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

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

Granted Issue

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 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 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]

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[1] UCMJ, Art. 66(b), 10 U.S.C. §866(b).
[2] UCMJ, Art. 67(a)(3), 10 U.S.C. §867(a)(3).

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 (Art.) 112a, UCMJ, 10 U.S.C. § 912a, and, contrary to his pleas, of involuntary manslaughter, in violation of Art. 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 affirmed the findings and sentence on May 16, 2012.[8] This Court granted review of the assigned issue on September 19, 2012.

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[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.
[8] JA at 1-2.

This Court reversed the Army Court's decision as to the charge of involuntary manslaughter, finding it was legally insufficient on the record. This Court dismissed the finding of guilty to Specification 2 of Charge I (involuntary manslaughter), in violation of Art. 119(b)(2), UCMJ.[9] This Court 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.[10]

On September 23, 2013, the Army Court reassessed and affirmed the sentenced as adjudged.[11]

This Court granted appellant's petition for review on August 25, 2014.

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 eleven pills of "Opana," otherwise known as oxymorphone.[12] Appellant distributed eight of the pills to various Soldiers, and kept three for himself.[13]

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[9] *United States v. Bennitt*, 72 M.J. 266 (C.A.A.F. 2013).
[10] Id.
[11] *United States v. Bennitt*, ARMY MISC 20100172 (Army Ct. Crim. App. 25 September 2013).
[12] JA at 53, 119-120.
[13] JA at 119-120.

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.[14] 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.[15] 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.[16] Appellant said "yes," then proceeded to smash the pill on the nightstand, divided it with a card from his wallet, and provided Ms. L.K. and her friend with the dollar bill to snort it.[17]

In the early morning hours of February 15, 2009, appellant awoke to find Ms. L.K. unresponsive, not breathing, foaming at the mouth, with vomit in her mouth, and proceeded to call the charge of quarters (CQ) and 911.[18] Ms. L.K. 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."[19]

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[14] JA at 120.
[15] JA at 120.
[16] JA at 121.
[17] JA at 121.
[18] JA at 120.
[19] JA at 571.

GRANTED ISSUE AND 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

"In light of the experience, training, and independence of military judges," a service court is granted "broad discretion," and sentence reassessments will be disturbed only "in order to prevent obvious miscarriages of justice or abuses of discretion."[20] Due to the operational nature of the practice of military justice, and the regular geographic movements of panel members, it is a legal fiction that a court-martial can be "reconvened." At best, a sentence is remanded and re-referred to a newly appointed general court-martial. A sentence reassessment is generally appropriate in cases such as appellant's, when the case was not overturned for error or evidentiary issues, affecting the presentation of the case on the merits.

Law and Analysis

1. The appropriateness of a sentence reassessment by a military service court is well founded in this honorable Court's controlling decisions. The Army Court is granted broad discretion to make the determination to reassess a sentence, and

[20] *United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013)(quoting *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000))

in accordance with *United States v. Winckelmann*, has lawfully done so here.

the Army Court's authority to reassess the sentence is established in Art. 66, UCMJ. "It may affirm...the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[21]

The Army Court's decision to reassess the sentence rather than return appellant's case for a rehearing was wise, and well based on controlling law. As this Court aptly explained in *Winckelmann*, where a service court "conducts a reasoned and thorough analysis of the totality of the circumstances" great deference is due.[22]

The Army Court conducted this requisite review. First, the Court positively identified the governing law on this matter, and highlighted the principles and *Sales*[23] factors that were of a particular concern in this case.[24]

Appellant was ultimately found not guilty of involuntary manslaughter. He remains convicted, pursuant to his pleas, of significant offenses. Although appellant has argued that his pleas are the sole source of his conviction, the government

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[21] 10 U.S.C. § 866; Art. 66, UCMJ.
[22] *Winckelmann*, 73 M.J. at 11.
[23] Citing *Winckelmann*, 73 M.J. at 15-16, and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).
[24] JA at 7.

presented a full merits case that provided evidence of his guilt on the remaining charges.

At trial, the maximum allowable punishment would have been a dishonorable discharge, 82 years, and reduction to E-1. With the resulting acquittal of the involuntary manslaughter charge, the maximum penalty was only reduced 10 years,[25] leaving a maximum allowable period of confinement at 72 years. As THE ARMY COURT found, this did not drastically change the penalty landscape.[26]

2. Ms. LK's death, and the facts related to her death, are the subject of multiple charges on the original charge sheet. Appellant's attempt to term this "uncharged misconduct," and therefore limit proper evidence to RCM 1001 is a misapplication of the law.

Appellant concedes that while he did not include distribution to Ms. LK in his providence inquiry, the government did confirm their intent to go forward with the charges and specifications related to Ms. LK.[27] Part of the government's case in chief included appellant's confession, which related directly to the distribution of drugs to Ms. LK.[28] Therefore, evidence of Ms. LK's death is directly related to the charged conduct, as originally reflected on the charge sheet, and the conduct of

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[25] Manual For Courts-Martial (MCM), App. 12-2 (2012).
[26] JA at 004; citing *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F 2003).
[27] App. Brief at 7.
[28] JA at 223-228.

which appellant remains guilty. Therefore, appellant improperly terms this as evidence of uncharged misconduct.

Appellant admitted that on February 14, 2009, he purchased the drugs in question. At the dealer's house, Ms. LK was present, and he witnessed her snort "Opana" earlier in the evening, and then saw her take "Xanex" later at the barracks.[29] He then admitted that he:

> "crushed [the Opana pills] on the nightstand using cigarette wrapper cellophane and my lighter. After I snorted the two pills I crushed up the other pill and [LK] and her friend snorted it... with a dollar bill."[30]

Appellant clarified that Ms. LK asked if her and her friend could have the pill, and he said "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."[31]

Appellant asks this Court to disregard the merits proceeding at his trial. Appellant exclusively relies upon his providence inquiry in support of the remaining findings of guilty. He argues that he "never admitted to distributing oxymorphone or alprazolam to LK during the providence inquiry."[32] However, a named victim is not an element of distribution of the drugs, which requires a time, place, date, and a wrongful substance.

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[29] JA at 224.
[30] JA at 224.
[31] JA at 225.
[32] App. Brief at 5.

In this case, each charge also required a showing of distribution on "divers occasions." The crime of distribution, under Art. 112a defines "distribute" as a "means to deliver to the possession of another. 'Deliver' means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship."[33]

Appellant is asking this court to apply the definitions of uncharged misconduct to the death of Ms. LK. However, it is a stretch to assume that the final conviction results from appellant's pleas alone. As the Army Court articulated, "it is clear from the record the government prosecuted the involuntary manslaughter specifications under a theory that appellant's unlawful killing of LK was a form of aggravated distribution of oxymorphone, either resulting in a death through culpable negligence or, alternatively, the lethal distribution was an offense directly affecting the person of LK."[34]

While appellant's argument is clever, the elements of a distribution charge do not specify a named recipient of the controlled substance. The evidence presented at trial, beyond the information gleaned from the providence inquiry, unambiguously establishes that Ms. LK received unlawful drugs from appellant, on the dates of his convicted misconduct. His

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[33] Article 112a, Manual for Courts-Martial (MCM), pt. IV, para. 37c(3). (MCM, 2012).
[34] JA at 008-009.

confession alone solidifies the fact that appellant did distribute the drug in question to Ms. LK on February 14, 2009. The testimony of the government expert confirmed that this drug was a significant factor in the cause of her death.[35] Therefore, as the Army Court described, the charge sheet in its entirety, reflected a singular course of misconduct.

The issue of distribution has been addressed in our sister court opinions. *United States v. Craig* is persuasive, particularly evaluating the definitions of "distribution" under the child pornography statutes. There, the court found the accused's plea to distribution improvident. The government argued that distribution of child pornography should encompass actual, constructive, or attempted delivery, as it does in drug distribution cases. The Navy-Marine Corps Court declined to adopt this broad definition, stating the Child Pornography Protection Act (CPPA) delineates separate offenses. The charge was dismissed.

Notably, the court did not find its dismissal of the distribution charge to have an impact on the sentence. "[T]he evidence that the appellant was knowingly acting as a distribution node... would still have been before the military judge as a matter of aggravation."[36]

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[35] JA at 121 (Testimony of Dr. Levine).
[36] *United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009).

3. *United States v. Booker* rendered the federal sentencing guidelines merely advisory, and confirmed the constitutionality of a fact finder's consideration of acquitted conduct.[37]

Appellant has asked this Court to apply *Burrage v. United States*.[38] The *Burrage* case discusses the application and scope of the federal sentencing guidelines, and identifies a mandatory application when the convicted misconduct is the "but for" cause of a certain result. Factually on point, *Burrage* discusses a drug distribution that resulted in the death of another. However, it is not applicable to this case on several legal grounds.

Appellant is singularly focused on the idea of Ms. LK's death as uncharged misconduct, and not properly before the fact finder. He premises this entirely on the language of RCM 1001(b)(4), which outlines the allowable evidence that the government may offer at sentencing.

Unfortunately, the evidence at issue is merit-based. Appellant pled guilty to his course of conduct over 14 and 15 February, 2009. He acknowledged his relationship with Ms. LK.[39] His confession confirms her presence at the scene of his drug distribution, and that he was fully aware of her earlier drug use. The evidence adduced in providency, as well as the

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[37] *United States v. Booker*, 543 U.S. 220 (2005).
[38] *Burrage v. United States*, 134 S.Ct. 881 (2014).
[39] JA at 73.

contested merits portion of the trial, went directly to a singular course of conduct. This encompassed all of the charges and their specifications. The resulting acquittal of involuntary manslaughter did nothing to change the landscape of his misconduct, or alter the application of the merits-based evidence.

Appellant continues to refer to the charge of involuntary manslaughter as the gravamen offense, but this negates the actual nature of the trial. As succinctly discussed by the Army court, Ms. LK's death was an aggravated result of his admitted drug distributions. The term "manslaughter" certainly evokes a visceral emotional response, but in a legal tone, involuntary manslaughter carries a relatively low maximum allowable punishment. The acquittal reduced the maximum period of confinement from 82 years to 72 years. Titling this one charge the "gravamen" offense is an emotional play that discounts the evidence in this record.

The Army court has faced this issue in the past, and has articulated situations where an appellate finding of not guilty might justify a sentence rehearing rather than a reassessment. For example, in *United States v. Girouard*, appellant was originally convicted of conspiracy to obstruct justice, violation of a lawful order, obstruction of justice, and three

specifications of negligent homicide.[40] The convictions for negligent homicide were findings of guilt as a lesser included offense to the original charges of premeditated murder.

Girouard was sentenced to ten years confinement and a dishonorable discharge. After this Court's decision in *Jones*, it became clear that negligent homicide was not properly before the fact finder as a lesser included offense.[41] The Court overturned the findings of guilty on the three specifications of negligent homicide, and returned the remaining conviction to the Army court, for a sentence reassessment or rehearing.[42]

On remand, the Army Court found that fairness dictated a return of this case for a sentence rehearing.[43] *Girouard* is clearly distinguishable from this case. There, the Court was not assessing a singular course of conduct. The evidence related to obstruction and violation of a lawful order was post-fact evidence, and therefore unrelated to the physical evidence supporting the charges of homicide. Although authorized to conduct a reassessment, the Army court exercised its broad discretion, finding a sentence rehearing the appropriate result.

a. The federal sentencing guidelines are advisory in nature,

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[40] *United States v. Girouard*, 2011 CCA LEXIS 98, 2011 WL 2092740 (A.C.C.A. May 23, 2011).
[41] *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).
[42] *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011).
[43] Id.

and have very little applicability to the court-martial system. A conviction under Art. 112a, even one that results in the death of another, does not carry a mandatory punishment. This Court should consider the rationale in *Burrage*. To ensure every right of an accused, the "but for" requirement should be imposed if a conviction will result in a mandatory punishment.[44]

That said, the Supreme Court ruling in *Booker* did establish a constitutional rule. The Supreme Court cases regarding the federal sentencing guidelines, constitutionally confirms the lawful consideration of acquitted conduct at sentencing. At the sentencing phase of a federal trial, the judge must make factual determinations in order to adjust the maximum possible punishment. Judges are granted broad discretion in determining how acquitted conduct factors as an aggravator to the ultimate conviction, if it applies at all.[45] The first case to confirm the constitutionality of acquitted conduct as evidence in aggravation was *Williams v. New York.*[46] As seen in *Booker*, this remains a constitutionally permissible example of judicial discretion.

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[44] See, e.g., RCM 1004's application of aggravating factors to premeditated murder, when the potential punishment extends to death.
[45] See, e.g., *United States v. White*, 551 F.3d 381, (6th Cir. 2008)(en banc).
[46] *Williams v. New York*, 337 U.S. 241 (1949).

There is an extra role for acquitted conducted in a court-martial proceeding. Our rules of procedure do vary from the federal sentencing practice. The Supreme Court "observed that military sentences are aggregate sentences not apportioned among the various offenses of which an accused is convicted.[47] There are many reasons why a fact finder or panel may reach a particular conclusion. We frequently referenced the "mixed verdict" phenomenon, which may render a conviction for some charges, and not reach guilty on all related offenses. It is not appropriate to get into the mind of the fact finder, and the deliberations on these issues are protected. As *Winckelman* explains in its general holding, the Army court is well suited to evaluate the evidence as it was presented, and is entitled to review the case in its entirety.[48]

As appellant pled, he was guilty of the distribution of Opana, the drug that ultimately killed Ms. L.K. Therefore, the death of Ms. L.K. was the result of the remaining charges and their specifications. These facts are similar to those in *Jackson v. Taylor*, wherein that appellant was originally convicted of both attempted rape and premeditated murder. The murder conviction was set aside, and the lower board of review

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[47] *Winckelman*, 73 M.J. at 15 (citing *Jackson v. Taylor,* 353 U.S. at 570, 77 S.Ct. 1027 (1957)).
[48] *Winckelman*, 73 M.J. at 11.

conducted a sentence reassessment, even though the "gravamen" offense was arguably stricken.

It is understandable that appellant would expect to see a change in sentence, with the dismissal of his conviction for manslaughter. However, the Army court is fully capable of reviewing the case, and is as neutral to the facts of the case as we would see with a freshly convened panel. As the law states, without ambiguity, the Army court related the applicable law, the appropriate factors, and reached a sentence that was well within the broad discretion given to a sentence reassessment. While this honorable Court may have expected to see some change, it is not a requirement under the law. The Army court's punishment determination should be affirmed.

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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I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically to the Honorable Clerk of Court's office and the Appellate Defense Counsel on 20 October 2014.

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