IN THE CASE OF: [redacted]

BOARD DATE: 4 April 2025

DOCKET NUMBER: AR20240011832

APPLICANT REQUESTS:

- clemency and upgrade of his under other than honorable conditions discharge to honorable
- vacation of his general court-martial conviction
- removal of his name from law enforcement databases and removal of law enforcement reports (LER) showing he is a convicted felon
- remuneration of service pay he forfeited during the period 15 July 2012 to 23 June 2016 as the result of his court-martial conviction and sentence
- restoration of entitlement to disability payments retroactive to and effective on 23 June 2016

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

- DD Form 149 (Application for Correction of Military Record), 24 October 2024
- Counsel presentation consisting of 48-pages, 3 February 2023, with exhibits (Ex) 1 through Ex 12
- Ex 1: DD Form 214 (Certificate of Release or Discharge from Active Duty), 20 May 2016
- Ex 2: memorandum, Under Secretary of Defense, 25 July 2018, subject: Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations, (known as the "Wilkie Memo.")
- Ex 3: Secretary of Defense memorandum, dated 6 June 2022, subject: Policy Regarding Human Immunodeficiency Virus (HIV)-Positive Personnel Within the Armed Forces
- Ex 4: U.S. Court of Appeals for the Fourth Circuit, Roe v. United States Department of Defense, 18 September 2019, Number 19-1410 (18 pages)
- Ex 5: Applicants Officer Record Brief (ORB), 29 June 2012
- Ex 6: U.S. District Court, [redacted], Declaration of [redacted] 5 December 2022 (7 pages)
- Ex 7: Applicant's Officer Evaluation Report (OER), 1 May 2009 to 30 April 2010
- Ex 8: memorandum, Colonel (COL) [redacted] 30 November 2012

- Ex 9: memorandum, Applicant's request for voluntary retirement, 17 February 2011
- Ex 10: Charge Sheets, dated 3 February 2012 and 9 February 2012
- Ex 11: Department of Veterans Affairs (VA) Rating Decision, 3 November 2022
- Ex 12: Letters of Support consisting of over 26 authors

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, through counsel in a brief presentation dated 3 February 2023:

a. The applicant had already submitted his formal retirement papers and they were approved.

b. The applicant was charged with exposing another service member to HIV under the factually inaccurate reasoning that this single alleged but disputed sexual contact constituted aggravated assault by engaging in sexual intercourse while infected with HIV, likely to produce death or grievous bodily harm. The applicant was accused of having unprotected anal sex with another Army officer without regard to whether in fact he could even transmit HIV or was the source of the accused's HIV infection.

c. The applicant was targeted because he was gay, and the Army wrongfully criminalized his HIV status.

d. The applicant denied and continues to deny any sexual contact. The fact finder, Colonel (COL) [redacted] denied the applicant's defense the right to call expert witnesses and present evidence that the distinguishable strain of HIV that the applicant had been infected with and where its viral load became undetectable is not the same HIV strain carried by his accuser. The applicant's defense was prohibited from cross-examining the applicant's accuser on certain credibility issues relevant to the issues of where and when the accuser was exposed to the HIV infection strain carried by the accuser, and whether any sexual contact occurred.

e. One witness testified that the applicant was never alone with his accuser and that no sexual assault or contact could have occurred. The Army had no forensic evidence of sexual contact and in fact the applicant's accuser could not testify to the transmission of bodily fluids. The lead Judge Advocate General (JAG) and seventh prosecutor assigned to the case made clear his flawed view of HIV and rationale for charging the applicant, stating at one point, "you're HIV positive so it must have been you."

f. After 26 years of service because of his HIV status, the applicant, a highly decorated and combat-wounded officer with an outstanding and unblemished record, was incarcerated for 272 days and then other than honorably discharged from the Army. Under the Department of Defense (DoD) policy as it now exists today, and the undisputed science of HIV, the applicant should not have been punished or discharged, or otherwise discriminated against, losing his ability to deploy status and command track position, because of his HIV infection status.

g. With the application, counsel submitted additional materials for consideration:

- a sworn affidavit of [redacted] December 5, 2022,reflecting that prosecutors were willing to repeatedly lie and suborn perjury in their biased attempt to persecute the applicant for being gay and infected with HIV
- counsel's legal memorandum setting forth the relevant facts from the court-martial and subsequent appellate and clemency proceedings, including newly discovered evidence and facts respecting the applicable 3-year statute of limitations that may also be waived in the interests of justice
- the applicant's official military personnel file (OMPF)
- dozens of letters of support
- published decision in Roe et al. v. DoD, finding the treatment of, and discharge policies for service members with certain chronic HIV statuses was arbitrary and capricious and in violation of the Administrative Procedure Act
- June 6, 2022, Secretary of Defense (SecDef) Memorandum titled Policy Regarding Immunodeficiency Virus-Positive Personnel within the Armed Forces that has effectively decriminalized the U.S. Military treatment of service member HIV status

3. The applicant provides:

a. His counsel's 48-page presentation, dated 3 February 2023, outlining his legal arguments and justifications for the requested relief. This complete presentation is available for Board review.

b. Ex 1: A DD Form 214 for his latest period of service in which he was discharged by reason of court-martial (other).

c. Ex 2: memorandum, Under Secretary of Defense, 25 July 2018, also known as the "Wilkie Memo," providing guidance for Board for Correction of Military Records to pay increased attention for criminal convictions and the circumstances under which citizens should be considered for restoration of rights forfeited as a result of court-martial convictions.

d. Ex 3: Secretary of Defense Policy memorandum, dated 6 June 2022, regarding HIV-positive personnel within the Armed Forces. This memorandum outlines updates and current standards as applied to service members identified as HIV-positive. In effect, in part, with respect to accession, the presence of HIV is not in itself, disqualifying with respect to covered personnel seeking to commission. Such personnel will be evaluated on a case-by-case basis. With respect to retention, a service member with HIV will be referenced for appropriate treatment and a medical evaluation for fitness for continued service in the same manner as a service member with other chronic progressive illnesses, on a case-by-case basis. Covered personnel will not be discharged or separated solely on the basis of HIV-positive status. Covered personnel are not non-deployable solely for the reason that they are HIV-positive.

e. Ex 4: United States Court of Appeals for the Fourth Circuit, Roe, et al., v. U.S. DoD, in which the court affirmed on appeal, the U.S. District Court for the Eastern District of Virginia, the plaintiffs Roe, et al., were likely to succeed on their claims that their discharges were arbitrary and capricious, in violation of the Administrative Procedure Act. Their discharges from the U.S. Air Force were based on the reason that their chronic but managed illness-HIV-made them unfit for military service.

f. Ex 5: The applicant's ORB showing his service accomplishments until 2012.

g. Ex 6: U.S. District Court, [redacted], Declaration of [redacted] dated 5 December 2022, a 7-page statement. The complete declaration is available for Board review.

h. Ex 7: Applicant's OER for the period 1 May 2009 through 30 April 2010. This OER evaluated him as the best qualified, and a comment section noting unlimited potential. Promote to colonel and select for Army Senior Service College Fellows Program.

i. Ex 8: A memorandum form COL [redacted] dated 30 November 2012, requesting clemency on behalf of the applicant.

j. Ex 9: A memorandum from the applicant's Commanding Officer, COL [redacted] dated 17 February 2011, recommending approval of the applicant's request for voluntary retirement.

k. Ex 10: Charge Sheets dated 3 February 2012 and 9 February 2012.

l. Ex 11: A VA Rating Decision dated 3 November 2022, in part, denying the applicant's application for disability benefits based on service connection for HIV.

m. Ex 12: 26 letters of support from people who know the applicant. These letters are available for Board review. To include a personal letter from President Jimmy Carter, requesting clemency be granted to the applicant for his lengthy period of service and participation in conflict; and a 6-page letter from Dr. [redacted] an HIV cure scientist.

n. Additional medical evidence consisting of 287 pages of medical progress notes.

o. General Court Martial Transcripts consisting of 1,423 pages. The entire transcript is available for Board review.

p. Additional medical evidence consisting of 215 pages. These documents include Viromed patient history reports from 1997 to 2006, and 2007 to 2012, viral load reports, transmittal list, maintenance sheets for samples reported, and Ampliprep/Taqman maintenance sheets for samples reported.

4. On 15 December 2023, counsel provided additional arguments and evidence consisting of 115 pages, in support of his issues. The Chief, Case Management Division, granted an extension and delay for the consideration of his new arguments and evidence in his case. He states, in part:

a. A U.S. Department of Justice, Civil Rights Division (DOJ CRD) correspondence titled "The United States Findings and Conclusions Based on its Investigation of the State of Tennessee and the Shelby County District Attorney General's Office [SCDAG] under Title II of the Americans with Disabilities Act, DJ Number 204-70-85," dated 1 December 2023, is new and pertinent supplemental authority directly relevant to the applicant's application.

b. As to the criminalization of a person's HIV status, the issue raised in the applicant's application, as set forth in the DOJ CRD findings and conclusions, in DJ Number 204-70-85, Title II prohibits public entities from discrimination against qualified individuals with disabilities or excluding them from participation in, denying them benefits, the public entity's services, programs, or activities.

c. The applicant's conviction, dismissal, and discharge were predicated entirely on his HIV status, without regard to the actual particular risk of harm; that it was and remains possible to ascertain that he was not the source of his accuser's particular strain of HIV infection.

d. The entirety of DJ Number 204-70-85, dated 1 December 2023, with highlighted sections, is presented by counsel for Board consideration and additional evidence.

e. Counsel further presents as supplemental evidence, findings, and recommendations of U.S. Army Criminal Investigation Command (CID) Final Report

Number [redacted] dated 18 November 2010. The CID LER and its associated evidence and investigating officer incremental reports are available for Board review. This CID final report contains additional evidence obtained during the law enforcement investigation, in part:

- Agent's investigative report, 23 February 2010, [redacted]
- Proffer memorandum of record detailing the allegation, 20 November 2009
- texts (email) between the applicant and the victim 1LT [redacted]
- victim statement, 8 April 2010
- preventive medicine counseling, victim 1LT [redacted] 30 June 2009
- victim lab result, 11 March 2010
- applicant medical documents, 29 June 2010
- Report of Sanitized Investigation, Military Police Report Number [redacted]
- Report of Sanitized CID Investigation, [redacted] dated 18 November 2010

5. The applicant's request for expungement and removal of his name and/or DNA information from LER records, databases or from sex offender registries is premature. Requests for removal of information from criminal databases must first apply through the U.S. Army Provost Martial General, Quantico Virginia. As this request is premature it will not be discussed further in these proceedings.

6. A review of the applicant's service record shows:

a. On 9 May 1987, he was appointed as a Reserve commissioned officer in the Adjutant General Corps.

b. On 9 June 1989, he was ordered to active duty (AD) in the pay grade of second lieutenant.

c. On 31 August 1994, he was honorably discharged. His DD Form 214 for this period reflects he completed 5 years, 3 months, and 23 days of AD service this period; and he completed service in Southwest Asia.

d. On 7 July 1996, he was ordered to AD.

e. On 30 March 1997, he was honorably released from AD and transferred to the U.S. Army Reserve (USAR) Control Group Reinforcement, after having completed 8 months and 24 days this period.

f. On 20 July 2006, he was again ordered to AD.

g. On 21 December 2007, he was promoted to lieutenant colonel (LTC).

h. On 3 October 2008, he received his 20-year letter.

i. On 3 February 2012, court-martial charges were preferred against him. On 9 February 2012, additional court-martial charges were preferred against him.

j. On 30 June 2012, the Commanding Officer, Miliary District of Washington (MDW), notified his unit commander of the results of his trial by general court-martial, which convened between 26 June 2012 to 30 June 2012. He was sentenced to be confined for one year and to be dismissed from the service.

k. On the same date, he was confined by military authorities.

l. General Court-Martial Order (GCMO) Number 1, dated 4 February 2013, reflects he was arraigned, tried, plead not guilty, and found guilty on 30 June 2012, and was sentenced to confinement for 1 year and to be dismissed from the service; of the charges:

(1) Charge I: that on or about 28 December 2008, he committed assault on first lieutenant (1LT) [redacted] by exposing him to HIV, a means likely to produce death or grievous bodily harm, by having unprotected anal sex with 1LT [redacted]

(2) Charge II: that on or about 28 December 2008, he engaged in sexual contact by penetrating the anus of 1LT [redacted] with a shower enema-anal douche causing bodily harm upon him, pain, and bleeding from the rectum;

(3) Charge III, Specification 1: that having received a lawful command from LTC [redacted] his superior commissioned officer, not to engage in unprotected sexual relationships, did at or near Arlington on or about 28 December 2008, willfully disobey the same;

(4) Charge III, Specification 2: that having received a lawful command from LTC [redacted] his superior commissioned officer, to verbally inform all prospective sexual partners of his HIV infection prior to engaging in any sexual behavior involving a significant risk of HIV transmission, did at or near Arlington on or about 28 December 2008, willfully disobey the same;

(5) Charge IV: that on or about 28 December 2008, he did wrongfully and recklessly engage in conduct while knowing himself to be infected with HIV, engage in unprotected sex with 1LT [redacted] likely to cause death or grievous bodily harm; and

(6) Charge V: that on or about 28 December 2008, while knowing himself to be infected with HIV, engage in unprotected anal sex with 1LT [redacted] which conduct was unbecoming an officer and a gentleman.

m. On 28 March 2013, he was released and present for duty; the same date he requested leave until 3 June 2013.

n. On 4 June 2013, approval for involuntary, indefinite excess leave was granted to him, pending appellate review and final issuance of GCM orders and execution of dismissal. He understood that a Soldier placed on excess leave would receive no pay and allowances.

o. On 21 June 2016, discharge orders issued to him assigned him to U.S. Army Transition Point, Fort Sill.

p. GCMO Number 11, issued by the Chief of Staff, Headquarters, Department of the Army, dismissed him from the Army, effective 20 May 2016.

q. On 20 May 2016, he was discharged. His DD Form 214 shows the authority for discharge as Army Regulation 600-8-24 (Officer Transfers and Discharges), paragraph 5-17, with a characterization of service of under other than honorable conditions and a narrative reason of court-martial. He completed 9 years, 2 months, and 2 days of net active service this period; 7 years and 11 days of prior active service; and 12 years and 1 month of prior inactive service.

MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available electronic records as necessary. The applicant requests upgrade of characterization of service from Under Other Than Honorable Conditions to Honorable and vacation of his general court-martial conviction among other related requests. The applicant indicated that his request was related to Sexual Assault/Harassment and Don't Ask Don't Tell (DADT). He does not argue for mitigation of the misconduct, for example due to a mental health condition; therefore, Liberal Consideration was not the focus of this review. The applicant contends that he is not guilty of the offenses for which he was convicted, and which led to his discharge from service. The undersigned reviewed the applicant's HIV condition and related conditions as pertinent, seeking to assist the Board in addressing the applicant's basic medically related questions/concerns/arguments put forth through counsel. The review will not include discussion about the existence of HIV, whether the applicant really has HIV, HIV testing packing insert label, HIV conspiracy theory related concerns etc. The reader is directed to the court proceedings for such. Likewise,

intricacies of HIV testing, lab calibration and management by infectious disease specialty, was also discussed at length in the court proceedings.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. Of pertinence, the applicant was appointed as a commissioned officer in the Reserve on 09May1987. His MOS was 42H Senior HR Officer for 10 years starting in 2006. In June 2012, he was convicted by court-martial of the following offences (paraphrased): On 28Dec2008, he exposed another service member to HIV by having unprotected anal sex with him ("likely to produce death or grievous bodily harm"), Charge I; he caused bodily harm (pain and bleeding from the rectum) during sex by penetrating the anus of the same service member with a shower enema-anal douche, Charge II; he disobeyed an order not to engage in unprotected sex, Charge III; and he disobeyed an order to inform all prospective sexual partners of his HIV infection prior to sex ("likely to cause death or grievous bodily harm"), Charge IV. He was confined 20120630 to 20130328. On 04Nov2015, a US Court of Appeals for the Armed Forces set aside and dismissed the finding of guilty for Charge IV; and the finding of guilty for Charge I was affirmed "only as to the lesser included offense of assault consummated by a battery". He was discharged from service due to conviction by court-martial on 20May2016. His service was characterized as Under Other Than Honorable Conditions.

3. Summary of medical records and related

a. As routine screening prior to deployment (Iraq), the applicant was found to be HIV (human immunodeficiency virus) positive 23Jun2006. During a July encounter, the applicant was informed of the positive results of the 2nd WB (Western Blot) test, confirming the HIV diagnosis during the 21Jul2006 Communicable Disease Clinic (Darnell Medical Center Fort Hood) visit. *The WB test detects antibodies to HIV*. His most recent test in November 2003 was negative. His viral load was 70K in August 2006 (30Aug2006 Infectious Disease). *The HIV viral load (VL) is a measure of the number of HIV viral particles in the blood. Among other purposes, it assists in monitoring response to treatment.* The applicant's CD4 count at the time of diagnosis was 614 (420-1850 cells/mm^3). *This was the reference range for normal for this DoD lab at the time. The CD4 test tracked by the Infectious Disease Clinic was CD3+CD4+ T cells. T cell number is tracked to monitor the immune system response to the presence of the virus. Among other purposes, it assists in monitoring the level of susceptibility to infections, opportunistic or otherwise*. According to the NIH, acute HIV infection occurs within about 2-4 weeks of exposure. At the time of diagnosis, the applicant's CD4 count was in normal range. The CDC classification was HIV Infection, Asymptomatic. The applicant was not started on ART (antiretroviral therapy), in part because it was unclear when he seroconverted to HIV positive, since he was last (officially) tested in 2003.

b. The provider asked about sexual contact(s), etc., and the applicant provided the history: He had been married for 6 years and was geographically separated from his wife and had not had sex with his wife or other sexual partners for the past year. He had been home testing regularly after a one-time prior indiscretion. The home tests were reportedly negative through June 2005. The applicant essentially endorsed that he contracted HIV when he assisted a surfer [redacted] over a rocky area and both he and the surfer were bloody. According to the CDC, specific fluids (blood, semen, pre-seminal, vaginal or rectal fluids, or human breast milk) from an infected individual must come in direct contact with a mucous membrane or damaged tissue or be directly injected into the blood stream (needle/syringe) for transmission to occur. Mucous membranes are linings of certain body openings. The mucous membranes that are important for HIV transmission are rectum, vagina, penis and mouth. *It should be noted that mode of transmission is important because prevention strategies/treatment regimens should be tailored to the individual. In addition, even though the applicant was already HIV positive, safe sex practices protect him from contracting additional strains as well as protect his future partners*.

c. In February 2008, the applicant developed a moderately pruritic (itchy) rash on his torso, upper extremities and face. The screening test for syphilis was positive with RPR titer 1:16. The confirmatory test was also positive (the test for antibodies to the causative organism for syphilis, Treponema pallidum) on 20Feb2008. He was diagnosed with Secondary Syphilis. Prior to that, his most recent RPR titer in August 2007, was nonreactive (normal). Secondary Syphilis occurs weeks after the initial characteristic painless sore or "chancre" (Primary Syphilis) goes away. Syphilis is considered an STD (sexually transmitted disease) or STI (sexually transmitted infection) because it is contracted almost exclusively through sex (anal, oral, vaginal). Rarely, infection can be acquired through significant skin-to-skin contact, blood transfusion, needle sharing or from mother to fetus (Tudor Maria E; Al Aboud Ahmad M; Leslie Stephen W; Gossman William, *NIH* 17Aug2024). Syphilis infection association with HIV infection is so common that individuals who test positive for one are routinely tested for the other. *Please note, the bacterial infection (syphilis) and viral infection (HIV) are not transmitted as one— it is just not uncommon for them to be transmitted at the same time*. The applicant stated he had no idea how he contracted the condition. He denied new sexual contacts; however, he did note "some encounters during the holidays" (22Feb2008 Infectious Disease Clinic). The applicant was advised that the contacts would have to be notified.

d. The applicant was also advised that the syphilis infection "could cause a rise in his viral load". It should be noted that an increase in HIV viral load impacts HIV transmissibility. As expected, the applicant's viral load increased from 8556 in October 2008 to 32K in May 2009. Also as expected, the absolute and percent CD4 count dropped, attributable to the syphilis infection's challenge to the applicant's immune system (22Oct2008 Infectious Disease Clinic note). The applicant was treated per

guidelines and the rash resolved, at least by the 06Aug2008 ER visit during which his skin was noted to be normal. And the RPR titer had more than a fourfold decrease in titer to 1:2 on 22Oct2008 which was considered consistent with resolution of infection. *This was prior to December 2008*.

e. It is presumed that the applicant was exposed to syphilis between 22Aug2007 (his last nonreactive test) and February 2008 (his first reactive test). To narrow the exposure time further, the incubation period for syphilis is 10-90 days according to the CDC. Concerning syphilis transmission, syphilis can remain transmissible for up to 2 years after first infected. In HIV positive individuals, it can take a longer time for the RPR titer to "normalize". In this case, the RPR titer normalized by 22Oct2008 (RPR was 1:2) which is not dissimilar to what occurs in individuals without HIV infection. Further corroboration that the applicant's immune system was not inordinately compromised at that time, was his CD4 count of 625 (22%) was within normal range. Given the prior antibiotic treatment per guidelines, the resolved rash months prior, the RPR titer response and presumably competent immune system; it was less likely than not, that syphilis was transmissible in the Fall 2008-time frame as clinically and per lab analysis (greater than fourfold fall in titer), the applicant's syphilis infection was resolved. *Although syphilis transmission was less likely than not, it was still possible as RPR was still reactive*.

f. In February 2009 the applicant presented again with a rash, slightly pruritic this time, diffusely present on his chest for at least one week and RPR titer >1:1024. The applicant denied any new sexual contact(s) and endorsed only having (protected) sex with his wife. The infectious disease specialist explained that due to the high titer and florid clinical presentation, it was highly suspicious for re-infection (new or repeat exposure) and very unlikely would represent relapse/reactivation. The specialist reasoned that the applicant was not so immunocompromised by the HIV infection that would account for reactivation/relapse. The specialist annotated "I have never seen someone relapse to secondary syphilis [in this scenario]". The applicant was treated per protocol again and the RPR titer dropped down to 1:32 on 09Oct2009.

g. By comparison, the HIV viral load (VL), measured in copies/mL of blood, was 8500 (22Oct2008). Although this viral load level was improved from when he was diagnosed and was considered a low viral load, HIV transmission was possible at this level as the viral load level was not undetectable. It is generally accepted that a level below 200 copies/mL is undetectable and carries no risk of transmission. A study with more than 14,500 HIV patients from six US clinics found that a considerable number of patients were at risk of transmitting HIV infection when their viral load was above 1500 copies/mL (AIDS, 2015 May 15;29(8):947-954). Individuals not on ART spent more person-time above the threshold. *The applicant was not on ART until March 2010*.

h. On 15Mar2010, the applicant presented with right flank pain and a very

painful/tender rash. He was diagnosed with Herpes Zoster (Shingles). The infectious disease specialist explained to the applicant that his immune system had waned which led to the Shingles (reactivation of his prior chicken pox virus infection also called varicella zoster virus or abbreviated VZV). The wanning immunity was reflected in the steady decline in CD4 count to the nadir 242 recorded in May 2010 a few months after VZV was diagnosed. The viral load was 22K at the time. As a result of the wanning immunity, the applicant was started on ART (Atripla). ART requires routine lab testing to monitor for medication toxicity. It should be noted that his waning immune system was also reflected in his difficulty in clearing the second syphilis infection (or at least in returning to an absolute non transmissible status). *After the second bout of Secondary Syphilis, the applicant became serofast until 2018. Syphilis serofast is said to occur when after treatment (and symptoms have resolved), the RPR remains positive (or reactive)*.

4. Labs summarized. Viral loads were found in the Infectious Disease provider's clinic notes. *The DoD reference lab range for normal for the CD4 counts listed below, was 414-1293 cells/mm^3 at the time (except for the 28Aug2006 reading, which was* 420-1850 cells/mm^3*)*.

28Aug2006	CD4 614 (29%) VL 70K	Baseline labs at/near the time of diagnosis
03Oct2006	CD4 655 (34%) VL 9K	
13Feb2007	CD4 893 (33%) VL 6K	
22Aug2007	CD4 722 (31%) VL 32K	Aug 2007 sinus infection, note CD4 drop
20Feb2008	CD4 538 (29%)	Feb 2008 first syphilis infection, CD4 drop
20Oct2008	CD4 625 (22%) VL 8556	Not non detectable— transmissible
20May2009	CD4 441 (20%) VL 32K	Feb 2009 second syphilis infection, CD4 drop
18Nov2009	CD4 480 (22%) VL 29K	
05May2010	CD4 242 (13%) VL 22K	Mar 2010 VZV infection, CD4 drop, start ART
01Dec2010	CD4 399 (19%) VL <50	Improvement after starting ART March 2010
10Jun2011	CD4 474 (23%)	
11Jan2012	CD4 666 (23%)	
31Oct2013	CD4 878 (28%) VL 71K	
15Sep2015	CD4 754 (30%) VL ND (not detected) recorded in 02Mar2016 Inf Dis note	

22Aug2007	RPR non-reactive
20Feb2008	RPR titer 1:16
22Oct2008	RPR titer 1:2, reactive with more than fourfold decrease in titer
11Feb2009	RPR titer >1:1024, markedly increased, consistent with reinfection
20May2009	RPR titer 1:256, reactive
07Oct2009	RPR titer 1:32, reactive
18Nov2009	RPR titer 1:64, reactive
05May2010	RPR titer 1:16, reactive
01Dec2010	RPR titer 1:8, reactive

10Jun2011 RPR titer not documented, reactive results
31Oct2013 RPR titer 1:2, reactive
09Sep2015 RPR titer 1:2, reactive
02Mar2016 RPR titer 1:2, reactive
28Sep2018 RPR nonreactive

5. Behavioral Health (BH): PTSD

a. The applicant first became engaged with BH (behavioral health) services in June 2006 under the multidisciplinary team including infectious disease to provide psychosocial support as needed. In September 2011, he self-referred for evaluation and treatment of insomnia, low energy, low motivation and feeling trapped and helpless. Stressors: The short-term stressors were an earthquake and hurricane that damaged his house. Long-term stressor was a 4 yearlong investigation for alleged sexual contact with a then junior military service member who subsequently accused the applicant of transmitting HIV. As a result of the ongoing investigation, he could not go to Military War College, be considered for promotion, PCS or retire. And in September 2011, a co-worker allegedly obtained confidential information about his HIV status and shared it with others at work. During the First Gulf War, he sustained a facial injury due to being hit by a 33mm. And finally, he reported being in the Pentagon when it was attacked (11Sep2020 Social Work Telephone Note VAMC). He denied having associated characteristic PTSD symptoms. He was recently prescribed Zoloft but had deferred taking it. He did take 5HTP, an over-the-counter supplement that is a serotonin precursor. He did participate in individual therapy through September 2012. Diagnoses while in service included: Adjustment Disorder; Adjustment Disorder with Anxiety and Depressed Mood; Involutional Melancholia Moderate; Phase of Life; Occupational Stress; and Legal Concerns.

b. After discharge, he continued being followed by BH services. Diagnoses included PTSD and Adjustment Disorder with Anxiety and Depressed Mood. He endorsed being court-martialed out of the military due to being HIV positive. He stated that his depression symptoms started in March 2013 when he got out of jail— certain smells reminded him of the experience, and he felt like he was there again. He also reported having experienced a traumatic injury in Iraq, when he was shot in the face and subsequently underwent facial reconstruction on the orbit, cheek and jaw. He reported being occasionally startled and hypervigilant. He also reported experiencing occasional flashbacks, avoidance symptoms, and occasional nightmares. He denied psychiatric hospitalization, psychosis, mania, violence, suicide ideation/attempt.

6. TBI

a. The applicant experienced facial trauma described above in 1991. In August

2008, the applicant was seen by Neurology Clinic at Bethesda after an emergency room visit for a fall 4 days prior. The boat rocked while stepping from the boat to the dock and he fell landing on his face and breaking several teeth. He was dazed but experienced no loss of consciousness. Two nights later, he had episodes of emesis when lying down accompanied by a sensation of movement. The motor exam was normal. There was no focal neurologic deficit. Head CT was normal. Diagnosis: Peripheral Vestibulopathy secondary to trauma. He was treated with the Epley maneuver. His final several years in service, he was working at the Pentagon as a Strategic Planner. A few years after discharge, in 2018 during a psychiatry visit, he complained of memory problems (31Oct2018 Psychiatry Consultation VAMC). At the time, he was single, he was in Pace Law School and was working with a law firm. He was also taking care of his parents in the home. Five years later he was seen by neurology (25Jul2023 Neurology Consult VAMC) complaining of headaches for 20 years. He had never been seen for headaches. He had been using Excedrin Migraine. He reported having headaches as a child triggered by smells. In-service events endorsed by the neurologist to have resulted in traumatic brain injury: He was shot in the face (right check) 1991 and he fell off a vehicle hitting his head. Diagnosis: Post-Traumatic Migraines. There were no cognitive complaints.

b. The Officer Evaluation Report covering the period from 20090501 thru 2010043 listed duty title as Force Management Integration Officer, 50A. Performance and Potential was evaluated as 'outstanding performance, must promote'. The senior rater assessment was 'best qualified'. The OER from 20110430 thru 20120429 had the same rating assessments.

c. JLV search today revealed that the applicant's TBI condition with PTSD was rated at 100% by the VA.

7. Summary/Analysis/Opinion

a. The applicant was diagnosed with HIV infection in June 2006. Service connection for the infection was denied by the VA because the condition was not diagnosed during a period of active duty (VA Rating Decision dated 03Nov2022). Once the applicant was diagnosed, he was referred into a specialty clinic for regular follow-up within a multidisciplinary team. HIV infection is considered a chronic infectious condition and is routinely managed by infectious disease specialists. HIV infection differs from many chronic diseases in that its presence can change the risk of developing other chronic diseases or change the course of a chronic disease once contracted. HIV infection also differs from many chronic diseases in that its presence can change the risk of contracting infectious diseases or change the course of an infectious disease once contracted—these changes mandate modifications/expertise in management of the infection once contracted in HIV infected individuals. To be sure, antiretroviral drugs have drastically reduced the number of persons dying from HIV

infection. However, AIDS, caused by the human immunodeficiency virus, is fatal if not treated. *AIDS can be defined as CD4 count less than 200 cells/mm^3*. The applicant received his HIV care with specialty Infectious Disease Clinic of the 779th Medical Group. The necessity for their expertise was clearly evident in the management of the applicant's HIV condition especially in the first few years while navigating his care through multiple infectious disease processes simultaneously. The applicant's HIV infection clinical course manifested the known natural course of the condition. Progression to waning immunity and the need for ART was inevitable with rare exception. As part of his HIV care, he attended a patient education class to encourage consistent safe sexual practices.

b. The applicant requests upgrade of characterization of service from Under Other Than Honorable Conditions to Honorable. He stated that he was not guilty of the offenses for which he was convicted. As proof, he contends that his viral load was so low he could not transmit the virus. However, upon review of the viral load around the time of alleged contact (28/29Dec2008), HIV infection was transmissible.

c. The applicant also reasoned that if there had been sexual contact, the other individual would have necessarily contracted syphilis (along with HIV). Although the applicant was diagnosed with Secondary Syphilis early in 2008; records indicated that the rash had resolved months prior, and the titer had decreased more than fourfold by the time frame in question, signaling resolution of the bacterial infection or at least a period of decreased transmissibility. The infectious disease specialist diagnosed Secondary Syphilis in February 2008. By definition, the applicant had symptoms with his Secondary Syphilis infections— he had an itchy skin rash. The condition was treated, and symptoms resolved. The applicant was diagnosed with Secondary Syphilis again in February 2009—the infectious disease specialist assessed that this was reinfection, not likely reactivation or relapse. The applicant was not diagnosed with Latent Syphilis, during which the individual is asymptomatic, but labs detect infection (seroreactivity). Based on this information, in this scenario, in the time frame in question, it was possible for HIV infection to have been transmitted and not syphilis. It should be stated that in an individual with both HIV infection and syphilis infection at the same time; any combination of one or both diseases can be transmitted: Either HIV or syphilis, or both or neither.

d. In the 03Feb2023 counselor's written argument, it was queried whether the HIV strain carried by the applicant was the same as the one carried by the other service member. It is true, through HIV strain testing and HIV genotype testing the genetic makeup of an HIV strain can be determined. Moreover, "phylogenetic analysis has been recurrently used in court settings as a forensic tool in HIV transmission investigations, for example cases where one or more complainants allege that a defendant has unlawfully infected them with HIV" (AIDS. 2018 Mar 13;32(5):543-554).

e. And finally, the undersigned notes that the applicant did not argue for mitigation of the misconduct(s). He maintains his innocence and contends that there was no sexual encounter with the other service member. Liberal Consideration was examined; however, neither the applicant's mental health conditions nor TBI condition would be mitigating for the misconduct which led to his discharge. The submission of the Wilkie memorandum was noted.

8. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant was diagnosed with PTSD and TBI conditions.

(2) Did the condition exist, or did the experience occur during military service? Yes. Providers endorsed that the applicant's PTSD condition had onset with the right facial injury in Iraq in 1991 and was triggered due to his confinement experience. The TBI condition also had onset with the right facial injury and was worsened by the fall from boat injury.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Neither the PTSD nor TBI condition is mitigating for the misconduct for which the applicant was found guilty and discharged from service, as neither condition impacts an individual's ability to distinguish right from wrong and act in accordance with the right.

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 applicant was separated by a General Court-Martial for violations of the Uniform Code of Military Justice, including Article 128 for committing an assault by exposing another Soldier to the Human Immunodeficiency Virus (HIV), a means likely to produce death or grievous bodily harm by having unprotected anal sex; Article 120 for engaging in sexual contact; two specification of Article 90 for disobeying a lawful command not to engage in unprotected sexual relationships; Article 134 for bringing discredit upon the armed forces; and Article 133 for conduct unbecoming an officer and a gentleman.

a. Clemency and upgrade of his under other than honorable conditions discharge to honorable. Deny. The Board found no error or injustice in the separation proceedings

and designated characterization of service assigned during separation. Based upon the misconduct leading to the applicant's separation and the following recommendation found in the medical review related to the liberal consideration:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant was diagnosed with PTSD and TBI conditions.

(2) Did the condition exist, or did the experience occur during military service? Yes. Providers endorsed that the applicant's PTSD condition had onset with the right facial injury in Iraq in 1991 and was triggered due to his confinement experience. The TBI condition also had onset with the right facial injury and was worsened by the fall from boat injury.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Neither the PTSD nor TBI condition is mitigating for the misconduct for which the applicant was found guilty and discharged from service, as neither condition impacts an individual's ability to distinguish right from wrong and act in accordance with the right.

The Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

b. Vacation of his general court-martial conviction. Deny. The applicant's trial by General Court-Martial was warranted by the gravity of the offenses charged. His conviction and subsequent dismissal were effected in accordance with applicable laws and regulations and appropriately characterize the misconduct for which he was convicted. The appellate review was completed and the affirmed sentence was ordered duly executed. The Board found all requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process and the rights of the applicant were fully protected. By law, the Board 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. The Board determined relief was not appropriate in this regard and denied the applicant's request.

c. Based on the foregoing, the Board determined remuneration of service pay he forfeited during the period 15 July 2012 to 23 June 2016 as the result of his court-martial conviction and sentence and restoration of entitlement to disability payments retroactive to and effective on 23 June 2016 were unwarranted.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	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.

4/29/2025

X [redacted]

Mario R. Beckles
CHAIRPERSON
[redacted]

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. By law (Title 10 U.S. Code Section 1552), court-martial convictions stand as adjudged or modified by appeal through the judicial process. This Board 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. The ABCMR does not have authority to set aside a conviction by a court-martial.

3. Army Regulation 600-8-24 (Officer Transfers and Discharges), then in effect, prescribed the officer transfers from active duty (AD) to the Reserve Component (RC) and discharge functions for all officers on AD for 30 days or more. It provides principles of support, standards of service, and policies to support office transfers and discharges.

a. Paragraph 5-1 prescribed disposition and procedures concerning miscellaneous types of separations whereby an officer may be dismissed, released, separated, and discharged from AD. In addition, it provides procedures whereby officers on AD or retired may be DFR of the Army.

b. Paragraph 5-17 a. An officer convicted and sentenced to dismissal as a result of GCM proceedings will be processed pending appellate review of such proceedings as follows:

(1) An RA officer will be retained on AD until the appellate review is completed or placed on excess leave in accordance with Army Regulation 600–8–10.

(2) An RC officer may be released from AD pending completion of the appellate review, under paragraphs 2–33 and 2–34, or placed on excess leave in accordance with Army Regulation 600–8–10 in lieu of REFRAD.

c. The HRC will make the final determination regarding retention or separation. Separation instructions will be issued by Human Resources Command, Alexandria to the appropriate command.

4. Department of Defense Instruction (DODI) 5505.07 (Titling and Indexing by DOD Law Enforcement Activities), currently in effect, 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 Defense Central Index of Investigations (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.

5. DODI 5505.11 (Fingerprinting Reporting Requirements), currently in effect, states:

a. Paragraph 1.2 (Policy). DOD law enforcement agencies will collect fingerprints upon determination of probable cause and will electronically submit the fingerprints to the Federal Bureau of Investigation for all service members investigated for offenses punishable under the Uniform Code of Military Justice (UCMJ).

b. Paragraph 2.2 (DOD Component Heads). DOD Component heads will issue procedures to implement and comply with this issuance, including expungement guidance, and direct commanders and directors to promptly notify DOD LEA when they become aware of an investigation against a service member for an offense punishable by imprisonment. Additionally, commanders will inform DOD LEA of the disposition of an investigation against a service member which has been resolved by administrative, nonjudicial punishment, or judicial action.

c. Paragraph 3.2 (Disposition). Adverse findings resulting from a summary court-martial, non-judicial proceedings pursuant to Article 15 of the UCMJ, administrative

action, or discharge do not constitute criminal proceedings. The disposition must be submitted to the FBI using the following language:

- Summary Court-Martial: "Subject found guilty by summary court-martial, which does not constitute a criminal conviction
- Article 15 of the UCMJ: "Non-judicial disciplinary action, which does not constitute a criminal conviction"
- Administrative Action: "Administrative paperwork" or "administrative discharge"

6. DODI 5505.14 (DNA (Deoxyribonucleic Acid) Collection and Submission requirements for Law Enforcement), currently in effect, 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 (CODIS).

a. Paragraph 1.2 (Policy). Defense Criminal Investigative Organizations (DCIOs), other DOD LEAs, DOD correctional facilities, the Coast Guard Investigative Service (CGIS), and commanders will collect and submit DNA samples from service members when their fingerprints have been collected pursuant to DODI 5505.11.

b. Paragraph 4.1 (Requests for Expungement). Current Service members from whom samples were collected and processed may request in writing that their DNA records be expunged if they are not convicted of any offense by general or special court-martial. This includes action generally inconsistent with such a conviction, such as non-judicial punishment, administrative separation, or referral to a summary court-martial.

7. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by ARBA be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//