IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	FINAL BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. No. Misc. Dkt. No. 2016-11
Major (E-4)	)	
JOSEPH W. PUGH, USAF,	)	USCA Dkt. No. 17-0306/AF
Appellant.	)	

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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28 August 2017

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JOSEPH W. PUGH, USAF,	)	USCA Dkt. No. 17-0306/AF
Appellant.	)	

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES**

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED IN FINDING THAT AFI 90-507 SERVES NO VALID MILITARY PURPOSE AND DISMISSING THE ADDITIONAL CHARGE AND ITS SPECIFICATION.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 62(a), Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review this issue under Article 67(a)(3), UCMJ. *See* United States v. Lopez de Victoria, 66 M.J. 67 (C.A.A.F. 2008).

STATEMENT OF THE CASE

Appellant's statement of the case is generally accepted.

STATEMENT OF FACTS

On 27 October 2015, Appellant was charged with one count of using marijuana in violation of Article 112a, UCMJ. (JA at 8.) On 18 December 2015, an additional charge was preferred against Appellant for being derelict in his duties, in violation of Article 92, UCMJ, by willfully failing to comply with Air Force Instruction 90-507, *Military Drug Demand Reduction Program*, dated 22 September 2014, which prohibits the ingestion of products containing hemp seeds and hemp oil. (JA at 10.) The specification alleged that Appellant was derelict in his duties by consuming Strong and KIND bars, a product containing hemp seeds. (JA at 10.) Both charges were referred on 22 December 2015. (JA at 11.)

On 26-29 April 2016, Appellant was tried at a general court-martial by a panel of officer members. (JA at 12.) Appellant pled not guilty to the charges and specifications. (JA at 21.)

On 28 April 2016, the member panel found Appellant not guilty of use of marijuana, but found Appellant guilty of the Additional Charge and its Specification for consuming Strong and KIND bars containing hemp seeds. (JA at 244.) The day after announcement of findings, 29 April 2016, Appellant filed a motion to dismiss the Additional Charge and its Specification for failure to state an offense. (JA at 245, 332.) Appellant argued that the Additional Charge and its Specification did not allege criminal misconduct, did not give fair notice, did not

serve a valid military purpose, and was too broad or void for vagueness. (JA at 333.)

During litigation of Appellant's motion, Appellant presented the testimony of Dr. ET, an expert in forensic toxicology. (JA at 252-62.) After further argument on the issue by both parties, the military judge took the motion under advisement, deferring his ruling. (JA at 274, 276.) After the military judge announced his decision to defer his ruling, trial defense counsel, raising their concern that a subjurisdictional sentence would rob AFCCA of jurisdiction under the All Writs Act, requested a continuance to await the military judge's ruling. (JA at 277.) The military judge denied the defense motion for a continuance. (JA at 278.) Later that same day, Appellant was sentenced to a dismissal by the panel. (JA at 2.)

Nineteen days after the announcement of the sentence,[1] the military judge provided his ruling on Appellant's motion to dismiss. (JA at 435, 449.) The military judge found the following facts by a preponderance of the evidence:

> 1) On 27 October 2015 a single charge and specification alleging a violation of Article 112a (wrongful use of marijuana) was preferred against the accused.
>
> 2) On 18 December 2015 an additional charge with one specification was preferred against the accused as well. This charge and specification read as follows:

[1] The military judge's ruling is dated "16 May 2016," but was not provided to the parties until 17 May 2016 at approximately 21:04 PST. (JA at 435, 449.)

> ADDITIONAL CHARGE: Violation of the UCMJ, Article 92.
>
> Specification: In that MAJOR JESEPH [sic] W. PUGH, United States Air Force, 60th Surgical Operations Squadron, Travis Air Force Base, California, who knew of his duties, with the state of California, on divers occasions between on or about 3 July 2015 and on or about 15 August 2015, was derelict in the performance of those duties in that he willfully failed to comply with Air Force Instruction 90-507, dated 22 September 2014, by consuming Strong & KIND bars, a product containing hemp seed, as it was his duty to do.

Both charges were referred to trial by General Court-Martial on 22 December 2015.

3) The accused was arraigned on 19 February 2016. Trial commenced on 26 April 2015 before a panel of officer members. On 28 April 2016 the panel returned its verdict: Not guilty as to the Charge, and guilty as to the Additional Charge and its Specification. The next morning, 29 April 2016, defense counsel filed the motion to dismiss referenced above.

4) Strong & KIND bars are a variety of protein bar that come in a variety of flavors. One thing the Strong & KIND bars share in common is that they contain hemp seeds as an ingredient. While the bars contain hemp seeds, they containing an exceedingly small amount of the substance – hemps seeds make up roughly .001% of Strong & KIND bars.[2] Strong & KIND bars are legal to purchase and consume throughout the United States. They can be found in many retailers such as Safeway grocery stores, coffee stores, and Target stores. The bars have even been sold in commercial venues on military installations.

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[2] This finding of fact is clearly erroneous, as the 0.001% represents the amount of THC in Strong and KIND bars. (JA at 122, 121, 123, 143, 292, 455.)

5) Strong & KIND bars are not the only commercially available food products containing hemp that are legally marketed and sold throughout the United States. For example, Chobani Yogurt contains hemp and cooking oils containing hemp have been marketed as a healthier alternative to traditional cooking oils. There have even been beers and ales brewed with hemp as an ingredient.

6) "Marijuana" and "hemp", while related, are not the same things. "Marijuana" and "hemp" are both derived from the *cannabis sativa* plant. "Marijuana" is the term for the leafy green substance or plant material that is produced by the plant. Marijuana is the portion of the *cannabis sativa* plant in which the chemical THC, the psychoactive element that creates the "high" marijuana users experience, is concentrated.[3] The term "hemp", on the other hand, refers to all other parts of the plant besides the leafy material that comprises marijuana. Hemp contains very small amounts of the chemical THC.[4] Another difference is in the various strands of the *cannabis sativa* plant – those strains of the plan breed [sic] to maximize the production of marijuana have much higher concentrations of THC. On the other hands, those strains breed for the commercial hemp market are breed to emphasize other characteristics then the maximization of THC content.

7) The use of hemp in food products marketed and sold in the United States is heavily regulated. In order to be legally sold in food products the hemp must undergo washing and industrial processing designed to eliminate all but the most minute trace amounts of THC. As a result, the legally available food products sold in the United States which contain hemp contain vanishingly small amounts of THC. In fact, the THC content of these products is so low as to be below the limits of detection of even Gas Chromatography/Mass

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[3] This finding of fact is clearly erroneous. (JA at 463.) Marijuana and hemp do not describe different portions of the plant *Cannabis sativa*, but instead described genetic variants of that plant, distinguishable by the amount of THC contained within each. (JA at 143, 463, 469.)

[4] Commercially produced hemp does not contain "very small amounts" of THC, but rather contains lower levels of THC as the plants are specifically bred for other purposes. (JA at 463.) However, if bred differently, the plant could contain higher levels of THC. *See* (JA at 473.)

Spectrometry (GC/MS) – the "gold standard" of drug testing programs.[5]

8)[6] It is possible that food products sold in unregulated venues (such a local farmer's markets or the like) could, illegally, contain hemp that has not been through the rigorous processing required by regulatory agencies such as the Food and Drug Administration (FDA). Save for being informed by the seller, a purchaser of such a product would have no way of knowing that it contained hemp that had not been processed according to the law. That being said, even such a product, unless it contained actual marijuana, would also contain only very small amounts of THC.

9) The Air Force drug testing program tests urine samples from service members for the metabolites from a wide variety of drugs – including marijuana. However, it is not enough that a given urine sample simply contain metabolites of an illicit drug. In order to be considered "positive" for any given drug, a urine sample must be found to contain an amount of the metabolite above a Department of Defense (DoD) mandated "cut off" level. In order to be considered "positive" for the use of marijuana, a given urine sample must contain at least 15 nanograms of THC per milliliter of urine. The cut off levels are set in order to preclude environmental contamination of any type as the source of THC in the sample.

10) Legally available commercial food products containing hemp, such as Strong & KIND bars, Chobani yogurt, various beers and ales, etc… simply do not contain enough THC to trigger a positive finding by the Air Force drug testing program – as referenced above, the THC concentrations in these products are so low as to be below the

[5] This finding of fact is clearly erroneous as the Armed Forces Institute of Pathology in 2008 tested "popular and commonly available" food products that contained hemp and detected varying levels of THC in those products. (JA at 465-66.)

[6] The military judge modified paragraphs 8-10 in his reconsideration ruling. In his reconsideration ruling, the military judge removed the last lines of paragraph 8, 9, and 10. (JA at 436-37, 514-15.)

> detections limits of the program.[7] Thus even the use of these products in junction with some other form of exposure to THC would not produce a positive urinalysis result.[8] These products cannot interfere with the Air Force drug testing program.[9] Even illegal products that might contain unprocessed hemp contain so little THC that they are very unlikely to produce a positive urinalysis result by themselves.
>
> 11) Not all countries regulate the use of hemp in food products as rigorously as the United States does – it is theoretically possible that a person could purchase a locally legal product while overseas that could contain unprocessed hemp in concentration sufficient to interfere with the Air Force drug testing program. Such products may not be lawfully imported into, or sold in, the United States

(JA at 434-47.)

In his analysis the military judge focused on whether the regulation served a valid military purpose "in other words, is there a sufficient nexus between the regulatory requirement and military necessity?" (JA at 439.) The military judge found that the evidence introduced at trial refuted AFI 90-507's assertion that consuming products with hemp seeds can interfere with the Air Force drug testing

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[7] Despite the military judge's findings, the Armed Forces Institute of Pathology tested commonly available hemp products, and detected THC in the various products. (JA at 465-66.)

[8] This finding of fact is clearly erroneous as the defense toxicology expert, admitted during cross-examination that a person could test positive ("push you up over the DOD cut-off") from passive inhalation in combination with a hemp product if the hemp product had THC in it. (JA at 256.)

[9] This finding of fact is conclusory and clearly erroneous, as it draws a conclusion from a single food product, and does not consider the impact of consuming pure processed hemp seeds (as opposed to a product that merely contains hemp seeds as one of the many ingredients). Nor does it consider the interference of an "innocent ingestion defense" (as discussed below) on the enforcement of the Air Force drug testing program.

program. (JA at 439.) The military judge found, "There simply is no credible reason to believe that these legal, commercially available food products pose the slightest threat to the integrity of the Air Force's drug testing program." (JA at 436.) Ultimately, the military judge concluded, "Given the evidence presented at the hearing, the court finds that there is not a sufficient nexus between military necessity and the duty AFI 90-507 seeks to impose. The regulation is overly broad and serves no valid military purpose." (JA at 440.) Based on this determination, the military judge granted Appellant's motion.

On 20 May 2016 at 1610 hours, the government filed a reconsideration motion. (JA at 441-448.) In its motion, trial counsel argued that the AFI provision was not overly broad, banned ingestion of a substance that contains THC, and had a sufficient military nexus. (JA at 445.) Regarding the regulation of hemp seeds in commercial food products, the government pointed out,

> Military members are at the mercy of whoever is processing the seeds, the quality of the plants the hemp seed manufacturers are using (some plants have higher THC levels), if the FDA or DEA caught any regulatory violations, and the country from which the manufacturers are buying the seeds. At issue is not spinach, chia seeds, or peanuts, but a product that contains measurable levels of a Schedule I controlled drug – THC.

(JA at 445.) Trial counsel argued that "[t]he very fact that the FDA and DEA must regulate the product provides insight into the volatility of the use of hemp seeds." (JA at 445.) Finally, trial counsel bluntly asserted:

> Military members should not be in a position to guess as to whether they can consume a product that is from a marijuana plant, and if it matters what store, farm, or country they buy it from. Military commanders should not be in a position to guess whether their airmen were using drugs or eating a poorly regulated food. Hemp seeds contain THC.

(JA at 446.)

On 1 June 2016, Appellant filed his response to the government's motion for reconsideration. (JA at 456.) On 18 July 2016, a post-trial Article 39(a), UCMJ session was held, and the United States provided argument for reconsideration of the military judge's ruling. (JA at 279.) During the session, both the government and Appellant offered additional documentary evidence. (JA at 284-85, 463-513.) The government also offered the testimony of Dr. HN, an expert witness in forensic toxicology who worked for the Air Force Drug Testing Laboratory. (JA at 288.)

On 11 August 2016 at 23:20 PST, the military judge denied the United States' motion for reconsideration. (JA at 514.) In his ruling, the military judge adopted the facts from his 16 May 2016 rulings, except that he modified paragraphs 8, 9, and 10:

> 8) It is possible that food products sold in unregulated venues (such a local farmer's markets or the like) could, illegally, contain hemp that has not been through the rigorous processing required by regulatory agencies such as the Food and Drug Administration (FDA). Save for being informed by the seller, a purchaser of such a product would

have no way of knowing that it contained hemp that had not been processed according to the law.

9) The Air Force drug testing program tests urine samples from service members for the metabolites from a wide variety of drugs – including marijuana. However, it is not enough that a given urine sample simply contain metabolites of an illicit drug. In order to be considered "positive" for any given drug, a urine sample must be found to contain an amount of the metabolite above a Department of Defense (DoD) mandated "cut off" level. In order to be considered "positive" for the use of marijuana, a given urine sample must contain at least 15 nanograms of THC per milliliter of urine.

10) Legally available commercial food products containing hemp, such as Strong & KIND bars, Chobani yogurt, various beers and ales, etc ... simply do not contain enough THC to trigger a positive finding by the Air Force drug testing program – as referenced above, the THC concentrations in these products are so low as to be below the detections limits of the program. Thus even the use of these products in junction with some other form of exposure to THC would not produce a positive urinalysis result. These products cannot interfere with the Air Force drug testing program.

(JA at 514-15.)

The military judge also made additional findings of fact:

2. Hemp is genetically identified as Cannabis strains that produce less than 1 % (by weight) of the psychoactive compound THC. Hemp used for manufacturing or the food industry is legal for import and sale in the United States, but currently remains illegal to grow. The majority of the hemp used by the U.S. industry is grown in Canada under government control. There is presently no way for laboratory testing to distinguish between THC ingested by use of marijuana and that ingested through the consumption of legal hemp products.

3. For as long as hemp food products have been sold in the United States there have been concerns about their potential impact on the Air Force's drug testing program. For example, a study conducted by the Armed Forces Institute of Pathology in 2000 found that some food

products containing hemp could produce a positive urinalysis test result and concluded that "the unintentional use defense will remain a powerful tool used by individuals found positive for THC by urinalysis."

4. That being said, since the early 2000's the technologies and procedures for processing hemp seeds have improved markedly - as a result, while modern commercially manufactured food products using hemp seeds may still contain THC, it's in much lower amounts than similar products manufactured in the 90s.

5. In 2008 the Armed Force Institute of Pathology conducted a study in which they tested food products containing hemp which were made before 2003 as well those made after 2003. The study found that modern commercially available food products manufactured with hemp had very low amounts of THC. The study concluded that

> "Results of the hemp products tested indicate the amount of THC present in commercially available products is significantly less in products available today than those reported in the past. As a result, the probability that these products will produce urine THC metabolite levels greater than the DoD and HHS confirmation cutoff of 15 ng/mL is significantly reduced and should not be considered as a realistic cause for a positive urinalysis result."

6. While legally available, properly manufactured, commercial food products containing hemp cannot interfere with the Air Force drug testing program, there are some theoretical ways in which food products containing hemp could create issues. For example, it is theoretically possible that KIND Snacks (the company that manufactures Strong & KIND Bars such as the ones at issue in this case) could experience some kind of failure in its manufacturing process that would lead to the inclusion of unwashed and unprocessed hemp seeds in some of its Strong and KIND bars. If these adulterated products were then consumed by an Airmen who was subsequently subject to urinalysis, it is theoretically possible a "false positive" could result. That being said, no evidence was presented indicating that such a manufacturing failure has in fact ever occurred. In another

> example, it is theoretically possible that a person could purchase a locally legal product while overseas that could contain unprocessed hemp in concentration sufficient to interfere with the Air Force drug testing program. As with the "manufacturing failure" scenario though, no evidence was presented that this as ever occurred. Finally, it is theoretically possible that an Airmen could order a hemp containing food product over the internet that would be otherwise illegal for sale in the United States that contained amounts of THC well above those allowed by the FDA for hemp food products sold legally in the United States. Once again, no evidence was presented indicating that this theoretical scenario has ever actually happened.
>
> 7. Commercial food products containing hemp seeds are not the only legally available food products that contain some amount of a controlled substance. For example, poppy seeds, which are commonly used in a wide variety of food products, contain measurable amounts of the Schedule II narcotics morphine and codeine. In fact, poppy seeds contain significantly higher amounts of morphine then even unwashed hemp seeds contain THC. Rather than banning the consumption of food products containing poppy seeds in order to avoid the risk of false positives, drug testing laboratories simply administratively raised the cutoff levels such that the risk of a positive test result from consuming poppy seeds was vitally eliminated.

(JA at 515-16.)

After considering the additional evidence and argument the military judge did not modify his earlier ruling. (JA at 516-17.) Once again, the military judge found "There is no reason to believe that lawfully available, commercially manufactured food products sold in the United States pose any risk of interfering with the Air Force's drug testing program." (JA at 517.) He found that the "blanket prohibition of the consumption of lawfully available, highly regulated, commercial manufactured food products sold in the United States is a singularly

unlikely measure to protect members from improperly labeled illicit food stuffs sold illegally over the internet." (JA at 516.) The military just also determined that "there is no reason to criminalize the consumption of a legal food product in the United States in the hope that this will somehow protect Airmen stationed overseas from locally manufactured and sold food products." (JA at 516.)

On 13 August 2016 at 0625 hours PST, the United States filed with the military judge its notice of appeal under Article 62, UCMJ. (JA at 313.) On appeal, AFCCA found the military judge erred in concluding that paragraph 1.1.6 did not constitute a lawful order. (JA at 1-7.) AFCCA held that the military judge erred "as the findings of fact did support that there is a sufficient nexus between a military purpose (the integrity of the urinalysis program) and the military duty (to refrain from consuming hemp products)." (JA at 5.)

Regarding the basis for the nexus, AFCCA pointed to the hemp seed and hemp oil studies referenced in the AFI, as well as thee three hypothetical situations identified by the military judge in his ruling. (JA at 5.) The Court found that since defects in a manufacturing process, purchase of hemp products overseas, or purchase of hemp products on the internet could result in false positives, "it was error for the military judge to conclude that there was an insufficient nexus between the military duty and the integrity and effectiveness of the drug testing program." (JA at 6.) Finally, AFCCA found it was error for the military judge to

completely discount earlier studies which demonstrated that ingestion of hemp products could result in false positives. (JA at 6.) Accordingly, AFCCA granted the United States' appeal and reversed the military judge's ruling dismissing the Additional Charge and its Specification. (JA at 7.)

SUMMARY OF THE ARGUMENT

AFCCA correctly held that the military judge erred when he found that Paragraph 1.1.6 of AFI 90-507 did not constitute a lawful order. Paragraph 1.1.6 is a lawful order, as its ban on the ingestion of hemp seeds protects the integrity of the Air Force's drug testing program. The order is not overly broad. The ingestion of hemp seeds, which even in processed form contain some amount of THC, has the potential to detract from good order and discipline by undermining confidence in drug testing results.

Furthermore, a more narrowly drafted order would be ineffective. On numerous occasions, this Court has identified the substantial interest the services have in preventing drug abuse by military members. On the other hand, the consumption of hemp seeds is not a protected right. In an age of a global economy fueled by the internet and increased access to marijuana and marijuana products in the United States, the AFI is drawn in order to ensure clarity when dealing with hemps seeds which contain varying levels of THC, are available in a variety of markets, and are indistinguishable from marijuana seeds and unprocessed hemp

seeds. Accordingly, Paragraph 1.1.6 amounts to a lawful order.

ARGUMENT

THE MILITARY JUDGE ERRED IN DISMISSING THE ADDITIONAL CHARGE AND ITS SPECIFICATION, AS PARAGRAPH 1.1.6 OF AFI 90-507 IS A CLEAR AND DEFINITE LAWFUL ORDER THAT SERVES THE VALID MILITARY PURPOSE OF PROTECTING THE INTEGRITY OF THE AIR FORCE DRUG TESTING PROGRAM.

Standard of Review

As this case was appealed under Article 62, UCMJ, “this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the prevailing party at trial.” United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014). The lawfulness of an order is a question of law reviewed de novo. United States v. New, 55 M.J. 95, 100-06 (C.A.A.F. 2001); United States v. Hughey, 46 M.J. 152, 154 (C.A.A.F. 1997).

Law and Analysis

The Supreme Court has long-recognized the principle that "the military is, by necessity, a specialized society." Parker v. Levy, 417 U.S. 733, 743 (1974). Accordingly, "the fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Id. at 758. “[T]he military community is unique in many respects and that its system of justice must

be responsive to needs not present in the civil society." Murray v. Haldeman, 16 M.J. 74, 79 (C.M.A.1983).

"It is the primary business of the military is to fight or be ready to fight wars should the occasion arise." United States v. Washington, 57 M.J. 394, 398 (C.A.A.F 2002) (quoting United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)). "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." United States v. Moore, 58 M.J. 466, 468 (C.A.A.F. 2003) (quoting Parker, 417 U.S. at 743). For that reason, appellate courts have upheld as lawful orders restricting service members' personal hygiene, consumption of alcoholic beverages, driving privileges, and financial transactions. *See* United States v. McDaniels, 50 M.J. 407 (C.A.A.F. 1999) (order prohibiting service member from driving his personal vehicle); United States v. McClain, 10 M.J. 271 (C.M.A. 1981) (order prohibiting loans between seniors and subordinates); United States v. McMonagle, 34 M.J. 852 (A.C.M.R. 1992) (order prohibiting alcohol consumption in Panama); United States v. Horner, 32 M.J. 576 (C.G.C.M.R. 1991) (order to take a shower).

Military orders can likewise permissibly intrude upon individual service members' physical privacy. An order to submit a blood test or urine sample is lawful. *See* Unger v. Ziemniak, 27 M.J. 349, 357-58 (C.M.A. 1989); United States

v. Armstrong, 9 M.J. 374 (C.M.A. 1980). Orders restricting sexual or romantic activity are permissible. United States v. Padgett, 48 M.J. 273, 276 (C.A.A.F. 1998) (upholding order to terminate romantic relationship with teenage girl); United States v. Womack, 29 M.J. 88, 91 (C.M.A. 1989) (upholding limitations on sexual intercourse for HIV positive service member). Even orders placing conditions upon marriage, and requiring service members to receive vaccinations over religious objection have been upheld. *See* United States v. Wheeler, 30 C.M.R. 387 (C.M.A. 1961); United States v. Chadwell, 36 C.M.R. 741, 749-50 (N.B.R. 1965).

1) Lawfulness of orders generally.

"A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. *See* the discussion of lawfulness in paragraph 14c(2)(a)." Manual for Courts-Martial (MCM), United States, 2012, Part IV, Paragraph 16c(1)(c). Properly promulgated orders and regulations are presumed to be lawful. Hughey, 46 M.J. at 154. Because of this presumption, the accused bears of the burden to establish otherwise. Id.

"The essential attributes of a lawful order include: (1) issuance by competent authority -- a person authorized by applicable law to give such an order; (2) communication of words that express a specific mandate to do or not do a specific

act; and (3) relationship of the mandate to a military duty." United States v. Deisher, 61 M.J. 313, 317 (C.A.A.F. 2005).

The test for determining the lawfulness of a general order or regulation is found in the Manual:

> The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs….

Hughey, 46 M.J. at 154 (quoting MCM, Part IV, Paragraph 14c(2)(a) (1995 ed.) (italics in original). An order must be "worded so as to make it specific, definite, and certain, and it may not be overly broad in scope or impose an unjust limitation on personal rights." Womack, 29 M.J. at 90. "In sum, an order is presumed lawful, provided it has a valid military purpose and is a clear, specific, narrowly drawn mandate." Moore, 58 M.J. at 468 (citing Womack, 29 M.J. at 90).

An appellant may challenge the lawfulness of an order on a number of grounds:

> that the order directed the commission of a crime; that the issuing officer lacked authority; that the order did not relate to a military duty; that it interfered with private rights or personal affairs without a valid military purpose; that it was solely designed to achieve a private purpose; that it conflicted with a person's statutory or constitutional rights.

Washington, 57 M.J. at 398 (citing para. 14c(2)(a)(i)-(iv), Part IV, MCM (2000 ed.)). When deciding relationship to military duty, this Court looks at the definition provided in the Manual – "all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service." Para. 14c(2)(a), Part IV, MCM (2012 ed.); New, 55 M.J. at 106 ("The test for assessing the lawfulness of an order under Article 92 comes from [this paragraph of the Manual]"); *see also* Padgett, 48 M.J. at 276.

Relationship to military duty has been broadly defined. There is a relationship to military duty when ordering a service member to receive an anthrax vaccine as it is "a defensive measure in the face of a significant military threat." Washington, 57 M.J. at 398. There is a relationship to military duty when ordering a service member to inform his sexual partners of his HIV status, as the Air Force has an interest in protecting the health of its members. Womack, 29 M.J. at 91. There is a relationship to military duty when ordering service members to refrain from unnecessary association with civilian employees, as the policy serves to promote good order and discipline. Moore, 58 M.J. at 469. Likewise, there is a relationship to military duty when ordering a service member to engage in safe-sex with a female civilian, as the military has a legitimate interest in protecting civilians from injury by service members. United States v. Dumford, 30 M.J. 137,

138 (C.M.A. 1990).

2) Paragraph 1.1.6 of AFI 90-507 is a lawful order, as its ban on the ingestion of hemp seeds protects the integrity of the Air Force's drug testing program.

To be a lawful order, Paragraph 1.1.6 must relate to military duty. The military judge erred in this case in finding that there was no "military purpose" (or "nexus") between the AFI's ban on the ingestion of hemp seeds and military duty. (JA at 516-17.) The military judge's reasoning was flawed in that his rationale focused entirely on legal, commercially available hemp seed products sold in the United States. However, this type of rationale relates more to the breadth of the AFI, not its relationship to military duty.

The AFI's ban on hemp seeds is "reasonably in furtherance of or connected to military needs," as such a ban is necessary to protect the reliability and integrity of the drug testing program. As military judge recognized in his findings of fact, the consumption of hemp seeds and hemp seed oil could result in false positives. (JA at 515-16.) Air Force members' ingestion of hemp seeds creates doubt as to whether a positive urine test would result from ingestion of "processed" hemp seeds or hemp seed products. There is no way to distinguish between THC ingested from a marijuana plant, and THC ingested through hemp seed or hemp oil. (JA at 515.)

By banning the ingestion of hemp seeds, the AFI seeks to do away with any

doubt in testing, either real or perceived, created by the possibility of the ingestion of hemp seeds. The ban seeks to obviate the need for the Air Force testing program to take on the burden of disproving the influence of hemp seed ingestion in each case. It not only provides for greater command confidence in drug testing, but also protects airmen from the fallout that would be associated with a false positive for THC.

Preventing drug use is a field in which this Court has given great deference to the services. "Drug abuse by members of the military has long been regarded as a serious threat, not only to the preparedness of the drug abusers themselves, but to the performance of the mission entrusted by the Constitution and Congress to the Armed Services." United States v. Heyward, 22 M.J. 35, 36 (C.M.A. 1986) (internal quotations omitted) (citing Murray, 16 M.J. at 79). "This Court has long recognized the disastrous effects occasioned by the wrongful use of narcotics on the health, morale and fitness for duty of persons in the armed forces." Murray, 16 M.J. at 78. "[U]se of marihuana and narcotics by military persons on or off a military base has special military significance in light of the disastrous effects of these substances on the health, morale and fitness for duty of persons in the armed forces." Id. (quotations and citations omitted).

Regarding the armed forces' urinalysis programs, this Court has held that "mandatory drug testing of servicemembers contributes substantially to reduction

of drug use in the armed services and to making the military community drug free. In our view, compulsory urinalysis is appropriate and necessary to maintain the effectiveness of the military establishment." Unger, 27 M.J. at 357. In fact this Court has determined, "Because of the impact of drug abuse on the performance of the military mission, we believe that mandatory drug testing in the military community is not necessarily subject to the same limitations that would be applicable in the civilian society." Id. at 357 n.17. By protecting the reliability and integrity of the Air Force's drug testing program, the banning of hemp seeds and hemp oil safeguards discipline and is directly connected with the maintenance of good order in the Air Force.

It should also be recognized that the AFI's prohibition on the "ingestion of products containing or products derived from hemp seed or hemp seed oil" is consistent with the Air Force's overall prohibition of ingesting illegal drugs. Simply put, hemp seeds contain THC, a Schedule I controlled substance. (JA at 515.) Hemp seeds come from the cannabis sativa plant, a plant that is illegal in the United States. (JA at 515.) Hemp plants, and hemp seeds, are generally illegal to grow in the United States. (JA at 515.)

Hemp seeds are also sold in a variety of domestic and foreign markets. (JA at 436-37.) A person cannot tell the difference between FDA-approved hemp seeds, and unwashed hemp seeds. (JA at 436.) Unprocessed hemp seeds, or

products containing unprocessed hemp seeds, which contain higher levels of THC, can be purchased in the United States (e.g. homegrown, farmers market, dispensary, internet, etc.). (JA at 436-37, 515.)

Because of the THC content, availability in various markets, and the inconsistent level of THC in hemp seeds, the Air Force has an interest in safeguarding members and protecting good order and discipline – a reasonable relationship to military duty. To put it plainly, not only does Paragraph 1.1.6 relate to a military duty by protecting the integrity of the Air Force drug testing program, it also prohibits the ingestion of THC, which happens to be found on hemp seeds. Thus, the hemp seed ban in Paragraph 1.1.6 is related to a military duty.

3) Paragraph 1.1.6 of AFI 90-507 is not overly broad, as the ingestion of hemp seeds in any form can detract from good order and discipline by undermining confidence in the drug testing program.

Paragraph 1.1.6 of AFI 90-507 is not overly broad in scope and does not impose an unjust limitation on a personal right. *See* Womack, 29 M.J. at 90. Paragraph 1.1.6 does not prohibit entire classes of foods, but an individual ingredient. It does not ban the use of hemp in clothing, soap, or rope, but only the ingestion of hemp. The ban does not prohibit peanuts or chia seeds, but hemp seeds and oil, which contain THC.

As to FDA-approved hemp seeds, even they contain measurable amounts of THC – a controlled substance. (JA at 436-37.) They come from a heavily

regulated plant, which is illegal to grow or harvest in the United States. (JA at 515.) The KIND bars at issue in this case contained a measurable amount of THC. (JA at 436-37, 455.) A failure in manufacturing processes could lead to companies inadvertently including unprocessed hemp seeds in their products. (JA at 515.) Given the above, even FDA approved commercially available hemp seeds can undermine confidence in the Air Force drug testing program and its results.

In United States v. Young, ACM S29673, 2001 CCA LEXIS 209 (A.F. Ct. Crim. App. 20 July 2001) (unpub. op.), AFCCA found that it was error for a military judge to not allow the appellant to cross-examine the government toxicologist about the Air Force AFI provision banning hemp seed and hemp seed oil. (JA at 520-525.) AFCCA ultimately found the military judge's error to be harmless because the appellant had cross-examined the government expert on studies demonstrating that the ingestion of hemp seeds and hemp oil could cause an airman to test positive. (JA at 522-23.)

Thus, according to Young, trial courts are not permitted to foreclose a defense of innocent ingestion based on the consumption of commercially available hemp seed products. For these same reasons, the Department of Transportation forbids the use or ingestion of hemp products as an excuse for a positive urinalysis

result in employee screenings.[10] *See* 49 C.F.R. § 40.151(f) (2000). This regulation, 49 C.F.R. § 40.151(f), exists for "preventing an assertion of hemp consumption from negating a positive drug test...[and] quite clearly bears a rational relationship to the legitimate government goal of maintenance of a safe and effective transportation system by limiting the issues the [medical review officer] may consider." Shipman v. DOT, 58 Fed. Appx. 481, 484 (Fed. Cir. 2003). This is precisely why the AFI in this case relates to a military duty and is narrowly drawn, as even processed hemp seeds create doubt about the reliability of the drug testing program.

This Court need look no further than this case as an example. Appellant relied on the hemp seed ingestion defense when he was interviewed by Security Forces – providing investigators the Strong and KIND bars he consumed. (Pros. Ex. 2.) During cross-examination of the government expert, trial defense counsel identified that the Air Force had a purpose for banning hemp seeds – implying that processed hemp seeds could cause a positive test result. (JA at 135.) Trial defense counsel also cross-examined the government expert on the potential for unregulated hemp products, such as hemp oil, to result in a false positive. (JA at 147.) The military judge recognized that the government had to spend a significant

[10] The Army also prohibits the ingestion of hemp seed and hemp oil. *See* Army Regulation 600-85, *The Army Substance Abuse Program*, para. 4-2.p. (28 November 2013).

amount of time during the trial challenging the assertion that processed hemp seeds as an ingredient in a commercial food product could not cause a false positive. (JA at 516.)

If this Court has any reservations about the potential for hemp ingestion in any form to create doubt as to the validity of drug test results, it need look no further than Appellant's closing argument in this case:

> The bottom line is, their expert has to concede, and he did so repeatedly, that is entirely possible that Major Pugh innocently ingested marijuana. And we know it's entirely possible, but is it reasonable? I'm sure that you, or your spouses, or your family members go out on Saturday, and you go to the local market, and you buy stuff. And you pick it up, and some of that stuff comes right off the shelf, some of it doesn't. We also know that this is Northern California, and we know that stuff gets put into counters. Now, remember what their expert said, remember one of the last things he said, you have to be very very careful what you eat. Boy, if that ain't the truth.
>
> ….
>
> How incredibly easy it is, in this day and age, to pop positive on a urinalysis test, because it's there, and it's real. Grab some popcorn, eat it, yeah, that could make you test positive. Do you know that that popcorn had THC in it? No, and I mean, I am sorry, but how many times have you went out and picked up, when you are at one of those VRBOs, or at someone's house, and pouring something out, like oil to eat bread for an Italian dinner? Common sense, gentlemen. Common sense.

(JA at 240-41.)

The Air Force has a military purpose and interest in protecting the

enforceability of its drug testing program by giving commanders and Airmen certainty that positive urine tests are not a result of consuming hemp seeds or their products. The AFI is not overly broad, as it only prohibits ingestion of hemp seeds and hemp oil, not entire classes of food items. Likewise, the AFI only prohibits ingestion, it does not bar other uses of hemp or hemp seeds, such as wearing or using clothing, lotions, rope, shoes, etc. Commercial FDA-approved hemp seed products in the United States, while regulated, still contain measurable levels of THC. (JA at 436-37.) Such processed seeds are indistinguishable from unprocessed seeds. (JA at 436.) Regarding the THC levels of such products, Airmen are at the mercy of whoever is processing the hemp seeds, the quality of hemp plants used, and the manufacturing processes utilized. As such, the AFI is not overly broad.

Moreover, this ban ensures the confidence in the results of the testing program are not eroded by claims of innocent ingestion of hemp seeds, whether or not those claims can be supported by expert opinion. In other words, prohibiting the ingestion of hemp seeds seeks to discourage airman from falsely claiming that their positive urinalysis resulted from the ingestion of hempseeds, which injects uncertainty into testing results.

4) A more narrowly drafted order would be ineffective.

As demonstrated above, even FDA approved commercially available hemp

seeds have the potential to undermine the integrity of Air Force drug testing. At a minimum, the flat out ban of all hemp seeds and hemp oil is necessary to provide clear guidance to Airmen.

Presumably, Appellant would argue that the AFI could state that only DEA and FDA approved hemp seeds may be consumed. But, as noted in the military judge's ruling, a failure in a manufacturing process could lead to the inclusion of unwashed and unprocessed hemp seeds in even FDA approved commercially available food products. (JA at 515.) Furthermore, in such a new and volatile market, including one in which a Schedule I drug is being sold in certain states in defiance of federal law, command has an interest in protecting Airmen at a level untethered from, and greater than, the interests currently held by the DEA and FDA in protecting their clientele.

Moreover, as this Court has held, commanders must issue specific, definite, and certain orders. Womack, 29 M.J. at 90. Marijuana and products made with marijuana are becoming increasingly available in the United States every day, which complicates matters for those required to refrain from ingesting Schedule I drugs. Processed hemp seeds are indistinguishable from unprocessed hemp seeds. (JA at 436.) Hemp seeds in Asia and Europe are not subject to DEA or FDA regulations, and are accessible through the internet. (JA at 437.)

Airmen will not know that not all hemp seeds are created equal – as they

cannot tell the difference between washed, unwashed, or marijuana seeds. An Airman would not know to ask the question if the hemp seeds were "properly processed according to FDA and DEA regulations." The Air Force could not possibly test all of the ever changing hemp seed containing products available in the United States and elsewhere, and identify which products are safe for consumption by Airmen.

As discussed above, this Court has recognized that the Air Force has a substantial interest in deterring illegal drug use, and relies heavily on its drug testing program to do so. On the other hand, Airmen have no fundamental constitutional right to the consumption of THC or hemp seeds. *See generally* United States v. Plume, 447 F.3d 1067, 1075 (8th Cir. 2006) (no fundamental right to hemp farming); Kuromiya v. United States, 37 F. Supp. 2d 717, 725 (E.D. Pa. 1999) ("[T]here is no constitutional provision by which one can discern a fundamental right to possess, use, grow or sell marijuana."); Raich v. Gonzales, 500 F.3d 850, 866 (9th Cir. 2007) ("[F]ederal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician . . . .") The Air Force's prohibition on the consumption of an ingredient that contains a Schedule I controlled drug is not a cognizable infringement on a personal right.

The substantial interest of the Air Force to provide clear and definite guidance in an effort to prevent drug abuse in its ranks, outweighs any personal

interest an Airman has in consuming a food product containing some amount of a controlled substance. In the age of a global economy, increased access to marijuana and marijuana products in the United States, the AFI is drawn in order to ensure clarity when dealing with hemps seeds which contain varying levels of THC, are available in a variety of markets, and are indistinguishable from marijuana seeds and unprocessed hemp seeds.

The AFI prevents Airmen from having to guess whether they can consume a product that is from a marijuana plant, and if it matters what store, farm, or website they buy it from. It likewise ensures that commanders will not be in a position to guess whether their airmen were using marijuana, or eating a poorly regulated or defective food product. Finally, banning the ingestion of hemp seeds and oil protects confidence in the drug testing program by seeking to foreclose the use of an innocent ingestion claim, even if such a claim may be scientifically unsound as to the consumption of certain products. Thus, the hemp seed and hemp oil ban in Paragraph 1.1.6 of AFI 90-507 is not overly broad.

Accordingly, the military judge erred when he determined that Paragraph 1.1.6 did not meet the requirements of a lawful order.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court affirm AFCCA's decision overturning the military judge in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and Civilian Appellate Defense Counsel on 28 August 2017.

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