IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
	)	Crim. App. Dkt. No. 201000179
v.	)	
	)	USCA Dkt. No. 11-0396/MC
Joshua D. FRY, Private (E-1) U.S. Marine Corps, Appellant	)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

KEVIN D. SHEA
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
202-685-8378,fax 202-685-7687
Bar no. 35125

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
202-685-7682,fax 202-685-7687
Bar no. 31714

Index

Table of Authorities

Issue Presented

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*?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), because Appellant's approved sentence included a bad-conduct discharge. This Court has jurisdiction in this case based on Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A military judge sitting as a general court-martial, convicted Appellant 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, UCMJ, 10 U.S.C. §§ 883, 886 and 934 (2006). The Military Judge sentenced Appellant to confinement for four years, forfeitures 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 the sentence executed. In accordance with a pretrial agreement, the Convening Authority suspended all confinement in excess of twelve months for a period of twelve months.

The Record of Trial was docketed with the lower court on March 16, 2010. After Appellant and the Government submitted briefs, the lower court rendered its decision without hearing oral argument or ordering supplemental briefs. *United States v. Fry*, No. 201000179, 2011 CCA LEXIS 5 (N-M. Ct. Crim. App. Jan. 27, 2011). The lower court affirmed the findings and the sentence.

On March 22, 2011, Appellant filed a petition for grant of review with this Court. On May 26, 2011, this Court granted review.

Statement of Facts

A. In January 2008, Appellant enlisted in the Marine Corps.

On January 7, 2008, Appellant went to the Military Entrance Processing Station (MEPS) in Los Angeles, California, and completed and passed the Armed Services Vocational Aptitude Battery (ASVAB) with an Armed Forces Qualification Test (AFQT) score of 56. (J.A. 238.) That same day, Appellant signed blocks 13 and 18 of an enlistment document of the Armed Forces of the United States (DD Form 4) certifying his understanding of the terms of the enlistment contract and confirming his enlistment in the Marine Corps. (J.A. 205, 218.) On January 14, 2008, Appellant took the oath of enlistment. (J.A. 219.) Appellant signed block 22a of DD Form 4 confirming his

enlistment into the regular component, shipped to boot camp at MCRD San Diego, to undergo recruit training, and began drawing military pay. (J.A. 205-06.) Before he shipped to boot camp, Appellant never reported that he was autistic in any written documents or forms. (J.A. 206.)

At boot camp, Appellant struggled early. (J.A. 206-07.) Between January 18, 2008, and February 7, 2008, Appellant received negative counseling because he: (1) failed to make satisfactory progress due to missed training (bed rest and light duty); (2) stole peanut butter from the chow hall; (3) urinated in his canteen instead of requesting permission to use the head; (4) refused to eat chow and left chow without permission; (5) failed to shave (and lied about not shaving); and, (6) was suspected of malingering. (J.A. 206.)

At one point during boot camp, Appellant told an Independent Duty Corpsman (IDC) that he had autism. (J.A. 3, 206.) Because of Appellant's revelation, the IDC contacted Ms. Fry, who confirmed that Appellant was autistic. (J.A. 3, 50, 206.) Appellant expressed his desire to return to training and was later deemed fit for duty. (J.A. 206-07.)

Appellant improved as a recruit, received no more negative documented counseling, and among other things, he completed: (1) initial drill; (2) first phase training; (3) initial physical fitness test; (3) second phase training; (4) rifle

qualification; (5) Series Commander Interview; (6) final drill; (7) practical application and written examination; (8) Marine Corps Martial Arts Program qualification; and, (9) "the Crucible." (J.A. 173-76, 207-08.)

On April 11, 2008, Appellant graduated from boot camp at Marine Corps Recruit Depot (MCRD) San Diego. (J.A. 208.) After taking several days of "boot leave," Appellant reported to the School of Infantry West at Marine Corps Base Camp Pendleton, where he continued to perform military duties as a member of the guard force while awaiting further training. (R. 101-02.) He received pay and allowances during that time. (J.A. 250-58.)

While at the School of Infantry, Appellant twice absented himself from his unit without authorization. (J.A. 4, 208.) He also downloaded images of child pornography onto two cell phones and two laptop computers. (Charge Sheet.)

B. In March 2009, Appellant asserted that his enlistment contract was void *ab initio* in a pretrial motion to dismiss for lack of personal jurisdiction.

Charges were preferred against Appellant on August 19, 2008. (Charge Sheet.) Appellant first introduced extensive evidence that he had a history of developmental and learning disabilities at the Article 32 investigation. (J.A. 154-65.) On March 25, 2009, Appellant filed a pretrial motion to dismiss for lack of personal jurisdiction. (J.A. 80-114.)

The following facts were fully developed after Appellant filed the pretrial motion to dismiss and the Military Judge received documentary evidence and witness testimony.

At a young age, the state of California sent him to live with his paternal grandmother, Mary Beth Fry. (J.A. 187.) In June 2006, Ms. Fry petitioned the California probate court for a "limited conservatorship of the person" over Appellant. (J.A. 188.) The petition was based on Appellant's developmental disability, autism, as defined by California Probate Code § 1420 (Deering 2009). (J.A. 126.) In response, the probate court named Ms. Fry as limited conservator of the person over Appellant:

> It is ordered that the following civil and legal rights of the Limited Conservatee under section 1801(d) of the Probate Code are limited:
> (1) The right to fix his RESIDENCE or specific dwelling;
> (2) The right to have access to his CONFIDENTIAL RECORDS and papers;
> (3) The right to enter into CONTRACTS on his behalf;
> (4) The right to have exclusive authority to give or withhold consent to MEDICAL TREATMENT; (except the power to consent to sterilization)
> (5) The right to make decisions concerning his EDUCATION[.]

(J.A. 139.) Ms. Fry received training and a handbook that explained her responsibilities as a limited conservator. (J.A. 77-78.)

After Appellant graduated high school in Colorado (J.A. 169-70), he returned to California. (J.A. 60.) Soon after,

Appellant called Gunnery Sergeant (GySgt) M. Teson, a Marine Corps recruiter assigned to the area, and expressed his desire to enlist in the Marine Corps. (J.A. 60.) Appellant had met the recruiter at "Young Marine" events at his former high school in California. (J.A. 55.) Appellant and GySgt Teson met to discuss Appellant's enlistment, and within ten days Appellant shipped to boot camp at MCRD San Diego. (J.A. 64-65, 220-21.)

During pre-enlistment screening, GySgt Teson learned that Appellant had been charged with several misdemeanors that were later dismissed. (J.A. 63, 204-05.) The Military Judge found that GySgt Teson knew or should have known that Appellant completed his high school education at an institution for children and adolescents with psychological, emotional, or behavioral problems. (J.A. 204.) Appellant told GySgt Teson that he was subject to a limited conservatorship, but the recruiter believed that it had no effect on Appellant's ability to enlist, partly because Ms. Fry——the limited conservator——told the recruiter that she could not stop Appellant from joining the Marine Corps. (J.A. 71, 205.) When Appellant told GySgt Teson that his grandmother would not want him to enlist, the recruiter assumed her objection was irrelevant because Appellant was over eighteen years old. (J.A. 75, 205.)

C. Appellant affirmatively misrepresented his medical history.

Between 2004 and 2006, a psychiatrist treated Appellant, and described him in May 2006 as "high functioning for a child with autism . . . ." (J.A. 116.) At no time, however, according to GySgt Teson, did Appellant or Ms. Fry report that Appellant was autistic. (J.A. 76.) Nor did Appellant tell GySgt Teson that he had received fifteen months of "psychiatric care and counseling to deal with [his] desire to view child pornography" because Appellant feared this would keep him from enlisting in the armed forces. (R. 263-64.)

On January 7, 2008, before he took his oath of enlistment, Appellant completed a "Report of Medical History." (Appellate Ex. VI at 50-58.) Appellant was asked, among other things: (1) "Have you consulted or been treated by clinics, physicians . . . within the past 5 years for other than minor illnesses?"; (2) "Have you ever received, is there pending, or have you ever applied for pension or compensation for any disability or injury?"; (3) "[Have you ever] received counseling of any type?"; (4) "[Have you ever] been evaluated or treated for a mental condition?"; and, (5) "Have you ever had any illness or injury other than those already noted?" Appellant answered each question in the negative. (Appellate Ex. VI at 50-51.) Additionally, Appellant checked yes when asked if he was "currently in good health." (Appellate Ex. VI at 50.)

Appellant told the IDC at boot camp that he lied when he enlisted in the Marine Corps and that he did not tell anyone, including MEPS officials, that he had autism. (J.A. 12.) The IDC did not recall Appellant stating that anyone told him to conceal facts when enlisting. (J.A. 13.) After the IDC called Ms. Fry, the Record reflects that Ms. Fry did not take any formal action to void Appellant's enlistment. (J.A. 18.) Instead, Ms. Fry generally stated that she wanted Appellant to come home, but did not ask to speak with anyone in authority. (J.A. 18.) Ms. Fry did not inform the IDC or anyone else that she wished to exercise any authority over Appellant's power to contract. (J.A. 207.) Ms. Fry later attended Appellant's boot camp graduation, and again, neither Ms. Fry nor Appellant sought to void his enlistment contract at this time. (J.A. 208.)

Before trial, Dr. B. Reed, a Navy psychologist, conducted a Rule for Courts-Martial 706 inquiry into Appellant's capacity to understand the nature of the charges against him and to participate in his defense. (J.A. 31-32.) Dr. Reed personally met with Appellant and concluded Appellant: (1) "did not have a severe mental disease or defect" at the time of his alleged criminal conduct, which included fraudulent enlistment; (2) "was not unable to appreciate the nature and quality or wrongfulness of his conduct"; and (3) "does have sufficient mental capacity to understand the nature of the proceedings and to cooperate in

his defense." (Appellate Ex. XIII at 1-2.) Additionally, Dr. Reed determined and testified at the motion hearing——after learning that Appellant was diagnosed with autism and had a limited conservatorship appointed over his person in California——that "by 51 percent or more, I would have to say yes [Appellant understood the effect of his enlistment into the armed forces]." (J.A. 34, 40.)

The Military Judge made written Findings of Fact and Conclusions of Law. (Appellate Ex. XI; J.A. 202-214.) The Military Judge found that "the preponderance of the evidence supports the conclusion that the standards set forth in Article 2(c) have been met making the accused subject to the jurisdiction of the UCMJ." (Appellate Ex. XXI at 14; J.A. 214.) The Military Judge denied Appellant's motion to dismiss for lack of personal jurisdiction.

Argument

APPELLANT WAS SUBJECT TO THE UCMJ BECAUSE HE HAD THE CAPACITY TO UNDERSTAND THE SIGNIFICANCE OF ENLISTMENT IN THE ARMED FORCES AND HE ENLISTED VOLUNTARILY. APPELLANT SATISFIED THE ENLISTMENT CRITERIA UNDER 10 U.S.C. §§ 504, 505, AND 802. EVEN IF APPELLANT'S ENLISTMENT CONTRACT WAS VOID AS A MATTER OF LAW, HE CONSTRUCTIVELY ENLISTED BY SUBMITTING VOLUNTARILY TO MILITARY AUTHORITY, RECEIVING PAY, AND PERFORMING MILITARY DUTIES.

A. Standard of review.

When an appellant challenges personal jurisdiction on appeal, this Court reviews that question of law *de novo*, but adopts the military judge's findings of fact unless they are clearly erroneous or unsupported in the record. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000) (citing *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999)).

B. Law.

The relationship between the Government and its military is "distinctively federal in character." *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672 (1977). "The power to regulate the armed forces must have been granted to Congress so that it would have the authority over its armed forces that other nations have long exercised, *subject only to limitations of the Constitution*." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 29 (1955) (emphasis added) (citations omitted).

"The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction . . . change of status from civilian to member of the armed forces shall be effective upon taking the oath of enlistment." Article 2, UCMJ, 10 U.S.C. § 802 (2006). A person serving in the armed forces who submitted voluntarily to military authority, met the mental competency and minimal age enlistment qualifications of 10 U.S.C. §§ 504 and 505, received military pay and allowances, and performed military duties is subject to courts-martial jurisdiction under Article 2. *Id*.

"No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force." 10 U.S.C. § 504(a) (2006). "The Secretary . . . may accept original enlistments in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard, as the case may be, of qualified, effective, and able-bodied persons who are not less than seventeen years of age nor more than forty-two years of age." 10 U.S.C. § 505(a) (2006).

C. Discussion.

1. Appellant's legal and "limited" conservatorship in California explicitly preserved his legal capacity to enter into binding contracts, subject only to his conservator's control.

The California Probate Code states that limited conservators should "assist the limited conservatee in the development of maximum self-reliance and independence." Cal. Prob. Code § 2351.5(a)(2) (Deering 2009). The Probate Code in § 1801(d) also states: "The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator." Cal. Prob. Code § 1801(d) (Deering 2009).

"The authority of a guardian, conservator, or committee . . . does not extend beyond the jurisdiction of the government under which that person was invested with authority, except to the extent expressly authorized by statute." Cal. Code Civ. Proc. § 1913(b). The California Code of Civil Procedure expressly declines to grant full faith and credit to the guardianships and conservatorships of other states. Cal. Code Civ. Proc. § 1913.

The conservatorship statute in California "permits a court to 'appoint a conservator for a person who [is] neither insane

nor incompetent, but who, for a variety of other reasons, need[s] direction in the management of his [or her] affairs.'" *Conservatorship of Bookasta*, 216 Cal. App. 3d 445, 449 (Cal. 1989) (quoting *Board of Regents v. Davis*, 14 Cal. 3d 33, 39 (Cal. 1975)).

The probate court order appointing Ms. Fry as limited conservator over Appellant explicitly "limited" Appellant's "right to enter into CONTRACTS on his behalf." (J.A. 138-39.) It did not divest Appellant of his right to contract, but simply granted Ms. Fry the power to "control the right of [Appellant] to CONTRACT." (J.A. 138-39.)

Thus under a clear read of the probate court order in this case and California law, Appellant's right to contract remained intact. The order merely limited that right, making it subject to the limited conservator's power only to *control* Appellant's right to contract. That is, insofar as the court did not expressly grant Appellant's right to contract to Ms. Fry or anyone else, Appellant retained the capacity to exercise that legal and civil right for himself, at least to the extent that Ms. Fry did not affirmatively act to stop him.

2. Appellant had the capacity to contract under Article 2, UCMJ, and California cannot bind the armed forces, where to do so would render Article 2 meaningless.

Regardless of the proper construction of California Civil Code § 40, nothing in the Record of Trial or the law supports that this provision prevents the change of status, from civilian to servicemember, contemplated by Article 2(b), UCMJ. In fact, because Appellant had the legal capacity to contract and, more importantly, the mental capacity to understand the significance of his voluntary decision to enlist in the Marine Corps, Article 2(b) makes his status as a member of an armed force a proper basis for personal jurisdiction at his general court-martial.

Under Cal. Code Civ. Proc. § 1913 and state case law, California would similarly not have been bound by Ms. Fry's conservatorship had it been ordered by a sister state. *See Holiway v. Woods,* 143 Cal. App. 3d 1006 (1983) (holding that a woman's Illinois conservatorship over her father gave her no special authority to act as his conservator in California). Appellant's argument that the California state court's order effectively bound Congress and the Marine Corps, (Appellant's Br. at 17), thus mistakenly relies upon *Irving Trust Co. v. Day*, 314 U.S. 556 (1942) for the proposition that "state judicial determinations of incapacity govern enlistment contracts signed in that jurisdiction." (Appellant's Br. at 17.)

In fact, *Irving Trust Co.* did not address the interplay between states and the armed forces, and merely held that the U.S. Constitution does not forbid a state legislature from limiting, conditioning, or abolishing the power of testamentary disposition over property within its jurisdiction. *Id.* at 562. Despite Appellant's narrow construction of California Civil Code § 40 (Appellant's Br. at 12), the court order establishing a *limited* conservatorship over the person of Appellant did not extinguish his capacity to contract.

The Supreme Court has equated marriage to military enlistment. *In re Grimley*, 137 U.S. 147, 151-52 (1890). "Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes." *Id*. at 151. The comparison flowed immediately: "Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations, does not destroy the status or change the relation of the parties to each other." *Id*. at 151-52; *see also Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 843 (2005) (holding that marriage arises out of a civil contract).

Appellant expressly concedes that he retained the unlimited right to consent to a marriage contract in California.

(Appellant's Br. at 14.) Here, where Appellant's limited conservatorship did not limit his ability to consent or withhold consent to contract to marry, it follows logically that——even if the state court's order was somehow binding upon the armed forces——he retained the unlimited ability to consent or withhold consent to enlist in the armed forces.

3. The Record demonstrates that Appellant had the capacity to understand the significance of enlisting in the Marine Corps, he enlisted voluntarily, and Appellant fails to demonstrate a lack of capacity. Appellant became a member of the armed forces subject to the UCMJ immediately upon taking the oath of enlistment.

A court-martial may try any person when the UCMJ allows it. *See* Rule for Courts-Martial (R.C.M.) 202(a), Manual for Courts-Martial (MCM), United States (2008 ed.). Members of the armed forces who enlist voluntarily and have the capacity to understand the significance of their enlistment in the armed forces become subject to court-martial jurisdiction upon taking the oath of enlistment. *See* Article 2(a)(1) and (b), UCMJ. Because Appellant had the capacity to understand the significance of his enlistment and he enlisted voluntarily, his general court-martial properly held personal jurisdiction over him.

a. Appellant voluntarily enlisted and took the oath of enlistment on January 14, 2008.

According to his service record book, Appellant took the oath of enlistment on January 14, 2008. (J.A. 218-19.) During the plea colloquy for Appellant's guilty plea to fraudulent enlistment, the Military Judge defined *enlistment* as "a voluntary entry or enrollment for a specific term of service in one of the armed forces of the United States." (R. 254.) Appellant told the Military Judge that he understood this definition. (R. 254.) He then confirmed for the Military Judge that he had enlisted on January 14, 2008, for a term of five years. (R. 262, 265.)

Before that date, Appellant took affirmative, voluntary steps to effect his enlistment in the Marine Corps. During the pretrial motion to dismiss for lack of jurisdiction, Appellant's recruiter testified that he first met Appellant at "Young Marine" events at Marine Corps Base Camp Pendleton. (J.A. 55.) At the time, Appellant was too young to enlist, and he later moved to another recruiting district, so the recruiter had limited contact with Appellant for several years. (J.A. 55-60.) However, when Appellant moved back into the recruiter's district, he sought out the recruiter to let him know that he wanted to enlist in the Marine Corps. (J.A. 60.)

Appellant's statements at trial also confirm the voluntariness of his actions. Regarding Appellant's decision to conceal that he had received fifteen months of counseling because of his "desire to view child pornography," the Military Judge asked Appellant, "And you did so because you wanted to enlist, right?" (R. 264.) Appellant answered, "Yes, sir." (R. 264.)

b. Appellant had the capacity to understand the meaning of his decision to enlist in the Marine Corps.

Having established that Appellant's enlistment was voluntary, the next question is whether he had the "capacity to understand the significance of enlisting in the armed forces." Art. 2(b), UCMJ. During the motion hearing, Trial Counsel asked Dr. Reed whether Appellant understood the consequences of enlisting: "By a preponderance of the evidence [or a] 51 percent standard do you believe [Appellant] was able to understand the effect of being enlisted in the armed forces?" (J.A. 34.) Dr. Reed answered, "Well, when you ask me 51 percent or more, I would have to say yes." (J.A. 34.) Dr. Reed testified to this conclusion, *after* learning that Appellant had autism and a limited conservatorship over his person ordered in California state court. (J.A. 37, 40.) Later, the Military Judge, relying heavily on the testimony of Appellant's recruiter, drill instructors, and sergeant of the guard at the School of Infantry

(West), concluded that Appellant had comprehended the meaning of his enlistment:

> The observations of those who observed [Appellant] from the time of his enlistment, throughout recruit training, and in his brief time at the School of Infantry, suggest that he was not far (one way or the other) from an average recruit or entry level Marine and provide no evidence that he lacked the capacity to understand the significance of his enlistment.

(J.A. 210.) The Military Judge also found that Appellant's "performance on the ASVAB indicates that he was well within the mental competency standards for enlistment." (J.A. 210.)

Thus, Appellant knew what he was doing and knew what to say, or not to say, when enlisting. Appellant admitted to the IDC that he intentionally lied at MEPS and withheld his autism diagnosis. (J.A. 20.) Because Appellant had the capacity to understand the significance of his enlistment in the armed forces and he enlisted voluntarily, the requirements of Article 2(b) were satisfied, and the Military Judge properly denied Appellant's motion to dismiss for lack of personal jurisdiction. (J.A. 214.)

4. Assuming that the California Probate Court's determination was somehow binding, the limited conservator ratified the enlistment contract.

Although Ms. Fry possessed the power to control Appellant's right to contract under California law, she made no formal effort to cancel Appellant's enlistment contract. (J.A. 205.) To the contrary, she testified at the motion hearing that upon

learning that Appellant was going to continue his training at boot camp, she began to hope that his staying in the Marine Corps would be "positive." (R. 207.) She also attended Appellant's boot camp graduation ceremony and did not seek to void Appellant's enlistment contract or otherwise challenge it. (J.A. 208.) Later, between boot camp graduation and the start of Appellant's School of Infantry training at Camp Pendleton, she still took no steps to rescind Appellant's contract, though she knew of Appellant's change in status and she remained in contact with the attorney who represented her when she petitioned for the limited conservatorship in the first place. (R. 208-10.)

Ultimately, she stated that she never asked anyone "to cancel or void [Appellant's] contract in the Marine Corps." (R. 210.) The Military Judge found that Ms. Fry "could have objected, had the opportunity to object, and had the responsibility as the limited conservator to object to [Appellant's enlistment] if she believed that objecting was 'necessary to promote and protect the well-being.'" (J.A. 213.) Ms. Fry, the limited conservator, chose not to act. Thus, assuming *arguendo* that Appellant's limited conservatorship in California is binding on Congress and the armed forces this court-martial still has jurisdiction over Appellant because Ms.

Fry effectively ratified his contract by failing to exert her power to limit his right to contract.

5. Even if Appellant's enlistment contract was invalid as a matter of law, his voluntary submission to military authority while he was neither drunk nor insane established a constructive enlistment.

A constructive enlistment can establish jurisdiction over the person in cases where a valid enlistment contract does not exist. *See, e.g., United States v. Harrison*, 5 M.J. 476, 480 (C.M.A. 1978) ("[T]here is no doubt as to the invalidity of the appellant's original enlistment contract and its lack of legal effect to change his status from civilian to sailor. Accordingly, jurisdiction in the present case can only exist if the appellant [later] effected a legitimate constructive enlistment.") (citation omitted). Congress later codified the doctrine of constructive enlistment:

> Notwithstanding *any* other provision of law, a person serving with an armed force who——
>
> (1) submitted voluntarily to military authority;
>
> (2) met the mental competence and minimum age qualifications of [10 U.S.C. §§ 504 and 505] at the time of voluntary submission to military authority;
>
> (3) received military pay or allowances; and
>
> (4) performed military duties, is subject to [the UCMJ] until such person's active service has been [properly] terminated.

Art. 2(c), UCMJ (emphasis added).

Appellant was born on January 8, 1988, so he was 20 years old when he took the oath of enlistment. (J.A. 216.) This satisfies the age requirement of 10 U.S.C. § 505(a). The Military Judge found, and Appellant does not dispute, that Appellant enlisted and submitted to military authority voluntarily and that he thereafter received pay and allowances and performed military duties. (J.A. 209.) At trial, Appellant confirmed that he had remained on active duty between his enlistment and his trial. (R. 266.)

At the same time, 10 U.S.C. § 504 prohibits the enlistment of anyone "who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony." 10 U.S.C. § 504(a). As the Military Judge observed: "There is no evidence of intoxication at the time of [Appellant's] enlistment and no evidence of a previous desertion by [Appellant]." (J.A. 209.) Likewise, there was no evidence that Appellant had been convicted of a felony. Nevertheless, Appellant challenges the Military Judge's determination (J.A. 7, 209.) that Appellant met the mental competency requirement of 10 U.S.C. § 504.

Section 504 plainly states that the "insane"[1] may not enlist. 10 U.S.C. § 504(a). Although multiple pieces of evidence and points of testimony confirm that Appellant was

[1] According to Congress, "the words 'insane' and 'insane person' and 'lunatic' shall include every idiot, lunatic, insane person, and person *non compos mentis*." 1 U.S.C. § 1 (2006).

autistic, nothing suggests that he was “insane” at any time, much less when he enlisted. The basis for the establishment of a limited conservatorship was Appellant’s diagnosis of autism, a “developmental disability” under California law. Cal. Prob. Code § 1420. The definition of *developmental disabilities* expressly includes autism, but insanity is not within the scope of the statute. Cal. Prob. Code § 1420.

Furthermore, the results of the pretrial R.C.M. 706 inquiry conducted by Dr. Reed establish that Appellant “did not have a severe mental disease or defect” at the time of his alleged criminal conduct, which included fraudulent enlistment. (Appellate Ex. XIII at 1.) Dr. Reed also found that Appellant was able “to appreciate the nature and quality or wrongfulness of his conduct” and that he had “sufficient mental capacity to understand the nature of the [judicial] proceedings and to cooperate in his defense.” (Appellate Ex. XIII at 2.) In other words, Appellant was not insane.

Appellant was sane, sober, and old enough to enlist when he submitted voluntarily to military authority. He not only attended boot camp in the first place, but also reported for further training at the School of Infantry. Further, he received pay and allowances, and performed military duties, establishing a constructive enlistment that provides a basis for

personal jurisdiction, notwithstanding any other provision of law. *See* Art. 2(c), UCMJ.

6. Appellant's autism and the California state court order do not bar this Court from finding a constructive enlistment.

Relying on *United States v. Blanton*, 7 C.M.A. 664 (C.M.A. 1957), Appellant argues that, assuming Appellant's enlistment contract was invalid as a matter of law, this Court cannot find a constructive enlistment. (Appellant's Br. at 19-20.) Appellant's reliance on *Blanton* is incorrect for three reasons. First, *Blanton* actually supports the Government's argument that because the limited conservatorship preserved Appellant's ability to marry, it necessarily preserved his ability to enlist. *Blanton*, 7 C.M.A. at 665 (citing *In re Grimley*, 137 U.S. at 151-52) (equating marriage and enlistment as more than mere contracts, which redefine a person's "status.") Appellant concedes that under the limited conservatorship he retained the exclusive right to contract to marry and create a status as a married man in California. (Appellant's Br. at 14.) With this, as analogized by the Supreme Court in *Grimley*, Appellant retained the right to contract to change his status from civilian to Marine.

Second, *Blanton* reaffirmed that Congress, and not state legislatures or state courts, determines the qualifications for armed forces enlistment. In *Blanton*, the United States Court of

Military Appeals held that Congress, by statute, "established a minimum age below which a youth is incompetent to acquire a military status." *Id.* at 667. This Court found that the where the appellee was less than sixteen years-old at the time of his criminal acts, there could be no constructive enlistment under the statute. There, because "at no time was [the appellee] on active duty at an age when he was legally competent to serve in the military [as defined by Congress]" his enlistment contract was not merely voidable, but void. *Id.*

Third, Appellant's argument against a constructive enlistment ignores the facts of his case. Simply put, the appellee in *Blanton* was never competent to serve because was he was disqualified by Congress. In the present case, Appellant met the threshold requirements set under 10 U.S.C. 504, 505, and 802. The Military Judge's Findings of Fact, which are neither clearly erroneous nor unsupported by the Record, establish that Appellant navigated and conquered, if unremarkably, the rigors of Marine Corps boot camp. (J.A. 202-08.) Accordingly, the California state court's order of limited conservatorship over Appellant and this Court's holding in *Blanton* do not prevent this Court from finding a constructive enlistment.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

/s/

KEVIN D. SHEA
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE,
Washington Navy Yard, DC 20374
(202) 685-78378,fax (202) 685-7687
Bar no. 35125

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(d) because: This brief contains 5,301 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2007 with 12 point, Courier New font.

Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court and a copy electronically served on opposing counsel on July 25, 2011.

/s/

KEVIN D. SHEA
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE,
Washington Navy Yard, DC 20374
(202) 685-78378,fax (202) 685-7687
Bar no. 35125