IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Crim. No. S198434
v.	)	
ZACHARY EDWARD DAVIS,	)	
Defendant and Appellant.	)	

SUPREME COURT
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Second Appellate District, Div. 4, No. B229615
Los Angeles County Superior Court, No. BA367204
The Honorable Barbara R. Johnson, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ZACHARY EDWARD DAVIS,** Defendant and Appellant.	Crim. No. S198434 (Court of Appeal No. B229615) (Superior Court No. BA367204)

APPELLANT'S OPENING BRIEF ON THE MERITS

QUESTION PRESENTED

In the absence of expert testimony or a stipulation that MDMA/Ecstasy was a controlled substance or an analog of a controlled substance, did the Court of Appeal correctly hold that substantial evidence supports defendant's convictions?

INTRODUCTION

Zachary Davis was convicted of selling and the possession of MDMA, which is not specifically listed as a controlled substance in the Health and Safety Code. Therefore, evidence sufficient to support convictions for possession or sale of MDMA must demonstrate MDMA contains a statutorily-listed controlled substance or that it meets the definition of a controlled substance analog. In this case, the prosecution failed to produce "a stipulation []or expert testimony showing that MDMA meets the definition of a controlled substance or controlled substance analog". (Slip Opin., p. 5.) In a similar case, Division Two of the same court found the evidence was insufficient to prove MDMA was a controlled substance when no expert testimony or a stipulation was presented at trial to support that finding. (*People v. Le* (S197493, on grant and hold; formerly at 198 Cal.App.4th 1031.) Division Four did not find *Le's* reasoning persuasive. "If we were to follow *Le*, we would have to overturn appellant's conviction[.]" (Slip Opin., p. 5.)

The prosecution's evidence showed the pills purchased from Davis by the undercover officer contained MDMA. However, the criminalist who made this determination never testified MDMA contains a listed controlled substance. Nor did he testify the chemical structure or effects of MDMA were substantially similar to a listed controlled substance. A police officer testified about how long someone would experience the effects of MDMA,

but he never described what those effects were. Thus, the testimony from the criminalist and undercover officer failed to prove MDMA contained a controlled substance or was a controlled substance analog. Notwithstanding this shortfall of evidence, since the criminalist had determined the pills were methylene-dioxy*methamphetamine*, the appellate court held "common sense ... supports the inference that the pills appellant sold . . . contained methamphetamine." (*Id.* at p. 6, emphasis added.)

The Court of Appeal then took judicial notice of scientific treatises to buttress its conclusion. "The scientific name of MDMA thus accurately reflects that it is derived from methamphetamine and amphetamine." (*Id.* at p. 7.) However, the appellate court's decision to consult learned treatises to establish MDMA contains, or is derived from, methamphetamine demonstrates jurors cannot make that finding by applying common sense. Expert testimony is necessary to help the jury determine whether methylenedioxymethamphetamine is a mere commingling of chemicals, where methamphetamine retains its separate existence, or is a chemical compound, a new substance with different chemical properties. Similarly, an expert is necessary before the jury can determine whether MDMA has a chemical structure or effect similar to a listed controlled substance.

The Court of Appeal's resort to judicial notice of scientific treatises to bolster its sufficiency finding unequivocally demonstrates the chemical nature of a substance not statutorily listed as a controlled substance calls for

expert testimony. Lacking that expert testimony, or any relevant stipulation, the prosecution's evidence in this case did not support a finding of guilt beyond a reasonable doubt. On this record it is evident the Court of Appeal did not correctly hold substantial evidence supported Davis's convictions because it improperly developed an additional factual record to support an essential element of the charged crimes. Reversal is therefore required.

STATEMENT OF THE CASE

Proceedings in the Trial Court

Petitioner, Zachary Edward Davis, was charged with sale and possession for sale of a controlled substance, "methylenedioxymethamphetamine (Ecstasy)." (Health & Saf. Code, §§ 11379, subd. (a); 11378; all further statutory references are to the Health and Safety Code, unless otherwise noted.) (CT 29-30.) A jury found Davis guilty of the sale of a controlled substance and guilty of the lesser-included offense of possession of a controlled substance. (CT 84.) The trial court sentenced Davis to three years of formal probation. (CT 92.)

The Appellate Court's Decision

On appeal, petitioner challenged his convictions on the ground the evidence was insufficient to support the verdicts because MDMA was not explicitly banned as a controlled substance under the Health and Safety Code and the jury heard no evidence MDMA either contained, or was an analog of, a banned controlled substance.

On October 26, 2011, in a published decision, the Second District Court of Appeal, Division Four, disagreed, finding the evidence sufficient to support the conviction. The appellate court recognized methylenedioxymethamphetamine, also known as MDMA or "Ecstasy", is not listed as a controlled substance in sections 11377, 11379, 11054 or 11055. (See Slip Opin., pp. 3-4.) However, it noted section 11055, subdivisions (d)(1) and (d)(2) did include the "salts, isomers, and salts of its isomers" of both amphetamine (subd. (d)(1)) and methamphetamine (subd. (d)(2)) as controlled substances. (Slip Opin., p 3.) The appellate court also noted section 11055, subdivision (d), provided "'any material, compound, mixture, or preparation' containing 'any quantity' of several substances having a 'stimulant effect on the central nervous system,' including amphetamine and methamphetamine, is a controlled substance." (*Ibid.*) It further noted methylenedioxy amphetamine (MDA) was identified as a controlled substance in section 11054, subdivision (d)(6), and that subdivision (d) of that section included "'any material, compound, mixture, or preparation' containing 'any quantity' or any 'salts, isomers, and salts of isomers' of any listed hallucinogenic substance, including MDA." (Slip Opin., pp. 3-4.) The appellate court stated an analog of a statutorily controlled substance is treated no differently than the listed controlled substance when its chemical structure is substantially similar to an

explicitly named controlled substance or in its effect. (Slip Opin., p. 4, citing to §11401, subds. (a) & (b).)

The appellate court thus concluded if MDMA contained amphetamine, methamphetamine or MDA, or could be defined as a controlled substance analog, then MDMA "may be treated as a controlled substance[.]" (Slip Opin., p. 4.) Citing *People v. Becker* (2010) 182 Cal.App.4th 1151 (*Becker*) and *People v. Silver* (1991) 230 Cal.App.3d 389 (*Silver*), the appellate court found that although expert testimony in those cases demonstrated MDMA was an analog of methamphetamine, such expert testimony was unnecessary to uphold the verdict. (Slip Opin., p. 5.) Instead, the appellate court found "common sense ... supports the inference that the pills appellant sold . . . contained methamphetamine" since MDMA's chemical name included the term "methamphetamine" and did not include "any suffix or term negating the inference (e.g., 'pseudo')". (Slip Opin., p. 6.)

In so holding, Division Four of the Second District Court of Appeal expressly disagreed with and declined to follow the decision of its sister division, Division Two, in *People v. Le* (S197493), another MDMA prosecution. The *Le* court reversed the defendant's conviction for transportation for sale and possession for sale of a controlled substance because the prosecution failed to offer expert testimony showing "'the language of a controlled substance statute or the analog statute has been

satisfied.'" (Slip Opin. p. 5, quoting from *Le*.) In sum, Division Four decided common sense was an adequate substitute for expert testimony.

Finally, to further bolster its conclusion the evidence was sufficient to "infer[] that MDMA contains some quantity of methamphetamine or amphetamine under section 11044, subdivision (d)", the appellate court took judicial notice under Evidence Code, section 452, subd. (h), of scientific treatises to find the component elements of MDMA's chemical name "include methamphetamine and, by extension, amphetamine." (Slip Opin., p. 7; see Evid. Code, § 452 ["Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"].) The appellate court did so despite the prosecution's failure to present any such evidence for the jury's consideration at trial.

Grant of Review

On December 5, 2011, Davis filed for review. This court granted review January 11, 2012, ordering briefing and argument as stated above.

STATEMENT OF FACTS[1]

On New Year's Eve, 2009, Zachary Davis sold some blue pills to Los Angeles undercover officer Romeo Rubalcava. (2 RT 342, 345, 346, 349.) A criminalist analyzed the pills and determined they were methylenedioxymethamphetamine (MDMA or Ecstasy). (2 RT 707-708.) The criminalist did not describe the chemical composition of methylenedioxymethamphetamine nor did he explain what it contained, or if it had a chemical structure or effect substantially similar to a controlled substance.

The undercover officer who purchased the pills had never before attempted to purchase MDMA and knew little about it. (2 RT 366, 367.) As a serviceman living in Croatia in the late 1990's, Rubalcava had spoken to users on the street who had described Ecstasy's effects. (2 RT 364, 365, 388.) From his training, Rubalcava knew the effects of one Ecstasy pill could last up to 24 hours, with onset of its effects occurring after 30 to 60 minutes. Maximization of its effects took place between 1 1/2 and 3 hours. The effect was halved at approximately 8 hours. (2 RT 370.) Rubalcava never described those effects.

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[1] The facts are limited to those relevant to the issue on review.

ARGUMENT

I. EXPERT TESTIMONY IS NEEDED TO ESTABLISH WHETHER MDMA CONTAINS A CONTROLLED SUBSTANCE OR IS A CONTROLLED SUBSTANCE ANALOG BECAUSE ITS DETERMINATION IS NOT A MATTER OF "COMMON SENSE"

A. Introduction

The law criminalizes the possession, sale or transportation of controlled substances or analogs of controlled substances. (See, e.g., §§ 11377–11379.5.) The Health and Safety Code includes extensive lists of what substances are prohibited. (See §§ 11054-11058.) MDMA is not listed as a controlled substance. (See §§ 11054-11058.) In this case, therefore, the prosecution had to prove the pills Davis possessed, identified at trial as MDMA, contained a controlled substance or were a controlled substance analog, i.e., a substance with a chemical structure "substantially similar" to the chemical structure of a listed controlled substance or which has "substantially similar" effects as a listed controlled substance. (§ 11401, subd. (b).)

The prosecution did not present any evidence demonstrating MDMA contained a listed controlled substance or was a controlled substance analog. More specifically, no expert testified MDMA contained a controlled substance, had a chemical structure substantially similar to that of a controlled substance or had substantially similar effects as a controlled substance. There also was no stipulation establishing any of those facts.

Nevertheless, the Court of Appeal found the absence of proof did not matter. In its opinion, the Second District Court of Appeal, Division Four, ruled expert testimony "showing that MDMA meets the definition of a controlled substance or controlled substance analog" was unnecessary. (Slip Opin., pp. 5-6.) In support of its holding, the appellate court noted the prosecution evidence showed MDMA's chemical name, methylenedioxy-methamphetamine (see Exh. 12 [laboratory report]), contained the words methamphetamine and amphetamine, both controlled substances listed under the relevant statutes. (Slip Opin., p. 6; see § 11055, subds. (d)(1).) The appellate court thus reasoned inclusion of the word "methamphetamine" in MDMA's chemical name, and the absence of "any suffix or term negating the inference (e.g., 'pseudo')", was, as a matter of "common sense", sufficient evidence the pills sold to the undercover officer contained methamphetamine. (Slip Opin., p. 6.) The court further reasoned "MDMA's name demonstrates that it is produced from methamphetamine by the addition of methylenedioxy." (Slip Opin., p. 7.)

When the appellate court relied on common sense to hold sufficient evidence existed to prove the blue pills contained methamphetamine, it erred. True, expert testimony is unnecessary when it "would add nothing at all to the jury's common fund of information." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.) Here, however, the issue involved the chemical structure of a chemical compound. Common sense suggests expert

testimony is necessary to make findings about the chemical structure of a compound. When the chemical compound at issue is not listed in the relevant controlled substance statutes, expert testimony (or a stipulation) is required before the average juror can determine whether the object (here, the blue pills) contains a controlled substance or qualifies as a controlled substance analog. In the absence of expert testimony or a stipulation establishing this essential element, there was insufficient evidence to prove beyond a reasonable doubt Davis possessed or sold a controlled substance. His convictions therefore violate his Sixth Amendment right to a jury determination of every element of the crime and right to due process under the Fifth and Fourteenth Amendments. (See *In re Winship* (1970) 397 U.S. 358, 364; *Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) A conviction without adequate support also violates the due process clause of Article I, section 15 of the California Constitution. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.)

B. Matters Relating to Chemistry Are Not Matters of Common Sense.

Common sense involves a decision "based on a simple perception of the situation or facts." (http://www.merriam-webster.com/dictionary/common%20sense.) In contrast, expert testimony is necessary when the underlying facts are "beyond lay comprehension." (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124,

141(*Franz*).) Chemistry involves facts which are beyond lay comprehension. Therefore, an expert is needed to explain the subject matter of chemistry to jurors. The Court of Appeal thus erred when it held no expert testimony was required to prove MDMA contains methamphetamine on the basis common sense was enough to make that determination.

Common sense does control, precluding any need for expert testimony, when a term before the jury has a "plain, nontechnical meaning." (See, e.g., *People v. Eastman* (1993) 13 Cal.App.4th 668, 673 ["transport" as used in statute was "commonly understood and of a plain, nontechnical meaning."].) Common sense also is a proper method of reaching a conclusion when the underlying facts are simple and understood by the average layperson. For example, it was "just common sense" to conclude a defendant committed insurance fraud when he sought reimbursement in excess of what he had actually paid for an item. (*People v. Guzman* (2011) 201 Cal.App.4th 1090, 1100 ["It requires no sophisticated legal analysis to so conclude. This is just common sense."].) Similarly, in a case involving medical malpractice, expert testimony is unnecessary when "the facts present a medical question resolvable by common knowledge." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 236 (*Cobbs*), citations omitted.) Thus, when a patient suffers a shoulder injury during an appendectomy or, after surgery, the patient has a surgical instrument in his

body, "the jury is capable of appreciating and evaluating the significance of such events." (*Id.* at p. 236.)

In contrast, there is no "common sense exception" when the underlying facts are "beyond lay comprehension." (*Franz, supra,* 31 Cal.3d at p. 141, citations omitted.) In *Franz* this court stated the "common knowledge exception" is not a substitute for sufficient evidence when "the basis for the technical findings [must] be shown and an opportunity for rebuttal given." (*Ibid.,* citing to *Cobbs, supra,* 8 Cal.3d at p. 236.)

Cobbs, supra, is an example of a case where expert testimony was required to resolve an issue because it did not involve common sense. In *Cobbs* the defendant (a doctor) appealed the jury's malpractice verdict. He argued the unanimous opinion of three experts that his decision to operate, and the procedure used, showed due care precluded the jury from finding negligence. (*Id.* at p. 236.) The plaintiff, on the other hand, argued the jury's verdict was supported "under the recognized exception to the need for medical testimony: the facts present a medical question resolvable by common knowledge." (*Ibid.*)

This court disagreed, finding the "general rule" requiring expert medical testimony applied. (*Ibid.*) Whether medical malpractice occurred in that case involved the interpretation of x-rays, whether a duodenal ulcer required emergency surgery and conclusions drawn from the plaintiff's stools. "Under such circumstances the common knowledge exception to the

need for expert medical testimony is not applicable." (*Id.* at p. 237.) As this court held, "only an expert would be capable of understanding whether surgery was immediately necessary for plaintiff's well-being." (*Id.* at p. 236.)

Cobbs demonstrates expert testimony is essential "where the facts are not commonly susceptible of comprehension by a lay juror" so the jurors can come to a verdict supported by the evidence. (*Ibid.*) The same conclusion should be reached in this case. Determining whether MDMA contains a controlled substance such as methamphetamine or is an analog of methamphetamine is a question of chemistry, not common sense. Here, as in *Cobbs*, the "significance of underlying facts seems beyond lay comprehension." (*Franz, supra*, 31 Cal.3d at p. 13.) In this case expert testimony was essential before the jury could determine whether MDMA contained a controlled substance or was a controlled substance analog.

C. The Court of Appeal's Mistaken Assertion Regarding How MDMA Is Produced Demonstrates the Need for Expert Testimony to Prove MDMA Contains a Controlled Substance or Is a Controlled Substance Analog.

The need for expert testimony to prove MDMA contained a controlled substance is demonstrated by the appellate court's erroneous reliance on common sense to conclude methylenedioxymethamphetamine is "produced from methamphetamine by the addition of methylenedioxy."

(Slip Opin., p. 7.) This conclusion has a common sense appeal. However, it is wrong. Methylenedioxymethamphetamine is not produced from methamphetamine. "There are four principal precursors which can be used in the manufacture of MDMA []: safrole, isosafrole, piperonal and 3,4-methylenedioxyphenyl-2-propanone." (www.emcdda.europa.eu [MDMA]; see also www.erowid.org/chemicals/mdma/mdma_faq.shtml#precursors [safrole, isosafrole and MDP-2-P are the most common MDMA precursors].) In contrast, the precursors of methamphetamine are ephedrine and pseudoephedrine. (www.emcdda.europa.eu [methamphetamine]; 720 ILCS 648, § 5 [purpose of Illinois Methamphetamine Precursor Control Act is to make it difficult for people "to obtain methamphetamine's essential ingredient, ephedrine or pseudoephedrine"].) The appellate court's conclusion MDMA "is produced from methamphetamine" finds no support in science.

Expert testimony in *Silver, supra,* 230 Cal.App.3d 389 also demonstrates concluding whether MDMA is a controlled substance involves an analysis of its chemical structure, something beyond common knowledge. In *Silver* a lab analyst and a biochemist testified for the prosecution. Neither witness testified it was obvious MDMA contained methamphetamine merely because the word "methamphetamine" was included in its name. The lab technician testified MDMA and

methamphetamine had substantially similar chemical structures. (*Id.* at p. 392.) The biochemist explained, "both compounds contain phenyl propylamines which act as a stimulant; that the addition of a methylene dioxy group would convert methamphetamine into MDMA; and that the addition would not create a substantial difference." (*Id.* at p. 393.) The opinion of both experts, which was contradicted by two defense experts, was based on their knowledge of chemistry, not common sense. Only a chemist, as an expert witness, is capable of determining and informing the jury whether the addition of a methylenedioxy group to a methamphetamine molecule "would not create a substantial difference."

D. MDMA Does Not "Contain" Methamphetamine; It Is a Derivative of Methamphetamine, a New Chemical Compound. Thus Expert Testimony Is Necessary to Determine Whether the Two Chemical Compounds Are Substantially Similar.

United States v. Ching Tan Lo (9th Cir. 2006) 447 F.3d 1212 (*Lo*) (cert. dism.) demonstrates why "common sense" cannot substitute for expert testimony when the issue involves the question whether a substance contains another chemical substance or is substantially similar in structure to another chemical substance. *Lo* was convicted of possessing ephedrine knowing it would be used to manufacture a controlled substance. What Lo possessed, however, was not ephedrine; it was the extract of the ma huang

plant. The trial court acquitted Lo, reasoning Lo's possession of ma huang was not the possession of ephedrine. (*Id.* at p. 1221.)

When the government appealed, Lo contended the district court's conclusion was correct because there was insufficient evidence to show "ephedrine retained a separate existence within the ma huang extract." (*Id.* at p. 1222.) The Ninth Circuit disagreed, because expert testimony from the prosecution *and* defense demonstrated "ephedrine maintained a separate existence within the ma huang extract." (*Id.* at p. 1222.) In other words, all three experts testified the Ma Huang extract "*contained* ephedrine." (*Id.* at p. 1223, italics added.)

Critical to the Ninth Circuit's analysis was the fact the ephedrine was not a "chemical compound." (*Id.* at p. 1222.) A chemical compound is "something that necessarily implies not a mere mingling of components but a chemical combination of them, *resulting in their destruction as distinct entities* and in the development of a new substance possessing properties radically different from those of its constituent elements." (*Ibid.*, citation and internal quotation marks omitted, emphasis added.) The evidence was sufficient, the Ninth Circuit held, because within the Ma Huang extract ephedrine "did not disappear or become [a] different chemical[.]" (*Id.* at p. 1223, fn. 3.)

Lo's analysis demonstrates a jury is not equipped to determine whether methylenedioxymethamphetamine is a mere commingling of

chemicals, wherein methamphetamine retains a separate existence, or whether it becomes a different chemical. (See also *United States v. Daas* (9th Cir. 1999) 198 F.3d 1167, 1175 [sufficient evidence supported conviction for possessing ephedrine since expert testimony established ephedrine retained its own chemical identity in decongestant medicine and was extractable].) Expert testimony therefore is necessary to determine what happens when chemicals are combined. Relying, as the Court of Appeal did, on common sense based merely on the chemical name of the substance cannot substitute for expert testimony.

The authorities consulted by the Court of Appeal in this case expose the fallacy of its reliance on common sense. The *Encyclopedia of Toxicology* (cited at Slip Opin., p. 7) explains "Methylenedioxymethamphetamine" is a "synthetic phenylalkylamine *derivative* of amphetamine." (Baer & Holstege, *Encyclopedia of Toxicology* (2d ed. 2005) p. 96, emphasis added.) *Stedman's Medical Dictionary* (28th ed. 2006) p. 1164 (cited at Slip. Opin. p. 7) defines MDMA as "[a] centrally active phenethylamine *derivative* related to amphetamine and methamphetamine ...." (Emphasis added.) *Stedman's Medical Dictionary* defines a chemical "derivative" as "1. Something obtained or produced by *modification* of something else" and "2. A *chemical compound* that may be produced from another compound of similar structure in one or more steps." (*The American Heritage® Stedman's Medical Dictionary*. Houghton

Mifflin Company. 22 May. 2012. <Dictionary.com http://dictionary.reference.com/browse/derivative>, emphasis added.)

Lo, supra, 447 F.3d at pp. 1122-1123 explained that a "chemical compound" is a new chemical substance in which the constituent elements are destroyed "as distinct entities." (*Lo, supra,* 447 F.3d at p. 1122.) The sources cited by the appellate court in this case (see Slip Opin., p. 7) state MDMA is a "derivative" of methamphetamine, that is, a chemical compound, not merely a commingling of ingredients. The authorities the Court of Appeal relied upon therefore demonstrate common sense cannot substitute for expert testimony. Simply because MDMA's chemical name includes the term "methamphetamine" will *not* support the inference "the pills contained methamphetamine." (Slip Opin., p. 6.) As MDMA is a chemical compound derived from methamphetamine, expert testimony is needed to prove methamphetamine maintains its "distinct chemical identity" (*Lo, supra,* 447 F.2d at p. 1221) within MDMA. It is an issue "*beyond* lay comprehension." (*Franz, supra,* 31 Cal.3d at p. 14, emphasis added.)

Here the jury heard no expert testimony allowing it to conclude MDMA contains methamphetamine or is substantially similar to methamphetamine in chemical structure or effect. (Cf. *Silver, supra*, 230 Cal.App.3d at p. 392 [prosecution experts testified the chemical structures of MDMA and methamphetamine are substantially similar and have the

same general effect when consumed]; *Becker, supra,* 183 Cal.App.4th at p. 1154 [expert testified MDMA has a stimulant effect similar to methamphetamine or cocaine].) As that evidence was not presented at trial, under the reasoning of *Cobbs* and the persuasive authority of *Lo*, the Court of Appeal erred when it found sufficient evidence existed showing MDMA was a controlled substance despite the lack of expert testimony. The absence of expert testimony, or a stipulation, that MDMA was a controlled substance or substantially similar to a controlled substance was fatal to the sufficiency of the evidence, requiring reversal. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Johnson, supra,* 26 Cal.3d at p. 576.)

II. SINCE JUDICIAL NOTICE IS A SUBSTITUTE FOR PROOF, THE REVIEWING COURT'S RESORT TO JUDICIAL NOTICE ESTABLISHES THERE WAS INSUFFICIENT PROOF MDMA CONTAINED A CONTROLLED SUBSTANCE

A. Introduction

After applying "common sense" to conclude MDMA "contained methamphetamine" based solely on its chemical name (Slip Opin., p. 6), the appellate court took judicial notice of a number of scientific treatises. It consulted Zumdahl, *Chemical Principles* (2d ed. 1995), Baer & Holstege, *Encyclopedia of Toxicology, supra,* and *Stedman's Medical Dictionary, supra*. (*Ibid.*) Based on information gleaned from those scientific treatises, the Court of Appeal concluded MDMA "is derived from methamphetamine and amphetamine." (Slip Opin., p. 7.)

By resorting to judicial notice to find MDMA is derived from methamphetamine, the appellate court demonstrated the evidence at trial was insufficient to prove the pills Davis possessed were a controlled substance. Judicial notice is a form of evidence, a substitute for proof. The evidence from the learned treatises described by the appellate court was not presented at trial. The act of taking judicial notice to prove MDMA is a controlled substance demonstrates the evidence at trial was insufficient. Additionally, proving an element of the crime by consulting scientific treatises is the antithesis of common sense. By resorting to judicial notice the appellate court demonstrated the issue whether MDMA contains methamphetamine or is an analog of methamphetamine is not something which can be gleaned by applying common sense.

B. The Appellate Court's Resort to Judicial Notice for Proof of a Fact Demonstrates That Fact Was Not Proven at Trial.

Judicial notice is "a form of evidence." (*Mann v. Mann* (1946) 76 Cal.App.2d 32, 42; *Del Bosque v. Singh* (1937) 19 Cal.App.2d 487, 490 (*Del Bosque*).) "'The doctrine of judicial notice is an evidentiary doctrine. [] Judicial notice is a substitute for formal proof.'" (*Post v. Prati* (1979) 90 Cal.App.3d 626, 633, citation and italics omitted.) It is "'a judicial shortcut, a doing away with the formal necessity for evidence because there is no real necessity for it.'" (*Varcoe v. Lee* (1919) 180 Cal. 338, 344.)

For example, in *Varcoe v. Lee, supra,* the trial court took judicial

notice of an ordinance which showed the area in question was heavily traveled and cars were not allowed to exceed a speed of 15 m.p.h. Both these facts were crucial to the determination of negligence. The reviewing court found this "judicial short-cut" proper. (*Id.* at p. 344.) Judicial notice provided "ample support for findings and a judgment *based upon it.*" (*Del Bosque, supra,* 19 Cal.App.2d at p. 489, emphasis added.)

Here, in contrast, the trial court did not take judicial notice of scientific treatises. There was, therefore no "ample support" *on appeal* for the jury's verdict since the jury's judgment was not supported by any judicially noticed facts. Thus, since "there was neither a stipulation nor expert testimony showing that MDMA meets the definition of a controlled substance or controlled substance analog" (Slip Opin., p. 5), the Court of Appeal took judicial notice, a "form of evidence" (*Mann v. Mann*, *supra*, 76 Cal.App.2d at p. 42), to fill the evidentiary gap and avoid "overturn[ing] appellant's conviction." (Slip Opin., p. 5.) The Court of Appeal's resort to judicial notice implicitly acknowledged the insufficiency of evidence to prove MDMA contained a controlled substance or was a controlled substance analog.

The Court of Appeal had no mandatory duty under the applicable statute to take judicial notice of matters bearing on an essential element of the crime when the prosecution's evidence fell short. (See *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2 [a

reviewing court "may", but is not required, to take judicial notice under Evid. Code, § 452, subd. (h)].) Nevertheless, to remedy the evidentiary deficit, the Court of Appeal inappropriately took a "judicial shortcut" (*Varcoe v. Lee, supra,* 180 Cal. at p. 344) to supply the missing support required to affirm Davis's conviction. This action amounts to a concession the evidence at trial was insufficient to prove MDMA contained a controlled substance or was a controlled substance analog.

C. Taking Judicial Notice of a Fact is the Antithesis of "Common Sense".

The appellate court's resort to judicial notice to prove MDMA "contained methamphetamine" (Slip Opin., p. 5) also contradicts its assertion the jury could make that finding based on common sense. Common sense "consists of inferences and conclusions which can be drawn … easily and intelligently by the trier of fact[.]" (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.) For example, in *People v. Hernandez* (1977) 70 Cal.App.3d 271, 281, a prosecution for possession of heroin for sale, the appellate court found only "common sense" was necessary to inform the jury heroin addicts congregate outside methadone centers. Similarly, when the defendant shook "his head from side to side when he was approached by two other persons" outside that methadone center, the jury "easily and intelligently" could conclude what that meant in the case. (*Ibid.*) Since these matters involved common sense, matters about which jurors were

fully equipped to form their own conclusions, there was "no basis for admitting [] expert testimony." (*Id.* at p. 280.)

In contrast with the facts *Hernandez* found subject to common sense interpretation, whether MDMA contains methamphetamine or is its analog is a question involving chemistry. The matters noticed by the appellate court demonstrate the issue is not one the jury was equipped to easily resolve based on common sense. The Court of Appeal consulted *Chemical Principles*, *supra,* at p. 39 to determine "Both methamphetamine and MDMA are derivatives of amphetamine." (Slip Opin., p. 7.) Consulting a learned treatise to establish that fact is the opposite of a finding based on common sense, which requires no expert testimony. The Court of Appeal consulted *Stedman's Medical Dictionary, supra,* to learn that a "derivative" is a "compound that may be produced from another compound in one or more steps." (*Ibid.*) It then consulted the online *Oxford English Dictionary* to establish "Methamphetamine's scientific name . . . confirms that it is '[a] methyl derivative of amphetamine.'" (Slip Opin., p. 7.) It then deduced that, similarly, "MDMA's name demonstrates that it is produced from methamphetamine by the addition of methylenedioxy." (*Ibid.*)

These are not matters jurors can determine based on common sense. The chemical meaning of the word "derivative" required consulting a scientific treatise. The finding "scientific names of chemical compounds reflect their composition" (Slip Opin., p. 7) also was based on consulting a

scientific treatise. Therefore, these are matters which require expert testimony, the equivalent of consulting a scientific treatise. Common sense was no substitute for expert testimony to prove MDMA contains methamphetamine or is a derivative (i.e., an analog) of methamphetamine. Since there was no expert testimony offered at Davis's trial, there was insufficient evidence to prove this essential element. As the learned treatises consulted by the Court of Appeal demonstrate, common sense is not a substitute for expert testimony.

Therefore, the question whether methamphetamine maintained "its distinct chemical identity within the combination" of methylenedioxy and methamphetamine, "rather than changing into a different chemical" (*Lo, supra*, 447 F.3d at p. 1221; see also 1223, fn. 3) was a matter requiring expert testimony or a stipulation. Here, when the appellate court took judicial notice of several treatises to prove a scientific fact, it engaged in conduct that was the antithesis of common sense. The very fact it had to consult *several* treatises to pile one inference on top of another to conclude MDMA was a derivative of methamphetamine and amphetamine demonstrates the conclusion was not one which could be drawn "easily and intelligently" by jurors. (*People v. Torres, supra,* 33 Cal.App.4th at p. 45.) As shown, taking judicial notice of scientific treatises is the antithesis of common sense.

D. Had a Juror Consulted the Dictionaries and Scientific Treatises Accessed by the Court of Appeal, This Court Would Have Found Juror Misconduct.

The appellate court's resort to a "judicial shortcut" when there was no evidence of the judicially noticed facts at trial underscores the lack of evidence at trial to prove an essential element of the crime. Had a juror contacted a chemist and asked whether MDMA contained methamphetamine or amphetamine, this court quickly would find that juror had committed misconduct. (See *People v. Honeycutt* (1977) 20 Cal.3d 150, 157 [consulting attorney about questions of law in the case is misconduct].) Similarly, this court also would find misconduct occurred had a juror consulted *Stedman's Medical Dictionary* or the online version of the *Oxford English Dictionary* (see Slip Opin., p. 7) and told other jurors he or she thereby learned the meaning of "chemical derivative" or that MDMA's scientific name demonstrated it contained methamphetamine or was produced from methamphetamine. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 645 [misconduct for a juror to look up the definition of "mitigate" in a dictionary]; *Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314 [prejudicial misconduct to look up definition of "preponderance" and share it with other jurors].)

Jurors are permitted to apply "their own common sense and life experience" in deciding cases. (*People v. Vigil* (2011) 191 Cal.App.4th

1474, 1487.) However, jurors "should not discuss an opinion explicitly based on specialized information obtained from outside sources." (*People v. Fauber* (1992) 2 Cal.4th 792, 839, citation omitted.) The appellate court's consultation of dictionaries and scientific treatises meant it obtained information from sources outside the evidence presented at Davis's trial. Had jurors acted as the Court of Appeal did, it would have been misconduct, not the application of their own common sense. The appellate court's resort to judicial notice to prove MDMA contains methamphetamine establishes there was insufficient evidence *at trial* to prove that essential element and that this finding could not be based on common sense.

E. Conclusion

On appeal it is too late to find evidence of an essential element of the crime "true for purposes of proof." (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564.) Here, the reviewing court's use of judicial notice, a substitute for proof, unquestionably demonstrates the prosecution at trial failed to provide sufficient proof that MDMA, a chemical compound, contained a controlled substance as opposed to changing into a different chemical. (See Arg. I, subs. D.)

III. THE COURT OF APPEAL DID NOT CORRECTLY HOLD SUBSTANTIAL EVIDENCE SUPPORTED THE CONVICTIONS BECAUSE IT IMPROPERLY DEVELOPED AN ADDITIONAL FACTUAL RECORD TO SUPPORT AN ESSENTIAL ELEMENT OF THE CRIMES NOT PROVEN AT TRIAL, IN VIOLATION OF DAVIS'S CONSTITUTIONAL RIGHTS

A. Introduction

In this case the prosecution had to prove MDMA was a controlled substance or controlled substance analog because MDMA is not a listed controlled substance. The prosecution presented an expert to testify the pills Davis sold contained MDMA and introduced his laboratory report, which included MDMA's chemical name, into evidence. However, the expert never testified MDMA contained a controlled substance, or had a chemical structure or effect substantially similar to a controlled substance. In the absence of expert testimony or a stipulation establishing MDMA contained a listed controlled substance or was a controlled substance analog, the prosecution failed to prove an essential element of the charged crimes beyond a reasonable doubt. As noted in the first argument, Davis's convictions therefore were obtained in violation of his constitutional rights to due process and jury determination of every element of the crime beyond a reasonable doubt. (*In re Winship, supra,* 397 U.S. at p. 364; *Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Johnson, supra,* 26 Cal.3d at p. 576; *People v. Rowland, supra,* 4 Cal.4th at p. 269.)

The prosecutor easily could have remedied the evidentiary gap by

asking the criminalist, who had a degree in chemistry (see 3 RT 702), whether the chemical structure or the effects of MDMA were substantially similar to methamphetamine. (Cf. *Silver, supra*, 230 Cal.App.3d 389 [prosecution expert testifies the chemical structure of MDMA was substantially similar to the chemical structure of methamphetamine]; *Becker, supra,* 183 Cal.App.4th 1151 [prosecution expert testifies the effects of MDMA are substantially similar to the effects of methamphetamine].)

Alternatively, the prosecutor could have asked the trial court to take judicial notice under Evidence Code section 452, subdivision (h), of the same (or similar) scientific treatises consulted by the appellate court. Had the prosecutor done so, the defense could have opposed the request or could have called defense experts to contradict the assertion MDMA is substantially similar to methamphetamine in structure or effect. (See *Silver, supra,* 230 Cal.App.3d 389 [defense calls two experts who testify MDMA does not have a chemical structure or effect substantially similar to methamphetamine].) However, the prosecutor never asked the court to take judicial notice of scientific treatises. In the absence of expert testimony establishing MDMA contained a controlled substance or was a controlled substance analog, the evidence at trial was insufficient to support Davis's convictions.

Undoubtedly recognizing the evidence at trial was insufficient to

prove MDMA contains a controlled substance or is a controlled substance analog, the appellate court took judicial notice of scientific treatises to hold "[t]he scientific name of MDMA thus accurately reflects that it is derived from methamphetamine and amphetamine." (Slip Opin., p. 7.) However, an appellate court is not allowed to resurrect a conviction supported by insufficient evidence by taking judicial notice of facts which were never presented at trial. When an insufficiency challenge is made on appeal, the role of an appellate court is limited to a review of the sufficiency of evidence *given to the factfinder*. The Court of Appeal erred when it took judicial notice under Evidence Code section 452, subdivision (h), because it amounted to judicial factfinding of an essential element of the crime. That evidence had not been presented to and considered by the factfinder when rendering its verdict in this case. Thus the Court of Appeal's resort to factfinding by judicial notice violated Davis's constitutional right to a jury determination of every element of the crime beyond a reasonable doubt and due process. Reversal is required.

B. Applicable Law

Due process under the Fifth and Fourteenth Amendments to the federal Constitution requires every element of a crime be proven beyond a reasonable doubt. (*In re Winship*, *supra,* 397 U.S. at p. 364.) A guilty verdict will not be affirmed on appeal unless "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; accord, *People v. Johnson, supra,* 26 Cal.3d at p. 576.)

Furthermore, the federal Constitution guarantees a defendant the right to have *the jury* decide the existence of all elements of the charged offense. "The Sixth Amendment to the federal Constitution 'gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.'" (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523, citation omitted.)

"[A]n appeal reviews the correctness of a judgment as of the time of its rendition, *upon a record of matters which were before the trial court* for its consideration." (*In re James V.* (1979) 90 Cal.App.3d 300, 304, emphasis added; see also *People v. Kelly* (1992) 1 Cal.4th 495, 546 [appeal addresses legal issues limited to the record below].) Therefore, "[a]n appellate court generally is not the forum in which to develop an additional factual record, particularly in criminal cases when a jury trial has not been waived." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1205, citation omitted.)

In this case the Court of Appeal engaged in judicial factfinding when it took judicial notice of scientific treatises to support its sufficiency finding in violation of Davis's constitutional right to have the jury find every essential element of the crime beyond a reasonable doubt. The result is that

"the wrong entity judged the defendant guilty." (*Rose v. Clark* (1986) 478 U.S. 570, 578; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.)

C. An Appellate Court Violates a Defendant's Constitutional Right to a Jury Determination of Every Element of the Crime and Due Process When It Develops a Factual Record to Support an Essential Element of the Crime.

It is impermissible for a reviewing court to "look to legal theories not before the jury in seeking to reconcile a jury verdict with the substantial evidence rule." (*People v. Kunkin* (1973) 9 Cal.3d 245, 251.) On direct review the appellate court's function is limited to matters contained in the record of the trial proceedings. (*People v. Jackson* (1992) 7 Cal.App.4th 1367, 1373, citations omitted (*Jackson*).) An appellate court cannot review issues dependent on a factual record not made first in the trial court. (*People v. Peevy, supra,* 17 Cal.4th 1184.)

Evidence Code section 452, "the discretionary judicial notice statute" (*People v. Preslie* (1977) 70 Cal.App.3d 486, 492), does not undermine the principle that an appellate court in a criminal case cannot make factual findings to uphold a guilty verdict. An appellate court cannot take judicial notice of facts where the trial record is insufficient to prove an essential element in a criminal case. *Jackson, supra,* 7 Cal.App.4th 1367 illustrates this point. On appeal, Jackson argued the prosecution failed to prove he had been convicted of a serious felony, burglary of an inhabited

dwelling. (*Id.* at p. 1372.) Under ordinary circumstances that lack of evidence "would end the matter." (*Ibid.*) However, in *Jackson* the "Attorney General, despite virtually conceding the trial death of the allegation, argues that, like Lazarus, it can be raised from that death" by virtue of "appellate judicial notice (Evid. Code, §§ 459, subd. (d), 452, subd. (d)) or appellate factfinding (Code Civ. Proc., § 909)." (*Id.* at p. 1372, footnotes omitted.)

The *Jackson* court disagreed. Since the defendant had asserted his constitutional right to a trial, the appellate court would not "judicially notice ... or factually find" the missing element. (*Id.* at p. 1373.) "To do so would do violence to the elementary principle that the function of an appellate court, in reviewing a trial court judgment on direct appeal, is limited to matters contained in the record of the trial proceedings." (*Ibid.*, citations and internal quotation marks omitted.) Reversal of the prior conviction finding was required because "no authority [existed] for the proposition that an essential element, not proved at trial, may be proved on appeal." (*Ibid.*, citations omitted.)

People v. Huntsman (1984) 152 Cal.App.3d 1073 (*Huntsman*) also decried use of "resuscitative" judicial notice on review. The *Huntsman* court refused to take judicial notice on appeal because to do so would relieve the prosecution of its burden of proof at trial and deprive the defendant of both his right to cross-examination and to present his own

evidence on the issue, rights which are essential to "'the kind of fair trial which is this country's constitutional goal.'" (*Id.* at p. 1087, citing to *Barber v. Page* (1968) 390 U.S. 719, 721; other citations omitted.)

In *Huntsman* the appellate court reviewed the denial of a suppression motion. The officer's search was premised on the fact he saw the defendant holding a plastic bag. However, the officer had no reason to suspect the bag contained illegal drugs. Recognizing the evidentiary void, at oral argument the Deputy Attorney General asked the reviewing court "to take judicial notice of the asserted fact that eight-by-eleven-inch plastic bags with 'Zip-Loc' tops are often used in narcotics transactions." (*Huntsman, supra,* 152 Cal.App.3d at p. 1086.) The appellate court refused. "[I]t is the job of an appellate court to review evidence submitted on the motion *in the trial court.*" (*Ibid.,* citation omitted, emphasis added.) Thus, as the prosecutor had not made a request for judicial notice at the hearing, the appellate court would not take judicial notice on appeal. (*Ibid.*)

The *Huntsman* court reasoned taking judicial notice on appeal would violate the defendant's fundamental rights. First, such a procedure relieves the prosecution of its burden of proof. Second, it deprives the defendant of his right to cross-examination "and to present his own evidence" at trial on the issue. (*Id.* at p. 1086, citations omitted.)

The significance of the defendant's right to present "his own evidence" on an essential element of the crime was illustrated in *Silver,*

supra, 230 Cal.App.3d 389, a prosecution where the contested issue at trial was whether MDMA was a controlled substance analog. Silver was charged with, tried, and convicted of possession for sale and sale of MDMA. At trial, the prosecution presented expert testimony in an effort to prove MDMA had a chemical structure and effects substantially similar to methamphetamine. (*Id.* at p. 392.) In response, Silver presented his own experts refuting the prosecution evidence on the issue "whether MDMA is an analog of methamphetamine." (*Id.* at pp. 392-393, 396.) Thus, Silver had the opportunity to present "his own evidence on the question of" (*Huntsman, supra,* 152 Cal.App.3d at p. 1086) whether MDMA was a controlled substance analog.

The procedure in *Silver* is in contrast with the procedure in this case, where the *appellate* court took judicial notice to prove MDMA contained methamphetamine. *Silver's* trial had all the elements of fairness. He was able to exercise his rights to cross-examination of prosecution experts and to present a defense. The prosecution was required to prove an essential element of the crime beyond a reasonable doubt. The jury rendered verdicts on the evidence it heard.

In this case, those fundamental constitutional rights were not honored. It was improper for the appellate court to engage in a "resuscitative feat" (*Jackson, supra,* 7 Cal.App.4th at p. 1372) when evidence contained in scientific treatises, evidence bearing on an essential

element of the crime, was not presented in the first instance in the lower court. The appellate court never should have taken "judicial notice of these facts" because they were "evidentiary matters . . . which should have been presented to the court below and are not matters of which [it was] required to take judicial notice." (See *People v. Preslie, supra,* 70 Cal.App.3d at p. 493, quotation marks and citation omitted.) Instead, the sufficiency of the evidence should have been determined "on the basis of the record of the trial court." (*Ibid.*; quotation marks and citation omitted.)

The Attorney General may argue appellate courts are vested with the authority to make "findings of fact contrary to, or in addition to, those made by the trial court" under Code of Civil Procedure section 909[2] (formerly Code Civ. Proc.§ 956a) and Article VI, section 11 of the California Constitution[3] (formerly art. VI, § 4 3/4). However, those provisions only apply "[w]hen a jury trial is not a matter of right, or where a jury has been waived[.]" (*People v. Cowan* (1940) 38 Cal.App.2d 144, 153 (*Cowan*).) In *Cowan* the appellate court supported that holding by noting the Code of Civil Procedure section was contained in the section that related to

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[2] Code of Civil Procedure, § 909 states, in relevant part: "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court."

[3] Article VI, § 11, subd. (c) states: "The Legislature may permit courts exercising appellate jurisdiction to take evidence and make findings of fact when jury trial is waived or not a matter of right."

"Appeals in Civil Actions". (*Id.* at p. 153.) Additionally, the court found the constitutional amendment inapplicable to criminal cases because at the time of its adoption, a defendant could not waive his right to a jury trial on felony charges. As the court aptly noted, "If it be assumed that the power to take additional evidence in criminal cases ... could be conferred on appellate courts, *the answer is that the legislature has not seen fit to do so.* The existing legislation has limited that power to civil cases." (*Id.* at p. 134, emphasis added.) *Cowan's* reasoning has held true through the years. Courts of appeal facing applications to produce additional evidence on appeal of criminal convictions have denied those applications because jury trial had not been waived. (See, e.g., *People v. Carmen* (1954) 43 Cal.2d 342, 349; *People v. Mendes* (1950) 35 Cal.2d 537, 546; *People v. McKinney* (1957) 152 Cal.App.2d 332, 335-336.)

These authorities establish the appellate court's resort to judicial notice to establish MDMA contained methamphetamine infringed on Davis's constitutional right to have the jury decide the facts and determine if all essential elements were proven. It also violated Davis's right to confrontation and to present a defense. The evidence presented *at trial* did not prove MDMA contains methamphetamine or that its chemical structure or effect is substantially similar to methamphetamine. This court should rebuff the Court of Appeal's attempt to resuscitate convictions supported by insufficient evidence.

D. The Evidence Also Was Insufficient Because the Reviewing Court Took Judicial Notice of Matters Bearing on an Essential Element of the Crimes But Not the Product of an Adversarial Hearing.

Whether MDMA contains a controlled substance or is a controlled substance analog can be disputed. (See Arg. I, subs. C.) In *Silver, supra,* 230 Cal.App.3d 389 prosecution and defense experts disagreed whether MDMA has a chemical structure or effect substantially similar to methamphetamine. Here, one of the "learned treatises" consulted by the Court of Appeal, *Stedman's Medical Dictionary*, defines MDMA as "a mescaline analog" (*The American Heritage® Stedman's Medical Dictionary.* Houghton Mifflin Company. 10 May. 2012. <Dictionary.com http://dictionary.reference.com/browse/mdma). Had the prosecutor in this case asked the court to take judicial notice of scientific treatises on the question whether MDMA contains methamphetamine or is substantially similar to methamphetamine in chemical structure or effect, the defense could have presented contrary expert testimony or asked for judicial notice of scientific treatises which disputed that evidence. It then would have been up to the *jury* to decide the disputed issue based on all the evidence presented.

"The appropriate setting for resolving facts reasonably subject to dispute is the adversary hearing. It is therefore improper for courts to take judicial notice of any facts that are not the product of an adversary hearing

which involved the question of their existence or nonexistence. [Citation.]" (*Lockley v. Law Office of Cantrell, et al.* (2001) 91 Cal.App.4th 875, 882.) (*Lockley*).) In *Lockley* the lower court took judicial notice of an assertion in a footnote of an appellate opinion in a related matter and used that fact as the basis for sustaining a demurrer brought by the defendant. (*Id.* at p. 882.) This was error. The factual matter in the footnote could not be judicially noticed as it had not been contested in an adversarial setting and thus "*remains* reasonably subject to dispute." (*Id.* at p. 884, emphasis added.) "It is one thing to recognize the Court of Appeal made factual findings with regard to Law Office's legal representation of *Lockley* .... It is another to assert those factual findings are indisputably true." (*Ibid.*)

People v. Rubio (1977) 71 Cal.App.3d 757(*Rubio*), disapproved on other grounds by *People v. Freeman* (1978) 22 Cal.3d 434, 438-439, is to the same effect. In *Rubio* the trial court took judicial notice of a magistrate's order stating defendant did not have "sufficient excuse" for failing to appear at a pretrial hearing and thereafter instructed the jury "it should regard defendant's unexcused absence from trial as an uncontrovertible fact" bearing on his consciousness of guilt. (*Id.* at p. 766-767.) The appellate court reversed, finding the lower court could not take judicial notice of truth of facts asserted in a minute order, facts made by a magistrate without the benefit of an adversarial hearing. (See also *People v. Tolbert* (1986) 176 Cal.App.3d 685, 690 [same].)

When Davis exercised his right to jury trial, *by definition* all the elements of the crime were in dispute. Had judicial notice been sought in the trial court, Davis would have had the opportunity to rebut it. Moreover, even if a scientific fact is "so well known" that it becomes a matter "of judicial knowledge" (*Roy v. Smith* (1933) 131 Cal.App. 148, 151), a reviewing court cannot remove that fact "as a subject of dispute and ... accepted for evidentiary purposes as true." (*Sosinsky v. Grant, supra,* 6 Cal.App.4th at p. 1563.) Even a scientific fact can be a subject of dispute. "[I]f there is 'any possibility of dispute' the fact cannot be judicially noticed[.]" (*Communist Party v. Peek* (1942) 20 Cal.2d 536, 547, citing to *Varcoe v. Lee, supra,* 180 Cal. at p. 345.) As this court noted almost 100 years ago, a reviewing court cannot resort to the "judicial short-cut [of judicial notice] to avoid necessity for the formal introduction of evidence." (*Varcoe v. Lee,* at p. 344.)

Here the Court of Appeal took judicial notice of facts from scientific treatises that had not been contested in an adversarial setting to hold "the evidence is sufficient to establish that the pills appellant sold ... contained a controlled substance[.]" (Slip Opin., p. 7.) "However, resolution of this question was for the jury in the first instance, not for the [appellate] court." (*People v. Figueroa* (1986) 41 Cal.3d 714, 730; *People v. Wilkins* (1993) 14 Cal.App.4th 761, 778 ["Due process requires" issues of fact related to an element of the crime "be submitted to the jury"].) It was not the appellate

court's function "to seek out on its own initiative indisputable sources of information." (*People v. Moore* (1997) 59 Cal.App.4th 168, 177, citation omitted.)

E. A Reviewing Court Should Not Take Judicial Notice of Evidence Which Could Have Been Presented in the Trial Court.

Presumably, the scientific treatises consulted by the appellate court also were available to the prosecution. Had the prosecution asked the trial court to take judicial notice of these treatises, and had the court granted that request, the jury could have considered the evidence when rendering its verdict.[4] However, the prosecutor never requested the trial court take judicial notice of scientific treatises. In those circumstances a reviewing court should not take judicial notice of evidence which could have been presented in the trial court.

In re Rogers (1980) 28 Cal.3d 429 (*Rogers*) makes this point. In *Rogers* the Board of Prison Terms used constitutionally defective prior convictions to extend the defendant's determinate sentence. Rogers filed a petition for writ of habeas corpus and won relief. The Board appealed and asked this court to take judicial notice of the prior proceedings to learn why the lower court found the prior convictions invalid. This court refused. The State had had two prior opportunities in the lower courts to present

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[4] "In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." (*Franz, supra*, 31 Cal.3d at p. 146, fn. 2, (conc. opn. of Kaus, J.).)

evidence of the court's reasons for invalidating the prior convictions yet had "failed to do so." (*Id.* at p. 437, fn. 6.) The Board's request for judicial notice was too late and made in the wrong venue. "It is elementary that the function of an appellate court, in reviewing a trial court judgment on direct appeal, is *limited* to a consideration of matters contained in the record of trial proceedings[.]" (*Ibid.*, emphasis added.) Since it had failed to present the evidence in the proper venue, "the state should not expect this court to bend its rules, take judicial notice and thereby augment the record with the [prior] proceedings." (*Ibid.*, citations omitted; see also *People v. Preslie, supra,* 70 Cal.App.3d at p. 493 [same].)

People v. Benford (1959) 53 Cal.2d 1 illustrates this same principle. On appeal of his criminal conviction for the sale of marijuana, Benford wanted to produce an officer's testimony corroborating a defense theory. However, that evidence could have been produced at trial. (*Id.* at p. 7.) This court denied the defendant's application to produce evidence at the appellate level because an appellate court's "evidence-taking and fact-finding powers [do not] convert the appellate courts into triers of fact[.]" (*Id.* at p. 6; see Code Civ. Proc., § 909; see also *Tupman v. Haberkern* (1929) 208 Cal. 256, 269-270 ["appellate tribunals" are not "triers of fact"]; *Bruhnke v. Bowlus-Teller Mfg. Co.* (1937) 21 Cal.App.2d 317, 319 [reviewing "court is not a fact-finder"].)

This case presents no basis for the appellate court "to bend its rules,

take judicial notice and thereby augment the record" on appeal (*Rogers, supra,* 28 Cal.3d at p. 437, fn. 6) when the prosecution could have presented evidence on an essential element of the crime in the proper venue, the trial court.

F. Conclusion

The evidence presented at trial to prove MDMA contained a controlled substance or was a controlled substance analog was insufficient to support Davis's convictions because the reviewing court used judicial notice to develop an additional factual record to support an essential element of the crime. Insufficiency of the evidence also exists because the appellate court took judicial notice of matters that bore on an essential element of the crimes but were not the product of an adversarial hearing. The Court of Appeal thereby violated Davis's constitutional rights to due process and jury determination of each element of the charged crimes under the Fifth, Sixth, and Fourteenth Amendments of the federal Constitution and Article 1, sections 15 and 16 of the California Constitution. Additionally, a reviewing court should not take judicial notice of evidence which could have been presented at trial. Here, then, this court emphatically must reassert "the general rule that an appellate court generally is not the forum in which to develop an additional factual record." (*People v. Castillo* (2010) 49 Cal.4th 145, 157, citations omitted.)

CONCLUSION

Insufficient evidence supported Davis's convictions. As MDMA is not listed in the Health and Safety Code, only expert opinion will support a finding MDMA contains methamphetamine or is an analog of methamphetamine. Common sense cannot suffice. Nor can an appellate court use judicial notice as a substitute for proof of this essential element. The appellate court's very resort to a judicial "short-cut" demonstrates the insufficiency of an essential element of the crimes. Finally, a reviewing court cannot develop an additional factual record not subject to an adversarial hearing to support an essential element. As Davis has shown the appellate court did not correctly hold that substantial evidence supported his convictions, this court should reverse the convictions and bar retrial on double jeopardy grounds. (*Burks v. United States* (1978) 437 U.S. 1, 10-11.)

DATED: May 29, 2012.

Respectfully submitted,

Carla Castillo
Attorney for Zachary Davis

CERTIFICATE OF COMPLIANCE WITH RULE 8.360(b)

I, Carla Castillo, counsel for Zachary Davis, certify pursuant to the California Rules of Court, rule 8.360(b), that the word count for this document is 9,523 words, excluding the tables, this certificate, and the caption on page one. This document was prepared in Word 2007 and this is the word count generated by the program for this document.

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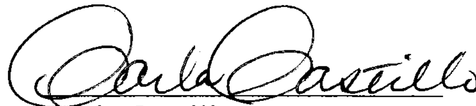

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CERTIFICATE OF SERVICE BY MAIL
SUPREME COURT OF CALIFORNIA
***People v. Zachary Davis,* Case No. S198434**

I declare that I am employed in the City of Berkeley, County of Alameda, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is 1563 Solano Avenue, PMB 286, Berkeley, CA 94707. On the date shown below I served the within *Appellant's Opening Brief on the Merits* on the interested parties in said cause, by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at Berkeley, California, addressed as follows:

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I declare, under penalty of perjury, the foregoing is true and correct.

Executed in Berkeley, California, this 30th day of May, 2012.

Carla Castillo