# UNITED STATES NAVY-MARINE CORPS
# COURT OF CRIMINAL APPEALS
# WASHINGTON, D.C.

**Before**
**J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN**
**Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**TRAVIS J. WESTHOVEN**
**LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000132**
**GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 13 October 2009.
**Military Judge:** Col Daniel J. Daugherty, USMC.
**Convening Authority:** Commanding General, 2d Marine Division, Camp Lejeune, NC.
**Staff Judge Advocate's Recommendation:** Col B.D. Barkey, USMC.
**For Appellant:** LCDR Brian Mizer, JAGC, USN.
**For Appellee:** LCDR Sergio F. Sarkany, JAGC, USN.

**9 November 2010**

---

**OPINION OF THE COURT**

---

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas and subject to various exceptions, of violating one specification of a lawful general regulation by possessing drug paraphernalia; one specification of violating a lawful general regulation by using 4-Methylmethcathinone (4-Meth); one specification of wrongful use of heroin; one specification of wrongful possession of heroin; one specification of wrongful possession of 2,5-Dimethoxy-4-(n)-propylthiophenethylamine (2C-T-7); one specification of wrongful introduction of heroin onto an installation; one specification of wrongful introduction of 2C-T-7 onto an installation; one

specification of wrongful distribution of oxycodone; one specification of wrongful distribution of heroin; one specification of negligent homicide; one specification of introducing 4-Meth, which conduct was prejudicial to the good order and discipline of the armed forces; and one specification of distributing 4-Meth which conduct was prejudicial to the good order and discipline of the armed forces, in violation of Articles 92, 112a, and 134, Uniform Code of Military Jusice, 10 U.S.C. §§ 892, 912a, and 934. The appellant pled not guilty to certain excepted language generally going to the intent to distribute on the Article 112a offenses, additional violations of Articles 112a, and involuntary manslaughter charged under Article 119. The excepted language and remaining charges were withdrawn and dismissed.

The appellant was sentenced to eight years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, but, in accordance with a pretrial agreement, suspended confinement in excess of twenty-four months.

The appellant raises three assignments of error. First, he questions whether his plea to negligent homicide can be provident when additional narcotics present in the victim may have been a superseding cause of death in a multiple toxicity case. Second, he questions whether his plea to negligent homicide can be provident when participation in using drugs with the victim is the "sole basis" for the plea. Finally, the appellant avers that his pleas to a general disorder offense for introducing and distributing an analogue of a controlled substance are not provident when the substance charged is not, in fact, a controlled substance.

After careful consideration of the entire record of trial and the appellate pleadings, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

**Background**

A Marine is tragically and unnecessarily dead from multiple drug toxicity following his consumption of a controlled substance and a chemical analogue of a controlled substance with the appellant, a fellow Marine. The appellant is a combat veteran with substance abuse issues, then assigned to a medical platoon at Camp Lejeune, whose only duties at the time apparently consisted of tending to his own medical matters. He shared a barracks room with Lance Corporal B (LCpl B). The appellant purchased heroin, a depressant, which he kept in his barracks room. He had no misgivings that this heroin was an illegal substance, nor did he know its true composition or potency. The appellant also obtained a stimulant, the designer drug 4-

Methylmethcathinone (4-Meth), received by mail order from a pharmaceutical company in Canada, and shared the 4-Meth with LCpl B, which they consumed together, along with alcohol, in the early morning hours of 21 May 2009. LCpl B asked the appellant for heroin and the appellant eventually provided LCpl B with heroin, helping him prepare it for use by cooking it in a soda can and showing him how to load it into a syringe. The appellant watched as LCpl B injected himself with the heroin. When the appellant went to sleep, LCpl B was conscious, walking around the room and talking on his cellular phone. When the appellant awoke several hours later, he found LCpl B unconscious, passed out between his rack and wall locker. The appellant put him into his rack, turned onto his abdomen, and the appellant then went about his morning routine. The appellant later noticed that LCpl B had stopped snoring, observed that he was not breathing, attempted CPR and summoned another Marine to call for help. LCpl B was pronounced dead at Naval Hospital, Camp Lejeune.

**Discussion**

We review a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A military judge may abuse his discretion if there is a substantial basis in law or fact for questioning the plea. *Id.*; *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

In his first assigned error, the appellant claims that LCpl B's use of other narcotics may have caused his death, since his death was attributed to multiple drug toxicity and not solely from the heroin and 4-Meth provided by the appellant. In pleading guilty to negligent homicide under Article 134, UCMJ, the appellant must have committed a negligent act which proximately causes another's death. *United States v. Romero*, 1 M.J. 227, 229-30 (C.M.A. 1975). An act need not be the sole cause of death, nor must it be the immediate cause, but a contributing cause can be deemed proximate only if it plays a material role in the victim's death. *United States v. Lingenfelter*, 30 M.J. 302, 307 (C.M.A. 1990); *Romero*, 1 M.J. at 230. The appellant's assigned error essentially claims that heroin and 4-Meth were not the proximate cause of LCpl B's death because they did not play a material role in the victim's death. We disagree. In this case, the appellant does not deny that he provided LCpl B with both 4-Meth and heroin and that LCpl B took both drugs on 21 May 2009. Prosecution Exhibit 1 at 11-12. The autopsy confirms that the metabolites for both 4-Meth and heroin were discovered in LCpl B's body and are listed as drugs that, in combination with two others, caused his death. PE-1 at 16, 21. While 4-Meth and heroin were not the only drugs detected, they clearly played a material role in LCpl B's death. The military judge did not err in accepting the appellant's plea to negligent homicide on the basis of multiple toxicity or putative superseding causation. This assignment of error is without merit.

The appellant's second alleged error avers that his participation in using 4-Meth and heroin are, as a matter of law, insufficient to constitute negligent homicide, and his plea was therefore improvident. We first note that mere participation in the use of drugs is not the sole basis establishing the providence of the appellant's plea to negligent homicide, as appellant avers. The appellant provided a detailed account of how he provided LCpl B with 4-Meth and heroin from his own stash, preparing the heroin for use loading it into a syringe, watching as LCpl B injected it into his body. His enabling, assistance and participation in LCpl B's wrongful use of 4-Meth and heroin materially contributed to LCpl B's death and the evidence is sufficient as a matter of law to constitute negligent homicide. *See United States v. Henderson*, 23 M.J. 77 (C.M.A. 1986). The military judge did not abuse his discretion in accepting the appellant's plea of guilt to negligent homicide. This assignment of error is likewise without merit.

After careful consideration, we find that the matters raised by the appellant's third assignment of error are without merit. *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987). *See also United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005).

**Conclusion**

Accordingly, we affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court