

## UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

**First Lieutenant (O-2)**  
**CALYX E. HARRELL**  
**USAF,**

## Petitioner

v.

UNITED STATES

Respondent

**Misc. Dkt. No. 2013-14**

## ORDER

## Special Panel

## Background

On 21 December 2013, the general court-martial convening authority referred for trial two specifications alleging violations of a lawful general regulation, three specifications alleging the use and possession of marijuana and lysergic acid diethylamide (LSD), four specifications alleging conduct unbecoming an officer, and one specification alleging fraternization, in violation of Articles 92, 112a, 133, and 134, UCMJ, 10 U.S.C. §§ 892, 912a, 933, 934. These offenses allegedly occurred between 1 January 2011 and 12 October 2012.

The petitioner was arraigned on 22 March 2013. At that session, after the military judge discussed the petitioner's right to counsel, the petitioner released her military counsel and provided the name of a civilian counsel whom she had recently retained. She also deferred the entry of pleas, and a trial date of 7 May 2013 was set.

The petitioner was ordered into pretrial confinement on 28 March 2013 based on her group commander's conclusion that reasonable grounds existed to believe she had committed the offense of unlawful entry.<sup>1</sup> Her commander concluded pretrial confinement was necessary because it was foreseeable that the petitioner will not appear for her trial and/or will continue to commit further serious misconduct if she remained at liberty. That same day, an officer appointed pursuant to Rule for Courts-Martial (R.C.M.) 305(i)(1) found probable cause that the petitioner committed the offense and reasonable grounds to believe that continued pretrial confinement is necessary for the same reasons given by her commander.

<sup>1</sup> This belief was based on an allegation that the petitioner wrongfully entered the locked office of her First Sergeant between on or about 22 and 25 March 2013.

On 1 April 2013, a pretrial confinement review officer (PCRO) held a hearing pursuant to R.C.M. 305(i)(2). The petitioner was represented by her civilian defense counsel and a newly-assigned military defense counsel, who argued that pretrial confinement was not appropriate or necessary. In addition to evidence regarding the alleged unlawful entry, the Government presented evidence that drug paraphernalia had been found inside one of the petitioner's shoes when other military members brought those shoes from her residence to the confinement facility. Following the hearing, the PCRO concluded that the petitioner had demonstrated a pattern of behavior that showed a complete disregard for the court-martial process and her superior officers. He also concluded it was more likely than not that the petitioner had committed the offenses of unlawful entry and possession of drug paraphernalia, that he had grave concerns the petitioner would continue to commit further serious misconduct, and that her demonstrated pattern of behavior made lesser forms of restraint inadequate.

On 9 April 2013, the military judge detailed to the petitioner's case denied her request for judicial review of the propriety of her continued pretrial confinement, ruling that he lacked jurisdiction to decide the issue because the offenses for which she was placed into pretrial confinement had not yet been referred to trial. On 17 April 2013, the military judge denied the petitioner's request that he reconsider his ruling.<sup>2</sup>

On 22 April 2013, the petitioner asked the PCRO to reconsider his earlier decision based upon information not previously considered. On 26 April 2013, the PCRO denied her request.

On 30 April 2013, the petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, a Writ of Prohibition, and a Stay of her court-martial proceedings until a judicial review of her pretrial confinement is conducted. Specifically, the petitioner asks us to order the recusal of the current military judge<sup>3</sup> and that a "non-conflicted" military judge review the propriety of her pretrial confinement. She further asks us to order the military judge to refrain from taking any further action in the court-martial until this Petition is resolved.

In its filing with this Court, the respondent states, without any supporting declaration or documentation, that "in accordance with R.C.M. 601(e)(2), any additional

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<sup>2</sup> The petitioner also filed a complaint under Article 138, UCMJ, 10 U.S.C. § 938, with her squadron commander, alleging that she was being subjected to unlawful pretrial confinement. On 14 May 2013, that commander determined he did not have the authority to overturn the confinement order of his superior officer.

<sup>3</sup> This request is based on the petitioner's claim that the military judge is a potential witness in the court-martial proceedings since his interaction with the petitioner during the arraignment was considered by the commander and pretrial confinement review officer as part of their pretrial confinement determinations. Both officers noted the military judge had "verbally reprimanded" the petitioner on proper courtroom etiquette when she failed to stand when he initially addressed her (The transcript submitted to this Court indicates the military judge stated "Would you like to rise when you address the court, Lieutenant Harrell?"). The petitioner has not asked the military judge to recuse himself.

charges or specifications that are eventually referred will not be joined with the first court-martial, but will be referred to a second court-martial.” The record is silent as to whether the petitioner would consent to any new charges being joined to the current court-martial. *See* Discussion to R.C.M. 601(e)(2) (“ordinarily, all known charges should be referred to a single court-martial”). As of 29 May 2013, 60-days after the petitioner entered pretrial confinement, the Government has not preferred any additional charges.

### *Law*

This Court has jurisdiction to entertain this petition. *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); *United States v. Draughon*, 42 C.M.R. 447 (A.C.M.R. 1970). To prevail on her writ, the petitioner must 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, 380-81 (2004).

The President, acting pursuant to his authority under Article 36, UCMJ, 10 U.S.C. § 836, prescribed in R.C.M. 305 the procedure for reviewing pretrial confinement. These procedures partly provide that “once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred [] may direct release from pretrial confinement” upon motion by the accused. R.C.M. 305(g). R.C.M. 305(j) states that “[o]nce the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.” R.C.M. 305(j), *Review by military judge*, “establishes that the military judge has the power after referral (*United States v. Newcomb*, 5 M.J. 4 (C.M.A. 1977)) to review pretrial confinement and to order release when appropriate.” Drafter’s Analysis, *Manual for Courts-Martial, United States*, A21-20 (2012 ed.).

### *Discussion*

In his ruling, the military judge determined that he lacked jurisdiction to review the propriety of the petitioner’s pretrial confinement because the “charges for which the accused has been confined,” unlawful entry and possession of drug paraphernalia, have not been referred to trial, and thus R.C.M. 305(g) precludes him from reviewing the propriety of that confinement. He further found that the PCRO’s reference to the petitioner’s pending court-martial charges does not confer jurisdiction upon him in contravention of R.C.M. 305(g). We disagree.

We find that the petitioner is in pretrial confinement in connection with the original charges. The commander’s original decision to place her in confinement was based in part on his belief she would not appear for her pending court-martial. That rationale was endorsed by the officer who conducted the initial review of that decision. The PCRO’s report included the petitioner’s pending court-martial amongst the reasons

why the criteria of R.C.M. 305(h)(2)(B) were met, and thus why pretrial confinement was necessary. Under these facts, we find the petitioner is confined in connection with the charges pending at her current court-martial. Cf. *United States v. Garner*, 39 M.J. 721, 724-25 (N.M. Ct. Crim. App. 1993); *United States v. Robinson*, 28 M.J. 481, 482 (C.M.A. 1989); *United States v. Mladjen*, 41 C.M.R. 159, 161 (1969) (when a service member is already in pretrial confinement when a second set of offenses is discovered and being investigated, the Government is accountable for speedy trial purposes for the time period of that investigation if the individual is confined "in connection with" those new charges). This conclusion is bolstered by the fact that, over 60 days after the Government came into possession of evidence to support charges of unlawful entry and paraphernalia possession, the respondent has not preferred those charges. We believe R.C.M. 305 provides the protection of judicial review of a PRCO's post-referral decision on additional non-referred offenses. Without this protection, a commander could improperly confine an accused leaving him or her without a viable recourse by simply electing not to prefer additional charges. As such, the military judge is authorized under R.C.M. 305 to review the propriety of the petitioner's pretrial confinement, and, under the facts of this case, we find issuance of an extraordinary writ to be necessary and appropriate.

Additionally, we have carefully reviewed all of the documents and the briefs from both parties and find the petitioner has not met her burden for the issuance of a writ disqualifying the military judge from further involvement in her court-martial.

Accordingly, it is by the Court on this 29th day of May 2013,

**ORDERED:**

That the petitioner's Petition for Extraordinary Relief is hereby **GRANTED In Part**.

That pursuant to R.C.M. 305(j) the detailed military judge shall review the propriety of the petitioner's pretrial confinement. All court-martial proceedings are stayed until the completion of such review.

That the part of the petitioner's Motion for Extraordinary Relief requesting the disqualification of the detailed military judge is hereby **DENIED**.



FOR THE COURT

A handwritten signature in black ink, appearing to read "Leah M. Calahan", is written over the text "FOR THE COURT".

LEAH M. CALAHAN  
Deputy Clerk of the Court