

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 March 2025

DOCKET NUMBER: AR20240007303

APPLICANT REQUESTS: vacation of his Court-Martial sentence and dishonorable discharge, and the restoration of all his rights and privileges.

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)
- U.S. Criminal Investigation Laboratory DNA Supplemental Report, 8 April 2013
- Email, 10 April 2018
- U.S. Army Court of Criminal Appeals – Motion for Leave to File Out of Time Supplemental Matters, 27 October 2017

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, Section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states he has exhausted all of his military appeals. He says there is DNA [deoxyribonucleic acid] evidence that proves his innocence, and it was withheld from him and was never used to exonerate him by his military defense counsel. He discovered this information through a Freedom of Information Act request in 2015. The information was submitted throughout his entire appellate review process but was ignored at all levels.
3. On his DD Form 149, the applicant indicates sexual assault/harassment are related to his request; however, it does not directly pertain to him.
4. He enlisted in the Regular Army on 25 October 2005 in the rank/grade of private two (PV2)/E-2. He was promoted to the rank/grade of sergeant/E-5 effective 1 December 2009.

5. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding the processing of his discharge. However, his record does contain the following:

a. A DA Form 4187 (Personnel Action) that shows his duty status changed from "Present for Duty" to "Confined by Military Authorities" effective 6 December 2013. The remarks block contained the following statement: "Soldier confined as a result of Court-Martial USDB [U.S. Disciplinary Barracks]."

b. Headquarters, Joint Readiness Training Center and Fort Polk Orders 345-303, dated 11 December 2013, assigned him to the Personnel Control Facility with confinement at the USDB, Fort Leavenworth, KS for confinement pending completion of his appellate process and sentence.

c. General Court-Martial Order Number 14, published by Headquarters, Joint Readiness Training Center and Fort Polk on 27 August 2014, shows the applicant, after pleading not guilty to all charges, was convicted of violating the following Articles of the Uniform Code of Military Justice (UCMJ):

(1) Charge I: Article 120b was dismissed prior to entry of pleas.

(2) Charge II: Article 120, specifically for:

(a) Specification 3: did on diverse occasions, at or near Fort Polk, LA, between 1 October 2011 and 27 June 2012, engage in a sexual act, to wit: placing his penis into the vulva of Mis T.C.G., who had attained the age of 12 years, but had not attained the age of 16 years.

(b) Specification 7: did on diverse occasions, at or near Fort Polk, LA, between 1 October 2011 and 27 June 2012, engage in sexual contact, to wit: licking and biting with his mouth the breast of Miss T.C.G, a child who had attained the age of 12 years, but had not attained the age of 16 years, except the words, "licking and."

(c) Note: Specifications 1, 2, 4, 5, 6, and 8 was dismissed prior to entry of pleas. Specification 9 he pleaded not guilty and was found not guilty.

(3) Charge III: Article 120, specifically for:

(a) Specification 1: did, at or near Fort Leonard Wood, MO, between on or about 26 May 2006 and on or about 27 July 2007, commit the offense of carnal knowledge with Miss T.C.G., a person under the age of 12.

(b) Note: Specification 2 was dismissed prior to entry of pleas.

(4) Charge IV: Article 107 the specification was dismissed prior to entry of pleas.

(5) Additional Charge 1: Article 120, the specification that he did, at or near Alexandria, LA on or about 24 November 2013, commit a sexual act upon Miss T.C.G., a child who had not attained the age of 16 years to wit: placing his penis into the vulva of the said Miss T.C.G..

d. His sentence was adjudged on 6 December 2013 and included reduction to the grade of private (E-1), to be confined for 45 years, and to be discharged from the service with a Dishonorable Discharge.

e. The action taken was so much of the sentence is approved and, except for the at part of the sentence extending to a Dishonorable Discharge, will be executed.

f. General Court-Martial Order Number 122, issued by Headquarters, U.S. Army Fires Center of Excellence and Fort Sill on 29 June 2018, announced:

(1) Pursuant to Article 66, UCMJ, the affirmed findings of guilty of Specification 7 of Charge II and Charge II, and the Specification of Additional Charge I and Additional Charge I, having survived final judgement as defined by Article 71(c)(1), UCMJ, the findings of guilty of Specification 3 of Charge II, and Specification 1 of Charge III and Charge III, have been set aside and dismissed.

(2) The remaining findings of guilty and only so much of the sentence adjudged on 6 December 2013, as provides for reduction to Private/E-1, confinement for 20 years, and a Dishonorable Discharge, as promulgated by General Court-Martial Order Number 14, Headquarters, Joint Readiness Training Center and Fort Polk, Fort Polk, LA, dated 27 August 2014, have been finally affirmed.

(3) All rights, privileges, and property of which the accused has been deprived by virtue of the findings set aside, will be restored. Article 71(c) having been complied with; the Dishonorable Discharge will be executed.

g. The Chief, Military Justice, Office of the Staff Judge Advocate, U.S. Army Fires Center of Excellence and Fort Sill memorandum (L3 and L8 Convicted Sex Offense), undated to Commander, noted:

(1) He validated the Soldier had been convicted b a court-martial for a sex related offense of offenses as defined by Title 10, U.S. Code and equivalent Articles of the UCMJ as registered exhaustively in Army Regulation 600-37 (Unfavorable Information), paragraph 3-4b(1) and Department of Defense Instruction (DODI) 1325.07 (Administration of Military Correctional Facilities and Clemency and Parole Authority), Table 4.

(2) The Soldier meets the criteria for L3 and L8 assignment consideration coding. The documents should be processed as prescribed in Army Regulation 600-37, paragraphs 3-4f(3) and 3-4g.

6. The applicant was discharged from the Army on 11 July 2018, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, as a result of court-martial (other) in the rank/grade of private/E-1. His DD Form 214 shows:

- he completed 8 years, 1 month, and 11 days of net active service
- his character of service as "Dishonorable"
- his separation code as "JJD"
- his reentry code as "4"
- he had lost time from 6 December 2013 through 11 July 2018 (a period of 4 years, 7 months, and 6 days)

7. He provides:

a. a U.S. Criminal Investigation Laboratory DNA Supplemental Report, 8 April 2013 that noted in paragraph 10: "A partial Y-STR DNA profile was obtained from the swab of the inside the front/crotch of underwear of (redacted). Due to the mixture complexity and a lack of sufficient data, these results do not meet the laboratory's inclusionary reporting criteria. (Applicant) is excluded as a source of the male DNA detected" (see attachment for further details);

b. an email, dated 10 April 2018 between his appellate defense counsel and a law firm (see attachment for further details); and

c. the U.S. Army Court of Criminal Appeals – Motion for Leave to File Out of Time Supplemental Matters, dated 27 October 2017 shows he filed a motion to offer a new argument for the Court's consideration. The motion was denied on 27 October 2017.

8. The Board should consider the applicant's statement in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The evidence of record shows the applicant was arraigned, tried, and found guilty of committing sexual act(s) on a minor and punished by Court-Martial. The Board acknowledged the applicant's statement of an exculpatory DNA report that could have exonerated him. The Board determined there was insufficient evidence and did not find an error or injustice in the Court-Martial process or procedures. Therefore, the Board denied relief.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented 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.

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. Title 10, U.S. Code, Section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.
3. Title 10, U.S. Code, Section 866: Article 66 (Review by Court of Criminal Appeals), directs each Judge Advocate General to establish a Court of Criminal Appeals for the purpose of reviewing court-martial cases.
4. Article 71(c) of the UCMJ stipulates that if a sentence extends to death, dismissal, or dishonorable or bad-conduct discharge and if the right of the accused to appellate review is not waived and an appeal is not withdrawn, that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is final judgment as to the legality of the proceedings. A judgement as to

legality of the proceedings is final in such cases when review is completed by a Court of Military Review.

5. Department of Defense Instruction 1325.07 (Administration of Military Correctional Facilities and Clemency and Parole Authority) prescribes procedures to carry out the administration and operation of military correctional programs and facilities and the administration and operation of military clemency and parole programs.

a. It implements Title 10, U.S. Code, Section 1565 (also known as "The Justice for All Act of 2004) which requires collection of DNA samples from each person who is or has been convicted of a qualifying military offense. It also revises the offenses for which sex offender notification is required and adds notification to the United States Marshals Sex Offender Targeting Center.

b. It contains the specific list of UCMJ convictions that require registration under the Sex Offender Registration and Notification Act (SORNA) under the Adam Walsh Child Protection and Safety Act of 2006. In 2015, SORNA was amended to require DOD to submit information to the National Sex Offender Registry and the National Sex Offender Public Website about any person adjudged of a covered sex offense via courts-martial or released from a military corrections facility after being incarcerated for such an offense.

6. Army Regulation 27-10 (Military Justice) prescribes the policies and procedures pertaining to the administration of military justice and implements the Manual for Courts-Martial.

7. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. The AMHRR includes, but is not limited to, the Official Military Personnel File, finance-related documents, and non-service-related documents deemed necessary to store by the Army. Paragraph 3-6 provides that once a document is properly filed in the AMHRR, the document will not be removed from the record unless directed by the ABCMR or another authorized agency. Appendix B (Documents Required for Filing in the AMHRR and/or Interactive Personnel Electronic Records Management System) states general court-martial orders will be filed in the restricted folder if all approved findings are not guilty.

8. Army Regulation 600-37 (Unfavorable Information) sets forth policies and procedures to ensure the best interests of both the Army and Soldiers are served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's Army Military Human Resource Record (AMHRR). Unfavorable information will not be filed in the AMHRR unless the recipient has been given the

opportunity to review the documentation that serves as the basis for the proposed filing and a reasonable amount of time to make a written statement in response.

a. Paragraph 3-4b(1) (Filing of Information on sex-related offenses) states this requirement applies to Soldiers in all components, regardless of grade. Commanders do not have the authority to designate any of these documents be filed in the restricted folder of the AMHRR or locally. The sex-related offenses include a violation of the following sections of 10 USC and equivalent articles of the UCMJ:

- Section 920 – Article 120: Rape and sexual assault generally. This includes rape, sexual assault, and aggravated sexual contact
- Section 920a – Article 120a: Stalking
- Section 920b – Article 120b: Rape and sexual assault of a child. This includes rape, sexual assault, and sexual abuse of a child
- Section 920c – Article 120c: Other sexual misconduct. This includes indecent viewing, visual recording, or broadcasting
- Section 925 – Article 125; Forcible sodomy; bestiality
- Section 880 – Article 80: Attempt (to commit any of the offenses listed in this paragraph)

b. Paragraph 3-4f(3) states processing of sex-related offenses the HRC-G3 will forward the memorandum and supporting documents to the appropriate records custodian, as defined in Army Regulation 600-8-104 (Army Military Human Resource Records Management), for web uploading to the AMHRR in interactive Personnel Electronic Records Management System.

c. Paragraph 3-4g states for the coding of record the Commander, HRC, will designate and implement an appropriate assignment consideration code (ASCO) for use on Soldier's record briefs, for a sex-related offense. U.S. Army Reserve Command and The Adjutant General for state/territory National Guard will enter ASCO for Soldiers in their component (RCMS-R/SIDPERS).

9. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel:

a. Paragraph 3-7a provides that an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 3-7b provides that a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 3 provided that an enlisted person would be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

10. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army and the Reserve. The regulation provides that prior to discharge or release from active duty individuals will be assigned Reenlistment Eligibility (RE) codes based on their service records or the reason for discharge. Chapter 3 of this regulation prescribes basic eligibility for prior service applicants for enlistment. Table 3-1 includes a list of the RE codes, and states:

- an RE code of "1" applies to Soldiers completing their term of active service who are considered qualified to reenter the U.S. Army; they are qualified for enlistment if all other criteria are met
- an RE code of "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, but disqualification is waivable; they are ineligible unless a waiver is granted
- an RE code of "4" applies to Soldiers separated from their last period of service with a non-waivable disqualification

11. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) states that separation codes are three-character alphabetic combinations, which identify reasons for and types of separation from active duty. The separation code "JJD" is the correct code for Soldiers separating under Army Regulation 635-200, Chapter 3, for court-martial (other).

12. The SPD/RE Code Cross Reference Table provides instructions for determining the RE code for Active Army Soldiers and Reserve Component Soldiers. This cross reference table shows the separation code and a corresponding RE code. The table in effect at the time of his discharge shows the separation code of "JJD" has a corresponding RE code of "4."

13. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs), on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

//NOTHING FOLLOWS//