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 REPLY 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

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COMES NOW Appellant, and provides the following reply to the government's answer:

I

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

The government invites this Court's attention to the purported misrepresentations of Appellant, a developmentally disabled adult with a lifelong obsession with becoming a policeman or a solider. Government Brief at 7. The government also invites this Court's attention to the equally irrelevant misrepresentations of Gunnery Sergeant Teson regarding his pre-enlistment conversations with Appellant's conservator, Ms. Fry. Government Brief at 6. Were it necessary, there is ample evidence in the record to find this finding of fact by the military judge to be clearly erroneous given Gunnery Sergeant Teson's conduct, Ms. Fry's testimony that she never spoke with Gunnery Sergeant Teson before he enlisted Appellant, or the conclusion of the Investigating Officer at Appellant's Article 32 that Gunnery Sergeant Teson's testimony at that hearing "[was] not believable and he may have even purjured himself." (R. at 200); Report of Investigating Officer dated August 18, 2008 at 4. But these facts are irrelevant to the sole issue before this Court: Appellant's continuing lack of capacity to contract and change his status from civilian to solider.

A. Appellant has no capacity to enter into contracts anywhere in the United States, and the government cites no authority to the contrary.

Citing no authority, the government asserts the limited conservatorship at issue in this case places no limit on the Conservatee's authority to enter into contracts, and merely authorizes the Conservator to rescind ill-advised contracts. Government Brief at 13. This argument wholly ignores the statutory scheme put in place for developmentally disabled adults by the state legislature in California.

Were it not for the order establishing the limited conservatorship at issue in this case, Appellant would have in fact retained the capacity to contract. "Except as otherwise provided in the order appointing a limited conservator, the appointment does not limit the legal capacity of the limited conservatee to enter into transactions or types of transactions." Cal. Prob. Code § 1872(b) (2011). A court is not required to wholly limit a conservatee's capacity to contract as was done in this case. Cal. Prob. Code § 1873 (2011). In Appellant's probate case, the court could have authorized the conservatee to enter into certain types of transactions, or transactions under a specified dollar amount, and it could have entered a provision authorizing the conservator to "avoid any transaction made by the conservatee pursuant to the authority of the order if the

transaction is not one into which a reasonably prudent person might enter." *Id.* The Court did none of these things and instead, using the term of art provided for in the California Probate Code, limited Appellant's right to enter into contracts. In 1979, the California legislature, after considering amendments to the probate code that would have supported the government's argument, rejected those provisions and put in place the current statutory scheme. *O'Brien v. Dudenhoffer*, 16 Cal. App. 4th 327, 333-335 (Cal. App. 1993).

Contrary to what is contained in the government's brief, California courts grant full faith and credit to conservatorships established in other states. *See e.g., Gibson v. Westoby*, 115 Cal. App. 2d 273 (Cal. App. 1953)(Granting full faith and credit to New Mexico judicial determination of guardianship rending California contract void). Likewise, this Court must also grant full faith and credit to the Superior Court's order establishing a conservatorship. 28 U.S.C. § 1738 (2006); *Migra v. Warren City School Dist. Bd. Of Education*, 465 U.S. 75, 79 (1984); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932). Appellant's enlistment contract is void *ab initio*. *Hellman Commercial Trust & Sav. Bank. v. Alden*, 275 P. 794 (Cal. 1929); *United States v. Valadez*, 5 M.J. 470, 474 (C.M.A. 1978).

The government correctly notes that California has codified

the common-law rule that foreign personal representatives, such as executors and guardians, are without authority to act outside the state of their appointment. Cal. Code Civ. Proc. § 1913 (2006); *See e.g., Fehldman v. Gross*, 106 F. Supp. 308, 310 (E.D. Ohio 1952). But § 1913 cannot be misconstrued as a legislative declination to grant "full faith and credit to the guardianships of other states." Government Brief at 12. To the contrary, California courts routinely cite § 1913 for the proposition that judicial records, such as the court-ordered conservatorship in this case, are to be given full faith and credit by California courts. *R.S. v. Pacificare Life & Health Ins. Co.*, 194 Cal. App. 4th 192, 201 (Cal. App. 2011); *Ehrenclou v. MacDonald*, 117 Cal. App. 4th 364, 373 (Cal. App. 2004).[1]

B. Together, 10 U.S.C. §§ 504, 505, and 802, codify the holding in In Re Grimely, 137 U.S. 147 (1890), that a party that lacks the capacity to change his status may not validly do so.

In amending Article 2, UCMJ, Congress expressed its intent 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

[1] The government also makes much of the fact that Appellant retained the rights to vote, marry, and to control his personal and sexual relationships. Government Brief at 15-16, 25. Unlike the power to contract, the record is silent on the need for a conservator to control these rights. Absent some evidence Appellant was harming himself with marriages or voting, the Court may have not elected to wade into the constitutional and public policy issues involved with limiting these rights. *See e.g., Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Maine 2001). But speculation is not required in this case, which does not involve a marriage.

changing his status or entering into new relations." *Grimley*, at 153; SEN. REP. No. 96-197, at 122 (1980). The age and mental competency components of *Grimely* can be found in 10 U.S.C. §§ 504, 505 (2006).

Section 504 prohibits the enlistment of anyone who is insane. 10 U.S.C. § 504 (2006). Although the statute does not define insanity, 1 U.S.C. § 1 (2006), defines insanity in language similar to that found in *Grimely*. The word insane, "shall include every idiot, lunatic, insane person, and person *non compos mentis*." *Id.* Latin for "not master of one's mind", the phrase *non compos mentis* "generally refers to someone incapable of handling her own affairs or unable to function in society." *Smith-Haynie v. District of Columbia*, 155 F. 3d 575, 579 (D.C. App. 1998); Black's Law Dictionary, 1151 (9th Ed. 2008). The Supreme Court of California has defined the phrase to include "all degrees of mental incompetency known to the law." *Hellman Commercial Trust & Sav. Bank. v. Alden*, 275 P. 794, 799 (Cal. 1929); Black's Law Dictionary, 948 (5th Edition 1979)("This is a very general term embracing all varieties of mental derangement.") The phrase has even been used to describe someone who is intoxicated. *See e.g., Mont. V. Egelhoff*, 518 U.S. 37, 45 (1996)(citations omitted); *May v. State*, 253 Miss. 597, 601 (Miss. 1965).

Despite the broad definition generally attributed to *non compos mentis*, and the equally broad language involving disabilities to contract found in *Grimely*, the government submits insanity is limited to the narrow definition of mental capacity to stand trial found in Rule for Courts-Martial 909. Government Brief at 23. Absent some authority for this proposition, *Grimely*, the stated Congressional intent to codify *Grimely*, and the rule of lenity all require this Court to find Appellant's *de facto* and *de jure* incapacitation rendered him *non compos mentis* for purposes of 10 U.S.C. §§ 504 and 802.

The government correctly notes that California courts may appoint conservators for developmentally disabled adults who, although not insane or incompetent, require direction in the management of their affairs. Government Brief at 12-13. According to the petition at issue in this case, Appellant is "impulsive and lacks ability to comprehend the terms of a contract." (A.E. II at 49.) The petition also noted Appellant "cannot control his impulsivity." (A.E. II at 46.) Appellant's treating psychologist, Dr. Schuck, states in her sworn affidavit Appellant lacked the "mental capacity to understand the significance of his enlistment in the military." (A.E. XIV at 4.) "Developmentally, he is mentally like a child at the age of 14." *Id.*

Upon a showing of clear and convincing evidence, the court approved the petition without modification, and it limited Appellant's ability to enter into contracts. Together, the petition and subsequent court-ordered conservatorship call into question both the voluntariness of Appellant's actions and his capacity to understand their significance.

The only medical evidence to the contrary in the record is the equivocal opinion of Dr. Reed, who never reviewed Appellant's complete medical history before forming his opinions in this case. (R. at 115.) Dr. Reed's conclusions, including the finding Appellant suffered no severe mental disease or defect, are astonishing, and they should be given little weight by this Court in light of the overwhelming evidence to the contrary.

Bereft of medical evidence, the government asks this Court to rely on the observations of lay witnesses neither tasked nor trained to determine an individual's mental capacity to contract. Government Brief at 18-20. Appellant's ability to marginally complete the simple and mundane tasks required during basic training is hardly remarkable given that he had just completed fifteen months under highly regimented conditions at the Devereux Cleo Wallace Treatment Facility in Denver, Colorado. (A.E. II at 9; A.E. II Exhibit 6.) Like the testimony of Dr. Reed, this evidence should be given little weight as this Court determines

whether Appellant had the "capacity to understand the significance of enlisting in the armed forces...." 10 U.S.C. § 802(b) (2006).

C. Appellant has at all times lacked the capacity to voluntarily submit himself to military authority pursuant to 10 U.S.C. §§ 504 and 802, and he cannot constructively enlist.

In *United States v. Blanton*, 7 U.S.C.M.A. 664 (C.M.A. 1957), this Court addressed the fifteen-month enlistment of a fourteen-year-old boy. As in this case, which involves a developmentally disabled adult with the mind of a fourteen-year-old boy, "the question is one of legal competency to effect a change of status." *Blanton*, at 666. Appellant has not had the legal competency to change his status since it was judicially limited on April 19, 2006.

Nothing in *Blanton* suggests the apparent acquiescence of Freddie Blanton's parents or guardians to his fifteen-months of military service would have made his contract any less void. Similarly, even assuming Ms. Fry's request to HM1 Lawlor that she return Appellant to her constitutes acquiescence, her conduct is irrelevant given Appellant has never been "legally competent to serve in the military." (R. at 55.); *Blanton*, at 667.

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

RESPECTFULLY SUBMITTED

/s/

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CERTIFICATE OF FILING AND SERVICE

I certify that I will electronically file a copy of the foregoing with the Clerk of Court on August 4, 2011, pursuant to this Court's order dated July 22, 2010, and that a copy was electronically-delivered to Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity on August 4, 2011.

/s/

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