NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE
AARON V. WYLDE PRIVATE FIRST CLASS U.S. MARINE CORPS	)	8 SEPTEMBER 2010

1. Nature of the Motion.

This is a motion to dismiss for failure to state an offense. R.C.M. 907(b)(1)(B). Specifications 2, 3, 5 [sic] and 6[sic] under the charge allege violations of a general order that is not a lawful order. Moreover all the specifications under the charge fail to state an offense. The burden is on the defense by a preponderance of the evidence. R.C.M. 905(c).

2. Summary of Facts.

a. The charge sheet (*Exhibit A*) contains five specifications under one charge of violating Article 92, UNIFORM CODE OF MILITARY JUSTICE (UCMJ). An Additional charge with four specifications will not be discussed nor be subject of this motion. Specifications 2, 3, 5 [sic], and 6[sic] of the charge allege violations of Marine Corps Forces Pacific Order 5355.2 dated 1 December 2009, [Hereinafter "MARFORPACO 5255.2" or "The Order"]. *Exhibit B.* Specification 1 alleges violation of Marine Corps Air Station Miramar Order 5300.1. [Hereinafter "StaO 5300.1"]. *Exhibit C.*

MARFORPACO 5355.2 seeks to prohibit use, possession or distribution of a substance known as "Spice." The Order is signed by the Chief of Staff, a person by the name R.F.L. Heureux. The signature does not include the words "by dir," "acting" or any other words to suggest a delegated authority to promulgate or publish the order.

The order subject line reads: "Prohibited Substances." It purports to outlaw possession, sale, use, or distribution of substances which are intended to produce a psychotropic "high" when ingested or smoked. Psychotropic substances are also known as psychoactive substances. Psychotropic or psychoactive substances include analgesics such as Aspirin or Ibuprofen and as well as codeine and morphine; antidepressants such as Zoloft; stimulants such as caffeine, nicotine and alcohol. http://en.wikipedia.org/wiki/Psychoactive_drug. (As it appeared on September 8, 2010).

Under paragraph 3.b. of The Order, labeled "Concept of Operations," it states "[t]he actual or attempted possession, use, sale, distribution, or manufacture, of Spice, Salvia, or any derivative, analogue or variant of either substance is prohibited…." The only descriptor of "Spice" is provided in Enclosure (1) which states "Spice also known as: a. Genie, b. K2, c. Skunk, d. Spice Diamond, e. Spice Gold, f. Spice Silver, g. Yucatan Fire, h. Zohai." The order contains no scientific name of what spice is, neither chemical composition, nor the putative ingredients that make up spice except a reference to "Spice being a mixture of herbs laced with a synthetic cannebinoid." The family of synthetic cannebinoids is varied and includes many substances, most of which are legal. This is an important detail. The defense recognizes that even legal substances when improperly used could violate certain military regulations, for example paint thinners or computer compressed gas dusters both of which are sometimes illegally used as inhalants. Normal use for Legal Synthetic cannebinoids, on the other hand, is smoking. In the United States controlled substances are listed under 21 U.S.C. §812.

The Order references 21 U.S.C. §812. 21 U.S.C. §812 provides an interesting contrast to MARFORPACO 5355.2. 21 U.S.C. §812 provides a list of controlled substances organized into schedules. The statute does not prohibit any of these substances but organizes them based on

predetermined criteria, for example a substance's potential for abuse. Substances are described by their scientific names and chemical compositions. For example, Under of 21 U.S.C. §812(c)(c)(17) the term Tetrahydrocannanbinols [hereinafter "THC"] appears. THC is the scientific name for marijuana. THC also describes the chemical composition of the substance in the schedule. The term "Spice" appears nowhere under any of the schedules in 21 U.S.C. §812.

Private First Class Wylde is alleged to have used, possessed and distributed "spice." None of the five specifications provides more detail than the term "spice" to describe the alleged misconduct. "Spice" is colloquially used, without specificity, to describe a host of herbal incense blends sold online and in smoke shops throughout the state of California and until the late Spring of this year most of the United States. A Google search using the words "buy spice online" returned 4,390,000 hits. *Exhibit D*.

3. Discussion.

a. WHETHER AN ORDER THAT IS NOT SIGNED BY A FLAG OFFICER OR AN OFFICER WITH GENERAL COURT-MARTIAL CONVENING JURISDICTION AND THAT IS NOT SIGNED "BY DIRECTION" OR LABELED "ACTING" IS A LAWFUL GENERAL ORDER UNDER 10 U.S.C.§892?

No. To be a lawful General Order an order must, among other requirements by a Flag Officer in command or an officer with general court-martial jurisdiction. 10 U.S.C. §892. LCpl Wylde is alleged to have violated Article 92 of the Uniform Code of Military Justice. Article 92 states:

> Authority to issue general orders and regulations.
> General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or the Secretary of Defense, of Homeland Security, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by:
> (i) *an officer having General court-martial jurisdiction*;
> (ii) *a general or flag officer in command*; or

(iii) *a commander superior to (i) or (ii).*

Id. (emphasis added).

Although MARFORPACO 5355.2 states "From: Commander, U.S. Marine Corps Forces, Pacific." It is not signed by the commander, by anyone signing at the direction of the commander or by anyone acting for the commander. An order not signed by a Flag officer in command, an officer having General court-martial jurisdiction, or a commander superior to both is invalid. *United States v. Rex Shelley*, NMCCA 200800396 (unpublished). The appellate court in *Rex Shelley* set aside a conviction for violation of Article 92 because one of the elements of the offense failed. The Court found that an order signed by the deputy Chief of Staff did not constitute a lawful General Order as intended by the statute. "It is not signed by direction and does not purport to place the signatory in an 'acting' capacity for his principal." *Id*. Although *Rex Shelley* is an unpublished case, it must control. An extensive search was conducted to find a published case but to no avail. This appears to have been an issue of first impression for the *Rex Shelley* court. The defense has also not discovered any contrary authority to *Rex Shelley*.

The Order alleged to have been violated by LCpl Wylde is signed by R.F.L. Heureux and states "Chief of Staff" beneath the signature. Like the Order in *Rex Shelley*, it is not signed "by direction" or in an "acting" capacity. Because R.F.L. Heureux does not fit within the categories set forth under Article 92, the elements of the offense fail requiring dismissal of specifications 2,3, 5 [sic], and 6 [sic] of Charge I.

1. MARFORPACO 5355.2 is Void for Vagueness On Its Face[1]

[1] Judge Erdmann of the Court of Appeals for the Armed Forces wrote a robust dissent in United States v. Pope, 63 M.J. 68, 78-80 (C.A.A.F. 2006). His extensive discussion of the issue of vagueness provides a helpful overview of the state of the law in military courts-martial.

MARFORPACO 5355.2 fails to put service members on notice of what conduct it sought to prohibit because the order is unconstitutionally vague on its face and, therefore, violates PFC Wylde's constitutional right to due process. The Fifth Amendment to the United States Constitution provides: "No person shall be ... deprived of life, liberty, or property, without due process of law." The Supreme Court has stated that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The Supreme Court established a two-part test to determine whether a given criminal statute is void for vagueness: "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citing *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned*, 408 U.S. 104; *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. General Construction Co.*, 269 U.S. 385 (1926)). These two concerns – fair notice and adequate enforcement standards – are somewhat intertwined, but the Supreme Court treats them as two separate points of analysis and regards the law enforcement standard to be the more important of the two questions. *Kolendar*, 461 U.S. at 358.

In *Parker v. Levy*, the Supreme Court stated: "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." 417 U.S. 733, 756 (1974). At issue in *Parker v. Levy* was a free speech question. The Supreme Court stated that the typical standard for free speech would not

apply in this case. Instead, the Supreme Court referenced the standard for economic regulation, which states that there is "strong presumptive validity" to an act of Congress, much like the strong presumptive validity in the military regarding general orders.[2] *Id*. at 757.

Kolendar, the seminal Supreme Court case cited above for the vagueness two-pronged test, addresses a California loitering statute. 461 U.S. 352. Some of the cases cited in *Kolendar* are similarly unrelated to free speech issues. For instance, *Village of Hoffman Estates*, 455 U.S. 489, challenges an ordinance regarding sale of real estate and *Papachristou*, 405 U.S. 156, challenges a city vagrancy ordinance. The real estate ordinance in *Village of Hoffman Estates* underwent "economic" analysis by the Supreme Court. 455 U.S. at 498-99. The vagueness test in that case was cited in support of the test as articulated in *Kolendar*. A more stringent test applies to free speech cases. *Village of Hoffman Estates*, 455 U.S. at 499.

The standard in *Kolendar* is the appropriate standard for evaluating void for vagueness questions in the military. *See United States v. Pope*, 63 M.J. 68, 78-80 (C.A.A.F. 2006) (Erdmann, J., dissenting). The Court of Appeals for the Armed Forces (CAAF) in *United States v. Moore*, citing *Parker v. Levy*, described the test as follows: "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." 58 M.J. 466, 469 (C.A.A.F. 2003).

An internet search of the term spice yields numerous results that have nothing to do with the substance the order seeks to control. There are links to spices, the common substances used in food, "The Spice Home Page" which states "Spice is a general-purpose circuit simulation program for nonlinear dc, nonlinear transient, and linear AC analysis." http://bwrc.eecs.berkeley.edu/classes/icbook/spice/ (as it appeared on September 8, 2010). As

[2] "A superior's order is presumed to be lawful and is disobeyed at the subordinate's peril." *United States v. Moore*, 58 M.J. 466, 467 (C.A.A.F. 2003) (citing Paragraph 14c(2)(a) of Part IV of the UCMJ).

well as a Wikipedia link that discusses "Spice" being synthetic cannabis. What is clear from the search and a review of the Wikipedia article is that "Spice" is most certainly legal in the United States and is not a controlled substance. A search for marijuana, on the other hand, results in several links that immediately make it clear to the reader that Marijuana is a controlled substance, including the website http://drugabuse.gov/infofacts/marijuana.html (as it appeared on September 8, 2010). "Drugabuse.gov" makes clear that Marijuana is an illegal substance in the first sentence of the home page. Likewise, Wikipedia's link makes clear that Marijuana is a controlled or illegal substance. MARFORPACO 5355.2 on the other hand provides the name "Spice" and describes it as medicinal herbs. The Station Order does not even provide that information and limits the descriptor to psychotropic drug. There is no further explanation on what herbs are prohibited and which of these herbs expose their users to criminal liability. The Order goes further to state that the medicinal herbs are "laced with synthetic cannabinoid or cannabinoid mimicking compounds." No further explanation is provided to put anyone on notice.

Article 112a of the U.C.M.J., 10 U.S.C. § 112a, prohibits the use, possession, sale or distribution of certain substances. That Article provides a poignant contrast to MARFORPACO 5355.2 and StaO 5355.1. Both Article 112a and the orders at issue here seek to prohibit the same type of conduct as it relates to certain chemical substances. But while Article 112a specifically lists the scientific names, chemical names and refers to a clear and unambiguous statute (21 U.S.C. §812) and its schedule of substances, the two orders simply state "spice" and describe certain physical psychotropic or psychoactive effects that may result from its use. Interestingly, the same psychotropic effects that purportedly result from "spice" also result from the use of undoubtedly legal substances – caffeine and tobacco. *See*

http://en.wikipedia.org/wiki/Psychoactive_drug (as it appeared on September 8, 2010). "Psychotropic" is defined simply as "acting on the mind" according to MERRIAM-WEBSTER'S MEDICAL DICTIONARY, 2002 Ed. Alcohol and tobacco act on the mind, but one would presume that this order does not purport to regulate their consumption.[3] MARFORPACO 5355.2 and StaO5355.1 provide no guidance in answering that question.

The "fair notice" prong is not satisfied by MARFORPACO 5355.2 or StaO 5355.1. A Marine looking at the various "spice" options for sale online cannot know what is lawful and what is not lawful to use, possess or distribute. The "adequate enforcement standard" prong of the law as set forth by the Supreme Court is equally problematic in this case. Nothing in the order helps to ensure uniform enforcement and prevents against arbitrary enforcement, as required by the law.

Commanding Officers have the discretion to arbitrarily charge and punish Marines under these orders for using a leafy green or brown substance sometimes called "spice," and its other purported names as listed in the MARFORPAC Order. Neither order provides any guidance regarding law enforcement standards. The Supreme Court was particularly worried about "a standardless sweep" by law enforcement officials and prosecutors. Smith, 415 U.S. at 575. Commanders are doing such a sweep, calling anything that is dried, brown, and leafy "spice" and using that determination to punish Marines under this order. If tobacco were repackaged in a shiny gold bag labeled "spice," a Marine would presumably be charged criminally for its use.

The standards applied in military case law are precisely the standards explained above. The Navy-Marine Corps Court of Criminal Appeals addressed a similar issue regarding a Navy Regulation in *United States v. Cochrane*, 60 M.J. 632 (N-M.C.C.A. 2004). The NMCCA said

[3] Tobacco is smoked legally; so are cloves. Cloves are a spice and an herb. Cloves are not regulated. What if cloves are blended with tobacco? That would be a legal herbal blend that involves a spice, and it is smoked for its effect on the mind.

"[t]o be valid, a military order 'must be a clear and specific mandate... worded so as to make it specific, definite, and certain.'" *Id.* at 634 (quoting *United States v. Womack*, 29 MJ 88, 90 (C.M.A. 1989)). NMCCA also stated that "[a]lthough general orders and regulations are not in and of themselves statutes, when a violation occurs and is charged under Article 92... such orders and regulations are subject to the same rules of construction as are statutes and the punitive articles of the UCMJ." *Id*. (citing *Womack,* 29 M.J. at 91).

In *Cochrane*, NMCCA reviewed Secretary of the Navy Instruction (SECNAVINST) 5300.28C for vagueness. Electronic Technician Third Class (ETT3) Cochrane **pled guilty** to mixing a variety of chemicals with the intent to become intoxicated. His actions were in direct contravention of regulation. His use was wrongful because it was **not an authorized use** of the chemicals and because it was done with the intent to become intoxicated. NMCCA found no vagueness in the regulation as applied specifically to ETT3 Cochrane. *Id*. at 635. It is important to note that *Cochrane* was only decided "as applied," and that the appeal resulted from a guilty plea. *See also United States v. Dutton*, 2008 WL 2890977 (N-M.C.C.A. 2008) (citing *Cochrane* in a guilty plea for unauthorized use of prescription medication); *cf. United States v. Lancaster*, 36 M.J. 1116 (A.F.C.M.R. 1993). The court in *Cochrane* likely recognized the logical inconsistency with overturning an otherwise provident guilty plea for vagueness using the "as applied" standard.

The charge and all its specifications alleged against LCpl Wylde are distinguishable. MARFORPACO 5355.2 and StaO5355.1 do not prohibit a broad category of substances because of their effects. Rather, they publish a specific list of two substances to be regulated –spice and Salvia. The order purports to list these substances with specificity. One of the substances listed is reasonably specific. For instance, salvia divinorum is the chemical underpinning for a drug

that is sold under a variety of names, but can eventually be traced back to this chemical. If a substance tests positive for salvia, then it is salvia and the order proscribes its use. The charge and specifications against PFC Wylde allege nothing more than "wrongfully possessing 'spice,'" "wrongfully using 'spice,'" and "wrongfully distributing 'spice.'" Spice, however, is too broad of a term. And the description provided within the order does not narrow the definition nor put the category of people to whom it is directed on notice.

Some states have undertaken to prohibit substances that are sometimes referred to as "spice." Alabama and Georgia are among these states. The Alabama statute states in part:

> Section 1. (a) The possession of the following chemical compounds shall be illegal in this state:(1) (6aR,10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2methyloctan-2-yl)-6a,7,10,10a -tetrahydrobenzo[c]chromen-1-ol, some trade or other names: HU-210. (2) 1-Pentyl-3-(1-naphthoyl)indole, some trade or other names: JWH-018. (3) 1-Butyl-3-(1-naphthoyl)indole, some trade or other names: JWH-073.
>
> Alabama HB 697, first read 09 Mar 2010. *Exhibit E*.

The Alabama statute is illustrative of a law that is unambiguous and satisfies the due process clause of the Fifth Amendment to the United States Constitution. It lists specific chemical compounds that are prohibited. In fact the term "spice" appears nowhere in the text of the Bill. Yet the definition is clear and unambiguous. It places the public on notice consistent with the requirements of the law. Likewise the state of Georgia has enacted legislation to prohibit the use of certain substances that are sometimes associated with the street name "spice." The Georgia statute reads:

> Any material, compound, mixture, or preparation which contains any quantity of the following substances, their salts, isomers (whether optical, positional, or geometric), homologues, and salts of isomers and homologues, unless specifically excepted, whenever the existence of these salts, isomers, homologues, and salts of isomers and homologues is possible within the specific chemical designation: (A) 1-pentyl-3-(1-naphthoyl)indole(JWH-018); (B)1,1-dimethylheptyl-11-hydroxy-delta-8-tetrahydrocannabinol(HU-210;(6a,10a)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-

methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol);(C)2-(3-hydroxycyclohexyl)-5-(2-methyloctan-2-yl)phenol (CP 47,497).

Georgia House Bill 10 LC 35 1829S/AP. *Exhibit F*.

Both the Georgia and Alabama Bills provide examples of unambiguous statutes. Both statutes are also consistent with the statutory construction of 21 U.S.C. §812 and Article 112a of the UCMJ.

The use of the term "spice" in the orders is ambiguous. Spice is not defined but left open to the subjective interpretation of the convening authority and prosecutor. There is no uniform scientific or even colloquial agreement on what ingredients make up "spice." The ambiguousness of the "spice" descriptor demonstrates the ambiguous nature of an order that seeks to regulate a substance by the simple use of a street name without more. To better illustrate the point, assume that an order sought to regulate a substance known as "pot." No dispute as to the unconstitutionality of an order would exist if, for example, an order prohibited "Pot" and described it as being known to cause decreased motor function, loss of concentration and temporary memory loss. Pot is of course a common street name for Marijuana. Yet "Pot" would never be used as a descriptor in an order to prohibit Marijuana. It is too uncertain, ambiguous, and open to a variety of interpretations

2. MARFORPACO 5355.2 is Void for Vagueness As Applied

MARFORPACO 5355.2 is void for vagueness on its face. However, if the military judge does not believe that it is void on its face, it is certainly void as applied in this case. The five specifications do not place PFC Wylde on notice, as described *supra*, of what substance he is alleged to have been involved with. If this were an Article 112a charge, the government would

have to specify a substance on the Controlled Substances List and the schedule on which the substance is named. Analogous standards should apply to cases involving "spice."

3. StaO 5355.1 Has No Valid Military Purpose

Article 92, UCMJ provides the rule for determining whether an order is lawful. In Article 92(c)(1)(C), lawfulness is defined as follows: "A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. *See* the discussion of lawfulness in paragraph 14c(2)(a)." Paragraph 14 c(2)(a) is the discussion of lawful orders is Article 90, which will be discussed further in depth below. It provides the "valid military purpose" rule.

From the definition in Article 92, there seem to be four distinct reasons that an order could be deemed "unlawful." The defense concedes that nothing in the Constitution directly forbids this type of regulation, except for the due process questions already discussed above. This order is unlawful because it contravenes the laws of the United States, other lawful superior orders and because it contravenes the case law expounding on paragraph 14c(2)(a).

Paragraph 14c(2)(a)(iv) of Part IV of the UCMJ states that for an order to be a lawful order:

> The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

StaO 5355.1 is too broad to serve such a valid military purpose.

The above-cited paragraph requires that an order be *directly* connected to military service and it also provides that commanders cannot regulate "the attainment of some private end." Thus, 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."[4] Other than a broad statement regarding ensuring of health and mission readiness of Sailors and Marines, there is nothing in StaO 5355.1 to explain this order's military purpose. The Situation paragraph of the StaO is informative because it betrays the commander's personal objective: "[a] disturbing trend of substance abuse has surfaced throughout Marine Corps Air Station Miramar and the surrounding San Diego area…" No other explanation of why the abuse is disturbing and why this particular abuse is any less disturbing than nicotine addiction that kills hundreds of thousands each year and alcohol addiction that kills tens of thousands each year. The order simply says that use of this will cause someone to **likely** suffer an adverse physical reaction or engage in some unlawful conduct. The assertion is pure conjecture unsupported by any research or data.

The Air Force Court of Military Review (AFCMR) articulated a useful three-part test for determining whether an order is lawful: "The order must be reasonably in furtherance of or connected to military needs, specific as to time and place and definite and certain in describing the thing or act to be done or omitted, and not otherwise contrary to established law or regulation." *United States v. Spencer*, 29 M.J. 740, 743 (A.F.C.M.R. 1989) (citing *United States v. Wine*, 28 M.J. 688, 691 (A.F.C.M.R. 1989). Although it would only have to fail one prong to be declared unlawful in the Air Force court system, StaO 5355.1 fails all three prongs. First, there is nothing "reasonably in furtherance or connected to military needs" in the order. Second,

[4] The military purpose must relate to the use of "spice" itself. The defense knows of no examples where "spice" use led to other forms of misconduct.

the order is certainly not "specific as to time and place." Finally, it is contrary to both established law, in which this conduct is perfectly legal, and regulation in SECNAVINST 5300.28D.

Military case law on this topic can be reduced to a few distinct categories. There are free speech and freedom of religion challenges to orders, which are irrelevant in this context. In addition, there are mandatory inoculation and safe sex orders that are equally inapposite. In reviewing the case law, military case law addressing alcohol consumption appears to be the most directly related. Alcohol is a legal substance, much like "spice," but commands have tried to regulate its consumption with varying degrees of success. Only when that regulation is specifically tied to a military purpose are those orders declared valid.

United States v. Wilson is the seminal case on this topic. 30 C.M.R. 165 (C.M.A. 1961). In *Wilson* the Court of Military Appeals (CMA) ruled that an order to refrain from drinking alcohol at all times was illegal. The CMA stated: "In the absence of circumstances tending to show its connection to military needs, an order which is so broadly restrictive of a private right of an individual is arbitrary and illegal." *Id*. at 166-67. The court reached this decision because the order "was to apply in all places and on all occasions." *Id*. at 166. The *Wilson* court also found it unpersuasive that this order was issued "for his own good." *Id*. *See also United States v. Stewart*, 33 M.J. 519 (A.F.C.M.R. 1991) (holding a "no drink" order given to an airman with an alcohol problem to be unlawful).

In contrast with *Wilson*, the CMA ruled in *United States v. Blye* that prohibiting alcohol for a service member on pretrial restriction serves a valid military purpose. 37 M.J. 92, 94 (C.M.A. 1993). The CMA explicitly distinguished *Wilson* from *Blye*. *Id*. The court was

convinced that the order in Blye was given with a military purpose in mind, especially because the appellant was on pretrial restriction after having been released from pretrial confinement.

In *United States v. Roach*, the Coast Guard Court of Criminal Appeals (CGCCA) followed *Wilson* in another case addressing a broad order to refrain from drinking under all circumstances. 26 M.J. 859 (C.G.C.C.A. 1988). In that case, the CGCCA stated that such a broad order "interferes with private rights or personal affairs." *Id.* at 865. The *Roach* decision relied on *Wilson* to find "an absence of circumstances tending to show a connection to a military need." *Id*.

The above cited case law shows that an order is unlawful if it seeks to regulate otherwise lawful conduct without a service connection. The use, possession and distribution of "spice" was and remains lawful in the United States the two orders were promulgated. There is no legitimate tie to service connection for use outside the workplace, or in a way that does not interfere with good order and discipline. The orders as written are as broad as the "no drink" orders in *Wilson, Stewart* and *Roach*, and are, therefore, unlawful orders.

4. The Law in the United States

There is no law that prohibits the use of "spice" in the United States. HU-210 is a schedule I controlled substance and has been found in some samples of "Spice Gold." But HU-210 is not at issue here. It was not charged nor was it discovered in the seized sample from PFC Wylde.

5. Superior Orders and Regulations

SECNAVINST 5300.28D regulates drug use in the Navy and the Marine Corps. The order states in paragraph 5.c:

> The unlawful use by persons 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 punitive action under the UCMJ or adverse administrative action or both.
>
> *Id*.

As discussed above and below, there is nothing "unlawful" about the use of "spice" in the United States as long as it does not contain the compound HU-210. In addition, smoking "spice" is its intended use, so it does not fall into the same category as inhalants or other *wrongfully* used but otherwise legal substances. There is no reliable information regarding whether "spice" actually creates "intoxication, excitement or stupefaction." There is very little reliable information about "spice" period.

SECNAVINST 5300.28D does not prohibit possession or distribution of anything. Instead, it is targeted purely at use. One would presume that if the Secretary of the Navy wanted to make it illegal to possess or distribute these substances, he could have. SECNAVINST 5300.28D describes precisely what is, and what is not, illegal in the Department of the Navy. R.F.L. Heureux in promulgating MARFORPACO 5355.2 and the Commanding Officer of Marine Corps Air Station Miramar in promulgating StaO 5300.1 overstepped their authority when they published orders that encroached on the balance struck by the Secretary of the Navy.

The Army Court of Military review addressed this issue in *United States v. Green.* At issue in *Green* was a Department of the Army regulation regarding alcohol consumption and a more stringent Fort Stewart regulation. The court held that "a local regulation must not be arbitrary or unreasonable and it cannot conflict with or detract from the scope or effectiveness of Department of the Army provisions on the same subject." 22 M.J. 711, 718 (A.C.M.R. 1986);

see also United States v. Cowan, 47 C.M.R. 519, 521 (A.C.M.R. 1973). In *Green*, the more stringent regulation was declared invalid because it conflicted with the Army Regulation even though it merely further restricted the prohibited behavior.

In this case, R.F.L. Heureux not only lacked the authority to issue **any** General Order, he and the Commanding Officer of MCAS Miramar also possessed no authority to regulate "spice" because the Secretary of the Navy had preempted such an action in SECNAVINST 5300.29D.

4. Relief Requested.

The defense respectfully requests the military judge to dismiss the charge and all its specifications for failure to state an offense.

5. Evidence.

a. Exhibits:

A. Charge Sheet

B. MARFORPACO 5355.2

C. StaO 53001

D. Screen shot of Google inquiry of "buy spice online."

E. Alabama Bill to prohibit chemical composition of substances that are sometimes used in "spice."

F. Georgia Bill to prohibit chemical composition of substances that are sometimes used in "spice."

G. 21 U.S.C. §812

b. Witnesses:

The defense will call a yet undetermined toxicologist or pharmacologist.

6. Oral Argument. Respectfully requested.

By: ___/S/_____ __8 September 2010_
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CERTIFICATE OF SERVICE

I certify that a copy of this document was served upon government counsel on September 8, 2010.

By: ___/S/_____ __26 August 2010
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