IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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.

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

Granted Issue

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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. §866(b) [hereinafter UCMJ].[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition

[1] UCMJ, art. 66(b), 10 U.S.C. §866(b).

of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

Statement of the Case

A military judge sitting alone as a general court-martial convicted appellant, pursuant to his pleas,[3] of wrongful distribution of a controlled substance (4 specifications), and wrongful use of a controlled substance (4 specifications), in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a [hereinafter UCMJ], and, contrary to his pleas, of involuntary manslaughter, in violation of Article 119(b)(2), UCMJ.[4] The military judge sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for seventy (70) months, and to be dishonorably discharged from the service.[5] The convening authority approved the sentence as adjudged.[6] Appellant was credited with 360 days of confinement against the sentence to confinement.[7]

Appellant filed an appeal to the Army Court under Article 66, UCMJ, alleging that his conviction for involuntary manslaughter was legally insufficient. The Army Court summarily

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[2] UCMJ, art. 67(a)(3), 10 U.S.C. §867(a)(3).
[3] Joint Appendix (JA) at 46-48, 49, 50.
[4] JA at 109.
[5] JA at 110.
[6] JA at 111.
[7] JA at 111.

affirmed the findings and sentence on May 16, 2012.[8] This Court granted review of the assigned issue on September 19, 2012.

Statement of Facts

The pertinent facts in this case occurred in the late evening and early morning of February 14-15, 2009. During the day on February 14, 2009, appellant purchased 11 pills of "Opana," otherwise known as oxymorphone.[9] Appellant distributed 8 of the pills to various Soldiers, and kept 3 for himself.[10]

Late in the evening on February 14, 2009, appellant was watching a movie in his barracks room with his girlfriend, Ms. L.K., and one of her friends.[11] While they were watching the movie, appellant took two of the Opana pills he had purchased that day, crushed them on a nightstand using cigarette wrapper cellophane and a lighter, and snorted them with a dollar bill.[12] When Ms. L.K. saw appellant "snorting the two pills" she asked if she and her friend could have the third pill that appellant had purchased that day.[13] Appellant said "yes," then proceeded to smash the pill on the nightstand, divided it with a card from

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[8] JA at 1-2.
[9] JA at 53, 119-120.
[10] JA at 119-120.
[11] JA at 120.
[12] JA at 120.
[13] JA at 121.

his wallet, and provided Ms. L.K. and her friend with the dollar bill to snort it.[14]

In the early morning hours of February 15, 2009, appellant awoke to find Ms. L.K. unresponsive, not breathing, foaming at the mouth, and with vomit in her mouth, and proceeded to call the CQ and 911.[15] Ms. L.K. had died as a result of a lethal overdose of oxymorphone and alprazolam (Xanax), with the oxymorphone being "the much bigger player in the CNS depression that caused her death."[16]

GRANTED ISSUE AND ARGUMENT

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.

Standard of Review

The standard of review for questions of legal sufficiency is de novo.[17] The interpretation and statutory construction of Article 119(b)(2), UCMJ, is a question of law reviewed de novo.[18]

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[14] JA at 121.
[15] JA at 120.
[16] JA at 571.
[17] *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).
[18] *United States v. Nerad*, 69 M.J. 138, 150 (C.A.A.F. 2010)(Stuckey, dissenting), citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008).

Law and Analysis

The test for legal sufficiency is whether, when viewed in the light most favorable to the prosecution, "a reasonable fact-finder could have found all of the essential elements of the offense beyond a reasonable doubt."[19] In resolving legal sufficiency questions, this Court is "not limited to appellant's narrow view of the record."[20] To the contrary, this Court is required "to draw every inference from the evidence of record in favor of the prosecution."[21] "[T]he appellate question is not whether the evidence is better read one way or the other, but whether. . .a reasonable factfinder reading the evidence one way could have found all the elements of the offense beyond a reasonable doubt."[22] Moreover, "[p]roof beyond a reasonable doubt does not require that the evidence be free from all conflict."[23]

The elements of involuntary manslaughter in violation of Article 119(b)(2), UCMJ, are:

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[19] *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987); UCMJ, art. 66(c).
[20] *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996) (citing *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)).
[21] *McGinty*, 38 M.J. at 132 (citing *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)).
[22] *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011).
[23] *United States v. Mitchell*, 58 M.J. 20, 21 (C.A.A.F. 2002)(summary disposition)(Crawford, C.J., dissenting) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)).

> (1) That a certain named or described person is dead;
>
> (2) That the death resulted from the act or omission of the accused;
>
> (3) that the killing was unlawful; and
>
> (4) That the act or omission of the accused . . . occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person.[24]

The only matter in dispute in this case is whether, as alleged, appellant's "aiding or abetting [Ms. L.K.'s] wrongful use of Oxymorphone" is an "offense directly affecting the person."

In *United States v. Sargent*,[25] this Court stated:

> A conviction for involuntary manslaughter cannot be sustained solely by evidence that an accused sold someone a drug and that the purchaser later died from an overdose of that drug. On the other hand, 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 directly affecting the person," this prerequisite for Article 119(b)(2)'s application is present under those circumstances.[26]

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[24] *Manual for Courts-Martial* (MCM), part IV, ¶44(b)(2).
[25] 18 M.J. 331 (C.M.A. 1984).
[26] *Sargent*, 18 M.J. at 339. This Court later re-affirmed the distinction between merely distributing drugs, and going further to "assist[] the decedent in injecting or ingesting the substance" in determining whether the offense directly affected the person. *See United States v. Dillon*, 18 M.J. 340, 342 (C.M.A. 1984).

Whether the third sentence of the quoted section is a correct statement of the law is the central issue in this case. In addressing *Sargent*, appellant argues primarily that only the first sentence is the *ratio decidendi* of the case, while the remaining two sentences are mere dicta and should be ignored.

Dealing first with the persuasiveness of the language in *Sargent* and its precedential value, this Court should not be as dismissive of the language as appellant urges. In the context of the opinion in *Sargent*, the above quoted language was not mere *obiter dictum*.[27] This Court's decision in that case went through an extensive discussion of the history of Article 119(b)(2), particularly as it related to the meaning of "offense directly affecting the person." While the ultimate conclusion of the Court was that distribution alone is insufficient to constitute an offense "directly affecting the person," its examples of what would meet that definition in the context of drug use were not mere surplusage. They were intended to provide guidance as to what would have been sufficient in that case (and others) to constitute manslaughter. The Court was clearly intending to further define the parameters of what

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[27] "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." Black's Law Dictionary (9th ed. 2009), obiter dictum.

constitutes an "offense directly affecting the person," in particular involving drug offenses, which was the central issue in that case.

Regardless of whether the language quoted above is considered dictum, it is still a correct statement of the law for two reason: (1) Aiding or abetting the wrongful use of narcotics a viable "offense"; and (2) It is an "offense directly affecting the person under Article 119(b)(2), UCMJ. Finally the evidence in this case was legally sufficient to establish that appellant committed the offense "directly affecting the person" of Ms. L.K. by aiding or abetting her wrongful use of oxymorphone.

1. Aiding or Abetting the Wrongful use of a Controlled Substance is a Viable Offense.

The elements of wrongful use of a controlled substance, in violation of Article 112a, are that (1) the accused used a controlled substance; and (2) the use by the accused was wrongful.[28] It is indisputable that Ms. L.K.'s ingestion of oxymorphone, a Schedule II controlled substance, without legal justification or authorization constituted "wrongful use of a controlled substance" under Article 112a, UCMJ. That Ms. L.K. was a civilian and not actually subject to prosecution under

[28] MCM, part IV, ¶37.b.(2).

Article 112a, UCMJ, is irrelevant in the context of aiding and abetting.[29]

Having established Ms. L.K.'s use of a controlled substance, the question is whether appellant could "aid or abet" her wrongful use of oxymorphone. By its terms, Article 77, UCMJ, applies equally to any offense under the code, and does not exclude wrongful use of controlled substances.[30] Therefore, by the plain language of Article 77, one could properly be charged with aiding or abetting another's wrongful use of a controlled substance, depending on the facts of the case.

The State of California, in the context of applying its manslaughter statute, has found that aiding or abetting the

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[29] "The amenability of the actual perpetrator to prosecution is not a requirement for criminal liability as an aider and abettor. The determinant is whether the act aided and abetted is an offense, not whether the perpetrator is subject to prosecution." *United States v. Minor*, 11 M.J. 608, 611 (A.C.M.R. 1981); *see, e.g., United States v. Jones*, 37 M.J. 459 (C.M.A. 1993)(accused properly convicted of aiding and abetting distribution of a controlled substance despite principal being a civilian).

[30] Aiding or abetting the wrongful use of a controlled substance would also not violate Wharton's Rule, nor the general principle that "where the crime is so defined that participation by another is inevitably incident to its commission," the person who assists or encourages the crime is not guilty as an accomplice. *United States v. Hill*, 25 M.J. 411, 413-14 (C.M.A. 1988) citing *United States v. Crocker*, 18 M.J. 33 (C.M.A. 1984)("[A] defendant may not be convicted of conspiring to commit a subsequent offense with another person if commissions of that offense necessarily required the active participation of both persons."). Merely providing a controlled substance to an individual does not inevitably mean that the receiver will use the substance. That person could just as easily be another link in the distribution chain, and not a user.

wrongful use of a controlled substance is a viable underlying offense.[31]

Appellant's primary argument is that his actions were exclusively "distribution of a controlled substance" under Article 112a, UCMJ, and therefore could not be considered aiding or abetting wrongful use of a controlled substance. Appellant is correct that the Government could have charged him with distribution of a controlled substance to Ms. L.K. when he provided her with the oxymorphone pill the evening of February 14, 2009.[32] Appellant's argument that his conduct was *exclusively* distribution is unpersuasive, however. First, appellant's proposition ignores the basic tenet discussed in *Blockburger v. United States*,[33] that "[a] single act may be an offense against two statutes."[34] Further, the cases appellant cites stand only for the proposition that had appellant been

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[31] *See People v. Oliver*, 210 Cal.App.3d 138, 258 Cal.Rptr. 138 (1989); *People v. Hopkins*, 101 Cal.App.2d 704, 226 P.2d 74 (1951); *People v. Edwards*, 39 Cal.3d 107, 702 P.2d 555, 216 Cal.Rptr 397 (1985)(finding involuntary manslaughter instruction should have been given because evidence could support a finding of defendant's aiding and abetting the victim's use of narcotics.)

[32] Appellant undoubtedly delivered to the possession of Ms. L.K., without legal justification or authorization, some amount of oxymorphone. *See* MCM, part IV, ¶37.b.(3).

[33] 284 U.S. 299 (1932).

[34] *Blockburger*, 284 U.S. at 304, quoting *Morey v. Commonwealth*, 108 Mass. 433 (1871). In addition, "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States v. Batcheldor*, 442 U.S. 114, 123-24 (1979).

charged with distribution of a controlled substance, in violation of Article 112a, UCMJ, he could not claim as a defense that his actions were merely "buddy use" or "joint possession."[35] What they do not stand for is the proposition that the receiver of drugs from a distributor cannot be prosecuted for wrongful use of the controlled substance that they received.

This makes sense factually, and is in line with the language of Article 112a, UCMJ. A distribution is completed in its entirety the moment the distributor actually or constructively transfers the drug to the possession of the receiver.[36] The fact that an individual distributes a drug, however, does not inevitably lead to the receiver using it. The receiver must take the additional affirmative step to use the drug.[37] If the receiver actually uses the drug, the question is whether the distributor assisted, encouraged, advised or commanded the use of the drug, separate from the distribution.

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[35] *See United States v. Tingler*, 65 M.J. 545 (N.M. Ct. Crim. App. 2006)(sharing an illegal drug is considered "distribution" and not "personal use"); *United States v. Ratleff*, 34 M.J. 80 (C.M.A. 1992)(passing drugs between each other is distribution, not joint possession); *United States v. Tuero*, 26 M.J. 106, 107 (C.M.A. 1988); *State v. Moore*, 529 N.W.2d 264 (Iowa 1995); *United States v. Glazebrook*, 2005 WL 2467769, at *2-3 (N.M. Ct. Crim. App. 2005)(unpub.), *rev. den.*, 63 M.J. 282 (C.A.A.F. 2006)(passing of drugs between persons is distribution, not joint possession).

[36] *MCM*, part IV, ¶37.c.(3).

[37] Until the receiver actually ingests or injects the drug, once they obtain possession from the distributor they are merely wrongfully possessing a controlled substance. *MCM*, part IV, ¶37.b.(1).

The facts of this case are illustrative. Appellant completed the distribution of the oxymorphone to Ms. L.K. the moment he transferred the pill to her possession.[38] However, appellant's actions in this case went beyond the mere transfer of possession, and included the additional steps by appellant to assist Ms. L.K. in ingesting the oxymorphone. To that end appellant crushed the pill into an ingestible consistency, separated the pill into "lines" for ingestion by both users, and provided Ms. L.K. with the rolled dollar bill to physically assist in the ingestion. Short of physically causing Ms. L.K.'s lungs to inhale air through her nostrils, thus ingesting the oxymorphone into her body, appellant performed every action associated with Ms. L.K.'s ingestion of a controlled substance.

The Government does not propose that the mere distribution of a controlled substance is sufficient to establish "aiding or abetting" the wrongful use of the controlled substance. It is the additional actions of a distributor to assist the purchaser in injecting or ingesting the drug (going beyond what is required to "distribute" a controlled substance) that renders a distributor liable as an aider or abettor. Such was the

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[38] Arguably the moment he placed it on the nightstand for her to take.

distinction made in *Sargent*,[39] and such is what the evidence establishes in this case.

2. "Aiding or Abetting the Wrongful use of Narcotics" is an "Offense Directly Affecting the Person."

In order to be guilty of involuntary manslaughter under Article 119(b)(2), UCMJ, the accused must have caused the death of someone "while perpetrating or attempting to perpetrate an offense . . . directly affecting the person."[40] Congress did not define the term "offense directly affecting the person." The President has defined the term to mean "one affecting some particular person as distinguished from an offense affecting society in general. Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, and maiming."[41] This Court, after reviewing the legislative history of manslaughter statutes in the military, interpreted this provision to mean that the offense must not only affect a particular individual, but also the physical "person" of the individual.[42] The Court also recognized that the illustrations in the Manual are not exclusive, though "they all involve

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[39] *Sargent*, 18 M.J. at 339.
[40] UCMJ, art. 119(b)(2).
[41] MCM, part IV, ¶44.c.(2).(b).
[42] *Sargent*, 18 M.J. at 338.

situations in which physical force is applied immediately against an individual's body."[43]

The wrongful use of a controlled substance meets the plain reading of the term "offense directly affecting the person." The actual use affects a particular person (the user) as opposed to society in general, and it has a direct physical effect on the body of the user.[44] As is plainly evident from the fact that Ms. L.K. died as a result of ingesting oxymorphone, the wrongful use of controlled substances has a direct and debilitating effect on the human body. The wrongful ingestion of harmful narcotics in an improper manner results in the same effect as any form of "physical force" - physical injury to that particular person.[45] The wrongful use of a controlled substance is therefore consistent with the examples provided in the MCM of "offenses directly affecting the person."

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[43] *Id.* However, false imprisonment (which is not an offense under the UCMJ) does not necessarily require any form of physical assault. *See, e.g.*, 32 Am. Jur.2d False Imprisonment §7.

[44] *See* Black's Law Dictionary (9th ed. 2009), affect (generally means only "to produce an effect on.")

[45] This conclusion rebuts appellant's analogy to someone being charged with manslaughter because the victim died from a heart attack during an adulterous sexual encounter. The fallacy in that analogy is that adultery would not be considered an "offense directly affecting the person." The act of engaging in sexual intercourse does not include the same level of physical injury or harm as does the improper use of a controlled substance or battery.

This conclusion is in line with the Supreme Court of Minnesota's holding that a seller of heroin who aids the purchaser in preparing and injecting it has committed an offense "upon or affecting the person whose death was caused."[46]

Further, the State of California specifically recognizes that an individual may be charged with involuntary manslaughter by virtue of aiding and abetting the victim's use of a controlled substance.[47] While the applicable California manslaughter statute defines manslaughter as involving only the "commission of an unlawful act,"[48] and does not limit it to "offenses directly affecting the person," these holdings should still be considered additional persuasive authority, at a minimum for the proposition that it is not uncommon for persons to be convicted of manslaughter for aiding and abetting the use of controlled substances that result in death.

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[46] *State v. Forsman*, 260 N.W. 2d 160, 164 (Minn. 1977), *cited approvingly by Sargent*, 18 M.J. at 338.

[47] *See People v. Oliver*, 210 Cal.App.3d 138, 258 Cal.Rptr. 138 (1989); *People v. Hopkins*, 101 Cal.App.2d 704, 226 P.2d 74 (1951); *People v. Edwards*, 39 Cal.3d 107, 702 P.2d 555, 216 Cal.Rptr 397 (1985)(finding involuntary manslaughter instruction should have been given because evidence could support a finding of defendant's aiding and abetting the victim's use of narcotics.).

[48] Cal. Pen. Code § 192.

a. The Legislative History of Article 119(b)(2), UCMJ, does not Exclude Aiding or Abetting the Wrongful Use of a Controlled Substance as an Offense Directly Affecting the Person.

Beyond the plain meaning, the primary issue is whether the term "offense directly affecting the person" was intended by Congress to encompass appellant's actions. Prior to the enactment of Article 119, UCMJ, involuntary manslaughter involving the commission of an unlawful act was punishable only where the unlawful act was *malum in se*, not merely *malum prohibitum*, or, in other words, "the unlawful act must be evil in itself by reason of its inherent nature and not an act which is wrong only because it is forbidden by a statute or orders."[49]

When Congress enacted Article 119, UCMJ, it specifically rejected language that would have continued the common law practice of distinguishing between *malum in se* and *malum prohibitum* offenses for purposes of involuntary manslaughter, and instead chose to utilize the more specific terminology of an "offense directly affecting the person."[50] The intent was to "endeavor to define the distinction between malum in se and malum prohibitum."[51]

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[49] *Sargent*, 18 M.J. at 335-336.
[50] *Sargent*, 18 M.J. at 336-37, citing 96 Cong. Rec. 1307 (1950) and Manual for Courts-Martial, Legal and Legislative Basis ¶198 (1951). As enacted, the phrase was likely taken from Section 1050 of the New York Penal Code.
[51] *Sargent*, 18 M.J. at 337 (quoting Manual for Courts-Martial, Legal and Legislative Basis ¶198 (1951)).

Congress' enactment of Article 119, UCMJ, is similar to the enactment by the state of Louisiana of Louisiana Revised Statute (LRS) 14:31. Louisiana (the only other jurisdiction that does so) defines manslaughter as including, in part, "[a] homicide committed . . . when the offender is engaged in the perpetration or attempted perpetration . . . of any intentional misdemeanor directly affecting the person."[52] Louisiana, in enacting this language, specifically chose to reject utilizing "the artificial, but generally recognized, distinction between crimes malum in se and malum prohibitum" because that distinction "would invite confusion, litigation, and possible injustice," pointing out that "[t]he attempted definitions and practical applications of this distinction have been far from uniform."[53] Louisiana referred to Section 1050 of the New York Penal Code as well, and described the term "directly affecting the person" as being "distinctly limited in scope and would only include such offense as assault, battery, and false imprisonment."[54]

The legislative history of Article 119, UCMJ, makes clear, therefore, that Congress specifically rejected, as did the State of Louisiana, the distinction between *malum in se* and *malum*

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[52] LSA-RS 14:31.
[53] LSA-RS 14:31, Comment, Subdivision (2)(a).
[54] *Id.*

prohibitum offenses.[55] Whether the wrongful use of a controlled substance (and the aiding and abetting of such use) may appropriately lead to liability for manslaughter does not turn on whether it is *malum in se*, but only on whether it "directly affects the person." As discussed, above, under a plain reading of the statute the acts in question in this case meet that definition.

b. Offenses Directly Affecting the Person Include those where the Victim Contributes to the Cause of Death

The fact that Ms. L.K. was the individual who actually physically performed the act of ingesting the controlled substance does not alter the analysis in this case. Courts have upheld manslaughter convictions where the accused assisted or encouraged another to commit suicide.[56] While these cases were charged under a contributory negligence theory, they at least stand for the proposition that an accused may properly be convicted of manslaughter even where the decedent is the one who physically performed the act causing death.

Further, the California cases cited *infra* directly refute appellant's proposition that manslaughter requires that the

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[55] *See Sargent*, 18 M.J. at 336 (pointing out that Congress rejected an alternate manslaughter statute proposed by Senator Tobey that was based on the *malum in se* distinction).

[56] *See* 40 A.L.R.4th 702, citing *State v. Marti*, 290 N.W.2d 570 (Iowa 1980), *People v. Duffy*, 586 N.Y.S.2d 150 (1992), *review denied* 80 N.Y.2d 929.

"perpetrator and victim be[] two separate and distinct persons."[57]

3. The Evidence is Legally Sufficient to Support Appellant's Conviction.

Having shown that aiding and abetting the use of a controlled substance by another is a viable offense under the UCMJ, and is one that directly affects the person under Article 119(b)(2), UCMJ, the remaining question is whether the evidence in this case establishes that appellant aided and abetted Ms. L.K.'s use of oxymorphone.[58]

"A person who aids, abets, counsels, commands, or procures the commission of an offense . . . is equally guilty of the offense as one who commits it directly."[59] "[A]iding and abetting requires proof of the following: (1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused

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[57] Appellant's Brief at 20-21; *People v. Oliver*, 210 Cal.App.3d 138, 258 Cal.Rptr. 138 (1989); *People v. Hopkins*, 101 Cal.App.2d 704, 226 P.2d 74 (1951); *People v. Edwards*, 39 Cal.3d 107, 702 P.2d 555, 216 Cal.Rptr 397 (1985).

[58] As noted, *infra*, appellant only contests the fourth element of involuntary manslaughter, that the act or omission of the accused which caused the death of the victim occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person.

[59] MCM, part IV, para. 1.b.(1)

assisted or participated in the commission of the offense."[60] "Intent may be inferred from the circumstances of the particular case."[61]

There is no question that appellant aided and abetted Ms. L.K.'s use of oxymorphone in this case. He physically provided the drug to Ms. L.K., crushed the pill for her, divided the crushed pill into "snorting" lines, and gave her the rolled dollar bill to use to "snort" the drugs.[62] Appellant's actions demonstrated a clear intent to assist Ms. L.K. in ingesting the controlled substance. Appellant's argument that his crushing and separating the pill was incidental to the distribution is unpersuasive. If appellant's only intent was to distribute the oxymorphone pill to Ms. L.K. and her friend, he need only have handed them the pill and allowed them to decide how to use it.[63] The only reasonable interpretation of appellant's actions -

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[60] *United States v. Mitchell*, 66 M.J. 176, 178 (C.A.A.F. 2008) (quoting *United States v. Pritchett*, 31 M.J. 213, 217 (C.M.A. 1990)).

[61] *Mitchell*, 66 M.J. at 178 (citing *United States v. Simmons*, 63 M.J. 89, 92-94 (C.A.A.F. 2006)).

[62] PE 27. *See also United States v. Henderson*, 23 M.J. 77, 80 (C.M.A. 1986)("[a]ppellant actively aided and abetted the injection of the lethal dose by making available a large quantity of cocaine knowing it would be injected, by permitting the privacy of his room to be utilized for the injection, by encouraging the decedent to 'get fired up,' and by his presence during the consumption of the cocaine.").

[63] Interestingly, appellant explains in his sworn statement that Ms. L.K. asked only whether her and her friend could "have" the last pill, but did not ask appellant to prepare it for ingestion for them. JA at 121.

crushing it himself, dividing it into lines, and providing the dollar bill to snort it - is that appellant specifically intended to assist Ms. L.K., and that he actually did assist her.[64]

Appellant aided and abetted Ms. L.K.'s wrongful use of a controlled substance, an offense directly affecting the person of Ms. L.K.. This use of the controlled substance, assisted by appellant, directly led to her unlawful death. As a result, the evidence is legally sufficient to find appellant guilty of violating Article 119(b)(2), UCMJ.

[64] *See United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)(all reasonable inferences must be drawn in favor of the government when reviewing for legal sufficiency).

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and seven copies of the foregoing were delivered to the Court on the 19th day of November 2012, and that a copy of the foregoing was delivered to appellate military defense counsel on the 19th day of November 2012.

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