INTRODUCTION

A sample Joint Appendix follows. Counsel are reminded that as of August 1, 2007, compliance with the Rule may be accomplished by following the Rule or by including the items specified in Rule 24(f)(1)(A-C) and by listing the items described in Rule 24(f)(1)(D-F) that appellant/petitioner and appellee/respondent wish to direct the Court's attention. Starting July 1, 2008, compliance will require full observance of the Rule including consultation between counsel for both sides (Rule 24(f)(4)), and by reproduction of the items that both sides wish to bring to the attention of the Court. This sample assumes full compliance with the Rule and not the interim listing procedure. It is suggested that, in preparing the list of pages that counsel provide sufficient detail to identify and locate the document or transcript being listed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
	)	
Appellee	)	
	)	**JOINT**
v.	)	**APPENDIX**
	)	
	)	USCA Dkt. No. XX-XXXX/NA
Antoine M. THOMAS	)	
Seaman Recruit	)	Crim. App. Dkt. No. XXXXXXXX
U.S. Navy,	)	
	)	
Appellant	)	

Name
Grade, Service
Address
Phone No.
Bar No.

Counsel for Appellee

Name
Grade, Service
Address
Phone No.
Bar No.

Counsel for Appellant

TABLE OF CONTENTS

** Not all items specified in the Rule will be needed, such as where no unpublished decisions are cited in the brief for the appellant or petitioner. Docket entries (Rule 24(f)(1)(D) will generally NOT be made part of the trial record and therefore cannot be included in a Joint Appendix. Signature pages and certificates of service need not be included unless relevant to the appeal.*

Examples of pages that need not be included in the Joint Appendix are provided as illustrations and have a large X running through the page to indicate that the page is NOT included in the Joint Appendix.

1 of 1 DOCUMENT

UNITED STATES v. Antoine M. THOMAS, Seaman (E-3), U.S. Navy PUBLISH

NMCCA 200401690

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2005 CCA LEXIS 404

December 19, 2005, Decided

SUBSEQUENT HISTORY: Motion granted by *United States v. Thomas, 2006 CAAF LEXIS 276 (C.A.A.F., Mar. 7, 2006)*

PRIOR HISTORY: [*1] Sentence adjudged 22 July 2004. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Transient Personnel Unit, Naval Submarine Base, Silverdale, WA.

COUNSEL: CDR BRENT FILBERT, JAGC, USNR, Appellate Defense Counsel.

LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel.

LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel.

JUDGES: BEFORE Charles Wm. DORMAN, D.A. WAGNER, J.F. FELTHAM. Chief Judge DORMAN and Senior Judge WAGNER concur.

OPINIONBY: J.F. FELTHAM

OPINION: FELTHAM, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of physically controlling a vehicle while impaired by marijuana, and wrongfully introducing marijuana onto an installation used by the armed forces, in violation of Articles 111 and 112a, Uniform Code of Military Justice, *10 U.S.C. § § 911* and *912a*. The appellant was sentenced to a bad-conduct discharge, confinement for five months, and forfeiture of $ 750.00 pay per month for five months. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement [*2] over 90 days.

We have carefully considered the record of trial, the appellant's assignment of error that the military judge erred in accepting his guilty plea to the offense of wrongful introduction of a controlled substance because the appellant did not know he had entered a military installation, and the Government's response. We conclude that the appellant's guilty pleas are provident, that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c)*, UCMJ.

Background

At 0027 hours on 10 June 2004, the appellant drove his Honda Accord on Military Road, Fort Lewis, Washington, about 45 minutes to an hour after he smoked a marijuana cigarette. The appellant prepared the cigarette from a stash of marijuana he had previously stored in a bag. The bag, containing a trace amount of marijuana, was in the appellant's car. A military police officer stopped the car after observing it execute an illegal U-turn, and the marijuana was discovered during a subsequent search of the vehicle. The appellant admitted during the providence inquiry and in a stipulation of fact, Prosecution [*3] Exhibit 1, that at the time he drove on Military Road on 10 June 2004, he was driving on a military installation, but was then unaware that he had entered onto military property.

Providence of the Appellant's Guilty Plea

A military judge may not accept a guilty plea to an offense without inquiring into its factual basis. Art. *45(a)*, UCMJ; *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969)*. Before accepting a guilty plea, the military judge must ordinarily explain the elements of the offense, and must ensure that a factual basis for the plea exists. *United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)*; *United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996)*; *United States v. Davenport, 9 M.J. 364, 367 (C.M.A. 1980)*; Rule for Courts-Martial 910(e), Manual for Courts-Martial, United States (2002

ed.), Discussion. Acceptance of a guilty plea requires an appellant to substantiate the facts that objectively support the guilty plea. *United States v. Schwabauer, 37 M.J. 338, 341 (C.M.A. 1993)*; R.C.M. 910(e).

> The standard of review to determine whether a plea is provident is whether [*4] the record reveals a substantial basis in law or fact for questioning the plea. *United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)*. Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. The only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs. R.C.M. 910(j); *Art. 59(a)*, UCMJ.

United States v. Dawson, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

If, after entering a plea of guilty, an accused sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty improvidently, a plea of not guilty shall be entered in the record, and the court shall proceed as if the accused had pleaded not guilty. *Article 45(a)*, UCMJ. "Under the express language of Article 45, a military judge cannot allow a guilty plea to stand if the defense offers 'inconsistent' matter, even though clearly the accused and his counsel have made a sound tactical judgment that, in light of the evidence available to the prosecution, such a plea would be in the accused's best interest." *United States v. Clark, 28 M.J. 401, 406 (C.M.A. 1989).* [*5] "The fact that a stipulation of fact or other evidence would convince the factfinder of appellant's guilt beyond a reasonable doubt is not an adequate substitute when the accused interjects matter patently inconsistent with his plea." *United States v. Garcia, 43 M.J. 686, 689 (A.F.Ct.Crim.App. 1995), rev'd on other grounds, 44 M.J. 496 (C.A.A.F. 1996).*

Article 112a provides that "Any person . . . who wrongfully . . . introduces into an installation . . . used by or under the control of the armed forces a substance described in subsection (b) [marijuana] shall be punished as a court-martial may direct." *See* Manual for Courts-Martial, United States (2002 ed.), Part IV, P37a(b)(1). The elements of this offense are "that the accused introduced onto an . . . installation used by the armed forces a certain amount of a controlled substance; and . . . that the introduction was wrongful." *Id.* at P37b(4).

Introduction of a controlled substance is wrongful if it is without legal justification or authorization. *Id.* at P37c(5). Introduction of a controlled substance is not wrongful if it is done without knowledge of the contraband nature of the [*6] substance. *Id.* Introduction of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. *Id.* If the evidence raises an issue concerning the wrongfulness of the introduction of a controlled substance, the burden of proof is upon the Government to establish that the introduction was wrongful. *Id.*

After ruling that an accused need not actually know he entered an installation used by or under the control of the armed forces in order to be guilty of wrongful introduction of a controlled substance, the military judge accepted the appellant's guilty plea to this offense. Record at 38-39, 49. The issue of whether a person who knowingly possesses a controlled substance must have actual knowledge that he or she has entered an installation used by the armed forces or under the control of the armed forces in order to be guilty of the offense of wrongful introduction is one of first impression for our court. Our superior court does not appear to have addressed this issue either. It has, however, ruled that knowledge is an element of wrongful use and wrongful possession in *United States v. Mance, 26 M.J. 244, 253 (C.M.A. 1988).* [*7] Addressing the duty of a military judge to instruct court members in prosecutions for violations of *Article 112a*, the court wrote:

> In light of the earlier ambiguity in Manual provisions and in this Court's opinions concerning the treatment of knowledge, it is appropriate to state that, henceforth, in prosecutions for wrongful use or wrongful possession, the military judge should instruct the court members that, in order to convict, the accused must have known that he had custody of or was ingesting the relevant substance and also must have known that the substance was of a contraband nature -- regardless whether he knew its particular identity.

Id., at 256.

Although *Mance* involved use, not wrongful introduction, of a controlled substance, its holding appears to have influenced the wording of the model instruction for the offense of wrongful introduction in the Military Judges' Benchbook. The model instruction states that the second element of wrongful introduction is "that the accused actually knew (he)(she) introduced the substance." *See* Military Judges' Benchbook, Dept. of the Army

Pamphlet 27-9 at P3-74-4 (15 Sep 2002). The model instruction [*8] also states that the accused must be aware of the presence of the substance at the time of the introduction. *Id.*

If we were to treat the Military Judges' Benchbook model instruction for wrongful introduction as persuasive, the facts before us would lead us to hold that the appellant's plea to this offense was improvident. The Benchbook, however, is not legal authority. For that, we must examine other sources. Finding no military case law on point, we turn to interpretive decisions pertaining to a drug offense statute in the Federal Criminal Code that is analogous to *Article 112a.*

Section 860(a) of Title 21, U.S.C., enhances the penalty for "any person who violates *section [841(a)(1)* or *section 856* of Title 21] by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility . [*9] . . ." *21 U.S.C. § 860(a).*

In October 2002, the United States Court of Appeals for the Tenth Circuit affirmed a conviction in the United States District Court for the District of New Mexico for possession with intent to distribute cocaine base within 1,000 feet of a school in violation of *21 U.S.C. § 860(a). United States v. Harris, 313 F.3d 1228 (10th Cir. 2002), cert. denied, 537 U.S. 1244 (2003).* In *Harris*, the appellant argued, *inter alia,* that his conviction was supported by insufficient evidence because the Government was not required to prove that he intended to distribute the cocaine base within 1,000 feet of a school. *Id. at 1231.*

In upholding the conviction in *Harris*, the Tenth Circuit reviewed other circuits' interpretations of *21 U.S.C. § 860(a).* "Five of our sister circuits have previously addressed the precise issue before us today, and each has adopted a broad ruling of *§ 860(a)* by holding that the government need only prove that the defendant possessed illegal drugs within 1,000 feet of a school and intended to distribute them *somewhere* [*10] . [emphasis in original]" *Id. at 1238* (citing *United States v. Ortiz, 146 F.3d 25, 28-30 (1st Cir. 1998); United States v. Lloyd, 10 F.3d 1197, 1218 (6th Cir. 1993); United States v. Hohn, 8 F.3d 1301, 1307 (8th Cir. 1993)); United States v. McDonald 301 U.S. App. D.C. 157, 991 F.2d 866, 868-71 (D.C. Cir. 1993); United States v. Rodriguez, 961 F.2d 1089, 1090-95 (3d Cir. 1992); United States v. Wake, 948 F.2d 1422, 1429-34 (5th Cir. 1991).*

The Tenth Circuit found "the reasoning of [its] sister circuits persuasive and adopted it as the law of [its] circuit." *Harris, 313 F.3d at 1239.* The court then explained the legal analyses of its sister circuits that it found particularly compelling:

> First, we agree with the rationale espoused by the Sixth Circuit in *Lloyd.* There, the court held that because *§ 860(a)* does not have a *mens rea* requirement, a jury need not find intent on the part of a defendant to distribute illegal drugs within 1,000 feet of a school. *Lloyd, 10 F.3d at 1218; see also Wake, 948 F.2d at 1432* (citing *United States v. Falu, 776 F.2d 46, 50 (2d Cir. 1985)* [*11] ("Our reading is consistent with a *strict liability* approach to the statute that recognizes Congress' intent to create a drug-free zone." (emphasis added)). We have likewise held that *§ 860(a)* contains no knowledge requirement. *United States v. DeLuna, 10 F.3d 1529, 1534 (10th Cir. 1993)*(citation omitted). Given this, we believe that a defendant need not intend to distribute drugs within 1,000 feet of a school to be convicted under *§ 860(a).*

Id.

In addition to the Tenth Circuit, we note that one of our sister service courts has previously found this same line of reasoning persuasive in its review of a conviction for wrongful introduction with intent to distribute. *See United States v. Dinzy, 39 M.J. 604, 605-06 (A.C.M.R. 1994)*(holding that a guilty plea to wrongful introduction with intent to distribute was provident, and that the actual location of the intended distribution was not critical because the intent to distribute was satisfied by proving an intent to distribute at some time in the future)(citing *United States v. Pitt, 35 M.J. 478 (C.M.A. 1992)).*

In *Dinzy*, the Army Court of Military Review consulted [*12] the Circuit Courts' interpretation of *§ 860(a)* because neither the UCMJ nor the Manual for Courts-Martial address where the actual distribution of a controlled substance is to take place in a case where introduction of the drugs onto a military installation with the intent to distribute is alleged. *Dinzy, 39 M.J. at 605.* We now find ourselves facing a similar dilemma, as neither the UCMJ nor the Manual for Courts-Martial address whether or not an individual who wrongfully possesses a controlled substance must have actual knowledge that he or she has crossed the boundary line of an armed forces installation in order to be guilty of the offense of wrongful introduction.

The court in *Dinzy* noted that "there are obvious dangers arising out of the presence of drugs on a military installation, even when the possessor intends to distribute the drugs elsewhere. The gravamen of the offense of introduction with the intent to distribute is twofold: violating the integrity of a military installation's drug-free environment, and the presence on the installation of an individual who trafficks [sic] in illegal drugs for profit." *Dinzy, 39 M.J. at 605.*

Our [*13] view of the offense of wrongful introduction is similar to that of the Army court's view of the offense of wrongful introduction with intent to distribute. In the case before us, the appellant violated the integrity of a military installation's drug-free environment. Although he did not enter Fort Lewis to traffic in illegal drugs for profit, his offense nonetheless involved the presence on Fort Lewis of an individual who carried illegal drugs in his vehicle for a wrongful purpose. Although the appellant did not know at the time of the offense that he had crossed the boundary line of Fort Lewis, we do not view ignorance of an installation boundary's exact location as creating an exception to the proscription against wrongful introduction in *Article 112a.*

The United States Court of Appeals for the Fifth Circuit expressed a similar view in its analysis of *§ 860(a).* "Our reading is consistent with a strict liability approach to the statute that recognizes Congress' intent to create a drug-free zone." *Wake, 948 F.2d at 1432* (citing *Falu, 776 F.2d at 50*). "Further, Congress chose not to include exceptions in the statute for conduct that some might argue [*14] presented no direct danger to schoolchildren. Rather, it placed the burden on drug dealers to ascertain their proximity to schools. It adopted enhanced penalties to deter persons from bringing drugs within the prohibited zone in a sufficient quantity to evidence an intent to distribute. We will not, indeed cannot, second-guess Congress' decision not to exempt certain conduct related to the evil it sought to prevent." *Id. at 1433.*

In the absence of specific guidance in the UCMJ and Manual for Courts-Martial, as well as a lack of case law on the issue before us, we adopt a similar strict liability approach to the offense of wrongful introduction. Therefore, we conclude that appellant's guilty plea to the offense of wrongful introduction was provident.

Conclusion

We therefore affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Senior Judge WAGNER concur.

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
THOMAS, Antoine M.	[redacted]	SR	E-1

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Transient Personnel Unit Puget Sound	2 JUL 02	4 years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$1,193.40	N/A	$1,193.40	Pretrial Confinement	10 June 2004 to Present

II. CHARGES AND SPECIFICATIONS

10. CHARGE: I VIOLATION OF THE UCMJ, ARTICLE 111

Specification: In that Seaman Antoine M. Thomas, U.S. Navy, Transient Personnel Unit Puget Sound, Naval Base Kitsap - Bangor, Silverdale, Washington, on active duty, did, at Ft. Lewis Army Base, Ft. Lewis, Washington, on or about 10 June 2004, on Military Road, Ft. Lewis Army Base, Ft. Lewis, Washington, physically control a vehicle, to wit: a passenger car, while impaired by marijuana.

Charge II: Violation of the UCMJ, 112a

Specification: In that Seaman Antoine M. Thomas, U.S. Navy, Transient Personnel Unit Puget Sound, Naval Base Kitsap - Bangor, Silverdale, Washington, on active duty, did, at Ft. Lewis Army Base, Ft. Lewis, Washington, on or about 10 June 2004, wrongfully introduce less than 40 grams of marijuana onto a vessel, aircraft, vehicle, or installation used by the armed forces or under control of the armed forces, to wit: Ft. Lewis Army Base, Ft. Lewis, Washington.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
Behrendt, Brenda L.	LN2(SW/AW)	Transient Personnel Unit Puget Sound

d. SIGNATURE OF ACCUSER	e. DATE
Brenda L Behrendt	19 July 2004

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 19th day of July, 20 04, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

D. J. McMATH
Typed Name of Officer

Transient Personnel Unit Puget Sound
Organization of Officer

Lieutenant, U.S. Navy
Grade and Service

Executive Officer
Official Capacity to Administer Oaths
(See R.C.M. 307(b)—must be commissioned officer)

DJM
Signature

DD FORM 458 S/N 0102-LF-000-4580

ORIGINAL

RECORD OF TRIAL

Of

THOMAS, ANTOINE M.	[redacted]	SR (E-1)
(Name: Last, First, Middle initial)	*(Social Security Number)*	*(Rank)*
Transient Personnel Unit Puget Sound	U. S. Navy	Silverdale, WA.
(Unit/Command Name)	*(Branch of Service)*	*(Station or Ship)*

By

SPECIAL COURT-MARTIAL

Convened by COMMANDING OFFICER
(Title of Convening Authority)

Transient Personnel Unit Puget Sound
(Unit/Command of Convening Authority)

Tried at

Naval Base Kitsap Bremerton Annex,
Bremerton, WA. on 22 July 2004.
(Place or Places of Trial) *(Date or Dates of Trial)*

TESTIMONY

Name of Witness (*Last, First, Middle Initial*)	Direct and Redirect	Cross and Recross	Court
PROSECUTION			
DEFENSE			

EXHIBITS ADMITTED IN EVIDENCE

Number or Letter	Description	Page Where – Offered	Page Where – Admitted
PE 1	Stipulation of Fact	17	19
DE A	Personal Data Sheet	52	52
AE I	Memorandum of Pretrial Agreement		
AE II	Maximum Sentence Appendix to Memorandum of Pretrial Agreement		
AE III	Appellate and Post-Trial Rights		
AE IV	Appellate Rights Statement (Long Version)		
AE V	Special Power of Attorney		

CERTIFICATE IN LIEU OF RECEIPT

_____ _____
(Place) *(Date)*

I certify that on this date a copy of the record of trial in the case of United States v. _____

Was transmitted (delivered) to the accused, _____
(Rank and Name of Accused)

at _____ By, _____
(Place of delivery, or address sent to) *(Means of effecting delivery, i.e., mail, messenger, etc.)*

and that the receipt of the accused had not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

_____
(Signature of trial counsel)

OR

Trial Service Office West Detachment, Bremerton, Wa. 26 August 2004
(Place) *(Date)*

I certify that on this date a copy of the record of trial in the case of United States v. SR Antoine M. Thomas, U.S. Navy
(Rank and Name of Accused)

was transmitted (delivered) to the accused's defense counsel, Lieutenant Karen Robertson, JAGC, USNR
(Rank and Name)

at Naval Legal Service Office, Bremerton WA by _____
(Place of delivery or address sent to) *(Means of effecting delivery, i.e., mail, messenger, etc.)*

because the accused requested such at trial and the accused so requested in writing, which is attached.

(_____).

William N Gates, LTJG, USN
(Signature of trial counsel)
for JOHN GATES, LT, JAGC, USNR

DD Form 490, OCT 84, Page 3

DEPARTMENT OF THE NAVY

TRANSIENT PERSONNEL UNIT
NAVAL SUBMARINE BASE, BANGOR
2019 BARB STREET
SILVERDALE, WA 98315-2019

8 January 2004

SPECIAL COURT-MARTIAL CONVENING ORDER 1-04

Pursuant to authority contained in paragraph 0120c, Judge Advocate General of the Navy Instruction 5800.7C, of 3 October 1990, a special court-martial is convened with the following members:

Lieutenant Commander Thomas L. Frerichs, U.S. Navy.
Lieutenant Michael R. Christensen, U.S. Navy.
Lieutenant Andrew C. O'Meara, U.S. Navy.
Lieutenant Christian W. Wangsgard, U.S. Navy.
Chief Warrant Officer (CWO4) James W. Harris, U.S. Navy.

D. R. MONROE
Lieutenant Commander, U. S. Navy
Commanding Officer
Transient Personnel Unit
Puget Sound
Naval Submarine Base, Bangor
Silverdale, Washington

MJ: The court will come to order at Naval Base Kitsap, Bremerton Annex, in the case of *United States versus Seaman Recruit Antoine M. Thomas*, United States Navy. Trial Counsel?

TC: This court is convened by Lieutenant Commander Debra Monroe, Commanding Officer, Transient Personnel Unit Puget Sound, by Special Court-Martial Convening Order 1-04, dated 8 January 2004, copies of which have been furnished to the military judge, defense counsel, accused, and the court reporter for insertion in the record of trial. There are no modifications or corrections to the convening order.

The general nature of the charges in this case are violation of the UCMJ, Articles 111 and violation UCMJ, Article 112 alpha.

The charges were preferred by LN2 Behrendt, a person subjected to the UCMJ; sworn to before an officer authorized to administer oaths; and have been properly referred to this court-martial for trial by the Commanding Officer, Transient Personnel Unit Puget Sound.

The charges have not been referred to any court other than that reflected on the referral block of the charge sheet.

The charges were served on the accused on 19 July 2004. The 3-day waiting period has expired. In addition there were two

other charge sheet which were withdrawn and will be attached to the record of trial.

MJ: Well I don't think the 3-days has expired. I think tomorrow might be the 3-days have expired. Since 19 July—today's only the 22nd. Counsel?

TC: The 3-day waiting period has not expired, Your Honor.

MJ: Okay.

TC: The accused and the following persons detailed to this court-martial are present:

CAPTAIN BRUCE MACKENZIE, JAG CORPS, U.S. NAVY, as MILITARY JUDGE;

LIEUTENANT KAREN ROBERTSON, JAG CORPS, U.S. NAVAL RESERVE, as DEFENSE COUNSEL; and

LIEUTENANT JOHN GATES, JAG CORPS, U.S. NAVAL RESERVE, as TRIAL COUNSEL.

The members are absent.

LN2 Gasperetti has been detailed and sworn as court reporter for this court-martial and has previously been sworn.

I have been detailed to this court-martial by the Senior Trial Counsel, Trial Service Office West Detachment Bremerton. I am qualified and certified under 27 bravo and sworn under 42 alpha of the UCMJ. I have not acted in any manner which might tend to disqualify me in this court-martial.

MJ: I don't know this for sure, but didn't you tell me in an 802 that you had a couple of referrals and withdrawals of these charges.

TC: That is correct, Your Honor.

MJ: Why don't you go ahead and put that on the record.

TC: The first charge sheet was preferred on 21 June 2004; withdrawn by direction of the convening authority on 21 July 2004. Correct me, 21 June 2004. The second charge sheet, which was preferred on 25 June 2004, was withdrawn and dismissed without prejudice on 19 July 2004.

MJ: Which led to this third charge sheet, is that correct?

TC: That's correct, sir.

MJ: And I'm sorry, you said you had not acted in any manner which might tend to disqualify you in this case.

TC: That is correct, Your Honor.

MJ: All right, thank you. Lieutenant Robertson, will you state for the record by whom you've been detailed, your legal qualifications, status as to oath, and whether or not you've acted in any disqualifying manner, please.

DC: Yes, Your Honor. I have been detailed to this court-martial by Commanding Officer, Naval Legal Service Office Northwest. I am qualified and certified under Article 27 bravo and sworn under

The trial counsel has examined this record of trial for errors and omissions, and has made all corrections and changes required by R.C.M. 1103(i)(1)(A), MCM, 2002.

JOHN GATES
LT, JAGC, USNR
TRIAL COUNSEL
23 AUGUST 04
(DATE)

I have examined the record of trial in the foregoing case.

KAREN ROBERTSON
LT, JAGC, USNR
DEFENSE COUNSEL
16 Aug 04
(DATE)

AUTHENTICATION OF RECORD OF TRIAL
In the case of
SEAMAN RECRUIT ANTOINE M. THOMAS, U.S. NAVY
TRANSIENT PERSONNEL UNIT PUGET SOUND

BRUCE W. MACKENZIE
CAPT, JAGC, USN
MILITARY JUDGE

26 Aug 2004
(DATE)

SPECIAL COURT-MARTIAL
UNITED STATES NAVY
NORTHWEST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
v.	)	
	)	STIPULATION OF FACT
ANTOINE M. THOMAS	)	
SR, U.S. NAVY	)	
	)	

IT IS HEREBY AGREED BETWEEN TRIAL COUNSEL AND DEFENSE COUNSEL, WITH THE EXPRESS CONSENT OF THE ACCUSED, THAT THE FOLLOWING FACTS ARE TRUE, ARE SUSCEPTIBLE OF PROOF, AND ARE ADMISSIBLE INTO EVIDENCE WITHOUT REGARD TO ANY EVIDENTIARY RULE, APPLICABLE CASE LAW, OR RULE FOR COURTS-MARTIAL. THE ACCUSED HEREBY WAIVES ANY OBJECTION HE MAY HAVE TO THE ADMISSION OF THESE FACTS AND EVIDENCE. THE MILITARY JUDGE MAY CONSIDER THESE FACTS IN DETERMINING THE PROVIDENCE OF THE ACCUSED'S PLEAS AND IN DETERMINING AN APPROPRIATE SENTENCE.

PERSONAL JURISDICTION

1. SR Thomas, USN, enlisted in the U.S. Navy 02 July 2002.

2. SR Thomas has not been released or discharged from active duty.

3. SR Thomas is currently on active duty.

4. SR Thomas current unit/organization is Transient Personnel Unit Puget Sound (TPU), in Naval Base Kitsap, Silverdale, Washington.

CHARGE I: VIOLATION OF UCMJ ART 111

5. SR Thomas was on active duty on 10 June 2004.

6. SR Thomas was assigned to TPU on 10 June 2004.

7. SR Thomas was in physical control of a motor vehicle onboard Fort Lewis Army Base.

8. While in physical control of said vehicle, SR Thomas was impaired by his use of marijuana.

Prosecution Exhibit 1
~~for identification~~
Offered 17
Admitted 19

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 112a

9. SR Thomas was on active duty on 10 June 2004.

10. SR Thomas was assigned to TPU on 10 June 2004.

11. SR Thomas introduced marijuana on or about 10 June 2004 onto Fort Lewis Army Base, an installation used by and under the control of the armed forces.

12. This introduction of marijuana was wrongful.

ADDITIONAL AGGRAVATION/MITIGATION

13. SR Thomas was on Appellate Leave awaiting discharge on 10 June 2004 and was not engaging in or required to perform military duties.

14. When SR Thomas introduced marijuana onto Fort Lewis, he had a civilian passenger with him in his vehicle.

15. There were no physical injuries or property damage as a result of SR Thomas' actions.

16. At 0027 hours on 10 June 2004 SR Thomas was driving on Military Road in FT Lewis, WA, a remote area of FT Lewis Army Base. SR Thomas did not pass through a security gate and was unaware that he was driving on military property.

17. The arresting officers initiated the traffic stop because SR Thomas executed an illegal u-turn. There were no other vehicles in sight when SR Thomas made the u-turn.

18. The marijuana introduced was a small, immeasurable amount.

19. During his custodial restraint at the scene, Thomas made this spontaneous statement to the arresting officers, "We just smoked a blunt."

20. On 13 May 2004, SR Thomas was convicted at a special court-martial in Bremerton, Washington of violations of UCMJ Articles 86 and 112a. Captain Bruce Mackenzie, JAGC, USN awarded the following sentence: to forfeit $750.00 per month for 3 months, to be reduced to paygrade E-1, to be confined for 75 days, and to be awarded a bad-conduct discharge.

J. D. Gates
LT, JAGC, USNR
Trial Counsel

Antoine M. Thomas
SR, USN
Accused

Karen Robertson
LT, JAGC, USNR
Defense Counsel

SPECIAL COURT-MARTIAL
UNITED STATES NAVY
NORTHWEST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
v.	)	**MEMORANDUM OF**
	)	**PRETRIAL AGREEMENT**
ANTOINE M. THOMAS	)	
SR, U.S. NAVY	)	
	)	

I, SR ANTOINE M. THOMAS, U.S. Navy, do hereby certify that:

1. For good consideration and after consultation with my counsel, LT KAREN ROBERTSON, JAGC, USNR, I agree to enter a voluntary plea of guilty to the charges and specifications set forth below, provided the sentence as approved by the Convening Authority will not exceed the maximum sentence set forth and approved in Part II of this agreement.

2. That it is expressly understood that, for purposes of this agreement, the sentence is considered to be in these parts, namely: (1) punitive discharge; (2) period of confinement or restraint; (3) forfeiture and/or fine; (4) reduction in rate or paygrade; and (5) any other lawful punishment.

3. Should the Court adjudge a sentence which is less, or a part thereof is less, than that set forth and approved in this agreement, then the convening authority will approve only the lesser sentence.

4. I am satisfied with LT KAREN ROBERTSON, my defense counsel, in all respects and consider her qualified to represent me in this court-martial.

5. No person has made any attempt to force or coerce me into making any part of this offer or pleading guilty at this court-martial.

6. My defense counsel has fully advised me of the meaning and effect of my guilty pleas, and that I fully understand and comprehend the meaning thereof and all of its attendant effects and consequences.

7. My counsel has advised me that I may be processed for an administrative discharge which may be under other than honorable conditions, and that I may therefore be deprived of virtually all veterans benefits based upon my current period of active service, and that I may therefore expect to encounter substantial prejudice in civilian life in many situations, even if part or all of the sentence, including a punitive discharge, is suspended or disapproved pursuant to this agreement. I acknowledge that I have had adequate opportunity to consult with, and have so consulted with my defense counsel regarding the meaning and ramifications of this term of this pretrial agreement.

APPELLATE EXHIBIT I

8. My counsel has advised me of the meaning and effect of Article 58a of the UCMJ and section 0152 of the JAG Manual regarding the possibility of administrative reduction in pay grade as a result of an approved court-martial sentence that includes a punitive discharge or confinement in excess of 90 days (or 3 months), whether that sentence is suspended or not, unless the convening authority has agreed to limit the automatic administrative reduction in the pay grade category of punishment.

9. My counsel has advised me of the meaning and effect of Article 58(b) of the UCMJ regarding the possibility of administrative forfeitures as a result of a court-martial sentence that includes a punitive discharge and confinement.

10. My counsel has fully advised me of, and I understand, the meaning and effect of UCMJ, Articles 57, 58(a), and 58(b). I also understand that if the adjudged sentence is subject to the provisions of one or more of these Articles, this agreement will have no effect on the application of those Articles on the adjudged sentence unless the effect is specifically indicated in this agreement.

11. My counsel has advised me that I may be placed on appellate leave in a no pay status under the provisions of Article 76(a) of the UCMJ, notwithstanding any provision regarding forfeitures or fines in the maximum sentence appendix of this agreement.

12. I understand I may withdraw my plea of guilty at any time before my plea is actually accepted by the military judge. I understand further that, once my plea of guilty is accepted by the military judge, I may ask permission to withdraw my plea of guilty at any time before sentence is announced, and that the military judge may, at his discretion, permit me to do so.

13. I understand this offer and agreement and have been advised that it cannot be used against me in the determination of my guilt on any matters arising from the charges and specifications made against me in this Court-Martial in accordance with Military Rule of Evidence 410.

14. I understand that should I become involved in any misconduct after the convening authority signs this pretrial agreement but before the date of my trial, the convening authority may use such misconduct as grounds to unilaterally withdraw from this pretrial agreement. Should the convening authority unilaterally withdraw from the pretrial agreement due to my misconduct, I understand that the pretrial agreement is thereby null and void, and I am relieved of all obligations and responsibilities which I have been required to meet by the terms of this agreement. For the purposes of this and other relevant paragraphs of this pretrial agreement, misconduct is defined as any violation of the UCMJ, however minor.

15. I further understand that should I become involved in any misconduct after the date of trial, that such misconduct may be the basis for proceedings held pursuant to the procedures discussed in Article 72, UCMJ, and R.C.M. 1109, Manual for Courts-Martial (2002 ed.). If the misconduct occurs prior to the date of the convening authority's action, then such proceedings may result in the sentence limitation provisions of this agreement being set-aside, and the convening authority may then approve the entire sentence adjudged. If the misconduct occurs after the date of the action but before the termination of any period of suspension as may be required by the terms of this agreement, then such proceedings may result in the vacation of any periods of suspension

agreed to in the maximum sentence appendix of this agreement, or otherwise approved in the convening authority's action.

16. It is expressly understood that the pretrial agreement may become void in the event: (1) I fail to plead guilty to the each of the charges and specifications as set forth below; (2) the Court refuses to accept my pleas of guilty; (3) the Court accepts each of my pleas of guilty but, prior to the time sentence is announced, I ask permission to withdraw any of my pleas of guilty, and the Court permits me to do so; (4) the Court initially accepts my plea of guilty to each of the charges and specifications set forth below but, prior to the time sentence is adjudged, the Court sets aside my guilty pleas and enters a plea of not guilty on my behalf; or (5) I fail to plead guilty at a rehearing, should one occur.

SPECIALLY NEGOTIATED PROVISIONS

17. I request to be tried before military judge alone, and expressly waive my right to request trial before members, including enlisted members.

18. I agree I will not request or otherwise require the government to provide for the personal appearance of witnesses at government expense during the sentencing proceedings of my court-martial.

19. I agree to waive all motions that are not nonwaivable under R.C.M. 907, Manual for Courts-Martial (2002 ed.) and which do not deprive me of the right to due process or the right to challenge the jurisdiction of this court-martial.

20. I agree to enter into a stipulation of fact with the government concerning the circumstances surrounding the offenses to which I am pleading guilty. I agree not to object to the admission of the stipulation of fact during the providence inquiry, on the merits or during the pre-sentencing proceedings of my court-martial.

21. I agree, that should a punitive discharge be adjudged, I will submit, within five working days from the date of this Court-Martial, a written request to be placed on appellate leave, which may be without pay or allowances.

22. This agreement and its appendix constitutes all the conditions and understandings of both the government and the accused regarding the pleas of the accused and the disposition of this case.

CHARGES	PLEAS OF THE ACCUSED
Charge I: Violation of the UCMJ, Article 111:	Guilty
Specification:	Guilty
Charge II: Violation of the UCMJ, Article 112a	Guilty
Specification:	Guilty