



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

██████████
Docket No. 8872-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER ██████████
XXX XX ██████/█████ USMC

Ref: (a) 10 U.S.C. § 1552
(b) USD (P&R) Memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations," 25 July 2018

- Encl:
- (1) DD Form 149 w/attachments
 - (2) DD Form 214
 - (3) MCAS, ██████████ General Court-Martial Order and Action ██████████, ██████████
 - (4) Naval Council of Personnel Boards Memo 5815 401A, subj: NC&PB Actions, 6 January 2004
 - (5) *United States v. [Petitioner]*, in the U.S. Navy-Marine Corps Court of Criminal Appeal, NMCCA ██████████, decided ██████████
 - (6) Order Denying Petition, in the case of *United States v. [Petitioner]*, in the United States Court of Appeals for the Armed Forces, USCA Dkt. No. ██████████ MC, Crim. App. No. ██████████, ██████████
 - (7) OJAG Memo 1070 Ser 20/011, subj: Advisory Opinion in the case of [Petitioner], 8 May 2003
 - (8) OJAG Professional Responsibility Coordinator Memo 5803, subj: Advisory Opinion to the Board for Correction of Naval Records, 1 August 2023
 - (9) Petitioner's Counsel's Letter, Re: Response to the August 4, 2023 Letter and Accompanying Advisory Opinion, Docket No. NR20220008872, 1 September 2023

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, hereinafter referred to as the Board, requesting an upgrade to his punitive discharge¹ and that his narrative reason for separation and reentry code be changed to reflect "Secretarial Authority."

2. The Board considered Petitioner's allegations of error or injustice on 15 September 2023 and, pursuant to its governing policies and procedures, determined that clemency is warranted in the interests of justice. Documentary material considered by the Board included the enclosures;

¹ Specifically, Petitioner requested that his characterization of service be upgraded to honorable or, alternatively, general (under honorable conditions).

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relevant portions of Petitioner's naval record; and applicable statutes, regulations, and policies, to include reference (b).

3. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board found 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 waive the statute of limitations and consider Petitioner's application on its merits.

c. Petitioner enlisted in the Marine Corps and began a period of active duty service on 17 March 1998. See enclosure (2).

d. In January 2002, Petitioner allegedly assisted two fellow Marines to obtain marijuana from a supplier that he knew of in the trailer park where he had previously resided.² Specifically, he allegedly had the other two Marines follow him back to the mobile home park, and then obtained marijuana for them from the supplier on multiple occasions over a period of approximately three weeks. The other two Marines then brought this marijuana back to the barracks at [REDACTED]. See enclosures (1) and (3).

e. On 11 June 2002, Petitioner was charged with conspiracy to commit the offense of wrongful possession of marijuana, in violation of Article 81, Uniform Code of Military Justice (UCMJ);³ four specifications of violation of Article 112a, UCMJ;⁴ and wrongfully soliciting another Marine on diverse occasions between 1 May 2001 and 31 August 2001 to distribute Lysergic Acid Diethylamide (LSD) by asking the other Marine to obtain LSD and sell it to him in violation of Article 134, UCMJ.⁵ See enclosure (3).

f. A general court martial (GCM) was convened on 23 July 2002 to hear the charges against Petitioner referenced in paragraph 3e above. Petitioner pled guilty to the conspiracy charge in violation of Article 81, UCMJ, and to the possession of marijuana charge in violation of Article 112a, UCMJ, and not guilty to the remaining charges.⁶ See enclosure (3).

² According to enclosure (1), this came to light just days before Petitioner was scheduled to commence terminal leave upon the completion of his enlistment, when the other two Marines were caught smoking marijuana on base and told law enforcement that Petitioner had helped them to obtain it.

³ Petitioner was charged as a co-conspirator with the other two Marines referenced in paragraph 3d.

⁴ Specifically, Petitioner was charged with possessing an unknown amount of marijuana; wrongfully introducing an unknown amount of marijuana onto [REDACTED]; wrongfully distributing some amount of marijuana on divers occasions between 1 August 2000 and 30 April 2002; and wrongfully using marijuana. It appears that Petitioner was charged as an aider and abettor of the two Marines referenced in paragraph 3d for the first two of these charges.

⁵ The "other" Marine referenced in this charge was not among the two Marines referenced in paragraph 3d.

⁶ Petitioner claims in enclosure (1) that he attempted to plead guilty to all of the charges pursuant to a pretrial agreement, but that the GCM would not accept his plea because the military does not accept *Alford* pleas (i.e., a guilty plea whereby the defendant does not admit to committing the crime but agrees that the prosecution has enough evidence to obtain a conviction). As a result, the Government withdrew from a plea agreement.

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g. On 12 December 2002, the GCM accepted Petitioner's plea to the conspiracy and possession charges, and found him guilty of the charge of wrongfully distributing marijuana on diverse occasions between 1 August 2000 and 30 August 2002.⁷ Petitioner was sentenced to be reduced to pay grade E-1; to forfeit all pay and allowances; to be confined for 12 months; and to a bad-conduct discharge (BCD). See enclosure (3).

h. On 15 September 2003, the convening authority approved the sentence adjudged by the GCM and, except for the BCD, ordered it executed. See enclosure (3).

i. By memorandum dated 6 January 2004, the Naval Clemency and Parole Board denied Petitioner's request for clemency. See enclosure (4).

j. On 17 October 2005, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCCA) upheld the findings and sentence of the GCM, as approved by the convening authority. See enclosure (5).

k. On 14 March 2006, the U.S. Court of Appeals for the Armed Forces denied Petitioner's petition for review of his GCM conviction. See enclosure (6).

l. On 9 June 2006, Petitioner's BCD was executed. See enclosure (2).

m. Petitioner, through counsel, requests clemency based upon several factors:

(1) There was no evidence that Petitioner ever actually sold marijuana to anyone. His possession charge was based upon an aiding and abetting theory.

(2) He took ownership of his actions and attempted to plead guilty to all of the offenses alleged against him.

(3) The other two Marines with whom Petitioner was charged with conspiracy to possess marijuana, who were military police officers and who had approached Petitioner first, received far more lenient sentences.⁸ Petitioner implies that this discrepancy was racially motivated.

(4) Unbeknownst to Petitioner and the GCM, the civilian attorney retained by Petitioner to represent him had resigned from and been prohibited from practicing law before the United States District Court for the [REDACTED] for misleading the court, abandoning her clients, failing to file important documents, and jeopardizing her clients' rights, and was under investigation by the [REDACTED] State Bar. However, she informed the GCM on the record that she was a "member in good standing" of the State Bar of [REDACTED], and that she had "not

⁷ Petitioner was acquitted of the other three charges (i.e., wrongfully introducing an unknown amount of marijuana onto [REDACTED]; wrongfully using marijuana between 1 August 2000 and 30 April 2002; and wrongfully soliciting another Marine to obtain LSD for him.

⁸ Petitioner's counsel claims that the other two Marines received only 45 day sentences from the military judge and their offenses were referred only to special courts-martial. However, enclosure (3) reflects that these two individuals actually were adjudged sentences to confinement of 100 and 150 days, respectively. The 45-day sentences resulted from their respective pretrial agreements, which are included in the record.

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acted in any manner which might tend to disqualify” her from acting as Petitioner’s defense counsel. If he had known of this background, Petitioner claims that he would have fired her and hired another attorney. Instead, he “relied upon the advice of his shoddy counsel whom he was made to believe was in ‘good standing’ and experienced with military criminal matters.” Petitioner claims that her substandard representation harmed him in several ways. Specifically, in her opening statement to the GCM, she promised the military judge that Petitioner would testify on his behalf, but then did not have him do so. He also asserts that the one of the Government’s witnesses disclosed exculpatory evidence to the prosecutor during the trial, but his attorney declined to have that witness testify during sentencing with no explanation. Finally, Petitioner asserts that he allowed his long time military defense counsel to be excused from his trial team based upon his assumption of the civilian defense counsel’s competence.

(5) Society’s views towards the legality of marijuana have shifted over the past 20 years. As such, he would not reasonably expect to receive such harsh consequences for similar conduct today.

(6) Petitioner claims to have developed severe depression while on pretrial restriction pending court-martial. He also claims that his psychological issues were exacerbated by preexisting medical and neurological problems, to include recurrent migraine headaches. Since his discharge, Petitioner claims to have struggled with major depressive disorder, which ultimately led to him being treated for post-traumatic stress disorder (PTSD) in 2013.⁹

(7) He has demonstrated exemplary post-discharge behavior over the past 20 years. Specifically, he claims to have been a productive member of society and most recently worked for the [REDACTED]. He also states that he has no criminal record or arrests since his discharge. He claims to have received an Associate’s Degree in Applied Science for Medical Assisting, and later obtained an Emergency Medical Technician certificate. He also claims to have previously worked with [REDACTED] for eight years, where he became a Lead Medical Assistant, and during which time he volunteered countless hours assisting with various clinics, fairs, and public education classes.

(8) Petitioner provided several character references in support of his request for clemency, attesting to his helpful and caring nature and service to his community. He has also been ordained as a minister in the [REDACTED], and uses his own experience to teach and testify to forgiveness, redemption and mercy. Based upon his post-service record, Petitioner suggested that he deserves the same type of relief granted by the Board in four previous cases.¹⁰

See enclosure (1).

n. By memorandum dated 8 May 2023, the Office of the Judge Advocate General (OJAG), Code 20 (Criminal Law Division), provided an advisory opinion (AO) for the Board’s

⁹ As Petitioner did not claim that his PTSD condition existed during his service or contributed to his misconduct, the Board did not apply liberal consideration to this claim. It did, however, consider this claim among the totality of the circumstances to determine whether clemency is warranted.

¹⁰ The cases cited by Petitioner a precedent for the relief he seeks were Docket Nos. 3368-98; 5979-02; 3437-06; and 9416-18.

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consideration, opining that the failure of the civilian attorney referenced in paragraph 3m(4) above to disclose unresolved misconduct allegations did not violate the professional conduct rules or impact her representation of Petitioner at his GCM. Specifically, this AO informed the Board that this attorney's representation to the military judge that she was "licensed by the State Bar of [REDACTED]" and in "good standing" was accurate at the time that she made it, and that she was under no obligation to disclose her Federal bar resignation or the unsubstantiated accusations associated with her resignation. It also opined that Petitioner's claims of ineffective assistance of counsel were without merit. See enclosure (7).

o. By memorandum dated 1 August 2023, the OJAG Professional Responsibility Coordinator also provided an AO for the Board's consideration. This AO opined that neither the civilian attorney's resignation and subsequent bar from practice before the U.S. District Court for the [REDACTED], nor the formal complaint filed against her by the [REDACTED] State Bar, adversely impacted her "good standing" or her ability to practice before a military court-martial, as she remained in "good standing" as a member of the [REDACTED] bar until 16 February 2004. It also opined that this attorney was not under any obligation to notify her client, the court, or the Judge Advocate General of the Navy of the professional competency allegations and complaints that had been against her, or of her resignation from the U.S. District Court for the [REDACTED] and the decision of that court to prohibit her from practicing before it on 9 May 2001. As such, this AO concluded that the civilian attorney was qualified to represent Petitioner at his court-martial. See enclosure (8).

p. By letter dated 1 September 2023, Petitioner, through counsel, submitted a rebuttal to the AOs referenced in paragraph 3o above. This rebuttal first noted that the AO did not address the Petitioner's argument for clemency, and suggested that this omission indicated that the AO author agreed that clemency was warranted.¹¹ In this regard, Petitioner reiterated his argument for clemency. The rebuttal then disagreed with the AO conclusion that the civilian attorney was qualified to represent Petitioner at his court-martial, as she did not make the same affirmation required of all other officers of the court-martial that she had not acted in any way that might tend to disqualify her. He argues that this omission constituted a breach of her duty of loyalty to Petitioner, and her duty of candor to both Petitioner and the court. Petitioner further noted that although the AO stated that the Military Judge found the civilian attorney to be qualified, that finding does not appear on the record. Finally, he argued that although his civilian attorneys' incomplete affirmation of her qualifications was technically correct, it was at odds with his right to competent, qualified counsel. See enclosure (9).

¹¹ In actuality, neither of the AOs addressed Petitioner's clemency argument because OJAG was not asked to opine on that argument. The Board requested OJAG's opinion only on the contentions made by Petitioner regarding the qualifications and obligations of his civilian attorney. The Board did not require expert advice to assess whether clemency is warranted.

MAJORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Majority of the Board determined that clemency is warranted in the interests of justice.

The Majority found no error in the GCM proceedings which resulted in Petitioner's conviction and BCD. He pled guilty to two of the charges, and was found guilty beyond a reasonable doubt by the military judge of a third charge. The military judge acquitted him of the remaining charges, despite the fact that he had previously attempted to enter an *Alford* plea to them, meaning that he acknowledged that the Government had enough evidence to sustain a conviction. This suggests that the military judge held the Government to its burden of proof and convicted Petitioner only of those charges which were, in fact, proven beyond a reasonable doubt. This conviction and the sentence were subsequently sustained on appeal by the NMCCA. The Majority found the sentence adjudged to be reasonable given the charges of which Petitioner was convicted. His contention that he received a disparate sentence compared to his co-conspirators is without merit, as his co-conspirators were convicted of fewer offenses of less severity. Specifically, enclosure (3) reflects that, unlike Petitioner, neither of his co-conspirators for the offenses occurring in January 2002 were charged with or convicted of wrongfully distributing marijuana on divers occasions over a 21-month period from 1 August 2000 to 30 April 2002. This was by far the most severe offense of which Petitioner was convicted, and far more severe than any the charges for which his co-conspirators were convicted. As such, this offense justified a far more severe sentence from a higher-level of court-martial. Further, the evidence reflects that Petitioner's co-conspirators, unlike Petitioner, were provident to the charges for which they had agreed to plead guilty as part of a pretrial agreement. As Petitioner was not so provident, he lost the protection of his pretrial agreement. Finally, the Majority found no merit to Petitioner's contention that he was the victim of ineffective assistance of counsel by an unqualified attorney. Petitioner's attorney was, in fact, in good standing with the [REDACTED] State Bar at the time of his court-martial. As such, she was qualified to represent him at the court-martial. Additionally, that attorney had no obligation to reveal that she had resigned from and was not qualified to practice before a particular court unless Petitioner was required to appear before that particular court. Finally, Petitioner provided no evidence to suggest that her performance was deficient. There are numerous reasons that his attorney may have made the strategic decisions at trial that he now complains about, to include maintaining the providence of the guilty pleas that were sustained by the military judge. Additionally, the trial transcript reflects that the decision not to call the witness who provided exculpatory evidence was made by Petitioner's detailed military defense counsel, and not his civilian attorney. Given the fact that Petitioner was acquitted of three charges for which he apparently believed that the Government had sufficient evidence to sustain a conviction based upon his *Alford* plea, and that the sentence adjudged was reasonable for the charges of which he was convicted, the Majority did not agree with Petitioner's contention that a different attorney likely would have produced a better result. Given the circumstances, Petitioner's consequences easily could have been worse. It is Petitioner's burden to prove that a different counsel would have produced a different result, and he provided no evidence to support this claim.

In addition to reviewing the circumstances of Petitioner's GCM conviction, the Majority also considered the totality of the circumstances to determine whether clemency is warranted in the

interests of justice in accordance with reference (b). In this regard, the Majority considered, among other factors, Petitioner's post-service record of accomplishment and employment, and his reputation and valuable service to his community, which reflects his rehabilitation and resilience in spite of the stigma of his BCD; the character references provided with Petitioner's application for review, which reflected the positive impact that he has had on the lives of numerous people; that Petitioner reportedly cooperated with law enforcement personnel, attempted to take responsibility for all of the charges against him through an *Alford* plea which was not accepted by the military judge, and ultimately did take responsibility for certain of the charges without the benefit of a pretrial agreement; that Petitioner was not charged as a principal for either of the offenses for which he pled guilty; the non-violent nature of the offenses for which Petitioner was convicted; the totality of Petitioner's Marine Corps service, which included no record of misconduct prior to August 2000 and included receipt of a Good Conduct Medal in addition to other commendations; that Petitioner received a more harsh sentence than his co-conspirators for the offenses occurring in January 2002; that Petitioner was represented by a civilian attorney who reportedly failed to inform him that her qualification to practice law had been challenged and were under review at the time;¹² that marijuana offenses are considered to be relatively less severe today than they were in 2002, and that Petitioner likely would not receive the same type of sentence under similar circumstances today; that Petitioner developed depressive symptoms while awaiting court-martial, and was later treated for PTSD; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. In particular, the Majority found it compelling that, after having been convicted of drug-related offenses, Petitioner has since dedicated his life as a social services caseworker to combatting the effects of addiction in children and families. Based upon this review, the Majority found that the combined weight of the mitigating circumstances outweighed the severity of the misconduct for which Petitioner was convicted and discharged, and that clemency is therefore warranted in the interests of justice. Specifically, the Majority found that an upgrade to Petitioner's discharge from BCD to general (under honorable conditions) was warranted in the interests of justice.

Although finding some clemency to be warranted, the Majority did not find the mitigating circumstances to so significantly outweigh the severity of Petitioner's misconduct as to justify the extraordinary relief of an upgrade of his punitive discharge characterization to fully honorable as he requests. Likewise, the Majority did not believe that a change to Petitioner's narrative reason for separation or reentry code were warranted as acts of clemency, as those entries on his DD Form 214 were and remain appropriate under the totality of the circumstances.

MAJORITY RECOMMENDATION:

In view of the above, the Majority of the Board recommends that the following corrective action be taken on Petitioner's naval record in the interests of justice:

¹² Although it concurred with the AOs' conclusion that this attorney was qualified to represent Petitioner at his court-martial and was under no obligation to disclose her resignation from or status with a particular Federal court, the Majority considered the unfavorable circumstances of this situation among the totality of the circumstances to determine whether clemency is warranted in the interests of justice.

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That Petitioner be issued a new DD Form 214 reflecting that his service ending on 9 June 2006 was characterized as "General (under honorable conditions)." All other entries currently reflected on his DD Form 214 are to remain unchanged.

The Majority noted a potential administrative error on Petitioner's DD Form 214 in that it appears he was credited for active service during the period which he would have been on involuntary appellate leave awaiting completion of the appellate process following his release from confinement. Specifically, his DD Form 214 currently credits Petitioner with over seven years and five months of active service, when in fact it appears that he should only have approximately five years and nine months of creditable active service. Accordingly, the Board recommends that Headquarters, Marine Corps (HQMC), conduct an audit of Petitioner's records to determine whether an administrative correction to his DD Form 214 is warranted.

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

That no further corrective action be taken on Petitioner's naval record.

MINORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Minority of the Board found insufficient evidence of any error or injustice warranting relief.

The Minority concurred with the Majority conclusion that there was no error or injustice in the GCM proceedings which resulted in Petitioner's BCD.

Like the Majority, the Minority also considered the totality of the circumstances to determine whether clemency is warranted in the interests of justice in accordance with reference (b). In this regard, the Minority considered the same potentially mitigating circumstances as did the Majority, but reached a different conclusion. Specifically, the Minority found the misconduct for which Petitioner was convicted to be far more severe than did the Majority. The Minority acknowledges that marijuana use is much more accepted in society today than it was 20 years ago. However, Petitioner was not convicted of mere marijuana use. Rather, Petitioner was convicted of helping other Marines obtain marijuana. He facilitated the purchase of marijuana by his co-conspirators on multiple occasions in January 2002, and he was distributing marijuana over a 21-month period from 1 August 2001 to 30 April 2002. As such, he was responsible creating the harm that he now seeks to mitigating as a social worker, and for severely undermining good order and discipline and the readiness of his fellow Marines. Additionally, while Petitioner was acquitted of the other three charges, his attempt to make an *Alford* plea to those charges suggests that there was evidence of more charges than those for which he was convicted. The Minority believed that the severity of Petitioner's misconduct far outweighed all of the potentially mitigating circumstances combined, and that clemency was therefore not warranted in the interests of justice.

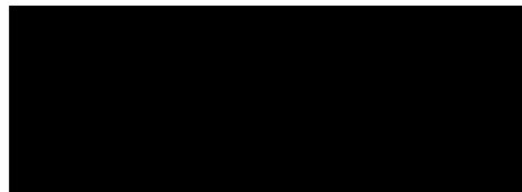
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MINORITY RECOMMENDATION:

In view of the above, the Minority of the Board recommends no corrective action be taken on Petitioner's naval record. It does, however, recommend that HQMC be informed of the potential administrative error in Petitioner's DD Form 214 discussed in the Majority's recommendation above.

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 titled matter.
5. The foregoing action of the Board is submitted for your review and action.

11/9/2023



ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

MAJORITY Recommendation Approved (Partial Relief – I concur with the Majority conclusion and therefore direct the relief recommended by the Majority above.)

MINORITY Recommendation Approved (Deny Relief – I concur with the Minority conclusion and therefore direct that no corrective action be taken on Petitioner's naval record. I do, however, recommend that the Board make HQMC aware of the potential administrative error in Petitioner's DD Form 214 discussed in the Majority recommendation.

11/24/2023

