IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20100172
Private (E-2) **TIMOTHY E. BENNITT,** United States Army, Appellant	)	USCA Dkt. No. 12-0616/AR

JACOB D. BASHORE
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703) 693-0651
USCAAF# 35281

PATRICIA A. HAM
Colonel, Judge Advocate
Chief, Defense Appellate
Division
USCAAF# 31186

INDEX OF SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Case Law

U.S. Supreme Court

Court of Appeals for the Armed Forces

State Courts

Court of Criminal Appeals

Statutes

Uniform Code of Military Justice

Other Authorities

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Army Misc. Dkt. No. 20100172
	)	
Private (E-2) **Timothy E. Bennitt,** United States Army, Appellant	)	USCA Dkt. No. 12-0616/AR

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

Issue Presented

WHETHER APPELLANT'S CONVICTION FOR INVOLUNTARY MANSLAUGHTER UNDER ARTICLE 119(b)(2), UCMJ, IS LEGALLY INSUFFICIENT BECAUSE 1) IN ACCORDANCE WITH *UNITED STATES V. SARGENT*, 18 M.J. 331 (C.M.A. 1982), APPELLANT'S DISTRIBUTION OF OXYMORPHONE WAS NOT A CRIME DIRECTLY AFFECTING THE PERSON UNDER ARTICLE 119(b)(2), AND (2) EVEN IF SO, CONGRESS DID NOT INTEND FOR ARTICLE 119(b)(2) TO COVER APPELLANT'S MISCONDUCT.

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 (2008) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On November 19, 2009, and January 19-22, 2010, a military judge sitting as a general court-martial at Fort Lewis,

Washington, tried Private (PV2) Timothy E. Bennitt. Pursuant to his pleas, the military judge convicted PV2 Bennitt of wrongful distribution of a controlled substance (four specifications) and wrongful use of a controlled substance (three specifications) in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2008). Contrary to his plea, the military judge convicted appellant of involuntary manslaughter[1] in violation of Article 119(b)(2), UCMJ, 10 U.S.C. § 919(b)(2) (2008).[2]

The military judge sentenced PV2 Bennitt to reduction to the grade of Private E1, forfeiture of all pay and allowances, confinement for seventy months, and a dishonorable discharge. The military judge also awarded PV2 Bennitt with 360 days confinement credit against his sentence to confinement. The convening authority approved the adjudged sentence and credited appellant with 360 days confinement credit against PV2 Bennitt's sentence to confinement.

On May 16, 2012, the Army Court affirmed the findings and the sentence. (JA 1). Private Bennitt was notified of the Army Court's decision and petitioned this Court for review on July

---

[1] The military judge also convicted PV2 Bennitt of language excepted in his plea in Specifications 1 and 7 of Charge II—wrongful distribution and use of a controlled substance in violation of Article 112a, UCMJ.

[2] The military judge acquitted PV2 Bennitt of involuntary manslaughter by culpable negligence under Article 119(b)(1).

11, 2012. On September 19, 2012, this Honorable Court granted appellant's petition for review.

Statement of Facts

Leah King died the morning of February 15, 2009, from a lethal combination of Xanax and Oxymorphone. (JA 64). The evidence used to convict PV2 Bennitt of Specification 2 of Charge I was taken solely from his sworn statement to CID on February 20, 2009. (JA 119-24). In his statement, PV2 Bennitt stated that Ms. King introduced him to Oxymorphone and arranged his purchases with Ms. Evelyn Seaman. (JA 119, 123). Private Bennitt then provided the only account of events that could be used to convict him under either provision of Article 119, UCMJ:

> When we were watching the movie I crushed up two of the pills that I had gotten for myself and snorted them. I crushed them on the nightstand using cigarette wrapper cellophane and my lighter. After I snorted the two pills I crushed up the other pill and Leah and her friend snorted it. We snorted it with a dollar bill. . . .
>
> Q. Where is the dollar bill that *you* used to snort the Opana that night?
>
> A: I am sure that I spent it by now.
>
> . . . .
>
> Q. What did you say to Leah and her friend when you gave them the Opana pill they snorted?
>
> A. When she saw me snorting the two pills *Leah asked me* if her and her friend[, Ms. T. Yoachum,] could have the other one. I told

> her "yes". That is when I smashed it on the nightstand for them to snort it. I then divided it with a card that I had in my wallet. *They then came to the nightstand and snorted the pill* I had crushed for them.

(JA 120-21)(emphasis added).

There is no evidence that PV2 Bennitt divided the crushed pill into "lines" or that he gave Ms. King and Ms. Yoachum a dollar bill to use for ingestion. There is no additional evidence of assisting or encouraging Ms. King's use of Oxymorphone. By their own actions, Ms. King and Ms. Yoachum each snorted the Oxymorphone given to them by PV2 Bennitt. (*Id.*). A short while later, PV2 Bennitt, Ms. King, and Ms. Yoachum fell asleep in PV2 Bennitt's bed. (JA 113, 120). At approximately 0430, PV2 Bennitt awoke to find Ms. King dead. (JA 114, 120).

Private Bennitt was found not guilty of Specification 1, of Charge I, involuntary manslaughter by culpable negligence, but guilty of Specification 2, of Charge I, involuntary manslaughter "while perpetrating an offense directly affecting the person of Ms. Leah King, to wit: wrongful use of Oxymorphone . . . unlawfully kill Ms. King by aiding and abetting her wrongful use of Oxymorphone."[3] (JA 109).

---

[3] Appellant was charged with aiding and abetting Ms. King's wrongful use of Oxymorphone and Alprazolam (Xanax), but he was found guilty by exception of aiding and abetting Ms. King's wrongful use of Oxymorphone only. (JA 109).

The government's theory at trial was that appellant was guilty of both specifications of involuntary manslaughter in Charge I. (JA 52, 83-85). Trial counsel described PV2 Bennitt's act of giving Oxymorphone to Ms. King as "*distribution*" during the government's opening statement. (JA 53). Trial counsel argued that appellant "provided" Oxymorphone to Ms. King during the closing argument on the merits. (JA 84, 86).

The government had the burden of proving beyond a reasonable doubt that the following occurred: (1) Ms. Leah King was dead, (2) her death resulted from the acts of PV2 Bennitt as alleged, (3) her killing was unlawful, and (4) PV2 Bennitt's acts constituted culpable negligence or her death occurred while PV2 Bennitt was perpetrating an offense directly affecting Ms. Leah King. *Manual For Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶ 44a(b)(1)-(2).

Summary of Argument

Ms. Leah King tragically died due to her own choice to abuse prescription drugs. She requested the drug knowing the risks, she alone acquired an instrument to ingest the drug, and then she consciously chose to snort the drug through her nose. Under the facts of this case, any culpability of PV2 Bennitt exists via Article 119(b)(1)—involuntary manslaughter due to culpable negligence. Here, the government failed to prove that

PV2 Bennitt was culpably negligent. Private Bennitt agrees with the trial counsel—his conduct amounted to a distribution. (JA 53). As his distribution was insufficient to constitute culpable negligence, he is only responsible for the distribution itself. Notwithstanding all the government's contortions to make PV2 Bennitt's actions appear more than a distribution to two parties, the evidence is legally insufficient to support that the accused's act resulted in death, and that his crime was perpetrated while committing an offense "directly affecting the person."

In 1984, the Court of Military Appeals (CMA) held that distribution of narcotics that later leads to death does not constitute an offense "directly affecting the person" under Article 119(b)(2), UCMJ. *United States v. Sargent*, 18 M.J. 331 (C.M.A. 1984); *United States v. Dillon*, 18 M.J. 340 (C.M.A. 1984). That same holding was re-solidified in 1986 in *United States v. Henderson* when the court found distribution may constitute involuntary manslaughter under Article 119(b)(1). 23 M.J. 77 (C.M.A. 1986). In both *Sargent* and *Dillon*, in dicta, Chief Judge Everett stated that a person may be liable as an aider and abetter of drug use under Article 119(b)(2) if his acts go beyond distribution in that he assists with the injection or ingestion of the drugs that cause the death. 18 M.J. at 339; 18 M.J. at 342. First, PV2 Bennitt's actions

simply constitute distribution which makes his prosecution legally insufficient under Article 119(b)(2). *Sargent*, 18 M.J. at 339. Second, even if this Court believes that PV2 Bennitt's actions amounted to aiding and abetting use, this Court should overrule the dicta of former Chief Judge Everett and hold that Congress did not intend for this act to be punishable under Article 119(b)(2) as a crime directly affecting the person.

Argument

Standard of Review

The issue of legal sufficiency is reviewed de novo. *United States v. Green*, 68 M.J. 266, 268 (C.A.A.F. 2010). The test for legal sufficiency requires courts to review the evidence in the light most favorable to the government. If any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

Law and Argument

The government's theory of appellant's guilt fails because the alleged facts do not satisfy every element of the charged offense. Private Bennitt's conviction for violating Art. 119(b)(2), UCMJ, hinged solely on the government's theory that PV2 Bennitt aided and abetted Ms. King's personal drug use, and because her own drug use led to her own death, Ms. King died

while PV2 Bennitt perpetrated an offense directly affecting her person.

The government's theory fails for multiple reasons. Private Bennitt's conduct was defined by Congress as distribution of a controlled substance, not aiding and abetting wrongful use, and distribution is not an offense directly affecting the person. Aiding and abetting wrongful use requires an accused to physically assist the user with the actual ingestion of the drug. In addition, offenses directly affecting the person require the perpetrator and the victim to be two separate persons where here Ms. King acted in both roles.

A. Private Bennitt's Act of Distribution Does Not Qualify as an Article 119(b)(2), UCMJ offense.

1. Wrongful Distribution of a Controlled Substance is not an "offense directly affecting the person."

Sharing an illegal drug between two persons is distribution and not "personal use." *United States v. Tingler*, 65 M.J. 545 (N.M. Ct. Crim. App. 2006). A person may be culpably negligent for distributing a drug that kills another, but distributing a drug that kills another is not an offense directly affecting the person. *Cf. Henderson*, 23 M.J. 77 (conviction affirmed for involuntary manslaughter by culpable negligence when accused "made available" to the victim the lethal dose of cocaine); *Sargent*, 18 M.J. 331 (reversed conviction for involuntary manslaughter for perpetrating an offense against the person

where the accused only distributed heroin to the victim); *United States v. Dinkel*, 13 M.J. 400 (C.M.A. 1982)(conviction affirmed for involuntary manslaughter by culpable negligence when accused injected victim with a lethal dose of heroin); *United States v. Mazur*, 13 M.J. 143 (C.M.A. 1982)(conviction affirmed for involuntary manslaughter by culpable negligence when accused assisted the victim to inject a lethal dose of heroin), *overruled in part by Sargent*, 18 M.J. 331 (overruled to the extent that the decision cited approvingly to *United States v. Moglia*); *United States v. Romero*, 1 M.J. 227 (C.M.A. 1975) (conviction affirmed for negligent homicide as a lesser included offense of involuntary manslaughter by culpable negligence when accused injected victim with a lethal dose of heroin). *But see United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977)(affirmed conviction of involuntary manslaughter for perpetrating an offense against the person when the accused distributed to the victim a lethal dose of heroin), *abrogated by Sargent*, 18 M.J. 331, *as recognized in United States v. Lonergan*, 2000 WL 35801740, at *4 (A. Ct. Crim. App. 2000).

Courts have refused to interpret facts to create an offense other than wrongful distribution when the alleged conduct meets the statutory definition of wrongful distribution. In *United States v. Ratleff*, appellant claimed his conduct was "joint possession," not distribution as the government alleged, when he

opened a container of hashish, took out some of the hashish and handed it to a another soldier. 34 M.J. 80 (C.M.A. 1992). The CMA disagreed: "The plain, ordinary construction of Article 112a . . . requires us to conclude that appellant 'delivered' hashish to his friend . . . ." *Id.* at 82. In *United States v. Tingler*, the Navy-Marine Corps Court also rejected a similar argument where appellant claimed he did not distribute drugs, but only "jointly possessed" the drugs, when he smoked cocaine with another sailor on multiple occasions. 65 M.J. at 549. The Navy-Marine Corps Court held that sharing an illegal drug between two servicemembers is distribution and not "personal use." *Id.* If the government's theory of vicarious liability for another's use is legally defensible, every act of 'distribution' is, depending on the facts, also an act of 'aiding and abetting possession,' 'aiding and abetting use,' 'aiding and abetting distribution,' or 'aiding and abetting possession with the intent to distribute.'

a. Private Bennitt's actions amounted only to distribution.

The offense the government alleged appellant perpetrated directly affecting the person of Ms. King, "aiding and abetting her wrongful use of Oxymorphone," is not an offense defined by Congress, nor is it supported by the facts. To support its theory, the government relied exclusively upon PV2 Bennitt's

sworn statement to Special Agent (SA) Boettger. (JA 119-24). Private Bennitt claimed in the narrative portion of the statement, "I crushed up the other pill and Leah and her friend snorted it." (JA 120). In the 'question and answer' portion of the statement, SA Boettger asked PV2 Bennitt, "[w]hat did you say to Leah and her friend when you gave them the Opana pill they snorted?" (JA 121). Private Bennitt answered,

> When she saw me snorting the two pills *Leah asked me* if her and her friend could have the other one. I told her "yes". That is when I smashed it on the nightstand for them to snort it. I then divided it with a card that I had in my wallet. *They then came to the nightstand and snorted the pill* I had crushed for them.

Id. (emphasis added).

Private Bennitt's acts, as the government alleged, are defined by Congress in Article 112a, UCMJ, as "wrongful distribution of a controlled substance." "Distribute" means to deliver to the possession of another. *MCM*, pt. IV, ¶ 44c(3). "Deliver" means the actual, constructive, or attempted transfer of an item . . . ." *Id.* The government created an offense other than distribution solely for PV2 Bennitt because distribution is not "an offense directly affecting the person," under the facts alleged by the government. *See Sargent*, 18 M.J. 331.

Departing from civilian practice, the government has worked for years to ensure that "buddy use" is prosecuted as a distribution offense. *See* David A. Schluter et al., Military Crimes and Defenses § 5.33[5] (1st ed. 2007). Whether the accused transfers drugs to a fellow conspirator who already has constructive possession or whether the accused hands drugs back to the person he just received it from, the courts have found a delivery to the possession of another equates to distribution. *See, e.g., United States v. Tuero*, 26 M.J. 106, 107 (C.M.A. 1988); *Ratleff*, 34 M.J. at 81-82; *State v. Moore*, 529 N.W.2d 264 (Iowa 1995)(finding a distribution when appellant injected joint possessor). Even the passing of a joint amongst a circle of friends has been deemed a distribution. *United States v. Glazebrook*, 2005 WL 2467769, at *2-3 (N.M. Ct. Crim. App. 29 Sept. 2005)(unpub.), *rev. den.*, 63 M.J. 282 (C.A.A.F. 2006). This background led the Navy Court to "hold that sharing an illegal drug between two [people] is distribution and *not 'personal use.'*" *Tingler*, 65 M.J. at 549 (emphasis added).

Now, when this distribution construct prevents the government from having a back-up theory of criminal liability, the government seeks to re-write the rules on what is and is not a distribution. When charging this case, the government clearly saw the caselaw that supported a culpable negligence theory of liability. (*Compare* Charge Sheet, Specification 1 of Charge I

(JA 34), *with* cases listed *supra*, sec. A.1). The government presumably also saw that no reported involuntary manslaughter case involving distribution of drugs upheld a conviction under Article 119(b)(2), UCMJ. Thus, the government seeks to re-cloak a distribution offense into an aiding and abetting use offense[4] in order to avoid the limitations set forth in *United States v. Sargent*. 18 M.J. 331. This strategy is made apparent by looking at the charge sheet—the government did not charge PV2 Bennitt for aiding and abetting the use of Oxymorphone by Ms. T. Yoachum, but his distribution to her falls under Specification 3 of Charge II.

The government argued to the Army Court that "no principle of law prohibits one from being charged with aiding and abetting 'use' where the evidence establishes that an accused distributed a controlled substance to the user."[5] (Gov't Appellate Brief to the Army Court [hereinafter Gov't Br.] at 7). This statement is

---

[4] During the trial counsel's opening statement, he focused on how PV2 Bennitt "distro-ed" the Oxymorphone (JA 53) while repeatedly using the phrase "follow the drugs." The trial counsel's theory of the case rests on distribution, and he never presented argument regarding how PV2 Bennitt aided and abetted Ms. King's use.

[5] A secondary argument presented by the government is that the government is free to charge an alternative crime because it "would reduce his maximum punishment." (Gov't Br. at 8 (citing *United States v. Hill*, 24 M.J. 411, 413 (C.M.A. 1988)). This argument is without merit as the government merely removed one distribution offense from a divers occasions specification (Specification 3 of Charge II) in order to add an involuntary manslaughter specification. This tactic *increased* PV2 Bennitt's punitive exposure by ten years of confinement.

incorrect. The CMA prohibited such an act in *Sargent*. *Sargent* held that distribution cannot be the basis for an Article 119(b)(2), UCMJ offense because distribution of a controlled substance is not an offense that "directly affect[s] the person." 18 M.J. at 338-39. The government cannot now call distribution "aiding and abetting use" in order to avoid the rule set forth in *Sargent*. When dealing with a distribution offense, the government is limited to prosecuting involuntary manslaughter offenses under the culpable negligence theory listed in Article 119(b)(1), UCMJ.

Private Bennitt's case falls squarely in the distribution scenario set forth in *Sargent*. Private Bennitt had one pill. Upon request, he chose to distribute the one pill to two individuals. To do that, he had to split the one piece into two shares just as if he was dealing any other type of drug.[6] So, he crushed the pill and divided it into two portions. Dividing a whole into two parts to effectuate two distributions does not transform his conduct into "go[ing] further and assist[ing] the purchaser in injecting or ingesting the drug . . . [to] become[]

[6] It is inconceivable that the government would charge a soldier with two specifications of aiding and abetting use because he separated a baggie of marijuana into two portions for two individuals. Searching over sixty years of caselaw, undersigned counsel have not found even one incident where the Army has prosecuted a case in this manner.

one which does directly affect the person for purposes of Article 119(b)(2)." *Sargent*, 18 M.J. at 339.

In addition, this Court should set aside PV2 Bennitt's conviction because his criminal act was complete prior to Ms. King's use of the Oxymorphone. Article 119(b)(2) only allows for prosecution of a death when the criminal act is committed *while perpetrating* an offense "directly affecting the person." As PV2 Bennitt's crime was complete when he stepped away from the crushed pill effecting the distribution, PV2 Bennitt's conduct is disqualified from an Article 119(b)(2) offense. *See United States v. Aarsvold*, 376 N.W.2d 518, 522-23 (Minn. Ct. App. 1985) (overturning felony murder conviction even though seller remained in decedent's presence during use because distribution was a completed offense, thus the death did not occur "*while* committing . . . a felony")(emphasis added).

b. Even accepting all reasonable inferences in favor of the government, Private Bennitt's actions amounted only to distribution.

Even if this Court were to accept the premise that a distribution can transform to aiding and abetting use of controlled substances and that aiding and abetting use is a crime that "directly affects the person," there is no evidence to support an act other than distribution.

When conducting a legal sufficiency review, this Court may only draw "'*reasonable* inference[s]'" in favor of the

government. *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1983)(quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1981))(emphasis added). For an inference to be reasonable, it must "'be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend.'" *Barnes v. United States*, 412 U.S. 837, 842 (1973)(quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)) (emphasis added). If the permissive inference is required to prove guilt, as it is here, the inference must meet the higher standard of *beyond a reasonable doubt*. *United States v. Bond*, 46 M.J. 86, 92 (C.A.A.F. 1997)(Gierke, J., dissenting)(citing *Turner v. United States*, 396 U.S. 398 (1970)).

When limited to reasonable inferences, the evidence indicates that PV2 Bennitt did nothing more than divide a single pill in order to distribute it to two separate persons.[7] The fact that he crushed the pill with a lighter should be of no import. Making such a finding would lead to absurd results. For example, such a finding would mean that had PV2 Bennitt had a knife in his pocket, splitting the pill in two solid half pieces with a knife would save him from liability under Article 119(b)(2), UCMJ, where having any other blunt object to effectuate the same action in crushed form would cause him to

---

[7] There is no evidence that he arranged the divided pill into snorting "lines" even if this small act could somehow constitute assistance to the user.

incur a significant additional liability apart from the distribution. Such a fine-line between levels of criminality does not comport with fairness, justice, and predictability in the law.

Furthermore, even if this Court were to believe that all the parties used only one dollar bill to snort the Oxymorphone,[8] there is no evidence that PV2 Bennitt took the affirmative step of giving Ms. King the bill. If this Court were to find that giving a bill to Ms. King would be a separate act constituting "aiding and abetting use," evidence was not presented to find such an inference under the "more likely than not" standard, let alone proven beyond a reasonable doubt. There are at least four possible scenarios to explain how Ms. King obtained the bill to snort the Oxymorphone. She could have acquired it herself, Ms. Yoachum could have handed it to her, PV2 Bennitt could have handed it to her, or a different dollar bill belonging to Ms. King or Ms. Yoachum could have been used (*see* JA 112 (picture of handbag contents showing two dollar bills)). As there are multiple inferences from PV2 Bennitt's statements, with at least the first three being equally plausible, it cannot be inferred

---

[8] While PV2 Bennitt stated in his sworn statement to CID that all three individuals used a dollar bill to snort the pill, PV2 Bennitt's statement did not clarify if one or multiple bills were used. The Special Agent asking the questions never asked a question to clarify this point other than verifying that PV2 Bennitt spent the dollar that he personally used. (*See* JA 120).

by this Court that PV2 Bennitt aided and abetted Ms. King's use of Oxymorphone by giving her a dollar bill. Thus, the evidence is legally insufficient to affirm guilt on Specification 2 of Charge I.

2. To constitute an "offense directly affecting the person," aiding and abetting another's wrongful use requires, at minimum, the aider and abettor to physically assist with the actual injection, or ingestion, of the controlled substance.

The government argued to the Army Court that *United States v. Sargent* supports Specification 2 of Charge I. In *Sargent*, the CMA reversed a conviction for involuntary manslaughter charged under Article 119(b)(2) when the accused distributed heroin to another and that person overdosed on the heroin. 18 M.J. 331. The court noted that the accused's conduct may have satisfied a specification alleging culpable negligence under Article 119(b)(1), but that distribution alone was not an "offense directly affecting the person" required to satisfy a specification of involuntary manslaughter under Article 119(b)(2). The court then wrote,

> when the seller has gone further and assisted the purchaser in injecting or ingesting the drug, the sale becomes one which does directly affect the person for purposes of Article 119(b)(2). Furthermore, because assisting someone to inject or ingest a drug constitutes aiding and abetting use of the drug and because such use is "an offense affecting the person," this prerequisite for Article 119(b)(2)'s application is present under those circumstances.

Id. at 339.

Private Bennitt encourages this Court to approach that language in *Sargent* with caution for three reasons. First, the plain meaning of the court's words limits the application of "aiding and abetting" another's use to those instances where an accused physically assists another with the actual injection or ingestion. Private Bennitt maintains that *Sargent's* language "assisted the purchaser in injecting or ingesting the drug," requires more than acts normally associated with dividing a stash of drugs for multiple distributions. *Id.* The level of assistance in "ingesting" would be akin to inserting a needle into another's arm to achieve an "inject[ion]." Some examples are holding a drug pipe to another's mouth or placing an LSD laced "stamp" into another's mouth.

Furthermore, Private Bennitt urges this Court to reject the thirty-year old dicta by its predecessor court. For reasons already discussed, the court's fact pattern in *Sargent* appears to describe the offense of distribution as defined by Congress and supported by military case law, and, as discussed below in section B, there is no legislative history to support the proposition that Congress intended this type of offense to be punishable under Article 119(b)(2), UCMJ.

All involuntary manslaughter cases known to appellant, where an accused physically assisted a victim with the injection or ingestion of a lethal dose of drugs were charged under the "culpable negligence" standard, not the "offense directly affecting the person" standard of Article 119(b)(2). *See generally Dinkel*, 13 M.J. 400 (conviction affirmed for involuntary manslaughter by culpable negligence when accused injected victim with a lethal dose of heroin); *Mazur*, 13 M.J. 143 (conviction affirmed for involuntary manslaughter by culpable negligence when accused assisted the victim to inject a lethal dose of heroin), *overruled in part by Sargent*, 18 M.J. 331 (overruled to the extent that the decision cited approvingly to *United States v. Moglia*); *United States v. Thibeault*, 43 C.M.R. 704 (A.C.M.R. 1971), *pet. denied*, 43 C.M.R. 413 (C.M.A. 1971)(conviction affirmed for involuntary manslaughter by culpable negligence when accused injected victim with a lethal dose of epinephrine).

3. All known examples of "offenses directly affecting the person" involve a perpetrator separate and apart from the victim.

The offenses listed in the *MCM* as those types of offenses that could be an "offense directly affecting the person . . . . are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, and maiming." *MCM*, pt. IV, ¶ 44c(2)(b). These offenses all share the common feature of the

perpetrator and the victim being two separate and distinct persons. Private Bennitt has found no case, military or civilian, to hold otherwise. In appellant's case, the government's theory of what constituted an "offense directly affecting the person" is missing this critical feature. That critical feature is found only if the government's strained application of Article 77(2) survives this Court's review.

If this Court accepts the government's unique interpretation of Article 77(2), the offense "directly affecting the person" the government alleged remains one where Ms. King is the perpetrator *and* victim of her own drug use. This is not the type of offense the drafters of Article 119(b)(2) contemplated. *See infra* Section B.

B. Congress did not intend for Private Bennitt's actions to constitute an offense "directly affect the person" of Ms. King.

The government argued to the Army Court that because Ms. King ingested drugs and those drugs caused her death, "there can be no question" that Ms. King's use "directly affects the person" of herself. (Gov't Br. at 5). Under the government's broad reading of the term "directly affects the person," any offense committed in conjunction with a death would result in a legally cognizable offense under Article 119(b)(2), UCMJ. This reading would allow the absurd result of the government charging one adulterer for the death of her partner merely because he

died of a heart attack during the act of adultery—under the government's broad view, an offense that directly affects the person. Like in this absurd scenario, there is no evidence that Congress intended acts such as these to be charged under Article 119(b)(2).

1. The legislative history of Article 119.

The legislative history of Article 119, UCMJ, provides little guidance to the definition "directly affecting the person." Like the statute on which Article 119 was based, New York Code 1050, Congress failed to provide a definition for the phrase "directly affecting the person." *See Sargent*, 18 M.J. at 336-38 (discussing legislative history of Article 119). In 1967, New York revised its statute and scrapped this vague terminology. In the decades that Code 1050 was in effect, PV2 Bennitt has found no case where the victim committed an offense against himself that was found to be "affecting the person" to create a criminal liability on another. *See generally People v. Grieco*, 193 N.E. 634 (N.Y. 1934)(finding that drunk driving that resulted in a pedestrian's death was not a crime "affecting the person" as intended by the legislature), *cited in Sargent*, 18 M.J. at 337.

The 1949 Manual for Courts-Martial defined involuntary manslaughter in Article of War 93 as "the commission of an unlawful act, the unlawful act must be evil in itself by reason

of its inherent nature [(*malum in se*)] and not an act which is wrong only because it is forbidden by a statute or order [(*malum prohibitum*)]." *MCM*, 1949, ¶ 180a, p. 234. When debating the revision of the involuntary manslaughter statute for the 1951 *MCM*, there were two primary proposals: the Article 119 that we know today based on New York Code 1050, and a proposal that mirrored Article of War 93 in the *MCM*, 1949. The proposal for maintaining the language of Article of War 93 was premised on Article of War 93 covering *malum in se* offenses while the phrase "directly affecting the person" was not only misleading but further restricted the Article of War 93 definition. Congressional Floor Debate on The Uniform Code of Military Justice, p. 174-75.[9]

While accepting the more "restrictive" language of "directly affecting the person," *see id.*, Article 119(b)(2) was adopted without any discussion of drug related offenses being included in the type of offenses Article 119(b)(2) was intended to punish. However, the type of crimes qualifying as "directly affecting the person" is seen in the consistency of the lineage of terms used to define involuntary manslaughter by specific type of acts other than culpable negligence. *See United States v. Stanley*, 60 M.J. 622, 629-30 (A.F. Ct. Crim. App. 2004)

---

[9] Legislative history documents cited in this brief are available at http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html.

(discussing Article 119(b)(2)'s limitation to *malum in se* offenses while declaring maiming a qualifying offense). These offenses are consistently a third person committing some sort of physical violence on an innocent party.[10]

In the years before and after the 1951 creation of Article 119, UCMJ, the prevailing view was that drug offenses were *malum prohibitum*. *United States v. Cavett*, 18 C.M.R. 793, 795 (A.F.B.R. 1955)(finding anti-narcotic laws are *malum prohibitum* because they are designed for "social betterment of the community" rather than punishment of the individual), *rev'd on other grounds*, 19 C.M.R. 361 (C.M.A. 1955). It was not until decades later where the general view began to shift so that *furnishing* drugs to another became *malum in se*. Anne M. Vann,

---

[10] *Compare MCM*, 1918, ¶ 443I, p. 253 ("In involuntary manslaughter in the commission of an unlawful act the act must be *malum in se* and not *merely malum prohibitum*. . . . [V]oluntarily engaging in an affray is such an act. To use an immoderate amount of force in suppressing a mutiny is an unlawful act . . . ."), *with MCM*, 1949, ¶ 180a, p. 234 ("[V]oluntary engagement in an affray is such an unlawful act. To use an immoderate amount of force in suppressing a mutiny, riot, or affray is an unlawful act . . . ."), *with MCM*, 1951, ¶ 198b, p. 355 ("Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, the use of more force than is reasonably necessary in the suppression of a mutiny or riot, and maiming."), *with MCM*, 2008, pt. IV-65, ¶ 44c(2)(b) ("Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, and maiming."). *See also MCM*, 1951, ¶ 197g, p. 353 (listing felony murder crimes that directly affect the person as burglary, sodomy, rape, robbery, and aggravated arson); *MCM*, 2008, pt. IV-62, ¶ 43a(4) (listing these same crimes but adding certain sexual assault offenses).

Annotation, *Homicide: Criminal Liability for Death Resulting from Unlawfully Furnishing Intoxicating Liquor or Drugs to Another*, 32 A.L.R. 3d 589 (1970), *cited in United States v. Thibeault*, 43 C.M.R. 704, 708 (A.C.M.R. 1971); *United States v. Uno*, 47 C.M.R. 683, 684-85 (A.C.M.R. 1973). *But see United States v. Anderson*, 654 N.W.2d 367, 370-71 (Minn. Ct. App. 2002) (stating that the sale of cocaine is a *malum prohibitum* crime), *rev'd on other grounds*, 666 N.W.2d 696 (Minn. 2003). Even though distribution of drugs has transformed into a *malum in se* offense in many jurisdictions, the CMA has determined that distributing drugs is not the type of offense envisioned by Article 119(b)(2), but, under certain circumstances, is punishable under Article 119(b)(1). *See Sargent*, 18 M.J. at 339 n.6.

Even with decades of caselaw across the states and in the military, Congress has never indicated that the phrase "directly affecting the person" should be given a broader meaning than what was intended in 1951—acts of physical violence against another. *See United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007)(stating that where Congress is silent and the legislative intent is ambiguous, the courts "have long adhered to the principle that criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused"); *People v. Pinckney*, 38 A.D.2d 217, 220-21 (N.Y. App. Div. 1972)

(reversing a felony murder conviction for furnishing and injecting narcotics because the legislation made no reference to death caused by dangerous drugs). Thus, until Congress speaks on the issue, the judiciary should strictly construe the statute and find that drug crimes were not intended to be charged under Article 119(b)(2).

The act of distribution by PV2 Bennitt is not in the category of offenses envisioned by the drafters of Article 119(b)(2). *Id.* Private Bennitt contends that neither was personal drug use of another. Even if this Court finds that PV2 Bennitt's acts went beyond distribution, drug use is not a qualifying offense under Article 119(b)(2) because personal drug use does not come close to the categories of offenses listed in the *MCM*s of the last nearly 100 years as those that "affect the person." In addition, PV2 Bennitt has been unable to find, and the government did not cite to the Army Court, any cases from jurisdictions with a similar statute where (1) an accused's acts surrounding a drug distribution have been found to "affect the person," or (2) a victim's own misconduct is the basis of criminal liability of a third-party under an "affect the person" statute.[11] As a result, PV2 Bennitt's acts do not legally

---

[11] New York and Minnesota have abandoned such statutory language. N.Y. Penal Law §§ 125.15, 125.20; Minn. Stat. §§ 609.205, 609.20 (creating a drug distribution or administering manslaughter provision). Louisiana still defines manslaughter as an unlawful

qualify as an Article 119(b)(2) offense, and this Court should find Specification 2 of Charge I legally insufficient.

2. The legislative history and effect of enacting Article 112a, UCMJ.

The government relied on *Sargent* for the proposition that assisting use is a qualifying offense for "directly affecting the person" manslaughter. (Gov't Br. at 9). Although the referenced language in *Sargent* was merely dicta, the facts of this case do not even rise to the level of that dicta, i.e., "assisting someone to inject or ingest" as PV2 Bennitt took no part in assisting Ms. King ingest Oxymorphone. In addition, the dicta in *Sargent* now lacks a legal basis as *Sargent* was based on an involuntary manslaughter offense that occurred prior to the enactment of Article 112a.

The current Article 112a, UCMJ, was first published in the 1984 edition of the *MCM*.[12] The need for an enumerated offense covering drug offenses did not revolve around the desire to protect individuals from harm associated with drug abuse. Rather, the theme repeatedly stated in the congressional record revolved around military readiness. As the Chairman of the

---

act "affecting the person." LA. REV. STAT. ANN. § 14:31 (2008). The government cited three California cases asserting that aiding and abetting drug use can form the basis for manslaughter. (Gov't Br. at 8 n.33). However, California does not have an "affect the person" manslaughter statute. CAL. PENAL CODE § 192 (2007).

[12] Prior the 1984, drug offenses were prosecuted solely under Articles 92 and 134, UCMJ.

Senate Subcommittee on Manpower and Personnel stated in 1982, "It is inconceivable to us that there is no specific statutory article pertaining to an offense that represents a most serious threat to our *military readiness* and constitutes a significant percentage of all courts-martial." *The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel* [hereinafter *S. 2521 Hearings*], 97th Cong. 10 (1982) (emphasis added); *see also* S. Rep. No. 98-53, at 11, 29 (1983) (stating that Article 112a is "essential" because of the "substantial dangers to morale and readiness created by drug abuse"). The Department of Defense's (DOD) General Counsel added, "This amendment will clarify the state of law on various offenses and substantially stiffen punishment of those who undermined *military discipline* through the abuse of illegal substances." *S. 2521 Hearings* at 25 (emphasis added).

The proposed Article 112a continued to advance through the legislative process in 1983. The DOD's General Counsel submitted this same reasoning of need for discipline to the House of Representatives. *See The Military Justice Act of 1983: Hearings on S. 974 Before the Subcomm. on Military Personnel and Compensation*, 98th Cong. 41 (1983). This all informed the Senate Armed Services Committee's final report calling for Article 112a to be passed because "[a]buse of controlled substances is one of the most significant disciplinary problems

facing the armed forces." S. Rep. No. 98-549, at 17, 19 (1983). Following the enactment of The Military Justice Act of 1983, the Secretary of Defense submitted an advisory report to Congress that focused on the need to protect the military community at large rather than the individual soldier from drug crimes. Advisory Commission Report, Vol. I, at 52 (1984). The commission stated that "crimes [related to drug abuse], affects both the ability of the military to respond and the peace and security of the military living community." *Id.*

What this legislative history makes clear is that Article 112a's prohibition on drug use and distribution is not focused on protecting "some particular person." Rather, Article 112a was created to protect military "society in general." *See* Article 112a analysis at A23-11 (stating that increased sentences are necessary because "*any* drug offense is serious because of high potential for adversely affecting readiness and mission performance"). As a result, drug use and distribution fall outside the scope of qualifying offenses for Article 119(b)(2), UCMJ, since "offense[s] directly affecting the person" are limited to those crimes that are meant to protect individuals rather than society at large. UCMJ art. 119c.(2)(b). Thus, this court should find Specification 2 of Charge I legally insufficient.

Conclusion

Accordingly, PV2 Bennitt requests that this Honorable Court dismiss Specification 2 of Charge I and return his case for a sentence rehearing.

JACOB D. BASHORE
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703)693-0651
USCAAF# 35281

For
PATRICIA A. HAM
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF# 31186

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because this brief contains 6,820 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2007 with Courier New, using 12-point type with no more than ten and ½ characters per inch.

Jacob D. Bashore
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0651
USCAAF # 35281

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Bennitt, Crim. App. Dkt. No. 20100172, Dkt. No. 12-0616/AR, was delivered to the Court and Government Appellate Division on October 18, 2012.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736