IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	BRIEF ON BEHALF OF
Appellee	)	APPELLANT
	)	
v.	)	Crim. App. Dkt. No. 20160786
	)	
Specialist (E-4)	)	USCA Dkt. No. 20-0195/AR
JEREMY N. NAVARETTE	)	
United States Army	)	
Appellant	)	

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Presented

WHETHER THE ARMY COURT ERRONEOUSLY DENIED APPELLANT'S REQUEST FOR A POST-TRIAL R.C.M. 706 INQUIRY BY REQUIRING A HEIGHTENED THRESHOLD SHOWING UNDER R.C.M. 1203.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [UCMJ], on remand from this Court on February 27, 2019. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ (2012).

Statement of the Case

1. Appellant's court-martial and initial appeal.

On December 14, 2016, a general court-martial panel with enlisted representation convicted SPC Navarette (appellant), contrary to his plea, of one specification of wrongful distribution of 4.2 grams of cocaine in violation of Article 112a, UCMJ (2012). (JA 215). The panel sentenced appellant to 90 days confinement and a bad-conduct discharge. (JA 216). The convening authority approved the adjudged sentence. (JA 193).

On May 18, 2018, during appellate proceedings, appellant's former appellate defense counsel learned appellant suffered from bipolar disorder I, with mania and psychosis. (JA 083, 107). Accordingly, counsel filed the first motion to stay the proceedings, requesting a Rule for Courts-Martial [R.C.M.] 706 inquiry into appellant's capacity and mental responsibility and to a motion to attach additional medical records reflecting that appellant had repeatedly been diagnosed as "gravely disabled" and involuntarily committed to psychiatric institutions on multiple occasions. (JA 076-085). On September 17, 2018, the Army Court denied appellant's motion and affirmed the findings and sentence. *United States v. Navarette*, 2018 CCA LEXIS 446 (A. Ct. Crim. App. Sep. 17, 2018) (*Navarette I*).

2. This Court's remand to the Army Court to ensure a more thorough review.

After granting appellant's petition for review in this case, this Court remanded appellant's case to the Army Court in light of "two concerns surrounding Appellant's medical condition that we feel should be more thoroughly addressed to ensure a proper Article 66, UCMJ, review." *United States v. Navarette*, 79 M.J. 123, 126 (C.A.A.F. 2019) (*Navarette II*).

The first concern was whether appellant had "establish[ed] a nexus between his mental impairment and his ability to participate intelligently in the proceedings," as required by R.C.M. 1203(c)(5). *Navarette II*, 79 M.J. at 126—27. Because this Court had never explicitly required such a nexus, it remanded appellant's case to the Army Court to give appellate counsel the opportunity to do so. *Id*. at 127 n. 7.

This Court was also concerned that the Army Court failed to properly consider the significance of appellant's mental illness and that multiple involuntary commitments spanned significant periods of his appellate representation. *Id*. at 127. Accordingly, this Court required that the Army Court "*more fully evaluate* Appellant's R.C.M. 1203 motion." *Id*. (emphasis added). Chief Judge Stucky dissented, determining that the Army Court abused its discretion, and he would have ordered an R.C.M. 706 inquiry. *Id*. at 133.

3. Appellant's second motion to abate.

On October 20, 2019, after remand from this Court, former appellate defense counsel moved the Army Court to abate proceedings and order an inquiry into appellant's competency and responsibility in accordance with R.C.M. 706, as Chief Judge Stucky suggested. (JA 013). To address this Court's concern that the initial motion failed to establish a nexus between appellant's disorder and his competency to participate in appellate proceedings, this motion supplemented the record in four ways.

First, appellant included a new affidavit from a forensic psychologist explicitly addressing the relationship between bipolar disorder and both competency and responsibility. (JA 093-096). The psychologist informed the Army Court that bipolar disorder would "severely limit an individual's ability to manifest a rational and factual understanding of the charges against them as well as ability to assist an attorney in preparing a defense and proceeding to trial." (JA 095). The forensic psychologist also explained that the same disabilities affected mental responsibility at the time of the offense. (JA 095). Finally, the expert explained that appellant's other disabilities—intellectual disability and PTSD—exacerbated these deficiencies. (JA 095).

Second, appellant presented new medical records demonstrating that even after he was discharged from involuntary commitments with a "positive

outlook"—a fact on which the Army Court originally placed considerable emphasis in its denial of appellant's first motion—appellant still suffers from unpredictable manic episodes and, to illustrate the gravity of his impairment and irrationality, had jumped on New York subway tracks during a manic episode as recently as April 2019, a month prior to oral arguments before this Court. (JA 086-092).

Third, appellant's appellate defense counsel explicitly informed the Army Court that he had serious misgivings about appellant's competency over the course of appellate representation. (JA 107). In support of his concerns, counsel disclosed that three of the conversations he had with appellant took place when appellant had been judicially determined to be "gravely disabled" and involuntarily committed in California psychiatric wards. (JA 107).

Counsel further disclosed that, during these conversations, appellant exhibited what counsel now recognizes as symptoms of mania and depression, including a rapid speech pattern, disorganized thought patterns, and factual assertions inconsistent with the existing record of trial. (JA 033-034, 107). In light of these observations, and counsel's knowledge of appellant's disorder, counsel also informed the Court of his "substantial questions about the accuracy of appellant's recollections and his ability to identify and communicate all relevant information in order for me to effectively represent him on appeal." (JA 107).

Counsel added he had "no way of knowing what material information appellant's mental illness may have prevented him from disclosing." (JA 107).

Finally, appellate counsel specifically identified a board president and two qualified board members who were available and agreeable to serve on a post-trial R.C.M. 706 board.[1] (JA 042).

4. The government acknowledged a "substantial question" had been raised.

On October 28, 2019, the government responded, agreeing "that a substantial question as to appellant's current mental capacity has been raised" and "a post-trial R.C.M. 706 examination pursuant to R.C.M. 1203(c)(5) would be appropriate." (JA 050). Although agreeing that an R.C.M. 796 board was appropriate, the government argued that the board should be limited to present competency and should exclude consideration of competency at the time of trial and mental responsibility at the time of the offenses. (JA 051-053).

[1] The Army Court granted appellant's contemporaneously filed motion to attach, *inter alia* the *curriculum vitae* of the proposed board president, Dr. Paul Montalbano, as Defense Appellate Exhibit J. Dr. Montalbano is the Director of the Walter Reed Forensic Psychology Postdoctoral Fellowship Program, part of the Army's Center for Forensic Behavioral Science. Dr. Montalbano agreed to perform a post-trial inquiry into present and past competency, as well as mental responsibility. Dr. Montalbano further recommended a three-person board to incorporate a multi-disciplinary approach to the inquiry and to include Major Hammelman and CPT Richter, both fellows in Center for Forensic Behavioral Science Fellowship Program and acting under Dr. Montalbano's supervision.

5. Despite the position of the parties, the Army Court concluded a "substantial question" was not raised.

Despite the agreement of both parties, as well as Chief Judge Stucky's dissent, on January 29, 2020, the Army Court denied appellant's second motion to abate proceedings and declined to order any inquiry into appellant's mental health, past or present. *United States v. Navarette*, 2020 CCA LEXIS 31, *20 (A. Ct. Crim. App. Jan. 29, 2020) (*Navarette III*) (JA 001). The Army Court similarly denied appellant's motion for *en banc* reconsideration on February 19, 2020.

6. Appellate counsel continued to have concerns based on conversations with appellant after the Army Court issued its opinion.

Former lead appellate defense counsel withdrew from representation on August 11, 2020, at which point, the first undersigned counsel became lead appellate defense counsel. (JA 108). Since that time, lead appellate counsel has formed her own serious concerns regarding appellant's capacity to cooperate intelligently in his own defense.

Summary of the Argument

The Army Court erred in failing to order an R.C.M. 706 board to address appellant's mental status at the time of the offense and on appeal. Appellant's submissions, consisting of expert opinion, diagnostic records, and appellate defense counsel's declaration, raise a substantial question about appellant's mental

responsibility at the time of the offense and original trial, and his competency to cooperate intelligently in ongoing appellate proceedings.

Since 1965, this Court has interpreted "substantial basis" to mean a "non-frivolous, good faith" basis for questioning an accused's capacity. *United States v. Nix*, 15 U.S.C.M.A. 578, 582 (C.M.A. 1965). The decision below, *Navarette III*, however, would appear to *sub silentio* overrule *Nix*. When the president promulgated R.C.M. 1203(c)(5) in 1994, adding post-trial provisions for inquiry into the capacity of the accused, he used nearly identical language, requiring an inquiry where "a *substantial question* is raised as to the requisite mental capacity of the accused . . . ." (emphasis added).

As appellant argued to both this Court and the Army Court, the "substantial question" language has since been included in R.C.M. 1203(c)(5) and there is no readily apparent reason to interpret it differently from how this Court did in 1965. (JA 023-027). The appropriate inquiry at this stage is not whether appellant has demonstrated by clear and convincing evidence that he *actually lacks* mental capacity or responsibility, but instead whether there is a legitimate reason to believe this *may* be an issue. *Nix*, 15 U.S.C.M.A. at 582-83.

While this Court may yet parse a nuance between these standards,[2] by *any* standard, appellate defense met the threshold showing to obtain a post-trial R.C.M. 706 inquiry of appellant. The Army Court's only job was to "determine whether the evidence had raised a *substantial question* as to Appellant's competence." *Navarette II*, 79 M.J. at 129 (Stucky, C.J., dissenting) (emphasis in original). Because the Army Court would only be satisfied by requiring appellant to show that which can only be shown by a R.C.M. 706 inquiry, it abused its discretion.

The Army Court bolstered its clearly erroneous finding of law that a substantial question had not been raised as to appellant's competence with multiple clearly erroneous findings of fact. First, despite receiving supplementary evidence documenting appellant's ongoing struggle with severe mental illness (in addition to the already voluminous record) and the government's concession that the supplementary evidence raised a substantial question concerning appellant's competence, the Army Court nonetheless found "insufficient information" existed to raise a substantial question about appellant's competence or mental responsibility. The Army Court then wholly misconstrued the guidance provided by this Court in *Navarette II* as requiring former appellate defense counsel to

[2] *See Navarette II*, 79 M.J. at 133 (Stucky, C.J., dissenting) (noting the majority left open whether the "substantial question" articulated in R.C.M. 1203(c)(5) is the appropriate standard, or whether the non-frivolous, good faith basis standard articulated in *Nix* controls).

provide substantive contents of his privileged communications with appellant. To compound these errors, the Army Court actually faulted appellant's former trial forensic psychologist expert for not having recently evaluated appellant, despite no mechanism in place for the expert to have done so, except through the very R.C.M. 706 review the court was denying.

The Army Court disregarded the complicated and insidious nature of severe mental illness, and further diminished the historical "preferential treatment [of] the question of mental responsibility of a military member. . ." *United States v. Young*, 43 M.J. 196, 197 (C.M.A. 1995). It raised the threshold showing for a post-trial R.C.M. 706 inquiry to an insurmountable bar by requiring appellant to prove his incompetence and lack of mental responsibility before granting him access to the very legal mechanism under the Code equipped to render that opinion. In so doing, it unreasonably disregarded the opinions of "highly trained medical personnel,"[3] rendering the very existence of post-trial R.C.M. 706 inquiries superfluous.

Statement of Facts

Appellant provided a detailed overview of the relevant facts in his first petition to this court. (JA 116-26). Appellant incorporates those facts previously

[3] *Nix*, 15 C.M.A. at 583.

presented, as well as the additional facts in Defense Appellate Exhibits H, I, J, and K, discussed above. (JA 086-107).

WHETHER THE ARMY COURT ERRONEOUSLY DENIED APPELLANT'S REQUEST FOR A POST-TRIAL R.C.M. 706 INQUIRY BY REQUIRING A HEIGHTENED THRESHOLD SHOWING UNDER R.C.M. 1203.

Standard of Review

This Court reviews the decision to grant or deny a motion for a R.C.M. 706 inquiry for an abuse of discretion. *Navarette II*, 79 M.J. at 126 (internal citations omitted). When reviewing for abuse of discretion, "[f]indings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *Id*. (quoting *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011)).

Law and Argument

An appellate authority may order a mental status evaluation in accordance with R.C.M. 706 if a "substantial question is raised as to the requisite mental capacity of the [appellant]." R.C.M. 1203(c)(5). Such capacity requires an appellant to have the ability to "conduct and cooperate intelligently in the appellate proceedings." R.C.M. 1203(c)(5). "Without substantial evidence to the contrary," an [appellant] is presumed competent. *Navarette II*, 79 M.J. at 125. Therefore, to prevail on a motion for a post-trial sanity board, "an appellant must, at a minimum, articulate how his mental condition prevents him from being able to understand or

participate in the proceedings. Without such a nexus, Appellant does not raise a 'substantial question' as to his mental capacity." *Id*. at 126.

A. Despite overwhelming evidence to the contrary and the government's concession to the existence of a "substantial question" of appellant's competency, the Army Court erroneously concluded appellant failed to articulate the requisite nexus.

The Army Court concluded appellant "failed to articulate how his mental health diagnoses prevent him from being able to understand or participate in his appellate proceedings." *Navarette III*, 2020 CCA LEXIS 31 at *14. This conclusion is simply wrong given the abundant evidence presented to the Army Court.

1. In addition to the original record previously before the Army Court, appellate defense counsel presented further evidence illuminating appellant's continued struggle with severe mental illness.

This case includes a well-developed post-trial record documenting appellant's diagnosis with multiple mental illnesses—including severe bipolar disorder and post-traumatic stress disorder. The underlying record demonstrates how these illnesses specifically manifest in appellant—including, among other things, complete psychotic breaks, delusions of being an FBI agent, breaking into a grade school, and multiple involuntary hospitalizations. (JA 076-085).[4]

[4] Del Amo Discharge Report ("encountered by the police in a florid manic state with…severe levels of psychomotor acceleration, grandiose and delusional symptomatology with severe levels of grandiose themes, severe levels of tangentiality and disorganized thought, tremendous lability to mood, severe

A snapshot of appellant's mental illness chronology in relation to his appellate proceedings is as follows:

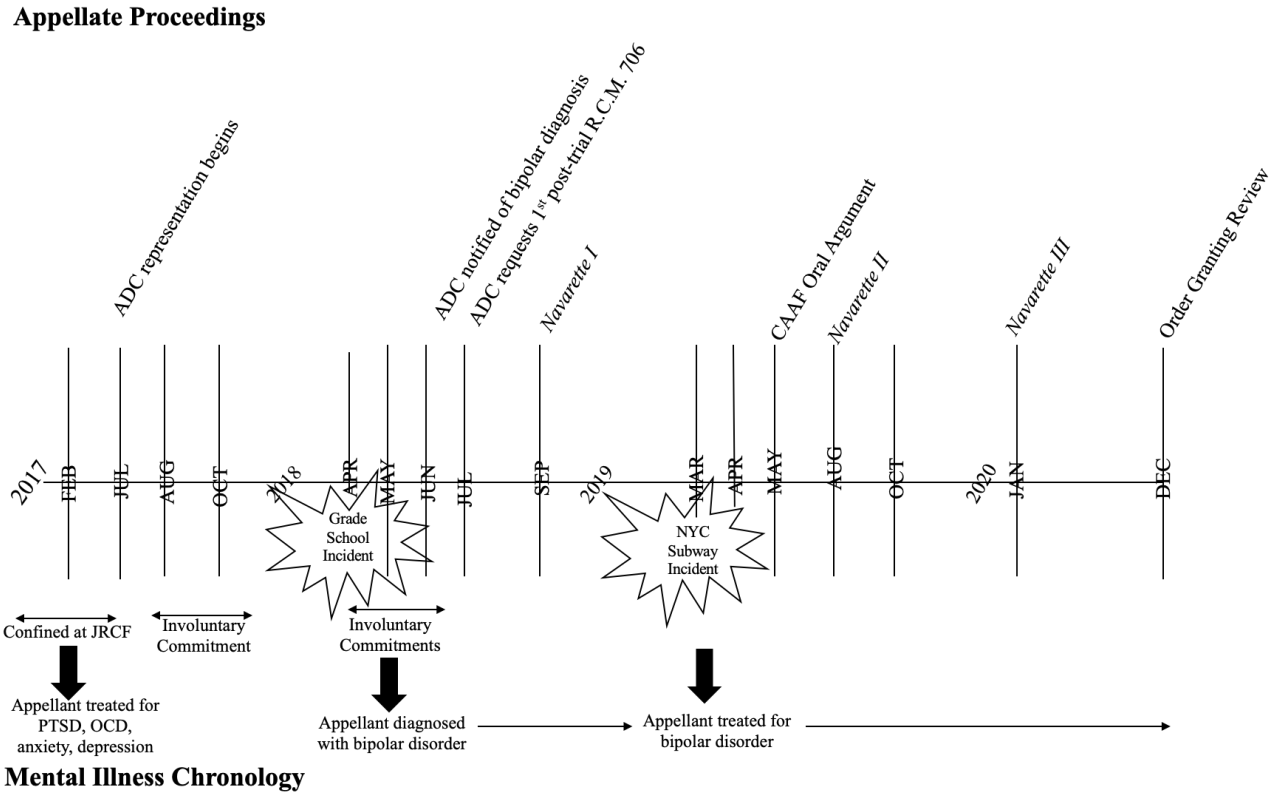

Fig. 1

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difficulties with focus of thought, concentration, and cognitive tracking, and significant levels of irritability and impulsiveness" and "The bipolar diagnosis has not only affected the patient's general psychological functioning, but classically and quite certainly had an impact in terms of affecting his judgment and decision-making capacity as judgment and awareness of consequences are certainly compromised by the underlying bipolar illness") (JA 080); Declaration of Dr. Hirsch (describing SPC Navarette "believing he was a Special Agent of the FBI and attempting to enter a grade school believing he was on assignment to instruct children in the event of a terrorist attack, making threats against others, crashing his car into a school bus and then attempting to kill himself with a cord around his neck" and repeatedly being found to be "gravely disabled" by California court judges) (JA 083).

On remand, appellate defense counsel presented the Army Court with additional evidence documenting appellant's ongoing struggle with severe mental illness as recorded by his treating psychiatrist, Dr. Vinjay Phalgoo. (JA 086-092). Dr. Phalgoo documented one such acute manic episode appellant suffered in April 2019, just before oral arguments in appellant's case before this Court.[5] During that manic break, appellant jumped onto the subway tracks in New York City and began cutting himself; after being removed from the tracks by a Metropolitan Transportation Authority worker, the police took appellant to the hospital for treatment. (JA 086). In addition to describing the acute manic episode, the records also detailed appellant's continued struggle with hypomania: his symptoms of "racing thoughts, sleeping only 1-2 hours, suicidal ideation, irritability/anger, sexual promiscuity, flight of ideas, feelings of grandiosity, hyper/overly energetic, feeling out of reality" persisted, despite pharmacological intervention.[6] (JA 087-088).

Additionally, appellate defense counsel provided the Army Court with an affidavit from Dr. Kevin Richards, appellant's former trial-level expert in forensic

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[5] This Court heard oral arguments in *Navrette II* on May 21, 2019. Dr. Phalgoo's treatment records were entered on April 23, 2019. (JA 086).

[6] The records document numerous pharmacological attempts—past and present—to manage SPC Navarette's symptoms of bipolar disorder and the concomitant side effects. (JA 087-089). At the time of this event, SPC Navarette was taking 300mg of Lithium twice daily. (JA 087).

psychology.[7] (JA 093-097). Dr. Richards explained the nexus between the symptomatology of bipolar disorder experienced by appellant and both capacity and mental responsibility: individuals with bipolar disorder exhibit "elevated mood states, agitation, rapid speech, racing thoughts, and heightened levels of activity"; additionally, individuals may experience psychotic symptoms, including "hallucinations, delusions, disorganized thinking and disorganized behavior." (JA 094). When in an acute manic state, an "individual's ability to think clearly and process information appropriately is generally severely impacted. If the manic state is accompanied by psychotic symptoms, these also interfere with an individual's ability to accurately interpret and understand what is going on around

[7] Dr. Richards evaluated appellant before trial; this evaluation did not occur as part of an R.C.M. 706 inquiry. (JA 199). He concurred in appellant's earlier diagnoses of ADHD and PTSD. (JA 199). Dr. Richards also tested appellant's IQ, and discovered it was in the "mild mentally retarded range." (JA 200). In February 2017, while in military confinement, appellant was diagnosed with and treated for anxiety, depression, PTSD, and obsessive-compulsive disorder (OCD). (JA 058). In May 2018, during one of appellant's involuntary commitments in California, Dr. Hirsch, appellant's treating psychiatrist, finally correctly diagnosed him with Bipolar Disorder – Type I after extensive evaluation. (JA 083-084). Appellant's involuntary commitment at the time stemmed from a severe manic episode. (JA 080, 083). "Bipolar disorder I is diagnosed when a person has a manic episode." What Are Bipolar Disorders, American Psychiatric Association, https://www.psychiatry.org/patients-families/bipolar-disorders/what-are-bipolar-disorders (last accessed Jan. 26, 2021). While the typical age for a first manic episode is eighteen, it can occur later in adulthood. It is not uncommon for bipolar disorder to go undiagnosed for years, as a person's symptoms may masquerade as those of other mental illnesses. Bipolar disorder can also exist concurrently with other mental health diagnoses in an individual. For example, appellant suffers simultaneously from bipolar disorder and PTSD. (JA 084).

them." (JA 094-095). Individuals like appellant suffering from bipolar disorder may also suffer from "residual 'hypomanic' symptoms. These symptoms are similar to those in a manic episode, though less severe." (JA 095). Dr. Richards was unsurprised appellant continued to experience symptoms of bipolar disorder despite treatment, as this "is a common occurrence with people who suffer from severe and persistent mental disorders."[8] (JA 094).

Dr. Richards further explained bipolar disorder "has the potential to severely limit an individual's ability to manifest a rational and factual understanding of the charges against them as well as ability to assist an attorney in preparing a defense and proceeding to trial." (JA 095). He also candidly stated he could not answer the ultimate question regarding appellant's competency and criminal responsibility as he had not performed an R.C.M. 706 evaluation of appellant. (JA 094). Indeed, Dr. Richards opined those ultimate questions "could *only* be determined if [appellant] were to undergo a [sic] [R.C.M.] 706 evaluation to address the connections between his diagnosed disorders and the psycho-legal questions at hand." (JA 096) (emphasis added).

2. Appellate defense counsel personally asserted substantial questions regarding appellant's competency.

[8] Dr. Richards also noted the release of a patient from the hospital did not in any way indicate the patient was no longer suffering from a severe mental disease because "the criteria for release from hospital is generally an absence of imminent danger to self or others and not an absence of psychiatric symptoms." (JA 094).

In accordance with this Court's guidance in *Navarette II*, former appellate counsel provided an affidavit to the Army Court in which he expressed his professional concerns as to appellant's competency. (JA 107). He informed the Army Court precisely why *he believed* there was a substantial reason to question appellant's ability to assist in his appellate defense: at least three communications took place when appellant was involuntarily confined in two separate psychiatric wards; during these communications, appellant exhibited keystone symptoms of bipolar disorder; and "counsel himself has a substantial question not just about appellant's present competency, but about his competency during essential periods of his appellate representation before this Court." (JA 0330034).

3. Appellant defense counsel established a nexus between appellant's mental health diagnoses and competency.

Appellate defense counsel "explicitly connect[ed] the dots"[9] for the Army Court by explaining the nexus between appellant's historical and ongoing battle with severe mental illness and his ability to understand and participate in his appellate proceedings. Appellant's struggle with severe mental illness not only predates the commencement of appellate representation—it spans the entire duration of these appellate proceedings and continues to this day. *See* Fig. 1. (JA 057-096, 116-26).

[9] *Navarette II*, 79 M.J. at 132 (Stucky, C.J., dissenting).

Appellate defense counsel addressed this nexus in two ways. First, appellate defense counsel provided relevant information from Dr. Richards, a forensic psychologist, to illuminate the connection between appellant's illness and his ability to understand and participate in his appellate proceedings. (JA 093-096). In addition to appellant's multiple, well-documented episodes of acute mania with psychosis, his persistent struggles with hypomania are also well-documented. (JA 080-092). According to Dr. Richards, bipolar disorder *will* "severely limit an individual's ability to manifest a rational and factual understanding of the charges against them as well as ability to assist an attorney in preparing a defense and proceeding to trial." (JA 095). Furthermore, "residual symptoms can also create interference in the person's ability to carry out the tasks described above." (JA 095). Dr. Richards also explained bipolar disorder could "potentially impact [someone's] degree of criminal responsibility" and that appellant's other mental disabilities would only exacerbate these deficiencies. (JA 095).

Second, appellate defense counsel asserted his professional and substantial questions as to appellant's competency. (JA 107). While appellate defense counsel is not a trained forensic psychologist, he assiduously sought assistance from multiple health professionals to educate himself on the insidious nature of bipolar disorder. (JA 083-085, 093-096).

Appellate defense counsel based his concerns on Dr. Hirsch's diagnosis of appellant's severe illness, appellant's vast history of serious struggles with mental health established by his records, Dr. Richards's assessment of the generalized impact of bipolar disorder on competency and responsibility, and counsel's own observations of appellant's behavior during key consultations. Counsel thus concluded that this "raised substantial questions about the accuracy of appellant's recollections and his ability to identify and communicate all relevant information in order for me to effectively represent him on appeal." (JA 107).

4. The government conceded appellant had raised a "substantial question" as to his competency.

Before the Army Court on remand, the government conceded that a substantial question had been raised as to appellant's competency, and "a post-trial R.C.M. 706 examination pursuant to R.C.M. 1203(c)(5) would be appropriate." (JA 050). Furthermore, the government acknowledged that it appeared appellant's mental health had continued to deteriorate through the course of appellate proceedings. (JA 054).

In light of the overwhelming evidence establishing the nexus between appellant's diagnosis and his ability to understand and participate in his appeal—and the government's concession to that point[10]—the Army Court nonetheless

[10] While the Army Court was not bound by the government's concession, its nonconcurrence raises a question regarding the propriety of its departure from the

determined there remained a "substantial question" as to whether an R.C.M. 706 board was appropriate.

B. The Army Court reached its conclusion of an insufficient nexus by ignoring the salient, common sense evidence before it.

1. The Army Court erroneously imposed on counsel a requirement to make talismanic assertions that far exceeded this Court's guidance in *Navarette II*.

The Army Court found "[a]ppellant's counsel has not asserted that appellant 'is unable to under the nature of the proceedings . . . or cooperate intelligently in the defense of the case." *Id*. at *15. It faulted former lead appellant defense counsel for "merely assert[ing] a general belief as to concerns about appellant's competency." *Id*. at *14-16. This finding is flawed in numerous ways.

First, it misconstrued this Court's concern that the record lacked "even a *prima facie* statement by counsel or another witness that there is reason to question Appellant's competence to participate in his appeal"[11] with a requirement to invoke particular language to satisfy that concern. But this Court imposed no such requirement on counsel. Indeed, the propriety of requiring counsel to assert any kind of personal claim was questioned by one member of this Court. *Navarette II*,

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parties' mutual agreement. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020) ("[A] court is not hidebound by the precise arguments of counsel, but the [appellate court's] radical transformation of this case goes well beyond the pale.") It also invites the question why the Army Court continues to so vigorously oppose inquiry into appellant's competency.

[11] *Navarette II*, 79 M.J. at 126.

79 M.J. at 129 (Stucky, C.J., dissenting) ("Hypothetically, evidence of incompetence could be overwhelming notwithstanding counsel's subjective, lay impression that an appellant is perfectly competent. In that case, counsel should be able to successfully move for a sanity board notwithstanding an inability to claim personal reservations about competence based on client interaction.")

Second, while this Court, citing *United States v. Proctor*, 1990 CMR LEXIS 547, at *1 (A.F.C.M.R. May 8 1990), highlighted materials that *might* substantiate competency concerns,[12] *Proctor*'s appellate record contained non-privileged materials, such as information contained in allied papers and court documents reflecting the appellant's refusal to cooperate with counsel, upon which counsel could rely. But no such materials exist in appellant's case. Counsel cannot be chided for failing to produce something that simply does not exist.

Third, the Army Court ignored this Court's support of upholding ethical obligations. This Court acknowledged that while counsel could rely upon a client's demeanor or bearing that may be readily observable to others as being non-privileged, "the privilege might apply when an opinion about mental capacity is entirely or largely based on the content of the client's statements." *Navarette II*, 79 M.J. at 126, n. 6 (internal citations omitted). Appellate defense counsel have never met appellant in person. Counsel relied largely on the content of appellant's

[12] *Navarette III*, 79 M.J. at 126, n. 5.

conversations with counsel—privileged information—to form opinions concerning appellant's competency. Appellate defense counsel remain bound by rules of professional responsibility to maintain that privilege.[13]

Lastly, in finding that "counsel have not claimed any difficulty in communicating with appellant or stated a concern about his ability to assist with the appellate process," the Army Court ignored precisely that to which former lead appellate defense counsel actually gave a sworn oath. Counsel attested to Dr. Hirsch's disclosure first alerting him to appellant's diagnosis with bipolar disorder, and his ensuing recognition that appellant exhibited "many of the classic symptoms of bipolar disorder during prior consultations." (JA 107). In accordance with this Court's guidance, counsel attested to characteristics of appellant's demeanor and bearing that were readily observable to anyone: he spoke in rapid speech patterns. He exhibited disorganized thoughts. He appeared sluggish and apathetic. (JA 107).[14]

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[13] First undersigned counsel's state bar proposes withdrawal from representation when counsel are forced to balance the sanctity of attorney-client privilege and questions of client competency. Florida Bar Ethics Opinion, Opinion 85-4 (Oct. 1, 1985), https://www.floridabar.org/etopinions/etopinion-85-4/ (last accessed Jan. 24, 2021).

[14] These are the precise symptoms mental health professionals attributed to bipolar disorder, as articulated to both appellate defense counsel and the Army Court. (JA 080-096).

Similarly comporting with this Court's opinion and rules of professional responsibility, counsel expressed his concerns about appellant's competency, but did so without crossing an ethical line and divulging the substantive contents of his communications. Counsel even explained that "claims SPC Navarette made during consultations, including allegations about his court-martial, were potentially the product of grandiose thinking and potentially psychosis." (JA 107). Furthermore, counsel specifically relayed the circumstances surrounding his communications with appellant in April 2018. During those conversations, appellant failed to disclose on three separate occasions that he was involuntarily committed to a psychiatric ward during the times he communicated with appellate defense counsel.[15] (JA 107). Based upon appellant's demeanor, appellate defense counsel questioned the accuracy of the information appellant provided to him, as well as appellant's ability to "identify and communicate all relevant information in order for me to effectively represent him on appeal." (JA 107).

2. The Army Court arbitrarily faulted counsel for relying on disclosed mental health records and personally lacking mental health expertise.

[15] It is self-evident if one is repeatedly involuntarily committed because they are unable to feed, clothe, or shelter themselves, and cannot be trusted to not harm themselves or others, that person does not possess the requisite competence to participate intelligently in their appeal. It is similarly self-evident that if a person's sense of reality is distorted as a result of hallucinations, that person will have "difficulty" in communicating with counsel and assisting with their appeal.

The Army Court criticized counsel for refusing to disclose the substantive contents of communications with appellant protected by attorney-client privilege while simultaneously relying on material that would otherwise be privileged by the psychotherapist-patient privilege. *Id*. *17. In its critique, the Army Court failed to acknowledge that appellate defense counsel was not the holder of the privilege of those communications. *See* Military Rule of Evidence 513. Counsel simply supplemented the appellate record with communications provided directly by Dr. Phalgoo—appellant's treating psychiatrist and holder of the privilege. It was not counsel's decision to waive the privilege, nor was it his responsibility to scrutinize the manner in which the waiver was effectuated. Furthermore, nothing precludes counsel from relying on mental health records subject to disclosure—either through consent or court order—in reaching his opinion as to his client's capacity. It in fact would be absurd to fail to do so.

Second, the Army Court, in remarking that "counsel merely assert[ed] a general belief as to concerns about appellant's competency,"[16] appeared to fault former lead appellate defense counsel for lacking expertise that no appellate attorney can reasonably be expected to possess. Appellate defense counsel, just like judges, are attorneys, not mental health professionals, and must rely on the expertise of those who are—something the Army Court noticeably failed to do.

[16] *Id.* at *16.

Appellate defense counsel discovered, through various communications, that appellant was being professionally treated for a severe mental disease, and determined that information, coupled with his own communications with the appellant, indicated to him that appellant suffered from a severe mental illness to such a degree that appellant could not assist in his own appeal. Appellant defense counsel connected the dots between the voluminous mental health records, opinions of multiple mental health professionals, and his own "subjective, lay impressions."[17]

3. The Army Court unreasonably diminished the import of Dr. Richards' affidavit because he had not recently evaluated appellant.

The Army Court interpreted Dr. Richards's affidavit as "merely outlin[ing] the general *potential* impacts of bipolar disorder" and "not specifically link[ing] any of the symptoms and manifestations of bipolar disorder to appellant." *Navarette III*, 2020 CCA LEXIS 31 at *18. This conclusion, however, overlooked the vast appellate record documenting precisely and specifically how these symptoms manifest in appellant. (JA 080-096). It also disregards appellate defense counsel's affidavit describing those various behaviors described by Dr. Richards with behaviors and symptoms appellant exhibited during telephonic consultations with counsel. (JA 033-34, 107). Indeed, a California state court

[17] *Navarette II*, 79 M.J. at 129 (Stucky, C.J., dissenting).

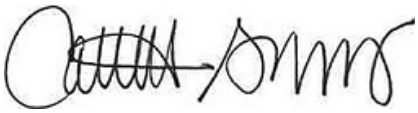
found appellant "gravely disabled" at the very time the conversations with appellate defense counsel were taking place. (JA 033-34).

The only remaining rationale for the Army Court's disregard of this overwhelming evidence is that Dr. Richards did not opine that appellant was incompetent. In other words, the Army Court was looking for a talismanic invocation. This, obviously, cannot be what is required. If it were, the expert opinion would answer the ultimate question every time, and would render the post-trial R.C.M. 706 inquiry process entirely superfluous. Dr. Richards' role was to merely describe the symptomatology of bipolar disorder, and how it can affect individuals' competency and mental responsibility—the precise question that needed answered. Indeed, Dr. Richards made plain the *only* way to answer the ultimate question of competency was for appellant to undergo a R.C.M. 706 evaluation. (JA 096) (emphasis added).

Conclusion

WHEREFORE, appellant respectfully requests this Court order an inquiry into appellant's present capacity, capacity at the time of trial, and mental responsibility at the time of the offense, consistent with its order in *United States v. Collins*, 2001 CAAF LEXIS 987 (C.A.A.F. 2001) and *United States v. Massey*, 27 M.J. 371, 374 (C.M.A. 1989) (stating multiple reasons why once a present capacity inquiry is ordered, it would be unwise for the inquiry to fail to consider past

capacity and mental responsibility). In the alternative, appellant respectfully requests this Court remand this case to the Army Court with instructions to order a post-trial R.C.M. 706 into his present capacity, capacity at the time of trial, and mental responsibility at the time of the offense.



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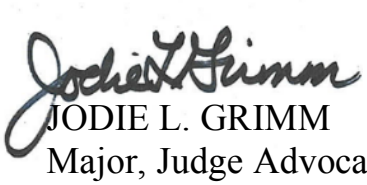

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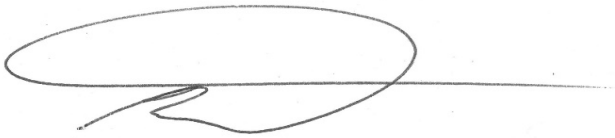

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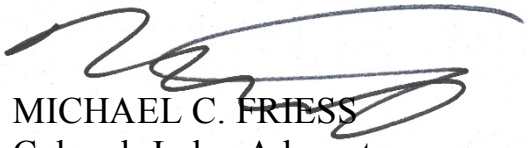

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Navarette, Crim. App. Dkt. No. 20160786, USCA Dkt. No. 20-0195/AR, was electronically filed with the Court and Government Appellate Division on January 28, 2021.

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