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

AARON R. INKENBRANDT
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0682
USCAAF No. 35750

AMY E. NIEMAN
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF No. 35969

JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF No. 26450

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

Issue Presented

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ABUSED ITS DISCRETION BY REAFFIRMING APPELLANT'S APPROVED SENTENCE AFTER THIS COURT SET ASIDE HIS CONVICTION FOR MANSLAUGHTER.

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) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

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 (2006). 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) (2006).

The military judge sentenced PV2 Bennitt to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for seventy months, and a dishonorable discharge. The military judge credited PV2 Bennitt 360 days of confinement against his sentence to confinement. The convening authority approved the adjudged sentence and credited PV2 Bennitt 360 days of confinement against the sentence to confinement.

On May 16, 2012, the Army Court affirmed the findings and the sentence. This Court, in *United States v. Bennitt*, 72 M.J. 266 (C.A.A.F. 2013), reversed the Army Court's decision and dismissed the finding of guilty to Specification 2 of Charge I (alleging a violation of Article 119(b)(2), UCMJ). This Court also set aside the sentence, affirmed the remaining findings of guilty, and returned the record of trial to the Army Court to either reassess the sentence or order a sentence rehearing.

[1] The military judge also convicted PV2 Bennitt of language excepted in his plea to Specifications 1, 4, and 7 of Charge II—wrongful distribution and use of a controlled substance in violation of Article 112a, UCMJ.

On September 23, 2013, the Army Court reassessed and affirmed the approved sentence. On November 15, 2013, the Army Court granted PV2 Bennitt's motion to reconsider its decision affirming the sentence. On March 25, 2014, the Army Court again affirmed the approved sentence. Private Bennitt was notified of the Army Court's decision and petitioned this Court for review on May 15, 2014. On August 25, 2014, this Honorable Court granted appellant's petition for review.

Statement of Facts

Ms. LK died on February 15, 2009, of a drug overdose. (JA 121). Due to PV2 Bennitt's alleged involvement in LK's death, the government charged him with involuntary manslaughter under two theories. In Specification 2 of Charge I, the government alleged that PV2 Bennitt committed manslaughter while perpetrating an offense directly affecting the person by aiding and abetting LK's wrongful use of oxymorphone and alprazolam. (JA 12). In Specification 1 of Charge I, the government alleged that PV2 Bennitt committed manslaughter through culpable negligence by making oxymorphone available to LK. (JA 12). Contrary to his plea, the government initially convicted PV2 Bennitt of Specification 2 of Charge I. (JA 186).

The government primarily relied on PV2 Bennitt's February 20, 2009, sworn statement to law enforcement to convict him of manslaughter. (JA 223-28). In his statement, PV2 Bennitt said

that on February 14, 2009, LK introduced him to Opana (oxymorphone) and arranged his purchases with Ms. ES. (JA 223, 227). Private Bennitt used the oxymorphone he obtained from ES to resell to others. (JA 223-24). While at ES's house, LK borrowed money from PV2 Bennitt to purchase three Xanax (alprazolam) pills from ES. (JA 224). LK also snorted oxymorphone while at ES's house which PV2 Bennitt did not provide her. (JA 144-45, 224). According to LK's friend, TY, ES's daughter, MS, provided LK this oxymorphone. (JA 144-45).

That evening, PV2 Bennitt, LK, and TY went to PV2 Bennitt's barracks room on Ft. Lewis. (JA 224). LK and TY used alprazolam in PV2 Bennitt's room. (JA 150, 224-25). According to TY, LK had the alprazolam in her purse. (JA 150). Later, PV2 Bennitt crushed and snorted one of the oxymorphone pills he possessed. (JA 225). After LK requested some of the drug, PV2 Bennitt crushed another pill and divided it on his nightstand. (JA 225). LK and TY snorted the oxymorphone. (JA 224). Private Bennitt, LK, and TY then fell asleep. (JA 217, 224). At about 0430 PV2 Bennitt awoke to find LK dead. (JA 217-18, 224).

At trial, the government's toxicology expert, Dr. Levine, testified "to a reasonable degree of scientific certainty, that in the absence of any other disease or trauma . . . that the combination of [alprazolam and oxymorphone] can account for [LK's] death." (JA 121). Dr. Levine believed "the oxymorphone

was the much bigger player in the [central nervous system] depression that caused her death." (JA 121). Dr. Levine could not determine which drug LK ingested first or how much she ingested of either. (JA 123, 127). Dr. Levine did not know how or when LK ingested the drugs "[b]eyond saying that it was likely within hours as opposed to days . . . ." (JA 131). According to Dr. Levine, no set amount of oxymorphone constitutes a lethal dose; determining this must "be interpreted in context to the case." (JA 138). He again confirmed "that to a reasonable degree of scientific certainty, the cause of death was the drug combination." (JA 137).

Private Bennitt pled guilty to Specification 3 of Charge II, except the words and figures "between" and "on or about 15 February 2009." (JA 28-29, 57). Private Bennitt also pled guilty to the remaining specifications of Charge II and the Specification of The Additional Charge either as alleged or by exceptions and substitutions. (JA 28-29, 70).

During the plea colloquy, PV2 Bennitt admitted to distributing oxymorphone to Privates (PVT) Swindle, Doherty, and Waldroop on February 14, 2009. (JA 51-57). Private Bennitt also asserted that he only distributed alprazolam once to PVT Doherty on February 14, 2009. (JA 58-60, 69-70). Private Bennitt never admitted to distributing oxymorphone or alprazolam to LK during the providence inquiry. (JA 51-60, 69-70).

Later addressing Specifications 5 and 6 of Charge II,[2] the military judge informed PV2 Bennitt that he would not consider additional acts of misconduct related to drug offenses outside the charged periods if PV2 Bennitt was not convicted of those acts. (JA 94-96). After this discussion, the military judge clarified his position with the government as follows:

> MJ: So, I want both sides to be very clear that, in view of what I said earlier, if you want the court to consider misconduct as charged misconduct, then you have to go forward on the merits and Private Bennitt needs to be found guilty of that. Is that clear to both parties?
> . . . .
>
> TC: I believe the government's clear but may disagree. But just to clarify, sir, so, the court believes that even if the accused, let's say, distro-ed the same substance--the same substance during a charged period of time of which he's been found provident, the distros to other individuals, while still within the charged period of time, and within that spec, are not admissible at pre-sentencing, even under a theory of related misconduct, within that charged period of time? Is that the court's position, sir?
>
> MJ: They are--any admissible misconduct can help characterize this accused's service, in that way it can be considered. But, this accused will not be sentenced for misconduct that he hasn't been found guilty of.

[2] For Specification 5 of Charge II, the military judge only found PV2 Bennitt provident to using oxycodone on divers occasions between February 1 and 15, 2009. (JA 94). For Specification 6 of Charge II, the military judge only found PV2 Bennitt provident to using marijuana on divers occasions between December 19, 2008, and January 15, 2009. (JA 95).

> TC: I think the government understands now, sir. But there may be an alternative method of admissibility?
>
> MJ: Certainly.
>
> TC: But it wouldn't be considered as an offense for which you can sentence the accused, separate and apart--beyond the provident-- --
>
> MJ: Absolutely.
>
> TC: --offenses.
>
> MJ: Absolutely.
>
> TC: Okay, understood, sir. Thank you.

(JA 96).

Before the government presented its opening statement the military judge engaged in the following exchange with the assistant trial counsel:

> MJ: Government, let me ask you: Do you intend to go forward on Charge I, [sic] Specifications 5 and 6 of Charge II?"
>
> ATC: Yes, Your Honor. I'd say, Your Honor, we--the government plans to go forward on Charge I, and Specification 6 of Charge II. Just would [sic] ask to defer a decision on Specification 6--or, excuse me, Specification 5.
>
> MJ: Certainly. I would point out, with the deferring of proceeding on Specification 5 of Charge II, both parties will be given an opportunity to give an opening statement on that specification. On the portions of that specification, which the court does not believe Private Bennitt is provident.
>
> ATC: Thank you, Your Honor.

(JA 99-100).

Following the contested portion of PV2 Bennitt's trial, the military judge found him guilty of involuntary manslaughter under Specification 2 of Charge I except the words "and alprazolam, a Schedule IV controlled substance," and except the words "and alprazolam." (JA 186). The military judge found PV2 Bennitt of guilty of Specification 3 of Charge II except the words and figures "between . . . and on or about 15 February 2009." (JA 186). The military judge also found PV2 Bennitt guilty of Specifications 1, 2, 4, 5, 6[3], and 7 of Charge II, and the Specification of The Additional Charge. (JA 186).

The military judge found PV2 Bennitt not guilty of the manslaughter alleged in Specification 1 of Charge I. (JA 186). This Court later dismissed as legally insufficient the conviction for manslaughter as alleged in Specification 2 of Charge I. *Bennitt*, 72 M.J. at 271.

During PV2 Bennitt's presentencing proceeding, the government presented the testimony of LK's mother, grandmother, and two sisters. (JA 187-98, 202-04). Each of these witnesses shared memories of LK and described the devastating impact of her death on their family. (JA 187-98, 202-04). LK's mother

[3] For Specification 6 of Charge II, the military judge excepted the figure "1," substituting the figure "19," and excepted the word "February," substituting the word "January." (R. at 941).

also used a packet of family photos to depict her daughter's life from infancy to her funeral. (JA 187-93, 229-38). During its sentencing argument the government emphasized LK's death and aggravating evidence emanating from it. (JA 211-15).

On March 25, 2014, the Army Court reaffirmed the approved sentence citing the factors announced in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013). (JA 6-11). The Army Court reached this result by first finding that the military judge convicted PV2 Bennitt of distributing oxymorphone to LK under Specification 3 of Charge II. (JA 8-9). According to the Army Court this was demonstrated by the "charging framework" and the evidence presented at trial. (JA 9). As a result, the Army Court found "all of the consequences associated with that distribution were and remain admissible, to include the toxicologist's trial testimony that the oxymorphone use played a major role in LK's death." (JA 10 (citing *United States v. Terlep*, 57 M.J. 344 (C.A.A.F. 2002)). [4]

Summary of Argument

The Army Court abused its discretion by relying on evidence of LK's death to reaffirm PV2 Bennitt's sentence.

[4] *Terlep* does not say that "all the consequences" of an accused's offenses are admissible under Rule for Courts-Martial 1001(b)(4). In *Terlep*, this Court held that the victim's sentencing testimony that the accused raped her did not contradict the accused's stipulation of fact admitted in support of his plea of guilty to assault consummated by a battery. 57 M.J. at 348.

The Army Court's finding that PV2 Bennitt was convicted of distributing oxymorphone to LK is clearly erroneous. Private Bennitt's plea of guilty to Specification 3 of Charge II only referenced his distribution of oxymorphone to three other soldiers on February 14, 2009. The military judge ultimately found PV2 Bennitt guilty of Specification 3 of Charge II except the date February 15, 2009, consistent with PV2 Bennitt's plea. The record does not show the military judge found PV2 Bennitt guilty of distributing oxymorphone to *LK*.

The Army Court's finding that the government could only have charged PV2 Bennitt with distributing oxymorphone to LK under Specification 3 of Charge II is also clearly erroneous. The government could have drafted Specification 2 of Charge I to allege manslaughter by distributing oxymorphone. Also, the government could have asked the military judge to consider oxymorphone distribution as a lesser included offense of Specification 2 of Charge I or to consider the same under Specification 3 of Charge II as an alternative charging theory. The government simply chose not to pursue a conviction for distributing oxymorphone to LK as a distinct offense.

The Army Court's finding that PV2 Bennitt was convicted of distributing oxymorphone to LK also rests on an erroneous view of the law. Appellate courts may not affirm a conviction under a theory not presented to the trier of fact. Here, the Army Court

effectively found PV2 Bennitt guilty of distributing oxymorphone to LK under a theory never placed before the trier of fact.

The Army Court could not consider evidence of LK's death under a closely related conduct theory. Evidence of uncharged misconduct must be directly related to the charged offenses and be found more probative than prejudicial. Uncharged misconduct may not serve as a conduit for aggravation evidence independent of the charged offenses. So even if the Army Court could consider PV2 Bennitt's uncharged distribution of oxymorphone to LK as closely related to the charged offenses, it could not consider evidence of LK's death.

The Army Court erred in finding that, "all the consequences associated" with PV2 Bennitt's drug distribution could be considered as aggravating evidence against him. In *Burrage v. United States*, 134 S.Ct. 881 (2014), the Supreme Court held that a federal mandatory minimum sentence does not apply unless the defendant's drug distribution was the "but for" cause of a recipient's death and not merely a contributing factor. The outcome in *Burrage* turned upon the plain meaning of the phrase "results from." This Court should find *Burrage* is persuasive. The facts presented in that case are substantially similar to PV2 Bennitt's. The plain meaning of the phrase "results from" in the federal statute is synonymous with the phrase "directly relating to or resulting from . . ." found in Rule for Courts-

Martial [hereinafter R.C.M.] 1001(b)(4). *Burrage* is also consistent with this Court's precedent interpreting R.C.M. 1001(b)(4) and the law generally.

As in *Burrage*, the record cannot establish that PV2 Bennitt's distribution of oxymorphone to LK was the "but for" cause of her death. LK died from of a lethal combination of oxymorphone and alprazolam. Though oxymorphone played the largest role, no evidence suggests this drug would have killed LK independent of the alprazolam in her system. The record shows that PV2 Bennitt was not the only source of the oxymorphone LK ingested. Also, no evidence shows PV2 Bennitt personally distributed alprazolam to LK. Absent evidence indicating LK would not have died but for PV2 Bennitt's acts, her death is inadmissible under both R.C.M. 1001 and Military Rule of Evidence [hereinafter M.R.E.] 403.

The evidentiary picture changed dramatically after this Court dismissed PV2 Bennitt's manslaughter conviction. LK's death was the gravamen offense. This evidence is not relevant to PV2 Bennitt's remaining convictions. By applying an erroneous legal and factual analysis, the Army Court abused its discretion in reaffirming PV2 Bennitt's approved sentence.

Argument

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ABUSED ITS DISCRETION BY REAFFIRMING APPELLANT'S APPROVED SENTENCE AFTER THIS COURT SET ASIDE HIS CONVICTION FOR MANSLAUGHTER.

Standard of Review

This Court reviews a Court of Criminal Appeal's (CCA's) sentence reassessment "'to prevent obvious miscarriages of justice or abuses of discretion.'" *Winckelmann*, 73 M.J. at 15 (quoting *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (additional citation omitted)). A CCA may reassess a sentence without ordering a rehearing if it determines "'to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error.'" *Id*. (quoting *United States v. Moffett*, 63 M.J. 40, 41 (C.A.A.F. 2006)). This assessment based on the totality of the circumstances. *Id*. at 12. "If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error." *United States v. Doss*, 57 M.J. 182, 186 (C.A.A.F. 2002). A CCA abuses its discretion if it bases its sentence reassessment on clearly erroneous factual findings or an erroneous view of the law. *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997).

Law and Argument

The Army Court abused its discretion by considering evidence of LK's death in its decision to reaffirm PV2 Bennitt's sentence. Private Bennitt was not convicted of distributing oxymorphone to LK in violation of Article 112a, UCMJ. Victim impact evidence arising from uncharged misconduct may not be considered as aggravation at sentencing. And even if PV2 Bennitt's distribution of oxymorphone to LK were admissible, her death was not directly related to or the result of this act.

During presentencing, the government may admit evidence of aggravating circumstances,

> directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense . . . .

R.C.M. 1001(b)(4). "This rule does 'not authorize introduction in general of evidence of . . . uncharged misconduct,' . . . and is a 'higher standard' than 'mere relevance.'" *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (quoting *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001), *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)) (internal

quotation marks omitted). Aggravating evidence must also be admissible under M.R.E. 403, "which requires balancing between the probative value of any evidence against its likely prejudicial impact." *Id*. (citation omitted).

a. The military judge did not find PV2 Bennitt guilty of distributing oxymorphone to LK.

The Army Court's finding that PV2 Bennitt was convicted of distributing oxymorphone to LK is clearly erroneous. Private Bennitt only pled guilty to distributing oxymorphone to PVTs Swindle, Doherty, and Waldroop on February 14, 2009. (JA 51, 53). The military judge expressly told the government "if you want the court to consider misconduct as charged misconduct, then you have to go forward on the merits and Private Bennitt needs to be found guilty of that." (JA 96). The government understood that any additional incidents of misconduct not mentioned by PV2 Bennitt during his providence inquiry or proven on the merits could be offered during presentencing to characterize his service "[b]ut it wouldn't be considered as an offense for which you can sentence the accused, separate and apart--beyond the provident . . . offenses." (JA 96).

Thereafter, the government said it only intended to prove the specifications of Charge I and Specifications 5 and 6 of Charge II during the contested portion of PV2 Bennitt's trial. (JA 99-100). Consistent with these discussions, the military

judge only found PV2 Bennitt guilty of distributing oxymorphone on divers occasions on February 14, 2009. (JA 186). And consistent with PV2 Bennitt's plea, the military judge found PV2 Bennitt not guilty of distributing oxymorphone on February 15, 2009. (JA 186). Thus, nothing in the record supports the Army Court's finding that PV2 Bennitt was convicted of distributing oxymorphone to LK under Specification 3 of Charge II.

The Army Court's conclusion that "[t]here could not have been a separate conviction for distribution of oxymorphone to LK as the existing specification covered that time frame and behavior," is also clearly erroneous. (JA 8-9). Specification 2 of Charge II alleged that PV2 Bennitt committed manslaughter "by aiding and abetting [LK's] wrongful use of Oxymorphone and Alprazolam" on February 15, 2009. (JA 12). Had the government wished to allege a drug distribution in Specification 2 of Charge I it could have. Because PV2 Bennitt distributed oxymorphone to persons other than LK on more than one occasion between February 14 and 15, 2009, doing so would not have resulted in multiplicious offenses. Instead, the government pursued the theory it did to show that PV2 Bennitt actively

assisted LK's *use* of drugs beyond mere distribution of oxymorphone. (JA 12, 100-07).[5]

Similarly, at trial the government knew PV2 Bennitt only pled guilty to distributing oxymorphone to PVTs Swindle, Doherty, and Waldroop on February 14, 2009. Knowing this, the government could have requested the military judge consider distribution of oxymorphone to LK on February 15, 2009, as a lesser included offense of the specifications of Charge I. The government also could have requested the military judge consider distribution of oxymorphone to LK as an alternative charging theory under Specification 3 of Charge II. Yet the government was content with PV2 Bennitt's providence testimony and plea by exceptions to this offense on the merits. In short, nothing prevented the government from pursuing PV2 Bennitt's conviction for distributing oxymorphone to LK. It simply chose not to.

The Army Court's decision also rests on an erroneous view of the law. "An appellate court may not affirm an included offense on 'a theory not presented to the' trier of fact." *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) (quoting *Chiarella v. United States*, 445 U.S. 222, 236 (1980)).

[5] The government's charging theory was consistent with this Court's discussion in *United States v. Sergeant*, 18 M.J. 331, 339 (C.M.A. 1984) that "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." *See also Bennitt*, 72 M.J. at 269-71.

"It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

According to the Army Court, the government pursued the involuntary manslaughter offenses "under a theory that appellant's unlawful killing of LK was a form of aggravated distribution of oxymorphone." (JA 9). This reasoning led the Army Court to conclude that "the distribution of oxymorphone charge included the distribution to LK." (JA 9). The Army Court does not explain how Specification 3 of Charge II could be the lesser included offense of the specifications of Charge I when the government and the military judge treated the distribution and manslaughter specifications as distinct offenses at trial. Moreover, if Specification 2 of Charge I was an aggravated form of distribution to LK, the Army Court did not explain why that distribution was not dismissed by this Court along with the greater offense. "[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Dunn v. United States*, 442 U.S. 100, 107 (1979). By expanding Specification 3 of Charge II to include LK the Army Court effectively found PV2 Bennitt guilty of distributing oxymorphone to LK under a theory never placed before the trier of fact.

b. Uncharged misconduct cannot generate admissible aggravation evidence unrelated to the charged offenses.

The Army Court could not consider evidence of LK's death under a closely related conduct theory. "[E]vidence of uncharged misconduct and the crime for which the accused has been convicted must be direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime." *Hardison*, 64 M.J. at 281-82. This evidence must also comply with M.R.E. 403, "which requires balancing between the probative value of any evidence against its likely prejudicial impact." *Id*. at 281. Uncharged misconduct meeting these criteria is admissible to show an accused's charged offenses were not isolated incidents or to accurately reflect the nature of charged offenses. *See, e.g., Nourse*, 55 M.J. at 232 (uncharged robberies admissible because they were part of the same course of conduct against the same victim, in the same place, several times prior to the charged offense); *United States v. Metz*, 34 M.J. 349, 351–52 (C.M.A. 1992) (uncharged conduct admissible because it was "interwoven" in the *res gestae* of the crime and provided information to determine the identity of the murderer and his intent when committing the crime); *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992) (uncharged misconduct permissible to show the accused's alteration of military aptitude tests was not limited to the four instances of

which he was convicted); *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982) (uncharged misconduct admissible "so that the circumstances surrounding that offense or its repercussions may be understood by the sentencing authority"); *United States v. Silva*, 21 M.J. 336, 337 (C.M.A. 1986) (uncharged misconduct was an "integral part of [the appellant's] criminal course of conduct"); *United States v. Shupe*, 36 M.J. 431, 436 (C.M.A. 1994) (evidence of uncharged drug distributions admissible to show a continuing course of conduct and its full impact on the military community).

This Court has never held that uncharged misconduct may serve as a conduit for aggravation evidence independent of the charged offenses. "Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was *the victim of an offense committed by the accused* . . . ." R.C.M. 1001(b)(4) (emphasis added). "The correct standard for [admitting uncharged misconduct] is not whether some prior instance is or is not isolated from a subsequent incident, but whether the former is *directly related to the crime for which Appellant was convicted*." *Hardison*, 64 M.J. at 282-83 (emphasis in original).

Here, LK was not a "victim" of the drug distributions alleged in Specification 3 of Charge II. Further, any

aggravation evidence associated with her death was two or more steps removed from PV2 Bennitt's charged distributions, i.e.: (1) charged distributions > (2) distribution to LK > (3) LK's death > (4) impact of LK's death on others.[6] So even if the Army Court could consider the uncharged distribution to LK, evidence of her death and its impact on her family cannot be *directly* related to PV2 Bennitt's charged distribution to others.

c. LK's death was not directly related to or the result of PV2 Bennitt's drug distribution.

Contrary to the Army Court's legal conclusion, "all the consequences associated" with PV2 Bennitt's drug distribution are not admissible under R.C.M. 1004(b)(4) or M.R.E. 403. (JA 10). Here, LK's death was not directly related to or the result of PV2 Bennitt's actions. His actions were at worst a contributing factor along with LK's independent use of other drugs. As such, neither LK's death nor any evidence arising from it may be considered as aggravating evidence against him.

[6] When discussing the concept of "direct relationship" in civil cases the Supreme Court has held that "'[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 10 (2010) (quoting *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 271-72 (1992) (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 534 (1983), in turn quoting *Southern Pacific Co. v. Darnell–Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918), (internal quotation marks omitted in original))). For that reason, *Hemi* held that "[b]ecause the City's theory of causation requires us to move beyond the first step, that theory cannot meet RICO's direct relationship requirement." *Id*.

1. LK's death is not admissible under R.C.M. 1001(b)(4) unless PV2 Bennitt's distribution was the "but for" cause.

The Supreme Court recently addressed a similar issue in *Burrage v. United States*, 134 S.Ct. 881 (2014). In that case, the Court considered the applicability of a federal mandatory minimum sentence for drug distribution "when 'death or serious bodily injury results from the use of such substance.'" *Id*. at 885 (quoting 21 U.S.C. § 841(a)(1), (b)(1)(A)-(C) (2012)). The Court held that when "the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but for cause of the death or injury." *Id*. at 892.

The Court's reasoning in *Burrage* is persuasive. There, the government alleged the defendant's distribution of heroin resulted in the death of recipient Banka. *Id*. at 885. Trial evidence established that, before obtaining heroin from Burrage, Banka used heroin and other drugs obtained from other sources. *Id*. As in PV2 Bennitt's case, the government's expert testified that Banka died from a "'mixed drug intoxication' with heroin, oxycodone, alprazolam, and clonazepam all playing a 'contributing' role." *Id*. at 886. The expert "could not say whether Banka would have lived had he not taken the heroin, but observed that Banka's death would have been "[v]ery less

likely." *Id*. The trial court denied Burrage's requested jury instruction explaining that the mandatory minimum sentence does not apply unless the government proved his distribution was the proximate cause of Banka's death. *Id*. at 886.

The crux of the Court's decision in *Burrage* was the plain language of the statute. Because the statute "did not define the phrase 'results from,' [the Court gave] it its ordinary meaning." *Id*. at 887 (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). After consulting relevant precedent and secondary sources, the Court determined "results from" refers to conduct representing the "but for cause" of the harm. *Id*. at 887-88. Adopting this definition, the Court held the "language Congress enacted requires death to 'result from' use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed." *Id*. at 891. The Court further explained, "[e]specially in the interpretation of a criminal statute subject to the rule of lenity . . . , we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Id*.[7]

Applying this reasoning, the Court found the government expert's testimony "that Banka's death would have been '[v]ery

[7] The Supreme Court's recent decision in *Paroline v. United States*, 134 S.Ct. 1710 (2014) further explains its view of aggregate causation in criminal law and the interplay between a statute's plain language and its purpose when determining requisite causation.

less likely' had he not used the heroin that Burrage provided," insufficient. *Id*. at 892. Assigning a percentage estimate to the contribution each drug had on the outcome would also be insufficient. *Id*. Instead, to establish a drug distribution as the "but for cause," the government must prove the defendant's act independently resulted in the death or injury.[8]

Though interpreting a federal sentencing statute, the analysis in *Burrage* is applicable to the phrase "directly relating to or resulting from . . ." found in R.C.M. 1001(b)(4). The plain meaning of "direct" is:

> 1. (Of a thing) straight; undeviating <a direct line>. 2. (Of a thing or a person) straightforward <a direct manner> <direct instructions>. 3. Free from extraneous influence; immediate <direct injury> . . . .

Black's Law Dictionary (9th ed. 2009). "*Directly*" means: "1. In a straightforward manner. 2. In a straight line or course. 3. Immediately." *Id*. The phrase "'[r]esults from' imposes . . . a requirement of actual causality. . . ." requiring proof "'that

[8] The Supreme Court also recently expressed a stricter approach in determining criminal culpability under the federal aiding and abetting statute (18 U.S.C. § 2) in *Rosemond v. United States*, 134 S.Ct. 1240 (2014). In *Rosemond*, the defendant was convicted as a principle for using a gun in connection with drug trafficking under an aiding and abetting theory. *Id*. at 1243-44. The Court found the trial judge's instructions erroneous because they did not require proof of the defendant's advance knowledge that his confederate would be armed during the drug transaction. *Id*. This decision could call into question whether one can be "'an accomplice to a crime merely because . . . that crime was a natural and probable consequence of another offense as to which he is an accomplice.'" *Id*. at 1248 n.7.

the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *Burrage*, 134 S.Ct. at 887-88 (quoting *University of Tex. Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013) (quoting Restatement of Torts § 431, Comment a. (1934))).

Burrage is generally consistent with this Court's precedent interpreting the scope of R.C.M. 1001(b)(4).[9] This Court has held that "[t]he phrase 'directly relating to or resulting from the offenses' imposes a 'higher standard' than 'mere relevance.'" *Rust*, 41 M.J. at 478 (quoting *United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990)). Further, "an accused is not 'responsible for a never-ending chain of causes and effects.'" *Id*. (quoting *United States v. Witt*, 21 M.J. 637, 640 n.3 (A.C.M.R. 1985), pet. denied, 22 M.J. 347 (1986)); *but see Witt*, 21 M.J. at 641 (stating that R.C.M. 1001(b)(4) does not require facts

[9] Appellant recognizes the "but for" test *Burrage* relies on is at odds with this Court's precedent interpreting the requisite causal link between an accused's act and the victim's death under Articles 118 and 119, UCMJ. *See, e.g., United States v. Varraso*, 21 M.J. 129 (C.M.A. 1985). In fact, *Burrage* is overtly critical of the "substantial" or "contributing" factor test advanced by the government—a test similar to the "material role" instruction commonly applied in homicide offenses at courts-martial. *Compare Burrage*, 134 S.Ct. at 890-91 *with* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 5-19 (1 Jan. 2010). Even so, Articles 118 and 119, UCMJ, do not contain the language "directly relating to or resulting from" found in R.C.M. 1001(b)(4) and this Court has not yet adopted a formal test for determining requisite causation under R.C.M. 1001(b)(4). Thus, *Burrage* and this Court's precedent applying R.C.M. 1001(b)(4) can be read harmoniously.

establishing proximate or but for cause). *See also Hardison*, 64 M.J. at 281-82 (stating that "evidence of uncharged misconduct and the crime for which the accused has been convicted must be direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime"). And as in *Burrage*, this Court also recognizes the primacy of a text's plain meaning when interpreting the law. *See United States v. McPherson*, 73 M.J. 393, 394 (C.A.A.F. 2014) (stating that "'[t]he first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). Thus, this Court should adopt the Supreme Court's reasoning in *Burrage*.

2. Private Bennitt's distribution was not the "but for" cause of LK's death.

That LK died from ingesting a lethal combination of oxymorphone and alprazolam is an uncontested fact. (JA 121, 137). Though oxymorphone played the largest role, no evidence suggests this drug would have killed LK independent of the alprazolam in her system.

It is not clear PV2 Bennitt was the sole source of the oxymorphone LK ingested. Both PV2 Bennitt's pretrial statement

and TY's testimony asserted that LK also obtained and used oxymorphone earlier in the day from other persons. (JA 144-45, 224). The government's toxicology expert could not determine how much oxymorphone constituted a lethal dose (JA 138), how much LK consumed (JA 127), or when she consumed it "[b]eyond saying that it was likely within hours as opposed to days . . ." (JA 131). The expert also could not say the specific dose of oxymorphone provided by PV2 Bennitt independently resulted in LK's death.

After this Court dismissed PV2 Bennitt's remaining manslaughter conviction under Specification 2 of Charge I, the record contains no valid finding of fact that PV2 Bennitt's actions resulted in LK's death. The military judge specifically found PV2 Bennitt not guilty of aiding or abetting LK's use of alprazolam. (JA 186). No other evidence indicates PV2 Bennitt personally distributed alprazolam to LK or played more than a collateral role in her use of alprazolam. (JA 58-60, 69-70, 150, 224-25). The military judge also found PV2 Bennitt not guilty of the culpably negligent manslaughter of LK by making oxymorphone available as alleged in Specification 1 of Charge I. So even if PV2 Bennitt's actions contributed to LK's death, no evidence or findings show his actions *resulted* in that outcome.

The Army Court also made no finding of fact that PV2 Bennitt's alleged drug distribution was the but for cause of

LK's death. In its decision, the Army Court acknowledged only PV2 Bennitt's single provision of oxymorphone to LK and the "toxicologist's trial testimony that the oxymorphone use played a major role in LK's death." (JA 10). But the Army Court makes no mention of the alprazolam and oxymorphone provided to LK by others. Nor does the Army Court mention the toxicologist's opinion that "to a reasonable degree of scientific certainty, the cause of death was the drug combination." (JA 137). As in *Burrage*, the Army Court's findings do not establish PV2 Bennitt's distribution of oxymorphone to LK as the but for cause of her death. Absent that finding, LK's death and its impacts are inadmissible under both R.C.M. 1001 and M.R.E. 403.

d. The Army Court abused its discretion by reaffirming PV2 Bennitt's approved sentence.

The evidentiary picture changed dramatically after this Court dismissed PV2 Bennitt's manslaughter conviction. LK's death was the gravamen offense in this case. This is evident by the government's sentencing evidence and argument. At the presentencing hearing, government counsel produced LK's mother, grandmother, and two sisters. (JA 187-98, 202-04). The government presented only one other witness to admit a nonjudicial punishment record and briefly testify PV2 Bennitt low had rehabilitative potential. (JA 199-202). Likewise, the government repeatedly emphasized LK's death and the impact

on her family during its sentencing argument. (JA 206-15). Without the involuntary manslaughter conviction, none of this testimony or argument is relevant. By applying an erroneous legal and factual analysis, the Army Court abused its discretion in reaffirming PV2 Bennitt's approved sentence.

Conclusion

WHEREFORE, PV2 Bennitt respectfully requests that this Court set aside the sentence and remand this case for a sentence rehearing or, alternatively, a sentence reassessment applying the correct legal standard.

AARON R. INKENBRANDT
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0682
USCAAF No. 35750

FOR AMY E. NIEMAN
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF No. 35969

JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF No. 26450

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing 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 September 17, 2014.

AARON R. INKENBRANDT
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703) 693-0682
USCAAF No. 35750