IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

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| UNITED STATES | ) | |
| | ) | **DEFENSE RESPONSE TO** |
| v. | ) | **THE ALLEGED LEGAL ISSUES** |
| | ) | **RAISED BY THE PROPOSED** |
| | ) | **PROVIDENCE INQUIRY AND** |
| | ) | **PLEA** |
| **MANNING**, Bradley E., PFC | ) | |
| U.S. Army, xxx-xx(b) | ) | DATED: 21 February 2013 |
| Headquarters and Headquarters Company, U.S. | ) | |
| Army Garrison, Joint Base Myer-Henderson Hall, | ) | |
| Fort Myer, VA 22211 | ) | |

## RELIEF SOUGHT

1. The Defense respectfully requests that this Court deny the Government's requested relief. The Defense requests oral argument.

## BURDEN OF PERSUASION AND BURDEN OF PROOF

2. 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. *See* Manual for Courts-Martial, United States, Rule for Courts-Martial (RCM) 905(c)(1) (2012). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the Government as the moving party. *See* RCM 905(c)(2).

## FACTS

3. PFC Manning is charged with one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of violations of 18 U.S.C. § 793(e), five specifications of violations of 18 U.S.C. § 641, two specifications of violations of 18 U.S.C. § 1030, and five specifications of violating a lawful general regulation, in violation of Article 104, 134, and 92, Uniform Code of Military Justice (UCMJ).

## WITNESSES/EVIDENCE

4. The Defense does not intend to produce any witnesses or evidence for this motion.

## LEGAL AUTHORITY AND ARGUMENT

5. The Court should deny the Government's requested relief of precluding the Defense from offering PFC Manning's statement as a document in support of his providence inquiry. The Government's objection is based upon a fundamental misunderstanding of the use of statements during the providence inquiry. Statements made during the providence inquiry may only be considered by the military judge in determining the providence of an accused's guilty plea and in sentencing in order to determine an appropriate sentence. Statements made during the providence inquiry may not be used during the merits phase of the trial on contested offenses.

6. The case the Government primarily relies upon for its argument is *U.S. v. Cahn*, 31 M.J. 729 (A.F.C.M.R. 1990). The Government's reliance on *Cahn* is misplaced. Far from supporting the Government's position, *Cahn* undercuts its entire argument.

7. In *Cahn*, the appellant was convicted of the theft of his roommate's automated teller machine (ATM) card despite his plea of not guilty. During the *Care* inquiry on related offenses of theft of money by using the ATM card, the appellant explained to the judge how he came into lawful possession of the ATM card. *Id.* at 729. The appellant told the military judge that when he asked for the ATM card his roommate had initially said "no." *Id.* at 730. The appellant then told the military judge that despite the initial "no" he was eventually successful in talking his roommate into loaning him the ATM card.[1] *Id.*

8. The appellant elected not to testify during the contested portion of the trial. *Id.* As such, the appellant did not offer his version of the events again where he claimed that he was eventually successful in convincing his roommate into letting him borrow the ATM card. Instead, the appellant relied upon the cross-examination of his roommate in order to attempt to establish that he had authorization to possess the ATM card. *Id.*

9. During the findings argument, the military judge stated the he would not consider the statements made by the appellant during the *Care* inquiry on the contested offense.[2] *Id.*; *see generally U.S. v. Care*, 40 CMR 247 (1969). Instead, the military judged stated that he would rely solely on the evidence presented by the parties during the merits on the contested offense. *Id.*

10. On appeal, the appellant defense counsel argued that the statements made during the providence inquiry should have also been admissible during the merits phase on the contested offenses. *Id.* The appellate defense counsel argued "that it would be 'an absurd distinction' to allow such statements to be used to support charges to which an accused pleads guilty, but not to permit their consideration on other charges which are being contested." *Id.* In response to the appellant's assertion that it would be "an absurd distinction" the court in *Cahn* held "on the contrary, we find this distinction to be a critical one." *Id.*

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[1] Although the facts provided by Airman Cahn were not relevant to the theft of money offenses that he was pleading guilty to, they were circumstances surrounding the theft offenses in that they explained how he gained access to his roommate's money.

[2] Interestingly, both the trial counsel and defense counsel had specifically agreed that the stipulation of fact used during the *Care* inquiry was intended for consideration on the merits of the contested offense as well.

11. The above quote, "we find this distinction to be a critical one" was just the first of several quotes that the Government chose to cherry-pick from the *Cahn* opinion. In doing so, the Government has presented a misleading account of the *Cahn* opinion in order to support its request for this Court to limit the proffered statement by PFC Manning. To demonstrate the liberties taken by the Government, the entire relevant portion of the *Cahn* opinion is provided below:

> Allowing *Care* inquiry statements to be considered in sentencing is a far cry from approving the use of such statements on the merits of an offense to which an accused has pled not guilty and, thus, has chosen to place on the government the burden of producing evidence to prove his guilt. Indeed, in so arguing, appellate defense counsel would have us establish a dangerous precedent—one which would undoubtedly serve more often as a *sword against an accused* rather than, as in this case, *a shield in his favor*. We find no support for the proposition that an accused's right to remain silent on a contested offense may be abridged by allowing consideration of statements required to be made in support of a guilty plea.
>
> Allowing such use would not only serve as a deterrent to guilty pleas where related offenses were to be contested, but would inhibit an accused's willingness to speak freely in establishing a factual basis for pleas of guilty in such situations. 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.
>
> For the foregoing reasons, we conclude that the military judge acted properly in not considering appellant's *Care* inquiry statements in arriving at findings on the contested offense.

*Id.* at 730 – 731 (emphasis added; citations omitted). The court in *Cahn* was concerned about an accused's statements being used during the merits stage of the trial – *not* about an accused's statements being used during the providence inquiry itself or on sentencing. Specifically, the court in *Cahn* was concerned about 1) the chilling effect on an accused during the providence inquiry if his statements could be used against him during the contested portion of the trial (use as a sword) and 2) the incentive of an accused to pepper his providence inquiry statements with favorable statements for use during the merits, thereby avoiding cross-examination (use as a shield). Importantly, the court in *Cahn* did not say that the statements made by the appellant could not be properly considered by the military judge during the providence inquiry itself or on sentencing to determine an appropriate sentence.

12. In the instant case, the Defense is simply requesting the Court to consider the statement during the providence inquiry and in determining an appropriate sentence. Thus, the concerns in *Cahn* are not applicable to this case and the Government's reliance upon *Cahn* is not persuasive. As the Court is well aware, in a guilty plea the military judge is responsible for ensuring the

providence of an accused's plea. *U.S. v. Care*, 40 CMR 247 (1969). An accused's plea must be knowing, intelligent, and voluntary, and have a basis to survive appellate review. *U.S. v. Grisham*, 66 M.J. 501, 504 (A. Ct. Crim. App. 2008) (*citing Santobello v. New York*, 404 U.S. 257, 262-63 (1971)); RCM 910(e). A military judge ensures that an accused's plea is knowing, intelligent, and voluntary through a *Care* Inquiry. *Id.*

13. The *Care* inquiry consists of arraignment and the providence inquiry. During the providence inquiry, the military judge must include an explanation of the offenses and ensure the accused:

a) Understands that the accused waives certain rights: specifically the right against self-incrimination; trial of facts by members; and the right of confrontation;
b) Understands the elements of the offense;
c) Agrees that the plea admits every element, act or omission, and relevant intent;
d) Understands that the accused may be convicted on plea alone without further proof;
e) Is advised of the maximum sentence available based on the plea alone;
f) Has had the opportunity to consult with counsel;
g) Is entering the plea knowingly, intelligently, and voluntarily.

RCM 910(c)-(e); *see also Boykin v. Alabama*, 395 U.S. 238 (1969). In order to establish that there is a factual basis for the plea, the military judge is required to question the accused, under oath, about the offenses. RCMs 910(c)(5), 910(e). The military judge must ascertain, through the accused's own words, why the accused believes he is guilty. *Id.*

14. In most guilty pleas, the military judge will have the assistance of a stipulation of fact by the parties. However, in cases where there is no pretrial agreement, there is no stipulation of fact. In such situations, the military judge must rely upon the accused to provide the factual basis for the plea, but also the details of the circumstances surrounding the offense. Illustrative of such a situation is *U.S. v. Irwin*, 42 M.J. 479 (C.A.A.F. 1995).

15. In *Irwin*, the appellant entered his guilty pleas without the benefit of a pretrial agreement. *Id.* at 480. During the "providence inquiry, the appellant described *in detail* the how, when, why, and where he committed each of the offenses." *Id.* (emphasis added). The appellant's "recitation of the facts not only provided the factual basis required" under the *Care* inquiry, but "it also included details of the circumstances surrounding the offenses." *Id.* at fn 6 (noting that "The appellant's recollection of the events was so vivid at two places during the providence inquiry that he spoke without interruption or prompting by the military judge for three and six pages, respectively, in the record of trial....").

16. After the providence inquiry, the government gave notice to the military judge and the defense of its intent to play a recording of the providence inquiry to the panel members on sentencing. *Id.* at 480 – 481. The trial counsel argued that the "appellant's statement was, in effect, a judicial confession; that the court members should have the facts surrounding the offenses in order to adjudge a proper sentence; and that playing the tape would be in accordance with *United States v. Holt*, 27 MJ 57 (CMA 1988)." *Id.* at 481.

17. Over the defense's objection, the trial court permitted the government to play portions of the providence inquiry for the members as proper aggravation evidence under RCM 1001(b)(4). *Id.* On appeal, the appellant contended that admissibility of his providence inquiry statement was in violation of the *Holt* opinion and an impermissible admission of his statements since the members were "given access to evidence of misconduct of which he was not found guilty." *Id.*

18. The CMA rejected the appellant's argument that it was error under *Holt* to consider statements made by him during the providence inquiry on sentencing. *Id.* The CMA specifically held "[c]ontrary to appellant's beliefs, *Holt* did not place limits on how much evidence is admissible during sentencing; it only limits the kind of evidence." *Id.* Thus, the Court held the "question becomes whether that portion of the providence inquiry that was presented to the members amounted to "aggravating circumstances directly relating to ... the offenses of which the accused" was found guilty. RCM 1001(b)(4)."[3] *Id.* at 482. With this question in mind, the Court held that the appellant's responses during the providence inquiry "did not 'range[] far afield' but instead, were relevant as they directly described circumstances surrounding the offenses without venturing into unrelated matters, and there was no stipulation of fact in this case so there was no danger of cumulative effect." *Id.* (citations omitted). As such, the statements amounted to a judicial admission under MRE 801(d)(2).

19. As in *Irwin*, PFC Manning should be allowed to provide the facts and circumstances surrounding the commission of the charged offenses during his providence inquiry. When doing so, PFC Manning is permitted to "described in detail the how, when, *why*, and where he committed each of the offenses." *Irwin*, 42 M.J. at 480 (emphasis added). As long as a statement describes the "circumstances surrounding the offenses without venturing into unrelated matters" the statement is properly before the Court.[4] *Id.* at 482.

20. Given that there is no stipulation of fact, the statement provided by PFC Manning will help the Court with an understanding of the facts and circumstances surrounding the offenses. It also provides the Court with the factual basis to conduct a sufficient inquiry of PFC Manning. *U.S. v. Bailey*, 20 M.J. 703 (A.C.M.R. 1985) (holding that a military judge must conduct a sufficient inquiry in order for a guilty plea to not be set aside on appeal). The facts provided by PFC Manning will provide the Court with the factual basis to determine that PFC Manning's plea is indeed knowing, intelligent and voluntary. RCM 910(c)-(e). Thus, the Court can certainly consider PFC Manning's statement in determining the providence of his pleas.

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[3] The Court also stated that admissibility of the statement for sentencing purposes must satisfy the Military Rules of Evidence. Id. at 582 (citations omitted).

[4] PFC Manning's initial draft of his statement contained several pages describing in detail his struggles with not being able to dress like a woman during the deployment. PFC Manning discussed how this impacted him during the deployment and how it made it difficult for him to control his emotions. He also discussed how he dressed like a woman while on mid-tour leave from Iraq. Specifically, he described how he dressed like a woman during his train trip to and from Boston to see his boyfriend, Tyler Watkins. Although these details were important to PFC Manning, because they helped describe the emotional struggles that he was enduring during the deployment, the Defense advised him to remove these from his statement as we believed that they ventured into unrelated matters more appropriately brought out during direct examination of witnesses. The remaining facts, however, we advised him to retain given that they describe circumstances surrounding the offenses that he was pleading guilty to.

21. The Government argues that PFC Manning's statement must "contain the sort of uncontested facts or information helpful to focus issues, such as those found in a stipulation." The Government's continues its diatribe by stating the "form and substance of the proffered statement allow[s] the defense and the accused to circumvent the adversarial process outlined in the Rules for Court-Martial" and that "[w]here 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." Government's Motion at p. 5-6.

22. The Government cites no authority for its position. Undoubtedly this is because it has no such authority. When an accused pleads guilty without the benefit of a pretrial agreement, there will be no such stipulation of fact and obviously no "participation of both parties" in any statement provided to the Court during the providence inquiry. If the Government contests the facts within PFC Manning's statement in support of his plea to the lesser included offenses, it may either attempt to prove up the greater offenses or offer proper rebuttal evidence during sentencing. The Government, however, is not permitted to limit PFC Manning's statement to a bald assertion of the elements of the offenses. *U. S. v. Frederick*, 23 M.J. 561 (A.C.M.R. 1986) (military judge's inquiry requiring simple yes or no answers when asked whether he did that which the specifications alleged was inadequate). Additionally, the Government's concerns ignore the practical reality that statements made during the providence inquiry are only admitted for the purposes of the military judge determining the providence of an accused's plea and on sentencing in determining an appropriate sentence. *U.S. v. Resch*, 65 M.J. 233 (C.A.A.F. 2007) (CAAF concluded that it was error to use the providence inquiry statements in determining guilt of the contested offense).

23. Assuming that PFC Manning's pleas are providence and accepted by the Court, the providence inquiry statement may also be considered by the Court in order to determine an appropriate sentence. When deciding which portions of the providence inquiry statement to consider during sentencing, the Court may clearly consider those statements that either amount to "aggravating circumstances directly relating to or resulting from the offense of which the accused has been found guilty" or are matters in extenuation or mitigation. RCMs 1001(b)(4) and 1001(c)(1)(A) and (B).

24. The Government's final argument regarding PFC Manning's statement is also without merit. The Government argues that PFC Manning's statement may increase the probability of creating a matter inconsistent with his plea. The Government frames its concern by stating:

> 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 [C]ourt 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 offense. 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.

Government Motion at p. 6-7. The Government's concern is based upon a misunderstanding of what it means to have a matter inconsistent with factual or legal guilt. Under RCM 910(h)(2), "If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea." The key is that the inconsistent matter must be raised by the accused, not the Government. This requirement is also outlined in Article 45(a), UCMJ, "[i]f an accused . . . after a plea of guilty sets up a matter inconsistent with the plea . . . a plea of not guilty shall be entered." When an accused presents either a matter inconsistent with factual or legal guilt, the military judge is required to explain the inconsistent matter to the accused and should not accept the plea unless the accused admits facts which negate the factual or legal inconsistency. *See* discussion to RCM 910(h)(2); *see also U.S. v. Phillippe*, 63 M.J. 307 (C.A.A.F. 2006) (accused's statement regarding his attempt to return right after 9/11 raised a matter inconsistent with pleading guilty to an almost three year AWOL).

25. Far from creating an "untenable" situation, the statement by PFC Manning provides the Court with the facts surrounding the offenses to which PFC Manning's is pleading guilty. If the Government goes forward on the greater offenses, and if they are unsuccessful in proving the greater offenses, the Court will find PFC Manning guilty in accordance with his pleas. In such a situation, the Court need only be concerned with PFC Manning raising a matter that is inconsistent with his factual or legal guilt to the lesser included offenses. Whatever facts the Government would present on the greater offenses would be of no importance. If, however, the Government is successful in proving the greater offenses, then there is no potential issue for a matter that is inconsistent with factual or legal guilt. In this situation, the Court would enter a finding of guilt to the greater offenses, and not to the lesser included offenses pled to by PFC Manning. In short, the Government spends seven pages discussing possible concerns and issues with PFC Manning's statement that are simply not valid concerns. As such, the Court should deny the Government's requested relief of altering the content of PFC Manning's pretrial statement or accepting PFC Manning's statement in an open-ended providence inquiry question-and-answer colloquy that meets with the Government's arbitrary sense of what an accused's statement in support of his pleas should be.

26. Finally, the Government proposes an additional line of questioning "in an abundance of caution" to ensure PFC Manning understands the nature and effect of his plea of guilty. Government Motion at p. 8. The Defense believes the current proposed providence inquiry ensures that PFC Manning's plea is knowing, intelligent, and voluntary. As such, the Court should deny the Government's request for an additional line of questioning.

## CONCLUSION

27. For foregoing reasons, the Defense respectfully requests that this Court deny the Government's requested relief.

Respectfully submitted,

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Civilian Defense Counsel