

Spice, Bath Salts, Salvia Divinorum, and Huffing: A Judge Advocate's Guide to Disposing of Designer Drug Cases in the Military

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Trying to get some relaxation, [Specialist Bryan Rodebush] sat on a balcony in Waikiki, Hawaii, and took five hits off a small pipe packed with a drug called spice. He stepped back inside, dozed off on the couch beside his girlfriend Ola Peyton, and then—as if in a trance—he beat Peyton senseless and nearly pushed her off the 11th floor balcony. He was charged with attempted murder.¹

I. Introduction

Servicemembers are dying, engaging in heinous criminal acts, and adversely affecting military readiness while under the influence of designer drugs.² Until recently, judge advocates found themselves without the tools, policies, and laws necessary to successfully combat and prosecute servicemembers who were seeking and getting a legal “high” from designer drugs. Several states, the federal government and, in particular, the Department of Defense (DoD) recognize the dangers associated with the use of designer drugs and have taken drastic action to combat this rising epidemic.

Servicemembers in search of a new high have had easy access to these designer drugs, since they can purchase the substances in local stores, order them on the Internet, or find the ingredients in common household chemicals. This ease of access is a contributing factor to the epidemic. Several stores are selling these types of products and marketing them as incense “not intended for human consumption” as a ploy to escape regulation by the Federal Drug Administration (FDA).³ Military commanders are committed to combating

this craze and have focused on this problem by creating policies, campaigns and crime-tip websites to deter the use of designer drugs.⁴ Each branch of the military has a similar policy reflecting its approach to dealing with designer drugs.

Additionally, the Division of Forensic Toxicology, Armed Forces Medical Examiner System (AFMES) and the U.S. Army Criminal Investigation Laboratory (USACIL) now have the ability to test for the illegal compounds found in spice, bath salts, and other designer drugs.⁵ This article will show that the recent changes in the law and new developments within the DoD provide judge advocates with the resources necessary to aggressively prosecute or administratively dispose of cases involving designer drugs. A sample charge sheet, a local command policy memorandum, and a charging decision matrix are included to assist trial counsel with the case disposition decision.

II. Defining Spice, Bath Salts, Salvia, and Huffing

Designer drugs are becoming increasingly popular within the ranks of each military branch.⁶ Before adding any type of designer drug charge to a charge sheet, trial counsel should be familiar with the chemical composition of the alleged designer drug and its effects. Doing so will assist the trial counsel in identifying specific violations of applicable

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¹ Joe Gould, *Legal High Becomes Horrible Dream*, ARMY TIMES (Oct. 2, 2010), available at <http://www.armytimes.com/news/2010/10/SATURDAY-army-spice-became-horrible-dream-roudebush-100210w/>.

² A designer drug is a drug produced by a minor modification in the chemical structure of an existing drug, resulting in a new substance with similar pharmacologic effects, especially one created to achieve the same effect as a controlled or illegal drug. *Designer Drug*, DICTIONARY.COM, <http://dictionary.reference.com/browse/designer+drug> (last visited Apr. 26, 2012).

³ See Major Andrew Flor, *Spice—“I Want a New Drug.”* ARMY LAW., July 2010, at 23; see also Colonel Timothy Lyons, Chief, Div. of Forensic Toxicology, Office of the Armed Forces Med. Examiner, Spice Presentation (Dec. 1, 2011) [hereinafter Lyons AFME Spice Presentation] (on file with author).

⁴ See Eric Slavin, *Navy Begins New Anti-Spice Campaign*, STARS & STRIPES (Nov. 3, 2011), available at <http://www.stripes.com/news/pacific/japan/navy-begins-new-anti-spice-campaign-1.159606>; Joe Gould, *Army Targets Designer Drugs, Bans Spice*, ARMY TIMES (Aug. 27, 2011), available at <http://www.armytimes.com/news/2011/08/army-targets-designer-drugs-bans-spice-082711w/>; Travis J. Tritten, *Marine Corps Opens Crime-Tips Website to Combat Use of Spice*, STARS & STRIPES (March 10, 2011), available at <http://www.stripes.com/news/marine-corps/marine-corps-opens-crime-tips-website-to-combat-use-of-spice-1.137197>.

⁵ See Lyons, AFME Spice Presentation, *supra* note 3.

⁶ The Armed Forces Medical Examiner Service Synthetic Cannabinoid Testing Summary from March 2011 through March 2012 revealed the following statistics: within the Army, 580 of 672 reported cases yielded a positive result (86%); within the Air Force, 201 of 370 reported cases yielded a positive result (54%); within the Marine Corps, 146 out of 244 reported cases yielded a positive result (60%); within the Navy, 217 out of 345 cases yielded a positive result (63%); within the Coast Guard, 4 out of 4 reported cases yielded a positive result (100%). These statistics represent samples that were seized and submitted where spice use and/or possession was suspected. E-mail from Colonel Timothy Lyons, Chief, Div. of Forensic Toxicology, Armed Forces Med. Examiner Office, to author (May 7, 2012, 07:32:00 EST) (on file with author).

regulations and command policies, and further assist them with effectively explaining the offense to panel members and the military judge. Furthermore, the effects of the drugs are relevant to prove the accused's intended purpose for their particular use or possession of the illicit substance, i.e., to get "high" as opposed to use as an incense to make their quarters smell better.⁷

A. Spice

Spice is a green leafy substance that resembles marijuana.⁸ It produces euphoria, psychosis, respiratory problems, and low blood pressure; however, lower doses usually result in calming sensations.⁹ Spice is comprised of a combination of different plant materials. To avoid criminal liability, manufacturers are continuously altering the chemical makeup of spice, to allow the distribution of other types of legal cannabinoids that produce the same or similar high.¹⁰

B. Bath Salts

Bath salts, or designer cathinones, are synthetic stimulants found in numerous retail products.¹¹ These should not be mistaken for the traditional bath salts commonly used while bathing.¹² They are marketed as such to avoid being classified as illegal.¹³ Bath salts are sold in small plastic or foil packaging most often in white, off-white, or yellow

⁷ Knowledge of the effects of a specific designer drug is one of the essential proof elements required in proving violations of current policy memorandums. See UCMJ arts. 80, 92, 134 (2012).

⁸ Spice is a mixture of herbs and spices sprayed with synthetic cannabinoids, similar to the compounds found in Tetrahydrocannabinol (THC), the main ingredient in marijuana. Spice is marketed and sold in small metallic packaging under numerous brand names, including, but not limited to, K2, Spike 99, Spice Gold, Spice Silver, Spice Diamond Dream, and Blaze. U.S. DRUG ENFORCEMENT ADMIN., DRUG FACT SHEET: K2 OR SPICE, http://www.justice.gov/dea/pubs/abuse_data_sheets/K2_spice.pdf (last visited Mar. 10, 2012). See also Flor, *supra* note 3, at 23; Lyons, AFME Spice Presentation, *supra* note 3. Spice is also marketed and sold as a legal alternative to marijuana. Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids into Schedule I, 76 Fed. Reg. 11,075, 11076 (Mar. 1, 2011).

⁹ Lyons, AFME Spice Presentation, *supra* note 3.

¹⁰ *Id.*

¹¹ U.S. DRUG ENFORCEMENT ADMIN., DRUG FACT SHEET: BATH SALTS OR DESIGNER CATHINONES (SYNTHETIC STIMULANTS), http://www.justice.gov/dea/pubs/abuse/drug_data_sheets/Bath_Salts.pdf (last visited Mar. 10, 2012) [hereinafter BATH SALT FACT SHEET].

¹² Matt McMillen, *Why 'Bath Salts' Are Dangerous, Though Not Illegal in All States*, WEBMD, <http://www.webmd.com/mental-health/features/bath-salts-drug-dangers> (last visited Mar. 10, 2012).

¹³ *Id.* See also Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65,372 (Oct. 21, 2011) (Bath salts are sold as a legal alternative to cocaine, methylenedioxymethamphetamine (MDMA), and methamphetamine.).

powder form, or in some cases as a tablet or capsule.¹⁴ They have similar effects as cocaine, acid, amphetamines, and ecstasy.¹⁵ Side effects include, but are not limited to, paranoia, seizures, panic attacks, suicidal gestures, rapid heart rate, and an impaired perception of reality.¹⁶ It is normally ingested by snorting, but can also be taken orally, smoked, or put in a solution and injected intravenously.¹⁷

C. Salvia Divinorum (Salvia)

Salvia is a green, leafy perennial herb in the mint family, often used by the Mazatec Indians during rituals and healing.¹⁸ Salvia is being increasingly used for its hallucinogenic effects. The use of salvia can disrupt sensory and cognitive functions, which may in turn result in serious injury or death.¹⁹

D. Huffing

Huffing is the practice of purposefully inhaling chemical vapors to reach and achieve a euphoric mental and

¹⁴ BATH SALT FACT SHEET, *supra* note 11.

¹⁵ *Id.* Acid is the most common name for lysergic acid (LSD) and ecstasy is the common name for MDMA. *Id.*

¹⁶ Bath salt effects have also been allegedly tied to human cannibalism attacks. See Katherine Cooney, *Cannibal Alert: Another Face Chewer Surfaces in Louisiana*, TIME.COM (Jun. 8, 2012), available at <http://newsfeed.time.com/2012/06/08/zombie-alert-another-face-chewer-surfaces-in-louisiana/?iid=nf-category-mostpop1> (man bites off a piece of another man's face during a domestic dispute, while allegedly high on bath salts); see also Howard Portnoy, *Latest Naked Zombie on Bath Salts Threatens to Eat Arresting Police Officers*, EXAMINER.COM (Jul. 5, 2012), available at <http://www.examiner.com/article/latest-naked-zombie-on-bath-salts-threatens-to-eat-arresting-police-officers>. See also Veronica Rocha, *Man on Bath Salts Attacks Woman with Shovel, Glendale Police Say*, L.A. TIMES (Jun. 22, 2012), available at <http://latimesblogs.latimes.com/lanow/2012/06/man-eats-bath-salts-attacks-elderly-woman-with-shovel-police-say.html> (elderly woman asks man to stop swinging a shovel at birds; man then swings and strikes woman in the head with the shovel while high on bath salts).

¹⁷ BATH SALT FACT SHEET, *supra* note 11; see also JoNel Aleccia, *Woman Loses Arm to Flesh Eating Bacteria from Bath Salts*, MSNBC.COM, http://vitals.msnbc.msn.com/_news/2012/01/15/10159359-woman-loses-arm-to-flesh-eating-bacteria-from-bath-salts (last visited Mar. 10, 2012) (woman loses arm after injecting bath salts into her arm intravenously).

¹⁸ U.S. DRUG ENFORCEMENT AGENCY, SALVIA DIVINORUM AND SALVINORIN A (2010), available at http://www.justice.gov/dea/concern/salvia_divinorum.html [hereinafter SALVIA FACT SHEET]. The Mazatec Indians are primarily located in Oaxaca, Mexico. They are Roman Catholics who believe widely in witchcraft. *Mazatec*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/371210/Mazatec> (last visited Mar. 10, 2012).

¹⁹ SALVIA FACT SHEET, *supra* note 18. Other common names for salvia include Maria Pastora, Sage of the Seers, Diviner's Sage, Salvia, Sally-D, and Magic Mint. *Id.*

physical state.²⁰ The effects of huffing mimic alcohol intoxication, such as drunkenness, slurred speech, nausea, hallucinations, and belligerence.²¹ Inhalants exist in most households and include aerosols and gases, and are commonly referred to as “whippets.”²²

III. Laws, Regulations, and Policy

Before deciding how to charge these types of cases, judge advocates must be cognizant of the current status of the laws, regulations, and policies pertaining to designer drugs and their applicability to their particular branch of service. In addition to federal law, each branch of the military has published regulations and policy memorandums addressing designer drugs.

A. Federal Law

Currently, spice and bath salts are the only designer drugs criminalized by federal statute.²³ The Drug Enforcement Agency (DEA) Administrator initially exercised his lawful authority to temporarily place these designer drugs on the CSA.²⁴ On 1 March 2011, the DEA added five synthetic cannabinoids²⁵ frequently found in

“spice” to Schedule I of the Controlled Substance Act (CSA).²⁶ Additionally, on 21 October 2011, the DEA temporarily placed three synthetic cathinones²⁷ commonly found in “bath salts” on Schedule I of the CSA.

The Administrator exercised this authority after determining that such action was necessary to avoid an imminent hazard to public safety.²⁸ In response to this phenomenon, on 9 July 2012, President Barack Obama signed into law, the Food and Drug Administration Safety and Innovation Act. This Act encompasses the Synthetic Drug Abuse Prevention Act of 2012, which permanently added additional spice, bath salts, and other synthetic drug chemical compounds to the CSA.²⁹ Criminal, civil, and administrative penalties may be imposed against anyone who manufactures, distributes, possesses, imports, or exports

²⁰ NAT'L DRUG INTELLIGENCE CTR., INTELLIGENCE BRIEF: HUFFING, THE ABUSE OF INHALANTS (2001), available at <http://www.justice.gov/ndic/pubs07/708/index.htm>.

²¹ *Id.*

²² The most common class of inhalants is categorized as volatile solvents, such as gasoline, nail polish, glue, felt-tip markers, and correction fluid. *Id.* A “whippet” is slang for inhaling nitrous oxide out of a canister. *Slang for Inhalants*, INHALANT.ORG, <http://www.inhalant.org/inhalant/slang.php> (last visited Mar. 6, 2012).

²³ Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, § 1152, 126 Stat. 993 (2012). *Bill Summary and Status*, THE LIBRARY OF CONGRESS—THOMAS, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.03187>. See also Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids into Schedule I, 76 Fed. Reg. 11075, 11076 (Mar. 1, 2011); see also Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65,371 (Oct. 21, 2011).

²⁴ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (amended § 201, 21 U.S.C. § 811 (1970)) (giving the Attorney General the authority to temporarily place a substance into Schedule I of the Controlled Substance Act for one year without regard to the requirements of 21 U.S.C. § 811(b), if he finds that such action is necessary to avoid imminent hazard to the public safety; the Attorney General could extend the temporary scheduling up to an additional six months); see also Judicial Administration, 28 C.F.R. § 0.100 (2010) (explaining the Attorney General has delegated his authority to the Administrator of the Drug Enforcement Agency). The Synthetic Drug Abuse Prevention Act of 2012 now gives the DEA Administrator the authority to temporarily place a substance on Schedule I for two years with the authority to extend the scheduling up to an additional one year. Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, § 1153, 126 Stat. 993 (2012). *Bill Summary and Status*, THE LIBRARY OF CONGRESS—THOMAS, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.03187>.

²⁵ The five synthetic cannabinoids are 1-pentyl-3-(1-naphthoyl)indole (JWH-018), 1-butyl-3-(1-naphthoyl)indole (JWH-073), 1-[2-(4-morphol

inyl)ethyl]-3-(1-naphthoyl)indole (JWH-200), 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497), and 5-(1,1-dimethylloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue. Schedules of Controlled Substances: Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids into Schedule I, 76 Fed. Reg. 11,075 (Mar. 1, 2011) (to be codified at 21 C.F.R. pt. 1308.11).

²⁶ LISA N. SACCO & KRISTIN M. FINKLEA, CONG. RES. SERV., 7-5700, SYNTHETIC DRUGS: OVERVIEW AND ISSUES FOR CONGRESS 3-4 (2011), available at <http://www.fas.org/sgp/crs/misc/R42066.pdf>.

²⁷ The three synthetic cathinones are 4-methyl-Nmethylcathinone (mephedrone), 3,4-methylenedioxy-N-methylcathinone (methydone), and 3,4-methylenedioxypropylvalerone (MDPV). Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65,371 (Oct. 21, 2011) (to be codified at 21 C.F.R. § 1308.11).

²⁸ See Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids into Schedule I, 76 Fed. Reg. 11075 (Mar. 1, 2011); see also Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65,371 (Oct. 21, 2011).

²⁹ Effective 9 July 2012, ten additional synthetic cannabinoids were added to the CSA. They are: 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497); 5-(1,1-dimethylloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol or CP-47,497 C8-homolog); 1-pentyl-3-(1-naphthoyl)indole (JWH-018 and AM678); 1-butyl-3-(1-naphthoyl)indole (JWH-073); 1-hexyl-3-(1-naphthoyl)indole (JWH-019); 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200); 1-pentyl-3-(2-methoxyphenylacetyl)indole (JWH-250); 1-pentyl-3-[1-(4-methoxynaphthoyl)indole (JWH-081); 1-pentyl-3-(4-methyl-1-naphthoyl)indole (JWH-122); 1-pentyl-3-(4-chloro-1-naphthoyl)indole (JWH-398); 1-(5-fluoropen-tyl)-3-(1-naphthoyl)indole (AM2201); 1-(5-fluoropentyl)-3-(2-iodobenzoyl)indole (AM694); 1-pentyl-3-[(4-methoxy)-benzoyl]indole (SR-19 and RCS-4); 1-cyclohexylethyl-3-(2-methoxyphenylacetyl)indole (SR-18 and RCS-8); and 1-pentyl-3-(2-chlorophenylacetyl)indole (JWH-203). Further, effective 9 July 2012, eleven additional synthetic cathinones and amphetamines, were added to the CSA. They are: 4-methylmethcathinone (Mephedrone); 3,4-methylenedioxypropylvalerone (MDPV); 2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C-E); 2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C-D); 2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C-C); 2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2 C-I); 2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-2); 2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-4); 2-(2,5-Dimethoxyphenyl)ethanamine (2C-H); 2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C-N); 2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine (2C-P). Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, § 1152, 126 Stat. 933 (2012). *Bill Summary and Status*, THE LIBRARY OF CONGRESS—THOMAS, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.03187>.

one of the aforementioned cathinones or synthetic cannabinoids.

B. Army

A major revision to Army Regulation (AR) 600-85 was released in 2009.³⁰ Among the major changes was an expansion on the prohibition of the *use* of several substances for purposes of inducing excitement, intoxication, or stupefaction of the central nervous system.³¹ Army Regulation 600-85 specifically bans the use of controlled substance analogues (designer drugs); chemicals, propellants, or inhalants (used in huffing); and naturally occurring substances, including salvia.³² Violations of this regulation are only applicable to those who use—*not* possess—the illicit substances.

On 29 May 2012, the Secretary of the Army issued an Army-wide punitive directive (Army Directive 2012-14) prohibiting the use, possession, manufacturing, distribution, importation, and exportation of controlled substance analogues, including those found in spice and bath salts.³³ It also prohibits the introduction of these substances onto an installation, vehicle, vessel, or aircraft, under the control of the Army. This directive expands the prohibitions listed in the SECARMY's previous policy letter on prohibited substances, dated 10 February 2011, which only prohibited the *use and possession* of synthetic cannabis and other tetrahydrocannabinol (THC) variants.³⁴ The former policy letter did not address or punish the use or possession of any other designer drugs, only spice.³⁵ Army Directive 2012-14 is to be rescinded upon publication of the impending revised AR 600-85.

Until AR 600-85 is updated, Army judge advocates should ensure commanders at their respective installations implement local command policy letters that make the use,

³⁰ U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM (RAR, 2 Dec. 2009) [hereinafter AR 600-85].

³¹ *Id.* para. 4-2(p).

³² *Id.* Army Regulation (AR) 600-85 also prohibits the use of dietary supplements banned by the U.S. Food and Drug Administration. There is also a prohibition on prescription or over-the-counter medication when used in a manner contrary to their intended medical purpose or in excess of the prescribed dosage amount. *Id.*

³³ U.S. DEP'T OF ARMY, DIR. 2012-14, PROHIBITED SUBSTANCES (CONTROLLED SUBSTANCE ANALOGUES) (29 May 2012), available at [http://pubsod1.acsap.hqda.pentagon.mil/drug_testing/Army%20Directive%20201214%20\(Prohibited%20Substances\(Controlled%20Substance%20Analogues\).pdf](http://pubsod1.acsap.hqda.pentagon.mil/drug_testing/Army%20Directive%20201214%20(Prohibited%20Substances(Controlled%20Substance%20Analogues).pdf)

³⁴ Memorandum from The Sec'y of the Army to Principal Officials of Headquarters, Dep't. of the Army et al., subject: Prohibited Substances (Spice in Variations) (Feb. 10, 2011), available at http://www.acsap.army.mil/Pdf/Sec_Army%20Prohibited_Substances-Spice_in_Variations-Memo.pdf.

³⁵ *Id.*

possession, distribution, exportation, and importation of designer drugs punitive.³⁶ Doing so will close loopholes that currently exist within the Army and provide judge advocates with additional charging options.

C. Air Force

Air Force Instruction 44-121 is similar to AR 600-85 in that it prohibits the *use* of any controlled substance analogues and intoxicating substances (“other than the lawful use of alcohol and tobacco products”)—which would include bath salts and spice—salvia, and inhalants used for huffing.³⁷ This instruction differs from AR 600-85, in that it also prohibits the *possession* of the aforementioned substances if done with the intent of altering mood or function.³⁸

The Secretary of the Air Force has not published a separate service-wide prohibition on the use or possession of designer drugs. However, several subordinate Air Force commands have issued punitive policies regarding designer drugs.³⁹

D. Navy and Marine Corps

In the Navy and Marine Corps, Secretary of the Navy Instruction 5300.28E is one of the primary sources

³⁶ See, e.g., Policy Letter #6, Headquarters, U.S. Forces Korea, subject: United States Forces Korea Command Policy Letter #6, Prohibited Substances (17 Oct. 2011) [hereinafter Policy Letter #6], available at http://www.usfk.mil/usfk/Uploads/140/USFK_PL6_Prohibited_Substances.pdf; see also Policy Memorandum 11-10, Headquarters, U.S. Army Pacific, subject: USARPAC Policy on Prohibiting the Use, Possession, Distribution, and Purchase of Intoxicating Substances—Policy Memorandum 11-10 (4 May 2011) (This policy supersedes Policy Memo 10-17 dated 8 July 10); see also Headquarters, Reg'l Command (South) Combined Joint Task Force—10, Gen. Order No. 1 (13 Nov. 2010).

³⁷ U.S. DEP'T OF AIR FORCE, SEC'Y OF AIR FORCE, INSTR. 44-121, ALCOHOL AND DRUG ABUSE PREVENTION AND TREATMENT (ADAPT) PROGRAM para. 3.2.3 (11 Apr. 2011) [hereinafter SEC'Y OF AIR FORCE, INSTR. 44-121]. See also U.S. DEP'T OF AIR FORCE, SEC'Y OF AIR FORCE, INSTR. 44-120, MILITARY DRUG REDUCTION PROGRAM para. 1.1.6 (3 Jan. 2011) [hereinafter SEC'Y OF AIR FORCE, INSTR. 44-120].

³⁸ SEC'Y OF AIR FORCE, INSTR. 44-121, *supra* note 37; SEC'Y OF AIR FORCE, INSTR. 44-120, *supra* note 37.

³⁹ The Commander, Air Force District of Washington, published a punitive general order prohibiting the use of salvia and spice, applicable to military members assigned to the Air Force District of Washington. Memorandum from Commander, Headquarters Air Force Dist. of Washington to All Members Assigned or Attached to the Air Force Dist. of Washington, subject: General Order Prohibiting the Use, Possession or Distribution of Salvia and Spice (June 9, 2010). The Commander of the Air Force Special Operations Command (AFSOC) instituted a punitive policy prohibiting the use of designer drugs and other intoxicants used to achieve a psychoactive affect. This policy applies to everyone assigned to AFSOC. Memorandum from Commander, Air Force Special Operations Command to all AFSOC Personnel, subject: General Order Prohibiting the Use of Intoxicating Substances (Jan. 29, 2010).

addressing the prohibitions on designer drugs.⁴⁰ On 23 May 2011, this instruction was expanded to punish not only the use, but also the possession, distribution, manufacturing, importation, and exportation of designer drugs.⁴¹ The other service regulations are not as broad. This instruction further prohibits using chemical inhalants and propellants for illicit purposes, other than what the product is intended for, such as huffing.⁴²

Many subordinate Navy and Marine Commanders have also implemented local policy letters prohibiting the use and possession of designer drugs. One particularly noteworthy policy letter requires Sailors and Marines to sign a statement of understanding that acknowledges use, possession, and distribution of spice and salvia are prohibited.⁴³

E. Coast Guard

Unlike the other service regulations and instructions, the applicable Coast Guard Regulation, Personnel Manual, COMDTINST M1000.6 A, prohibits only the use and possession of drugs listed in the CSA.⁴⁴ As a result, the Coast Guard Commandant published additional guidance on designer drugs in ALCOAST 605/10.⁴⁵ This guidance is a general order applicable to all Coast Guard members. The order prohibits the wrongful *use and possession* of controlled substances and certain non-controlled substances which pose significant risks to the safety, readiness, discipline, morale, and health of Coast Guard members.⁴⁶

⁴⁰ U.S. DEP'T OF NAVY, SEC'Y OF NAVY, INSTR. 5300.28E, MILITARY SUBSTANCE ABUSE PREVENTION AND CONTROL (23 May 2011) [hereinafter SECNAVINST 5300.28E].

⁴¹ *Id.* at 4–5.

⁴² *Id.* See also Naval Administrative Message 108/10, 251705Z Mar 10, Chief of Nav. Ops., subject: Drug Abuse Zero Tolerance Policy and Prohibition on Possession of Certain Substances (lawful general order applicable to all uniformed personnel in the Navy that prohibits the wrongful use and possession of controlled substances, controlled substance analogues, salvia, and common items abused by huffing).

⁴³ U.S. DEP'T OF NAVY, NAVAL CONSTR. BATTALION CTR. & TWENTIETH SEABEE READINESS GROUP, INSTR. 5830.1, MILITARY SUBSTANCE ABUSE PREVENTION AND CONTROL (2 Feb. 2009).

⁴⁴ U.S. DEP'T OF TRANSP., U.S. COAST GUARD, COMDTINST M1000.6A, COAST GUARD PERSONNEL MANUAL (14 May 2002).

⁴⁵ Message, 222045Z Dec 10, U.S. Coast Guard Commandant, subject: General Order Prohibiting Wrongful Use and Possession of Certain Non-Controlled Substances.

⁴⁶ The non-controlled substances prohibited by this order include control substance analogues (e.g., bath salts), products that contain synthetic cannabinoid compounds (e.g., spice), and natural substances (e.g., salvia), chemicals used as inhalants (e.g., huffing), propellants, and/or prescribed or over-the-counter drugs when used in a manner contrary to their intended medical purpose or in excess of the prescribed dosage. *Id.*

IV. The Charging Decision

Normally, drug offenses in the military are prosecuted under Article 112a, UCMJ, which is tied to the CSA. Services have attempted to devise a method to criminalize and deter the use and possession of designer drugs not subject to Article 112a. After the background overview of the applicable laws and policies in the previous part, this article next turns to guidance on how to charge cases involving designer drugs.

Assume the following scenario to assist with evaluating the charging decision: During a random command-directed barracks room inspection, the First Sergeant (1SG) enters the room of Sergeant (SGT) Smith and finds a “green, leafy substance” lying on his nightstand. After being properly advised of his Article 31 rights,⁴⁷ SGT Smith says, “It is spice, but I didn’t plan on smoking it. I only planned on burning it as an incense to make my room smell better.” Subsequent to this statement, the commander contacts a Criminal Investigation Command (CID) agent who seizes the substance in the room and sends it to the USACIL for testing.

A. Article 112a, UCMJ

Charges may be preferred against a servicemember pursuant to Article 112a in cases involving the use, possession, manufacture, or distribution of substances listed in Schedules I through V of the CSA.⁴⁸ Thus, if USACIL subsequently determines that the substance found in SGT Smith’s room contained one of the illegal spice compounds prohibited by the CSA, the proper charge would be a violation of Article 112a. The trial counsel should specifically identify the illegal chemical on the charge sheet, not just “spice,” and charge SGT Smith with one specification of possession. Sample specifications for this type of offense are located in Charge III, Specifications 1-5, of Appendix A of this article.

Now assume that during the health and welfare inspection described above, the 1SG discovers a substance resembling bath salts instead of the green, leafy substance in SGT Smith’s room. If USACIL determined that the substance found contains one of the synthetic cathinones listed on the CSA, the appropriate charge would also be a violation of Article 112a. Sample specifications for this type of offense are located in Charge III, Specifications 6-8, of Appendix A of this article.

⁴⁷ UCMJ art. 31 (2012).

⁴⁸ *Id.* art. 112a.

During trial, the trial counsel should also remember to ask the military judge to take judicial notice of the prohibited spice or bath salt chemical compound charged as being a Schedule I controlled substance, as defined in the CSA.⁴⁹ Failure to do so may result in legally and factually insufficient evidence to support convictions under Article 112a.⁵⁰

Although the ability to use Article 112a to charge spice and bath salt cases is a recent development, trial counsel have been successful in prosecuting these types of cases. For example, in December 2011, an Army specialist was convicted at a general court-martial for wrongfully possessing spice and wrongfully introducing spice onto a U.S. Army installation in violation of Article 112a.⁵¹

B. Article 92, UCMJ

The charging decision changes if the substances identified in the hypothetical above are returned from USACIL and do not contain any chemical compound listed in the CSA. Article 112a is not available at that point; however, Article 92 may be.

Pursuant to Article 92, servicemembers who violate or fail to obey any lawful general order or regulation may be punished. Accordingly, preferring charges under this article is encouraged when servicemembers use or possess designer drugs in violation of a local command policy or service regulation and when the chemical composition of the designer drug is not listed in the CSA.

Article 92 is not an automatic catchall. In order to achieve a conviction under Article 92, trial counsel must be able to produce evidence proving the otherwise legal substance was used or possessed for the purpose of altering the servicemember's mood or function or to get high. It is not enough for a policy letter or regulation to simply state that the use or possession of spice, bath salts, and salvia is prohibited.⁵² In order to ensure successful prosecution, the policy or regulation must contain an "objective and clearly

understood standard of criminality."⁵³ In *United States v. Cochran*, the Navy-Marine Court of Criminal Appeals (NMCCA) upheld a conviction under a Navy policy that prohibited

the unlawful use . . . of controlled substance analogues (designer drugs), natural substances (e.g., fungi, excretions), chemicals (e.g., chemicals wrongfully used as inhalants), propellants, and/or prescribed or over-the-counter drugs . . . with the intent to induce intoxication or excitement, or stupefaction of the central nervous system[.]⁵⁴

The court found that this language gave the accused sufficient notice of what conduct was prohibited, and that the phrase "with the intent to induce intoxication or excitement, or stupefaction . . ." showed that a criminal intent was required. The court found that the Department of the Navy had a sufficient legitimate interest in prohibiting this conduct, and that the limiting words in the policy ("unlawful" and "with the intent to induce . . .") ensured that the policy did not improperly infringe on the user's liberty interest.⁵⁵

However, in *United States v. Swinford* (an Army court-martial held in Okinawa in 2010), the trial judge, relying on *Cochran*, dismissed an Article 92 charge based on a command policy that prohibited the use of "the intoxicating substance SPICE."⁵⁶ The policy letter also prohibited "possessing, purchasing, attempting to purchase, accepting shipment of, attempting to ship, or distributing SPICE." The military judge found that "there was nothing in the policy letter which would inform an ordinary, reasonable Soldier . . . what spice is, other than that it is an intoxicating substance."⁵⁷ The judge also ruled that "the modifier 'intoxicating' does not save the policy from being deemed void for vagueness," since alcohol and caffeine in sufficient concentrations would also qualify as intoxicating, which could bring about absurd results.⁵⁸

⁴⁹ *United States v. Bradley*, 68 M.J. 556, 667 (A. Ct. Crim. App. 2009).

⁵⁰ *United States v. Chmiel*, No. S29582, 1998 WL 743504, at *1 (A.F. Ct. Crim. App. Oct. 6, 1998).

⁵¹ The court-martial occurred as a result of the U.S. Army Criminal Investigation Division (CID) discovering a substantial amount of spice in the Soldier's vehicle, which he had driven onto a military installation. He was sentenced to nine months of confinement, total forfeitures, and a bad-conduct discharge. *United States v. Halcom*, No. 20111105 (19th Expeditionary Sustainment Command, Camp Carroll, South Korea, Dec. 8, 2011).

⁵² See *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa, Japan, Nov. 22, 2010) (Ruling, Elements of the Offense Charged in Specification 2 of Charge III, at 1, 3) (Feb. 23, 2010)).

⁵³ *United States v. Peszynski*, 40 M.J. 874, 878 (N.M.C.M.R. 1994) (citing *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974)).

⁵⁴ *United States v. Cochran*, 60 M.J. 632, 633, 635 (N-M. Ct. Crim. App. 2004).

⁵⁵ *Id.* at 635.

⁵⁶ *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa, Japan, Nov. 22, 2010) (Ruling, Def.'s Motion to Dismiss, at 1 (Feb. 23, 2010)).

⁵⁷ *Id.*

⁵⁸ *Id.* at 8 (citing *United States v. Forbes*, 806 F. Supp. 232 (D. Colo. 1992)); see also *United States v. Cochran*, 60 M.J. 632 (N-M. Ct. Crim. App. 2004).

Thus, to be enforced, an order against designer drugs and inhalants must definitely indicate what substances are being prohibited. This is important for judge advocates to remember if they are tasked to draft or review command policy letters prohibiting spice, bath salts, and other designer drugs, as they are being marketed and sold under various names and compositions for a variety of benign uses. Local policy letters should contain language that objectively defines the substance so the presence or lack of a prohibited substance can be verified by a reasonable person.⁵⁹ The policy letter in Appendix B contains specific paragraphs describing the prohibited substances by chemical composition and effects. Thus, it is more likely to survive the “void for vagueness” test referenced in *Swinford*.⁶⁰

Some command policy letters and regulations, like the Navy instruction in *Cochrane*, include language that prohibits the use and possession of substances *intended* to alter a person’s mood or mental faculties.⁶¹ The Navy-Marine court’s language in that case and the trial judge’s holding in *Swinford* suggests that such language is important in making the orders enforceable in court. This “intent” language requires the trial counsel to offer evidence to prove the possessor’s intent. A servicemember who sniffs glue because he likes the smell has not committed a criminal offense under such an order; one who does so in order to get high may be charged with violating Article 92. Thus, in the hypothetical presented above, because SGT Smith stated he merely intended to use the green, leafy substance as incense, the government will be forced to prove otherwise, since the lab results revealed that the substance was not one of the illegal compounds listed on the CSA, and therefore not chargeable under 112a. Corroborating evidence may include an admission by the accused that he smoked spice to get high, or statements of others who saw him ingest the substance.

The successful prosecution of designer drugs under Article 92 depends solely on two things: the evidence and the wording of the prohibitions in the applicable regulations and policies. The NMCCA has upheld an Article 92 “spice” conviction, based primarily on physical evidence and witness testimony identifying the prohibited substance spice as identified and described in the applicable command

policy letter.⁶² Specifically, in *United States v. Caldwell*, the NMCCA held, “[w]e are convinced beyond a reasonable doubt from the foil packages found in the appellant’s single-occupant barracks room, the tobacco residue in that same trashcan, the observations by the duty personnel of the group in the abandoned chow hall, the physical evidence taken from the chow hall, and the testimony of an investigator with experience in identifying illicit substances, that the appellant did possess spice.”⁶³ For a sample specification of an Article 92 violation, see Charge II of Appendix A.

C. Article 134, UCMJ

Refer back to the hypothetical above and continue to assume the substance found in SGT Smith’s room was not listed on the CSA. Additionally, assume that SGT Smith did not make any statements during the search. Lastly, assume SGT Smith made statements to several of his friends that he had Spice in the barracks and was looking forward to smoking it, because it made him feel really good.

If charges under Article 92 and Article 112a are not appropriate, a charge under Article 134 may be. Article 134 criminalizes “all disorders and neglects to the prejudice and good order and discipline . . . all conduct of a nature to bring discredit upon the armed forces and [other] crimes and offenses, not capital. . . .”⁶⁴ A notable case reflecting the nexus between Article 134 and designer drug cases is *United States v. Larry*.⁶⁵

Lance Corporal Larry was a Marine who was convicted at a special court-martial for wrongful possession of Spice with intent to distribute, in violation of Article 134. He was prosecuted before Spice was placed on Schedule I. Accordingly, Larry asserted on appeal that because the word “wrongful” was included in the charge and the fact that the possession of Spice was not illegal or prohibited, the finding of guilty at the trial level was legally insufficient.⁶⁶ The NMCCA determined that the issue was not whether or not the possession of Spice was illegal; rather, it was whether the possession with intent to distribute the substance was prejudicial to good order and discipline, in violation of Article 134.⁶⁷ The trial judge instructed the panel members that “not every possession of a substance with the intent to distribute, constitutes an offense under the UCMJ. . . .

⁵⁹ *Id.* at 7.

⁶⁰ *Id.* at 4 (citing 5th U.S. Air Force, 18th Wing, Gen. Order No. 3 (13 Mar. 2009), which defines spice as “a mixture of medicinal herbs that causes decreased motor function, loss of concentration, and impairment of short-term memory”; citing U.S. Marine Forces Pacific Order 5355.2 (1 Dec. 2009), which states, “[s]pice, a mixture of medicinal herbs laced with synthetic cannabinoids or cannabinoid mimicking compounds, is known to cause decreased motor function, loss of concentration, and impairment of short-term memory”).

⁶¹ See, e.g., Policy Letter #6, *supra* note 36, at 2. (“[T]he possession of any intoxicating substance described [in the order] is prohibited if done with the intent to alter mood or function.”) (emphasis added).

⁶² *United States v. Caldwell*, 70 M.J. 630, 634–35 (N-M. Ct. Crim. App. 2011).

⁶³ *Id.* at 5.

⁶⁴ UCMJ art. 134 (2012).

⁶⁵ *United States v. Larry*, No. 200900615 (N-M. Ct. Crim. App. May 18, 2010) (unpublished), available at http://www.jag.navy.mil/courts/opinion_archive_2010.htm.

⁶⁶ *Id.* at *2.

⁶⁷ *Id.*

[However,] the government must prove beyond a reasonable doubt that the conduct was prejudicial to good order and discipline” in order to convict the accused of an Article 134 offense.⁶⁸

Based on testimony from a Navy Criminal Investigative Service (NCIS) agent that spice was a “huge problem in the military” and evidence that the appellant had distributed spice in the barracks, on a military installation and to other Marines, the NMCCA held that “a reasonable fact finder could have found beyond a reasonable doubt that the appellant’s wrongful possession of Spice with intent to distribute was prejudicial to good order and discipline in the armed forces.”⁶⁹ *Larry* demonstrates that Article 134 may be the default charge for the prosecution of designer drugs not listed on the CSA, as long as the conduct associated with the use, possession, or distribution of the substance is prejudicial to good order and discipline (or is service discrediting). However, substances that are listed on the CSA—including the synthetic cannabinoids found in spice and the synthetic cathinones found in bath salts—are preempted from prosecution under Article 134.⁷⁰

Huffing cases are also commonly prosecuted under Article 134. In *United States v. Erickson*,⁷¹ the appellant admitted to purchasing cans of nitrous oxide, popularly known as laughing gas, inserting the gas into a balloon and inhaling the fumes which “made [him] feel happy, made [him] laugh. Afterward it gave [him] a really bad headache . . . for about ten seconds.”⁷² Further, the appellant noted that the gas made him “high” and altered his thinking. He was convicted at a special court-martial for wrongfully using nitrous oxide in violation of Article 134.⁷³ On appeal, the Court of Appeals for the Armed Forces (CAAF) upheld the conviction based in part on the accused’s “admission regarding impairment of mental faculties [which] reflected his understanding that he had engaged in conduct that would undermine his capability and readiness to perform military duties—a direct and palpable effect on good order and discipline.”⁷⁴

⁶⁸ *Id.* at *4.

⁶⁹ *Id.* at *3.

⁷⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60.c.(5)(a) (2006) [hereinafter MCM]. “The preemption doctrine prohibits application to Article 134 to conduct covered by Articles 80 through 132.” *Id.* For example, the synthetic cannabinoids found in spice and the synthetic cathinones found in bath salts are covered by Article 112a; therefore, offenses involving these specific chemical substances, if listed on the CSA, may not be charged under Article 134.

⁷¹ *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005).

⁷² *Id.* at 232.

⁷³ *Id.* at 231.

⁷⁴ *Id.* at 232. The court also addressed a defense preemption argument, and held that the absence of nitrous oxide on the lists of substances prohibited by Article 112a in no way precluded an Article 134 charge for using it—

In *United States v. Deserano*,⁷⁵ by contrast, the Air Force Court of Criminal Appeals (AFCCA) reversed a finding of guilty under Article 134 for inhaling nitrous oxide out of a whipped cream can. The court did not hold that this conduct could never violate Article 134, but only that the government had failed to prove that it did in this case. There was no evidence at trial of the harmful effects of inhaling nitrous oxide, or even that the propellant in the cans was in fact nitrous oxide. “Without proof of the identity of the substance the appellant ingested and its potential effects, we are unwilling to make a ‘leap of faith’ to conclude his conduct was a disorder punishable under Article 134(1).”⁷⁶

Thus, if the government charges designer drug or inhalant use under Article 134, trial counsel must meet an extra burden, proving not only what the substance was but that “the substance as defined has adverse physiological effects . . . on the central nervous system [and] lacks healthful effects.”⁷⁷ Counsel must further demonstrate a negative impact on good order and discipline or service discrediting conduct.⁷⁸ A sample specification is provided in Charge IV of Appendix A.

A charge under Article 134 is also proper in situations involving crimes of local application that may be assimilated under the Federal Assimilative Crimes Act (FACA). The FACA permits the adoption of a criminal law in the state where the military installation is located and applies it as though it were federal law.⁷⁹ Several states have enacted legislation criminalizing inhalation of nitrous oxide.⁸⁰ Over half of the states have enacted laws criminalizing the use,

There is nothing on the face of the statute creating Article 112 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.

Id. at 233.

⁷⁵ *United States v. Deserano*, 41 M.J. 678 (C.A.A.F. 1995).

⁷⁶ *Id.* at 682.

⁷⁷ *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa, Nov. 22, 2010) (Ruling, Elements of the Offense Charged in Specification 2 of Charge III (Feb. 23, 2010)).

⁷⁸ The terminal element of the general article should be alleged on the charge sheet. Failure to include the terminal element in the specification may result in plain error and materially prejudice the accused’s substantial right to notice of the charges against him. *See United States v. Humphries*, 71 M.J. 29 (C.A.A.F. 2012) (citing *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) (“The Government must allege every element expressly or by necessary implication, including the terminal element.”)). *See also United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012).

⁷⁹ 18 U.S.C. § 13 (2006).

⁸⁰ *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005) (citing TEX. HEALTH & SAFETY CODE ANN. § 485.031 (Vernon 2001); *id.* § 484.003(b); ARK. CODE ANN. § 5-64-1201 (2001); CAL. PENAL CODE § 381b (West 1999); FLA. STAT. § 877.111 (West 2001); IND. CODE § 35-46-6-3 (2004)).

possession, or distribution of salvia.⁸¹ Accordingly, servicemembers who engage in huffing nitrous oxide or who possess salvia while assigned to an installation located in one of those states may be punished in violation of Article 134, even in the absence of a local policy or regulation prohibiting the misconduct. In such cases, the government need not prove that the conduct was prejudicial to good order and discipline or service discrediting,⁸² but must prove that the place where it happened was under exclusive or concurrent federal jurisdiction.⁸³

D. Article 80, UCMJ

“Any act, done with the specific intent to commit an offense . . . amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.”⁸⁴ A servicemember may be guilty of an attempt if he intends to possess a specific substance but in fact possesses something else—even something completely innocuous, or something the identity of which is left unproven.⁸⁵ The Air Force Court of Military Review has held that a servicemember may be found guilty of attempted possession even if the specific substance is not identified.⁸⁶ However, the military judge in *Swinford* held that “the substance he or she specifically intended to possess must still, itself, be chemically defined” on the charge sheet.⁸⁷ For example, if SGT Smith mistakenly sold what he thought was spice and advertised the sales as spice, but the substance was really oregano, SGT Smith may still be charged with attempt. For an example of how to charge these types of offenses, refer to Charge I in Appendix A of this article.

⁸¹ SALVIA FACT SHEET, *supra* note 18.

⁸² *United States v. Sadler*, 29 M.J. 370, 374 (C.M.A. 1990).

⁸³ *United States v. Irvin*, 21 M.J. 184, 186 (C.M.A. 1986). This proof requirement cannot be “handwaved” but must be met at every trial, with evidence or judicial notice.

⁸⁴ UCMJ art. 80 (2012).

⁸⁵ *United States v. LaFontant*, 16 M.J. 236 (C.M.A. 1983).

⁸⁶ *United States v. Guevara*, 26 M.J. 779, 781 (A.F.C.M.R. 1988). The Navy-Marine Court of Criminal Review has further held that an accused can be ignorant of the identity of the substance possessed, yet guilty of actual possession of a controlled substance, if he intended to possess one controlled substance but in fact possessed another. *United States v. Sharar*, 30 M.J. 968, 969 (N.M.C.M.R. 1990) (accused thought he possessed cocaine but in fact possessed heroin). “A lack of knowledge of both the character and precise identity of the substance is a defense. A lack of knowledge of either the character or precise identity of the substance, alone, is not a defense.” *United States v. Fitchett*, No. ACM 28576, 1990 WL 149867, at *1 (A.F.C.M.R. Aug. 17, 1990).

⁸⁷ *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa Nov. 22, 2010) (Ruling, Elements of the Offense Charged in Specification 2 of Charge III, at 5 (Feb. 23, 2010)). Although rulings by military judges at the trial court level have no precedential power over one another, this ruling should be followed as it ensures an accused is put on notice of the crimes for which he is charged.

In *United States v. Gonzalez-Chavez*, a Soldier was convicted at a special court-martial of violations of Article 80, when the chemical composition of the substance found in his possession believed to be spice could not be proven.⁸⁸ Charges under Article 80 should be reserved for cases in which evidence exists that the accused intended to possess, use, or distribute a prohibited substance, yet the substance actually possessed is not illegal or its chemical composition is unknown.

V. Challenges for Prosecutors

Even though judge advocates have a wide variety of options available to prosecute designer drug cases, the challenges referenced below depict a few of the roadblocks that prosecutors may face when trying to combat this designer drug epidemic.

The USACIL and the AFMES are capable of testing blood, urine, and substances believed to contain spice or bath salts.⁸⁹ However, in accordance with the AFMES policy, samples will only be tested if they were seized as a result of an open investigation by CID, NCIS, or Air Force Office of Special Investigation (AFOSI).⁹⁰ As a result, designer drugs will not be screened or tested *en masse*, like samples obtained during a routine and random urinalysis.⁹¹ This policy prevents high volumes of testing and was implemented, in part, due to the high costs associated with testing, the chemical substances in each brand of designer drug constantly changing, and the limited resources available to develop new tests for the emerging and varied types of designer drugs. The Navy and the Air Force have implemented new internal policies which permit testing of these substances by contract and service-specific laboratories.⁹² However, random testing is still not allowed

⁸⁸ Private Gonzalez-Chavez was convicted of an attempt to violate a lawful general order by wrongfully possessing what he believed to be spice, an attempt to conspire with another to wrongfully distribute what he believed to be spice, an attempt to wrongfully introduce onto an installation under control of the armed forces approximately 250 grams of what he believed to be spice, and four specifications of attempts to wrongfully distribute what he believed to be spice. He was sentenced to five months of confinement, reduction to the grade of E-1, and a bad-conduct discharge. *United States v. Gonzalez-Chavez*, No. 20110811 (19th Expeditionary Sustainment Command, Camp Carroll, South Korea, Sept. 14, 2011).

⁸⁹ See Lyons, AFME Spice Presentation, *supra* note 3.

⁹⁰ Memorandum from Colonel Timothy Lyons, Chief, Div. of Forensic Toxicology, to DoD Drug Testing Managers et al., subject: Armed Forces Medical Examiner Policy on Spice Testing (7 Feb. 2011) (on file with author).

⁹¹ Lyons, AFME Spice Presentation, *supra* note 3.

⁹² On 12 March 2012, the Navy implemented internal urinalysis testing for synthetic compounds. Under the Navy’s program, commanders, commanding officers, officers-in-charge, or their designated representative must obtain authorization for testing from the Director of the Navy Alcohol and Drug Prevention Office prior to collecting a synthetic compound urine sample and may only conduct testing on Navy personnel. Random testing is not allowed and is limited to member consent, command-directed, unit

by those laboratories at this point. It is also likely that results from civilian drug testing laboratories may not be admissible at trial against a servicemember, but those results may be used to take administrative action against a servicemember who “pops hot” for spice and/or bath salts.⁹³

Additional challenges exist involving spice “use” cases. Specifically, there is not a cut-off score applicable in the testing of spice cases. Ordinarily, in order for a drug to be reported as “positive” in a specimen, the metabolites must reach a certain level, known as a cut-off score. However, spice is reported at the limit of detection, rather than satisfying a minimum cut-off score.⁹⁴ This is problematic when attempting to prove whether or not an accused actually ingested spice or whether the substance entered a person’s body via passive exposure. There has been no passive exposure studies on spice; therefore, even though a lab may detect “spice” in a seized specimen, an expert will not be able provide an opinion as to how the substance entered the specimen.⁹⁵ In turn, the prosecutor will be forced to introduce evidence demonstrating that the accused intentionally ingested the substance. This may be done via an admission by the accused or by someone who witnessed the accused ingest the substance. Otherwise, the accused may have a valid defense negating intentional ingestion.

VI. Mandatory Administrative Separations

The decision to prosecute a case lies solely in the discretion of a commanding officer. However, each branch of military service requires the mandatory initiation of administrative separation proceedings against all servicemembers determined to be illegal drug users. In every branch, except for the Army, illegal drugs are classified as those prohibited by federal and state law, and all other

and/or subunit sweeps. Testing incident to a Navy Criminal Investigative Service or equivalent agency investigation is a separate process not covered under this program. Such samples are sent to the Navy Drug Screening Laboratory in Great Lakes, Illinois, not the Armed Forces Medical Examiner or U.S. Army Criminal Investigation Laboratory. U.S. NAVY, NAVY ALCOHOL AND DRUG ABUSE PREVENTION PROGRAM, SYNTHETIC DRUG URINALYSIS OPERATING GUIDE (4 Apr. 2012). See also Naval Administrative Message 082/12, 121420Z Mar 12, Chief of Naval Operations., subject: Implementation of Urinalysis Testing for Synthetic Compounds. The Air Force has contracted with civilian laboratories to conduct spice testing and has even purchased specialized machines that can test for spice at the Air Force Drug Testing Laboratory in Lackland Air Force Base, Texas. For now, the testing is reserved for command-directed urinalysis and unit, dorm, and gate sweeps. Travis J. Tritten, *Air Force to Increase Testing for Spice*, STARS & STRIPES (Mar. 19, 2012), <http://www.stripes.com/news/air-force/air-force-to-increase-testing-for-spice-1.172031>.

⁹³ Major Andrew Flor, *Testing for Spice and Bath Salts*, 31(B)LOG, (Jun. 5, 2012, 8:13 AM), <http://tjaglcs-adc.blogspot.com/2012/06/testing-for-spice-and-bath-salts.html> (citing *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001) and *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), supplemented on reconsideration, 52 M.J. 386 (C.A.A.F. 2000)).

⁹⁴ Lyons, AFME Spice Presentation, *supra* note 3.

⁹⁵ *Id.*

designer drugs intended to alter mood or function.⁹⁶ In the Army, mandatory initiation of administrative separation is required only for servicemembers involved with illegal drugs, which can be interpreted to include only those substances listed in the CSA, or prohibited by state law.⁹⁷ Thus, the definition of illegal drugs does not expand to otherwise legal substances (i.e., salvia and substances used in huffing).

VII. Conclusion

When determining how to properly charge designer drug cases, it is important to conduct an initial analysis of the substance and available evidence. Law enforcement should first lawfully seize the substance and send it to USACIL or AMFES to determine if the seized substance is a chemical compound listed on the CSA. If the results confirm a prohibited Schedule I substance, include violations of Article 112a and Article 92.

The laboratories will expedite the request for testing these substances if charges are preferred. Therefore, if time is of the essence, and there is a need to prefer charges before the results are received from the laboratory, the trial counsel has two options. First, the trial counsel may include violations of Article 112a and Article 80 on the charge sheet. However, since the generic terms “spice” and “bath salts” are not sufficient for charges under 112a (and Article 80

⁹⁶ See U.S. DEP’T OF AIR FORCE, INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN (9 July 2004) (use of the following substances triggers the automatic initiation of administrative separation: any controlled substance on the CSA, steroids, any intoxicating substance, other than alcohol, introduced into the body or the purposes of altering mood or function, improper use of prescription medication); see also U.S. MARINE CORPS, ORDER P1700.24B W/CH1, MARINE CORPS PERSONAL SERVICES MANUAL (21 Dec. 2001) (use of the following substances triggers the initiation of automatic administrative separation: controlled substances, abuse of prescribed over-the-counter drug or pharmaceutical compound and/or wrongful use of a chemical as an inhalant); see also U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS, INSTR. 5350.4D, NAVY DRUG AND ALCOHOL PREVENTION PROGRAM (4 June 2009) (same triggers as the Air Force); see also U.S. DEP’T OF TRANSPORTATION, COMMANDANT, U.S. COAST GUARD, INSTR. M1000.10, COAST GUARD PERSONNEL MANUAL (14 May 2002) (the intentional use of the following substances triggers the automatic initiation of administrative separation: inhalants, glue, and cleaning agents, or over-the-counter or prescription medications to obtain a “high,” contrary to their intended use, and controlled substances).

⁹⁷ AR 600-85, *supra* note 30, para. 1-7(c)(7). The Secretary of the Army recently issued a directive establishing policies for separating and initiating suspension of favorable actions (flags) on Soldiers who engage in alcohol and illegal drug abuse. The directive requires commanders to process for separation (and flag) all Soldiers who are: (1) identified as illegal drug abusers, as defined in AR 600-85; (2) involved in two serious incidents of alcohol-related misconduct within a 12-month period; (3) involved in illegal trafficking, distribution, possession, use or sale of illegal drugs; (4) tested positive for illegal drugs a second time during his/her career; and (5) convicted of driving while intoxicated or driving under the influence a second time during his/her career. Memorandum from The Sec’y of the Army to Principal Officials of Headquarters, Dep’t. of the Army et al., subject: Army Directive 2012-07 (Administrative Processing for Separation of Soldiers for Alcohol or Other Drug Abuse) (Mar. 13, 2012).

charges relating to Article 112a offenses), trial counsel must list each chemical compound that is listed on the CSA on the charge sheet, pertaining to the designer drug that is seized. This will result in a lengthy charge sheet. But, the trial counsel can move to dismiss charges before or even during trial, to reflect the laboratory results once they are received.⁹⁸ Trial counsel should also include Article 92 and Article 134 violations, if evidence exists to support those charges. Until the results of the testing are received, leave all charges on the charge sheet. A second option in time-sensitive cases involves only charging Article 92 and Article 134 violations. Appendix C is a matrix that will assist trial counsel with determining the appropriate charge for cases involving designer drugs.

Even if a commander decided to take administrative action or non-judicial punishment against a servicemember for their involvement with designer drugs, ensure they are initiating mandatory administrative separation actions, in accordance with their applicable service policy or regulation. Judge advocates should utilize the new developments in federal law, command policies, and service regulations to aggressively prosecute or administratively dispose of cases involving designer drugs. The appendices in this article are tools to combat the designer drug epidemic and help commanders restore good order and discipline.

⁹⁸ See MCM, *supra* note 70, R.C.M. 907.

Appendix A

Sample Charges and Specifications Involving Designer Drugs

Purpose: To provide judge advocates with sample charges and specifications for cases involving designer drugs. The sample charges and specifications in this appendix are in line with the hypothetical scenarios presented in Section IV of this article.

Caveat: The charges below were drafted by the author and are only recommendations. The primary resources for model specifications remain the *Military Judge's Benchbook* and the *Manual for Courts-Martial*. The specifications listed in Charges I and III below are not all-inclusive of the additional substances added to the CSA effective 9 July 2012, pursuant to the Synthetic Drug Abuse Prevention Act of 2012.

Charge: I Violation of the UCMJ, Article 80

Specification 1: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, attempt to wrongfully possess 1-pentyl-3-(1-naphthoyl)indole (JWH-018), a Schedule I controlled substance; 1-butyl-3-(1-naphthoyl)indole (JWH-073), a Schedule I controlled substance; 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200), a Schedule I controlled substance; 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497), a Schedule I controlled substance; or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue, a Schedule I controlled substance.⁹⁹

Specification 2: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, attempt to wrongfully possess 4-methyl-N-methylcathinone (mephedrone), a Schedule I controlled substance; 3,4-methylenedioxy-N-methylcathinone (methylone), a Schedule I controlled substance; or 3,4-methylenedioxypyrovalerone (MDPV), a Schedule I controlled substance.¹⁰⁰

Specification 3: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, attempt to violate a lawful general order, to wit: paragraph 5, USFK Command Policy #6, dated 17 October 2011, by wrongfully possessing a substance that Sergeant (E-5) John A. Smith believed to be a type of "spice," an intoxicating substance capable of inducing excitement, intoxication, or stupefaction of the central nervous system with the intent to use in a manner that would alter mood or function.¹⁰¹

Specification 4: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, attempt to violate a lawful general order, to wit: paragraph 5, Secretary of the Army Policy on Prohibited Substances (Spice in Variations), dated 10 February 2011, by wrongfully possessing a type of "spice", a Tetrahydrocannabinol (THC) analogue used as a means to produce excitement, intoxication, and stupefaction of the central nervous system.¹⁰²

Charge: II Violation of the UCMJ, Article 92

Specification 1: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, violate a lawful general order, to wit: paragraph 5, Secretary of the Army Policy on Prohibited Substances (Spice in Variations), dated 10 February 2011, by wrongfully possessing a type of "spice", a

⁹⁹ This is the recommended language for an "attempt to possess spice" specification. The chemicals listed in this specification are only inclusive of the original synthetic spice chemicals placed on Schedule I, by the DEA. All of the new synthetic cannabinoids listed in Schedule I, as of 9 July 2012, should be listed in this specification, if charging before receiving lab results.

¹⁰⁰ This is the recommended language for an "attempt to possess bath salts" specification. The chemicals listed in this specification are only inclusive of the original synthetic bath salt chemicals placed on Schedule I, by the DEA. All of the new synthetic cathinones listed in Schedule I, as of 9 July 2012, should be listed in this specification, if charging before receiving lab results.

¹⁰¹ This is the recommended language for an "attempt to violate a lawful general order, policy or regulation" specification.

¹⁰² *Id.*

Tetrahydrocannabinol (THC) analogue used as a means to produce excitement, intoxication, and stupefaction of the central nervous system.¹⁰³

Specification 2: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea on or about 1 January 2012, violate a lawful general order, to wit: paragraph 5, USFK Command Policy #6, dated 17 October 2011, by wrongfully possessing a substance that Sergeant (E-5) John A. Smith believed to be a type of “spice,” an intoxicating substance capable of inducing excitement, intoxication, or stupefaction of the central nervous system with the intent to use in a manner that would alter mood or function.¹⁰⁴

Charge: III Violation of the UCMJ, Article 112a¹⁰⁵

Specification 1: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 1-pentyl-3-(1-naphthoyl)indole (JWH-018), a Schedule I controlled substance.¹⁰⁶

Specification 2: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 1-butyl-3-(1-naphthoyl)indole (JWH-073), a Schedule I controlled substance.¹⁰⁷

Specification 3: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200), a Schedule I controlled substance.¹⁰⁸

Specification 4: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497), a Schedule I controlled substance.¹⁰⁹

Specification 5: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue), a Schedule I controlled substance.¹¹⁰

Specification 6: In that Sergeant (E-5) John A. Smith, U.S. Army, did, at or near Camp Jagger, Republic of Korea, on or about 1 January 2012, wrongfully possess 4-methyl-Nmethylcathinone (mephedrone), a Schedule I controlled substance.¹¹¹

¹⁰³ This is the recommended language for “violation of a lawful general order, policy or regulation” specification. Be sure to include to the exact language from the order, policy, or regulation on the charge sheet that defines what spice is and its effects. For example, in this specification, spice is defined as a THC analogue, whose effects may produce excitement, intoxication, and stupefaction of the central nervous system. See Memorandum from the Sec’y of the Army to Principal Officials of Headquarters, Dep’t. of the Army et al., subject: Prohibited Substances (Spice in Variations) (Feb. 10, 2011), available at http://acsap.army.mil/Pdf/Sec_Army%20Prohibited_Substances-Spice_in_Variations-Memo.pdf.

¹⁰⁴ This is the recommended language for “violation of a lawful general order, policy or regulation” specification. Be sure to include to the exact language in the order, policy, or regulation that defines what spice is and its effects. In this specification, spice is defined as an intoxicating substance and its effects are described as capable of inducing excitement, intoxication, or stupefaction of the central nervous system. Additionally, this policy is only punitive if the substance is used with the intent to use in a manner that would alter mood or function. Include this language if required by the order, policy, or regulation. See Policy Letter #6, *supra* note 36.

¹⁰⁵ When drafting Article 112a charges, it is recommended that each synthetic cannabinoid or cathinone be charged in a separate specification, until USACIL or the AFMES confirms the exact chemical composition of the substance. Separating the analogues will minimize error. It is important to check the charges against the statute to ensure the chemical composition is accurately listed on the charge sheet. Once the chemical composition of the substance is confirmed, trial counsel may move to dismiss the specifications reflecting the chemical compositions that are not in the CSA. If the chemical composition of the spice and/or bath salt is known before preferral, only include the chemical compound found on the USACIL or AFMES report that is listed on the CSA. The specifications listed in this charge are only inclusive of the original chemical substances placed on Schedule I by the DEA. All of the synthetic chemical compounds should be listed on the charge sheet if charging an Article 112a charge prior to receiving lab results.

¹⁰⁶ This is the recommended language for one type of illegal synthetic cannabinoid found in spice.

¹⁰⁷ This is the recommended language for a second type of illegal synthetic cannabinoid found in spice.

¹⁰⁸ This is the recommended language for third type of illegal synthetic cannabinoid found in spice.

¹⁰⁹ This is the recommended language for a fourth type of illegal synthetic cannabinoid found in spice.

¹¹⁰ This is the recommended language for a fifth type of illegal synthetic cannabinoid found in spice.

¹¹¹ This is the recommended language for one type of illegal synthetic cathinone found in bath salts.

Appendix B

Sample Designer Drug Policy Letter

Purpose: To provide judge advocates and commanders with an example of a punitive command policy letter that thoroughly addresses the use, possession, distribution, and possession of designer drugs.

Caveat: The policy letter in this appendix was drafted by staff members of the Headquarters, United States Army Pacific Command (USARPAC) and is only applicable to servicemembers assigned to USARPAC and its subordinate commands.

Policy letters meant to be punitive should ensure that the prohibited substance and its effects are clear to an “ordinary and reasonable person.”¹¹⁶ Paragraph 3a of the policy letter in this appendix provides a brief description and the effects of spice and other household goods used in huffing. While this is a good model paragraph, it should be updated to include information on bath salts and salvia, the other two increasingly popular and abused designer drugs.

A policy letter relating to designer drugs should also contain an “objective and clearly understood standard of criminality,”¹¹⁷ similar to the policy letter in this appendix. Paragraph 4 makes clear what substances are prohibited (i.e., certain household chemicals, spice, bath salts, salvia, and their derivatives). This paragraph also specifies the prohibited acts pertaining to the prohibited substances (i.e., possessing, distributing, purchasing, inhaling, etc.). Additionally, this paragraph explains why the acts referenced above that are pertaining to the substances are prohibited, in that they attribute to “the significant risks to health, welfare, and good order and discipline of the force and the associated threat to mission accomplishment and national security. Lastly, paragraph 6 provides appropriate language that makes the policy letter punitive.

There should also be a definite indication of what substance is prohibited and language that objectively defines the substance, so the presence or lack of a prohibited substance can be verified by a “reasonable and ordinary person.”¹¹⁸ The enclosure at the end of the USARPAC policy letter does an excellent job satisfying this requirement. For example, the enclosure provides a list of prohibited substance and chemicals. The enclosure also provides a disclaimer that the list is “non-inclusive” and “provided only as an aid to help Soldiers identify products that contain the substances prohibited under this policy.”

For a more detailed explanation of essential provisions that should be included in a designer drug policy letter, refer to Part IV.B of this article.

¹¹⁶ See *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa, Japan, Nov. 22, 2010) (Ruling, Elements of the Offense Charged in Specification 2 of Charge III (Feb. 23, 2010)).

¹¹⁷ *Id.*

¹¹⁸ See *United States v. Swinford*, No. 20100156 (10th Support Grp., Okinawa, Japan, Nov. 22, 2010) (Ruling, Def.’s Motion to Dismiss (Feb. 23, 2010)).



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY, PACIFIC
FORT SHAFTER, HAWAII 96858-5100

APCG

4 May 2011

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: USARPAC Policy on Prohibiting the Use, Possession, Distribution and Purchase of Intoxicating Substances – Policy Memorandum 11-10 (This policy supersedes Policy Memo 10-17 dtd 8 Jul 10)

1. Purpose. The purpose of this memorandum is to prohibit the use, possession, distribution and/or purchase of certain intoxicating/psychoactive substances.
2. Applicability. This order applies to all military personnel assigned or attached to the United States Army, Pacific (USARPAC), or to any subordinate unit or element assigned or attached to USARPAC, and to any mobilized National Guard members or units assigned or attached to USARPAC. Subordinate commands may publish their own policies or supplement this policy as appropriate, consistent with the provisions of this policy.
3. Justification.
 - a. The use of intoxicating/psychoactive substances by military personnel is incompatible with service in USARPAC. Commanders have reported to me a significant increase in the number of USARPAC personnel using substances designed to mimic the psychoactive effects of otherwise illegal drugs. Spice is a common name for a family of prohibited products which contain a mixture of organic plant matter that is laced with synthetic cannabinoids or cannabinoid mimicking compounds that are known to cause a decrease in motor function, loss of concentration, and impairment of short-term memory. Personnel are also improperly abusing otherwise permissible household or over the counter items in such a way as to achieve an intoxicating/psychoactive effect. This intoxicating effect includes becoming high, altering one's mood or function, experiencing a loss of concentration, impairment of short-term memory, or achieving a psychoactive effect.
 - b. The use of substances that create such an effect on the human body directly compromises the readiness, safety, welfare, security and good order and discipline within this command, and constitutes a serious threat to mission accomplishment and national security. Spice and the other substances similar to the ones in the enclosure are not regulated, and any introduction into the human body is potentially dangerous. Additionally, some of the substances listed in the enclosure have been outlawed in some states due to their intoxicating effects on the human body. The people of the

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United States have reposed a special trust in the United States Armed Forces. The use of these psychoactive substances betrays that trust and is not conducive to an effective, professional fighting force.

4. Based on the significant risks to health, welfare, and good order and discipline of the force and the associated threat to mission accomplishment and national security, and pursuant to my authority as the Commander, United States Army, Pacific, military personnel assigned or attached to USARPAC, or to any subordinate unit assigned or attached to USARPAC, are hereby prohibited from engaging in the following activities:

a. Inhaling, smoking, chewing, consuming, injecting, inserting, absorbing, or introducing into the body in any form, and by any manner, intoxicating substances, to include, but not limited to, *Salvia Divinorum*, *Salvadoran A*, or the intoxicant "spice," "Ivory Wave," or any derivative thereof (see enclosure for a non-inclusive list of prohibited substances and derivatives);

b. Possessing intoxicating substances, to include, but not limited to, *Salvia Divinorum*, *Salvadoran A*, or the intoxicants "spice," "Ivory Wave," or any derivative thereof (see enclosure for a non-inclusive list of prohibited substances and derivatives);

c. Possessing, with the intent to distribute, intoxicating substances, to include, but not limited to, *Salvia Divinorum*, *Salvinorin A*, or the intoxicants "spice," "Ivory Wave," or any derivative thereof (see enclosure for a non-inclusive list of prohibited substances and derivatives);

d. Distributing to others, intoxicating substances, to include, but not limited to, *Salvia Divinorum*, *Salvinorin A*, or the intoxicants "spice," "Ivory Wave," or any derivative thereof (see enclosure for a non-inclusive list of prohibited substances and derivatives);

e. Purchasing or attempting to purchase intoxicating substances, to include, but not limited to, *Salvia Divinorum*, *Salvinorin A*, or the intoxicants "spice," "Ivory Wave," or any derivative thereof (see enclosure for a non-inclusive list of prohibited substances and derivatives);

f. Inhaling household chemicals and other chemical inhalants for the purpose of becoming intoxicated, high, altering the mood or function, or achieving a psychoactive effect;

g. Abusing over-the-counter nonprescription medications for the purpose of becoming intoxicated, high, altering the mood or function, or achieving a psychoactive effect;

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h. Abusing products marketed as "bath salts" for the purpose of becoming intoxicated, high, altering the mood or function, or achieving a psychoactive effect;

i. This order does not apply to alcohol, caffeine, tobacco, lawfully-used prescribed medications, or over-the-counter medications used according to their stated directions.

5. The enclosure, which is a non-inclusive list of prohibited substances and derivatives, is part of this order.

6. Failure to obey this general order constitutes a violation of Article 92, Uniform Code of Military Justice (UCMJ), and may result in disciplinary or administrative action. These actions include, but are not limited to, trial by military court-martial, nonjudicial punishment under Article 15, UCMJ, reprimand, admonishment, administrative reduction, security clearance revocation, and involuntary separation with an adverse characterization of service attending the discharge.

7. This policy remains in effect until superseded or rescinded.

8. Point of contact for this policy is the USARPAC Staff Judge Advocate's office at (808) 438-9470.

Encl
as



FRANCIS J. WIERCINSKI
Lieutenant General, USA
Commanding

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ENCLOSURE

1. Spice, also known as:
 - a. Spice (Gold, Dragon, Diamond, Diamond S, Silver, Pep, or any variant thereof)
 - b. Tribal Warrior
 - c. Smoke XXX (Vanilla, Strawberry, Blueberry, or any variant thereof)
 - d. Genie
 - e. Solar
 - f. Yucatan Fire
 - g. Herbal Incense
 - h. K2
 - i. Skunk
 - j. Zohai (MX, RX, SX, or any variant thereof)
 - k. Nehan
 - l. Tropical Synergy
 - m. Spice Diamond
 - n. AMPED
 - o. Bombay (Black, Blue, Extreme, or any variant thereof)
 - p. Buzz
 - q. Dr. Green Thumb
 - r. Experience Alternatives
 - s. Fire and Ice
 - t. Kratom (Black, Black Label, 15X Extract, Xscape, or any variant thereof)
 - u. Magic Gold
 - v. Mojo
 - w. Mystery
 - x. Power Sceletium
 - y. Pulse
 - z. Serenity Now

2. **Salvia Divinorum: Salvia Divinorum or Salvinorum A; all parts of the plant presently classified botanically as salvia divinorum, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture or preparation of such plant, its seeds or extracts. Salvia Divinorum is also known as:**
 - a. Sage of the Seers
 - b. Diviner's Sage
 - c. Sally-D
 - d. Magic Mint
 - e. Maria Pastora
 - f. Sage Goddess

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- g. Emerald Essence
 - h. La pastora
 - i. The shepherdess
 - j. The leaves of the shepherdess
 - k. Salvia
 - l. Dalvia
3. Any material, compound, mixture or preparation which contains any quantity of the following substances:
- a. HU-210: [(6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c] chromen-1-ol]]
 - b. CP 47,497 and homologues: 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol
 - c. HU-211: (dexanabinol, (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol)
 - d. JWH-018: 1-Pentyl-3-(1-naphthoyl)indole
 - e. JWH-073: 1-Butyl-3-(1-naphthoyl)indole
 - f. Cannabinoid(s) or Cannabicyclohexanol(s)
 - g. THC Analogues
 - h. Any Spice derivative or Spice cannabinoid
4. *Mitragyna Speciosa* Korth, also known as:
- a. Kratom
 - b. Thang
 - c. Kakuam
 - d. Ketum
 - e. Biak
5. Blue Lotus, also known as:
- a. Blue Water Lily
 - b. Egyptian Lotus
 - c. Sacred Narcotic Lily of the Nile
6. *Convolvulaceae Argyreia Nervosa*, also known as:
- a. Hawaiian Baby Woodrose
7. Lysergic Acid Amide, also known as:
- a. Morning Glory
8. Amanitas Mushroom

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9. Datura, also known as:
 - a. Jimson Weed
 - b. Devils Apple
 - c. Thorn Apple
 - d. Stinkweed
 - e. Moonflower
 - f. Malpitte
 - g. Toloache

10. Absinthe

11. 5-Methoxy-Dimethyltryptamine (5-Meo-DMT), also known as:
 - a. Powder Mushrooms
 - b. AMT
 - c. Alpha-O
 - d. Bronco
 - e. DMT

12. 4-Methylmethcathinone, also known as:
 - a. Mephedrone
 - b. Devil Tracks

13. Methylenedioxypropylone (MPDV), also known as:
 - a. Vanilla Sky
 - b. Ivory Wave
 - c. Ivory Wave Ultra
 - d. Pure Ivory
 - e. Charge +
 - f. Sextacy
 - g. Blue Silk
 - h. Ivory Snow
 - i. Ocean Burst
 - j. Purple Wave
 - k. Snow Leopard
 - l. Stardust (Star Dust)
 - m. White Dove
 - n. White Knight
 - o. White Lightning
 - p. Blizzard

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14. The list of substances in this enclosure is non-inclusive. Brand names and street names of these substances frequently change and new brand/street names may appear. The brand/street names listed in this enclosure are provided only as an aid to help Soldiers identify products that contain the substances prohibited under this policy. Other substances not listed in this enclosure may also be prohibited provided they meet the requirements stated in this policy memorandum.

Appendix C

Designer Drug Charging Matrix

Purpose: To provide judge advocates with a charging matrix that will provide guidance on how to charge cases involving designer drugs.

Caveat: This matrix was drafted by the author and is only a recommendation. The *Manual for Courts-Martial*, the *Military Judge's Benchbook*, current case law, and the evidence the specific case should be reviewed before making a charging decision. Judge advocates should also consult with their Chief of Military Justice prior to making a charging decision.

	Article 80 <i>charge if:</i>	Article 92 <i>charge if:</i>	Article 112 <i>charge if:</i>	Article 134 <i>charge if:</i>
Spice (green, leafy substance resembling marijuana)	the accused attempted to possess, use, or distribute spice, but in fact possessed something else ¹¹⁹	the chemical substance is NOT in the CSA <i>and</i> there is a service regulation or command policy letter prohibiting spice or other intoxicating substances	the chemical composition is one of the synthetic cannabinoids listed in the CSA	the chemical composition is NOT one of the synthetic cannabinoids listed in the CSA, <i>and</i> evidence exists that the conduct relating to spice is prejudicial to good order and discipline and/or is service discrediting ¹²⁰
Bath Salts (white, off-white, or yellow powder; tablet; or capsule)	the accused attempted to possess, use, or distribute bath salts, but in fact possessed something else ¹²¹	the chemical substance is NOT in the CSA <i>and</i> there is a service regulation or command policy letter prohibiting bath salts or other intoxicating substances	the chemical composition is one of the synthetic cathinones listed in the CSA	the chemical composition is NOT one of the synthetic cathinones listed in the CSA, <i>and</i> evidence exists that the conduct relating to bath salts is prejudicial to good order and discipline or is service discrediting ¹²²
Salvia (green, leafy herbs)	evidence exists that the accused, through his conduct, attempted to violate a service regulation or policy letter that prohibits salvia or other intoxicating substances	there is a service regulation or command policy letter prohibiting salvia or other intoxicating substances	N/A	evidence exists that the conduct relating to salvia is prejudicial to good order and discipline and/or is service discrediting; or if salvia is prohibited in the state where the military installation is located allowing for assimilation IAW the FACA ¹²³
Huffing (aerosols, gases, nitrates, and other inhalants including glue, nail polish, correction fluid, and felt-tip markers)	evidence exists that the accused, through his conduct, attempted to violate a service regulation or policy letter that prohibits the ingestion of substances, with the intent to alter mood or function	there is a service regulation or command policy letter prohibiting the ingestion of substances, with the intent to alter mood or function	N/A	evidence exists that the conduct relating to huffing is prejudicial to good order and discipline or is service discrediting

¹¹⁹ Charge a violation of Article 80, unless and until the substance is confirmed to be one of the synthetic cannabinoids listed in the CSA *and* evidence exists that the accused believed the substance was spice.

¹²⁰ If the spice contains one of the synthetic cannabinoids listed in the CSA, then prosecution under Article 134 is preempted by Article 112a.

¹²¹ Charge a violation of Article 80, unless and until the substance is confirmed to be one of the synthetic cathinones listed in the CSA *and* evidence exists that the accused believed the substance was bath salts.

¹²² If the spice contains one of the synthetic cathinones listed on the CSA, then prosecution under Article 134 is preempted by Article 112a.

¹²³ The FACA stands for the Federal Assimilative Crimes Act.