RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2010-03842

 XXXXXXXXXX COUNSEL: NONE

 HEARING DESIRED: NO

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APPLICANT REQUESTS THAT:

His Dishonorable Discharge (DD) be replaced with a suitable discharge.

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APPLICANT CONTENDS THAT:

His DD should never have been affirmed by the Air Force Court of Criminal Appeals (AFCCA). His sentence was approved and executed, with the exception of the DD. According to *US v. Wilson*, it was deemed an error of the Court to affirm the portion of his sentence pertaining to the DD.

In support of his request, the applicant provides copies of his DD Form 214, *Certificate of Release or Discharge from Active Duty,* as well as documentation related to his sentence and the aforementioned case law.

The applicant’s complete submission, with attachments, is at Exhibit A.

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STATEMENT OF FACTS:

The relevant facts pertaining to the applicant’s discharge, extracted from the applicant’s military personnel records, are contained in the letter prepared by the Air Force office of primary responsibility which is at Exhibit C. Accordingly, there is no need to recite these facts in this Record of Proceedings.

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AIR FORCE EVALUATION:

AFLOA/JAJM recommends denial, indicating there is no evidence of an error or injustice. On 18 Aug 03, the applicant was convicted by general court-martial of storing, processing, displaying, sending, or otherwise transmitting obscene materials; of wrongfully using another person’s account or identity without appropriate authorization or permission; and of possessing visual depictions of a minor engaged in sexually explicit conduct. He was sentenced to a bad conduct discharge (BCD), confinement for 12 months, reduction to the grade of airman basic (E-1), and total forfeitures. While on appellate leave, he was charged with additional offenses under the UCMJ and, on 9 Aug 05, he was convicted by a general court-martial of two specifications of committing indecent acts on a child less than 16 years of age, one specification of taking indecent liberties with a child less than 16 years of age, and one specification of possessing visual depictions of a minor engaged in sexually explicit conduct. He was sentenced to a DD, nine years of confinement, and total forfeitures. The convening authority approved the sentence in its entirety, and ordered that, except for the DD, it be executed. The sentence from the second court-martial was affirmed by the AFCCA on 15 Dec 06. The applicant did not petition the US Court of Appeals of the Armed Forces (CAAF) for grant of review in either case. On 9 Apr 07, the DD was adjudged in the applicant’s second court-martial and executed on 26 Apr 07. The applicant’s reliance on *XXXXXX* is misplaced. In *XXXXX*, the convening authority’s initial action provided, in part: “The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed.” The court found that because the plain language of the action was complete and unambiguous, its meaning must be given effect; the meaning given to the convening authority’s language was the DD was not approved. However, in the applicant’s case, the convening authority’s language expressly approved the DD. Specifically, the 24 Oct 05 action provides: “the sentence is approved, and except for the Dishonorable Discharge, will be executed.” The language deferring execution of the DD is required by the UCMJ, which requires a final judgment as to the legality of the proceedings before a sentence to death, dismissal, DD, or BCD can be executed. Following the appeal process, the applicant’s sentence to a DD was properly ordered executed on 9 Apr 07. There was no error in the convening authority’s action and the applicant is not entitled to relief. The applicant’s request should be denied as untimely as the alleged injustice, i.e. defective action by the convening authority, would have been evident as early as 24 Oct 05. The applicant has provided no excuse for the delay. Accordingly, the Board should deny the applicant’s request as untimely.

A complete copy of the AFLOA/JAJM evaluation is at Exhibit C.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A copy of the Air Force evaluation was forwarded to the applicant on 10 Dec 11 for review and comment within 30 days. As of this date, no response has been received by this office (Exhibit D).

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FINDINGS AND CONCLUSIONS OF THE BOARD:

After careful consideration of applicant’s request and the available evidence of record, we find the application untimely. The applicant did not file within three years after the alleged error or injustice was discovered as required by Title 10, United States Code, Section 1552 and Air Force Instruction 36-2603. The applicant has not shown a plausible reason for the delay in filing, and we are not persuaded the record raises issues of error or injustice which require resolution on the merits. Thus, we cannot conclude it would be in the interest of justice to excuse the applicant’s failure to file in a timely manner.

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DECISION OF THE BOARD:

The application was not timely filed and it would not be in the interest of justice to waive the untimeliness. It is the decision of the Board, therefore, to reject the application as untimely.

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The following members of the Board considered AFBCMR Docket Number BC-2010-03842 in Executive Session on 2 Jun 11, under the provisions of AFI 36-2603:

The following documentary evidence was considered:

 Exhibit A.  DD Form 149, dated 12 Oct 10, w/atchs.

 Exhibit B.  Applicant's Master Personnel Records.

 Exhibit C.  Letter, AFLOA/JAJM, undated.

 Exhibit D.  Letter, SAF/MRBR, dated 10 Dec 10.