

## Spice Court Martial Cases

### The Military's Crackdown on Designer Drugs

The stakes are now much higher for service members who test positive for designer drugs such as spice, a smokeable herbal product with psychoactive and hallucinogenic effects similar to marijuana. Until recently, service members could legally obtain these substances that mimic the psychotropic effects of marijuana and lysergic acid diethylamide (LSD). But on March 1, 2011 the U.S. Drug Enforcement Administration (DEA) temporarily classified five chemicals used in spice products as Schedule I controlled substances. This one-year scheduling action (with a possible six-month extension) made it illegal to possess and sell spice and other similar synthetic designer drugs. Consequently, the scheduling action also makes the possession, distribution, and use of these substances a crime punishable under Article 112a of the Uniform Code of Military Justice. Article 112a is generally used for offenses involving marijuana, methamphetamine, cocaine, and other illegal drugs, and it is now a tool in the military's fight against spice. Military Laws and Regulations

Under current laws and regulations, the armed forces have prohibited the ingestion, possession, distribution, and sale of designer drugs, such as spice, as well as naturally occurring intoxicating substances such as salvia divinorum ("salvia"). These prohibitions are outlined in MARFORCOM Order 5355.1

, NAVADMIN 108/10

AR 600-85

, and AFI 44-121

.As MARFORCOM Order 5355.1 states, the use of the below-listed substances "adversely affects good order and discipline, mission readiness, and the health of service members, as well as adversely affects the good order of civilians aboard installations."List of Prohibited Substances\*

Substance

Street Name

Spice

Spice Gold

Salvia Dinorum and Salvinorin A

Maria Pastora Sage of the Serris Sally-DDiviners Sage Magic Mint

Mitragyna Speciosa Korth

Kratom Thang Kakuam Ketum Biak

Nymphaea Caerulea

Blue Water Lily Egyptian Lotus Sacred Narcotic Lily of the Nile

Convolvulaceae Argyreia Nervosa

Hawaiian Baby Woodrose

Lysergic Acid Amide

Morning Glory

Amanitas Mushrooms

Datura

Jimson Weed Devil's Apple Thorn Apple Stinkweed Moonflower Malpitte Toloache

5-Meo-DMT

Powder Mushrooms AMT Bromo DMT

\* Prohibited substances identified in MARFORCOM Order 5355.1.

## Harsher Penalties

Prior to March 1, 2011, service members could have legally obtained spice, also known as K2 and many other names, and the military's only deterrent was prosecution under Article 92 as a violation of a general order or regulation not to use or possess such substances. Now with the DEA scheduling action, service members can face much harsher penalties under Article 112a. Maximum Penalties under Spice-Related UCMJ Charges

Article 92(Failure to obey a lawful general order or regulation)

Article 112a(Wrongfully using, possessing, distributing or selling a controlled substance)

Dishonorable discharge

Dishonorable discharge

Forfeiture of all pay and allowances

Forfeiture of all pay and allowances

Two (2) years of confinement

Five (5) years of confinement

Sentencing information from the 2008 Manual for Courts-Martial.

## Fighting for Your Rights

Even with the recognition of spice's chemicals as Schedule I controlled substances, practical problems still abound in testing. And to complicate matters even further, many of these synthetic substances are marketed as herbal incense, making innocent exposure a real possibility. So although stiffer penalties are now available to the armed forces, proving the requisite criminal intent remains as elusive as ever. Sample Methods for Fighting Positive Urinalyses Indicating Spice Use

## Innocent Ingestion

## Unlawful Search and Seizure

Urinalyses usually test for the metabolite that is created during the body's process of ingesting or excreting a drug.

For example, tetrahydrocannabinol (THC) is the primary metabolite for marijuana.

If a service member is inadvertently exposed and tests positive on a urinalyses test for spice, a defense of innocent ingestion (e.g. secondhand smoke) could be possible depending on the metabolite level and a number of other factors.

In some possession cases, service members who were unaware of the specific nature of what they purchased could raise a mistake of fact defense because some packages in which these substances are sold identify their contents as "incense only."

Commanders need probable cause to conduct a search or seizure, including a command-directed urinalysis.

One service member's report that another was seen ingesting or possessing spice does not necessarily establish probable cause for a search or seizure.

In order to have probable cause for a command-directed urinalysis, the authority conducting the search must have reliable information that the illegal item (e.g. chemical/biological evidence of drug use), is in the location being searched (e.g. the body), at the time the search is being conducted.

In a case where a Marine says he or she saw a fellow service member ingesting spice at a party, the informant's credibility could be shadowed by the fact that he or she attended an event at which drugs were used (i.e. the source of the information may not be reliable).

Commanders do not have probable cause to demand a urinalysis if an informant reports that a Marine was seen ingesting a designer drug a month ago because traces of it may no longer be in his or her system (i.e. information may be stale as to time and the drug is no longer located in the body in sufficient concentrations).

Eyewitness testimony that a service member was seen ingesting a designer drug the previous day could amount to probable cause (i.e. reliability, location, time).

Commanders cannot conduct a sweeping barracks check or random urinalysis as a means to circumvent the probable cause requirement in order to search a specific individual.

Service members who test positive for spice or salvia should immediately contact a military attorney to explore whether any of these or other defenses may apply to their case. To schedule a meeting with one of Tully Rinckey PLLC's military law attorneys, call 703-525-4700 or e-mail [info@fedattorney.com](mailto:info@fedattorney.com)

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Contact us during normal business hours via Skype

. Click on the image above to schedule a time to speak with an attorney.