

Absent Without Leave on Appeal and the Fugitive Disentitlement Doctrine

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Background

Private First Class (PFC) Amanda N. Moss left her unit in August 2007 and remained away for three years.¹ She was apprehended by civilian authorities on civilian charges and was eventually returned to military control.² After her court-martial arraignment on a charge of desertion terminated by apprehension,³ Private First Class Moss again left military control and did not appear at her court-martial.⁴ A special court-martial convicted her in absentia and adjudged a bad-conduct discharge, confinement for six months, partial forfeiture of her pay, and reduction to the lowest enlisted grade.⁵

Before trial, the trial defense counsel advised PFC Moss in writing that, if the approved sentence included a punitive discharge or confinement in excess of one year, her case would be automatically forwarded to the Court of Military Review⁶ for appellate review, and she could request appellate counsel to represent her. Appellant signed an appellate rights form that contained the following advice: “After the [Army Court of Criminal Appeals] ACCA completes its review, I may petition the United States Court of Appeals for the Armed Forces (CAAF) to review my case.” Later, in the same form, Appellant indicated as follows: “If applicable, I do want to be represented before the Army Court of Criminal Appeals by Appellate Defense Counsel appointed by The Judge Advocate General (TJAG) of the Army.” There is no evidence that Appellant authorized an appeal before the CAAF. Before trial, PFC Moss and her defense counsel prepared an unsworn

statement for her to give during the sentencing hearing, if she were convicted.⁷ After her conviction, PFC Moss’s defense counsel read the unsworn statement to the court members.⁸

Private First Class Moss’s sentence resulted in automatic referral of her case to the ACCA.⁹ Before the ACCA, PFC Moss’s appellate defense counsel argued four issues related to the propriety of the trial defense counsel reading the unsworn statement from the absent Appellant to the court-martial.¹⁰ The ACCA affirmed the findings and sentence, holding that the trial defense counsel did not provide ineffective assistance of counsel by presenting the unsworn statement.¹¹

The Clerk of Court mailed a copy of the ACCA’s opinion to PFC Moss’s last known address with instructions on the process for appealing the ACCA’s decision to the CAAF.¹² The envelope was returned to the Clerk’s office with the notation “undeliverable.”¹³

On behalf of PFC Moss, appellate defense counsel petitioned the CAAF for review.¹⁴ The CAAF granted review of the same four issues Appellant had raised before the ACCA.¹⁵ After oral argument, during which it became apparent that Appellant was still in an unauthorized absence status, the CAAF specified four additional issues, all revolving around that status: (1) whether the decision to appeal was personal to Appellant and, if so, how is it to be exercised; (2) whether there is evidence in the record that she authorized an appeal to the CAAF and, if not, does counsel nevertheless have a continuing duty to represent her; (3) when an appellant cannot be located, what is the appellate defense counsel’s responsibility to file an appeal in light of the statutory time limit to file an appeal; and

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¹ *United States v. Moss*, 73 M.J. 64, 65 (C.A.A.F. 2014). The full case is located in the Appendix.

² *Id.*

³ Uniform Code of Military Justice (UCMJ) art. 85; 10 U.S.C. § 885 (2012).

⁴ *Moss*, 73 M.J. at 65.

⁵ *Id.*

⁶ The Courts of Military Review became the Courts of Criminal Appeals on October 5, 1994, seventeen years before Appellant signed the form. Pub. L. 103-337, § 924, 108 Stat. 2663 (1994).

⁷ *Moss*, 73 M.J. at 70 (Baker, C.J., joined by Effron, S.J., dissenting).

⁸ *Id.* at 65.

⁹ See UCMJ art. 66(b), 10 U.S.C. § 866(b) (2012) (unless an accused specifically waives appellate review, the “Judge Advocate General shall refer to the Court of Criminal Appeals the case of any accused whose sentence as approved by the convening authority extends to “death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more”).

¹⁰ *United States v. Moss*, No. 2011037, 2013 WL 211255, at *1 (A. Ct. Crim. App. Jan. 17, 2013).

¹¹ *Id.* at *5.

¹² *Moss*, 73 M.J. at 66.

¹³ *Id.*

¹⁴ *United States v. Moss*, 72 M.J. 161 (C.A.A.F. 2013) (docketing order).

¹⁵ *Moss*, 73 M.J. at 66.

(4) should the case be dismissed with prejudice under the CAAF's holding in *United States v. Schreck*.¹⁶

Appellate defense counsel argued that PFC Moss had “manifested her desire to seek review of her case at [the CAAF] when she elected to have counsel appointed to represent her at the Army Court.”¹⁷ Appellate counsel had a continuing duty to represent her and the fugitive disentitlement doctrine of *Schreck* should not apply because she was not an escapee from confinement.¹⁸

The Government agreed that PFC Moss had requested appellate representation before she went absent and, therefore, appellate defense counsel had a continuing duty to represent her before the CAAF.¹⁹ Nevertheless, the Government argued that, because of her fugitive status, her appeal should be dismissed with prejudice.²⁰

The Opinion

A three-member majority of the CAAF dismissed the case because PFC Moss had not personally authorized the appeal and, therefore, the CAAF lacked jurisdiction to hear her appeal.²¹ Judge Erdmann, writing for the majority, neither relied on nor mentioned either *Schreck* or the fugitive disentitlement doctrine.

The majority's analysis begins and ends with a discussion of the court's jurisdiction under Article 67(a)(3), UCMJ.²² That statute “directs this Court to review cases which have been reviewed by a Court of Criminal Appeals and where there is a ‘petition of the accused’ and ‘good cause shown.’” The statute clearly establishes that all three of these predicates must exist before the congressional mandate to review a case arises.²³ The majority noted that, although Appellant had authorized an appeal to the ACCA, she had not authorized such an appeal to the CAAF.

Although PFC Moss's appellate counsel had a continuing duty to represent her that duty “was, by its own terms,

limited to representation before the ACCA.”²⁴ The majority concluded that the decision to appeal “is personal to an appellant, and because Moss did not authorize the appeal, [the CAAF] lacks statutory jurisdiction under Article 67(a)(3) and the appeal must be dismissed.”²⁵

Chief Judge Baker joined by Senior Judge Effron, dissented, asserting that the majority “reaches for a jurisdictional issue the parties did not raise or appeal and that we need not decide. In doing so the majority reaches an erroneous conclusion that dramatically curtails the jurisdiction of this Court to provide appellate and civilian review of trials in absentia.”²⁶ They found compelling the Government's concession that PFC Moss's case was lawfully before the court.²⁷

The dissenters argued that “the military justice system is predicated on the principle of civilian oversight,” but the majority “has determined that there should be no civilian review of trials where an accused has absented himself prior to appeal before this Court or the Supreme Court.”²⁸ They noted that Article 39(b), UCMJ,²⁹ does not specifically authorize trial in absentia and argue that, “[i]f the accused can be tried in absentia under Article 39, UCMJ, then there is no statutory reason to read Article 67, UCMJ, as prohibiting an appeal in absentia.”³⁰

Analysis of the Opinion

As the Supreme Court has noted, “the accused has the ultimate authority to make certain fundamental decisions regarding the case, [including] whether to . . . take an appeal.”³¹ There is no evidence of record that PFC Moss authorized an appeal to the CAAF, and the court should not infer she wanted to appeal merely because she asked her appellate counsel to appeal to the ACCA.

¹⁶ *United States v. Moss*, 73 M.J. 53 (C.A.A.F. 2013) (supplemental order).

¹⁷ Brief for Appellant on Specified Issues at 3, available at <http://www.armfor.uscourts.gov/newcaaf/briefs/2013Term/Moss13-0348AppellantBriefSpecifiedIssue.pdf> (last viewed Jan. 14, 2015).

¹⁸ *Id.*

¹⁹ *Id.* at 2.

²⁰ *Id.*

²¹ *Moss*, 73 M.J. at 69.

²² 10 U.S.C. § 867(a)(3) (2012): “The Court of Appeals for the Armed Forces shall review the record in—(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.”

²³ *United States v. Rodriguez*, 67 M.J. 110, 114–15 (C.A.A.F. 2009), quoted in *Moss* 73 M.J. at 67.

²⁴ *Moss*, 73 M.J. at 69.

²⁵ *Id.* The Supreme Court denied a Petition for Certiorari in a death penalty case, in which the defendant asserted he had not authorized an appeal, and referred correspondence with counsel to the Disciplinary Board of the Supreme Court of Pennsylvania. *Ballard v. Pennsylvania*, 134 S. Ct. 2842 (2014) (discussed in Jeffrey D. Koelemay, *Did Inmate OK Supreme Court Appeal? Death-Row Drama Sent Back to Pennsylvania*, 95 CRIM. L. REP. (BNA) 603 (Aug. 20, 2014).

²⁶ *Moss*, 73 M.J. at 69. (Baker, C.J., joined by Effron, S.J., dissenting).

²⁷ *Id.* (Baker, C.J., joined by Effron, S.J., dissenting).

²⁸ *Id.* at 70 (Baker, C.J., joined by Effron, S.J., dissenting).

²⁹ 10 U.S.C. § 839(b) (2012) (providing that, in hearings held out of the presence of the court members, an accused has a right to be present or, if at least one defense counsel is in accused's presence, such hearing may be held by audiovisual technology).

³⁰ *Moss*, 73 M.J. at 71 (Baker, C.J., joined by Effron, S.J., dissenting).

³¹ *Jones v. Barnes*, 463 U.S. 745, 751 (1983); accord *Florida v. Nixon*, 543 U.S. 175, 187 (2004); see *United States v. Larnear*, 3 M.J. 76, 79 (C.M.A. 1977).

The dissenters' argument that the majority "reaches for a jurisdiction issue the parties did not raise or appeal and that we need not decide," is misplaced. The CAAF is an Article I³² federal court.³³

Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.³⁴

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction This question the court is bound to ask and answer for itself, even when not otherwise suggested"³⁵ The majority in *Moss* correctly determined that jurisdiction was the threshold question that had to be answered before the court could reach the merits of the issue presented. PFC Moss had not authorized an appeal to the CAAF and, therefore, the CAAF was without jurisdiction to hear her case.

The dissenters are correct in asserting that the military justice system is predicated on civilian oversight but incorrect in assuming that the CAAF is the sole instrument able to exercise that control. Congress exercises civilian control over the military justice system;³⁶ the CAAF is merely a limited instrument of congressional control and oversight. After all, Congress has limited the CAAF's jurisdiction to cases in which (1) the sentence, as affirmed by the service court of criminal appeals, includes death; (2) the case was reviewed by the service court of criminal appeals and the Judge Advocate General orders it sent to the CAAF; or (3) the case was reviewed by the service court of criminal appeals and the CAAF grants review on good cause shown.³⁷ Surely, the dissenters would not suggest the CAAF has jurisdiction to review cases not meeting these jurisdictional requirements.

The dissenters are also correct in noting that Article 39, UCMJ, does not provide for trials in absentia. But read in context, Article 39 was only meant to ensure that an accused

is not excluded from sessions in which the military judge makes evidentiary and procedural rulings that will affect the accused's trial. It was not meant to preclude in absentia trials where the accused had been present for arraignment.

Finally, the dissent's conclusion that the majority "has determined that there should be no civilian review of trials where an accused has absented himself prior to appeal"³⁸ should be written off as mere hyperbole. The majority decided the case on lack of jurisdiction and specifically declined to decide the remaining specified or granted issues.³⁹

Discussion

Jurisdiction

Resolving the jurisdictional issue is easy. In fact, it is likely that the military services have already modified the statement of appellate rights to provide an accused the opportunity to authorize appeals before the CAAF. But the greater issue—whether the CAAF should and will consider such cases—is uncertain.

Fugitive Disentitlement Doctrine

In *Ortega-Rodriguez v. United States*, the Supreme Court noted that "[i]t has been well 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."⁴⁰ The justifications for such a rule are: (1) concerns about the enforceability of the appellate court's judgment against the fugitive;⁴¹ (2) escape is "tantamount to waiver or abandonment" of the right to appeal;⁴² (3) "[i]t discourages the felony of escape and encourages voluntary surrender";⁴³ and (4) "[i]t promotes the efficient, dignified operation" of the appellate court.⁴⁴ But there are limitations to the court's discretion to dismiss. There must be "some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response."⁴⁵

³² U.S. CONST. art. I.

³³ See *United States v. Denedo*, 556 U.S. 904, 912 (2009); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999).

³⁴ *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), quoted in *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013) (quotation marks and citations omitted).

³⁵ *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), quoted in *Ctr. for Constitutional Rights*, 72 M.J. at 128.

³⁶ U.S. CONST. art. I, § 8, cl. 14 ("The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.").

³⁷ UCMJ art. 67, 10 U.S.C. § 867(a) (2012).

³⁸ *Moss*, 73 M.J. at 71.

³⁹ *Id.* at 69.

⁴⁰ 507 U.S. 234, 239 (1993); see also *Molinero v. New Jersey*, 396 U.S. 365 (1970); *Smith v. United States*, 94 U.S. 97 (1876).

⁴¹ *Rodriguez*, 507 U.S. at 239–40 (citing *Smith*, 94 U.S. at 97; *Bohanan v. Nebraska*, 125 U.S. 692 (1887); *Eisler v. United States*, 338 U.S. 189 (1949)).

⁴² *Id.* at 240 (citing *Molinero*, 396 U.S. at 366).

⁴³ *Id.* at 241 (citing *Estelle v. Dorrrough*, 420 U.S. 534, 537 (1975)).

⁴⁴ *Id.* (citing *Dorrrough*, 420 U.S. at 537 (1975)).

⁴⁵ *Id.* at 244.

In *United States v. Smith*,⁴⁶ the Court of Military Appeals⁴⁷ (CMA) adopted the Supreme Court's fugitive disentitlement jurisprudence. Smith fled after his arraignment and was tried in absentia.⁴⁸ After his conviction was affirmed by the Navy Court of Military Review (CMR), his appellate defense counsel filed a timely petition for review at the CMA.⁴⁹ The court granted review. The accused returned to military control within the thirty-day period for petitioning the CMA but after his counsel had petitioned the CMA for review. The Court held that "one who voluntarily absents himself without leave is not entitled to invoke the processes of this Court, so long as he continues in that status."⁵⁰ Thus, while the appellant was a fugitive, the petition filed by his attorney was unauthorized by law, unauthorized by the appellant, and therefore, "ineffective for all purposes."⁵¹ As no petition was filed between the time the appellant returned to military control and the end of the statutory period for such filing, there was no petition validly before the Court. The court's "jurisdiction, therefore, terminated."⁵²

Only seven years later, however, the judges on the CMA could not agree on the application of the fugitive disentitlement doctrine to the military. In *United States v. Schreck*, appellate defense counsel filed a petition for review before the CMA.⁵³ The Government moved the court to dismiss the petition because the appellant was an unauthorized absentee on the day the CMR rendered its decision in the case, and the time for filing at the CMA had long passed.⁵⁴ In a split opinion, the CMA held that the appellant had specifically authorized service on his counsel if he could not be served; Schreck's counsel had been served, and had filed a petition within the statutory period.⁵⁵ The court denied the Government's motion to dismiss and allowed the appeal to go forward, even though the appellant had not returned to military control.⁵⁶ Citing the court's previous opinion in *United States v. Larnear*,⁵⁷ which

permitted service on either the accused or counsel of the intermediate appellate court's judgment, the majority concluded that its opinion in *Smith* had, in part, been overruled.⁵⁸

Chief Judge Everett, in a concurring opinion, criticized the CMA's earlier *Smith* opinion:

Since such a result would penalize the accused who relies on the power of attorney procedure authorized by *Larnear* and the regulations stemming from that decision, the rule in *Smith* seems inconsistent with *Larnear*. Secondly, in holding "ineffective" the filing of a petition for review by an accused who at the time was absent without authority, *Smith* sought to restrict a right which Congress had given in unqualified terms.⁵⁹

Judge Cook dissented, noting that *Larnear* did not involve an accused who was absent without leave and, therefore, did not overrule *Smith*.⁶⁰ *Larnear* was not a fugitive from justice: he had already served his sentence to confinement and was on appellate leave.⁶¹ *Larnear* instead concerned whether a petition for review was timely filed at the CMA when the accused had granted his appellate counsel power of attorney to receive the decision of the CMR and the petition for grant of review was filed within the statutory time period. The CMA recognized that the statute requires the accused be notified but accepted, under general principles of agency, that notification to counsel who had the accused's power of attorney to receive the CMR's decision, was notification to the accused.⁶²

When *Schreck* reached the CMA on its merits, the court split three ways.⁶³ In the lead opinion, Chief Judge Everett noted that in allowing *Schreck*'s appeal to move forward, the court "did not intend to suggest that [it] lack[ed] the power to dismiss, at some time after filing, a petition for review filed for an accused who is absent without authority."⁶⁴ Judge Fletcher concurred in the result,⁶⁵ specifically limiting

⁴⁶ 46 C.M.R. 247, 248 (C.M.A. 1973) (citing *Molinaro*, 396 U.S. at 366; *Smith*, 94 U.S. at 97).

⁴⁷ The United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces on October 5, 1994. Pub. L. No. 103-337, § 924(b), 108 Stat. 2663 (1994).

⁴⁸ *Smith*, 46 C.M.R. at 248.

⁴⁹ *Smith*, 46 C.M.R. at 248. Although unclear from the case, it is probable that the CMA lacked jurisdiction to hear the appeal, as it is unlikely the appellant had authorized his counsel to file one at the CMA.

⁵⁰ *Id.* at 249 (citing *Molinaro*, 396 U.S. at 366).

⁵¹ *Id.*

⁵² *Id.*

⁵³ 9 M.J. 217, 217 (C.M.A. 1980).

⁵⁴ *Id.*

⁵⁵ *Id.* at 219 (Everett, C.J., concurring).

⁵⁶ *Id.*

⁵⁷ 3 M.J. 76 (C.M.A. 1977).

⁵⁸ *Schreck*, at 218.

⁵⁹ *Id.* at 219 (Everett, C.J., concurring) (discussing *Larnear*, 3 M.J. 76). Although the power of attorney may have permitted the defense attorney to accept service of the lower court's decision, the CMA opinion does not discuss whether *Schreck* had specifically authorized an appeal to the CMA.

⁶⁰ *Id.* at 220 (Cook, J., dissenting).

⁶¹ *Larnear*, 3 M.J. at 78. An accused who completes the sentence to confinement but is awaiting a discharge to be executed may now be placed on appellate leave. U.S. DEP'T OF DEF. INSTR. 1327.06, LEAVE AND LIBERTY POLICY AND PROCEDURES enclosure 2 ¶ 1.1.(2) (13 Aug. 2013).

⁶² *Larnear*, 3 M.J. at 81.

⁶³ *United States v. Schreck*, 10 M.J. 226 (C.M.A. 1981).

⁶⁴ *Id.* at 229 (opinion by Everett, C.J.).

⁶⁵ *Id.* (Fletcher, J., concurring in the result).

his concurrence to the disposition of the case—unless the appellate defense counsel advised the court within thirty days that the accused had returned to military control, it would dismiss the appeal with prejudice—but declined to join the rest of the Chief’s opinion.⁶⁶ Judge Cook dissented.⁶⁷ Unbeknownst to the court, Schreck had returned to military control and was on appellate leave.⁶⁸ The CMA later concluded that it would be inappropriate under these circumstances to dismiss Schreck’s petition.⁶⁹ The CMA granted his appeal and remanded for a new supervisory authority action.⁷⁰

Conclusion

After *Schreck*, the continued vitality of *Smith* and the fugitive disentitlement doctrine in the military is unclear. To the extent permitted by the Supreme Court in *Ortega-Rodriguez*, the CAAF should adopt this discretionary doctrine. To do otherwise is to waste judicial resources and grant an AWOL appellant the power to determine whether the court’s judgment will be enforceable.

⁶⁶ *Id.* (opinion by Everett, C.J.).

⁶⁷ *Id.* (Cook, J., dissenting).

⁶⁸ *See id.* 374.

⁶⁹ *Id.* at 375.

⁷⁰ *Id.*