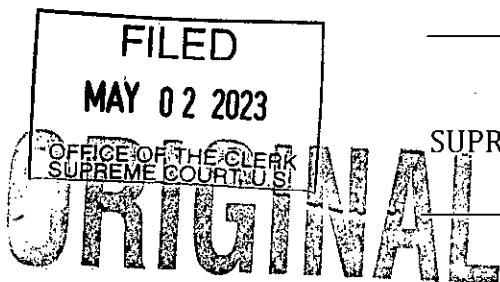


22-1221

No. 23-_____



In The
SUPREME COURT OF THE UNITED STATES

Marvin L. Stewart

Petitioner,

Vs.

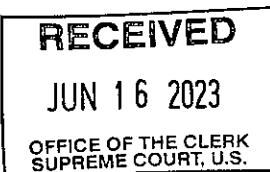
Alejandro N. Mayorkas, et al.,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED

When the Ninth Circuit renders a judgement that is contrary to other Circuit Courts' opinions and this Court's opinion, regarding *res judicata* and *claims preclusion*, when the actions of the U.S. COAST GUARD on June 14, 2019, occurred after the U.S. Coast Guard Board for Correction of Military Records on ("BCMRCG") Decision Docket No. 176.95 on August 23, 1995, and the facts were not in existence at the time of the original action. Rule 14.1(a)

The Questions Presented are:

- (1.) Whether a claim based on actions of the Respondents, and facts that were not yet in existence at the time of the original action is precluded by *claims preclusion*?
- (2.) Whether *res judicata* can bar a claim predicated on events that have not yet transpired?
- (3.) Whether the Board For Correction of Military Records United States Coast Guard ("BCMRCG") failed to fulfill its statutory obligation to correct an injustice and make Petitioner whole by correcting the injustice in the Service Health Records, when evidence was presented, that Petitioner never took the Mandatory Physical Examination for discharge on September 22, 1971, December 6, 1971, or on September 21, 1973?

II. PARTIES TO PROCEEDINGS

The following are parties to the proceeding in this Court. Rule 14.1(b)(i):

- (1.) Alejandro Mayorkas, in his official capacity as Secretary Of The U.S. Department of Homeland Security;
- (2.) Julia Andrew, in her official capacity as Chair of the Board For Correction of Military Records United States Coast Guard.

III. RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii).

Board for Correction of Military Records United States Coast Guard, decision dated July 23, 2021.

Stewart v. Mayorkas, Case No. CV-21-3605-DSF, U.S. Central District Court of California. Judgement entered on November 16, 2021.

Stewart v. Mayorkas, Case No. 21-56354, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on February 23, 2023.

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2. Constitutional Provisions

United States Constitution, Amendment V:.....2,12

The *Due Process Clause of the Fifth Amendment* guarantees that an individual will not be deprived of life, liberty, or property without due process of law. *U.S. Const. amend. V.* Due process of

law has been interpreted to include notice and a fair opportunity to be heard¹.

To raise a due process question, the claimant must demonstrate a property interest entitled to such protections².

United States Constitution, Amendment XIV:...2,12

Fourteenth Amendment speaks of life, liberty or property it is speaking of "*laws for the punishment of crimes against life, liberty, or property.*" This is why we find the phrase "due process" associated with these words: All persons are entitled to the protection against govt. acts by having the right to a trial by jury and other basic procedures of law before they can be deprived of their life, liberty and property by government action.

Petitioner's Retirement by reason of Disability is his property that has been taken by the Respondents through fraudulent concealment.

¹ *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

² *Richard v. West*, 161 F.3d 719, 723 (Fed. Cir. 1998).

VI. Petition for Writ Of Certiorari

Dr. Marvin L. Stewart respectfully petitions this court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals. As explained below. Petitioner submits that this petition for writ of certiorari should be granted pursuant to this Court's opinion¹.

VII. Opinions Below

The opinions below are unpublished. The Decision of the Board for Correction of Military Records of the CG (“BCMRCG”) dated July 23, 2021 is attached at Appendix (“App C” at 6-7). The judgment by the Central District Court of California denying Dr. Marvin L. Stewarts’ complaint for judicial review on the grounds of res judicata, dated November 16, 2021, Case No. CV 21-3605 DSF is attached at (“App B” at 3-5). The Ninth Circuit Court of Appeal, affirming the Central District of California’s judgment of claim preclusion denying Dr. Marvin L. Stewarts’ direct appeal Case No. 21-56354 dated February 23, 2023, is attached at (“App A” at 1-2)

¹ *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327-328, 75 S. Ct. 865, 99 L. Ed. 1122 (1955).

VIII. Jurisdiction

Dr. Marvin Stewarts' petition for appeal was denied by the Ninth Circuit Court of Appeals and judgement was entered on February 23, 2023. Dr. Marvin Stewart invokes this Court's jurisdiction under 28 U.S.C. §1254(1), having timely filed this petition for writ of certiorari within ninety days of the Ninth Circuit Court of Appeals judgment.

Pursuant to Rule 33.1

IX. Constitutional Provisions

United States Constitution, Amendment V:

The *Due Process Clause of the Fifth Amendment* guarantees that an individual will not be deprived of life, liberty, or property without due process of law. *U.S. Const. amend. V.* Due process of law has been interpreted to include notice and a fair opportunity to be heard². To raise a due process question, the claimant must demonstrate a property interest entitled to such protections³.

United States Constitution, Amendment XIV:
Fourteenth Amendment speaks of life, liberty or property it is speaking of "*laws for the punishment of crimes against life, liberty, or property.*" This is why we find the phrase "due process" associated

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with these words: All persons are entitled to the protection against govt. acts by having the right to a trial by jury and other basic procedures of law before they can be deprived of their life, liberty and property by government action.

Petitioner's Retirement by reason of Disability is his property that has been taken by the Respondents through fraudulent concealment.⁴

X. Statement of the Case

1. Petitioner enlisted in the United States Coast Guard ("USCG") on September 1, 1969, and was assigned to USCG Cutter Glacier ("Glacier") on November 19, 1969. While aboard the Glacier, Petitioner extensive disciplinary infractions resulted in great measure from a racially-prejudiced environment aboard the Glacier, and of which Petitioner complained to responsible USCG officers on several occasions. It is significant to note that Petitioner had no previous disciplinary infractions prior to Petitioner's assignment aboard the Glacier and that within a few months of Petitioner's assignment, admittedly a short period of time, Petitioner incurred several disciplinary infractions, most within days of each other culminating in his general discharge from the Coast Guard by reason of unsuitability.

2. That between the dates of June 1970, and July 21, 1971, Petitioner was assigned the position as striking Gunnersmate (E-3) aboard the Glacier.

⁴ *Cushman v. Shinseki*, 576 F.3d 1290

Plaintiff was responsible for operation and maintenance of minor caliber gun systems, small arms, and the small arms training programs. Petitioner inspected magazines, and pyrotechnics locker for proper temperature and storage. Plaintiff was assigned this duty with the promise that the rank of petty officer third class gunnersmate (GM-4), would be forth coming and that Petitioner would have the opportunity to apply to Officers Candidate School with the prospect of attaining the rank of Warrant Officer. Petitioner's job assignment was a required entry in the Service Record Jacket, pursuant to Art. 13-C-20 of the CGPERSMAN, as is outlined in the Enlisted Qualification Manual (COMDTINST/M141.4.8R), that as a result of Petitioner's authorized access to the Armory, magazines, pyrotechnic lockers, this served as a prelude to the attempted firebombing charges.

3. That had Petitioner's term in the CG, not been interrupted by the conditions that besiege Plaintiff under the umbrella of racial animus, and by virtue of tenure, June 1970, through July 21, 1971. In which Petitioner served as Striking GM aboard the Glacier and pursuant to the CG Enlistment Qualifications Manual (COMDTINST/M141.4.8R), Petitioner would have earned the rank of GM-4.

4. That during the period of Dec. 1970, through June 1971, Petitioner encountered problems regarding proper documentation of evaluation of Petitioner's position as Striking GM, in which Plaintiff was to have been an E-3 with a

designator of GM within six months of serving in the position.

5. That this was one of the multiple problems Petitioner and other minorities of the Glacier encountered and complained of to District Command, whereby Lt. Simms and other investigators were assigned to investigate the multiple Issues.⁵

6. That on July 21, 1971, there was an attempted firebombing aboard the Glacier, after a preliminary investigation, Petitioner was relieved of his duties as Striking Gunnersmate, in which Plaintiff was immediately suspected of the incident.

7. That on Sept. 22, 1971, and Dec. 6, 1971, Petitioner never received the Medical Examination for Separation from the CG, in which the federal defendants have claimed Petitioner received.

8. That on Sept. 17, 1971, while in the Arctic Circle Petitioner disembarked the WAGB-4 Icebreaker Glacier via CG helicopter at Barrow Alaska. Petitioner was initially scheduled to return via CGC Burton Island WAGB-293, on Sept. 20, 1971, for transportation to CG Base Terminal Island, San Pedro, CA. Instead the Order was changed, and Petitioner returned by Commercial Airline. Whereby Petitioner enjoyed six days of travel from Barrow, Alaska, enroute to CG Ease Terminal Island, San Pedro, CA.⁶

⁵ BCMRCG Decision Docket No. 27-78.

⁶ Abstract Of Service Enlisted Personnel

9. That Petitioner's [Travel Order of Sept.17, 1971], for transfer to CG Base Terminal Island, the very first document that is signed upon arrival at a pre-determine location; A document in which the Original of is mandated to be part of the Service Record Jacket; A document, Base Personnel at Terminal Island endorsed was completed and that the service record 'was check; A document that is not part of the Service Record Jacket.

10. That on Sept. 23, 1971, Petitioner reported to Terminal Island. Petitioner was advised by James W. Williams, RADM, USCG Commander 11th Coast Guard ("CG") District, Long Beach, CA, that Petitioner was officially being charged with the attempted firebombing of the Glacier, and that Plaintiff was to be taken into immediate custody, and placed in the U.S. Naval Correctional Center in Long Beach, CA, to await General Court-Martial (GCM) Proceedings⁷.

11. That on Sept. 30, 1971, while in custody at the Long Beach Naval Correctional Center pending Article 32 proceedings, Petitioner was placed on Not Fit For Duty (NFFD) status as a result of traumatic fall that occurred in the line of duty on March 22, 1971, when Petitioner, while in rough seas in the Bering Straits, fell down a ladder, when the heel of his shoe came off bouncing down off his lower back, at which time Petitioner was treated with a long period of physical therapy and non-steroidal anti — inflammatory drugs. This

⁷ Confinement Order

therapy continued through Dec. 6, 1971, in which Petitioner was kept on NFFD status⁸.

12. That on Oct. 14, 1971, Petitioner was transferred to MCAS EL TORO, maximum security stockade due to the seriousness of the Offenses, from NAVSTA Long Beach Correctional Center⁹.

13. That on Dec. 2, 3, and 6, of 1971, Petitioner stood trial by General Court Martial "GCM"; That on Dec. 6, 1971, Petitioner was found not guilty of all charges and specification; and that when the Court-Martial adjourned at 1045 hours, Petitioner at approximately 1230 hours was illegally discharge with a General under Honorable Conditions by reason of Unsuitability and without a Separation Examination from the CG, as Petitioner stood at the corner of First Pine in Long Beach, CA

14. That during the period of February 1972, to June 1972, Petitioner went to the 11th Coast Guard District Headquarters to inquire about receiving medical treatment; it was at that time that CMDR. Dirschel informed Petitioner that he was going to get a pound of Petitioner's flesh administratively.

15. That in June of 1972, Petitioner sought treatment for his lower back injury that was service connected at the Veterans Outpatient Clinic at 425 S. Hill St., in Los Angeles, CA.

⁸ Medical Order from Dispensary Naval Station Long Beach

⁹ Service Personnel Administrative Remarks dated
10/14/1971

16. That on September 5, 1972, the Veterans Administration Regional Office, in Los Angeles, CA., denied Petitioner Medical treatment, and disability benefits, on the ground that Petitioner's last examination, did not show any present disability¹⁰.

17. That Petitioner was never advised or had knowledge that a Separation Examination was ever administered as alleged in the Report For Medical Examination.

18. That in 1976, as a result of being fired on several occasions; as a result of the firebombing incident; and the military listing Petitioner as a security risk, Petitioner sought correction of his military records to upgrade his discharge, delete unjust demotion, delete an adverse re-enlistment code, delete references to Petitioner as a security risk, change his date of discharge to the date of completion of enlistment, and correct the record to show his discharge was not due to unsuitability. Petitioner, a member of the United States Coast Guard, had sought to report and provide evidence of systemic racism which resulted in Petitioner being falsely charged with attempted firebombing the USCGC Glacier WAGB-4, with the intent to destroy government property valued at forty million dollars. Petitioner was confined in maximum security for seventy-seven days in shackles pending the General Court Martial of which Petitioner was acquitted of all

¹⁰ Report For Medical Examination For Separation Dec. 6, 1971 (SF-88).

charges. The acquittal of the charges only infuriated the Command of the United States Coast Guard with further racist antics against Petitioner that has continued unto this day.

Approximately one hour after the General Court Martial concluded the **CG** fraudulently claimed that they had discharged Petitioner in accordance with Title 10 U.S.C. § 1169 and the **CGPERSMAN**. The **CG** in furtherance of its racial animus coded Petitioner's DD-214 with prejudicial information that reference the Petitioner as a National Security Risk which had a re-enlistment code of "RE-4" Not recommended for reenlistment and instructed Petitioner that he was prohibited from entering on government property.

19. That on September 17, 1979, The Board for Correction of Military Records Coast Guard (**BCMRCG**) in its opinion in Docket No. 27-78¹¹ waived the issue of un-timeliness and addressed the merits.

20. That around April of 1995 Petitioner requested a copy of his Service Medical Record, from the Department of Veterans Affairs.

21. That on August 23, 1995, Petitioner filed DD 149 with the BCMRCG seeking disability by reason of retirement. On or about October 1, 1995, Petitioner received from the Department of Veterans Affairs a copy of his Service Medical Records. Without knowledge as to what Petitioner was looking for, Petitioner discovered that on the SF 88 that alleged a Separation Examination

¹¹ **BCMRCG** Docket No. 27-78

contained false information. Among the false information were the dates that the allege Separation Examination was administered September 22, 1971, and December 6, 1971, the CG Form-88 entitled "Report of Medical Examination.

22. That on December 5, 1995, the Petitioner submitted to the BCMRCG a supplemental brief, stating that Petitioner did not arrive at CG Base Terminal Island until September 23, 1971. It was a miscarriage of justice by the BCMRCG and an act of concealment in light of the overwhelming evidence of the military service jacket to say that Petitioner's allegations concerning the medical reports also fails to meet the standard for reconsideration because you could have made this argument in the earlier case had you been diligent in examining that record¹².

23. That from December 1995 until July 23, 2021, the BCMRCG has failed to acknowledge the evidence of the Service Record that this Medical Examination for Separation dated September 22, 1971, December 6, 1971, and on September 21, 1973 never occurred or respond on the factual contentions. In addition the Respondents have of yet to controvert the evidence that this Medical Examination for Separation has never occurred.

24. That on May 20, 2009, Petitioner received new evidence that could not have been presented earlier in court proceedings. This evidence was

¹² BCMRCG Docket No. 176-95

the medical opinion of Lawrence C. Lerno, MD, Veterans Long Beach Healthcare System and; Brad M. Luke, RN, MSNH, BSN, Veterans Long Beach Healthcare System in their Medical Opinion stated that: "the Service Medical Records has been tampered with and altered".

25. That on May 29, 2009, Petitioner, presented the evidence to the **BCMRCG** seeking reconsideration of the Final Decision in Docket No. 176-95, and or as a new Application for correction of the service health record.

26. That on November 18, 2009, the **BCMRCG** denied Petitioner's request of the Application seeking reconsideration of the Final Decision in Docket No. 176-95, and or as a new Application for correction of the service health record. The **BCMRCG** chose once again to conceal the fraudulent acts of the United States Coast Guard and ignore the medical opinion evidence of Lawrence C. Lerno, MD, Long Beach Veterans Hospital and Brad M. Luke, RN, MSNH, BSN, Long Beach Veterans Hospital, stating that the Service Medical Records has been tampered with and altered. The **BCMRCG** chose to ignore the evidence that the **CG** has made false statements, allowed medical doctors signatures to be forge, tampering, altering and destruction of military records. The **BCMRCG** once again chose not to inquire of the **CG** regarding the insurmountable *prima facie* evidence but to **conceal** the criminal acts of the **CG**.

27. That on May 14, 2010 Petitioner, filed a claim for with the United States Coast Guard for Damages in the amount of \$100,000,000.00.

28. That on July 15, 2010, The United States Coast Guard denied Petitioner's claim for damages in USCG File No. 10-32-LC-0423 with leave to commence action in the appropriate U.S. District Court within six (6) month¹³.

29. That on October 12, 2010, Petitioner filed in the United States District Court Central District of California Case No. CV10-07598-DSF, with three causes of actions: (a.) **COUNT I:** Federal Respondent's Tampered, Altered and Destroyed Federal Records in violation of 5 USCS § 552a; 44 USCS § 3106; 18 U.S.C. §641, §1001and §2071; 42 U.S.C. §§ 1981, 1981a, 1985(2)(3), 1986, 1987, 1988(a)(b)(c); 5th & 14th Amend. U.S. CONSTITUTION;

(b.) **COUNT II:** Federal Respondents Unlawful Conspiracy in Violation of Petitioner's Civil Rights pursuant to: 42 U.S.C. §§ 1981, 1981a, 1985(2)(3), 1986, 1987, 1988(a)(b)(c); 5th & 14th Amendment. U.S. Constitution.

(c.) **COUNT III:** Damages Civil Rights Violation pursuant to: 5 USCS § 552a; 44 USCS § 3106; 18 U.S.C. §641, §1001and §2071; 42 U.S.C. §§ 1981, 1981a, 1985(2)(3), 1986, 1987, 1988(a)(b)(c); 5th & 14th Amend. U.S. Constitution;

30. That on March 8, 2011, Petitioner filed in the United States District Court Central District of California Case No. CV10-07598-DSF, a Notice of

¹³ USCG File No. 10-32-LC-0423

Dismissal pursuant to Notice to Federal Rules of Civil Procedures 41(a) or (c).

31. That on August 31, 2017, Petitioner delivered to the United States Post Office an Application for Correction of Military Record

32. That Petitioner 's Certificate of Discharge [DD-214] that was issued around October 18, 1979, is wholly invalid. The certificate of discharge is a nullity.

33. That the **CG** in response to the BCMRCG Docket No. 27-78, order to reinstate Petitioner back into the CG to show that Petitioner served on active duty until the expiration date of his term of enlistment, September 21, 1973.

34. That the **BCMRCG** Docket No. 27-78 ordered the **CG** to remove from Petitioner's DD-214 the "R14001" which is the serial number of the message the **CG** ordered Petitioner discharged. that was issued around October 1979. The **CG** has failed to remove those codes.

35. That the certificate of discharge [DD-214] that was received on or about October 1979, that reflected that Petitioner was discharge on September 21, 1973 was legally invalid and is a nullity where the Respondents failed to comply with the provisions of 10 USC §§ 1168(a);1169 and its own regulations in administering a medical examination for separation.

36. That on April 20, 2020, Petitioner delivered to the United States Post Office an Application for Correction of Military Record.

37. That Petitioner 's Certificate of Discharge [DD-214] that was issued around October 18,

1979, where the **CG** failed to remove the codes as ordered and to separate Petitioner according to law is wholly invalid. The certificate of discharge is a nullity.

38. That the **CG** in response to the BCMRCG Docket No. 27-78, order to reinstate Petitioner back into the CG to show that Petitioner served on active duty until the expiration date of his term of enlistment, September 21, 1973.

39. That the **BCMRCG** Docket No. 27-78 ordered the **CG** to remove from Petitioner's DD-214 the "R14001" which is the serial number of the message the **CG** ordered Petitioner discharged. that was issued around October 1979. The **CG** has failed to remove those codes.

40. That the certificate of discharge [DD-214] that was received on or about October 1979, that reflected that Petitioner was discharge on September 21, 1973 was legally invalid and is a nullity where the Respondents failed to comply with the provisions of 10 USC §§ 1168(a);1169 and its own regulations in administering a medical examination for separation. The Service Medical Record is devoid of any medical documents that is dated September 21, 1973 and there-after.

41. That on August 31, 2017, Petitioner served an Application for Correction of Military Record [Form DD 149] under the provisions of Title10, U.S. Code, Section 1552 to the Department of Homeland Security Office of the General Counsel Board for Correction of Military Records 245

Murray Lane, Stop 0485 Washington, DC 20528-0485.

42. That Petitioner requested the following error or injustice in the record be corrected as follows: Petitioner's Certificate of Discharge [DD-214] that was issued around October 18, 1979, is wholly invalid. This certificate of discharge is a nullity. That the **CG** had failed to remove the codes; administer a final accounting of Petitioner's physical body and mental being as required by **COAST GUARD PERSONNEL MANUAL CHAPTER 12.B. \ 12.B.6. Physical Examination Before Separation; and COAST GUARD MEDICAL MANUAL COMDTINST MANUAL COMDTINST M6000.1D \ CHAPTER THREE – PHYSICAL STANDARDS AND EXAMINATION**, in addition they failed to pay Petitioner for Basic Allowances for Housing (BAH); Basic Sep-Ration (BAS)(Food); clothing allowances; expenses for medical; expenses for dental; Petitioner is entitled to his Servicemen's Group Life Insurance coverage (SGLIC). Therefore, Petitioner is still on active duty and has not received a final accounting of pay, of which Applicant is demanding his active duty pay as of this writing and a valid certificate of discharge.

43. That the **BCMRCG** Docket No. 27-78 ordered the **CG** to reinstate Petitioner back in the military and remove from Petitioner's DD-214 the "R14001" which is the serial number of the message the **CG** ordered Petitioner discharged that was issued around September 17, 1979. The **CG** has failed to remove those codes.

44. Petitioner further stated that he believed the record to be in error or unjust for the following reasons: That the certificate of discharge [DD 214] that was received on or about October 18, 1979, that reflected that Petitioner was discharged on September 21, 1973, was invalid and is a nullity where the CG failed to comply with the provisions of 10 USC §§ 1168(a);1169 and its own regulations in administering a medical examination for separation and payment for all allowances.

45. That on March 30, 2018, Julia Andrews, Chair for Correction of Military Records, Office of the General Counsel, Department of Homeland Security, responded to Petitioner's August 31, 2017 DD149 Application. In the opinion of the Chair, Julia Andrews, failed to docket the Application as a new application for correction of the military record under the 10 USCA § 1552, to address the injustice of the Service Medical Record. In addition the Chair failed to address the issues raised in the application.

46. That on April 18, 2019, the United States Coast Guard advised Petitioner of its intent to modify Petitioner's DD-214. That the DD-214 was incomplete which needed Petitioner's signature; initials and date on all eight copies.

47. That upon review of DD FORM 214, AUG 2009, the information that is presented in **block 17** of all 8 copies presents false statements of a material fact in violation of Title 18 U.S.C. § 1001 stating that "Member was provided complete Dental Examination and all appropriate Dental

Services and Treatment within 90 days prior to separation. **DD FORM 214, AUG 2009**

48. That on April 23, 2019, Petitioner responded to the CG April 18, 2019 letter objecting to the validity of the [DD FORM 214, AUG 2009] requesting my signature; initials; and date on all 8 copies.

49. That on June 14, 2019, the CG sent Petitioner two signed copies of the **DD FORM 214, AUG 2009**, with false statements that Petitioner; "Member was provided complete Dental Examination and all appropriate Dental Services and Treatment within 90 days prior to separation.

50. In support of this claim Petitioner presents evidence that Petitioner's "Discharge from the United States Coast Guard is not valid and therefore void and nullified." Petitioner discharge is void and nullified on the grounds that Petitioner was never advised of a Separation Medical examination; or are there orders ordering a separation medical examination in the service jacket for a discharge date of September 21, 197

51. That Petitioner's Service Medical Record was terminated on December 6, 1971. That from December 6, 1971 until September 21, 1973 that there are no entries in the Service Medical Records after that date, and pursuant to the Orders of the BCMRCG in Docket No, 27-78 which was presented to Petitioner as the Record Before the Agency of which a copy of the entire U.S. Coast Guard Service Medical Record.

52. Therefore until a separation examination is given as mandated by Coast Guard Personnel Manual (CGPERSMAN), which states the following:

12.B.6. Physical Examination Before Separation

12.B.6.a. Applicability

Before retirement, involuntary separation, or release from active duty

(RELAD) into the Ready Reserve (selected drilling or IRR), every enlisted member, except those discharged or retired for physical or mental disability, shall be given a complete physical examination in accordance with the Coast Guard Medical Manual, COMDTINST M6000.1 (series). Other members separating from the Coast Guard; e.g., discharge or transfer to standby reserve (non-drilling) may request a medical and dental screening. The examination results shall be recorded on Standard Form 88. To allow additional time to process enlisted members being discharged for enlistment expiration or being released from active duty, the physical examination shall be given at least six months before separation from active duty. **All physical examinations for separation are good for 12 months. If the member is discharged.**

53. That on April 28, 2021, Petitioner filed in Central District of California, a Petition to compel the Respondent to comply with 10 USCA § 1552; 5 USCA § 706(1) and pursuant to 14 U.S.C.A. § 425

54. BCMRCG in its delayed response dated July 23, 2021 stated the following at ("App C" at 6-7):

"My letter to you dated March 30, 2018, in which I explained that I could not docket a prior request for reconsideration because you had not submitted any new evidence of the alleged error: Although not previously reviewed by the Board when it issued the decision in BCMR Docket No. 176-95, my letter to you does not support your request because it does not cast light on whether you received proper pre-separation medical and dental examinations from the Coast Guard. It was issued more than 40 years after your separation from the Coast Guard.

55. A Coast Guard cover letter dated April 18, 2019, at ("App E" at 22-23),forwarding copies of a new DD214 to you: Although not previously reviewed by the Board when it issued the decision in BCMR Docket No. 176-95, this cover letter does not support your request because it does not cast light on whether you received proper pre-separation medical and dental examinations from the Coast Guard. It was issued more than 40 years after your separation from the Coast Guard.

56. Your letter to various officials dated April 23, 2019, at ("App E" at 24-27),with claims similar to those made in your current request for reconsideration: Although not previously reviewed by the Board when it issued the decision in BCMR Docket No. 176-95, your letter to the officials does not support your request because it does not cast light on whether you received proper pre-separation medical and dental examinations from the Coast Guard. It was issued

more than 40 years after your separation from the Coast Guard.

57. A copy of the new DD214 that the Coast Guard sent you on April 18, 2019. Although not previously reviewed by the Board when it issued the decision in BCMR Docket No. 176-95, the DD-214 does not support your request because it claims in block 17 that you did receive a proper pre-separation dental examination from the Coast Guard, and it was issued more than 40 years after your separation from the Coast Guard.

58. Copies of your Coast Guard military medical records: Your Coast Guard military medical records were previously reviewed and considered by the Board when it issued the decision in BCMR Docket No. 176-95.

59. Your submission has not met the requirements for reconsideration in 10 U.S.C. § 1552(a)(3)(D). Therefore, I cannot docket it because you have not submitted any new evidence supporting the alleged error or injustice.

60. This delayed decision by Julia Andrews, Chairwoman of the **BCMRCG** dated July 23, 2021 has failed to examine the Service Record and Service Medical Record these past forty-two years of which they have falsely averred. Had examination of the Service Record taken place the **BCMRCG** would have noted that the CG failed to adhere to the BCMRCG Decision in Docket No. 27-78 and that the Service Medical Record is devoid of any records that a Medical Separation Examination was administered by the **CG** before

and after the BCMRCG Decision in Docket No. 27-78. Dated September 17, 1979.

61. That on November 16, 2021, the Central District Court of California in Case No. CV 21-3605 DSF, dismiss Petitioner's petition for Judicial Review on the grounds of claims preclusion and res judicata. ("App B" at 3-5)

62. That on December 15, 2021, Petitioner appealed the U.S. Central District Court of California in Case No. CV 21-3605 DSF, decision to the U.S. Ninth Circuit Court of Appeal Case No. 21-56354.

63. That on February 14, 2023, the Ninth Circuit Court of Appeals in Case No. 21-56354, affirmed the U.S. Central District Court for California in Case No. CV 21-3605 DSF. At ("App A" at 1-2)

XI. Reason For Granting The Writ

A. To avoid a deprivations of rights to remove and injustice from the Military Service Record, The United States Court of Appeals for the Ninth Circuit in Case No. 21-56354, affirmed the U.S. District Court for the Central District of California in Case No. CV 21-3605 DSF, in conflict with the decision of other United States court of appeals on the same important matter that conflicts with the decisions of this Court on res judicata; and claims preclusions.

64. Where the lower court had APA jurisdiction of the BCMRCG Decision that is dated July 23, 2021 attached at ("App C" at 6-7), and the action taken by the Respondent CG in an attempt to correct the DD-214 by removing the codes that was order by the BCMRCG in Docket No. 27-78 that displayed false statements of a material fact, that a Separation Examination was taken on September 21, 1973, of which a cover letter and 8 copies of the proposed new DD-214 [DD FORM 214 Aug 2009] that is dated April 18, 2019, that was sent to Petitioner on April 22, 2019 by the USCG asking Petitioner to review; sign; initial and date as instructed.

65. That on April 23, 2019, Petitioner responded with an objection regarding the false statements of a material fact and that the discharge as represented by the DD-214 is null and void on the grounds that a separation examination was never administered for the 1973 discharge.

66. It is well-established that the Court has jurisdiction to review decisions of the various Boards for Correction of Military Records. See Guerrero v. Stone, 970 F.2d 626, The U.S. Supreme Court has stated, "Board [for Correction of Military Records] decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." Chappell v. Wallace, 462 U.S. 296, 303, 103 S. Ct. 2362, 2367, 76 L.Ed.2d 586 (1983). Moreover, as stated in Secretary of Navy v. Huff, 444 U.S. 453, 458 n. 5, 100 S. Ct. 606, 609 n.5, 62 L.Ed.2d 607

(1980), “the federal courts are open to assure that, in applying [military] regulations, commanders do not abuse the discretion necessarily vested in them.” See also *Sanders v. United States*, 594 F.2d 804, 811, 219 Ct. Cl. 285 (1979) (“Once a Petitioner has sought relief from the Correction Board, such Petitioner is bound by that board’s determination unless he can meet the difficult standard of proof that the Correction Board’s decision was illegal because it was arbitrary, or capricious”). We are persuaded by the reasoning in *Neal v. Secretary of Navy*, 639 F.2d [1029, 1037 (3d Cir.1981)] (applying this standard in review of decisions of Enlisted Performance Board and Board for Correction of Naval Records); see also *Ballenger v. Marsh*, 708 F.2d 349, 350 (8th Cir. 1983) (“Board decisions denying ‘corrective’ action are reviewable by federal courts”) (citing cases). Guerrero, 970 F.2d at 628. The Ninth Circuit concluded that “[t]he federal courts have subject matter jurisdiction” over APA claims alleging that the civilian Board for Correction of Military Records acted arbitrarily and capriciously. *Id.* (footnote omitted).

67. The court also has subject matter jurisdiction over a mandamus petition regarding the Board. See Guerrero v. Marsh, 819 F.2d 238 (9th Cir. 1987) (granting a mandamus petition that sought to compel the Army Board for Correction of Military Records “to exercise its express statutory jurisdiction”).

68. In this matter that was before the court for judicial review, the BCMRCG in its decision on July 23, 2021 stated that when the CG issued a cover letter dated April 18, 2019, forwarding copies of a new DD 214 to you: Although not previously reviewed by the Board when it issued the decision BCMR Docket No. 176-95. This cover letter does not support your request because it does not cast light on whether you received proper pre-separation medical and dental examinations from the Coast Guard. It was issued more than 40 years after your separation from the Coast Guard. That this statement was arbitrary and capricious when the Respondent CG failed to follow regulations in discharging Petitioner.

B. The Doctrine of Res Judicata Is Inapplicable In This Case At Bar “On The Merits”

69. Where the Decision of the **BCMRCG** dated July 23, 2021 was a violation of the provisions of 10 U.S.C. §1552 the “APA” as set forth in 5 U.S.C. §701; §702; §704; §706; where §702 provides judicial review to any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by action within the meaning of a relevant statute.” “The section further instructs that” [a]n action in a court of the United States seeking relief other than money damages, and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal

authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States, or that the United States is an indispensable party."

70. This Court in *Dickinson v. Zurko* 527 U.S. 150, 152, 119 S.Ct. 1816 (June 10, 1999), stated..."*But this is something more than a mere appeal, it is an application to the court to set aside the action of one of the executive departments of the government.*"...A new proceeding is instituted in the courts...to set aside the conclusions reached by the administrative department...It is...not to be sustained by a mere preponderance of evidence...It is a controversy between two individuals over a questions of fact which has once been settled by a special tribunal.

C. § 131.22 Claim Preclusion Doctrine Does Not Apply to Actions Based on Different Claim

71. The Claims Preclusion Doctrine does not apply to the action taken by the Respondent CG on June 14, 2019, which was before the court for Judicial Review. The judgment that was rendered by the Central District Court of California in Case No. CV-21-3605-DSF, violated this Court holdings in *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327-328, 75 S. Ct. 865, 99 L. Ed. 1122 (1955), that was affirmed by the Ninth Circuit.

72. [1] Acts or Events Occurring After Prior Judgment Which Support New Claim

A subsequent action that simply alleges new facts in support of claims asserted in a prior action will usually not avoid application of the claim preclusion doctrine (see § 131.21). However, if such facts *in themselves* establish independent grounds for a claim against the defendants in the previous action, claim preclusion does not apply, even if the new claims are based on the same legal theories or seek the same damages as the prior action. *See Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327-328, 75 S. Ct. 865, 99 L. Ed. 1122 (1955) (prior dismissal of action alleging antitrust violations did not preclude new action alleging antitrust violations and other legal theories based on conduct of Respondent which occurred after prior judgment). Still, even if the new facts can establish independent grounds, the claim will be precluded if those facts were known or knowable during the first action because it could have been included in or amended onto the prior complaint. *D.C. Circuit Drake v. FAA*, 291 F.3d 59, 66-67 (D.C. Cir. 2002) (claim preclusion "does not preclude claims based on facts not yet in existence at the time of the original action"). *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) (res judicata requires identity of issues). *See Costantini v. Trans World Airlines, Inc.*, 681 F.2d 1199, 1202 (9th Cir.) (arguing fraudulent concealment exception to doctrine of res judicata), *cert. denied*, 103 S. Ct. 298 (1982). Compare *Ingram Corp. v. J. Ray McDermott & Co.*, 1983-1 Trade Cas. P 65,241 (5th Cir. 1983)

(refusing to invalidate general release on basis of fraudulent concealment).

73. The United States Court of Appeals for the District of Columbia Circuit held in *Page v. United States*, 729 F.2d 818 **res judicata** cannot bar a claim predicated on events that have not yet transpired.

D. APA CLAIM

74. The APA provides that [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 702 Agency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review under the APA. 5 U.S.C. § 704 (emphasis added); *see also Cobell v. Norton*, 345 U.S. App. D.C. 141, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (noting that [w]ith a few exceptions, if there is no final agency action, there is no basis for review of the government's decision or policy). APA does not authorize an award for monetary damages. *See* 5 U.S.C. § 702 (providing that a Petitioner may bring an action against a federal agency in a federal court seeking relief other than money damages). Thus, to the extent that the **Petitioner** has not asserted an APA claim for monetary damages, such claim must be dismissed by the Court. However, **Petitioner** is seeking declaratory relief. A complaint should not be categorized as seeking

money damages merely because its success may lead to pecuniary costs for the government or benefits for the Petitioner. *See also Vietnam Veterans of Am. v. Sec'y of Navy*, 269 U.S. App. D.C. 35, 843 F.2d 528, 533 (D.C. Cir. 1988) (Walton, J.). The District of Columbia Circuit has conclusively held that actions under the APA which challenge decisions of military correction boards and seek only declaratory relief that is not 'negligible in comparison' with the potential monetary recovery should not be construed as seeking monetary relief. *Tootle v. Sec'y of the Navy*, 371 U.S. App. D.C. 28, 446 F.3d 167, 169 (D.C. Cir. 2006) (concluding that a service member seeking review of a Navy PEB determination that he was not eligible for medical retirement and asking for declaratory relief should not be construed as seeking monetary relief merely because the success of his claim may have monetary consequences) (quoting *Kidwell*, 56 F.3d at 284).

75. The District Court of Columbia held in *Carter v. Dep't of the Navy*, 2006 U.S. Dist. LEXIS 59767, Claims challenging the decisions of **military** boards for the **correction** of records are subject to judicial review under the APA. *Piersall v. Winter*, 369 U.S. App. D.C. 207, 435 F.3d 319, 324(D.C. Cir. 2006).

E. Petitioner Is Entitled To Judicial Review of An Final Agency's Action of BCMRCG Dated July 23, 2021, On The Grounds of Arbitrary And Capricious Pursuant To the "APA"

76. The U.S. Supreme Court has held that congress intended judicial review of administrative action. *Bowen v. Michigan Acad. Of Family Physicians*, 476 U.S. 667,670 (1986). Thus “judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress” *Abbotts Labs., v. Gardner*, 387 U.S. 136, 140-141 (1967) (collecting cases).

77. In *Chappell v. Wallace*, 462 U.S.C. 296 (1983), the U.S. Supreme Court held that when a Board reviews the merits of a former service member’s application under 10 U.S.C. §1552(a) (1), the decision is subject to judicial review. *Id.*, at 303 (“Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence.”). It is instructive that *Chappell* held that Boards decisions to correct or not correct a military record are reviewable despite the fact that §1552(a)(1) provides that the Secretary “may correct any military record”. 10 U.S.C. §1552(a)(1) (emphasis supplied).

F. Justiciability

78. The Ninth Circuit in *Barber v. Widnall* 78 F.3d 1419, 1422 in its opinion stated that we may consider the issue of justiciability at any time because it is a prudential aspect of the case and controversy prerequisite for federal court jurisdiction. See *Western Mining Council v. Watt*,

643 F.2d 618, 624 (9th Cir.), cert. denied, 454 U.S. 1031, 70 L.Ed. 2d 474, 102 S. Ct. 567 (1981).

79. Petitioner has continually asserted the "justiciability" in the Application to the **BCMRCG**, that his military DD-214 is null and void Sept. 21, 1973, and that the discharge was illegal and not in conformance with law. And the attempt by the Respondent USCG on April 18, 2019 to correct the Service Record with false statements. 10 U.S.C. §1552 has been enacted for the correction of erroneous records. **Petitioner** contends that the Board has violated §1552, in denying his petition; by failing to remove the codes from the DD-214 as order by the BCMRCG in Docket No. 27-78, and **Petitioner** has exhausted his intraservice remedies. Therefore **Petitioner** meets the threshold requirements for judicial review of a military decision under the Mindes Doctrine, (*Mindes v. Seaman*, 453 F.2d 197, 201-02 (5th Cir. 1971)). See *Sebra v. Neville*, 801 F.2d 1135, 1141 (9th Cir. 1986). That decision in-which **Petitioner** clearly asserted he was seeking judicial review of, being BCMRCG Decision, dated July 23, 2021, on the grounds of arbitrary, capricious, legally and factually wrong and not based on substantial evidence. The current DD-214 that was issued and signed on June 14, 2019, by the Respondents contains false information that Petitioner was provided a complete dental examination and all appropriate dental services and treatment 90 days prior to separation on September 21, 1973. In addition this current DD-214 contains Petitioner's current address and phone number.

Compare at ("App D" at 21a-22a) with ("App D" at 23a).

80. The United States Court of Appeals for the Federal Circuit in *Cushman v. Shinseki*, 576 F.3d 1290 held that the presentation of improperly altered material evidence has been found to constitute a due process violation. Fraudulent intent on the part of the presenter of the false evidence is not required to find a due process violation. Alterations of evidence are material for due process purposes if there is a reasonable probability of a different result absent those alterations.

81. The Respondents realizing that there is a strong possibility of Petitioner being re-instated in the USCGC, on April 18, 2019 notified Petitioner of their intent to correct his discharge by removing the codes that it was ordered to be remove by BCMRCG Docket 27-78 forty-two years ago.

82. That on April 23, 2019, Petitioner rejected the request on the grounds the documents contained false statement of a material fact.

83. The Service Medical Record is devoid of any Dental Records for the allege Dental Examination 90 days prior to September 21, 1973. Therefore a new medical examination for separation is mandated when Petitioner was re-instated in the Coast Guard with a new discharge date of September 21, 1973.

84. The Court held in *Middleton v United States* (1965) 170 Ct Cl 36, that testing the validity of a discharge given by an armed service, one of the

prime questions is whether the department complied with its own regulations. *Cf. Service v. Dulles*, 354 U.S. 363 (1957). We have several times held that a discharge issued in violation of regulations is a nullity. Not merely the character of the discharge but the fact of discharge is voided by the failure to accord the serviceman his material rights or to follow the required procedures.

85. Therefore, that as a result of, the U.S. Coast Guard failing to administer a physical examination for separation, Petitioner received an invalid certificate of discharge on September 17, 1979 and on June 14, 2019 . Until such time as, Applicant receives a physical examination for separation Petitioner is still on active duty.

86. Therefore, Petitioner objected to the signing of this proposed upgraded DD -214, until Petitioner Discharge is in compliance with law. Until such time Petitioner is still on active duty.

87. That the **BCMRCG** for the last forty-two years has denied that Petitioner has not submitted evidence which was contrary to the action taken by the CG on June 14, 2019 in part and has failed to administer a Separation Examination which is validated by the Service Medical Record that is devoid of any such record. The **BCMRCG** July 23, 2021 decision is premised on false statements and therefore is Arbitrary and Capricious.

88. That Petitioner discharge on September 21, 1973, was invalid and is a nullity, where the Respondents failed to comply with the provisions of 10 USC §§ 1168(a);1169 and its own

regulations in administering a medical examination for separation. This statement by the United States Coast Guard is contrary to the Finding and Conclusions in BCMR No. 176-95 when the Board stated that "...when he was examined by a physician as part of a discharge physical examination on September 22, 1971 and December 6, 1971." Although the **BCMRCG** in its Decision in BCMR No. 176-95, referenced that Petitioner was examined on September 22, 1971 and December 6, 1971, nowhere in that Decision does it states Petitioner had a physical examination for September 21, 1973.

89. That the Judgment of the Central District Court of California in Case No. CV 21-3605 DSF of which the Ninth Circuit Court of Appeals in Case No. 21-56354, affirming the Central District of California judgment on the grounds of claims preclusion, which contradicts this Court holdings as held in *See Lawlor v. National Screen Serv. Corp.* 349 U.S. 322, 327-328, 75 S. Ct. 865, 99 L. Ed. 1122 (1955) (prior dismissal of action alleging antitrust violations did not preclude new action alleging antitrust violations and other legal theories based on conduct of defendant which occurred after prior judgment). Absent intervention by this Court, the BCMRCG Decision dated July 23, 2019, the judgment of the Central District Court of California in Case No. CV-21-3605-DSF, dated November 16, 2021, the unpublished opinion of the Ninth Circuit Court in Case No. 21-56354, dated February 23, 2023, affirming the lower court judgement will

undermine the precedents of the circuit courts and of this Court which has spent the past 68 year developing.

XII. Conclusion

For the foregoing reasons, Dr. Marvin L. Stewart, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARVIN L. STEWART, LL.B,
MBA-PPM, J.D.,
Plaintiff-Appellant,
v.
ALALEJANDRO N. MAYORKAS, in
his official capacity as Secretary
of The U.S. Department of
Homeland Security; JULIA
ANDREW, in her official capacity
as Chair of The Board for
Correction of Military Records
United States Coast Guard,
Defendants-Appellees.

No. 21-56354

D.C. No.
2:21-cv-036

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Submitted February 14, 2023^{1**}
Before: FERNANDEZ, FRIEDLAND, and
H.A. THOMAS, Circuit Judges.

¹ This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

^{**} The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

Marvin L. Stewart appeals pro se from the district court's judgment dismissing his action alleging that the Board for Correction of Military Records of the United States Coast Guard ("BCMR") violated the Administrative Procedure Act ("APA") by declining to docket his request for reconsideration of BCMR Docket No. 176-95. We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* a dismissal under Federal Rule of Civil Procedure 12(b)(6). *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005). We affirm.

The district court properly dismissed Stewart's action on the basis of claim preclusion because Stewart's claims arise out of the same transactional nucleus of operative fact as Stewart's claims in his prior APA action against the same parties or their privies that resulted in a final judgment on the merits. *See id.* at 987-88 (setting forth elements of res judicata and explaining this court's transaction test used to determine whether two suits share a common nucleus of operative fact).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal or in the reply brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARVIN L. STEWART, Plaintiff,

v.

ALEJANDRO MAYORKAS, et
al., Defendants.

CV 21-3605 DSF

JUDGEMENT

The Court having granted a motion to dismiss,

IT IS ORDERED AND ADJUDGED that Plaintiff take nothing, that the action be dismissed with prejudice, and that Defendants recover costs of suit pursuant to a bill of costs filed in accordance with 28 U.S.C. § 1920.

Date: November 16, 2021

/s/ Dale S. Fischer
Dale S. Fischer
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARVIN L. STEWART,
Plaintiff,
v.
ALEJANDRO MAYORKAS,
et al., Defendants.

CV 21-3605 DSF (Ex)
Order GRANTING
Motion to Dismiss
(Dkt21)

Plaintiff Marvin L. Stewart has again brought an action for review of a decision of the Board for Correction of Military Records (BCMR) regarding his discharge from the United States Coast Guard in 1971. Defendants move to dismiss due to res judicata and the expiration of the statute of limitations period. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for November 22, 2021 is removed from the Court's calendar.

Plaintiff argues that res judicata does not apply because he is challenging the BCMR's July 23, 2021 declining to consider another request for reconsideration of Plaintiff's arguments – arguments that he has made many, many times in numerous forums over the span of decades. But, if nothing else, this Court found in 2013

that the BCMR did not act in an arbitrary or capricious fashion when it refused to reconsider the same request that Plaintiff made this year and for which he nominally seeks review. Stewart v. Napolitano, CV 12-6776 DSF (Ex). Plaintiff simply repeated his prior request and got essentially the same answer from the BCMR. There is nothing to suggest that this case differs in any relevant way from the case filed in 2012, adjudicated with prejudice in 2013, and summarily affirmed by the Court of Appeals in 2014. Plaintiff cannot manufacture new claims and escape claim and issue preclusion by repeatedly filing the same arguments before the BCMR. See Friedman v. United States, 310 F.2d 381, 396 (Ct. Cl. 1962) (refusal of reviewing board to review decision of separate board six years prior does not create a "new claim" for the purposes of the statute of limitation).

The motion to dismiss is GRANTED as precluded by res judicata.

IT IS SO ORDERED.

Date: November 16, 2021

/s/Dale Fischer

Dale S. Fischer
United States District Judge

DHS Office of the General Counsel
Board for Correction of Military Records
2707 Martin Luther King Jr. Ave., SE, Stop
0485
Washington, DC 20528-04 5

Homeland Security

July 23, 2021

Mr. Marvin L. Stewart
1437 E. 37th Street
Long Beach, CA 90807

Re: Request for Reconsideration of BCMR Docket No.
176-95

Dear Mr. Stewart:

I have received your DD 149 requesting reconsideration of the Board's decision in BCMR Docket No. 176-95. In that case, you claimed that your discharge was erroneous and that you should receive a disability retirement and other relief based on allegations that you did not receive proper pre-separation medical and dental examinations, as required by Coast Guard policy. Likewise in your latest application, you claim that your discharge was erroneous and that you should receive a

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disability retirement and other relief based on allegations that you did not receive proper pre-separation medical and dental examinations, as required by Coast Guard policy.

Pursuant to 10 U.S.C. § 1552(a)(3)(D), the BCMR must consider a request for reconsideration of a prior determination if the application is "supported by materials not previously presented to or considered by.. the BCMR at the time of its prior determination. Therefore, if you submit new material evidence supporting the existence of the alleged error — the lack of proper pre-separation medical and dental examinations—I will docket your request for reconsideration by the Board.

My review shows that you submitted the following documents with your request for reconsideration:

I. My letter to you dated March 30, 2018, in which I explained that I could not docket a prior request for reconsideration because you had not submitted any new evidence of the alleged error: Although not previously reviewed by the Board when it issued the decision in BCMR Docket No. 176-95, my letter to you does not support your request because it does not cast light on whether you received proper pre-separation medical and dental examinations from the Coast Guard. It was issued more than

40 years after your separation from the Coast Guard.

2. A Coast Guard cover letter dated April 18, 2019, forwarding copies of a new DD 214 to you: Although not previously reviewed by the Board when it issued the decision in BCMR Docket No. 176-95, this cover letter does not support your request because it does not cast light on whether you received proper pre-separation medical and dental examinations from the Coast Guard. It was issued more than 40 years after your separation from the Coast Guard.

3. Your letter to various officials dated April 23, 2019, with claims similar to those made in your current request for reconsideration: Although not previously reviewed by the Board when it issued the decision in BCMR Docket No. 176-95, your letter to the officials does not support your request because it does not cast light on whether you received proper pre-separation medical and dental examinations from the Coast Guard. It was issued more than 40 years after your separation from the Coast Guard.

4. A copy of the new DD 214 that the Coast Guard sent you on April 18, 2019: Although not previously reviewed by the Board when it issued the decision in BCMR Docket No. 176-95, the DO 214 does

not support your request because it claims in block 17 that you did receive a proper pre- separation dental examination from the Coast Guard, and it was issued more than 40 years after your separation from the Coast Guard.

5. Copies of your Coast Guard military medical records: Your Coast Guard military medical records were previously reviewed and considered by the Board when it issued the decision in BCMR Docket No. 176-95. Your submission has not met the requirements for reconsideration in 10 U.S.C. § 1552(a)(3)(D). Therefore, I cannot docket it because you have not submitted any new evidence supporting the alleged error or injustice.

Sincerely

/s/ _____
Julia Andrews
Chair

**MARVIN L. STEWART SUPPLEMENTAL STATEMENT IN
SUPPORT OF APPLICATION AGAINST USCG FOR
INVALID CERTIFICATE OF DISCHARGE
DATED JUNE 14, 2019**

Department of Homeland Security
Office of the General Counsel
Board for Correction of Military Records
245 Murray Lane, Stop 0485
Washington, DC 20528-0485

In support of this Application for correction of the military record, Applicant present this supplemental statement in support of the evidence that Applicant's "Certificate of Discharge [See attached DD FORM 214, AUG 2009 dated June 14, 2019, Exhibit "4"] from the United States Coast Guard that was issued pursuant to the BCMR Decision No. 27-78 dated September 18, 1979 order is invalid and therefore void and nullified."

The Service Medical Record is devoid of any Examination [Medical or Dental] after the termination of the Service Medical Record dated December 6, 1971.

III. Statement of Facts

That on August 31, 2017, Applicant served an Application for Correction of Military Record [Form DD 149] under the provisions of Title 10, U.S. Code, Section 1552 to the Department of Homeland Security Office of the General Counsel Board for Correction of Military Records 245 Murray Lane, Stop 0485 Washington, DC 20528-0485.

That Applicant requested the following error or injustice in the record be corrected as follows: Applicant's Certificate of Discharge [DD-214] that was issued around October 18, 1979, is wholly invalid. This certificate of discharge is a nullity. That the **CG** failed to administer a final accounting of Applicant's physical body and mental being as required by **COAST GUARD PERSONNEL MANUAL CHAPTER 12.B. \ 12.B.6. Physical Examination Before Separation; and COAST GUARD MEDICAL MANUAL COMDTINST M6000.1D \ CHAPTER THREE - PHYSICAL STANDARDS AND EXAMINATION**, in addition they failed to pay Applicant for Basic Allowances for Housing (BAH); Basic Sep-Ration (BAS)(Food); clothing allowances; expenses for medical; expenses for dental; Applicant is entitled to his Servicemen's Group Life Insurance coverage (SGLIC). Therefore, Applicant is still on active duty and has not received a final accounting of pay, of which Applicant is demanding his active duty pay as of this writing and a valid certificate of discharge.

That the **BCMRCG** Docket No. 27-78 ordered the **CG** to reinstate Applicant back in the military and remove from Applicant's DD-214 the "R14001" which is the serial number of the message the **CG** ordered Applicant discharged that was issued around September 17, 1979. The **CG** has failed to remove those codes.

Applicant further stated that he believed the record to be in error or unjust for the following reasons: That the certificate of discharge [DD 214] that was received on or about October 18, 1979, that reflected that Applicant was discharge on September 21, 1973, was invalid and is a nullity where the **CG** failed to comply with the provisions of 10 USC §§ 1168(a);1169 and its own regulations in administering a medical examination for separation and payment for all allowances.

App. 12

That on March 30, 2018, Julia Andrews, Chair for Correction of Military Records, Office of the General Counsel, Department of Homeland Security, responded to Applicant's August 31, 2017 DD149 Application. In the opinion of the Chair, Julia Andrews, failed to docket the Application as a new application for correction of the military record under the **10 USCA § 1552**, to address the injustice of the Service Medical Record. In addition the Chair failed to address the issues raised in the application. [See the Opinion of the Chair, Julia Andrews, dated March 30, 2018 as Exhibit "1"].

That on April 18, 2019, the United States Coast Guard advised Applicant of its intent to modify Applicant's DD-214. That the DD-214 was incomplete which needed Applicant's signature; initials and date on all eight copies. [See attached letter and a copy of the new DD FORM 214, AUG 2009 as Exhibits. "2" and "4"].

That upon review of [DD FORM 214, AUG 2009], the information that is presented in **block 17** of all 8 copies presents false statements of a material fact in violation of Title 18 U.S.C. § 1001 stating that "Member was provided complete Dental Examination and all appropriate Dental Services and Treatment within 90 days prior to separation.

That on April 23, 2019, Applicant responded to the CG April 18, 2019 letter objecting to the validity of the [DD FORM 214, AUG 2009] requesting my signature; initials; and date on all 8 copies. [See Plaintiff's objection to the request of the CG's April 18, 2019 letter as Exhibit "3"]

That on June 14, 2019, the CG sent Applicant two signed copies of the [See DD FORM 214, AUG 2009 Exhibit "4"], with false statements that Plaintiff ; "Member was provided complete Dental Examination and

all appropriate Dental Services and Treatment within 90 days prior to separation.

In support of this claim Applicant presents evidence that Applicant's Discharge from the United States Coast Guard is not valid and therefore void and nullified. Applicant discharge is void and nullified on the grounds that Applicant was never advised of a Separation Medical examination; or are there orders ordering a separation medical examination in the service jacket for a discharge date of September 21, 1973;

That Applicant's Service Medical Record was terminated on December 6, 1971. That from December 6, 1971 until September 21, 1973 that there are no entries in the Service Medical Records after that date, and pursuant to the Orders of the BCMRCG in Docket No, 27-78 which was presented to Applicant as the Record Before the Agency of which a copy of the entire U.S. Coast Guard Service Medical Record is attached below as [See Official Copy of Service Medical Record Provided By the Department of Veterans Affairs on April 16, 2015 Exhibit "5"].

Therefore until a separation examination is given as mandated by Coast Guard Personnel Manual (CGPERSMAN), which states the following:

12.B.6. Physical Examination Before Separation

12.B.6.a. Applicability

Before retirement, involuntary separation, or release from active duty (RELAD) into the Ready Reserve (selected drilling or IRR), every enlisted member, except those discharged or retired for physical or mental disability, shall be given a complete physical examination in accordance with the Coast Guard Medical Manual, COMDTINST M6000.1

(series). Other members separating from the Coast Guard; e.g., discharge or transfer to standby reserve (non-drilling) may request a medical and dental screening. The examination results shall be recorded on Standard Form 88. To allow additional time to process enlisted members being discharged for enlistment expiration or being released from active duty, the physical examination shall be given at least six months before separation from active duty. **All physical examinations for separation are good for 12 months. If the member is discharged.**

IV. CLAIMS

10 U.S.C. § 701 Entitlement and accumulation

(a) A member of an armed force is entitled to leave at the rate of 2 1/2 calendar days for each month of active service, excluding periods of.

10 U.S.C. § 1168(a) Back Pay Pursuant To

The Court of Federal Claims in *Motto v. United States* 360 F. 2d 643, 175 Ct.Cl. 862, 865 (1966) citing *Garner v United States* (1963) 161 Ct.Cl. 73, held that a wrongfully discharged enlisted person whose enlistment was for indefinite time period is allowed to recover back-pay and allowances until date of valid discharge. In addition this Court held that he is entitled to constructive active duty credit, with all corresponding back pay and allowances, for as long as he retained this status—that is, until this active duty status ended as a result of some action releasing him from active duty.

That on April 22, 2019, Applicant received a delivery from the :

United States Coast Guard Stop 7200
2703 Martin Luther King Jr. Ave SE
Washington, DC 20593-7200
Attn: YNC Knapp PSC-bops-c

That was delivered by FedEx.

That upon examination of the contents which included a Cover Letter requesting Applicant's signature/initials and date on the eight copies of [DD Form 214, Aug 2009]. The information that is presented in block #17 of all 8 copies presents false statements of a material fact in violation of Title 18 U.S.C. §1001 stating that "Member was provided complete Dental Examination and all appropriate Dental Services and Treatment within 90 days prior to Separation.

That on April 23, 2019, Applicant responded with a strong objection that the Service Medical Record was devoid of any Dental Records for the allege Dental Examination and that no Examination was administered at the expiration of enlistment on Sept 21,1973. The only Dental Records that exist are for the original enlistment dated 1969.[See Applicants' original dental examination attached below as App. "5" pgs. 42-45];[See Applicant's response attached below as Exhibit "3"].

That on June 14, 2019, the CG ignored the objection of Applicant, that the Service Medical Record was terminated on December 6, 1971, and signed the altered **[DD FORM 214, Aug 2009]** with the false statements that "Member was provided complete Dental Examination and all appropriate Dental Services and Treatment within 90 days prior to Separation".

That the action taken by the CG on April 18, 2019, waived the statute of limitation pursuant to 28 USCS § 2501 in its attempt to modify the DD-214, and then making the statement that "Member was provided

complete Dental Examination and all appropriate Dental Services and Treatment within 90 days prior to Separation. This statement is contrary to the evidence of the Service Medical Record. [See **DD FORM 214, Aug 2009**, Exhibit "4"]

That from December 6, 1971 until September 21, 1973, Applicant was reinstated in the United States Coast Guard. The CG failed to adhere to its' policy and procedures in discharging an enlisted serviceman. That at no time was there a "Physical Examination before Separation administered. If one was to have been administered Applicant would have been entitled to a medical retirement based on the rating by the Department of Veterans Affairs of sixty percent.

That until such time Applicant receives a valid certificate of discharge; Applicant is due back pay from September 21, 1973 and allowances from December 6, 1971 until present day when a valid separation medical examination has been performed representing constructive service. Applicant objects to any set-off of his civilian earnings.

Military Disability Retirement

The money-mandating statute that provides a basis for Applicant's Tucker Act claim is 10 U.S.C. § 1201. *See Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005). Applicant is requesting military disability retirement pay which falls squarely within 10 U.S.C. § 1201. *Id.* Section 1201(a) provides:

Upon a determination by the Secretary that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent as described in subsection (c)(3), the

Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).

10 U.S.C. § 1201(a) (emphasis added). Claims for military disability retirement pay based on § 1201 are within the jurisdiction of this court. *See Chambers*, 417 F.3d at 1223; *Fisher v. United States*, 402 F.3d 1167, 1174 (Fed. Cir. 2005). Thus, the court has jurisdiction to hear plaintiff's case provided that the requisite jurisdictional requirements are satisfied.

That Applicant has a 60 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination. Had a medical examination been administered for the September 21, 1973 discharge that was ordered BCMRCG Docket No. 27-78, September 17, 1979, Applicant would have been entitled to retirement by reason of disability.

37 U.S.C.A. § 204

In support of this claim Applicant presents evidence that Applicant's “Discharge from the United States Coast Guard is not valid and therefore void and nullified.” Applicant discharge of September 21, 1973 is void and nullified on the grounds that Applicant was never advised of an separation medical examination; Applicant's Service Medical Record Terminated on December 6, 1971, Applicant's was re-instated with a new discharge date is September 21, 1973 that was ordered by the BCMRCG Docket No. 27-78 dated September 17, 1979. The CG in compliance with the BCMRCG Docket No. 27-78 order to re-instate Applicant back in the United States Coast Guard until the end of his enlistment September 21,

1973. The CG on April 18, 2019, reissued Applicant DD-214. Upon examination of the contents which included a Cover letter requesting Applicant's signature/initials and date on the eight copies of [DD Form 214, Aug 2009]. The information that is presented in block 17 of all 8 copies presents false statements of a material fact in violation of Title 18 U.S.C. §1001 stating that "Member was provided complete Dental Examination and all appropriate Dental Services and Treatment within 90 days prior to Separation. This is a false statement, the Service Medical Record is devoid of theses supporting documents for the September 21, 1973 discharge date, that the only dental records that exist represent the Original Enlistment.

That neither did Applicant have a Type III Dental Examination, Class II as reported on the "Report of Medical Examination" dated September 22, 1971, and December 6, 1971.

A military discharge issued in violation of regulation of executive department is nullity, and character and fact of discharge are both voided by failure to accord serviceman his material rights or to follow required procedures. *Middleton v United States (1965) 170 Ct Cl 36.*

Valid discharge requires delivery of valid discharge certificate, final accounting of pay, and undergoing "clearing" process required under appropriate service regulations, and mere physical transfer of discharge certificate does not constitute delivery. *United States v King (1989, CMA) 27 MJ 327.*

Whereby Applicant's discharge is in violation of 10 U.S.C. § 1168(a). "A valid discharge requires delivery of valid discharge certificate, final accounting of pay, and undergoing clearing process required under appropriate service regulations, and mere physical transfer of

discharge certificate does not constitute delivery. United States v King (1989, CMA) 27 MJ 327."

Upon reinstating Applicant in the United States Coast Guard from December 6, 1971, until this present-day Applicant showing constructive military service Applicant will be entitled to the following benefits retroactive to the date of Separation, and until Discharge proceedings can be conducted in conformance with law as follows: Pursuant to 37 U.S.C. § 204

(a.) Applicant is entitled to Basic Allowances for Housing (BAH) in the amount of \$ 2985. @ Month; \$35,820 a year @ 48 years from [Dec. 6, 1971 through 2020], for an accumulated amount of \$1,719,360.

(b.) Applicant is entitled to Basic Allowances Sep-Ration \$357.27 @ month; \$4,287.24 a year @ 48 years from [Dec. 6, 1971 through 2019], for an accumulated amount of \$205,787.52.

(c.) Applicant is entitled to clothing allowances in the amount of \$2,000, a year @ 48 for an accumulated amount of \$96,000.

(d.) Applicant is entitled to expenses spent for medical during the period of [1972 through 2019], in the amount of \$100,000.

(e.) Applicant is entitled to expenses spent for dental during the period of [1972 through 2019], in the amount of \$23,000.

(f.) Applicant is entitled to his Servicemen's Group Life Insurance [SGLIC] a fully vested policy in the amount of \$500,000.

14 USCA § 2765. Retroactive payment of pay and allowances delayed by administrative error or oversight

Selective Re-Enlistment Bonus (SRB); Pursuant to 14 U.S.C. §2765; because of the nature of the enlistment, and the special relationship the **CG** and Applicant have maintained these last 50 years. Applicant is entitled to the SRBs' for the following periods, in the following amounts:

Demand For Relief

In acting as described above, the United States Coast Guard failed to exercise the care required of an agency of the United States government.

Whereby the United States of Coast Guard has failed to give notice or hearing that a physical examination before separation was required.

Therefore, Applicant moves the BCMRCG to find that the falsified Report of Medical Examination dated September 22, 1971 and December 6, 1971, on the grounds that, it is beyond the 12 months of which it is good for pursuant to [See CGPERSMAN Chapter 12. B.6. CH-34.] is **moot**.

In addition, the U.S. Coast Guard violated **10 USCS § 1168(a); 10 USCS § 1169**, whereby, Applicant received an invalid discharge certificate [[DD FORM 214, AUG 2009] that was signed on June 14, 2019, that is null and void and not legal.

Whereby the certificate of discharge that was issued as a result of the BCMR Docket No. 27-78 September 17, 1979 that is dated June 14, 2019 is wholly invalid and is a nullity.

Therefore, Applicant is still on active duty until such time that Applicant's discharge is in compliance with law. Applicant demands back pay and all ancillary

benefits and expenses with interest that has been delayed due to fraud and administrative error; (2) That until Applicant receives a valid certificate of discharge; Applicant is due back pay and allowances from September 23, 1973 until present day when a valid separation medical examination has been performed representing constructive service; (3) That upon the completion of a physical examination for discharge Applicant seeks disability retirement.

Respectfully requested,

Marvin L. Stewart, LL.B, MBA-PPM, J.D.
1437 E. 37th
Long Beach, CA. 90806-4205
(562) 221-1820

VERIFICATION

I, Marvin L. Stewart, declare under penalty of perjury that the foregoing facts stated herein are true and correct of my knowledge. Executed on this 20th day of April 2020, in Los Angeles County, Long Beach, Calif.

Marvin L. Stewart, LL.B, MBA-PPM, J.D.

U.S. Department of
Homeland Security

United States
Coast Guard

Commander
United States Coast Guard
Personnel Service Center
Business Operations

United States Coast Guard Stop 7200
2703 Martin Luther King JR Ave SE
Washington, D.C. 20593-7200
Staff Symbol: PSC-bops-c
Phone (202) 795-6492
Email: Jennifer.m.knapp@uscg.mil

1900
Apr 18, 2019

Dear Mr. Stewart:

Enclosed you will find your reissued DD-214 for signature.

Please note that the enclosed DD-214 is incomplete. It requires your signature I initials and date on all 8 copies, in blocks 21a., 21b., and 30. Please ensure that you sign in blue Ink. Once completed, return to the following address:

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United States Coast Guard Stop 7200
2703 Martin Luther King JR Ave SE Washington, DC
20593-7200
ATTN: YNC Knapp PSC-bops-c

If you have any further questions or concerns, we may be
contacted via email at
Jennifer.m.knapp@uscg.mil or by telephone at 202-795-
6492.

Sincerely,
USCG Military Records Section

APP. 24

DR. MARVIN L. STEWART

April 23, 2019

The Honorable Kevin K. McAleenan
Acting Secretary of Homeland Security
Washington, D.C. 20528

Commandant of the Coast Guard
Admiral Karl L. Schultz
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593

United States Coast Guard Stop 7200
2703 Martin Luther King Jr. Ave SE
Washington, DC 20593-7200
Attn: YNC Knapp PSC-bops-c

Marcus Kerner
Assistant United States Attorney
411 West Fourth Street, Suite 8000
Santa Ana, California 92701

Re: Stewart v. Kirstjen Nielsen; Case No. 2:18-cv-07542-
DSF-E.

To the above mentioned I Dr. Marvin L. Stewart, on April
22, 2019, received a delivery from the:

1437 E. 37th St. • Long Beach, CA • 90807-4205
Phone: 562.221.1820
Email: marvlee.marv@verizon.net

United States Coast Guard Stop 7200
2703 Martin Luther King Jr. Ave SE
Washington, DC 20593-7200
Attn: YNC Knapp PSC-bops-c

That was delivered by FedEx .

Upon examination of the contents which included a Cover letter requesting my signature/initials and date on the eight copies of [DD Form 214, Aug 2009]. The information that is presented in block 17 of all 8 copies presents false statements of a material fact in violation of Title 18 U.S.C. §1001 stating that "Member was provided complete Dental Examination and all appropriate Dental Services and Treatment within 90 days prior to Separation.

COAST GUARD PERSONNEL MANUAL CHAPTER 12.B.

12.B.6. Physical Examination Before Separation

12.B.6.a. Applicability

Before retirement, involuntary separation, or release from active duty

(RELAD) into the Ready Reserve (selected drilling or IRR), every enlisted member, except those discharged or retired for physical or mental disability, shall be given a complete physical examination in accordance with the Medical Manual, COMDTINST M6000.1 (series). Other members separating from the Coast Guard; e.g., discharge or transfer to standby reserve (non-drilling) may request a medical and dental screening. The examination results shall be recorded on Standard Form 88. To allow additional time to process enlisted members being discharged for enlistment expiration or being released from active duty, **the physical examination shall be given at least six months before separation from active duty** (emphasis added). **All physical**

examinations for separations are good for 12 months

(emphasis added) If the member is discharged for immediate reenlistment, the physical examination is not required. However, before discharge for immediate reenlistment, the commanding officer shall review the member's health record and require him or her to undergo a physical examination if evidence in the record or personal knowledge indicates a potential health problem.

Pursuant to **10 USCS § 1169**-- Valid discharge requires delivery of valid discharge certificate, final accounting of pay, and undergoing clearing process required under appropriate service regulations, and mere physical transfer of discharge certificate does not constitute delivery.

The allege Medical Examination for Separation dated September 22, 1971 and December 6, 1971, is moot.

This allege medical examination was valid for one year until December 6, 1972, pursuant to the Coast Guard Personnel Manual (CGPERSMAN), 12.B.6. Physical Examination before Separation.

The Service Medical Record is Devoid of any Dental Records for the allege Dental Examination.

Therefore a new medical examination for separation is mandated when Applicant was re-instated in the Coast Guard with a new discharge date of September 21, 1973.

The Court held in Middleton v United States (1965) 170 Ct Cl 36, that testing the validity of a discharge given by an

armed service, one of the prime questions is whether the department complied with its own regulations. *Cf. Service v. Dulles*, 354 U.S. 363 (1957). We have several times held that a discharge issued in violation of regulations is a nullity. *Sofranoff v. United States, supra*; *Smith v. United States, supra*; *Murray v. United States, supra*; *Rowe v. United States*, 167 Ct. Cl. 468, 470 (1964) cert. denied, 380 U.S. 961 (1965); *Cf. Grant v. United States*, 162 Ct. Cl. 600, 612 (1963). Not merely the character of the discharge but the fact of discharge is voided by the failure to accord the serviceman his material rights or to follow the required procedures. See *Clackum v. United States, supra*, 148 Ct. Cl. at 410; *Murray v. United States, supra*, 154 Ct. Cl. at 188, 191; *Sofranoff v. United States, supra*, at p. 478.

Therefore, that as a result of, the U.S. Coast Guard failing to administer a physical examination for separation, Applicant received an invalid certificate of discharge on September 17, 1979. Until such time as, Applicant receives a physical examination for separation plaintiff is still on active duty.

Therefore, Plaintiff objects to the signing of this proposed upgraded DD -214, until Plaintiff Discharge is in compliance with law. Until such time Plaintiff is still on active duty .

Respectfully,

/S/ _____
Marvin L. Stewart, LL.B., MBA-PPM. J.D.
1437 E. 37th St.
Long Beach, CA 90806-4205
(562) 221-1820