IN THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

In re Ethan W. Tucker, Seaman (E-3) U.S. Coast Guard, Petitioner v. United States, Real Party in Interest	))))))))))	GOVERNMENT ANSWER TO PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF HABEAS CORPUS Misc. Dkt. No. 003-19 Before McClelland, Bruce, Brubaker, 11 October 2019

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this answer and brief in accordance with Rule 19(f)(1) of this Honorable Court's Rules of Practice and Procedure.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction under the All Writs Act to determine whether it has jurisdiction to act on Petitioner's Writ-Appeal, and to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction over Coast Guard Courts-Martial. 28 U.S.C. § 1651(a).

STATEMENT OF THE CASE

On 28 August 2019, Petitioner, Seaman (SN) Ethan W. Tucker, was charged with one specification of failure to obey an order or regulation in violation of Article 92, U.C.M.J., 10 U.S.C. § 892 (2019), one specification of false official statement, in violation of Article 107, U.C.M.J., 10 U.S.C. § 907 (2019), two specifications of murder in violation of Article 118, U.C.M.J., 10 U.S.C. § 918 (2019), one specification of involuntary manslaughter in violation of

Article 119, U.C.M.J., 10 U.S.C. § 919 (2019), two specifications of aggravated assault in violation of Article 128, U.C.M.J., 10 U.S.C. § 928 (2019), one specification of maiming, in violation of Article 128a, U.C.M.J., 10 U.S.C. § 928a (2019), and one specification of obstructing justice, in violation of Article 131b, U.C.M.J., 10 U.S.C. § 931b (2019). Petitioner (Pet'r) Attachment (Attach). A, at 2-6. That same day Petitioner was ordered into pretrial confinement by the acting Commander of Coast Guard Base Alameda. *Id*. at 6-7. On 03 September 2019, an Initial Review Hearing was held pursuant to Rule for Court-Martial (R.C.M.) 305(i)(2). Pet'r Attach. D, at 1. Again on that same day, 03 September 2019, the Initial Review Officer (IRO) ordered Petitioner to remain in pretrial confinement. *Id*. at 5.

On 6 September 2019, Trial Defense Counsel requested the Commander of Base Alameda release Petitioner from pretrial confinement. Pet'r Attach. E. On 11 September 2019 the Commander of Base Alameda denied the request for release. Pet'r Attach. F. On 21 September 2019 Trial Defense Counsel requested the IRO reconsider his previous decision to order Petitioner to continue confinement. Pet'r Attach. G, at 1. On 25 September 2019, upon receipt of a request to reconsider his decision from Trial Defense Counsel, and after reviewing new evidence, the IRO denied Trial Defense Counsel's request to release Petitioner from confinement. Pet'r Attach. H.

ISSUE PRESENTED

WHETHER THIS HONORABLE COURT SHOULD GRANT THE PETITION FOR A WRIT OF HABEAS CORPUS WHEN THE DECISION TO CONTINUE PETITIONER'S CONFINEMENT WAS BASED ON SPECIFIC EVIDENCE AND THE RULES FOR COURTS-MARTIAL PROVIDE PETITIONER A SPECIFIC PROCESS TO ADDRESS HIS CLAIMS?

STATEMENT OF FACTS

On 26 January 2019, the CGC Douglas Munro was making a port call in Dutch Harbor, AK. *See* Pet'r Attach. A at 59. At the time, Petitioner, SN Trevin Hunter, and SN Ethan Kelch were all members of the crew of the CGC Douglas Munro. *See id* at 60. On the evening of 26 January, SN Joshua Reznik purchased a bottle of Canadian Whiskey and gave it to Petitioner, SN Kelch, and SN Hunter because they were underage. *Id*. at 11. The three were then dropped off by the liberty van at a location where they could walk to a remote beach on Amank Island, AK. *Id*.

Later that evening, SN Reznik observed SN Hunter returning to the ship alone. *Id*. at 32. SN Hunter told SN Reznik that Petitioner and SN Kelch were still at the beach and "not in a good way." *Id.* SN Reznik assembled two other crew-members, SN Eldridge and SN Bednarchyk, to conduct a search for SN Kelch and SN Hunter. *Id.* During their search they found Petitioner soaking wet and unconscious near the location where he had originally been dropped off. *Id.* SN Eldridge stayed with Petitioner in the liberty van while the others went to look for SN Kelch. *Id*. at 11. While the two were in the liberty van, Petitioner regained consciousness and began talking to SN Eldridge. He stated he and SN Kelch had hit each other, and he had choked out SN Kelch. *Id* at 39. SN Eldridge also reported that Petitioner was "hammered" when they found him. *Id*. at 40. After SN Reznik and SN Bednarchyk returned without SN Kelch, all crewmembers then returned to the ship, notified the command that SN Kelch was missing, and a larger search was initiated. *Id.* After they arrived at the cutter, Petitioner was sent to his rack. *Id*. at 36.

CWO Daniel Polhemus led the search for SN Kelch, which began around 0031 on 27 January. *See id* at 43. At around 0224 CWO Polhemus contacted the cutter and asked that

Petitioner be woken up to provide more information regarding SN Kelch's last known whereabouts. *Id* at 12. Petitioner was woken up from his rack and brought in the Combat Information Center to aid in the search. *Id*. at 35. When being asked where he had last seen SN Kelch, Petitioner continuously provided conflicting information. *Id*. at 36. He first stated SN Kelch was aboard the CGC Douglas Munro in his rack. *Id*. The entire ship was subsequently searched to ensure SN Kelch was not aboard. *Id*. Petitioner then was given a chart and pointed to multiple locations when asked where he had last seen SN Kelch. *Id*. That night multiple crew members observed injuries to Petitioner's face and hands. *Id*. at 11, 35, 36. These injuries were later documented by Coast Guard Investigative Service Agents. *Id*. at 59-62.

At around 0319 on 27 January, AMT2 Jentzen Green located a body floating in the water, which he recognized as SN Kelch, near the location where Petitioner, SN Kelch, and SN Hunter had spent the evening. *Id*. at 46. SN Kelch was about twenty feet into the water when AMT2 Green saw him. *Id*. After SN Kelch was pulled from the water the search party began resuscitation efforts as his body was placed in a truck to be driven to emergency services. *Id*. at 13. Upon arriving at the medical clinic, Mr. Robert Gneiting, nurse practitioner, observed SN Kelch had open, fixed eyes, with no EKG rhythm, and was extremely cold. *Id*. at 11, 57-8. SN Kelch's body was so cold that Mr. Gneiting had to wait thirty minutes for the body to warm up before his instruments would work. *Id.* at 57-8. Mr. Gneiting noted SN Kelch's face and back of his head had contusions and lacerations, and SN Kelch's face was swollen and discolored. *Id*. at 13. SN Kelch was pronounced dead at 0454 on 27 January 2019. *Id*. at 13.

On 29 January, an autopsy was conducted on SN Kelch's body. Dr. Christian Wolf determined the cause of death was drowning and hypothermia. *Id.* at 21. She also noted there were multiple contusions around SN Kelch's forehead and face, that he was missing a fingernail,

and that he had two subgaleal hematomas on the back of his skull. *Id*.

Petitioner was interviewed by Coast Guard Investigative Service (CGIS) agents multiple times, and gave differing accounts of what occurred each time. On 27 January, Petitioner first told agents that he and SN Kelch were not in any physical altercation, and that SN Kelch likely sustained injuries when he was rolling on the rocky beach. *Id*. at 60-2. When agents noticed he had injuries to his face, neck, hands, he claimed he had received them from falling and crawling on the rocks. *Id*. at 3. However, later in that interview when confronted by agents, Petitioner admitted that he and SN Kelch may have wrestled, that SN Kelch had struck him, and finally that he may have hit SN Kelch but could not remember. *Id*. at 62-3. SN Kelch also stated his hand was swollen because he had struck a steel bulkhead on the cutter. *Id*. at 61.

On 10 March 2019, CGIS interviewed Petitioner again. *Id*. at 13, 69. During that interview, Petitioner told agents he and SN Kelch had been in a fight on the beach. *Id*. at 13, 69. After the fight, Petitioner, SN Kelch, and SN Hunter began walking back to the cutter. However, Petitioner and SN Hunter quickly realized SN Kelch was not with them. *Id*. at 13. Petitioner then told agents they found SN Kelch by the water, disoriented, and unable to stand. *Id*. Petitioner told agents he then assaulted SN Kelch again. *Id*. At that point, Petitioner reported SN Kelch could not speak coherently, could not make eye contact, was not moving under his own power, and was not responding to Petitioner's requests. *Id*. at 69. Petitioner communicated to CGIS investigators that he believed SN Kelch was dead. *Id*. Petitioner then admitted he and SN Hunter dragged SN Kelch into the water. *Id.*

During the investigation CGIS agents discovered other relevant evidence. BM1 Alexander Donoso told CGIS agents that in the days following the incident, he observed Petitioner and SN Hunter spending an unusual amount of time together. *Id*. at 14. BM1 Donoso

stated they began to decrease their interaction with the rest of the crew. *Id*. Additionally, during each of their initial interviews, both Petitioner and SN Hunter described certain events the same way. *Id*. For example, both Petitioner and SN Hunter stated that they left SN Kelch on the beach awake, both initially denied any physical altercation took place, and then both later stated Petitioner either slapped SN Klech, or that his alleged assault was not serious. *Id*.

Charges were preferred in this case on 28 August 2019. *Id*. at 2. The acting Commander of Base Alameda ordered the Petitioner into pretrial confinement that day, and issued a probable cause memorandum the next day, 29 August 2019. *Id*. at 6-14. An initial review hearing was conducted on 3 September 2019. After the hearing the Initial Review Officer (IRO) ordered continued confinement. Petitioner Attach. D, at 2. The IRO found the injuries to SN Kelch appeared consistent with the injuries to Petitioner's hands, that the CGIS reports linked Petitioner to SN Kelch's death, and that Petitioner gave conflicting statements to CGIS. *Id*. at 2. The IRO went on to conclude that, based on the evidence presented in Petitioner Attachments A and C, it was likely Petitioner had committed the alleged offenses. *Id*. at 4-5. Further, the IRO found that because of the serious and violent nature of the offenses, the potential collusion with SN Hunter, and the inconsistent statements by the Petitioner, he was a flight risk and a risk to commit future misconduct. *See Id*. at 3-5.

Petitioner submitted a request for reconsideration on 21 September 2019, along with new evidence included here as Attachment G. After reviewing the evidence, the IRO did not change his previous decision and maintained Petitioner's confinement. The IRO found that the evidence submitted was inconsistent with the fact pattern documented by CGIS and the autopsy report. Pet'r Attach. H.

Argument

I. PETITIONER HAS FAILED TO ESBALISH A CLEAR AND INDISPUTIBLE RIGHT TO RELEASE OR SHOWN A WRIT IS APPROPRIATE BECAUSE THE IRO DID NOT ABUSE HIS DISCRETION AND THE R.C.M. PROVIDE A MEANS TO ADDRESS HIS CLAIMS

This Honorable Court should deny the petition because Petitioner has not met the extraordinarily high standard required by the Supreme Court under the All Writs Act. First, Petitioner has not shown his right to the issuance of the writ "clear and indisputable" as he cannot show the IRO's decision was an abuse of discretion. Petitioner focuses his argument on the decisions of the Base Alameda Acting Commander when he was initially ordered into confinement. However, appellate courts focus on the decision of the IRO when assessing illegal pretrial confinement claims. Finally, the issuance of the writ is not appropriate at this time because the R.C.M. provide Petitioner a means to address his claims.

A. The issuance of a writ of habeas corpus is drastic remedy, reserved for only the most egregious errors.

An extraordinary writ is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004) (internal citations omitted) *(*Quoting *Ex parte Fahey,* 332 U.S. 258, 259–260 (1947)); *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) ('[A writ] is a drastic instrument which should be invoked only in truly extraordinary situations"). The issuance of an extraordinary writ is a matter of discretion of the court to which the petition is addressed. *See Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 25 (1943); *see also Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8 (1964); *Parr v. United States,* 351 U.S. 513, 520 (1956). A petitioner bears the burden of showing he has a clear and indisputable right to the extraordinary relief that they have requested. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 314 (1957); *McKinney v. Jarvis*, 46 M.J. 870, 874

(A.Ct. Crim. App. 1996) ("The extraordinary nature of relief under the All Writs Acts places an extremely heavy burden upon the party seeking relief" (internal quotations omitted)).

To justify the issuance of a writ, "the judicial decision must amount to more than even "gross error"; it must amount "to a judicial 'usurpation of power…" *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (Quoting *United States v. DiStefano* 464 F.2d 845, 850 (2d Cir.1972)). "Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals*, 474 U.S. 34, 42 (1985). Since 1953, the Supreme Court has recognized that an extremely high burden should be placed on a party attempting to go outside the normal judicial process. *See Bankers Life & Cas. V. Holland*, 347 U.S. 379, 382-3 (1953). In that way, writs are disfavored because their issuance "disrupts the orderly judicial process of trial on the merits and appeal." *McKinney*, 46 M.J. at 874-5.

When seeking any extraordinary writ, a petitioner must show the issuance of the writ is within a court's jurisdiction, and that the writ is necessary and appropriate. *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008); *Howell v. United States*, 75 M.J. 386, 390 (C.A.A.F. 2016). To satisfy a court a writ is necessary and appropriate, the burden is on the petitioner to show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380–1 (2004) (internal citations omitted); *Howell*, 75 M.J. at 390.

B. Petitioner cannot demonstrate a "clear and indisputable right" to relief because the IRO's decision to continue confinement was not an abuse of discretion but based on specific evidence presented by both parties.

This Honorable Court should reject the petition because the IRO reviewed the evidence presented by the Government and Petitioner and reasonably concluded Petitioner should continue confinement. There is substantial evidence to show that Petitioner was both a flight risk and that he would engage in future misconduct. As this Honorable Court reviews the IRO's findings for an abuse of discretion, the IRO's conclusions are afforded substantial deference. Petitioner's assertions he should be released from pretrial confinement amount to nothing more than disagreement on how the evidence should be weighed. Finally, case law supports upholding the confinement decision in this case.

Standard of Review

The decision of the IRO to maintain Petitioner's pretrial confinement is reviewed for an abuse of discretion. *United States v. Gaither*, 45 M.J. 349, 351-2 (C.A.A.F. 1996); *U.S. v. Williams*, 29 M.J. 570, 572 (A.F.C.M.R. 1989) ("A reviewing officer's decision to continue a prisoner in confinement should not be overturned absent clear abuse of discretion.") "[T]he abuse of discretion standard is strict, 'calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (quoting *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000)). Further, the appellate court must limit its review to the facts before the deciding official. *Gaither*, 45 MJ. at 351. "[To] allow a de novo review of the magistrate's decision by . . . a Court of Criminal Appeals would promote confusion as to which facts should be considered and undermine the deference to be given the magistrate's findings."

Id. at 351-2. The burden is on petitioner to "establish a violation or Article 13, UCMJ." *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006).

Discussion

Article 10, U.C.M.J., allows a person subject to the U.C.M.J. who is charged with an offense to be ordered into confinement. R.C.M. 305 implements Article 10, U.C.M.J. R.C.M. 305(h)(2)(B) establishes that a commander may order a member into confinement when the accused has committed an offense triable by court-martial, and confinement is necessary because accused will not appear at trial or pretrial hearing, or will engage in serious criminal misconduct and less severe forms of restraint are inadequate. The discussion section of R.C.M. 305(h)(2)(B) lists out factors to be considered, which include: "(1) the nature and circumstance of the offense charged or suspected, including extenuating circumstances, (2) the weight of the evidence against the confinee… (4) the confinee's character and mental condition."

R.C.M. 305 also outlines the requirements for conducting a review of pretrial confinement. First, the accused's commander shall prepare a memorandum which states the reasons for confinement. R.C.M. 305(h)(2)(C). Next, a neutral and detached officer must review the adequacy of confinement within forty eight hours. R.C.M. 305(i)(1). Those two requirements may be satisfied together. R.C.M. 305(h)(2)(A). Then, "within seven days of the imposition of confinement, a neutral and detached officer… shall review the probable cause determination and necessity for continued confinement." R.C.M. 305(i)(2). That officer shall review the commander's memorandum, as well as additional matters submitted by the Government or the accused. R.C.M. 305(i)(2)(A)(i). Further, the seven day review officer, upon request, may reconsider his decision to continue confinement based on information not

previously considered. R.C.M. 305(i)(2)(E).

While an accused may not be sent to pretrial confinement solely based on the seriousness of an offense, both the R.C.M. and case law show it is a significant factor taken into consideration. *See* R.C.M. 305(h)(2)(B) Discussion; *United States v. Rios*, 24 M.J. 809, 811 (A.F.C.M.R. 1987) ("However, we do not take those cases to mean that seriousness of the offense is not one factor to consider and that the circumstances surrounding and connected with serious offenses may not justify pretrial confinement"). Further, a command is not obligated to first try lesser forms of restraint if pretrial confinement is necessary. *United States v. Gaskin*, 5 M.J. 772, 775 (A.C.M.R. 1978). And while the accused's commander makes the decision to initiate pretrial confinement, an appellate court considers the decision of the IRO when reviewing pretrial confinement. *See Gaither*, 45 M.J. at 351; *Rios*, 24 M.J. at 81; *United States v. Williams*, 29 M.J. 570, 572 (A.F.C.M.R. 1988).

In this case, the IRO correctly applied R.C.M. 305 to specific evidence to find there was probable cause for the charges, that Petitioner was flight risk, and was a risk to commit future misconduct. First, based off all the evidence provided to the IRO, there is probable cause to believe Petitioner committed the offenses. Addressing the evidence for each charge in turn, in his first interview with CGIS, Petitioner admitted to drinking alcohol, and initially denied injuring his hand by striking SN Kelch. Pet'r Attach. A, at 59. Petitioner later admitted to striking SN Kelch. *Id*. at 69-70. Numerous parties, including Petitioner, SN Hunter, OS2 Kennedy, and SN Eldridge provide evidence that Petitioner assaulted SN Kelch multiple times. *Id*. at 36, 39, 59-63, 69-70; *See* Pet'r Attach. G. Petitioner also sustained injuries that could be consistent with a physical altercation. Pet'r Attach. A, at 59-63. The autopsy report indicates the cause of SN Kelch's death to be drowning. *Id*. at 21. Petitioner admitted to dragging SN Kelch's body in the

water. *Id*. at 69-70. Finally, OS2 Kennedy reported Petitioner gave multiple conflicting responses when pointing out where he had last seen SN Kelch, including a statement that SN Kelch was aboard the cutter. *Id*. at 36. Considering all the evidence, the IRO properly found probable cause existed for all charges.

Second, the IRO found based on specific evidence that the Petitioner was a potential flight risk. While not basing his decision exclusively on the nature of the offenses, the IRO properly considered that Petitioner is charged with murder and manslaughter under Article 118 and 119, U.C.M.J. *Id.* at 4; Pet'r Attach. D, at 3. These offenses could result in life without parole if convicted. *Manual for Court-Martial, United States (2019 ed.) [M.C.M.], pt. IV,* ¶ *56.d*.

Further, the inconsistent statements provided by Petitioner, and potential collusion with SN Hunter, show he was attempting to escape culpability. Petitioner provided inconsistent statements both within the same interview and between interviews. During his first interview, on 27 January 2019, Petitioner initially denied assaulting SN Kelch, described SN Kelch both as playing dead and being an "active resistor," claimed he obtained his injuries from falling on rocks, stated he rolled around in the water with SN Kelch, and told agents that when he left the beach SN Kelch was conscious. Pet'r Attach. A, at 59-62. All these statements he later changed or denied. During his interview on 10 March 2019, Petitioner acknowledged he had assaulted SN Kelch, denied collaborating with SN Hunter to create a cover story, stated he never wanted to hurt SN Kelch, told agents he thought SN Kelch was dead, admitted to dragging SN Kelch's body into the water. *See* Pet'r Attach. A, at 69-70. Even after Petitioner admitted to dragging SN Kelch's body into the water he denied the only two logical reasons for the act, to harm SN Kelch or to hide his body. *Id*. The statements by the Petitioner show a consistent attempt to try

to minimize and downplay his actions.

The IRO also reviewed evidence that Petitioner and SN Hunter had colluded to come up with remarkably similar stories of what had occurred. An examination of Petitioner's and SN Hunter's interview summaries shows both initially claimed Petitioner had only struck SN Kelch a few times, that Petitioner sustained injuries by falling, stated Petitioner may have injured his hand punching something aboard the CGC Douglas Munro, and that when they left SN Kelch was on the beach. *See Id*. at 14, 59-62; Pet'r Attach. G. at 1-5. Testimony from another crewmember also indicated Petitioner and SN Hunter spent significant amounts of time together and away from other crewmembers after 26 January 2019. Pet'r Attach. A, at 14.

Finally, the very fact that Petitioner had seven months between the incident and when he was charged would greatly impact his mental condition. Petitioner's submissions to the IRO indicated has was hoping to go to BM "A" school very soon. Pet'r Attach. C, at 6. Once Petitioner had been served the charges, he had to switch his mindset from looking forward to the prospect of going to an "A" school to the prospect of being convicted of murder. Regardless of the evidence showing Petitioner committed the charged acts, this would greatly impact any person's mental state. The discussion section of R.C.M. 305(h)(2)(B) allows consideration of a potential confinee's mental state. After reviewing the evidence that Petitioner had attempted to escape accountability, the IRO reasonably found that those circumstances, when combined with the nature of the offenses and his mental state, made Petitioner a potential flight risk.

The IRO also reasonably found that Petitioner would engage in further serious criminal misconduct. The evidence used to consider Petitioner a flight risk also shows he is a risk to commit further serious misconduct. And contrary to Petitioner's assertions, the months between the incident and his confinement were not misconduct free. Pet'r Br. at 9. The statements made

by Petitioner in his interview with CGIS on 10 March 2019 were directly contradictory to many of the statements he had previously made to CGIS on 27 January 2019. Pet'r Attach. A, at 59-62, 69-70. Those statements could be considered additional violations of Article 107, UCMJ, false official statements, or Article 131b, obstruction of justice.

The evidence of collusion reviewed by the IRO also shows potential for future misconduct. Petitioner and SN Hunter's initial interviews are similar on key facts. When that is combined with the evidence of their increased time together and apart from the rest of the key, it provides a basis to show Petitioner and SN Hunter were colluding. *See* Pet'r Attach. at 14, 59-62; Pet'r Attach. G. at 1-5. And these acts are explicitly not included in the charges against Petitioner. *See* Pet'r Attach. A, at 4-5. The fact that evidence supports Petitioner colluding with SN Hunter to cover up potential misconduct directly after the incident, supports the inference that after Petitioner was charged with crimes based on that misconduct he would again collude with SN Hunter to cover it up.

The IRO considered all the above evidence when he made his decision to continue confinement, and therefore did not abuse his discretion. Under an abuse of discretion standard, a decision maker has the authority to make a wide range of choices, as long as those choices are not "arbitrary" or "clearly unreasonable." *Erikson*, 76 M.J. at 234. Basing a decision on specific evidence is by definition the opposite of arbitrary, which is "a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures." *Arbitrary*, Blacks Law Dictionary (11th ed. 2019). Here, IRO took into account specific facts and circumstances from the evidence that was presented. *See* Pet'r Attach. A, at 10-14; Pet'r Attach. D, at 1-5; Pet'r Attach. H. Ordering Petitioner to continue pretrial confinement was within his discretion.

Petitioner's assertions that holding Petitioner in pretrial confinement was an abuse of

discretion do not alter that conclusion. A close reading of Petitioner's brief shows his objections either are a misread of the applicable law or a "difference of opinion" allowed under the abuse of discretion standard. Petitioner first asserts the the severity of the charges may not be considered when determining whether petitioner would be a flight risk. *See* Pet'r Br. at 8. But even the cases Petitioner cites state it is permissible to consider the nature of the offenses, along with other extenuating circumstances. *See* Pet'r Br. at 7; *Rios*, 24 M.J. at 811. Petitioner next asserts the Base Commander did not consider the evidence Petitioner submitted to the IRO. Pet'r Br. at 8-9. However, this Honorable Court reviews the facts before the IRO. *Gaither*, 45 M.J. at 351. The IRO considered that evidence and simply gave it less weight than Petitioner wished. *See* Pet'r Attach. D, at 3.

Petitioner is also incorrect when he asserts no evidence exists to show the potential for future misconduct. *See* Pet'r Attach. A, at 14, 59-62; Pet'r Attach. G. at 1-5. Despite Petitioner's assertions there was a seven month gap in misconduct, this is belied by his own contradictory statements given in the 10 March 2019 interview. *See* Pet'r Attach. A, at 59-62; 69-70. Further, the evidence of collusion submitted to the IRO shows Petitioner's willingness to commit future misconduct directed at preventing accountability for SN Kelch's death. Like the other evidence Petitioner submitted to the IRO, Petitioner simply disagrees with the weight this evidence should receive.

The final argument Petitioner makes is that lessor forms of restraint should have been attempted. *See* Pet'r Br. at 10. While lesser forms of restraint need to be considered, there is no rule requiring them to be imposed first. *See Gaskin*, 5 M.J. at 775. And R.C.M. 305(h)(2)(B) specifically allows an IRO, or Commander, to consider, among other factors, the "nature of the offenses, including extenuating circumstances, the weight of the evidence against the

[Petitioner]" when considering lessor forms of restraint. Given the nature of the of offense, and along with considering all the other evidence presented, the IRO reasonably concluded lesser forms for restraint were inadequate.

Perhaps most importantly for this proceeding, Petitioner makes no effort to show why his right to relief is clear and indisputably, and does not address the extraordinary writ standard. *See generally* Pet'r Br. While Petitioner argues his placement in pretrial confinement was an abuse of discretion, he cannot do more than assert certain evidence was not reviewed, or not weighed correctly. *Id*, Petitioner does not allege that he was deprived of any procedural right under R.C.M. 305, and does not attempt to show the alleged abuse of discretion was the "judicial usurpation of power…" required for this Honorable Court to issue an extraordinary writ. *Labella*, 15 M.J. at 229 (internal quotation omitted). Petitioner's difference of opinion on how to weigh the evidence does not amount to an "exceptional circumstance[] amounting to a 'clear abuse of discretion or usurpation of judicial power' justify the invocation of the writ." *In re C. P-B*, 78 M.J. 824, 827 (C.G. Ct. Crim. App. 2019) (Quoting *Bankers Life & Casualty Co*, 346 U.S. at 383 (citation and internal quotation marks omitted)).

Lastly, case law supports denying the writ in this circumstance. This case is similar to *United States v. Rios*. In *Rios*, the accused argued the military magistrate who had reviewed the decision to place him in pretrial confinement had abused his discretion. *Rios*, 24 M.J. at 809. The accused had pleaded guilty to robbing German nationals and being absent from his unit without leave. *Id*. When holding the magistrate had not abused his discretion, the Court primarily considered the seriousness of the charges, and the fact he had lied to investigators, considering his lies a "further indicator of his unreliability." *Id*. at 811. Though the accused presented evidence that he had no disciplinary problems, the Court did not consider that enough

to show he was a reliable person. *Id*. Here, the IRO had essentially the same evidence as the in *Rios*, serious charges and lies to investigators. Importantly, the Court stated, "While we do not say that we would have decided the appellant should have remained in pretrial confinement had we acted as the magistrate, we do hold that the magistrate did not abuse his discretion. . ." *Id*. This highlights the abuse of discretion standard, and makes clear that this Honorable Court may not agree with the decision of the IRO, but still find the decision to continue Petitioner's confinement within his discretion.

Petitioner cites *Coffee et al. v. Commanding Officer* to show his release is required. However, *Coffee* does not necessitate this outcome. In *Coffee*, the accused had been held, with multiple accused members, as a result of altercation with other members in the barracks. *Coffee et al. v. Commanding Officer*, 2 M.J. 234 (C.M.A. 1977). First, the charges in this case are much more serious than in *Coffee*. Second, the opinion makes conclusory statements regarding why the accused should be released, such as "nothing in the records of to indicate disposition on the part of any petitioners to report to flight to avoid prosecution" and "nothing in the reviewing officer's findings 'suggest apprehension on his part that the petitioners will not appear." *Id*. (internal quotations omitted). However, without facts to show why the Court considered the submissions by the Government to be without merit, these are just restatements of the requirements outlined in R.C.M. 305(h)(3)(B). And as noted, a Commander or IRO can reply explicitly on the charges, as long as he or she accounts for other factors when considering pretrial confinement. In this case IRO specifically used other facts, in addition to relying on the seriousness of the charges, to continue Petitioner's confinement. See Pet'r Attach. G.

C. Petitioner cannot show "the issuance of the writ is appropriate under the circumstances" because the Rules for Courts-Martial and case law show the proper avenue for relief is to apply to a military judge.

The R.C.M. outline multiple ways to obtain relief for pretrial confinement which may be in violation of Article 13, U.C.M.J. First, Petitioner may apply to a military judge for release. R.C.M. 305(j)(1). Upon an application for release, a military judge may take into account any information which was not presented to the IRO. R.C.M. 305(j)(1)(B). Second, R.C.M. 305(k) lays out a specific remedy for pretrial confinement which is later found to violate that rule. An accused member may receive additional credit if it is later found his pretrial confinement was an abuse of discretion. *Id*. And even if Petitioner were not to receive a significant confinement sentence after a trial or plea, R.C.M. 305(k) specifically allows pretrial confinement to be credited towards other punishments.

Here, a writ is not appropriate under the circumstances because Petitioner will be able to apply to a military judge for multiple avenues of relief in the normal course of the court-martial process. The R.C.M. specifically contemplate scenarios where an accused believes he is being confined in violation of R.C.M. 305(h). Under any factual scenario, an accused has a remedy in the rules for a potential R.C.M. 305 violation. Petitioner alleges he is being confined in violation of R.C.M. 305(h)(2)(B)(iii). Pet'r Br., at 7-8. But the very fact that the R.C.M. provide multiple remedies for this exact situation after referral shows this is not "a truly extraordinary situation[]" required for an extraordinary writ. *Labella*, 15 M.J. at 229. Indeed, it is a situation explicitly contemplated by the R.C.M. If it is later determined that Petitioner is being held in violation of R.C.M. 305(h)(2)(B)(iii), then he will either be released or given confinement credit upon conviction.

While it is true that Petitioner has no immediate avenue for relief from pretrial

confinement, the All Writs Act should not be used, "whenever compliance with statutory procedures appears inconvenient. . ." *Pennsylvania Bureau of Correction*, 474 U.S. at 43. "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Id*. While this case involves the R.C.M. and not a statute, the principal is the same.[1]

Military Courts have come to the same conclusion. In *United States v. Richards*, an accused, who had been placed in pretrial confinement before referral, filed a habeas petition with the Air Force Court of Criminal Appeals alleging his IRO was biased and, just as this case, there were not sufficient grounds to continue his confinement. *United States v. Richards*, 2012 WL 3136497, at 3 (A.F. Ct. Crim. App. 23 July 2012) (unpub. op.). The Court denied his petition stating both issues, "should be addressed to the military judge after he or she is appointed." *Id*. This case is analogous to *Richards*, and Petitioner should apply for relief to the military judge once appointed.

Conclusion

This Honorable Court should deny the petition for a Writ of Habeas Corpus. The IRO found, based on specific evidence, that there was probable cause Petitioner committed the crimes charged, and that he was a flight risk and a risk to commit further misconduct. Petitioner has not attempted to meet his burden to show his right to relief his clear and indisputable. Even if this Honorable Court would have released Petitioner, the IRO's decision to continue confinement

[1] Petitioner can also avail himself of Article 138, U.C.M.J. "[I]it is now well established that one who believes he is wronged by a decision directing his confinement prior to trial, must pursue the remedy provided by Article 138, Uniform Code, supra, 10 USC § 938, prior to seeking the intervention of this Court pursuant to 28 USC § 1651(a)." *Catlow v. Cooksey, Commanding General, Fort Dix*, 44 C.M.R. 160, 162 (C.M.A. 1971). While the Coast Guard Military Justice Manual indicates Article 138 complaints should not be used for "proceedings, findings of fact, or final actions of. . . court-martial," Petitioner's case has not yet been referred to any court-martial. Coast Guard Commandant Instruction M5810.1G, Military Justice Manual, Ch. 25.B.2.e. (January 2019).

should be upheld as it is reviewed for an abuse of discretion. Further, the R.C.M. have a specific process set out to address Petitioner's current claims, and as such a writ is not appropriate at this time.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that this Honorable Court deny the Petition for a Writ of Habeas Corpus.

Respectfully submitted,

DATE: 11 October 2019

/s/

HATHAWAY.NICHOLAS.JEANFREY.1515234850
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 11 October 2019.

/s/

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