

INVESTIGATING OFFICER'S REPORT

(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. FROM: <i>(Name of Investigating Officer - Last, First, MI)</i> LEVINE, JOSHUA D.	b. GRADE CAPT/0-3	c. ORGANIZATION JOINT LAW CENTER, H&HS, MCAS MIRAMAR, CA	d. DATE OF REPORT 24 JUNE 2010
2a. TO: <i>(Name of Officer who directed the investigation - Last, First, MI)</i> SWAN, WILLIAM H.	b. TITLE COMMANDING OFFICER	c. ORGANIZATION MARINE FIGHTER ATTACK SQUADRON 323 (VMFAT 323)	
3a. NAME OF ACCUSED <i>(Last, First, MI)</i> WYLDE, AARON V.	b. GRADE PFC/E-2	c. SSN 521710964	d. ORGANIZATION VMFAT 323
			e. DATE OF CHARGES 11. 26 MAY 2010

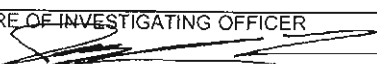
<i>(Check appropriate answer)</i>			YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)			X	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)			X	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d) (2), 502(d)			X	
7a. NAME OF DEFENSE COUNSEL <i>(Last, First, MI)</i> CROSSWELL, RYAN R.	b. GRADE CAPT	8a. NAME OF ASSISTANT DEFENSE COUNSEL <i>(If any)</i>	b. GRADE	
c. ORGANIZATION <i>(If appropriate)</i> JOINT LAW CENTER, H&HS, MCAS MIRAMAR, CA		c. ORGANIZATION <i>(If appropriate)</i>		
d. ADDRESS <i>(If appropriate)</i>		d. ADDRESS <i>(If appropriate)</i>		
9. <i>(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)</i>				
a. PLACE		b. DATE		

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED				
10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: <i>(Check appropriate answer)</i>			YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION			X	
b. THE IDENTITY OF THE ACCUSER			X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31			X	
d. THE PURPOSE OF THE INVESTIGATION			X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE			X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT			X	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES			X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED			X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION			X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING			X	
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE <i>(If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)</i>			X	

b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL

NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading *(Example: "7c")*. Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: (Check appropriate answer)				
NAME (Last, First, MI)	GRADE (If any)	ORGANIZATION/ADDRESS (Whichever is appropriate)	YES	NO
WOOD, ANTHONY	MA1/E-6	CID, NAS FALLON, NEVADA	X	
WHALEY, SCOTT A.	MA1/E-6	CID, NAS FALLON, NEVADA	X	
WILLIAMS, JAMES C.	MA1/E-6	CID, NAS FALLON, NEVADA	X	
WILLEY, MICHAEL D.	LCPI/E-3	VMFAT 323, 3D MAW, MCAS MIRAMAR	X	
FLIEGEL, DANIEL W.	SGT/MAJ/E-9	VMFAT 323, 3D MAW, MCAS MIRAMAR	X	
LOGSDON, TEDDY L.	LCPL/E-3	VMFAT 323, 3D MAW, MCAS MIRAMAR	X	
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.			X	
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH.				
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL (If not attached)		YES	NO
SEE ATTACHED ADDENDUM (LISTING INVESTIGATIVE EXHIBITS 1-25)			X	
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			X	
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. (See R.C.M. 909, 916(k).)				X
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT (If Yes, specify in Item 21 below.)				X
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL			X	
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM			X	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED			X	
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (See R.C.M. 405(d) (1).)			X	
20. I RECOMMEND:				
a. TRIAL BY <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input checked="" type="checkbox"/> GENERAL COURT-MARTIAL				
b. <input type="checkbox"/> OTHER (Specify in Item 21 below)				
21. REMARKS (Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.)				
SEE ATTACHED ADDENDUM				
22a. TYPED NAME OF INVESTIGATING OFFICER		b. GRADE	c. ORGANIZATION	
JOSHUA D. LEVINE		CAPT/0-3	JOINT LAW CENTER, H&HS, MCAS MIRAMAR, CA	
d. SIGNATURE OF INVESTIGATING OFFICER			e. DATE	
			25 JUNE 2010	

ADDENDUM TO DD FORM 457
ICO
UNITED STATES v. PFC AARON V. WYLDE

12.b. Summary of Witness Testimony

MA1 ANTHONY WOOD

MA1 Anthony Wood, USN, is a Security Detachment Patrol Officer at NAS Fallon, Nevada. In early May 2010, he responded to a medical emergency involving a young Marine that had fallen in a rocky area along a parking lot. The Marine, LCpl Michael Wiley, was having a seizure. MA1 Wood's duties primarily focused on crowd control. He testified that MA2 Edwards, MA2 Ruiz, and a fire chief entered LCpl Wiley's barrack's room in order to look for medication to determine the potential cause of his symptoms.

MA1 Wood is willing and available to testify if he is requested as a witness at any future court proceeding.

MA1 SCOTT A. WHALEY

MA1 Scott A. Whaley, USN, is a Command Investigator with CID onboard NAS Fallon, Nevada. On 4 May 2010, he received a phone call regarding a Marine found lying on the ground having what appeared to be serious medical issues. The Marine, later identified as LCpl Michael Wiley, had reportedly jumped from a balcony, ran, and then low-crawled on rocks before coming to a stop. Two witnesses saw LCpl Wiley foaming at the mouth and stated that he was having a difficult time saying his name. After arriving at the scene, patrol officers conducted an exigency search of LCpl Wiley's room in order to search for medications that could have caused his symptoms. Investigators were not involved in this initial search.

During the exigency search, the patrol officers found a bag of green leafy substance in a rucksack under one of the beds in the room. The patrol officers immediately stopped their search, called CID, and left the room. CID then obtained a verbal search authorization from CAPT Michael Glaser, USN, Commanding Officer, NAS Fallon, Nevada. After receiving the search authorization, Investigator Whaley participated in a search of the room, discovering several items of interest belonging to LCpl Aaron Wylde to include:

- A notebook that appeared to Investigator Whaley, based on his training and experience, to contain a detailed business plan for selling some type of illicit drugs. Investigator Whaley explained that the numbers and weight units in the notebook were consistent with those typically used by drug dealers.
- A bag of a green leafy substance.
- A glass imitation cigarette pipe that in Investigator Whaley's training and experience is paraphernalia commonly associated with drug use.
- A roll of approximately 36 plastic zip lock baggies of the same type that contained the green leafy substance.

- A large amount of cash.
- Brass knuckles.
- The room's smoke detector with the batteries removed.

MA1 Whaley testified that he knew of "Spice" as a synthetic cannabinoid with similar affects to marijuana, but sometimes even more dangerous. MA1 Whaley explained that Spice is not a "controlled substance," making it legal for civilians to use in the United States, even though it is currently banned for members of the military.

MA1 Whaley noted that most of the evidence of interest was found in a backpack with the name "Wylde" written on it. MA1 Whaley also testified that he had the opportunity to question PFC Wylde after searching the room. PFC Wylde waived his rights and agreed to speak to MA1 Whaley. During the interview, PFC Wylde claimed that he was using Spice in order to help himself quit smoking.

MA1 Whaley is willing and available to testify if he is requested as a witness at any future court proceeding.

MA1 JAMES C. WILLIAMS

MA1 James C. Williams is a Command Investigator with CID onboard NAS Fallon, Nevada. On 4 May 2010, he was called out to assist in the command-authorized search of PFC Wylde's barracks room. When MA1 Williams arrived at the barracks room, he found that personnel conducting the exigency search had already laid out medications on the bed. MA1 Williams did not discuss what he found in the room during his Article 32 testimony but these findings are discussed at length in the CID Report of Investigation included as IE 22.

MA1 Williams was also present during the CID interviews of PFC Wylde, LCpl Wiley, and LCpl Teddy Logsdon. During these interviews, MA1 Williams took notes, which have been provided to counsel for both sides and are included as Investigative Exhibit 23.

MA1 Williams is willing and available to testify if he is requested as a witness at any future court proceeding.

LCPL MICHAEL D. WILEY

LCpl Wiley was read his Article 31(b) rights, and agreed to voluntarily waive these rights and testify under oath at the Article 32 hearing. LCpl Wiley was not represented by counsel and knowingly and voluntarily declined to seek counsel prior to testifying.

LCpl Wiley is a Fixed Wing F/A-18 Aircraft Mechanic, MOS 6217.

LCpl Wiley began his testimony by reviewing the sworn statement that he provided to CID on 4 May 2010, verifying its accuracy, and again adopting the statement as his sworn testimony at the hearing. A copy of LCpl Wiley's statement is included as Investigative Exhibit 11.

LCpl Wiley went on to testify that on the morning of 4 May, PFC Wylde had asked him if he wanted to smoke some Spice. LCpl Wiley agreed and claims to have smoked only "one bowl." On that occasion, PFC Wylde did not charge him any money. After smoking the Spice, LCpl Wiley laid down, but at some point got back up and went outside to try to get some fresh air. He remembers leaving the door to his room open and then laying on some rocks, but nothing else. LCpl Wiley then recalls waking up in an ambulance and then passing back out. He does not remember being examined at the hospital but vaguely remembers a Gunnery Sergeant saying something to him. According to LCpl Wiley, his next memory is of being at "the police station."

LCpl Wiley testified that "Spice" is a generic term that can represent a variety of brand name products. He said the substance was also known as "Buddha." LCpl Wiley added that Spice does not look like tobacco.

LCpl Wiley testified that he met PFC Wylde at the end of January or beginning of February 2010. LCpl Wiley stated that he observed PFC Wylde use Spice approximately 2 weeks after he met him. LCpl Wiley also explained that PFC Wylde would store Spice in his backpack. At some point, PFC Wylde told LCpl Wiley that he was going to sell Spice to local smoke shops. LCpl Wiley also noted that PFC Wylde had a spray bottle in his room that he believed PFC Wylde used to make Spice, but LCpl Wiley is not certain of this fact.

According to LCpl Wiley, the first time he bought a baggie (approximately 3" x 4") of Spice from PFC Wylde, he was charged \$60. The next two baggies he bought from PFC Wylde were \$40 each and were the same size. PFC Wylde would load the smaller plastic bags from the large plastic bag of Spice he would keep in his backpack whenever he would make a sale. LCpl Wiley believes that PFC Wylde sold Spice to LCpl Logsdon the night prior to the incident because he heard the term "Spice" being used when LCpl Logsdon came to the room. However, LCpl Wiley did not actually see the transaction transpire.

LCpl Wiley stated that he may be leaving on an exercise aboard the USS Ronald Reagan for two months in the near future, but he is willing to testify if he is requested as a witness at any future court proceeding.

SGTMAJ DANIEL W. FLIEGEL

SgtMaj Fliegel is the Squadron Sergeant Major for VMFAT 323. On 4 May 2010, he was at NAS Fallon, Nevada, as part of VMFAT 323's workup for their deployment onboard the USS Ronald Reagan. He noted that the training at Fallon was important training and that it required an increased operational pace for the enlisted Marines.

While SgtMaj Fliegel was attending a welcome aboard brief at NAS Fallon's Liberty Center, one of the speakers mentioned that there was a medical emergency involving a Marine outside the building. SgtMaj Fliegel responded by going outside where he saw an individual wearing boxer shorts and a green skivvy shirt lying on the ground. The individual's lips were turning blue and he was unresponsive. SgtMaj Fliegel also noted that he was foaming at the mouth and had cuts and scrapes on his body from crawling across the rocks. Medical personnel were on scene and

asked if LCpl Wiley was on any type of medications. In response, security personnel went to LCpl Wiley's room to search for medications that may have caused his symptoms.

SgtMaj Fliegel testified that the Marines in VMFAT 323 were briefed that the use of Spice was prohibited in the Marine Corps and specifically recalled the Commanding Officer discussing the issue at an all hands brief in February 2010. He stated that he believed the Marine Corps had banned the substance at some point in 2009, but did not give any specific times when the Marines were briefed on its legality other than the discussion in February of this year.

SgtMaj Fliegel explained that after the Spice was discovered, PFC Wylde and LCpl Wiley were placed on pre-trial restriction and watched by an SNCO from the unit, SSgt Branch. At one point, SSgt Branch picked up a note from the trash can that he believed was being passed from PFC Wylde to LCpl Wiley. This note is included as Investigative Exhibit 18.

SgtMaj Fliegel will be deploying for two months aboard the USS Ronald Reagan in the near future, but is willing testify if he is requested as a witness at any future court proceeding.

LCPL TEDDY L. LOGSDON

LCpl Logsdon was read his Article 31(b) rights, and agreed to voluntarily waive these rights and testify under oath at the Article 32 hearing. LCpl Logsdon was not represented by counsel and knowingly and voluntarily declined to seek counsel prior to testifying.

LCpl Logsdon began his testimony by reviewing the sworn statement that he provided to CID on 7 May 2010, verifying its accuracy, and again adopting the statement as his sworn testimony at the hearing. A copy of LCpl Logsdon's statement is included as Investigative Exhibit 10.

LCpl Logsdon described Spice as looking similar to marijuana, "like dirt," with a green color. He stated that Spice was legal for civilians but was not permitted in the Marine Corps. He noted that "Spice" is a generalized term for the substance. He also testified that he learned that Spice was illegal in April 2010, but stated that he would not have used it in front of an NCO in January 2010 because he would "not want to take that risk."

LCpl Logsdon testified that there was never any confusion as to whether using Spice was wrong. LCpl Logsdon explained that "if it looks like bud and smells like bud, you probably shouldn't be doing it."

LCpl Logsdon will not be aboard the USS Ronald Reagan for the upcoming deployment and is willing testify if he is requested as a witness at any future court proceeding.

13.a. List of Investigative Exhibits

The following Investigative Exhibits were considered and the items, or a copy or recital of the substance or nature thereof, is attached. The accused and his defense counsel were permitted to examine each of the Investigative Exhibits prior to consideration by the Investigating Officer.

- IE 1: Appointing Order
- IE 2: Charge Sheet (preferred 11 May 2010)
- IE 3: Charge Sheet- Additional Charge (preferred 26 May 2010)
- IE 4: Proposed Additional Charge under Article 134, UCMJ, Re: Possession of Metal Knuckles Onboard NAS Fallon
- IE 5: Defense Continuance Requests (dated 24 May and 3 June 2010)
- IE 6: U.S. Marine Corps Forces, Pacific Order 5355.2, dated 1 December 2010
- IE 7: U.S. Marine Corps Air Station Order 5300.1, dated 31 August 2010
- IE 8: SECNAV Instruction 5300.28D, dated 5 December 2005
- IE 9: Sworn Statement of PFC Aaron V. Wylde, USMC, dated 4 May 2010
- IE 10: Sworn Statement of LCpl Teddy L. Logsdon, USMC, dated 7 May 2010
- IE 11: Sworn Statement of LCpl Michael D. Wiley, USMC, dated 4 May 2010
- IE 12: Pictures of Room 6483, Building 475, MCAS Miramar
- IE 13: Pictures of bag of "Marshmallow Leaf C/S"
- IE 14: U.S. Army Criminal Investigation Laboratory Drug Chemistry Branch Final Report, dated 17 May 2010
- IE 15: "JWH-018" (http://www.deadiversion.usdoj.gov/drugs_concern/spice/spice_jwh018.htm)
- IE 16: "JWH-073" (http://www.deadiversion.usdoj.gov/drugs_concern/spice/spice_jwh073.htm)
- IE 17: Nevada Revised Statute §202.350 (<http://www.leg.state.nv.us/NRS/NRS-202.html>)
- IE 18: Hand-written Note on "Muscular Development" Business Reply Card
- IE 19: Sworn Statement of Lakrisha A. Ernst, dated 4 May 2010
- IE 20: Sworn Statement of John Sopiak, dated 4 May 2010
- IE 21: Results of Command Authorized Search of Living Quarters, dated 11 May 2010
- IE 22: Criminal Investigative Division, Report of Investigation (Interim), dated 10 May 2010
- IE 23: Notes taken by PO1 James C. Williams, USN, during CID interviews of PFC Aaron Wylde, LCpl Teddy Logsdon, and LCpl Michael Wiley
- IE 24: Proposed Additional Charge under Article 107, UCMJ, Re: False Official Statement about Reason for Using Spice
- IE 25: Directed Comments by Counsel Submitted 15 June 2010

21. Remarks

a. **Charge I- Violation of UCMJ, Article 92:**

i. Specifications 1-3 - Wrongfully Possessing Spice with the Intent to Distribute.

There is probable cause to believe that PFC Wylde wrongfully used and possessed Spice in violation of Marine Corps Air Station Miramar Order 5300.1 and Marine Corps Forces, Pacific Order 5355.2 as alleged in Specifications 1, 2, and 3. This conclusion is supported by an abundance of evidence, including PFC Wylde's sworn confession (IE 9) as well as the sworn statements and testimony of LCpl Logsdon (IE 10) and LCpl Wiley (IE 11). I recommend that both specifications be forwarded to a General Court-Martial.

ii. Specification 4- Wrongfully Possessing Drug Abuse Paraphernalia. Specification 4 charges PFC Wylde with the wrongful possession of "drug abuse paraphernalia" in the form of a glass pipe in violation of SECNAVINST 5300.28D (IE 8). The glass pipe at issue is an imitation glass cigarette. Enclosure (4), paragraph 1(i) of SECNAVINST 5300.28D defines

“drug abuse paraphernalia” as “[a]ll equipment, products, and materials of any kind that are used, intended for use, or designed for use in...inhaling or otherwise introducing into the human body” a “controlled substance.” Trial counsel concedes in written comments on this issue (IE 25) that “JWH-018, JWH-073, or other cannabinoid mimicking compounds used to manufacture ‘Spice’ are not controlled substances within the meaning of the controlled substance act.” This statement mirrors sworn testimony by CID Investigator Scott Whaley. Investigator Whaley also noted in his testimony that no illicit substances other than Spice were found or detected in the pipe or anywhere in PFC Wylde’s room. Investigator Whaley did broadly support trial counsel’s position by testifying that glass pipes are often used for smoking marijuana. However, there was no evidence presented that the specific pipe found was tailored for smoking marijuana as opposed to any other inhalant or that it had ever been used to smoke marijuana. Instead, the weight of the evidence suggests that PFC Wylde used the pipe exclusively for inhaling Spice, a substance currently legal for civilians, thus indicating the existence of “legitimate” uses for the pipe in the civilian community. While there is little doubt that the pipe was used to facilitate illicit conduct (i.e., the inhalation of Spice), the technical definition of “paraphernalia” under SECNAVINST 5300.28D contemplates a close nexus between the object and a “controlled substance.” Because Spice is not a “controlled substance” under the relevant law, I find that there is not probable cause to believe that PFC Wylde wrongfully possessed drug abuse paraphernalia within the meaning of SECNAVINST 5300.28D. Accordingly, I recommend that this specification be dismissed.¹

iii. Specifications 5 and 6- Wrongfully Distributing Spice to LCpl Logsdon and LCpl Wiley. There is probable cause to believe that PFC Wylde wrongfully distributed Spice to LCpl Logsdon and LCpl Wiley in violation of Marine Corps Forces, Pacific Order 5355.2. This conclusion is supported by an abundance of evidence, including PFC Wylde’s sworn confession (IE 9) as well as the sworn statements and testimony of LCpl Logsdon (IE 10) and LCpl Wiley (IE 11). I recommend that both specifications be forwarded to a General Court-Martial.

b. Additional Charge- Violation of UCMJ, Article 134:

i. Specification 1- Wrongfully Manufacturing Spice. There is probable cause to believe that PFC Wylde wrongfully manufactured Spice with intent to distribute and that this conduct was prejudicial to good order and discipline. This conclusion is supported by PFC Wylde’s own sworn statement (IE 9), the sworn statements and testimony of LCpl Logsdon (IE 10) and PFC Wiley (IE 11), and the physical evidence found in PFC Wylde’s room (e.g., notebook, spray bottle, etc.). PFC Wylde claims in his statement that he was manufacturing the Spice only to sell it to a local smoke shop. While this may be partially true, the evidence suggests he also intended, and in fact did, sell the Spice he manufactured to his fellow Marines. Due to the serious nature of this conduct, I recommend that this specification be forwarded to a General Court-Martial.

ii. Specification 2- Wrongfully Distributing Spice to an Unknown Smoke Shop. In his sworn statement provided 4 May 2010, PFC Wylde admits to distributing Spice to a local smoke shop. There is an argument to be had that distributing a substance that is legal outside of

¹ Notwithstanding this recommendation, I find that the glass pipe is still significant evidence supporting the government’s use and possession allegations.

the military to a civilian business is not prejudicial to good order and discipline. However, I do not find this position persuasive as such conduct would allow servicemembers to benefit from their illicit activities (i.e., manufacturing and possessing an illegal substance under military law) and potentially encourage other servicemembers to follow suit in order to gain similar profits. As such, I find that there is probable cause to believe that such conduct is prejudicial to good order and discipline, and thus, recommend this specification be forwarded to a General Court-Martial.

iii. Specification 3- Wrongfully Introducing Spice onto a Military Aircraft. PFC Wylde in his sworn statement from 4 May 2010 states that "I did take about 100 grams [of Spice] from Mira Mar with me to Fallon, Nevada on a C5 for personal use." Based on this admission, I find that there is probable cause to believe that PFC Wylde committed the charged conduct and recommend this specification be forwarded to a General Court-Martial.

iv. Specification 4- Wrongful Possession of Metal Knuckles in Violation of Section 202.350 of the Nevada Revised Statutes, assimilated into Federal law by 18 U.S.C. Section 13. At the beginning of the Article 32 hearing, trial counsel indicated that the government intends to dismiss this specification due to the fact that proprietary jurisdiction is exercised over NAS Fallon, Nevada. The government intends to charge the conduct as prejudicial to good order and discipline and service discrediting instead under Article 134, UCMJ. This proposed additional charge (IE 4) is discussed below. In accordance with the government's wishes, I recommend that you dismiss this specification.

c. Proposed Additional Charge- Violation of UCMJ, Article 134 (IE 4):

As discussed above, during the Article 32 hearing, trial counsel indicated that the government intends to dismiss Specification 4 of the Additional Charge (wrongful possession of metal knuckles under the Assimilated Crimes Act) and prefer a new additional charge. Due to time considerations, the new proposed charge was not preferred, but a new proposed additional charge was drafted and provided to defense counsel. Defense counsel and PFC Wylde indicated that they understood the proposed additional charge, they were notified that I would investigate the proposed charge, and PFC Wylde was given the full rights advisement relating to the proposed additional charge.

While questioning SgtMaj Fliegel, defense counsel suggested that the possession of metal knuckles was not prejudicial to good order and discipline because it is common for Marines to carry knives and other objects that pose a similar or greater threat. Trial counsel countered on redirect by pointing out that knives generally have multiple legitimate purposes in addition to posing a threat to others, which distinguishes such objects from metal knuckles. Trial counsel also emphasized that the Nevada law prohibiting metal knuckles (included as IE 17), while not binding, was also evidence that possessing these weapons is prejudicial to good order and discipline. Based on SgtMaj Fliegel's testimony, I find that there is probable cause to believe that possession of metal knuckles is prejudicial to good order and discipline and recommend this charge be preferred and forwarded to a General Court-Martial.

d. Proposed Additional Charge- Violation of UCMJ, Article 107 (IE 24):

Investigator Whaley testified that PFC Wylde claimed in his interview that he had used Spice in order to help himself quit smoking. Trial counsel then asked that a new proposed additional charge be considered as part of the Article 32 Investigation. Trial counsel drafted a proposed additional charge under Article 107, UCMJ, and provided a copy to PFC Wylde and defense counsel. PFC Wylde and his counsel were given time to review the proposed additional charge and request additional witnesses, evidence or a continuance based on the additional charge. After defense counsel and PFC Wylde indicated they understood the additional proposed charge and wished to proceed, PFC Wylde's rights were fully reviewed with him on the record with respect to the new proposed charge.

PFC Wylde's assertion that he was using Spice in order to help quit smoking is dubious at best. However, the burden of proof is not on the defendant to prove his innocence but rather on the government to prove guilt. To obtain a conviction at trial on this proposed charge, the government would have to *prove* that PFC Wylde lied about something that only he knows—whether or not one of what could be multiple reasons why he was using Spice was that he thought it would help him stop smoking. As defense counsel noted, even if he used Spice primarily for its intoxicating effects, that does not necessarily negate the possibility that an additional reason was that he thought it might help him stop smoking. Absent some type of admission by PFC Wylde that he lied about this fact, which was not presented at the Article 32 hearing, there are not reasonable grounds to support this allegation. Consequently, I recommend that no further action be taken with regard to this proposed charge.

e. Objections & Evidentiary Considerations:

As Investigating Officer, I granted two continuances at the request of defense counsel. Those continuance requests are included in Investigative Exhibit 5 and specify that all delay shall be considered excludable under R.C.M. 707 and Article 10, UCMJ.

Counsel for both the government and the defense made oral comments on the evidence at the end of the Article 32 hearing. Both sides also submitted written comments on the evidence, which are included as Investigative Exhibit 25.

Counsel were instructed to submit all objections in writing no later than 1630 on Tuesday, 15 June. As no objections were received prior to, or after that date, none were considered.

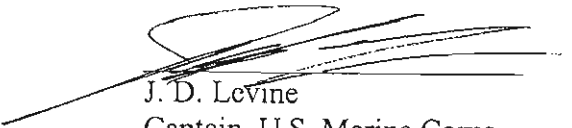
During the proceedings, defense counsel raised various evidentiary concerns, focusing on the availability of notes taken by CID investigators and the legality of the initial search of PFC Wylde's room. With respect to the investigation notes, some were provided by MA1 Williams during the Article 32 proceeding and are included as Investigative Exhibit 23. Other notes, to the extent they exist, I anticipate will be the subject of future discovery disputes and are properly handled as matters for pre-trial motions.

I also anticipate the defense will challenge the search of PFC Wylde's room, to include his backpack, arguing that the initial search was improper under the Fourth Amendment. If

successful, the defense may be able to suppress some or all of the physical evidence recovered from his room. However, the government will be able to argue that the initial search falls under the exigent circumstances exception to the general rule requiring a warrant. Exigent circumstances arise when law enforcement officers have reasonable grounds to believe that there is an immediate need to protect their lives, the lives of others, their property, or that of others; the search is not motivated by an intent to arrest and seize evidence; and there is some reasonable basis, to associate an emergency with the area or place to be searched. This matter is most properly handled during pre-trial motions, but based on the evidence available at the Article 32 hearing, I feel that it is likely that the initial warrantless search will fall under this exception. Nevertheless, additional evidence regarding the motivations of those participating in the initial search may significantly affect how the search is characterized. Regardless of the outcome on this issue, PFC Wylde's sworn confession and the sworn statements and testimony of LCpl Wiley and LCpl Logsdon still provide strong evidence in support of the majority of the government's allegations.

f. Recommended Forum:

Defense counsel argues at length in both oral and written comments on the evidence, that a special court-martial is the appropriate forum, if any, to dispose of this case. The focus of defense counsel's argument is that Spice is a legal substance for civilians and that subjecting LCpl Wylde to a potential felony conviction based on actions that would otherwise be legal is unjust. While I find there is some merit to defense counsel's argument, I recommend that you refer the charges specified above to a General Court-Martial. The mere fact that conduct is prohibited in the military alone does not necessarily diminish the seriousness of the offense. As trial counsel noted in his closing comments, some of the most serious crimes in the UCMJ find no counter-part in civilian law. This is primarily due to the fact that the unique nature of military service requires the utmost trust and confidence to be placed in one's fellow servicemembers. There is significant evidence in this case to indicate that LCpl Wylde, in a very calculated manner, and over a long period of time, decided to produce, use, and distribute, a banned substance intended to create intoxicating effects similar to marijuana. There is also little doubt that this substance poses a significant hazard. The condition of LCpl Wiley on 4 May 2010 is obvious proof. The fact that LCpl Wiley recovered later that day does not diminish the fact that he was initially found lying on a bed of rocks convulsing while his lips turned blue and he foamed at the mouth. The seriousness of the charged conduct is only made more evident by the fact that it involves manufacturing, and then using and distributing Spice to Marines charged with maintaining aircraft. If proved beyond a reasonable doubt at trial, such conduct represents a significant breach of the trust shared by fellow servicemembers. For this reason, referral of this case to a General Court-Martial is justified.


J. D. Levine
Captain, U.S. Marine Corps
Investigating Officer

25 June 2010
Date