NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	GENERAL COURT-MARTIAL
v.	)	
	)	GOVERNMENT RESPONSE TO
AARON V. WYLDE	)	DEFENSE MOTION TO DISMISS
XXX XX 0964	)	
PRIVATE FIRST CLASS	)	(Failure to State an Offense)
U.S. MARINE CORPS	)	
	)	20 September 2010

1. Nature of Motion

This is the government's response to the defense motion to dismiss all specifications under the Charge for failure to state an offense and vagueness. The government opposes the motion.

2. Summary of Facts

The accused is charged, *inter alia*, with violation of the UCMJ, Article 92, for violating two lawful general orders: Marine Forces, Pacific (MARFORPAC) Order 5355.2, dated 1 December 2009, and Marine Corps Air Station Miramar Order 5300.1. MARFORPACO 5355.2 is issued by the Commanding General, Marine Forces, Pacific, and promulgated under the signature of his Chief of Staff, Colonel R. F. L'Heureux. StaO 5300.1 is personally signed by the Commanding Officer, MCAS Miramar, a general court-martial convening authority. Both orders prohibit the use of substances intended to induce a psychotropic "high" when smoked, specifically including a substance known as "Spice." StaO 5300.1 notes that StaO 5300.1 is also known as Spice Gold. MARFORPACO 5355.2 defines Spice as "a mixture of medicinal herbs laced with cannabinoids or cannabinoid mimicking compounds" and lists several examples of common brand names of "Spice," including "Spice" and "K2."

The offenses in this case came to light on 4 May 2010, when Lance Corporal (LCpl) Michael D. Wiley smoked some homemade "Spice" with the accused and thereafter suffered an extreme reaction. LCpl Wiley jumped off a balcony wearing boxers, a skivvy shirt, and no shoes, began to low crawl through a pile of rocks, foamed at the mouth, began convulsing, experienced shortness of breath, and eventually had to be transported to a hospital.

An exigent search of the room shared by LCpl Wiley and the accused revealed a ziploc bag containing a green leafy substance in the accused's backpack. A follow on search pursuant to a Command Authorization for Search and Seizure (CASS) revealed numerous items of evidentiary value in a backpack marked with the accused's name, including a large bag containing a green leafy substance, which was later tested and found to contain the synthetic cannabinoid JWH-018, 36 rolled up zip loc baggies, $1540 in cash (mainly $20 bills) and a notebook labeled "business plan" with a series of calculations about profit margins for making and selling drugs. Another bag of Spice containing JWH-018 was found in a laptop bag with the accused's computer.

On 4 May 2010, the accused gave a sworn statement to CID, NAS Fallon in which he admitted to manufacturing, using, and distributing Spice using JWH-073, a medicinal herb known as damiana, and acetone. The accused admitted that he knew that Spice was prohibited in the military. The accused mentioned to CID that he learned how to manufacture Spice by researching it online.

The accused's computer, which had a single user profile, "Vic Wylde" was forensically examined at the Regional Computer Forensic Laboratory in San Diego. The examiner found numerous references to Spice, K2, and various synthetic cannabinoid components of Spice on the accused's computer. For example, among many references to Spice or synthetic

cannabinoids in the accused's Google search history are the search phrases "what is the active ingredient in pep spice," "active chemical in pep spice," "buy pure HU-210," "buy pure JWH-018," "buy pure jwh- 073," "how can I get jwh-018 into my smoking blend?," "cannabinoid jwh-018," "example of denaturing agents in acetone," "pound to kilo converters," and "marijuana alternative jwh-018." The accused's internet favorites folder also includes links to (1) a bulk supplier of damiana leaf which indicates that it is used in "herbal medicine," (2) http://jwh-018direct.com, a site advertising pure jwh-018, and (3) a lengthy tutorial titled "make your own Spice, K2, Serenity Now, Jwh-018 incense blends." The tutorial describes jwh-018 as the main ingredient in K2 and describes a manufacturing process similar to the accused's CID statement, in which the manufacturer dissolves jwh-018 in acetone and sprays it on an herbal substrate. The tutorial notes that "you must spray the leaves as evenly as possible, or you can get 'hotspots' or localized areas in your mixture that can be dangerous." Both the "jwh-018 direct" site and the tutorial have disclaimers reading "not for human consumption."

Jwh-018 and jwh-073 are synthetic cannabinoids[1] which were originally synthesized in order to study their effects on the cannabinoid receptors, the same family of receptors affected by THC (the active compound in marijuana). Laboratory studies have shown both jwh-018 and jwh-073 to have a similar effect in animals to THC; however, these chemicals bind to the cannabinoid receptor much more strongly than THC, meaning that they are far more potent gram for gram.

3. <u>Table of Authorities</u>

a. *United States v. Breault*, 30 M.J. 833 (1990)
b. *United States v. Johnson*, 10 U.S.C.M.A. 630, 28 C.M.R. 196 (1959)

[1] A compound may be a "cannabinoid" either by structure (similar chemical composition) or by effect. JWH-018 and JWH-073 are the latter, in that they bind to the cannabinoid receptors in the brain and work in a pharmacologically identical manner to THC, the active ingredient in marijuana.

c. *United States v. Masusock*, 1 U.S.C.M.A. 32, 1 C.M.R. 32 (1951)
d. *United States v. Bartell*, 32 M.J. 295 (1991)
e. *United States v. Ayers*, 54 M.J. 85 (2000)
f. *Parker v. Levy*, 417 U.S. 733 (1974)
g. *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003)
h. *United States v. Nation*, 26 C.M.R. 504 (1958)
i. *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963)
j. *Jordan v. De George*, 341 U.S. 223 (1951)
k. *United States v. Harriss et al*., 347 U.S. 612 (1954)
l. *Boyce Motor Lines, Inc. v. United States* 342 U.S. 337 (1952)
m. *Colton v. Kentucky*, 407 U.S. 104 (1972)
n. *United States v. Pope*, 63 M.J. 68 (2006)
o. *United States v. Cochrane*, 60 M.J. 632 (N.M.C.C.A. 2004)
p. *United States v. Serianne*, 69 M.J. 8 (C.A.A.F. 2010)
q. *United States v. Green*, 22 M.J. 711, 718 (A.C.M.R. 1986)

4. Discussion

a. Under controlling precedent, customs, and regulations of the Naval Service, an order *issued* by a general officer may be *signed* by his Chief of Staff, and the order carries a presumption of regularity.

The question raised by the defense regarding the ability of the Chief of Staff to a Commanding General (CG) to issue an order signed by the CG has been answered by the courts of the armed services under circumstances indistinguishable from this case. The Navy-Marine Corps Court of Criminal Review first considered the issue of the validity of a general order signed by a Chief of Staff in *United States v. Breault*, 30 M.J. 833 (1990). The court in *Breault* reviewed provisions of the Department of the Navy Directive Issuance System and the Naval Correspondence Manual and concluded that "a signature over the functional title 'Chief of Staff' subscribed to a directive bearing the issuing authority identification of a headquarters commanded by a flag or general officer is the equivalent of what, for most lesser staff officers, would be a signature 'By direction,' meaning 'by direction of the Commander.'"[2] *Id*. at 836.

[2] The current edition of the Naval Correspondence Manual advises "When a principal subordinate authorized to sign by title, *such as the chief of staff* or deputy in a major command will sign the correspondence, include their title as the second line of the signature line… Put the term "By direction" under the name of a subordinate formally authorized to sign official

"We consider the distinction between 'issuing' a directive and 'signing' it to be crucial to reaching the correct result in cases such as this." *Id*. at 837. The court noted that even in certain situations where the authority of the commander was non-delegable, "the *decisional* authority, which is discretionary in nature, remains with the commander, while the *signature* authority, which is delegated, is wholly ministerial in nature." *Id*. (emphasis in original). The court ultimately held that "it is not necessarily fatal to the validity of a general order or regulation that it was signed by someone other than the commander, so long as the person who did sign it was properly authorized to do so." *Id.* at 838. "The Government in cases such as this is aided by a presumption of regularity, which, unless overcome by evidence to the contrary, is sufficient to support a finding that the order was duly signed by a person authorized to sign it." *Id.*, citing *United States v. Johnson*, 10 U.S.C.M.A. 630, 28 C.M.R. 196 (1959); *United States v. Masusock*, 1 U.S.C.M.A. 32, 1 C.M.R. 32 (1951). The court upheld the finding of guilty to a violation of Article 92(1), UCMJ, where the order was signed by the Chief of Staff. *Id.*

The reasoning and holding of *Breault* have been adopted by the Court of Military Appeals and subsequently by the Court of Appeals for the Armed Forces. *United States v. Bartell*, 32 M.J. 295 (1991) (lawful general order can be signed by Chief of Staff rather than Commanding General); *United States v. Ayers*, 54 M.J. 85, 90-91 (2000). These cases remain good law. The trial counsel was able to locate this body of case law within a few minutes of beginning a WESTLAW™ search on this topic.

The defense cites a single unpublished NMCCA case, *United States v. Sheley*, NMCCA 200800396, as *de facto* controlling authority in this case. The defense argument that *Sheley* "must control" fails in light of the controlling precedent cited *supra*. *Sheley* is distinguishable

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correspondence, *but not by their title*." SECNAV Manual M-5216.5, Para. 7-13(b).

from *Breault* and this case in that the order in *Sheley* was issued over the signature of the *deputy* chief of staff, who is not the type of official typically given the authority to sign by title as the Chief of Staff himself is. Additionally, the opinion in *Sheley* gives little indication that the issue regarding the validity of the order in that case was thoroughly briefed or argued in light of the existing case law. The court noted that the issue was "not brought to our attention by either one of the parties." *Id.*, slip op at 2. The orders violation in *Sheley*, having a nonmilitary female guest in the barracks in violation of a Marine Corps Bases Japan Bachelor Housing order, was a minor offense relative to the specification of aggravated sexual assault upon a minor at the heart of the case. Consequently, the court gave no sentence relief despite setting aside the finding regarding the barracks order violation. To the extent that *Sheley* in fact stands for the proposition that the Chief of Staff for a major command may not publish an order issued by the commanding general under his signature, it is not only contradictory to prior controlling case law and therefore erroneous, but should carry negligible weight even as persuasive authority due to the insufficient consideration given to the issue at hand in this case.

b. <u>The standard of review for the challenged order in this case is not strict scrutiny, nor any heightened scrutiny. The order need only be a legitimate exercise of the commander's discretion.</u>

In the context of this case, the defense has argued that the Miramar Air Station Order, StaO 5300.1, is "void for vagueness on its face" (Def. Motion, p.4). Citing *Parker v. Levy*, 417 U.S. 733 (1974), the defense concedes in passing that the Supreme Court has stated that even in the context of free speech, the test for a challenge to the action of military commanders in impinging the First Amendment rights of a servicemember would not be strict scrutiny, but instead "because of the factors differentiating military society from civilian society, we hold that the proper standard for review for a vagueness challenge to the Articles of the Code is the

standard which applies to criminal statutes regulating economic affairs." *Parker*, 417 U.S., at 756. The defense cites a number of unrelated cases and opts for a simple statement in *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003), that notes that "void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his or her contemplated conduct is proscribed." *Moore*, at 469.

This statement, however, while generally true, is neither a standard of review nor a correct statement of the burden upon the defense, nor very helpful in helping the military judge understand to what level of scrutiny the Station Order should be subjected. It must first be noted, however, that the conduct is (1) smoking a substance, (2) distributing that same substance, and (3) manufacturing that same smokable substance. This is not exactly First Amendment conduct and, given the current regulation of smoking broadly in our society, from the banning of smoking from federal establishments to most restaurants or places of public accommodation, a Station Order aimed at prohibiting such conduct should hardly be subjected to a searching analysis. This is not an adjuration for the Court to abandon its role to examine the questioned order, but the defense's repeated claims that "smoking Spice is most certainly legal" (Def. Motn., at 7), or that the Station Order is "contrary to established law, in which this conduct is perfectly legal..." misses the point entirely. As noted in Section A. above, wearing a yarmulke is also perfectly legal, and not only legal, but Constitutionally protected, yet it violated an Air Force uniform regulation and the religious practice had to yield. In this case, the defense argues a high standard of review for an activity that is not only not Constitutionally protected, but uniformly regulated and even banned from federal buildings. To bring the point to a close, Commanders frequently curtail the rights of sevicemembers in pursuit of the military mission, from orders to not possess contraband in a Muslim country (including pictures displaying nudity, a Constitutionally

protected activity), to orders limiting the possession of firearms in one's living area on base, to orders forbidding servicemembers from patronizing certain clubs or bars ("off-limits establishments"), to no contact orders (impacting upon free association rights), to orders limiting the dress, location, and hours of liberty (liberty risk programs), to "take that hill" that may require a servicemember to give up their "life" and "liberty". Under the defense's articulation, all of these orders are as equally problematic as the Station Order because they are "too broad to serve... a valid military purpose." Def. Motn., at 12. The defense continues the argument by claiming that "the commanding officer must be able to show that there is an effect on performance of duty or some other detriment to good order and discipline from the use, possession, or distribution of 'spice'." *Id.,* at 13. This argument is, at its essence, a shift of the defense's burden of proof onto the "commanding officer" to justify his determination of the detrimental effects of the substance in question, which is comprised of synthetic cannabis. This is no strawman; the defense states in the same paragraph that the "order simply says that use of this will cause someone to likely suffer and adverse physical reaction or engage in some unlawful conduct. The assertion is pure conjecture unsupported by any research or data." *Id.* The defense has now propounded a new standard that evidently would require Commanders to conduct scientific research and analysis before he issued any order, otherwise his reasons for issuing the order are "pure conjecture unsupported by research or data."

The preliminary issue here is that (A) the defense has the burden on its motion, (B) the standard for court review of a Commander's discretionary decisions and orders related to the military efficiency, morale, and discipline of his or her unit is one of deference, according to the Supreme Court of the United States, (C) orders start, as a matter of law, as being presumed lawful and are "disobeyed at one's own peril", and finally, (D) the "economic review" standard

from *Parker v. Levy* means that a complainant cannot challenge the order on the basis of "hypothetical conduct" but only in the light of "their own conduct" and what they knew and should have known.

c. The vagueness doctrine requires that the accused prove that he could not have known that *his* conduct was prohibited.

The lawfulness of an order is a question of law to be determined by the military judge. M.C.M., Part IV, para. 14.c(2)(a)(ii). Military orders are presumed valid and are disobeyed at the peril of the subordinate. *Id.*, at (i). See also *Moore*, 58 M.J. at 467. General regulations…which do not offend the Constitution, an Act of Congress, or a lawful order of a superior, are lawful, if reasonably necessary to safeguard and protect the morale, discipline and usefulness of members of the command and directly connected with the maintenance of good order in the services. *United States v. Nation*, 26 C.M.R. 504, 506 (1958).

The detailed body of case law evaluating various legislative enactments alleged to be unconstitutionally vague provides a helpful standard for evaluating whether a general order places a service member on notice. "Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language", and (2) "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *Parker* 417 U.S at 757. "A person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Id* at 759. For a statute to be unconstitutional, it is not enough that it "requires a person to conform his conduct to an imprecise but comprehensible normative standard," but rather it must be so vague that "no standard of conduct is specified at all." *Id.* at 755. At the root of this concept is the principle that legislatures should "set reasonably clear

guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Id.* at 752.

Parker references its earlier decision on the standard for criminal statutes relating to economic matters in *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963). In that case, National Dairy was charged with violating the Robinson-Patnam Act, which made illegal the practice of selling products at "unreasonably low costs for the purpose of destroying the competition." The Court rejected arguments that the statute was invalid based upon hypothetical possibilities, but instead found that National Dairy's actions would be judged in light of the language of the Act, past legislation, and its own actions only. In *National Dairy*, the Court set forth the economic standard analysis and explicitly rejected plaintiffs' analytical framework for analyzing the statute - the identical framework that the defense here urges the Court to adopt.

> National Dairy and Wise urge that §3 is to be tested solely "on its face" rather than as applied to the conduct charged in the indictment, i.e. sales below cost for the purpose of destroying competition. The Government, on the other hand, places greater emphasis on the latter, contending whether or not there is doubt as to the validity of the statute in all of its possible applications, [it] is plainly constitutional in its application to the conduct alleged in the indictment... The strong presumptive validity that attaches to an Act of Congress has led this Court to many times hold that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.
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> *National Dairy*, at 32.

The Court has also stated it does not require "impossible standards of specificity", as a statute is not automatically unconstitutional just because there is "difficulty in determining whether certain marginal offenses are within the meaning of the language under attack". *Jordan v. De George*, 341 U.S. 223, 231 (1951). A level of generality is acceptable in a statute so long as the "general class of offenses" is "plainly within its terms", even where there are marginal

cases "where doubts might arise." *United States v. Harriss et al*., 347 U.S. 612, 618 (1954). When a person encounters one of those marginal situations, the Court has said that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line. *Boyce Motor Lines, Inc. v. United States* 342 U.S. 337 (1952).

Recognizing the difficulty in crafting criminal statutes "both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited", the Court said the vagueness doctrine should not act to create a "constitutional dilemma." *Colton v. Kentucky*, 407 U.S. 104 (1972). The language of the statute must, however, sufficiently convey "definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan* at 231. Significant policy considerations support these limitations on the vagueness doctrine as well. If the vagueness doctrine were given the reach urged by the defense, many classes of criminal activity could remain entirely free from prohibition simply because of the difficulty of drawing a precise bright line in every single case.

d. MARFORPAC Order 5355.2 is not unconstitutionally vague as applied to an accused who specifically researched, sought out ingredients and manufactured a substance matching the definition in the Order.

To withstand a challenge on vagueness grounds, a regulation must provide sufficient notice so that a servicemember can reasonably understand that his conduct is proscribed. *United States v. Pope*, 63 M.J. 68, 73 (2006), citing *Moore*, 58 M.J. at 469. Inherent in this analysis is that the regulation must not be impermissibly vague on its face, or as applied to a particular servicemember. *Pope* considered a vagueness challenge to an Air Force recruiting instruction prohibiting improper relationships between recruiters and applicants. Staff Sergeant Pope was

an Air Force recruiter and was charged with violating a recruiting regulation which proscribed, among other things, "engaging in any verbal or physical conduct of a sexual nature that creates and intimidating, hostile, or offensive environment." *Pope*, 63 M.J. at 71. The accused challenged the instruction as unconstitutionally vague, claiming he was not on "fair notice" as to what specific conduct was prohibited by the regulation. CAAF answered:

> "This Court recognizes that possible sources of 'fair notice' include: federal law, state law, military case law, military custom and usage, and military regulations. Training, pamphlets, and other materials may also serve as source of notice because they may give context to regulations and explain the differences between permissible and impermissible behavior."

Pope, at 73. Moreover, the accused argued that the regulation was unconstitutionally vague as applied to him because the regulation at issue was not as specific as, for example, the Navy's sexual harassment directive in listing many specific and detailed ways in which the instruction could be violated. The court rejected appellant's argument that the regulation failed for vagueness because it could have been more specific. The court held that "the Air Force was not required, as a matter of law, to expressly set forth all conceivable instances of impermissible conduct. In our view, the language of [the regulation] provided ample discussion of the types of behavior prohibited by the regulation and a reasonable person would have been on notice that misconduct of the sort engaged in by Appellant was subject to criminal sanction." *Pope*, 63 M.J. at 74.

Both the case law regarding statutory vagueness and *Pope* clearly indicate that in order to determine whether an order is unconstitutionally vague, the relevant inquiry is whether the language in the order clearly applied to the conduct of the accused in the case at hand. When the defense argues in its motion about whether or not cigarettes laced with cloves would be prohibited, or whether the Court should analogize the Station Order to alcohol orders cases, it is

an attempt to invalidate the order based upon hypothetical conduct not at issue before this Court. The accused in this case was not manufacturing and distributing tobacco, cloves, seasonings, or general-purpose circuit simulation programs. The accused methodically researched, manufactured, used, and sold a particular type of mind-altering drug made with synthetic cannabinoids.

Although the government is not aware of any published case law specifically relating to orders prohibiting Spice, the government notes that a vagueness challenge to a Marine Corps Bases Japan Order (MCBJO) very similar to StaO 5300.1[3] was rejected in a recent case in the Western Pacific Judicial Circuit. The military judge in that case reasoned that the MCBJO adequately put the accused on notice that his conduct was prohibited:

> MCBJO 5355.1 gives one of the street names of spice for further clarification. Additionally, the body of MCBJO 5355.1 puts a servicemember on notice that the military is trying to stop the use of spice because of its psychotropic high and effects similar to marijuana, LSD and other psychotropic substances…
>
> Despite the many variations of spice available on the market, the Court is not concerned that someone smoking legal clove cigarettes will be prosecuted under the order. The many variations of the spice available, as shown by the Defense, illustrate the "derivative[s], analogue[s], or variant[s]" spice may take. This fact, however, does not mean that the order must spell out every single variation of spice to be valid. Listing a street name by stating "A.K.A. Spice Gold" in the order does not imply that only "spice gold" is being prohibited. Nor does it mean that because there are so many variations that a servicemember cannot reasonably understand that his conduct runs afoul of the order.
>
> The Court agrees with the government's contention that a reasonable person would be able to use "contextual clues" to understand that certain products sold are contraband… Certainly an order prohibiting someone from smoking marijuana would not have to include the words "weed," "pot," or other variations of the substance for the order to withstand constitutional scrutiny. The fact that the word "spice" may be a homonym for nutmeg or tarragon does not render the order invalid. The key is whether the order offers enough guidance to put the reasonable servicemember on notice that certain conduct is illegal. MCBJO

[3] Marine Corps Bases Japan Order 5355.1. The similarity between the orders is not coincidental.

5355.1 does this.

With regard to StaO 5300.1, the accused's own statements and internet history indicate that he knew that he was manufacturing and distributing mind-altering Spice, the same drug commercially sold as "Spice" and "Spice Gold." The accused admitted that he knew that his conduct was prohibited by the military. The accused specifically searched for the ingredients that he used to make his homemade spice under terms such as "marijuana alternative" and "active ingredient in spice." The accused also searched for ways to buy HU-210, which the defense concedes is a controlled substance. Numerous contextual clues were available to the accused to show that the product he was manufacturing was contraband. In particular, the websites that the accused viewed frequently contained "not for human consumption" warnings balanced with hints that the products being discussed were in fact intended as drug substitutes.

e. The Orders are a valid exercise of command prerogative and the Court of Criminal Appeals has already held such orders to be valid.

If the analytical framework required by the Supreme Court is followed, the MARFORPAC and Station Orders are constitutionally valid as applied to the accused because any of the claims about hypothetical circumstances (clove cigarettes, alcohol,) that might possibly render the Orders constitutionally invalid are simply inapplicable and not a valid means for finding the Orders "vague," as the defense argues. References to how many Google hits "spice" produces tell us absolutely nothing about whether the accused was put on 'fair notice' of the prohibited nature of his conduct in this case.[4] Under the standards announced by CAAF in *United States v. Pope*, the accused in this case is on notice by virtue of prior federal law, state

[4] The government respectfully submits that if Google hits are of any relevance to this case, the court should consider the hits produced from the search terms entered by the accused relating to Spice and synthetic cannabinoids. However, even the Google search results submitted by the defense show that the first hit relating to "Spice Gold" was from a website called grasscity.com. "Grass" is well-known slang for marijuana.

law, military case law, existing regulations, and customs and traditions of the service. A look at each of these categories reveals that the Orders are valid (and the accused on notice) by reference to the federal drug schedule (I) and the UCMJ (Article 112a). The federal drug schedule, while not listed as a reference, is certainly a part of federal law (21 U.S.C. §812) and thus provides a reference for the accused, highlighting that marijuana/cannabis is federally controlled, and at least serving to provide some context to use and distribution of an unregulated, synthetic version of cannabis, which is intended to replicate the same mind-altering "high." While the defense attacks the Station Order because it does not list the chemical components for "spice", the defense makes the government's case by pointing out state law that does, in fact, list the exact chemical components of "spice." If the Court of Appeals is to be followed, this state law provides a basis for the accused to be on "fair notice" that his conduct was prohibited. The next two specie of "notice" from *Pope* are case law and existing regulations. As to existing regulations, the Station Order specifically references SecNavInst 5300.28D, Military Substance Abuse and Control. That regulation specifically prohibits the "abuse, possession, manufacture, distribution, importation, exportation, and introduction... [of] cannabinoids, cocaine, amphetamine... and any compound, derivative, or isomer of any such substance." SecNavInst 5300.28D, ¶5(a)(1). Whether or not spice is a "derivative or isomer" may be a question of fact for experts at trial, but it certainly puts the accused on notice as a matter of law that his activities with respect to a synthetic cannabinoid would be subject to criminal sanction. Further, if this section does not provide notice, i.e. if "spice" is not considered a "derivative or isomer" of THC/cannabis, then there can be no question that ¶5(c) does provide fair notice when it states that the

> unlawful use by person in the DON of controlled substance analogues (designer drugs), natural substances (e.g. fungi,

> excretions), chemicals (e.g. chemicals wrongfully used as inhalants), propellants, and/or a prescribed or over-the-counter drug or pharmaceutical compound, with the intent to induce intoxication, excitement, or stupefaction of the central nervous system, is prohibited and will subject the violator...

to criminal and/or administrative sanction. SecNavInst 5300.28D, ¶5(c).

Finally, case law has already found this SecNav Instruction to be constitutionally valid and to provide a means for prosecuting even the abuse of otherwise legal substances. In *United States v. Cochrane*, 60 M.J. 632 (N.M.C.C.A. 2004), *rev denied*, 2004 CAAF Lexis 771 (C.A.A.F. 2004), the accused was charged with, among other specifications, violating the SecNav Instruction (5300.28C) by "mixing, heating, and using a combination of cough syrup, ammonia, lighter fluid, and lemon juice on two occasions, and then ingesting it, after discovering the recipe on the internet." *Cochrane*, 60 M.J., at 634. The accused argued on appeal that the Instruction was unconstitutionally vague because he was not put on notice as to what exactly was prohibited by the Instruction. The Court, in rejecting the claim, held that the Instruction "establishes a clear standard against which an individual's conduct is measured. The phrase 'with the intent to induce intoxication or excitement, or stupefaction of the central nervous system' makes clear that a criminal intent is required, and that the 'excitement' prohibited refers only to a drug-induced manipulation of the central nervous system." *Cochrane*, at 635. Of central importance for this Court is that the defense attempts to distinguish the holding by stating that the case stands for the proposition that the conduct was proscribed and illegal because "it [the use] was not an authorized use of the chemicals and because it was done with the intent to become intoxicated." Def. Motn. at 9 (emphasis in original). The defense then goes on to ignore the second, and most important half of the ruling, and later argues that "smoking 'spice' is its

intended use,[5] so it does not fall into the same category as inhalants or other wrongfully used but otherwise legal substances." Def. Motn. at 16 (italics in original).

This is completely, legally wrong. The defense fails to understand that the essence of the criminality is not how consistently or inconsistently one uses the drugs with their generally intended use - it is that one tries to use them, as NMCCA explicitly held, "with the intent to induce intoxication or excitement, or stupefaction of the central nervous system" and that is the requisite criminal intent, the gravamen of the offense, is the "drug-induced manipulation of the central nervous system." *Cochrane*, at 635. This is clear from the facts of *Cochrane* itself. Cochrane cooked up lemon and cough syrup (as well as other items) both of which are liquids intended to be drunk - which is what Cochrane did with them. Cochrane also mixed in ammonia and lighter fluid, but the Court did not find his actions illegal because of the inconsistency of use with the original product label. If that were the gravamen of the offense, as the defense contends, then it would be illegal for Cochrane to have used those same substances to take a shower or clean his boots, because that is not their "intended use," but that is clearly not the holding. The holding, and the instruction, are aimed at prohibiting Marines and sailors from using "otherwise legal substances" with the intention of frying their brains and getting high - alternatively, in the correct legal parlance - prohibiting the "drug-induced manipulation of the central nervous system."

The defense also asks the Court to waive away the import of *Cochrane* by noting that it was a guilty plea, though how that changes the underlying Constitutional legal principle is unclear. If the order were unconstitutionally vague, the fact that Cochrane pleaded guilty to it would not somehow save the Instruction. Finally, the defense points to the standard used, "as

[5] Although smoking Spice may be its *true* intended use, it is noteworthy that numerous spice-related websites viewed by the accused indicate that either spice or its synthetic chemical components are "not for human consumption."

applied" and asks this Court to also distinguish the case from the instant case.

This illustrates exactly the point made earlier in the Government's response that the defense has not previously understood the proper level of scrutiny and burden that both the Supreme Court and CAAF have set forth for challenges to orders in these contexts; the proper standard of review is an "as applied" and hypothetical challenges are not to be considered. *Cochrane* itself follows this guidance, as well. "The appellant's attempt to boot-strap any and all forms of inducements of "excitement" as being proscribed by the Secretary of the Navy's instruction is rejected by this Court." *Cochrane*, at 635.

In fact, *Cochrane* sums up the position of the government quite well in the final paragraph on both the Constitutional challenge to the Instruction and the claim that there is no legitimate interest being served by regulating legal substances. The court said clearly:

> We find that the Secretary of the Navy has a legitimate and overriding interest in preventing the unlawful use by Department of the Navy personnel of controlled substance analogues, natural substances, chemicals, propellants, and/or prescribed or over-the-counter drug or pharmaceutical compounds, when those persons have the intent to induce intoxication or excitement, or stupefaction of the particular individual's central nervous system. We further find that the instruction is sufficiently tailored to protect that important Secretarial interest, and that the instruction does not needlessly infringe on any legitimate or lawful use of the aforementioned controlled substances...

Id. (italics in original).

The Orders at issue here reference the more updated SecNav Instruction and seek to add one other thing - a prohibition on the manufacture and distribution of these same substances by Marines belonging to the Command. In that sense, the order is correct in pointing out that there is a "gap" in coverage by the SecNav Instruction, which does not prohibit manufacture and distribution of these same substances. It is also important to recognize that "spice," unlike

alcohol or tobacco, does not have a use that is not intended to produce the "high" or stupefaction prohibited by the SecNav Instruction. That is to say, its sole purpose is to produce the marijuana-like high associated with THC, but by use of synthetic cannabinoids. The Commander's order to prohibit its presence in his command is no different than any other order to prohibit contraband by Marines.

And while spice has not yet made its way onto a controlled substances schedule, the defense's own concession that at least two states have proscribed it, and described it exactingly with the scientific rigor that the defense has demanded of the Commander, means that the accused, according to both CAAF and the Supreme Court, is on notice by the station order as to what was proscribed. In short, the Commander here has used his inherent authority to safeguard the morale, welfare, and effectiveness of his unit to prohibit the use of these mind-altering substances by his Marines. That the chemists in the drug culture are ahead of the law's ability to prohibit the very latest concoction is no surprise. It is always the way. The conduct prohibited is clear. The accused's acts in not only purchasing and using the substance, but manufacturing and attempting to distribute it, set forth in the specifications, are a serious threat to the welfare of the Command. The Commander has acted under his inherent authority to issue orders to protect the welfare of his command; to do less would be irresponsible and a neglect of the obligations that inhere to Command.

f. <u>The defense interpretation of SECNAVINST 5300.28D as a barrier to the ability of subordinate commanders to specifically prohibit forms of drug use is logically incoherent and legally unsound.</u>

The defense also claims that the orders at issue here should be struck down because they are preempted from SECNAVINST 5300.28D. As discussed above, the SECNAVINST at least places the accused on notice that his conduct was prohibited. However, nothing in the

SECNAVINST implies that the order is intended to preclude the ability of a subordinate commander to target and prohibit specific forms of drug use as they appear. On its face, the SECNAVINST clearly shows that the Secretary of the Navy's intent was to prohibit numerous forms of drug abuse intended to artificially manipulate the central nervous system to produce a "high." The language of the SECNAV instruction anticipates that new forms of drug abuse may be developed that could escape the language of a narrowly drafted order.

The defense claims that the SECNAVINST precludes or pre-empts the order in this case, each of which is entirely logically incoherent. First, the defense focuses on the use of the word "unlawful" in the SECNAVINST to argue that the order prevents commanders from banning certain drugs unless civilian law has already placed those drugs on controlled substance schedules. This reading of the SECNAVINST makes no sense whatsoever because it implies that the SECNAVINST prohibited nothing that was not already illegal under federal law, yet had the effect of granting *carte blanche* to service members to engage in various forms of substance abuse, notwithstanding the efforts of their commanders to protect the good order, discipline, health, and welfare of their commands. The second argument made by the defense is that because the SECNAVINST does not prohibit possession or distribution, the SECNAVINST therefore preempts the ability of a subordinate commander to ban possession or distribution. This argument implies that a user who takes a concoction of herbs laced with synthetic mind-altering chemicals in order to get high can be held accountable; yet the dealer who purchases the same synthetic mind-altering chemicals over the internet, manufactures the final product, and sells it to the eventual user, must escape any punitive liability.

An order may be invalid if the order either explicitly contradicts or is irreconcilable with an order issued by superior competent authority. See *United States v. Serianne*, 69 M.J. 8

(C.A.A.F. 2010); *United States v. Green*, 22 M.J. 711, 718 (A.C.M.R. 1986). In *Serianne*, the CAAF held that an OPNAV instruction requiring self-reporting of any arrest conflicted with a superior competent regulation, Article 1137 of the Navy regulations, which explicitly eliminated a self-reporting requirement for a person involved in offenses that the person would otherwise be obligated to report. In *Green*, the court noted in dicta that a regulation prohibiting soldiers from having "any alcohol on their breath" was irreconcilable with a superior Department of the Army regulation prohibiting soldiers from having a blood alcohol content above 0.050% while on duty.

Unlike *Serianne* and *Green*, nothing in the MARFORPAC or Station Orders at issue in this case is contrary to or irreconcilable with SECNAVINST 5300.28D. The accused could very well comply with the SECNAVINST, MARFORPAC and Station Orders. In fact, the SECNAVINST places the accused on notice not to engage in the types of conduct specifically prohibited by the latter two orders. A general order may validly prohibit conduct that is not proscribed by superior competent authority, as long as the order does not conflict with superior authority in such a manner that the standards set by the two orders are irreconcilable. Both orders at issue in this case serve to effectuate the commander's intent evinced in the SECNAVINST by acting against particular threats which have emerged at particular places and times.

5. Relief Requested

The government requests that the court deny the motion.

6. Evidence and Burden of Proof

The defense bears the burden of proof by a preponderance of the evidence. In addition to the enclosures previously submitted by the defense, the government offers the following evidence on this motion:

Statement of Lakrisha Ernst (previously submitted)

Article 32 Investigator's Report, summaries of testimony (previously submitted)

Statement of accused dated 4 May 2010 (previously submitted)

Encl (1): Results of command-authorized search of accused's barracks room

Encl (2): USACIL drug chemistry branch final report dated 17 May 2010

Encl (3): Investigator's notes from interview of accused on 4 May 2010

Encl (4): RCFL report and excerpts from accused's search history and internet "favorites"

Encl (5): DEA information sheets on JWH-018 and JWH-073

Encl (6): Military Judge's ruling, U.S. v. Morman (Marine Corps Bases Japan Spice case)

Encl (7): Excerpts from Naval Correspondence Manual

7. <u>Oral Argument</u>

The government respectfully requests oral argument on this motion.

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on the court and defense counsel by electronic mail on 20 September, 2010.

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel