No.

IN THE CALIFORNIA SUPREME COURT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

v.

LANITA DAVIS,

Defendant-Appellant.

PETITION FOR REVIEW

of an
OPINION BY THE FIRST DISTRICT COURT OF APPEAL,
DIVISION 5
Case No. A143470

APPEAL FROM THE CONTRA COSTA SUPERIOR COURT
No. 51214204
The Honorable Barbara Zuniga, Judge Presiding

Walter K. Pyle
State Bar No. 98213
2039 Shattuck Ave, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424
walt@wfkplaw.com

Attorney for Defendant-Appellant Lanita Davis
By Appointment of the Court of Appeal
Under the First District Appellate Project's
Independent-Case System

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CALIFORNIA STATUTES

UNITED STATES CONSTITUTION

BOOKS AND TREATISES

NEWSPAPERS

INTERNET SOURCES

JURY INSTRUCTIONS

RULES OF COURT

IN THE CALIFORNIA SUPREME COURT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

v.

LANITA DAVIS,

Defendant-Appellant.

PETITION FOR REVIEW

With the publication of the Court of Appeal's decision in this case, a conflict exists between two Districts of the Court of Appeal, and between two Divisions of the First District Court of Appeal, as to whether information from an Internet Web site is hearsay, and whether a comparison of pictures of pharmaceutical pills found on the Internet Website "Ident-a-Drug" is sufficient evidence to prove beyond a reasonable doubt that suspected prescription pills do in fact contain controlled substances.

THE ISSUES PRESENTED FOR REVIEW

1. The first issue is whether information taken from an Internet Web site and put into a report, the contents of which were conveyed to the jury by a witness, was inadmissible hearsay, or whether it was a "published compilation," a hearsay exception found in section 1340 of the Evidence Code.

2. The second issue is whether information gathered from an out-of-court Web site source, obtained for the purpose of presenting

the information in court in lieu of live testimony, was "testimonial" evidence under the Confrontation Clause of the Sixth Amendment.

3. The third issue is whether the People proved beyond a reasonable doubt, as the Due Process Clause requires, that the defendants possessed controlled substances, when (1) there was no expert opinion (or other direct evidence) that the pills contained controlled substances; (2) the professional standards for testing for controlled substances require both a screening test and, if it is positive, a confirmatory test, but here no confirmatory test was done; (3) and the People's expert testified that the only way she could determine whether a pill was counterfeit was to do a chemical analysis, which was not done.

4. The People's expert on "presumptive identification" testified that codeine was a Schedule III controlled substance and that the pills in Exhibit 11 B-1 tested "presumptively positive" for codeine. The fourth issue is whether the *record* evidence shows that the People proved beyond a reasonable doubt that the defendants possessed codeine, absent proof that the suspected codeine was combined in certain weights and ratios with other substances in the limited quantities set forth in the Schedule III statute.

NATURE OF THE CASE

Police recovered a large number of what appeared to be prescription pills at a residence occupied by Appellant Lanita Davis and Darrell Mooring, Sr. (Appellant Mooring's father). (Slip opn., p. 3.) Appellants were charged with possession for sale of controlled substances. (Slip opn., p. 2.)

No chemical testing of the pills was performed (3 RT 502), nor was there an expert opinion about the chemical composition of the pills. Instead, a chemist for the sheriff's crime laboratory looked on a Website called Ident-a-Drug, and compared the size, color and markings of the pills with what was on the Web site, which, she said, gave her a "presumptive identification based on the appearance and markings of the pill" (3 RT 497) of, say, diazepam (3 RT 513-514, 530), a controlled substance commonly known as Valium. (3 RT 537.) At one point the chemist volunteered, "And I feel it's important to add, these were all presumptive identifications." (3 RT 560.)

The chemist testified she could not visually look at a pill and say whether it was a legitimate or counterfeit pill. Nor would the Web site help determine that, because "that would require a chemical analysis." (3 RT 552.)

Formal guidelines for the analysis of controlled substances require the use of *two* tests based on different physical and chemical principles, a screening (or presumptive) test, and, if the screening test is positive, "the analyst must conduct a confirmation test." (Scientific Evidence in California Criminal Cases (Cont. Ed. Bar 2013) § 4.39.)

Appellants asserted on appeal that the evidence from the Ident-a-Drug Web site was inadmissible, and that there was not sufficient evidence to prove they possessed controlled substances. The Court of Appeal said the information was admissible, and that the evidence was sufficient to prove guilt.

The Court of Appeal's decision was issued September 27, 2017. A timely petition for rehearing was denied October 23, 2017. This petition is filed within 10 days of finality of the appellate court's decision.

WHY REVIEW SHOULD BE GRANTED

In People v. Stamps (2016) 3 Cal.App.5th 988 Shana Meldrum, a chemist from the sheriff's laboratory—the same witness who testified in this case—testified to the same visual comparisons (something she considered a "presumptive test") from the same Internet Web site. Division Two of the First District, citing case decisions that held Web sites were inherently unreliable (id., at p. 996), held that her testimony was inadmissible hearsay.[1]

The case at bench reached a different conclusion, because, according to the opinion, information on an Internet database is a "published compilation," a hearsay exception admissible pursuant to Evidence Code section 1340, a point which was not considered in Stamps.

In People v. Franzen (2013) 210 Cal.App.4th 1193 the Sixth District Court of Appeal, after a careful analysis, held that Internet databases do *not* come within the definition of published compilations as described in Evidence Code section 1340.

---

[1] A petition for review and a depublication request were denied in the Stamps case on January 25, 2017 (No. S238236). Two justices would have granted review.

The decision of the Court of Appeal creates a conflict in the governing law when it comes time for a trial court to rule whether information from Web sites like Ident-a-Drug is admissible to prove beyond a reasonable doubt that the defendant possessed a controlled substance.

This is an issue of substantial interest to the bar. An article discussing the breadth and importance of the decision in this case, Delaney, Thomas, "Can the internet provide reliable case-specific facts?" recently appeared in the San Francisco Daily Journal (October 23, 2017) p. 8. The article contends that Mooring (this case) and Stamps can provide guidance to practitioners on "how the published compilation exception under Evidence Code Section 1340 may apply to information from a source that has been characterized as 'inherently untrustworthy'—the internet."

Review is necessary to secure uniformity of decision with respect to whether information found on the Internet is reliable enough to constitute proof beyond a reasonable doubt of the "facts" which appear there. (Rule (8.500(b)(1), California Rules of Court.)

In addition to the conflict between the decision in the case at bench and the decisions in Stamps and Franzen, the decision is in conflict with the accepted professional standards for the analysis of suspected controlled substances, which require a preliminary, or screening, test, followed by a confirmatory chemical analysis. Allowing the People to meet their beyond-a-reasonable-doubt standard under the Due Process Clause with a mere visual screening test is an endorsement of junk science, something which in recent years has been cause for serious concern to the courts. As

the United States Supreme Court has recognized, "Serious deficiencies have been found in the forensic evidence used in criminal trials." (Melendez-Diaz v. Massachusetts (2009) 557 U.S. 305, 319.) Review is necessary to settle an important question of law with respect to the requirements of chemical analysis of suspected controlled substances. (Rule (8.500(b)(1), California Rules of Court.)

LEGAL DISCUSSION

I.
THE DECISION HERE CONFLICTS WITH *PEOPLE v. FRANZEN*, WHICH HELD THAT AN INTERNET DATABASE QUERIED BY A WITNESS IS NOT A "PUBLISHED COMPILATION" FOR PURPOSES OF SECTION 1340 OF THE EVIDENCE CODE.

The Court of Appeal's opinion (p. 12) concludes that the information found on the Ident-a-Drug Web site is a "published compilation" as defined in Evidence Code section 1340, an exception to the hearsay rule.

We submit that the Ident-a-Drug Web site, like most Web sites, is neither "published" nor a "compilation."

In People v. Franzen the Sixth District Court of Appeal analyzed in detail the nature of a database accessible on the Internet and compared its characteristics with the "published compilation" exception. The court concluded that a database accessible on the Internet "bears virtually no resemblance to a 'published compilation' " as the latter is commonly described. (Id., 210 Cal.App.4th, at p. 1210.) "[I}nformation on a database is not *presented to* users in any form, let alone in a fixed form analogous to

printing." (Ibid. [italics by the court].) Rather, the content is electronically "retrieved byte by byte" through electronic searching. (Ibid.)

The Court of Appeal opinion here found Franzen to be "easily distinguishable," because the source of the information for the database for the particular Web site under consideration in Franzen was unknown. (Slip opn., p. 15.)

But such an analysis misapprehends the holding in Franzen. Franzen did not say that some Internet Web sites are published compilations while others, like the particular site under consideration there, are not; it said that Internet Web sites *in general* do not qualify as a published compilation. Information on the internet is too easily changed, by either the database operator or a hacker, for *any* Internet database to be deemed accurate.

A.
People v. Franzen States that the Content of a Web Site Was Not "Fixed." The Decision Here Says it Is.

The Court of Appeal opinion states that the Ident-a-Drub Web site is a "fixed form analogous to printing." (See slip opn., p. 13.)

We suggest that this conclusion is based on an erroneous assumption of the underlying nature of an Internet Website, and is a conclusion which risks misleading trial courts seeking to analyze what information on the Internet—if any—is reliable enough to be admitted as evidence.

The decision in the case at bench focused on the information the inquirer sees on his or her computer screen, while People v. Franzen focused on the source of that information. Franzen

explained that information online is completely *electronic* in form, subject to both purposeful or unintended modification at any given moment. The information is not "fixed" at all.

The paradigmatic "compilation" is written, said the court in Franzen, and is made public by printing, or an equivalent process. (Id., 210 Cal.App.4th, at p. 1210.) The content of a Web site, in contrast, is stored on a server at a remote location, perhaps in a state a thousand miles away. If a juror actually went to Texas (or wherever the server for the Ident-a-Drug Web site was located) and looked at the server, she would not see a picture of a Valium pill, or the name "Watson" (which is sometimes imprinted on pills, see 2 RT 291), like she would on her computer, or even see a code in the form of a series of 1's and 0's. All she would see is a magnetically coated medium, perhaps a hard disc, or a series of semiconductor chips, with millions of tiny transistors or capacitors. Information would not be "presented" to the juror (see ibid.), because she would not "see" any information at all. That is because electronic information is stored using positive and negative magnetic charges to represent the code for the information in an electronic format. The information is volatile, as opposed to "fixed," which means it never reaches a "final" form, and can be overwritten at any time, replaced by new magnetic charges. This allows for fast updating or corrections, and it also allows for hackers to make unauthorized changes, or for corruption from other causes. This is what Franzen meant when it said that "a database bears less resemblance to an organized fixed presentation than to an invisible, shapeless mass of information." (Id., at p. 1211.) Web site content does not become a

"published compilation" merely because it is accessible through a Web site. (Ibid.) The court in Franzen was not speaking about the particular Web site used in that case, but of Web sites in general.

In addition, as Franzen explained, unlike a "fixed" presentation, such as a stock market quotation published in the newspaper, there is no commercial incentive for a Web site like Ident-a-Drug to be accurate and reliable. Internet data is not "fixed," but rather is subject to revision at any time, and there is no way for the public to know when an error has occurred. (Id., 210 Cal.App.4th, at p. 1212.) The difficulty of printing out hard copy, said the court in Franzen, "has had some tendency to inhibit the circulation of erroneous information. That inhibition has now all but disappeared," which means that the mere fact of "publication" on the internet "cannot be relied upon to furnish any assurance of reliability." (Ibid.)

Nor does the fact that a fee is paid to access the site make the site accurate, as the Court of Appeal here inferred. (See slip opn., p. 14.) As the court in Franzen stated, "treating a website's database as a 'published compilation' merely because a fee is paid for access would stray far from the conception underlying section 1340." (Id., at p. 1212.) The court in Franzen described the flaw in assuming that a database creator will not make mistakes for fear of financial repercussions:

> Wherever the information may come from, nothing requires a database creator to take any particular steps to ensure its correctness. He may choose quantity over quality and leave it to users to verify the accuracy of the data they retrieve. When an inaccuracy is brought to the

> operator's attention it may be corrected with no one the wiser save the person who discovered it. And while the entire database may be accessible at any given time, it never achieves a final, unified form in which it is "published" to a mass audience.

(Ibid.) These concerns are equally applicable to the Ident-a-Drug Web site.

Franzen, then, is not distinguishable. Rather, it is in direct conflict with the decision in the case at bench. This means one trial judge can choose to follow Franzen, and the judge in the courtroom down the hall can choose to follow Mooring. *Stare decisis* serves the important goals of stability in the law and predictability of decision. The decision here seriously detracts from those goals.

This court can grant review of a Court of Appeal decision "to secure uniformity of decision" (Rule 8.500(b)(1), and there is an urgent need to do so here.

B.
People v. Franzen Said That Gathering Information at an Internet Web Site Does Not Result in a "Compilation" as That Term Has Been Recognized as a Hearsay Exception. The Decision Here Says it Does.

The published compilation hearsay exception has always been considered a narrow one. (People v. Franzen , supra, 210 Cal.App.4th, at p. 1208 ["the published compilation exception is not to be broadly or uncritically applied"].) The Commission Comments to section 1340 give only two cases as examples, one involving actuarial tables (Emery v. Southern Calif. Gas Co. (1946) 72 Cal.App.2d 821, 824-826) and one involving mortality tables (Christiansen v. Hollings (1941) 44 Cal.App.2d 332, 339-341). The

Comments also cite section 2724 of the California Commercial Code, which allows admission in evidence of market reports "in official publications or trade journals or in newspapers or periodicals of general circulation." One federal case gave as examples covered by a similar federal rule (Fed. R. Evid. 803(17))[2] "market reports, telephone directories, weather reports, mortality tables or like documents." (Conoco Inc. v. Department of Energy (Fed. Cir. 1996) 99 F.3d 387, 393.)

The Franzen court noted that the statute itself, before using the phrase "or other published compilation," lists four specific kinds of "compilations" that will come within its scope:

- a "tabulation;"
- a "list;"
- a "directory;" and
- a "register."

(Id., at p. 1209.) Applying the constructional principle of *ejusdem generis*, the court concluded that the Web site in that case ("Entersect") was not similar in nature to the enumerated phrases. The meaning of "compile" connotes "to collect and put together," usually in written form, such as a "literary work or the like formed by compilation." (Ibid.) "From the user's perspective, a database bears less resemblance to an organized fixed presentation than to an invisible, shapeless mass of information." (Id., at p. 1211.)

---

[2] Rule 803(17) of the Federal Rules of Evidence is similar to California Evidence Code § 1340, except that it is slightly broader; it references use by the "public" instead of businesses, as the California statute does.

C.
People v. Franzen Said That The Content of a Web Site Was Not "Reliable." The Decision Here Says It Is.

The court's opinion states that the Ident-a-Drug Web site is "generally . . . relied upon as accurate" by the crime lab. (Slip opn., p. 14.) The reader—including a trial judge trying to determine whether to allow "Ident-a-Drug" information to be admitted in evidence—might get the impression from that statement that there was testimony that the crime lab relied on the Web site as accurate, when the court's opinion was actually just quoting a portion of Evidence Code section 1340. There was no testimony about how "accurate" the crime lab considered information on the Web site to be.[3] A word search discloses that the only time the word "accurate" appears in Meldrum's testimony is when she was asked if 25 to 50 times was an "accurate" number of the number of confirmatory tests she had done in her laboratory. (3 RT 558.) Meldrum did answer a general preliminary question about the "tests" her crime

---

[3] The Ident-A-Drug Web site advises subscribers, "Users of this document are cautioned to use their own professional judgment and consult any other necessary or appropriate sources prior to making clinical judgments. See https://identadrug.therapeuticresearch.com/logon.aspx?cs=&s=ID&bu=%2fid%2fmemberhome.aspx%3fcs%3d%26s%3dID%26SearchType%3dexact%26SearchType%3dexact%26IDSearchSide1%3dlegal%26btnSearch.x%3d0%26btnSearch.y%3d0.

Meldrum applied none of her own judgment or expertise to the information from the Web site; she simply repeated what information she found there As the court in Stamps put it, Meldrum was a "mere conduit" for the Ident-A-Drug hearsay. (Stamps, supra, at p. 992, fn. 2.)

lab uses, which she said are generally accepted in the scientific community (3 RT 495), but she was never asked about the *accuracy* of the information on the Ident-a-Drug site, or whether she considered visiting the Web site to be a "test" in that specific context, or who else uses the Web site. Indeed, Meldrum's testimony as a whole suggested that the laboratory did *not* consider the information to be accurate, because the only way they could determine whether a pill was actually counterfeit was to do a confirmatory test:

> Q. So -- but the Internet wouldn't help you determine if it was a counterfeit or a legitimate pill either?
> A. No, that would require chemical analysis.

(3 RT 552.)

If presumptive tests were truly "accurate," there would be no need for confirmatory tests. But as Meldrum told the prosecutor, it is correct to say that "you can't be certain what's in the pills without actually performing any confirmatory tests." (3 RT 557.)

Meldrum did testify, "The source of the information for the Ident-A-Drug Internet website is the Food and Drug Administration and information from the pharmaceutical manufacturers," but she was "not familiar with all the steps they go through to ensure uniqueness or how the registering works of different drugs." (3 RT 555.)

Who obtains the information from the FDA?

We do not know.

What expertise does that person have?

We do not know.

How does that person go about obtaining the information?

We do not know.

What quality controls are in place to ensure the accuracy and lack of errors in the information on the Web site itself?

We do not know.

When it comes to specific evidence necessary to prove a specific crime beyond a reasonable doubt, "evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretations of the hearsay exception rules." (United States v. Jackson (7th Cir. 2000) 208 F.3d 633, 637, cert. denied, 531 U.S. 973.) The information from the Web site here was tentative at best. It required a confirmatory test to determine what was actually in the pills, and that was not done.

Retrieval of information from a website "cannot transform it into proof worthy of presentation to a jury." (Franzen, supra, at p. 1215; see also Cook v. United States (9th Cir. 1966) 362 F.2d 548, 549 [taking judicial notice that "whether or not a powder or substance is a narcotic cannot be determined by a mere inspection of its outward appearance"]; Garvey v. O'Donoghue (D.C. 1987) 530 A.2d 1141, 1145 [holding *Physicians' Desk Reference* does not fall under the "lists" hearsay exception of Fed.R.Evid. 803(17)]; Kahanek v. Rogers (Tex.App., San Antonio, 1999) 12 S.W.3d 501, 504 [PDR is not "a compilation of market material"].)

D.
The Content of the Web Site Was Not "Necessary."

Weinstein's Federal Evidence explains that hearsay exceptions such as market reports and commercial publications

under Federal Rule 803(17) are predicated on factors of reliability and necessity. "Necessity lies in the fact that if this evidence is to be obtained, it must come from the compilation, since the task of finding every person who had a hand in making the report would be impossible." (5 Weinstein's Federal Evidence (Matthew Bender 2002) § 803.19[1].)

The use of the Ident-a-Drug site may be helpful, but it is not "necessary" to a police investigation in the sense that, like a market report, the information is not easily available from other sources. Meldrum or the police could have simply have utilized a different presumptive test, such as the color test Meldrum mentioned (3 RT 495), or thin layer chromatography, or one of several immunoassays available on the market. (See Scientific Evidence in California Criminal Cases, supra, § 4.42 [color tests], § 4.43 [thin layer chromatography], § 4.44 [immunoassays].)

Law enforcement investigators often use or rely on information even when they doubt its accuracy. Presumptive tests sometimes prove inaccurate, but the investigation still goes on, because they are not "necessary" to the investigation. A confirmatory test, on the other hand, is "necessary" to an investigation, because, as Meldrum testified (3 RT 557), "you can't be certain what's in the pills without actually performing any confirmatory tests." That necessary test was lacking here.

The conclusion by the Court of Appeal in our case, then, is in direct conflict with People v. Franzen, and suffers from significant shortcomings in its application of the published compilation hearsay exception.

II.
TESTIMONY RELATING THE CONTENTS OF THE IDENT-A-DRUG WEB SITE VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

The court's opinion states that "the challenged hearsay is not testimonial." (Slip opn., p. 18.) The opinion reasons that the information compiled by someone working on the Ident-a-Drug Web site "was not to gather or preserve evidence for a criminal prosecution."[4]

A.
In Addressing Whether Information Is Testimonial, Reviewing Court Should Look to the Purpose for Which the Information Was Obtained by the In-Court Witness, not the Purpose for Which the Out-of-Court Witness Obtained It.

The critical inquiry, however, is not the purpose of the actions of the hearsay *declarant*, but the purpose for which *the testifying witness* gathered the information.

Statues enacted in England during the 16th century reign of Queen Mary permitted justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court in lieu of live testimony. (Crawford v. Washington (2004) 541 U.S. 36, 43-

---

[4] The court cites a footnote in Stamps for the proposition that the content of the Ident-a-Drug Web site was not testimonial. (Slip opn., p. 18.) We have obtained copies of the briefs filed in People v. Stamps. (No. A2142424, First Appellate District, Division 4.) They show that neither party addressed the question whether the information on the Web site was testimonial.

A decision is not authority for what is said in the opinion, but only for the points actually involved and actually decided. (Trope v. Katz (1995) 11 Cal.4th 274, 284.)

44; see also Melendez-Diaz v. Massachusetts, supra, 557 U.S. 305, 310-311 [documents prepared by laboratory analysts were prepared for an "evidentiary purpose," and were "functionally identical to live, in-court testimony"].) It did not matter how the out-of-court suspect or witness gathered the information he possessed; rather, what raised confrontational concerns at the time the Constitution was adopted in our country was the purpose for which *the justice of the peace* gathered the information from the witnesses, which was to present the information in a courtroom as a substitute for live testimony.

The same confrontational concerns are present here. The reason Meldrum went to the Internet in the case at bench was precisely the same reason a 16th or 17th century justice of the peace went to an out-of-court witness—to obtain and present the out-of-court information in a court of law as a substitute for live testimony—with no opportunity to cross-examine its source.

B.
Meldrum's Gathering of the Information Was Sufficiently Formal for a "Testimonial" Purpose.

The opinion notes that to be testimonial, the statement to the in-court witness "must be made with some degree of formality or solemnity." (Slip opn., p. 18.)

Meldrum's access of the information can be described as methodical, precise, proper, which are synonyms for the word "formal." (See Thsaurus.com, available at http://www.thesaurus.com/browse/formal [last visited November 1, 2017].) "Solemn" has been defined as "Having or showing a

formal and serious or reserved manner; not joking or playful in mood or manner; causing or marked by an atmosphere lacking in cheer." (Merriam-Webster Thesaurus, available online at https://www.merriam-webster.com/thesaurus/solemn [last visited October 31, 2017]. We submit that Meldrum's access of the information was sufficiently formal or solemn to qualify as "testimonial" in nature, when it was gathered for the purpose of presenting it to a jury.

III.
CHEMISTS DO NOT ANALYZE SUSPECTED CONTROLLED SUBSTANCES BY LOOKING AT THEM. IT IS IMPORTANT THAT THE COURTS PERMIT ONLY EVIDENCE DERIVED FROM A METHODOLOGY UTILIZED BY THE SCIENTISTS WHO USE IT.

A.
Professional Standards Require a Confirmatory Test to Determine What the Pills Actually Are, and the People's Expert Was Careful to Say the Tests Here Were Only Presumptive.

The court's opinion states that defendants acknowledge that "chemical analysis is not always required to establish the identity of a controlled substance." (Order Modifying Opinion and Denying Rehearing, p. 2; slip opn., p. 20.)

This overstates what defendants acknowledge.

At oral argument we agreed that in certain limited circumstances this might be so. We gave the example of marijuana, which has a distinctive leaf pattern, a distinctive smell, and has a certain effect on the human body. A person who observed the leaves of the plant, smelled it, smoked it and experienced a resulting "high," might be qualified to testify, based on her experience, that

what she consumed was marijuana.[5] And in at least one case cited by the parties, a chemical analysis was performed on half of a quantity of drugs and the court concluded that that was sufficient proof that the other half was a controlled substance, too.

But such examples are rare exceptions which usually arise when the suspected substance has not been recovered. In most cases, a chemical analysis *is* required; indeed, the professional standard for testing suspected controlled substances ordinarily involves a two-step protocol—a screening test, and, if it is positive, a confirmatory chemical analysis.

As a general rule, "evidence of a scientific test should not be admitted unless the scientific basis for the test and its reliability are generally recognized by competent authorities." (People v. Coleman (1988) 46 Cal.3d 749, 775.)

The toxicology standard for testing controlled substances is summarized in Scientific Evidence in California Criminal Cases, supra:

> § 4.39 1. Two-Step Protocol
>
> Forensic toxicology requires that drug identification be made beyond a reasonable scientific doubt. While forensic toxicology has no mandatory protocols for testing processes, formalized guidelines outline good practice. *It is a long-established guideline that good practice requires the use of two tests based on different physical and chemical principles.* This

---

[5] The trial court would have to determine whether the witness's experience was "of a type that reasonably may be relied upon by an expert in forming an opinion on the subject." (Evid. Code § 801, subd. (b).)

guideline has been formalized in the SOFT/AAFS Forensic Toxicology Laboratory Guidelines (2006) by Society of Forensic Toxicologists, Inc., and the American Academy of Forensic Sciences (Toxicology Section); for the online version of these guidelines, go to http://www.soft-tox.org/files/Guidelines_2006_Final.pdf. Identification of a drug by the use of two similar methods is not acceptable because, for example, two different immunoassays may have antibodies with similar cross-reactivities or artifact susceptibilities, each of which cold generate the same incorrect result. The combination of an immunoassay screen and confirmation through gas chromatography (GC), high-performance liquid chromatography (HPLC), or mass spectrometry (MS) meets the requirement of using two different techniques for forensic drug identification. See Wolff et al., A Review of Biological Indicators of Illicit Drug Use, Practical Considerations and Clinical Usefulness, 94(9) Addiction 1279-1280 (Sept. 1999).

Forensic drug identification is generally conducted in two steps: a screening test and a confirmation test. [Italics added.] The screening test enables the laboratory to quickly determine whether a sample is negative or presumptively positive for a given drug or drug class. If a screening test shows that a sample is negative for a specific drug, the analyst can have a high degree of confidence that there is none of that specific drug in the sample. If the screen is positive, however, *the analyst must conduct a confirmation test.* [Italics added.]

This California standard is the same as the national standard. "A Simplified Guide To Forensic Drug Chemistry," a Website developed and designed by the National Forensic Science Technology Center under a cooperative agreement from the Bureau of Justice Assistance [a component of the Office of Justice Programs, U.S. Department of Justice] available at:

http://www.forensicsciencesimplified.org/drugs/principles.html [last visited Oct. 24, 2017] explains in "Presumptive & Confirmatory Testing for Drugs" the difference between presumptive and confirmatory testing:

> There are two main types of tests used to determine whether an illegal drug is present in a substance: presumptive tests and confirmatory tests. Presumptive tests are less precise and indicate that an illegal substance may be present. Confirmatory tests provide a positive identification of the substance in question.

If a presumptive test were sufficient proof beyond a reasonable doubt of the chemical composition of a substance, there would be no need for the more expensive confirmatory test.

The People did not dispute that professional standards for testing for controlled substances requires a screening test and a confirmatory test. They argued however, and the court's opinion seems to at least implicitly accept (slip opn., p. 20-21), that "circumstantial evidence" proved the chemical composition of the pills beyond a reasonable doubt.

We respectfully submit that such reasoning is unsound. Performing only the first half of the screening/confirmatory test protocol is not circumstantial evidence that a controlled substance is present. What a confirmatory test would have shown is, as Meldrum testified, uncertain. Indeed, a screening test is not circumstantial evidence at all. As the jury was instructed, circumstantial evidence involves proof of a fact from which the jury may reasonably conclude the truth of the fact in question, (4 CT 982), whereas evidence of the results of the presumptive tests here

was offered by the prosecution to prove the fact in question itself. As Meldrum testified, the presumptive test still left her uncertain what was in the pills, and the only way to resolve that uncertainty was with a confirmatory test. (3 RT 557.) Her testimony about the appearance of the pills was direct, not circumstantial, evidence. Circumstantial evidence involves proof of a fact from which a logical inference leading to a conclusion about another fact can be drawn. In this case, for example, the court instructed the jury that circumstantial evidence "is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question." (CALCRIM 223, 4 CT 982.) Meldrum's testimony was offered to prove the fact in question, not a fact from which the fact in question could be inferred.

B.
The Court of Appeal's Opinion Erroneously Suggests That Scientists Can, and Do, Determine Whether a Suspected Prescription Pill is Counterfeit by Comparing it With Examples of Pills Found on the Internet. The People's Chemist Testified That Without a Chemical Analysis She Could *Not* Tell if a Suspected Pill Was Counterfeit or Not.

The court's opinion states that "Meldrum did not think the pills were counterfeit" (Slip opn., p. 4) and that she "testified she did not believe the pills were counterfeit."[6] (Slip opn., p. 21.)

---

[6] Curiously, Respondent's Brief made two similar assertions, one at p. 5 ("Meldrum did not suspect that any of the pills she examined were counterfeit") and another at p. 36 (Meldrum "concluded that none of the pills that she presumptively tested were counterfeit"). (Respondent's Brief, p. 36.)

The problem with these statements found in the opinion is that they are not supported—and indeed are contradicted—by the record. A judge being asked to admit evidence like that found on the Ident-a-Drug Web site could erroneously believe the Web site had been found sufficiently reliable to discern if a pill was counterfeit.

Meldrum testified that she had read in some scientific journals that some counterfeit pills have a softer texture or a slightly different color than genuine pills, and she did not see any such indicators in the pills she examined. But she cautioned that did not men the pills were not counterfeit: "Um, but, again, it is important to express those are not -- just because those features aren't there, doesn't mean the pill isn't counterfeit." (3 RT 556.)

Earlier in her testimony Meldrum defined counterfeit pills as "pills that are marked and shaped and colored to look like something they're not." (3 RT 542.) The prosecutor followed up with a leading question which suggested that Meldrum believed the pills were not counterfeit, but to her credit, Meldrum did not rise to the bait:

> Q. Okay. So can you tell this jury why you think that the drugs in this case are not counterfeit drugs?
>
> A. Um, again, I have -- there were no indications in my visual inspection that they were counterfeit pills. They all looked to be pressed.[7] Um, none of the pills appeared

---

[7] Drug manufacturers commonly use a pill press to manufacture pills. A CNN article by Sara Ganim, "Numbers," posted March 17, 2017, states that pill presses, which "allow someone to take powder and press it into a pill that looks

crumbly, which sometimes you see with homemade pills. But *I don't know with any certainty that any of these are not counterfeit pills because I did not do a chemical analysis.*

(3 RT 542 [italics added].) The analysis Meldrum performed on the pills "was a physical analysis only, meaning that no chemical or confirmatory testing was done." (3 RT 502.)

On cross-examination, Meldrum was asked if she could tell if a pill was counterfeit by looking at it. She answered:

> A. *I'm unable to visually look at a tablet and say with any certainty that it's a legitimate or counterfeit pill*, no.
>
> Q. So -- but the Internet wouldn't help you determine if it was a counterfeit or a legitimate pill either?
>
> A. No, *that would require chemical analysis.*

(3 RT 552 [Italics added].) Finally, Meldrum was specific that presumptive tests did not establish the chemical composition of the pills, because without a chemical analysis she could not tell *what* was in the pills:

> BY MR. ADODOADJI [The Prosecutor]:
>
> Q. You also talked about *you can't be certain what's in the pills without actually performing any confirmatory tests*.
>
> A. *That is correct.*
>
> Q. When you discuss the term "certainty," are you talking about scientific certainty?

---

legitimate," can easily be obtained online. The article also states that U.S. Customs and Border Protection is seizing pill presses at a rate 19 times higher than 2011. (Available at: http://www.cnn.com/2017/03/17/health/pill-presses-counterfeit-fentanyl/index.html [Last visited Oct. 3, 2017].)

A. I'm talking about the scientific certainty *that would be required for me to testify that that is what the pill contains*, yes.

Q. Okay. So the nature of the testing that you performed limits or defines what you can actually testify to knowing; would that be fair to say?

A. That would be fair. These are all presumptive analyses.

(3 RT 557 [italics added].)

Chemists and toxicologists simply do not analyze a suspected controlled substance by looking at it. The harm done by the statements in this published opinion—a case of first impression—is that they give judges and lawyers who read the opinion the impression that they do, when Meldrum's actual testimony was that to tell whether a pill was counterfeit "would require a chemical analysis." (3 RT 552.)

Meldrum's conclusion that one cannot tell whether a pill is counterfeit by looking at it is supported by evidence presented to the U.S. Food and Drug Administration, by Randall W. Lutter, the Acting Associate Commissioner for Policy and Planning, at the Food and Drug Administration, who told a Congressional hearing on counterfeit drugs in the United States (November 1, 2005) that many counterfeit prescription drugs "are visually indistinguishable from authentic drugs." ("Statement of Randall W. Lutter, Ph.D., Acting Associate Commissioner for Policy and Planning Food and Drug Administration" (Nov. 1, 2005), available at:

https://web.archive.org/web/20090118043854/http://www.fda.gov/ola/2005/counterfeit1101.html [last visited Oct. 24, 2017].) A more recent CNN article posted March 17, 2017, Ganim,

Sara, "Pill presses for counterfeit drugs seized in record numbers," supra (available at: http://www.cnn.com/2017/03/17/health/pill-presses-counterfeit-fentanyl/index.html [last visited Oct. 24, 2017]) quotes John Martin, the DEA Special Agent in charge of the San Francisco Division as saying, "To the naked eye, you can't tell the difference."

According to Carl Sagan, surveys suggest that some 95 percent of Americans are "scientifically illiterate." (Sagan, Carl, The Demon-Haunted World: Science as a Candle in the Dark (1995), p. 6.) Even conceding there is a degree of arbitrariness about the determination of illiteracy, it is clear that a large segment of the general population—which includes lawyers, judges and juries—are not familiar with many of the accepted scientific techniques that may affect the liberty of a criminal defendant.

That is why more than 40 years ago this court rejected the idea that the reliability of scientific evidence should be a matter left to the discretion of a judge, and instead decreed that the task of determining reliability of an evolving technique must be assigned to members of the scientific community from which the new method emerges. (People v. Kelly (1976) 17 Cal.3d 24, 31.)

Meldrum, Lutter and Martin are the kind of persons in the scientific community who deal on a day-to-day basis with counterfeit prescription pills. They all say one cannot tell if a pill is counterfeit just by looking at it. If some new scientific technique arises that would allow the chemical nature of pills to be analyzed by simply looking at them, it is for persons like them, not a court, to say that such a technique is acceptable to scientists. The opinion of

the Court of Appeal here undertakes a role not intended by this court. (People v. Kelly, supra, 17 Cal.3d, at p. 31.) Worse yet, it endorses a bad scientific technique, one not recognized by the scientists who actually test for controlled substances.

C.
Confirmatory Tests Are Necessary to the Integrity of the Criminal Justice System.

There is good reason underlying the professional toxicology standards, and for Meldrum's testimony, of the necessity of a confirmatory test to prove the chemical composition of a substance.

Numerous contemporary reports confirm the unreliability of presumptive tests for drugs. For example, Harris County, Texas alone had 42 drug case exonerations after a new District Attorney was appointed and the office's Conviction Review Section discovered that laboratory tests showed that numerous suspected drugs were not what they had been assumed to be. According to BBC News,[8] in many cases pills were simply misidentified, even after positive field screening tests.

On July 10, 2016 the New York Times Magazine, in the cover story "Proof Negative," reported (at p. 34) that widespread evidence shows that presumptive color tests routinely produce false positives. The article (available online at https://www.nytimes.com/2016/07/10/magazine/how-a-2-

---

[8] Lussenhop, Jessica, "Why Harris County, Texas, Leads the U.S. in Exonerations"(BBC News, Feb. 12, 2016), available at http://www.bbc.com/news/magazine-35543898 [last visited 12-28-15].

roadside-drug-testsends- innocent-people-to-jail.html?_r=0) questions why police and prosecutors still use them. The piece concludes (p. 53) by describing one woman who pled guilty based on a false positive presumptive test as "one among unknown tens of thousands of Americans whose lives have been torn apart by a very flawed test." A letter from the Harris County District Attorney's Office advised the woman, years after she had been jailed and lost her job, that she had been "prosecuted for a criminal drug offense and convicted in error."

In ruling that sworn certificates from laboratory analysts about the content of drug samples violated the Confrontation Clause, the U.S. Supreme Court itself stated, "Serious deficiencies have been found in the forensic evidence used in criminal trials." (Melendez-Diaz v. Massachusetts, supra, 557 U.S. 305, 319.)

The number of sources reporting the presence of flawed science in the courtroom shows that there is a perceived crisis in the quality of forensic evidence being used to obtain convictions, and suggests that this and other courts should insist on strict standards of admissibility for forensic tests, consistent with the protocols developed by the professionals who actually use them and who understand what is necessary for reliable forensic analysis.

Should the courts permit the admission of the kind of evidence which scientists do *not* rely on to prove that something is a controlled substance? To prove it beyond a reasonable doubt? In view of the conflict with the applicable professional standards, this court should grant review to make that determination.

IV.
THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANTS POSSESSED CODEINE IN A FORM THAT VIOLATED THE HEALTH AND SAFETY CODE.

Appellants asserted on appeal that the People had not proved they possessed dihydrocodeinone or codeine in a form that was prohibited by law, because Meldrum testified that dihydrocodeinone (3 RT 507) and codeine (3 RT 521) are Schedule III controlled substances, and under the Schedule III statute they are illegal only if they are combined with certain other substances in certain specific weights and ratios. (See Health & Saf. Code § 11056, subd. (e).) The State offered no testimony about weights or ratios, and thus failed to prove an essential element of the offense. (In re Winship 1970) 397 U.S. 358, 364.)

The Court of Appeal opinion agreed with respect to dihydrocodeinone (slip opn., p. 22), but disagreed with respect to codeine (slip opn., p. 23, fn. 12), because, the opinion said, codeine [in its unadulterated form] is also a Schedule II drug. (Health & Saf. § 11055, subd. (b)(1)(G).)

The People, however, did not try the case as a substance prohibited by Schedule II; when Meldrum testified about pills being "presumptively positive for codeine," the prosecutor asked her "what schedule is that particular substance," to which she answered, "Codeine is a Schedule III controlled substance." (3 RT 521.)

Thus all the jury had before it was evidence of a Schedule III drug. As this court has stated before, "An appellate court cannot take judicial notice of additional facts the prosecution failed to prove

at trial to affirm a conviction." Rather, the question is whether "the *record* evidence" supports the verdict. (People v. Davis (2013) 57 Cal.4th 353, 360 [italics by the court].)

CONCLUSION

This case presented precisely the same issue as in People v. Stamps, where the same criminalist accessed the same Web site and gave virtually the same testimony to the jury. In Stamps the Court of Appeal expressed "a common judicial skepticism of evidence found on the Internet" (3 Cal.App.5th, at p. 996), and reversed the conviction, while here the Court of Appeal found the "evidence" from the Internet to be accurate (slip opn., p. 14), and affirmed the conviction. In each case Meldrum's "unvarnished recapitulation of what she saw on the Ident-a-Drug Internet Web site" (3 Cal.App.5th, at p. 998) was central to the conviction. The two cases cannot be reconciled.

The decision here held that information on an Internet Web site is a "published compilation," whereas in People v. Franzen the Sixth District Court of Appeal held that information on an Internet Web site is *not* a published compilation. The two cases cannot be reconciled.

This means there is no uniformity of decision to provide predictability and to guide lawyers preparing for trial or judges who must rule on the admissibility of such evidence.

Even if the information on the Web site fell within a hearsay exception, there was insufficient evidence of guilt, because the decision here is also in conflict with long-standing professional

standards for drug identification, which require a screening test, and, if the screen is positive, "the analyst must conduct a confirmation test." The purpose of the Due Process Clause of the Fourteenth Amendment is to guarantee a criminal defendant a fair trial. The unfairness of the trial here, and the wisdom of the applicable professional standards, is illustrated by the testimony of the People's own witness, who stated unequivocally that "you can't be certain what's in the pills without actually performing any confirmatory tests." (3 RT 557.)

Uncertainty is not proof beyond a reasonable doubt.

Finally, the Sixth Amendment guarantees a criminal defendant the right to be confronted with the witnesses against him. Here the primary "witness" was an unknown agent who gathered information on a Web site and who did not appear in court, and whose "our-of-court statement," as Stamps described it (3 Cal.App.5th, at p. 996, fn. 6), was presented in the same manner as were out-of-court statements in 16th century England. The purpose of the Sixth Amendment was to prohibit such practices.

Uniformity of decision and the fairness of criminal trials can be maintained only if his court grants review to resolve the inconsistencies created by this decision.

Respectfully submitted

/s/ Walter K. Pyle

Walter K. Pyle
Attorney for Defendant-Appellant Lanita Davis
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704
(510) 849-4424

CERTIFICATE OF COMPLIANCE

I certify that this brief is in 13-point roman typeface and that it contains 7898 words.

/s/ Walter K. Pyle

Walter K. Pyle

APPENDIX

OPINION
OF THE
COURT OF APPEAL

People v. Mooring and Davis

No. A143470

Proof of Service

The undersigned is at least 18 years of age and not a party to this action. My business address is 2039 Shattuck Avenue, Suite 202, Berkeley, CA 94704-1116. My electronic service address is walt@wfkplaw.com. I served the foregoing

PETITION FOR REVIEW

on Friday, November 3, 2017 by transmitting a PDF copy thereof via the court's TrueFiling system to the following participants who are registered with TrueFiling:

Office of the Attorney General
SFAG.Docketing@doj.ca.gov

First District Appellate Project
eservice@fdap.org

Court of Appeal
First District, Division 4

and by enclosing a copy thereof in a sealed envelope and depositing it with postage fully prepaid in the United States mail at Berkeley, California on said date addressed to:

Appellant Lanita Davis

Clerk of the Superior Court
Contra Costa County
725 Court Street
Martinez, CA 94553

Office of the District Attorney
900 Ward Street
Martinez, CA 94553

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated Friday, November 3, 2017

/s/Walter K. Pyle

Walter K. Pyle