No. 11-1395

IN THE
Supreme Court of the United States

JOSHUA D. FRY,
Private,
United States Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI

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ARGUMENT

In its brief in opposition, the government understates the severity of Joshua Fry's mental disability and omits any reference to the efforts of his conservator to end his enlistment. Nevertheless, a California court declared Petitioner *non compos mentis* for purposes of contracting. None of the government's reasons as to why military courts are not required to honor the judgments of California's courts are persuasive. This Court should grant the writ of certiorari and reverse the lower court's decision, which is in conflict with *In Re Grimley*, 137 U.S. 147 (1890) and the codification of that decision found in Article 2, UCMJ.

1. Developmentally, Joshua Fry is mentally like a child at the age of 14. Pet. App. At 21a. Under Marine regulations in force at the time of his enlistment, his developmental disability was not subject to waiver and permanently disqualified him from military service in the Marine Corps. MCO P1100.72B dated June 18, 2004 at 3-86. The fact he was receiving Social Security Disability Insurance for this disability at the time he entered basic training was an additional bar to his enlistment. *Id.* at 3-144. And so Joshua Fry and his recruiter elected to conceal his autism. The military judge found that, at the time of his enlistment, Joshua Fry's military recruiter was aware that his grandmother had a conservatorship over him, and that his grandmother did not want Joshua to join the Marine Corps. C.A.A.F. Joint App. at 205. The recruiter told Joshua Fry that the conservatorship, and the wishes of his conservator, was irrelevant

because he was 18. *Id.* A Marine Investigating Officer would later conclude the military recruiter might have committed perjury when he testified under oath as to how Joshua Fry had been enlisted at a hearing held pursuant to Article 32, UCMJ. C.A.A.F. Joint App. at 159.

When Joshua Fry reported to basic training, his medical record was silent as to his disqualifying medical condition. C.A.A.F. Joint App. at 20. When he later notified medical staff of his autism, they noted it was not documented in his medical record and he was therefore fit for duty. Def. C.A.A.F. Br. at 7. Contrary to what is contained in the brief in opposition, the military judge found that Joshua Fry's conservator requested that the military authorities return Joshua Fry home. Gov't Brief at 3; C.A.A.F. Joint App. at 206. And they told her he would be sent home. C.A.A.F. Joint App. at 207. Joshua Fry's conservator then called his military recruiter, who in turn spoke with Fry's Senior Drill Instructor. Def. CAAF Br. at 8. After the conversation between the two non-commissioned Marines, all negative counseling entries in Joshua Fry's military record, which had included storing peanut butter in a sock, urinating in his canteen, lying about shaving, and attempting to escape basic training by climbing the fence, suddenly ceased. C.A.A.F. Joint App. at 172-75. The government correctly notes that, after her request to return her conservatee home was ignored, she attended his graduation ceremony from basic training. Gov't Br. at 3.

2. The government places great weight on the testimony of a government psychologist who was ordered to investigate, not Petitioner's capacity to contract, but his capacity to cooperate in his defense and appreciate the wrongfulness of his actions pursuant to Rule for Courts-Martial 706. Gov't Br. at 3, 13. As noted by the dissent below, the government psychologist had not treated Appellant for any period of time, was not familiar with Appellant's full history or medical records, and did not know Appellant was subject to a conservatorship. Pet. App. at 23a. And yet his equivocal testimony, which was directly contradicted by Petitioner's long-time treating psychologists and the conservatorship itself, led the military judge to conclude "all of the evidence indicates the accused's enlistment was voluntary" and "all of the evidence" indicates he had the capacity to contract. Pet. App. at 33a. According to the government, the military judge did not ignore the state-court order of conservatorship, he merely gave it "appropriate evidentiary weight." Gov't Br. at 11.

3. The conservatorship order made Petitioner *non compos mentis* for purposes of contracting. The government correctly notes California Probate Code § 1801(d) provides that a conservatee retains all rights not designated as legal disabilities by court order. Gov't Br. at 10 n. 4. But the government has never explained, much less cited legal authority, as to how the conservatorship at issue in this case, which designated the capacity to contract as a legal disability and specifically granted that right to the conservator, presents no limitation on Joshua Fry's

capacity to contract. *Id.* The government's position is akin to reciting that a person is presumed to be competent to stand trial, never addressing a judicial determination to the contrary, and then declaring competency.

In her petition seeking control of Petitioner's right to contract, Mrs. Fry noted Petitioner is "impulsive and lacks ability to comprehend the terms of a contract." C.A.A.F. Joint App. at 128. "The proposed conservatee requires 24 hour care and supervision to ensure that he has housing, proper food and nutrition, clothing and medical care." C.A.A.F. Joint App. at 130. In response to the petition, and upon a showing of clear and convincing evidence, the California court restricted Petitioner's capacity to contract and gave his grandmother exclusive control of that right.

Importantly, California's probate courts are not required to take the extreme measure of entirely restricting a conservatee's capacity to contract, as was done in Petitioner's case. Cal. Prob. Code § 1873 (2012). In Petitioner'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 that Joshua Fry retained some residual capacity to contract, 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). Accordingly, Petitioner has been *non compos mentis* and lacked the capacity to contract since that right was restricted in April 2006.

4. The California court order finding Petitioner *non compos mentis* is entitled to full faith and credit in federal courts. 28 U.S.C. § 1738. State law can inform a federal question, and there is no distinction between the capacity inquiry at issue in Article 2, UCMJ, and that found in 18 U.S.C. § 922(g). *United States v. Dorsch*, 363 F. 3d 784, 787 (8th Cir. 2004). Should the United States elect to prosecute the Marines who provided Petitioner with weapons and ammunition in violation of 18 U.S.C. § 922(g), they would undeniably rely on the order of conservatorship in this case to prove Petitioner had been adjudicated a "mental defective." *United States v. Vertz*, 102 F. Supp. 2d 787 (W.D. Mich. 2000)(state adjudication of incapacity to contract constitutes adjudication of "mental defective.") And yet the lower court concluded "courts-martial are not bound by orders like the one in issue when determining whether the requirements of Article 2(c) are met." Pet. App. at 17a.

Like the lower courts, the government miscasts Petitioner's argument as an impermissible infringement upon the authority of Congress to

"raise and support armies" and to "make Rules for the Government and Regulation of the land and naval Forces." Gov't Br. at 8. To the contrary, Petitioner does not challenge the authority of Congress to conscript an entire army of persons *non compos mentis*. But Congress has not elected to do so. Petitioner merely invokes the Congressional restriction prohibiting such persons from serving and successfully changing their status from citizen to solider.

5. The government argues the lower court's decision does not conflict with, what it refers to as dictum, in *In Re Grimely*, 137 U.S. 147 (1890). The government also argues the lower court's opinion does not even "mention, let alone apply, a criminal-insanity standard." Gov't Br. at 14. This statement is surprising given the lower court's holding that mental capacity, "inevitably overlaps with the mental capacity determination in Article 2(c)2." Pet. App. at 11a. "Thus, we are left only to consider whether Appellant understood the nature or significance of his actions." *Id.* In determining Petitioner had the capacity to contract, the lower court relied upon *United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002), a case discussing the military's criminal-insanity standard. Pet. App. at 12a. The lower court not only mentioned the criminal-insanity standard, it applied it in direct conflict with *In Re Grimley*, 137 U.S. 147 (1890).

The government rightly notes the lower court acknowledged *Grimely*. Gov't Br. at 14. The lower court even noted Article 2(c) was amended to codify *Grimely*. Pet. App. at 13a; SEN. REP. NO. 96-197, 122

(1980). But the lower court's interpretation of both *Grimely* and Article 2(c), where voluntariness is defined by a lack of duress or coercion, and where capacity to contract is equated with mental capacity to stand trial under Rule for Courts-Martial 706, constitutes a radical departure from the capacity to enlist set forth in *Grimely* and codified by Congress in Article 2(c).

6. The government also argues the question presented is unlikely to reoccur because regulations enacted after his enlistment bar his enlistment. Gov't Br. at 14. But Joshua Fry's enlistment was barred by military regulations in place at the time of his enlistment, and this Court should have little faith that these regulations will be any more effective than those that preceded them. Military recruiters are under tremendous pressure to fill quotas in an all-volunteer military during the longest war in our nation's history. Damien Cave, *Army Recruiters Say They Feel Pressure to Bend Rules*, The New York Times, May 3, 2005; Michael Bronner, *The Recruiters' War*, Vanity Fair, Sept. 2005. The lower court's decision expands potential military jurisdiction over a "broad spectrum" of mentally disabled individuals once thought beyond the reach of military recruiters. Pet. App. at 12a.

The question of who may change his status from citizen to soldier is an important federal question, and one that this Court has not addressed since America's tiny army wore woolen blue uniforms and the Great White Fleet was more than a decade away. This Court should use this case as vehicle to

reaffirm *Grimely* and bring this important area of jurisprudence into the 21st Century.

CONCLUSION

The lower court's decision is in direct conflict with *Grimely*, and with the decisions of the circuit courts of appeals. The lower court's decision on this important federal question also directly conflicts with the Full Faith and Credit Statute. For the reasons given above, as well as those presented in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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