22 January 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. No. S32025
Airman (E-2) CHARLES W. PAUL, USAF *Appellant.*	)	USCA Dkt. No. 14-0119/AF

BRIEF ON BEHALF OF THE UNITED STATES

MATTHEW J. NEIL, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 34156

C. Taylor Smith, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 31485

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 27428

DON M. CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 35093

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

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS 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 Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ. This Honorable Court has jurisdiction to review AFCCA's decision under Article 67, UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF FACTS

Appellant was charged with two specifications of violating a lawful general order by wrongfully smoking "a botanical incense or herbal mixture commonly known as Spice," in violation of Article 92, UCMJ; one specification of wrongful use of 3,4-methylenedioxymethamphetamine, "commonly known as Ecstasy, Ex,

or E," in violation of Article 112a, UCMJ; one specification of soliciting two Airmen to disobey a general order, in violation of Article 134, UCMJ; and one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ. (JA at 6-10.) Appellant elected to be tried by military judge alone, and in accordance with his pleas was found guilty of the two specifications of violating a lawful general order. (JA at 72.) Contrary to his pleas, the military judge found Appellant guilty of all remaining specifications. (JA at 72-73.)

The specification of Charge II, alleging wrongful use of Ecstasy, read as follows:

> In that AIRMAN FIRST CLASS CHARLES W. PAUL, United States Air Force, 355th Aircraft Maintenance Squadron, Davis-Monthan Air Force Base, Arizona, did, at or near Tucson, Arizona, on divers occasions between on or about 1 June 2011 and on or about 31 July 2011, wrongfully use 3,4-methylenedioxymethamphetamine, a Schedule I controlled substance, commonly known as Ecstasy, Ex or E.

(JA at 6.) This specification was preferred on 9 November 2011 and served on Appellant on 15 November 2011. (JA at 6-7.) The evidence presented by the government on the specification of Charge II consisted, in part, of text messages, the testimony of Investigator TS, and the testimony of HK. (JA at 17-52.) During the direct examination of Investigator TS, the following colloquy took place:

> TC: Did you ever find any evidence the accused

> had been legally prescribed the use of ecstasy or marijuana?
>
> A: No, sir.
>
> TC: In your questioning of him, did he identify that he was **legally prescribed any schedule drugs**?
>
> A: No, sir.

(JA at 22.) (emphasis added). Appellant asked no cross examination questions pertaining to the above questions and answers. (JA at 23-24.)

After the government rested, Appellant rested his case without presenting evidence, calling a witness, or making a motion for a finding of not guilty pursuant to Rules for Courts-Martial (R.C.M.) 917. (JA at 53.)

During trial counsel's closing argument, he displayed a slide which read "Charge One [sic]: Article 112a Wrongful Use of a Controlled Substance (Ecstasy)." (JA at 80.) There was no other reference during trial counsel's closing argument concerning Ecstasy being a Schedule I controlled substance. (JA at 54-61.) During closing argument, Appellant's trial defense counsel focused primarily on the lack of evidence in the government's case to prove the contested specifications, at times addressing specific elements of the charged offenses. (JA at 61-68.) With respect to the alleged wrongful use of ecstasy, Appellant offered the following defense:

> When we're talking about the use, they rely heavily on [HK's] testimony of the ecstasy. On one of their slides on element three, they put up that the evidence was supported by [HK's] testimony and [KR]. And what you actually heard from [KR] on the stand today was the fact that, no, he didn't see the use. Where was the actual evidence that he was able to provide? He himself knew he took some ecstasy; he felt some effects. He was told other folks may have been taking ecstasy, but he was in his room, and he did not see that being taken. That was the evidence supporting that element on slide specifically--I believe it was slide number 5 by the government. The element was the accused actually thought the substance he used was ecstasy ... And so, really, all you have is [HK's] testimony. And we're talking about Article 112a, both Charge II and Additional Charge, it's [HK's] statement. That's it...

(JA at 63-64.) Appellant did not mention or contest the fact that Ecstasy is a Schedule I controlled substance. (JA at 61-68.)

On appeal before the Air Force Court of Criminal Appeals, Appellant challenged the legal sufficiency of his conviction for wrongful use of Ecstasy. (JA at 2.) Specifically, Appellant alleged no evidence was introduced at trial that Ecstasy is a Schedule I controlled substance, as charged in the specification. (Id.) The Air Force Court of Criminal Appeals agreed with Appellant that no evidence was presented on this issue, yet took judicial notice that Ecstasy is a Schedule I controlled substance and affirmed the findings and sentence. (JA at 4-5.)

Additional facts necessary to the disposition of the issue are set forth in the argument below.

SUMMARY OF ARGUMENT

The Air Force Court of Criminal Appeals did not abuse its discretion when it took judicial notice that 3,4-methylenedioxymethamphetamine, commonly known as Ecstasy, is a Schedule I controlled substance. The fact that Ecstasy is a Schedule I controlled substance is indisputable. The Air Force Court of Criminal Appeals correctly applied Garner v. Louisiana, 368 U.S. 157 (1961) and United States v. Williams, 17 M.J. 207 (C.M.A. 1984) in determining that it was appropriate to take judicial notice of this indisputable fact in this case.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ERR WHEN IT TOOK JUDICIAL NOTICE THAT 3,4-METHYLENEDIOXYMETHAMPHETAMINE IS A SCHEDULE I CONTROLLED SUBSTANCE, IN ACCORDANCE WITH MRE 201A AND UNITED STATES V. WILLIAMS, 17 M.J. 207 (C.M.A. 1984).

Standard of Review

This Court reviews questions of law *de novo*. United States v. Green, 66 M.J. 266, 268 (C.A.A.F. 2010). Questions of legal sufficiency are questions of law, and thus, reviewed by this Court *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

As a matter of due process, the taking of judicial notice generally must be done on the record at trial to provide an accused with both notice and an opportunity to challenge such judicial notice. Garner v. Louisiana, 368 U.S. 157, 173-74 (1961). A military judge may not take judicial notice implicitly or *sub silentio*. United States v. Irvin, 21 M.J. 184, 186-87 (C.M.A. 1986). However, this Court and the service courts have the authority to take judicial notice of indisputable facts. United States v. Williams, 17 M.J. 207, 214 (C.M.A. 1984).

Military Rule of Evidence (M.R.E.) 201A(a) permits a military judge to take judicial notice of domestic law. When a domestic law is "a fact of consequence to the determination of the action," the procedural requirements of M.R.E. 201 apply, with the exception of M.R.E. 201(g).[1] M.R.E. 201A(a). This Court has similarly held that domestic law can be an adjudicative fact subject to judicial notice. United States v. Ayers, 54 M.J. 85, 90 (C.A.A.F. 2010).

As the Air Force Court of Criminal Appeals noted, "[n]othing in the record of trial evidences compliance with the procedural requirements for judicial notice, in accordance with

[1] M.R.E. 201(g) provides "[t]he military judge shall instruct the members that they may, but are not required to, accept as conclusive any matter judicially noticed." When the fact judicially noticed is a domestic law, the members are not provided this instruction.

Mil. R. Evid. 201." (JA at 3.) Therefore, applying Garner and Irvin, the Air Force Court of Criminal Appeals rejected the government's argument that the military judge impliedly took judicial notice that Ecstasy was a Schedule I controlled substance. (Id.) If the question before this Court were simply whether a military judge could impliedly, or *sub silentio*, take judicial notice, Garner and Irvin would end the inquiry.[2] However, twenty-three years after the Garner decision, this Court decided Williams, holding:

> We are convinced, however, that this Court is entitled to take judicial notice of **indisputable facts**. In the first place, we do not believe that the use of the term 'military judge' in Mil.R.Evid. 201 was intended to exclude this Court. Indeed, we can think of no reason the President would have chosen to do so. Moreover, in view of the other powers granted us by Congress, we consider that our power ... to prescribe ... [our] own rules of procedure would encompass the power to prescribe rules for our taking judicial notice. Indeed, the power to take judicial notice **is probably one of our inherent powers as an appellate court**.

Williams, 17 M.J. at 214 (internal citations and quotations omitted) (emphasis added). It is this very power the Air Force Court of Criminal Appeals recognized and appropriately exercised in taking judicial notice of an indisputable fact, that Ecstasy is a Schedule I controlled substance.

Appellant argues before this Court that the Air Force Court

[2] Garner and Irvin did not address the authority of appellate courts to take judicial notice of indisputable facts.

of Criminal Appeals erred in taking judicial notice that Ecstasy is a Schedule I controlled substance for three reason. (App. Br. at 7.) First, Appellant argues that Williams, 17 M.J. 207, does not apply to the facts of this case. Specifically, Appellant argues that the Air Force Court of Criminal Appeals took "judicial notice of a domestic law under MRE 201A, not an 'indisputable fact.'" (Id.) However, Appellant's argument ignores the plain language of M.R.E. 201A, precedent of this Court, and common sense. The language of M.R.E. 201A(a) plainly recognizes that a domestic law can also be a "fact" subject to the requirements of M.R.E. 201. Similarly, in interpreting M.R.E. 201 and 201A, this Court has also recognized "domestic law is an adjudicative fact." Ayers, 54 M.J. at 90. Common sense would also dictate that Williams applies to this case. Domestic law, such as the presence of a drug on the Schedule of Controlled Substances, is much more readily identifiable and less open to dispute than facts that are not also domestic law. Indeed, while members are instructed that they do not have to "accept as conclusive" those facts judicially noticed that are not domestic law, members do not have the same discretion with respect to domestic law judicially noticed as adjudicative fact. M.R.E. 201A. Put another way, members are required to accept as conclusive domestic law judicially noticed under M.R.E. 201 and

201A.[3] Thus, it is clear that Williams, 17 M.J. 207, is squarely on point and applicable to this case.

Appellant next argues the Air Force Court of Criminal appeals erred because it put Williams "above the requirements of Garner, a Supreme Court case." (App. Br. at 7.) However, the Air Force Court of Appeals opinion is entirely consistent with Garner and Williams. Appellant seems to suggest that Garner somehow restricts the authority of an appellate court to take judicial notice that was not otherwise taken or raised at trial. (Id.) Appellant's argument is flawed in several respects.

First, Garner can easily be distinguished from Appellant's case. In Garner, a 1961 case, the petitioners were charged with disturbing the peace for sitting at "white lunch counters." Garner, 368 U.S. at 158-60. On appeal, the state of Louisiana argued that the trial court "took judicial notice of the general situation and that it therefore became apparent to the court that the petitioners' presence at the lunch counters might cause a disturbance which it was the duty of the police to prevent," although there was nothing in the record to suggest the trial court took judicial notice of anything. Id. at 173. In reversing the convictions, the Supreme Court held that there was no evidence presented to support a finding that petitioners

[3] When judicial notice is taken, members are instructed "[Ecstasy] is a controlled substance under the laws of the United States." Military Judges' Benchbook, DA. PAM. 27-9, Paragraph 3-37-2 (1 January 2010); United States v. Gould, 536 F.2d 216 (8th Cir. 1976).

disturbed the peace and as a matter of due process, the taking of judicial notice generally must be done on the record at trial to provide an accused with both notice and an opportunity to challenge such judicial notice. Id. at 173-74. The Supreme Court was concerned with a trial court's reliance on "unknown evidence" and the appellate courts' ability to "review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where that evidence is unknown." Id. It is precisely these concerns that are not present in Appellant's case, as noted by the Air Force Court of Criminal Appeals.

Secondly, and more fundamentally, Garner did not address the authority of an appellate court to take judicial notice. Garner simply prohibited a trial court from taking judicial notice without expressly putting it on the record. The Supreme Court, this Court, and federal circuit courts have consistently recognized the authority of appellate courts to take judicial notice. See Heller v. New York, 413 U.S. 483, 493 (1973) (Supreme Court took judicial notice that movie films may be compact, readily transported for exhibition in other jurisdictions, easily destructible, and particularly susceptible to alteration by cutting and splicing critical parts of film); United States v. Erickson, 61 M.J. 230, 233 (C.A.A.F. 2005) (Judicial notice taken by this Court of the fact that a number

of states have recognized the harmful effects by criminalizing inhalation of nitrous oxide); United States v. Lavender, 602 F.2d 639 (4th Cir. 1979) (Court of Appeals took judicial notice that the place of the crimes on the Blue Ridge Parkway was within Federal jurisdiction). Indeed, the very question in this case was answered by the 10th Circuit Court of Criminal Appeals in 1975. United States v. Van Buren, 513 F.2d. 1327, 1328 (10th Cir. 1975), cert. denied, 421 U.S. 1002 (1975). In addressing defendant's claim of a fatal variance between a charge of distribution of cocaine and proof of distribution of cocaine hydrochloride, the 10th Circuit Court of Criminal Appeals held "[w]e take judicial notice of the fact that cocaine hydrochloride is a prohibited drug under the subject statute and that no fatal variance is present." Id.

In addition, while Williams did not specifically cite to Garner, this Court certainly addressed the Garner due process concerns when it held that appellate courts had the authority to take judicial notice of only "indisputable facts." Williams, 17 M.J. at 214. In fact, after finding it had the authority to take judicial notice, this Court went to explain that it would not exercise its authority to take judicial notice because it would have involved the "possible impairment of appellant's statutory right to have his guilt established before members of a court-martial" because there was a real question as to whether

the facts subject to the judicial notice were "generally known universally, locally, or in the area pertinent to the event [or] capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned." Id. As the Air Force Court of Appeals correctly noted, "[t]hose concerns do not exist in the instant case." (JA at 4.) Therefore, it is clear that the Air Force Court of Criminal Appeals has the authority to take judicial notice of indisputable facts.[4]

Appellant argues that even if the Air Force Court of Criminal Appeals has the authority to take judicial notice of indisputable facts, it was inappropriate to do so in this case because "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." (App. Br. at 9.) In making this argument, Appellant ignores the elements of the charged offense. To sustain a conviction for wrongful use of Ecstasy, the government is required to prove simply that Ecstasy is in fact a Schedule I controlled substance, not that it is **properly** listed as a controlled substance. As a result, any evidence concerning the medicinal properties of Ecstasy and whether it should be listed as a

[4] In his brief, Appellant argues the Air Force Court of Criminal Appeals ignored this Court's opinion in United States v. Williams, 3 M.J. 155 (C.M.A. 1977). (App. Br. at 8.) However, as with Garner, Williams, 3 M.J. 155, did not address the question of whether an appellate court could take judicial notice of an indisputable fact, and adds nothing to the analysis of the issue in this case.

controlled substance is irrelevant, would not be admissible in findings, and should not be considered by this Court.[5] Even Appellant concedes that Ecstasy is listed as a Schedule I controlled substance. While Appellant's argument concerning the medicinal properties of Ecstasy is creative, it is utterly unpersuasive.

This is especially true when this Court considers Appellant never contested the fact that Ecstasy is a Schedule I controlled substance. Appellant was on notice as of 9 November 2011 that he was charged with wrongful use of "3,4-methylenedioxymethamphetamine, a Schedule I controlled substance." (JA at 6.) Despite this notice, Appellant never once contested whether Ecstasy was a Schedule I controlled substance, nor whether it was **properly** listed, either through motions, witness testimony, or argument. (JA at 15-73.) In addition to the notice contained on the charge sheet, Ecstasy was referenced as a controlled substance during the testimony of Investigator TS. (JA at 22-23.) Specifically, after asking Investigator TS if there was any evidence Appellant had been legally prescribed Ecstasy, trial counsel asked Investigator TS whether Appellant had identified "that he was legally prescribed any schedule drugs," to which Investigator TS responded "[n]o,

[5] Appellant has not raised ineffective assistance of counsel for the failure of trial defense counsel to admit any studies concerning the efficacy of Ecstasy for the treatment of PTSD in sentencing.

sir." (Id.) Despite this clear reference, Appellant asked no questions during cross-examination about whether ecstasy was listed as, or whether Ecstasy was **properly** listed as, a controlled substance. (JA at 23-25.) Appellant had every opportunity to litigate whether Ecstasy was in fact a Schedule I controlled substance. It is clear from the record that all parties, to include Appellant, were on notice and believed Ecstasy was in fact a Schedule I controlled substance. For Appellant to argue now that he was deprived of the opportunity to challenge this fact is utterly without merit and completely unpersuasive.

As the Air Force Court of Criminal Appeals stated, "[i]t is a very rare case where this Court would be willing to judicially notice a matter which could, and should, have been judicially noticed at trial." (JA at 5.) This is that rare case. The fact that Ecstasy is a Schedule I controlled substance is indisputable. See 21 C.F.R. § 1308.11(d)(11). As such, it is readily identifiable domestic law not subject to the discretion of the finder of fact. See M.R.E. 201A. Appellant was on notice he was charged with use of a "Schedule I controlled substance," and evidence was presented at trial that Ecstasy is a "schedule drug." (JA at 6, 22-3.) Ample evidence was presented at trial that Appellant used Ecstasy, that he knew the substance he used was Ecstasy, and that he had no lawful reason

for his use. Accordingly, a military judge sitting alone convicted Appellant for his wrongful use, simply without stating what all parties knew and understood, that Ecstasy is a Schedule I controlled substance under the laws of the United States. As the Air Force Court of Criminal Appeals so appropriately put it, "[b]ecause judicial notice in this case involves a question of domestic law ... and there is no question that Ecstasy is a Schedule I controlled substance under the laws of the United States, we are taking the extraordinary step of judicially noticing domestic law on appeal." (JA at 5.)

The Air Force Court properly took judicial notice of an indisputable fact, pursuant to United States v. Williams, 17 M.J. 207 (C.M.A. 1984), and did not abuse its discretion in doing so. Appellant's late attempt to escape justice for his crimes is without merit, and the findings and sentence should stand.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

MATTHEW J. NEIL, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

CHRISTOPHER T. SMITH, Lt Col, USAF
Reviewing Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4805
Court Bar No. 31485

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 27428

For

DON CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Suite 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35093

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and to the Air Force Appellate Defense Division on 22 January 2014.

MATTHEW J. NEIL, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156