DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2024-042

[redacted]
SR (Former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on May 1, 2024, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated November 21, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former Seaman Recruit (SR/E-1), who received a bad conduct discharge on May 20, 2009, asked the Board to correct his record by making the following changes:

- Upgrade his discharge characterization to Honorable; or
- In the alternative, should the Board determine that an Honorable is not warranted, he respectfully requests an upgrade to General (Under Honorable Conditions); and
- Change the reason for his discharge to "Secretarial Authority"; and
- Order the correction of all records, including, but not limited to, his DD 214, to reflect the upgraded characterization.

The applicant states that he enlisted in the Coast Guard in December of 2001, and he served with the USCG for four years, before facing Court-Martial charges. He states that, upon the advice of counsel, he pleaded guilty at a General Court-Martial on or about December 9, 2005. The applicant argues that there were many irregularities with his investigation and representation from counsel.

The applicant states that he graduated Basic Training in February 2002 and was eventually sent to Operations Specialist "A" School. According to the applicant, he excelled in "A" School despite being unable to socially fit in with his classmates. After graduating, the applicant states that he arrived at [redacted] in September 2003.

According to the applicant, he was a lonely 19-year-old with few friends at the time and he frequented dating websites curtailed for same sex individuals. The applicant states that the site required you to be 18 years or older to have a dating profile and it was on this site that he met SR. The applicant asserts that, after conversing with SR, he learned he was a dependent of a fellow service member but believed SR to be 17 years old.

The applicant states that he and SR met each other at the base chapel. According to the applicant, after spending hours talking, SR attempted to initiate sexual contact with him. The applicant asserts that he stopped the contact. According to the applicant, SR later revealed his true age was 15 years old not 17 years old as he had previously represented. The applicant states that he was racked with guilt and wrote the parents of SR to explain what happened and to apologize.

The applicant notes that SR adamantly stated he had no negative effects from his singular sexual encounter with the applicant and that he believed the applicant was a positive influence on him. The applicant states that SR's parents agreed, and SR did not believe the applicant had done anything wrong and requested he receive the lightest sentence possible.

According to the applicant, his life and Coast Guard career began to unravel in December 2004, when he, after coming off a long watch period, was questioned by the Coast Guard Investigative Service (CGIS) regarding an allegation of him having sexual relationship with an underage female, while he was stationed in [redacted]. The applicant states that, since he was gay, he knew the allegation was false, but when he informed CGIS that he was gay, they immediately began treating him with hostility. The applicant states they began questioning him about his travels to Canada and making inappropriate comments.

According to the applicant, a female dependent living in [redacted] got into some trouble for vandalism. The applicant asserts, to get herself out of trouble, she accused him and SR of having sex with her. The applicant states that the female dependent denied she knew the applicant had a relationship with SR but stated SR would often lie about his age to get dates.

The applicant states that, following the investigation, he was charged with two charges and five specifications of Uniform Code of Military Justice (UCMJ) violations. The applicant notes that Charge I and the sole specification was for violation of the UCMJ, Article 125, in which he was accused of having sodomy on multiple occasions with a person under 16 years of age. The applicant also notes that Charge II with four specifications was for violations of the UCMJ, Article 134, committing indecent acts with a person under 16 years of age.

According to the applicant, during the investigation, he only met with detailed defense counsel twice. The applicant asserts that the lack of attentiveness to his case was alarming to his chain of command. The applicant states that his chain of command reached out to the legal office

to request assignment of new defense counsel, but, on the advice of the legal office, the original detailed defense counsel remained.

The applicant states that, on the advice of his counsel, he accepted a plea offer to plead guilty at a General Court-Martial. The applicant notes that had he contested the charges at Court-Martial and was convicted of all charges and specifications, he faced 30 years confinement and a Dishonorable Discharge. According to the applicant, given the lack of confidence he had in his defense counsel to properly represent him at a contested Court-Martial and the maximum punishment if convicted, he opted for the lessor of the evils and accepted a plea offer.

The applicant states, at a General Court-Martial, he pleaded guilty to Charge I and its sole specification and one specification of Charge II, but the specification of Charge II was changed to committing indecent acts with another, removing the penalty enhancing language of child under the age of 16; and he only pleaded guilty to one act of sodomy in Charge I. According to the applicant, the Military Judge sentenced him to three months confinement, reduction in rank to E-1, total forfeitures, and a Bad Conduct Discharge.

According to the applicant, during the providence inquiry by the Military Judge, the hearing had to be recessed so that he and the Defense Counsel could discuss the facts of the case because there was confusion about what he was supposed to confess to. The applicant states that the Military Judge was understandably skeptical of his willingness to plead guilty, but he only wanted the facts to be stated correctly and not the way the investigators had twisted them. The applicant quotes SR," ... on a personal level, I had (and still) have no problem with what happened."

The applicant states that, during his confinement period, the brig personnel commented on his model conduct, and it was reported that he volunteered to assist with work and cleaning. The applicant states that he earned the admiration of the brig staff.

The applicant states that, following the plea, he submitted three clemency requests to have his discharge disapproved. According to the applicant, all the character witnesses spoke of his hard work ethic and the senior officers all believed a Bad Conduct Discharge was not warranted given the facts and circumstances. The applicant states that they all believe he made a bad decision due to troubled childhood that attributed to a lack of maturity, and it was mentioned that he maintained a positive attitude throughout the process and positively contributed to the Coast Guard through his duties.

The applicant states that he overcame the odds and did not let his past inhibit his ability to be a positive influence on other persons and society. According to the applicant, one person that he has known for 12 years, refers to him as respectable and someone who excels working with the public. The applicant states that she described him as having a great sense of humor, being witty, careful about choosing his friends and more importantly honest, kind, compassionate, intelligent and a responsible person and another character witness describes him as a hard worker and very punctual. According to the applicant, he will go to work even when not feeling well, is dedicated to helping others, and is careful of who he befriends.

The applicant notes that his previous executive officer, Captain (CAPT) K, provided a glowing character reference. The applicant states, in CAPT K's statement, he provided a recount of the facts and circumstances concerning the investigation, but more importantly, CAPT K (ret) relates the deception of the CGIS. According to the applicant, CAPT K also provides mitigating information as he reviewed the investigation, and he recalls SR being the pursuer as well as that the family was not interested in pursuing charges. The applicant states that CAPT K reaffirms that once the applicant revealed he was gay, the CGIS did everything in their power to prove he was a pedophile.

The applicant states that he was examined by clinical psychologist and determined he was not a pedophile nor attracted to children. According to the applicant, it is reported he did not suffer from psychological disorder, and he understood it was legally and morally wrong to engage in sexual relations with minors.

The applicant argues, as a gay service member, that he was undeniably a victim of the Don't Ask Don't Tell (DADT) policy. The applicant states that it is unquestionable that the DADT policy permitted the abuse of gay service members. According to the applicant, the policy permitted uncontained prejudice and disparate treatment of all homosexuals. The applicant argues that he is a prime example of how the bigotry against homosexuals permitted law enforcement to violate his constitutionally protected rights and pursue a weak legal case against him. The applicant states that there is no doubt without the protection of the DADT policy this case would have died on the vine. The applicant states that it is not his desire to re-litigate his case but to request clemency in that a Bad Conduct Discharge was not warranted in his case and the punishment has served its purpose. The applicant asserts that he has been stigmatized with this Bad Conduct Discharge for nearly twenty years and now comes before this honorable board to correct this error and injustice.

The DADT policy enhanced the prosecution of the applicant.

According to the applicant, when CGIS first contacted his command to request their assistance, the command was informed he just needed to answer some questions and did not need legal representation. The applicant states that CGIS accused him of having sexual intercourse with a female minor. The applicant argues that was an accusation that would require the reading of Article 31(b) rights and he would have been entitled to Miranda warnings. According to the applicant, he was never informed that the was entitled to consult with counsel before answering any questions.

The applicant states that, naturally, he denied these fabricated allegations. The applicant notes that the CGIS agents continued to press him until he was finally forced to reveal he was gay, but that the questioning did not stop. The applicant states that the agents became aggressive, and the questioning now focused on his sex life – completely irrelevant given that he was initially suspected of having sex with a female minor. According to the applicant, CGIS eventually questioned him about his relationship with SR and they insisted he had sex with SR, which the applicant continued to deny. The applicant asserts that he requested to speak with counsel and this valuable right was denied.

According to the applicant, at the Article 32 hearing, the two agents contradicted themselves concerning the interrogation. The applicant states that one admitted he had requested to speak with counsel and the other denied it. The applicant notes that the agents accused him of horrendous acts without any evidence and misrepresented their case to the prosecution. The applicant argues that CGIS told the prosecutor that he had maps to boys' homes, but he had maps of the area, not to young boys' homes. The applicant states that such an accusation was baseless and full of bigoted implications.

The applicant argues that CAPT K, his Deputy Group Commander at the time of the investigation, reports the initial investigation was wrought with errors and was weak. According to the applicant, because of the seriousness of the allegations and the lack of evidence the investigation contained, CAPT K and his boss, the Group Commander, would not sign off on most of the charges. The applicant states that the Command's push back on the weak case caused friction with the Legal office.

The applicant argues that the family of SR had no desire to press charges against him and SR had no interest in pressing charges against him. The applicant states that CGIS and USCG [redacted] District Legal pushed the issue. The applicant argues that, upon CAPT K's departure, [redacted] District Legal was able to convince the new leadership to prefer the more serious charges.

According to the applicant, CAPT K believes strongly it was his revelation of his sexual orientation that led the full court press against him. The applicant argues that there is no doubt that the umbrella of DADT policy permitted the aggressive states CGIS and [redacted] District Legal took against him. The applicant asserts, given the unique facts of his case, his sexual orientation and the stereotypes and prejudices of gay service members clouded the good judgment of CGIS and [redacted] District Legal. The applicant notes that the victim and his family had no interest in prosecuting him. The applicant argues that, had this been a heterosexual case of similar facts, there is no doubt without the family's cooperation there would have been no prosecution.

The applicant was deserving of clemency by the Convening Authority

The applicant states that he submitted several clemency requests to the Convening Authority, but he was denied. The applicant asserts that the Convening Authority is not required to grant clemency, but given the many character witness statements, to include his chain of command, request from the victim, his childhood, as well as statements from colleagues and friends, and the unique facts of his case, he was a great candidate for clemency.

According to the applicant, the common theme by leadership was that he lacked maturity as he lacked a proper male role model growing up. The applicant states that CAPT K and Commander (CDR) O agreed that the USCG was a positive influence, and he was maturing as a young Petty Officer. The applicant notes that they agreed he made a poor decision but did not believe a punitive discharge was warranted for his poor decision. The applicant asserts that they described his performance as Petty Officer above par and admired his tenacity to stay positive through the whole ordeal. According to the applicant, CDR O commented that the stress of the investigation and court-martial process has drained his soul, but he still remained positive.

The applicant argues that the facts are unique and require consideration for clemency. According to the applicant, he met SR on a dating website, a website that required a member to be 18 years or older. The applicant states that, upon speaking with SR and learning he was a dependent, he was led to believe SR was 17. The applicant notes that at the time, he was only 19 – two years older than what he believed SR to be. The applicant asserts that SR's friend testified that SR often lied about his age to get dates. According to the applicant, SR often talked about his sexual exploits with BS, but never mentioned it with the applicant. The applicant asserts SR was the aggressor. The applicant states that he stopped SR during the initial sex act. The applicant notes that, without prompting, he wrote a letter to SR's parents to apprise them of the situation and apologize for his actions. The applicant asserts that the family did not want to prosecute him, and SR did not want to prosecute him, nor did he want him punished. The applicant states that he plead guilty and took responsibility for his actions.

According to the applicant, both of the offenses that he plead guilty to were consensual acts. The applicant argues, in that sense, there was no victim to the crime. The applicant states that he was only a few years older than the alleged victim and only two years older than he believed him to be. The applicant asserts that the Sodomy offense was holdover because of DADT and the indecent acts with another is a holdover of the DADT and certainly not General Court Martial worthy. The applicant argues that our government never should have wasted such significant resources to attack his sexual orientation, and this constituted sexual harassment and hostile work environment in any employment context.

The applicant states that, although the convening authority is not required to grant clemency, if ever a case screamed clemency, it is his case. The applicant argues that, clearly, his sexual orientation played into the decision of the Convening Authority. The applicant states that the specter of the DADT policy once again prejudiced him.

The applicant states that both the issuance of the Don't Ask Don't Tell memo[1] and the Wilkie Memo[2] have occurred since the targeting of him in this action and both memos are relevant to this matter.

One offense is no longer an offense under the UCMJ, and the other is not worthy of a Bad Conduct Discharge

The applicant states that it is important to note, that he plead guilty to consensual sodomy and indecent acts with another person, not a minor child under the age of 16 years old. The applicant notes that punishment for consensual sodomy has been ruled unconstitutional by the U.S. Supreme Court. The applicant states that, once the repeal of DADT occurred, the UCMJ removed

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[1] On September 20, 2011 upon the repeal of DADT, the Under Secretary of Defense (Personnel and Readiness) issued a memorandum, subject: Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code. Historically, this Board has applied the principals articulated therein to applications implication DADT or its predecessor policies. This memorandum is colloquially known as the "Stanley Memo."

[2] The "Wilkie Memo" is the colloquial term of a memorandum, subject: Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations, dated July 25, 2018, issued by the Under Secretary of Defense (Personnel and Readiness). It does not apply to the Department of Homeland Security, to include this Board.

consensual sodomy as an offense. The applicant argues that one of the offenses he plead guilty to is no longer an offense in the United States nor under the UCMJ and it was only an offense under the UCMJ because of DADT policy.

The applicant argues that one of the offenses he plead guilty to has been previously ruled unconstitutional and it only existed to punish homosexual service members. The applicant states that he was under the mistaken belief at the time of the alleged sodomy that the individual was 17 years old, and he was only 19 at the time. The applicant argues that, if you remove the unconstitutional consensual sodomy offense, you are left with the indecent act with another or now indecent conduct. The applicant states that, as the U.S. Supreme Court has ruled, consensual acts between homosexuals are protected by privacy rights. The applicant argues, therefore, the indecent conduct should likewise fall under this ruling. The applicant asserts that, although the conduct took place in the base chapel, it was never his intent to engage in conduct with SR. The applicant states he chose the chapel so the two would have privacy to talk and not to engage any conduct that would be deemed indecent. According to the applicant, he was not the aggressor and stopped the sex act, which is demonstrative of his lack of intent to have engaged in any conduct other than talking while at the base chapel.

The applicant argues that it is hard to imagine that had a young heterosexual couple been caught in the chapel engaged in consensual sexual conduct, such as sodomy, that either one would have been referred to a General or a Special Court-Martial, much less received a Bad Conduct Discharge. The applicant asserts that he and SR were not caught in the chapel, but they were homosexual and because of this fact he received a Bad Conduct Discharge.

The applicant states that every court case is based on the facts and circumstances as presented. He argues that, in this case, it is the facts and circumstances that should be controlling and not the offense in and of itself. According to the applicant, the facts of this case may have met the technical requirements for a violation under the UCMJ, but that does not mean the facts and circumstances were deserving of the sentence given. He argues that given the changes and attitude toward homosexuals serving in the military and in society, the repeal of the DADT policy and the U.S. Supreme Court's protection of privacy rights of homosexual individual, he is deserving of clemency and a punitive discharge is not warranted.

The applicant argues that the guilty plea, as accepted by the Military Judge, was a victimless crime. He states that the family did not want to prosecute, and SR did not want to prosecute. The applicant notes he served three months in the brig, was reduced in rank from E-4 to E-1, forfeited all pay and received a Bad Conduct Discharge. The applicant argues that the punishment has served its purpose. He asserts that, but for this incident, his service had been honorable and faithful. The applicant quotes CDR O, "I hope for [the applicant's] sake and for the sake of society that at a minimum, [the applicant's] Bad Conduct Discharge be reduced to the most favorable possible discharge category." The applicant argues that this is not a statement from his mother; it's a statement from a USCG CDR and should be treated as such.

SUMMARY OF THE RECORD

Initial interview with CGIS

On February 23, 2005, the applicant met with a CGIS Special Agent and was notified that he was suspected of rape. The applicant signed the form acknowledging his rights and chose to speak with CGIS without consulting a lawyer. The applicant's statement is reproduced below:

> In the summer of 2003, I met a person whom I was unaware was under the age of consent. I chatted with this individual while on the computer at the local library. We agreed to meet at the church on base. Although no exact plans were made, and I had no intentions on anything occurring at one point masturbation did occur and the individual that I was meeting performed brief fellatio on me. I was not comfortable with this situation, nor do I remember exactly what did happen in any event for the record I know that I am being investigated for 'rape.' I did not 'rape' anyone, frankly, I am appalled by the fact that I am, or have been being accused of rape. Anyways, during the second 'meeting,' I was not intending on masturbating. I do not remember everything, but recall this happening in the church on base. I had been to this church many a time for the purposes of practicing the piano or reading the bible for solitude. In a synopsis, I can recall masturbating twice w/ [SR] and once having fellatio performed on me while in the church. This was not planned, nor did I enjoy the acts that were occurring I do not remember how many times I met [SR], but can summarize the facts – I met him twice at his house, his parent(s) were present. His mother invited me over for dinner or at least that's what [SR] told me. Another time we drove to 'Jack-In-The-Box' for a meal. Another time to a cliff that overlooked the ocean in the vicinity of south of [redacted]. My intent was to become friends with [SR] not to be under accusations of raping him. After our first two meetings, as well as during them, I was uncomfortable, but continued 'hanging out' w/ him for lack of anything better to do. I partially felt coerced into having met him b/c of his persistence. I became annoyed w/ him and after having declined a few offers to 'hang out,' felt slightly obligated to spending time w/ him b/c of the way he had reacted towards my declinations (initial) after a few weeks. I had come up w/ even more excuses for why I couldn't hang out w/ him and I think that he began to realize that I was not interested in him. In conclusion, I was pulled from my 12-hour watch during the 11th hour, after having had no sleep the day prior. I am extremely tired, haven't eaten in a long while and had been reassured by this 'child' that I had supposedly 'raped' that I did nothing wrong, that the acts that occurred were consensual. I don't remember the details of this fiasco as it happened as it has been almost two years since. I don't work well or remember details when I am fatigued so I apologize for not being as informative as possible. I may be after a few days rest. I would also like to inform all parties reading this that I have done my best in answering all questions. I have no desire to manipulate an investigation or cover up things that may have happened.

Summary of Testimony at Art. 32 Hearing

On June 23-24, 2005, there was an Article 32 Hearing[3] regarding the applicant's charges. Below is a reproduction of certain portions of the summary of testimony.

> [SR]
>
> …
>
> Next, he discussed the events of July/August 2003 that involved the accused, [the applicant]. SR stated they met at a church located on the Coast Guard base at [redacted] on 7/9/2003. [SR] and [the applicant] talked with each other and got acquainted during this time. They both talked about being gay. They also discussed the age difference between them; [SR] being 15 and the accused being 19 at the time.

[3] An Article 32 hearing is a preliminary, pretrial hearing conducted under the UCMJ prior to charges being referred to General Court-Martial for trial.

During the 9 July encounter, [SR] testified that they engaged in sexual activity. Specifically, they started kissing and hugging each other. Also, they touched each other above and below the waist and engaged in oral sex…. Both [SR] and the accused showed each other their penis and they masturbated each other.

They stayed at the chapel until 6 a.m. the following morning. According to [SR], the accused had classes the next morning. They agreed to meet again. They went out together approximately 10 times during July and August 2003. The accused drove and they would meet at various locations. They engaged in more sexual activities after the church that included masturbation and oral sex….

[SR] stated that back on 9 July, he told the accused that he was 15. [SR] stated he actually looks younger than 15…. The relationship between [SR] and the accused ended in August 2003 because the accused thought it was weird due to the "age difference" between them.

…

[SR] states that his stepfather first approached him about the case against the accused. He gave investigators a statement sometime in October/November 2004. [SR] did not think the accused did anything wrong.

…

[SR's Mom]

…

[SR's mom] knows the accused, [the applicant], because he was a friend of her son, [SR]. The accused came to her house at base housing [redacted] with her son. At the time, the accused was 19 and her son was 15 years of age. The accused came to the house so she could meet her son's friend…. At one point, the accused stop coming to the house when they discovered he was an A school student.

In September 2003, [SR's mom] received a letter from the accused. In the letter the accused stated that he liked the…family, that [SR] was a great kid, he apologized for anything he said or did, and mentioned they were a great family.

[SR's mom] had to tell the accused to leave a few times due to the late hour when he hung out in [SR's] room. She did not have a serious concern about their age difference at the time. She did not know what they were doing. She found out about their physical activity through the Coast Guard Investigation Service (CGIS) investigators. She has changed her mind about the situation because a 19-year-old person was doing sexual things with a 15-year old boy. Its beings discredit to the service because the accused was in the Coast Guard.

…

[Chief Warrant Officer (CWO) Two GR]

…

[CWO GR] stated that he is [SR's] stepfather….

Regarding the events of July/August 2003, [CWO GR] knew the accused was [SR's] friend. Otherwise, he knew very little about him or his age. He thinks he saw the accused about six to eight times during this period. [CWO GR] knew the accused was an OS A School student when he saw him in the hall at the school. He did not think the relationship was appropriate because A School students are not supposed to be in the housing area at [redacted]. A student needs the School Chief's permission to do so.

He saw a letter from the accused but did not read it. It was four pages in length. It was a nice letter but he is not sure why the accused had to explain himself in the letter. Later, he discovered the sexual nature of the

relationship between the accused and [SR]. It was a little upsetting but he did not pursue anything because he thought [SR] could manage it based on his maturity.

…

[BS]

…[S]he stated that she is currently a Coast Guard dependent (student) living at [redacted] with her parents.

[BS] stated that on 3/14/2004 CGIS investigated her for vandalism on the base at [redacted]. At that time [BS] provided CGIS with information about drug users on the base. She also told them that she went to the base church with [SR] to meet someone. Sometimes, she would talk to him about sexual activity of other people. She claims that CGIS got her out of trouble for information. She claims [SR] lied about his age to get dates with people.
…

Investigating Officer's Report

On July 7, 2005, the investigating officer submitted his report in the DD Form 457. The report indicates that the applicant was represented by qualified counsel. On the form, there is a box for the accused to sign and acknowledge that they waive their right to counsel. The applicant did not sign this box. The report indicates that the investigating officer informed the applicant of the charges and his rights, including the right against self-incrimination under Article 31. Relevant portions of the report are reproduced below:

5. The following information is provided regarding the truth of the matters set forth in the charges and the recommended form of the charges.

a. Charge: Violation of Article 125, UCMJ – Sodomy

The elements of the specification are:

(1) That the accused did, at [redacted], on divers occasions from about 9 July 2003 to 10 August 20003, commit sodomy with [SR].

(2) That [SR] was a child under the age of 16.

The evidence produced at the hearing relevant to this specification is derived primarily from the statements of the alleged victim, [SR] (enclosures (26) and (25)). In addition, the accused provided an oral statement to the [S/A G] (enclosure 25)) and written statement (enclosure (20)) that supports the specification.

The first element is met based on [SR's] testimony. [SR] testified that on 9 July 2003 he met the accused at the Coast Guard base [redacted] chapel and engaged in sexual activity with him. Specifically, [SR] stated that he and the accused performed oral sex on each other's penis. This occurred in the chapel office and [SR] indicated that he ejaculated. After their initial meeting on 9 July, [SR] stated that they met approximately 10 times during July and August 2003 and engaged in sexual activities including oral sex. They performed oral sex on each other in the accused's vehicle. During this period, they saw each other three to four times a week. According to the explanation under Article 125, "It is unnatural carnal copulation for a person to take into that person's sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts with another person; or to have carnal copulation with an animal." Based on the testimony of [SR], it is clear that they committed oral sodomy on each other's penis.

The second element is also met based on [SR's] testimony. On 9 July 2003, [SR] told the accused he was 15 years old, and they discussed their age difference. [SR] testified that he was born on 7 December 1987. [SR]

stated that he actually looked younger than 15 at the time he met the accused. He is 5'11" tall and has a small build. At this time, the accused was 19. [SR] testified that they ended the relationship because the accused was uncomfortable with the age difference. In addition, [SR] testified that he has never been married.

Please note that [SR] is a central figure in this case and a credible witness. He sounded very sincere and forthright during his telephonic testimony. He showed no bias or ill will against the accused but spoke about the relationship in a very candid manner. I found his testimony credible and he is willing to testify about this matter in the future.

Based on the above, I believe that reasonable grounds exist to believe the accused committed the crime of sodomy with a child as alleged.

b. Charge: Violation of Article 134, UCMJ – Indecent Acts or Liberties with a Child

The elements of Specification 1 of the Charge are:

(1) That the accused did, at [redacted], on divers occasions from about 9 July 2003 to 10 August 2003, fondle his penis in the presence of [SR];

(2) That [SR] was under 16 years of age and not the spouse of the accused;

(3) That the act of the accused was indecent;

(4) That the accused committed the act with intent to gratify the sexual desires of the accused and [SR];

(5) That, under the circumstances, the conduct of the accused was to prejudice of good order and discipline in the armed forces.

The evidence produced at the hearing relevant to this specification is derived primarily form the statements of the alleged victim, [SR] (enclosure (16) and (25)). In addition, the accused provided an oral statement to [S/A G] (enclosure (25)) and written statement (enclosure (20)) that supports the specification.

The first element is met based on [SR's] testimony. [SR] testified that during the period of July to August 2003 he went out with the accused on various occasions and they would masturbate themselves in front of each other. This meant the accused would do so in front of [SR] and [SR] would do the same. They went out together several times during the July and August 2003 period and engaged in sexual activity, including masturbation in front of each other. Please note that [SR] contradicted this point (masturbation) somewhat later in his testimony so this should be clarified prior to any proceeding.

The second element regard [SR's] age (15 years old) is met based on [SR's] testimony (see the discussion under the first charge and specification above).

The third element of the specification (indecent act) is met by the nature of the accused's conduct. However, it might be better to charge this as an indecent liberty since there was not physical conduct in this instance. Under Article 134, the explanation states that "indecent liberties" means, "When a person is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but physical contact is not required. Thus, one who with the requisite intent exposed one's private parts to child under 16 years of age may be found guilty of this offense."

The fourth element is met based on [SR's] testimony. [SR] testified that he and the accused engaged in sexual activities on various occasions during the applicable period and they derived sexual gratification from this interaction.

The fifth element is met based on the testimony of [SR] and others. This element is met because the conduct at issue was to the prejudice of good order and discipline. In order to meet this requirement under Article

134, the explanation states that, "It is confined to cases in which the prejudice is reasonably direct and palpable." In this case, [SR] testified that the first sexual encounter between the accused and [SR] occurred at the chapel located on the Coast Guard base in [redacted]. Further, the relationship occurred between a Coast Guard dependent, [SR], and the accused, an OS A School student at the time. [SR] also testified that they engaged in sexual activities at the accused barrack's room. Instead of setting an example for a young Coast Guard dependent, the accused did the opposite by his behavior with [SR]. It is reasonable to find that based on the accused's behavior, there is reasonable direct and palpable prejudice to good order and discipline.

Based on the above, I believe that reasonable grounds exist to believe the accused committed the crime of taking indecent acts with a child as alleged

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The elements of Specification 2 of the Charge are:

(1) That the accused did, at [redacted], on divers occasions from about 9 July 2003 to 10 August 2003, watch while [SR] fondled his penis;

(2) That [SR] was under 16 years of age and not the spouse of the accused;

(3) That the act of the accused was indecent;

(4) That the accused committed the act with intent to gratify the sexual desires of the accused and [SR];

(5) That, under the circumstances, the conduct of the accused was to prejudice of good order and discipline in the armed forces.

The evidence produced at the hearing relevant to this specification is derived primarily from the statements of the alleged victim, [SR] (enclosures (16) and (25)). In addition, the accused provided an oral statement to [S/A G] (enclosure 25)) and written statement (enclosure (20)) that supports this specification. The discussion outlined under specification 1 applies to Specification 2. The difference is that [SR] is fondling his penis in the presence of the accused.

It is my opinion that reasonable grounds exist to believe the accused committed the crime of taking indecent liberties with a child as alleged.

The elements of Specification 3 of the Charge are:

(1) That the accused did, at [redacted], on divers occasions from about 9 July 2003 to 10 August 2003, let [SR] fondle the accused's penis;

(2) That [SR] was under 16 years of age and not the spouse of the accused;

(3) That the act of the accused was indecent;

(4) That the accused committed the act with intent to gratify the sexual desires of the accused and [SR];

(5) That, under the circumstances, the conduct of the accused was to prejudice of good order and discipline in the armed forces.

The evidence produced at the hearing relevant to this specification is derived primarily from the statements of the alleged victim, [SR] (enclosures (16) and (25)). In addition, the accused provided an oral statement to [S/A G] (enclosure 25)) and written statement (enclosure (20)) that supports this specification.

The first element is met based on [SR's] testimony. [SR] testified that during the period of July to August 2003 he went out with the accused on various occasions and they masturbated each other. The second element regarding [SR's] age (15 years old) is met based on the testimony of [SR] (see the discussion under the first charge and specification above). The third element of the specification (indecent act) is met by the nature of the accused's conduct. The fourth element is met based on [SR's] testimony. [SR] testified that he and accused engaged in sexual activities on various occasions during the applicable period and they derived sexual gratification from this interaction.

The fifth element is met based on the testimony of [SR] and others. This element is met because the conduct at issue was to the prejudice of good order and discipline. In order to meet this requirement under Article 134, the explanation states that, "It is confined to cases in which the prejudice is reasonably direct and palpable." In this case, [SR] testified that the first sexual encounter between the accused and [SR] occurred at the chapel located on the Coast Guard base in [redacted]. Further, the relationship occurred between a Coast Guard dependent, [SR], and the accused, an OS A School student at the time. [SR] also testified that they engaged in sexual activities at the accused barrack's room. Instead of setting an example for a young Coast Guard dependent, the accused did the opposite by his behavior with [SR]. It is reasonable to find that based on the accused's behavior, there is reasonable direct and palpable prejudice to good order and discipline.

It is my opinion that reasonable grounds exist to believe the accused committed the crime of taking indecent liberties with a child as alleged.

The elements of Specification 4 of the Charge are:

(1) That the accused did, at [redacted], on divers occasions from about 9 July 2003 to 10 August 2003, fondle [SR's] penis;

(2) That [SR] was under 16 years of age and not the spouse of the accused;

(3) That the act of the accused was indecent;

(4) That the accused committed the act with intent to gratify the sexual desires of the accused and [SR];

(5) That, under the circumstances, the conduct of the accused was to prejudice of good order and discipline in the armed forces.

The evidence produced at the hearing relevant to this specification is derived primarily from the statements of the alleged victim, [SR] (enclosures (16) and (25)). In addition, the accused provided an oral statement to [S/A G] (enclosure 25)) and written statement (enclosure (20)) that supports this specification. The discussion outlined under specification 1 applies to Specification 4. The difference is that the accused is fondling [SR's] penis.

It is my opinion that reasonable grounds exist to believe the accused committed the crime of taking indecent liberties with a child as alleged.

…

3. Recommended Disposition: I recommend that these charges be referred to a General Court-Martial.[4]

[4] The investigating officer included a discussion of other charges that he recommended against pursing further.

Psychiatric Evaluation

The applicant was given a psychiatric evaluation at the request of [redacted] Legal. On July 29, 2005, the report was issued. The discussion section is reproduced below:

> While the evaluee has experienced some sadness, regret, and stress over his legal situation and collapse of his Coast Guard career; this does not rise to the level of psychiatric disorder. In addition, I find no support for a diagnosis of pedophilia or sociopathy. Further, I am not finding evidence to support a pattern of his reaching out preferentially to persons significantly younger than himself as sexual partners. He communicates a sense that it would be wrong for him to have sex with an underage person from not only a legal, but also moral standpoint. While the evaluee is no doubt framing his narrative in a way that would be less likely to further incriminate him (which is quite normal), my impression is he is leveling with for the most part.

Email Correspondence Between SR and CGIS Agent

On December 5, 2005, SR sent the below email to a CGIS Agent. SR responded to questions from the CGIS Agent in the body of the email.:

> Good Afternoon [SR],
>
> As per our telephone conversation, Can you please answer the following questions in detail regarding the investigation of [the applicant]:
>
> 6. What is your sexual preference?
>
>   gay…. I dont know how i can really go into more detail than that…
>
> 7. Are you currently in a relationship? If so, How long?
>
>   yes with my current boyfriend [L]. we've been going out since September 12, 2005 (almost 3 months)
>
> 8. In regards to your current relationship with [the applicant], has it affected your life in a negative way? If yes or no, please explain.
>
>   no, my relationship with [the applicant] did not affect my life in a negative way. it actually affected my life in a more positive way than anything else. He taught me a lot, and introduced me to a lot of new things that have become part of my life (like trance music and marching band)
>
> 9. How important is this investigation to you?
>
>   not very much, i'd prefer for it not to have happened.
>
> 10. What do you want the outcome of this investigation to be? The outcome for [the applicant]?
>
>   I wanted [the applicant's] sentence to be as low as possible because he hasn't affected me in a negative way. As said earlier, legally, i know what happened was wrong, but on a personal level I had (and still) have no problem with what happened.

General Court-Martial

On January 11, 2006, the applicant was tried by general court-martial. The following is a summary of the findings that the applicant, pursuant to his pleas of guilty entered in accordance with a pretrial agreement, was convicted of:

- Charge I: Violation of the Uniform Code of Military Justice, Article 125
  - "Specification: In that [the applicant], did, at or near [redacted] on divers occasions from about 9 July 2003 to about 10 August 2003, commit sodomy with [SR], a child under the age of 16 years."
  - Plea: "GUILTY, except for the words, 'on divers occasions from about 9 July 2003 to about 10 August 2003,' substituting therefore the words 'on or about 9 July 2003' of the excepted words, Not Guilty; of the Specification as excepted and substituted, Guilty"
  - Findings: "GUILTY, except for the words, 'on divers occasions from about 9 July 2003 to about 10 August 2003,' substituting therefore the words 'on or about 9 July 2003' of the excepted words, Not Guilty; of the Specification as excepted and substituted, Guilty"

- Charge II: Violation of the Uniform Code of Military Justice, Article 134
  - "Specification 3: In that [the applicant], did, at or near [redacted], on divers occasions from about 9 July 2003 to about 10 August 2003, commit indecent acts with [SR], a child under the age of 16 years, by [SR] fondling the accused's penis, with intent to gratify the sexual desires of the accused and said [SR]."
  - Plea: "GUILTY, except for the words 'on divers occasions from about 9 July 2003, to about 10 August 2003, commit indecent acts with [SR], a child under the age of 16 years,' substituting therefore the words 'on or about 9 July 2003, commit indecent acts with [SR],' of the excepted words, Not Guilty; of the substituted words, Guilty; of the Specifications as excepted and substituted, Guilty"
  - Finding: "GUILTY, except for the words 'on divers occasions from about 9 July 2003, to about 10 August 2003, commit indecent acts with [SR], a child under the age of 16 years,' substituting therefore the words 'on or about 9 July 2003, commit indecent acts with [SR],' of the excepted words, Not Guilty; of the substituted words, Guilty; of the Specifications as excepted and substituted, Guilty"

There were three other specifications for Charge II that were withdrawn and dismissed. On December 8, 2005, the applicant was sentenced to be reduced in rank to the pay grade of E-1, to total forfeitures, to be confined for a period of three (3) months, and to be discharged from the Coast Guard with a bad conduct discharge.

USCG Court of Criminal Appeals

On August 29, 2008, the USCG Court of Criminal Appeals issued its ruling on the applicant's case. The applicant assigned two errors:

I. Appellant's plea to an indecent act is improvident because the military judge failed to elicit facts sufficient to show that the act occurred in an open and notorious manner and no other factors are present to show that the act was indecent, the fact that the act was committed in a chapel by itself being insufficient to support a finding that the act was indecent.

> II. Appellant was denied conflict-free counsel when he notified the Government of a conflict with his attorney and wanted a new attorney and when no new attorney was detailed to represent him.

The court rejected both assignments. Notably, the court agreed that "indecency cannot be based on SR's age" for the indecent acts charge because mistake of fact is a defense to indecent acts with a child. The court upheld the indecency charge on two bases: that the act occurred in the base chapel, a public place, and that the applicant "admitted that he was attracted to and aroused by SR, the stepson of a Coast Guard instructor" and was acting in preparation to engaging in "homosexual sodomy with a child under the age of sixteen." Further, the court rejected the applicant's claims on the breakdown of the attorney-client relationship as minor and fixed prior to the guilty plea. The court did not include the record on why the applicant asked for a new attorney only that he did request a new attorney and the applicant was persuaded by the prosecution to keep assigned counsel.

Letter from CAPT K

CAPT K, the applicant's executive officer at the beginning of the investigation, wrote the following letter dated January 23, 2018:

> The following is a recount, to the best of my memory, regarding the events concerning the subject legal proceedings. These recollections concern only my official dealings with the case in my capacity as Deputy Group Commander, USCG [redacted], which was at the time of this portion of the investigation [the applicant's] permanent duty station.
>
> Around Feb 2005, after [the applicant] had been assigned to [redacted] for a few months, I was informed by [redacted] District Legal, that CGIS wanted to interview [the applicant], presumably for something that had occurred during his "A" school time at USCG [redacted]. It was made clear by the CGIS agents that [the applicant] would not need counsel as he was not being charged with anything. Still I advised [the applicant] that if, at any time during the interview, he felt uncomfortable with the line of questioning that he should request counsel. No one from command was present during the interview. I was later advised that [redacted] legal had taken up a former CGIS case from [redacted] concerning [the applicant] and his alleged involvement with a minor in CG housing at that command. [Redacted] legal was obliged to process the legal documentation of the case through USCG [redacted] since we were now [the applicant's] duty station. As the Executive Officer of that command it was my responsibility to handle the details of that process.
>
> As I became clearer regarding what was being alleged, I requested a copy of the original CGIS investigation into the case as it was conducted at [redacted]. I also advised [the applicant] that he did indeed need to retain legal counsel as the charges were serious. I remember being more than a little annoyed at not having been given a more complete picture, from the CGIS agents, or just how serious the charges were against [the applicant]. He was being charged with several violations of UCMJ relating to inappropriate relations with a minor, sodomy, etc. Being [the applicant's] current command, my boss, the Group Commander, had to sign off on the charges. After reading the original case file in detail I was convinced that the charges as presented by [redacted] Legal were a significant overreach…most of the charges had no foundation in evidence. My Group Commander concurred. [Redacted] Legal and I went round and round about those charges, but I only signed off on one or two minor charges where I thought there was evidence that some UCMJ articles MIGHT have actually been violated.
>
> I must say here that what I read of the original investigation, [the applicant] appears to have struck up some kind of relationship, friendship or otherwise with a 15 yr old male Coast Guard dependent living in Coast Guard Housing at [redacted]. Neither the 15 yr old nor his family would press charges against [the applicant]. Furthermore, the parents expressed no desire to pursue any action what-so-ever against [the applicant]. There was no hard evidence of anything more than a friendship between [the applicant] and the 15 yr old boy,

though one might infer from the investigation that there might have been some romantic element. Neither the 15 yr old boy nor, to my knowledge, [the applicant] admitted to any sexual relations with one another. The 15 yr old boy also claimed to have initiated contact and remained the "pursuer." There was certainly no evidence that a sexual act had taken place between them.

What follows here is conjecture on my part.

The case against [the applicant] continued well after I was reassigned to another command in May/June 2005. I did touch base with the applicant from time to time throughout the legal proceedings, and I also spoke to other officers in [redacted] that knew about the case. It appears that after I left [redacted], [redacted] Legal managed to get all of the charges that they originally wanted to levy against [the applicant] reinstated. Through I only heard [the applicant's] account of his legal issues, I did sound like he was poorly represented by counsel who, incidentally, I never met or talked with even after he was assigned the case. It seems that once [the applicant] admitted to CGIS that he was gay, the [redacted] legal process was determined to make him out as the worst kind of miscreant and to punish him to the fullest extent of the UCMJ. I'd have no problem with this is there were any indication of further evidence uncovered in the case, but I'm not aware of any, other than the admission by [the applicant] that he was indeed gay. Being gay does not predispose one to pedophilia and to my knowledge there was no reasonable evidence of that charge ever disclosed.

In my opinion, and I have a fair amount of experience in the conduct of Coast Guard investigations, [the applicant] was guilty of displaying poor judgment. He was the responsible adult and should not have engaged in any suspicious relationship with a minor. He appears to have been tricked or badgered into revealing his sexual orientation, which one might attribute to very effective interrogation techniques, but I do believe [the applicant] when he tells me that he requested legal counsel but was told by agents in authority (CGIS) that he didn't need counsel. If true, that amounts to a very serious violation of CG member rights and legal protocol.

Based on the weak evidence in the investigation and the shoddy and suspicious nature of the prosecution of the case, coupled with the punishment that [the applicant] had to endure as a result of his ultimate conviction, I think an upgrade of the nature of his discharge is fully warranted!

Repeal of Don't Ask, Don't Tell

On September 20, 2011, a memorandum with the subject "Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code" was issued to the Secretaries of the Military Departments. Relevant portions are reproduced below.

Pursuant to the Don't Ask, Don't Tell Repeal Act of 2010, the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have certified the Department of Defense is prepared for the repeal of section 654 of title 10, United States Code, commonly referred to as Don't Ask, Don't Tell (DADT). Repeal will take effect on September 20, 2011. Upon repeal, some former Service members discharged under DADT or prior policies may request a correction of their military records for either their Service Discharge Review Board (DRB) or their Service Board for Correction of Military/Naval Records (BCM/NR).

…

Effective September 20, 2011, Service DRBs should normally grant requests to change the narrative reason for a discharge (the change should be to "Secretarial Authority" (Separation program Designator Code (SPD) code JFF)), requests to re-characterize the discharge to honorable, and/or requests to change the reentry code to an immediately-eligible-to-reenter category …when both the following conditions are met: (1) the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT and (2) there were no aggravating factors in the record, such as misconduct. Although each request must be evaluated on a case-by-case basis, the award of an honorable or general discharge should normally be considered to indicate the absence of aggravating factors.

…

[T]he Service BCM/NRs, provided for in section 1152 of title 10, United States Code, and also governed by DoDD 1332. 41, have a significantly broader scope of review and are authorized to provide much more comprehensive remedies than are available from the DRBs. Upon finding an error or injustice, BCM/NRs may fashion the remedy they find necessary and appropriate within the applicable legal limits. Although the correction boards have wide latitude in determining what constitutes an error or injustice, it is DoD policy that broad, retroactive corrections of records from applicants discharged under DADT are not warranted. Although DADT is repealed effective September 20, 2011, it was the law and reflected the view of Congress during the period it was the law.

Similarly, DoD regulations implementing various aspects of DADT were valid regulations during the same period. Thus, consistent with what we understand is past board practice on changing standards, DADT's repeal may be a relevant factor in evaluating an application (such as requests to change narrative reason for a discharge, requests to re-characterize the discharge to honorable, and/or requests to change the reentry code to an immediately-eligible-to reenter category) but the issuance of a discharge under DADT should not by itself be considered to constitute an error or injustice that would invalidate an otherwise proper action taken pursuant to DADT and applicable DoD policy. Thus, remedies such as correcting a record to reflect continued service with no discharge, restoration to a previous grade or position, credit for time lost, or an increase from no separations pay to half or full separation pay or from half to full separation pay, would not normally be appropriate.

This policy does not address situations where a correction board determines that DADT (or other prior policy) as applied under the circumstances of a particular case constituted an error or injustice. Under those circumstances, the BCMR would craft an appropriate remedy. Additionally, the Boards should also consider the guidance provided in my repeal of DADT and Future Impact on Policy memorandum, dated January 28, 2011 (attached) in determining whether a specific requested record correction is necessary or appropriate.

VIEWS OF THE COAST GUARD

On September 13, 2024, a judge advocate (JA) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

In response to the applicant's argument that he is a victim of the now repealed DADT policy, and that his sexual preference was the real reason for his separation from the Coast Guard, the JA states that the applicant's argument is predominately fact based, but the record supports that the applicant was properly separated after a lawfully convened general court-martial found him guilty of committing crimes of a sexual nature against a child, not because of his sexual preference.

The JA argues that the applicant's assertion that he was discharged for being a homosexual should be dismissed because the record clearly shows that his conviction at general court-martial was predicated on the age of his victim, not the sex. The JA notes that, per General Court Martial Order No. 03-06, the age, and not the sex of the applicant's sexual partner in this case initially served as the basis for both charges to which he plead guilty. The JA states that the applicant plead guilty to one count of UCMJ Art. 125, Sodomy for committing "sodomy with [SR] *a child under the age of 16 years old*" (emphasis added) and one count of UCMJ Art. 134, Indecent Acts, for committing "indecent acts with [SR], *a child under the age of 16* …" (emphasis added), though the age of the child was later excepted in this second charge in his pleas. Nonetheless, the age of the victim, not the sex, was the driving factor in the applicant's conviction at court martial.

The JA argues that the applicant's conviction at general court-martial of Art. 125, Sodomy was not unjust because the applicant's victim was a child who could not lawfully consent. The JA notes that applicant argues that *consensual sodomy* has been ruled unconstitutional and is no longer an offense under the UCMJ and that the actions which led to the applicant's UCMJ Article 125 conviction and subsequent separation in May of 2009 would not result in a conviction today, and this should entitle him to the requested relief. The JA states that the National Defense Authorization Act (NDAA) for Fiscal Year 2014 (FY14) repealed the offense of Consensual Sodomy under the UCMJ and amended the offense to only include "Forcible Sodomy" or "Bestiality." The NDAA for Fiscal Year 2014 (FY15) completely removed the offense of Sodomy from UCMJ, Art. 125 by amending it to refer to the offense of Kidnapping. However, engaging in sexual acts with a minor has always been, and remains a crime under the UCMJ. The JA states that the applicant's arguments ignore the fact that the applicant was not convicted of simple consensual sodomy. The JA notes that the applicant was convicted of engaging in sodomy *with a child under the age of 16 years old*. According to the JA, while the UCMJ Article 125 Sodomy, has been eliminated, engaging in sexual contact with a child under the age of 16 would still be punishable under the UCMJ in its current form. The JA argues that, both then and now, this offense would merit a Bad Conduct Discharge or a Dishonorable Discharge.

The JA states that there is no evidence to support the applicant's allegation that his UCMJ Article 134, Indecent Acts, conviction was also predicated on DADT policy.

In response to the applicant's argument that he would not have been referred to a General or Special Court-Martial, nor would it have been worthy of a Bad Conduct Discharge were the applicant caught engaging in sexual conduct with a woman, rather than a fifteen-year-old boy, the JA argues that the United States Coast Guard Court of Criminal Appeals held that "[e]ven when consensual, sexual behavior is not inherently indecent, it may still be punishable under Article 134, UCMJ, when committed in an 'open and notorious' manner…'", thus directly refuting the applicant's hypothetical. By having a sexual encounter in an on-base chapel, the applicant was correctly found to have engaged in indecent conduct in an "open and notorious manner," no matter who the other actor was – male or female. The JA argues that the fact the applicant engaged in sexual acts with a fifteen-year-old boy, who could not lawfully consent, merely exacerbates the indecency of the applicant's conduct. The JA concludes, therefore, the Article 134 charge was not erroneous or unjust, and the applicant's request for relief on these grounds should be denied.

The JA argues that the applicant's requested relief should be denied because the separation was properly based on the applicant's conviction at GCM. The JA notes that chapter 12.B.19.f Commandant Instruction (COMDTINST) M1000.6A, the Coast Guard Personnel Manual (MOR C), which was in effect at the time of the applicant's separation, required that members discharged as a result of a sentence of a general or special court-martial "shall be issued a bad conduct discharge (DD Form 259 CG) or a dishonorable discharge (DD Form 260 CG), whichever appropriate authority directs."

The JA argues that MOR B shows the applicant was properly separated with a Bad Conduct Discharge under Ch. 12-B-19 of MOR C pursuant to a sentence of a general court-martial for valid offenses; with appropriate SPD Code: JDD, and; Narrative reason: Court Martial. The JA states that the Coast Guard did not err in awarding a Bad Conduct Discharge in accordance with the

policy outlined in paragraph MOR B. Furthermore, the JA argues, as his separation is not predicated on DADT policy, but upon the conviction which was later affirmed by CAAF, his discharge does not amount to an injustice because it does not constitute treatment by military authorities that "shocks the sense of justice" as outlined in *Sawyer v. United States*.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 24, 2024, the Chair sent the applicant a copy of the Coast Guard advisory opinion and invited him to respond within thirty days. The Chair received the applicant's response on October 24, 2024.

The applicant argues that there are mitigating circumstances in this case which warrant clemency. The applicant states that, according to the statements made by both SR and the applicant's supervisors, he is a person of good moral character and deserves relief in accordance with the Wilkie's memo.

According to the applicant, under the Wilkie's Memo, this honorable Board has the authority to grant clemency. The applicant states that clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority that DRBs and BCM/NRs have to ensure fundamental fairness and consistency. The applicant argues that the Board should consider the following factors, amongst others:

1. Relief is generally more appropriate for nonviolent offenses than for violent offenses.
2. The aggravating and mitigating facts related to the record of punishment from which the veteran or Service member wants relief.
3. Acceptance of responsibility, remorse, or atonement for misconduct.
4. Whether misconduct may have been youthful indiscretion.
5. Victim support for, or in opposition to relief, and any reasons provided.

The applicant argues that this case is non-violent. The applicant states that he was convicted of sodomy and indecent acts; however, the acts of misconduct committed are not violent. According to the applicant, he did not force any sexual acts on SR. The applicant notes that the facts support the conclusion that any sexual acts were consensual and not forced. The applicant concludes that, therefore, his acts are non-violent.

The applicant argues that there are mitigating circumstances in the record and SR did not recommend punishment. The applicant states that, when he first met SR, he reasonably believed SR was seventeen years old since SR was on a website for people over the age of eighteen and told he that he was seventeen. The applicant argues that, based on his knowledge at the time, he was only two years older than SR since he was nineteen at the time. The applicant notes that even when SR's father found out about the allegations against the applicant, he did not pursue any charges against him. Finally, the applicant states that SR himself did not want the applicant to get in trouble and held no ill feelings toward him. The applicant quotes the email correspondence between SR and CGIS Agent. The applicant argues that, in this regard, SR is not a traditional victim who suffered greatly at the hands of a perpetrator. According to the applicant, no harm was done, and even the "victim" supports him and acknowledges his positive contributions to his life.

In conclusion, the applicant urges the Board to set aside the advisory opinion because there is evidence to support clemency. The applicant states that the advisory opinion properly cites to *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989) in that the definition of injustice is "treatment by military authorities that 'shocks the sense of justice'" *Id.* In this case, the applicant argues that maintaining a Bad Conduct Discharge despite the clemency evidence submitted on his behalf is an injustice. The applicant asserts that the record is replete with clemency evidence to include multiple character statements, and mitigating evidence (including statements by SR). The applicant argues, therefore, it is an injustice to maintain a Bad Conduct Discharge on his DD Form 214 and this Board should grant the relief requested.

APPLICABLE LAW AND POLICY

The Manual for Courts Martial (2000), Part IV, Paragraph 51 (Article 125—Sodomy), states:

> **51. Article 125 – Sodomy**
>
> …
>
> b. *Elements.*
>
> (1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.
>
> …
>
> (2) That the act was done with a child under the age of 16.
>
> …
>
> c. *Explanation.* It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's sexual organ in the mouth of anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.
>
> …
>
> e. *Maximum punishment.*
>
> …
>
> **(3)** *With a child who, at the time of the offense, has attained the age of 12 but is under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

The Manual for Courts Martial (2000), Part IV, Paragraph 90 (Article 134—Indecent act with another), states:

> **90. Article 134 – (Indecent acts with another)**
>
> …
>
> b. *Elements.*
>
> (1) That the accused committed a certain wrongful act with a certain person;
>
> (2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* "Indecent" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

…

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

• • •

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[5] However, the Board is free to waive its statute of limitations "if it finds it to be in the interest of justice."[6] The record shows that the applicant was discharged in May 2009 and DADT was repealed in 2011. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record since 2011, and his application is untimely. As discussed below, the Board finds that the evidence of the record reveals a significant injustice, and it is in the interest of justice to waive the statute of limitations.

3. The applicant alleged that the Coast Guard committed an error and injustice when he was given a Bad Conduct Discharge. The Board may correct any military record of the Coast Guard when necessary to correct an error or remove an injustice.[7] Error means either legal or factual error.[8] Injustice, when not also error, is treatment by the military authorities that shocks the sense of justice but is not technically illegal.[9] With respect to records of courts-martial convened under the UCMJ, the Board's authority extends only to action of the sentence of a court-

[5] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[6] 10 U.S.C. § 1552(b); *see Baxter v. Claytor*, 652 F.2d 181, 186 (noting that "the time limit contained in section 1552 itself is not an absolute bar to the Board's consideration" of an application); *see also McFarlane v. Sec'y of Air Force*, 867 F. Supp. 405, 410 (E.D. Va. 1994) ("all is not lost if an application is untimely, for the Board still 'may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.'").
[7] 10 U.S.C. § 1552(a); 33 C.F.R. § 52.2(a).
[8] *Sawyer v. United States,* 18 Cl.Ct. 860, 868 (1989), *rev'd on other grounds,* 930 F.2d 1577 (Fed.Cir.1991).
[9] Id.

martial for purposes of clemency.[10] When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[11] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[12]

4. The applicant was convicted of Article 125 – Sodomy and Article 134 – Indecent Act with Another. The applicant plead guilty on both charges and is today claiming he was the victim of DADT policies. The applicant, 19 years old at the time, engaged in these acts with a person who was 15 years of age, but he believed to be 17. The applicant and his executive officer alleged that, once the applicant revealed he was homosexual, he was prosecuted more vigorously.

5. Error. The applicant alleges the Coast Guard committed an error when it separated him with a bad conduct discharge his convictions for Article 125 – Sodomy and Article 134 – Indecent Act with Another. The applicant plead guilty to both charges, which each carry a maximum punishment discharge of dishonorable. The applicant appealed his case to the Coast Guard Court of Criminal Appeals. The court upheld the convictions. Thus, the applicant has not shown that his bad conduct discharge was in error.

6. Injustice. Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,"[13] and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."[14]

7. While the Board does not condone the applicant's behavior, the Board finds the applicant has demonstrated by a preponderance of the evidence that the gender and sexual orientation of both himself and the victim played some role in the decision to pursue trial by court-martial. During the investigation, the applicant alleges that he was treated with hostility when he revealed his sexual orientation. His executive officer expressed concerns with the investigation and believes the sexual orientation of the applicant was the root of the hostility. Further, the applicant was subjected to psychiatric testing to determine if he was a pedophile – this is the relic of discriminatory ideas about homosexual men being pedophiles. The applicant was with an individual who had gone through puberty meaning there was no reason to suspect pedophilia other than discriminatory attitudes toward homosexuals.

8. The Board notes that while the Wilkie memo does not apply, the July 1976 memorandum, subject: BCMR and "Clemency" from the General Counsel of the Department of Transportation does apply to this case. The memorandum notes that "[t]he Board is entirely free

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[10] 10 U.S.C. § 1552(f).
[11] 33 C.F.R. § 52.24(b).
[12] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).
[13] *Roth v. United States,* 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).
[14] *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

to take into account changes in community mores, civilian as well as military, since the time of discharge was rendered [sic], and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards." The General Counsel noted that "the Board should not upgrade …unless it is convinced, after having considered all the evidence …that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed."

9. The Board finds that the applicant has demonstrated by a preponderance of evidence that a Bad Conduct Discharge, based on contemporary standards and changes in community mores, is disproportionately severe in light of the misconduct for which it was imposed. The record shows that the applicant believed the victim to be 17 years old – only two years younger than the applicant at the time. The record shows that SR had a history of lying about his age to get dates. Further, if the applicant's belief in the victim's age was correct, he would not have been convicted on the age of the victim, but the sexual acts. Those consensual sexual acts are no longer a crime. Additionally, the charge of indecent acts was not based on the other individual's age, but on the fact that the acts occurred in a chapel. Further, the applicant wrote a letter to the victim's family acknowledging what he did was wrong and sought forgiveness. The victim and his parents did not pursue charges against the applicant.

10. The JA states that applicant's convictions were predicated on the age of the victim, this is only true with respect to the Article 125 – Sodomy conviction. The Article 134 charge was for Indecent Acts with *Another* not Indecent Acts with a child. The JA improperly relies on the age of the victim as being further basis for indecency; however, the Coast Guard Court of Appeals, noted that mistake of age is a defense for Article 134 and that could not be a basis for this charge.

11. Based upon the totality of the evidence, the Board finds that the applicant has demonstrated the existence of an injustice warranting the requested relief. As such, the Coast Guard should upgrade the applicant's discharge to General (Under Honorable Conditions) and narrative reason to Secretarial Authority with corresponding separation code.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former SR [redacted], USCG, for correction of his military record is granted. The Coast Guard shall upgrade the applicant's characterization of service to General (Under Honorable Conditions), narrative reason for separation to Secretarial Authority, and corresponding separation code of JFF. The Coast Guard shall issue the applicant a DD Form 214 reflecting these corrections.

[redacted]

November 21, 2024