

Classification Assessment of Apache Video and Transcript of PE 15, and the Defense Motion for Judicial Notice of WikiLeaks Publication of 9/11 Pager Messages.

WITNESSES/EVIDENCE

The United States does not request any witnesses be produced for this response. The United States requests that this Court consider the Charge Sheet and the cited Appellate Exhibits.

LEGAL AUTHORITY AND ARGUMENT

A judicially noticed fact “must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Military Rule of Evidence (MRE) 201(b); *see also United States v. Needham*, 23 M.J. 383 (C.M.A. 1987). Judicial notice of facts serves as a substitute for testimonial, documentary, or real evidence. Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* § 201.02[1] (7th ed. 2011). Additionally, judicial notice promotes judicial economy as it relieves a proponent from formally proving certain facts that a reasonable person would not dispute. *Id.*

Judicial notice is of adjudicative facts. Judicial notice is not appropriate for inferences a party hopes the fact finder will draw from the fact(s) judicially noticed. *See* Appellate Exhibit (AE) 356. Legal arguments and conclusions are not adjudicative facts subject to judicial notice. *See United States v. Anderson*, 22 M.J. 885 (A.F.C.M.R. 1985)). Judicial notice also cannot be employed in contravention of the relevancy, foundation, and hearsay rules. *See American Prairie Construction Company v. Holch*, 560 F.3d 780, 797 (8th Cir. 2009) (noting that “[c]aution must also be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules”).

In all three motions, the defense relies on statements made by the accused during the providence inquiry, without being subject to cross-examination, to establish the relevance of those facts which it now requests this Court take judicial notice. Statements made by the accused during the providence inquiry in a mixed plea case cannot be used as a basis of relevance for facts at trial. *See United States v. Davis*, 65 M.J. 766, 767 (A.C.C.A. 2007) (holding that statements from a guilty plea inquiry cannot be considered when deciding the admissibility of evidence during the contested portion of the trial); *see also United States v. Calm*, 31 M.J. 729 (A.F.C.M.R. 1990) (finding no support for appellate defense counsel’s proposition “that an accused’s right to remain silent on a contested offense may be abridged by allowing consideration of statements required to be made in support of a guilty plea”). Doing so, the Court in *Calm* reasoned, “would tempt an accused to ‘garnish’ his [providence inquiry] testimony with favorable statements, thereby placing such statements before the court without being subject to cross-examination.” *Id.*, at 731.

A. The Reuters FOIA request and the response by CENTCOM are not relevant.

The United States objects to this Court taking judicial notice that Reuters submitted a FOIA request, to which CENTCOM responded twenty-one months later. The defense has not demonstrated that this fact is relevant IAW MRE 401. The United States agrees that the

accused's motive is relevant to the Specification of Charge I; however, there is no evidence before the Court that the accused had knowledge of the FOIA request or of CENTCOM's response. The defense cites the accused's statements made during the providence inquiry as evidence supporting its request. Statements made during the providence inquiry cannot be used as the basis of relevance for facts at trial. *See Davis*, 65 M.J. at 767. Until evidence is before the Court that the accused knew of the FOIA request and of CENTCOM's response, these facts are neither relevant IAW MRE 401 nor proper for judicial notice.

B. The statement of RADM Donegan is hearsay and not otherwise admissible IAW MRE 801(d)(2)(D).

The United States objects to this Court taking judicial notice of the statement made by RADM Donegan. *See* Enclosure I to the Defense Motion. The defense argues this statement is an admission made by a party-opponent IAW MRE 801(d)(2)(D). The United States opposes because the statement does not otherwise meet the three-part test outlined in *United States v. Salerno*, 937 F.2d 797, 811 (2d Cir. 1991), and adopted in previous rulings by this Court.

Hearsay is a statement, other than the one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. *See* MRE 801(c). Hearsay is not admissible except as provided by the Military Rules of Evidence or by any Act of Congress applicable in trials by court-martial. *See* MRE 802.

MRE 801(d)(2) provides in relevant part that admissions by a party-opponent are not hearsay if the statement is offered against a party and is either (A) the parties' own statement in either the party's individual or representative capacity; (B) a statement of which the party has manifested the party's adoption or belief in the truth; (C) a statement by a person authorized by the party to make a statement concerning the subject; or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant made during the existence of the relationship The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under (C), or the agency or employment relationship and the scope thereof under (D). *See* MRE 801(d)(2).

This Court previously noted that "it is possible for statements by executive branch officials to be admitted in a criminal proceeding as admissions of a party opponent[,] but that "the cases allowing such admissions are those where the prosecution has manifested its belief in the truth of a statement in a court proceeding or judicial document that should be admissible when the Government takes a contrary position." AE 356 (citing *United States v. Branham*, 97 F.3d 835, 851 (6th Cir. 1991) and *United States v. Morgan*, 581 F.3d 933, 937 (D.C. Cir. 1978)). To determine whether a statement is admissible against the United States IAW MRE 801(d)(2)(D), this Court adopted the three-part test set forth in *Salerno*. *See Salerno*, 937 F.2d at 811. First, the court must "be satisfied that the prior [statement] involves an assertion of fact inconsistent with similar assertions in a subsequent trial. Second, the court must determine that the [statements] were such as to be the equivalent of testimonial statements.... Last, the district court must determine by a preponderance of the evidence that the inference that the proponent of the statements wishes to draw is a fair one and that an innocent explanation for the inconsistency does not exist." *Salerno*, 937 F.2d at 811 (quoting *United States v. McKeon*, 738 F.2d 26, 33 (2d

Cir. 1984) (quotations omitted)); *see also United States v. DeLoach*, 34 F.3d 1001, 1005 (11th Cir. 1994 (adopting the test from *Salerno*)).

Here, the first prong of this test (i.e., that the prior statement involve an assertion of fact inconsistent with similar assertions in a subsequent trial) has not been met. RADM Donegan's statement (i.e., that the Apache video should not be classified) is first and foremost an opinion, not an assertion of fact. Furthermore, assuming the Court considers the statement an assertion of fact, the statement is consistent with the Charge Sheet and the United States' position throughout this court-martial. *See* Charge Sheet. At no point has the United States offered evidence that the video is, or should be, classified. Accordingly, the statement should not be admitted as the admission of a party-opponent under MRE 801(d)(2).

Additionally, RADM Donegan has been a named sentencing witness for the United States since 15 October 2102. The defense has previously interviewed him in preparation for this trial. The defense is free to cross-examine RADM Donegan during the presentencing phase on the content of this statement, if otherwise admissible and relevant.

C. The transcript provided by the defense is not a verbatim account of PE 15.

The United States objects to this Court taking judicial notice that the transcript provided by the defense is a verbatim account of the video contained in PE 15 because the transcript is not verbatim and the defense did not provide any explanation of how the transcript was produced. For purposes of judicial economy, the United States stipulates that Enclosure 2 is an accurate representation of the one radio channel for which the defense intends to use. *See* Enclosure 2.

D. WikiLeaks Publication of 9/11 Pager Messages.

The United States does not object to this Court taking judicial notice of the fact "that, on 25 November 2009, WikiLeaks published purported text and paper messages surrounding the terrorist attacks against the United States on 11 September 2001."

CONCLUSION

For these reasons, the United States respectfully requests this Court deny the Defense Motion for Judicial Notice of FOIA Request by Reuters and the Defense Motion for Judicial Notice of CENTCOM Classification Assessment of Apache Video and Transcript of PE 15.



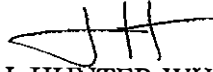
J. HUNTER WHYTE
CPT, JA

Assistant Trial Counsel

2 Enclosures

1. Defense's Transcript of PE 15 (edits tracked)
2. Defense's Transcript of PE 15 (edits applied)

I certify that I served or caused to be served a true copy of the above on Defense Counsel,
via electronic mail, on 19 June 2013.

A handwritten signature in black ink, consisting of a stylized 'J' followed by a series of vertical strokes and a horizontal line.

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel