DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-087

FINAL DECISION ON RECONSIDERATION

ANDREWS, 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 recommended final decision on reconsideration, dated March 20, 2001, is signed by two of the three duly appointed members who were designated to serve as the Board in this case. The third member of the Board has submitted a dissenting opinion.

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INTRODUCTION

RELIEF REQUESTED

The applicant, a fireman first class (FN1) on active duty in the Coast Guard Reserve during and after World War II, asked the Board to reconsider its decision in BCMR Docket No. 373-91 denying his request to upgrade the character of his discharge from undesirable to honorable. He served in the Coast Guard from August 18, 194x, until April 27, 194x, when he was discharged after having been convicted of manslaughter in the U.S. District Court for the Territory of Xxxxx and sentenced to five years in a federal penitentiary.

FINAL DECISION IN BCMR DOCKET NO. 373-91

In the applicant's original case before the BCMR, filed on August 29, 1991, he alleged that he had been a victim of racial discrimination. He alleged that he "was charged with manslaughter but [he] never received a trial or had the chance to defend [him]self."

The applicant did not provide any further information or submit any evidence to support these allegations. He stated that he had not previously applied to the BCMR for relief because he "did not know that [he] could appeal prior decision due to hospitalization."

In his advisory opinion for the original application, the Chief Counsel of the Coast Guard explained that the applicant had received an undesirable discharge for misconduct after pleading guilty to manslaughter in February 194x and being sentenced to five years in prison. The Chief Counsel alleged that the applicant had previously been convicted by summary court-martial for an earlier assault with a dangerous weapon in 194x. The Chief Counsel further alleged that, in 1951, the Secretary of the Treasury had approved a decision of the Coast Guard Board of Review, Discharges, and Dismissals (the predecessor to the Discharge Review Board), which had "concluded that Applicant's discharge was legal, proper, just, and equitable under applicable standards of Coast Guard and naval law and discipline."

On July 30, 1992, the BCMR denied the applicant's application for untimeliness and lack of proof, because the passage of time had severely hindered the Coast Guard's ability to investigate the case and the applicant had submitted no evidence in support of his allegations.

On September 15, 1992, the applicant submitted further evidence and allegations. He explained that one night, after dancing with a white woman at a bar, he returned to his ship, reported that a group of southern white members were out to get him, and went to his bunk. He then "received the beating of [his] life" and his vertebra was cracked. He alleged that during his subsequent prison term, xxxxxxxx infected his spine through the crack, and he later lost hearing in one ear due to his treatment for xxxxxxxx.

The applicant submitted copies of a letter from a doctor dated January 11, 1972, stating that the applicant had undergone a spinal fusion for xxxxxxxx, and a letter from the New York League for the Hard of Hearing dated September 16, 1982, stating that the applicant should be excused from jury duty due to his hearing loss. He also submitted copies of a page from his Coast Guard medical records showing that he had been treated for Xxxxx throughout his time in service and a 194x letter informing him that he had been turned down for National Service life insurance because of Xxxxx and albumin in his urine.

On September 24, 1992, the BCMR informed the applicant that his recent submissions had not met the standard for reconsideration set out in 33 C.F.R. § 52.67(b). Therefore, his case would not be reconsidered.

PROCEDURE UPON RECONSIDERATION

On March 2, 1998, the applicant filed an application for reconsideration. In light of the substantial new evidence submitted by the applicant and his 1997 pardon by the Governor of Xxxxx, the Chairman of the BCMR docketed the case on June 22, 1998, and waived the statute of limitations under 33 C.F.R. § 52.67(e). The BCMR then ordered the applicant's military record from the National Personnel Records Center (NPRC), in accordance with the requirements of 33 C.F.R. § 52.21(c)(2). However, despite numerous requests, the NPRC never found the applicant's official military records.

On June 23, 1999, the BCMR received from the applicant's attorney of record photocopies of many of the applicant's military records. Therefore, the Chairman determined that his application was complete under 33 C.F.R. § 52.21(c). On June 30, 1999, the Chief Counsel of the Coast Guard submitted his advisory opinion in accordance with 33 C.F.R. § 52.82. On July 1, 1999, that recommendation was sent to the applicant and his attorney of record with an invitation to respond within 15 days, in accordance with 33 C.F.R. § 52.82(d).

On July 16, 1999, the applicant's attorney requested an extension of the time to respond to the advisory opinion until August 30, 1999, which the BCMR granted. On August 27, 1999, he wrote to the BCMR requesting a further extension of 60 days, through October 29, 1999, which was granted. On November 1, 1999, he wrote to the

BCMR requesting a further extension of 45 days, through December 13, 1999, which was granted. On December 9, 1999, he wrote to the BCMR requesting a further extension of one month, through January 13, 2000, which was granted. On January 12, 2000, he requested a further extension of one week, through January 20, 2000, which was granted.

On January 27, 2000, the BCMR received the applicant's response to the Chief Counsel's advisory opinion. Because the response included a substantial amount of new evidence, a copy was forwarded to the Chief Counsel of the Coast Guard for review, in accordance with 33 C.F.R. § 52.82(a), with a request that he respond within 90 days. On May 5, 2000, the BCMR received the Chief Counsel's supplemental response. On May 10, 2000, a copy of the supplemental response was sent to the applicant's attorney with an invitation to respond with 15 days, in accordance with 33 C.F.R. § 52.82(d). On May 19, 2000, the applicant's attorney requested an extension of 30 days, which was granted. On June 23, 2000, he requested a further extension of three weeks, through July 15, 2000, which was granted. On July 19, 2000, the BCMR received his response, which included a new affidavit, to the Chief Counsel's supplemental response. The applicant's final response was forwarded to the Chief Counsel's office not for comment but for informational purposes only.

APPLICANT'S INITIAL ALLEGATIONS

ALLEGATIONS OF FACT

In his application for reconsideration, the applicant alleged that his unjust conviction for manslaughter was the sole basis for his undesirable discharge in 194x. He alleged that the Governor of Xxxxx had granted him "a full and unconditional pardon" on November 26, 1997, and thereby vacated his conviction. Therefore, he alleged, the BCMR should upgrade his undesirable discharge to an honorable discharge.

The applicant alleged that in October 194x, he was one of four black members of a 150-member crew aboard the *U.S.S. Xxxxxx*. He alleged that many of the crew were racist and would refer to him and other black sailors with racial slurs.

On the night of Friday, October 26, 194x, the applicant alleged, the *Xxxxxx* was moored at Xxxxxx in the Territory of Xxxxx, and the starboard watch, of which he was a member, was granted liberty until midnight. He and J.M., a black sonarman, went to a cocktail lounge, where the applicant danced with several women, some of whom were white. The applicant alleged that, while he was dancing with a woman who was either white or Native American, several of his shipmates approached them. A seaman first class from Oklahoma, L.S., asked the woman to dance with him, but she declined. Heated words were exchanged, and L.S. and another shipmate, R.W. from Texas,

threatened to "do him up like they do in Texas and Oklahoma." A friend advised the applicant and J.M. to leave the lounge.

The applicant alleged that he returned to the *Xxxxxxx* before midnight, went to the bridge, and told an officer that he had been threatened by L.S. and others. The officer told him to go to his bunk. Several of his shipmates returned to the ship from the lounge around midnight and began looking for him and making threats. The applicant was discovered and chased by L.S. He ran to his bunk, where he was cornered. He alleged that L.S., who was much bigger than he, then began to beat him viciously. The applicant alleged that he began to feel an incredible amount of pain, especially in his back, and nearly lost consciousness. As a result, he fell to his knees. L.S. began kicking him, so he reached into his foot locker and grabbed a knife with which to defend himself. He alleged that he stabbed L.S. to save his own life when "confronted with a deadly force."[1]

The foregoing allegations appear in the applicant's brief and are apparently based on recent statements of fellow crewmembers collected by his counsel. In 1996, the applicant signed an affidavit[2] containing the following statement, which describes the stabbing incident somewhat differently:

> … I was lying in my bunk when I looked up and saw between five and ten men surrounding me. One of the men grabbed me from behind and had me in a choke hold. At the same time I felt a knee jam into my back and I felt an incredible amount of pain. I felt that my back had been cracked. I was also being severely beaten by the others and was trying my best to escape the beating. I was kicked and punched repeatedly by the men. No one ever tried to help me. As I was being beaten, I began to lose consciousness and I remember blacking out for a time. When I regained consciousness, I crawled up a ladder to the deck and sought the protection of the officers. They told me that I had killed [L.S.].

In his brief, the applicant alleged that, after the stabbing, many of the crew began to punch and kick him until the officer of the deck, who was armed, stopped them and escorted the applicant out of the compartment. On his way out, the applicant alleged, he was struck in the back with a fire extinguisher, which cracked a vertebra. Soon afterwards, the ship's lights were turned off in an attempt to calm the crew. The applicant was guarded until 1:20 a.m., when he was placed in the custody of a federal marshal on shore.

The next day, Sunday, October 28, 194x, the remaining black sailors were also removed from the *Xxxxxxx* for their own safety because of the racist tensions among the

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[1] One of the crewmembers, P.V., provided a very different account of these events in a 1995 affidavit (see page 32). The applicant alleged that P.V.'s 1995 affidavit differed greatly from what P.V. told the F.B.I. in 194x and that P.V. disavowed and denied signing the 1995 affidavit when he learned that his 194x statements to the F.B.I. had been found.

[2] The affidavit is excerpted in Appendix B of this Final Decision on Reconsideration.

crew. They too were placed in the custody of the marshal even though they had not participated in the incident. However, the applicant alleged, even in the Xxxxxxx jail, they were not safe because some of the crew later aimed one of the ship's three-inch guns at the jail intending to blow it up but were stopped by an officer. The *Xxxxxxx*, the applicant alleged, never again had black crewmembers.

On Monday, October 29, 194x, a coroner's inquest was held in Xxxxxxx. On October 30th, the applicant was charged with first-degree murder, arraigned, and held without bail. He was soon transferred to Xxxxxxx. The *Xxxxxxx* also went to Xxxxxxx but soon set sail for China, leaving all its black crewmembers behind and taking all but six of the witnesses with it. The applicant alleged that many sailors failed to tell the authorities what they knew because they were afraid of revealing their involvement, of incurring the wrath of their racist shipmates, and of being left behind for a lengthy stay in Xxxxx.

Because no grand jury was scheduled to be convened in Xxxxxxx until October 194x, the applicant agreed to be sent to Xxxxx to be tried in January. On January 26, 194x, the applicant was indicted for second-degree murder in Xxxxx. He was arraigned on January 29th. On February 1, 194x, the applicant alleged, a plea of not guilty was entered on his behalf by his assigned counsel, M.E.M., whom he had never met. Trial was set for one week later, February 8, 194x. On that day, it was reset for February 13th.

On February 13, 194x, the applicant alleged, M.E.M. entered a plea of guilty to the charge of manslaughter on his behalf without ever having consulted the applicant. The applicant alleged that he first met M.E.M. later that day. "He told me that my case had been taken care of and that he had made a plea of guilty to manslaughter on my behalf and I was going to serve a five year sentence. He told me that this was better than the twenty years I would have gotten for murder. I never gave him permission to make a plea on my behalf." For years, the applicant alleged, he believed that he had not been allowed to appear in court because his clothes were still on the *Xxxxxxx*.

On February 18, 194x, the applicant was sentenced to five years in a federal penitentiary. He alleged that, while serving those years in prison, he contracted xxxxxxxx. Treatment for the xxxxxxxx, he alleged, later rendered him almost completely deaf. He alleged that he also had to undergo spinal fusion due to the back injury he had received when he was beaten on the *Xxxxxxx*. The applicant alleged that because of his undesirable discharge, he received no veterans' benefits for these ailments.

The applicant alleged that in 1951, he appealed his discharge to the Discharge Review Board, but relief was denied.

The applicant further alleged that in the intervening 50 years, he "has lived an exemplary life" and "has had no further encounters with the criminal justice system.

He has been neither charged with, nor accused of, any further crimes." From 1955 to 1971, he worked in an umbrella factory. From 1971 until he retired in 1985, he worked as a bookkeeper at a bank.

APPLICANT'S LEGAL ARGUMENTS

Timeliness

The applicant alleged that his application should not be barred by the doctrine of laches because he applied promptly after his pardon in 1997. Furthermore, the pardon and his application to the BCMR are based upon evidence that was not previously accessible to him. Therefore, under *Hirabayashi v. United States*, 828 F.2d 595 (9th Cir. 1987), and *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), the doctrine of laches should not apply. The applicant argued that the evidence was not accessible because it came to light only after an investigation that consisted of placing more than 1,000 phone calls to all 50 states; hiring two private investigators to locate witnesses; locating and retrieving old military records; and acquiring the aid of the Solicitor General of the United States in obtaining old files of the Federal Bureau of Investigation (F.B.I.). The applicant argued that, like the plaintiff in *Hirabayashi*, he could not be faulted for not uncovering this information on his own. Therefore, he argued, the Board should waive its statute of limitations.

Self-Defense

The applicant alleged that he when he stabbed L.S., he was acting in self-defense against a deadly force. He alleged that his actions met the definition of self-defense under both statutory law and case law.[3] He alleged that 24 witnesses have provided testimony proving that he had good reason to fear for his life and that he acted in self-defense when he stabbed L.S. He also alleged that the medical evidence supports his allegation that he was being viciously beaten when he stabbed L.S.

Due Process

The applicant alleged that, because the Coast Guard removed most of the witnesses to the incident when the *Xxxxxxx* sailed off to China, he was "deprived of his right to a fair trial, under the Due Process Clause of the United States Constitution. His ability to prepare a defense based on eyewitness testimony was abolished." The applicant alleged that, even if his attorney had requested a continuance, he could not have found the witnesses because the *Xxxxxxx* was constantly on the move in exotic locales. Moreover, since the war was over, sailors were being discharged and deposited at many different ports along the way.

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[3] XXXXX STAT. § 11.81.335; *Owens v. United States*, 130 F. 279, 281 (Ct. App. 1904).

Furthermore, the applicant argued, he was denied the right to effective counsel because his attorney was not appointed until his arraignment a few days before the trial date, could not gather evidence from absent witnesses, did not consult him before the trial date, and entered a guilty plea without his consent.

The applicant argued that the court transcripts that indicate his presence at the arraignment and trial "are so formulaic and pro-forma that they are unconvincing as a means of establishing that [the applicant] was in court." The reliability of the court transcripts cannot be presumed, he argued, because three of the seven sailors named as witnesses before the grand jury have since stated that they did not testify or cannot recall testifying before the grand jury. (Of the remaining four sailors, three are deceased and one was not located.) Therefore, the presumption of regularity accorded court documents should not apply in this case, the applicant argued. The applicant also argued that further doubt is cast on the reliability of the proceedings because the documents indicate he pled guilty just minutes before his trial was to begin, yet two of the witnesses stated that they never spoke with the prosecutor.

Thus, the applicant alleged, he "was denied the opportunity to prepare a defense as guaranteed and proscribed [sic] by the land mark case of Powell v. Alabama, 287 U.S. 45 (1932)." He further alleged that, had he been permitted to prepare a proper defense, the jury would have found that he acted in self-defense.

The applicant argued that, even if one assumes that he did plead guilty, the plea cannot be considered a waiver of his right to trial because the trial he was offered was not constitutionally valid: it did not include the right to present the testimony of the witnesses because the witnesses were unavailable. The applicant argued that "[b]y pleading guilty, [he] was doing nothing more than acknowledging the loss of rights that had already been effectively denied." As the Court held in *Powell v. Alabama*, "[i]t is vain to give the accused his day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts … of the case."[4] Furthermore, he argued, because the grand jury witnesses apparently never actually appeared before the grand jury, any "plea of guilty to a charge stemming from such a defective indictment" should be considered void.

The applicant also argued that the Coast Guard should have retained jurisdiction over his case because both the accused and the victim were servicemembers and the stabbing occurred on a military vessel. He alleged that the due process violations that resulted in his conviction probably would not have occurred had the Coast Guard retained jurisdiction over the case. He alleged that, in a court-martial conducted under the Articles of War, he would have had access to all the evidence known to the govern-

[4] *Powell v. Alabama*, 287 U.S. 45, 70 (1932).

ment, whereas in a common law criminal prosecution, discovery was limited "to some tangible evidence, inspection of grand jury witnesses and a list of government witness names." He alleged that in a court-martial, he could have subpoenaed witnesses and requested an investigating officer to obtain further evidence on his behalf.[5] The Coast Guard could have ordered the subpoenaed witnesses to appear and transported them to Xxxxx or whatever site it chose for the court-martial.[6] Furthermore, a military judge could have granted a continuance if more time was needed to gather the witnesses.[7]

In contrast, the criminal code of the territory contained no provisions for discovery. The private attorney assigned to his case at the arraignment would have had to bear the cost of transporting any witnesses to Xxxxx, were that even feasible after they had sailed away on the *Xxxxxxx*. The territory only reimbursed the travel expenses of witnesses for indigent defendants if the witnesses were located within the district or within 100 miles of the court.[8]

The applicant argued that the only reason the Coast Guard failed to court-martial him was because he was black and there was racial animus on board the *Xxxxxxx* after the incident. Therefore, the captain did not want him or any of the other black sailors to remain on board. Thus, he was denied due process in large part because of his race.

Pardon

The applicant argued that his discharge should be upgraded from undesirable to honorable because it was based solely upon his conviction, which was vacated when he was pardoned by the Governor of Xxxxx in 1997. He alleged that a letter written by the Deputy Chief of the Coast Guard's Congressional Affairs Staff in 1993 (see page 46) proved that the conviction was the sole basis for his undesirable discharge.

The applicant argued that the Governor's pardon vacated his federal conviction because jurisdiction over his case "devolved upon the State of Xxxxx" under the Xxxxx Statehood Act. He argued that "[a] full pardon 'frees the criminal without any condition whatever[, erasing both] the punishment prescribed for the offense and the guilt of the offender. It obliterates in legal contemplation the offense itself.'"[9] He alleged that the pardon showed that he had acted in self-defense in a racially motivated attack and that he had not received a fair trial.

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[5] THE ARTICLES OF WAR, Art. 70, 10 U.S.C. § 1471 (1920).
[6] Calvin M. Lederer, *Warrants of Attachment: Forcibly Compelling the Attendance of Witnesses*, 98 MIL. L. REV. 1, 2 (1982), *citing* MANUAL FOR COURTS-MARTIAL, para. 115(a) (1969).
[7] THE ARTICLES OF WAR, Art. 20, 10 U.S.C. § 1471 (1920).
[8] COMPILED LAWS OF XXXXX § 5423 (1933).
[9] *State v. T.M.*, 860 P.2d 1286, 1290 n.3 (Alaska Ct. App. 1993) (quoting BLACK'S LAW DICTIONARY (6th ed. 1990)).

SUMMARY OF THE EVIDENCE

APPLICANT'S MILITARY RECORD

The applicant was born on July 29, 192x, in xxxxxxxxxxx, xxxxxxxxxxxx. He enlisted in the Coast Guard Reserve on August 18, 194x, as a seaman third class.

He was promoted to seaman second class on November 27, 194x, and to seaman first class on February 20, 194x. On May 29, 194x, he was promoted to fireman second class.

On June 30, 194x, the applicant went to captain's mast for failing to carry out a lawful order and was awarded non-judicial punishment (NJP).

On October 14, 194x, the applicant appeared before a summary court-martial at the Coast Guard barracks in New York City for "wilfully, maliciously, and without justifiable cause" assaulting and wounding another member of the Coast Guard with a hunting knife on August 18, 194x. The member was cut on his left arm, left elbow, and left wrist. The charge was proved, and his sentence was confinement for two months, extra duties for two months, and a fine of $132.

On January 1, 194x, the applicant was promoted to fireman first class.

On November 1, 194x, the applicant went to captain's mast for failing to report to work and was awarded NJP of 10 days' restriction and 20 hours of extra duty.

The applicant was reported by his commanding officer in Charleston, South Carolina, to be AWOL (away without leave) from December 19, 194x, to December 26, 194x. He was apprehended by the Navy Shore Patrol in Jacksonville, Florida.

On June 20, 194x, the applicant began serving on the *U.S.S. Xxxxxxx*. For his service overseas on the *Xxxxxxx*, the applicant became eligible to wear the Asiatic-Pacific Area Campaign Medal and the American Campaign Medal.

The applicant's DD Form 214 indicates that he was discharged on April 27, 194x, with an "undesirable" character of discharge. His final average marks were 2.39 for proficiency and 2.91 for conduct.[10]

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[10] The copy of the applicant's record provided by his counsel did not include the evaluation marks he received during his first two years on active duty after his enlistment on August 18, 194x. His quarterly marks thereafter were as follows: 9/30/4x: 3.0 for proficiency, 4.0 for conduct; 11/1/4x: 2.5 for proficiency, 2.5 for conduct; 3/31/4x: 3.0 for proficiency, 4.0 for conduct; 6/14/4x: 3.0 for proficiency, 4.0 for conduct; 9/30/4x: 2.5 for proficiency, 4.0 for conduct. In addition, the applicant received nine

LOG OF THE *U.S.S. XXXXXXX*

Just after midnight, on Saturday, October 27, 194x, the ship's log notes that the "liberty party" returned on time. The log records the stabbing incident and its aftermath as follows:[11]

> 0035 [12:35 a.m.] – Fight reported on after berth deck, Officer-of-the-Deck below to investigate. Discovered [L.S.] to be severely injured, results of knife wounds inflicted by [the applicant]. 0040 – [L.S.] pronounced dead by [the ship's doctor]. 0055 – [R.S.] and shore patrol of four (4) men returned. 0100 – [The applicant] placed under armed guard. 0110 – [R.Y.] placed on report by the [Officer of the Deck] for disorderly conduct. 0120 – [The applicant] placed in custody of U.S. Marshall … for confinement in Federal brig. The following named men placed in custody of U.S. Marshall … for safe-keeping: [F.W., J.M., and M.W.][12] 0130 – Security watch of two (2) officers, one (1) chief and three (3) guards placed throughout the ship; security patrol stationed on dock. 0200 – Two (2) shore patrol dispatched to Federal Brig as sentries. 0205 – Dr. [A.N.], coroner of Xxxxxxx, Xxxxx, aboard. 0230 – Body of [L.S.] removed to Xxxxxxx morgue for autopsy by [the ship's doctor], and Dr. [A.N., the local coroner].

At 4:00 p.m. that day, the log notes that the body of L.S. was taken by plane to Xxxxxxx for burial in a Coast Guard plot.

On October 28 and 29, 194x, the ship's log notes that the crew were "maintaining Brig watch at U.S. Federal Building." At 9:30 a.m. on Monday, October 29th, the log indicates that the "Board of Investigation party and witnesses departed for U.S. Federal Building." The party returned at 11:45 a.m. and departed again at 12:55 p.m. At 2:00 p.m., the log notes that "[t]he following persons appeared in Justice's Court … in accordance with Justices Court Subpoena of 29 October, 194x … : [the ship's doctor]; [R.W.]; [R.D.]; [R.A.]."

On Tuesday, October 30, 194x, the ship's log notes that at 3:25 p.m., "[the applicant was] delivered to custody of … Deputy U.S. Marshal on a warrant issued for his arrest by U.S. Commissioner's Court, Xxxxxxx, Xxxxx, charging the crime of murder." At 9:45 p.m., the log notes that the "[p]ersonal gear belonging to [the applicant was] transferred to Federal Building, Xxxxxxx, Xxxxx, as per invoice no. 46-44."

On Wednesday, October 31, 194x, the ship's log notes that the crew was still maintaining the brig watch at the Federal Building where the applicant was held. At 10:15 a.m., the log notes that an agent of the Federal Bureau of Investigation (F.B.I.)

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conduct marks of 4.0 for very short-term periods during the year before the stabbing. From 11/1/4x to 4/27/4x, he received marks of 0.0 in proficiency and conduct for four evaluations.

[11] For privacy purposes, crewmembers are identified by their initials rather than by name in this decision. Because some crewmembers have the same initials, certain crewmembers are identified by initials consisting of the first letters of their first names and the last letters of their last names.

[12] These three were the only other black crewmembers serving on the *Xxxxxxx*.

came on board to interview witnesses and for transportation to Xxxxxxx. The log also notes that F.W., J.M., and M.W., the three other black sailors "reported on board for return to regular duty." The ship sailed to Xxxxxxx the same day.

On Thursday, November 1, 194x, the ship's log notes that F.Z., R.W., E.G., N.S., R.D., and P.V. were transferred off the ship pursuant to instructions in ALCOAST bulletin 99-44.

On Friday, November 2, 194x, the ship's log notes that F.W., J.M., and M.W., as well as another sailor, T.S., were transferred off the *Xxxxxxx* pursuant to ALCOAST 99-44. The ship left Xxxxxxx the same day with orders to sail to the Far East.

STATEMENTS IN THE 194x F.B.I. REPORT

The F.B.I. agent who boarded the *Xxxxxxx* to investigate the stabbing completed his report on November 28, 194x. The report states that the applicant was delivered over for civilian prosecution because "under articles governing the Navy or Coast Guard, neither had authority to court martial a man for the crime of murder if it was committed within the territorial jurisdiction of the United States." The F.B.I. report included 20 statements attributed to the applicant and other crewmembers after their interviews with the agent.[13] The agent reported that the statements were made in duplicate and that the duplicate copies were given to the U.S. District Attorney in Xxxxx, Xxxxx. Large excerpts of these statements appear in Appendix A to this decision. The statements are summarized below.

194x Statement of the Applicant[14]

The applicant stated that, after returning to the ship from shore leave, he had been in the Mess Hall with his friend, J.M., but was heading to bed about 12:05 a.m., when he ran into L.S., R.W., and R.Y., who was very drunk, in a passageway. The applicant made no mention of any incidents on shore.

The applicant stated that in the passageway, L.S. shoved him and said, "go hit your sack you black cocksucker." L.S. grabbed the applicant's coat. The applicant stated that he then kicked L.S. in the abdomen, ran down the passageway, turned

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[13] The use of personal pronouns indicates that the applicant and some sailors wrote or dictated and signed their statements themselves, while other statements were apparently typed up by the F.B.I. agent after his interviews. However, the BCMR does not have any of the original 194x statements.

[14] The agent reported that he interviewed the applicant in the Xxxxxxx jail between 9:30 p.m. on October 30, 194x, and 1:30 a.m., October 31st, after he was arraigned by the Commissioner. The agent reported that the applicant "was advised of his constitutional rights" and that his statements "were reduced to writing and signed by" the applicant.

around, and kicked him in the abdomen again because L.S. had followed him. Then he heard R.W. yell "get him," and he ran toward his berthing compartment.

The applicant stated that, as he was "undogging" (opening) a hatch, R.W. found him and told him L.S. was going to bed and that the applicant should not have kicked L.S. The applicant also stated that although a pipe was "involved," he did not remember having it in his hand or handing it to R.W.

The applicant went to his locker near his bunk and opened it. L.N. told him not to get into trouble. He heard R.W. say that he was "a knife man." R.W. told him repeatedly that if he "cut" L.S., R.W. would "bend a pipe over" the applicant's head. R.W. also said "I'll do you like they do Negros in Texas." Then E.G. and R.W. talked about how "they hang and beat Negros in Texas." The applicant stated that he had not seen his knife yet and that he told R.W. his knife was locked up.

The applicant stated that he then squatted down and opened his locker, which was not in fact locked. L.S. entered the room looking for him, and B.C., who was near the hatch, pointed the applicant out by saying "there that Negro is." L.S. came "charging after" him "attempting to hit" him. The applicant used his arms to "knock off" L.S.'s blows and then ran around some of the bunks. The applicant stated that he ran through a crowd of men, stumbled, and was caught or held by one or two sailors. He told them, "Hold [L.S.], don't hold me." He continued running and fell down near his locker.

The applicant stated that he was on the ground by his locker when L.S. gripped him by the neck, with his arm under the applicant's chin. He could hardly breathe, but then L.S. dropped him. The applicant stated that as he tried to retrieve his knife from his locker, L.S. tried to pull him to his feet, but he got the knife, pulled it out of its sheath, and rose to his feet, while L.S. was still "strangling" him. The applicant stated that his right arm and hand, holding the knife, went over L.S.'s back, but then his mind went blank, and he could not recall the rest, except that some sailors started punching and kicking him before the Officer of the Day arrived and stopped them.

194x Statement of J.M.[15]

J.M., a black petty officer and the applicant's friend, stated that he accompanied the applicant while they went on shore leave. In his description of their evening on liberty, J.M. did not mention running into L.S. at all. He stated that the applicant drank five or six shots or "approximately 1/2 pint of whisky" over the course of the evening.

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[15] J. M.'s 1996 statement is summarized on page 30.

J.M. stated that in one bar, the applicant danced with a white girl. Later, the applicant asked the girl to dance again, but she refused and told him he was too drunk. J.M. said that if he had been she, he would have refused to dance with the applicant too. J.M. also stated that later in the evening, the applicant got into an argument with another sailor, whom J.M. did not know.[16] He did not indicate the cause of the argument.

J.M. stated that he and the applicant left the bar to return to the ship and were followed by the man with whom the applicant had argued. The three of them went to the Mess Deck and continued to argue. The applicant soon said he was tired of arguing and left to go to bed, leaving the other two on the Mess Deck. J.M. estimated that this happened sometime between 12:15 and 12:30 a.m.

Shortly thereafter, L.S. and another sailor entered the Mess Deck and asked J.M. if he knew where the applicant was. L.S. told J.M., "If I find him, I'll kill him. He kicked me in my stomach." B.C. and F.R. advised J.M. that four sailors were looking for the applicant and "had it in for him" because he had kicked L.S. in the stomach. J.M. stated that he told F.R. that "he had done his best all evening to keep [the applicant] out of trouble so that any further trouble in which he got involved would be his own neck." J.M. said he then went to bed.

Regarding race relations on board, J.M. stated that "he had not had any trouble with any of the white men on board ship." However, he stated that the applicant was not well liked because of his "independent, arrogant attitude." But, J.M. said, the dislike was "due strictly to his personality and not against him because of his race." J.M. stated that the applicant was "always arguing with someone." He further indicated that the four black sailors had discussed the fact that they should try to keep out of trouble because there were men who did not want them on board. He stated that the only overtly racist incident he knew of was when a white sailor protested having to sleep in the same compartment with a black sailor.

The F.B.I. report states that J.M. was transferred off the ship to be available to serve as a witness at the applicant's trial.

194x Statement of R.W.

R.W. stated that he and L.S. had gone "uptown" together while on shore leave in Xxxxxxx. L.S. had had "about five drinks" during the evening. L.S. spent most of the evening talking with "an old Indian man and his wife" in a bar. R.W. stated that they

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[16] It is clear from his statement that J.M. knew L.S. Therefore, this argument presumably was not with L.S.

had not run into the applicant at all while on shore and that L.S. did not quarrel or fight with anyone in Xxxxxxx that evening.

R.W. and L.S. returned to the *Xxxxxxx* together about midnight. They came upon the applicant, A.A., and R.Y., who was drunk, arguing in a passageway. L.S. and the applicant began to scuffle, and the applicant kicked L.S. in the stomach. R.W. saw the applicant run down the passageway, with L.S. chasing him, turn around, brace himself, and kick L.S. in the stomach again. R.W. said he told L.S. to forget it, but L.S. ran after the applicant.

R.W. followed them down the passage. He found the applicant by the starboard hatch of the berthing compartment with a ten-inch pipe used for dogging hatches in his hand. R.D. was talking to the applicant. R.W. says he persuaded the applicant to hand over the pipe. R.W. denied having threatened the applicant. He stated that he told the applicant he would try to keep L.S. away from him, and the applicant walked away toward his bunk.

R.W. stated that in the berthing compartment, he heard someone mention a knife and saw sailors arguing with the applicant about his knife. He said he then approached the applicant and saw that he had his knife out. R.W. told him to put it away and threatened to use the pipe on him if the applicant "cut" L.S. The applicant put the knife away in his locker, and R.W. handed the pipe over to another man.

At this moment, L.S. entered the compartment. R.W. stated that he went to him and warned him that the applicant had a knife. However, L.S. approached the applicant and they "swung two or three licks at each other, but neither were hit." The applicant then ran around some bunks, ran back to his locker, and dropped to his knees to open it. L.S. grabbed the applicant around his neck somehow —R.W. stated that he could not see—and said: "Stand up and fight like a man." R.W. stated that the applicant told L.S. he had a knife but then "instantly got up on his feet, threw his left arm around [L.S.'s] right shoulder and pulled [L.S.] close to him" before throwing his right arm over L.S.'s back to stab him three times. R.W. stated that it happened too fast for anyone to stop it. He stated that these events—beginning with the incident in the passageway—happened over a period of six to eight minutes.

R.W. stated that after the stabbing, E.G. took the knife away from the applicant and other sailors began to punch him, saying "Why did you cut him—etc." R.W. indicated that he and L.S. were close friends, and he knew L.S. had not previously had trouble or arguments with the applicant.

Regarding race relations on board, R.W. stated that he had "not observed any prejudice or discrimination shown against the negroes." He also stated that the other black crewmembers, F.W., M.W., and J.M., were "nice fellows" but that the applicant

had "always been arrogant, quarrelsome and a 'wise guy'." He stated that most of the crew knew the applicant had "cut" a man before.

The report states that R.W. was transferred off the ship to be available to serve as a witness at the applicant's trial.

194x Statement of J.C.

J.C., a sonarman on the *Xxxxxxx*, stated that, while on liberty in Xxxxxxx, he "saw [L.S.] two times and [the applicant] once or twice up town, but neither time were they together." J.C.'s description of the stabbing was substantially the same as that of R.W. and the other witnesses. He mentioned that L.S. called the applicant a "black s____ b____" when the applicant was on his knees reaching into his locker for the knife. He stated that the fight in compartment 202 happened about 12:10 or 12:15 a.m.

194x Statement of A.A.[17]

A.A. stated that he was helping R.Y., who had gotten drunk in Xxxxxxx, get back on board and to his bunk about 12:10 a.m. when they ran into the applicant and L.S. in a passageway. The applicant called R.Y. a "c___ s_____," and A.A. had to hold R.Y. back to prevent a fight. A.A. stated that L.S. began to help him with R.Y., but the applicant pushed L.S. away, saying "He doesn't need your help, I'll help." L.S. and the applicant then began shoving each other. A.A. stated that L.S. did not punch the applicant at this time. However, the applicant kicked L.S. in the stomach, ran down the passageway, turned, braced himself, and kicked L.S. in the stomach again. The applicant and L.S. then disappeared, running aft down the passageway.

Regarding race relations on board, A.A. stated that he had not seen any of the black sailors being mistreated. He stated, however, that the applicant was a "wise guy" who frequently got into arguments and used "filthy language." A.A. said that he did not think either the applicant or L.S. was drunk.

194x Statement of F.Z.

F.Z. was also in the passageway, and his description of the cause and onset of the fight between the applicant and L.S. is very similar to A.A.'s description, although he stated that it occurred between 11:45 and 11:55 p.m. F.Z. stated that, based on their actions and quickness, he did not think either the applicant or L.S. was drunk.

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[17] A summary of an audiotaped telephone interview between A.A. and the applicant's counsel appears on page 36.

F.Z. said that he followed L.S. down the passageway and into a berthing compartment. They asked other sailors if they had seen the applicant, but no one had. F.Z. then "went on top side" and did not witness the stabbing, which he estimated happened about ten minutes after the incident in the passageway.

F.Z. said that the applicant was a "wise guy" who often carried a knife. He indicated that he and the applicant had argued several times before.

The report states that F.Z. was transferred from the *Xxxxxxx* in order to be available to serve as a witness at the applicant's trial.

194x Statement of F.W.

F.W., one of the other black crewmembers of the *Xxxxxxx*, stated that he was in his bunk when the applicant walked past into the next berthing compartment. A little later, L.S. and another man walked through asking if anyone had seen the applicant. Then someone he knew as "Joe" came in quite intoxicated. He asked for the applicant and said, "I'll kill the s___ b____." Some of the crew got "Joe" under control and took him away. F.Z. and R.W. also walked through looking for the applicant. F.W. stayed in his bunk and did not witness the stabbing.

194x Statement of L.N.[18]

L.N. stated that he was in the berthing compartment at about 12:15 a.m. when he heard that L.S. was looking for the applicant. L.N. told the applicant he should "go tell the Officer of the Day what was going on for his own protection," but the applicant refused. R.W. came up to talk to the applicant and told L.N. that he had taken the pipe in his hands away from the applicant. L.N. stated that he then took the pipe away from R.W.

L.N. stated that when L.S. came in, L.N. tried to get hold of him, but L.S. walked on toward the applicant. L.N. started to leave to get the Officer of the Day, but just before he left the compartment, he turned and saw the applicant stab L.S.

194x Statement of R.C.

R.C. was sleeping in his bunk across the aisle from the applicant's bunk when he was awakened by N.S. and L.N., who were talking. The applicant came in and joined them. R.C. heard L.N. tell the applicant he should go to the Officer of the Day and ask

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[18] In 1996, the applicant's attorney prepared an affidavit for L.N. that he never signed. Excerpts of the unsigned statement appear in Appendix B on page B-13. An audiotape of an interview between the applicant's counsel and L.N. is summarized on page 34).

for protection. He heard R.W. tell the applicant to put his knife away. He also heard R.W. tell the applicant that if he "cut" L.S., R.W. would "bend" the pipe over his head.

R.C. stated that from his bunk, he saw L.S. come in and chase the applicant around the bunks. L.S. caught up with the applicant near his locker and began to throw punches, which the applicant "warded off" with his arms. Then the applicant dropped to his knees to open his locker, and L.S. kicked him. When the applicant stood up, he had a knife in his hand, and he reached over L.S.'s shoulder and stabbed him in the back.

194x Statement of N.S.[19]

N.S. was in the berthing compartment at about 12:05 a.m. when the applicant ran by appearing "excited." N.S. stated that he walked toward the applicant's bunk and saw R.W. with a pipe in his hand talking to the applicant. N.S. saw that the applicant had his knife in a sheath sticking out of the top of his trousers. He saw L.N. talking to both R.W. and the applicant. N.S. said that at about 12:10, R.W. told L.N. that he had taken the pipe away from the applicant, and the applicant said that he had grabbed the pipe to protect himself. N.S. said that he heard R.W. tell the applicant that he would use the pipe on him if the applicant used his knife on L.S., but he did not hear any threats about treating the applicant like the people in Texas treat Negroes. N.S. heard L.N. tell the applicant to go to the Officer of the Day. He stated that they convinced the applicant to put his knife away but he would not go to the Officer of the Day. He described the applicant as "scared and excited."

When L.S. came running in, N.S. saw L.N. and R.W. try to stop him. He heard L.N. say that the applicant would knife L.S. and that he would go get the Officer of the Day. N.S. stated that there were several men between him and the applicant at the moment of the stabbing and so he did not see it.

The report states that N.S. was transferred off the ship to be available to appear as a witness at the applicant's trial.

194x Statement of R.D.

R.D. stated that he was in his bunk when L.S. and F.Z. came through looking for the applicant because, they said, he had kicked L.S. in the stomach. R.D. went out of his compartment and saw R.W. take a pipe away from the applicant. He stated that R.W. and the applicant were not arguing. R.D. stated that he told the applicant to go to the officers' ward room, but the applicant did not answer him.

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[19] N.S.'s 1996 statement is summarized on page 29, below.

A little later, he walked into the berthing compartment and saw R.W. and the applicant talking. He heard the applicant say, "I will hit my sack if you will get [L.S.] to hit his sack." He also heard the applicant agree to put his knife away. R.D. stated that as he left to go back to his own compartment, he heard L.N. say, "If someone doesn't go after the [Officer of the Day], I will."

Soon he heard a commotion and went back into the other compartment. R.D.'s description of the fight was very similar to that of the other sailors. He saw L.S.'s hands around the applicant's neck and shoulders but "could not see the exact position or nature of the hold" or say whether the applicant was being choked. He heard L.S. say, "Stand up and fight like a man." He stated that as the applicant rose to his feet, L.S. was not hitting him, but the applicant told L.S. that he had a knife and quickly stabbed him.

The report states that R.D. was transferred off the *Xxxxxx* to be available to serve as a witness at the applicant's trial.

194x Statement of R.A.

R.A. stated that at about 12:15 a.m., the applicant ran through compartment 202 into 203, followed a few minutes later by L.S., who was looking for the applicant. A few minutes later, he walked over to the starboard side of the compartment and saw R.W. take a pipe away from the applicant. He stated that they were not arguing. Later, R.A. overheard part of the conversation between the applicant, R.W., L.N., and N.S. He heard them talk the applicant into putting away his knife. R.A. stated that L.S. came in about a minute later. He saw L.S. running around the bunks after the applicant and observed some "scuffling" but did not see the stabbing. After the stabbing, he saw E.G. take the knife away from the applicant.

194x Statement of P.V.[20]

P.V. stated that he was asleep in his bunk, which was next to the applicant's, when he was awakened by a scuffle. He first noticed that there were 10 or 15 men standing around the compartment "talking and hollering." He saw L.S. hit the applicant, who protected himself with his arms and then knelt down by his locker. P.V. saw L.S. hit the applicant again around his body and shoulders with his "hands," kick him once, and call him an "S.B." P.V. stated that L.S. was not holding the applicant's neck or choking him. People were telling them to break it up, but the applicant rose, embraced L.S., and stabbed him. After the stabbing, P.V. said, he saw the applicant

[20] P.V.'s 1996 statement is summarized on page 32. An unsigned statement prepared by the applicant's counsel is excerpted in Appendix B on page B-14.

swing at B.C. with the knife before it was taken away from him. P.V. did not leave his bunk during the fight.

The report states that P.V. was transferred off the ship to be available to appear as a witness at the applicant's trial.

194x Statement of H.R.[21]

H.R. stated that he was awakened shortly after midnight and witnessed L.S. chasing the applicant around the bunks. L.S. brushed off several men who tried to stop him. When the applicant went to his locker, H.R. saw L.S. grab him by the "shoulders and jumper" and pull up saying, "Stand up and fight like a man." H.R. saw the applicant rise, turn to face L.S., and stab him three times very quickly in the back.

194x Statement of P.B.

P.B. stated that at about 12:20 a.m., he entered compartment 202 upon hearing a commotion and saw L.S. trying to make the applicant stand up by pulling on his shoulders. He saw the applicant rise to his feet, get closer to L.S., throw his right arm over L.S.'s left shoulder, and stab him two or three times in the back. P.B. stated that he did not see L.S.'s arm around the applicant's neck.

P.B. admitted that he hit the applicant three or four times after the stabbing and asked him why he "cut" L.S. He stated that other men were doing the same.

194x Statement of B.C.

B.C. stated that he heard a scuffle and entered the berthing compartment in time to see L.S. trying to pull the applicant to his feet by his shoulders. B.C. stated that the applicant "came to his feet, threw his left arm around [L.S.'s] body and with his right hand stabbed [L.S.] in the back three times." B.C. then saw E.G. take the knife away from the applicant, and men began to hit him.

194x Statement of E.G.

E.G. stated that he observed the climax of the fight after he came aboard from liberty at about 12:10. His description of it was consistent with that of other witnesses. He stated that he heard L.S. say, "Get up and fight like a man" and that L.S. was holding the applicant around his neck or head, but E.G. could not see "the nature of the hold." E.G. stated that L.S. did not have hold of the applicant's neck when the latter rose to his feet and stabbed L.S. E.G. stated that after the stabbing, he grabbed the

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[21] H.R.'s 1996 statement is summarized on page 31.

applicant's right arm, took the knife, and threw it out of the way under some lockers. He stated that sailors punched and kicked the applicant, while asking him why he "cut" L.S.

The report states that E.G. was transferred off the ship to be available to appear as a witness at the applicant's trial.

194x Statement of Ensign R.R., Officer of the Day[22]

R.R. stated that he was in the Ward Room serving as Officer of the Day when a sailor entered at about 12:20 a.m. and told him of the stabbing. He further stated that when he entered the berthing compartment, he pulled his gun to stop the men from hitting and kicking the applicant.

194x Statement of W.M.

W.M., one of the other black crewmembers of the *Xxxxxxx*, stated that he was asleep in his bunk when someone awakened him, told him about the stabbing, and told him to report to the Officer's Ward Room. He stated that he had not seen or heard anything of the fight.

***194x Statement of LCDR C.S., Commanding Officer of the* U.S.S. Xxxxxx**

Lieutenant Commander C.S., the captain of the *Xxxxxxx*, stated that the applicant ran into the Ward Room at about 12:30 a.m. and told him "They made me do it." Upon inquiry, the applicant said, "I cut a man." The applicant then told him he had been on the Mess Deck with J.M. but was headed to bed when he met R.Y. and L.S. in the passageway. The applicant told the captain that L.S. had called him a "cocksucker," told him to go to bed, and raised his arm to swing at the applicant, so the applicant "pushed his foot out and stopped" L.S. The applicant then refused to say anything more to the captain. The captain indicated that the applicant "was not drunk and knew what he was doing."

The captain stated that, when he again interviewed the applicant at 9:00 a.m., the applicant told him that L.S. had been kicking him when he was getting his knife from his locker. The applicant further told him that he had stabbed L.S. in the back as he came to his feet. The applicant also told the captain that he had gotten "tight" while on shore leave but "knew what he was doing." The applicant again told that captain that the men had "forced" him to do it. When the captain asked him if the circumstances justified killing L.S., he answered, "No, I won't say anything more."

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[22] R.R.'s 1996 statement is summarized on page 31. A statement he signed in 1999 for the Coast Guard is summarized on page 34.

The captain stated that the Coast Guard had held a Board of Investigation on October 29 and 30, 194x, to inquire into the death of L.S. The captain stated that a lieutenant junior grade who served as the applicant's defense counsel had instructed the applicant not to make any statements to the Board.

The captain also stated that the ship was headed to Shanghai, China, but if witnesses other than those being left behind were necessary for the applicant's trial, they could be reached by a request to Coast Guard headquarters.

194x Statement of the Deputy U.S. Marshal

The Deputy U.S. Marshal reported that the captain of the *Xxxxxxx* gave him the hunting knife the applicant allegedly used to stab L.S. He reported that the knife was 11.5 inches long, with a 7-inch blade. It was covered in dried blood. He stated that E.G. had identified the knife as the one he had taken from the applicant after the fight.

MEDICAL AND AUTOPSY REPORTS

The F.B.I. report included the coroner's report and reports by the ship's doctor. The F.B.I. report states that L.S. was 5' 10" tall, 200 pounds, and "stout." His military personnel record indicates his race was white, but in fact he was Native American.[23] The applicant, an African American, was 5' 7" tall, 138 pounds, and "slim." Excerpts of the medical reports appear in Appendix D to this decision.

Report of the Autopsy on L.S. by Dr. A.N., Coroner

The report of the autopsy stated that L.S. had three wounds in his back. The first, over his right scapula, was two inches deep and did not extend through the scapula. The second, located to the left of the spine, penetrated the thoracic cavity. The third, located to the right of the spine, also entered the thoracic cavity.

Report of the Ship's Doctor to the F.B.I. Concerning L.S.'s Wounds

The ship's doctor stated that he examined L.S. in the berthing compartment soon after the stabbing. Initially, L.S. was still breathing with difficulty, but his pulse was imperceptible. He had three "gaping" wounds in his back.

Report of the Ship's Doctor to the F.B.I. Concerning the Applicant's Injuries

The ship's doctor stated that he examined the applicant at 3:00 a.m. on the morning of the stabbing. The applicant was moderately intoxicated and had contusions on his "left ankle, left hip, right lower leg, lumbar area, [and] right lower arm." These areas were tender. There was also a slightly tender "brush burn" contusion on his mid right forearm. The doctor noted that the "flexion" of the applicant's back was limited about 50 percent because of pain and that the applicant stood with difficulty because of pain in his left ankle and hip.

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[23] Although L.S.'s enlistment papers indicate that he was white, fellow crewmembers apparently knew him to be Native American. The Coast Guard recently contacted a relative of L.S., who stated that L.S. was a member of the Xxxx Indian Nation.

The doctor stated that the applicant's head, scalp, and neck appeared "normal" and that nothing was wrong with his ears, eyes, nose, throat, and thorax.

Applicant's Medical Records

The applicant submitted many medical records indicating that he has suffered from xxxxxxxx, xxxx, and deafness and that he underwent a spinal fusion.

Medical Opinion on Applicant's Physical Examination by the Ship's Doctor

The Coast Guard submitted a recent doctor's analysis of the report of the ship's doctor to the F.B.I. concerning the applicant's physical condition after the incident. The doctor is the Chief of the Office of Health Services at Coast Guard Headquarters. He previously served as the consulting physician to the Albemarle County jail in Virginia and stated that he is therefore "familiar with the aftermath of physical assaults and their attendant injuries."

The doctor stated that the ship doctor's description of the applicant's condition "is consistent with a history of assault." He noted that no bruising of the neck was indicated but that the ship's doctor might have missed a bruise because the applicant is black. He indicated, however, that if the applicant's neck had been hurt, the doctor probably would have seen swelling or injury to the skin. He stated that a "brush burn" is usually caused by friction or scraping rather than by hitting. The doctor concluded that "there is no objective evidence from the report … that led me to believe [the applicant's] life was in jeopardy or that he had suffered a near fatal choking."

COURT DOCUMENTS

On Monday, October 29, 194x, the F.B.I. agent sent to investigate the stabbing filed a complaint charging the applicant with first-degree murder. The complaint states that the applicant, "being of sound memory and discretion, did purposely and of deliberate and premeditated malice, kill [L.S.] by cutting him with a knife." The record indicates that a warrant for the applicant's arrest was issued and served. Crewmembers R.W., R.D., R.A., and the ship's doctor were subpoenaed to appear at an inquest into the death of L.S. later that day.

Also on October 29, 194x, a six-member coroner's jury and the U.S. Commissioner and Ex-Officio Justice of the Peace for Xxxxxx signed a Verdict of Coroner's Jury. The verdict states that the jury, "after due inquiry, and the hearing of testimony, find that the deceased [L.S.], met his death early Saturday morning, October 27, 194x, aboard the U.S.S. Xxxxxx … by penetrating knife wounds of thorax and lacerations of internal viscera, inflicted by [the applicant], member of crew of said vessel."

On Tuesday, October 30, 194x, the U.S. Commissioner issued a commitment order requiring the U.S. Marshal to keep custody of the applicant pursuant to the

charge against him of first-degree murder, a violation of Section 4757 of the Compiled Laws of Xxxxx. The Commissioner also signed an Order Holding Defendant to Answer stating that "[i]t appearing to me … from the testimony produced before me on the examination of the above named defendant that the crime of first degree murder has been committed and that there is sufficient cause to believe the defendant guilty thereof. … I have this day committed [the applicant] to jail to await the action of a grand jury."

On Wednesday, October 31, 194x, the U.S. Commissioner signed a transcript of the proceedings in Xxxxxxx, which indicates that the applicant had been charged with first-degree murder after a hearing on October 30, 194x, at which he "waived examination" and after the verdict of a coroner's jury. The transcript indicates that on October 29th and 30th, the complaint was taken, the warrant was issued and returned, the defendant was arraigned and informed of his rights, the defendant waived examination in open court, judgment was given and entered that he be held without bail, and the commitment was issued and returned.

On November 5, 194x, the applicant appeared in court to request that his case be transferred to Xxxxx, Xxxxx. The Commissioner granted the request.

On January 26, 194x, the applicant was indicted for second-degree murder, a violation of § 4749 of the Compiled Laws of Xxxxx, at the U.S. District Court for the Territory of Xxxxx in Xxxxx. Bail was set at $5,000. The arraignment was set for January 29, 194x, at 10:00 a.m. The indictment indicates that L.S. was stabbed in the back and lists the following witnesses before the grand jury: F.Z., P.V., N.S., J.M., E.G., R.D. (all crewmembers), and A.N. (the coroner). The names of the witnesses are listed twice on the indictment, which is signed by an Assistant U.S. Attorney for the Territory of Xxxxx, the Deputy Clerk of the U.S. District Court, and the Foreman of the Grand Jury.

On January 29, 194x, the applicant was arraigned on the charge of second-degree murder. The clerk noted in a log that the "[e]ntry of plea [was] set for Feb 1st at 10:00 a.m."

On February 1, 194x, the court records state, "[a]t this time the defendant was present in person and by his attorney, [M.E.M.,] for the entry of a plea herein and personally entered a plea of Not Guilty." The clerk noted in the log that "Deft personally entered a plea of Not Guilty." The transcript of the applicant's plea on February 1st appears as follows:

> BE IT REMEMBERED, that on the 1st day of February, 194x, at Xxxxx, Xxxxx, the above titled cause came on for hearing, the HONORABLE …, District Judge, presiding; the Government appearing by …, United States District Attorney; the defendant appearing in person and by [M.E.M.], his attorney; the defendant was called before the Court:

AND THEREUPON, the following occurred:

THE COURT: [Applicant], you are accused in this indictment of murder in the second degree … . What is your plea, guilty or not guilty?

[The applicant]: Not guilty.

THE COURT: Let a plea of not guilty be entered. That will be all.

On February 4, 194x, the judge noted that the applicant's case was set for trial following the conclusion of another case, which was set to begin on Monday, February 11, 194x, at 10:00 a.m. However, on Friday, February 8, 194x, the judge noted that the applicant's trial could begin that same day at 2:00 p.m. Later that day, the judge granted a continuance and set the applicant's trial for Wednesday, February 13, 194x, at 10:00 a.m. The record indicates that "[t]he defendant was present in person." Also on February 8, 194x, the coroner, A.N., was subpoenaed to appear at trial on the 13th.

On February 11, 194x, the clerk noted that a subpoena for A.N. had been issued, served, and returned.

On February 13, 194x, the court's record indicates that, "[a]t this time the defendant was present in person[24] and by his attorney, [M.E.M.,] and personally withdrew his plea of Not Guilty in 2nd degree and personally entered a plea of Guilty to the lesser included crime of Manslaughter. … United States Attorney concurred." The clerk noted in the log that "Deft personally withdrew his plea of Not Guilty to murder in 2nd degree + personally entered a plea of Guilty to Manslaughter." He also noted that sentencing was set for February 18, 194x, at 10 a.m. The transcript of the applicant's change of plea on February 13th appears as follows:

BE IT REMEMBERED, that on the 13th day of February, 194x, at Xxxxx, Xxxxx, the above titled cause came on for hearing, the HONORABLE …, District Judge, presiding; the Government appearing by …, United States District Attorney; the defendant appearing in person and by [M.E.M.], his attorney; the defendant was called before the Court:

AND THEREUPON, the following occurred:

[District Attorney]: I have just been informed that [the applicant], whose trial was set for this morning, wishes to withdraw his plea of not guilty to murder in the second degree and enter a plea to manslaughter, an included offense. He and his attorney informed me of this about five minutes ago. They are present in court.

[M.E.M.]: Yes, may it please the Court, the defendant informed me of that just a few minutes ago in the presence of the District Attorney, about five minutes ago, or I would have notified the Court. That is the defendant's wishes. …

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24 Elsewhere on the same page of court records, the recorder noted that another defendant in a civil case was not present but was represented by his attorney.

THE COURT: The defendant come forward. [Applicant], in case No. 2414-B you are indicted by the Grand Jury for … the crime of murder in the second degree … . Previously in this court you entered a plea of not guilty. You have heard what the United States Attorney has said and what your counsel has said in reference to your withdrawing that plea and entering a plea now to a lesser included crime, to-wit, the crime of manslaughter. Do you understand that?

[The applicant]: Yes, sir.

THE COURT: Do you wish then to have the plea of not guilty to second degree murder withdrawn?

[The applicant]: Yes, sir.

THE COURT: And do you wish to enter a plea of guilt [sic] to the crime of manslaughter?

[The applicant]: Yes, sir.

THE COURT: Let the plea of not guilty to second degree murder be withdrawn and a plea of guilty to manslaughter be entered in this case. You may sit down.

On Monday, February 18, 194x, the record states that "[a]t this time the defendant was present in court in person and by his attorney, [M.E.M.], for the imposition of sentence. The defendant was asked if he had any reason to state why sentence should not now be imposed to which he gave no good or sufficient reason. Thereupon the Court sentenced defendant to serve 5 years at xxxxxxxxx or such other institution as the Attorney General of the United States may designate." The transcript of the applicant's sentencing on February 18th appears as follows:

BE IT REMEMBERED, that on the 18th day of February, 194x, at Xxxxx, Xxxxx, the above titled cause came on for hearing, the HONORABLE …, District Judge, presiding; the Government appearing by …, United States District Attorney; the defendant appearing in person and by [M.E.M.], his attorney; the defendant was called before the Court:

AND THEREUPON, the following occurred:

THE COURT: [The applicant], in case No. 2414-B, you have been charged with murder in the second degree, in violation of Section 4759, Compiled Laws of Xxxxx, 1933, and to that you have entered a plea to an included offense of manslaughter. Do you have anything to say now why sentence should not be passed upon you?

[The applicant]: I ask for leniency of the Court.

THE COURT: I didn't hear that.

[The applicant]: I ask for leniency of the Court and a little for back time.

THE COURT: How long have you been in jail?

[The applicant]: Four and one-half months.

THE COURT: How old are you?

[The applicant]: Twenty.

THE COURT: You were born in 1926, were you?

[The applicant]: 1925.

THE COURT: Do you have anything further to say?

[M.E.M.]: I have nothing to say.

THE COURT: I have considered your case with your attorney and with the United States Attorney. In view of your age and of the circumstances which surrounded the case, in which I have been advised, I have decided to sentence you to the penitentiary, and will now do so, for a term and period of five years. That will be all.

Also on February 18th, the judge signed a Judgment and Commitment stating that on February 13, 194x, the defendant "being present and represented by his counsel," had pled guilty to manslaughter.

On April 11, 194x, the court reporter signed her transcripts of the proceedings in the applicant's case. Her certifications state that the transcripts were based on her own shorthand notes.

The applicant served time in several federal penitentiaries before being released, after four years imprisonment, in November 194x.

1951 BOARD OF REVIEW, DISCHARGES AND DISMISSALS

In 1951, the applicant applied to the Coast Guard Board of Review, Discharges and Dismissals (the precursor to the Discharge Review Board) to have his discharge upgraded. He alleged that he should have been tried by court-martial because the stabbing took place on a U.S. vessel.

On August 30, 1951, the president of the Board recommended to the Secretary of the Treasury that no change be made to the applicant's character of discharge because it was "legal, proper, just and equitable under applicable standards of Coast Guard and naval law and discipline." The president noted that the applicant "was administratively discharged from the Coast Guard Reserve on 27 April, 194x, with an Undesirable Discharge by reason of Misconduct Due to Trial and Conviction by Civil Authorities, in accordance with Article 584(4) CG Regulations. (Ref: HL (PE AD (CG-783) dtd 4/8/46)."

The president based his recommendation on the applicant's entire record and on the Board's finding that the applicant had been treated fairly with regard to the stabbing and had pled guilty to manslaughter upon the advice of counsel. He stated the Coast Guard's Board of Investigation on October 29, 194x, had concluded that both the applicant and L.S. had "indulged in intoxicating drink but that both were in possession of the faculties and were capable of using their reason." He also stated that, in contrast to the applicant's claims, his medical records indicated that his back problems predated his enlistment in the Coast Guard Reserve.

The president stated that the Coast Guard could have court-martialed the applicant "but could legally turn the subject over to the U.S. Marshall for indictment and trial." He stated that, although the applicant had complained that a witness had sailed away on the *Xxxxxx*, his attorney had never tried to subpoena the witness and had advised the applicant to plead guilty to a lesser charge rather than stand trial for murder, which the applicant agreed to do.

On December 2, 1951, the president of the Board of Review, Discharges and Dismissals, sent the applicant a letter informing him that this request to have his undesirable discharge upgraded had been denied.

RECENT AFFIDAVITS SUBMITTED BY THE APPLICANT[25]

The applicant submitted a number of statements prepared by his counsel for crewmembers of the *Xxxxxxx*. His counsel prepared the statements in 1996 based on telephone interviews with the veterans. Excerpts of these statements appear in Appendix B to this decision. The following are summaries of the affidavits submitted by the applicant.

1996 Statement of N.S.[26]

N.S., a retired attorney who served as a motor-machinist mate third class on the *Xxxxxxx* from November 14, 194x, to November 1, 194x, stated that some of the crew on the *Xxxxxxx* "would refer to blacks as 'n[]' or 'black bastards.'" He said that L.S. was a "large man who liked to throw his weight around to get his own way" and that the applicant "was not well liked."

N.S. stated that he had seen the applicant dance with an "Indian girl" at the bar in Xxxxxxx and that, when L.S. objected to it, "a scuffle ensued." He further stated that, when he was back in the berthing compartment, the applicant entered "immediately followed" by L.S. The applicant retreated to the back of the compartment to a place where he was trapped, and L.S. began to beat him viciously. N.S. stated that he had feared for the applicant's life. N.S. stated that L.S. was too strong for anyone to stop and that he ran to get the Officer of the Day and so did not see the stabbing. After the stabbing, N.S. stated, there was "a lynching atmosphere" on board. He further stated that because of that racist atmosphere, he "never discussed my view or statements to the FBI with any of my shipmates for fear that they would vent their hostility on me."

N.S. stated that when he was questioned by the F.B.I. he was reluctant to answer because he did not want to be put off the ship. However, he was not threatened in any way. N.S. stated that he was put off the ship and told to remain in Xxxxxx until he was called as a witness. He stayed there until January, when he was sent to Xxxxx pursuant to a subpoena. In Xxxxx, he stayed in a hotel with fellow crewmembers R.D., R.W., and some others.

N.S. stated that neither the prosecutor nor the applicant's attorney ever approached him to discuss the case. He stated that he does not believe R.D. or R.W. ever discussed the case with them either. N.S. stated that he does not remember appearing in front of a grand jury, but he "may have done so."

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[25] The applicant also submitted four statements that his counsel prepared for crewmembers but that the crewmembers did not sign. The unsigned statements are excerpted in Appendix B.

[26] A summary of N.S.'s 194x statement to the F.B.I. begins on page 19.

1996 Statement of J.M.[27]

J.M., a sonarman third class and one of four black sailors (out of more than 150) on the *Xxxxxxx,* stated that "there was a tense racial climate" on board and that the black and white sailors "tended to keep to themselves." He tried to "stay clear of many of the white sailors."

J.M. stated that he spent a lot of time with the applicant and was certain that the applicant "never had any trouble with any member of the crew, officers or enlisted until the night of October 26-27, 194x."

J.M. stated that, while on liberty in Xxxxxxx, he saw the applicant dance with a white woman. L.S. tried to cut in, the woman refused, and L.S. got into an argument with the applicant. Fearing violence, J.M. stated, he and the applicant returned to the *Xxxxxxx*, and the applicant went to bed. J.M. stated that he then heard L.S. and other sailors discussing the applicant's dancing with the white woman "in a loud and aggressive tone." J.M. stated that he then returned to his own bunk in the officers' quarters and did not witness the stabbing.

J.M. stated that after the stabbing, he was removed from the ship for his own safety. He was kept in the Xxxxxxx jail for about a week and then flown to Xxxxx, where he was kept in the jail for several days. He stated that while in Xxxxx, no one ever discussed the case with him and he never testified at any proceeding. He stated that he remembered the time well because he met his wife while staying in Xxxxx.

1996 Statement of L.B.

L.B., a sonarman first class on board the *Xxxxxxx* from 194x to 194x, stated that he had not been on leave in Xxxxxxx but had heard that the applicant and L.S. got into an argument at a dance. He stated that he was in his bunk in the berthing compartment when he heard a disturbance and looked down to see that L.S. had the applicant "in a bear hug with each man facing … the other." He stated that the applicant "was also holding on to" L.S. and stabbed him in the back.

L.B. stated that he thought the applicant was not the instigator and was merely defending himself. He thought L.S. "had it coming." He also stated that he sailed with the ship to China and was not asked to testify at any proceedings.

1996 Statement of M.Z.

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[27] A summary of J.M.'s 194x statement to the F.B.I. begins on page 15.

M.Z., a crewmember of the *Xxxxxxx* from 194x to 194x, stated that he was in his bunk in the berthing compartment when he saw the applicant being chased by L.S. He saw L.S. catch the applicant as he stopped at his locker to grab a knife. M.Z. stated that the two men "wrestled and scuffled" until L.S. was stabbed.

1996 Statement of R.S.

R.S., a chief pharmacist's mate on the *Xxxxxxx* from 194x to December 194x, stated that he was on shore patrol when someone told him about the stabbing. When he got to the ship, the applicant had already been put in the Xxxxxxx jail. He stated that the captain had L.S.'s body removed from the ship as if he were alive in an attempt "to avoid repercussions." R.S. stated that "blacks were not tolerated too well."

R.S. said he assisted at the autopsy and that L.S. was such a large man "that there probably was not anyone big enough on the ship to stop him." R.S. accompanied L.S.'s body to the inquest and had to "unzip" the wounds, which had been sewn up, so they could be examined.

1996 Statement of H.R.[28]

H.R., a signalman on the *Xxxxxxx* from 194x to 194x, stated that he was in his bunk around midnight when he saw L.S. chasing the applicant around. When the applicant dropped to his knees beside his locker, L.S. grabbed him and said, "Stand up and fight like a man." H.R. stated that he saw the applicant grab his knife and stab L.S. After the stabbing, H.R. stated, the applicant was removed so that there would not be a "race riot."

1996 Statement of W.R.

W.R., a crewmember of the *Xxxxxxx* from 194x to 194x, did not indicate whether he had witnessed any of the events in question. However, he stated that on the night in question, L.S. became angry because the applicant danced with a white woman at a dance in Xxxxxxx. W.R. stated that when they returned to the ship, L.S. told the applicant not to dance with white women and "was going to beat the hell out of him, when [the applicant] stabbed [L.S.] in the back."

W.R. stated that after the stabbing, sailors began to beat the applicant, and one struck him with a fire extinguisher. Later, he said, some of the crew were so angry that they aimed a three-inch gun at the jailhouse and said they would blow it up but were stopped by an officer.

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[28] H.R.'s 194x statement to the F.B.I. is summarized on page 21.

W.R. stated that many sailors were reluctant to admit to the F.B.I. that they had witnessed the stabbing.

1996 Statement of R.R.[29]

R.R., an ensign on the *Xxxxxxx* who was the Officer of the Day, stated that he was standing watch on deck when someone came to tell him that there was a fight. He ran to the berthing compartment, where he found "a sea of people … milling around." He told the applicant to go to the Ward Room. Because some of the crew were becoming "hysterical," he had the lights turned off for a while so they would settle down. R.R. stated that the applicant and the three other black sailors were transferred off the ship for fear of "repercussions" since the stabbing was done by a black man.

1996 Statement of R.E. [30]

R.E., a seaman on the *Xxxxxxx* from 194x to 194x, stated that he did not witness the stabbing, but he remembered that all the black sailors were transferred off the ship for fear that some of the southern sailors might harm them.

1996 Statement of A.P.

A.P., a lieutenant and engineering officer on board in the *Xxxxxxx* in 194x, stated that he was not on board at the time of the stabbing, but he spoke about it with other officers who were on board and who told him they thought the applicant "was not to blame for the incident." A.P. remembered that all of the black crewmembers were taken off the ship after the stabbing for their own protection.

1996 Statement of W.D.

W.D., who served on the *Xxxxxxx* from 194x to 194x, indicated that shortly before the incident, he saw the applicant in the Mess Hall "not looking for any trouble." After W.D. went to the machine shop, L.S. and another sailor came to the door, looking for the applicant. They were upset because the applicant had danced with a woman in town. W.D. stated that he did not witness the stabbing, but heard that the applicant stabbed L.S. after L.S. attacked him.

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[29] R.R.'s 194x statement is summarized on page 22. A statement he signed for the Coast Guard in 1999 is summarized on page 34.

[30] Summaries of two audiotaped telephone interviews between R.E. and the applicant's counsel appear on page 37.

1996 Statement of P.V.[31]

P.V., a machinist's mate on the *Xxxxxxx*, signed an affidavit prepared by an attorney now working in the law firm of M.E.M., who is deceased. P.V. stated that there was no racial segregation on board and "no demonstration of racial prejudice to my knowledge." He stated that there was no dance in Xxxxxxx; the sailors on leave just went to the bars.

P.V. stated that the applicant returned from shore leave drunk and was making noise and waking up sleeping sailors when L.S. got out of his bunk and told him to keep quiet. As L.S. turned to walk away, the applicant stabbed him. P.V. and several others "jumped on" the applicant and disarmed him. P.V. stated that it was L.S.'s duty to keep order and that L.S. was "a very decent person and well liked by the crew."

P.V. stated that, as an eyewitness, he was subpoenaed and had to stay in Xxxxx to wait for the trial. He was later told that the applicant had "copped a plea" so there would be no trial.

1996 Statement of Xxxxx Attorney on Territorial Judicial Process

The applicant also submitted an affidavit signed by an attorney who practiced in the District Court for the Territory of Xxxxx in Xxxxx for many years. The attorney stated that in Xxxxx at that time, the grand jury would normally meet only once per year. Persons arrested outside of Xxxxx would be transferred there to wait. After they were indicted by a grand jury, the judge would assign counsel to them at their arraign-ments if they had not hired attorneys.

2000 Statement of J.P., a WWII Navy Veteran

The applicant submitted an affidavit from J.P., an attorney who served aboard the *U.S.S. Xxx* during World War II as a seaman first class in the Navy. He stated that during his service, he underwent a deck court-martial for being absent without leave for one day and a summary court-martial for falling asleep while on watch. He alleged that, when he was being processed for discharge in 194x, the yeoman who typed his discharge papers stated that he would include the summary court-martial but not the deck court-martial. J.P. received an honorable discharge and therefore was eligible for veterans' benefits.

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[31] P.V.'s 194x statement to the F.B.I. is summarized on page 20. The applicant's counsel conducted a telephone interview with P.V. and prepared a different affidavit, which P.V. did not sign. Excerpts from that unsigned affidavit appear in Appendix B on page B-14.

RECENT AFFIDAVITS SUBMITTED BY THE COAST GUARD

In his advisory opinion to the BCMR, the Chief Counsel of the Coast Guard submitted affidavits signed by crewmembers in 1999. Excerpts of these statements, which are summarized below, appear in Appendix C to this decision.

1999 Statement of R.B.[32]

R.B. stated that he had refused to sign the affidavit prepared by the applicant's counsel because "it misrepresented my observations and opinions regarding the incident." He further stated that he was in his bunk when the applicant entered the berthing compartment, followed a while later by L.S. The two "started to throw punches at each other." R.B. estimated that L.S. hit the applicant four or five times before the applicant opened his locker to get his knife. L.S. continued to hit the applicant while he was reaching into his locker. "Almost immediately," the applicant stood up and stabbed L.S. R.B. estimated that about 45 seconds elapsed between the time they started swinging and when L.S. was stabbed. He stated that he "did not feel at any point that the fight was out of control or that [he] or any of [his] other shipmates needed to separate the two combatants for their own safety." The fight was no worse than many others he had seen on board until the applicant grabbed his knife. He stated that the stabbing happened too quickly for anyone to prevent. He further stated that at no time did he see L.S. choking the applicant.

Regarding race relations, R.B. stated that the sailors were treated equally and he witnessed "no overt acts of racism."

1999 Statement of Ensign R.R., the Officer of the Day[33]

R.R. stated that the applicant was "standing up and able to walk to the wardroom after the incident." R.R. stated that he saw no one hit the applicant and did not notice any injuries to him. He also stated that the applicant had never expressed any concern for his safety, either before or after the stabbing. R.R. further stated that he does not remember the sailors ever pointing one of the ship's guns at the jailhouse. He stated that he absolutely would have been informed if they had done so, and the incident would have been noted in the ship's log.

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[32] A summary of an audiotaped telephone interview between the applicant's counsel and R.B. appears on page 38. Excerpts of a statement prepared by the applicant's counsel, which R.B. refused to sign, appear in Appendix B on page B-12.

[33] R.R.'s 194x statement to the F.B.I. is summarized on page 22. The affidavit he signed in 1996 is summarized on page 31.

1999 Statement of P.M.[34]

P.M., a lieutenant serving as the *Xxxxxx*'s gunnery officer, stated that he was asleep in his stateroom during the fight between L.S. and the applicant. He was told that the stabbing had happened too fast for anyone to stop. He did not know the applicant but knew L.S. to be a good man and superior performer. P.M. called W.R.'s statement about sailors pointing a gun at the jailhouse a "pure fabrication." He stated that as the gunnery officer, he would have known if such an incident had occurred, and there is "no possibility" that it did.

Regarding race relations on board, P.M. stated that there were no adverse incidents or problems and that the black and white sailors worked, ate, and slept side by side.

AUDIOTAPES SUBMITTED BY THE APPLICANT[35]

Audiotape of Interview with L.N.[36]

In a 1996 telephone interview with the applicant's counsel, L.N. stated that he heard that the applicant and L.S. got into a brief argument while on liberty because they were both dancing with the same "native girl." He stated that when he saw the applicant on the ship, he told him to go tell the Officer of the Day what had happened. L.N. stated that nothing would have happened if the applicant had done so, but he did not. He said that when the applicant was on the floor by his footlocker, L.S. tried to get him to stand up. When the applicant stood up, L.N. saw him put his arm over L.S.'s back and stab him. When told that the applicant went to prison, L.N. said, "He should have served time." However, L.N. also said, "Had the black not had the knife, the killing might have gone the other way." He also said that nobody expected the stabbing and that drinking "had a lot to do with it." He said it happened so quickly that "[i]t was over before it started."

L.N. stated that he remembers being questioned about the stabbing but he does not remember who questioned him. He said that whoever questioned him was not

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[34] A summary of an audiotaped telephone interview between P.M. and the applicant's counsel appears on page 36.

[35] In none of the recorded telephone conversations submitted by the applicant's counsel were the interviewees informed that they were being taped. During the conversations, the applicant's counsel sometimes described the facts of the case in accordance with the applicant's allegations. At the end of the telephone interviews, the applicant's counsel asked some of the veterans if they would be willing to sign statements prepared by the counsel based on their conversations.

[36] L.N.'s 194x statement to the F.B.I. is summarized on page 18. Excerpts of the statement prepared by the applicant's counsel based on this interview, which L.N. did not sign, appear in Appendix B on page B-13.

happy with his answers and that some people had drunk an "awful lot" of alcohol and were "covering their butts."

Audiotape of First Interview with F.R.[37]

In a 1996 telephone interview with the applicant's counsel, F.R. said that he would not sign an affidavit he received from the applicant's counsel because there was no point in "broadcasting" certain things. He said that a statement about the crew wanting to hang the applicant from a totem pole should be deleted and that another statement about people chasing the applicant was not true. He said that he saw people looking for the applicant, not chasing him, and that they asked another sailor, not him, where the applicant was. When the applicant's counsel told him that his statement to the F.B.I. contradicted his current version of events, F.R. said that he "may be hallucinating" and that he really does not remember what happened anymore.

Audiotape of Second Interview with F.R.

In a 2000 telephone interview conducted by an assistant of the applicant's counsel, who identified herself only as a "student" researching military history, F.R. stated that he had heard that the fight started because L.S. did not "appreciate" the applicant dancing with a white woman in a bar on shore. He said that he had heard that, back on board the *Xxxxxxx*, L.S. chased the applicant, who ran to his footlocker, got a knife, and stabbed L.S. F.R. said that when he got back to the ship that night, some sailors were talking about hanging the applicant, so he turned out the lights to calm them down. He stated that there was a lot of ill feeling on board, and the captain sent the other black crewmembers to the jail for their protection. He remembered that a lot of the sailors were interviewed and signed statements. F.R. indicated that other members of the crew with whom he had recently communicated did not remember the events as he did. He said time is like a game of telephone in that the facts change a lot along the way.

Audiotape of Interview with the Widow of H.B.

In a 2000 telephone interview with the applicant's counsel, the widow of a crewmember, H.B., stated that her husband had told her about the stabbing. Her husband had told her the fight occurred because all of the sailors were drunk and one black sailor had danced with a white woman. She said that all the officers wore their guns afterward and that her husband, who had been scheduled to leave the ship, had to stay on longer because of the incident.

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[37] Excerpts of the statement prepared by the applicant's counsel, which F.R. refused to sign, appear in Appendix B on page B-13.

Audiotape of Interview with R.O.

In a 2000 telephone interview with the applicant's counsel, R.O., a crewmember, stated that he was not on board at the time of the stabbing but heard about it later. He said that he was on liberty that night and had seen L.S. and the applicant a few times but not together. He said that L.S. hated black people and that "anything would set him off." R.O. said that after the stabbing, other sailors beat up the applicant and that the southerners were so angry they "were going to tear the place apart." He said the captain posted guards on the dock and at the jailhouse because the southerners wanted to lynch the applicant. He said no one tried to blow up the jail, but the other black sailors were removed from the ship for their protection. R.O. characterized the applicant as a "nasty bastard" and an "arrogant bastard." The recording submitted into evidence ends before the end of the telephone conversation.

Audiotape of Interview with A.A.[38]

In a 2000 telephone interview with the applicant's counsel, A.A. repeatedly stated that he cannot remember what happened. He stated that he did not know L.S. or the applicant very well, but R.Y. was a friend of his. In response to the attorney's questions, he indicated that he did not remember seeing them argue or even being on board at the time of the stabbing. He also did not remember R.Y. getting into trouble on the night of the stabbing or being interviewed by an F.B.I. agent. He said he remembered hearing that the captain ordered the ammunition stored below decks to prevent further trouble. He stated that the officers were afraid of a riot after the "murder."

Audiotape of Interview with P.M.[39]

In a 1996 interview with the applicant's counsel, P.M., an officer on the *Xxxxxxx*, stated that he had never heard about the fight between L.S. and the applicant starting on shore after the applicant danced with a woman until the applicant's counsel informed him of this. He stated that he had been told that the fight started when L.S. and the applicant disagreed about a "mutual friend" who was a steward's mate, which he thought was "kind of ridiculous" but explained by the fact that they had been drinking. P.M. also stated that he had not heard that L.S. was beating the applicant "savagely" before the stabbing. He heard that L.S. was telling the applicant to "stand up and fight like a man" when the latter rose and stabbed him. After the stabbing, he stated, the captain had the applicant removed from the ship quickly for his protection.

P.M. stated that he was very "rattled" when he was questioned by the Coast Guard Board of Investigation and mixed up the times and details because he had not

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[38] A.A.'s 194x statement to the F.B.I. is summarized on page 17.

[39] P.M.'s 1999 statement submitted by the Coast Guard is summarized on page 34.

slept since the day before. He does not remember speaking to an F.B.I. agent. He stated that because the ship was tied up to the pier, the Coast Guard did not have jurisdiction over the case. He further stated that, because none of the officers on the *Xxxxxxx* had experience with conducting a general court-martial, it would not have been fair to try the applicant on board.

Audiotape of Interview with R.Y.

In a 1996 telephone conversation with the applicant's counsel, R.Y., when asked to talk about his service in the Coast Guard, refused to talk and hung up the phone.

Audiotape of First Interview with R.E.[40]

In a 1996 telephone interview with the applicant's counsel, R.E. stated that he heard that L.S. got into an argument with about five black sailors on shore because they were dancing with white women. He said that they kept arguing all the way back to the ship and started fighting when they got below decks. He said he did not witness the fighting and was at his bunk in another compartment when he heard a commotion and learned that L.S. had been stabbed. R.E. stated that after the fight, the captain transferred all the black sailors off the ship for their protection. He also stated that the ship was not integrated and that the black sailors were required to sleep separately in the galley.

When R.E. referred to previous trouble the applicant had gotten into, his counsel denied it. The counsel told R.E. that the applicant had been beaten so badly, he could not stand up and his back was broken. R.E. concluded that the applicant should get an honorable discharge because the stabbing was "self-defense."

Audiotape of Second Interview with R.E.

In a 2000 telephone interview with the applicant's counsel, R.E. stated that he was on liberty that night but did not see anything happen on shore. He was in his bunk about to go to sleep when he heard the commotion. He got up and saw R.S. trying to save L.S. Afterward, he went back to sleep. R.E. said the crew was sad about the killing and that it would be an exaggeration to say that they "went crazy." However, he said some of the southerners would probably have gone after the other black sailors. He stated that the "scuttlebutt" was that the captain transferred the other black sailors off the ship for their protection. R.E. said he did not remember an F.B.I. investigation.

Audiotape of Interview with H.M.

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[40] R.E.'s 1996 affidavit based on this interview is summarized on page 32.

In a 1996 telephone interview with the applicant's counsel, H.M. stated that when he returned to the ship after being on liberty in Xxxxxxx, the captain was on deck and told him to go to his bunk. He said when he got below, he saw L.S.'s body lying on a footlocker and was told he had been murdered. He said he was never questioned by the F.B.I. H.M. stated that he had thought the ship was headed "home," but instead it sailed to China.

Audiotape of Interview with **R.B.**[41]

In an undated telephone interview with the applicant's counsel, R.B. said that he heard that L.S., the jack of the dust who was "getting stuff for the cooks,"[42] was coming up the gangway when he and the applicant bumped into each other and got into "a little todo." He said he was in Xxxxxxx on liberty that night and does not remember seeing or hearing about any incident over a woman. He said he was lying in his bunk when L.S. chased the applicant into the sleeping compartment. R.B. said he saw L.S. hit the applicant a couple of times before the latter dropped to his knees and reached into his footlocker. He said L.S. hit him once or twice more before the applicant rose to his feet and stabbed L.S. in the back. He said the other sailors had started to get out of their bunks to see what was happening when the applicant got hold of his knife to defend himself.

After the stabbing, R.B. said, the Officer of the Day arrived with his weapon on his belt and told everyone to stand aside. R.B. said he himself was a gunner's mate and soon went on watch.[43] He could not recall speaking to any "law enforcement" about the incident.

NEWSPAPER ARTICLES

Account of Coroner's Inquest in the **Xxxxxxx Xxxxx**

The applicant submitted a copy of an article in the *Xxxxxxx Xxxxxx* dated Monday, October 28, 194x. The article states that the applicant had difficulty answering the questions of the judge and the F.B.I. agent at the inquest and seemed "dazed and uncomprehending." The article quotes R.W. as having stated at the coroner's inquest that the quarrel arose due to the applicant having kicked L.S. "earlier in the evening." The newspaper attributed the following quotation to R.W.:[44]

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[41] Excerpts of the statement prepared by the applicant's counsel based on this interview, which R.B. did not sign, appear in Appendix B on page B-12. A signed 1999 statement by R.B. submitted by the Coast Guard is summarized on page 33.

[42] The "jack of the dust" was the crewmember responsible for the ship's stores.

[43] The applicant's counsel did not ask this interviewee about the alleged plan by some sailors to fire on the jailhouse.

[44] R.W.'s 194x statement to the F.B.I. is summarized on page 16.

> We came aboard and were going down to turn in when we saw three fellows standing in the passageway arguing. One of them was [the applicant] who turned and ran when he saw [L.S.]. [L.S.] caught up with him and kicked him. I caught up with [L.S.] and [L.S.] almost stopped. I went into compartment 201 and there was no one there. I went into compartment 203 and found [the applicant] standing there with an iron pipe about ten inches long in his hand. It's a wrench used to tighten the dogs on the hatches. I talked him out of the pipe and promised to talk to [L.S.]. [The applicant] promised me he'd hit the sack if I could get [L.S.] to do the same.

The article reports that R.W. then stated that he later found the applicant arguing with someone else near the bunks with a sheathed knife in his hand. R.W. said he told the applicant "to put the knife away or I would use the iron pipe on him." R.W. stated that the applicant put the knife away in his footlocker.

According to the article, R.W. testified that he warned L.S. that the applicant had a knife but that L.S. again "went after" the applicant, who "to avoid him, circled around a tier of bunks, back to the locker where he had put the knife and dropped to one knee before it. He thrust his arm into the locker while [L.S.] was standing above him pulling at him and trying to get the negro to 'stand up and fight like a man.'" R.W. testified that the applicant then warned L.S. that he had a knife and began to stand up and that he saw the applicant "put his left arm around [L.S.'s] neck, pull him toward him and drive the knife three times into [L.S.'s] back."

The article states that R.A. and R.D. also testified and indicated that the applicant and L.S. had been drinking but were not drunk. R.A. stated that he heard L.N. tell the applicant to go to the Officer of the Day for protection prior to the stabbing.

The article also states 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." The article states that the applicant and other black sailors were being kept in the Xxxxxx jail for their protection.

***Account of Coroner's Inquest in the* Xxxx Xxxxx Xxxxx**

The applicant also submitted a copy of an article about the coroner's inquest that appeared in the *Xxxx Xxxxx Xxxxx* on Thursday, October 31, 194x. The article states that the applicant had been charged with first-degree murder by a coroner's jury on Monday afternoon for stabbing L.S. It states that R.W. and R.D. testified that the stabbing "was the outcome of an incident earlier in the evening when [the applicant] kicked [L.S.] in the stomach." The article further reports the testimony at the inquest as follows:

> Following shore leave, [L.S.] looked up [the applicant] to settle the score. Witnesses said both men had been drinking but were not drunk. [L.S.] chased [the applicant] through sleeping quarters, hitting and kicking him. The Negro picked up an iron bar which [R.W.] took away, then [the applicant] promised to go to bed if [R.W.] would urge [L.S.] to do the same.
>
> Minutes later [R.W.] saw [the applicant] by the bunk with a knife in its sheath and told him to put the knife away. [The applicant] put the knife in the locker, and [R.W.] warned [L.S.] that [the applicant] had a knife, but [L.S.] seemed not to understand and started again for [the applicant], who circled the tier of bunks around to the locker where he dropped to one knee.
>
> Meanwhile, [L.S.], trying to pull [the applicant] to his feet, was telling him to get up and fight like a man. The Negro rose, put his left arm around [L.S.] and drove the knife three times in [L.S.'s] back. …

The article states that the applicant, who had been held in the Xxxxxxx jail with three other black sailors for safekeeping, was arraigned on Tuesday and "bound over to the Grand Jury to be tried in Xxxxxxx or Xxxxx."

Death Penalty Research Article

As evidence of racism in the justice system in the Territory of Xxxxx, the applicant submitted part of an article in the *Xxxxxxxxxxxxxxxxx* on capital punishment in the territory. The article states that, of the eight men executed in the territory between 1900 and 1957, only two were white Americans, although most of the murders in the territory were committed by white Americans. Of the other six men executed, three were "Natives," two were black, and one was from Montenegro (Yugoslavia).

CORRESPONDENCE

Letter of the Deputy Chief of the Coast Guard's Congressional Affairs Staff

In 1993, the Deputy Chief of the Coast Guard's Congressional Affairs Staff responded to a letter from Senator xxxxxxxxxxxxx regarding the applicant's undesirable discharge. The Deputy Chief wrote the following:

> [The applicant] was convicted of manslaughter in Federal Court in the Territory of Xxxxx in 194x. As a result of this conviction, he was awarded an Undesirable Discharge by the Coast Guard in accordance with service directives. … The Undesirable Discharge was based on the Federal conviction, which the Coast Guard has no authority to overturn. Should [the applicant's] Federal conviction for manslaughter be overturned, he may seek a reconsideration of his case by the Board for Correction of Military Records based on this new information. …

Unavailability of Grand Jury Proceedings

On June 5, 1996, the Justice Department informed the applicant's counsel that, "under Federal Rule of Criminal Procedure 6(e) grand jury minutes can be disclosed only 'when so directed by a court * * * in connection with a judicial proceeding."

GOVERNOR'S PARDON

On October 16, 1997, the applicant's counsel signed an Application for Executive Clemency on his behalf. The form states that it "may be used in applying for any type of Executive Clemency, including a pardon, commutation of sentence, or remission of a fine or forfeiture." In support of his application, he submitted all of the 1996 affidavits and an almost completely illegible copy of the 194x F.B.I. report.[45]

On October 16, 1997, the Attorney General of the State of Xxxxx recommended that the application be granted. He based his recommendation on the following grounds: (1) The applicant had "served his sentence nearly a half century ago"; (2) the applicant had "led an exemplary life since release from custody"; and (3) the applicant had been injured and might become eligible for "certain government benefits" if clemency were granted. He further stated that he did not believe the applicant received ineffective assistance of counsel or improper judicial procedure, but he stated that "racial animosity no doubt contributed to the incident leading to his conviction."

On November 6, 1997, the Honorable xxxxxxxxxxxxxxx, Governor of Xxxxx, signed a decree regarding the applicant's request for pardon. The decree states the following:

> WHEREAS, [the applicant] was convicted and sentenced for the crime of manslaughter …
>
> WHEREAS, [the applicant] was sentenced to a term of five years, all of which has been served; and,
>
> WHEREAS, [the applicant] has lead an exemplary life since his release from custody in 194x; and,
>
> WHEREAS, recently sworn affidavits from several eyewitnesses indicate that [the applicant] acted in self-defense during a racially motivated attack; and

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[45] A reasonably readable copy of the F.B.I. report was obtained by the Chief Counsel of the Coast Guard in June 1999. The copy the applicant received from the F.B.I. and submitted to the Governor and to the BCMR is almost completely illegible. The F.B.I. told the applicant that the copy he received was the most readable copy available but was later able to produce a significantly more readable copy for the Coast Guard. The BCMR sent a copy of this readable copy of the F.B.I. report to the applicant's counsel on July 30, 1999.

> WHEREAS, the incident leading to the conviction of [the applicant] occurred during the unusual conditions of wartime, and many eyewitnesses to the incident were unavailable to testify because their military duties took them far from Xxxxx; and,
>
> WHEREAS, it appears that [the applicant] is a fit subject for a pardon on this sentence; and,
>
> NOW THEREFORE, BE IT KNOWN, THAT I, xxxxxxxxxxxxxx, GOVERNOR of the State of Xxxxx, in consideration of the above facts and other good and sufficient reasons made known to me, do hereby grant a pardon on this case; … .

The applicant also submitted a copy of a videotape of the press conference at which the Governor signed his pardon. Governor xxxxxxxxx stated that the affidavits gathered by the applicant's counsel show that the fight started because the applicant danced with a white or Native American woman at a nightclub in Xxxxxxx. He quoted from the 1996 statement of N.S. and said that twelve of the affidavits state that the stabbing was committed in self-defense. He did not mention the F.B.I. report. He said that there was no proof of any wrongdoing by the court in 194x and that, under the circumstances, the applicant's attorney "may have served [him] well" in recommending that he plead guilty to manslaughter. He stated that he hoped the pardon would convince the Coast Guard to upgrade the applicant's discharge. The three members of the Executive Clemency Board, the applicant's counsel in Xxxxx and Xxxxxxx, and the applicant's sons also spoke briefly, thanking the Governor for pardoning the applicant.

VIEWS OF THE COAST GUARD

On June 30, 1999, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request.

NO JURISDICTION TO COURT-MARTIAL

The Chief Counsel denied the applicant's allegation that the Coast Guard committed an injustice by handing over the applicant to civilian authorities for prosecution. The Chief Counsel stated that the Coast Guard had to do so because, under the Articles and regulations governing the Navy and Coast Guard at the time, the Coast Guard had no jurisdiction to try a member for murder or manslaughter. Thus, he argued, both statutes and regulations required the Coast Guard to deliver the applicant over to the custody of the territorial authorities.

PARDON HAS NO LEGAL EFFECT ON THE DISCHARGE

The Chief Counsel alleged that the pardon granted to the applicant by the Governor of Xxxxx had no legal effect on the applicant's discharge. "[A]n executive action on the part of a State's Executive is insufficient as a matter of law to overturn a federal administrative action, especially where the federal action has been long settled."

The Chief Counsel compared the applicant's position to that of the petitioner in *Thrall v. Wolfe*, 503 F.2d 313 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975), whose pardon by the Governor of Montana was determined not to erase his conviction for the purpose of being eligible for a federal license to sell firearms. The Chief Counsel stated that because the court in *Thrall* "concluded that the issue is not the effect of a pardon within the jurisdiction of the granting sovereign but rather the effect of the pardon within the federal sovereign …, the Board need not decide what recognition Xxxxxn State authorities would give to [the applicant's] pardon." The Chief Counsel stated that the *Thrall* court concluded that a state pardon does not "relieve a person of federal disabilities resulting from a state conviction."

The Chief Counsel also noted that the Full Faith and Credit Clause of the Constitution applies only to the states and that "allowing state action to independently change a federal action is contrary to the federal supremacy doctrine."

The Chief Counsel cited two federal Circuit Court of Appeals cases from Xxxxx and one from the D.C. Circuit Court of Appeals that followed the holding in *Thrall*. He argued that the decisions in *United States v. Bergeman*, 592 F.2d 533, 534 (9th Cir. 1979), *United States v. Potts*, 528 F.2d 883 (9th Cir. 1975), and *Yacovone v. Bolger*, 645 F.2d 1028 (D.C. Cir. 1981), establish that "it is the fact of the state conviction that is important for federal purposes, not how the state subsequently elects to treat that conviction short of a judicial reversal." Therefore, the Chief Counsel argued, the applicant's undesirable discharge on the basis of his conviction is not affected by the Governor's pardon.

DOCTRINE OF LACHES SHOULD BAR CLAIM

The Chief Counsel argued that, because the Coast Guard acted properly in handing the applicant over to territorial authorities and because the pardon has no legal effect on the applicant's discharge, the Board can only grant relief if it finds on the basis of the record that the undesirable discharge was unjust. He alleged that the applicant's killing of L.S. and other documented misconduct fully supported the Coast Guard's decision to award the applicant an undesirable discharge "by reason of misconduct due to trial and conviction by civil authorities."

Therefore, the Chief Counsel argued, the only possible basis for upgrading the applicant's discharge is if the facts show that the incident occurred as a result of racism and that the applicant was a victim of racial injustice. However, by delaying his application for over 50 years, the applicant has waited until many of the witnesses have died and the still living witnesses may have forgotten what happened. The Chief Counsel alleged that the *Xxxxxx*'s commanding officer, executive officer, and engineering officer (who was the applicant's supervisor) are deceased. Also deceased are the applicant's attorney, M.E.M., the investigating F.B.I. agent, the Deputy U.S. Marshall for Xxxxxx, Xxxx, the prosecutor, the judge, and the court reporter. Therefore, the government "is unable to determine the validity of the Applicant's various assertions of racial animus and lack of due process because that information went to the graves with the deceased witnesses."

The Chief Counsel alleged that the unreliability of recently gathered witnesses' statements is shown by the fact that two witnesses whose eyewitness accounts appear in the 194x F.B.I. report stated that they could not recall being interviewed by the F.B.I. when interviewed by the applicant's counsel. Furthermore, there are significant contradictions between what some witnesses reported to the F.B.I. five days after the incident and what the same witnesses told the applicant's counsel in 1996. For example, contradicting what they told the applicant's counsel in 1996, neither the applicant nor J.M., who accompanied him while on liberty in Xxxxxx the evening before the stabbing, told the F.B.I. agent that the applicant had met and argued with L.S. in a bar. Instead, the applicant indicated to the F.B.I. agent that their argument began in a passageway after they had returned to the ship. J.M. mentioned to the agent that the applicant had danced with a white woman, but stated that it was the woman who told the applicant she did not want to dance with him again because he had drunk too much alcohol. The Chief Counsel also pointed out that, in his description of their evening in Xxxxxx to the F.B.I. agent, J.M. did not mention encountering L.S. at all.

The Chief Counsel further alleged that, other than the pardon, the evidence presented by the applicant was previously available to him if he had exercised due diligence. The denial of his petition by the Board of Review, Discharges and Dismissals in 1951, the Chief Counsel argued, put the applicant on notice that he would need to pre-

sent substantial evidence to have his discharge upgraded. Yet the applicant did nothing for over 40 years and then failed to submit substantial evidence again when he finally applied to the BCMR in 1991. The Chief Counsel pointed out that the applicant could have sought the help of a legal aid clinic years ago, but waited until 1996 to seek the help of the students at the Xxxxx University law school clinic who gathered the evidence and prepared his application.

Therefore, the Chief Counsel argued, the doctrine of laches should apply to bar the applicant's claim because he presented no valid excuse for the delay and his delay prejudiced the Coast Guard's ability to gather evidence.[46]

UNDESIRABLE DISCHARGE FULLY JUSTIFIED

The Chief Counsel alleged that the applicant was properly awarded an undesirable discharge in 194x under Article 584(4) of the 1940 Personnel Manual because he had been convicted by a civil authority and sentenced to confinement in a penitentiary. Therefore, the Coast Guard committed no error in this respect.

However, the Chief Counsel argued, even setting aside the conviction, "the determination that he should receive an Undesirable Discharge was valid based on his service record and misconduct." The Chief Counsel alleged that the "Governor's action was essentially an act of clemency and does not eliminate the fact that Applicant killed a shipmate with a knife." That fact and his prior record of misconduct "fully support his Undesirable Discharge."

The Chief Counsel argued that Coast Guard regulations directed undesirable discharges for both misconduct and unfitness. "Unfitness" could be established by repeated petty offenses, shirking, and moral turpitude,[47] and the Commandant could discharge a member for unfitness without recourse to a board if the member had the opportunity to present a written statement on his own behalf.[48] The Chief Counsel alleged that the applicant had two opportunities to make such a statement, the first to the F.B.I. and the second (which he waived upon the advice of counsel) to the Coast Guard Board of Investigation. Therefore, the Chief Counsel argued, the Coast Guard had the authority to award the applicant an undesirable discharge based on his prior record alone, which included a summary court-martial for an earlier stabbing of another member of the Coast Guard, two non-judicial punishments for misconduct, an extended period of being AWOL, and below average performance and conduct marks. The Chief Counsel alleged that the Coast Guard may have refrained from discharging the appli-

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[46] *Cornetta v. United States*, 851 F.2d 1372, 1377 (1988); *Deering v. United States*, 620 F.2d 242, 245 (1980); *Frommhagen v. United States*, 573 F.2d 52, 56 (1978), *cert. denied*, 440 U.S. 909 (1979); and *Brundage v. United States*, 504 F.2d 1382, 1384 (Ct. Cl. 1974), *cert. denied*, 421 U.S. 998 (1975).

[47] United States Coast Guard, PERSONNEL MANUAL, Art. 4615 (1940).

[48] *Id*. Art. 585.

cant earlier because its policy during the war was not to discharge members who committed misconduct, so that members would not be motivated to commit misconduct just to get discharged.

The Chief Counsel stated that current corresponding regulations properly base the character of discharge awarded to a member on the underlying misconduct recorded in his performance evaluation, rather than on the civilian legal consequences of the misconduct, over which the Coast Guard has no control.[49] Under Article 12.B.2.f.3. of the current Personnel Manual, he alleged, the applicant would have been subject to an administrative discharge for misconduct even without the conviction, although the term "undesirable discharge" has been replaced by the phrase "discharge under other than honorable conditions" (OTH). The Chief Counsel concluded that "by any rational standard, the Applicant would have been subject to an Undesirable Discharge by administrative proceedings in 194x notwithstanding his manslaughter conviction."

EVIDENCE DISPROVES SELF-DEFENSE

The Chief Counsel argued that the record fully supports the applicant's conviction for manslaughter. "Ordinary voluntary manslaughter involves the intentional killing of another while under the influence of an induced emotional disturbance causing a temporary loss of normal self-control. Except for this emotional condition, the intentional killing would be murder," the Chief Counsel argued.[50] He further argued that "where two persons willingly engage in mutual combat, and, during the fight one kills the other as the result of an intention to do so formed during the struggle, the homicide has long been held to be manslaughter, and not murder, the notion being [that] the suddenness of the occasion, rather than some provocation by the victim, mitigates the intentional killing to something less than murder."[51]

The Chief Counsel alleged that the record proves that the applicant willingly engaged in combat with L.S. by shoving and kicking him in the passageway, searching for weapons to use, exchanging punches with him in the berthing compartment, and finally seeking and using his knife to kill L.S. In addition, the evidence indicates that the applicant did not attempt to ward off L.S. with the knife. Moreover, the Chief Counsel alleged that, in contradiction to the applicant's allegation that he was being choked, the evidence proves that as soon as he found his knife, he stood up, faced his unarmed victim, and lunged over his back to stab him three times. The Chief Counsel argued that "[t]hese facts do not fit within any objective basis for the defense of self-defense. The Applicant intentionally used a deadly weapon to stab and kill [L.S.] sud-

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[49] United States Coast Guard, PERSONNEL MANUAL (COMDTINST M1000.6A), Art. 8.B.4.b. (1999).
[50] *Commonwealth v. Flax*, 200 A. 632 (1938).
[51] W. LaFave et al., CRIMINAL LAW § 7.10(b)(4) (2d ed. 1986).

denly during the incident. His guilty plea to manslaughter was consistent with the facts and appropriate under the law."

The Chief Counsel argued that "[u]nder the common principles of self-defense, one who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that use of such force is necessary to avoid danger." The Chief Counsel further argued that "[i]t is never reasonable to use deadly force against a non-deadly attack."[52] Deadly force, he alleged, may only be used in self-defense "if he reasonably believes that the other is about to inflict unlawful death or grievous bodily harm upon him."[53]

The Chief Counsel argued that the applicant's use of deadly force was not justified because, when he stepped away from L.S. to open his locker, there was no clear and present threat to his life. He alleged that the record shows that only four or five punches had been thrown prior to the stabbing and that the applicant sustained no serious injuries or injuries to his neck. Moreover, he pointed out, while the applicant had a bad reputation, L.S. had a spotless record in conduct.[54] Therefore, the Chief Counsel concluded, there is no evidence that the applicant's life was in danger or that he had a reasonable basis to believe his life was in danger.

VOLUNTARY INTOXICATION BARS DEFENSE OF SELF-DEFENSE

Furthermore, the Chief Counsel stated, one who honestly but unreasonably believes in the necessity of using deadly force to prevent death or grievous bodily harm loses the defense.[55] Therefore, "[v]oluntary intoxication deprives the defendant of a bona fide claim of self-defense, which requires that the defendant appraise the situation, as would a reasonable sober man.[56] Thus, the Chief Counsel alleged that the applicant cannot assert the defense of self-defense if his belief in the necessity of using deadly force was unreasonable or induced by his voluntary intoxication.

The Chief Counsel alleged that, based on J.M.'s statement to the F.B.I., the applicant drank half a pint, or eight ounces, of whisky between 5:45 and 11:00 p.m. on the

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[52] CRIMINAL LAW § 5.7

[53] *Beard v. United States*, 158 U.S. 550 (1895).

[54] L.S.'s military record contains no negative entries. From his enlistment on February 25, 194x, until his death, he received 16 perfect conduct marks of 4.0.

[55] CRIMINAL LAW § 5.7(c).

[56] *Springfield v. State*, 11 So. 250 (1892); *Golden v. State*, 25 Ga. 527 (1858).

evening before the stabbing. Therefore, since he weighed approximately 135 pounds, the applicant's blood-alcohol content was probably about 0.1573.[57]

APPLICANT'S RESPONSE TO THE COAST GUARD'S ADVISORY OPINION

On January 27, 2000, the Board received the applicant's response to the Chief Counsel's advisory opinion. The applicant reiterated his argument that because his undesirable discharge was based on an unjust, "constitutionally infirm" conviction that has been vacated, the character of his discharge was unjust.

The applicant further argued that the evidence considered by the Governor of Xxxxx who pardoned his conviction included a copy of the 194x F.B.I. report that "was, with effort, readable" and that the enhanced copy of the report received by the Coast Guard "only strengthens [his] case." He also stated that the Coast Guard's "version of events" is based entirely on the 194x F.B.I. report. That report, he alleged, "was fatally tainted by racism, fear and a desire, on the part of the *Xxxxxx*'s officers and crew, to distance themselves from the events."

ALLEGATIONS CONCERNING THE ORIGINS OF THE FIGHT

Regarding the genesis of the fight, the applicant alleged that it "was a racially charged confrontation that occurred earlier that evening on shore." He alleged that the events related by sailors in the F.B.I. report were "concocted out of that same racial animosity in order to shield certain crewmembers from potential negative repercussions." He stated that the recent affidavits and taped interviews of N.S., L.B., W.R., W.D., R.E., J.M., L.N., and F.R. prove that the F.B.I.'s statements were false and that the fight started because L.S. was angry that the applicant had danced with a white or Native American woman. The applicant argued that, while time does dull memories, it is impossible for all of these witnesses to have identical false memories about the onset and motivation for the fight. Therefore, their recent statements prove that the nature of the fight was as the applicant alleged and not as indicated in the F.B.I. report. In addition, he pointed out that an October 194x account of the incident in the *Xxxxxxx Xxxxxx* (see page 44) indicates that the fight started in the bar and not in a corridor on the ship.

Moreover, the applicant argued, the statements by the F.B.I.'s witnesses to the alleged incident in the corridor should be discredited. He submitted a tape of a recorded interview between A.A. and his attorney in which A.A. stated that he did not return to the ship at all until an hour after the stabbing and that he never spoke to an

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[57] The Coast Guard used the formula of the National Highway Traffic and Safety Administration at http://www.nhtsa.dot.gov/people/injury/alcohol/bacreport.html to calculate the applicant's alleged blood-alcohol content.

F.B.I. agent. Therefore, the applicant alleged, A.A.'s detailed statement in the 194x F.B.I. report about the incident in the corridor "is totally devoid of credibility."

The applicant stated that R.W.,[58] another sailor who described the incident in the corridor to the F.B.I., was a friend of L.S. and had threatened the applicant. Moreover, he characterized R.W.'s statement to the effect that L.S. and the applicant had not met while on shore as an "out of the blue" assertion like that of a "child that volunteers his innocence to his mother before questioned." In addition, the applicant pointed out discrepancies between R.W.'s statement to the F.B.I. and a reporter's account of R.W.'s testimony at the coroner's inquest. Therefore, he argued, R.W.'s description of the incident in the corridor lacks credibility, and all of R.W.'s testimony to the F.B.I. should be considered questionable.[59]

Furthermore, the applicant alleged that the F.B.I. agent who took the sailors' statements and filed the complaint against the applicant was complicit in the witnesses' lies. He alleged that the agent, who was present at the inquest, must have known that R.W.'s account of the events at the inquest (as reported in the *Xxxxxxx Xxxxxx*) differed from his sworn statement to the F.B.I. Thus, the applicant stated that the F.B.I. agent suborned perjury in accepting R.W.'s contradictory testimony.

The applicant stated that the F.B.I. report proves that F.Z., who also described the incident in the corridor, held a grudge against the applicant, who had once told him to get back in the mess line. F.Z.'s statement, the applicant argued, should be discredited as "a dim and silly story." He further stated that the sailors' description of the incident in the hall was "ridiculous," as P.M. stated in his interview.

The applicant also argued that his own 194x statement to the F.B.I. about the onset of the fight in the corridor is "suspect." He said the report shows that the "purported statement" was obtained during a four-hour "sweat him out" interrogation with no counsel present between 9:30 p.m. and 1:30 a.m. on October 31, 194x. He alleged that the statement "must have undergone a good deal of editing" because it was short enough to have been written in five minutes. The applicant also stated that his description of the incident in the corridor is more credible than those of the other sailors because it shows L.S., the larger of the two, initiating the fight and the applicant, who was smaller, running away. Furthermore, the applicant stated, the evidence indicates that L.S. passionately hated African Americans and that the applicant would never have initiated a fight with L.S. because L.S. was so big. The applicant alleged that attacking such a large man would have been "lunacy," and the F.B.I. report indicates that neither he nor L.S. was "drunk."

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[58] The applicant submitted a copy of an obituary indicating that R.W. died in 1993.

[59] *See Hargrave v. Stockloss*, 21 A.2d 820, 823.

Finally, the applicant alleged that R.Y., who according to the F.B.I. report was supposedly the drunken cause of the shoving match in the hall, did not make a statement to the F.B.I. for the report and now "refuses to talk."

ALLEGATIONS CONCERNING THE END OF THE FIGHT

Regarding the remainder of the fight, the applicant argued that the F.B.I. report verifies his claim that L.S. intended to do him "great bodily harm." The applicant stated that several sailors told the F.B.I. that L.S. and four or five others had "hunted" for the applicant and threatened to kill or hurt him if they found him. The applicant further stated that his and the other sailors' statements to the F.B.I. prove that he went to his bunk and began "settling in for the night" when R.W. and E.G. began threatening him.

The applicant alleged that the accounts in the F.B.I. report of his brandishing a pipe and then retrieving his knife from his trunk are untrue and the result of the crewmembers' attempts to deflect blame from L.S. and themselves. Moreover, even if he did brandish the pipe or the knife, he argued, it would have been justifiable under the circumstances. He alleged that the sailors' accounts show that, if he did pick up the pipe and the knife, he voluntarily disarmed himself of both weapons, manifesting a "peaceful intent."

The applicant alleged that the F.B.I. report shows that R.W. told him L.S. had gone to bed. Thus, he alleged, "[i]t sounds like [R.W.] was setting [the applicant] up for the kill: trying to lull [the applicant] into a sense of security in order to render him defenseless for the surprise entry of [L.S.]." Moreover, the applicant stated, if he refused to seek the protection of the Officer of the Day, as L.N. indicated, it was probably because he doubted that officer's ability or willingness to protect him.

The applicant argued that the statements in the F.B.I. report prove that, when L.S. found him in his sleeping compartment, he tried to run but finally retreated to his bunk, where L.S. cornered him, got him in a chokehold, and beat and kicked him. He alleged that, given the disparity in their sizes and L.S.'s racial hatred, he justifiably feared for his life, since a single punch can kill someone and there was no indication that L.S. would stop before he was dead. In addition, the applicant alleged that he had reason to fear injury at the hands of the other sailors who had hunted and threatened him along with L.S. Therefore, he argued, since he reasonably feared for his life, had retreated "to the wall," and had warned L.S. that he had the knife, his use of deadly force to defend himself was completely justified.[60] In light of these facts, he stated, it is

[60] XXXXX STAT. § 11.81.335; *Owens v. United States*, 130 F. 279, 281 (Ct. App. 1904).

clear that he acted in self-defense and that he should never have been charged with murder.[61]

The applicant pointed out that several sailors told the F.B.I. that neither the applicant nor L.S. was drunk. This evidence, he alleged, contradicts the ship's doctor's finding that the applicant was "moderately intoxicated" three hours after the fight. He also stated that the Coast Guard miscounted the number of shots of whiskey the applicant had drunk when it calculated his blood-alcohol level. He stated that the evidence indicates he had drunk only five or six shots, rather than eight. Therefore, he argued, the Coast Guard's allegation that he is barred from asserting self-defense due to voluntary intoxication is without merit. He also argued that the two cases cited by the Coast Guard for this proposition, *Springfield v. State*, 11 So. 250 (1892), and *Golden v. State*, 25 Ga. 527 (1858), are old and would not have been controlling in the U.S. District Court for the Territory of Xxxxx or if the applicant had been tried by court-martial. Moreover, the applicant stated that the Coast Guard's argument suggests that anyone who gets drunk relinquishes the right to defend himself from attack and is "fair game" for anyone who wants to assault them, which is wrong. Finally, the applicant argued that the "totality of the evidence strongly suggests that [he] was not intoxicated at the time of the attack. At least not intoxicated to the level where he could not tell if he were about to be beaten to the point of serious injury or death."

ALLEGATIONS CONCERNING THE MEDICAL EVIDENCE

The applicant alleged that the report of the ship's doctor in the F.B.I. report and the newspaper account of the applicant's behavior at the inquest prove that he had been assaulted and suffered some type of neurological damage. He alleged that the modern medical opinion submitted by the Coast Guard is untenable and ignores the fact that being choked with a forearm does not leave a mark on someone's neck, as does being choked with hands and fingers. Moreover, he alleged, the expert's conclusion that his life was not in jeopardy is untenable since, even if the applicant had dodged every potentially deadly punch and kick by L.S., he could have escaped without a mark despite having his life placed in jeopardy.

The applicant alleged that during the fight, his spine was injured and he was "beat to a pulp," in contradiction to the report of the ship's doctor. This injury, he alleged, made him unable to perform hard labor in prison for more than a week, so he was transferred to a prison hospital in Florida for treatment. He alleged that he later underwent five operations on his back and has a limp.

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[61] The applicant also alleged that the U.S. Attorney who handled his case was later disgraced by his involvement in a protection scheme in which he took money from a Xxxxxx brothel.

ALLEGATIONS CONCERNING THE AFTERMATH OF THE FIGHT

The applicant alleged that the 1999 affidavit of R.R., denying having seen the crew beat up the applicant, contradicted R.R.'s 194x statement to the F.B.I., in which he said he saw three or four sailors hitting the applicant, and contradicted other sailors' statements that as the Officer of the Day, R.R. stopped the crew's attack on the applicant. He also alleged that R.R.'s statement that he drew his gun to use as a club "strains credibility."

The applicant alleged that after he was beaten, white sailors formed a lynch mob, looked for rope, and "attempt[ed] to lynch all the black sailors on the ship." He alleged that the lynching was only prevented by the officers, who put the black sailors off the ship and "locked them up for their own safety." He alleged that the captain had to order extra security watches, prevent sailors from leaving the ship, and post sentries at the jail in Xxxxxxx to prevent further violence and keep the southern sailors from lynching the applicant.

In addition, the applicant alleged that the evidence indicates that crewmembers actually plotted to fire on the jail and that the captain had to lock up the ammunition to keep them from doing so. He alleged that crewmember R.Y.[62] was probably involved in the attempt to fire on the jail because he was placed on report that night for disorderly conduct. Although the ship's log indicates that R.Y. was placed on report 10 minutes before the applicant was taken off the ship, he alleged that the log must be inaccurate.[63] He also alleged that "something as grave as pointing artillery at American territory would not [have been] broadcast in the ship's log." In the alternative, he argued that R.Y. may have been put on report for trying to lynch the applicant.

The applicant further alleged that, "[a]s the ship pulled out [of Xxxxxxx] local law enforcement must have sighed with relief. Quite possibly people were informed that they could once again come out of their basements. The terror was over."

ALLEGATIONS CONCERNING THE INVESTIGATION

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[62] In the F.B.I. report, R.Y. is identified as the very drunk crewmember who was being helped on board by A.A. when they met the applicant in the corridor.

[63] As further evidence of the log's inaccuracy, the applicant pointed to the fact that the F.B.I. report noted that the Coast Guard's Board of Investigation convened on October 29 and 30, 194x, but the log only mentions crewmembers leaving the ship to attend the Board of Investigation on October 29th. He also pointed out that J.M. remembers being taken by seaplane from Xxxxxxx to Xxxxx without returning to the *Xxxxxxx*, whereas the ship's log indicates that the black crewmembers returned to the ship and made the trip from Xxxxxxx to Xxxxxxx on board. In addition, he alleged that the log fails to mention the fact that one crewmember repeatedly jumped overboard one night. Therefore, he alleged, it is clear that the log was censored before being typed and sent to the Bureau of Naval Personnel.

The applicant alleged that the statements of the officers and crewmembers in the F.B.I. report reveal only half of the truth. He alleged that the officers did not tell the whole truth because they feared how it could affect their careers and wanted to save the ship's honor. He alleged that even today, some of the officers and sailors are not telling the truth about what happened to preserve the ship's honor. He alleged that the enlisted men did not tell the F.B.I. the truth for fear of criminal sanctions or disciplinary measures and also to save the reputation of the ship. He alleged that several of them refused to sign affidavits prepared by his counsel for their signature to preserve the ship's reputation and to avoid getting involved.

The applicant alleged that the desire of the sailors in 194x not to get themselves or each other in trouble and the officers' desire to avoid repercussions caused them to conspire together to omit some facts, such as the fight beginning on shore when the applicant danced with a white woman, and to invent other facts, such as the fictional origin of the fight in the corridor. He alleged that the abridged truth of the F.B.I. report is proved by the lack of an affidavit from R.Y., the sailor whose extreme drunkenness, according to the F.B.I. report, triggered the incident in the corridor. He also alleged that many sailors failed to tell the truth in 194x because they wanted to stay on the ship, which was sailing to China, rather than stay in Xxxxx until the trial.

Therefore, the applicant alleged, the sailors conspired to place the entire blame on the applicant. He alleged that his friend, J.M., also placed the blame on the applicant because he was afraid he might have to continue serving on the *Xxxxxxx* and feared he would be lynched if he told the truth. He also alleged that fear of lynching caused the black sailors to tell the F.B.I. agent they had experienced little overt racism while on board.

The applicant alleged that the investigation was further flawed by the actions of the F.B.I. agent. He alleged that the agent ignored discrepancies in R.W.'s testimony and must have omitted crucial information from the report. He alleged that the agent's investigation of race relations on board was only "cursory." In addition, he alleged, the agent overzealously charged the applicant with murder. He concluded that the agent was either a "bungler" or a part of the conspiracy to set up the applicant.

ALLEGATIONS CONCERNING THE 194x COURT-MARTIAL

The applicant alleged that the stabbing for which he was court-martialed in 194x was also committed in self-defense. He alleged that it occurred when he got into an argument with another black sailor, C.C., at a USO dance. He alleged that C.C. hit him over the head with a bottle and that he only drew his knife and "cut him on the arm in which he held the bottle" to prevent C.C. from hitting him again. He alleged that C.C. "was not seriously injured."

ALLEGATIONS CONCERNING THE NAVY

The applicant alleged that the Navy ordered the *Xxxxxxx* to sail to the Far East instead of to a home port to avoid having the truth about the incident revealed. He also alleged that the Navy had jurisdiction over the case but wrongfully handed him over to civilian authorities. He alleged that the Board of Review, Discharges and Dismissals admitted that the Navy had jurisdiction in its 1951 report on the applicant's case.

ARGUMENTS CONCERNING THE PARDON

The applicant alleged that, while the Governor's pardon may have no legal effect on the character of his discharge, "logic dictates that the undesirable discharge should be null and void." He argued that the authority to pardon persons convicted in the District Court for the Territory of Xxxxx devolved to the Governor under the Xxxxx Statehood Act. Moreover, he alleged, contrary to the Coast Guard's view, the pardon fully exonerated him and erased his guilt.[64]

ARGUMENTS CONCERNING THE DOCTRINE OF LACHES

The applicant reiterated his arguments concerning the timeliness of his application. In addition, he argued that it is unfair for the Coast Guard to argue that the case should be dismissed under the doctrine of laches after the Deputy Chief of the Congressional Affairs Staff indicated in his letter of 1993 that his discharge could be upgraded if his conviction were overturned. Moreover, he argued that the Coast Guard has not been prejudiced by the delay because there is more evidence now, due to the efforts of the applicant's counsel, than there would have been had the applicant been properly tried in 194x when most of the witnesses were in the Far East.

ARGUMENTS CONCERNING DUE PROCESS

The applicant reiterated his arguments concerning the lack of due process accorded him. He alleged that he was not assigned counsel soon enough, since he was initially charged with a capital offense, and that he never actually appeared in court. He also argued that the indictment was fraudulent because the three surviving witnesses do not remember appearing before a grand jury, as indicated on the indictment. He alleged that, because the *Xxxxxxx* sailed off to the Far East with most of the witnesses and left only hostile witnesses behind, the applicant had no chance of a fair defense. Moreover, he could not have afforded to pay for their travel back to Xxxxx if he had succeeded in getting the court to issue subpoenas for them.

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[64] *State of Alaska v. T.M. & J.B.*, 860 P.2d 1286, 1290 (Ct. App. 1993).

In light of these circumstances, the applicant argued, even if the Board believes he did plead guilty, such a plea cannot be considered a waiver of his right to a fair trial since he had no opportunity to prepare a meaningful defense: "By pleading guilty," he alleged, he "was doing nothing more than acknowledging the loss of rights that had already been effectively denied."

COAST GUARD'S SUPPLEMENTAL RESPONSE

On May 5, 2000, the Chief Counsel of the Coast Guard submitted a supplemental response to the applicant's further allegations and evidence. The Chief Counsel argued that the applicant still had not proved by a preponderance of the evidence that his manslaughter guilty plea or undesirable discharge were in error or unjust.

The Chief Counsel argued that "[t]he central issue in this case is not whether Applicant was criminally guilty of manslaughter for his actions of October 27, 194x, but whether Applicant's record of unsatisfactory conduct and performance over his entire service tenure provided the Coast Guard with a sufficient administrative basis to discharge him with an Undesirable Discharge." He alleged that the applicant's record clearly provided the Coast Guard with that sufficient basis. Moreover, he argued, the Board should conclude, based on the record, that no trier of fact should attempt to reweigh evidence and overturn a conviction in a case settled 55 years ago. The Coast Guard's ability to respond to the applicant's allegations has been extremely prejudiced, he alleged, by the death of witnesses, human forgetfulness, and lost documents. He also alleged that the applicant has not provided any rationale for excusing his long delay in applying for relief. Therefore, the Board should deny the case under the doctrine of laches.[65]

The Chief Counsel alleged that, regardless of the stabbing for which the applicant was convicted of manslaughter, the remainder of his record, "standing alone, constituted a reasonable basis for the assignment of an Undesirable Discharge." In addition to the applicant's previous disciplinary problems, he alleged, the applicant consistently earned below average marks during his service and "received notably adverse marks for the last three marking periods of his active-duty service." He pointed out that the last marking period ended on September 30, 194x, before the stabbing, so those low marks were not even affected by the incident. He stated that the applicant's final average marks of 2.39 in proficiency and 2.91 for conduct were below the average mark of 3.3 (on a scale of 4.0) and that any mark below a 3.0 was considered unsatisfactory. In light of these marks and the applicant's record, the Chief Counsel argued, his undesirable discharge was amply justified under Articles 459, 585, or 4592 of the Personnel Manual then in effect even without consideration of his manslaughter conviction.

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[65] *See Cornetta v. United States*, 851 F.2d 1372, 1377 (1988); *Deering v. United States*, 620 F.2d 242, 245 (Ct. Cl. 1980); *Frommhagen v. United States*, 573 F.2d 52, 56 (1978), *cert. denied*, 440 U.S. 909 (1979).

The Chief Counsel compared this case to that of the applicant in BCMR Docket No. 1999-087.[66] In BCMR Docket No. 1999-087, the applicant received an undesirable discharge in 194x because he was tried and convicted in a civilian court for interfering with police officers when they tried to arrest a woman he was with. He was sentenced to 30 days' confinement. In addition, his record indicated two periods of being AWOL. The Chief Counsel argued that this other case shows that the applicant's record in this case, which is much worse than that of the applicant in BCMR Docket No. 1999-087, amply justified his undesirable discharge. Therefore, he argued, under *Sawyer v. United States*, the applicant's undesirable discharge cannot be considered "treatment by military authorities that shocks the sense of justice" and should not be altered by the Board.[67]

The Chief Counsel further argued that, under a July 5, 1976, directive of the General Counsel, the Board should not upgrade a discharge unless it believes that the discharge was too severe in light of today's standards. He alleged that under today's standards and regulations, Coast Guard members who disobey orders, go AWOL, and fight with knives are tolerated even less than they were in 194x. Therefore, he argued, the Board should conclude that the applicant has not proved he was eligible for an honorable discharge under either 194x or modern standards.

APPLICANT'S FINAL RESPONSE

On July 19, 2000, the Board received the applicant's final response in this case. The applicant characterized the Coast Guard's contention that he would not have received an honorable discharge even if he had not been convicted of manslaughter as "pure speculation." He stated that many "human elements" could have affected the character of the applicant's discharge. As an illustration of what could have happened, he attached to his response the affidavit of J.P., a seaman on the *U.S.S. Xxx* during World War II, who alleged that at the time of his discharge, a yeoman at his base decided to ignore his deck court-martial for one day of being AWOL and list only his summary court-martial for sleeping while on watch. As a result of that decision, J.P. received an honorable discharge.

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[66] At the time the Chief Counsel wrote this response, the Board had not yet reached a final decision in BCMR Docket No. 1999-087. The Board signed a final decision denying relief in that case on November 30, 2000.

[67] *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (Fed. Cir. 1991) (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

SUMMARY OF APPLICABLE LAW

BCMR STATUTES, REGULATIONS, AND POLICIES

Under 10 U.S.C. § 1552, the Board may correct a member's or veteran's military record when such a correction is considered "necessary to correct an error or remove an injustice." In performing this function, the Board has "an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief."[68]

33 C.F.R. § 52.67(a)(2) provides that the Board shall reconsider an application if an applicant requests it and the applicant "presents evidence or information that the Board, or the Secretary as the case may be, committed legal or factual error in the original determination that could have resulted in a determination other than that originally made." Section 52.67(b) provides that the Board shall docket a request for consideration if it meets the requirements of Section 52.56(a)(2).

33 C.F.R. § 52.67(e) provides that "[a]n applicant's request for reconsideration must be filed within two years after the issuance of a final decision, except as otherwise required by law. If the Chairman dockets an applicant's request for reconsideration, the two-year requirement may be waived if the Board finds that it would be in the interest of justice to consider the request despite its untimeliness."

On July 8, 1976, the General Counsel of the Department of Transportation established the following policy concerning the upgrading of discharges:

> [T]he Board should not upgrade discharges solely on the basis of post-service conduct. … This emphatically does not mean that the justness of a discharge must be judged by the criteria prevalent at the time it was rendered. The Board is entirely free to take into account changes in community mores, civilian as well as military, since the time of discharge was rendered, and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards. …

JURISDICTION OVER STABBING

The Articles of War[69]

The applicant cited the Articles of War, rather than the Articles for the Government of the United States Navy, to support his allegation that he should have been court-martialed. However, Article 2 of the Articles of War provides that they do not apply to "any person under the United States naval jurisdiction unless otherwise spe-

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[68] *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959).

[69] Lee S. Tillotson, ARTICLES OF WAR ANNOTATED (3d rev. ed. 1944).

cifically provided by law." Article 12 of the Articles of War (predecessor to the Uniform Code of Military Justice) provided that "[g]eneral courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles … ." The accused in a court-martial is entitled to summon witnesses, whose transportation costs and expenses are reimbursed. Military members who refuse to appear to testify at a court-martial are subject to punishment under Article 23.

Article 92 of the Articles of War provided that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." The Territory of Xxxxx is outside this geographical area. Therefore, under the Articles of War, a military service could court-martial a servicemember charged with murder while in the Territory of Xxxxx or deliver him over to civilian authorities.

Because the Articles of War did not define murder or manslaughter, military courts used common law definitions.[70]

Articles for the Government of the United States Navy 1930 (2d ed. 1944)[71]

Article 6 of the Articles for the Government of the United States Navy stated that "[i]f any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court-martial and punished with death." Article 7 provided that such persons could also be punished by imprisonment for life or for a stated term at hard labor.

Coast Guard Regulations—Jurisdiction

During World War II, the Coast Guard functioned under the auspices of the Navy, pursuant to 14 U.S.C. §§ 1, 3. The Coast Guard continued to function as part of the Navy until January 1, 194x.[72] Article 39 of the 1935 Coast Guard Courts and Boards manual provided the following:

> Whenever, in time of war, the Coast Guard operates as a part of the Navy in accordance with law, the personnel of that service shall be subject to the laws prescribed for the government of the Navy: *Provided*, That in the initiation, prosecution, and completion of disciplinary action, including remission and mitigation of punishments for any offense committed by any officer or enlisted man of the Coast Guard, the jurisdiction shall depend upon and be in accordance with the laws and regulations of the department having jurisdiction of the person of such offender at the various stages of such action. …

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[70] *United States v. Sargent*, 18 M.J. 331, 335-36 (1984).

[71] Lee S. Tillotson, ARTICLES OF WAR ANNOTATED (3d rev. ed. 1944).

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

Therefore, at the time of the stabbing, the Coast Guard and its members were subject to the Navy's regulations in the Naval Courts and Boards and to the Articles for the Government of the United States Navy. However, Coast Guard regulations governed the applicant's discharge in April 194x.

Article 21 of the 1935 Coast Guard Courts and Boards manual defines the jurisdiction of Coast Guard courts over various offenses. Murder and manslaughter are not listed. Article 23 specifies that, "[f]or offenses against the laws of the United States other than those specified (in article 21, Coast Guard Courts and Boards), offenders shall be turned over to the civil authorities for trial (U.S.C., title 14, sec. 144)."

Article 242 of the 1935 Coast Guard Courts and Boards manual states as follows:

> If murder, felony, or other crime or offense against the laws of the United States, not punishable by Coast Guard courts, be committed on board of or at any Coast Guard unit within the jurisdiction of the United States, the commanding officer, or the officer in charge, as the case may be, shall invoke the aid of and deliver the offender to the civil authorities, to whom he shall afford all the facilities in his power. If such crime be committed at sea or without the limits of the United States, he shall confine and safely guard the offender until he can deliver him to the proper civilian authorities of the United States.

Article 351 of the 1935 Coast Guard Courts and Boards manual states that "such crimes as murder, manslaughter, larceny, arson, burglary, and robbery are not within the jurisdiction of Coast Guard courts … ."

Navy Regulations—Jurisdiction

Article 33 of the 1937 Naval Courts and Boards manual (194x edition) states that the Navy shall have jurisdiction over crimes committed by members of the Coast Guard, "when serving as part of the Navy in time of war or national emergency." Article 335 states that the jurisdiction of naval courts over offenses is prescribed by the Articles for the Government of the Navy.

Article 336 of the manual states that Article 6 of the Articles for the Government of the United States Navy "precludes a court martial taking jurisdiction of murder committed within the territorial jurisdiction of the United States." Murder was defined in Article 53 of the manual as "the unlawful killing of a human being with malice aforethought." Article 53 further provided the following:

> Malice does not necessarily mean hatred or personal ill will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.

Under Chapter 10 of the manual, a board of inquiry or investigation was convened after any homicide to collect evidence and examine witnesses. Under Articles 723 and 734, a suspect had to be informed of his rights and assigned counsel prior to appearing before a board. The board members made preliminary findings of fact and could recommend disposition of a case to the convening authority, such as a ship's captain.

CHARACTER OF DISCHARGE

194x Coast Guard Regulations—Discharge

The applicant was discharged from the Coast Guard in 194x after it had reverted to the Department of the Treasury and operated under its own rules. Article 584(4) of the 1940 Regulations for the United States Coast Guard provided that undesirable discharges be awarded for unfitness (shirkers, alcoholics, repeat petty offenders, bad debts, etc.) or for misconduct, which included "[t]rial and conviction by a civil court when he has been sentenced to confinement in a jail or penitentiary for any period, regardless of the fact that such sentence may have been suspended or that he may have been placed on probation."

Dishonorable and bad conduct discharges were awarded pursuant to a court-martial only.

Honorable discharges were awarded under any of five conditions: expiration of enlistment; convenience of the government; hardship; minority (age); and disability not the result of own misconduct.

A general discharge could be awarded "for the same [five] reasons as an honorable discharge and issued to individuals whose conduct and performance of duty have been satisfactory but not sufficiently deserving or meritorious to warrant an honorable discharge."

Under Article 4592 of the 1934 Personnel Instructions of the Coast Guard, a member was required to have average marks of at least 2.75 for proficiency and 3 for conduct to be considered to have an "honorable" character of service.

2001 Coast Guard Regulations—Discharge

Today's standards for discharge appear in Article 12-B-2(f) of the Personnel Manual (COMDTINST M100.6A). An enlisted member may receive an honorable discharge if his or her service is characterized by "[p]roper military behavior and proficient performance of duty with due consideration for the member's age, length of service,

grade, and general aptitude"; and if the member's final average evaluation mark is at least 2.7 (out of 4.0) for performance of duty and at least 3.0 for conduct.

A member may receive a general discharge if he has been involved with illegal drugs or if his evaluation marks for job performance or conduct have not met the standards for an honorable discharge.

A member may receive a discharge under other than honorable conditions (OTH) for misconduct or security concerns or upon the approval of the recommendation of an administrative discharge board or in lieu of trial by court-martial. A bad conduct discharge is the equivalent of an OTH discharge but is directed by an approved sentence of a court-martial. A member may receive a dishonorable discharge only by an approved sentence of a court-martial.

Members today are also assigned a reason for discharge, as well as a character of discharge. Under Article 12-B-18(b)(1) of the Personnel Manual, a member may be discharged by reason of misconduct if he or she is convicted by a civilian court of "an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement in excess of 1 year … ."

CRIMINAL LAW

1933 Compiled Laws of Xxxxx

Section 4757 of the Compiled Laws of Xxxxx, 1933, provided that "[w]hoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison … kills another, is guilty of murder in the first degree, and shall suffer death."

Section 4759 provided that "[w]hoever purposely and maliciously, except as provided in the last two sections [which concern justifiable homicide], kills another, is guilty of murder in the second degree, and shall be imprisoned in the penitentiary not less than fifteen years."

Section 4760 provided that "[w]hoever unlawfully kills another, except as provided in the last three sections [which concern justifiable homicide and negligent homicide], is guilty of manslaughter and shall be imprisoned in the penitentiary not more than twenty nor less than one year."

Section 4764 provided that "[e]very killing of a human being by the culpable negligence of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable, shall be deemed manslaughter, and shall be punished accordingly."

Section 4766 provided that "[t]he killing of a human being is … justifiable when committed by any person as follows: First. To prevent the commission of a felony upon such person … ." The section is annotated with the following explanations:

> A homicide committed in actual defense of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased and that his act in causing death was necessary in order to avoid the death or great bodily harm … . Anderson vs. U. S. (1898) 170 U.S. 481, 42 L.Ed. 1116. …
>
> An assault which will justify the homicide of the assailant must be something more than an ordinary assault, and must be such as would lead a reasonable person to believe that his life is in peril: Allen vs. U.S. (1896) 164 U.S. 492, 41 L.Ed. 528. …
>
> The jury is not authorized to find a defendant guilty of murder because of his having deliberately armed himself, provided he rightfully so armed himself for purposes of self-defense, and if, independently of the fact of arming himself, the case, tested by what occurred on the occasion of the killing, was one of manslaughter only: Gourko vs. U.S. (1893) 153 U.S. 183, 38 L.Ed. 680.

Section 4767 stated that a killing is excusable when committed "[b]y accident or misfortune in the heat of passion, upon a sudden and sufficient provocation, or upon a sudden combat, without premeditation or undue advantage being taken, and without any dangerous weapon or thing being used, and not done in a cruel or unusual manner."

Section 5341 provided that "[n]o act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; but whenever the actual existence of any particular motive, purpose, or intent is a necessary element to constitute any particular species or degrees of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act."

Modern Criminal Law

Punitive Article 118 of the 1994 Manual for Courts-Martial states that "[a]ny person … who, without justification or excuse, unlawfully kills a human being, when he (1) has a premeditated design to kill; (2) intends to kill or inflict great bodily harm; …; or …; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct."

Punitive Article 119(a) states that "[a]ny person … who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct." The discussion explains that the "[h]eat of passion may result from fear or rage."

Rule 916(e) states that "[i]t is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused: (A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and (B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm." The discussion explains that the first element, (A), is an objective test. Therefore, "matters such as intoxication or emotional instability of the accused are irrelevant. On the other hand, such matters as the relative height, weight, and general build of the accused and the alleged victim, and the possibility of safe retreat are ordinarily among the circumstances which should be considered determining the reasonableness of the apprehension of death or grievous bodily harm." The test for the second element, (B), is subjective. The accused's emotional control and intelligence are relevant in determining whether he or she actually believed that force was necessary.

Rule 917(l)(2) states that voluntary intoxication is not a defense, though it may be relevant as to the existence of intent. The discussion to the rule explains that "[i]ntoxication may reduce premeditated murder to unpremeditated murder, but it will not reduce murder to manslaughter or any other lesser offense."

Section 210.2 of the Model Penal Code[73] defines "murder" as criminal homicide that is "committed purposely or knowingly" or "committed recklessly under circumstances manifesting extreme indifference to the value of human life."

Section 210.3 of the Model Penal Code defines "manslaughter" as criminal homicide that is "committed recklessly" or that "would otherwise be murder [but] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."

Section 3.02 of the Model Penal Code explains "justification" as follows:

> (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged ….

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[73] American Law Institute, MODEL PENAL CODE, OFFICIAL DRAFT (1962).

> (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be suffices to establish culpability.

Section 3.04(2)(b) of the Model Penal Code provides as follows:

> The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury … ; nor it is justifiable if: (i) the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating … .

Case Law—Self-Defense

The applicant cited *Owens v. United States*, 130 F. 279 (9th Cir. 1904), in support of his claim that he acted in self-defense. In *Owens*, the court overturned the conviction of the petitioner for second-degree murder on the basis of a faulty jury instruction on self-defense. The petitioner had stabbed a man who, he alleged, attacked him with a knife in his cabin. The court held that the lower court, in its 18-page in jury instruction, indicated that the jury was to determine the necessity of the killing and thus "ignored the well-settled doctrine that, where one is attacked by another with a deadly weapon, the party attacked may, if he does so honestly and in good faith, safely act in the light of his surroundings, on the appearances to him at the time … ."[74]

In *Anderson v. United States*, 170 U.S. 481, 508 (1898), cited in Section 4766 of the Compiled Laws of Xxxxx, 1933, the Court held that "a homicide committed in actual defence of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that his act in causing death was necessary in order to avoid the death or great bodily harm which was apparently imminent. But where there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack, the plea of self defence cannot avail."

In *Allen v. United States*, 164 U.S. 492, 498 (1896), also cited in Section 4766 of the Compiled Laws of Xxxxx, 1933, the Court held that "to establish a case of justifiable homicide it must appear that something more than an ordinary assault was made upon the prisoner; it must also appear that the assault was such as would lead a reasonable person to believe that his life was in peril."

In *Beard v. United States*, 158 U.S. 550, 560 (1895), which was cited by the Chief Counsel of the Coast Guard, the Court held that "the question for the jury was whether,

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[74] *Owens v. United States*, 130 F. 279, 282 (9th Cir. 1904).

without fleeing from his adversary, [the defendant] had, at the moment he struck the deceased, reasonable grounds to believe, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by doing what he did, namely, strike the deceased with his gun, and thus prevent his further advance upon him."

In *Huber v. United States*, 259 F. 766 (1919), after the defendant threw the deceased's clothes out of their cabin, the deceased hit him several times, backed him onto a bunk, and began to choke him with both hands around his throat, at which point the defendant reached for his gun and shot his attacker.[75] The Ninth Circuit Court of Appeals held that "if the defendant was forced back to his bunk and thrown down upon it, and deceased was on top of him and choking him, and he really was 'all in,' as he expressed it, or had reasonable ground to believe he was going to suffer great bodily harm at the hands of the deceased, and that it was necessary to protect himself, the law would justify Huber in using all means necessary to defend himself, even to the extent, if reasonably necessary, of killing his assailant."[76] The court held that the plea of self-defense was available to the defendant even if he willingly engaged in mutual combat because "[i]t is not every 'fault' which a man might commit that precludes him from defending himself when violently assaulted or menaced, nor is it every 'provocation of a difficulty' which robs him of right of self-defense."[77]

In *Alaska v. Walker*, 887 P.2d 971 (1994), the defendant stabbed one attacker once in the arm and immediately thereafter stabbed another attacker thrice in the back, "including two deep wounds to the chest that collapsed [the attacker's] lungs," possibly believing that he faced attack by a larger group of men. He was convicted of assaulting the second attacker but not the first.[78] The judge threw out the verdicts, finding them contradictory. The Court of Appeals of Alaska found that the jury's verdicts were not contradictory if the applicant's use of force against one attacker was deemed reasonable, but his use of force against the other was not. The court held that "[e]ven though a person faces a threat of imminent death or serious physical injury, so that he or she is legally entitled to use deadly force in self-defense, the law still requires that the force used be no greater than necessary to avert the danger. … But even in circumstances when a person is permitted to use deadly force in self-defense under [Alaska Statutes] 11.81.335, that person may still not be authorized to employ all-out deadly force because such extreme force is not necessary to avert the danger."[79]

In *State v. Koutro*, 210 N.C. 144, 146 (1936), the Supreme Court of North Carolina held that "where one person strikes another with an open hand and commits a simple

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[75] *Huber v. United States*, 259 F. 766, 767 (1919).
[76] *Id.* at 770.
[77] *Id.* at 771 (quoting *Foutch v. State*, 95 Tenn. 711, 34 S.W. 423).
[78] *Alaska v. Walker*, 887 P.2d 971, 976 (1994).
[79] *Id.* at 978.

assault upon him or strikes him with his fist and there is no great difference in the size of the parties, then the law would not permit that other person to take out a knife or any deadly weapon and assault his aggressor. That is in keeping with when one is not permitted to attack in simple assault. That principle does not apply 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."

In *State v. Born*, 159 N.W.2d 283, 285 (Minn. 1968), the Supreme Court of Minnesota, in upholding the defendant's conviction for assault with a dangerous weapon where the defendant used only his fists and feet in hitting and kicking the victim, stated that "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."

CRIMINAL PROCEDURE

1933 Compiled Laws of Xxxxx

Section 5166 of the Compiled Laws of Xxxxx, 1933, provided that all offenses triable within the territory be brought before a grand jury of not less than 16 persons nor more than 23. Section 5196 provided that at least 12 of the jurors, including the foreman, must endorse an indictment, and the indictment must be signed by the foreman.

Section 5219 provided that, to be legally sufficient, an indictment must indicate the name of the court with jurisdiction over the offense; that the indictment was by grand jury; the name of the defendant; that the crime was committed within the jurisdiction of the court; the approximate date of the crime; and the nature of the criminal act, clearly described.

Section 5235 provided that, upon indictment, a defendant must be arraigned in person and given a copy of the indictment along with a list of witnesses. Under Section 5236, he must be informed of his right to counsel before being arraigned and entering a plea. Section 5243 provided that a defendant indicted for a felony "must be personally present at the arraignment," but someone indicted for a misdemeanor could appear by counsel.

Section 5280 provided that "[a] plea of guilty must in all cases be put in by the defendant in person, in open court … ."

Section 5423 provided that if an indigent defendant stated in an affidavit that "there are witnesses whose evidence is material to his defense; that he can not safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses, the court, in term, or any judge thereof in vacation, may order that such witnesses be subpoenaed if found within the limits aforesaid." The United States would pay such witnesses' expenses.

Section 5424 provided the following:

> Any judge or other officer who may be authorized to arrest and imprison or bail any person charged with any crime or offense against the United States may, at the hearing of such charge, require of any witnesses produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And when the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important and is in danger of being otherwise lost.

Rules of Court

Rule 13 of the Revised Rules of the District Court for the Territory of Xxxxx, Division Number One, 1922, provided the following:

> In a criminal case where the court shall appoint an attorney to defend a poor person on trial on a criminal charge in this court, the judge may, in his discretion, after the trial has been concluded, make an allowance to such attorney for his services therein, to be paid out of fund "C" on the court's order, as a part of the incidental expenses of the court, which allowance shall not exceed, (1) in misdemeanor cases, $25.00; (2) in felony cases less than capital, $100.00; (3) in capital cases, $250.00.

DUE PROCESS LAW

Grand Juries

The Fifth Amendment of the U.S. Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger …"

In *Costello v. United States*, 350 U.S. 359 (1956), the Supreme Court stated that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." In *Costello*, the petitioner had been indicted based on the hearsay evidence of the agents who had investigated his crime, rather than on the witnesses whom the agents had interviewed. The Court held that the indictment was valid.

Effective Counsel

The Sixth Amendment to the U.S. Constitution provides that, in all criminal prosecutions, the accused has the right "to have the assistance of counsel for his defense." The U.S. Supreme Court has interpreted this provision to require that criminal defendants have "effective" counsel.[80]

In *Powell v. Alabama*, 287 U.S. 45 (1932), cited by the applicant, the petitioners were seven black boys who had been riding on a railroad car with seven white boys and two white girls. In a fight, the white boys were thrown off the train. After the Scottsboro sheriff stopped the train, the two white girls accused the petitioners of raping them. The petitioners were indicted and arraigned six days later. The judge appointed "all the members of the bar for the purpose of arraigning the defendants and then of course anticipated that the members of the bar would continue to help the defendants if no counsel appeared."[81] The petitioners were all from out of state and were not asked whether they could employ counsel, wanted counsel appointed for them, or wanted to contact their families. Six days later, at the start of the trial, "[n]o one answered for the defendants or appeared to represent or defend them."[82] Therefore, the trial judge approved a casual arrangement whereby the petitioners would be represented by an out-of-state attorney, who stated several times that he would not represent the petitioners and was not prepared to do so, and the local members of the bar, who agreed to "help" the out-of-state attorney.[83] The petitioners were tried, convicted, and sentenced to death in three separate trials lasting a single day each.[84]

The Supreme Court found that, "from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."[85] The Court overturned the petitioners convictions, stating that, "the right to

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[80] *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 680-81 (1984); *Polk Cty. v. Dodson*, 454 U.S. 312, 326 (1981); *Spano v. New York*, 360 U.S. 315, 326 (1959); and *Michel v. Louisiana*, 350 U.S. 91, 100 (1955).
[81] *Powell v. Alabama*, 287 U.S. 45, 49 (1932).
[82] *Id.* at 53.
[83] *Id.* at 56.
[84] *Id.* at 50.
[85] *Id.* at 59-60.

counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard."[86]

In *Johnson v. Zerbst*, 304 U.S. 458 (1938), cited by the applicant, the defendant had informed the trial judge that he had no counsel but then said that he was ready for trial, apparently unaware that he had a constitutional right to counsel.[87] The Court held that "[i]f the accused … is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty."[88]

PARDON

Governor's Jurisdiction

The Xxxxx Statehood Act, xxxxxxxxx, P.L. 85-508, 72 Stat. 339, 48 U.S.C. prec. § 21 (1999), provided for the following transfer of jurisdiction:

> Section 13. [Continuation of suits] … [A]ll criminal offenses which shall have arisen or been committed prior to the admission of said State … shall be subject to prosecution in the appropriate State courts or in the United States District Court … . such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Xxxxx.
>
> Section 14. [Appeals] … All cases in which final judgment has been rendered in [the District Court for the Territory of Xxxxx], and in which appeals might be had except for the admission of such State, may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit … .
>
> Section 15. [Transfer of cases.] All causes pending or determined in the District Court for the Territory of Xxxxx at the time of the admission of Xxxxx as a State which are of such nature as to be within the jurisdiction of a district court of the United States shall be transferred to the United States District Court for the District of Xxxxx … . All other causes pending or determined in the District Court for the Territory of Xxxxx at the time of the admission of Xxxxx as a State shall be transferred to the appropriate State court of Xxxxx. …
>
> Section 16. [Succession of courts.] Jurisdiction of all cases pending or determined in the District Court for the Territory of Xxxxx not transferred to the United States District Court for the District of Xxxxx shall devolve upon and be exercised by the courts of

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[86] *Id.* at 53.
[87] *Johnson v. Zerbst*, 304 U.S. 458, 460 (1938).
[88] *Id.* at 468.

> original jurisdiction created by said State, which shall be deemed to be the successor of the District Court for the Territory of Xxxxx … .

Section 21 of Article III of the Constitution of the State of Xxxxx states that "the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures."

Section 33.20.070 of Xxxxx Statutes states that "[t]he governor may grant pardons, commutations of sentence, and reprieves, and suspend and remit fines and forfeitures in whole or part for offenses against the laws of the State of Xxxxx or the Territory of Xxxxx."

Legal Effect of Pardon

In *United States v. Wilson*, 32 U.S. 150, 160 (1833), the Supreme Court stated that a "pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."

In *Knote v. United States*, 95 U.S. 149, 153-54 (1877), the Supreme Court expanded this definition as follows:

> A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities emposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. … However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers,--it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress.

In *State v. Jacobson*, 348 Mo. 258, 152 S.W.2d 1061, 1064 (1949), the Supreme Court of Missouri held that the defendant could appeal his conviction, despite having already been pardoned by the Governor, because the "fact that he was convicted remains," even though the Governor's pardon stated that "I am convinced that this man is not guilty."

In *Thrall v. Wolfe*, 503 F.2d 313 (7th Cir. 1974), the petitioner argued that the Internal Revenue Service should grant him a license to sell guns because the Governor

of Montana had pardoned him for a 1942 felony conviction, for which he had been sentenced to five years in prison. A statute prevented anyone who had been convicted of a crime punishable by more than one year's imprisonment from receiving such a license. The U.S. Court of Appeals for the Seventh Circuit held that a state pardon has no impact on a federal disability resulting from a state conviction.[89]

In *United States v. Bergeman*, 592 F.2d 533 (9th Cir. 1979), the defendant argued that a federal statute making it unlawful for anyone who had been convicted of a crime punishable by imprisonment for more than one year to receive a firearm that had been shipped in interstate commerce did not apply to him because his prior conviction had been expunged by the state of Idaho. The U.S. Court of Appeals for the Ninth Circuit held that the state's action did not affect the defendant's convicted status for the purposes of the federal statute.[90]

In *Yacovone v. Bolger*, 645 F.2d 1028 (D.C. Cir. 1981), the defendant was fired by the U.S. Postal Service after being convicted for shoplifting. The Governor of Vermont granted the defendant a full pardon. The D.C. Circuit Court of Appeals upheld the defendant's dismissal, finding that the pardon did not wipe out the conviction for purposes of federal employment.[91]

In *State v. T.M.*, 860 P.2d 1286 (Alaska Ct. App. 1993), the lower court had vacated the defendant's delinquency adjudication even though the court's two-year statutory jurisdiction over the defendant had expired. In reversing that decision, the Court of Appeals compared the lower court's action to granting a pardon, and quoted the Black's Law Dictionary definition that a full pardon "frees the criminal without any condition whatever[, erasing both] the punishment prescribed for the offense and the guilt of the offender. It obliterates in legal contemplation the offense itself … ."[92]

Effect of Letter by Coast Guard Congressional Affairs Staff

The Supreme Court first established in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947), that the advice of federal employees concerning matters not within the scope of their authority is not binding on the government:

> Whatever the form in which government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rulemaking power. . . . Just as everyone is charged

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[89] *Thrall v. Wolfe*, 503 F.2d 313, 316 (7th Cir. 1974).
[90] *United States v. Bergeman*, 592 F.2d 533, 536-37 (9th Cir. 1979) (citing many similar decisions, including *United States v. Potts*, 528 F.2d 883 (9th Cir. 1974)).
[91] *Yacovone v. Bolger*, 645 F.2d 1028, 1034 (D.C. Cir. 1981).
[92] *State v. T.M.*, 860 P.2d 1286 (Alaska Ct. App. 1993) (quoting BLACK'S LAW DICTIONARY (6th ed. 1990))

> with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.

This rule has been followed by the courts and by the BCMR.[93]

[93] *See, e.g.*, Final Decision in BCMR Docket No. 1997-149; *Goldberg v. Weinberger*, 546 F.2d 477 (2d Cir. 1976), *cert. denied sub nom. Goldberg v. Califano*, 431 U.S. 937 (1977); *Montilla v. United States*, 457 F.2d 978 (Ct. Cl. 1972).

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to Section 1552 of Title 10 of the United States Code.

2. An application for correction must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). An application for reconsideration must be filed within two years after the issuance of a final decision. 33 C.F.R. § 52.67(e). These requirements may be waived if the Board determines that it would be in the interest of justice to do so. The applicant filed his original application, BCMR Docket No. 373-91, more than 4x years after he received his undesirable discharge from the Coast Guard. His application for reconsideration was filed more than five years after the issuance of the final decision in Docket No. 373-91. In light of the new evidence gathered by the applicant's counsel and the decision of the Governor of Xxxxx on November 26, 1997, to pardon the applicant for his 194x conviction for manslaughter, the Board finds that it is in the interest of justice to waive the statute of limitations and reconsider this case.

3. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

4. The applicant, a former fireman first class who is African American, was awarded an undesirable discharge from the Coast Guard Reserve in April 194x after being convicted of manslaughter in the U.S. District Court of the Territory of Xxxxx for stabbing a Native American crewmate, L.S., in October 194x. He asked the Board to upgrade his undesirable discharge to honorable because, he alleged, when he stabbed L.S., he was acting in self-defense against a vicious, racially motivated attack. He further alleged that the Coast Guard's decision to hand him over to civil authorities in the Territory of Xxxxx for prosecution was due to the crew's racism and was unjust because many of the eyewitnesses sailed away with his ship, the *U.S.S. Xxxxxxx*, and were therefore unavailable to serve as witnesses at trial. The applicant also alleged that his indictment for second-degree murder was unjust because the eyewitnesses who stayed in Xxxxx did not appear before the grand jury. Moreover, he alleged, he never received effective assistance of counsel because his conviction for manslaughter was based on a guilty plea entered by his attorney without his consent, and his attorney never interviewed the available witnesses. Finally, he alleged that his discharge should be upgraded because the Governor of Xxxxx has pardoned him.

FINDINGS OF FACT

Events in Xxxxxx, Xxxxx, on Friday, October 26, 194x

5. The statements in the 194x F.B.I. report attributed to the applicant, J.M., J.C., and R.W. indicate that the applicant and L.S. did not meet on shore while on liberty the evening of October 26, 194x, and argue over the applicant's dancing with a white or Native American woman. Neither the applicant himself nor J.M., who accompanied him on liberty in Xxxxxx, mentioned fighting, arguing with, or even seeing L.S. in town to the F.B.I. agent. Nor, according to the 194x statement of the ship's captain, did the applicant say anything about meeting or fighting with L.S. while on liberty when the captain interviewed him immediately after the fight and at 9:00 a.m. the next morning. J.M. told the F.B.I. about an incident in which a white woman refused to dance with the applicant because he was "too drunk" and another incident in which the applicant and he got into a "fracas" with another sailor. However, he did not indicate that the "fracas" was caused by the dancing or that either incident involved L.S. J.M. clearly knew who L.S. was because he stated that when he returned to the ship and was on the Mess Deck, L.S. entered and asked him where the applicant was. R.W., who accompanied L.S. on liberty, stated that they did not run into the applicant in Xxxxxx. J.C. stated that he saw both the applicant and L.S. in town, but they were not together.

6. The applicant argued that recent statements by former crewmembers and a 194x newspaper article prove that L.S. began the fight at a bar in Xxxxxx after the applicant danced with a white or Native American woman. In his 1996 statement, J.M. described the incident in the bar with the woman quite differently from the way that he did to the F.B.I. agent in 194x: he alleged that L.S. instigated a fight by trying to cut in when the applicant was dancing with her. In his 1996 statement, N.S. said that he saw the applicant and L.S. scuffle in the bar, but in his 194x statement, he mentioned nothing about seeing L.S. or the applicant while on liberty. In recent statements and taped conversations, L.B., W.R., R.E., W.D., L.N., and F.R. stated that they had heard that the fight started in the bar, but they did not indicate how or when they heard this. The *Xxxxxx Xxxxx* reported that L.S. had been "picking on" the applicant for several days and that the "[f]inal quarrel is said to have started at a local cocktail bar."

7. In light of Findings 5 and 6, the Board finds that the applicant has not proved by a preponderance of the evidence that the fight between him and L.S. started in Xxxxxx over the applicant's dancing with a white or Native American woman. He has not proved that the statements in the F.B.I. report attributed to himself, J.M., R.W., and J.C. are false or unreliable.[94] Those statements indicate that L.S. and the applicant did not begin fighting or even meet while on liberty in Xxxxxx. They also indicate that

[94] Findings 27 through 34 further explore the credibility of the evidence in this case.

the applicant danced with a white woman and later got into a "fracas" with a sailor about an unidentified issue, but L.S. was not implicated in either incident.

8. According to the F.B.I. report, when asked how much alcohol the applicant had drunk while on liberty, J.M. stated that he remembered him having three or four shots of whiskey in one bar and two shots in another bar. When asked to estimate the total amount of alcohol the applicant consumed while on liberty that evening, J.M. reported that he drank approximately one-half pint (eight ounces) of Schenley's whisky, but he also indicated that he was not aware of how much the applicant drank during their final visit to "Helen's Tavern" at about 11:00 p.m. Military and medical records indicate that the applicant stood 5 feet, 7 inches tall and weighed approximately 138 pounds. According to the formula used by the National Highway Traffic and Safety Administration (NHTSA), someone of the applicant's weight who drinks eight ounces of 80 proof[95] whiskey in an hour will have a blood alcohol content (BAC) of approximately 0.166 soon afterward. However, time and metabolism can significantly affect a person's BAC. For example, if the applicant drank those eight ounces gradually over the course of the entire evening, his BAC may have been as low as 0.064.[96] A 138-pound man who consecutively drinks five one-ounce shots (the minimum the applicant may have drunk according to J.M.) will have an immediate BAC of 0.104, but may be essentially sober by midnight if the shots are drunk gradually during the evening. J.M. told the F.B.I. that the applicant was "feeling good" but was not "drunk" when they returned to the ship, and other witnesses stated that he seemed to be in control of his actions. However, the ship's doctor found that the applicant was still "moderately" intoxicated at 3:00 a.m., at least two and one-half hours after the stabbing.[97] In addition, according to the ship's captain, the applicant told him the morning after the stabbing that he had been "tight" at 10:30 that evening.

9. Eyewitnesses also told the F.B.I. that L.S. was in control of his actions at the time of the fight. R.W. reported that L.S., who stood 5 feet, 10 inches tall and weighed approximately 200 pounds according to the autopsy, had about five "drinks" of whisky while on liberty in Xxxxxxx.[98] Using the NHTSA formula and assuming each "drink" was a one-ounce shot of 80 proof whisky, L.S.'s BAC would have been approximately 0.071 if he drank all the shots in the hour before he returned to the ship, but he may have been essentially sober if he drank them gradually over the course of the entire evening.

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[95] Schenley's whiskey is advertised as being 80 proof.

[96] According to NHTSA, the average man's BAC decreases by 0.017 per hour due to the metabolism of alcohol.

[97] The applicant alleged that the doctor's report was unreliable, but see Finding 31 below.

[98] R.W. stated that he and L.S. had a pint (16 ounces) bottle of whiskey. He stated that they gave most of it away, but he had two or three drinks from the bottle (plus four or five beers) and L.S. had "about five" drinks.

The Onset of the Fight on the **U.S.S. Xxxxxx**

10. According to the F.B.I. report, the applicant and J.M. stated that upon returning to the *Xxxxxx* near midnight, they went to the Mess Deck, where they continued to argue with the sailor with whom they had argued while on liberty. Soon thereafter, the applicant told the F.B.I., he left the Mess Deck and ran into R.Y., A.A., and L.S. in a passageway. The 194x statements of the applicant, A.A., R.W., and F.Z. indicate that the argument between L.S. and the applicant began in the passageway near the Mess Deck. According to the statement of the ship's captain to the F.B.I., the applicant also told him about the onset of the fight in the passageway when he came to the Ward Room after the fight. Also according to the F.B.I. report, A.A. and F.Z. stated that L.S. was helping A.A. get R.Y., a steward's mate who was very drunk,[99] to his bunk when the applicant intervened, calling R.Y. a "cocksucker" and insisting that he would help R.Y. to his bunk. A.A. and F.Z. stated that the applicant then shoved L.S., who shoved the applicant back into the connecting passageway. The applicant told the F.B.I. that L.S. shoved him first and called him a "black cocksucker." The statements made by the applicant, R.W., A.A., and F.Z. in 194x indicate that, after exchanging shoves with L.S., the applicant kicked him in the stomach, walked backward down the passageway followed by L.S., and kicked him again in the stomach or "crotch," causing L.S. to double over. J.M.'s 194x statement strongly supports these statements because he indicated that shortly after the applicant left the Mess Deck, L.S. entered the Mess Deck looking for and threatening the applicant because he had kicked L.S. in the stomach. The applicant told the F.B.I. that he first kicked L.S. because the latter was holding him by his coat. The ship's captain told the F.B.I. that the applicant said he kicked L.S. because the latter was about to hit him.

11. The applicant alleged that the onset of the fight as described in the 194x F.B.I. report was a "ridiculous" and "dim and silly story" fabricated by the sailors. He alleged that he would never have begun a physical confrontation with someone so much bigger than he and that both F.Z. and R.W. disliked him enough to lie about the fight. He pointed to the fact that F.Z. had previously called him "Joe" and to the fact that R.W., the Master at Arms,[100] twice disarmed him that evening as evidence of their bias. He also pointed out that in a telephone conversation in 2000, A.A. indicated that he did not remember this incident. However, the applicant himself told virtually the same story—differing only as to who shoved whom first and what insults were spoken—to the ship's captain after he ran to the Ward Room and later to the F.B.I. The Board finds that the 194x accounts of the encounter in the passageway are detailed, reasonably consistent, and credible, especially in light of the fact that the participants had

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[99] The ship's log states that R.Y. was placed on report for disorderly conduct that night and later had to perform many hours of extra duty as punishment. The applicant alleged that R.Y.'s punishment was not awarded because of his drunkenness but because of other, unrevealed culpable behavior in the fight between L.S. and himself. However, this allegation is not supported by any evidence in the record.

[100] The Master at Arms was responsible for keeping order among the enlisted men on the ship.

been drinking alcohol while on liberty.[101] Therefore, and in light of the evidence described in Findings 5 through 10, the Board finds that the applicant has not proved by a preponderance of the evidence that the fight between him and L.S. started in Xxxxxxx over his dancing with a white or Native American woman, rather than in the passageway on the *Xxxxxxx*, as he told the ship's captain and the F.B.I. in 194x.

***The Break in the Fight on the* U.S.S. Xxxxxx**

12. The applicant alleged that after he returned from liberty, four or five sailors were "hunting" him and threatening to kill him. Statements by the applicant, R.W., and others in 194x indicate that after the applicant kicked L.S. the second time in the passageway, he ran and eluded L.S. for a few minutes. The applicant told the F.B.I. that before he ran, R.W. "said 'get him.'" The 194x statements of J.M., R.W., F.Z., F.W., R.A., and R.D. indicate that aside from L.S., crewmembers B.C. and F.Z. were looking for the applicant and that R.W., the Master at Arms, began looking for both the applicant and L.S. J.M. told the F.B.I. that when L.S. came through his compartment with B.C. looking for the applicant, he threatened to kill the applicant if he found him. J.M. said that B.C. advised him to go find the applicant because he had kicked L.S. in the stomach. J.M. also said that F.R. walked through the compartment and urged him to find the applicant because four sailors "had it in for him."[102] F.W. told the F.B.I. that he heard a motor mechanic third class called "Joe"[103] threatening to kill the applicant, but "Joe" was "quite intoxicated" and was being handled by other sailors. In 1996, W.D. stated that he remembered being in the machine shop when L.S. and another sailor came by looking for the applicant.

13. The Board finds that the preponderance of the evidence indicates that, after the applicant kicked L.S., the latter was very angry and looked for him in the berthing compartments while uttering at least one threat to kill him to another sailor. "Joe" threatened to kill the applicant while other sailors were taking him somewhere because he was very drunk. B.C. and F.Z. also searched for the applicant and may have "had it in for him" as F.R. told J.M. However, F.Z. went "top side" and saw no more of the fight. B.C. did not explain to the F.B.I. why he was walking though the compartments[104] or mention his warning to J.M. to help the applicant, but according to J.M.'s

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[101] Although the F.B.I. report did not include a statement by R.Y., the supposed cause of the fight, it seems likely from the evidence that he was too drunk to remember anything or to make a reliable statement about what happened in the passageway.

[102] According to the F.B.I. report, J.M. told the agent that he did not follow the advice of B.C. and F.R. because "he had done his best all evening to keep [the applicant] out of trouble so that any further trouble in which he got involved would be on his own neck."

[103] The ship's log indicates that N.S. was a motor mechanic third class, but it is not clear that he was the "Joe" in question. According to the ship's log, R.Y. was a steward's mate second class.

[104] According to the F.B.I. report, B.C. said he had been in his own berthing compartment, 203, and had walked through 202 back to 201, when he saw L.S. go from 201 to 202 through the portside hatch. B.C. stated that he followed L.S. back into 202 through that hatch.

and the applicant's statements to the F.B.I., B.C. searched for the applicant with L.S. and later pointed him out to L.S. through the port-side hatch between compartments 201 and 202. Therefore, it appears that B.C. was helping L.S. as he searched for the applicant.

14. The applicant stated in 194x that R.W. was also out to "get him" and threatened to lynch him if he "cut" L.S. However, the 194x statements of the applicant and other sailors indicate that R.W. never laid a hand on the applicant until after he stabbed L.S., though he had plenty of opportunity to do so. When the applicant armed himself with his knife, he was violating Article 4 of the Articles for the Government of the United States Navy.[105] R.W.'s alleged threat to lynch the applicant if he "cut" L.S. with his knife was racist if true,[106] but it would not prove that R.W. actually intended to harm the applicant. As Master at Arms, it was R.W.'s job to maintain order among the enlisted men; the fact that he threatened the applicant to try to stop him from "cutting" L.S. does not prove that he actually intended to hurt the applicant, though the latter may have felt terrified by the warning. In summary, the evidence in the 194x F.B.I. report indicates that after the incident in the passageway, four crewmembers were looking for the applicant: L.S., who was searching for him to fight him; B.C., who apparently accompanied L.S. on his search and pointed him out to L.S. but also told J.M. to help the applicant; F.Z., who briefly joined the search but then "went topside"; and R.W., who as Master at Arms was trying to stop the fight.

15. According to the F.B.I. report, R.W., L.N., R.D., N.S., and R.A. stated in 194x that R.W., the Master at Arms, found the applicant near the starboard hatch between berthing compartments 202 and 203, holding a ten-inch pipe used for dogging (sealing and unsealing) the hatches. These sailors' statements also indicate that R.W. persuaded the applicant to give the pipe to him without an argument. N.S. stated that he heard the applicant tell R.W. that he picked up the pipe to protect himself. The applicant told the F.B.I. a pipe was "involved" but he did not remember having it or giving it to R.W.

16. Shortly thereafter, according to the statements of L.N., R.C., and N.S. in the F.B.I. report, L.N. advised the applicant to go tell the Officer of the Day what was happening for his own protection, but the applicant would not do so. In his own 194x statement, the applicant told the F.B.I. that L.N. approached him and said "I do not want to see you get in no trouble."[107]

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[105] ARTICLES FOR THE GOVERNMENT OF THE UNITED STATES NAVY 1930, Art. 4 (2d ed. 1944).

[106] However, the majority of the Board has found that the applicant has not proved that R.W. or any other sailor threatened him with lynching. See Finding 18.

[107] In his 1996 statement, the applicant alleged that he reported the fight to an officer on the bridge as soon as he returned to the ship, but this allegation is not supported by any other evidence in the record concerning his actions that evening.

17. The 194x statements of R.W., R.C., N.S., and R.A. indicate that the applicant then went to his locker on the port side of compartment 202, took his knife out in a sheath, and tucked it in the top of his trousers. He put the knife back in his locker when R.W. came over and told him that he would "bend" the pipe over the applicant's head if the applicant "cut" L.S. with his knife. The applicant told the F.B.I. that R.W. made this threat and also threatened him by discussing lynching with E.G., but he denied actually having his knife out of his locker at this time. According to the 194x statements of R.W. and L.N., after the applicant put his knife back in his locker, R.W. handed the pipe to L.N. The statements of R.W. and R.D. to the F.B.I. indicate that R.W. told the applicant that if he would go to bed, R.W. would persuade L.S. to go to bed.

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 that 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. Therefore, the Board concludes that the applicant has not proved by a preponderance of the evidence that R.W. or any other sailor threatened him with lynching during the break in the fight.

***The End of the Fight on the* U.S.S. Xxxxxx**

19. Statements made by the applicant, R.W., L.N., R.C., N.S., R.A., and H.R. in 194x indicate that while R.W. and other sailors were talking to the applicant near his locker on the port side of compartment 202, L.S. entered the berthing compartment through the port-side hatch between compartments 201 and 202 and saw the applicant. The applicant stated that B.C., who was with L.S., pointed him out. R.W. stated that he was standing between the applicant and that hatch when L.S. came through it. The statements of R.W., L.N., and N.S. to the F.B.I. indicate that R.W. and L.N. tried to grab L.S., but he broke free and went after the applicant. The 194x statement of R.W. indicates that after L.S. broke free, he and the applicant threw "two or three licks at each other, but neither was hit." R.W.'s statement is supported by that of the applicant—who told the F.B.I. that L.S. was "attempting" to hit him but that he was "knocking [L.S.'s] blows off with my arms"—and by that of R.D.—who stated that L.S. and the applicant were "throwing punches" and that the applicant was "warding off" L.S.'s hits. R.C. and R.A. did not mention these punches in their descriptions of the fight. According to the statements of L.N., N.S., and R.D., L.N. started to exit the compartment at this moment to get the Officer of the Day.

20. The 194x statements of the applicant, R.W., R.C., R.D., R.A., and P.V. indicate that after "knocking" or "warding" off L.S.'s punches, the applicant ran all the way around the inboard port-side tier of bunks and back again to his locker, with L.S. chasing him. On the way, the applicant ran through a group of several men near the port-side hatch between compartments 202 and 201. He told the F.B.I. that when some of them tried to grab him, he said, "Hold [L.S.], don't hold me," broke free, and ran back toward his locker. H.R. told the F.B.I. that some of the men in the group tried but failed to stop L.S. when he ran through.

21. The statements of the applicant, R.W., and many others indicate that L.S. caught up with the applicant near his locker. In his application to the BCMR, the applicant alleged that L.S. began to beat him viciously at this point. This allegation is supported by the recent statement of only one eyewitness: in his 1996 affidavit, N.S. stated that L.S. was "pounding" the applicant with his fists "savagely." In his 194x description of the fight to the F.B.I., however, N.S. did not mention any fierce fighting and indicated that he could not see the fight because he was behind a group of sailors. In a recent taped telephone conversation, L.N. said that if the applicant had not grabbed his knife, "the killing might have gone the other way," but he did not describe the fight and he also opined that the applicant "should have served time" for the stabbing. L.N. also did not describe the fighting to the F.B.I. agent in 194x; he stated that he had already turned away to get the Officer of the Day by this time. In his own 194x statement, the applicant did not mention being hit by L.S. after he ran around the bunks. However, the 194x statements of E.G., R.A., R.D., P.V., and R.C. indicate that L.S. and the applicant "scuffled," and the applicant again warded off L.S.'s blows.[108] This characterization of the fight is supported by the 1996 statement of another eyewitness, M.Z., who stated that the applicant and L.S. "wrestled and scuffled." In a recent telephone interview, another eyewitness, R.B., stated that L.S. hit the applicant a couple of times before he reached for his knife and once or twice more thereafter. In his 1999 statement submitted by the Coast Guard, R.B. "estimated" that L.S. hit the applicant four or five times before he knelt by his locker and several times before he was stabbed. H.R., who also witnessed the fight, did not describe any punches being thrown at all prior to the stabbing in either his 194x or 1996 statements. The other recent statements submitted by the applicant that describe the fight are by persons who did not actually witness it.[109]

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[108] R.A. and E.G. stated that L.S. and the applicant were "scuffling"; R.C. stated that L.S. began fighting the applicant, who threw up his hands to "ward off the blows" of L.S.; R.D. stated that L.S. "was swinging at [the applicant] but not hitting him"; P.V. stated that L.S. was hitting the applicant, who "was protecting himself with his arms."

[109] In their 1996 statements, W.D. stated that he did not witness the fight but heard that L.S. "attacked" the applicant; W.R. said he heard that L.S. "was going to beat the hell out of him, when the black man stabbed [L.S.] in the back"; and L.B. stated that the first moment he witnessed any of the events was when L.S. and the applicant were facing each other in a "bear hug" just before the applicant stabbed L.S.

22. According to the F.B.I. report, R.W., J.C., R.C., R.D., P.V., and H.R. stated that after L.S. caught up with the applicant again near his locker, the applicant knelt down on his right knee with his back toward L.S., opened his locker, and reached in with his right hand to grab his knife.[110] The applicant told the F.B.I. that he fell down near his locker after running around the bunks and that L.S. lifted him to his knees. None of the other statements in the record mentions the applicant falling down. P.V. and R.D. both told the F.B.I. that, while L.S. was swinging at him, the applicant walked backward down the aisle past his locker, but then stepped toward it and dropped to one knee to open his locker. Although the applicant did not tell the F.B.I. that L.S. kicked him, the ship's captain said that the applicant told him the morning after the stabbing that L.S. "was kicking" him when he reached for his knife. In addition, the statements of R.D., J.C., R.C., H.R., and P.V. indicate that L.S. kicked the applicant after he knelt by his locker.[111] J.C. told the F.B.I. that, when L.S. kicked the applicant, he also called him a "black s___ b___." P.V. told the F.B.I. that other sailors in the compartment were saying "break it up" and "let him alone" at this point.

23. The applicant told the F.B.I. that L.S. tried to pull him up twice and that the first time L.S. tried to pull him up, L.S. was choking him and he could "hardly breathe." According to the captain's account of his interview with the applicant on the morning after the stabbing, the applicant complained only of having been kicked. The F.B.I. report indicates that the agent asked the witnesses to describe the hold L.S. had on the applicant after he knelt by his locker. R.W., R.D., and E.G. told the F.B.I. that they could not see the exact nature of the hold but that L.S. was stooping over the applicant with his arm around his neck, head, or shoulders and was trying to pull him to his feet when he said "Stand up and fight like a man." The statements of P.B., H.R., and B.C., however, indicate that L.S. was not holding the applicant by his neck but was pulling him up by his shoulders or jumper when he said "Stand up and fight like a man."[112] P.V., who was lying in his bunk right beside the fight, told the F.B.I. that L.S. was not choking the applicant or holding him by his neck. The eyewitnesses' 194x statements indicate that this part of the fight lasted only a few seconds.[113] The report of the ship's doctor indicates that he found no evidence that the applicant had been choked when he

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[110] The applicant told the F.B.I. that he was reaching for his knife. However, he also claimed that he did not know if his knife was in his locker.

[111] R.D. and P.V. told the F.B.I. that L.S. "kicked" the applicant after he knelt beside his locker, while R.C. and H.R. stated that L.S. "began kicking" the applicant, and J.C. stated that L.S. "was kicking" the applicant when J.C. entered the compartment.

[112] The difference in holds described by the witnesses may be due to the fact that L.S. tried to pull the applicant to his feet twice. The applicant told the F.B.I. that the first time this happened, L.S. had his arm under his chin and he could "hardly breathe," but he did not describe L.S.'s second attempt to pull him up. Therefore, it is possible that when L.S. tried to pull the applicant up the first time, he had his arm under his chin and that the second time, he grabbed the applicant by his shoulders or jumper.

[113] See Finding 25, regarding the timing of the fight.

examined him at 3:00 a.m. the same morning.[114] In their recent statements and audiotaped conversations, none of the veterans mentioned the applicant being choked by L.S. Therefore, although it is conceivable that the first time L.S. tried to make the applicant stand up, he may have had his arm under the applicant's chin for a couple of seconds in a hold that hurt the applicant and constricted his breathing, as the applicant alleged, the Board finds that the applicant has not proved by a preponderance of the evidence that L.S. was choking him or trying to choke him.

24. The 194x statements of the applicant, R.W., J.C., R.C., R.D., P.V., H.R., P.B., and B.C. indicate that when the applicant grasped his knife in his locker, he stood up and immediately threw his right arm over L.S.'s left shoulder, stabbing him three times in the back very quickly and forcefully. According to R.W. and R.D., the 7 inch blade entered "to the hilt." This is supported by the coroner's report, which found that two of the knife wounds in L.S.'s back entered the thoracic cavity. The applicant and R.D. stated that the applicant told L.S. he had a knife as he was rising to his feet. According to the *Xxxxxxx Xxxxxx*, R.W. testified at the inquest that the applicant announced he had a knife as he rose to his feet. However, there is no indication that the applicant attempted to ward L.S. off with the knife. The statements of R.W. and B.C. and the newspaper accounts of testimony at the inquest indicate that, upon rising to his feet, the applicant used his left hand to pull L.S. close before throwing his right arm over L.S.'s left shoulder to stab him in the back. P.V. described this as an "embrace." The applicant told the F.B.I. that L.S. was still choking him when he stabbed him, but there is no other evidence in the record that supports this allegation. L.S. died a few minutes later.

25. The applicant told the F.B.I. that he left the Mess Deck at about 12:05 a.m.[115] A.A. stated that he and R.Y. boarded the ship about 12:10 and met the applicant in the passageway where the fight started. R.A. stated that the applicant ran through his compartment at about 12:15, followed a few minutes later by L.S. The statements of R.W., J.C., L.N., and R.R., the Officer of the Day, taken together, indicate that the stabbing occurred at about 12:20. R.W. told the F.B.I. agent that he thought that the "events"—beginning with the shoving in the passageway—took just "six to eight minutes shortly after midnight." The statements of N.S. and E.G. also indicate that the fighting took place between 12:10 and 12:20. The witnesses' 194x descriptions of the end of the fight in the berthing compartment indicate that it happened very quickly. L.N.'s 194x statement indicates that although he started to go get the Officer of the Day when L.S. began swinging at the applicant, he had just reached the hatch when the stabbing occurred. In his recent audiotaped interview, L.N. said that it happened so quickly "[i]t was over before it started." R.W. told the F.B.I. that "[i]t happened so fast,

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[114] The applicant alleged that the doctor failed to see signs of choking on the skin of his neck because he is African American. See Finding 31, regarding the doctor's credibility.

[115] J.M. told the F.B.I. the applicant left the Mess Deck sometime between 12:15 and 12:30, but this is inconsistent with other sailors' statements. F.Z.'s statements about the time were also very inconsistent with those of other sailors, as he indicated that the fight in the passageway started about 11:45.

no one had time to do anything until [L.S.] was stabbed." In his 1999 statement, R.B. indicated that only about 45 seconds elapsed between the time L.S. first swung at the applicant in the berthing compartment and the stabbing.[116]

26. According to the statements of E.G., R.W., R.A., and B.C. in the F.B.I. report, after the stabbing, E.G. took the knife out of the applicant's hand and threw it under some lockers. The applicant, R.W., P.B., B.C., E.G., F.W., and R.R. told the F.B.I. that some of the sailors then grabbed the applicant and began to punch and kick him while asking him why he had "cut" L.S. They stopped when R.R., the Officer of the Day, arrived and sent the applicant to the Ward Room. The ship's log indicates that the applicant was quickly removed to the Xxxxxxx Federal Building in the custody of the U.S. Marshal.

Reliability of the Evidence

27. The applicant alleged that his own 194x statement to the F.B.I. was unreliable and may have been made under duress because it was made during his interview with the F.B.I. agent from 9:30 p.m. to 1:30 a.m. on Tuesday, October 30, 194x. Although the timing of the interview may be unusual, it does not prove that his statement was false or incomplete. The statement is lengthy, contains several exculpatory claims, and is written in the first person, indicating that it was written or dictated by the applicant himself. In addition, during the interview, the applicant requested pencil and paper and drew a map of the berthing compartment and his movements therein. Other than the time, there is no evidence that the applicant had reason to be particularly tired during the interview. It is unknown what schedule of watches he had been performing on the *Xxxxxxx* prior to the stabbing or whether he had resumed a normal civilian or military waking and sleeping schedule while in jail after the stabbing. Moreover, the timing of the interview may have been necessitated by the fact that the ship was sailing to Xxxxxxx the next day, Wednesday, October 31, 194x, and the F.B.I. agent needed to be on board to interview the witnesses. There is no evidence in the record of what day the F.B.I. agent arrived in Xxxxxxx, and the record indicates that during the day on Monday and Tuesday, the applicant was busy attending the Board of Investigation, the coroner's inquest, and his own arraignment. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that his statement to the F.B.I. is unreliable or was obtained under duress.

28. The applicant alleged that the 194x statement of J.M. to the F.B.I. is unreliable because J.M. may have feared violence at the hands of the racist crewmembers if he told the truth. However, by the time he was interviewed by the F.B.I. agent, J.M. had either been removed from the *Xxxxxxx* along with the other black sailors or knew he

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[116] In addition, P.M., an officer who did not witness the fight, stated in 1999 that he was told afterwards that "the stabbing and the events leading up to the stabbing had taken place very quickly with no opportunity for any other crew members to intervene between the two individuals."

would be removed as soon as the ship reached Xxxxxxx.[117] In addition, there is no evidence indicating that the other sailors would learn the substance of J.M.'s testimony: the F.B.I. report indicates that only the F.B.I. and the U.S. District Attorney received copies of statements in the agent's report, and in his 1996 statement, N.S. indicated that none of his shipmates knew the substance of his 194x statement. Moreover, in his own 1996 statement, J.M. did not allege that he lied to the F.B.I. due to fear or coercion in 194x. His statement in the F.B.I. report is long and detailed in its discussion of the events in question and racial relations on board the *Xxxxxxx*. Therefore, the applicant has not proved by a preponderance of the evidence that J.M.'s 194x statement in the F.B.I. report is unreliable.

29. The applicant alleged that the 194x statement of R.W. to the F.B.I. is unreliable because R.W. was a friend of L.S. and was protecting himself from getting into trouble for not having stopped the fight. He alleged that the unreliability of R.W.'s statement to the F.B.I. is proved because it differs from his testimony at the inquest as reported by the *Xxxxxxx Xxxxxx* and the *Xxxx Xxxxx Xxxxx*. The two newspaper articles indicate that the quarrel arose after the applicant kicked L.S. in the stomach "earlier in the evening." Each article then provides a more detailed account of R.W.'s testimony, including the incident in the passageway. The applicant alleged that the reports of kicking "earlier in the evening" prove that R.W. testified at the inquest that L.S. and the applicant fought while on shore, contrary to his statement to the F.B.I. However, the newspaper articles are hearsay, and his reported statement about a kicking "earlier in the evening" could have been a reference to the kicking in the passageway. In addition, R.W.'s account of the fight in the F.B.I. report is supported by the accounts of the other witnesses, and his statement about the lack of any confrontation between L.S. and the applicant on shore is consistent with the 194x statements of the applicant and J.M. Moreover, in his statement to the F.B.I., R.W. freely admitted to threatening the applicant after he picked up his knife the first time, and to the fact that he was standing between L.S. and the applicant when L.S. entered the compartment and yet still failed to stop L.S. The applicant also alleged that the fact that R.W. disarmed him twice prior to the stabbing proves that R.W. was biased against him. However, R.W. was the Master at Arms, and the fact that he twice disarmed the applicant, who he knew had stabbed someone before, while trying to stop the fight does not prove that he was biased against the applicant. Therefore, the applicant has not proved by a preponderance of the evidence that R.W.'s statement to the F.B.I. is unreliable.

30. The applicant also alleged that the other sailors made false statements to the F.B.I. because they wanted to lay the blame on the applicant rather than L.S., avoid trouble for themselves and their shipmates, and stay on the ship. In 1996, N.S. stated that he did not want to be removed from the ship but "reluctantly" told his story to the

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[117] The F.B.I. report does not indicate when any of the sailors' statements were taken except the statement of the applicant himself.

F.B.I. agent anyway. He indicated that because no one else on the ship knew what he had told the F.B.I., he did not face any negative repercussions due to his testimony.[118] In his audiotaped telephone interview, L.N. said that the sailors had drunk an "awful lot" while on liberty and were "covering their butts." Although this evidence indicates that some of the sailors may not have been enthusiastic about giving statements to the F.B.I., perhaps in part because they had been intoxicated, it does not prove that any of them lied to the F.B.I. agent, either separately or in a conspiracy, to protect themselves, L.S., or another sailor. L.S. was dead, and as a Native American, he was likely subject to racism from other crewmembers himself. In none of the recent statements by veterans did any of them allege that the sailors had lied or conspired against the applicant. The fact that some of the sailors had previously gotten into arguments with the applicant does not prove that they would have lied to frame the applicant and risked being found out through other sailors' testimony. Nor has the applicant proved that the sailors lied in order to remain on board for an extended trip to the Far East rather than stay behind in a hotel in Xxxxx until the trial. Moreover, several sailors did freely admit to the F.B.I. agent potentially punishable behavior committed by themselves or their fellow shipmates, such as getting drunk on liberty, searching for the applicant with L.S., threatening the applicant, failing to stop the fight, and hitting and kicking him after the stabbing. Their 194x accounts of the onset, motivation, and nature of the fight are consistent, coherent, and credible. Therefore, although the 194x statements were collected and typed by the F.B.I. agent in part to aid the prosecution of the applicant, the Board finds that the applicant has not proved that the sailors' statements in the F.B.I. report are unreliable or misleading.[119]

31. The applicant alleged that the report of the ship's doctor about his physical condition after the fight is false. He alleged that, because he is African American, the ship's doctor was unable to see marks on his neck caused by choking and bruises on his skin caused by the fierce beating he received. He alleged that the doctor's incompetence is proved by the fact that he found only a few contusions on the applicant, since he should have had many contusions because the other sailors beat him up after the stabbing. He also alleged that the ship's doctor mistook his battered condition for drunkenness, when he was not really intoxicated. However, as indicated in Findings 19 through 22, the applicant has not proved that L.S. beat him fiercely or even that L.S. landed many punches. In his own statement to the F.B.I., the applicant stated that L.S. was "attempting" to hit him but that he was "knocking [L.S.'s] blows off with my arms." The doctor found that the applicant had contusions on his right forearm, left ankle, left knee, right lower leg, and lower back. He also reported that the applicant

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[118] In a 1996 statement, W.R. stated that he thought some of the sailors were "reluctant" to come forward for the F.B.I. investigation, but he did not claim to have witnessed any of the events himself or to have played any role in the investigation.

[119] The applicant also alleged that the fact that some of the crewmembers cannot now remember what they reported seeing or being interviewed by the agent is proof that their statements in the F.B.I. report are unreliable. The Board finds that it is more probative of the unreliability of their memories.

had pain and tenderness in his left hip, left ankle, and "paravertiberal muscles on both sides of the lumbar vertebrae" (lower back), which caused him to limp and stand with difficulty. The applicant has not proved that the blows and kicks inflicted upon him by L.S. and by the other sailors after the stabbing would have left more contusions than those the doctor found. Nor has he proved that the doctor was unable to distinguish between the physical results of a fight and alcoholic intoxication or unable to find signs of choking on an African American man.

32. The applicant alleged that the F.B.I. report is unreliable because the F.B.I. agent himself was biased against the applicant. He presented no evidence of such bias, but pointed out that newspaper accounts of the inquest related testimony by R.W. that was contrary to R.W.'s statement in the F.B.I. report. The articles in the *Xxxxxxx Xxxxxx* and the *Xxxx Xxxxx Xxxxx* seem to contradict the statements of R.W. and other sailors in a few ways. The articles also contradict each other in their accounts of what R.W. said about who kicked whom when and at what point L.S. began chasing the applicant around the berthing compartment. Neither newspaper account of the fight adheres perfectly to the order of events related in the statements of the applicant, R.W., and the other sailors to the F.B.I., but both relate some of the events just as the sailors described. On the basis of the discrepancies between newspaper reporters' written accounts of R.W.'s oral testimony at the inquest and the statements of the applicant, R.W., J.M., and other sailors included in the F.B.I. report, the applicant asks the Board to find that the F.B.I. agent knowingly included false statements in his report or falsified or censored those statements himself.

33. Absent strong evidence to the contrary, government officials, such as the F.B.I. agent who investigated and wrote the report on the stabbing, are presumed to have discharged their duties correctly, lawfully, and in good faith.[120] In writing his report, the F.B.I. agent had reason to believe that the applicant and at least seven of the sailors whose statements he was including in the report would be called on to testify before a grand jury and at the applicant's trial. Any false information in the report could have landed the agent in serious trouble with the law. Moreover, even if he had conspired with the other sailors, including the applicant's friend, J.M., to falsify the report, he could not count on those sailors remembering and repeating the same lies several months later to the grand jury and the trial court. The agent apparently typed the report after he left the ship, and the sailors did not receive copies of their own statements.[121] Therefore, the agent had a strong personal motivation to make the report as accurate as possible. In addition, the witnesses' statements in the F.B.I. report indicate that the agent diligently investigated each of the applicant's exculpatory claims: the applicant alleged that L.S. began the fight in the passageway, and the report indicates

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[120] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Muse v. United States*, 21 Cl. Ct. 592, 601 (1990); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

[121] The report indicates that the statements were made in duplicate, with one copy retained by the F.B.I. and the other delivered to the U.S. District Attorney in Xxxxx.

that the F.B.I. agent questioned A.A., R.W., F.Z., and J.M. about how and when the fight began; the applicant alleged that R.W. and E.G. threatened to lynch him, and the report indicates that the agent questioned R.W., E.G., N.S., R.C., R.A., and L.N. about the substance of R.W.'s warnings; the applicant alleged that L.S. choked him, and the report indicates that the agent questioned R.W., R.D., E.G., P.V., P.B., H.R., and B.C. about how L.S. was holding the applicant when he tried to make him stand up; and finally, the applicant alleged that he was beaten up after he stabbed L.S., and the report indicates that the agent questioned R.W., P.B., B.C., E.G., F.W., and R.R. about this beating. Therefore, the Board finds that the applicant has not proved that the statements in the F.B.I. report are false or unreliable as a result of the agent's intentional wrongdoing, bias, or negligence.

34. The applicant submitted in support of his application 12 affidavits signed by crewmembers of the *Xxxxxxx* more than 50 years after the events in question and 12 audiotapes of recent telephone conversations with crewmembers.[122] Most of the recent statements and conversations are by persons who, according to their own admission, did not actually witness the fight or the parts of the fight that are described in their statements. The Board accords little weight to the hearsay of non-witnesses made more than 50 years after the events in question.[123] N.S. stated in 1996 that the fight began on shore in a bar after the applicant danced with a white woman, but N.S.'s 194x affidavit mentions nothing about this episode. Moreover, his 1996 account of the fight differs from his 194x account in several respects. In 1996, J.M. also stated that the fight began over the applicant dancing with a white woman, but in 194x, J.M. gave a very different account of the incident. J.M.'s 194x account of his evening on liberty with the applicant does not mention L.S. at all, although the agent clearly questioned him about this. Contrary to J.M.'s 1996 statement that the applicant "never had any trouble with any member of the crew" prior to the stabbing, he told the F.B.I. in 194x that the applicant "was always arguing with someone" and that, after F.R. told him that four sailors "had it in for" the applicant, J.M. went to sleep because "he had done his best all evening to keep [the applicant] out of trouble so that any further trouble in which he got involved would be his own neck." Moreover, much of the content of the recent evidence concerns the aftermath of the stabbing and is irrelevant to its cause. Of the few eyewitnesses to the fight who have provided recent evidence about it, only two, N.S. and L.N., indicated in any way that a fiercer fight occurred than that described by the eyewitnesses in 194x.[124] In the audiotapes, the veterans frequently stated that they could not

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[122] The applicant also submitted unsigned statements, which, his attorney attested, reflected the contents of telephone interviews the attorney had had with crewmembers. None of these findings is based upon them.

[123] Although the entire 194x F.B.I. report is hearsay—even the signed statements have been retyped for inclusion in the report—the Board finds the report to be credible for the reasons indicated in Findings 27 through 33.

[124] The 1996 accounts of the fight signed by the applicant and P.V. are anomalous and not credited by the Board.

remember the facts, and the applicant's counsel sometimes described facts of the case to the veterans, as alleged by the applicant, prior to asking them to sign statements he prepared about the facts. Therefore, the applicant has not proved that the statements signed by crewmembers more than 50 years after the event are more reliable as evidence of what happened in 194x and 194x than the court records, the ship's log, or the contemporary eyewitnesses' statements to the F.B.I. agent.

The Role of Racism in the Fight

35. The evidence concerning the amount of racial animosity on board the *Xxxxxxx* prior to the stabbing is inconsistent. In 194x, black and white sailors alike generally denied overt acts of racism and reported to the F.B.I. only two previous incidents of overt racism on board the *Xxxxxxx*: according to J.M., a white sailor had objected to sleeping in the same compartment with black sailors, and according to F.Z., he called the applicant "Joe" on his third day on the ship. However, the black sailors indicated to the F.B.I. that they were very aware that there were racists on board and went out of their way to avoid confrontations. Moreover, statements by sailors signed in 1996 indicated that some of the crew referred to black sailors with racial slurs. Apart from mentioning that L.S. called the applicant a "black s____ b____" at one point, the F.B.I. report sheds no light on L.S.'s own views, but in recent affidavits and interviews, N.S., J.M., L.B., W.R., R.E., F.R., and R.O. suggested that L.S., a Native American, was racist against blacks.

36. The record indicates that after the stabbing, the officers of the *Xxxxxxx* took several precautionary measures to prevent further violence. According to the ship's log, guards were posted at the jail and on the dock to keep sailors from leaving the ship. In addition, the three other black sailors were removed from the ship and held at the jailhouse in Xxxxxxx temporarily before being transferred from the ship permanently when it reached Xxxxxxx. These actions and others alleged by the applicant[125] indicate that the captain feared that racist sailors might try to harm the applicant or the other black sailors because of the stabbing. They are not particularly probative of the cause of the fight but are indicative of the presence of potentially violent racists on board.

37. In light of Findings 7, 11, 35, and 36, the Board finds that the applicant has not proved by a preponderance of the evidence that L.S. was acting out of racism in arguing with, chasing, or fighting the applicant on the night of the stabbing. The preponderance of the evidence indicates L.S. was angry because the applicant kicked him in the abdomen twice (including once in the "crotch") after their argument began in the passageway. J.M. told the F.B.I. that L.S. and B.C. were looking for the applicant

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[125] The applicant alleged that an officer ordered the ship's lights turned out to prevent a riot and that some sailors threatened to fire one of the ship's guns at the jailhouse.

because he had kicked L.S. in the stomach. The record also indicates that at least once during the fight, L.S. used the racial slur "black s_____ b_____" when speaking to the applicant. However, no other contemporary, 194x evidence indicates that L.S. was fighting the applicant because he was black, although the F.B.I. agent clearly questioned the black and white sailors about racism on board.

The Prosecution of the Applicant

38. According to the ship's log, on the morning of Monday, October 29, 194x, the Coast Guard convened a Board of Investigation into the stabbing, in accordance with Chapter 10 of the 1937 Naval Courts and Boards manual. Although the findings of that board are not in the record, it is reasonable to assume that the Board of Investigation concluded that L.S. was a victim of homicide and that the applicant should be handed over to federal civilian authorities for prosecution. Court records show that on the afternoon of October 29th, the coroner held an inquest in Xxxxxxx, and the applicant was arrested and charged with first-degree murder. On Tuesday, October 30th, he was arraigned, informed of his rights, and committed into the custody of the U.S. Marshal. On October 31, 194x, the *Xxxxxxx* left Xxxxxxx and sailed to Xxxxxxx, Xxxxx. The ship's log states that, on November 1, 194x, six sailors (F.Z., R.W., E.G., N.S., R.D., and P.V.) who had witnessed parts of the fight between the applicant and L.S. were transferred off the ship in Xxxxxxx as potential witnesses for the applicant's trial. The next day, J.M., the applicant's friend, was also required to stay in Xxxxx as a potential witness after he was permanently transferred off the ship with the other black sailors. On November 2, 194x, the *Xxxxxxx* sailed away from Xxxxxxx. Court records indicate that on November 5, 194x, the applicant's case was transferred to Xxxxx, Xxxxx, at his request.[126] According to the 1996 affidavits of J.M., N.S., and P.V., the seven potential witnesses were also moved to Xxxxx to await his trial. Soon thereafter, the *Xxxxxxx* sailed to the Far East with the rest of the witnesses on board.

39. Court documents indicate that, on January 26, 194x, the applicant was indicted for second-degree murder by a grand jury. The indictment was signed by the jury foreman, the Assistant U.S. Attorney for the Territory of Xxxxx, and the Deputy Clerk of the U.S. District Court for the Territory of Xxxxx. The indictment lists the names of seven witnesses who appeared before the grand jury: crewmembers F.Z., P.V., N.S., J.M., E.G., and R.D., and the Xxxxxxx coroner, A.N.[127] The applicant submitted a 1996 affidavit by J.M. denying that he had ever appeared before the grand jury. He also submitted a 1996 affidavit by N.S., who stated that "I do not remember actually speaking in front of a grand jury and giving testimony, although I may have done so."

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[126] In the Territory of Xxxxx, grand juries were in session for only a few weeks each year. Apparently, the session in Xxxxxxx had recently ended and would not begin again for another year. Therefore, the applicant agreed to have his case transferred to Xxxxx, where a grand jury would convene in January.

[127] There is no evidence in the record that indicates why R.W., who was transferred off the ship to serve as a witness, did not testify before the grand jury.

P.V. signed an affidavit that does not address whether he remembers appearing before a grand jury, and he apparently refused to sign an affidavit indicating that he was not called to testify before a grand jury. Therefore, on the basis of one affidavit made 50 years after the fact, the applicant asked the Board to find that the jury foreman, the Assistant U.S. Attorney, and the Deputy Clerk of the Court signed a false document, conspiring to indict him illegally. The Board finds that the applicant has not proved by a preponderance of the evidence that the witnesses listed on the indictment did not appear before the grand jury or that his indictment was in any way invalid.

40. Court documents indicate that on January 29, 194x, the applicant was arraigned on the charge of second-degree murder. On February 1, 194x, the court's records show, the applicant appeared in court in person with his attorney and entered a plea of not guilty to second-degree murder. The trial date was first set to begin on Monday, February 11, 194x, at the conclusion of another trial. However, on Friday, February 8, 194x, the judge noted that the trial could begin that same day. Court documents show that the applicant personally appeared in court that afternoon with his attorney and was granted a continuance. The trial was rescheduled for Wednesday, February 13th. Another court document shows that on February 13, 194x, the applicant appeared in court with his attorney and entered a plea of guilty to manslaughter. The document includes a transcript of a conversation between the applicant and the judge in which the applicant confirmed his attorney's statement that he wished to plead guilty to manslaughter. On February 18, 194x, the court records show, the applicant appeared in court and, after personally answering the judge's questions concerning his age and time already served, was sentenced to five years in jail. He was released early, in November 194x, having been incarcerated for four years.

41. The applicant alleged that the court documents are false because he never appeared in court at all. The applicant alleged that he first met his attorney when he came to the jail to tell him that he had entered a plea of guilty to manslaughter on the applicant's behalf and that the applicant would serve five years. The applicant presented no evidence to support these allegations. However, he argued that the court documents are pro forma and formulaic and are therefore untrustworthy. Court proceedings are presumptively reliable.[128] Moreover, the Board finds that the court documents in this case are convincingly detailed regarding the applicant's appearances in court and his brief conversations with the judge. In addition, they expressly state that another defendant whose case was before the court on February 13, 194x, was not personally present but was represented by his attorney only. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the court documents and transcripts indicating that he personally appeared in court and pled

[128] *Strickland v. Washington*, 466 U.S. 668, 696 (1984) (finding that court proceedings are afforded a "strong presumption of reliability"); *Miller v. United States*, 78 U.S. 268, 299 (1870) (holding that "[t]he general rule, however, is that in courts of record all things are presumed to have been rightly done).

guilty to manslaughter are false. The evidence indicates that the applicant personally appeared in court on February 13, 194x, withdrew his plea of not guilty to second-degree murder, and pled guilty to manslaughter.

42. The applicant alleged that his counsel never spoke to him or to the available witnesses in Xxxxx before entering a guilty plea without his consent. The applicant submitted two 1996 affidavits from the witnesses stating that they do not remember meeting the applicant's counsel in 194x. The applicant's counsel, however, is now deceased, and it is impossible to reconstruct his actions on behalf of the applicant. Court records indicate that on February 8, 194x, the applicant's counsel requested a continuance of the trial, which was rescheduled for February 13th. Moreover, the court records clearly show that the applicant's counsel also appeared with the applicant in court when he pled not guilty to the charge of second-degree murder on February 1, 194x; when he pled guilty to manslaughter on February 13, 194x; and when he was sentenced on February 18, 194x.

FINDINGS OF LAW

Doctrine of Laches

43. The Chief Counsel of the Coast Guard argued that the doctrine of laches should apply to bar the applicant's claims. He alleged that because many of the crewmembers of the *U.S.S. Xxxxxxx*, the applicant's attorney, and the court officials are deceased, the Coast Guard "is unable to determine the validity of the Applicant's various assertions of racial animus and lack of due process because that information went to the graves with the deceased witnesses." The Chief Counsel also alleged that all of the evidence presented by the applicant was previously available to him had he exercised due diligence.

44. The applicant's counsel used the Internet to find the crewmembers of the *Xxxxxxx* whose affidavits were submitted with his petition for clemency to the Governor of Xxxxx and with his application to the Board. Although it is possible that the veterans could have been tracked down by more arduous methods earlier, the Board is not convinced that the applicant could have done so himself or could have found and afforded counsel willing to undertake that enormous task on his behalf. Moreover, the efforts of the applicant's counsel and the Coast Guard have created a record that provides the Board with sufficient evidence on which to base the necessary findings in this case. Therefore, under *Hirabayashi v. United States*, 828 F.2d 595 (9th Cir. 1987), and *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), the Board finds the doctrine of laches should not apply to bar the applicant's claims, despite the difficulties caused by the applicant's very long delay in applying to this Board.

Jurisdiction over the Stabbing

45. The applicant alleged that the Coast Guard erred when it handed him into the custody of civilian authorities for prosecution for murder. The record includes evidence indicating that the applicant provoked an argument with L.S., kicked him in the abdomen twice, picked up a pipe as a potential weapon, refused to go to the Officer of the Day, took out his knife before L.S. entered the compartment, and stabbed L.S. quickly in the back three times without attempting to ward him off. Such conduct could reasonably be considered evidence of premeditation and malice aforethought. Therefore, the Board finds that it was not unreasonable or unjust for the Coast Guard to conclude that the applicant might be guilty of and could be charged with first-degree murder even though other evidence in the record could have led a jury to acquit the applicant or convict him of a lesser offense. A claim of self-defense or manslaughter—supported by some evidence but contradicted by other evidence—does not prevent someone from being charged with murder.

46. The applicant alleged that the Coast Guard committed an injustice when it decided to hand him over to territorial authorities for prosecution instead of court-martialing him under the Articles of War. He argued that civilian prosecution was unfair because many of the eyewitnesses sailed away with the ship and because he was entitled to less pretrial discovery under Xxxxx's territorial law than he would have been under military law in a court-martial. He alleged that the Coast Guard's decision was based upon his race because the captain was afraid the crew might lynch him if he stayed on board, and the record supports his allegation that the captain was concerned for his safety. In 194x, the Coast Guard was still operating under the aegis of the Navy, and naval laws and regulations applied to the applicant, as a member of the Coast Guard Reserve.[129] The Articles of War did not apply to the applicant because he was serving under the jurisdiction of the Navy.[130] Article 335 of the 1937 Naval Courts and Boards provided that the Navy's jurisdiction over criminal offenses was prescribed by the Articles for the Government of the United States Navy, Article 6 of which provided that only members charged with murder outside of the territory of the United States could be court-martialed. In addition, Article 336 of the 1937 Naval Courts and Boards also prohibited court-martialing a member charged with murder committed within the territorial jurisdiction of the United States. Therefore, the applicant has not proved that either the Navy or the Coast Guard had the legal authority to court-martial a member charged with murder committed in the Territory of Xxxxx in 194x.[131]

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[129] COAST GUARD COURTS AND BOARDS, Art. 39 (1935); NAVAL COURTS AND BOARDS, Art. 33 (1937).

[130] 10 U.S.C. § 1473 (1945); *see* Lee S. Tillotson, ARTICLES OF WAR ANNOTATED, Art. 2 (3d rev. ed. 1944); *see McCune v. Kilpatrick*, 53 F. Supp. 80, 86-90 (E.D. Va. 1943) (discussing the inapplicability of the Articles of War to members of the Coast Guard when it is operating as a part of the Navy).

[131] The Board of Review, Discharges and Dismissals that reviewed the applicant's case in 1951 concluded that he could have been court-martialed, and this would have been true if he had been charged with manslaughter instead of murder. However, as stated in Finding 45, the Board has concluded that in light

47. Furthermore, the highest ranking officer on the *Xxxxxxx* was the captain, a lieutenant commander in the Coast Guard Reserve. All of the other officers were also members of the Coast Guard or Coast Guard Reserve. Articles 21 and 23 of the 1935 Coast Guard Courts and Boards manual prohibited members charged with murder from being court-martialed. Although the captain may have been a lawyer in civilian life, there is no evidence that he or anyone else on board had sufficient legal experience to conduct a general court-martial for murder even if it had been authorized under the Articles for the Government of the United States Navy and Navy regulations. In light of the fact that these laws provided expressly and exclusively for civilian prosecution of a sailor charged with murder, and given the lack of the necessary legal expertise on the *Xxxxxxx*, the applicant has not proved his allegation that the Navy or the Coast Guard refused to court-martial him solely because of his race and the racial animosity of some of the crew.

48. The applicant argued that under *Solorio v. United States*, 483 U.S. 435 (1987), the military always has jurisdiction over an offense by a member based solely on the member's status. However, the Court based its decision in *Solorio* on the language in Article I, Section 8, Clause 14 of the Constitution, under which Congress has the power to regulate land and naval forces.[132] Thus, any member of the military who commits an offense under the Uniform Code of Military Justice (UCMJ) may be tried by court-martial rather than by civilian authorities.[133] In 194x, however, the UCMJ did not yet exist. Congress exercised its constitutional power through the Articles for the Government of the United States Navy, which provided expressly and exclusively for civilian jurisdiction over sailors charged with murder in territorial waters, as stated in Finding 46. Therefore, the Board concludes that the Coast Guard's decision to deliver the applicant to civilian authorities was consistent with the decision in *Solorio*.

49. Neither the Navy nor the Coast Guard could be expected to retain the *Xxxxxxx* in the region so that all possible witnesses would be available for the applicant's trial when the ship was needed in the Far East.[134] The applicant has not proved his allegation that the ship was sent abroad because of the stabbing. The record reflects that the following sailors were transferred off the ship and made available as witnesses: J.M., the applicant's friend, who accompanied him while on liberty in Xxxxxxx the evening before the fight; R.W., the Master at Arms, who accompanied L.S. while on liberty, witnessed both the onset and the end of the fight, and twice persuaded

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of the evidence in the record, it was not improper or unjust for the applicant to be charged with murder, even if other evidence in the record would support a conviction for a lesser offense or an acquittal on the grounds of self-defense.

[132] *Solorio v. United States*, 483 U.S. 435, 438 (1987).

[133] *Id.* at 451.

[134] The *Xxxxxxx* participated in the evacuation of Chiang Kai-shek's Nationalist troops at the end of the civil war in China.

the applicant to give up or put away his weapons during the break in the fight; F.Z., who witnessed the onset of the fight in the passageway; N.S., who witnessed the interactions between the applicant, R.W., and L.N. during the break in the fight; R.D., who witnessed those interactions and the stabbing as well; P.V., who witnessed the end of the fight from his bunk near the applicant's locker; and E.G., who witnessed the end of the fight and took the knife away from the applicant after the stabbing. The applicant has not proved that these witnesses were more biased against him than any of the other witnesses, although several of the 194x statements and the more recent statements and interviews indicate that he was often quarrelsome and had argued with many of the crew. Nor has he proved that any crewmember who sailed away on the *Xxxxxxx* would have recounted the events of that night significantly differently than the seven who stayed behind in Xxxxx. In addition, the captain of the *Xxxxxxx* wrote in his statement in the F.B.I. report that although the ship was under orders to sail to the Far East, if further witnesses were needed for the applicant's trial, they could be reached through Coast Guard Headquarters in Washington, D.C. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that either the Coast Guard or the Navy committed an injustice by acting in accordance with the law and delivering the applicant over for civilian prosecution and by leaving behind the seven sailors to serve as witnesses.

Self-Defense

50. The applicant alleged that he was wrongly convicted and awarded an undesirable discharge by the Coast Guard based on that conviction because he stabbed L.S. in self-defense. He alleged that the record shows that he had retreated "to the wall" and was being viciously beaten and choked in a racist attack by L.S. when he reached for his knife. For the use of deadly force to be justified, a person must reasonably believe that it is necessary to protect himself from being killed or severely injured, and he cannot have provoked the use of force against himself in the same encounter or use the deadly force when he could retreat to safety.[135] Under *Anderson v. United States*, 170 U.S. 481, 508 (1989), a person must have a reasonable belief that he is in imminent danger of death or great bodily harm to justify killing his attacker. Under *Allen v. United States*, 164 U.S. 492, 498 (1896), not every ordinary assault justifies homicide; one must reasonably believe that one's life is in peril.

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. Therefore, although as indicated in Finding 8, the applicant drank at least five to eight ounces of whiskey that evening and was still, according to the doctor,

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[135] COMPILED LAWS OF XXXXX § 4766 (1933); *see also* American Law Institute, MODEL PENAL CODE, OFFICIAL DRAFT § 3.04(2)(b) (1962).

moderately intoxicated more than two hours after the stabbing, the Board finds that the applicant's intoxication does not bar him from claiming he stabbed L.S. in self-defense. Because the preponderance of the evidence indicates that the applicant was moderately intoxicated, however, the Board finds that the fact that he used deadly force is not probative of whether a reasonable (sober) person in his place would have felt the need to use deadly force. His intoxication prevents his own actions from being considered evidence of what a "reasonable person" would have done in response to L.S.'s assault.

52. In light of the evidence described in Findings 19 through 23, the Board finds that the applicant has not proved by a preponderance of the evidence that he was being beaten fiercely by L.S. before he grabbed his knife. As indicated in Findings 19 and 21, the majority of the statements by eyewitnesses, including the applicant's own 194x statement, indicate that L.S. had swung at the applicant a few times, but that these hits were warded off by the applicant. The applicant himself told the F.B.I. in 194x that L.S. tried to hit him, but he was "knocking [L.S.'s] blows off with my arms." As indicated in Finding 22, eyewitnesses stated that even while L.S. was swinging at him, the applicant was able to step toward his locker, turn his back to L.S., drop to one knee, open his locker, and grab his knife. In his own statement to the F.B.I., the applicant did not mention being hit or kicked at all after he ran around the bunks, though witnesses indicated that the applicant was warding off L.S.'s blows as he backed down the aisle and that L.S. kicked him after he knelt by his locker. Moreover, as stated in Finding 37, the applicant has not proved by a preponderance of the evidence that L.S. was assaulting the applicant because he was black rather than because he had earlier kicked L.S. twice in the abdomen, including once in the groin.

53. As stated in Finding 23, the Board finds that the applicant has not proved by a preponderance of the evidence that he was being choked when he grabbed his knife and stabbed L.S. As indicated in Findings 22 and 23, eyewitnesses told the F.B.I. that after the applicant knelt to get his knife, L.S. kicked him and then stooped over him and tried to pull him to his feet, saying "Stand up and fight like a man." As shown in Finding 23, three witnesses stated that L.S. was trying to pull the applicant up by his shoulders or jumper; three witnesses said that they could not see exactly how L.S. was trying to pull the applicant to his feet but that he held him around his head, neck, or shoulders; and P.V., who apparently was closest to the combatants, stated that L.S. did not choke the applicant or hold his neck. Moreover, nothing in the record indicates that L.S.'s attempt to make the applicant stand up lasted more than a few seconds, and the ship's doctor found no evidence that the applicant had been choked. In addition, none of the statements in the record supports the applicant's allegation that he was being choked when he rose to his feet and stabbed L.S.

54. The applicant alleged that his use of deadly force was justified because, by going to his bunk, he had retreated "to the wall." As indicated in Finding 16, however, witnesses stated that the applicant was advised to seek the protection of the Officer of

the Day but did not do so. Instead, as indicated in Finding 17, he got his knife out of his locker and tucked it in the top of his trousers. In addition, as shown in Finding 20, after L.S. entered berthing compartment 202 by the port-side hatch from compartment 201 and began swinging at the applicant near his locker on the port side, the applicant ran away but, instead of exiting through one of the four hatches or going up the double ladder, he circled around the bunks back to his locker where he had just put his knife away. In light of this evidence, the Board finds that the applicant has not proved by a preponderance of the evidence that his return to the aisle beside his bunk and locker constituted a retreat "to the wall."

55. The applicant alleged that as a black sailor on a ship with many white racist sailors, at least one of whom had recently threatened him with a pipe and lynching if he "cut" L.S., his belief that L.S. might kill him or cause him serious injury was reasonable. However, as Findings 17 and 18 indicate, he has not proved that R.W., the Master at Arms, threatened to lynch him, and whatever threatening statements he did make were warnings aimed at preventing the applicant from using his knife to "cut" L.S. after he had tucked it in the top of his trousers before L.S. entered the compartment. There is no evidence that L.S. had made such threats to the applicant, and R.W. had not touched the applicant, though he had plenty of opportunity to do so. Moreover, as Findings 19, 20, and 22 indicate, the other sailors in the compartment had tried to stop L.S. physically and were telling the combatants to "break it up" and "let him alone" when the applicant stabbed L.S. There is no evidence that the applicant had reason to fear that, if L.S.'s attack did turn serious, they would all stand by while L.S. choked the applicant or beat him to death. Furthermore, as indicated in Finding 24, the applicant did not try to ward L.S. off once he got hold of his knife. Instead, he rose to his feet, turned to face L.S., and immediately threw his right arm over L.S.'s shoulder to stab him three times in the back. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that his resort to deadly force was reasonable and that a sober African American sailor in his position would reasonably have concluded that it was necessary to stab L.S. three times in the back to avoid death or grievous bodily injury. This conclusion is also supported by the fact that after the stabbing, many of the witnesses were very angry at the applicant and did not understand why he had stabbed L.S., as they punched him and asked him why he had "cut" L.S.

56. As Findings 11 and 25 indicate, the onset of the fight occurred some six to ten minutes prior to the stabbing, in a passageway near the Mess Deck, when the applicant intervened as A.A. was helping R.Y. to his bunk. The applicant told the F.B.I. that L.S. shoved him first, but the statements of A.A. and F.Z. indicate that it was the applicant who started the fight by insulting R.Y. and shoving L.S. All of the witnesses, including the applicant, told the F.B.I. that, after L.S. shoved him, the applicant kicked L.S. in the abdomen, backed away from him, braced himself, and kicked L.S., who had followed him, again. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that he did not provoke the fight that shortly thereafter

ended by him stabbing L.S. three times in the back. Although the applicant alleged in his application to the Board that he would never have provoked a fight with a larger man, his intoxication fully explains his apparently unreasonable behavior in the passageway.

57. The Board finds that the applicant has not proved by a preponderance of the evidence that his use of deadly force against L.S. was so clearly a matter of self-defense that (a) the Coast Guard erred in handing him over for prosecution for murder; (b) his arraignments for first-degree and then second-degree murder were unjust; or (c) his conviction for manslaughter was unjust. As Findings 15, 17, and 20 through 22 indicate, after kicking L.S. twice in the passageway, he chose three times to arm himself with a weapon instead of seeking the protection of the Officer of the Day. Moreover, although L.S. was clearly angry and intent on fighting him, the applicant has not proved that a reasonable, sober person would have believed that he was in imminent danger of death or grievous bodily injury under these circumstances, as required under *Anderson v. United States*, 170 U.S. 481, 508 (1989). The applicant's and witnesses' accounts indicate that L.S. swung at the applicant several times, but the applicant warded off his blows. None of the witnesses' 194x statements indicates that L.S. was committing more than an "ordinary assault" upon the applicant, which does not justify use of a deadly weapon under *Allen v. United States*, 164 U.S. 492, 498 (1896). L.S.'s behavior in the compartment, though violent, was not indicative of any lethal intent. In addition, the applicant was well able to elude L.S., as shown by his actions in the passageway, but chose instead to circle a tier of bunks and return to his locker for his knife after he ran from L.S. in the compartment. Unlike the defendant in *Huber v. United States*, 259 F. 766 (9th Cir. 1919), at the moment of the killing, the applicant was not pinned down and being choked with both hands; he was rising to his feet and turning to face L.S. As indicated in Finding 24, although the applicant informed L.S. he had a knife as he rose to his feet, he did not pause to see if he could ward L.S. off with it but immediately pulled L.S. closer to stab him. As the Court of Appeals of Alaska found in *Alaska v. Walker*, 887 P.2d 971, 978 (1994), even if a person faces a threat of imminent death or serious injury, he or she is allowed to use only the force necessary to avert the danger. The Board finds that the applicant has not proved by a preponderance of the evidence that the threat from L.S. was so grave that it required the applicant to stab him three times in the back. Nor has he proved that if he had gone to trial rather than plead guilty to manslaughter or been tried by court-martial, a fair jury presented with all of the witnesses' testimony would have acquitted him based on a claim of self-defense.

58. The third, dissenting member of this Board, who finds that the applicant has proved that he stabbed L.S. in self-defense, bases her decision almost entirely upon speculation about what might have happened in the berthing compartment that the witnesses failed to describe or that the F.B.I. agent left out of his report. While it may be remotely conceivable that (a) all of the sailors conspired to tell similar false or misleading stories about the onset and character of the fight, and the F.B.I. agent falsified the

applicant's own statement to support many of their allegations; (b) all of the sailors independently happened to tell the F.B.I. agent similar false or misleading stories about the onset and character of the fight, and the F.B.I. agent falsified the applicant's own statement to support many of their allegations; or (c) the F.B.I. agent edited or otherwise falsified all of the statements to obscure the onset of the fight or to minimize evidence of its ferocity, the applicant has not proven any such scenario. The Board is not unmindful of the fact that racism was generally more overt and accepted 50 years ago than it is today and that the captain's actions after the stabbing indicate that he feared retaliatory racial violence by some of the crewmembers. However, these facts do not prove that L.S.'s assault on the applicant was caused by racism or was more severe than is indicated by the witnesses' statements in the F.B.I. report.

Due Process—Grand Jury

59. The applicant alleged that he was denied due process because the witnesses listed on his indictment did not appear before the grand jury. He submitted one recent affidavit from a witness who claimed that he never appeared before a grand jury and another from a witness who indicated that he cannot remember whether he appeared before a grand jury. However, court records indicate that the applicant was properly indicted. Under § 5219 of the Compiled Laws of Xxxxx, 1933, the applicant's indictment was legally sufficient. Furthermore, the Board notes that in *Costello v. United States*, 350 U.S. 359 (1956), the Supreme Court determined that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." The hearsay rules do not apply to grand jury proceedings. Therefore, even if the applicant's allegations were true, and no witnesses appeared before the grand jury, the applicant, like the petitioner in *Costello*, could have been indicted on the basis of the F.B.I. report alone. The applicant has not proved by a preponderance of the evidence that his indictment was fraudulent, erroneous, or legally insufficient in any way.

Due Process—Right to Counsel

60. The applicant alleged that he was denied his Sixth Amendment right to counsel, like the petitioners in *Powell v. Alabama*, 287 U.S. 45 (1932). Under *Powell* and similar cases, defendants have a right to effective counsel, which includes the opportunity to consult with an attorney who investigates and prepares the case.[136] In *Powell*, the petitioners were not assigned counsel until the moment before their trial began.[137] However, as shown in Findings 39 and 40, the applicant was assigned counsel sometime between his indictment on January 26, 194x, and February 1, 194x, when he appeared in court with his attorney to plead not guilty to second-degree murder. An

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[136] *Powell v. Alabama*, 287 U.S. 45, 59-60 (1932).

[137] *Id.* at 56.

affidavit of an attorney who practiced in the Territory of Xxxxx indicates that defendants who could not afford attorneys were assigned counsel at their arraignments. The applicant was arraigned on January 29, 194x. He alleged that his attorney never met with him prior to February 13th, but these allegations are strongly contradicted by the court documents, as stated in Finding 42. The applicant also alleged that his attorney never investigated the facts of his case. Because the attorney is long deceased, this is unknowable. However, according to the court records, the applicant's attorney probably had 15 days (between January 29 and February 13, 194x) and, at the least, had 12 days (from February 1 to February 13, 194x), in which to investigate the applicant's case and consider how best to proceed. Although the judge set the trial for February 8, 194x, the attorney apparently requested and was granted a continuance until February 13th. Moreover, in light of the evidence against the applicant, the Board finds that the attorney may well have acted in the applicant's best interest when he advised him to plead guilty to manslaughter. Therefore, the applicant has not proved by the preponderance of the evidence that he was denied his Sixth Amendment right to counsel.

Due Process—Right to Present and Confront Witnesses

61. The applicant argued that even if the Board finds he did voluntarily plead guilty to manslaughter, under *Johnson v. Zerbst*, 304 U.S. 458 (1938), it should not be held against him because his plea cannot be considered a waiver of his right to a fair trial. He alleged that he could never have received a fair trial because he was denied access to witnesses and so had no chance to present a meaningful defense. According to the statements collected by the F.B.I., at least eleven sailors (R.W., N.S., E.G., R.D., P.V., B.C., J.C., R.C., R.A., H.R., and P.B.) were in the berthing compartment when the applicant stabbed L.S. At least five other sailors (J.M., A.A., F.Z., R.Y., and F.W.) witnessed events leading up to the stabbing. Of these sixteen known witnesses, the *Xxxxxxx* left behind seven (J.M., F.Z., R.W., N.S., E.G., R.D., and P.V.) to serve as witnesses at the applicant's trial. As stated in Finding 49, there is no evidence that the Coast Guard chose to leave behind as witnesses sailors who were biased against the applicant. The 194x statements of the seven left behind are not significantly different in tone or content from the others. Furthermore, there is no evidence that any of the witnesses who remained on the *Xxxxxxx* would have contradicted any of the testimony of the seven left behind. In addition, the *Xxxxxxx*'s captain informed the F.B.I. agent and, through his statement, the District Attorney that other witnesses could be contacted through the Coast Guard if needed. The applicant has not proved by a preponderance of the evidence that his attorney was denied access to the evidence in the F.B.I. report or to the witnesses in Xxxxx or that his attorney did not know that the Coast Guard would cooperate to make other witnesses available. Nor has he proved that the Coast Guard would have required the applicant to pay the witnesses' travel costs.

62. Therefore, the applicant has not proved by a preponderance of the evidence that the Coast Guard or the circumstances of his case denied him access to wit-

nesses from the *Xxxxxx* whose testimony might have made a difference in the outcome of his case if it had gone to trial. In addition, the Board notes that if, as the applicant alleged, the fight started in a bar in Xxxxxx after he danced with a white woman, the woman and other civilian witnesses to that incident were presumably still living in Xxxxxx and could easily be subpoenaed by the court in Xxxxx. Because Xxxxxx was in the court's district, the court would have paid the witnesses' travel expenses.[138]

Effect of Pardon

63. The applicant alleged that his pardon by the Governor of Xxxx vacated his conviction and so the basis for his undesirable discharge no longer exists. However, 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.[139] Moreover, as the Supreme Court of Missouri stated in *State v. Jacobson*, 348 Mo. 258, 152 S.W.2d 1061 (1949), even if a convicted criminal has been pardoned, "the fact that he was convicted remains."[140] Therefore, the pardon granted by the Governor of Xxxx had no legal effect on the applicant's military discharge or on his convicted status for the purpose of his discharge.

64. Although the 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 testimony of "several eyewitnesses" supporting his allegation of self-defense in their 1996 affidavits, 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 entire five-year sentence, but the applicant was released early, in November 194x. More significantly, the Board finds that having served one's sentence is an insufficient basis for upgrading a military discharge.

(b) The Governor concluded that the applicant has 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. However, the General Counsel of the Department of Transportation has ruled that "the Board should not upgrade discharges solely on the basis of

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[138] COMPILED LAWS OF XXXX § 5423 (1933).
[139] *Thrall v. Wolfe*, 503 F.2d 313, 315-16 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *Knote v. United States*, 95 U.S. 149, 153 (1877).
[140] *State v. Jacobson*, 348 Mo. 258, 262-63 (1949).

post-service conduct."[141] Therefore, the Board finds that the applicant's gainful employment and law-abiding life since his release from prison are insufficient to justify upgrading his discharge.

(c) The evidence in the 1996 affidavits indicating that the attack on the applicant was racially motivated is contradicted by the statements made by eyewitnesses in 194x to the F.B.I., as shown in Findings 7, 11, and 37. The Governor did not have a legible copy of the F.B.I. report when he granted the pardon. Moreover, the Governor said at the press conference at which he signed the pardon that twelve of the recent affidavits submitted by the applicant stated that he stabbed L.S. in self-defense, and the pardon indicates that the Governor believed that "several eyewitnesses" had attested that the stabbing was done in self-defense. However, in only two of the recent affidavits did crewmembers conclude that that the stabbing was committed in self-defense, and neither of the two, N.S. and L.B., witnessed much of the fight.[142] M.Z. described some of the fighting between L.S. and the applicant but did not draw any conclusion about self-defense. Three other recent affiants, W.D., W.R., and A.P., who did not witness any of the fighting, indicated only that they had been told that the applicant was getting beaten up.

(d) When the Governor found that the applicant had been denied access to witnesses, he did not have a readable copy of the F.B.I. report. Therefore, he could not know how many witnesses there were, how many were left behind in Xxxxx, what the absent witnesses' testimony would have been, or whether the Coast Guard was willing to make additional witnesses available for the trial. As explained in Finding 49, the applicant has not proved that the witnesses who remained on the *Xxxxxxx* were unavailable or that the Coast Guard or the circumstances of his case denied him access to witnesses whose testimony might have made a difference in the outcome of his case.

Therefore, although the Governor pardoned the applicant, the Board finds that the pardon does not require a grant of relief in equity. The evidence contained in the legible copy of the F.B.I. report that strongly contradicts many of the applicant's allegations was not in the record of this case considered by the Governor and his Executive Clemency Board at the time of the pardon.

Effect of the Letter of the Deputy Chief of the Congressional Affairs Staff

65. In a 1993 letter to Senator xxxxxxx, the Deputy Chief of the Congressional Affairs Staff stated that "[a]s a result of [the applicant's] conviction, he was awarded an

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

[142] In 194x, N.S. told the F.B.I. that he was in the compartment but not near the combatants, and L.B. said that he did not see any punches thrown because he woke up only seconds before the stabbing.

Undesirable Discharge by the Coast Guard in accordance with service directives. … The Undesirable Discharge was based on the Federal conviction … . Should [the applicant's] Federal conviction for manslaughter be overturned, he may seek a reconsideration of his case by the Board for Correction of Military Records based on this new information." Therefore, the applicant alleged, his conviction was the sole basis for his undesirable discharge, and because it has been removed by the pardon, his discharge should be upgraded. However, as explained in Findings 63 and 64, the pardon had no effect on the applicant's conviction for the purposes of his federal military discharge. Furthermore, the letter does not state that the discharge will be upgraded if the applicant is pardoned; it indicates only that, if a court overturned the applicant's conviction, he could apply to this Board with the new information.

Grounds for Discharge

66. The applicant alleged that, absent his conviction for manslaughter, he would have received an honorable discharge. He alleged that his 194x summary court-martial for stabbing another sailor with a knife would have been ignored. He submitted an affidavit by another sailor whose deck court-martial for being AWOL one day was apparently ignored when his command granted him 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.[143] 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.[144] 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. Trial and conviction by a civilian court resorting in confinement for any period resulted in an undesirable discharge.[145] Because the applicant has not proved by a preponderance of the evidence that he acted in self-defense or was denied due process, the Board finds that the applicant has not proved that the Coast Guard committed any error or injustice in awarding him an undesirable discharge based on his conviction for manslaughter. Moreover, he has not proved that absent his conviction for manslaughter, he would have received an honorable discharge. His record contains several negative entries, including the 194x summary court-martial for stabbing his friend and apprehension by military authorities after being AWOL for over a week. Under today's regulations, the applicant likely would have received a discharge under other than honorable conditions or a bad conduct or dishonorable discharge.[146]

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[143] Exec. Order No. 9666 (December 28, 1945).
[144] United States Coast Guard, PERSONNEL INSTRUCTIONS, Art. 4592(1) (1934).
[145] *Id.* Arts. 4592(5) and 584(4).
[146] United States Coast Guard, PERSONNEL MANUAL (COMDTINST M1000.6A), Arts. 12-B-2(f) and 12-B-18(b)(1) (2000).

CONCLUSION

67. The applicant has not proved by a preponderance of the evidence that his stabbing of L.S. was justified on the grounds of self-defense, that he was denied due process, or that his undesirable discharge was erroneous or unjust. Although he presented a few recent statements by crewmembers supporting some of his allegations, the allegations that constitute the gravamen of his complaint were thoroughly contradicted by detailed court documents and by the 194x statements of the applicant himself and of other eyewitnesses, which were included in the F.B.I. report. For the balance of his life, the applicant has been law-abiding and gainfully employed, but this is not a sufficient legal basis for upgrading the character of his military discharge. Therefore, the applicant's request should be denied.

ORDER

The application for correction of the military record of former fireman first class, xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, is hereby denied.

(see dissenting opinion)
Sharon Y. Vaughn

David M. Wiegand

Betsy L. Wolf

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-087

DECISION OF THE DEPUTY GENERAL COUNSEL
ACTING UNDER DELEGATED AUTHORITY

___X__ I approve the Board's majority recommended Final Decision on Reconsideration.

_____ I approve the recommended Dissenting Opinion on Reconsideration.

DATE: _____

_____
Rosalind A. Knapp
Deputy General Counsel
as designated to act for the
Secretary of Transportation