IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

HUGH CAMPBELL MCKINNEY,

Applicant,

v.

CHRISTINE WORMUTH, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES ARMY,

Respondent.

APPLICATION TO THE HON. JOHN G. ROBERTS, JR. FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pursuant to Supreme Court Rule 13(5), Hugh Campbell McKinney ("Applicant") hereby moves for an extension of time of sixty (60) days, to and including December 17, 2021, for the filing of a petition for writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be October 18, 2021.

In support of this request, Applicant states as follows:

1. The United States Court of Appeals for the District of Columbia Circuit rendered its decision, and entered judgment, on July 20, 2021 (Exhibit 1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. This case concerns the standards for reviewing a decision of a uniformed service's board for correction of military records. "The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to

correct an error or remove an injustice. . . . [S]uch corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department." 10 U.S.C. § 1552(a)(1). The board through which the Secretary of the United States Army acts is the Army Board for Correction of Military Records ("ABCMR"). 32 C.F.R. § 581.3. "The ABCMR consists of civilians regularly employed in the executive part of the Department of the Army (DA) who are appointed by the Secretary of the Army and serve on the ABCMR as an additional duty." 32 C.F.R. § 581.3(c). Before ABCMR, an "applicant [seeking correction] has the burden of proving an error or injustice by a preponderance of the evidence." 32 C.F.R. § 581.3(e)(2).

3. Applicant, Army Sergeant First Class (Retired) Hugh McKinney, suffered a traumatic brain injury on October 9, 2005 from the concussive force of an improvised explosive device that detonated near his Humvee, while he was leading a mounted patrol in Kirkuk, Iraq. His deployment ended shortly after the incident. Military health assessments thereafter documented symptoms consistent with mild-to-moderate traumatic brain injury, including "weakness," "headaches," "muscle aches," "numbness or tingling in hands or feet," "ringing of the ears," "dizziness, fainting, light headedness," and "difficulty remembering." These service records, declarations, and Applicant's subsequent evaluations and treatments by the Department of Veterans Affairs ("VA"), and private doctors, link his symptoms—indeed the injury—to the October 9, 2005 blast.

4. At the time of this injury, there was no accepted, systematic approach for evaluating a service member for a mild traumatic brain injury in military operational settings. Consequentially, award of the Purple Heart decoration[1] essentially was foreclosed for such

[1] "The [Purple Heart] is awarded to any Service member who is killed or wounded, to an extent requiring treatment by a medical officer, under [certain circumstances]. The [Purple Heart] differs from other [personal military decorations] in that an individual is entitled to the

concussive injuries that lacked the overt indicia of trauma such as seen with a penetrating shrapnel wound. Army recognized this and issued clarifying guidance in April 2011 concerning how a mild TBI could meet the Purple Heart standard. Applicant then sought such recognition from 2011-2014, acting *pro se* with the assistance of his wife (necessary because of his injury). Having made no progress, Applicant engaged undersigned *pro bono* counsel and appealed to ABCMR on August 7, 2015. Almost eighteen months later, on January 25, 2017, ABCMR acted on the request and issued its denial, relying upon a threadbare opinion of an Army physician who deemed the injury to be "cumulative" of more than one blast exposure and thus ineligible for award of the Purple Heart. Yet that opinion failed to account for, and directly contradicted, record evidence, including medical records and a medical opinion from a VA physician specializing in trauma from blast injuries who stated that the injury was due to the single blast exposure on October 9, 2005.

5. Applicant sued the Secretary of the Army, and on cross-motions for summary judgment, while the district court concluded that "it is a close case," a single word in the medical opinion from the VA physician—"expected" rather than "required"—was cited as warranting affirmance of the Board, the court's hands being tied by controlling circuit precedent that it "must evaluate [ABCMR's] decision 'under an unusually deferential application of the arbitrary or capricious standard of the [Administrative Procedure Act ("APA")].'" *McKinney v. Esper*, No. 18-cv-371 (TSC), 2020 U.S. Dist. LEXIS 92401 (D.D.C. May 26, 2020), at *5-9.

6. The D.C. Circuit affirmed, its hands also being tied: "[W]e are required to review the Army's decision under a deferential standard." Exhibit 1 at 2. According to the court of appeals,

---

decoration upon the awarding authority determining that the specified award criteria have been met." DoD Manual 1348.33, Volume 3, *Manual of Military Decorations and Awards: DoD-Wide Personal Performance and Valor Decorations* (Dec. 21, 2016), at § 3.7(a).

> Our review of Board decisions involves "an unusually deferential application of the 'arbitrary or capricious' standard." *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989). Because of the Secretary's broad statutory discretion, "[i]t is simply more difficult to say that the Secretary has acted arbitrarily if he is authorized to act '*when he considers it necessary* to correct an error or remove an injustice.'" *Id.* (quoting 10 U.S.C. § 1552(a)) (emphasis in original). Moreover, we cannot lose sight of the fact that "'[j]udges are not given the task of running the Army,'" so our review asks only if the Board's decisionmaking "process was *deficient*, not whether [its] decision was *correct*." *Id.* at 1511 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953)) (emphasis added).

Id. at 7.

7. The D.C. Circuit's decision effectively converts the preponderance of the evidence standard applied to ABCMR proceedings, *see* 32 C.F.R. § 581.3(e)(2), into a higher burden of proof. Moreover, the APA is completely silent concerning the "unusually deferential application of the 'arbitrary or capricious' standard" mandated by *Kreis*, 866 F.2d at 1514. Nowhere does the APA provide for a special category of "arbitrary and capricious" evaluations, under special deference, for military-related matters. 5 U.S.C. § 706. Yet the court of appeals has established a standard such that "[p]erhaps only the most egregious decisions may be prevented under such a deferential standard of review." *Id.* at 1515.

8. According to *Cone*,

> [t]his deferential standard is calculated to ensure that the courts do not become a forum for appeals by every soldier dissatisfied with his or her [outcome], a result that would destabilize military command and take the judiciary far afield of its area of competence.

223 F.3d at 793. But this policy consideration has an utterly chilling effect. There are few appeals to district courts, let alone to courts of appeals, from the many thousands of decisions of military corrections boards each year. It needs scarcely to be emphasized that those boards are

comprised of *civilians*, who need not have any legal background, and are not even subject to oversight by an administrative law judge in the first instance.

9. Contrary to the opinion of the court of appeals, the APA does not permit an "unusually deferential application" of the arbitrary and capricious standard to decisions of military corrections boards. The preponderance of the evidence burden of proof to which applicants are held is replaced, under this reading, by an "anything goes" approach given that board decisions effectively are all but irreversible under *Kreis* and *Cone*.

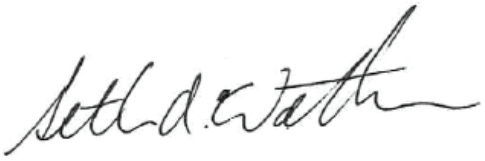
10. Applicant's *pro bono* counsel has upcoming commitments in other cases on behalf of different clients, including a summary determination briefing at the D.C. Circuit, hearings in state court matters, and preparation of a new complaint to be filed in federal court. Counsel also has unexpected, upcoming travel due to the deaths of two lifelong friends during flash flooding from Hurricane Ida last month.

11. Separately, because Applicant suffers from a traumatic brain injury, attorney-client communications are challenging and must be made with the assistance and oversight of Applicant's caregiver (his wife). Applicant, who lives in Idaho, also has unavailability because he continues to require medical interventions as a result of his blast injury, including over the next week when a petition for certiorari otherwise would need to be finalized.

12. Finally, COVID-19 has created additional professional and personal disruptions for Applicant and Applicant's lead counsel, resulting in delays in correspondence, decision-making, and the preparation of a petition for certiorari.

WHEREFORE, for the foregoing reasons, Applicant requests that an extension of time to and including December 17, 2021, be granted within which Applicant may file a petition for writ of certiorari.

Respectfully submitted,



Seth A. Watkins
Counsel of Record
WATKINS LAW & ADVOCACY, PLLC
1455 Pennsylvania Avenue NW, Suite 400
Washington, DC 20004
(202) 355-9421
watkins@wlapllc.com

Counsel for Applicant

October 8, 2021