IN THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

CHARLES W. PAUL,
Airman (E-2), USAF,
Appellant.

Crim. App. Dkt. No. S32025

USCA Dkt. No. 14-0119/AF

BRIEF ON BEHALF OF APPELLANT

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

Issue Presented

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED WHEN IT TOOK JUDICIAL NOTICE OF AN ELEMENT OF A CHARGE IN VIOLATION OF *GARNER v. LOUISIANA*, 368 U.S. 157 (1961), AND MILITARY RULE OF EVIDENCE (MRE) 201(c).

Statement of Statutory Jurisdiction

The AFCCA had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 866 (2008). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ; 10 U.S.C. § 867(a)(3) (2008).

Summary of Proceedings

On 4-5 January 2012, Appellant was tried by a military judge sitting as a Special Court-Martial at Davis-Monthan AFB, Arizona. Appellant was charged with two specifications of disobeying a general order, in violation of Article 92, UCMJ, one specification of wrongfully using a controlled substance on

divers occasions and one specification of wrongfully using marijuana on divers occasions, in violation of Article 112a, UCMJ, and one specification of soliciting another to disobey a general order, in violation of Article 134, UCMJ. On 23 August 2013, the AFCCA affirmed the findings and the sentence.[1]

Statement of Facts

Appellant was charged with "wrongfully us[ing] 3,4-methylenedioxymethamphetamine, a Schedule I controlled substance, commonly known as Ecstasy, Ex, or E."[2] Appellant pleaded not guilty to the specification.

During trial, government counsel requested that judicial notice be taken of a general order prohibiting the use of spice and salvia divinorum for a different charge.[3] However, trial counsel did not ask the military judge to take judicial notice that ecstasy was a controlled substance and the military judge did not do so. Trial counsel did not introduce any evidence, that ecstasy was a controlled substance.

On appeal, the AFCCA agreed with Appellant and held, "The fact that Ecstasy is a Schedule I controlled substance is an essential element of the offense charged in this case, however,

[1] Joint Appendix (J.A.) 1-5.

[2] J.A. 6-10.

[3] J.A. 16. *See also* J.A. 74-78.

no evidence of this fact was introduced at trial."[4] However, the AFCCA found that "[t]he fact that Ecstasy is a Schedule I controlled substance is indisputable"[5] and held, pursuant to *United States v. Williams*,[6] that they could take judicial notice of this "indisputable fact."[7]

Summary of Argument

Appellant's due process rights were violated when the AFCCA held, contrary to long-established Supreme Court precedent, this Court's precedent, and MRE 201, that it may take judicial notice of an element when the military judge failed to do so at trial. Accordingly, its decision must be overturned, and the charge at issue in this case must be set aside.

Argument

THE AFCCA ERRED WHEN IT TOOK JUDICIAL NOTICE OF AN ELEMENT OF A CHARGE ON APPEAL.

Standard of Review

Whether a ruling by the AFCCA violates binding legal precedent is a matter of law and is, accordingly, reviewed *de*

[4] J.A. 3. The AFCCA noted the government's failure, stating "It is incumbent on trial counsel to properly prepare their case and provide legal and competent evidence on each and every element of the charged offense. The Government should not be in a position of needing this Court to take judicial notice of domestic law on appeal.

[5] J.A. 4.

[6] 17 M.J. 207 (C.M.A. 1984).

[7] J.A. 4.

novo.[8] This Court reviews the legal sufficiency of the evidence presented at trial *de novo*.[9] When the evidence is legally insufficient to sustain a finding of guilty, this Court must dismiss the charge.[10]

Law and Analysis

The Court of Military Appeals (CMA) in *Williams*[11] held that it was "entitled to take judicial notice of indisputable facts."[12] In *Williams*, the CMA considered whether the "fact" that the United States had exclusive or concurrent jurisdiction over the place where a kidnapping took place was an indisputable fact.[13]

That issue was also raised at trial by the prosecution.[14] Specifically, the prosecution noted in a 39(a) session:

> [T]he Government realizes that there is going to be a jurisdictional question here, and we have no problem whatsoever with permitting the panel to make the decision as to whether or not the incident occurred on or off post. In fact, that is what the Government expected [to be] one of the issues that the panel

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[8] *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

[9] *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[10] *United States v. Williams*, 3 M.J. 155, 156 (C.M.A. 1977).

[11] Appellant highlights that there are two different cases styled *United States v. Williams* cited in this brief. The first is found at 17 M.J. 207 (C.M.A. 1984). The second is at 3 M.J. 155 (C.M.A. 1977).

[12] 17 M.J. at 214.

[13] *Id.*

[14] *Id.* at 209.

would have to decide in this case.[15]

However, at trial, the government failed to establish whether the offense, charged under Article 134(3), occurred "within the special maritime and territorial jurisdiction of the United States" and asked the CMA to take judicial notice of that fact on appeal.[16]

In the present case, the AFCCA cited *Williams* for the proposition that it may take judicial notice of indisputable facts. The AFCCA held that "[t]he fact that Ecstasy is a Schedule I controlled substance is indisputable" and took judicial notice of that fact.[17] Curiously, however, the AFCCA acknowledged MRE 201A requires that, to take judicial notice of a law, the military judge must follow the requirements of MRE 201.[18]

MRE 201(c) states:

> (c) *When discretionary.* The military judge may take judicial notice, whether requested or not. The parties

[15] *Id.*

[16] *Id.* The government did request judicial notice of 18 U.S.C. § 1201, the law assimilated under the charge. *Id.* at 210. However, they did not establish whether the location on Fort Hood where the kidnapping occurred was within the special maritime and territorial jurisdiction of the United States. Additionally, the military judge did not take judicial notice that Fort Hood fell within the special maritime and territorial jurisdiction of the United States and did not discuss the jurisdictional requirements with the members.

[17] J.A. 4.

[18] *See* J.A. 11-12 (MRE 201A(a)). While "military judge" is normally associated with the trial judge, as the CMA noted in *Williams*, MRE 201 and 201A still apply on appeal. 17 M.J. at 214.

> shall be informed in open court when, without being requested, the military judge takes judicial notice of an adjudicative fact **essential to establishing an element of the case.**[19]

Further, the Analysis of MRE 201(c) states:

> (c) *When discretionary.* While the first sentence of the subdivision is taken from the Federal Rule, the second sentence is new and is included as a result of the clear implication of subdivision (e) and of the holding in *Garner v. Louisiana*, 368 U.S. 157, 173-74 (1961). In *Garner,* the Supreme Court rejected the contention of the State of Louisiana that the trial judge had taken judicial notice of certain evidence stating that: There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice ... would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be to turn the doctrine into a pretext for dispensing with a trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon. 368 U.S. at 173.[20]

Despite acknowledging *Garner*, the requirements of MRE 201(c), and that the military judge did not follow these requirements, the AFCCA found it could itself take judicial notice (without adhering to the requirements of MRE 201(c)) pursuant to *Williams*.[21]

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[19] J.A. 11 (MRE 201(c)) (emphasis added). It should be noted this language was retained in the latest version of MRE 201(c), adopted 15 May 2013. *See* J.A. 89-90 (Executive Order 13643).

[20] J.A. 13.

[21] J.A. 3.

This was error for three reasons. First, *Williams* arguably does not apply because what the AFCCA was actually doing was taking judicial notice of a domestic law under MRE 201A, not an "indisputable fact." For the AFCCA to state that it was taking notice of an "indisputable fact" that ecstasy was on the list of controlled substances instead of taking judicial notice of a domestic law is to read the distinction of MRE 201A (now MRE 202)out of existence. Put differently, while it may be said that it is a fact that a law exists, that does not make the law itself indisputable. Accordingly, MRE 201A (now MRE 202) exists.

Second, even if *Williams* applies, the AFCCA's ruling places *Williams*, a CMA case, above the requirements of *Garner*, a Supreme Court case. Third, the AFCCA places *Williams* above *Garner* because it ignores the posture and facts of *Williams*. Specifically, *Williams* did not discuss *Garner*, nor need to, because the issue of jurisdiction was actually raised at trial and the defense was on notice of the issue.[22] Accordingly, the due process requirements which form the basis of MRE 201(c) were not violated in *Williams*. Additionally, the CMA ruled it would *not* take judicial notice so a discussion of *Garner*, to the extent it was not resolved by the issue being raised at trial, was moot.

[22] 17 M.J. at 209.

Additionally, the AFCCA ignored the CMA's holding in a second case, also styled *United States v. Williams*.[23] In *Williams*, the Appellant was charged with violating Article 92(1), specifically, disobeying an Army regulation.[24] No evidence was introduced at trial regarding the regulation.[25] On appeal, the Army Court of Military Review (ACMR) approved the findings and sentence without modification.[26] In overruling the ACMR, the CMA held,

> it must be proven that the regulation in question existed at the date and time of the alleged violation, and that both the accused and his act(s) were within the proscription of the same regulation. The defense at trial must be given an opportunity to be confronted with the regulation, and attack it in the same manner as any other element.[27]

Citing the Supreme Court's holding in *Garner*, the Court continued, finding that

> the trial counsel neither introduced a copy of the regulation into evidence nor requested that the trial judge judicially notice it [but]. . . argue[s] that there was no failure of proof as the trial judge must have sub silentio considered the regulation's existence in arriving at his findings. This is a proposition that we cannot accept. Clearly where the matter to be judicially noticed is essential to the case in order for the act to become criminal, it must be reflected in the record of trial and cannot be

[23] 3 M.J. at 155.

[24] 3 M.J. at 156.

[25] *Id.*

[26] *Id.*

[27] *Id.* (citing *United States v. Hayes*, 45 C.M.R. 669 (A.C.M.R. 1972)).

> later assumed . . . Counsel for the government counterargue that it may be "safely assumed" . . . that as the matters contained in the regulation are "commonly known" to all service personnel, it is safe to presume that the regulation was, in fact, properly judicially noticed . . . Absent clear indication on the record that the trial judge properly judicially noticed a regulation in a prosecution for a violation of Article 92(1), we must hold that the judge did not have before him any evidence that what the accused did was a crime.[28]

Like a prosecution under Article 92(1), UCMJ, here there is no crime without showing that ecstasy was a Schedule I controlled substance. Further, under this Court's precedent, it will not presume the military judge actually took judicial notice *sub silentio*.

Finally, it should be noted that while it may be that ecstasy is on the list of controlled substances, it is not an indisputable fact that it is *properly* listed as a Schedule I controlled substance. In order to be listed as a Schedule I controlled substance, the "drug or other substance [must have] no currently accepted medical use in treatment in the United

[28] *Id.* at 156-57.

States."[29] However, there exist numerous medical uses for 3,4-methylenedioxymethylamphetamine, otherwise known as ecstasy.[30]

Accordingly, because of the AFCCA's ruling, Appellant was denied the opportunity to challenge whether the Attorney General of the United States violated 21 U.S.C. §§ 811 and 812 when he placed ecstasy in the Schedule I category of controlled substances. The ability to litigate a viable issue such as this, particularly in light of current and constantly changing medical research, is exactly what the Supreme Court intended to protect when it held that an accused cannot be deprived of the opportunity to challenge or dispute the notoriety or truth of the facts allegedly relied upon.[31] Accordingly, the AFCCA erred when it determined it could take judicial notice on appeal of a fact essential to an element of a charged crime.

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[29] 21 U.S.C. § 812.

[30] *See* Michael C. Mithofer, et. al., *Durability of improvement in post-traumatic stress disorder symptoms and absence of harmful effects or drug dependency after 3,4-methylenedioxymethamphetamine-assisted psychotherapy: a prospective long-term follow-up study*, J. PSYCHOPHARMACOL, 2013 January; 27(1): 28–39 (also available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3573678/).

See also Michael C. Mithofer, et. al., *The safety and efficacy of 3,4-methylenedioxymethamphetamine assisted psychotherapy in subjects with chronic, treatment-resistant posttraumatic stress disorder: the first randomized controlled pilot study*, J. PSYCHOPHARMACOL, 25(4): 439–52 (also available at http://www.maps.org/w3pb/new/2010/2010_Mithoefer_23124_1.pdf);

Grinspoon v. Drug Enforcement Administration, 828 F.2d 881 (1st Cir. 1987) (in which the First Circuit ordered the Drug Enforcement Administration to reconsider whether 3,4-methylenedioxymethylamphetamine had no medical uses).

[31] *See Garner*, 368 U.S. at 173.

WHEREFORE, this Court should set aside Charge II and its Specification.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to this Honorable Court and the Appellate Government Division on 23 December 2013.

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