IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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Granted Issue:

> 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.

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

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice; 10 U.S.C. § 866 (2012) (UCMJ), on remand from this Court on August 1, 2019. This Court has jurisdiction over this matter in accordance with 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 appellant, contrary to his plea, of one specification of wrongful distribution of cocaine, in violation of Article 112a, UCMJ; 10 U.S.C. § 912a (2012). (JA 193). The panel sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 90 days, and to be discharged from the service with a bad-conduct discharge. (JA 216).

Appellate defense counsel filed appellant's initial brief with the Army Court on April 27, 2018.[1] (JA 003). Appellant's initial pleading before the Army Court also included matters submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).[2] Approximately three months later, on July 30, 2018, appellant filed his initial motion to the Army Court to stay the appellate proceedings, to order a Rule for Courts-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 said motion. (JA 003).

[1] *See United States v. Navarette*, 2020 LEXIS 31, at *2 (Army Ct. Crim. App. 29 Jan. 2020) (mem. op.).

[2] As noted by the Army Court in footnote 1 of its January 29, 2020 opinion, "Appellant has not moved to withdraw or supplement his brief or [*Grostefon*] appendix." (JA 003).

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).

United States v. Navarette, ARMY 20160786, 2018 CCA LEXIS 446 (Army Ct. Crim. App. 17 Sep. 2018) (mem. op.).

In its September 17, 2018 opinion, the Army Court determined appellant failed to raise a substantial question regarding his competency. *Navarette,* ARMY 20160786, 2018 CCA LEXIS 446, at *5 ("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 for three interrelated reasons."). The Army Court identified three reasons in support of its finding that appellant was mentally competent during the Article 66(c), UCMJ, review of his case: (1) the discharge paperwork the court had before it at the time of its ruling evidenced that appellant responded well to treatment; (2) during the Army Court's initial Article 66(c), UCMJ, review, appellate defense counsel never asserted a claim of appellant's lack of mental competency or inability to understand the nature of the appellate proceedings; and (3) appellant submitted a brief to the court containing *Grostefon* matters. *Navarette,* ARMY 20160786, 2018 CCA LEXIS 446, at *5 –

6. As a result of its findings, the Army Court denied appellant's post-trial motion that an appellate authority direct an R.C.M. 706 examination and affirmed the court-martial's findings and sentence. *Navarette,* ARMY 20160786, 2018 CCA LEXIS 446, at *1, *8.

Appellant subsequently filed a petition to this Court for review. The Court granted the petition on February 27, 2019 and ordered the parties to submit briefs addressing the following two issues:

> 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.

United States v. Navarette, USCA Dkt. No. 19-0066/AR (C.A.A.F. 2019) (Order).

After reviewing the parties' briefs, this Court noted two interrelated concerns. The first was that "a sufficient nexus had not been established between appellant's medical condition *and* his ability to cooperate intelligently in the appellate proceedings. . . . [A]n appellant must, at a minimum, articulate how his mental condition prevents him from being able to understand or participate in the proceedings." *United States v. Navarette,* 79 M.J. 126, 126 (C.A.A.F. 2019). This Court's second concern was:

> [I]t is not clear the lower court appropriately considered the degree to which Appellant suffered from serious mental illness that may have impacted his decision-making capacity during the period of appellate representation. . . . Appellant was involuntarily hospitalized March 26, 2018, to April 2, 2018, and April 7, 2018, to April 22, 2018. Appellant's third, nearly seven-week long involuntary hospitalization covered a period of time from May 9, 2018, through June 2018. Two of these periods of hospitalization appear to have occurred during the time appellate defense counsel was preparing the brief filed on April 27, 2018. . . . Though we recognize that the discharge paperwork indicated Appellant was responding to treatment at the time of his release, we are not yet convinced that Appellant's significant mental health struggles during the period of appellate representation were appropriately considered by the lower court.

Id.

In its August 1, 2019 opinion, this Court set aside the Army Court's September 17, 2018 decision and remanded the case back to the Army Court to:

> (1) [G]ive appellate defense counsel the opportunity to make a showing of nexus between [a]ppellant's significant and documented mental health issues and his capacity to participate in appellate proceedings; and
>
> (2) [G]ive the lower court the opportunity to more fully evaluate [a]ppellant's R.C.M. 1203 motion in light of counsel's representations and all other evidence relating to [a]ppellant's mental capacity, particularly in regard to the events that unfolded during the period of appellate representation.

Id. at 127.

On October 21, 2019, appellant filed a second post-trial motion to the Army Court requesting an appellate authority direct an R.C.M. 706 inquiry into his mental capacity and mental responsibility, pursuant to R.C.M. 1203 and 706(c)(5).[3] (JA 013). Contemporaneously, appellant also filed a motion to attach Defense Appellate Exhibits (DAE) H–J to the record of trial. (JA 013). The Army Court previously admitted DAEs B–G. (JA 013). Defense Appellate Exhibits B–H contain appellant's treatment records and two affidavits relating to appellant's mental condition during the post-conviction timeframe. (JA 058–092). Defense Appellate Exhibit I is an affidavit from Dr. K.R., who evaluated appellant prior to his court-martial in December 2016 and testified for the defense at trial. (JA 093–096; 198–214). Dr. K.R.'s affidavit listed *possible* symptoms associated with Bipolar Disorder and detailed *possible* effects of the disorder. (JA 093–096). However, Dr. K.R. had not met with appellant in the almost three years since his trial, nor had he conducted any evaluation of appellant prior to drafting his affidavit. (JA 094). Dr. K.R. specifically offered no opine regarding appellant's "current diagnostic status, ability to assist and criminal responsibility." (JA 094).

[3] Appellant's motion also included a request to stay the appellate proceedings pending the outcome of the inquiry into appellant's mental capacity and mental responsibility. (Appellant's Motion to Stay the Proceedings and Motion for R.C.M. 706 Inquiry, dated October 21, 2019).

On January 29, 2020, after "meticulously review[ing] and consider[ing] the entirety of appellant's mental health history and hospitalizations," hearing oral argument, and considering the declarations by appellate defense counsel, the Army Court issued its opinion in which it held:

> [A]ppellate [defense] counsel have failed to demonstrate a nexus between any of appellant's mental health diagnoses and his mental responsibility at the time of the charged offense or ability to cooperate intelligently in his appellate proceedings, as required by Rule for Courts-Martial [R.C.M.] 1203(c)(5). We therefore deny appellant's motion for an R.C.M. 706 inquiry into his mental capacity and mental responsibility.

United States v. Navarette, ARMY 20160786, 2020 CCA LEXIS 31, at *1 (Army Ct. Crim. App. 29 Jan. 2020) (mem. op.).

On March 30, 2020, appellant filed a second petition for grant of review with this Court. On April 22, 2020, appellant filed a supplement to his second petition for review with this Court. On December 1, 2020, this Court granted appellant's second petition for review. *United States v. Navarette,* USCA Dkt. No. 20-0195/AR (C.A.A.F. 2020) (Order).

Statement of Facts

While still confined at the Joint Regional Correctional Facility (JRCF) after his conviction, appellant was evaluated by an Army psychiatrist, Colonel (COL) P.L. (JA 058). On February 3, 2017, COL P.L. noted that appellant was "awake, alert and oriented." (JA 059). Colonel P.L. also observed appellant's memory was

intact; and there was no obvious impairment to his concentration. (JA 059). On March 1, 2017, as part of a Report of Mental Status Evaluation, a behavioral health provider noted that appellant "[c]an understand and participate in administrative proceedings" and "[c]an understand the difference between right and wrong." (JA 067). The same provider also noted "no obvious impairments" to appellant's cognition and that his perceptions were "normal." (JA 067). In August 2017, appellant was admitted to Red River Hospital in Wichita Falls, Texas. (JA 075). Between March 26, 2018 and April 2, 2018, appellant was admitted to a Veterans Affairs (VA) hospital in Long Beach, California. (JA 075). Appellant was then admitted to Las Encinas Hospital in Pasadena, California from April 7 to April 22, 2018. (JA 075). Shortly after arriving at Las Encinas, appellant was given Seroquel, an antipsychotic medication. (JA 077). When appellant was discharged from Las Encinas, it was noted that appellant was orientated, with respect to person, place, time and situation. (JA 078). Further, appellant's concentration was "fair," he was described as "compliant" with a "[stable mood]," and his condition upon discharge was "moderately improved." (JA 078). Additionally, appellant was given the same antipsychotic medication and it was noted that his expected course of recovery was "good with [out-patient] follow up." (JA 078). Merely five days after his discharge from Las Encinas, appellant filed his initial brief with

the Army Court, which included matters, apart from the assignment of error by counsel, he personally raised pursuant to *United States v. Grostefon*. (JA 003).

Between May 9 and June 26, 2018, appellant was admitted to Del Amo Hospital. (JA 080). Upon admission, appellant suffered "disorganized thought," "difficulties with focus of thought, concentration, and cognitive tracking, and severe levels of irritability and impulsiveness." (JA 080). While in treatment, providers prescribed a series of different medications at various levels. (JA 081). Upon discharge, appellant was "orientated in all spheres and able to correctly recite today's date." (JA 081). Further, appellant's activities of daily living were described as "appropriate." (JA 081). Additionally, appellant's eye contact was "good," his "[s]ocial graces are fully intact[,]" his "[r]esponses to questions asked are without delay or evidence blocking[,]" and there were "no auditory or visual hallucinations" and "no delusional content." (JA 081). Further, there was "no evidence of any residual grandiose themes or tendencies toward expansiveness." (JA 081). Most importantly, appellant's cognition was "intact without derailment" and his "[s]hort, intermediate and long term memory were intact." (JA 081).

On April 23, 2019, after consuming alcohol, appellant suffered a manic episode and was evaluated at the Kings County Hospital Emergency Room in Brooklyn, New York. (JA 086). At the time of his Kings County hospitalization, appellant was married and employed as an electrician. (JA 087). Following his

examination, appellant did "not meet criteria for involuntary hospitalization" and declined an offer for inpatient treatment. (JA 086). All of this history was recounted in greater detail in the January 29, 2020 Army Court opinion. *Navarette*, ARMY 2016076, 2020 CCA LEXIS 31, at *7–11.

The Army Court opinion highlighted appellate defense counsel's statements made during oral argument regarding appellant's ability to participate in his appeals. *Navarette*, ARMY 2016076, 2020 CCA LEXIS 31, at *15. During oral argument before the Army Court and this Court, appellate defense counsel "declined to say whether the communication had revealed any competency concerns," citing attorney-client privilege. *Navarette*, ARMY 2016076, 2020 CCA LEXIS 31, at *15, *17. As part of the second post-trial request for an R.C.M. 706 inquiry, appellant's counsel asserted in an affidavit that appellant exhibited symptoms including "rapid speech pattern, disorganized thought patterns, sluggishness, and apathy." (JA 107). Counsel recognized "many of the claims [appellant] made during consultations . . . were *potentially* the product of grandiose thinking and *potentially* psychosis." (JA 107) (emphasis added). However, counsel maintained the contents of his communications with his client raised a substantial question as to appellant's capacity to participate in his appeals.[4] (JA

[4] Current lead appellate defense counsel vaguely asserts "serious concerns regarding appellant's capacity to cooperate intelligently in his own defense." (Appellant's Br. at 7). Appellee notes the record of trial and joint appendix is

107) Yet again, appellate defense counsel refused to specifically articulate the basis for his concern regarding appellant's capacity, citing attorney-client privilege. (JA 107). The Army Court found appellate defense counsel asserted "a general belief" as to appellant's competency and "fail[ed] to provide any information about how appellant's mental health conditions impact his competency." *Navarette*, ARMY 2016076, 2020 CCA LEXIS 31, at *16.

Summary of Argument

Appellant and his counsel have failed twice to provide the Army Court with the required nexus that specifically link appellant's mental health diagnoses and the effects of those illnesses with his ability to participate intelligently in his appellate proceedings. *See Navarette*, 79 M.J. at 126[5]; R.C.M. 1203(c)(5).[6] Thus, appellant has failed to raise a "substantial question" concerning his competency. *See* R.C.M. 1203(c)(5).

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devoid—aside from CPT Z.G.'s recount of his April 2018 observations—of any evidence regarding appellant's *present capacity to understand and cooperate in the appellate proceedings*. R.C.M. 1203(c)(5). Indeed, neither appellant nor his counsel has provided this Court with any additional documentation in support of said "serious concerns."

[5] "Our first and primary concern is that a sufficient nexus has not been established between Appellant's medical condition and his ability to cooperate intelligently in the appellant proceedings."

[6] "An appellate authority may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings."

Although appellant has been hospitalized on multiple occasions following his court-martial conviction, they do not themselves justify the relief he seeks. While appellee acknowledges appellant's struggles with Bipolar Disorder since his initial diagnosis in April 2018, hospital records indicate treatment and medication control his symptoms. Through treatment and medication, Appellant exhibits a coherent, cooperative, and intact memory, which supports the Army Court's conclusion that he has not raised a substantial question as to his ability to participate in the appellate process. (*See* JA 006, 076, 080–092).

Indeed, the Army Court thoroughly and meticulously reviewed all of the records provided by appellant, as well as the statements of appellant's previous appellate counsel. As mandated by this Court, the Army Court below properly considered the degree to which appellant suffered from mental illness. *See Navarette*, 79 M.J. at 127. The opinion from the lower court did not raise the bar with regard to the standard for ordering an R.C.M. 706 sanity board during appellate review. After considering all of the evidence presented, the Army Court appropriately determined appellant simply failed to provide the requisite nexus to raise a substantial question regarding his competency. The Army Court neither made erroneous findings of fact, nor applied an incorrect conclusion of the law. Therefore, the lower court did not abuse its discretion, and relief is not warranted.

Standard of Review

"[T]he decision to grant or deny a motion for a sanity board is reviewed for an abuse of discretion." *Navarette*, 79 M.J. at 126 (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)).

Law

"Under the abuse of discretion standard, findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *Id.* (internal quotations omitted). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable," or clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (citing *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)); *United States v. Travers*, 25 M.J. 61, 62 (C.A.A.F. 1987). The abuse of discretion standard requires "not that the judge is maybe wrong or probably wrong, but rather it must strike a chord of wrong with the force of a five-week-old, unrefrigerated dead fish." *United States v. Byrd*, 60 M.J. 4, 12 (C.A.A.F. 2004) (citing *United States v. French*, 38 M.J. 420, 425 (C.M.A. 1994)) (internal quotations omitted).

Rule for Courts-Martial 1203(c)(5) instructs,"[i]n the absence of *substantial evidence* to the contrary, the [appellant] is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings."

The rule further notes that, "[i]f a *substantial question* is raised as to the requisite mental capacity of the [appellant], the appellate authority may direct that the record be . . . for an examination of the [appellant] in accordance with R.C.M. 706." *Manual for Courts-Martial, United States* (2012 ed.) [*MCM,* 2012]. (emphasis added). For an appellate court to order an R.C.M. 706 inquiry, the burden is on appellant to show "there is sufficient reason to question either his mental capacity or mental responsibility." *Navarette*, 79 M.J. at 126.[7] "[T]he rule requires that an appellant establish a nexus between his mental impairment and his ability to participate intelligently in the proceedings." *Id.*

Argument

The Army Court's opinion below clearly demonstrates its compliance with this Court's instruction to, "more fully evaluate Appellant's R.C.M. 1203 motion in light of counsel's representations and all other evidence relating to Appellant's mental capacity, particularly in regard to the events that unfolded during the period

[7] Appellant continues to assert that the appropriate standard for ordering an R.C.M. 706 sanity board comes from *United States v. Nix*, 15 U.S.C.M.A. 578 (C.M.A. 1965). In *Nix*, the court held that a motion for a sanity board should be granted "if it is not frivolous and is made in good faith." *Id.* at 582. *Nix* concerned a pretrial R.C.M. 706 request. *Id.* at 579. This question need not delay the courts long, as the rules themselves clarify a definite distinction exists between requests for pretrial R.C.M. 706 inquiries and post-trial requests pursuant to R.C.M. 1203. A pretrial request is based upon but a "reason to believe," while a post-trial request requires substantial evidence sufficient to raise a "substantial question." R.C.M. 706; R.C.M. 1203(C)(5); *see also Navarette*, 79 M.J. at 131 (Stucky, C.J., dissenting).

of appellate representation." *Navarette*, 79 M.J. at 127. The Army Court precisely followed this Court's mandate, and merely because appellant disagrees with the lower court's conclusion, that does not create a basis for relief.[8] *See McElhaney*, 54 M.J. at 130 (citation omitted).

[8] Appellant accurately notes the Government did not oppose appellant undergoing a *post-trial* R.C.M. 706 examination pursuant to R.C.M. 1203(c)(5) to determine appellant's competency to participate in his appellate proceedings. (Appellant's Br. at 6). However, in his request for relief from this Court, appellant asks not only for this Court to order an R.C.M. 706 inquiry into appellant's current capacity to participate in his appellate proceedings, but also into appellant's capacity at the time of trial and mental responsibility at the time of the offense. (Appellant's Br. at 26). The Government continues to oppose any inquiry into appellant's capacity at the time of trial or during the offense. This request by appellant is well outside the issue for review granted by this Court and is inappropriate given the procedural posture of this case. Appellant's mental health was thoroughly documented and described during his court-martial. Dr. K.R. spent several hours evaluating [appellant]." (JA 199). During his evaluation, Dr. K.R. conducted psychological tests and reviewed the findings of Dr. F, another mental health professional who also previously assessed appellant's mental condition. (JA 199). Both doctors agreed that Appellant suffered from Attention Deficit Disorder (ADD) and Post-Traumatic Stress Disorder (PTSD). (JA 199–200). Neither Dr. F, nor Dr. K.R. diagnosed appellant with Bipolar Disorder in 2016. Rather, Dr. K.R. went into substantial detail in support of his assessment that appellant also suffered from anxiety and distractibility, which contributed to his low IQ score. (JA 200–01). Dr. K.R.'s testimony culminated with an overall expert opinion that appellant's anxiety, ADD, and PTSD contributed to appellant's suggestibility which could, in turn, increase the likelihood of appellant being "fool[ed]" or increase his "willingness to do things against one's best interests." (JA 209–10). At no point during the *several hours* spent conducting appellant's comprehensive mental assessment did Dr. K.R. have reason to believe appellant lacked the mental responsibility for the charged offense, nor did Dr. K.R. express any concern regarding appellant's mental capacity to stand trial. *See* R.C.M. 706(a).

Without offering any evidence of his current behavioral health condition, appellate counsel continues to focus only on appellant's mental illness diagnoses, entirely neglecting the obligation to demonstrate how this illness has prevented appellant from participating in and understanding his appellate proceedings. Mental illness alone is not sufficient to warrant a sanity board on appeal. The Army Court considered all of the evidence regarding appellant's post-conviction hospitalizations, treatment, and progress. It also considered the effect his illness had on his life and found that appellant worked as an electrician, took medication, and told his doctor that he exercises for approximately two hours each day. (JA 007; 087; 092). Finally, it carefully considered the information provided by prior appellate defense counsel. It concluded "[n]either appellant or his counsel has tethered any of these symptoms to a deficiency or inability on appellant's part that has affected his understanding of or cooperation in his appeal. *Navarette*, 2020 CCA LEXIS 31, at *17.

Appellant merely wishes this Court to review the same facts and reach a different conclusion. Such an outcome is inconsistent with the abuse of discretion standard. *See McElhaney*, 54 M.J. at 130 (citation omitted). Accordingly, this Court should not grant appellant's requested relief.

1. The Army Court Applied the Proper Standard Required by this Court and Did Not Require a Heightened Threshold Showing Under R.C.M. 1203.

Appellant asserts in his brief that the appropriate inquiry for this Court is "whether there is a legitimate reason to believe that [appellant's mental condition] *may* be an issue." (Appellant's Br. at 8) (emphasis in original). Appellant cites *Untied States v. Nix*, 15 U.S.C.M.A. 578, 582–83 (C.M.A. 1965) for support and argues that the Army Court's decision *sub silentio* overrules *Nix* by requiring a higher threshold to order an R.C.M. 706 inquiry. (Appellant's Br. at 8). Appellant's assertion is incorrect. Importantly, this Court did not require the Army Court to conduct its analysis using the *Nix* standard. *See Navarette*, 79 M.J. at 131 (Stucky, C.J., dissenting). Rather, this Court required appellant to "articulate how his mental condition prevents him from being able to understand or participate in the proceedings." *Id.* at 126. This Court continued, "[w]ithout such a nexus, Appellant does not raise a 'substantial question' as to his mental capacity." *Id.*

Appellant argues the Army Court required him to show that he was actually incompetent, rather than requiring him to show whether a substantial question had been raised concerning his competence.[9] (Appellant's Br. at 9–10). However, the

[9] As previously noted, this Court's directive to the Army Court placed appellant on notice that—in order to be granted a post-trial R.C.M. 706 sanity board—he needed to show that he "suffered from serious mental illness that may have impacted his decision-making capacity during the period of appellate representation." *Navarette*, 79 M.J. at 126. Further, this Court's instruction on

lower court's opinion repeatedly notes that appellant failed to raise a "substantial question" regarding his competency. *Navarette*, ARMY 2016076, 2020 CCA LEXIS 31, at *15–20. This is expressly the correct standard—and not an inappropriately heightened one. At no point did the Army Court infer or explicitly require appellant to produce definitive evidence that he was actually mentally incapacitated or incompetent. Appellant provides examples to bolster his argument of the Army Court misapplying the standard–it "disregarded the complicated and insidious nature of severe mental illness . . ." and "disregarded the opinions of highly trained medical personnel." (Appellant's Br. at 10). As evidenced by its detailed opinion, the Army Court considered all of the material cited by appellant, but found it wanting of evidence, specific to appellant, sufficient to raise a substantial question of appellant's *present* capacity, or lack thereof, to understand and cooperate in appellate proceedings. *Navarette* ARMY 2016076, 2020 CCA LEXIS 31, at *14–18. Specifically when considering whether former appellate defense counsel's statements provided the nexus, the Army Court again found the evidence wanting for lack of specificity. *Navarette* ARMY 2016076, 2020 CCA LEXIS 31, at *16–17. "Neither appellant nor his appellate counsel has tethered

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remand to the lower court notified appellant of the prerequisite to being granted a post-trial R.C.M. 706 inquiry; *i.e.* "appellant [was required] to make a showing of nexus between [a]ppellant's significant and documented mental health issues and his capacity to participate in appellate proceedings." *Id.* at 127.

any of these symptoms[10] to a deficiency or inability on appellant's part that has affected his understanding of or cooperation in his appeal." *Navarette* ARMY 2016076, 2020 CCA LEXIS 31, at *18. Requiring this specificity did not create a higher bar for appellant. Rather, it held the appellant to "the" unmoved and established bar. The Army Court appropriately used the standard set by this Court in evaluating appellant's claims and found he failed to make the requisite showing in his request for a post-trial R.C.M. 706 inquiry.

2. The Records Provided by Appellant do not Constitute "Overwhelming" Evidence of the Required Nexus between Appellant's Mental Illness and His Inability to Participate in the Appellate Proceedings.

Initially, it is important to note that a diagnosis of Bipolar Disorder does not per se require a court to order an R.C.M. 706 inquiry. *Navarette*, 79 M.J. at 129 (Stucky, C.J., dissenting). Further, simply because appellant was hospitalized as a result of his Bipolar Disorder does not per se require a court to order an R.C.M. 706 inquiry. Rather, the analysis focuses on whether the specific symptoms of appellant's mental condition "*disables* [appellant's] capacity to understand and participate in the proceedings." *Id.* at 129–30 (Stucky, C.J., dissenting) (emphasis added). Indeed, appellant was hospitalized multiple times for complications related to his mental health condition. The Army Court acknowledged,

[10] Rapid speech pattern, disorganized thought patterns, sluggishness, and apathy. *Navarette*, ARMY 2016076, 2020 CCA LEXIS 31, at *16.

"appellant's mental health issues have continually plagued him since his conviction . . ." *Navarette*, ARMY 2016076, 2020 CCA LEXIS 31, at *7. However, upon appellant's discharge from confinement and from the various treatment facilities, he was deemed competent and coherent. *Navarette*, ARMY 2016076, 2020 CCA LEXIS 31, at *7–11; (JA 059, 067, 081). As an example, during appellant's consultation with Dr. V.P. in April, 2019, appellant discussed his court case and gave consent for Dr. V.P. to speak to his attorney.[11] (JA 086). This, in particular, is evidence that appellant was not disabled from understanding what was happening in his appeal and participating in it. Appellee acknowledges that appellant's medical records highlight certain specific, finite periods of temporary disability, however symptoms of Bipolar Disorder "wax and wane in both intensity and duration." (JA 084). The Army Court relied on information like this to conclude that he was not disabled from his capacity to understand his case and that appellant failed to raise a substantial question as to his present capacity. This indicates that the lower court's findings of fact were not clearly erroneous, it did not misapprehend the law, and its findings were not "arbitrary, fanciful [or] clearly unreasonable." *McElhaney*, 54 M.J. at 130.

[11] As noted by ACCA, appellant and his counsel appear to have no issue relying on the waiver of psychotherapist-patient privilege here, but appellant's prior counsel simultaneously does not believe his former client is competent to waive attorney-client privilege. (JA 107).

In his brief, appellant hangs his proverbial hat on Dr. K.R.'s affidavit. Appellant states, "[Dr. K.R.] explained the nexus between the symptomology of bipolar disorder experienced by appellant and both capacity and mental responsibility . . . ." (Appellant's Br. at 15). Appellant's interpretation of Dr. K.R.'s affidavit is simply inconsistent with the words contained therein. Certainly, Dr. K.R.'s affidavit explains the nexus between the potential symptomology of *someone* with Bipolar Disorder and how that *could* impact both capacity and mental responsibility. However, Dr. K.R.'s affidavit makes clear that he is not opining on appellant's situation, specifically. "[Dr. K.R.'s] purpose in submitting this affidavit is strictly to provide information on the *potential* impact such disorders *can* have on those psycho-legal issues." (JA 094) (emphasis added). Whereas Dr. K.R.'s affidavit contained general information, the information specific to appellant indicated he was working as an electrician, a job that requires mental acuity and awareness. (JA 087). Further, appellant submitted *Grostefon* matters, which presumably means his counsel briefed him on the opportunity to submit issues and arguments, appellant weighed that option, and chose to exercise it. Nothing in the Joint Appendix nor in any of the previous opinions of this Court or the lower court indicates that the personally-raised *Grostefon* matters were so unusual or detached from reality that it raised a red flag for any court or appellate defense counsel before they were filed. Finally, when appellant was treated and

discharged from his hospital stays, he was seemingly oriented to reality. (JA 078, 081). The evidence in front of the Army Court, specific to appellant, did not paint a picture of someone disabled from understanding the appellate process and participating in it. Rather, it showed someone who struggles with mental illness, but who also responds to treatment.

3. Appellate Defense Counsel's Statements Do Not Provide Specific Information to Constitute the Nexus Required by this Court.

During oral argument in August 2018 and in his affidavit wherein he recounts the observations made in April 2018, prior appellate defense counsel avers generally that he has a substantial question regarding appellant's capacity. (JA 009; 107). In his brief to this Court, appellant argues that his prior counsel "explicitly connected the dots." (Appellant's Br. at 17). However, at no point did appellate defense counsel specifically explain why appellant's diagnoses, specific statements by appellant, or actions by appellant *disable* appellant from understanding and participating in the appellate process. At best, counsel noted that his client exhibited "rapid speech pattern, disorganized thought patterns, sluggishness, and apathy" during conversations that immediately preceded the filing of appellant's brief and *Grostefon* matters. (JA 107). Counsel further notes that he "now recogniz[es] that many of the claims [appellant] made during consultations . . . were *potentially* the product of grandiose thinking and *potentially* psychosis." (JA 107) (emphasis added). Potentiality aside, no dots were

connected as to how appellant's condition hindered appellate defense counsel's representation or evidence that appellant did not understand the appellate process. Further, while previous appellate counsel's observations from nearly three years ago may have been accurate, the absence of any substantiation to reflect appellant's current condition make it impossible for this Court to determine that appellant is unable to participate in his appellate proceedings. "In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings." R.C.M. 1203(c)(5). Former appellate counsel apparently thought appellant was competent enough to submit the initial brief to the Army Court, which included appellant's personally raised *Grostefon* matters.

Appellant failed to persuade the lower court that his mental health condition *presently* prevents him from conducting or cooperating intelligently in the appellate proceedings. This Court provided appellant an additional opportunity to "make a showing of nexus between [his] . . . mental health [diagnoses] and his capacity to participate in appellate proceedings." *Navarette*, 79 M.J. at 127; *see also* R.C.M. 1203(c)(5). Starting shortly after appellant was released from confinement, he has been provided treatment, which included medication. Upon his discharge from the various treatment facilities and upon his release from confinement, his records noted intact cognition and memory.

This Court's mandate and R.C.M. 1203 are both quite clear. The Army Court allowed appellant to append additional material to make his case and had the benefit of briefing by the parties. It concluded that appellant failed to establish the requisite nexus between his mental illness and his ability to participate in the appellate proceedings. The lower court reasonably determined that appellant failed to carry his burden and made neither erroneous findings of fact nor incorrect conclusions of law. Accordingly, the Army Court did not abuse its discretion.

Conclusion

WHEREFORE, the United States opposes the granting of appellant's request for R.C.M. 706 evaluation into appellant's present mental capacity.

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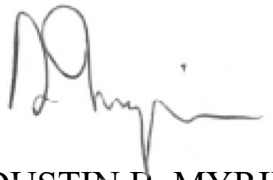

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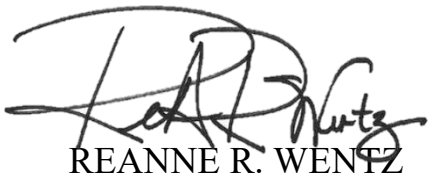

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CERTIFICATE OF FILING AND SERVICE

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 March 1, 2021.

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