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	) BRIEF ON BEHALF OF APPELLEE)))) Crim. App. Dkt. No. 20160786)) USCA Dkt. No. 19-0066/AR))

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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 C.M.A. 578, 582, 36 C.M.R. 76, 80 (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.

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v.	)	
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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ.

Statement of the Case

On December 14, 2016, a general court-martial panel with enlisted representation convicted appellant, contrary to his plea, of one specification of wrongful distribution of cocaine, in violation of Article 112a, UCMJ. (JA 215). The panel sentenced appellant to be confined for 90 days, to be reduced to E-1, to forfeit all pay and allowances, and to be discharged from the service with a bad-conduct discharge. (JA 224). The convening authority approved the sentence as adjudged. (JA 102).

Appellate defense counsel filed appellant's brief with the Army Court on April 30, 2018 followed by a motion to attach medical records substantiating diagnoses of anxiety, Post-Traumatic Stress Disorder (PTSD), and Bipolar Disorder. (JA 15-45). Appellant's PTSD was acknowledged at the time of trial. (JA 155).

On July 30, 2018, appellant filed a motion to stay the appellate proceedings, to request a Rule for Court Martial [R.C.M.] 706 inquiry into appellant's "mental capacity or mental responsibility," and to attach additional documentary evidence to the record in support of the requests. (JA 47). The additional evidence supported the diagnosis of Bipolar Disorder I, Mania with Psychosis. (JA 58–64).

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 denied the motion for a R.C.M. 706 inquiry and affirmed the findings and sentence. (JA 2). Appellant subsequently petitioned this Court for a grant of review, which was so ordered on February 27, 2019. (JA 9).

Statement of Facts

Appellant's mental responsibility at the time of the offense.

On July 15, 2016, appellant approached Special Agent (SA) KS while she was working undercover at a bar because he "wanted to sleep with her." (JA 133-34, 177-78). He invited her to come and "get drunk" with the "$150.00 worth of liquor" he purchased for a party later that night. (JA 180). Special Agent KS never went to the party. (JA 184). However, she did exchange text messages with appellant and inquired if he could get her drugs. (JA 139). Appellant told her that he was "the right dude" and asked if she wanted "yay" or "bud."[1] (JA 136, 183).

[1] Cocaine or marijuana, respectively.

Special Agent KS provided the messages to her chain of command for follow-up. (JA 139).

Between the night of July 15th and July 21st, appellant and SA KS did not communicate. (JA 140-41). Appellant did however begin to use his friend as an intermediary to contact drug suppliers. (JA 186-88). When another agent contacted appellant on July 21st, appellant stated he could sell her cocaine the following day, but the sale did not materialize. (JA 142). Over the course of several days, appellant attempted to complete the sale, but stated he was having trouble with his supplier. (JA 142). He quoted SA KS prices during that time. (JA 143). He also suggested they meet at a local Walmart after rejecting SA KS's suggestion to meet on Fort Drum. (JA 135, 137). Finally, on July 29, 2016, appellant met SA KS at Walmart, exchanged the cocaine for $240, and invited her to come hang out with him later that evening. (JA 103, 190, 199). Appellant stated the wrongfulness of selling cocaine "wasn't [his] focus" at the time. (JA 199). In fact, he later admitted to CID that he did not even profit from the transaction. (JA 121-23).

Appellant's mental capacity at all stages of court-martial.

Prior to trial, a forensic psychologist appointed as an expert consultant for the defense evaluated appellant. (JA 151). He interviewed appellant, interviewed appellant's family, and conducted psychological testing. (JA 151). He also

reviewed a summary of the CID investigation, the relevant text messages between appellant and CID, and the mental health records of appellant's treating physician. (JA 151). At trial, he testified that appellant's IQ was "well below average in what we would call the extremely low or borderline range." (JA 153). He agreed with the treating physician that appellant had Post-Traumatic Stress Disorder (PTSD) and Attention Deficit Disorder (ADD), both of which went untreated prior to November 2016. (JA 153-55, 228-29). He testified that appellant had a history of "making decisions that were clearly against his best interest" due to his mental condition, such as remaining friends with his rapists in high school, giving his financial resources to people who were clearly taking advantage of him, and changing religions based on who he was dating. (JA 154-55, 230-31). He testified people with ADD "jump to conclusions too quickly," "can be impulsive," and "struggle" to anticipate consequences. (JA 154). When asked about the thoroughness of the treating physician's mental health diagnoses, the psychologist found the assessments used were the "standard accepted measures" and the formulation of the diagnoses themselves were "very detailed." (JA 156). Appellant was subsequently convicted and sentenced. (JA 215, 224).

While confined in February 2017, a military psychiatrist evaluated appellant on at least three occasions over the course of 18 days. (JA 22-7). Appellant was diagnosed with anxiety disorder and PTSD, but he was not diagnosed with bipolar

disorder. (JA 27). He was released after a final mental health evaluation. (JA 31). Fourteen months later, in April 2018, appellant was admitted to Las Encinas Aurora Behavioral Health Care for 15 days. (JA 40). His discharge diagnosis paperwork stated he was "bipolar" and "manic," but his expected course of recovery was "good with . . . follow up." (JA 42). He denied having suicidal or homicidal ideations, his mood was stable, and he was compliant. (JA 44). Appellant agreed to attend a follow-up appointment for medication management and counseling. (JA 44).

On May 9, 2018, appellant was admitted to Del Amo Hospital for approximately six weeks. (JA 58). The treating psychiatrist contacted appellate defense counsel as part of his evaluation and received information about appellant's PTSD diagnosis and his pending appeal. (JA 62). The psychiatrist ultimately diagnosed appellant with "Bipolar disorder I, mania, with psychosis." (JA 59). Impairment in judgment, inability to appropriately weigh consequences, and compromised impulse control are "typical consequence[s]" of this diagnosis. (JA 63).

Appellant was discharged from Del Amo on June 26, 2018. (JA 59). Appellant's discharge paperwork reflected that his impulse control was "level and appropriate," his "psychomotor activity [was] normal and level," his "[c]ognition was intact," his "insight and judgement were good," and his "short, intermediate,

and long term memory were intact." (JA 59). Appellant's prognosis was classified as "good dependent upon [his] continued compliance with [the] treatment recommendation" of medication management, monitoring, and evaluation in a "partial hospital program." (JA 60). The psychiatrist specifically "noted that following the initial [manic and psychotic episode], the patient remained fully cooperative and engaged in the treatment process." (JA 60).

Appellant's *Grostefon* matters.

Appellate defense counsel submitted a brief on behalf of appellant urging the Army Court to set aside his discharge as inappropriately severe on April 27, 2018. (JA 74). The cover page of the brief stated, "[p]ursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant requests that this honorable court consider the information provided in the Appendix." (JA 74). The brief was signed by appellate defense counsel and two supervising attorneys. (JA 92).

The first substantive page of the appendix began by stating "appellant, through appellate defense counsel, personally requests that this Court consider" two different grounds for relief: the affirmative defense of entrapment and reasonable doubt arising from a tainted CID investigation. (JA 94-7). The conclusion page of the appendix included a plea that the court "set aside the findings and sentence" in their entirety and was left unsigned. (JA 98). The Army Court acknowledged appellant's *Grostefon* matters in its opinion, noting that they

did not merit relief nor facially "indicate appellant [was] unable to competently assist in his appeal." (JA 5).

When appellate defense counsel submitted its Supplement to Petition for Grant of Review to this Court, appellant again submitted *Grostefon* matters. (Supp. Pet. For Grant of Review, App'x B). The appendix only asserted the defense of entrapment. (App'x B).

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 C.M.A. 578, 582, 36 C.M.R. 76, 80 (1965).

Standard of Review

This Court reviews the decision "whether to order additional inquiry into an accused's mental health" for an abuse of discretion. *United States v. Collins*, 60 M.J. 261, 266 (C.A.A.F. 2004) (citing *United States v. Gray*, 51 M.J. 1, 13 (C.A.A.F. 1999). This Court reviews the question of law regarding the Army Court's application of the *Nix* standard de novo. *United States v. Pattin*, 50 M.J. 637 (Army Ct. Crim. App. 1999).

Law

An inquiry into the mental health of an appellant "should be granted if it is not frivolous and is made in good faith." *United States v. Nix*, 15 C.M.A. 578, 582

(1965). An inquiry is frivolous when it fulfills the same function as a previously administered psychiatric evaluation.[2] *United States v. English*, 47 M.J. 215, 225 (C.A.A.F. 1997). Replication "would offer the court little of weight or importance." *English*, at 221 (Crawford, J., dissenting). An inquiry has a good faith basis when the moving party has an honest "reason to believe" a psychiatric evaluation is needed. *Nix*, 15 C.M.A. at 582. This basis must be articulated to the authority ordering the inquiry. *See* R.C.M. 706(c)(2) ("[T]he order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused.").

The "primary distinguishing characteristics" of the R.C.M. 706 inquiry are: (1) the participation of a psychiatrist or someone with similar expertise in the detection or evaluation of mental diseases or defects; and (2) the administration of a forensic mental evaluation. *United States v. Jancarek*, 22 M.J. 600, 603-04 (Army Ct. Crim. App. 1986). The inquiry's primary function is "to provide for the detection of mental disorders." *Id.* at 603 (citing *Nix*, 15 C.M.A. at 583). It also evaluates the mental disorder's effect on appellant's ability to do two things: (1) appreciate the nature and quality or wrongfulness of his criminal conduct; and (2)

[2] In *English*, the C.A.A.F. cites to *United States v. Jancarek*, 22 M.J. 600 (A.C.M.R. 1986), for the proposition that "in a proper case there can be a substitute for a sanity board."

understand the nature of the legal proceedings or cooperate intelligently in his defense. R.C.M. 706(c)(2).

An appellant lacks mental responsibility when "as a result of a severe mental disease or defect, [he is] unable to appreciate the nature and quality or the wrongfulness of his . . . acts" at the time he commits them. R.C.M. 916(k). A person who does not appreciate the "nature and quality" of an act "simply [does] not know what he [is] doing." *United States v. Martin*, 56 M.J. 97, 108 (C.A.A.F. 2001). A person who does not appreciate the "wrongfulness" of an act knows what he is doing, but because of severe mental disease, does not know that it is wrong."[3] *Id*. A mental disease or defect, in and of itself, does not constitute a lack of mental responsibility, *Id*., nor does brain damage, in and of itself. *Gray*, 51 M.J. at 14.

An appellant lacks mental capacity when he is "unable to understand the nature of the proceedings against [him]" or "cooperate intelligently in [his] defense" at trial or on appeal. R.C.M. 909(a); R.C.M. 1302(c)(5). An appellant's mental capacity encompasses his "rational as well as factual understanding of the

[3] Generally, a "severe" mental disease or defect "*does not* include . . . minor disorders such as nonpsychotic behavior disorders and personality defects." RCM 706(c)(2)(A) (emphasis added). However, case law indicates that some nonpsychotic disorders constitute a severe mental disease or defect. *See United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) (discussing mental responsibility and pedophilia); *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993) ("[A]n accused need not be found to be suffering from a psychosis in order to assert an affirmative defense based on lack of mental responsibility.").

proceedings against him," his ability "to consult with his lawyer with a reasonable degree of rational understanding," and his ability to assist in his defense by sharing relevant facts, identifying witnesses, and testifying on his own behalf, if he so chooses. *United States v. Proctor*, 37 M.J. at 336. A non-frivolous good faith basis to believe appellant cannot accomplish these tasks must exist in order to overcome the presumption that a person has the capacity to stand trial. *Pattin*, 50 M.J. at 639; R.C.M. 909(b). The mere existence of a mental health condition does not raise a substantial question as to mental capacity. *United States v. Riddle*, 2008 CCA LEXIS 613, at *1 (Army Ct. Crim. App. May 28, 2008), *aff'd*, *United States v. Riddle*, 67 M.J. 335 (C.A.A.F. 2009) ("While appellant's mitigation evidence established she suffered from bipolar disorder, there was no factual record developed either during or after the trial indicating whether and how bipolar disorder may have influenced her plea.").

Summary of Argument

The Army Court did not erroneously deny appellant an R.C.M. 706 inquiry nor did it require a greater showing than the *Nix* standard. On the issue of mental capacity, appellate defense counsel failed to present a non-frivolous reason to believe appellant was incapable of assisting with his defense at any relevant period of time. The Army Court asked appellant's counsel to provide "any" reason to believe appellant could not understand the proceedings or assist in his defense.

(JA 4). Appellate defense counsel refused to do so during oral argument, (JA 3-4), and has yet to articulate one reason beyond the unavailing fact that appellant has Bipolar Disorder. Although the Army Court did not write about mental responsibility because of the form of appellant's motion, the court did not erroneously deny appellant any warranted relief.

Argument

1. Appellant's request for a post-trial R.C.M. 706 inquiry into his mental capacity is frivolous and lacks a good faith basis.

Appellant's counsel has yet to provide any court with a non-frivolous good faith basis to order additional inquiry into appellant's mental capacity under R.C.M. 706. Moreover, appellant has not asserted that he could not and cannot assist in his defense. When counsel filed his motion for an inquiry pursuant to R.C.M. 706 with the Army Court, appellant revealed his clinical psychiatric diagnosis of Bipolar Disorder. (JA 50). At that point, directing an inquiry to evaluate appellant for an already known diagnosis became superfluous. *See* R.C.M. 706(c)(2)(B); *English*, 47 M.J. at 225; *Proctor*, 37 M.J. at 336. The only remaining basis for inquiry into appellant's mental capacity became concern for appellant's ability to understand the nature of the proceedings or cooperate intelligently in his defense. *See* R.C.M. 706(c)(2)(D). Appellate defense counsel never presented a reason to believe appellant's mental capacity was impaired such that he could not assist.

Appellate defense counsel did not articulate a claim in its brief to the Army Court. (JA 51-3). Further, during oral argument on the R.C.M. 706 motion, when the court specifically asked about the basis for the inquiry, appellate defense counsel declined to answer "whether [his] communication [with appellant] revealed any competency concerns." (JA 3-4). Appellant's counsel claims the court required an express assertion that appellant was unable to understand or participate in these proceedings. (App. Br. 25). However, what the Army Court actually requested was "any actual *claim*" to that effect. (JA 4) (emphasis added) (evoking the "reason to believe" required by *Nix*). Ultimately, the court asked the right question to satisfy the *Nix* standard, but "in the absence of the answer [it had to] fall back on the presumption that appellant [was] competent." (JA 4).

In his briefs to this Court, appellate defense counsel has yet to reveal a reason to believe appellant was or is unable to understand or participate in his pending appeal. Instead, he continued to argue that evidence of appellant's "mental health issues unequivocally constitutes a non-frivolous, good faith basis to question appellant's capacity." (App. Br. 20-1). This Court's affirmance in *Riddle* supports the opposite conclusion. 67 M.J. 335, 338 ("Should the accused's statements or material in the record indicate a history of mental disease or defect . . . the military judge must determine whether that information raises either a conflict . . . or only the mere possibility of conflict."). Appellate defense

counsel's brief creates no conflict with the presumption of competence because it raises no reason to believe appellant actually lacks capacity.

Although appellant presented medical records that showed that he may have been impaired briefly, those same documents demonstrate that he overcame his impairment and was released from in-patient care. Appellant was discharged from Las Encinas with a diagnosis of Bipolar Disorder with mania, a finding that his condition had stabilized, a "good" prognosis for recovery, and a treatment plan. (JA 42). Appellant was discharged from Del Amo with the same diagnosis, current condition, prognosis, and treatment plan. (JA 59-60). Simply put, appellant has not presented any information that his medical condition has affected his ability to understand or participate in his defense at any relevant point in time.

Despite the low evidentiary threshold required by *Nix* to articulate a non-frivolous good faith basis for an inquiry into appellant's mental capacity, it is "nonetheless a threshold which the proponent must cross." *Pattin*, 50 M.J. 637, 639. Appellant has yet to do so in this case.

2. Appellant's request for a post-trial R.C.M. 706 inquiry into his mental responsibility is frivolous and lacks a good faith basis.

Appellant requested a bifurcated and conditional inquiry pursuant to R.C.M. 706. The request stated, "[s]hould th[e] court choose to order an inquiry [into appellant's mental capacity], it should also inquire into appellant's mental state at

the time of the offenses."[4] (JA 52). The court declined to order an inquiry into appellant's mental capacity for the reasons stated above, and it also declined to order an inquiry into appellant's mental responsibility. (JA 3).

Reviewing appellant's request de novo, he still lacks a non-frivolous good faith basis to order additional inquiry into his mental responsibility. Evidence of appellant's severe mental diseases and defects at the time of the offense and his ability to have appreciated the nature and quality *and* wrongfulness of those acts is already in the record, therefore further inquiry is unnecessary. *See* R.C.M. 706(c)(2); R.C.M. 916(k); *English*, 47 M.J. at 225. There is no remaining basis for inquiry into appellant's mental responsibility under R.C.M. 706.

The first question a R.C.M. 706 inquiry must answer related to mental responsibility is: at the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? R.C.M. 706(c)(2)(A). The record already reflects the appellant suffered from untreated ADD and PTSD and that his IQ was "extremely low" at the time of the offense. (JA 153-55, 228-29). The forensic psychologist explained the far-reaching impact of those diagnoses on appellant's ability to function in society; most notably, that appellant remained friends with his

[4] The Argument section of the motion cited R.C.M. 1203(c)(5), *Action when accused lacks mental capacity*, and immediately petitioned the court to order an inquiry. (JA 51). It explicitly requested an inquiry into his mental capacity but only conditionally requested an inquiry into his mental responsibility. The Army Court's treatment of the issues was therefore appropriate.

rapists in high school. (JA 229). Appellant's trial made clear he was suffering from several mental diseases and defects at the time of the offense, but Bipolar Disorder was not one of them. *See generally Benedict*, 27 M.J. 253 (a "mental disease or defect" need not be a psychosis to negate mental responsibility); *Proctor*, 37 M.J. 330 (extending *Benedict's* definition of "mental disease or defect" to analyses of mental capacity).

Appellant's argument that he was "likely" also suffering from Bipolar Disorder at the time of the offense is unsupported. (Appellant's Br. 15). Appellant's psychiatrist who observed and evaluated appellant for almost seven weeks stated that he had "no direct knowledge of [appellant's] psychiatric state" at the time of the offense. (JA 63).[5] The "typical consequence[s]" of Bipolar Disorder are not evidence of appellant's psychological state or behavior at the time of the offense. (Appellant Br. 12; JA 63). There must be a good faith basis to believe that appellant did not appreciate the nature and quality or wrongfulness of his acts. R.C.M. 916(k). There exists no evidence to that effect.

[5] Appellant's claim that he suffered a "manic" episode in the days surrounding the offense is unsupported. It is speculation to translate the psychiatrist's statement that staying up all night is a "cardinal symptom" of bipolar disorder without any evidence the psychiatrist was aware of and evaluated the relevant circumstances surrounding the incident, to include the date of the event and the valid reason appellant had for not sleeping. (Appellant's Br. 13; JA 63, 117-18).

On the contrary, the record also answers the second R.C.M. 706 question related to mental responsibility: was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct? R.C.M. 706(c)(2)(C). Appellant knew the nature and quality of his actions. He testified that he knowingly coordinated with an intermediary to find a seller, borrowed money to purchase cocaine, and then gave the drugs to SA KS (JA 186-90). He also knew the wrongfulness of his actions despite his assertion that "it wasn't [his] focus" (JA 199). When appellant was interviewed by CID, he made the self-serving statement that he did not make a profit off of the sale, thus demonstrating his awareness of the nature and wrongfulness of his distribution. (JA 121). Thus, further inquiry into appellant's mental responsibility based on the facts presented would be unconstructive.

The Army Court applied the *Nix* standard to appellant's request for inquiry into his mental capacity and found there was no non-frivolous good faith basis to grant his request. (JA 4). This finding was eminently reasonable because appellant's sole argument was that he was *prima facie* entitled to an inquiry due to his diagnosis of Bipolar Disorder. (Appellant Br. 23). However, appellant's psychiatric history reveals that he was treated and released from both of his hospitalizations for Bipolar Disorder with "good" prognoses. (JA 42, 60). Further,

although the Army Court never reached appellant's second conditional request for inquiry into his mental responsibility, the facts presented demonstrate the *Nix* standard would not have been satisfied in that case either.

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.

Standard of Review

This Court reviews the mixed question of law and fact regarding the Army Court's consideration of *Grostefon* matters as evidence of mental capacity de novo. *See United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

Law

United States v. Grostefon sets forth the rights of an appellant, the rights of his counsel, and the responsibilities of his counsel. Appellant has the right to review his counsel's brief and "urge" an omitted issue, while counsel has the responsibility to consult with his client and then "list the issue for consideration of the appellate court." 12 M.J. 431, 435 (C.M.A. 1982). Counsel cannot "ignore the issues urged from below without the express consent of the accused, after proper advice." *Id*. at 436. However, counsel does have the right to simply "list the

issue" without briefing or "restate the issues in a manner [that] will be more responsive to the courts." *Id*. at 435.

While the Court of Military Appeals acknowledged the issues raised by an appellant run the spectrum "from clearly reversible error at the one end to purely frivolous at the other," its concern lay "with the perception of an accused that his appointed appellate counsel has not given him the full representation demanded by the [UCMJ]." *Id*. at 435-36. In order to avoid this perception, the court has preserved appellant's right to submit *Grostefon* matters prepared at his request by a non-attorney when he substantively adopts them. *United States v. Peel*, 29 M.J. 235, 243 (C.M.A. 1989) (finding an incarcerated appellant was entitled to have the court consider a document his mother prepared at his request and on his behalf). *Grostefon* matters are recognized by their substance rather than their form. *Id*.

Summary of Argument

The Army Court did not err by holding *Grostefon* matters were evidence of appellant's mental capacity. Properly submitted *Grostefon* matters undergo a process where appellant must consult with his counsel and understand the effect of his decisions. In this case, no evidence was presented to rebut the presumption that appellant submitted his matters with the competence and cooperation the process requires.

Argument

1. Properly submitted *Grostefon* matters are direct evidence of an appellant's mental capacity.

Appellate defense counsel's argument that "the origination of *Grostefon* issues cannot necessarily be attributed to appellant," their contents "are the creation of appellate defense counsel," and they therefore cannot be proof of mental capacity is untenable. (Appellant's Br. 29-30). *Grostefon* matters are those "urged" by appellant and are separate and distinct from those matters counsel finds meritorious. 12 M.J. at 435 (discussing counsel's obligation to inform the court of appellant's raised issues, but leaving at his discretion to brief only those issues he feels will best advance his client's interest). Further, *Peel* made it clear that the identifying characteristic of *Grostefon* matters is not who types or edits the document, but rather who attests to the issues within the document. 29 M.J. at 243. Appellant decides which matters to raise and if those matters may be retracted. *Grostefon*, 12 M.J. at 435-36. Without appellant's input and decision-making, there are no *Grostefon* matters to assert.

Appellate defense counsel's argument that a *Grostefon* issue cannot be proof of competence because the issue may be meritless is itself without merit. (Appellant's Br. 29-30). Appellant's mental capacity encompasses his ability "to understand the nature of the proceedings against [him]" and "cooperate intelligently in [his] defense" by consulting "with his lawyer with a reasonable

degree of rational understanding." R.C.M. 909(a); R.C.M. 1302(c)(5); *Proctor*, 37 M.J. at 336. The Court of Military Appeals in *Grostefon* recognized that appellants may raise clear errors or implausible claims and that appellants may disagree with their learned counsel. 12 M.J. at 435-36. However, it never characterized disagreement as demonstrating a lack of competence by either party. *Id*. at 435 ("we must also recognize that even the most conscientious counsel . . . will occasionally overlook an error in the press of dealing with a load of cases, and, for that reason, any assistance in the identification of issues can further the proper administration of military justice"). On the contrary, submission of *Grostefon* matters, irrespective of the issues raised, demonstrates that appellant understands the nature of this portion of the appellate process, understands his role in it, and is actively participating in his defense.

2. Appellant's *Grostefon* Matters Prove Certain Facts Relevant to His Mental Capacity.

Here, appellant submitted matters on two occasions. The first time, he asked the Army Court to overturn his conviction because he was entrapped and because CID's tainted investigation created reasonable doubt. (JA 94, 98). That appellant presented these arguments demonstrates three things: (1) he understood a discussion with his appellate defense counsel that counsel would not submit entrapment or taint of the investigation as assigned errors on appeal; (2) he understood a discussion with his counsel that he was entitled to submit matters to

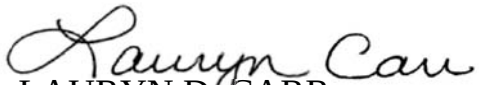
the court regardless of counsel's case strategy; and (3) he exercised his right to do so. The second time appellant submitted matters, he asked this Court to overturn his conviction because he was entrapped and he withdrew the taint issue. The second submission demonstrates that appellant understood another element of this portion of the appellate process: that he could withdraw previously asserted *Grostefon* matters.

None of the matters presented facially indicate appellant was unable to carry out the process of consulting with his counsel and making decisions about the two *Grostefon* matters he initially chose to assert and the matter he withdrew after the Army Court's ruling. (JA 94-8; Supp. Pet. For Grant of Review, App'x B). His counsel presents no evidence to the contrary. (JA 5).

Therefore, the Army Court did not err when it considered appellant's *Grostefon* matters as evidence of his mental capacity.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.



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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 5188 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on April 29, 2019.

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