IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Before Panel No. __

In re Ethan W. TUCKER	)	
Seaman (E-3)	)	PETITION FOR EXTRAORDINARY
U.S. Coast Guard,	)	RELIEF IN THE NATURE OF A WRIT OF
Petitioner	)	HABEAS CORPUS
	)	
v.	)	CGCMG _____
	)	
J. A. PEÑA	)	
Captain (O-6)	)	1 October 2019
U.S. Coast Guard,	)	
Respondent	)	

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

COMES NOW SEAMAN ETHAN W. TUCKER, U.S. COAST GUARD, pursuant to Rules 5(b)(9) and 19 of the Coast Guard Court of Criminal Appeals Rules of Practice and Procedure, and respectfully requests that this Honorable Court issue a Writ of Habeas Corpus directing his release from illegal pretrial confinement, an irreparable pretrial error from which Petitioner has no remaining alternative avenue for relief.

I

History of the Case

On August 28, 2019, the same day the Government preferred Charges, the acting Commanding Officer of Coast Guard Base Alameda ordered Petitioner into pretrial confinement at Naval Consolidated Brig Miramar. The next day, the acting Commanding Officer signed the probable-cause memorandum required to continue confinement under R.C.M. 305(h)(2) and 305(i)(1).

On September 3, 2019, an Initial Review Officer conducted a 7-day review under R.C.M. 305(i)(2) and ordered that Petitioner remain in pretrial confinement.

Three days later, Petitioner asked Respondent, Commanding Officer, Coast Guard Base Alameda to release him from pretrial confinement. Respondent denied the request on September 11, 2019.

The next week, citing newly-disclosed evidence, Petitioner requested that the Initial Review Officer reconsider his decision. He denied that request on September 25, 2019.

A preliminary hearing under Article 32, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 832 (2018) is not scheduled to occur until October 16, 2019. No requests for similar relief are pending with any other court.

II

Jurisdictional Statement

This Court has authority under the All Writs Act, 28 U.S.C. § 1651(a), to issue all necessary or appropriate writs in aid of its jurisdiction over Coast Guard courts-martial, including writs of habeas corpus. *Frazier v. McGowan*, 48 M.J. 828, 829 (C.G. Ct. Crim. App. 1998) (citations omitted); *see also Porter v. Richardson*, 50 C.M.R. 910 (C.M.A. 1975); *Keaton v. Marsh*, 43 M.J. 757 (A. Ct. Crim. App. 1996).

III

Statement of Facts

a. Upon charging Petitioner in August with offenses from January, the Government used the charged acts themselves, "the severity of the charges," and "likelihood of conviction" as sole justifications for ordering pretrial confinement.

Seven months after his friend and shipmate Seaman [redacted] drowned, the Government charged Petitioner with nine Specifications arising from that tragedy, each alleging an act

occurring "at or near Dutch Harbor, Alaska, on or about 26 January 2019." (Writ Pet. Attach. A at 4-5.) In addition to two Specifications of murder, the Government alleges that Petitioner, *inter alia*, lied to investigators and obstructed the investigation into himself and a third friend and shipmate, SN [redacted]. (*Id.*)

The Coast Guard Investigative Service conducted an investigation that included two voluntary interviews of Petitioner—in January in Dutch Harbor and in March in Alameda, California, where Petitioner had been reassigned. (*Id.* at 59-74.) Charges were not preferred, however, until August 28, 2019. (*Id.* at 2.) That same day, Commander Platt, acting as Commanding Officer of Coast Guard Base Alameda, ordered Petitioner into pretrial confinement at Naval Consolidated Brig Miramar. (*Id.* at 6-9.)

The next day, CDR [redacted] issued a probable-cause memorandum. (*Id.* at 10-14.) As to Petitioner's flight risk, her memorandum asserts that confinement is necessary because "[t]he severity of the charges make it foreseeable that SN Tucker will not appear at trial, pretrial proceedings, or further investigation." (*Id.* at 14.) The memorandum refers to no evidence and contains no allegation that Petitioner failed to appear at any appointed place of duty in the seven months between SN [redacted] death and preferral of charges.

As to Petitioner's risk of committing serious criminal misconduct, CDR [redacted] memorandum asserts that "the unusual closeness" Petitioner and SN [redacted] "demonstrated after the event and the similarity of their false stories suggests that there is a likelihood that they have colluded in forming their initial statements. There is a substantial likelihood that they will do so again in light of the now-pending charges." (*Id.*) Beyond "the similarity" of their accounts, her memorandum cites no evidence that Petitioner and SN [redacted] did coordinate their responses to investigators the day after SN [redacted] death. The memorandum also refers to no evidence and

contains no allegation that Petitioner and SN [redacted] have had any contact since January 2019, nor any evidence that "now-pending charges" would cause them to resume contact..

Commander [redacted] concluded her memorandum, "[I]n light of the likelihood of conviction on the charges, the prospect of further confinement being ordered as a result, and SN Tucker's criminal exposure to a life sentence, I consider SN Ethan W. Tucker a significant flight risk and determine that lesser forms of pretrial restraint [are] inadequate." (*Id.* at 14.)

b. <u>The Initial Review Officer ordered continued confinement over Petitioner's argument for release and without waiting for additional evidence demonstrating he presented no flight risk</u>.

Before the 7-day review hearing under R.C.M. 305(i)(2), Petitioner requested that the Government produce evidence for the Initial Review Officer that demonstrated Petitioner's lack of flight risk. (Writ Pet. Attach. B.) Specifically. Petitioner requested:

- His orders assigning him to Coast Guard Base Alameda;
- His performance reviews and counselings while assigned there;
- Each of his leave chits he executed while assigned there; and
- His housing contract while assigned there.

(*Id*.)

Arguing to continue pretrial confinement, the Government presented the Initial Review Officer, CDR [redacted], with the Charge Sheet, Confinement Order, and Probable Cause Memorandum, along with evidence that Petitioner had committed the charged offenses and statements from SN [redacted] family. (Writ Pet. Attach. A.)

For his part, Petitioner objected to the Government's evidence supporting confinement as punishment for the offenses. (Writ Pet. Attach. C.) He argued that there was no evidence he and SN [redacted] had colluded in their initial statements to investigators, in which each explained that SN [redacted], while intoxicated, had been trying to enter the frigid ocean waters and resisting their increasingly-frantic efforts to extract him. (*Id*. at 2.) Asking for his release, Petitioner

highlighted, beyond his cooperation with investigators, the other evidence establishing that he was neither a flight risk nor a threat to commit future serious criminal misconduct. (*Id*. at 1.) He presented statements from his supervisors at the Base Alameda Security Division, where he worked under no restraint for seven months. (*Id*., Encls. (1) – (3).) Petitioner also presented evidence of his factual innocence and the variety of defenses available, given evidence that SN [redacted] was an uncontrolled aggressor on the night he died. (*Id*. at 2, Encls. (4) – (6).)

Although the Government had not produced Petitioner's requested evidence, CDR [redacted] declined to delay his findings and ordered continued confinement. (Writ Pet. Attach. D.)

c. Commander, Coast Guard Base Alameda declined to revisit the confinement decision and the Initial Review Officer refused to reconsider his decision, despite newly disclosed evidence of factual innocence.

After the hearing, Petitioner requested that Respondent order his release from confinement. (Writ Pet. Attach. E.) He declined. (Writ Pet. Attach. F.)

The next week, the Government disclosed evidence to Petitioner, including SN [redacted] Snapchat videos from the night of January 26, 2019. (Writ Pet. Attach. G.) Based on this new evidence, Petitioner requested that CDR [redacted] reconsider his decision. (*Id*.) Petitioner argued that these twenty-four short video clips corroborated the accounts that both he and SN [redacted] provided investigators more than seven months earlier and demonstrated that they neither lied nor colluded to obstruct an investigation. (*Id*.) Commander [redacted] denied the request. (Writ Pet. Attach. H.)

IV

Issue Presented

THE UNIFORM CODE FORBIDS PRETRIAL PUNISHMENT AND THE PRESIDENT ALLOWS PRETRIAL CONFINEMENT ONLY UPON A PROBABLE-CAUSE SHOWING OF BOTH (A) FLIGHT RISK OR THREAT TO COMMIT SERIOUS CRIMINAL MISCONDUCT, AND (B) INADEQUACY OF ANY LESSER RESTRAINT. FROM THE DATE OF THE CHARGED ACTS UNTIL PREFERAL SEVEN MONTHS LATER, PETITIONER TWICE VOLUNTARILY SAT FOR INTERVIEWS WITH INVESTIGATORS, EXECUTED TRANSFER ORDERS AND TWO AUTHORIZED LEAVE PERIODS WITHOUT INCIDENT, AND WORKED IN A BASE SECURITY DIVISION UNDER NO RESTRAINT. MAY THE GOVERNMENT STILL RELY ON THE CHARGED OFFENSES ALONE TO ESTABLISH PROBABLE CAUSE FOR PRETRIAL CONFINEMENT?

V

Specific Relief Sought

Petitioner seeks a Writ of Habeas Corpus, ordering his release from illegal pretrial confinement as required by Article 13, UCMJ, 10 U.S.C. § 813 (2018), and R.C.M. 304 and 305.

VI

Reasons Why the Writ Should Issue

"A fundamental component of due process is the presumption of innocence accorded the criminal defendant." *Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976) (citing *In re Winship*, 397 U.S. 358 (1970)); *United States v. Heard*, 3 M.J. 14, 20 (C.M.A. 1977) ("Practically, it must be recognized that confinement itself is a form of penal servitude.") (citing *United States v. Bayhand*, 6 C.M.A. 762, 766 (C.M.A. 1956)). Pretrial release is a necessary consequence of that presumption, permitting "the unhampered preparation of a defense." *Id.* (quoting *DeChamplain*

v. Lovelace, 510 F.2d 419, 424 (8th Cir. 1975), *judgment vacated as moot*, 421 U.S. 996 (1975) (citing *Stack v. Boyle*, 342 U.S. 1 (1951))).

Given the rights at stake, as the Court of Military Appeals has explained, the Government's burden to show necessity for confinement is high:

> [U]nless confinement prior to trial is compelled by a legitimate and pressing social need sufficient to overwhelm the individual's right to freedom—given the fact that probable cause exists to believe he has committed a crime—restrictions unnecessary to meet that need are in the nature of intolerable, unlawful punishment. Thus, the Government must make a strong showing that its reason for incarcerating an accused prior to his trial on the charged offense reaches such a level, for otherwise the right to be free must be paramount.

Heard, 3 M.J. at 20. The *Heard* court further clarified that "the necessity to assure the presence of an accused at his trial . . . assuming that a showing is made that it is not likely that he will be present" and "avoiding foreseeable future serious criminal misconduct of the accused" are the only two societal needs sufficient to warrant pretrial confinement. *Id*. at 20.

The President has since codified these conditions, along with the additional requirement of a showing that lesser forms of restraint are inadequate. R.C.M. 305(h)(2)(B)(iii), (iv); *see also Heard*, 3 M.J. at 21.

Even after these codifications, it remains settled law that the seriousness of offenses alone cannot establish a basis for continued pretrial confinement. *Coffee, et al. v. Commanding Officer*, 2 M.J. 234 (C.M.A. 1977); *see also United States v. Rios*, 24 M.J. 809, 811 (A.F.C.M.R. 1987).

a. <u>The Commander had no evidence that Petitioner would fail to appear at any hearing, nor any evidence that he would commit additional serious criminal misconduct</u>.

A commander must have probable cause to believe confinement is necessary because it is foreseeable that "[t]he confinee will not appear at trial, pretrial hearing, or preliminary hearing, or . . . will engage in serious criminal misconduct." R.C.M. 305(h)(2)(B)(iii).

To be reasonable, a belief that that an accused presents a flight risk requires something more than a hunch; it requires evidence. *See* R.C.M. 305(h)(2)(B), Discussion, Manual for Courts-Martial, United States (2019 ed.) (requiring that commanders ensure information supporting confinement have "a factual basis"); *United States v. Sharrock*, 30 M.J. 1003, 1006 (A.F.C.M.R. 1990) (holding information available did not support reasonable belief confinement was required when commander had "'gut feeling' that the appellant would consider [flight] a viable alternative" given seriousness of charges), *rev'd on other grounds*, 32 M.J. 326 (C.M.A. 1991).

In *Coffee*, the petitioners sought release from confinement ordered because of the seriousness of the charged offenses. 2 M.J. at 235. The Court of Military Appeals ordered the petitioners released, holding that "there is nothing in the records to indicate a disposition on the part of any of the petitioners to resort to flight to avoid prosecution" and nothing in the reviewing officer's findings "suggests apprehension on his part that the petitioners will not appear." *Id*.; *see also Sharrock*, 30 M.J. at 1006 (commander with "gut feeling" and no "concrete evidence" lacked "reasonable grounds" for probable cause to believe appellant presented flight risk).

Rather than evidence, the Commander here was just like the commander in *Coffee*, explicitly relying on "[t]he severity of the charges" to find it "foreseeable that SN Tucker will not appear at trial, pretrial proceedings, or further investigation [sic]."[1] But in this record, the only *evidence* is: Petitioner has never missed a day of work since the death of his friend. He has submitted to voluntary interviews with investigators. He has transferred duty stations. He has executed leave chits and returned to his work section—in the security division at Base Alameda.

[1] Presumably an accidental error, the Commander's suggestion that SN Tucker be required to appear for "further investigation" is nevertheless revealing: the Government has imposed unlawful pretrial punishment free from the required probable cause.

By any standard, Petitioner is no flight risk. The Commander abused her discretion in failing to consider the evidence that countered her assertion.

Likewise, to order pretrial confinement, a commander needs more than probable cause to believe an accused committed the charged offenses. The Rules address that initial requirement in R.C.M. 305(h)(2)(B)(i) and (ii). But the Rules also demand more: without evidence of flight risk, a commander must have evidence that it is foreseeable the accused will commit *other* serious criminal misconduct, beyond the charged offenses. *See United States v. Smith*, 53 M.J. 168, 171 (C.A.A.F. 2000) ("foreseeable that an accused might otherwise commit *additional* serious criminal misconduct") (emphasis added) (citing *Heard*, 3 M.J. at 20 ("foreseeable *future* serious criminal misconduct") (emphasis added)).

Here, attempting to establish foreseeability of future serious criminal misconduct, the Commander alleged that SN Tucker and SN [redacted] collaborated to mislead investigators the day after their friends' death. This naked allegation falls woefully short of the "strong showing" required by *Heard*. First, it is unsupported by evidence. Second, to the extent the allegation embraces Article 107 false official statement or Article 131b obstruction, those are charged offenses, which still cannot alone form the basis for pretrial confinement.

Third, and most importantly, any reference to Petitioner's alleged conduct "on or about 26 January 2019" ignores the seven-month gap between that conduct and the confinement order. The Government has failed in every forum—the confinement memorandum, the probable cause memorandum, the 7-day review hearing, and each subsequent appeal by Petitioner—to identify a single case in which reviewing authorities allowed a commander to ignore seven incident-free, restraint-free months from the charged acts until ordering confinement. Such a lengthy gap

overwhelms any inquiry as to threat to commit future misconduct. The Commander here abused her discretion in disregarding this evidence against her assertions.

b. The Commander not only had evidence that lesser forms of restraint were effective, she had evidence that no restraint was effective.

The Manual provides that lesser "forms of restraint must always be considered before pretrial confinement may be approved. Thus the commander should consider whether the confine could be safely returned to the confinee's unit, placed on restriction, placed under arrest, or placed under conditions on liberty." R.C.M. 305(h)(2)(B), Discussion. This requirement reflects the *Heard* court's admonition that the "ultimate device of pretrial incarceration" be used only "when lesser forms of restriction or conditions on release have been tried and have been found wanting." 3 M.J. at 21.

Here, far from attempting or even considering lesser restraint, the Commander concluded her probable cause memorandum by noting that given "the likelihood of conviction," she has "determine[d] lesser forms of restraint are inadequate."

It is now apparent that the evidence is nowhere near as strong as the Commander suggests—SN Tucker and SN [redacted] original accounts of their friend's death is supported by video evidence. Regardless, the Commander's bare assertion of inadequacy flips the Manual's set of pretrial-confinement probable-cause requirements on its head. If "likelihood of conviction" were to overwhelm the analysis, pretrial confinement would be warranted in *every* case where there is strong evidence. But that is not the law under R.C.M. 305(h)(2)(B). Instead, "All the factors to be considered by a commander or magistrate in imposing or continuing pretrial confinement are to be particularized to the individual to be confined." *Sharrock*, 30 M.J. at 1006.

Here, the only change in conditions for this particular individual was the preferral of Charges in late August. But that change was ministerial: Petitioner knew he was under investigation as far back as January, when investigators warned him that he was suspected of "ART 118 Murder." (Writ Pet. Attach. A at 66.) Between then and preferral, no restraint whatsoever was required to keep him at work, cooperating with the investigation, without incident, for seven months. Manifestly, that level of restraint was "adequate" to ensure Petitioner's presence and prevent future serious criminal misconduct. In failing to consider this evidence, the Commander abused her discretion.

VII

Request for Counsel and Stay

Petitioner requests the appointment of Appellate Counsel, but does not request that this Court issue any stay of his ongoing proceedings.

[redacted]
CDR, JAGC, U.S. Navy
Detailed Defense Counsel
DSO West Det Bremerton
365 S. Barclay St., Bldg 433
Bremerton, WA 98314
[redacted]

[redacted]
Assistant Defense Counsel
Defense Service Office West
3395 Sturtevant St., Ste. 2
San Diego, CA 92136
[redacted]

Attachments

A. Government IRO Binder

- Charge Sheet
- Command Memo - Imposition of Pretrial Confinement
- Confinement Order
- Command Memo - 48/72 Hour Review
  - Encl 1 Photo - Right Side
  - Encl 2 Photo - Right Above
  - Encl 3 Photo - Right Close
  - Encl 4 Photo - Forehead
  - Encl 5 Photo - Left Side
  - Encl 6 Photo - Left Above
  - Encl 7 Autopsy Report
  - Encl 8 Interview - SN Joshua Reznik
  - Encl 9 Interview - Carlton Kennedy
  - Encl 10 Interview - SN Valeriy Bednarchyk
  - Encl 11 Interview - BOSN Daniel Polhemus
  - Encl 12 Interview - CAPT Kevin Riddle
  - Encl 13 Interview - AMT2 Jentzen Green
  - Encl 14 Interview - Robert Gneiting, Nurse Practitioner
  - Encl 15 Interview - SN Tucker - 1
  - Encl 16 Interview - SN Tucker - 2
  - Encl 17 Photo - Hand 1
  - Encl 18 Photo - Hand 2
- Article 6b Letter 1
- Article 6b Letter 2
- Article 6b Letter 3
- Article 6b Letter 4

B. Defense IRO Production Request

C. Defense Release Request to IRO

Enclosure (1) Statement of MEC [redacted] USCG
Enclosure (2) Statement of ME1 [redacted] Vitali, USCG
Enclosure (3) Statement of ME2 [redacted], USCG
Enclosure (4) Summary of Interview of OS3 [redacted], USCG
Enclosure (5) Summary of Interview of SN [redacted], USCG
Enclosure (6) Summary of Interview of FA [redacted], USCG

D. IRO Findings

E. Defense Release Request to CO, Base Alameda

F. CO Release Request Denial

G. Defense IRO Reconsideration Request

Enclosure (1) Summary of SN [redacted] First Interrogation, 27 Jan 19
Enclosure (2) Summary of SN [redacted] Second Interrogation, 30 Jan 19

Enclosure (3) Summary of SN [redacted] Third Interrogation, 15 Mar 19
Enclosure (4) SN [redacted] Snapchat Videos of 26 Jan 19
(.zip file provided separately)

H. IRO Reconsideration Request Denial

Certificate of Filing and Service

I certify that a copy of the foregoing was electronically delivered to the Court, Appellate Counsel, Respondent, and Counsel for the United States on October 1, 2019.

[redacted]
/ CDR, JAGC, U.S. Navy
Detailed Defense Counsel
DSO West Det Bremerton
365 S. Barclay St., Bldg 433
Bremerton, WA 98314
[redacted]