

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 January 2024

DOCKET NUMBER: AR20230007173

APPLICANT REQUESTS: removal of his titling and indexing finding from the Defense Central Index of Investigations (DCII).

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Counsel's Memorandum (Request for Expungement – (Applicant)), 21 March 2023
- U.S. Army Criminal Investigation Command (CID) Memorandum (Law Enforcement Report – Serious Incident Report (Category 2)/Final), 15 January 2020
- DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 27 February 2020
- U.S. Army Criminal Investigation Division (CID) Letter, 6 December 2022
- four Supporting Statements, 25 January 2023 through 16 March 2023
- Counsel's Memorandum, 24 August 2023

FACTS:

1. The applicant defers to counsel.
2. Counsel states the applicant respectfully requests removal of his name from the DCII under the provisions of Department of Defense (DOD) Instruction 5505.07 (Titling and Indexing by DOD Law Enforcement Activities) based on a lack of credible evidence to believe he committed the misconduct for which he was titled.

a. According to the DA Form 4833, 27 February 2020, the applicant was titled for larceny of Government property, larceny of Government funds, and conspiracy to commit fraud offenses. The larceny of Government funds and conspiracy offenses were inappropriately included on the DA Form 4833, as there was a no probable cause opinion for these offenses. Further, he was inappropriately titled for the larceny of Government property offense, as no credible evidence existed at that time to believe he had committed the offense. Finally, the DCII entry regarding this incident improperly

noted he was arrested. That is not the case. The applicant previously requested expungement of this titling decision from his records through the CID/U.S. Army Crime Records Center. This request was improperly denied on 6 December 2022. With all other administrative avenues exhausted, we respectfully request removal of his name from any law enforcement database regarding these alleged offenses. In the alternative, we respectfully request removal of the term "arrested" from all databases.

b. The applicant was accused of stealing Army-purchased ammunition between 2014 and 2018.

(1) During this time, he was in command of Special Forces Operational Detachment Alpha (SFOD-A) 5125. "Members of 5th Special Forces Group endured extremely high operational tempos that, in addition to multiple deployments, often required intense preparatory training." Due to these conditions, he spent a lot of time at the range, often four to five times per week, spending hours there each time. Soldiers often brought their own range bags. It would not be unusual for some ammunition to go unspent during these days. It would not be unusual for some of that ammunition to remain in a Soldier's personal bag at the end of the day.

(2) Mr. M____ H____ served as the operations sergeant of SFOD-A 5125 from 2015 to 2018. His attached letter discusses the operational tempo of the unit; the long and frequent days at the range; and the regularity, through human error, that unspent ammunition would leave the range in an operator's personal bag. He states unequivocally that he never witnessed the applicant intentionally appropriating any ammunition during these days. He states it was common for members of 5th Special Forces Group to unintentionally misplace ammunition during these times. He states he is certain that the applicant did not misplace any ammunition with any criminal intent.

(3) The CID report states that investigators recovered "US Army purchased ammunition in excess of 2,000 rounds..." The applicant admitted that he very likely had U.S. Army-purchased ammunition in his ammunition can. He unequivocally denies that there were over 2,000 Army-purchased rounds in that can. This was his personal ammunition can. It contained his own stores of ammunition. To say that over 2,000 rounds were the property of the Army and not his own personal ammunition is wildly unrealistic. There is no way investigators sorted through over 2,000 rounds of ammunition to confirm the origin of each round. This statement is a rush to judgment. It is far more likely that the majority of these rounds belonged to the applicant, not the U.S. Army.

c. The applicant did not commit larceny of Government property. The applicant was accused of stealing a Surefire Light System for a .50-caliber machine gun and various gymnasium equipment from the Army between 2014 and 2018.

(1) In 2014, the applicant was deployed to Afghanistan with 5th Special Forces Group. At that time, they were undergoing retrograde operations, which resulted in a large amount of equipment being identified for destruction. The items ranged from weapons systems to vehicles to gymnasium equipment. Many of the items being scheduled for destruction, though not up to Army standards for continued use and maintenance, were still in good working order (refer to the attached statement from Mr. C____ H____ for a thorough explanation of the retrograde operations as they pertained to the applicant). The letter is important to understand the full circumstances in which the incident occurred, as the applicant's mindset with regard to these items is a vital element for an accusation of larceny. Many Soldiers would take these things rather than let them be destroyed. This was a common view toward these items throughout retrograde operations and was not or would not have been viewed as taking something with the intent to deprive the U.S. Government of the use and benefit of that property.

(2) Major (Retired) C____ B____ served with the applicant from 2015 to 2016. Though he was not in the 2014 deployment with the applicant, he was deployed to Iraq at the end of 2011 and experienced retrograde operations at that time. He describes the common practice of retaining serviceable property when it has been written off the books and scheduled for destruction due to retrograde operations. He attests to the attitude in the unit regarding this practice and states the unit judge advocate even made a determination that this was appropriate. He states these attitudes were "DOD wide."

(3) The applicant did not have the requisite guilty mind to permanently deprive the U.S. Government of this property. He retained items that were identified for destruction during retrograde operations. He believed this was an appropriate action because it was common in the unit during these operations. He understood these items to essentially be "in the trash" rather than on any property book. It is not wrongful to own a light system or gymnasium equipment. It is only wrongful if it is the property of another and was taken with a guilty mind without consent of the owner. It is the Government's burden to prove these elements. All the Government has shown is that these items were in his possession. There are no hand receipts showing these items still belonged to the Government when the applicant took them. He took home items that were to be destroyed. This was an accepted practice. He never had the requisite guilty mind to commit larceny. If investigators had conducted a proper investigation, they would have seen that, under the totality of the circumstances at the time, there was no credible evidence to believe the applicant committed larceny with regard to these items.

d. The applicant was never arrested. He met with CID agents at the Naval Postgraduate School to discuss an investigation. They met in an empty classroom. He was there for approximately 2 hours. They did not ask him about his own case for approximately 45 minutes. Rather, they asked him about his team and their deployments. They asked about their methodology as a team, specifically in Syria, where they had been very successful. They asked about his time in the Army,

congratulated him on a great career, and listed several of his accomplishments. They then began asking about his team's budgets and who on the team had access to team funds. After an hour or more, they began asking him about his divorce. He was never read his rights. He was never told he had the right to remain silent or that he was the subject of an investigation. At one point, he asked if he needed to request an attorney because their questions were beginning to sound accusatory. The officer's reply was that he "could if he wanted to" or words to that effect. At no point was he "in custody." At no point was he notified or cited by law enforcement. This was not an arrest under the Federal Bureau of Investigation's Uniform Crime Reporting Program.

3. On 21 February 2019, the applicant became the subject of an Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) administrative investigation into allegations of misconduct against him and members of SFOD-A 5125, Company B, 1st Battalion, 5th Special Forces Group (Airborne).

4. The 5th Special Forces Group (Airborne) memorandum from the investigating officer (Findings and Recommendations: Army Regulation 15-6 Administrative Investigation into Allegations of Misconduct against (Applicant) and Members of SFOD-A 5125), 25 February 2019, found:

a. A culture of indiscipline did exist in Operational Detachment-Alpha (ODA 5125) during the applicant's command. Toleration of unethical and morally compromising behavior of members of the detachment existed under the applicant's command and example. Further, the honesty of several members was questionable. This culture of toleration and neglect in matters of morals and ethics is distinct from the disciplined tactical culture that was evident to commanders and observers who recognized the team as tactically competent, physically fit, and reliable.

b. The allegation that members of ODA 5125 exhibited behaviors that glamorized a culture of behavior that is illegal, unethical, and antithetical to the Special Forces Regiment, is supported by a preponderance of the evidence. Specifically, those members included the applicant and Sergeant First Class (SFC) M____ H____, the detachment commander and team sergeant, respectively.

c. The allegation that the applicant violated Article 134 (Adultery), Uniform Code of Military Justice (UCMJ), is supported by a preponderance of the evidence.

(1) According to the marriage certificate and divorce documents, the applicant was married to Ms. J____ M____ from 7 August 2013 to July 2017.

(2) He maintained an adulterous relationship with First Lieutenant (1LT) S____ F____ from 2014 to June 2018.

(3) He maintained an adulterous relationship with Ms. T____ G____ from 2015 to 2018.

(4) The sexual nature of the relationships are described by both women and in accordance with the Article 134, UCMJ, definitions.

d. The allegation that SFC M____ H____ physically assaulted Chief Warrant Officer 2 (CW2) M____ in violation of Article 91 (Insubordinate Conduct) while the applicant stood by is not supported by a preponderance of the evidence. CW2 M____ acknowledged that an interaction between SFC H____ and himself did occur but that it's nature was not assault). Other members of the detachment unanimously stated that no assault occurred.

e. The allegations that the applicant violated Article 92 (Failure to Obey and Lawful Order), UCMJ, by drinking and becoming intoxicated in Syria in June, July, and October 2017 are not supported by a preponderance of the evidence. Texts messages from the applicant to 1LT F____ are the only evidence available toward the allegations. Detachment members unanimously rejected assertions that members of ODA 5125 violated the alcohol policy. Company commanders did not recall any encounters with intoxicated members of ODA 5125. The applicant's aggrandizement of illegal and unethical behavior is consistent with other claims he makes to other persons regarding unsubstantiated illegal and unethical activities indicating a pattern of dishonesty.

f. The allegation that the applicant destroyed Government property is not supported by a preponderance of the evidence.

(1) There is no physical evidence of destroyed Government computers or other property under the accountability of the applicant from May 2017 to October 2017. ODA 5125 maintained property accountability during this time and did not turn in or hand over destroyed computers.

(2) Key property management officers and noncommissioned officers, including the responsible officers, each reported that none of their property was destroyed. The company supply sergeant reported that no Government computers were turned in on account of being destroyed. The detachment special forces engineer sergeant responsible for property management reported that no computers were destroyed.

g. The allegation that the applicant and members of ODA 5125 violated Article 133 (Conduct Unbecoming to an Officer), UCMJ, in that they administered drugs to themselves and attended raves while operating in Lebanon is not supported by a preponderance of the evidence.

h. The allegation that the applicant assaulted a member of his partner force in Syria in October 2017 in violation of Article 128 (Assault), UCMJ, is not supported by a preponderance of the evidence. Detachment members unanimously denied ever observing the act or hearing stories of the act. No witnesses exist for the event outside of the applicant's own report to 1LT F____ via text message.

i. The allegation that the applicant is in financial debt to 1LT S____ F____ is supported by a preponderance of the evidence; however, the amount is difficult to establish. 1LT F____ states the applicant owes her \$20,000 for living expenses she incurred while he lived with her in Nashville, TN, between October 2016 and June 2018. Further, 1LT F____ states the applicant routinely borrowed money to pay expenses associated with his Clarksville, TN, residence. Text messages from the applicant to 1LT F____ do evidence the applicant discussing borrowing sums up to \$1,000 from 1LT F____.

j. The allegation that the applicant has displayed conduct unbecoming of an officer is supported by a preponderance of the evidence.

(1) Foreign national Ms. T____ G____ describes unprofessional sexual liaisons between her and the applicant in Lebanon while he was in command of an ODA in an operational environment. She further describes SFC M____ H____ being witness to these liaisons.

(2) The applicant acknowledged the relationship with foreign national Ms. G____.

(3) The applicant aggrandized unethical and illegal behaviors to 1LT S____ F____ and Ms. G____.

(4) The applicant maintained an adulterous relationship with a junior officer, 1LT S____ F____.

(5) The applicant's intention to subvert his commander by taking action to get "him fired and shame him. Ruin his reputation and ensure he never gets promoted" are antithetical to ethical norms required for mission command and the good order and discipline of any unit.

k. The investigating officer recommended revocation of the applicant's Special Forces Tab and initiation of court-martial proceedings against him based on his violation of Article 133, UCMJ, and Article 134, UCMJ.

5. The 5th Special Forces Group (Airborne) memorandum for record from the commander (Approval Memorandum – Findings and Recommendations: Army

Regulation 15-6 Administrative Investigation into Allegations of Misconduct against (Applicant) and Members of SFOD-A 5125), 1 April 2019, approved the findings and recommendations of the Army Regulation 15-6 administrative investigation into allegations of misconduct against the applicant and members of SFOD-A 5125, Company B, 1st Battalion, 5th Special Forces Group (Airborne).

6. The U.S. Army Criminal Investigation Command memorandum (Law Enforcement Report – Serious Incident Report (Category 2)/Final), 15 January 2020, names the applicant as a subject of the offenses of conspiracy – fraudulent offenses, larceny of Government property, and larceny of Government property (funds) from 1 August 2016 through 31 August 2016 in Lebanon and 1 August 2016 through 30 January 2018 in Kentucky.

a. The Report of Summary states:

(1) The applicant was advised of his rights, which he waived, and admitted he stole Government-purchased gymnasium equipment from Afghanistan during his deployment in 2014 for personal use. He denied telling team members that he stole operational funds or team funds for personal items. He also denied using operational funds and team funds at local casinos, and denied using funds set aside for partner forces.

(2) SFC [Redacted] was advised of his rights, which he waived, and denied taking or providing any funds to the applicant or any other team member for purchasing personal items. SFC [Redacted] denied having any knowledge of gymnasium equipment being stolen from Afghanistan during past deployments.

(3) No credible information was identified to support the allegations of theft of operational funds by the applicant, SFC [Redacted], or any personnel from 5th Special Forces Group (Airborne).

(4) Through coordination with the U.S. Attorney's Office within the Western District of Kentucky, a Search Authorization was effected through the U.S. District Court, Middle District of Tennessee. The search was executed at a storage facility shared by the applicant and resulted in the recovery of U.S. Army-purchased ammunition in excess of 2,000 rounds, a SureFire Light System for a .50-caliber machine gun valued in excess of \$7,000, a rowing machine, and several weight plates valued in excess of \$1,500. The collective amount of Government property stolen by the applicant was approximately \$9,100.00.

b. On 12 December 2019, 1st Special Forces Command (Airborne) trial counsel opined there was probable cause to believe the applicant committed the offense of larceny of military property. Trial counsel further opined there was no probable cause to

believe the applicant or SFC [Redacted] committed the offenses of conspiracy and larceny of Government funds.

7. On 29 January 2020, the applicant was issued a general officer memorandum of reprimand for adultery, conduct unbecoming an officer, and larceny.

8. On 20 February 2020, the imposing officer directed filing the general officer memorandum of reprimand in the applicant's Army Military Human Resources Record. The Army Regulation 15-6 report of investigation was filed in the restricted folder of his Army Military Human Resources Record.

9. The DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 27 February 2020, lists the applicant for the offenses of Larceny of Government Property (Funds), 1 August 2016; Conspiracy – Fraudulent Offenses, 1 August 2016; and Larceny of Government Property, 1 August 2016. Item 10a (Commander's Remarks) states "General Officer Letter of Reprimand in Official file."

10. The CID/U.S. Army Crime Records Center letter, 6 December 2022, notified the applicant that his request to correct information within CID files was denied. The CID decision supplements their previous response, 5 December 2022 (not in evidence).

11. The applicant provides four supporting statements from former Army service members, 25 January 2023 to 16 March 2023, stating, in part, it was common practice for military equipment and other property owned by the U.S. Army that was not being redeployed to be destroyed. It was common for ammunition to accidentally be taken home from ranges and deployments, even after thorough shakedowns and personnel checks by customs officials and senior unit members. If at any point ammunition was unaccounted for, it was accidental and with absolutely no intention of defrauding the Army. There was no knowledge of any misconduct or allegations made against the applicant.

12. Counsel's memorandum in response to the CID letter received by the Army Review Boards Agency, 24 August 2023, states:

On 18 August 2023, [Applicant] received a letter from the Board regarding his application to the Army Board for Correction of Military Records dated 21 March 2023. This letter disclosed the board had received a report from the USACID [U.S. Army Criminal Investigation Command], USACRC [U.S. Army Crime Records Center], 27130 Telegraph Road, Quantico, VA 22134, and advised [Applicant] he had a right to submit comments to the report. The letter referred to this report as an "advisory opinion."

The "advisory opinion" enclosed in the above referenced letter consisted of the Commander's Report of Disciplinary or Administrative Action (DA Form 4833) and the CID Law Enforcement Report in this case. This document was not an advisory opinion. It was the subject matter of [Applicant's] application for relief from the board.

Further, this enclosure was previously submitted to the board by [Applicant] as an enclosure to his application. It does not contain any new information for the Board. As such, [Applicant] has already fully responded to the contents of this enclosure in his original application and has no further comments regarding this document.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that partial relief was warranted. The Board through counsel carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. The Board acknowledged the applicant's request for removal of his name from the Defense Central Index of Investigations (DCII), asserting that the titling was unsupported by credible evidence and that the entry improperly included an arrest notation. The Board also considered the Trial Counsel's legal opinion, which found no probable cause for the offenses of Larceny of Government Funds and Conspiracy to Commit Fraud. Upon review through counsel of the applicant's petition and available military records, the Board concurred with the Trial Counsel's assessment and found that titling for those two offenses was not supported by probable cause. Accordingly, the Board found administrative correction are warranted to remove those charges from the DA Form 4833 and associated records. However, the Board found that the titling for Larceny of Government Property was properly executed and remains supported by the applicable legal standard.

2. The Board under DoDI 55.07 Section 3.2 determined, the elements of Larceny of Government Property: (1) wrongful taking of property; (2) that the property belonged to the United States; (3) that the property had value; and (4) that the taking was with the intent to permanently deprive the United States of its use and benefit. The CID Report of Investigation (ROI) documents the recovery of over 2,000 rounds of Army-purchased ammunition and other government property in the applicant's possession. While the applicant and supporting statements assert that these items were either personal property or scheduled for destruction during retrograde operations, the record does not contain sufficient evidence to rebut the reasonable belief that the property was government-owned and wrongfully retained with the intent to permanently deprive the

United States of the use and benefit of the ammunition. The applicant's admission that Army-purchased ammunition was likely in his possession, coupled with the absence of hand receipts or formal transfer documentation, supports the finding that probable cause existed at the time of the investigation.

3. The Board acknowledged the applicant's assertion that he was never arrested. Based on the CID ROI and the applicant's own account, the Board found that the investigative interview did not meet the legal definition of an arrest under the Federal Bureau of Investigation's Uniform Crime Reporting Program. Therefore, the Board determined correction of the DCII entry to remove any reference to an arrest is warranted. Furthermore, the Board weighed the credibility of the original investigation, the nature of the adverse action taken including a permanently filed General Officer Memorandum of Reprimand (GOMOR) and the applicant's post-investigation assertions. The Board recognized that titling does not imply guilt and that judicial or administrative actions must be based on more than the existence of a titling record, it found no clear error or injustice in the titling for Larceny of Government Property. The facts presented in the CID ROI, combined with the applicant's own statements, support a reasonable belief that the offense occurred, and that the applicant committed it.

4. Based on the evidence, the Board granted partial relief to correct the record by removing the titling for Larceny of Government Funds and Conspiracy to Commit Fraud and eliminating the erroneous arrest notation. However, the Board denied relief for removal of the titling and indexing for Larceny of Government Property, as the standard of probable cause was met, and no compelling evidence has been presented to warrant expungement.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
XXX	XXX	XXX	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected to show removal of the titling for Larceny of Government Funds and Conspiracy to Commit Fraud, and correction of the DCII entry to eliminate the erroneous arrest notation.
2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to removal of his titling and indexing finding from the Defense Central Index of Investigations (DCII) for Larceny of Government Property.

X //SIGNED//

CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Army Regulation 190-45 (Law Enforcement Reporting) prescribes policies, procedures, and responsibilities for the preparation, reporting, use, retention, and disposition of Department of the Army forms and documents related to law enforcement activities. It implements federal reporting requirements on serious incidents, crimes, and misdemeanor crimes.

a. Paragraph 3-6a (Amendment of Records) states an amendment of records is appropriate when such records are established as being inaccurate, irrelevant, untimely, or incomplete. Amendment procedures are not intended to permit challenging an event that actually occurred. Requests to amend reports will be granted only if the individual submits new, relevant and material facts that are determined to warrant their inclusion in or revision of the police report. Requests to delete a person's name from the title block will be granted only if it is determined that there is no probable cause to believe the individual committed the offense for which he or she is listed as a subject. It is emphasized that the decision to list a person's name in the title block of a police report is an investigative determination that is independent of whether subsequent judicial, nonjudicial, or administrative action is taken against the individual.

b. Paragraph 4-7 (DA Form 4833) states this form is used with the Law Enforcement Report to record actions taken against identified offenders and to report the disposition of offenses investigated by civilian law enforcement agencies.

2. Army Regulation 195-2 (Criminal Investigation Activities) establishes policies for criminal investigation activities, including the utilization, control, and investigative responsibilities of all personnel assigned to CID elements.

a. Paragraph 4-4b (Amendment of CID Reports) provides that:

(1) Requests to amend or unfound offenses in CID reports of investigation will be granted only if the individual submits new, relevant, and material facts that are determined to warrant revision of the report.

(2) The burden of proof to substantiate the request rests with the individual.

(3) Requests to delete a person's name from the title block will be granted if it is determined that credible information did not exist to believe the individual committed the offense for which titled as a subject at the time the investigation was initiated, or the wrong person's name has been entered as a result of mistaken identity.

(4) The decision to list a person's name in the title block of a CID report of investigation is an investigative determination that is independent of judicial, nonjudicial, or administrative action taken against the individual or the results of such action.

(5) The decision to make any changes in the report rests within the sole discretion of the Commanding General, CID. The decision will constitute final action on behalf of the Secretary of the Army with respect to requests for amendment under this regulation.

b. The Glossary defines credible information as information disclosed to or obtained by an investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to indicate that criminal activity has occurred and would cause a reasonable investigator under similar circumstances to pursue further the facts of the case to determine whether a criminal act occurred or may have occurred.

3. Department of Defense (DOD) Instruction 5505.07 (Titling and Indexing by DOD Law Enforcement Activities), 8 August 2023, establishes policy, assigns responsibilities, and prescribes uniform standard procedures for titling persons, corporations, and other legal entities in DOD law enforcement activity (LEA) reports and indexing them in the DCII.

a. Pursuant to Public Law 106-398, section 552, and Public Law 116-283, section 545, codified as a note in Title 10, U.S. Code, section 1552, establishes procedures for DOD personnel through which:

(1) covered persons titled in DOD LEA reports or indexed in the DCII may request a review of the titling or indexing decision; and

(2) covered persons titled in DOD LEA reports or indexed in the DCII may request their information be corrected in, expunged, or otherwise removed from DOD LEA reports, DCII, and related records systems, databases, or repositories maintained by, or on behalf of, DOD LEAs.

b. DOD LEAs will title subjects of criminal investigations in DOD LEA reports and index them in the DCII as soon as there is credible information that they committed a criminal offense. When there is an investigative operations security concern, indexing the subject in the DCII may be delayed until the conclusion of the investigation.

c. Titling and indexing are administrative procedures and will not imply any degree of guilt or innocence. Judicial or adverse administrative actions will not be taken based solely on the existence of a DOD LEA titling or indexing record.

d. Once the subject of a criminal investigation is indexed in the DCII, the information will remain in the DCII, even if they are found not guilty, unless the DOD LEA head or designated expungement official grants expungement in accordance with section 3.

e. Basis for Correction or Expungement. A covered person who was titled in a DOD LEA report or indexed in the DCII may submit a written request to the responsible DOD LEA head or designated expungement officials to review the inclusion of their information in the DOD LEA report; DCII; and other related records systems, databases, or repositories in accordance with Public Law 116-283, section 545.

f. Considerations.

(1) When reviewing a covered person's titling and indexing review request, the expungement official will consider the investigation information and direct that the covered person's information be corrected, expunged, or otherwise removed from the DOD LEA report, DCII, and any other record maintained in connection with the DOD LEA report when:

(a) probable cause did not or does not exist to believe that the offense for which the covered person was titled and indexed occurred, or insufficient evidence existed or exists to determine whether such offense occurred;

(b) probable cause did not or does not exist to believe that the covered person committed the offense for which they were titled and indexed, or insufficient evidence existed or exists to determine whether they committed such offense; and

(c) such other circumstances as the DOD LEA head or expungement official determines would be in the interest of justice, which may not be inconsistent with the circumstances and basis in paragraphs 3.2.a.(1) and (2).

(2) In accordance with Public Law 116-283, section 545, when determining whether such circumstances or basis applies to a covered person when correcting, expunging, or removing the information, the DOD LEA head or designated expungement official will also consider:

(a) the extent or lack of corroborating evidence against the covered person with respect to the offense;

(b) whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense; and

(c) the type, nature, and outcome of any adverse administrative, disciplinary, judicial, or other such action taken against the covered person for the offense.

4. DOD Instruction 5505.11 (Fingerprint Card and Final Disposition Report Submission Requirements), 21 July 2014, establishes policy, assigns responsibilities, and prescribes procedures for defense criminal investigative organizations and other DOD law enforcement organizations to report offender criminal history data to the Criminal Justice Information Services Division of the Federal Bureau of Investigation for inclusion

5. In the National Crime Information Center criminal history database. It is DOD policy that the defense criminal investigative organizations and other DOD law enforcement organizations submit the offender criminal history data for all members of the military service investigated for offenses, to include wrongful use of a controlled substance, to the Criminal Justice Information Services Division of the Federal Bureau of Investigation, as prescribed in this instruction and based on a probable cause standard determined in conjunction with the servicing staff judge advocate or other legal advisor.

6. The National Defense Authorization Act, Fiscal Year 2021, section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigation Reports, the Department of Defense Central Index of Investigations, and other Records and Databases), states not later than 1 October 2021, the Secretary of Defense shall establish and maintain a policy and process through which any covered person may request that the person's name, personally identifying information, and other information pertaining to the person shall, be corrected in, or expunged or otherwise removed from a law enforcement or criminal investigative report of the DCII, an index item or entry in the DCII, and any other record maintained in connection with a report of the DCII, in any system of records, records database, record center, or repository maintained by or on behalf of the Department.

c. Basis for Correction or Expungement. The name, personally identifying information, and other information of a covered person shall be corrected in, or expunged or otherwise removed from, a report, item or entry, or record of the DCII, in the following circumstances:

(1) probable cause did not or does not exist to believe that the offense for which the person's name was placed or reported, or is maintained, in such report, item or entry, or record occurred, or insufficient evidence existed or exists to determine whether or not such offense occurred;

(2) probable cause did not or does not exist to believe that the person actually committed the offense for which the person's name was so placed or reported, or is so maintained, or insufficient evidence existed or exists to determine whether or not the person actually committed such offense; and

(3) such other circumstances, or on such other bases, as the Secretary may specify in establishing the policy and process, which circumstances and bases may not be inconsistent with the circumstances and bases provided by subparagraphs (1) and (2).

d. Considerations. While not dispositive as to the existence of a circumstance or basis set forth in subparagraph (1), the following shall be considered in the determination whether such circumstance or basis applies to a covered person for purposes of this section:

(1) the extent or lack of corroborating evidence against the covered person concerned with respect to the offense at issue;

(2) whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense at issue; and

(3) the type, nature, and outcome of any action described in subparagraph (2) against the covered person.

//NOTHING FOLLOWS//