DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-087

DISSENTING OPINION ON RECONSIDERATION

[redacted] **Attorney-Advisor:**

This is a proceeding upon reconsideration, conducted under the provisions of 10 U.S.C. § 1552, 14 U.S.C. § 425, and 33 C.F.R. § 52.67. The final decision on the original proceeding in this case, BCMR Docket No. 373-91, was issued by the Board on July 30, 1992. The application for reconsideration was filed on March 2, 1998, and completed on June 23, 1999, upon receipt of copies of the applicant's military records.

This dissenting opinion, dated March 20, 2001, is signed by one of the three duly appointed members who were designated to serve as the Board in this case.

FINDINGS AND CONCLUSIONS

This dissenting opinion on reconsideration adopts Findings 1 through 6, 8 through 10, 12 through 22, 24 through 26, and 38 through 50, as they appear in the majority's Final Decision on Reconsideration. In place of Findings 7, 11, 18, 23, 27 through 37, and 51 through 67 in the majority decision, I have made the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

7. In light of Findings 5 and 6 in the majority decision, I believe that the applicant has proved by a preponderance of the evidence that the statements in the F.B.I. report do not reveal significant events that occurred in Xxxxxx on the evening of October 26, 194x. N.S. and J.M. stated in 1996 that they witnessed a scuffle or argument between L.S. and the applicant in the bar after the latter danced with a white or Native American woman. Five other veterans stated that they had heard about this incident, and an article in the [redacted] about the inquest strongly supports their state-

ments: it reported that "[s]ome seamen aboard the ship said the crime was [the] result of several days quarreling between [the applicant and L.S.] and that [L.S.] had been 'picking on' the negro. Final quarrel is said to have started at a local cocktail bar." In 194x, R.W. denied any meeting between L.S. and the applicant on shore while he was with L.S., but he admitted that they were not together for some 20 to 30 minutes between 10:00 and 11:00 p.m. The fact that the applicant's statement in the F.B.I. report begins with the encounter in the passageway does not prove that nothing happened between him and L.S. in Xxxxxxx. Nor does J.C.'s statement that he did not see L.S. and the applicant together while on liberty prove anything about whether they met and fought at some point in the evening. Although J.M.'s statement in the F.B.I. report does not mention any encounter between the applicant and L.S., he referred at least tangentially to an incident in the bar concerning the applicant dancing with a white woman and to a "fracas" with an unidentified "man." Therefore, I believe that the preponderance of the evidence indicates that the applicant was assaulted in Xxxxxxx because he danced with a white or Native American woman and that L.S. was involved in this fight.

11. In light of Finding 7, above, and Findings 8 through 10 in the majority decision, I believe that the fight in the passageway was a continuation of the fight on shore. I find the statements in the 194x F.B.I. report suggesting that the applicant, a relatively small black man, began insulting and shoving white sailors, including the much larger L.S., in the passageway over the issue of who would help a drunken white sailor to his bunk not credible. While the applicant may have been "moderately intoxicated," there is no evidence indicating that he was so inebriated as to commit such a rash act, especially when he had already been assaulted by L.S. earlier in the evening. R.W.'s 194x statement indicates that L.S. may have stopped in the passageway solely to continue fighting with the applicant, whom he found arguing with A.A. and R.Y. Moreover, the 194x statements indicate that L.S. was using significant force, since his shove sent the applicant into a connecting passageway, and the applicant's statement to the F.B.I. suggests that he first kicked L.S. only to break his hold on his coat and that the second kick was an attempt to keep L.S. from following him. Therefore, I find that the applicant has proved by a preponderance of the evidence that L.S. continued the assault on him begun in Xxxxxxx in the passageway, searched for him through the ship, and attacked him in the berthing compartment because he was black and because he had danced with a white or Native American woman while on liberty in Xxxxxxx.

18. Neither R.W. nor E.G. mentioned the conversation about lynching to the F.B.I., although R.W. did admit to telling the applicant he would "use this pipe" on him if he "cut" L.S. E.G.'s statement to the F.B.I. indicates he was not in compartment 202 until later, after L.S. and the applicant had begun fighting, and none of the other sailors' statements to the F.B.I. mentions E.G. being among those present in compartment 202 at the time. N.S., who overheard R.W.'s threat to "bend" the pipe over the applicant's head if he "cut" L.S., denied hearing any conversation about lynching in his statement

to the F.B.I. R.C. and R.A., who also overheard R.W. convincing the applicant to put his knife away, did not mention any threats of lynching. Although the sailors' statements, as reported by the F.B.I. agent, did not support the applicant's allegation about the conversation about lynching but did mention R.W.'s warning that he would "bend" the pipe over the applicant's head if the applicant "cut" L.S., the applicant's statement in the F.B.I. report about the references to lynching seems very credible. Though apparently intended to stop the applicant from "cutting" L.S., such a threatening conversation would no doubt have heightened the applicant's sense of danger.

23. The applicant told the F.B.I. that L.S. tried to pull him up twice and that as L.S. tried to pull him up, L.S. was choking him and he could "hardly breathe." The applicant's statement is supported by the statements of at least six sailors who told the F.B.I. that L.S. had his arm around the applicant's head, neck, or shoulders when he tried to pull him to his feet. There is no evidence indicating exactly how long L.S.'s attempt to pull the applicant up lasted, and it is quite possible that, as the applicant alleged, L.S.'s arm was severely hurting his neck and stopping him from breathing.

27-37. The majority decision of this Board vastly overrates the completeness, neutrality, and credibility of the 194x F.B.I. report. The F.B.I. agent's job was to prepare a report that would assist the prosecution, and there is no doubt that he attempted to do just that. He could easily have censored the applicant's, J.M.'s, and other sailors' statements either by telling them beforehand that their statements should not include certain information or by leaving out any information he did not wish to include when he typed up the final report. For example, he could have caused the applicant's statement to omit any mention of what happened in Xxxxxxx, and he could have purposely left the identity of the man and the cause of the "fracas" in Xxxxxxx obscured in J.M.'s account of their evening. He could have censored the sailors' descriptions of the fight and choking to diminish any evidence that the applicant was acting in self-defense. The sailors' statements in the F.B.I. report are very unclear about exactly how fiercely L.S. was hitting, kicking, and choking the applicant, and this ambiguity could be by the agent's design to aid the prosecution of the applicant. While the agent might have gotten in trouble for falsifying information in the F.B.I. report, it is very unlikely that he would have gotten in trouble for omitting certain information or for making the sailors' descriptions of the fight sufficiently vague to hide the ferocity of L.S.'s attack. In light of the recent, credible affidavits signed and sworn to by the veterans of the *Xxxxxxx*, I find that the applicant has proved by a preponderance of the evidence that the F.B.I. report is unreliable as an indicator of the cause and character of the fight because it was gathered and, no doubt, edited to aid in his prosecution, rather than to reveal everything that happened that evening in a neutral, unbiased manner. Moreover, as indicated by L.N.'s recent statement that sailors were "covering their butts" after the stabbing, many of the sailors interviewed by the F.B.I. agent may have had compelling reasons to hide the truth of what happened to the applicant that night, and the racists among them would have had no reason to reveal evidence in the applicant's favor. Fifty years later,

those compelling reasons no longer exist, and the racism may be diminished. Therefore, the new, original affidavits of the veterans are more likely to be neutral, accurate accounts of the cause and nature of the fight than are the statements in the F.B.I. report, even though the new affidavits were made more than 50 years after the events in question.

51. The Chief Counsel argued that the applicant should be barred from claiming self-defense because he was intoxicated. However, as the applicant argued, becoming intoxicated should not deprive a man of the right to defend himself from physical assault. Moreover, J.M.'s 194x statement indicated that the applicant drank just five to eight ounces of whiskey over the course of the entire evening, in which case he may have been quite sober, as shown in Finding 8 in the majority decision. In addition, the witnesses told the F.B.I. agent that he was not drunk and knew what he was doing. Given this evidence, it is highly unlikely that the doctor's assessment of his level of intoxication more than two hours after the stabbing and after he was beaten up by the other sailors could be accurate. Therefore, the fact that the applicant drank whiskey while on liberty should not bar him from claiming he stabbed L.S. in self-defense or be considered evidence that he was not making decisions at the time of the stabbing as any reasonable, sober African American man would have in similar circumstances.

52. The applicant cannot be considered to have provoked L.S.'s racist attack. Dancing with someone of another race does not justify an assault. Moreover, the 194x statements indicate that the applicant kicked L.S. in the passageway only to try to get away from him. In addition, both parties had sufficient time to cool off during the break, and the applicant did nothing to provoke L.S. after he entered the berthing compartment, but only warded off his blows, as indicated in Findings 19 and 21 in the majority decision. Furthermore, even if one ignored the evidence concerning the onset of the fight in Xxxxxx, the applicant's interference in the sailors' attempt to get the drunken R.Y. to his bunk is not the sort of "fault" that should preclude him from defending himself from a potentially lethal attack.[1]

53. As Findings 19 through 22 in the majority decision indicate, the statements in the F.B.I. report show that in the berthing compartment, L.S., who was much larger than the applicant, swung at him a several times, chased him, and then began hitting and kicking him. The recent statements of N.S. and other crewmembers indicate that this attack was even more vicious than the 194x statements reveal. While the fight apparently happened fairly quickly, even a minute's worth of blows and kicks can inflict severe injuries. Moreover, as stated in Finding 23, above, while attempting to pull the applicant to his feet, L.S. choked him. A person who has a reasonable belief that he is in imminent danger of death or great bodily harm is justified in killing his

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[1] *See Huber v. United States*, 259 F. 766, 771 (9th Cir. 1919) (holding that not every "fault" or "provocation" precludes a man from defending himself against violent assault).

attacker.[2] The F.B.I. report indicates that other sailors in the compartment, including the Master at Arms who was responsible for keeping order among the enlisted men, had only half-heartedly tried to stop L.S., and the Master at Arms had just threatened the applicant with a pipe and with lynching. Therefore, the applicant could not reasonably expect help from the other sailors in the compartment. Nor could he expect L.S., a very angry racist, to stop beating him voluntarily. The recommended majority decision of this Board ignores or greatly underestimates the potentially immobilizing effect of racism on the other sailors in the compartment and the potentially terrifying effect of their racism on the applicant. Moreover, given his much smaller size, the applicant could not himself stop L.S. from seriously injuring him without resorting to his knife.[3] In light of these circumstances and the fact that a single punch can upon occasion cause great bodily harm or even death, I find that the applicant has proved by a preponderance of the evidence that he acted reasonably in defending himself against L.S.'s attack with a deadly weapon and that his stabbing of L.S. was justified as self-defense.[4]

54. The applicant's decision to resort to his knife was also justified because the fight in the berthing compartment happened so quickly that he had little opportunity to seek the protection of the Officer of the Day. Even if he had decided to do so earlier, he was on a ship and could not hope to elude L.S. and his racist friends indefinitely. Going to the Officer of the Day for protection immediately after the incident in the passageway might have stopped L.S. from beating him up that night, but would not have prevented L.S. or another sailor from injuring him or killing him later. After L.S. entered the compartment and chased him, the applicant had nowhere to go that he could expect to reach safely. In going to his bunk, he had retreated "to the wall" and so was forced to use his knife in self-defense.

55. Although court documents indicate that the applicant was properly indicted and arraigned and that he pled guilty to voluntary manslaughter on February 13, 194x, perfect procedure does not prove that the applicant received true due process by modern standards. Most of the witnesses were thousands of miles away in the Far East and could not easily or quickly be brought back to Xxxxx. Moreover, the record

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[2] *Owens v. United States*, 130 F. 279 (9th Cir. 1904); *Anderson v. United States*, 170 U.S. 481, 508 (1989).

[3] *See State v. Spaulding*, 275 S.E. 391 (1979) (holding that the respective size of the parties in a fight is relevant to whether use of a deadly weapon was justified); *State v. Koutro*, 210 N.C. 144, 146 (1936) (holding that self-defense is justified "where from a fierceness of heart and difference in the size of the parties, the character of the parties, or other surrounding circumstances, the person assaulted has reasonable grounds to believe he is about to suffer death or great bodily harm").

[4] *See State v. Born*, 159 N.S.2d 283 (Minn. 1968) (upholding a conviction for assault with a dangerous weapon because "where defendant pursued his victim as he sought to escape and, overtaking him, used his fist to knock him to the floor and his feet to stomp him as he lay there without effective means of defense, the jury could reasonably find that defendant employed an instrumentality which was dangerous in the sense that the assault perpetrated was likely to produce a protracted impairment of the functions of the members or organs of the individual subjected to this extraordinary treatment").

does not show whether the U.S. District Attorney gave the applicant's counsel a copy of the F.B.I. report, so it is unclear if he knew that the captain of the *Xxxxxxx* had stated that the Coast Guard would make additional witnesses available if necessary. Even if he did know of the captain's statement and the Coast Guard had agreed to send other witnesses subpoenaed by the court back to Xxxxx, the applicant's trial would likely have been delayed for several months while their return was arranged. It is possible that testimony by these witnesses might have helped the applicant prove that he stabbed L.S. in self-defense. In addition, the recent statements by N.S., J.M., and P.V. indicate at the very least that the attorney's investigation of the case was not terribly involved, which is not surprising since he had two weeks or less in which to complete his investigation and prepare for the applicant's trial for second-degree murder. Under these circumstances, I find that the applicant and his counsel had no realistic chance to prepare and present a meaningful defense. Therefore, his decision to plead guilty to manslaughter cannot be held against him.

56. The applicant alleged that his pardon by the Governor of Xxxxx vacated his conviction, and so the basis for his undesirable discharge no longer exists. As stated in the majority's decision in this case, the courts have long established that a pardon issued by a state governor has no legal effect on any disability or punishment imposed by the federal government as a result of the pardoned individual's original conviction. However, even if the Governor's pardon had no legal effect on the applicant's discharge, the Board must consider whether justice requires that the applicant's discharge be upgraded because of the pardon. The Governor based his pardon on (a) the applicant's having served his sentence, (b) the applicant's "exemplary life since his release from custody," (c) the evidence in the 1996 affidavits supporting his allegation that he stabbed L.S. in self-defense, and (d) the "unusual conditions of wartime" that made many eyewitnesses "unavailable to testify."

(a) The Governor's pardon indicates that he thought the applicant had served his five-year sentence. The record indicates that the applicant was released early in November 194x, presumably because of good behavior.

(b) The Governor concluded that the applicant had led an "exemplary life" because, since his release from prison in 194x, he has not been charged with a crime, and he was gainfully employed until his retirement. The record also indicates that he raised a family. Although the General Counsel of the Department of Transportation has ruled that "the Board should not upgrade discharges solely on the basis of post-service conduct,"[5] post-service conduct should be a consideration in making a decision to upgrade a discharge.

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[5] Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records, July, 8, 1976.

(c) As indicated in Findings 7, 11, and 53, above, the attack on the applicant was racially motivated, and the preponderance of the evidence indicates that the applicant acted in self-defense, just as the Governor concluded.

(d) As stated in Finding 55, above, the absence of many of the witnesses from Xxxxx unjustly denied the applicant the right to present a meaningful defense.

Therefore, although the Governor's pardon had no legal effect on the applicant's military discharge, it is evidence that the applicant has been exonerated and that the character of his military discharge should be upgraded in the interest of justice.

57. The applicant alleged that, absent his conviction for manslaughter, he would have received an honorable discharge. When the applicant was discharged on April 27, 194x, the Coast Guard was no longer operating under the auspices of the Navy.[6] Under the Coast Guard's regulations in effect at that time, an honorable discharge could be received by members whose average marks were no lower than 2.75 in proficiency or 3.0 in conduct and whose records showed no more than one summary court-martial or no more than two deck court-martials.[7] Members who did not meet these criteria were issued general discharges unless they committed an offense that caused them to receive an undesirable or dishonorable discharge.

58. If the applicant had received a fair trial, he might well have been fully acquitted on the basis of self-defense. Without his conviction and the evaluation marks of zero he received while in prison, the applicant would have no more than one summary court-martial in his record, and his evaluation marks might well have been above the minimum. Although what his final average marks would have been is uncertain because his marks during his first two years are not in the record before the Board, it is clear that the marks of zero he received while in prison were calculated into the final averages shown in his record, 2.39 for proficiency and 2.91 for conduct. If the marks of zero had not been factored in, his final marks might easily have been above 2.75 in proficiency and 3.0 in conduct. Therefore, under the regulations then in effect, the applicant would likely have received an honorable discharge but for his unjust conviction for manslaughter.

59. The applicant has proved by a preponderance of the evidence that he stabbed L.S. in self-defense, that he was denied due process and unjustly convicted of manslaughter, and that his undesirable discharge was based on that unjust conviction. In addition, he has spent the balance of his life as a gainfully employed, law-abiding citizen, raising a family. In light of the laws precluding court-martial and the evidence

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[6] Exec. Order No. 9666 (December 28, 1945).

[7] United States Coast Guard, PERSONNEL INSTRUCTIONS, Art. 4592(1) (1934).

in the F.B.I. report, the applicant has not proved that the Coast Guard committed any error in deciding to hand the applicant over for civilian prosecution. Nor could the Coast Guard have been expected to leave all of the numerous crewmembers who witnessed important events in this case behind in Xxxxx when the *Xxxxxxx* sailed for the Far East. However, although the applicant has not proved that the Coast Guard committed any errors or injustice in handling his case, he has proved that his undesirable discharge is an injustice because the unusual circumstances of the case prevented him from proving to the court that he stabbed L.S. in self-defense. Therefore, the applicant's request for relief should be granted, and the Order that I believe would be just follows.

ORDER

The application for correction of the military record of former fireman first class, xxxxxxxxxxxxxxxxxxxxxx, USCGR, is hereby granted. The Coast Guard shall correct his military record to show that he received an honorable discharge.

[redacted]