IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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


CATHERINE E. GODFREY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0674
USCAAF Bar No. 37254

JODIE L. GRIMM
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 36968

JONATHAN F. POTTER
Senior Capital Defense Counsel
Defense Appellate Division
USCAAF Bar No. 26450

ANGELA D. SWILLEY
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 36437

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 33185

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

## Issue Presented

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

## Law and Argument

### A. Appellant presented a "substantial question" regarding his competency to the Army Court, the government's tardy argument notwithstanding.

Before the Army Court, the government agreed appellant had indeed raised a substantial question as to his competency on appeal. But the government has abandoned that argument, seeking to ignore its position below and adopt the Army Court's erroneous heightened threshold.

### 1. Appellate defense counsel's affidavit established a sufficient nexus between appellant's mental illness and his competency.

Despite former lead appellate defense counsel's affidavit remaining exactly as it was before the Army Court, the government now contends that counsel failed to provide sufficient specificity to establish a nexus between appellant's severe mental illness and his inability to assist in his appeal. Like the Army Court, the government chooses to ignore appellate defense counsel's limits on sharing confidential communications—a concern shared by all those representing individual clients—codified in rules of professional responsibility and, for Army counsel, in an Army regulation. *See* Army Regulation 27-26, Rule 1.6; *see also*, American Bar Association (ABA) Criminal Justice Standards on Mental Health, Standard 7-4.3 ("In making any motion for evaluation, or in the absence of a motion, in making known to the court information raising a good faith doubt of defendant's competence, the defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege").

Further, nothing in this Court's opinion in *Navarette II*[1] required appellate defense counsel to make specific assertions in his affidavit. This Court simply provided guidance on how appellate defense counsel may raise a "substantial question." *Navarette II*, 79 M.J. at 126, n. 5. "A competent defendant possesses sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the

[1] *United States v. Navarette* (*Navarette II)*, 79 M.J. 123 (C.A.A.F. 2019).

proceedings against him." *Nash v. Ryan*, 581 F.3d 1048, 1057 (9th Cir. 2009) (internal quotations and citations omitted).[2] Severe mental illness that interferes with a client's ability to accurately and rationally communicate with counsel substantially interferes with meaningful effective appellate representation. *See Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 818 (9th Cir. 2003) ("Perhaps there are cases where an incompetent [appellant's] counsel knows exactly what he needs to know and can't find out. Surely, however, those are the exception rather than the rule"). Thus, appellate defense counsel's representations, as an officer of the Court, regarding an appellant's lack of rational understanding, or inability to communicate rationally with counsel, should be sufficient. *See Nash*, 581 F.3d at 1054-1055; *see also Holmes v. Buss*, 506 F.3d 576, 579 (7th Cir. 2007).

In *Nash*, the appellant's counsel provided a sealed declaration to the court, "detailing the ways in which Nash's delusional disorder and memory problems substantially impede his ability to rationally communicate with her regarding his personal history and other potentially critical aspects of his appeal." 581 F.3d at 1057. The Ninth Circuit concluded that counsel's declaration, coupled with a psychiatric evaluation outlining appellant's "auditory hallucinations, as well as

[2] The ABA Criminal Justice Standards on Mental Health parrots this competency test. *See* Standard 7-5.2(b).

grandiose and paranoid delusions," provided sufficient evidence of incompetence to order a competency determination. *Id.*

In following this court's directive, former appellate defense counsel cogently laid out his concerns about appellant's capacity to participate in appellate proceedings. These concerns included the following: appellant's failure to reveal he was speaking to counsel while hospitalized at a mental health facility, where he had been involuntarily committed; once aware of appellant's severe mental illness, having to question any statement by appellant due to the effects of his grandiose thinking and psychosis; counsel's recognition of hallmark symptoms of bipolar disorder in consultations he had with appellant; and counsel's doubts about the accuracy and completeness of information provided by appellant.[3] All of these observations bear directly on appellant's ability to rationally and accurately communicate with appellate defense counsel and on counsel's ability to competently represent the appellant on appeal. Thus, appellate defense counsel's

[3] "Not only are criminal appellants seldom observed by the very court deciding their cases, a good many never get to meet the lawyers who are supposed to be representing them before such courts." *See* Mae C. Quinn, Reconceptualizing Competence: An Appeal, 66 Wash. & Lee L. Rev. 259, 282-283 (2009). As such, appellate defense counsel have limited opportunities to form opinions as to client competency.

affidavit more than adequately established the nexus between appellant's mental illness and his ability to participate in appellate proceedings.

**2. Additional documentary evidence furnished to the Army Court established a sufficient nexus between appellant's mental illness and competency.**

In another about-face, the government now argues the additional documentary evidence supplied to the Army Court is insufficient to substantiate the "substantial question" of appellant's competency. (Gov't Br. 19).

In deciding whether a competency hearing was necessary, federal courts look to a "history of mental illness and treatment, a finding of prior insanity, memory problems, erratic behavior, variety and quantity of medications, and attempts at suicide." *Nash*, 581 F.3d at 1057 (internal citations omitted). Appellate defense counsel supplied the Army Court with precisely that information, including additional treatment records and an affidavit from appellant's trial-level expert in forensic psychology.

As an initial matter, the government fails to acknowledge the complex and deceptive nature of severe mental illness. The government claims that discreet moments in time illustrate appellant's competency for *all* time.[4] But "[m]ental

[4] For example, the government argues "upon appellant's discharge from confinement and from various treatment facilities, he was deemed competent and coherent." (Gov't Br 20). But the standard for discharge from a facility has nothing to do with legal competence. The criteria for release from involuntary commitment is merely "generally an absence of imminent danger to self or others

illness is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Indiana v. Edwards*, 554 U.S. 164, 175 (2008). A person suffering from such an illness may not present consistently to mental health professionals; this is particularly true of someone affected by the dramatic mood shifts of bipolar disorder. (JA 084)[5].

The Army Court treated Dr. Richards' trial-level assessment of appellant as an end-all-and-be-all. *United States v. Navarette* (*Navarette III)*, 2020 CCA LEXIS 31, *19-20 (A. Ct. Crim. App. Jan. 29, 2020). The Army Court premised this erroneous conclusion on the misguided assumption that "a person with a severe mental defect will have the savvy to know what information the trained mental health professional needs to evaluate him . . ." *United States v. Harris*, 61 M.J. 391, 394 (C.A.A.F. 2005). In *Harris*, the appellant had been evaluated during trial by a clinical psychologist, who only spent several hours assessing the

---

and not an absence of psychiatric symptoms." (JA 094). It is not a stamp of approval of dischargee's mental health.

[5] Bipolar disorder is notoriously difficult to diagnose: "Sixty-nine percent of patients with bipolar disorder are misdiagnosed initially and more than one-third remained misdiagnosed for ten years or more." Tanvir Singh and Muhammad Rajput, Misdiagnosis of Bipolar Disorder, Psychiatry, Oct. 2006, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2945875/ (last accessed Mar. 15, 2021). Many patients suffer from other illnesses simultaneously with bipolar disorder. Additionally, patients often only present with or seek treatment for depression.

appellant. It was not until Harris was evaluated during confinement by a psychiatrist that he received the correct diagnosis of Bipolar Disorder – Type I. That psychiatrist benefitted from more fully evaluating Harris over a period of months, and had access to more detailed background on Harris's mental health history and family history. *Harris*, 61 M.J. at 393.

Like the trial-level psychologist in *Harris*, Dr. Richards' pre-trial assessment was limited to evaluating appellant for several hours and reviewing limited background information. At that time, Dr. Richards did not diagnose appellant with bipolar disorder. Indeed, it would have been difficult for Dr. Richards to render such a diagnosis without being aware of appellant's later but well-chronicled manic episodes.[6] Just as in *Harris*, months after Dr. Richards' evaluation, appellant received the appropriate diagnosis of bipolar disorder from a psychiatrist. That psychiatrist, Dr. Hirsch, had much more robust information about appellant's mental health, all garnered during one of appellant's months-long involuntary commitments. The Army Court's reliance on Dr. Richards's trial-level assessment of appellant based on information conjured during trial, more than four years ago, is illogical.

---

[6] "Bipolar disorder I is diagnosed when a person has a manic episode." What Are Bipolar Disorders, American Psychiatric Association, https://www.psychiatry.org/patients-families/bipolar-disorders/what-are-bipolar-disorders (last accessed Mar. 10, 2021).

The government faults appellant for relying on the declaration of a mental health professional who could not provide the ultimate opinion in appellant's case. (Gov't Br. 21). But Dr. Richards is of course unable to render an ultimate opinion as to appellant's competency because no R.C.M. 706 board has been ordered. (Gov't Br. 21). Dr. Richard's affidavit, based on his prior experience with appellant, appellant defense counsel's observations, and review of appellant's treatment records, support the existence of a substantial question of appellant's competency, which can only be determined by the R.C.M. 706 board appellant requests.

**3. The government now discounts the import of some evidence while misconstruing the irrelevance of other evidence.**

Wholly ignoring its earlier recognition that appellant's mental condition appeared to be deteriorating during the course of his appeal (JA 054)—and that such continued deterioration has been recognized as a reason to justify a competency determination[7]—the government now asserts that appellant is not "someone disabled from understanding the appellate process and participating in it". (Gov't Br. 22). The simple breadth and depth of evidence before this Court suggests otherwise.

[7] *See Nash*, 581 F.3d at 1057.

Furthermore, while the government was silent before the Army Court as to former appellate defense counsel's use of appellant's psychiatric records, the government now joins the Army Court in chastising former appellate defense counsel for relying on the same records. (Gov't Br. 20, n. 11). But "[a]ttorneys who represent defendants with mental disorders should seek relevant information from family members and other knowledgeable collateral sources." ABA Criminal Justice Standards on Mental Health, Standard 7-1.4(d); *see also Nash*, 581 F.3d at 1057-1058 (considering appellant's psychiatric evaluation as evidence in support of competency determination request without issue). Further, appellate defense counsel did not hold the privilege for this information. *See* Military Rule of Evidence 513. It would have been odd for appellate defense counsel to not utilize such information when it became available.

Lastly, the government now misguidedly points to the submission of *Grostefon*[8] matters as an indication of appellant's competence. (Gov't Br. 21, 23).[9] *Grostefon* requires appellate defense counsel to raise, on behalf of the client, those issues the counsel believes to be frivolous but the client nevertheless desires to raise. As this Court is well aware through experience, *Grostefon* submission may

[8] *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[9] The Army Court previously equated the submission of *Grostefon* matters with competency, causing this court to grant review in appellant's case. *Navarette II*, 79 M.J. at 124, n. 1.

be lucid or inane or somewhere in between, but they do not carry the label of the submitter as legally competent

**B. In *Navarette II*, this Court left unanswered the applicable standard.**

The government now asserts the standard by which an appellant may establish the "substantial question" is well settled. (Gov't Br. 17). A plain reading of *Navarette II* indicates otherwise. *See Navarette II*, 79 M.J. at 133 (Stucky, C.J., dissenting) (noting the majority left open whether the "substantial question" articulated in R.C.M. 1203(c)(5) is the appropriate standard, or whether the non-frivolous, good faith basis standard articulated in *United States v. Nix*[10] controls).

While R.C.M. 1203(c)(5) incorporates the "substantial question" language, no reason exists to interpret the standard differently than this Court did in *Nix*. Furthermore, requiring a non-frivolous, good faith basis is consonant with professional standards propounded for both attorneys and tribunals.[11] Lastly,

[10] 15 U.S.C.M.A. 578 (C.M.A. 1965).

[11] "Whenever, at any stage of the proceedings, a *good faith doubt* is raised as to the defendant's competence to proceed and the requirements below are met, the court should order an evaluation and conduct a hearing into the competence of the defendant to proceed." ABA Criminal Justice Standards on Mental Health, Standard 7-4.4, Judicial Order for competence evaluation (emphasis added). *See also*, ABA Criminal Justice Standards on Mental Health, Standard 7-5.2(c) (when a defense attorney possesses "a *good faith doubt* concerning the defendant's competence to make decisions within the defendant's sphere of control," such as whether to appeal, the attorney may make a motion to determine the client's competence) (emphasis added).

requiring a non-frivolous, good faith basis tracks more closely with federal practice.[12]

**C. Examining appellant's past capacity and criminal responsibility is warranted as he raised a substantial question about to his competency on appeal.**

This court has the discretion to order a sanity board to examine appellant's competency at the time of trial as well as on appeal, and in light of the unique facts in this case, should do so here. *United States v. Massey*, 27 M.J. 371, 374 (C.M.A. 1989). *Massey* offers several practical reasons making it prudent to examine these issues at the time appellant's appellate competency is examined.

First, requiring a sanity board to inquire into appellant's mental health at the time of trial and the offenses requires no real additional effort. *Massey*, 27 M.J. at 374. Second, if appellant is unable to effectively cooperate with appellate defense counsel, it is "desirable to learn as soon as possible" if the appellant was unable to cooperate with trial defense counsel. *Id*. Third, and most important, inquiring into the additional issues avoids the "possible injustice" that appellant has long suffered from mental illness that, although previously undiagnosed, affected his mental responsibility at the time of the offense. *Id*. Two mental health professionals have opined that it did. Dr. Richards averred appellant's bipolar disorder is just the sort

[12] *See* 18 U.S.C. § 4241(a) (A motion for a competency determination may be granted when "reasonable cause" exists to believe that the defendant is incompetent).

of illness that may impact criminal responsibility and capacity to stand trial. (JA 095). Furthermore, Dr. Hirsch opined in the day leading up to the offenses, appellant was likely suffering from mania. (JA 084).[13]

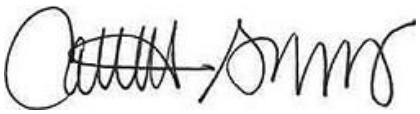
As such, an inquiry into appellant's prior mental responsibility and capacity to stand trial is warranted at the time an inquiry into appellant's present capacity is ordered. The government's continued opposition to learning the truth of appellant's capacity to stand trial and mental responsibility at the time of the offenses should cause this court concern.

## Conclusion

WHEREFORE, appellant respectfully requests this Court order an inquiry into appellant's present capacity, capacity at the time of trial, and mental responsibility at the time of the offense, consistent with its order in *Massey*, 27 M.J. at 374, and *United States v. Collins*, 2001 CAAF LEXIS 987 (C.A.A.F. 2001). In the alternative, appellant respectfully requests this Court remand this case to the Army Court with instructions to order a post-trial R.C.M. 706 into his

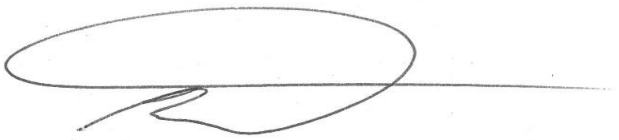
[13] In *Harris*, the confinement facility psychiatrist identified that in the days leading up to the charged offenses, the appellant had "exhibited a number of symptoms such as grandiosity, sleep disruption and unusual goal-directed activity." *Harris*, 61 M.J. at 393. The trial-level psychologist had failed to identify this information. *Id*.

present capacity, capacity at the time of trial, and mental responsibility at the time of the offense.

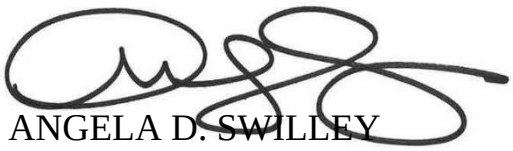


CATHERINE E. GODFREY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0674
USCAAF Bar No. 37254

JODIE L. GRIMM
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 36968



JONATHAN F. POTTER
Senior Capital Defense Counsel
Defense Appellate Division
USCAAF Bar No. 26450

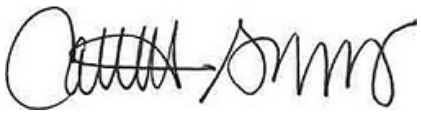


ANGELA D. SWILLEY
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 36437

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 33185

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing in the case of *United States v. Navarette*, Crim. App. Dkt. No. 20160786, USCA Dkt. No. 20-0195/AR, was electronically filed with the Court and the Government Appellate Division on March 15, 2021.



CATHERINE E. GODFREY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0674
USCAAF Bar No. 37254