

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 January 2025

DOCKET NUMBER: AR20240004670

APPLICANT REQUESTS: through counsel, expunction of two U.S. Army Criminal Investigation Command (CID) Law Enforcement Reports (LERs), 1 October 2018 and 11 December 2018, and all associated documents from CID, Defense Central Index of Investigations (DCII), and other federal agency criminal databases.

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

- DD Form 149 (Application for Correction of Military Record under the Provisions of the Title 10, U.S. Code, Section 1552)
- Counsel's Brief in Support of Application for Correction of Records, undated, with supporting documents –
  - Counsel's Memorandum (Request for Expungement – DCII and Identity History Summary (Applicant)), 31 May 2023, with –
  - U.S. Department of Justice Federal Bureau of Investigation (FBI) Criminal Justice Information Services Division (CJIS), 22 May 2023
  - DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 6 December 2018
  - CID Letter, 20 October 2023
  - Counsel's Memorandum (Appeal of Denial of Request for Expungement – DCII and Identify History Summary (Applicant)), 24 October 2023, with –
    - Counsel's Memorandum (Request for Expungement – DCII and Identity History Summary (Applicant)), 31 May 2023
    - U.S. Department of Justice FBI CJIS Division Letter, 22 May 2023
    - DD Form 214
  - CID Letter, 13 March 2024

FACTS:

1. The applicant defers to counsel.
2. Counsel states the applicant respectfully requests amendment or removal of the DCII entries made by CID regarding him such that entries identified no longer appear in the Department of Justice, Criminal Justice Information Service, National Crime Information Center (NCIC), National Instant Criminal Background Check System (NICS), and/or Identity History Summary. He has exhausted all administrative remedies through a request for expungement that was unjustly denied (see brief in support for details).

a. Statement of Facts.

(1) The applicant was "titled" in the DCII based on allegations related to sexual assault. However, the CID administrative act of placing him in the "title block" of an investigation is being improperly and unfairly interpreted by NICS as an "arrest." Further, the entry under the "Court" block is misleading in that it indicates that he was convicted of multiple sexual assault offenses but contains no clear or meaningful disposition for those charges. He was investigated by the Army based on false allegations of sexual assault. After a litigated general court-martial, he was fully acquitted. Unfortunately, after he was exonerated at trial another false allegation was made. Rather than remain in the Army and undergo a second trial, he chose to request separation. Currently, the records appear to conflate these two cases and there is a disposition that is confusing at best. Given that he was acquitted of all charges at trial and later voluntarily separated, the record should either be expunged or at least amended to reflect an accurate disposition.

(2) Prior to the false allegations, the applicant served with honor and distinction. The first trial ended when new evidence revealed the sexual assault allegation was fabricated. The second allegation was made in retaliation for the embarrassment suffered by the complaining witness and the Army at the trial. The Army did not prosecute him for the second allegation and instead administratively separated him.

b. Relevant Legal Authority.

(1) The probable cause requirement is fundamental to the Fourth Amendment's central concern that citizens be protected from arbitrary and oppressive interferences and intrusions by Government agents. Relevant regulations have further articulated these principles, stating that "[p]robable cause exists where the facts and circumstances within the officer's knowledge, and of which he or she has reasonably trustworthy information, are sufficient in themselves to warrant a belief by a person of reasonable

caution that a crime is being committed or has been committed" (see Department of Defense (DOD) Instruction (DODI) 5505.11 (Fingerprint Reporting Requirements)).

(2) A covered person "may submit a written request to the responsible DoD LEA [Law Enforcement Agency] 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" (see DODI 5505.07 (Titling and Indexing by DOD LEAs), paragraph 3.1). The expungement official will correct, expunge, or otherwise remove the covered person's information when: (1) probable cause did not or does not exist to believe the offense occurred, (2) probable cause did not or does not exist to believe the covered person committed the offense, or (3) the official believes it will be in the interest of justice (see DODI 5505.07, paragraph 3.2).

(3) The expungement official will consider: "(1) The extent or lack of corroborating evidence against the covered person with respect to the offense. (2) Whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense. (3) The type, nature, and outcome of any adverse administrative, disciplinary, judicial, or other such action taken against the covered person for the offense."

c. Discussion.

(1) This Board is authorized to grant requests for correction of military records to ensure fundamental fairness, especially in cases where "changes in policy, whereby a Service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received."

(2) In this case, Congress has acted to implement a significant change to the law regarding the expungement process and has made it clear that records can be expunged and corrected based on the interests of justice rather than the rigid "probable cause" finding that was used to deny the applicant's initial request.

(3) At the conclusion of a CID investigation, there was no credible evidence to support the finding of probable cause that the applicant had committed any offense investigated by the military. It was revealed at trial that the initial sexual assault allegation was fabricated. Moreover, the only disciplinary action he received for the second retaliatory allegation was administrative action.

(4) DODI 5505.07 requires that the Defense Criminal Investigation Organization place the name and identifying information of people under military criminal investigation in the title blocks of investigative reports, also known as "titling." Titling is only to be done when the investigation determines that credible information exists that the subject committed a criminal offense. Importantly here, titling is an administrative

procedure and shall not connote any degree of guilt or innocence. DODI 5505.07 also states that once the subject of the criminal investigation is indexed, the name shall remain in the DCII, even if the subject is found innocent of the offense under investigation, except when: (1) the subject's identity was mistaken or (2) when a mistake is made at the time of titling, and no credible information indicating that the subject committed a crime existed. In layman's terms, the purpose of "titling" is to ensure that information from a report of investigation can be retrieved at some future time for a law enforcement or security purpose. Titling is not a "law enforcement record" insofar as a DCII entry is not the equivalent of an "arrest" nor does titling, by DODI 5505.07, connote any degree of guilt or innocence. It is an administrative function used to ensure that information regarding military members, civilian employees of, and entities with a nexus to the DOD is available for review in future DOD administrative and criminal investigations.

(5) The NICS is a system of records that performs three routine functions, the most relevant of which is to provide a computerized database for ready access by a criminal justice agency making an inquiry and for prompt disclosure of information in the system from other criminal justice agencies about crimes and criminals. In addition, and relevant to this matter, is the disclosure from NICS of information for use by criminal justice agencies to conduct background checks.

#### d. Material Error.

(1) The Army and CID committed legal error, first, in the submission to NICS of DCII administrative data that neither documented an arrest nor a conviction and, second, in failing to clarify that the first allegation resulted in a full acquittal. In addition, it is now clear there was insufficient evidence for probable cause for the accusations. Because no such evidence now exists, the entry must be expunged in its entirety. The language in the Court section of the entry is misleading and highly prejudicial. At a minimum, the entry should be amended to read something to the effect of: "all criminal charges dismissed, member voluntarily separated."

(2) The NICS is a system where local, state and federal law enforcement agencies enter information regarding individuals who have either: (1) committed or have been identified with an offense which is classified as a felony or serious misdemeanor under the existing penal statutes of the jurisdiction originating the entry and for whom a felony or misdemeanor warrant has been issued with respect to the offense which was the basis of the entry; or (2) have been charged with serious and/or significant offenses, and fingerprinted and whose criminal history record information has been obtained. Conversely, the DCII is maintained on behalf of the Office of the Under Secretary of Defense for Intelligence and Security, as an automated central index used solely to determine the security clearance status and existence or physical location of criminal and personnel security investigative files of DOD for personnel security determinations.

It is a system to facilitate access to information by DOD in determining personnel security issues.

(3) The DCII is not a civilian criminal database and any exchange of information between it and NICS at the level at which data is currently being exchanged is legal error despite the regulatory assertions made in DODI 5505.11. The Office of Special Investigations (OSI) "titled" the applicant in the DCII, i.e., when he was investigated for an offense that he did not commit and for which there was no supporting evidence. OSI is categorizing the administrative annotation of placing him in the "title block" of an investigation as an "arrest." Again, "titling" is done to ensure that DOD law enforcement agencies can later identify the location of investigative files for the purpose of ensuring the national security of the United States. Insofar as he was not arrested by OSI, and never charged with any crimes by the Army, any entries in the DCII should be expunged as it is improper, irrelevant, and does not further the national security interests of the United States.

(4) Listing of the applicant's disposition is also the result of significant and prejudicial legal error. The version of DODI 5505.11 currently in effect states: "non-judicial proceedings pursuant to Article 15 of the UCMJ [Uniform Code of Military Justice], administrative action, or discharge do not constitute criminal proceedings (see DoDI 5505.11, paragraph 3.2(d)(2), dated 31 October 2019)." Despite these clear instructions, his Identity History Summary does not contain any language clarifying what occurred regarding administrative action and it does not make clear that there was a full acquittal in one investigation and that the other investigation was resolved administratively after all charges were dismissed. As a result, the disposition listed in his Identity History Summary is prejudicial and is the result of clear legal error. There was never a finding of wrongdoing in any form of judicial or administrative process. Therefore, his Identity History Summary should be amended to list the disposition as a full acquittal for one investigation and, in the second, "all criminal charges dismissed member voluntarily separated."

(5) The legal errors present in the applicant's Identity History Summary, as well as the above-described due process concerns, demonstrate that the applicant was not afforded administrative due process. The result is significant life-long harm that impacts his fundamental reputational interests and his ability to obtain gainful employment. Identity History Summary information is used by a wide variety of entities that will be misled in a prejudicial manner by the information in his Identity History Summary.

e. Conclusion. The transfer from the DCII to the NICS of the administrative annotation of the applicant's "arrest" by CID is an inappropriate expansion of the use of the titling information. Notably, the law now requires this Board to consider the interests of justice in reviewing expungement requests. Although it would still result in significant harm and injustice, at a minimum, the record should be updated with a proper

disposition statement indicating that all listed allegations were dismissed, and he voluntarily separated. To stigmatize him for the rest of his life for an incident for which he was fully acquitted and when all charges for the second allegation were dismissed is inappropriate and inconsistent with the purposes of a titling action and administrative actions. The proper and fair outcome that is in keeping with the interests of justice and of national security is to remove the CID record and titling action.

3. The applicant enlisted in the Regular Army on 30 December 2014 in pay grade E-1. He was promoted to the rank/grade of specialist/E-4 effective 30 December 2016.

4. The LER – Serious Incident Report (SIR) (Category 3)/Final, 29 March 2018, states the following occurred at Fort Polk, LA, on 5 May 2017 and was reported on 14 August 2017. The report summary noted:

a. The Fort Polk CID Office was notified by Ms. (Redacted) that she was sexually assaulted by the applicant at her off-post residence.

b. The applicant was advised of his legal rights, which he waived, and stated he engaged in consensual sexual acts with Ms. (Redacted). The applicant underwent a polygraph examination which determined he was deceptive when answering relevant questions. The applicant then admitted he performed sexual acts upon Ms. (Redacted) without her consent.

c. Legal Coordination. This is not a prosecutorial decision. For the purposes of fingerprint card submission (DODI 5505.11), Combined Deoxyribonucleic Acid (DNA) Index System (CODIS) sample submission (DODI 5505.14), and Defense Incident-Based Reporting System (DIBRS) indexing (DODI 7730.47 (DIBRS: Data Segments and Elements)), on 16 March 2018. Fort Polk Trial Counsel opined probable cause exists to believe the applicant committed the offense of Sexual Assault under Article 120, UCMJ. On 26 March 2018, Trial Counsel further opined probable cause exists to believe the applicant committed the offense of Unlawful Purchase of Alcoholic Beverages by Persons on Behalf of Persons under 21 under Louisiana Revised Statute (LRS) 14:93.13. No additional investigative efforts are required. There is sufficient evidence to provide to command for consideration of action.

d. Status. This is a Final Report. Commander's Report of Disciplinary or Administrative Action (DA Form 4833) is pending.

e. The investigation noted the following statutes/offenses were considered with this report:

- Sexual Assault – Articles 120 and 120b, UCMJ
- Purchase of Alcohol on Behalf of Persons under 21 – LRS 14:93.13

5. Although not available for review, it appears that a DD Form 458 (Charge Sheet) was initiated preferring charges against the applicant for court-martial offenses.

6. The Headquarters, 46th Engineer Battalion, memorandum (Final Disposition of Involuntary Extension Pertaining to (Applicant)), 16 September 2018, mandated the applicant's involuntary retention on active duty for 30 days beyond his current expiration term of service and established his new expiration term of service date as 15 October 2018.

7. The LER – SIR (Category 3)/2nd Final Supplemental, 1 October 2018, states the following occurred at Fort Polk, LA, on 5 May 2017 and was reported on 14 August 2017. The report summary noted:

a. The Fort Polk CID Office was notified by Ms. (Redacted) that she was sexually assaulted by the applicant at her off-post residence.

b. The applicant was advised of his legal rights, which he waived, and stated he engaged in consensual sexual acts with Ms. (Redacted). The applicant underwent a polygraph examination which determined he was deceptive when answering relevant questions. The applicant then admitted he performed sexual acts upon Ms. (Redacted) without her consent.

c. Legal Coordination. This is not a prosecutorial decision. For the purposes of fingerprint card submission (DODI 5505.11), CODIS sample submission (DODI 5505.14), and DIBRS indexing (DODI 7730.47), on 16 March 2018. Fort Polk Trial Counsel opined probable cause exists to believe the applicant committed the offense of Sexual Assault under Article 120, UCMJ. On 26 March 2018, Trial Counsel further opined probable cause exists to believe the applicant committed the offense of Unlawful Purchase of Alcoholic Beverages by Persons on Behalf of Persons under 21 under LRS 14:93.13. No additional investigative efforts are required. There is sufficient evidence to provide to command for consideration of action.

d. On 26 July 2018, Trial Counsel requested further investigative efforts. However, on 9 August 2018, Trial Counsel notified this office that no further investigative efforts were required.

e. On 6 September 2018, the Office of the Staff Judge Advocate (OSJA) requested that this office seek a search warrant pertaining the Facebook communication of the applicant and (Redacted) and to conduct an interview of Ms. (Redacted) as a potential victim of Abusive Sexual Contact by the applicant.

f. On 6 September 2018, Ms. (Redacted) was interviewed and stated she briefly met the applicant during a social gathering at a barracks building on Fort Polk in February 2017. During that encounter, Ms. (Redacted) consumed no alcoholic beverages and denied she was ever touched by the applicant in an inappropriate manner.

g. This office coordinated with the Office of Trial Defense Services pertaining to additional facts disclosed by the applicant for the application of a federal search warrant pertaining to Facebook communications between the applicant and Ms. (Redacted). After a review of all established facts, the additional facts disclosed by Trial Defense Services, and an additional review by the OSJA, it was determined the probable cause standard was not met to seek a search warrant for Facebook communications that would amount to any additional crime or would change the outcome of this investigation.

h. On 19 September 2018, the OSJA notified this office that no further investigative efforts were required.

i. Status. This is a Final Report. Commander's Report of Disciplinary or Administrative Action (DA Form 4833) is pending.

j. The investigation noted the following statutes/offenses were considered with this report:

- Sexual Assault – Articles 120 and 120b, UCMJ
- Purchase of Alcohol on Behalf of Persons under 21 – LRS 14:93.13

8. The Commanding General, Headquarters, Joint Readiness Training Center and Fort Polk, memorandum (Involuntary Extension on Active Duty for UCMJ Processing – (Applicant)), 12 October 2018, states:

In accordance with Army Regulation (AR) 635-200, paragraph 1-22, I direct that [Applicant] be involuntarily extended on active duty for the purpose of completing the prosecution initiated with a view to trial by court-martial for offenses under the Uniform Code of Military Justice he is alleged to have committed while assigned to 46th Engineer Battalion, and that you issue orders to that effect. [Applicant] will be extended 180 days, effective 15 October 2018, thereby extending him until 14 April 2019.

Joint Readiness Training Center and Fort Polk has general court-martial jurisdiction over this Soldier.

I further direct that [Applicant] not be permitted to end active service, or execute permanent change of station/transfer without prior written consent from the General Court Martial Convening Authority.

9. The DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 8 November 2018, lists the applicant as the subject.

a. The Referral Information lists the offenses of Articles 120 and 120b, UCMJ, and LSR 14:93.13 (Purchase of Alcohol on Behalf of Persons under 21), on 5 May 2017. On 26 September 2018, the commander:

(1) placed a checkmark in the "No" box by "Sexual Harassment" for the offense of "Sexual Assault" and a checkmark in the "Yes" box by "Action Taken." In the "Reason" block, he entered the statement: "Accepted"; and

(2) placed a checkmark in the "No" box by "Sexual Harassment" for the offense of "Purchase of alcohol on behalf of persons under 21" and a checkmark in the "No" box by "Action Taken." In the "Reason" block, he entered the statement: "Insufficient Evidence."

b. The Action Taken block shows a checkmark in the "Judicial Court-Martial or Civilian Criminal Court" box and a checkmark in the "General Court-Martial" box.

c. The Nonjudicial Punishment (NJP)/Court-Martial/Civilian Criminal Court Proceeding Outcome block shows the entries:

- Charged Offense – Sexual Assault/Plea – Not Guilty
- Finding Offense – Sexual Assault without Consent Causing Bodily Harm/Trial/NJP Finding – Not Guilty

d. The Commander's Remarks section contains the entry "Case History: XXXXX-2017-CIDXXX-XXXXXX."

e. The Commanding Officer or Reporting Officer section shows a checkmark was placed in the "Yes" box by "Was a DNA sample collected from the offender?" The commander's name and signature were redacted with a signature date of 8 November 2018.

10. On or about 20 November 2018 after consulting with legal counsel, the applicant voluntarily requested discharge for the good of the service in lieu of trial by court-martial under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), chapter 10. In his request for discharge, he acknowledged:

a. He is making this request of his own free will and has not been subjected to any coercion whatsoever by any person. By submitting this request for discharge, he acknowledges that he understood the elements of the offense charged and is guilty of the charges against him, which authorizes the imposition of a bad conduct or

dishonorable discharge. Moreover, under no circumstances does he desire further rehabilitation, for he has no desire to perform further military service.

b. He understood that by requesting discharge, he was admitting guilt to the charge against him or of a lesser-included offense that also authorized the imposition of a bad conduct or dishonorable discharge.

c. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the UCMJ, the possible effects of a discharge under other than honorable conditions, and of the procedures and rights that were available to him. He understood that upon approval of his request and discharge from the Army, he would be administratively reduced to the rank of private.

d. He further acknowledged he understood that if his discharge request were approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Department of Veterans Affairs, and he could be deprived of his rights and benefits as a veteran under both federal and state laws.

e. He was advised that he could submit any statements he desired in his own behalf; however, it is unclear if he elected to submit any statements.

f. He was advised that he could request a physical examination prior to his separation; however, he elected not to have a separation physical.

11. On 29 November 2018, the approval authority approved the applicant's request for discharge in lieu of trial by court-martial under the provisions of Army Regulation 635-200, chapter 10. He directed his reduction to the lowest enlisted grade and characterization of his service as under other than honorable conditions. He also directed that the applicant would not be transferred to the Individual Ready Reserve.

12. Headquarters, Joint Readiness Training Center and Fort Polk, Orders 337-0315, 3 December 2018, reassigned the applicant to the U.S. Army Transition Point and discharged him from the Regular Army on 6 December 2018.

13. The applicant was discharged accordingly on 6 December 2018. His DD Form 214 shows in:

- item 4a (Grade, Rate, or Rank) – Private
- item 4b (Pay Grade) – E-1
- item 12c (Net Active Service This Period) – 3 years, 11 months, and 7 days
- item 24 (Character of Service) – Under Other than Honorable Conditions
- item 25 (Separation Authority) – Army Regulation 635-200, Chapter 10

- item 26 (Separation Code) – KFS (for the good of the service in lieu of trial by court-martial)
- item 27 (Reenlistment Code) – 4 (ineligible for reenlistment)
- item 28 (Narrative Reason for Separation) – In Lieu of Trial by Court-Martial

14. The LER – SIR (Category 3)/Final, 11 December 2018, states the following occurred around Fort Polk, LA, on 5 August 2018 and 19 August 2018 and was reported on 28 August 2018. The report summary noted:

a. The Fort Polk CID Office was notified by Sergeant First Class (Redacted), 46th Engineer Battalion Sexual Assault Response Coordinator, Fort Polk, that the applicant sexually assaulted Private Two (PV2) (Redacted).

b. PV2 (Redacted) reported the applicant (redacted).

c. Witness interviews corroborated PV2 (Redacted's) level of intoxication and admission by the applicant and Mrs. (Redacted) that sexual activities with PV2 (Redacted) occurred.

d. The applicant was advised of his legal rights, which he invoked and requested a lawyer. (Redacted) invoked her legal rights and requested a lawyer.

e. A digital forensic examination of (Redacted's) phone and numerous text messages provided by PV2 (Redacted) indicated the applicant and (Redacted) requested PV2 (Redacted) to participate in a consensual sexual activity, which she declined.

f. Legal Coordination. This is not a prosecutorial decision. For the purposes of fingerprint card submission (DODI 5505.11), CODIS sample submission (DODI 5505.14), and DIBRS indexing (DODI 7730.470, on 7 December 2018, (Redacted). Special Assistant to the U.S. Attorney, U.S. District Court for the Western District of Louisiana, (redacted). PV2 (Redacted). No additional investigative efforts are required. There is sufficient evidence to provide to command for consideration of action.

g. On 3 October 2018, (redacted). On 29 November 2018, the applicant requested separation from the military service in lieu of trial by court-martial under the provisions of Army Regulation 635-200, chapter 10.

h. Status. This is a Final Report. Commander's Report of Disciplinary or Administrative Action (DA Form 4833) is pending.

i. The investigation noted the following statutes/offenses were considered with this report:

- Oral Sexual Battery/Sexual Assault – LRS 14:43.4/Article 120, UCMJ
- Sexual Assault – UCMJ/State Statutes
- Conspiracy – Sex Offenses (Federal (U.S. Code/Code of Federal Regulations) – Title 18, U.S. Code, section 371/Article 81, UCMJ))

15. The DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 10 January 2019, lists the applicant as the subject.

a. The Referral Information lists the offenses of: (1) Sexual Assault – State Statutes and UCMJ on 4 August 2018; (2) Oral Sexual Battery/Sexual Assault – Louisiana Code LRS 14:43.3 and Article 120, UCMJ, on 18 August 2018; and (3) Conspiracy – Sex Offenses – Title 18, U.S. Code, section 371, and Article 81, UCMJ, on 18 August 2018. On 29 November 2018, the commander:

(1) placed a checkmark in the "No" box by "Sexual Harassment" for the offense of "Sexual Assault" and a checkmark in the "Yes" box by "Action Taken." In the "Reason" block, he entered the statement: "Accepted";

(2) placed a checkmark in the "No" box by "Sexual Harassment" for the offense of "Oral Sexual Battery/Sexual Assault" and a checkmark in the "Yes" box by "Action Taken." In the "Reason" block, he entered the statement: "Accepted"; and

(3) placed a checkmark in the "No" box by "Sexual Harassment" for the offense of "Conspiracy – Sex Offenses" and a checkmark in the "Yes" box by "Action Taken." In the "Reason" block, he entered the statement: "Accepted."

b. The Action Taken block shows a checkmark in the "Judicial Court-Martial or Civilian Criminal Court" box, and a checkmark in the "General Court-Martial" box.

c. The NJP/Court-Martial/Civilian Criminal Court Proceeding Outcome block shows the entries:

(1) Charged Offense – Sexual Assault/Plea – Pre-Trial Diversion and Finding Offense – Settlement;

(2) Charged Offense – Conspiracy – Sex Offenses/Plea – Pre-Trial Diversion and Finding Offense – Settlement; and

(3) Charged Offense – Oral Sexual Battery/Sexual Assault/Plea – Pre-Trial Diversion and Finding Offense – Settlement.

d. The Details of Administrative Separation block shows the applicant was discharged in lieu of trial by court-martial under the provisions of Army Regulation

635-200, chapter 10, with characterization of his service as "Under Other than Honorable Conditions" effective 6 December 2018.

e. The Commander's Remarks section contains the entries:

- Case History: XXXXX-2018-CIDXXX-XXXXXX
- Subject received Chapter 10 Discharge, under other than honorable conditions, signed by BG (Redacted), 20 November 2018

f. The Commanding Officer or Reporting Officer section shows a checkmark was placed in the "Yes" box by "Was a DNA sample collected from the offender?" The commander's name and signature were redacted with a signature date of 10 January 2019.

16. The FBI CJIS Identity History Summary, 22 May 2023, shows the applicant's name is contained within the FBI database for the aforementioned offenses (see attachment for details).

17. Counsel's memorandum for all reviewing authorities (Request for Expungement – DCII and Identify History Summary (Applicant)), 31 May 2023, states:

a. Basis for Expungement or Amendment. The applicant was investigated by the Army based on false allegations of sexual assault. After a litigated general court-martial, he was fully acquitted. Unfortunately, after he was exonerated at trial another false allegation was made. Rather than remain in the Army and undergo a second trial, he chose to request separation. Currently, the records appear to conflate these two cases and there is a disposition that is confusing at best. Given that he was acquitted of all charges at trial and later voluntarily separated the record should either be expunged or at least amended to reflect an accurate disposition.

b. Analysis.

(1) The applicant was "titled" in the DCII in connection to a military police investigation. Though he was never convicted or found guilty of any crime, his Identity History Summary displays entries regarding an "arrest" due to being titled in the DCII. Additionally, the Identity History Summary does not contain a clear disposition that annotates he was acquitted and later voluntarily separated from the Army. The information on his Identity History Summary is incorrect, misleading, and prejudicial for several reasons. First, this entry is incorrect because he was fully acquitted at trial. The available evidence CID chose to ignore was revealed as "new evidence" at trial and demonstrated that there was never any credible evidence, let alone probable cause. Second, this entry is incorrect because the disposition is unclear. He was tried and acquitted and then after a new investigation, all charges were dismissed, and he

voluntarily separated from the Army. In the current form, the description of the charge, and the disposition, is misleading and prejudicial. The report creates a false impression that he was arrested and charged with a crime and that the outcome of a criminal proceeding was something other than a full acquittal.

(2) The second investigation was resolved administratively, and all charges were dismissed. Thus, the outcome of the first investigation was not simply no action taken because of insufficient evidence, the outcome was a full acquittal action based on exculpatory information that demonstrated there was never a credible basis for the allegations, let alone probable cause. For the second investigation, all charges were dismissed, and he was permitted to voluntarily separate. As a result, any entry regarding these charges should be expunged; it is misleading and prejudicial for the charges to appear in a criminal background check. If the entry is not expunged, the disposition merits amendment. As currently written, the entry is misleading and contains no language indicating that he was found guilty and later voluntarily separated after all charges were dismissed. These inaccuracies in his Identity History Summary are not just incorrect but also misleading, as they are highly likely to lead anyone who reviews his Identity History Summary to believe that he committed a criminal offense while serving in the military.

c. Counsel discusses two areas that were previously discussed in his undated Brief in Support of Application for Correction of Records, which are the DCII and the titling of the applicant. Counsel further notes:

(1) The Department of Justice CJIS FBI Identity History Summary. The Identity History Summary system is operated by the CJIS Division of the FBI, and it provides individuals with access to their arrest and conviction records upon request (see Title 28, Code of Federal Regulations, section 16.31. These records are intended to contain information submitted to the FBI regarding "arrests, detentions, indictments, information, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, and release," (see Title 28, Code of Federal Regulations, section 20.3(d). Identity History Summary records and the criminal history record information they contain are used within the criminal justice system, and they are relied upon to make critical decisions about apprehension, detention, and adjudication. Additionally, this information is also used by a wide variety of entities outside of the criminal justice system for important nonjudicial purposes, including decisions regarding employment, licensing, and adoption.

(2) Correction of FBI Identity History Summary Data and Appeals of DCII Information. Individuals are permitted to request their Identity History Summary records to provide them an opportunity to correct any errors that may be present (see Title 28, Code of Federal Regulations, section 16.31). In order to correct an error present in an FBI Identity History Summary, an individual must "make application directly to the

agency which contributed the questioned information" (see Title 28, Code of Federal Regulations, section 16.34). If the agency that contributed the information agrees to correct it, an individual's Identity History Summary will be updated to reflect that change. Since it was Army military police who contributed the questioned information in this case to the FBI, he is required to apply for correction directly to the Army. Regarding corrections of DCII information, a name may be removed from the DCII if "there is mistaken identity or it is later determined no credible information existed at the time of titling and indexing," DODI 5505.07, paragraph 1.2.d. Additionally, "when reviewing the appropriateness of a titling or indexing decision, the reviewing official will only consider the investigative information at the time of the decision," DODI 5505.07, paragraph 3.3. If expungement or amendment is warranted, then "DoD components that conduct criminal investigations will make appropriate corrections or expungements to criminal investigative reports or the DCII as soon as possible," DODI 5505.07, paragraph 3.4.

d. Legal Error.

(1) It is a clear legal error to maintain the record in this case because the available information demonstrates there was not credible evidence at the time of the decision to title and index the applicant in either case. In the first investigation, the evidence presented at trial resulted in a full acquittal. In the second, all charges were dismissed, and he was permitted to voluntarily resign.

(2) The listing of his disposition is also the result of significant and prejudicial legal error. The version of DODI 5505.11 currently in effect states: "non-judicial proceedings pursuant to Article 15 of the UCMJ, administrative action, or discharge do not constitute criminal proceedings. Despite these clear instructions, his Identity History Summary does not contain any language clarifying what occurred regarding administrative action, and it does not make clear that there was a full acquittal in one investigation and that the other investigation was resolved administratively after all charges were dismissed. As a result, the disposition listed in the applicant's Identity History Summary is prejudicial and is the result of clear legal error. There was never a finding of wrongdoing in any form of judicial or administrative process. Therefore, his Identity History Summary should be amended to list the disposition as a full acquittal for one investigation and, in the second, "all criminal charges dismissed member voluntarily separated."

(3) He requests that the entry be expunged in its entirety because of due process concerns. In accordance with the Fifth Amendment and Supreme Court jurisprudence, resolution of whether administrative procedures are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, due process requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable

value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

e. Conclusion. The transfer of the applicant's titling information from the DCII to the FBI, including its Identity History Summary system, is an inappropriate expansion of the use of titling information. When the entirety of the circumstances that led to the two investigations is properly reviewed, it is clear that there was never credible evidence to suspect him of wrongdoing. As a result, the entry of the information into DCII and its subsequent transmittal to the FBI was a procedural error that should be corrected. The allegations were demonstrably false, and he was fully exonerated and then permitted to voluntarily separate. It is inappropriate and inconsistent with the purposes of a titling action to permanently mar his record and reputation with a criminal history entry. At the very least, notions of fundamental fairness, balanced with national security interests, require that the entry be amended to include a disposition that accurately indicates that one investigation resulted in a full acquittal and the other in the dismissal of all charges. Otherwise, he will continue to be viewed and treated as an individual who was convicted of multiple offenses by any entity that accesses his criminal history record, which is improper and unjust.

18. The CID letter, 20 October 2023, responded to counsel's request (not available for review) received on 9 June 2023 to amend the applicant's records within the files of CID. The Chief, Freedom of Information Act (FOIA)/Privacy Act (PA) Division, stated:

After a review of the LERs was completed in accordance with Public Law 116-283 (William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021), section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigative Reports, The Department of Defense Central Index of Investigations, and Other Records and Databases), it has been concluded that [Applicant's] amendment request is denied.

In relation to the redacted LERs and Legal Review, be advised, the names of law enforcement personnel, as well as names, social security numbers and other personal items of information pertaining to third parties are withheld pursuant to FOIA Exemptions (b)(6), and (b)(7)(C), 5 U.S.C. § 552(b)(6) and (b)(7)(C) [Title 5, U.S. Code, sections 552(b)(6) and (b)(7)(C)], which protect the personal privacy of other individuals mentioned in the report. We applied Exemption (b)(5), which allows withholding information under the deliberative process privilege, civil discovery, attorney-client or attorney work product privileges. Moreover, disclosing the withheld information would harm an interest protected by these exemptions.

These withholdings also comply with the Privacy Act because the responsive records are maintained in a system of records that is exempt, pursuant to Exemption (j)(2), from the access provisions of the Privacy Act, 5 U.S.C. § 552a(j)(2) [Title 5, U.S. Code, section 552a(j)(2)].

This partial denial is made on behalf of the Director, DACID, the Initial Denial Authority for DACID records under the FOIA.

[Applicant] has the right to appeal the redacted document(s) to the Office of the Army General Counsel, the Army's appellate authority. If he decides to appeal at this time, his appeal must be submitted within 90 days of the date of this letter. In his appeal, he must state the basis for your disagreement with the partial denial and he should state the justification for its release. His appeal is made through this Division and should be addressed to the Chief, Department of the Army Criminal Investigation Division, FOIA/PA Division, 27130 Telegraph Road, Quantico, Virginia 22134 for forwarding to the Office of the Army General Counsel. Please note that your appeal should address information denied in this response and cannot be used to make a new request for additional or new information.

Please be advised, the Department of Defense (DOD) Instruction 5505.11 establishes policies and procedures for reporting criminal history data to the Federal Bureau of Investigation (FBI) National Crime Information Center (NCIC) for all military service members and civilians investigated by DOD criminal investigative organizations for commission of certain offenses. Those subjects who have resultant judicial, nonjudicial military proceedings, or where a servicing Staff Judge Advocate or legal advisor found probable cause existed to believe the subject has committed the offense in which they were titled, will remain in NCIC. Reporting information to the NCIC depends on the offense committed and the final result of the report.

A check of NCIC reflects that [Applicant] is listed as the subject in the aforementioned LERs. Retention of this criminal history data in the NCIC does conform to DOD policy and his name will remain in NCIC.

If this amendment is denied, [Applicant] has the right to appeal. He may submit his initial appeal to: Chief Counsel, [REDACTED]

[REDACTED]  
[REDACTED]

[Applicant] has the right to seek dispute resolution concerning this action. If he intends to do so, he may contact the Army FOIA Public Liaison by email at

[Applicant] may also seek dispute resolution services by contacting the Office of Government Information Services (OGIS) at [REDACTED]  
[REDACTED]

19. Counsel's memorandum for all reviewing authorities (Appeal of Denial of request for Expungement – DCII and Identity History Summary (Applicant)), [REDACTED] with associated documents, essentially notes the same issues and rationale that was noted in counsel's memorandum, [REDACTED] described above (see memorandum for details).

20. The CID letter, 13 March 2024, responded to the applicant's request for an appeal through counsel for expungement of his LERs from the CID database. After carefully considering the issues presented in the appeal, the CID Office of Chief Counsel denied the appeal and noted he may appeal the denial to this Board.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief was not 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. One potential outcome was to grant relief based on the applicant was acquitted. However, upon review through counsel of the applicant's petition and available military records, the Board majority determined the CID Law Enforcement Reports dated 1 October 2018 and 11 December 2018, and all associated records from the Defense Central Index of Investigations (DCII), CID, and other federal criminal databases, does not meet the criteria for expunction under DoDI 5505.07 29 March 2018.

2. The Board majority agreed that sufficient probable cause existed and continues to exist to believe that the applicant committed the titled offenses for the 29 March 2018, 1 October 2018, and 11 December 2018 Law Enforcement Reports (LERs). On 16 March 2018, the assigned Fort Polk Trial Counsel (TC) opined that probable cause exists to believe the applicant committed Sexual Assault under Article 120, UCMJ. On 26 March 2018, the TC further opined that sufficient probable cause exists to believe the applicant committed Unlawful Purchase of Alcoholic Beverages by Persons on Behalf of Persons under 21 under Louisiana Revised Statute (LRS) 14:93.13. The Board majority agreed with both determinations. The fact that the applicant admitted to CID that he performed sexual acts upon the victim without her consent was compelling. The Board also considered the fact that applicant was subsequently acquitted at trial of sexual assault without consent causing bodily harm. However, the Board determined that the applicant's pre-trial admission of guilt,

coupled with the probable cause determinations outweighed the 'not guilty' verdict and met the lower 'probable cause' versus 'beyond a reasonable doubt' standard. The Board determined that probable cause existed and continues to exist to believe the applicant committed the offenses listed in both the 29 March 2018 and 1 October 2018 LERs and satisfied the titling standards.

3. The Board considered that the Trial Counsel for the 11 December 2018 LER opined that probable cause existed to believe the applicant committed the offenses of Sexual Assault, Article 120, UCMJ and Conspiracy, Article 81 UCMJ for his second investigation and charges. The Board found it compelling that applicant submitted a pre-trial Chapter 10 request for the sexual assault and conspiracy charges in lieu of trial by courts-martial and instead was administratively separated from the service with an 'Under Other Than Honorable' conditions characterization of service. The applicant voluntarily requested discharge and the absence of any contrary findings or reversal of administrative action further reinforce the legitimacy of the original titling decision. These factors led the Board to believe that probable cause both existed and continues to exist to believe that the applicant committed the second set of sexual assault offenses listed in the 11 December 2018 LER. The request to amend the LER and all associated CID documents, Defense Central Index of Investigations (DCII), and other federal agency databases is without merit. The Board majority found no error or injustice and denied relief.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence present does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

I

X //SIGNED//I

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. DODI 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. 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.

2. DODI 5505.11 (Fingerprint Reporting Requirements), 31 October 2019, establishes policy, assigns responsibilities, and prescribes procedures for defense criminal investigative organizations and other DOD LEAs to submit fingerprints and report disposition data to the Criminal Justice Information Services Division of the FBI criminal

a. CID and other DOD LEAs will collect fingerprints and criminal history record information upon determination of probable cause and will electronically submit to the Criminal Justice Information Services Division of the Federal Bureau of Investigation for all service members who are investigated for all offenses punishable by imprisonment listed in the punitive articles of Title 10, U.S. Code, chapter 47, also known and referred to in this issuance as the UCMJ, or elsewhere in the U.S. Code. Fingerprints and criminal history record information will be collected and submitted using either a Federal Document 249 (Arrest and Institution Fingerprint Card) or its electronic equivalent. When required, a Privacy Act statement will be provided to each individual whose personal data is collected, in accordance with Title 5, U.S. Code, section 5529, and DOD Instruction 5400.11-R.

b. CID and other DOD LEAs will comply with Title 28, Code of Federal Regulations, Part 20.32(b), concerning offenses excluded from fingerprint collection. These exclusions include non-serious offenses such as drunkenness, vagrancy, disturbing the peace, curfew violation, loitering, false fire alarm, non-specific charges of suspicion or investigation, and traffic violations (except data will be included on arrests for vehicular manslaughter, driving under the influence of drugs or liquor, and hit and run).

3. DODI 5505.14 (DNA Collection and Submission Requirements for Law Enforcement), 5 April 2022, establishes policy, assigns responsibilities, and prescribes procedures for DNA sample collection and submission requirements for the purpose of inclusion in the Combined DNA Index System.

a. CID and other DOD LEAs, DOD correctional facilities, the Coast Guard Investigative Service, and commanders will collect and submit DNA samples from service members and civilians when their fingerprints are collected pursuant to DOD Instruction 5505.11.

b. CID and other DOD LEAs, and DOD correctional facilities will develop expungement procedures and provide instructions concerning expungement rights and procedures to all persons from whom DNA samples are collected as outlined in section 4.

c. CID and other DOD LEAs, DOD correctional facilities, and commands will submit DNA samples to the U.S. Army Criminal Investigation Laboratory (USACIL) at the time of collection. CID and other DOD LEAs will take DNA samples from civilians whom they detain or hold and who remain within their control when it is determined there is probable cause to believe the civilian has committed an offense that results in the collection of fingerprints.

d. Former or retired service members from whom samples were taken but who were not convicted of any offense by a general or special court-martial, or can provide a certified copy of a final court order documenting the charge has been dismissed or

resulted in an acquittal, may request in writing that their DNA records be expunged in accordance with the procedures in this section. Former or retired service members will submit requests for expungement to the Clerk of Court of the Military Department's Court of Criminal Appeals.

(1) Requests will include:

(a) All reasonably available proof showing that none of the offenses giving rise to the collection of DNA resulted in a conviction at a general or special court-martial (including a final court order establishing that such a conviction was overturned, or establishing action by the convening authority that has the effect of a full acquittal). A court order is not final if time remains for an appeal or application for discretionary review with respect to the order.

(b) The former or retired service member's name, social security number, current address and contact information, date of alleged offense, and contact information of the unit that the former service member belonged to when the sample was taken.

(2) Requests that do not provide adequate information to identify the alleged offense or to confirm that the alleged offense did not result in a conviction will be returned by "return receipt requested" with an explanation of the deficiency.

e. The Clerk of Court of the appropriate Military Department's Court of Criminal Appeals will search their records for any conviction pertaining to the former or retired service member and determine whether the former or retired service member is entitled to expungement. The Clerk of Court of the Military Department's Court of Criminal Appeals will send appropriate requests for expungement by former or retired service members to USACIL.

f. USACIL will review all requests for expungement that it receives to ensure they contain all the required information. Incomplete requests will be returned to the submitter. Only such requests that are deemed meritorious, USACIL will expunge the DNA records, destroy the submitted sample, notify the individual of its actions, and maintain documentation of that notice.

g. Civilians whose samples are taken and forwarded pursuant to paragraph 1.2.c., but who are not convicted of any offense, or provide a certified final court order documenting the conviction has been overturned, may request in writing that their DNA sample be expunged.

//NOTHING FOLLOWS//