DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

[redacted]
Docket No: 5911-21
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER [redacted] USN, XXX-XX[redacted]

Ref: (a) 10 U.S.C. § 1552
(b) SECDEF Memo, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder," of 3 September 2014 (Hagel Memo)
(c) PDUSD Memo, "Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or TBI," of 24 February 2016
(d) USD Memo, "Clarifying Guidance to Military Discharge Review Boards and Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment," of 25 August 2017 (Kurta Memo)
(e) USECDEF Memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations," of 25 July 2018 (Wilkie Memo)

Encl: (1) DD Form 149 with attachments
(2) Case summary

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected to upgrade his characterization of service and to make other conforming changes to his DD Form 214.

2. The Board, consisting of [redacted], [redacted], and [redacted] reviewed Petitioner's allegations of error and injustice on 21 January 2022, and, pursuant to its regulations, determined that the corrective action indicated below should be taken. Documentary material considered by the Board consisted of Petitioner's application together with all material submitted in support thereof, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies, to include the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency

determinations (Wilkie Memo). Additionally, the Board also considered an advisory opinion (AO) furnished by a qualified mental health provider.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Although enclosure (1) was not filed in a timely manner, it is in the interests of justice to review the application on its merits.

c. The Petitioner originally enlisted in the Navy and began a period of active service on 15 August 2012. Petitioner's pre-enlistment physical on 30 May 2012 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On his pre-service medical history, the Petitioner expressly denied ever having: (1) depression or excessive worry, (2) nervous trouble of any sort, (3) receiving counseling of any type, (4) been evaluated or treated for a mental condition, and (5) consulting or being treated by clinics, physicians, healers, or other practitioners within the past 5 years for other than minor illnesses. Petitioner reenlisted on 27 September 2015 for a period of four years.

d. On 21 June 2013 Petitioner successfully completed Level I outpatient alcohol rehabilitation treatment. In both August and October 2014 Petitioner underwent mental health evaluations. The Petitioner self-referred for the evaluations to address symptoms of anxiety. The Petitioner stated that he experienced anxiety since childhood which worsened in the context of a recent civilian DUI charge with ongoing, unresolved legal issues. The Petitioner was diagnosed with generalized anxiety disorder with panic symptoms (existed prior to service), alcohol use disorder, severe, and alcohol induced anxiety disorder (provisional). The Medical Officer noted that Petitioner was psychiatrically fit for duty and responsible for his actions.

e. During such evaluations, the Petitioner disclosed the following facts, *inter alia*, in direct conflict to his self-reported pre-enlistment medical history: (1) he reported a long history of generalized anxiety and panic symptoms since the sixth grade, (2) he reported a history of panic attacks first occurring in the third or fourth grade, (3) he reported he was treated for his anxiety and panic attack symptoms with either Xanax or Klonopin, (4) he tried Prozac for three weeks but discontinued its use due to adverse effects, and (5) he suffered from anxiety in 2011 and was treated with Klonopin.

f. On 18 April 2017, pursuant to his guilty pleas, Petitioner was convicted at a General Court-Martial (GCM) for two specifications of attempting to patronize a prostitute. At the time of his arrest, Petitioner understood and believed that both women were ages 14 and 16, respectively. Petitioner was sentenced to confinement for twenty-four months, a reduction in rank to the lowest enlisted paygrade (E-1), total forfeitures of pay, and a discharge from the Navy with a dishonorable discharge (DD). Pursuant to the terms of a voluntary pre-trial agreement (PTA), all confinement in excess of 366 days was suspended for twelve months after

the convening authority's action on the sentence on 15 August 2017. Following Petitioner's voluntary withdrawal of GCM post-trial appellate review on 6 November 2017, Petitioner was discharged from the Navy with a DD and assigned an RE-4 reenlistment code on 12 January 2018.

g. As part of the PTA, Petitioner agreed to enter into a stipulation of fact (SOF) for use during the providence inquiry and during the pre-sentencing proceeding describing the facts and circumstances surrounding the offenses to which Petitioner pleaded guilty. The SOF stated that the Petitioner stipulated and agreed that the facts contained therein were true, accurate, admissible into evidence, and that Petitioner specifically admitted the facts accurately reflected his actions, and that the military judge may consider such facts in determining the providence of his pleas and in determining an appropriate sentence.

h. The SOF, *inter alia*, outlined the following relevant facts:

> On or about 2 March 2016, I attempted to hire a prostitute for the purpose of engaging in sexual acts, such as manual stimulation, in exchange for money…I searched for and found an advertisement online for a prostitute. The advertisement indicated two females, who stated they were 18-years-old and were "looking for a good time". I understood the advertisement to be for two prostitutes willing to engage in sexual acts in exchange for money…I sent a text message to the number in the advertisement I asked if they were available and how much it would cost for both females. I received responses via text message. I negotiated a price of $80.00 for a "quick visit" or "qv". We reached an agreement for me to pay $80.00 for both females…**After learning of the girls' ages, 14 and 16**, via text message, I called the phone number. A female voice answered the phone, I believed this female to be the female I had texted and negotiated the price of $80.00…I then asked where they were located and for the address. After getting the address, I drove to meet the girls. **I drove to the address specifically intending to pay money in order to engage in sexual acts with both the girls**…The girl gave me the apartment number and code to request entrance. I walked from my car to the building, entered the code, and was buzzed into the building. I then walked to the apartment and knocked on the door. When I entered the apartment, I was arrested…When I was arrested, I had exactly $80.00 in cash on my person. **I intended to use the cash to pay the girls in exchange for sexual acts**…When I arranged to pay for sexual acts with the two females, I knew that paying for sexual acts was wrongful conduct…I freely chose to make the arrangement to pay for sexual acts…I believe and admit that my actions constituted a substantial step towards committing the offense of patronizing a prostitute. I negotiated the price, drove to the location of the two girls, entered the building, knocked on the apartment door, and entered the apartment with exactly $80.00, the previously negotiated price. Throughout all these steps I understood my actions and **I intended to engage in sexual acts with the two females**. (emphasis added).

i. In short, Petitioner contended that at the time of his court-martial offenses he suffered from severe mental illness and addiction to prescription drugs representing extenuating circumstances and substantially mitigates his offenses. The Petitioner argued that the Board must view his mental health condition as a mitigating factor to the misconduct underlying his discharge and upgrade his characterization of service.

j. As part of the review process, the BCNR Physician Advisor, who is a licensed clinical psychologist (Ph.D.), reviewed Petitioner's contentions and the available records and issued an AO on 24 November 2021. The Ph.D. initially observed that Petitioner provided active duty records confirmed he was diagnosed with an anxiety disorder, depressive disorder, and alcohol abuse and dependence disorder during his military service. The Ph.D. also observed that such documentation confirmed Petitioner suffered from a mental health condition (i.e., anxiety, panic attacks) prior to his enlistment into the Navy which was exacerbated by his Naval service, misconduct, as well as family concerns. However, the Ph.D. determined that a mental health condition does not excuse all misconduct. The Ph.D. noted that although Petitioner presented evidence he suffered from an anxiety disorder on active duty, the clinical evaluations contemporaneous to his service deemed him responsible for his actions. The Ph.D. also noted that there was no evidence Petitioner suffered from hallucinations, delusions or other psychotic symptoms, and no indication Petitioner did not know the difference between right and wrong. The Ph.D. concluded by opining that there was sufficient evidence Petitioner exhibited behaviors associated with a mental health condition on active duty and some, but not all, of his misconduct may be mitigated by his mental health condition. The Ph.D. specifically determined that Petitioner's anxiety may have precipitated his alcohol abuse and may mitigate certain subsequent misconduct (i.e., DUI and unauthorized absence), but his anxiety did not mitigate the misconduct of soliciting a prostitute or the nondisclosure of his anxiety disorder prior to enlistment.

CONCLUSION:

Upon review and liberal consideration of all the evidence of record, the Board concluded that Petitioner's request does not warrant relief.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to: (a) the punishment far outweighed the crime and a DD is not reflective of the offenses, (b) his defense counsel was ineffective, (c) the prosecutor committed an ethical violation by charging offenses not supported by the evidence solely to justify a GCM, (d) at the time of the offense for which Petitioner was court-martialed, he suffered from severe mental illness and addiction to prescription drugs, and (e) the Navy erred by not categorizing his first period of service between August 15, 2012 and September 26, 2015 as a prior period of active service on his final DD 214. However, given the totality of the circumstances, the Board determined that the request does not merit relief with the exception of making a minor administrative change to Petitioner's DD Form 214.

In accordance with the Hagel, Kurta, and Wilkie Memos, the Board gave liberal and special consideration to Petitioner's record of service, and his contentions about any traumatic or stressful events he experienced and their possible adverse impact on his service. However, even under the liberal consideration standard, the Board concluded that there was no nexus between any mental health conditions and/or related symptoms and Petitioner's GCM misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of Petitioner's DD. As a result, the Board concluded that Petitioner's GCM misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that Petitioner's GCM misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of his misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that Petitioner's misconduct was willful and intentional and demonstrated he was unfit for further service. The Board also determined that the evidence of record did not demonstrate that Petitioner was not mentally responsible for his conduct or that he should not be held accountable for his actions.

Further, the Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. Accordingly, the Board determined that there was no impropriety or inequity in Petitioner's discharge, and even under the liberal consideration standard for mental health conditions, the Board concluded that Petitioner's service discrediting, serious misconduct clearly merited his receipt of a DD.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite Petitioner's contentions this is not a case warranting any clemency. The simple fact remains is that Petitioner attempted to engage in sexual acts for money with two underage girls. As outlined and admitted in the SOF, even after Petitioner was aware of the girls' ages, he still proceeded to carry out his desire to engage in sexual acts with minors. As a result, the Board did not find any evidence of an error, injustice, ethical violations, or prosecutorial misconduct in this application that warrants upgrading Petitioner's DD. The Board carefully considered any matters submitted regarding Petitioner's post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that given the totality of the circumstances Petitioner's request does not merit relief.

Additionally, the Board determined that no ineffective assistance of counsel (IAC) occurred. The Board noted there is no convincing evidence in the record to support Petitioner's contention that he did not receive adequate representation or experienced IAC. The Board unequivocally concluded that Petitioner failed to meet the burden to show that: (a) his defense counsels' performance was deficient and fell below an objective standard of reasonableness, and (b) but for

the alleged deficiencies, there was a reasonable probability of a more favorable result. Moreover, in the PTA Petitioner expressly stated that he was satisfied with both of his detailed military defense counsel and that he considered them qualified to represent him at his GCM. Accordingly, the Board concluded that no IAC occurred whatsoever, and any such suggestion or argument was entirely without merit and not persuasive.

Although not factoring into the Board's analysis and ultimate decisions, the Board noted that the Petitioner fraudulently enlisted in the U.S. Navy. The Board noted that a fraudulent enlistment occurs when there has been deliberate material misrepresentation, including the omission or concealment of facts which, if known at the time, would have reasonably been expected to preclude, postpone, or otherwise affect a Sailor's eligibility for enlistment. The Board determined that Petitioner clearly failed to disclose his disqualifying pre-service mental health issues, treatment, and medication on his pre-enlistment medical documentation and application. The Board further determined that Petitioner had a legal, moral, and ethical obligation to remain candid on his enlistment paperwork. The Board concluded that had Petitioner properly and fully disclosed his pre-service mental health issues and history, he would likely have been disqualified from enlisting.

Notwithstanding the discharge upgrade denial, the Board did note, however, that the misconduct forming the basis of Petitioner's DD technically occurred during his second enlistment. Thus, the Board concluded that an administrative change to Petitioner's DD Form 214 should be made to reflect that his first enlistment was completed without any adverse disciplinary action. The Board was aware that the Department of the Navy no longer issues a separate DD Form 214 to enlisted personnel at the completion of each individual enlistment and instead makes appropriate notations in the Block 18 Remarks section upon their final discharge or retirement from the armed forces reflecting such previous enlistments.

RECOMMENDATION:

In view of the foregoing, the Board finds the existence of a material error warranting the following corrective action.

That Petitioner be issued a "Correction to DD Form 214, Certificate of Release or Discharge from Active Duty" (DD Form 215) for the period ending 12 January 2018, to reflect the following comment added to the Block 18 Remarks section:

"CONTINUOUS HONORABLE SERVICE FROM 15AUG2012 TO 26SEP2015."

Following the correction to the DD-214 for the period ending 12 January 2008, that all other information currently listed on such DD-214 remain the same.

That a copy of this report of proceedings be filed in Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

Subj: REVIEW OF NAVAL RECORD OF FORMER [redacted], USN, XXX-XX-[redacted]

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)), and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

1/26/2022

[redacted]

Executive Director
Signed by: [redacted]