

Criminal Law Notes

Spice—"I Want a New Drug"*

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What Is "Spice"?

As early as 2002, a new drug product emerged on the market: Spice.¹ Spice is advertised as an herbal incense not intended for human consumption.² Spice is a green, leafy product sprayed with synthetic cannabinoid substances that mimic the effects of marijuana when smoked.³ It is marketed under numerous brand names, including Spice, Spice Silver, Spice Gold, Spice Diamond, Spice Tropical Synergy, Spice Arctic Synergy, Spice Gold Spirit, PEP Spice, PEPpourri, K2, Genie, Yucatan Fire, Dream, Ex-ses, Blaze, Spike 99, Spark, Fusion, Magma, Hard Core, and Deliverance, as well as other names.⁴ Spice is generally packaged in two inch by three inch metallic packets containing approximately three grams of the substance;⁵ three grams is enough to make seven or eight "joints."⁶ Spice products are commonly sold in "head shops" and on the Internet.⁷ Google trends show that in 2010, the term

"spice drug" has been searched numerous times and a majority of those searches have come from the United States.⁸

The popularity of Spice has continued to rise since it was first introduced in 2002. Some seek it for a "legal high," while others are just curious.⁹ With some of the synthetic substances claiming to be one-hundred times as potent as THC, the market for these products is vast.¹⁰ Despite its popularity, Spice can also be dangerous. "Poison centers nationwide have reported 352 cases [of patients sickened by Spice] in 35 states."¹¹ Common symptoms include "rapid heart rate, dangerously high blood pressure and sometimes hallucinations or paranoia."¹²

Is Spice Legal?

Spice and most synthetic cannabinoid substances are currently legal in the United States, with the exceptions of Kansas¹³ and Kentucky;¹⁴ laws to ban synthetic cannabinoid substances are currently pending in Alabama, Florida, Georgia, Illinois, Louisiana, Missouri, New York, Tennessee, and Utah.¹⁵ The most notable exception to the legality of synthetic cannabinoids is the substance HU-210.¹⁶

* HUEY LEWIS AND THE NEWS, *I Want a New Drug*, on SPORTS (Chrysalis 1983).

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² NCIS Norfolk Field Office, *Introduction to Spice*, Dec. 9, 2009 (on file with author).

³ Sarah Aarthur, *Synthetic Marijuana a Growing Trend Among Teens, Authorities Say*, CNN.COM, Mar. 24, 2010, <http://www.cnn.com/2010/HEALTH/03/23/synthetic.marijuana/index.html?hpt=T2>.

⁴ *Id.*

⁵ This note refers to all synthetic cannabinoid herbal incense products as "Spice." Any attempt to list all Spice products is probably futile. The market moves quickly to evade detection by law enforcement. See Navy Alcohol and Drug Abuse Prevention (NADAP), *Herbal Incense an Awareness Presentation*, Nov. 17, 2009 [hereinafter NADAP Presentation] (providing a recent listing, including pictures) (on file with author). See *infra* appendix (providing pictures of Spice products).

⁶ Drug Enforcement Agency, *Intelligence Alert: "Spice"—Plant Material(s) Laced with Synthetic Cannabinoids or Cannabinoid Mimicking Compounds*, Mar. 2009, MICROGRAM BULL., <http://www.justice.gov/dea/programs/forensicsci/microgram/mg0309/mg0309.html> (last visited May 21, 2010).

⁷ European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), *Drug Profile: Synthetic Cannabinoids and "Spice"*, <http://www.emcdda.europa.eu/publications/drug-profiles/synthetic-cannabinoids> (last visited May 21, 2010).

⁸ A "head shop" is a "shop specializing in articles (as hashish pipes and roach clips) of interest to drug users." MERRIAM-WEBSTER ONLINE DICTIONARY, <http://mw1.m-w.com/dictionary/head%20shop> (last visited May 21, 2010). A recent Google search for "spice" turned up nine

sponsored links advertising Spice and other "herbal incense" products for sale (research on file with author).

⁹ Google Trends: Spice Drug, <http://www.google.com/trends?q=spice+drug&ctab=0&geo=all&date=all&sort=0> (last visited May 21, 2010).

¹⁰ Brian Neill, *Legal Weed?*, METRO SPIRIT, Apr. 28, 2010, http://metrospirit.com/index.php?cat=1211101074307265&ShowArticle_ID=11012704104659247.

¹¹ See NADAP Presentation, *supra* note 4.

¹² Donna Leinwand, *Places Race to Outlaw K2 "Spice" Drug*, USA TODAY, May 24, 2010, http://www.usatoday.com/news/nation/2010-05-24-k2_N.htm.

¹³ *Id.*

¹⁴ KAN. STAT. ANN. § 65-4105 (2010).

¹⁵ KY. REV. STAT. ANN. § 218A.010 (West 2010).

¹⁶ Research on file with author.

¹⁷ HU-210 was developed in 1988 in Israel (HU stands for Hebrew University, located in Jerusalem). See Spice Cannabinoid—HU-210, http://www.deadiversion.usdoj.gov/drugs_concern/spice/spice_hu210.htm (last visited May 25, 2010). HU-210 is "structurally and pharmacologically similar to [Delta]-9-tetrahydrocannabinol, the main active ingredient of marijuana. *Id.* However, HU-210 is approximately sixty-six to eighty

HU-210 is currently a schedule I controlled substance and is equally as illegal as marijuana.¹⁷ HU-210 has been found to be an ingredient in Spice, which led to a customs seizure of Spice in Ohio.¹⁸

Since virtually no synthetic cannabinoids are listed as controlled substances under the Controlled Substances Act, the possession or use of these substances cannot be charged as a violation under Article 112a, UCMJ;¹⁹ however, use of any of these substances “for the purpose of inducing excitement, intoxication, or stupefaction of the central nervous system is prohibited” by Army Regulation 600-85.²⁰ Unfortunately, a violation of this regulatory provision can only be charged as a failure to obey a lawful general regulation under Article 92, UCMJ.²¹ Moreover, establishing a violation of the regulation can be difficult because these substances cannot currently be detected by standard Department of Defense drug testing methods.²² This makes prosecution of Spice use very challenging. Significantly, the regulation does not prohibit the possession, distribution, introduction, or manufacture of these substances.²³

Is Spice Being Used in the Military?

Reports from the field are sporadic and mostly anecdotal at this point; however, there have been several high profile media reports about Spice use in the military. In a case study conducted at the Naval Air Station in Pensacola, Florida, twenty-eight Sailors were involved in incidents with Spice over a two-year period.²⁴ At Hill Air Force Base near

Salt Lake City, Utah, the Air Force discharged seven Airmen in early 2010 for Spice use, and another eleven Airmen are pending disciplinary action for Spice use.²⁵ Outside of the use prohibition in AR 600-85, the Army has been handling the possession, distribution, and introduction of these products on an installation-by-installation basis. The promulgation of an installation general order banning the possession, use, sale, distribution, or introduction of these products has been the most common solution to the Spice dilemma.²⁶

Recent Opinion—*United States v. Larry*²⁷

On 18 May 2010, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) decided *United States v. Larry*. The appellant was convicted, contrary to his pleas, at a special court-martial of conspiracy to violate a lawful general order, violation of a lawful general order, false official statement, wrongful possession of “Spice” with intent to distribute, and solicitation of another to distribute “Spice.”²⁸ He was sentenced to six months confinement and a bad-conduct discharge.²⁹ One of the issues on appeal was whether or not “possession with intent to distribute the substance is a violation of Article 134.”³⁰

During trial, a Navy Criminal Investigation Service (NCIS) agent had testified that Spice use and distribution was “a huge problem for the military . . . and [Spice] was being widely abused by military members.”³¹ On appeal, the appellant argued that because possession of Spice was legal, the use of the word “wrongful” in the charge made the specification legally insufficient. The NMCCA cited *United*

times more potent than Delta-9-tetrahydrocannabinol based upon laboratory animal tests. *Id.*

¹⁷ 21 U.S.C. § 812 (2006) (listing tetrahydrocannabinols as a Schedule I controlled substance). HU-210 is a tetrahydrocannabinol.

¹⁸ See Steve Bennish, *Synthetic Drug Seized at DHL Hub*, DAYTON DAILY NEWS, Jan. 15, 2009, <http://www.daytondailynews.com/n/content/oh/story/news/local/2009/01/15/ddn011509bustweb.html>.

¹⁹ Except for the above mentioned HU-210. See UCMJ art. 112a (2008) (requiring prohibited drugs to be listed in Article 112a, specified by the President, or to be listed in the controlled substances act. 21 U.S.C. § 812).

²⁰ U.S. DEP’T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 4-2p (RAR, 2 Dec. 2009) [hereinafter AR 600-85].

²¹ UCMJ art. 92 (2008).

²² See NADAP Presentation, *supra* note 4. However, European countries are reported to have detection capabilities via blood tests. *Id.*

²³ AR 600-85, *supra* note 20, para. 4-2p.

²⁴ *Id.* A Navy instruction prohibits

[t]he unlawful use by persons in the DON [Department of the Navy] 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.

U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 5300.28D, MILITARY SUBSTANCE ABUSE PREVENTION AND CONTROL para. 5.c (5 Dec. 2005).

²⁵ Associated Press, *7 Air Force Airmen Discharged for Utah Spice Use*, GAZETTE, Mar. 27, 2010, <http://www.gazette.com/articles/size-96303-font-11px.html>. The Air Force has an instruction that requires separation for use of “any intoxicating substance, other than alcohol, that is inhaled, injected, consumed, or introduced into the body in any manner for purposes of altering mood or function.” U.S. DEP’T OF AIR FORCE, INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN para. 5.54.1 (10 June 2004). The only exception is if the Airman meets all seven listed criteria for retention. *Id.* para. 5.52.2.1.

²⁶ For example, Fort Drum, New York, recently prohibited the “actual or attempted possession, use, sale, distribution, manufacture, or introduction of” Spice and other similar substances. See Installation Policy Memorandum 10-30, Headquarters, 10th Mountain Division (Light Infantry), Fort Drum, New York, subject: Prohibition of Certain Unregulated Intoxicants (21 Apr. 2010).

²⁷ No. 200900615 (N-M. Ct. Crim. App. May 18, 2010) (unpublished).

²⁸ *Id.* at *1.

²⁹ *Id.*

³⁰ *Id.* at *2.

³¹ *Id.* at *3.

*States v. Erickson*³² for the proposition that there “is nothing on the face of the statute creating Article 112a or in its legislative history suggesting that Congress intended to preclude the armed forces from relying on Article 134 to punish wrongful use by military personnel of substances, not covered by Article 112a, capable of producing a mind-altered state.”³³ The NMCCA held that “a reasonable fact finder could have found beyond a reasonable doubt that the appellant’s wrongful possession of Spice with the intent to distribute was prejudicial to good order and discipline in the armed forces.”³⁴ Based on *Erickson* and the testimony of the NCIS agent, the court upheld the conviction.³⁵

The primary take away from the *Larry* case is that even in the absence of a lawful general order or regulation prohibiting certain types of conduct with Spice products, the Government may still be able to prosecute that conduct as a violation of Article 134. The NMCCA specifically did not decide whether “the mere possession of Spice was prohibited or illegal in a general sense,” but the court left the door open to include other types of misconduct involving Spice as violations under Article 134.³⁶ In *Larry*, the

specific conduct was possession with the intent to distribute. However, other types of conduct, such as introduction or simple possession of Spice, may qualify as chargeable offenses under Article 134 if the Government can prove that the conduct was prejudicial to good order and discipline in the Armed Forces.

Practice Pointers

Practitioners in the field should be vigilant of the threat that Spice and Spice-like products pose to the good order and discipline of their installations. Until these substances are declared illegal or prohibited completely by regulation, Soldiers will continue to use and potentially abuse these products. Installation legal offices should push for general orders that prohibit more than just the use restriction contained in AR 600-85.³⁷ Additionally, establishments that sell Spice near military installations should be considered being placed off limits by the local Armed Forces Disciplinary Control Board.³⁸

³² 61 M.J. 230 (C.A.A.F. 2005).

³³ *Id.* at 233.

³⁴ *Larry*, No. 200900615, at *3.

³⁵ *Id.*

³⁶ *Id.* at *2.

³⁷ AR 600-85, *supra* note 20, para. 4-2p.

³⁸ See U.S. DEP’T OF ARMY, REG. 190-24, ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATION LIAISON AND OPERATIONS (27 July 2006).

Appendix

Pictures of Spice Products

