IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE MOTION TO**
v.	)	**COMPEL PRODUCTION**
	)	**OF WITNESSES AND EVIDENCE**
	)	**FOR ARTICLE 13 MOTION**
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 13 July 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law and Rule for Courts Martial (RCM) 703(b)(1) and 703(f)(1), requests this Court to compel production of the below listed witnesses and evidence.

BACKGROUND

2. On 29 May 2010, PFC Manning was detained by agents from the Army's Criminal Investigation Division (CID). The CID agents held PFC Manning in a secured area on Forward Operating Base Hammer, Iraq until he could be transported to the Theater Field Confinement Facility (TFCF) at Camp Arifjan, Kuwait. After 59 days, PFC Manning was transported from the TFCF and arrived at Marine Corps Base Quantico (MCBQ) Pretrial Confinement Facility (PCF) on 29 July 2010.

3. Once at the MCBQ PCF, PFC Manning was placed in Maximum (MAX) custody and under the special handling instructions of Suicide Risk (SR). Over the course of the following few weeks, PFC Manning was seen and treated by mental health professionals at the PCF. On 6 August 2010, one of these professionals, [redacted], determined that PFC Manning was no longer a suicide risk. Capt. Hocter recommended that PFC Manning be moved from Suicide Risk to Prevention of Injury (POI) status. On 11 August 2010, the PCF commander, [redacted] directed PFC Manning be moved from Suicide Risk to POI.

4. Over the course of the following three weeks, PFC Manning was observed by the Brig staff and received regular treatment from the Brig psychiatrists. PFC Manning did not receive any disciplinary reports or adverse spot evaluations; he was respectful, courteous and well spoken; and was evaluated as an average detainee that presented no problems to the staff or other inmates.

5. On 27 August 2010, [redacted] determined that PFC Manning was no longer considered a risk of self-harm. [redacted] recommended that PFC Manning be taken off of POI status and

that his confinement classification be changed from MAX to Medium Detention-In (MDI). The PCF Commander did not follow [redacted] recommendation.

6. Over the course of the next eight months, [redacted] as well as other mental health professionals made recommendations to remove PFC Manning from POI status. Despite their consistent and repeated recommendations, PFC Manning remained in MAX and POI. On two occasions, the Brig placed PFC Manning on MAX and SR. The upgrade of PFC Manning from POI to SR was done over the recommendations of PCF mental health professionals.

7. PFC Manning filed several complaints regarding his custody status of MAX and POI. He filed a complaint directly to [redacted]; filed an RCM 305(g) request to the Special Court-Martial Convening Authority; filed an Article 138, Uniform Code of Military Justice (UCMJ) complaint; and sought to complain to [redacted]. All of PFC Manning's efforts were unsuccessful.

ARGUMENT

8. The Defense's Article 13, UCMJ, motion will be filed on 27 July 2012. Although the Court does not have the benefit of the Defense's motion, the underlying facts, and the supporting documentation at this time, the Defense nonetheless requests that the Court grant the Defense's motion to compel production of these witnesses because their testimony is relevant and necessary to the motion at issue.

9. The Defense has been eminently reasonable in its request for witnesses. It has only requested that a total of ***seven*** witnesses be produced in support of its motion. Given the duration of the unlawful pretrial punishment (approximately 8 months) and the number of witnesses that the Defense could potentially have called (several dozen), the Defense finds it disingenuous that the Government would resist production of these two witnesses. Lest it remind the Government, the Government plans on calling twenty-two witnesses from the Department of State alone.

10. The Defense should be entitled to present its theory or theories of pretrial punishment in the manner of its choosing. That the Government does not agree with the theory, or the evidence presented, is of no moment. The Government can ultimately argue that the evidence is not persuasive or does not convincingly support the Defense's argument. However, that does not mean that the Defense should not be entitled to present that evidence to the Court.

11. There is an asymmetry in the military justice system, whereby the Government can call any witness that it would like in support of its motions – while the Defense must "run its witnesses by the Government" for the Government's approval. This must, of course, ultimately rest on the good faith of the prosecutor to not willy-nilly challenge Defense witnesses in order to: a) erect unnecessary hurdles for the Defense; and b) to use the challenges to flush out the Defense's theory before its time. Here, there was no reason for the Government to oppose production of these two particular witnesses. Their testimony is facially relevant to the unlawful pretrial punishment issue. Moreover, the Defense suspects that the Government will likely call at least

double the number of witnesses that the Defense has put on its witness list to rebut allegations of unlawful pretrial punishment. The stark imbalance cannot be tolerated.

A. The Government Must Produce All Witnesses and Evidence Relevant and Necessary to the Defense.

12. The Defense is entitled to production of witnesses whose testimony "would be relevant and necessary" to a matter in issue. RCM 703(b)(1). In determining relevance of the witness, a court must turn to the Military Rules of Evidence. *See*, e.g., *United States v. Breeding*, 44 M.J. 345, 351 (C.A.A.F. 1996). A witness is necessary when the witness is not cumulative, and when the witness would contribute to a party's presentation of the case in some positive way on a matter in issue." *United States v. Credit*, 8 M.J. 190, 193 (CMA 1980); *see also United States v. Williams*, 3 M.J. 239 (C.M.A. 1977).

i. [redacted]

13. [redacted] can describe the process of PFC Manning being transferred from the MCBQ PCF to the JRCF on 19 April 2011. She can discuss the nine days PFC Manning spent going through the normal indoctrination process. She can also discuss why, after completing the indoctrination process, PFC Manning was held in medium custody will all privileges of a normal pretrial detainee. [redacted] can testify regarding the JRCF's determination that PFC Manning did not need to be held in a POI status. Finally, [redacted] can testify regarding PFC Manning's behavior since being held in medium custody status. Specifically, that PFC Manning has not engaged in any self-harm behavior, engaged in any assaultive behavior towards the guards, or made any attempt to escape from custody.

14. Contrary to the Government's representation to the Court, [redacted] is not being called by the Defense to question another commander's decision at a different confinement facility. Additionally the Government wholly misses the mark when it believes [redacted] is not relevant because the Defense "does not alleged that the accused's confinement at the JRCF violated Article 13." *See* Appellate Exhibit CXCV at 1-2. [redacted]

15. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. [redacted] testimony is directly relevant to one aspect of the Defense's theory of why PFC Manning's confinement at the MCBQ PCF constituted unlawful pretrial punishment. The Defense will present evidence that PFC

Manning's custody status at the MCBQ PCF was the result of a direct order [redacted] and [redacted]. Although the Defense believes [redacted] may deny giving this order, a subsequent reiteration of this order was witnessed by [redacted] and [redacted]. The fact that PFC Manning was immediately downgraded to Medium Custody with no POI restrictions after completing his indoctrination period at the JRCF makes it more likely that his custody status while at the MCBQ PCF was not for a legitimate non-punitive basis. In other words, the fact that PFC Manning went from MAX and POI at MCBQ to Medium Custody (with no POI restrictions) at the JRCF virtually overnight is evidence that he was improperly held in MAX and POI to begin with. Courts are permitted to consider after-the-fact events to determine the reasonableness and legitimacy of custodial classifications. *See United States v. Kinzer*, 56 M.J. 739, 741 (N-M. Ct. Crim. App. 2001)("The fact that the appellant was released from special quarters the very next day after securing a pretrial agreement that limited his post-trial confinement to only three years is strong evidence that his assignment to special quarters was based primarily upon a length-of-sentence policy, and not upon other appropriate factors. Accordingly, we find that the decision to place the appellant in special quarters was based on an arbitrary policy and resulted in the imposition of conditions more rigorous than necessary to insure his presence for trial.").

16. The Defense does not object to [redacted] testifying by telephone. RCM 703(b)(1) (stating that the military judge may authorize any witness to testify via remote means).

ii. [redacted]

17. [redacted]. [redacted] will testify about his communications with the U.S. Government regarding the confinement conditions of PFC Manning. He will testify that he was told that the confinement conditions were imposed on PFC Manning due to the seriousness of the offenses. He will also testify that the U.S. Government informed him that PFC Manning was not being held in "solitary confinement" but was being held in "prevention of harm watch" but would not offer any details about what harm was being prevented by such a status. He will also testify regarding his efforts to meet with PFC Manning for an unmonitored conversation. Despite his numerous requests, he will testify that he was informed that his conversation would be monitored. [redacted] will testify that the U.S. Government's refusal to allow unmonitored conversations with PFC Manning violates [redacted], as documented in an official report he prepared. Due to the U.S. Government's continued refusal to allow unmonitored conversations, [redacted] had to decline the opportunity to meet with PFC Manning. [redacted] will also testify that he was aware, through Mr. Coombs, that PFC Manning also believed that an unmonitored meeting was not in his best interests. The reason unmonitored visits were not in PFC Manning's best interest was due to the fact that he would likely face a reprisal for anything that he said to [redacted].

18. Contrary to the Government's representation to the Court, [redacted] did not decline to meet with PFC Manning due to PFC Manning's refusal to have an unmonitored conversation. The attached report by [redacted] clearly states:

> The US Government authorized the visit but ascertained that it could not ensure that the conversation would not be monitored. Since a non-private conversation with an inmate would violate the terms of reference applied universally in fact-finding by [redacted]

See Attachment A (emphasis added).

19. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. [redacted] testimony is directly relevant to several aspects of the Defense's unlawful pretrial punishment argument. First, the Defense will use [redacted] testimony's to support its argument that PFC Manning was held under unduly onerous confinement conditions owing solely to the seriousness of the charges against him. Officials told [redacted] that this was the primary reason for the onerous conditions of PFC Manning's confinement. Second, the Defense will argue that the failure to allow PFC Manning to have access to [redacted] for an unmonitored visit where PFC Manning could freely discuss the conditions of his confinement in the hopes of getting some type of reprieve from them *itself* amounts to unlawful pretrial punishment. Because everyone at the MCBQ PCF was abiding by [redacted] unlawful order to not remove PFC Manning from MAX or POI, there was nowhere for PFC Manning to go – other than outside the chain of command – to potentially get relief. Case law has repeatedly emphasized the importance of the accused seeking out any and all forms of relief in an Article 13 claim. The failure to permit PFC Manning an unmonitored visit with the [redacted] was designed to cover up from public view the wrongs that were being perpetrated at MCBQ. Extensive documentation will be introduced showing how brig rules were being deliberately read in an absurd manner (by both the Government and officials at MCBQ) in order to deny [redacted] visit. Third, [redacted] will testify that the Government's refusal to allow unmonitored visits was surprising to him and was in violation of [redacted]. [redacted] will also testify generally about his knowledge of solitary confinement being in violation of [redacted]. The Defense believes that [redacted] testimony regarding [redacted] speaks to the issue of whether there was pretrial punishment and also speaks to the appropriate remedy for such punishment (i.e. conduct that is so egregious that it rises to the level of a violation of [redacted] warrants a greater remedy than a simple breach, say, of brig regulations).

20. [redacted] has volunteered to testify. He resides in [redacted]. and would not present a significant cost to the Government nor would his presence result in a delay in the proceedings.

ii. Requested Evidence

21. The Defense has requested that the Government produce three pieces of evidence for the Court's consideration: the issued suicide prevention smock, suicide prevention blanket, and suicide prevention mattress. RCM 703(f)(4)(A). Each piece of requested evidence can be obtained from MCBQ.

22. The requested evidence is directly relevant to the defense's theory of why PFC Manning's confinement at the MCBQ PCF constituted unlawful pretrial punishment. Each piece of evidence will independently demonstrate an aspect of the onerous conditions PFC Manning was unnecessarily subjected to while at MCBQ PCF. The requested evidence will also demonstrate how PFC Manning was held under conditions more rigorous than necessary to ensure his presence for trial. PFC Manning was subjected to each of the requested evidentiary items due to the MCBQ PCF's determination to hold him either on SR or POI status from 29 July 2010 to 19 April 2011.

23. Shortly after the deciding to strip PFC Manning of all of his clothing at night on 2 March 2011 (something that the Defense submits itself amount to unlawful punishment), the MCBQ PCF decided to require PFC Manning to wear a suicide prevention article of clothing called a "smock" at night. Due to PFC Manning's size and the coarseness of the smock, he had difficulty sleeping. The suicide smock that he was required to wear was not designed for someone of his size. It is important for the Court to see the smock in relations to PFC Manning's size to assess the reasonableness of this restriction.

24. Additionally, the smock itself posed a risk of harm to PFC Manning. On one occasion, PFC Manning got trapped inside the smock. The situation is explained in an Incident Report on 13 March 2011:

> Ma'am, on the above date and time while performing my duties as special quarters supervisor, I, [redacted], noticed Det. Manning [redacted] had his head and arms inside of his POI jump suit. I then woke up SND and told him that I need to see his face and to poke his head out. While doing what I instructed him to do, SND realized he was stuck and began to roll around, saying, "I hate this stupid thing." I then told SND to calm down and stand up and try to pull the POI jump suit over his head, but his arms were still stuck. I then called for the watch supervisor, [redacted], to come down to special quarters to look at the situation and get permission to open cell 191 and help SND. Upon [redacted] arrival, he evaluated the situation and opened cell 191 to help SND free his arms. Once SND was situated, I then told him not to put his head and arms inside his POI jump suit again, and that if he is cold to use his second POI blanket instead. The DBS was then notified and this report was written, and the incident was recorded on camera.

See Attachment B.

25. The Brig psychiatrists did not believe the smock precaution was needed and had consistently determined that PFC Manning was not a risk of self harm. Nonetheless, the [redacted], then [redacted], refused to change the decision to require PFC Manning to surrender his clothing and wear a smock at night. Her decision was not based upon a legitimate non-punitive basis, and thus constituted an additional aspect of unlawful pretrial punishment at the hands of MCBQ PCF.

26. PFC Manning was also not allowed to have a pillow or sheets. Instead he was provided with a suicide prevention mattress with a built-in pillow and a tear proof suicide prevention blanket. The provided mattress was uncomfortable and difficult for PFC Manning to sleep on. Additionally, the suicide prevention blanket was coarse and would frequently cause either a rash or a burn to PFC Manning's skin. As with the suicide smock, the Brig psychiatrists did not believe the suicide prevention measures of the mattress and tear proof blanket were necessary.

27. Contrary to the Government's representation to the Court, a picture of the above requested items will not be sufficient for the Court to "understand its purpose, limitations, or possible effect." *See* Appellate Exhibit CXCV at 2. The requested evidence is under the control of the Government. The requested production is not unreasonable or oppressive. As such, the Defense's request should be granted.

CONCLUSION

28. For the above reasons, the Defense requests this Court compel production of the above listed witnesses and evidence.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel