IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Specialist (E-4) JEREMY N. NAVARETTE United States Army, Appellant	FINAL BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20160786 USCA Dkt. No. 19-0066/AR

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

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ISSUES PRESENTED

I.

WHETHER THE ARMY COURT ERRONEOUSLY DENIED APPELLANT A POST-TRIAL R.C.M. 706 INQUIRY BY REQUIRING A GREATER SHOWING THAN A NON-FRIVOLOUS, GOOD FAITH BASIS ARTICULATED BY *UNITED STATES V. NIX*, 15 U.S.C.M.A 578, 582 (C.M.A. 1965).

II.

WHETHER THE ARMY COURT ERRED WHEN IT HELD THAT SUBMITTING MATTERS PURSUANT TO *UNITED STATES v. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982), WAS EVIDENCE OF APPELLANT'S COMPETENCE DURING APPELLATE PROCEEDINGS.

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) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2012).

STATEMENT OF THE CASE

On December 14, 2016, a general court-martial panel with enlisted representation convicted Specialist (SPC) Jeremy Navarette (appellant), contrary to his plea, of one specification of wrongful distribution of 4.2 grams of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2012). (JA 215). The panel sentenced appellant to 90 days confinement, reduction to E-1, forfeiture of all pay and allowances, and to be discharged from the service with a bad-conduct discharge. (JA 224). The convening authority approved the adjudged sentence. (JA 102).

Defense appellate counsel filed appellant's brief with the Army Court of Criminal Appeals on April 27, 2018, and a motion to attach medical records substantiating a clinical diagnosis of Post-Traumatic Stress Disorder (PTSD), depression and Attention Deficit Disorder on April 30, 2018. (JA 15). These conditions were recognized at the time of appellant's trial. (JA 153–55).

On July 30, 2018, before the government submitted its responsive brief, appellant filed a motion to stay the proceedings, requesting a Rule for Court Martial [R.C.M.] 706 inquiry into appellant's capacity and mental responsibility, and to attach additional documentary evidence to the record in support of this request. The additional evidence indicated appellant had recently been diagnosed with Bipolar Disorder I, Mania with Psychosis, and as a result of these disorders had been involuntarily committed on multiple occasions after his release from military confinement. (JA 57–64).

On August 30, 2018, the Army Court heard oral argument on two issues:

> I. Whether this Court should grant appellant's motion for a R.C.M. 706 inquiry into the present mental capacity of appellant. *See* R.C.M. 1203(c)(5) and R.C.M. 706.
>
> II. Whether the court should grant appellant's motion for a R.C.M. 706 inquiry to assess appellant's mental responsibility at the time of the offense. *See* R.C.M. 916(b)(2); R.C.M. 1210(f)(2); and *United States v. Campbell*, 57 M.J. 134 (2002).

(JA 7).

On September 17, 2018, the Army Court affirmed the findings and sentence. (JA 1). On November 16, 2018, appellant petitioned this Court for a grant of review and contemporaneously filed a motion to file the supplement separately. On December 17, 2018, appellant filed his supplement to his petition for review. This Court granted appellant's petition on February 27, 2019.

STATEMENT OF FACTS

Appellant's psycho-social history known at the time of trial

Appellant scored 58 on the Fourth Edition Wexler Adult Intelligence Scale, an IQ test, placing him in the bottom .3 percentile range. (JA 153). Although appellant's score was likely artificially depressed by his anxiety and distractibility, it was still only "closer to 70 in that area, maybe in the high 60s[.]" (JA 153). This score, as the defense expert testified, is "extremely low" and placed appellant in the "mild mentally retarded range[.]" (JA 153).

In addition to intellectual barriers, appellant was also diagnosed with post-traumatic stress disorder (PTSD), anxiety, and attention deficit disorder (ADD). (JA 22–29, 153, 155). Appellant's PTSD stemmed from "a very bad childhood" and witnessing the "accidental gunshot death of a close friend in the military" while deployed. (JA 21, 226–28). Appellant's mother had bipolar disorder and was a chronic drug addict who regularly neglected her children. (JA 63, 203–05). Doctor Kevin Richards, a forensic psychologist and expert witness for the defense, described appellant's childhood this way:

> Not having adequate resources, food, shelter, so forth; history of physical abuse; witnessing domestic violence; witnessing sexual abuse of siblings; being sexually assaulted himself by an age peer when he was a teenager, and this was all ongoing; drug addiction in the family members that were tasked with taking care of him; just—it just goes on and on.

(JA 228). This abuse began at a very young age and continued until appellant left his home at seventeen years of age.

In the absence of functional and emotionally stable relationships, appellant instead formed "attachments to people in order to avoid rejection or abandonment where he is willing to engage in conduct that's clearly outside the norm for him or even against his best interests." (JA 230). Appellant's fellow Soldiers and his fiancée described him as eager to please, easy to trick, gullible, and willing to go to extraordinary lengths to please. (JA 108–10, 158–61, 163–65). This pattern was repeated throughout appellant's childhood and teenage years when appellant continuously subjected himself to abusive relationships with family members, friends, and girlfriends. (JA 108–11, 191–98, 217–18, 231).

Appellant wanted to join the high school wrestling team when he was sixteen years old. (JA 21, 217–18). While socializing with the boys on his high school wrestling team one afternoon, two of his teammates grabbed his arms and forcibly splayed his legs while a third person sodomized him. (JA 21, 217–18). Between SPC Navarette's perpetually intoxicated mother and her abusive string of male partners, he had no one to tell and so the abuse continued. (JA 219).

As soon as appellant, raised a Jehovah's Witness, turned seventeen years old, he left home to live with his aunt. (JA 112, 219). While living with his aunt he met his first girlfriend. (JA 220). According to appellant, in an ill-fated effort

to “show her that [he] was committed to her,” “I threw myself into the Catholic faith. And I got [a large cross] tattooed on my chest and stuff, just to show her, you know, ‘Hey look, I’m in this for you.’” (JA 221). Appellant’s dedication was more than skin-deep; he completed his catechism and confirmation to convert to Catholicism in accordance with church doctrine. (JA 194). Unfortunately, appellant’s devotion was not reciprocated. After four years of dating, appellant’s girlfriend emptied his bank account and left him with nothing but a lasting reminder of her betrayal tattooed on his chest. (JA 111, 198).

Having joined the Army, appellant met his next girlfriend, a Pakistani national studying Political Science and Sociology in Kingsbridge, Canada. (JA 207). In an effort reminiscent of his attempts to please his previous girlfriend and her family, appellant abandoned Catholicism and converted to Islam. (JA 112–13, 165, 194). Appellant’s efforts extended beyond conversion. His devotion to his newfound faith included an extended stay in the barracks without access to Halal food and adherence to fasting during Ramadan, leaving him malnourished. (JA 195, 210–14). Despite his conversion, appellant’s fiancée left him in mid-July after her family said he was “good enough” for her. (JA 208).

At this time, appellant was living with AG, a friend from basic training who had recently been convicted of negligent homicide for killing their mutual friend, KG, while on deployment. (JA 168). When asked why he was staying with AG,

appellant stated, "Because everybody had to kill – basically, everybody in the Army didn't want to deal with [AG] anymore" after AG accidentally killed their friend. (JA 168).

When his fiancée broke off their engagement, appellant's "whole world just came crashing down," he "begged her to stay" but she declined. (JA 171–72). "I—I—I started—I just wanted to be numb. I just started drinking. I didn't want to feel anymore. I didn't want to carry on." (JA 172). After several self-pitying days, AG convinced appellant to go out with him. (JA 173). It just so happened, however, that the local Criminal Investigation Division (CID) office was planning an off-post operation for that same evening.

Events leading up to trial

The evening of July 15, 2016, CID coordinated with local law enforcement and to use SGT KS as an undercover law enforcement officer target to solicit narcotics from unwitting patrons at the same off-post bar that appellant and AG happened to visit that evening. (JA 133). Appellant immediately noticed SGT KS staring at him and, after making eye contact, told her that she was beautiful, and kissed her on the cheek. (JA 134, 174–75). According to appellant, he was uniquely drawn to SGT KS given her physical similarity to his former fiancée. (JA 174–75).

Later that night, appellant worked up the courage to talk further with SGT KS and introduced himself as "Navee." (JA 177). With appellant's hand on SGT KS's hip, SGT KS ran her hands over his stomach and admired his physical fitness. (JA 179). Appellant then invited SGT KS back to his friend's house for a party, and the two exchanged phone numbers before appellant left the bar. (JA 182).

Sergeant KS text-messaged appellant that night and he enthusiastically responded he had just purchased $150 in alcohol for a party he was going to. (JA 180). Neither person had mentioned drugs. (JA 138). It was at this point that SGT KS responded by asking SPC Navarette if he could get her drugs for her friend's bachelorette party. (JA 180). To this, appellant responded, "Like yay or bud?"[1] (JA 183). Sergeant KS confirmed that she did indeed mean drugs and appellant, afraid that if he couldn't "hook her up" that "she might lose interest" in him, responded, "You met the right dude[.] How much you lookin for?" (JA 136).

If SGT KS was looking for "yay or bud" that night, or any time in the near future, appellant was anything but "the right guy." Indeed, it would take appellant weeks to manage to acquire drugs on her behalf. Following the evening they met, the two did not communicate again until July 21, 2016, and in response to SGT KS's requests, appellant attempted to get her drugs on both July 22 and 28, 2016,

[1] References to cocaine or marijuana, respectively. (JA 138).

but was unable to do so. (JA 135–36, 142–43). It was not until July 29, 2016, after two failed attempts, that appellant was able to obtain cocaine for SGT KS and agreed to meet her off-post to give it to her. (JA 137, 144).

After giving SGT KS the cocaine, appellant continued trying to date SGT KS and never once brought up drugs again, let alone attempted to sell her any more. (JA 146, 148). Law enforcement never actually had any other information to suggest that appellant distributed drugs on any other occasion. (JA 146, 149). In fact, appellant did not profit from this transaction and actually had to borrow money just to pick up the drug for SGT KS. (JA 188).

Pretrial litigation immediately exposed the scope of appellant's psychological and intellectual challenges. During defense's motion to suppress his statement as involuntary, appellant was incapable of understanding the military judge's questions. (JA 121–27). Specifically, appellant failed to comprehend why the military judge would find it strange that appellant insisted that CID agents fabricated portions of appellant's confession that were exculpatory. (JA 122).

At trial, appellant remained fixated on SGT KS and was unable to comprehend that she was role-playing during their previous interactions. (JA 199–200). In appellant's eyes, he and SGT KS had "actually started like a relationship." (JA 184, 189). In response to his counsel's question as to whether

he would not have purchased drugs but for SGT KS's repeated requests, appellant responded:

> Yes, ma'am. This is what she—I wanted—I believed she wanted just me. I wanted—I believed she just wanted me, and then when she was there her eyes, like the way she looked when she looked down at [the drug]--that's when I woke up. I was like in a haze. It was like a slap. Like it's the same look that my mother had, the look where you don't care. You don't care about—you don't care about me. You only care about—you only care about the drug, and then I didn't want to believe it though, and then there she was doing it just like my mom did. Never again, like—I didn't that that [*sic*] would ever happen again.

(JA 199–200).

When the government suggested that appellant was "blaming" SGT KS for his actions, appellant insisted that it was SGT KS's addiction, not SGT KS herself, that was to blame: "She wanted it, sir, so—it's not her fault. She just—maybe she just wanted to be numb." (JA 200).

At trial, defense counsel argued that appellant's behavior was the result of the confluence of low intelligence, PTSD, and depression. Ultimately, however, the defense was unable to persuade the panel that this negated his guilt. After finding appellant guilty, the panel sentenced him to 90 days confinement and a bad-conduct discharge. (JA 224).

Appellant's post-trial conduct and new diagnosis

During confinement, the Army's mental health staff again diagnosed appellant with Post-Traumatic Stress Disorder (PTSD), depression/anxiety, and obsessive compulsive disorder. (JA 21). It was not until appellant was released from confinement that appellant's aberrant behavior would be correctly diagnosed.

Upon release from confinement, appellant was involuntarily hospitalized on two occasions, from late August to early October 2017 and again from March 26 through April 2, 2018. (JA 40). On April 7, 2018, appellant was involuntarily hospitalized after being taken into custody by police. (JA 40–45). Appellant was discharged from the hospital on April 22, 2018. (JA 45). Appellant was again involuntarily hospitalized on May 9, 2018. (JA 58, 62). The hospitalization was initiated by the Los Angeles Psychiatric Emergency Response Team after appellant tried to enter a grade school believing he was a Special Agent with the Federal Bureau of Investigations (FBI) tasked with instructing the children on how to respond to a terrorist attack. (JA 62). Appellant subsequently crashed his vehicle into a school bus. (JA 62). During this time, appellant was repeatedly determined by California courts to be "gravely disabled" pursuant to California Welfare and Institutions Code, § 5150. (JA 58–64).

On May 18, 2018, after learning appellant had been court-martialed and was pending appeal, appellant's psychiatrist, Dr. Peter Hirsch, contacted appellate

counsel.[2] (JA 62). Dr. Hirsch informed counsel that appellant had Bipolar Disorder I – Mania with Psychosis, and that much of his behavior was a manifestation of this disorder. After continued care and treatment in an involuntary status at the Del Amo Hospital,[3] appellant was discharged on June 26, 2018. (JA 60). Appellant and Dr. Hirsch provided counsel with appellant's discharge summary from the Del Amo Hospital, confirming the initial diagnosis of Bipolar Disorder and the preexisting diagnosis of PTSD. (JA 58–64).

Dr. Hirsch is "confident" in appellant's diagnosis with Bipolar Disorder and that the diagnosis was the result of "daily observation and treatment of [appellant] over nearly a seven week period, his psychiatric and genetic history and demonstrated clinical symptoms." (JA 63). According to Dr. Hirsch, "The ongoing psycho social dysfunction experienced by [appellant] is a typical consequence in the lives of individuals who suffer with Bipolar Disorder. Impairment in judgment, being unable to appropriately weigh consequences as part of a decision-making process, undermined by a compromise in impulse control is a sine quo non of this diagnosis." (JA 63).

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[2] Dr. Hirsch was treating appellant as a ward of the State of California and was not acting in the capacity of a hired expert.

[3] Del Amo Hospital is a psychiatric facility.

The impact of this diagnosis on appellant's behavior was also evident in his discharge paperwork from the psychiatric hospital. According to this discharge paperwork:

> 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. The coexistence of the posttraumatic stress disorder only complicates this clinical picture and the patient's capacity to function.

(JA 60).

Dr. Hirsch also made clear that Bipolar Disorder "usually begins in adolescence and early adulthood" and that it "often has an insidious onset that frequently is dismissed as 'just part of his personality' which delays professional intervention. [Appellant's] history fits this profile." (JA 63). Finally, Dr. Hirsch noted that appellant displayed "a cardinal symptom of a person in a manic state" just four days after procuring cocaine for SGT KS.[4] (JA 63, 117–18).

Upon receiving this information, appellate defense counsel moved the Army Court for a stay of proceedings and requested that the court order a post-trial R.C.M. 706 inquiry into appellant's current capacity, his capacity at the time of

[4] Dr. Hirsch was discussing the fact appellant had testified he stayed up all night helping a friend pack household goods for a pending move the night prior to speaking with CID. The offense took place on July 29, 2016; the interview took place on August 3, 2016.

trial, and his mental responsibility at the time of the offense. Despite being presented with the evidence of appellant's diagnosis, the fact his historical behavioral profile comported with symptoms of the disease, and the fact his original trial proceeded without the benefit of this knowledge, the Army Court denied appellant's motions and affirmed the finding and sentence in his case.

I.

WHETHER THE ARMY COURT ERRONEOUSLY DENIED APPELLANT A POST-TRIAL R.C.M. 706 INQUIRY BY REQUIRING A GREATER SHOWING THAN A NONFRIVOLOUS, GOOD FAITH BASIS ARTICULATED BY *UNITED STATES V. NIX*, 15 U.S.C.M.A 578, 582 (C.M.A. 1965).

Summary of Argument

In 1965, this Court interpreted the "substantial basis" language in Paragraph 121 of the 1951 *Manual for Courts-Martial* [*MCM*] to require that an appellant need only demonstrate a non-frivolous, good faith basis for requesting an inquiry into his sanity. *United States v. Nix*, 15 U.S.C.M.A. 578, 582 (C.M.A. 1965).[5] Since 1951, Paragraph 121 was recodified as R.C.M. 706, but the President removed the "substantial basis" language from R.C.M. 706 and instead included it in the newly amended R.C.M. 1203(c)(5), which states the appellate authority may

[5] "When the report indicates a substantial basis for the belief [an accused is insane at trial or was at the time of the offense], the matter will be referred to a board of one or more medical officers for their observations and report as to the sanity of the accused." Para. 121, *MCM* (1951).

order an examination of the accused "[i]f a substantial question is raised as to the requisite mental capacity of the accused[.]" *MCM* (1984 ed.) as amended by Exec. Ord. 12586. In short, if an appellant demonstrates a non-frivolous, good faith basis to question his capacity, the service court should order an examination in accordance with R.C.M. 706. R.C.M. 1203(c)(5).

Nevertheless, it would appear that in the face of considerable evidence appellant is currently suffering from severe bipolar disorder and likely was at both the time of the offense and his court-martial proceedings, the Army Court has interpreted R.C.M. 1203(c)(5)'s "substantial question" language to impose a heightened requirement otherwise unsupported by this Court's precedent.

The limited threshold showing required for mental health issues is consonant with the well-established "preferred rating" accorded by military courts to questions of mental health at all stages of proceedings. *United States v. Lilly*, 25 M.J. 403, 406 (C.M.A. 1986) (citations omitted). And this case demonstrates precisely why. Here, the military justice system stands poised to finalize a conviction for an appellant who suffers from severe manic episodes; who exhibited "cardinal symptoms" of this mania in the days surrounding the offense, (Def. App. Ex. G); who was tried and convicted without the identification of his severe, untreated mental illness; and who was repeatedly involuntarily committed after being determined to be gravely disabled.

Standard of Review

This Court reviews the decision to grant or deny a motion for a sanity board for an abuse of discretion. *United States v. Collins*, 60 M.J. 261, 266 (C.A.A.F. 2004). "A military judge abuses his discretion when 'the findings of fact upon which he . . . predicates his ruling are not supported by the evidence of record; if incorrect legal principles were used . . . ; or if his application of the correct legal principles to the facts . . . is clearly unreasonable.'" *Id.* at 266 n.5 (citation and quotation marks omitted). In this case, the Army Court accepted appellant's facts as true and as such, the remaining dispute is a matter of pure law. *Navarette*, ___ M.J. ___, slip. op., 2 fn 3 (A. Ct. of Crim. App. September 17, 2018). Questions of law examined for an abuse of discretion are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008).

Law

"From early times, military law has accorded a preferred rating to questions affecting the accused's sanity." *Lilly*, 25 M.J. at 406 (internal bracketing and quotations omitted). Even after Congress passed Article 50a, UCMJ, making mental responsibility an affirmative defense, this Court "perceive[d] no intent by Congress to change the principle that military law accords a preferred rating to questions affecting the accused's sanity." *United States v. Massey*, 27 M.J. 371,

373 (C.M.A. 1989); *see also* Pub. L. No. 99-661, Title VIII, § 802(a)(1), 100 Stat. 3816, 3905 (1986); R.C.M. 916 (k).

For this reason, since the inception of the *MCM* in 1951, the President has promulgated rules permitting inquiry into the sanity of an appellant at all stages of the proceedings. *MCM*, ¶¶ 121, 124 (1951 ed.) Pre-trial inquiry into an appellant's mental health was contemplated by Paragraph 121 of the 1951 *MCM*, which provided:

> [If] there is reason to believe the accused is insane…or was insane at the time of the alleged offense…, that fact should be reported through appropriate channels in order that an inquiry into mental condition of the accused may be conducted…. When the report indicates *a substantial basis* for the belief, the matter will be referred to a board of one or more medical officers for their observation and report with respect to the sanity of the accused.

(emphasis added). Since 1965, this Court has interpreted the phrase "substantial basis" as requiring only that the claim be "not frivolous and is made in good faith." *Nix*, 15 U.S.C.M.A. at 582 ("We decline to believe that the word 'substantial' would require the determination of an issue that is essentially a matter for consideration by highly trained medical personnel and for ultimate decision, on a factual basis, by the court members themselves.") "Despite changes in the Manual, this approach has remained intact." *United States v. English*, 47 M.J. 215, 221 (C.A.A.F. 1997) (J., Crawford, dissenting) (citations omitted).

As further evidence of the special status accorded mental health, Paragraph 124 of the 1951 *MCM* also contemplated the identification of mental health issues after trial:

> After consideration of the record as-a whole, if it appears to the convening authority or higher authority that a reasonable doubt exists as to the sanity of the accused, he should disapprove any findings of guilty of the charges and specifications affected by such doubt and take appropriate action with respect to the sentence. Such authority will take the action prescribed in 121 before taking action on the record whenever it appears from the record of trial or otherwise that further inquiry as to the mental condition of the accused is warranted in the interest of justice, *regardless of whether any such question was raised at the trial or how it was determined if raised*.

(Emphasis added). Accordingly, this Court recognized that even when not raised at trial, the right to request inquiry into an appellant's mental health is not waived. *Massey*, 27 M.J. at 375.

Paragraph 121 of *MCM* was subsequently incorporated in R.C.M. 706 which, in its current form, states:

> If it appears…that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis for the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused.

R.C.M. 706(a). Carrying on the understanding that the issue is nonwaivable, R.C.M. 706(c)(4) states, "Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require."

Courts have continued to apply the "non-frivolous, good faith" test for the inquiry under R.C.M. 706. *See English*, 47 M.J. at 221; *United States v. Pattin*, 50 M.J. 637, 639 (A. Ct. Crim. App. April 2, 1999); *United States v. Kish*, 20 M.J. 652, 655 (A.C.M.R. 1985); *United States v. Jancarek*, 22 M.J. 600, 601 n.1 (A.C.M.R. 1986).

Notably, however, the original language for this standard—"substantial basis"—never made it into R.C.M. 706 and was instead placed in R.C.M. 1203(c)(5). Rule for Courts-Martial 1203(c)(5), the successor to Paragraph 124 of the 1951 *MCM*, now states:

> If a *substantial question* is raised as to the requisite mental capacity of the accused, the appellate authority may direct that the record be forwarded to an appropriate authority for an examination of the accused in accordance with R.C.M. 706.

See Navarette, ___ M.J. ___, slip. op. at 4.

In sum, "substantial" basis as used in Paragraph 121 of the 1951 *MCM* was, and has always been, understood to merely require a "non-frivolous, good faith basis" to question an appellant's mental capacity or responsibility. *Nix*, 15 U.S.C.M.A. at 582. Rule for Courts-Martial 1203(c)(5) now requires the same

"substantial" showing. If "substantial basis" merely required a "non-frivolous, good faith basis" to warrant a sanity inquiry under Paragraph 121 and later under R.C.M. 706, it necessarily means the same under R.C.M. 1203(c)(5).

Argument

a. The Army Court failed to apply the "non-frivolous, good faith basis" test.

The Army Court opinion contains no mention of *Nix*, no discussion of the historical evolution of R.C.M. 706 or 1203(c)(5), no mention of this Court's or the Army Courts precedents that acknowledge the "non-frivolous, good faith basis" test, and no inquiry beyond appellant's present capacity to stand trial.[6] Instead, the opinion merely recites the language from R.C.M. 1203(c)(5) and concludes, "Here, while there is clear evidence that appellant has significant mental health issues, we do not find a *substantial question* to be raised regarding appellant's competency[.]"

The opinion's admission that "there is clear evidence appellant has significant mental health issues" unequivocally constitutes a "non-frivolous, good

[6] The Army Court states the basis for appellant's motion was "unclear" as to whether appellant raised capacity or responsibility but that counsel confirmed the "primary basis" was appellant's competency. *Navarette*, ___ M.J. ___, slip. op. at p. 3 fn 4. This is wrong. Appellant's motion plainly stated, "This new diagnosis raises substantial questions as to appellant's ability to have appreciated the wrongfulness of his actions at the time of his offenses." (JA 51). This was plainly clear to the Army Court, whose order for oral argument addressed both current capacity and past mental responsibility to be at issue. (JA 7).

faith basis" to question appellant's capacity. As such, the Army Court's denial of appellant's motion for an R.C.M. 706 inquiry makes plain that, however the Army Court interpreted a "substantial question," it did not apply the appropriate test. Instead, the Army Court offered three unpersuasive reasons to find no "substantial question" with respect to appellant's mental health: 1) That appellant was no longer "gravely disabled" when released from involuntary confinement; 2) that appellate counsel did not "actually claim" appellant was incompetent; and 3) that appellant submitted *Grostefon* matters.

b. The fact appellant is no longer "gravely disabled" and subject to involuntary civil confinement is not evidence that he is currently competent, nor is it evidence of his earlier mental state at the time of the offense or at trial.

In finding appellant failed to raise a "substantial question" regarding his sanity, the Army Court relied on the hospital paperwork discharging appellant from involuntary civil commitment and noted that the discharge summary states appellant "responded well to treatment" and that his responses were "appropriate and goal directed." *Navarette*, ___ M.J. ___, slip. op. at 3, 4 (quoting from Def. App. Ex. F). This basis for finding no "substantial question" as to appellant's mental health status is mistaken for four reasons.

First, appellant was involuntarily committed under California's Welfare and Institutions Code, § 5150, on the basis that he was "gravely disabled."[7] The term "gravely disabled" is defined under California law as "a condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter." Cal. Wel. & Inst. Code § 5008(h)(1)(A). Moreover, while most individuals are statutorily precluded from involuntary civil commitment for more than 72 hours, Cal. Wel. & Inst. Code § 5150, appellant's commitment was subsequently extended first, by fourteen-days, *id*. § 5250, and then an additional thirty-days, *id*. § 5270.15. (Def. App. Ex. G). A court order is required for any period of involuntary civil confinement extending beyond 72-hours. Cal. Wel. & Inst. Code §§ 5250 and 5270.15. The fact that the California judge subsequently determined that appellant was not so gravely disabled as to justify continued involuntary civil commitment is not dispositive of his mental capacity for the purposes of R.C.M. 1203(c)(5) or R.C.M. 706. That the opinion would cite to this "gravely disabled" standard is dismaying in light of the "preferred rating" the military has accords questions involving the sanity of a criminal defendant. *Lilly*, 25 M.J. at 406.

[7] Although appellant's motion to stay and request an inquiry under R.C.M. 706 did not include a discussion of the California Welfare and Institutions Code, appellate defense counsel discussed this standard extensively during oral argument for the benefit of the Army Court.

Second, when the Army Court delved beyond the *prima facie* showing of a non-frivolous, good faith basis that appellant suffered from bipolar disorder, it journeyed down a road that we, as attorneys and judges, are simply not equipped for. This Court specifically warned against doing so:

> When the claim of insanity is not frivolous, to allow the court to determine there is no cause to believe that an accused may be insane or otherwise mentally incompetent would be inconsistent with the legislative purpose to provide for the detection of mental disorders not readily apparent to the eye of the layman.

Nix, 15 U.S.C.M.A. at 583 (citing *Wear v United States*, 218 F.2d 24, 26 (D.C. Cir. 1954). Against the express direction of this Court, the "lay" Army Court nevertheless attempted to extract and interpret discrete portions of appellant's hospital discharge summary, in a vacuum, to infer there is no longer a "substantial question" as to appellant's mental health. This is something the Army Court was ill-equipped to do and is precisely why the standard originally articulated in *Nix* makes sense.

Third, the Army Court overlooked the fact the same hospital discharge paperwork it relies on also lists the significant prescription medication protocol appellant requires to maintain even a modicum of mental capacity. After seven weeks of hospitalization, appellant was released only after daily doses of two antipsychotic agents (lithium and zyprexa), a beta blocker (inderal), and a sedative (vistaril). (Def. App. Ex. F). Moreover, appellant's hospital discharge summary

also states appellant only received a 30-day supply of these medications. (Def. App. Ex. F). This supply lapsed on July 28, 2018.

Fourth, and finally, assuming *arguendo* there was not a substantial question as to appellant's mental health on the day he was discharged from civil confinement, the portions of appellant's hospital discharge paperwork cited by the Army Court say nothing about his mental responsibility at the time of the offense or his capacity at the time of trial. And while appellant's medical records states his prognosis is "good," it makes clear that this prognosis is "dependent upon the patient's continued compliance with treatment recommendation." (Def. App. Ex. F).

c. The Army Court opinion conflictingly states appellate defense counsel "has not asserted an actual claim" regarding appellant's competency but that "counsel confirmed that the primary basis for the R.C.M. 706 inquiry is appellant's competency."

The opinion's second basis for denying appellant's motion is equally unsatisfying. In short, the Army Court asserts that "appellant's counsel has not asserted an actual claim that appellant 'is unable to understand the nature of the proceedings or cooperate intelligently in the defense of the case.'" *Navarette*, ___ M.J. ___, slip. op. at 4. This suggestion is troubling for two reasons.

First, the Army Court contradicts itself on the previous page of its opinion, when it states that counsel "confirmed" the "primary basis" for appellant's motion

to stay proceedings was appellant's competency. *Navarette*, ___ M.J. ___, slip. op. at p. 3 fn 4. Although, this too is a misstatement of appellant's position—appellant also raised issues concerning mental responsibility at the time of the offense[8]—this footnote underscores the point that the Army Court opinion was simply wrong when it said "appellants counsel has not asserted an actual claim" with respect to competency.

Second, to the extent the Army Court's opinion is read to suggest appellate defense counsel must expressly assert that appellant "is unable to understand the nature of the proceedings or cooperate intelligently in the defense of the case," R.C.M. 909(a), *MCM* (2016 ed.), this is a medical determination and one that this Court made clear should not be left to a lay court or, presumably, an equally lay appellate defense counsel. *Nix*, 15 U.S.C.M.A. at 583. Appellate defense counsel are not psychiatrists or licensed clinical psychologists, and, as such, are unqualified to opine on whether the presence or absence of any behavioral indications support or rebut appellant's ability to understand the proceedings and effectively assist in his defense.

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[8] Appellant's motion plainly stated, "This new diagnosis raises substantial questions as to appellant's ability to have appreciated the wrongfulness of his actions at the time of his offenses." (JA 151).

d. Conclusion

The Army Court was presented with evidence appellant suffers from Bipolar disorder; that his disorder is typified by mania; that he "showed years of mood and behavior instability;" that this disorder typically emerges before the age at which appellant committed his offense; that just four days after the offense he demonstrated a "cardinal symptom" of mania; and that in the months following confinement he broke into a grade school believing himself to be an agent with the FBI tasked with briefing school children on counter-terrorism. (Def. App. Ex. G). The Army Court was also presented with evidence that the State of California deemed it necessary to civilly commit appellant. A full inquiry pursuant to R.C.M. 706 is necessary to determine appellant's mental health at the time of the offenses and his ability to participate in this appeal.

II.

WHETHER THE ARMY COURT ERRED WHEN IT HELD THAT SUBMITTING MATTERS PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982), WAS EVIDENCE OF APPELLANT'S COMPETENCE DURING APPELLATE PROCEEDINGS.

Summary of Argument

The Army Court found the fact appellant submitted matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) was evidence he is

competent. Any suggestion that the court can, or should, rely on matters raised pursuant to *Grostefon* as evidence of competency greatly misapprehends the nature and process by which such matters are briefed to the court. A proper understanding of the process demonstrates *Grostefon* submissions are simply irrelevant to competency for three reasons: (1) *Grostefon* issues are often written entirely by the attorney; (2) may not even originate with the client; and (3) would be submitted even if counsel had reason to question an appellant's competence. Furthermore, any further effort to conduct a fact-specific inquiry into these reasons inevitably requires courts to pierce the attorney-client privilege. Accordingly, this Court should expressly reject this practice by the Army Court as soundly against reason and policy.

Standard of Review

Whether the Army Court may consider the submission of matters pursuant to *United States v. Grostefon* as evidence of an appellant's competency is a question of law. As such, this Court reviews the issue de novo. *Inabinette*, 66 M.J. at 322 ("pure questions of law" are reviewed de novo).

Law

In *Grostefon*, this Court sought to reconcile the conflict between military counsel's duty of candor to the courts and an appellant's right to counsel on appeal.

12 M.J. at 434–35. To accomplish that objective, this Court mindfully formulated a procedure whereby appellate defense counsel shall raise, on behalf of the client, those issues the counsel believes to be frivolous but the client nevertheless desires to raise. *Id*. at 435–36.

Grostefon makes clear, however, that while the client has the ultimate authority to raise the issue, appellate counsel retains the authority over precisely how those issues are presented. In laying out this procedure, this Court articulated the delineation of authority accordingly:

> Thus, the proper procedure for appellate defense counsel, after consultation with the accused, is to identify the issue to the appellate court and to supply such briefs and argument as he feels will best advance his client's interest. We do not mean to say that every issue advanced by trial defense counsel [and the client] must be adopted and briefed *vel non* by appellate defense counsel; indeed, appellate defense counsel are assumed to have particular skills in their fields. Appellate defense counsel may well wish to restate issues in a manner they believe will be more responsive to the courts before which they practice.

Id. (citation omitted).

In sum, *Grostefon* issues may emerge from any number of sources: the appellant, trial defense counsel, or even a proactive appellate defense counsel who identifies, researches, and ultimately concludes an issue is not meritorious but nevertheless calls it to the appellant's attention. The appellant exercises plenary authority over the ultimate decision to raise these issues. But it is appellate defense

counsel who often drafts the *Grostefon* matters and briefs the issues included therein.

Argument: Grostefon matters are irrelevant because they are often written entirely by the attorney; may not even originate with the client; and would be submitted even if counsel had reason to question an appellant's competence.

The submission of *Grostefon* matters continues unchanged from the procedures articulated by this Court nearly four decades ago. In accordance with this Court's guidance, appellate defense counsel consults with the client, reviews the record, notes potential issues, researches issues identified by counsel and those—if any—identified by the client, consults with client again to explain which issues warrant briefing and which do not, determines which issues the client nevertheless requests to be raised, and ultimately drafts both the brief *and* appellant's *Grostefon* matters.

Accordingly, the contents of an appellant's *Grostefon* matters are the creation of appellate defense counsel and, as such, these matters are irrelevant to the issue of competency. Indeed, appellant's *Grostefon* matters begin with the following: "[A]ppellant, *through appellate defense counsel*, personally requests that this Court consider the following matters[.]" (JA 94) (emphasis added).

In fact, the one thing appellant fully controls—the decision to raise issues pursuant to *Grostefon*—sometimes militates against competency. At times, an appellant will raise a *Grostefon* issue that he is advised is meritless and which may

actively undermine issues included in appellant's main brief. To hold that such an exercise demonstrates competence belies common sense.

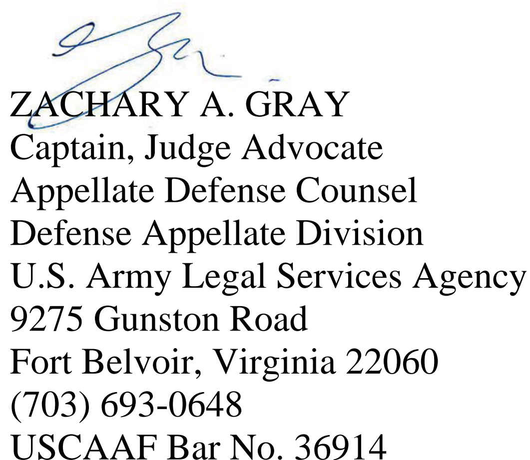
Even the origination of *Grostefon* issues cannot necessarily be attributed to appellant and, therefore, even this modest fact is irrelevant to appellant's competency. For example, *Grostefon* itself expressly contemplated that these matters could arise from issues previously identified by trial defense counsel whether at trial or as incorporated into appellant's post-trial submissions to the convening authority. 12 M.J. at 435–36.

Finally, appellate defense counsel's submission of *Grostefon* matters on behalf of an appellant cannot be treated as an implicit endorsement of appellant's competence. Even in the event counsel has reason to question an appellant's competency, this is a medical determination that should not be made by attorneys or judges. *Nix*, 15 U.S.C.M.A. at 583. Accordingly, any questions about an appellant's mental health would not overcome this Court's express mandate that counsel raise issues that the client insists on. *Grostefon*, 12 M.J. at 435–36.

Under the best case circumstances, the submission of *Grostefon* matters is irrelevant to an appellant's competency. The Army Court's consideration to the contrary is misguided and misapprehends the process by which these issues are identified and briefed. Accordingly, there is simply no reason for the courts to consider *Grostefon* submissions as any evidence of competency.

CONCLUSION

WHEREFORE, SPC Jeremy Navarette respectfully requests this Honorable Court remand this case to the Army Court with instructions to order a post-trial R.C.M. 706 inquiry into his present capacity, capacity at the time of trial, and mental responsibility at the time of the offense.



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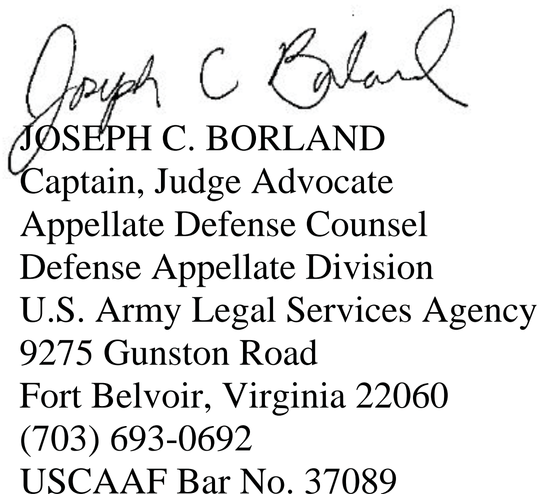

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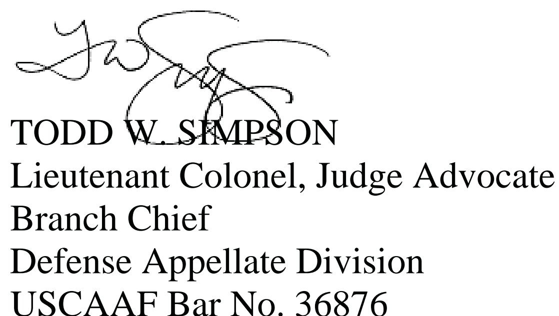

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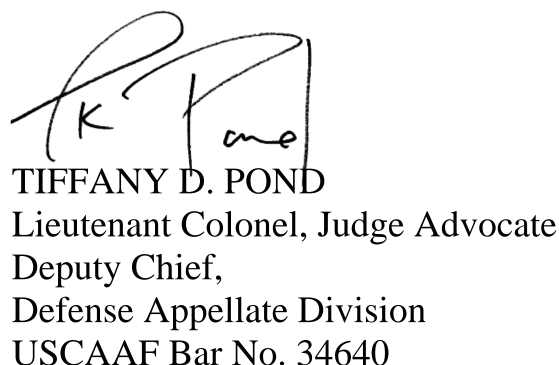

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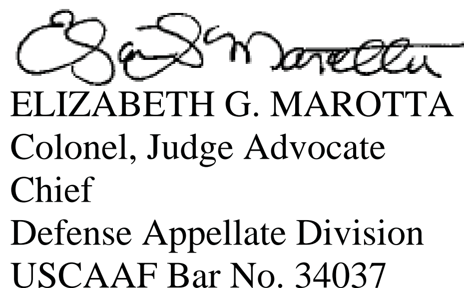

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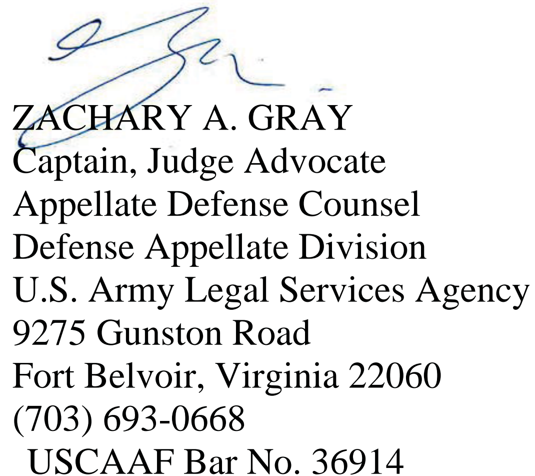
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Navarette,* Army Dkt. No. 20160786, USCA Dkt. No. 19-0066/AR, was electronically filed brief with the Court and Government Appellate Division on April 1, 2019. An electronic copy of the Joint Appendix is filed contemporaneously and the hardcopies will be delivered via courier service.



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CERTIFICATE OF COMPLIANCE WITH RULES 24(c) and 37

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 6976 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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