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

[redacted]
Docket No. 8022-23
Ref: Signature Date

[redacted]

Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 20 December 2023. The names and votes of the panel members will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of the Board. Documentary material considered by the Board consisted of your application together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations, and policies, to include to the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice or clemency determinations (Wilkie Memo).

You enlisted in the Marine Corps under a reserve option contract and served an initial period of active duty from 30 October 1971 through 29 March 1972. You were honorably discharged upon the expiration of your active obligated service and transferred into the Marine Corps Reserve. Your record documents that, on 15 January 1973, you were issued permanent change of duty station (PCS) orders incident to having reenlisted, with direction that you report for duty to [redacted] by 21 January 1973. You failed to report in accordance with orders and, on 4 December 1974, were apprehended by the Federal Bureau of Investigations (FBI) in [redacted]. Several days later, you submitted a letter to your elected official addressing the circumstances of your situation; meanwhile, you were returned to military authority. A message, on 7 April 1975, reported that you pleaded guilty before General Court-Martial (GCM) to an offense of unauthorized absence (UA). This message made no reference to any additional charges but identified that your sentence included, in relevant part, a Dishonorable Discharge (DD) and 10 years confinement.

For reasons not identified within your available records, you were subsequently tried before General Court-Martial again on 9 June, 30 June, and 1-2 July of 1975, this time for the original offense of UA under Article 86 of the Uniform Code of Military Justice (UCMJ) but an additional charge under Article 120, related to an alleged rape of a female Lance Corporal on 17 January 1975. You were found guilty of both offenses and sentenced to five years confinement at hard labor, reduction to the grade of E-1, total forfeitures of pay, and a DD. You were credited with confinement beginning 4 April 1975.

The Naval Clemency and Parole Board denied your request for restoration on 4 March 1976 and did not grant clemency with respect to your sentence. However, on 7 May 1976, the Naval Court of Military Review set aside the finding of guilt with respect to the charge of rape due to insufficiency of evidence and dismissed that charge with prejudice. It approved only one year of confinement and a Bad Conduct Discharge (BCD), rather than a DD, in addition to the reduction in grade and forfeitures of pay. You were released from confinement into an excess leave status on 18 May 1976. Your appealed for review by the U.S. Court of Military Appeals (USCMA) but your petition was denied on 8 December 1976. Subsequently, on 28 January 1977, the punitive charge of your sentence was ordered executed and you were separated with a BCD on 7 April 1978.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie Memo. These included, but were not limited to, your desire to upgrade your discharge to under honorable conditions and your contentions that your sentence was excessive due to prejudice based upon your race and the improper aggravating factor of the charged offense of rape, which was subsequently dismissed. Although you admit to being a reservist who missed several required training units and annual drill, you assert that there is no evidence to support why you did not report for duty, how you were contacted, or that military training began again. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application but noted you did not provide documentation describing post-service accomplishments or advocacy letters.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your GCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. Regardless of the reason why you did not report, the Board noted that you were specifically issued orders to active duty on 15 January 1973 incident to your reenlistment, failed to comply with those orders, and subsequently returned to military authority from your UA status following apprehension by the FBI. Regarding your contention that you were returned to duty in a non-disciplinary status such that you were permitted liberty and allowed to go to the enlisted club where you met the female who later accused you of the dismissed rape charge, the Board concurred that you appear to have been permitted liberty following your initial return, although the available records lack information regarding your purported disciplinary status. Regarding your contention that but for being accused of rape, you would not have been prosecuted for the missed drills or absences because "No records are present to suggest [you were] ever punished for being UA until [your] rape trial." The Board found that the delay in disposition of your UA offense, whether through judicial or nonjudicial means, is insufficient evidence of an error or injustice with respect to the final circumstances of

your discharge, notwithstanding the rape allegation which was subsequently dismissed for lack of evidence. Specifically, the Board observed that your protracted period of UA was supported by substantial evidence, to include your PCS orders referencing your voluntary reenlistment as well as your Congressional correspondence regarding your initial apprehension, which reflected your belief that you had originally contracted for assignment to a duty station closer to your home of record.

Notwithstanding the record of evidence regarding your initial GCM trial, which was disapproved, and your subsequent re-hearing, the Board noted that the entirety of the proceedings was subject to appellate review, to include your petition for appeal to the USCMA. From the time of the disapproval of your initial GCM proceedings through the final appellate review, the rape charge was dismissed and your sentence was reduced first from 10 years to five years then to one year, and your DD was reduced to a BCD. Of particular significance, in this regard, the Board found no evidence of error or injustice with respect to your final sentence to one year confinement and a BCD, which the Board observed was substantially consistent with the outcome of similar cases involving prolonged absences terminated by apprehension during that time period. Specifically, the Board concluded that there is insufficient evidence that your final sentence, as approved following appellate review, resulted from either improper aggravation with respect to the additional, but later dismissed, charge for rape or from considerations of race. Additionally, although the Board noted that you appear to have served confinement slightly in excess of one year, from 4 April 1975 through 18 May 1976, the Board noted that your period of confinement did not exceed the maximum punishment for your offense of an absence in excess of 30 days terminated by apprehension. Although you presumptively severed approximately 34 days of confinement in excess of your sentence, in addition to any good time earned, the Board concluded that this potentially mitigating factor was insufficient to outweigh the severity of the offense of your extended period of UA.

As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant a BCD. Even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants granting you the relief you requested or granting relief as a matter of clemency or equity. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon the submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity is attached to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

1/18/2024

[redacted]

Executive Director
Signed by: [redacted]