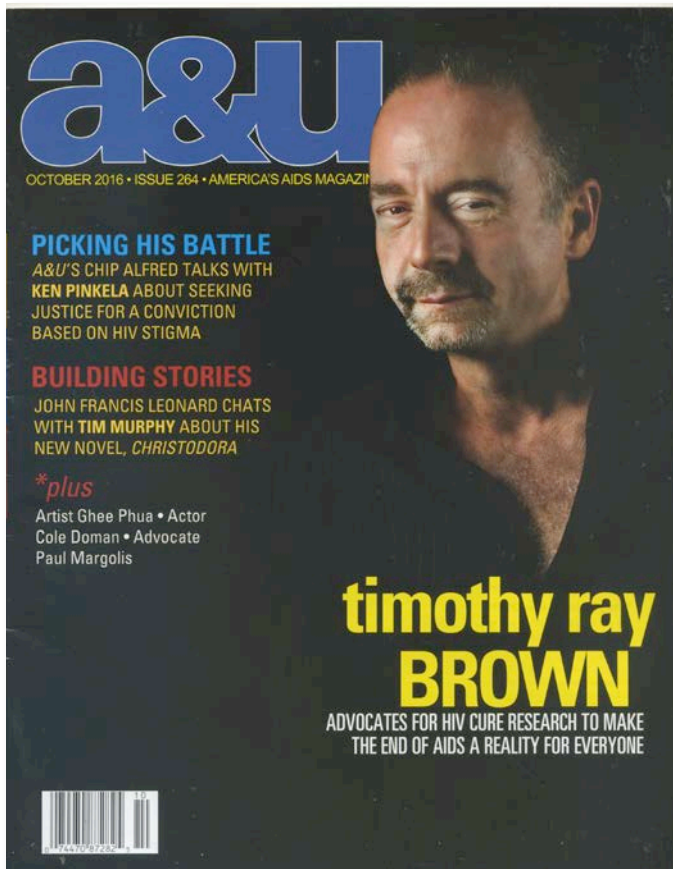


CHIP ALFRED, WRITER



I am pleased to share my article with you:



MILITARY INJUSTICE

Years After Being Wrongly Convicted in an HIV Criminalization Case, Decorated Army Officer Ken Pinkela is Still Seeking Justice. Now, in an *A&U* Exclusive, a Key Witness Opens Up About Recanting His Testimony and the Army's Chief JAG Officer Weighs In for the First Time.

BY CHIP ALFRED / A&U, OCTOBER 2016



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Years After Being Wrongly Convicted in an HIV Criminalization Case, Decorated Army Officer Ken Pinkela Is Still Seeking Justice. Now, in an A&U Exclusive, a Key Witness Opens Up About Recanting His Testimony and the Army's Chief JAG Officer Weighs In for the First Time
by Chip Alfred

PHOTOGRAPHED EXCLUSIVELY FOR A&U BY ALINA OSWALD

Lieutenant Colonel Ken Pinkela had an impeccable record in the U.S. Army. The twenty-six-year veteran completed tours of duty in Desert Storm, Desert Shield, Bosnia and Kosovo, and served a stint as the Army's legislative liaison to the U.S. House of Representatives. Now, he is fighting the toughest battle of his career—seeking acquittal for a crime he insists he didn't commit. "They went after me because I was gay and I was HIV-positive," he tells A&U. After a grueling eight-year legal ordeal, Pinkela says, "I lost everything. I was dismissed from the Army. They literally erased me like I never served a day in my life." Pinkela, forty-nine, has no job, no pension, and no VA benefits. "I don't even get a flag on my coffin when I die." Now, he speaks out about all that went wrong with this case and why he'll never give up trying to make it right.

The nightmare began in 2009 when a fellow Army officer, identified by the Army as "C.H.," told authorities that Pinkela did not disclose to him that he was HIV-positive before they had sex in Pinkela's Arlington, Virginia, home. According to Pinkela, C.H. also claimed that while he was getting ready for sex by using a douche

hose, Pinkela offered to help him "clean out" and was forceful with the douche hose and made him bleed. Pinkela says C.H.'s story is a bunch of lies. After C.H. came forward, the case languished in the Judge Advocate General (JAG) system for a few years, until Captain Jordan Stapley was assigned to prosecute. Amid the rampant homophobia in the military, Pinkela says Stapley was ruthless in his quest to convict him. "It's the Army and they had allegations of gay sex."

At trial, the only witness was Elliott Scott Henney, who had a consensual sexual relationship with Pinkela over several months before Pinkela was diagnosed with HIV on July 12, 2006. In an exclusive interview with A&U, Henney, thirty-four, shares the details of how he was tracked down by Stapley and coerced into giving false testimony against Pinkela. Henney says Stapley convinced him Pinkela was a deviant sexual predator, and that because he was HIV-positive, he must be guilty. "Where there's smoke, there's fire," Stapley said. Henney recalls Stapley grilling him about the last time he had sex with Pinkela, ultimately pressuring Henney into saying it might have been 2007, when it was actually before Pinkela's diagnosis

in 2006. In hindsight, Henney realizes he was a pawn in the Army's manipulative scheme. Stapley assured him there were several other witnesses testifying against Pinkela, when in fact Henney was the only one. "I thought Stapley was my buddy," he says with regret. "I was fooled by a con man." After a week-long trial, Ken Pinkela was convicted on June 30, 2012 of abusive sexual contact, aggravated assault with a means likely to produce death or grievous bodily harm, and reckless endangerment. C.H. testified that Pinkela sexually assaulted him in November 2008 by inserting a metal shower enema into his anus against his will, then engaged in unprotected, consensual anal intercourse with him.

On August 11, 2015, Henney wrote to then Secretary of the Army John McHugh, recanting his statements against Pinkela and asking that the case be dropped. In an excerpt from Henney's letter, he writes: "This entire case is NOT what the United States military represents. This case should have NEVER made it to a courtroom, and the way in which the case was 'put together' with deceit and lies, is NOT the way any person, or officer, should ever suffer."

The day after Henney's letter went



and C.H. The Army also did not conduct phylogenetic testing, which would determine if C.H. and Pinkela have similar strains of HIV.

On August 2, 2016, I started working on this article and sent a certified letter to Secretary of the Army Eric Fanning asking about the current status of the case and about Henney's allegations of judicial misconduct. About two weeks later, I received a letter from Colonel Walter M. Hudson, Chief of the Army's Criminal Law Division. The letter states, "On April 11, 2016, CAAF denied Pinkela's renewed petition for grant of review, concluding his military appeals process." With that, the Army affirmed that the case is officially closed, but Ken Pinkela isn't giving up fighting for justice. "I will never stop," he proclaims. He says he will appeal to Secretary Fanning, the first openly gay leader of any U.S. military service. At this point, only Fanning or President Obama has the authority to upgrade Pinkela's dismissal so that he can further appeal his case.

Fanning has not commented publicly about the Pinkela case and did

public, Pinkela updated a Change.org petition he established in 2014, which to date has garnered nearly 75,000 signatures supporting Pinkela's request to have his case reviewed by President Obama and the Secretary of the Army. In the revised petition, Pinkela writes, "The prosecution's only witness has recanted his testimony. He describes being threatened by Army prosecutors, being lied to and says that the prosecution led him in his testimony. This should be reason enough to have my case re-examined and get the charges against me dismissed."

It wasn't reason enough to get the charges against Pinkela dismissed, but the Army did review the case. On November 4, 2015, the United States Court of Appeals for the Armed Forces (CAAF) set aside and dismissed the reckless endangerment conviction against Pinkela and reduced

the aggravated assault charge to assault and battery. The Court acknowledged that the government failed to prove that "engaging in unprotected anal intercourse while HIV-positive constitutes a means likely to produce death or grievous bodily harm." The Court also noted the government offered no evidence at trial that "HIV infection was the 'likely' result of [LTC Pinkela's] actions." Ken Pinkela was sentenced to eleven months in military prison. He served 272 days in the Army prison in Fort Leavenworth, Kansas, and was released in April, 2013.

Pinkela maintains that he was the victim of an unjust prosecution. "The Army did no investigation. No CID [Criminal Investigative Command] official was at trial to testify." No physical evidence was presented at trial that an assault or a sex act of any kind occurred between Pinkela

not respond directly to my request or to Henney's letter. According to Henney, he and Fanning were acquaintances when Henney was a bartender at the Duplex Diner, a bistro in Washington that Fanning frequented. After Fanning received Henney's letter, Fanning sent a private message to Henney via Facebook Messenger. He wrote, "Elliott—received your letter today. I'm looking into it. Will get back to you. Best, Eric." That was the last communication he ever received from Fanning.

"It is disappointing that the Secretary of the Army—an openly gay man—would not have enough of an understanding of HIV-related stigma to at least order a review of the case," remarks Sean Strub, executive director of Sero, a network of people with HIV and allies fighting for freedom from stigma and injustice. "The entire Department of Defense lacks lead-

ership to make their HIV-related policies consistent with contemporary science, so they are stuck with these prosecutions based on stigma and ignorance,” Strub explains. “Elliott Henney’s experience is critical to understanding what happened to Ken and how the Army prosecutor disregarded any real interest in the truth or justice in his handling of the case.” Strub describes the Army’s total disregard of Henney’s recanting as “astonishing and disheartening. With a total absence of physical evidence, Ken’s case is a prime example of how every person living with HIV is just one accusation away from a courtroom.”

Ken Pinkela says his experience in the courtroom destroyed his life. “I had a great career and great opportunities,” he reflects. “Now I feel so naïve that the organization that I’ve given my life to could turn its back on me so blatantly.” With no steady source of income since 2012, Ken was forced to sell his Arlington home and move back home to live with his mother in Otisville, a small town in upstate New York. Last month, after a series of applications for public benefits, Pinkela finally qualified for public assistance with New York State’s ADAP (AIDS Drug Assistance Program). He has also secured basic healthcare insurance coverage. But his future isn’t exactly looking bright. “I can’t get a job,” he says. “Nobody wants to hire me at my age with a felony conviction.” He’s angry that he gets nothing from the Army, while his accuser got a sweet deal in exchange for his testimony. Pinkela says C.H. received immunity from being discharged from the Army under Don’t Ask Don’t Tell, which was in effect in 2009 when the case began. Pinkela tells *A&U* that C.H. receives a regular stipend check from the VA because he is considered a victim of sexual assault.

Today, Pinkela often struggles just to get through the day. He has physical wounds, including a combat injury that left him with a metal plate on one side of his face. But it’s the emotional wounds that have taken the greatest toll on him. He suffers from anxiety and depression, which have gone untreated because he can’t afford psychiatric care. He spends a lot of time as an advocate and public speaker combating HIV criminalization and as a volunteer with Sero. His one saving-grace is the support of his family and friends. “Their love every day is amazing,” he shares. “They have kept me alive.”

I am concluding this article with no conclusions. Instead, I will offer some food for thought and a call to action. Af-



ter trying for weeks to understand what it’s like to walk in Ken Pinkela’s Army boots, I am left with many more questions than answers. How could a man who devoted his life to serving his country be treated with such disrespect? Why hasn’t the Army responded to Elliott Scott Henney and launched an internal investigation about his allegations of prosecutorial misconduct? And the big question: Where does Eric Fanning stand on all of this? You can’t really stay above the fray, Mr. Secretary. It is your duty to do something, say something to address this injustice. No military service member should ever have to endure what Ken

Pinkela has been through.

“I have lost the freedom which I fought to defend for nearly three decades,” Pinkela declares. “I want it back. I want my life back.”

For more information: <http://seroproject.com/>; <http://justiceforkenpinkela.blogspot.com/>; and www.change.org/p/secretary-of-the-army-eric-fanning-review-an-innocent-soldier-s-wrongful-conviction.

Chip Alfred, Editor at Large, is the author of *Positive Justice*, an *A&U* column about HIV criminalization reform. If you have a story idea or suggestion, please contact Chip at chip.alfred@gmail.com.