1980, it expressed its intention that this Court's jurisprudence related to capacity to

contract and lack of voluntariness remain undisturbed. "It also overrules that portion of *United States v. Valadez*, 5 M.J. 470, 473 (C.M.A. 1978), which stated that an uncured regulatory enlistment disqualification, not amounting to a lack of capacity or voluntariness, prevented application of the doctrine of constructive enlistment." SEN. REP. No. 96-197, at 122(1980). At time Private Fry purportedly enlisted, he lacked the capacity to contract, and his enlistment was void. *Valadez*, 5 M.J. at 474.

The lower court held that a "state has [no] legal authority to limit the right of a citizen to enlist in the armed forces by the creation of a limited conservatorship." *United States v. Fry*, No. NMCCA 201000179(N-M. Ct. Crim. App. January 27, 2011). Appellant concedes a state may not restrict its citizens from enlisting in the armed forces through the arbitrary creation of a limited conservatorship or through any other means. But state judicial determinations of incapacity to contract govern enlistment contracts signed in that jurisdiction. 16 AM JUR. 2d Conflict of Laws § 97 (2010); *Irving Trust Co. v. Day*, 314 U.S. 556 (1942). Following the establishment of a conservatorship over Appellant, "the decree of incompetency was notice to the world of his incapacity to make a valid contract." *Hellman Commercial Trust & Sav. Bank.*, 275 P. 794.

The lower court concluded that capacity to sign enlistment

contracts is solely governed by *In Re Grimley*, 137 U.S. 147 (1890), and the codification of that case found in Article 2, UCMJ and 10 U.S.C. § 504. But even if state judicial determinations of incapacity to contract are not dispositive in analyzing capacity to enlist as the lower court suggests, they constitute compelling evidence Appellant was suffering from a "disability which, in its nature, disables a party from changing his status or entering into new relations." *Grimley*, 137 U.S. at 153.

In the context of federal firearms prosecutions, federal courts routinely look to state law to determine the federal question of whether an individual has been adjudicated as mentally defective or has been committed. *United States v. Whiton*, 48 F. 3d 356, 358 (8th Cir. 1995); *United States v. Giardina*, 861 F. 2d 1334, 1335 (5th Cir. 1988). At the very least, this Court should seek "guidance from state law..." on the similar federal question of mental capacity to contract. *Giardina*, 861 F. 2d at 1335; *see also*, Fed. R. Civ. P. 17(b)(requiring that capacity of an individual to sue be determined by the law of that individual's domicile.)

The lower court relied solely on the military judge's *ad hoc* use of Rule for Courts-Martial 706 to determine Appellant's capacity to contract at the time of his enlistment. (A.E. XIII.) Without the benefit of Appellant's medical history, or even

knowledge that he was a conservatee, Dr. Reed opined Appellant could more likely than not "understand the effect of being enlisted in the armed forces." (R. at 117.) His written report states Appellant did not have a severe mental disease or defect, and he failed to properly diagnose Appellant as autistic as other psychologists and psychiatrists had done for over a decade. (A.E. XIII.) The lower court noted the "caveat" Dr. Reed placed on his opinion, but found Appellant's capacity to contract in "the record as a whole." *United States v. Fry*, No. NMCCA 201000179, n. 4 (N-M. Ct. Crim. App. January 27, 2011). Given Appellant's extensive medical history to the contrary, and given that a judicial determination of incapacity to contract was made by clear and convincing evidence before a court established and better equipped to make such determinations, the military judge's factual finding of capacity to contract is clearly erroneous. *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993).

Finally, the doctrine of constructive enlistment is inapplicable to this case. The lower court held Appellant's grandmother failed to void his enlistment contract. *United States v. Fry*, No. NMCCA 201000179, n. 4 (N-M. Ct. Crim. App. January 27, 2011). Assuming for the sake of argument that Ms. Fry's request to HM1 Lawlor that she send Appellant home from bootcamp does not constitute an attempt to void Appellant's contract, the lower

court's reliance on cases involving the constructive enlistment of minors over the age of 16 is misplaced. Unlike the case of a sixteen-year-old enlistee whose parents do nothing to void his contract, contracts made after a judicial determination of incapacity are void, not merely voidable. Restatement Contracts (2nd) § 13; *Rubenstein v. Dr. Pepper Co.*, 228 F. 2d 528, 536 (8th Cir. 1955); *United States v. Blanton*, 7 U.S.C.M.A. 664 (C.M.A. 1957). If this case can be analogized to cases involving the enlistment of minors at all, the facts of *Blanton* more closely parallel this case. Like the fourteen-year-old "soldier" in *Blanton*, at no time during Appellant's purported enlistment was he "competent to serve in the military." *Blanton*, 7 U.S.C.M.A. at 667.

Because Appellant has at all times lacked the capacity to enter into an enlistment contract and voluntarily submit himself to military authority, the doctrine of constructive enlistment, which requires an eventual submission to military authority, is inapplicable. *See, United States v. McDonagh*, 14 M.J. 415, 417 (C.M.A. 1983); S. Rep. No. 96-197, 96th Cong., 1st Sess. 121, 122 (1980)("A person who initially does not voluntarily submit to military authority or who lacks the capacity to do so may do so successfully at a later time and jurisdiction shall attach at that moment.") And although Appellant was paid, he was never entitled

to military pay and allowances following a judicial determination of incapacity, and he should not even receive a DD 214. 39 Comp. Gen. 742, 747-748 (1960). Appellant's enlistment contract was void, and he was never subject to court-martial jurisdiction.

WHEREFORE, this Honorable Court should set aside the findings and sentence and dismiss this case with prejudice.

RESPECTFULLY SUBMITTED

/s/

BRIAN L. MIZER
LCDR, JAGC, USN
BAR NO. 33030
APPELLATE DEFENSE COUNSEL
NAVY-MARINE CORPS APPELLATE
REVIEW ACTIVITY
716 SICARD STREET, SE, SUITE 1000
WASHINGTON NAVY YARD, D.C. 20374
(703) 600-0840

CERTIFICATE OF FILING AND SERVICE

I certify that I will electronically file a copy of the foregoing with the Clerk of Court on June 23, 2011, pursuant to this Court's order dated July 22, 2010, and that a copy was hand-delivered to Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity on June 23, 2011. I further certify that the original and seven copies of the Joint Appendix were filed with the Court on June 23, 2011, and that a copy was hand-delivered to Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity on June 23, 2011.

/s/

BRIAN L. MIZER
LCDR, JAGC, USN
Bar No. 33030
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
716 Sicard Street, SE, Suite 1000
Washington Navy Yard, D.C. 20374
(703) 600-0840