IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	REPLY 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 Granted

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 the Case

On August 25, 2014, this Honorable Court granted Private (PV2) Bennitt's petition for review. Private Bennitt submitted his Final Brief to this Court on September 17, 2014. On October 20, 2014, the government submitted its Final Brief on Behalf of Appellee.

a. The government may not ask an appellate court to affirm a conviction contrary to its own trial theory.

It is not a "stretch," as the government asserts, to assume PV2 Bennitt's conviction of Specification 3 of Charge II was limited to his pleas alone in this case. (Gov't Br. 9). As this Court has held, "[i]t is the Government's responsibility to

determine what offense to bring against an accused." *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010). Further, "appellate 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).

Here, the government asks this Court to ignore the fact that the military judge specifically asked the government—twice, which charges and specifications it intended to prove up during the contested portion of PV2 Bennitt's trial. (JA 94-96, 99-100). The government ignores the fact that it never told the military judge it intended to prove up additional acts of misconduct that could be encompassed within Specification 3 of Charge II.[1] (JA 96, 99-100). The government ignores the fact that it proceeded under the theory that PV2 Bennitt was guilty of manslaughter by aiding and abetting LK's use of oxymorphone and alprazolam as a violation of Article 119, Uniform Code of Military Justice [hereinafter UCMJ]. (JA 12, 107). And the government ignores the fact that the military judge's findings excepted the words and figures "between . . . and on or about 15

[1] Instead, the government specifically confirmed other acts of distribution could be offered during pre-sentencing but "wouldn't be considered as an offense for which you can sentence the accused, separate and apart--beyond the provident . . . offenses." (JA 96).

February 2009[]" from Specification 3 of Charge II consistent with PV2 Bennitt's plea. (JA 51-57, 186).

Private Bennitt's assumption was by no means a "stretch." He had every reason to be surprised when, nearly four years after his trial, the Army Court announced him convicted of distributing oxymorphone to LK as a violation of Article 112a., UCMJ. The government had every opportunity to pursue that theory and chose not to. The government may not now treat Specification 3 of Charge II as an open vessel designed to catch similar offenses falling through the cracks on appeal.

b. The government did not claim it convicted PV2 Bennitt of distributing oxymorphone to LK under Article 112a, UCMJ, before the Army Court.

The government's current claim that it convicted PV2 Bennitt of distributing oxymorphone to LK under Specification 3 of Charge II is contrary to its position before the Army Court. (Gov't Br. 9-11).[2] Before the Army Court, PV2 Bennitt submitted a Motion for Reconsideration after that court initially reaffirmed his sentence. (SJA 15). In his motion, PV2 Bennitt argued the Army Court could not consider evidence of LK's death when reassessing his sentence because he was not convicted of

[2] *See Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (noting that "'[o]ur adversary system is designed around the premise that the parties . . . are responsible for advancing the facts and arguments entitling them to relief'" (quoting *Castro v. United States*, 540 U.S. 375, 381-83 (2003) (Scalia, J., concurring in part and concurring in the judgment))).

distributing oxymorphone to her under Specification 3 of Charge II. (SJA 16-18).

In its response to PV2 Bennitt's Motion for Reconsideration, the government's entire argument, and the case law it relied upon, was founded on the premise that uncharged misconduct closely related to the charged offenses is admissible as aggravation evidence under R.C.M. 1001(b)(4). (SJA 1-13). *At that time*, the government claimed: "The question in this case depends on whether the evidence of appellant's distribution to Miss L.K. and her friend, his additional use of oxymorphone, and Miss L.K.'s death, are 'directly relating to or resulting from' his *other distributions and uses*." (SJA 6) (emphasis added). According to the government, PV2 Bennitt's case was "strikingly similar to that of *United States v. Shupe*, 36 M.J. 431 (C.M.A. 1993)." (SJA 7). As the government explained, in *Shupe* the Court of Military Appeals (C.M.A.) modified the findings after the "military judge misconstrued the plea as being to a greater number of instances of possession and distribution." (SJA 7). "[H]owever, the Court went on to affirm the sentence because the remaining instances of misconduct were properly admitted as aggravation under R.C.M. 1001(b)(4)." (SJA 7). At no time did the government claim it convicted PV2 Bennitt of distributing drugs to LK under Specification 3 of Charge II.

Based on its arguments at trial and before the Army Court, it is a stretch to assume the government believed LK among the recipients included in Specification 3 of Charge II all along. (Gov't Br. 9). It appears the government was as surprised as PV2 Bennitt to learn of it.

c. Even if PV2 Bennitt was convicted of distributing oxymorphone to LK, evidence of her death remains inadmissible under Rule for Courts-Martial [hereinafter R.C.M.] 1001(b)(4).

Contrary to the government's argument, PV2 Bennitt is not "singularly focused on the idea of Ms. LK's death as uncharged misconduct . . . ." (Gov't Br. 11).[3] As PV2 Bennitt previously explained, "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." (Br. 14). This is true whether evidence of the distribution was admissible as charged misconduct or not.

If this Court applies the plain meaning of the phrase "directly relating to or resulting from . . ." to R.C.M. 1001(b)(4), then evidence of LK's death is only admissible if PV2 Bennitt's distribution of oxymorphone was the "but for" cause of that result. As shown by the Supreme Court's decision in *Burrage v. United States*, 134 S.Ct. 881 (2014), the evidence presented in PV2 Bennitt's case cannot establish his actions as the "but for" cause of LK's death. The fact remains that LK

[3] PV2 Bennitt in no way concedes he was convicted of distributing oxymorphone to LK under Specification 3 of Charge II.

died of a lethal combination of oxymorphone and alprazolam. (JA 121, 137). And PV2 Bennitt did not distribute the alprazolam or all the oxymorphone included in that lethal combination. (JA 58-60, 69-70, 144-45, 150, 186, 224-25). The distinction between charged and uncharged misconduct is irrelevant to this aspect of PV2 Bennitt's argument. (See Br. 21-28).

d. The applicability of federal sentencing guidelines is irrelevant to this case.[4]

The Supreme Court's decision in *Burrage* is not limited to sentencing guidelines. In *Burrage*, the outcome turned on the *ordinary meaning* of the phrase "results from." *Id.* at 887. The Court determined that ordinary meaning requires "but for" causation based on its examination of a wide variety of secondary sources, civil cases, and criminal cases. *Id.* 887-91. Nothing in the Court's opinion indicates the ordinary meaning of

[4] Section c. of PV2 Bennitt's brief also does not make a Due Process argument nor does it question whether the Army Court has the ability to consider aggravation evidence when reassessing sentences generally. His argument is simply that the plain language of R.C.M. 1001(b)(4) requires "but for" causation and under that standard the Army Court could not consider evidence of LK's death when reassessing his sentence or determining if a sentence rehearing was required. Thus, the government's reliance on *United States v. Booker*, *Williams v. New York*, and *Jackson v. Taylor* does not address this argument. (Gov't Br. 11-15)

"results from" varies from one statute to another.[5] Rather, "[w]here there is no textual or contextual indication to the contrary, courts regularly read phrases like 'results from' to require but-for causality." *Id.* at 888. According to the Court, lesser formulas for determining requisite causation "cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." *Id.* at 892 (citation omitted).

In light of *Burrage*, this Court is not at liberty to debate the ordinary meaning of "results from." Nor is there any doubt that "[t]he traditional way to prove that one event was a factual cause of another is to show that the latter would not have occurred 'but for' the former." *Paroline v. United States*, 134 S.Ct. 1710, 1722 (2014). The only questions before this Court are: 1) whether the language of R.C.M. 1001(b)(4) at issue has a plain and unambiguous meaning with regard to the particular issue in PV2 Bennitt's case, and 2) whether that language is otherwise ambiguous "by reference to the language itself, the specific context in which that language is used, and

[5] The broad reach of *Burrage*'s holding was not lost on Justices Ginsburg and Sotomayor. In their concurring opinion, the justices limit their decision to join the majority opinion on its application to criminal law. Specifically, neither justice believes "but for" causation should be imposed "in the context of antidiscrimination laws . . . ." *Burrage*, 134 S.Ct. at 892 (Ginsburg, J., and Sotomayor, J. concurring).

the broader context of the [rule] as a whole." *United States v. McPherson*, 73 M.J. 393, 394 (C.A.A.F. 2014) (citations and internal quotation marks omitted); *see also United States v. Davenport*, 73 M.J. 373 (C.A.A.F. 2014) (applying the plain language of R.C.M. 1103(f)); *Paroline*, 134 S.Ct. at 1727 (derogating from the standard application of "but for" causality only to effectuate the broader intent of the statute).

This Court has no reason to derogate from the ordinary meaning of "directly relating to or resulting from . . ." used in R.C.M. 1001(b)(4). In *United States v. Hardison*, this Court indicated the phrase should be given its ordinary meaning. 64 M.J. 279, 281-82 (C.A.A.F. 2007). Nothing in R.C.M. 1001 as a whole, or its discussions, addresses causation or indicates the rule should be more broadly interpreted than its plain language suggests. Rather, this Court has held R.C.M. 1001(b)(4) "imposes a higher standard than mere relevance[]" and that "an accused is not responsible for a never-ending chain of causes and effects." *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (citations and internal quotation marks omitted)). Thus, absent any clear indication to the contrary, this Court should find the President promulgated R.C.M. 1001(b)(4) intending to impose a "but for" causation requirement on sentence aggravation. *See Burrage*, 134 S.Ct. 889 ("In sum, it is one of the traditional background principles 'against which Congress legislate[s],' . .

. that a phrase such as 'results from' imposes a requirement of but-for causation") (quoting *University of Tex. Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2525 (2013)).

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

YOLANDA MCCRAY JONES
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF No. 36285

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, USCA Dkt. No. 12-0616/AR, was delivered to the Court and Government Appellate Division on October 27, 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