

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,)	BRIEF ON BEHALF OF APPELLEE
)	ON SPECIFIED ISSUES
)	
v.)	
)	USCA Dkt. No. 13-0348/AR
Private First Class (E-3))	
AMANDA N. MOSS)	Crim. App. Dkt. No. 20110337
United States Army,)	
Appellant)	
)	

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- I. WHETHER THE DECISION TO APPEAL TO THIS COURT IS A PERSONAL DECISION OF THE APPELLANT, AND IF SO, IN WHAT MANNER MAY SUCH A DECISION BE MADE?
- II. WHETHER THERE IS ANY EVIDENCE IN THE RECORD THAT THE APPELLANT HAS AUTHORIZED AN APPEAL TO THIS COURT, AND IF THERE IS NO SUCH AUTHORIZATION, IS THERE NONETHELESS A CONTINUING DUTY TO REPRESENT THE APPELLANT, AND IF SO, FROM WHERE DOES THIS DUTY DERIVE?
- III. IN CIRCUMSTANCES WHERE THE APPELLANT CANNOT BE LOCATED DURING THE TIME PERIOD AVAILABLE TO FILE A PETITION FOR GRANT OF REVIEW AT THIS COURT, WHAT IS THE RESPONSIBILITY OF APPELLATE DEFENSE COUNSEL IN THE CONTEXT OF THE STATUTORY TIME LIMIT IN ARTICLE 67, UCMJ, TO FILE AN APPEAL?
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**TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Specified Issues

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- IV. SHOULD THIS CASE BE DISMISSED WITH PREJUDICE UNDER THE HOLDING IN UNITED STATES V. SCHRECK, 10 M.J. 226 (C.M.A. 1981)?

Summary of Argument

The decision to appeal to this court is personal to appellant. As a statutory mandate to invoke the jurisdiction of this court, appellant must personally elect to appeal to this court within sixty days of being notified of the decision of the Army Court of Criminal Appeals (ACCA). Appellant indicated her desire to be represented by appointed appellate defense counsel on her post-trial and appellate rights form, which she signed before fleeing trial.

Appellant expressed her desire for appellate representation before she went absent from these proceedings. Appellate defense counsel has a continuing duty to represent appellant pursuant to and consistent with that authorization and appointment by The Judge Advocate General under Article 70, Uniform Code of Military Justice, 10 U.S.C. § 870 (2012) [hereinafter UCMJ].

If appellant cannot be located within the statutory period to elect appeal to this court, appellate defense counsel is responsible for preserving, to the extent practicable under the law, appellant's ability to invoke the jurisdiction of this court upon her return.

Although appellant's petition for review was lawfully before this court, her continuing fugitive status should preclude her from any relief from this court. Because appellant's absence from the court-martial and appellate proceedings relates directly to the appellate issues raised, the fugitive disentitlement doctrine applies and this case should be dismissed with prejudice.

Law and Argument

A. The decision to appeal to this court is personal to appellant and a petition may only be made on behalf of an absent appellant if properly authorized by appellant beforehand

Article 67, UCMJ, specifies three categories of cases reviewable by this court, of which one involves those cases that

come to the court upon "petition of the accused" and where the court has granted review for "good cause shown."¹ The decision to take an appeal, generally, is regarded to be among those "basic trial rights" that are "of such moment that they cannot be made for the defendant by a surrogate."² Given the discretionary nature of appellate review of cases arising under Article 67(a)(3), UCMJ, this court long ago held that "it is the appellant's decision whether to take an appeal to this Court."³

So long as an appellant has personally made the decision to appeal to this court, the petition for review can be made by appellant directly or through appellate defense counsel.⁴ If the appellant is absent from appellate proceedings but indicates prior to their absence a desire to pursue an appeal of an adverse decision, appellate defense counsel "can and should proceed in accordance with the authority previously given by the accused and file such proceedings as may be necessary to protect

¹ UCMJ art. 67(a)(3); Rule for Courts-Martial [hereinafter R.C.M.] 1204(a)(3).

² *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (citations omitted). While this court has also recognized that not every strategic decision of counsel requires the client's consent, counsel must nonetheless conduct "in-depth discussion" with the client about that decision beforehand. *United States v. Larson*, 66 M.J. 212, 218 (C.A.A.F. 2008).

³ *United States v. Larneard*, 3 M.J. 76, 82 (C.M.A. 1977).

⁴ Rules of Internal Practice and Procedure, United States Court of Appeals for the Armed Forces, Rule 19(a)(5). See also *Larneard*, 3 M.J. at 82. Cf. R.C.M. 1204(b) (noting that detailed appellate defense counsel shall advise and assist the accused with preparing a petition for further appellate review).

the interests of his client."⁵ This court recognized in *Larneard* that a properly authorized appellate defense counsel may act as the "agent" for an absent appellant in pursuing an appeal and that appellate defense counsel may lawfully petition this court for review on behalf of an absent appellant.⁶

Accordingly, where appellate defense counsel petitions this court for review pursuant to a previously indicated desire by appellant to pursue an appeal, this court may grant such a petition if it is made within the time period allowed by Article 67(b), UCMJ. In *Larneard*, this court examined the establishment of an "agency" relationship through a power of attorney, while in *Schreck I*, this court noted the use of "special authorization of counsel" forms used by the Navy.⁷ In this case, appellate defense counsel refers to the post-trial and appellate rights form signed by appellant prior to her absence from trial.⁸

⁵ *Larneard*, 3 M.J. at 82.

⁶ *United States v. Schreck*, 9 M.J. 217, 218 (C.M.A. 1980) [hereinafter *Schreck I*]. This court noted that where an intent to appeal has been previously indicated on a "special authorization of counsel," appellants who are absent without leave should not be subjected to "differential treatment" with regard to the right to petition this court for review. *Id.*

⁷ *Larneard*, 3 M.J. at 81; *Schreck I*, 9 M.J. at 218. The specific regulatory scheme of the Navy at the time of *Schreck I* distinguished that case from *United States v. Smith*, 22 C.M.A. 247 (1973). In *Smith*, appellate defense counsel was not authorized by regulation to accept service of the Court of Military Review's decision on behalf of the absent appellant. *Schreck I*, 9 M.J. at 218.

⁸ (J.A. at 176-80).

Appellant indicated on that form that she wished to be represented by appointed appellate defense counsel before ACCA.⁹ By implication, under *Larneard* and *Schreck I*, appellate defense counsel could accept service of ACCA's notice of its decision on appellant's behalf and proceed to file a petition for review to this court.¹⁰

B. Because appellant desired appellate representation, appellate defense counsel has a continuing duty to represent appellant until the end of the appellate process

There is no evidence in the record that appellant expressly authorized or requested appeal to this court specifically. However, appellant indicated on her post-trial and appellate rights form that she desired appellate defense counsel to represent her before ACCA.¹¹ The form also informed appellant that she would have the same rights to appellate defense counsel before this court as before ACCA.¹² This court in *Larneard* stated that appellate defense counsel "can and should proceed in accordance with the authority previously given by the accused and file such proceedings as may be necessary to protect the

⁹ (J.A. at 179).

¹⁰ Paragraph 5 of the form noted, "I have the same rights to counsel before [this court and the Supreme Court] as I have before the ACCA." (J.A. at 177). By Army regulation, service of ACCA's decision upon appointed appellate defense counsel "will constitute service on the accused's appellate counsel of record." Army Regulation 27-10, Legal Services: Military Justice (3 October 2011) [hereinafter AR 27-10], para. 12-9b.

¹¹ (J.A. at 179).

¹² (J.A. at 177).

interests of his client.”¹³ Appointed appellate defense counsel therefore has a continuing duty to represent appellant, in accordance with her prior authorization, before ACCA and this court to the extent that counsel believes further appeal to this court is consistent with the scope of the representation and in appellant’s interests.¹⁴

C. Appellate defense counsel is responsible for preserving, to the extent practicable, appellant’s ability to invoke this court’s jurisdiction upon her return

Appellant must invoke the jurisdiction of this court by submitting a petition for review within sixty days of receiving actual or constructive notice of ACCA’s decision.¹⁵ Compliance with the timeline for petitioning this court is a statutory mandate to invoke and preserve this court’s jurisdiction to hear an appeal under Article 67(a)(3), UCMJ.¹⁶ In appellant’s continuing absence, if appellate defense counsel accepts service of ACCA’s decision on appellant’s behalf, it is appellate

¹³ 3 M.J. at 82. See also UCMJ art. 70(c)(1) (stating that appellate defense counsel shall represent the accused before this court when requested by the accused).

¹⁴ See AR 27-10, Appendix C, paras. C-3(a)(1), (b)(1). See also AR 27-26, Legal Services: Rules of Professional Conduct for Lawyers (1 May 1992) [hereinafter AR 27-26], Rules 1.2 and 1.16 (discussing the scope of the representation and when counsel may seek to withdraw from representing the client).

¹⁵ UCMJ art. 67(b).

¹⁶ *United States v. Rodriguez*, 67 M.J. 110, 111, 115 (C.A.A.F. 2009) (citing *Bowles v. Russell*, 551 U.S. 205 (2007)).

defense counsel's responsibility to ensure that appellant's appeal proceeds to the extent allowable by law and regulations.¹⁷

As such, if appellate defense counsel believes it is consistent with the scope of the representation and appellant's interests, counsel must seek, at a minimum, to invoke or preserve appellant's ability to petition this court. The statutory mandate of Congress leaves no discretion to this court to "waive the limitation for equitable reasons."¹⁸ In a case like this, appellate defense counsel faces a Hobson's choice with regard to preserving an opportunity for further appellate review before a civilian court. If counsel fails to invoke the court's jurisdiction and allows appellant's opportunity to petition the court to irrevocably lapse, he leaves his client without recourse even under a possible claim of ineffective assistance.¹⁹ Even if appellate defense counsel understands that a petition for review could be denied due to appellant's absence, he is still obligated to proceed if he believes it is consistent with his client's previously stated desires.²⁰

¹⁷ See *Larneard*, 3 M.J. at 82.

¹⁸ *Rodriguez*, 67 M.J. at 115.

¹⁹ See *Rodriguez*, 67 M.J. at 121 (Baker, J., dissenting).

²⁰ See *Larneard*, 3 M.J. at 82 n.19 ("The same obligation exists to go forward with an appeal if the client desired it, even if the attorney felt there were no meritorious grounds to be urged on appeal") (citing *Anders v. California*, 386 U.S. 738 (1967)).

D. The court should apply the fugitive disentitlement doctrine and dismiss this case with prejudice

After initially denying the government's motion to dismiss the appellant's petition for review in *Schreck I*, this court made a conditional ruling to dismiss the appellant's petition with prejudice within thirty days unless appellate defense counsel notified the court of the appellant's return to military control.²¹ Relying on the fugitive disentitlement doctrine, the court in *Schreck II* noted that it had the "sound discretion to dismiss a criminal appeal when it appears that appellant has escaped from lawful confinement during the pendency of his appeal."²²

"It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal."²³ In addition to enforceability concerns, "dismissal by an appellate court after a defendant has fled its jurisdiction serves an

²¹ *United States v. Schreck*, 10 M.J. 226, 229 (C.M.A. 1981) [hereinafter *Schreck II*]. The appellant eventually returned to military control and his appeal was considered on its merits. *United States v. Schreck*, 10 M.J. 374 (C.M.A. 1981).

²² *Id.* (citing *Estelle v. Dorrough*, 420 U.S. 534 (1975), and *Molinaro v. New Jersey*, 396 U.S. 365 (1970)).

²³ *Ortega-Rodriguez v. United States*, 507 U.S. 234, 240 (1993) (citing *Smith v. United States*, 94 U.S. 97 (1876)).

important deterrent function and advances an interest in efficient, dignified appellate practice.”²⁴

Appellate defense counsel attempts to distinguish *Estelle* and *Schreck II* as applying only to situations where the appellant escaped from post-trial confinement.²⁵ The essential holding in *Estelle*, however, was that Texas was free under its statutory scheme to differentiate appellants who escape *after* or simultaneously to invoking the appellate process from those who flee, return, and then initiate an appeal.²⁶

In this case, as appellate defense counsel argues, appellant initiated and invoked the appellate process when she indicated her desire for appellate defense counsel on her post-trial and appellate rights form. (Appellant’s Supp. Br. 10). If appellant’s election did not operate to invoke the appellate process, appellate defense counsel would have no basis to argue that he lawfully petitioned this court for review.²⁷ The holdings in *Schreck II* and *Estelle*, therefore, remain applicable to this case and strongly support dismissal of this case with prejudice.

²⁴ *Id.* at 243 (citing *Estelle*, 420 U.S. at 537).

²⁵ (Appellant’s Supp. Br. 18-19).

²⁶ *Estelle*, 420 U.S. at 541. *Accord Ortega-Rodriguez*, 507 M.J. at 241-42.

²⁷ *See generally Smith*, 22 C.M.A. 247.

If anything, it is not only the timing of appellant's flight from justice, but her continuing fugitive status that underscores why it is appropriate for this court to apply the fugitive disentitlement doctrine to all issues raised in this case.²⁸ The sanction of dismissal is warranted where there is "some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during 'the ongoing appellate process.'"²⁹ Moreover, "some actions by a defendant, though they occur while his case is before the [trial] court, might have an impact on the appellate process sufficient to warrant an appellate sanction."³⁰ "[A] defendant's misconduct at the [trial] level might somehow make 'meaningful appeal impossible,' . . . or otherwise disrupt the appellate process so that an appellate sanction is reasonably imposed."³¹

All of the granted and specified issues before this court arise from appellant's continuing absence from the entirety of the trial and appellate proceedings. Her absence distorted not only the conduct of the trial and gave rise to the granted issues, but has also impaired full appellate review of those

²⁸ See *Ortega-Rodriguez*, 507 U.S. at 243 ("flight cannot be fairly construed as a waiver of appeal from errors occurring after recapture").

²⁹ *Id.* at 249 (citing *Estelle*, 420 U.S. at 542).

³⁰ *Id.*


³¹ *Id.* (quoting *United States v. Holmes*, 680 F.2d 1372, 1374 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983)).

issues, as evidenced by the need for further briefing of additional specified issues. While the petition for review was properly presented to this court, there is nothing to stop this court from choosing the sanction of dismissal in the exercise of its sound discretion, even at this stage of the proceedings.³²


Conclusion

Appellant's continuing fugitive status compels application of the fugitive disentitlement doctrine.


Wherefore, the Government respectfully requests this Honorable Court dismiss this case with prejudice.




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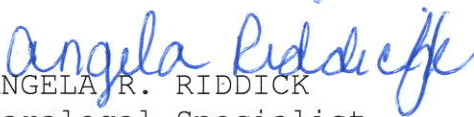


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³² See *Schreck II*, 10 M.J. at 229 (noting that the ruling in *Schreck I* "did not intend to suggest that we lack the power to dismiss, at some time after filing, a petition for review filed for an accused who is absent without authority").

CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on the 16 day of October, 2013 and contemporaneously served electronically and via hard copy on appellate defense counsel.


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