California Supreme Court To Decide Whether Ecstasy Is A Controlled Substance After The Court Of Appeal Struggles With Statutory Construction And "Common Sense"

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CALIFORNIA SUPREME COURT TO DECIDE WHETHER ECSTASY IS A CONTROLLED SUBSTANCE AFTER THE SECOND DISTRICT COURT OF APPEAL STRUGGLES WITH STATUTORY CONSTRUCTION AND "COMMON SENSE"

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Is there any place for “common sense” in the construction and application of the drug laws in the State of California? The Second District Court of Appeal has struggled with that question when it reviews convictions centered on the illegal drug “Ecstasy” – known by its chemical name MDMA.¹ In two cases decided less than two months apart, two separate divisions arrived at completely opposite constructions of the same statute – allowing one defendant to go free while the other was sent to county jail for 90 days. Interestingly, both panels purported to use appropriate canons of statutory interpretation to arrive at the correct result. Now, the California Supreme Court has agreed to settle the issue. This article examines the statutory framework, presents the two cases, discusses the legal reasoning of each opinion, and argues that the Supreme Court should reverse convictions for MDMA that are not based on expert testimony.

REGULATION OF ECSTASY

California’s Uniform Controlled Substances Act (CSA) places certain chemicals into one of five classifications known as “schedules.”² The CSA requires a valid prescription in order to obtain a schedule 2-5 drug.³ The law criminalizes possession of a controlled substance without a valid prescription;⁴ sale of a controlled substance;⁵ and possession for sale of a controlled

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¹ MDMA is short for the chemical name 3,4-methylenedioxyamphetamine.

² CAL. HEALTH & SAFETY CODE §§ 11053-11058.

³ Id. at § 11153.

⁴ Id. at § 11377.

⁵ Id. at § 11379(a).
substance.\textsuperscript{6} Despite the comprehensive regulation of controlled substances and the criminalization of their possession and distribution, California is one of only four states whose laws do not specifically list the chemical compound of MDMA – 3,4-methylenedioxymethamphetamine – as a controlled substance.\textsuperscript{7} While MDMA is not listed, the CSA does list “any material, compound, mixture, or preparation” containing “any quantity” of substances that have “a stimulant effect on the central nervous system.”\textsuperscript{8} The list includes “[a]mphetamine,”\textsuperscript{9} and “[m]ethamphetamine”\textsuperscript{10} and “[m]ethylenedioxy amphetamine (MDA)”\textsuperscript{11}

\textsuperscript{6} Id. at § 11378. This list applies to the cases cited herein and is not meant to be exhaustive.

\textsuperscript{7} The other states that do not explicitly list MDMA as a controlled substance are New Jersey, New Mexico and Rhode Island. However, in each of those jurisdictions, MDMA sale and possession remains unlawful. See, e.g., State v. One 1994 Thunderbird, 793 A.2d 792 (N.J.App.Div. 2002) (defining MDMA as a “controlled dangerous drug”); State v. Deng, 120 P.3d 830 (N.M. 2005) (treating MDMA as methamphetamine); State v. Storey, 8 A.3d 454 (R.I. 2010) (treating MDMA as methylenedioxyamphetamine). Every other state specifically lists MDMA in its laws or regulations as a controlled substance. See ALA CODE § 20-2-23(3)(a); ALASKA STAT. § 11.71.150(b)(6); ARIZ. REV. STAT. § 36-2512(A)(3)(f); 35 Ark. Reg. 4 (List of Controlled Substances, p. 3) (Feb. 2012); COLO. REV. STAT. § 18-18-203 (2)(c)(vii); CONN. GEN. STAT. 21a-243-7(c)(6); DEL. CODE ANN. tit. 16, § 4714(d)(1); FLA. STAT. 893.03(1)(a)(39); GA. CODE ANN. § 16-13-25(3)(A); HAW. REV. STAT. § 329-14(d)(4); IDAHO CODE ANN. § 37-2705(d)(11); 720 ILL. COMP. STAT. 570/204(d)(2); IND. CODE §35-48-2-4(d)(13); IOWA CODE § 124.204(4)(z); KAN. STAT. ANN. § 65-4105(d)(7); KY. REV. STAT. ANN. § 218A.050(3); LA. REV. STAT. ANN. § 40:964(c)(10); ME. REV. STAT. ANN. tit. 17-A, § 1102(o)(9); MD. CODE ANN. § 5-402(d)(1)(xvii); MASS. GEN. LAWS ch. 94C, § 31(a)(8); Mich. COMP. LAWS § 333.7212(1)(c); MINN. STAT. § 152.02(subd. 2)(3); MISS. CODE ANN. § 41-29-113(c)(4); MO. REV. STAT. §195.017(4)(j); MONT. CODE ANN. § 50-32-222(4)(k); NEB. REV. STAT. § 28-408(c)(27); NEV. ADMIN. CODE § 453.510(4); N.Y. PUB. HEALTH LAW § 3306(d)(25); N.C. GEN. STAT. § 90.89(3)(c); N.D. CENT. CODE § 19-03.1-05(5)(m); OHIO REV. CODE ANN. § 3719.41(c)(10); OKLA. STAT. tit. 63, §2-415(A)(8); OR. REV. STAT. §475.874; 28; PA. STAT. ANN. § 25.72(b)(6)(xxiv); S.C. CODE ANN. § 43-55-190(d)(3); S.D. CODIFIED LAWS § 34-208-14(29); TENN. CODE ANN. 39-17-406(g)(2); TEX. HEALTH & SAFETY CODE ANN. § 481.103; UTAH CODE ANN. § 58-37-4-2(a)(iii)(J); WASH. REV. CODE § 69.50-204(c)(11); W. VA. CODE § 60A-2-204 (d)(10); WIS. STAT. § 961.14(4)(am); WYO. STAT. ANN. § 35-7-1014(d)(xxviii). New Hampshire law provides for the placement of drugs into schedules, See N.H. REV. STAT. ANN. § 318-B:1-a, but because the state has taken no action, the courts follow the federal schedules. See State v. Cartier, 575 A.2d 347 (N.H. 1990). The federal government also lists MDMA as a controlled substance. See 51 Fed. Reg. 36552 (Oct. 14, 1986).

\textsuperscript{8} CAL. HEALTH & SAFETY CODE § 11055(d).

\textsuperscript{9} Id. at § 11055(d)(1).

\textsuperscript{10} Id. at § 11055(d)(2).
The CSA also includes analogs of the listed controlled substances.\textsuperscript{12} Under the statute, a “controlled substance analog” is defined as a substance that (1) has a substantially similar chemical structure as the controlled substance, or (2) has, is represented as having, or is intended to have a substantially similar or greater stimulant, depressant, or hallucinogenic effect as the controlled substance.\textsuperscript{13}

\textit{People v. Le}

In \textit{People v. Le}, authorities conducted a routine traffic stop in which they discovered that Defendant Le’s license was suspended.\textsuperscript{14} The police impounded the vehicle and conducted an inventory search that uncovered a plastic bag containing 407 tablets of suspected narcotics.\textsuperscript{15} At trial, Le stipulated that the tablets contained MDMA.\textsuperscript{16} Le was tried and convicted of transporting MDMA for sale and for possession of MDMA and was sentenced to seven years in state prison, which the court suspended on the condition that Le spend one year in county jail followed by three years of probation.\textsuperscript{17}

The Court of Appeal reversed Le’s conviction, holding that prosecutors presented insufficient evidence that MDMA was a controlled substance.\textsuperscript{18} The Court reasoned that because the CSA does not specifically list MDMA as a controlled substance, the government carried the burden to prove either (1) the chemical composition of MDMA qualifies as a statutorily defined controlled substance, or (2) that MDMA is similar in structure or intended effect as a listed

\begin{footnotes}
\item[11] Id. at § 11054(d)(6).
\item[12] Id. at § 11401(a).
\item[13] Id. at § 11401(b).
\item[15] Id. at 1034.
\item[16] Id. at 1035.
\item[17] Id. at 1033.
\item[18] Id. at 1038.
\end{footnotes}
drug. The Court noted that the stipulation of the parties did not satisfy either criterion, and the government presented no evidence that MDMA was a controlled substance.

The Court also rejected the trial court’s attempt to take judicial notice of the fact that MDMA contains amphetamine. During the trial, defense counsel moved to dismiss the MDMA charges, citing the lack of evidence presented that MDMA was a controlled substance. The trial court denied the request, stating “It appears to me from the way the schedule [ ] is worded, that it would include [MDMA] … based upon what appears to be the fact that it’s an amphetamine[.]” The Court of Appeal disagreed, noting, “there is no doctrine that permits a trial court … to conclude that [MDMA] contains amphetamine merely because their names are similar.”

The Court did provide two acceptable methods for the government to meet its burden. First, the parties could simply stipulate to the fact that MDMA is a controlled substance. Second, in the absence of a stipulation, the Court held that prosecutors “must offer an expert who testifies that the language of a controlled substance statute or the analog statute has been satisfied.” The Court concluded that this could be accomplished by having an expert testify either (1) “that the substance qualifies chemically as a statutorily defined controlled substance,” or (2) “that the substance is substantially similar to a [listed substance] in chemical structure or intended effect on the central nervous system.”

People v. Davis

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19 Id. at 1037.
20 Id. at 1038.
21 Id. at 1037.
22 Id. at 1035-36.
23 Id. at 1036.
24 Id. at 1037.
25 Id. at 1037-38.
26 Id. at 1038.
27 Id.
As the ink was still drying on the Second District’s opinion in *Le*, a different panel of the same district came to the opposite conclusion in *People v. Davis*. In *Davis*, an undercover officer of Los Angeles Police Department purchased two tablets of a suspected narcotics from the defendant. At trial, a criminalist from the LAPD crime lab testified that the tablets tested positive for MDMA. Another officer testified that MDMA is both a “raiser drug” and a “party drug.” On this evidence, the jury convicted Davis on separate counts of the sale and the possession of MDMA. The court sentenced Davis to 90 days in county jail followed by 36 months of probation.

On appeal, Davis argued that the government did not present sufficient evidence that MDMA was a controlled substance. In support of his argument, Davis cited two other cases in which the government introduced expert testimony that MDMA constituted an analog of methamphetamine. In the first case, *People v. Silver*, both sides presented conflicting expert testimony on the molecular structure and physiological effect of MDMA as compared to methamphetamine. In the other case, *People v. Becker*, the government presented expert testimony that MDMA includes methamphetamine, and that it consequently has a similar stimulant effect. The Court of Appeal concluded, however, “neither decision suggests that such testimony is necessary to uphold [a guilty verdict].”

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29 *Id.* at 208.
30 *Id.* at 209.
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
36 *Id.* at 392-393, 396.
38 *Id.* at 1156.
39 *Davis*, 200 Cal.App.4th at 211 (Emphasis added).
The Court then addressed the contrary opinion in the *Le* case. The Court correctly noted that “[i]f we were to follow *Le*, we would have to overturn [Davis’s] conviction.” After pointing out that the government did introduce the chemical name of MDMA – 3,4-methylenedioxyamphetamine – into evidence, the Court explained that it was “apply[ing] common sense” in concluding that because the chemical name contains both “methamphetamine” and “amphetamine,” the jury could have inferred that the tablets contained a controlled substance. To arrive at this ‘common sense’ conclusion, the Court of Appeal took judicial notice of four separate learned treatises to verify that MDMA’s chemical name reflects the fact this it is composed of methamphetamine, which is itself derived from amphetamine.

Having decided that the government presented sufficient evidence that MDMA was a controlled substance, the *Davis* court had to address the fact that the trial court did not instruct the jury that it had to determine whether MDMA was a controlled substance. The panel, citing *Silver*, decided that it was proper for the jury – not the court – to determine whether MDMA was an analog of methamphetamine. The panel noted that the failure to instruct the jury on an

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40 Id.
41 Id. at 211-12.
42 Id. at 212. California Evidence Code Section 452(h) permits a court to take judicial notice of “[f]acts 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.” In this case, the Court cited several learned treatises including: Zumdahl, *Chemical Principles* (2d ed. 1995) for the proposition that MDMA’s “chemical name reflects its component elements, which include methamphetamine and, by extension, amphetamine” (Id. at 212); Baer & Holstege, *Encyclopedia of Toxicology* (2d ed. 2005) for the proposition that “[b]oth methamphetamine and MDMA are derivatives of amphetamine” (Id.); *Stedman’s Medical Dictionary* (28th ed. 2006) for the proposition that “a derivative is a compound that may be produced from another compound in one or more steps” (Id.); *Oxford English Dict. Online* (3d ed. 2001) for the proposition that methamphetamine is “‘[a] methyl derivative of amphetamine’” (Id.).
43 Id. at 214.
element of the crime amounted to a violation of both the federal and state Constitutions, and it
decided that the failure to appropriately instruct the jury in this case amounted to error.\textsuperscript{44}

The panel saved Davis’s conviction by determining that the trial court’s error to instruct
the jury amounted to harmless error.\textsuperscript{45} An error to properly instruct the jury is harmless only if
“an omitted element is supported by uncontroverted evidence.”\textsuperscript{46} Evidence is uncontroverted if
“the defendant effectively concedes or admits the omitted element.”\textsuperscript{47} In this case, the panel
determined that Davis conceded the element by stipulating that he possessed MDMA; by failing
to ask for the jury instruction; and by referring to MDMA as both a “drug” and a “narcotic”
during the trial.\textsuperscript{48} Because there was no reasonably probability that the jury would have arrived
at a different verdict if it were properly instructed, the panel affirmed Davis’s conviction.\textsuperscript{49}

CALIFORNIA SUPREME COURT ENTERS THE FRAY

On January 11, 2012, the California Supreme Court granted a petition for review in

\textit{People v. Davis}. The Court agreed to decide whether:

[i]n 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?\textsuperscript{50}

By using the language of \textit{People v. Le}, the Court signaled that it would determine whether \textit{Le} or
\textit{Davis} correctly applied the statue and relevant case law. As of the date of this article, briefs have
not been filed in the Supreme Court. It is, however, possible to identify those issues that the
Supreme Court will have to decide.

Substantial Evidence Standard of Review

\textsuperscript{44} Id.\
\textsuperscript{45} Id. at 215.\
\textsuperscript{46} Id. at 214 (citing \textit{People v. Stanfill}, 76 Cal.App.4th 1137, 1154 (1999)).\
\textsuperscript{47} Id. (citing \textit{People v. Flood}, 18 Cal.4th 470, 504 (1998)).\
\textsuperscript{48} \textit{Davis}, 200 Cal.App.4th at 215.\
\textsuperscript{49} Id.\
\textsuperscript{50} \textit{People v. Davis}, rev. granted, Jan. 11, 2012, S198434.
The substantial evidence standard is very differential to the jury’s verdict. It provides that a conviction will not be reversed so long as “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Under this standard, the reviewing court “must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment.” The reviewing court does not determine “whether the evidence proves guilt beyond a reasonable doubt,” but simply “whether substantial evidence supports the decision.”

Recall that in Davis, prosecutors did not present expert testimony that MDMA satisfies the statutory definition of a controlled substance. However, the government did present some evidence bearing on the issue. First, the chemical name of MDMA – 3,4-methylenedioxyamphetamine – was entered into evidence. In addition, an LAPD criminalist testified that the tablets sold by Davis to an undercover officer contained MDMA. The Supreme Court will decide whether prosecutors must present expert testimony that MDMA is a controlled substance, or whether jurors may use ‘common sense’ to determine that MDMA contains methamphetamine or amphetamine.

Impact of the California Evidence Code

The Evidence Code provides that expert testimony is admissible only if it is “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” Thus, for Davis to prevail, he will have to convince the Supreme Court that jurors do not have enough sophisticated knowledge of biochemistry to determine whether

53 Id.
54 Davis, 200 Cal.App.4th at 211.
55 Id.
56 CAL. EVID. CODE § 801(a).
3,4-methylenedioxymethamphetamine contains either methamphetamine or amphetamine; and whether the jury likewise has enough knowledge of pharmacodynamics to decide whether MDMA creates the same or similar physiological effects as either methamphetamine or amphetamine.

SUPREME COURT SHOULD REVERSE DAVIS`S CONVICTION

Davis has a winning argument that the chemical composition and physiological effects of MDMA cannot be properly understood by a jury without the aid of some expert testimony. After all, the Court of Appeal itself had to rely on treatises in chemical principles and toxicology in order to conclude that MDMA actually contained a controlled substance.\textsuperscript{57} If a panel of judges had to resort to consulting textbooks to decide an issue, surely the subject of toxicology is sufficiently beyond the “common experience” of an average juror to necessitate some expert testimony. Moreover, \textit{Silver} confirms this understanding by noting that even experts in the field disagree as to whether MDMA has the same chemical structure and physiological effect of methamphetamine.\textsuperscript{58} Because experts in the field disagree, it was also inappropriate for the Court of Appeal to take judicial notice of the chemical composition of MDMA.

Given both the intrinsic complexity and the unsettled nature of the subject matter, it becomes clear that a jury needs more than just ‘common sense’ to decide issues of chemical properties of drugs. In fact, common sense is not always useful to understanding chemical structures. For example, common sense might lead a lay jury to incorrectly infer that the anti-fungal drug “fluconazole” is chemically equivalent to the stomach-acid reducing drug

\begin{footnotes}
\textsuperscript{57} See supra note 41.
\textsuperscript{58} \textit{Silver}, 230 Cal.App.3d 392-93. The court correctly noted that California Evidence Code § 452(h) allows it to take notice of “[f]acts and propositions that are not reasonably subject to dispute.….” Given the dispute among experts about the composition and effects of MDMA as compared to methamphetamine, the Court of Appeal should not have taken judicial notice.
\end{footnotes}
“omeprazole” because both drugs end in “-azole.” This confusion could be easily explained, but only through testimony of an expert knowledgeable in the field.

The *Davis* Court’s Incorrect Harmless Error Analysis

In addition to the lack of substantial evidence supporting Davis’s conviction, the Court of Appeal also erred in its harmless error analysis. Recall that the Court held that the trial court’s error by not instructing the jury that the government carried the burden of proving beyond a reasonable doubt that MDMA was a controlled substance under the CSA amounted to harmless error. In arriving at that conclusion, the Court of Appeal correctly stated the standard that an error is harmless only if “an omitted element is supported by uncontroverted evidence as where a defendant did not, and apparently could not, bring forth facts contesting the omitted element.”

The Court held that the instructional error was harmless for three reasons: Davis neither requested the correct jury instruction, nor objected to the incomplete instruction; Davis did not argue to the jury that government did not meet its burden on the missing element; and Davis never disputed that MDMA was a controlled substance, and often referred to it as both a ‘drug’ and a ‘narcotic.’

The fact that Davis did not request the correct jury instruction is not legally relevant. It is settled law that a jury instruction that relieves the prosecution of its burden to prove each element beyond a reasonable doubt “violates the defendant’s rights under both the United States

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59 See Physician’s Desk Reference (<http://www.pdr.net> [as of May 18, 2012]). Omeprazole is a “[p]roton pump inhibitor; suppresses gastric acid secretion by specific inhibition of the H+/K+ ATPase enzyme system at the secretory surface of the gastric parietal cell” whereas Fluconazole is “[t]riazole antifungal; selectively inhibits fungal CYP450 dependent enzyme lanosterol 14-α-demethylase, the enzyme which converts lanosterol to ergosterol.” It is beyond the scope of this article to explain the differences, but suffice it is to say that the two drugs are completely different in their molecular structure and physiological effect.

60 See *Davis*, 200 Cal.App.4th at 214 (internal quotations omitted).

61 *Id.*
and California Constitutions.”  

Moreover, the trial court had an additional sua sponte duty in this case to give explanatory instructions when certain terms have a “technical meaning peculiar to the law.”  

Three of the four elements in the jury instructions referred to a “controlled substance” without defining the exactly meaning of this legal term of art. 

The Court of Appeal’s second reason is similarly unpersuasive. The Court intimated that the fact that trial counsel did not argue that the prosecution failed to meet its burden in proving the missing element showed that the trial counsel “effectively conceded the issue of whether MDMA constitut[ed] a controlled substance.” This supposition by the Court is simply not supported by the record, as it is equally plausible that the defense counsel simply was not aware of the proper elements of the crime. There can be little doubt that Davis was prejudiced by his attorney’s failure to object to and argue the missing element, because a rational juror could have concluded that prosecutors presented insufficient evidence if counsel had appropriately argued that element. The fact that trial counsel did not argue the missing element to the jury clearly gives rise to a claim for ineffective assistance of counsel under People v. Sedeno and its progeny.

The Court of Appeal’s third justification suffers some from the same infirmities as the others. The fact that trial counsel never disputed that MDMA was a controlled substance simply does meet the standard that there was “unremarkable and uncontradicted evidence” that MDMA was a controlled substance. What is more, the opinion flatly contradicts the proceeding in Silver that confirms that experts disagree over whether MDMA is an analog of

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62 Id. at 213 (citing Flood, 18 Cal.4th at 479-80).  
64 Davis, 200 Cal.App.4th at 213.  
65 Id. at 215.  
66 Cf. Flood, 18 Cal.4th at 491.  
67 People v. Sedeno, 10 Cal.3d 703, 717 n.7 (1974).  
68 Flood, 18 Cal.4th at 490.
methamphetamine. This disagreement confirms that there was not “unremarkable and uncontradicted evidence” that MDMA was a controlled substance. Additionally, the fact that trial counsel referred to MDMA as a “drug” and a “narcotic” cannot relieve the government of its burden, because the jury is told that statements made by counsel during the trial are not to be considered evidence.69

The case that the Court of Appeal cited to make its point – People v. Flood – is entirely inapposite. In Flood, the California Supreme Court affirmed the defendant’s conviction for evading a pursuing peace officer even though the trial court did not instruct the jury that it must find that the pursuit involved a peace officer.70 In that case, however, the court noted that the evidence was uncontroverted that the pursuing officers were peace officers.71 The jury heard evidence that the pursuing men were police officers employed by the City of Richmond, and the status of the officers was corroborated by other witnesses.72 The Court in Flood was correct that the jury heard uncontroverted evidence that the officers were “peace officers” under the statute. However, in this case, the jury heard no evidence – let alone uncontroverted evidence – that MDMA was a controlled substance as defined by the statute.

CONCLUSION

Given the complete lack of evidence presented on an essential element of the crime, the Court of Appeal erred in affirming Davis’s conviction. The California Supreme Court should, therefore, reverse the opinion in Davis and adopt the holding in Le that in the absence of a

69 See, e.g., Judicial Council of California Criminal Jury Instructions (2012) CALCRIM No. 104 (“Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence. Their questions are not evidence.”).
70 Flood, 18 Cal.4th at 490-91.
71 Id.
72 Id.
stipulation, the government must present expert testimony that MDMA is classified as a controlled substance under the CSA.\textsuperscript{73}

\textsuperscript{73} Of course, the better approach would be for the state legislature to join the majority of other states and simply add 3,4-methylenedioxymethamphetamine to the list of controlled substances. By overturning the conviction in \textit{Davis}, the California Supreme Court could force action by the legislature to amend and clarify the statute. This will relieve the burden on the government to incur time and expense to present expert testimony in every MDMA prosecution.