IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	REPLY BRIEF ON BEHALF OF APPELLANT
v.	
Specialist (E-4) JEREMY N. NAVARETTE United States Army, 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 Granted

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 THE CASE

On February 27, 2019, this Court granted appellant's petition for review. On April 1, 2019, appellant submitted his final brief to this Court. The government responded on April 29, 2019. This is appellant's reply.[1]

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).

1. Appellant's pleadings are "claims" of incapacity, there are myriad "reasons" to question appellant's mental health, and requiring any greater showing unnecessarily compromises attorney-client privilege.

The government suggests appellate defense counsel has not made an actual "claim" that they have a non-frivolous, good faith basis to question appellant's capacity. (Gov't Br. 13). The act of filing this motion before the Army Court constituted making a claim. Pursuant to Army Regulation 27-26, Rule 3.1, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."

[1] Appellant rests on his brief with respect to Issue II.

And as the Army Court noted, "We trust and presume counsel submitted the brief within professional norms." Navarette, __ M.J. __, slip op. at 5.

Relatedly, the government asserts, "Appellate defense counsel never presented a reason to believe appellant's mental capacity was impaired such that he could not assist." (Gov't Br. 12). To the contrary, appellant has provided numerous "reasons." Beyond the bipolar diagnosis itself, appellant has to date changed religion three times in short succession, been involuntarily hospitalized four times, been determined to be gravely disabled and unable to care for himself by at least two California judges, broken into a grade-school believing himself to be an FBI agent, crashed his vehicle into a school bus, and most recently, threw himself onto the subway tracks after slitting his wrists in an attempt to kill himself. Not only is there plainly a non-frivolous, good faith basis to question his capacity, it would be objectively unreasonable not to do so.

The government's insistence that, despite the incontrovertible manifestations of extreme mental illness, there is no reason to question appellant's capacity appears born of three misunderstanding.

a. The government would require appellant show that which could only be shown by an R.C.M. 706 inquiry.

First, the government conflates the non-frivolous, good faith standard sufficient to justify an inquiry with the ultimate question to be answered by that

inquiry, which is to say, the merit of appellant's claim. "An appeal that lacks merit is not always—or often—frivolous." *Crain v. Commissioner*, 737 F.2d 1417, 1417 (5th Cir. 1984). The appropriate inquiry at this stage is not whether appellant has demonstrated by clear and convincing evidence that he lacks mental capacity or responsibility, but instead whether there is a legitimate reason to believe this may be an issue. *See United States v. Nix*, 15 U.S.C.M.A. 578, 582–83 (C.M.A. 1965) (emphasizing that mental health is "essentially a matter for highly trained medical personnel[.])" While the government purports to apply the non-frivolous, good faith basis standard, its rejection of the reasons already before this Court lead to the inescapable conclusion that it would only be satisfied by requiring appellant show that which could only be shown by an R.C.M. 706 inquiry. In essence, the government would require appellant prove his incapacity before availing himself of and inquiry into that capacity. This is not only unreasonable, it is non-sensical.

b. The government's position unnecessarily calls for the breach of attorney-client privilege.

The government's second misunderstanding stems from its failure to recognize that by requiring more than that which appellant has already shown, it would require appellate defense counsel to divulge privileged communications with their client. This is illustrated by the fact that the government does not and cannot articulate what such a showing would look like that did not also impinge on

the attorney-client privilege. In essence, the government's standard would pull this case into the same morass dealt with at trial in *United States v. Proctor*, where "there had been considerable discussion about whether [appellant's former defense attorney] could testify on appellant's behalf without breaching privilege." 37 M.J. 330, 331 (C.A.A.F. 1993).

Surely counsel could not disclose, hypothetically, examples of an appellant's grandiose thinking exhibited on multiple occasions. And while undersigned appellate defense counsel could withdrawal and receive a client waiver to potentially resolve these issues when the time comes to litigate the ultimate question of competency and capacity, this is wholly inappropriate at this stage in the proceedings when an appellant need only demonstrate a non-frivolous, good faith basis to question capacity or responsibility.

c. The government's position overlooks this Court's admonition that mental health is an issue for medical professionals.

Third, and finally, the government's insistence on appellate defense counsel's legal conclusion that appellant cannot in fact meaningfully participate in proceedings overlooks this Court's admonition that the exceedingly low standard to trigger an R.C.M. 706 inquiry was expressly intended by Congress because mental health is "an issue that is essentially a matter for consideration by highly trained medical personnel." *Nix*, U.S.C.M.A. at 582-83. Put another way:

> 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 incompetence would be inconsistent with the legislative purpose to provide for the detection of mental disorders 'not… readily apparent to the eye of the layman.'"

Id. at 583 (citing *United States v. Wear*, 218 F.2d 24, 26 (D.C. Cir. 1954)). Accordingly, the assessments of defense counsel, being lay people, cannot be conclusive, and deciding the matter on the basis of amateur opinion would be clearly contrary to congressional intent.

Appellate defense counsel's role, as appropriately defined, is to alert the court when there is a non-frivolous, good faith basis to question their client's capacity and to explain this claim with evidence of a severe mental disease or defect and the concomitant symptoms. This is what counsel has done. But to be clear, appellate defense counsel has grave concerns about the reliability and thoroughness of any client's capacity to participate who is prone to such psychotic breaks.

This Court has seen that bipolar disorder can vitiate even mental responsibility. *See United States v. Martin*, 56 M.J. 97, 100–01 (C.A.A.F. 2001) (expert testimony stating "appellant was unable to appreciate the nature and quality or wrongfulness of his conduct 'while experiencing manic episodes'" and that "to be manic is to be severely functionally impaired[.]") It has evidence of the fact that, as manifested in appellant, bipolar disorder can result in such a complete

detachment as to constitute a full psychotic break. Beyond this, only a trained mental health professional can intelligently assess whether and to what degree appellant's capacity and responsibility were impacted at the critical junctures of appellant's trial and appeal.

2. The government's emphasis on appellant's discharge paperwork is misplaced.

The government argues that appellant's medical records "showed that he may have been impaired briefly, [but] those same documents demonstrate that he overcame his impairment and was released from inpatient care" and that upon discharge he had a "'good' prognosis for recovery." (Gov't Br. 14). This argument is unavailing for three reasons.

a. Appellant's involuntary commitment was not "brief."

First, appellant's nearly seven-week commitment was exceptionally lengthy, requiring the state of California to return to court on two separate occasions to extend appellant's commitment. *See* Cal. Wel. & Inst. Code §§ 5250 and 5270.15. Brief it was not.

b. The standards for involuntary commitment and R.C.M. 1203(c)(5) are qualitatively different in nature and scope.

Second, the nature and purpose of clinical treatment during involuntary commitment is qualitatively different from an inquiry into mental capacity or

responsibility. The goal of clinical treatment is simply to stabilize symptoms to the point an individual no longer requires hospitalization. An R.C.M. 706 inquiry, on the other hand, explores the relationship between those symptoms and a client's ability to "understand the nature of the proceedings against [him]" or "cooperate intelligently in [his] defense at trial." R.C.M. 909(a).

Moreover, the standard for involuntarily committing someone is, as constitutionally mandated, exceptionally high when doing so is not based on a sentence adjudged in a court of law for a criminal offense. *See* Cal. Wel. & Inst. Code § 5008(h)(1)(A). Conversely, a non-frivolous question as to mental health is one of the lowest standard in the law. *See Wilson v. Parker, Covert & Chidester,* 28 Cal. 811, 820 (Cal. 2002) (recognizing that even cases that are "extremely unlikely" to win may be non-frivolous.) In essence, the government cites the fact that the exceedingly high involuntary commitment standard is no longer met as evidence that the exceedingly low non-frivolous standard is not met.

c. Mental health is not static and cannot be treated as such.

Third, and finally, the government follows the Army Court's erroneous assertion that mental health is somehow static. (Gov't Br. 14). Its reliance on the snapshot in time captured by appellant's medical record entries at the time of his discharge treats bipolar disorder as though it were a common-flu to be cured, rather than a chronic condition to be managed over the course of a lifetime. Even if—

setting aside the government's collapsed of the distinction between the gravely disabled and capacity standard—these records indicate that when written on June 28, 2018, appellant was competent to stand trial, the dynamic nature of mental illness means that this says nothing about capacity to assist counsel on June 29, 2018, or at any time thereafter. Nor, for obvious reasons, does it say anything about appellant's competency at the time he was "encountered by the police in a florid manic state[.]" (JA 58).

Indeed, the facts of the present case bear out the sad fact that a mental health stability is fleeting and not to be taken for granted. Despite appellant's "good" prognosis on June 28, 2018, by April 20, 2019, appellant had thrown himself onto subways tracks after slitting his wrists while in a manic state. This is a stark reminder of the pervasiveness and insidiousness of the mental health issues appellant will live with for the rest of his life, and why it would be a tragic mistake to rely on a snapshot in time to preclude a thorough forensic inquiry into appellant's psychological health.

3. The government's positions on the necessity of an R.C.M. 706 inquiry for present capacity and past responsibility are fundamentally at odds.

The government cites *United States v. English*, 47 M.J. 215, 225 (C.A.A.F. 1997), for the proposition that an "[i]nquiry is frivolous when it fulfils the same function as a previously administered psychiatric evaluation." (Gov't Br. 9). The

government makes two irreconcilable arguments. If appellant's bipolar disorder did not manifest until after his release from confinement, (Gov't Br. 16), then the previous exams are insufficient because he did not have bipolar disorder at the time they were conducted. If, on the other hand, appellant had bipolar disorder at the time of these earlier psychiatric evaluations, then these evaluations misdiagnosed appellant, were invalid, and should not be used to preclude a new, correct, examination. Either way, appellant's diagnosis and the evidence of the severity of his symptoms surely constitute a non-frivolous, good faith basis to question his mental capacity and responsibility.

4. The government's citation to *United States v. Riddle* for the proposition that "the mere existence of a mental health condition does not raise a substantial question as to mental capacity" mistakes both appellant's argument and the procedural posture of this case.

The government claims that instead of revealing "a reason to believe appellant was or is was unable to understand or participate in his pending appeal," appellate defense counsel argues the identification of a mental health issue is a *per se* non-frivolous, good faith basis to question appellant's capacity. (Gov't Br. 13). Appellant's argument is not that *any* mental health diagnosis necessarily constitutes a non-frivolous basis to question capacity, but rather that in this case—where the Army Court had before it copious evidence not just of the diagnosis but of the myriad manifestations of that diagnosis—and itself concluded "there is clear

evidence appellant has significant mental health issues," *this* confluence of evidence undoubtedly rises to the standard this Court articulated in *Nix.*

The government cites an Army Court decision in *United States v. Riddle* for the proposition, "The mere existence of a mental health condition does not raise a substantial question as to mental capacity." (Gov't Br. 11). 2008 CCA LEXIS 613, at *1 (A. Ct. Crim. App. May 28, 2008), *aff'd*, *United States v. Riddle*, 67 M.J. 335 (C.A.A.F. 2009). In doing so, the government demonstrates a misunderstanding of the present procedural posture of this case. *Riddle* involved a challenge to a guilty plea wherein the appellant had already received an R.C.M. 706 hearing, and is therefore distinguishable in two fundamental respects. First, this is not a guilty plea attendant with a stipulation of fact recognizing appellant's bipolar disorder. *Riddle*, 67 M.J. at 336. Indeed, it is possible that appellant's bipolar disorder went undiagnosed throughout trial. Second, the appellant in *Riddle* seemingly received an R.C.M. 706 inquiry which found that she had "the mental capacity to understand and participate in the proceedings" and that she "was mentally responsible." *Id*.

At this stage, appellant seeks not to litigate the ultimate issue of capacity or responsibility pursuant to R.C.M. 1210(f)(2), but rather the substantially more modest goal of simply receiving an R.C.M. 706 inquiry pursuant to R.C.M. 1203(c)(5). Because this is the case, appellant need show nothing more than a

"non-frivolous, good faith basis" to question his capacity and in light of the considerable evidence discussed above, this standard is met.

5. The government mistakenly asserts appellant "also knew the wrongfulness of his actions."

Government asserts appellant "also knew the wrongfulness of his actions despite his assertion 'it wasn't [his] focus." (Gov't Br. 17). In fact, appellant said precisely the opposite when asked whether he knew what he did at the time was wrong:

> Q: And you knew it was wrong?
>
> A: Um, not during that time. Not at that time, sir. Like—
>
> Q: You didn't know it was wrong to sell cocaine?
>
> A: When I was doing it, sir, I was—when I was—well, it wasn't my focus. Like I was just—imagine being in a haze and like you walk up to this girl and I ended up finally seeing her again, and then like right after I did it like when she looked—she changed, sir. The way she changed like she wasn't the same, sir.
>
> Q: Specialist Navarette—
>
> A: Like you have to understand she was—she changed. She was like she wasn't there for me anymore. She looked like my mom.

(JA 199).

Accordingly, not only did appellant expressly say that he did not know it was wrong, he goes on to demonstrate that he fundamentally did not understand, even at

the time of trial, that SGT KS was not in fact going to use the drugs. Appellant's inability to comprehend the role SGT KS played as an undercover agent plainly raises, at least non-frivolous, questions about his comprehension of the remainder of the proceedings, his ability to assist in his own defense, and even potentially his ability to understand the nature and quality or lawfulness of his actions. Answering these questions definitively, however, depends on appellant's ability to avail himself of an R.C.M. 706 inquiry. And this is all appellant asks.

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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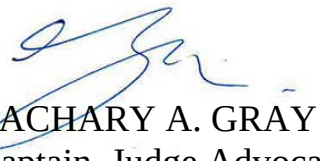
CERTIFICATE OF FILING AND SERVICE

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 May 9, 2019. The Joint Appendix will be delivered via courier service.



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