UNITED STATES OF AMERICA	)	
	)	**Government Response to**
v.	)	**the Accused's Proffered**
	)	**Statement and Associated**
Manning, Bradley E.	)	**Instructions**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**14 February 2013**
Fort Myer, Virginia 22211	)	

On 5 February 2013, this Court ordered any Government filing addressing legal issues raised by the accused's proposed providence inquiry and plea to be submitted no later than 14 February 2013. This filing articulates those issues.

RELIEF SOUGHT

The United States respectfully requests the Court preclude the defense from offering this statement into evidence, orally or as an exhibit, as part of the providence inquiry. Any statement offered by the accused during the providence inquiry should be tailored to the elements of the offenses and comprised of relevant information. Should the Court permit the accused to offer a different prepared statement, the subsequent statement should be made available for the Court's review in advance of its submission. The United States requests this relief in order to maintain compliance with the principles underlying germane Rules for Courts-Martial, to ensure the record contains only relevant information, and to minimize potential defects in the providence inquiry that would render it vulnerable to appellate review.

The United States also requests an additional line of questioning during the inquiry that clarifies the elements of 18 U.S.C. § 793(e); specifically, that the "documents" clause does not require the Government to prove the accused had "reason to believe" information relating to the national defense could be used to the injury of the United States or to the advantage of a foreign nation. This additional inquiry will protect the record and ensure the accused's plea is knowing and intelligent. The Government does not dispute that the specifications alleging misconduct in violation of 18 U.S.C. § 793(e), as written, contain this additional element.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue, the resolution of which is necessary to decide a motion, shall be by preponderance of the evidence. Rule for Courts-Martial (RCM) 905(c)(1). The burden of persuasion on any factual issue, the resolution of which is necessary to decide a motion, shall be on the moving party. RCM 905(c)(2).

FACTS

The accused is charged with aiding the enemy by giving intelligence, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications alleging misconduct in violation of 18 U.S.C. § 793(e), five specifications

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alleging misconduct in violation of 18 U.S.C. § 641, two specifications alleging misconduct in violation of 18 U.S.C. § 1030(a)(1), and five specifications alleging violations of lawful general regulations, in violation of Articles 104, 134, and 92, Uniform Code of Military Justice (UCMJ). See Charge Sheet. The misconduct is alleged to have occurred between 1 November 2009 and 27 May 2010. Id.

In its filing dated 30 January 2013, the defense provided the Court with notice of plea and forum, proposed providence inquiry questions and instructions, as well as a copy of a statement the defense intends the accused to provide the Court in written form and possibly through a sworn oral declaration. The proffered statement addresses a wide variety of issues—including the accused's personal background and motivation. The instructions propose script language for the Court to elicit the accused's statement that appears to be largely based on the Benchbook language for accepting stipulations of fact to support a guilty plea. See Military Judge's Benchbook Sec. 2-2-2.

On 5 February 2013, the United States requested the Court's leave to submit its own providence inquiry questions because of potential legal issues raised by the defense's filing. The Court ruled that the Government would submit proposed providence inquiry questions in accordance with the original calendar date, but permitted the Government to address legal issues raised by the accused's proposed providence inquiry and plea in a subsequent filing submitted no later than 14 February 2013.

WITNESSES/EVIDENCE

The prosecution requests the Court consider the Charge Sheet and the referenced filings and rulings.

LEGAL AUTHORITY AND ARGUMENT

I. ACCUSED'S PROFFERED STATEMENT AND ASSOCIATED INSTRUCTIONS

The accused's proffered statement and associated instructions are problematic in both form and substance. Section A addresses the substantive concerns; namely, that the statement contains largely irrelevant material. Section B discusses the purpose and form of providence inquiries, how they differ from stipulations (as outlined by the Rules for Courts-Martial and case law), and the problems inherent in the defense's proposed use of the statement. Section C addresses additional policy concerns and potential appellate issues should the statement be admitted in its current form during the providence inquiry.

A. Content of Statement is Largely Irrelevant

Military Rule of Evidence (MRE) 401 provides that "relevant evidence" is anything having a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less or probable than it would be without the evidence." MRE 403 provides for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues," misleading the fact-

finder, or to avoid "undue delay, waste of time, or needless presentation of cumulative evidence."

On 16 January 2013, this Court ruled that motive evidence is only relevant to the accused's knowledge in the Specification of Charge I. See AE 470. The accused's motive is therefore irrelevant to the offenses to which the accused is pleading guilty. This Court also stated:

> For the specifications charging violations of 18 U.S.C. §§ 793(e) and 1030(a)(l) the element that the accused had "reason to believe the information he communicated could be used to the injury of the United States or to the advantage of any foreign nation" is an objective element evaluated on facts actually known by the accused. It does not require the Government to prove the accused knew the information he communicated could be used to the injury of the United States or to the advantage of any foreign nation. The Government must prove that the accused had reason to believe that the information he communicated could be used to the injury of the United States or to the advantage of any foreign nation. Either the accused had reason to believe or he didn't. A subjective conclusion by the accused that he did not have reason to believe the information he communicated could be used to the injury of the United States or to the advantage or any foreign nation is immaterial to this element.

As currently written, the accused's statement addresses information that is not relevant to this case or to the elements at issue in this court-martial. The accused provides background and ancillary personal information. He discusses his reasons for joining the military, how and why he became an analyst, and his experience with potential separation from the United States Army. He also touches on his likes and dislikes about work, his activities and accomplishments on other intelligence projects, and his personal life. For example, in paragraph 6(d) of the proffered statement, the accused writes: "I was excited to see Tyler, and planned on talking to Tyler about where our relationship was going, and about my time in Iraq." In short, none of the topics outlined above relate to any element of any specification.

Slightly less attenuated, yet still irrelevant according to this Court's previous rulings, the accused offers evidence in extenuation and mitigation, and explains his motives. For example, the accused writes in paragraph 6(j):

> I believed that if the general public, especially the American public, had access to the information contained within the CIDNE-I and CIDNE-A tables, this could spark a domestic debate on the role of the military and our foreign policy in general, as well as it related to Iraq and Afghanistan. I also believed a detailed analysis of the data over a long period of time, by different sectors of society, might cause society to re-evaluate the need, or even the desire to engage in CT and COIN operations that ignored the

> complex dynamics of the people living in the affected environment each day.

The accused also discusses his thoughts on the legitimacy of the WikiLeaks organization, the personal value of his chats with Julian Assange, and his attempts to contact other organizations in order to disclose the Government information he amassed. For example, regarding his chats with Assange, the accused writes in paragraphs 8(w) and 8(x):

> Over the next few months, I stayed in frequent contact with Nathaniel. We conversed on nearly a daily basis, and I felt we were developing a friendship. The conversations covered many topics, and I enjoyed the ability to talk about pretty much anything, and not just the publications that the WLO was working on. In retrospect, I realize these dynamics were artificial, and were valued more by myself than Nathaniel. For me, these conversations represented an opportunity to escape from the immense pressures and anxiety that I experienced and built up throughout the deployment. It seemed that as I tried harder to "fit in" at work, the more I seemed to alienate my peers, and lose respect, trust and the support I needed.

Finally, the accused also discusses the contents of documents, and offers his opinion on the sensitivity of the documents. For example, in paragraph 3(k), he writes:

> In my perspective, the information contained within a single SIGACT, or group of SIGACTs is not very sensitive. The events encapsulated within most SIGACTs involve either enemy engagements or casualties. Most of this information is publicly reported by the Public Affairs Office (PAO), embedded media pools, or host-nation (HN) media.

By the Government's estimation, twenty-four of the thirty-four pages of the statement are filled with this irrelevant material. None of the areas identified above address the elements of the offenses to which the accused seeks to plead guilty. So, while the accused's statement offers a healthy dose of extenuation and mitigation, this information has no place in the merits portion of the proceedings, and is certainly not appropriately placed in the providence inquiry. It is, however, precisely the type of information that an accused should be permitted to express, either under oath or through an unsworn statement, during presentencing. See RCM 1000(c)(2).

B. The Proffered Statement does not Conform to the Purpose or Form of the Providence Inquiry as Outlined in the Rules for Courts-Martial

RCM 910 addresses the entry of pleas. RCM 910(e) explains that the accuracy of such pleas is established through inquiry by the military judge. The inquiry is designed to be a colloquy between the accused and the judge, discussing "the facts and circumstances surrounding the act or acts charged in order to establish a factual basis for the judge's conclusion that the accused is, in fact, guilty." United States v. Davenport, 9 M.J. 364, 366 (C.M.A. 1980)

(discussing United States v. Care, 40 C.M.R. 247 (C.M.A. 1969)). While stipulations of fact can be used to supplement the inquiry, they cannot stand alone in lieu of that personal colloquy. See United States v. Sawinski, 16 M.J. 808, 811 (N.M.C.M.R. 1983) (characterizing United States v. Lanzer, 3 M.J. 60 (C.M.A. 1877), United States v. Davis, 48 C.M.R. 892 (N.C.M.R. 1974), and United States v. Sweisford, 49 C.M.R. 796 (A.C.M.R. 1975)). The military judge must be convinced that the accused is personally convinced of facts necessary to establish guilt. RCM 910(e) discussion. Moreover, the military judge must also be convinced that potential defenses are negated by the facts. Id. The inquiry must therefore be driven by the facts and circumstances underlying the elements of the offenses.

Statements made during a providence inquiry may be used for sentencing. See United States v. Holt, 27 M.J. 57, 61 (C.M.A. 1988). Nonetheless, the "providence inquiry may not be used as a tool by the military judge or Government to elicit responses that only serve to magnify the Government's case in aggravation." United States v. Chambers, 2006 WL 4572919 (N.M.Ct.Crim.App.) (unpub.) (citing United States v. Sauer, 15 M.J. 113, 114 (C.M.A. 1983); Estelle v. Smith, 451 U.S. 454 (1981)). Additionally, in United States v. Cahn, the Air Force Court of Military Review stated that the distinction between use of Care inquiry statements in sentencing and to prove contested charges is "critical" for both policy and practical reasons. See United States v. Cahn, 31 M.J. 729, 730-31 (A.F.C.M.R. 1990). Though discussing the use of providence inquiry statements against an accused on contested specifications, the Court cautioned against setting up rules which tempt the parties to pepper their pleas with favorable statements. See id. at 731 ("From the standpoint of information favorable to an accused, this practice would tempt an accused to 'garnish' his *Care* testimony with favorable statements, thereby placing such statements before the court without being subject to cross-examination."). In light of the purpose articulated by Care, these cases suggest the providence inquiry should not be used as a vehicle for eliciting helpful sentencing evidence for the defense or government.

An accused is free to take the stand and testify under oath during the merits portion of the proceedings, thus subjecting himself to cross-examination by the United States. Additionally, the Rules for Courts-Martial afford the accused the opportunity to make a sworn or unsworn statement during sentencing. RCM 1001(c)(2) ("The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution."). However, sworn oral testimony shall be subject to cross-examination, and any unsworn statement subject to the prosecution's opportunity to rebut any statements of facts therein. See RCM 1001(c)(2)(B)-(C).

In this case, the statement submitted by the defense is inappropriate in both form and substance. Substantively, the statement does not contain the sort of uncontested facts or information helpful to focus issues, such as those found in a stipulation. Likewise, because the statement contains largely irrelevant information, it is not geared toward establishing facts underlying the elements of the offenses to which the accused is pleading—which is the purpose of a providence inquiry.

Additionally, the form and substance of the proffered statement allow the defense and the accused to circumvent the adversarial process outlined in the Rules for Courts-Martial; namely, by avoiding cross-examination of the accused and rebuttal of the evidence. Where the Rules

discuss the entry of evidence to the record – whether by stipulation, by testimony, or by statement – they contemplate the participation of both parties. Parties must agree to a stipulation; testimony is subject to cross-examination; and statements by an accused at presentencing are subject, at least, to rebuttal. In this case, the statement is submitted by the defense as a stipulation would be, and, presumably, is intended to have a similar effect. This is evidenced by the defense proposing the Court use the stipulation of fact script as the colloquy for the statement. However, it has not been agreed upon by the parties. It should not be accorded the same procedural respect and allowed to supplement the Court's in-person inquiry. Also, given the statement is not element-driven, it would be inappropriate to allow the statement to be shielded from cross-examination in the same way that statements made during the providence inquiry are normally protected. Finally, the Government's understanding is that the Court's interest in a proffered statement by the accused was driven by the Court's desire to be provided with background information and orient the Court to issues of contention. In that sense, the proffered statement fails to satisfy this interest.

C. The Statement's Inclusion of Broad Topics Increases the Probability of Inconsistency and Thereby the Onus on the Court to Track the Accused's Statements for Follow-up During Proceedings

The providence "inquiry must be made to ascertain if an accused is convinced of his own guilt." United States v. Moglia, 3 M.J. 216, 218 (C.M.A. 1977). It must establish "not only that the accused himself believes he is guilty but also that the factual circumstances as revealed by the accused himself objectively support [his] plea." United States v. Higgins, 40 M.J. 67, 68 (C.M.A. 1994) (citing Davenport, 9 M.J. at 367). If an accused, after a plea of guilty, sets up a matter inconsistent with the plea of guilty, a plea of not guilty shall be entered in the record. See Article 45, UCMJ.

The decision to accept or reject a guilty plea will be reviewed by an appellate court "for an abuse of discretion and questions of law arising from the guilty plea de novo." United States v. Inabinette, 66 M.J. 320, 321 (C.A.A.F. 2008). "When evaluating a guilty plea, an appellate court will not disturb the plea unless the record fails to objectively support the guilty plea, or where there is evidence in 'substantial conflict' with the plea of guilty." United States v. Schiewe, 64 M.J. 703, 706 (C.G.C.C.A. 2007); see also United States v. Adams, 2005 WL 139182 (N.M.Ct.Crim.App.) (unpub.) (citing United States v. Bullman, 56 M.J. 377, 381 (C.A.A.F. 2002)). The record must contain some reasonable ground for finding an inconsistency," in order for the plea to be overturned. See United States v. Logan, 22 U.S.C.M.A. 349, 350-51 (C.M.R. 1973).

The reviewing authority will "apply the substantial basis test, looking at whether there in something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the accused's guilty plea." Inabinette, 66 M.J. at 321. In this review, the totality of the record will be considered. See Adams, 2005 WL 139182 (N.M.Ct.Crim.App.) (unpub.); Schiewe, 64 M.J. at 706. This includes not only the accused's statements but also other evidence in the record. United States v. Garcia, 44 M.J. 496, 498 (C.A.A.F. 1996). Indeed, the "import and intent of [the Care inquiry in the first place] is that the record contain the true facts of the accused's offense." United States v. Johnson, 1 M.J. 36, 39

(C.M.A. 1975). Under Care, the "guilty plea deals with truth and all parties have an obligation to establish that truth on the record." Id. So, "where [an] inconsistent matter is set up, the judge has the duty to inquire into the circumstances . . . [and if appropriate] to reject the plea." United States v. Lee, 16 M.J. 278, 280 (C.M.A. 1983). The Care inquiry must be thorough, "with particular emphasis being placed on the accused's understanding of the nature and effect of his plea, the factual basis for his admission of guilt, and full inquiry by the military judge into any inconsistencies that may develop." See Logan, 22 U.S.C.M.A. at 351.

Inconsistencies that have concerned appellate courts include when a plea is inconsistent with elements of the charged offenses (see, e.g., Higgins, 40 M.J. at 68), when the accused has accepted guilt for a period of time which does not accord with known facts (see, e.g., Johnson, 40 M.J. at 38), or when the tenor of the accused's answers during an inquiry do not match the guilt required by the offense (see, e.g., Bullman, 56 M.J. at 381).

The United States does not suggest the defense may not present facts with which the United States disagrees. The accused should be allowed to speak freely during the inquiry on matters relevant to the issues before the Court, so that the Court may become convinced of the factual predicate underlying the accused's guilt. See Schiewe, 64 M.J. at 708. However, to allow broad commentary on unrelated issues not subject to ready rebuttal threatens issue confusion by mixing relevant and irrelevant information on the record—making it exponentially more difficult to track facts to the elements at issue. The inclusion of extraneous commentary also raises the possibility of inconsistencies between facts elicited during the inquiry and those presented during the merits portion of the proceedings. It thereby muddies the water and provides more material for the court to monitor. Moreover, the United States intends to move forward on the greater offenses and, in so doing, will present evidence relating to the elements of both the lesser and greater offenses. As such, to admit this largely irrelevant statement as sworn evidence would make an already complicated inquiry untenable. In short, the inclusion of extraneous information in the providence inquiry requires the Court and the parties to be hyper-vigilant to ensure any inconsistencies are identified and addressed.

D. Court Provided Guidelines Would Provide an Alternative to Outright Rejection of the Accused's Statement

The military judge is responsible for "ensuring that the court-martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources." RCM 801(a) discussion. Additionally, the Military Judge shall "exercise reasonable control over the proceedings to promote the purposes of the [Rules for Courts-Martial]. RCM 801(a)(3). MRE 104 vests the Military Judge with the power to determine preliminary questions of evidence admissibility.

The United States concedes it is within the Court's broad discretion to control her courtroom and allow the accused to make or submit a statement that will be entered into evidence. The United States further acknowledges that prepared statements are occasionally given, in practice, in response to open-ended inquiries from the Court (e.g. "Tell me what happened?"). Accordingly, should the Court wish to permit such a statement, given what has already been proffered by the defense, the United States requests the Court establish several

guidelines. First, the statement should be tailored to the facts and circumstances directly relevant to the elements of the offenses to which the accused is pleading and which therefore can serve as the factual predicate for his guilt. Second, the United States recommends the Court be provided with a copy of this statement in advance of its submission, so that the Court may ensure tailored and relevant information will in fact enter the record. This will avoid potentially time-intensive on-the-fly interruptions of the accused's statement. Finally, the United States recommends the Court accept such a statement in response to an open-ended providence inquiry question, and not, as the defense suggests, in a manner more befitting a stipulation.

II. ADDITIONAL LINE OF QUESTIONING

In making his plea, the accused will waive certain rights—including the right against self-incrimination as to the offense to which he is pleading. This waiver must be "knowing, intelligent, and voluntary." United States v. Dusenberry, 23 U.S.C.M.A. 287, 291 (C.M.A. 1975); see also Article 45, UCMJ (stating that a plea of not guilty shall be entered if the accused appears to have entered the plea of guilty through lack of understanding of its meaning and effect). Additionally, before accepting a plea of guilty, the military judge must address the accused and inform him of the nature of the offense to which the plea is offered, including the elements of each offense to which the accused has pleaded guilty. RCM 910(c)(1).

In an abundance of caution, the United States requests the Court instruct the accused during the providence inquiry that under the "documents" or "tangible items" clause of 18 U.S.C. § 793(e), the Government is not required to prove that the accused had reason to believe the information transmitted "could be used to the injury of the United States." In other words, the "reason to believe" scienter requirement only applies to intangible information relating to the national defense. See United States . Kiriakou, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) ("Importantly, § 793[e] differentiates between 'tangible' NDI, described in the 'documents' clause ('any document, ... or note relating to the national defense'), and 'intangible' NDI, described in the 'information' clause ('information relating to the national defense').."); United States v. Rosen, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) ("Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to include 'information relating to the national defense,' but modified this additional item by adding a scienter requirement...."); United States v. Drake, 818 F. Supp. 2d 909, 916-17 ("As the Government points out, however, Defendant's brief conflates the different *mens rea* requirements required for criminal violations involving the 'documents' clause and the 'information' clause of Section 793(e)...Thus, only the second 'information' clause requires proof of the 'reason to believe' element.").

This issue was initially raised by the Government in its Response to Court's Clarification of Ruling on LIO Max Punishments, dated 16 November 2012. See AE 391. Although "reason to believe" is an element of the charged specifications and not of the lesser-included offenses to which the accused is pleading guilty, the Government believes it would be prudent for the Court to ensure the accused is fully informed of the nature and effect of his plea, including any potential variations and their effect at trial. The Court indicated that it would instruct the accused on the remaining elements in the greater offenses. To protect the record and ensure the accused's plea is knowing and intelligent, the Court should also instruct on the elements of the

'documents' clause in § 793(e) and how findings on those elements at trial would result in the same exposure as the charged offenses. See 18 U.S.C. § 793(e).

CONCLUSION

The United States respectfully requests the Court preclude the defense from entry of this statement into evidence. The statement and its associated instructions seek to secure the protections of a stipulation in the forum of a providence inquiry, while disregarding the form and purpose of both. Additionally, muddled by extraneous and irrelevant information, the statement threatens issue confusion and will make it more difficult to track facts to the elements at issue. This raises the probability of inconsistencies and thereby the likelihood of appellate attention to the providence of any accepted plea. Assuming, *arguendo*, the Court permits the defense to present a different statement of the accused, the Government suggests the Court establish guidelines under which any such statement must conform. Chiefly, the United States proposes that any statement made or submitted in the context of this providence inquiry be submitted to the Court in advance and be tailored to address facts and circumstances relevant to the elements of the offenses at issue. Finally, the United States requests the Court instruct the accused on the elements of the "documents" clause in 18 U.S.C. § 793(e), to ensure the plea is knowing and intelligent.

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CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Defense Counsel via electronic mail, on 14 February 2013.

JODEAN MORROW
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