3 February 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee,	)	**REPLY TO GOVERNMENT'S ANSWER**
v.	)	USCA Dkt. No. 14-0119/AF
Airman (E-2) **CHARLES W. PAUL,** United States Air Force, Appellant.	)	Crim. App. Dkt. No. S32025

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

Pursuant to Rule 19 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby submits his reply to the government's answer.

Further Argument

The government raises several arguments in its brief which are incorrect.

1. The government argues that Appellant did not contest that ecstasy was a Schedule I controlled substance.

The government claims that Appellant never contested whether ecstasy is a Schedule I controlled substance.[1] However, as the government is aware, Appellant specifically pled not guilty to the charge.[2]

Indeed, as noted in *United States v. Clay*:[3]

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[1] Gov. Answer at 4, 13.

[2] *Id*. at 2.

[3] 1 C.M.R. 74, 77 (C.M.A. 1951). *See also United States v. Erickson*, 61 M.J. 230, 232-33 (C.A.A.F. 2005) ("If [Appellant] wished to challenge the legal

> The accused entered a plea of not guilty and under the uniform holdings of both civilian and military courts, this put in issue every material allegation of the charge and placed the burden upon the government to prove beyond a reasonable doubt all the essential elements of the offense. In addition, it permitted the presumption of innocence to weigh in his favor and required that any reasonable doubt must be resolved against his guilt. These are time-honored benefits called into use by a plea of not guilty.

Accordingly, the government's contention that ecstasy's scheduling was not challenged is without support.

2. The government confuses an "adjudicative fact" with an "indisputable fact."

The government contends that *United States v. Williams*[4] applies because a "domestic law [can be] an adjudicative fact."[5] In its argument, however, the government seems to conflate the distinction between an adjudicative fact and an indisputable fact.[6] In support of its implication that the two are the same, the government confusingly cites the different treatment they are given when instructing members between domestic laws and other facts that are judicially noticed.[7] There are three problems with this argument. First, an adjudicative fact is, by definition, different than an indisputable fact. Second, to

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basis for the charge, he could have done so through a motion to dismiss or a plea of not guilty at trial.").

[4] 3 M.J. 155, 156 (C.M.A. 1977).

[5] Gov. Answer at 8.

[6] *Id*.

[7] *Id*.

presume the two are the same is to read the distinction between Military Rules of Evidence (MRE) 201 and 201A out of the UCMJ. Finally, the different treatment given during instructions is not relevant because, even though the existence of the domestic law must be viewed as conclusive, "[i]nsofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil. R. Evid. 201—except Mil. R. Evid. 201(g)—apply."[8] That hearing did not occur.[9] It is clear that the government's position is not supported in the law.

3. The government argues inapposite case law to support its position that appellate courts may take judicial notice of an element of a crime.

The government first argues that *Garner v. Louisiana*[10] did not discuss whether appellate courts could take judicial notice, only whether trial courts could.[11] An understanding of the

[8] *See* Military Rule of Evidence (MRE) 201A.

[9] It should be noted that, while the government cites the instruction given in the Military Judge's Benchbook (DA PAM 27-9, ¶ 3-37-2 ("[Ecstacy] is a controlled substance under the laws of the United States"), this, too, does not provide sufficient information to the members regarding which schedule it falls under. Given the different penalties for the different schedules and the likely aggravating nature of the different schedules, this is not a distinction without a difference. Rather, as highlighted in DA PAM 27-9, ¶ 3-37-2 Note 7, ***"MRE 201 and 201A set out the requirements for taking judicial notice."*** (emphasis in original).

[10] 368 U.S. 157 (1961).

[11] Gov. Answer at 10 ("Second, and more fundamentally, Garner did not address the authority of appellate courts to take judicial notice.").

posture of *Garner*, and a reading of its plain language, belies that assertion.

Simply put, the United States Supreme Court was reviewing a case on appeal from Louisiana's highest appellate court.[12] In argument, the state of Louisiana contended that the trial court had taken judicial notice of the "general situation," which appeared to include an imminent threat of the breach of the peace.[13] In dispensing with that argument, the Supreme Court held:

> To extend the doctrine of judicial notice to the length pressed by the respondent 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.[14]

Thus, it is clear the Court was articulating that an appellate court may not take judicial notice of an element of a charge. Accordingly, the government assertion that *Garner* was only referring to the trial court is incorrect.

Next, the government contends "[t]he Supreme Court, this Court, and federal circuit courts have consistently recognized

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[12] 368 U.S. at 158.

[13] *Id*. at 173.

[14] *Id.* (internal quotations and citations omitted) (emphasis added). This is further supported by the Court's acknowledgement that "[t]here is nothing in the record that the trial court took judicial notice of anything." *Id*. So it is clear that the Supreme Court was not admonishing the trial court for doing so.

the authority of appellate courts to take judicial notice."[15] The government then cites four cases in support of its position.[16]

Only two of the four cases cited by the government discuss taking judicial notice of an element of a crime.[17] The first of those two, *United States v. Lavender*[18] took judicial notice that the crimes committed in that case were within federal jurisdiction. There are several issues with the government's reliance on *Lavender*.

First, the *Lavender* court cites only *Markham v. United States*[19] for support of its decision and provided little further analysis.[20] *Markham*, however, was decided in 1954 prior to *Garner* (1961) and prior to the enactment of Federal Rule of Evidence (FRE) 201 (1975).[21]

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[15] Gov. Answer at 10-11.

[16] *Id*.

[17] Appellant will only address the two cases discussing judicial notice of an element of a crime in its reply for purposes of brevity.

[18] 602 F.2d 639, 641 (4th Cir. 1979).

[19] 215 F.2d 56, 57 (4th Cir. 1954), *cert. denied*, 348 U.S. 539 (1955).

[20] 602 F.2d at 641.

[21] MRE 201 is based on Federal Rule of Evidence 201. *See* MANUAL FOR COURTS-MARTIAL (MCM), Appendix 22, page A22-4 (2008 ed.). Federal Rule of Evidence 201 was enacted in 1975. *See* Pub.L. 93-595, January 2, 1975. Further, MRE 201A "is new" and "[n]ot addressed by the Federal Rules of Evidence, the subject matter of the Rule is treated as a procedural matter in the Article III courts." MCM, Appendix 22, page A22-4 (2008 ed.).

Second, and most importantly, while *Lavender* appears to hold that the *civilian* federal appellate court could take judicial notice of the jurisdictional element of a crime, the Federal Rules of Evidence do not have the same procedural requirement as MRE 201A. As cited in note 21, *supra*, MRE "201A is new [and] [n]ot addressed by the Federal Rules of Evidence[.]"[22] Accordingly, the government's reliance on *Lavender* is misplaced since the federal civilian courts do not have the requirements military courts do.[23]

The second of the two cases the government relies on is *United States v. Van Buren.*[24] In that case, the appellant argued his conviction should be overturned where "a fatal variance between the charge and proof is asserted premised upon a charge alleging the distribution of cocaine and proof of distribution of cocaine hydrochloride."[25] The 10th Circuit held, "We take

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[22] MCM, Appendix 22, page A22-4 (2008 ed.). The civilian courts are, of course, still bound by *Garner*. However, there appears to be some argument in the civilian courts between "adjudicative facts" and "legislative facts." *See United States v. Bello*, 194 F.3d 18, 22-23 (1st Cir. 1999). That said, MRE 201A is clear that judicial notice of a domestic law that is of consequence to the determination of the action requires the same procedural requirements as MRE 201.

[23] The *Markham* Court held that evidence supporting the fact in issue was presented at trial. *Markham*, 215 F.2d at 58 ("The ownership by the United States of the base was established on the trial by parol evidence [on motion] without objection . . . . Furthermore, appellant in his reply brief concedes that the title was acquired by the United States in the year 1919."). This further weakens *Lavender's* support, if any exists, given the unique military requirements under MRE 201A.

[24] 513 F.2d 1327 (10th Cir. 1975).

[25] *Id*. at 1328.

judicial notice of the fact that cocaine hydrochloride is a prohibited drug under the subject statute and that no variance is present."[26] Again, the government's reliance on this case is problematic. First, the statute in question specifically penalizes possession of both cocaine and "its salts."[27] So cocaine "hydrochloride" (a salt) was contained in the statute. Accordingly, when the court took judicial notice, they were taking judicial notice of the law.[28] And, as noted above, when taking judicial notice of "a domestic law [that] is a fact that is of consequence to the determination of the action" in the military, MRE 201A requires the court to follow the procedures set forth in MRE 201.[29] No such requirement exists for civilian federal courts. Accordingly, the government's reliance on *Van Buren* is equally misplaced.

4. The government argues that Appellant did not challenge the Schedule listing of ecstasy at trial.

As with the government's other arguments, this one is without support. In short, the government contends that Appellant made no attempt to challenge whether ecstasy is

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[26] *Id*.

[27] *See* 21 U.S.C. § 841(b)(1)(A)(i).

[28] There is some question whether taking judicial notice was even necessary as "salts" were covered in at least the penalty section of the statute and the court appeared only to be interpreting the law.

[29] *See* MRE 201A.

properly scheduled.[30] However, it is not the Appellant's responsibility to challenge evidence not presented.[31]

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

Respectfully submitted,

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[30] Gov. Answer at 13.

[31] The government also argues that the medicinal properties of ecstasy should not be considered by this Court, noting they would not be admissible at trial. First, any challenge at trial would have very likely been in a motions hearing so, of course, the evidence would have probably been admissible.

Beyond that, to the extent that it is an indisputable fact that there has been successful medical treatment of post-traumatic stress disorders using ecstasy (as cited in Appellant's grant brief) the government will no doubt concur in Appellant's request that this Court take judicial notice of it.

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 3 February 2014.

Respectfully submitted,

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