

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF  
APPELLANT**

v.

Docket No. ARMY 20210368

Private First Class (E-3)

**CHRISTIAN G. ALVARADO,**

United States Army,

Appellant

Tried at Fort Bliss, Texas on 14  
January, 15 April, and 8 and 14–18  
June 2021, before a general court-  
martial appointed by the Commander,  
Headquarters, 1st Armored Division  
and Fort Bliss, Colonel Robert L.  
Shuck, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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Tried at Fort Bliss, Texas on 14 January, 15 April, and 8 and 14–18 June 2021, before a general court-martial appointed by the Commander, Headquarters, 1st Armored Division and Fort Bliss, Colonel Robert L. Shuck, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

**Assignments of Error<sup>1</sup>**

**I. WHETHER SPECIFICATION 1 OF CHARGE I AND  
SPECIFICATION 1 OF CHARGE III ARE FACTUALLY  
SUFFICIENT.**

**II. WHETHER DILATORY POST-TRIAL PROCESSING  
WARRANTS RELIEF.**

**Statement of the Case**

On 18 June 2021, a military judge sitting as a general court-martial convicted appellant, Private First Class (PFC) Christian G. Alvarado, contrary to his pleas, of one specification of false official statement, two specifications of

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<sup>1</sup> Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

sexual assault, and one specification of aggravated assault in violation of Articles 107, 120, and 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 107, 920, and 928.<sup>2</sup> (R. at 879; Charge Sheet). That same day, the military judge sentenced appellant to be confined for eighteen years and three months and dishonorably discharged from the service.<sup>3</sup> (R. at 930). On 16 July 2021, the convening authority approved the findings and sentence in appellant's case. (Action). On 26 July 2021, the military judge entered judgment. (Judgment of the Court). This court docketed appellant's case on 8 February 2022. (Referral and Designation of Counsel).

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<sup>2</sup> Appellant was acquitted of Specification 2 of Charge I, Specification 2 of Charge III, Specifications 1 and 2 of Charge IV, and Specifications 1 and 2 of Charge V. (R. at 879). The military judge granted the government's motion to dismiss without prejudice Specifications 3 and 4 of Charge V. (R. at 124-25).

<sup>3</sup> The military judge sentenced appellant as follows:

Charge I, Specification 1	6 years
Charge I, Specification 3	12 years
Charge II, The Specification	3 years
Charge III, Specification 1	3 months

The military judge ordered the sentences to confinement for Specification 3 of Charge I and The Specification of Charge II to run concurrently. (R. at 930).

**I. WHETHER SPECIFICATION 1 OF CHARGE I AND SPECIFICATION 1 OF CHARGE III ARE FACTUALLY SUFFICIENT.**

**Facts Relevant to Assignment of Error**

**A. The Sexual Encounter**

In late December 2019, during block leave, appellant hung out with PFC [REDACTED] and her girlfriend PFC [REDACTED] in PFC [REDACTED] barracks room on Fort Bliss, Texas. (Pros. Ex. 8, 11 JUN, 46:30); (Def. Ex. D, Part 1 of 3, 57:58) (R. at 526). They socialized and consumed alcohol to the point of intoxication. (Def. Ex. D, Part 1 of 3, 57:58-59:15). Eventually the three left PFC [REDACTED] room and went to appellant's barracks room, where they joined his roommate, Specialist (SPC) [REDACTED] (Def. Ex. D, Part 1 of 3, 59:15; R. at 128).

When the three arrived at appellant's room, SPC [REDACTED] was inside playing video games. (R. at 602); (Def. Ex. D, Part 1 of 3, 59:16). While the four socialized, PFC [REDACTED] and appellant began talking and flirting. (Def. Ex. D, Part 1 of 3, 59:31). Private First Class [REDACTED] wanted to be alone with appellant and they left for her barracks room. (Pros. Ex. 8, 11 JUN, 47:20); (Def. Ex. D, Part 1 of 3, 59:36).

Once inside PFC [REDACTED] room, the two sat on her bed and continued to flirt and drink. (Pros. Ex. 8, 27 JUL, 19:50); (Def. Ex. D, Part 1 of 3, 1:00:10). The two began kissing and progressed to gradual sexual foreplay, to include stimulating

each other's genitals. (Pros. Ex. 8, 27 JUL, 23:37); (Def. Ex. D, Part 1 of 3, 1:02:15-47). Eventually, the two had consensual sex. (Def. Ex. D, Part 1 of 3, 1:02:20).

First, PFC [REDACTED] performed oral sex on appellant. (Def. Ex. D, Part 1 of 3, 1:02:59). Appellant then removed PFC [REDACTED] PT shorts (Def. Ex. D, Part 1 of 3, 1:03:33) and they had vaginal sex in a variety of positions requiring physical cooperation. (Def. Ex. D, Part 1 of 3, 1:00:10). During the sex, both PFC [REDACTED] and appellant expressed satisfaction and enjoyment. (Pros. Ex. 8, 27 JUL, 30:30-50). Once they finished having sex, they discussed hanging out again in the future before appellant got dressed and left. (Pros. Ex. 8, 27 JUL, 25:05).

## **B. The Threat**

A few weeks after their consensual sexual encounter, sometime at the end of January or beginning of February 2020, PFC [REDACTED] asked appellant to sell drugs for her. (R. at 522). Private First Class [REDACTED] had been involved with selling illegal drugs at or near Fort Bliss, Texas for several months. (R. at 815). According to a U.S. Army Criminal Investigation Division (CID) investigation, PFC [REDACTED] had other soldiers buy and sell mushrooms, cocaine, and synthetic cannabinoid vape juice for her. (R. at 816).

In early May 2020, PFC [REDACTED] again asked appellant if he would sell drugs for her. (R. at 522-25). Appellant rebuffed her each time, telling her the second time



to “Cut this shit. I am going to tell somebody about this.” (R. at 525). Both requests for appellant to deal drugs for her occurred prior to PFC [REDACTED] eventual sexual assault allegation. (R. at 522, 524).

Other than PFC [REDACTED] requests for appellant to sell drugs, after the two had sex they did not talk much. (Pros. Ex. 8, 11 JUN, 44:05-10). Appellant figured his experience with PFC [REDACTED] was just a one-night stand. (Pros. Ex. 8, 11 JUN, 35:55). He was, however, hanging out with PFC [REDACTED] romantic partner, PFC [REDACTED] (R. at 526) (Pros. Ex. 8, 11 JUN, 41:05, 48:59). By May 2020, PFC [REDACTED] felt close enough to appellant that, when she and PFC [REDACTED] got into an argument and she feared PFC [REDACTED] would get violent, she called appellant to pick her up. (R. at 526-27) (Pros. Ex. 8, 11 JUN, 41:30).

When appellant arrived, PFC [REDACTED] came outside with PFC [REDACTED] following and yelling at her. (R. at 527). Appellant took PFC [REDACTED] to stay with a friend. (R. at 527). Private First Class [REDACTED] told appellant that when PFC [REDACTED] “gets mad she just keeps going.” (Pros. Ex. 8, 11 JUN, 41:50).

On 31 May 2020, appellant was serving on charge of quarters (CQ) duty and PFC [REDACTED] was serving extra duty as punishment for a summarized Article 15. (R. at 796-97). Private First Class [REDACTED] repeatedly came to the CQ desk and yelled and cursed at appellant. (Pros. Ex. 8, 11 JUN, 39:10); (R. at 529-30). Appellant felt uncomfortable and got another soldier to cover his CQ shift and left. (R. at 529).

Private First Class [REDACTED] kept returning to the CQ desk, swearing and demanding to know where appellant was. She yelled that she would get him in trouble and was “going to fuck Alvarado’s life up.” (Pros. Ex. 8, 11 JUN, 39:51; R. at 529).

Roughly two weeks later, PFC [REDACTED] reported to CID that their sexual encounter six months earlier had actually been an assault. (Pros. Ex. 8, 11 JUN, 38:58).

### **C. The CID Interrogations**

Appellant was interrogated by CID agents three times: on 11 June 2020, 27 July 2020, and 28 July 2020. (Pros. Ex. 8); (Def. Ex. D). Special Agent (SA) [REDACTED] conducted the first two interrogations. (Pros. Ex. 8, 11 JUN, 27 JUL). Special Agent [REDACTED] conducted the last interrogation, which also included a polygraph examination. (Def. Ex. D). Appellant agreed to the polygraph so “there would be no room to doubt my memories or what I am telling Agent [REDACTED] (R. at 537).

In his first two interviews and his pre-polygraph interview, appellant maintained that PFC [REDACTED] had consensual sex with him the night in question and had been an active participant throughout the sexual encounter. (Pros. Ex. 8, 11 JUN, 58:00-59:00); (Pros. Ex. 8, 27 JUL, 21:00-24:38); (Def. Ex. D, Part 1 of 3, 1:00:10-1:04:30). He told the agents that PFC [REDACTED] had performed oral sex on him, and then they had vaginal intercourse in several positions including missionary, with PFC [REDACTED] on top, and “doggy-style.” (Def. Ex. D, Part 1 of 3, 1:00:10, 1:02:59).

Special Agent ■ explained how the polygraph machine measured appellant's sweat glands, muscle reactions, and heartrate to see if he was answering the questions truthfully. (Def. Ex. D, Part 1 of 3, 47:10-55:05). The test included two types of queries: did you do it questions (about the alleged offenses) and what type of person are you questions. (Def. Ex. D, Part 1 of 3, 26:24-42). The latter questions, SA ■ explained, were about detecting sexual deviancy. (Def. Ex. D, Part 1 of 3, 28:10-30). Special Agent ■ defined "sexual deviancy" broadly to include impure thoughts from a young age, such as the desire to have sex with a sibling, to desires for anal sex, to use an object other than a penis to have sex (Special Agent ■ said sex was only for procreation), or to engage in a gay or lesbian sexual relationship. (Def. Ex. D, Part 1 of 3, 29:00-55, 1:14-16).

A sexual deviant, SA ■ explained, continues to have these impure thoughts, act on them, and may have committed these alleged offenses. (Def. Ex. D, Part 1 of 3, 29:55-30:30). In high school, appellant had experimented sexually with another man. (R. at 542-43). Perhaps unsurprisingly, when told this qualified as deviant behavior exhibited by sexual assailants, appellant denied ever engaging in SA ■ definition of sexual deviancy. (Def. Ex. D, Part 1 of 3, 31:36).

The polygraph examination and interrogation took about ten-and-a-half-hours. (Def. Ex. D, R. at 683-84). During this time, appellant was kept in a windowless room and needed an escort to use the bathroom. (R. at 688).

Appellant struggled to stay awake during this lengthy process. He repeatedly told SA ■ he was tired. (Def. Ex. D, Part 1 of 3, 19:58); (Def. Ex. D, Part 2 of 3, 58:57). He yawned almost forty times. (R. at 249). If SA ■ left the room, appellant fell asleep. (Def. Ex. D, Part 1 of 3, 2:20:40); (Def. Ex. D, Part 3 of 3, 0:10). He also struggled to fight off his exhaustion during the polygraph tests, sometimes bowing his head and closing his eyes. (Def. Ex. D, Part 1 of 3, 2:12:20); (Def. Ex. D, Part 2 of 3, 1:17:15). Yet SA ■ kept the interview going by urging appellant to remain awake and asking him to sit in an odd position, with his body leaned forward and his head tilted up to the ceiling. (Def. Ex. D, Part 2 of 3, 1:01:16); (Def. Ex. D, Part 3 of 3, 2:03:35).

Throughout the interrogation, SA ■ suggested to appellant that PFC ■ had actually been unconscious for at least part of the sexual encounter. Special Agent ■ broached the issue early on, informing appellant prior to the polygraph that he wanted to specifically “test” the details appellant had provided about things PFC ■ did to show she was participating in sexual intercourse. (Def. Ex. D, Part 1 of 3, 1:05:30).

The “did you do it” portion of the polygraph focused on three things appellant consistently said PFC ■ did, which indicated consent: that PFC ■ performed oral sex on him, that PFC ■ had vaginal sex on top of him, and that during sex PFC ■ made approving comments. (Def. Ex. D, Part 1 of 3, 2:43:47).

After the polygraph test, SA ■ told appellant that he had not passed, and he immediately raised again the possibility that PFC ■ had been unconscious. Special Agent ■ kept pressing appellant to admit that he had lied when he listed the things PFC ■ said and did that indicated her consent. “If you don’t,” SA ■ warned, “we’re just gonna keep doing this.” (Def. Ex. D, Part 1 of 3, 3:04:40). He also told appellant that the machine showed he was not being entirely truthful on the sexual deviancy questions. (Def. Ex. D, Part 1 of 3, 2:54:18).

Special Agent ■ claimed this was not a typical “he-said-she-said” sexual assault because PFC ■ could not say anything about what happened. (Def. Ex. D, Part 1 of 3, 2:34:42). He implied that because PFC ■ did not explain what happened, appellant was guilty of sexual assault unless he could prove his innocence. Special Agent ■ stayed on this point, stressing appellant was in the worst place a young man accused of sexual assault could be, because the victim had no recollection of it for him to contradict. (Def. Ex. D, Part 1 of 3, 2:36). Since PFC ■ could not say what happened, SA ■ said, the burden to show her participation fell on appellant and it was only natural that he would exaggerate PFC ■ involvement. (Def. Ex. D, Part 1 of 3, 2:39:39).

Even as appellant admitted his memory was hazy because he had been drinking that night, SA ■ kept hinting at what he believed to be the truth. (Def. Ex. D, Part 1 of 3, 2:51:40). Special Agent ■ suggested that appellant may be

mixing up his experience with PFC [REDACTED] with appellant's experiences with other partners. (Def. Ex. D, Part 1 of 3, 2:50:13). Special Agent [REDACTED] told appellant that PFC [REDACTED] said the only reason she knew she had sex with appellant was because someone told her she did. (Def. Ex. D, Part 1 of 3, 2:58:54). Special Agent [REDACTED] explained that people don't remember something for only three reasons: because they were passed out, drunk, or asleep. (Def. Ex. D, Part 1 of 3, 2:59:19-51). "I don't want you to leave here today with a failed test," he warned appellant. (Def. Ex. D, Part 1 of 3, 3:02:25). If PFC [REDACTED] "was completely passed out and you had sex with her, you did it for a reason," SA [REDACTED] offered. Special Agent [REDACTED] encouraged appellant to be forthcoming because "it mattered" if PFC [REDACTED] was flirting with appellant and appellant was drunk. (Def. Ex. D, Part 1 of 3, 3:23:55). Sowing doubt into appellant's mind.

After SA [REDACTED] told appellant that he failed a second polygraph, SA [REDACTED] continued to bear down on PFC [REDACTED] consciousness. (Def. Ex. D, Part 2 of 3, 1:16:40). Special Agent [REDACTED] claimed Private First Class [REDACTED] level of intoxication meant she could not consent, but also explained it in a confusing way (stating words to the effect of, [REDACTED] very intoxicated state meant her level of participation really went away at the moment of sex). (Def. Ex. D, Part 2 of 3, 1:18:55). Appellant then questioned his memory of PFC [REDACTED] participation. "So I'm remembering it differently then? Or I didn't remember it I just assumed it was

that?” “No,” SA ■ interrupted. (Def. Ex. D, Part 2 of 3, 1:19:20). “Then why do I remember it like that?” appellant wondered. (Def. Ex. D, Part 2 of 3, 1:29:24). “There’s a difference,” SA ■ asserted, “between not remembering, not wanting the memory, and not knowing...” (Def. Ex. D, Part 2 of 3, 1:29:31). Appellant said, “I don’t know what’s true anymore. Because that’s what I always thought it was. And that’s what I had it.” (Def. Ex. D, Part 2 of 3, 1:29:47). “I don’t know,” he told SA ■ “I guess I don’t know what to believe anymore, because this thing is telling me differently and I thought it came out a different way.” (Def. Ex. D, Part 2 of 3, 1:44:33).

“You have a memory of what happened,” SA ■ insisted. (Def. Ex. D, Part 2 of 3, 1:29:55-1:30:05). Special Agent ■ continued to pit two “versions” of appellant against each other, referring to them as drunk-you and sober-you, insisting that drunk-appellant did things that sober-appellant thought was wrong. (Def. Ex. D, Part 2 of 3, 1:33:01). “Sober-Chris wants believe that this other thing happened, but deep down sober-Chris knows, *you know*, right now, deep down” that what happened in that room was wrong. (Def. Ex. D, Part 2 of 3, 1:33:10). Special Agent ■ repeatedly rejected the details appellant provided which showed PFC ■ participation, and instead suggested appellant was recounting these details that appellant *wanted* to believe, because appellant in fact had sex with someone who could not consent. (Def. Ex. D, Part 1 of 3, 2:41:50); (Def. Ex. D,

Part 2 of 3, 1:21:30). “Maybe that’s what I’m doing to myself,” appellant considered. “I was believing that but I guess my vitals are saying different.” (Def. Ex. D, Part 2 of 3, 1:21:15). Later on, still pressing for appellant to give him the correct details, SA ■■■ warned that the test “doesn’t know what happened that night.” (Def. Ex. D, Part 3 of 3, 2:36:00). “No,” appellant replied, “it determines it.” (Def. Ex. D, Part 3 of 3, 2:36:04).

After hours of interrogation and sleep deprivation, and finally doubting himself and choosing to believe the polygraph machine over his own memory, appellant finally surrendered, “I can admit that I was wrong. I thought it was that way but I guess not.” (Def. Ex. D, Part 2 of 3, 1:41:49). “If the test says that’s not the truth then it’s not the truth. I’m not going to argue it.” (Def. Ex. D, Part 3 of 3, 2:27:40). Trusting the machine, and not his own memory, appellant changed his story to match the polygraph results as well as SA ■■■ suggestion, eventually denying that PFC ■■■ ever performed oral sex on him, got on top of him, or made those comments. (Def. Ex. D, Part 2 of 3, 1:48:15).

At this point, about five and a half hours into the interrogation, appellant began working on a written statement. (Def. Ex. D, Part 2 of 3, 2:05:51). Special Agent ■■■ guided appellant on what to say, beginning by explaining why he gave a false official statement to SA ■■■ (Def. Ex. D, Part 2 of 3, 2:05:51). Appellant complied. (Pros. Ex. 2, p. 1). During the drafting, SA ■■■ asked appellant several



questions and allowed appellant to type his responses. (Def. Ex. D, Part 2 of 3, 2:17:00; 2:18:20). At one point, SA ■ asked, “Why did you continue to have sex with [PFC ■ after she passed out?” (Def. Ex. D, Part 2 of 3, 2:28:44); (Pros. Ex. 2, p. 2). Appellant replied he did not become aware PFC ■ was unconscious until he finished having sex. (Def. Ex. D, Part 2 of 3, 2:28:50). “No, you said halfway through, you knew she passed out,” Special Agent ■ insisted. (Def. Ex. D, Part 2 of 3, 2:28:58). Special Agent ■ said appellant might have kept having sex with PFC ■ after she lost consciousness because he was “in the moment.” (Def. Ex. D, Part 2 of 3, 2:29:04). Appellant repeated this phrase twice, blankly gazed into the distance for a few seconds, and said he was not sure what to say. (Def. Ex. D, Part 2 of 3, 2:29:23). “You could say, ‘I was in the moment,’” SA ■ replied, and then appellant typed that exact phrase that SA ■ supplied into his sworn statement. (Def. Ex. D, Part 2 of 3, 2:29:25); (Pros Ex. 2, p. 2).

After he finished typing the statement SA ■ prompted, appellant’s interrogation continued and he was questioned about another criminal allegation for which he was ultimately acquitted. (Def. Ex. D, Part 2 of 3, 2:48:35); (R. at 879). At the interview’s conclusion, appellant remarked, “Well, I thought it was a certain way, but I guess not.” (Def. Ex. D, Part 3 of 3, 3:08:30).

#### **D. The Defense Case at Trial**

At trial, the defense called several witnesses, including appellant and Major (MAJ) [REDACTED] (R. at 522, 659). Major [REDACTED] held a master's and doctorate degree in psychology and was a forensic psychology fellow stationed at Walter Reed National Military Medical Center. (R. at 659). At appellant's trial, she was recognized as an expert in the fields of psychology with expertise in alcohol, memory, and false confessions. (R. at 665).

Major [REDACTED] was tasked with reviewing appellant's case and evaluating whether there were risk factors present for appellant that would increase the likelihood of him making an unreliable statement to law enforcement. (R. at 667). To conduct her evaluation, she reviewed the case file, including the three recorded CID interviews, as well as appellant's medical and mental health records, both those from and prior to his military service, and conducted collateral interviews with people who knew appellant. (R. at 665). She also personally interviewed appellant for two days and conducted various psychological tests. (R. at 665).

Major [REDACTED] testified that suggestibility focuses on two concepts: yield and shift. "Yield" is how likely or to what extent someone gives in to leading questions. (R. at 675). "Shift" is how well a person copes with pressure and whether he changes his answers in response to negative feedback. (R. at 675-76). She also described how the scientific community distinguished between three types

of false confessions: voluntary, compliant, and internalized. (R. at 668-69). With a voluntary false confession, someone admits to something they did not do without prompting. (R. at 669). With a compliant false confession, the influence of an interrogation moves somebody to acquiesce to a false confession. (R. at 669). With an internalized false confession, a person accepts or adopts an interrogator's statements and comes to personally accept that they might have committed the crime or accept guilt for that crime, even if they did not do it. (R. at 669).

To assess appellant's suggestibility, MAJ [REDACTED] administered the Gudjonsson Suggestibility Scale (GSS), which is a standard diagnostic tool that measures the extent to which someone will yield or give in to leading questions. (R. at 666). The GSS test showed appellant's suggestibility was 75-90% higher than those in the general population. (R. at 676). As MAJ [REDACTED] noted, appellant's story was consistent through his first two CID interviews and the pre-polygraph interview. (R. at 709). However, his story noticeably shifted after appellant received the negative feedback about not "passing" the test, which was analogous to the shift MAJ [REDACTED] observed in appellant's GSS results. (R. at 681-82, 709).

To test whether appellant feigned memory impairment or exaggerated his responses, MAJ [REDACTED] administered two other evaluations: the Test of Memory Malingering (TOMM), which assesses whether someone is feigning memory

impairment, and the Minnesota Multiphasic Personality Assessment (MMPI-2-RF), which evaluates a person's potential psychological problems and provides indications to personality structure. (R. at 666). Appellant's TOMM results indicated he was not feigning memory impairment. (R. at 666). Similarly, his MMPI-2-RF results indicated that appellant was not exaggerating, feigning, or over-reporting. (R. at 666).

Major [REDACTED] also testified that two different risk factors increase the odds of a false confession. (R. at 669-70, 695). A situational risk factor relates to the interrogation's length, whether the person interrogated was isolated or was experiencing sleep deprivation, or the presence of certain interrogation techniques. (R. at 670, 682-83). In contrast, a dispositional risk factor is a unique personal characteristic such as age, suggestibility, or a compliant nature. (R. at 669-70).

The presence of even one risk factor, MAJ [REDACTED] explained, increases the probability of an unreliable statement. (R. at 695). In appellant's case, she identified *many* situational and dispositional risk factors that increased appellant's risk of making a false confession. (R. at 695). For situational risk factors, MAJ [REDACTED] noted the interview's ten-and-a-half-hour length, appellant's sleep deprivation, his isolation, his drinking on the night in question, and the interrogative techniques employed by SA [REDACTED] (R. at 683-690). For dispositional

factors, MAJ [REDACTED] highlighted appellant's young age, compliance in the interview room, and very high suggestibility. (R. at 671, 676, 678-82).

Based on all of these risk factors, MAJ [REDACTED] expert opinion was that appellant was unable to effectively resist SA [REDACTED] relentless negative feedback. (R. at 681). She noted that appellant's inability to resist was grounded in his belief that the polygraph machine could detect the truth, even if it contradicted his own memory. (R. at 688). When someone profoundly distrusts his own memory, as appellant did, that person is particularly vulnerable to external sources of information. (R. at 689). Special Agent [REDACTED] continually provided that external information by suggesting that PFC [REDACTED] was unconscious. (R. at 689). According to MAJ [REDACTED] SA [REDACTED] suggestions about what happened increased the likelihood that appellant would make an unreliable statement. (R. at 689).

At trial, appellant testified that PFC [REDACTED] was never unconscious the night of the incident. (R. at 651).

### **Standard of Review**

Pursuant to Article 66, UCMJ., this court is required "to conduct a de novo review of [the] legal and factual sufficiency of the case." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

## Law

This court's test for factual sufficiency is whether, after "weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," the members of this court are "*themselves convinced of appellant's guilt beyond a reasonable doubt.*" *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency. *Washington*, 57 M.J. at 399. Accordingly, this court must make "its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Id.* In so doing, this court may "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." UCMJ art. 66.

## Argument

Neither appellant's convictions for Specification 1 of Charge I (Sexual Assault of an Unconscious Person) nor Specification 1 of Charge III (False Official Statement) are factually sufficient. As to the former, appellant does not dispute that he and PFC [REDACTED] engaged in a sexual act. However, the government failed to prove beyond a reasonable doubt both that appellant did so when PFC [REDACTED] was

unconscious and that appellant either knew or reasonably should have known PFC ■■■ was unconscious. To prove these two elements, the government relied solely on appellant's post-polygraph statements. However, those statements are unreliable because SA ■■■ coerced appellant into admitting something that was not true and that he did not independently believe. Those statements are part of a false confession and should not be believed. Without those statements this conviction cannot stand.

Appellant's false official statement conviction is also factually insufficient. The government must show that when appellant made the allegedly false statement he did so with an intent to deceive. As the evidence shows, however, appellant lacked that intent. When he gave those statements, he believed they were true, because they were true. Therefore, this court should set aside and dismiss both convictions.

**A. Appellant's Conviction for Specification 1 of Charge I is Factually Insufficient.**

Appellant's conviction for sexually assaulting PFC ■■■ rests on solely on appellant's post-polygraph statements that at some point in the sexual encounter PFC ■■■ become unconscious and appellant continued to have sex with her. These statements are unreliable because they were part of a coerced and manufactured admission based on (1) appellant's unusually high suggestibility; and (2) the presence of numerous other risk factors.

### ***1. Appellant's High Suggestibility Undercuts His Post-Polygraph Statements' Reliability.***

Appellant was unusually prone to submit to external suggestion. His strong suggestibility caused him to change his story in response to the sustained pressure and negative feedback from SA [REDACTED] and his false implication that a polygraph machine is more reliable than his own memory. His story, remarkably consistent through three separate interrogations, noticeably shifted after SA [REDACTED] claimed he failed. (R. at 681-82). He began to trust the polygraph results instead of his own memory. This made him more vulnerable to adopt SA [REDACTED] suggestions about what happened—a false narrative which appellant eventually internalized.

According to MAJ [REDACTED] testimony, the GSS test showed that appellant's suggestibility—which measures both the likelihood of yielding to leading questions and changing answers in response to negative feedback—was 75-90% higher than those in the general population. (R. at 676). However, even without MAJ [REDACTED] expert assistance, appellant's suggestibility is clearly evident from his recorded CID interviews. During his two interviews and his pre-polygraph interview, appellant told the same consistent thing – that PFC [REDACTED] was an active and willing participant in consensual sex. (Pros. Ex. 8, 11 JUN, 58:00-59:00); (Pros. Ex. 8, 27 JUL, 21:05-24:30); (Def. Ex. D, Part 1 of 3, 1:00:10-1:04:30). But, after hours of SA [REDACTED] repeatedly claiming appellant “failed” a polygraph test and suggesting PFC [REDACTED] may have been unconscious, appellant eventually started



to doubt his own memory, surrendering his resistance and accepting SA [REDACTED] framing.

“I don’t know I guess I don’t know what to believe anymore,” he told Special Agent [REDACTED] “because this thing is telling me differently and I thought it came out a different way.” (Def. Ex. D, Part 2 of 3, 1:44:33). Special Agent [REDACTED] kept pressing appellant to change his story, telling him he might be remembering the sexual encounter the way he wanted it to be rather than the reality, in order to feel good about himself. (Def. Ex. D, Part 1 of 3, 2:41:50); (Def. Ex. D, Part 2 of 3, 1:21:30); (Def. Ex. D, Part 2 of 3, 1:33:10). “Maybe that’s what I’m doing to myself,” appellant acknowledged. “I was believing that but I guess my vitals are saying different.” (Def. Ex. D, Part 2 of 3, 1:21:15). After all, appellant conceded (after telling Special Agent [REDACTED] what he wanted to hear), “If the test says that’s not the truth then it’s not the truth. I’m not going to argue it.” (Def. Ex. D, Part 3 of 3, 2:27:44). “Well, I thought it was a certain way,” appellant said at the interview’s conclusion, “but I guess not.” (Def. Ex. D, Part 3 of 3, 3:08:30).

In MAJ [REDACTED] expert opinion, appellant was unable to resist SA [REDACTED] negative feedback. (R. at 681). This inability to resist was rooted in appellant’s mistaken belief that the polygraph machine knew and could scientifically detect the truth. (R. at 539, 688). Appellant trusted the machine over his own memory. (R. at 539-40).

This unwavering faith in a machine was due in part to his belief that the polygraph knew the truth about his same-sex experimentation in high school. (R. at 542-43). Appellant had denied engaging in this consensual and constitutionally protected behavior because SA ■■■ told him that homosexuality is a form of sexual deviancy (and presumably a predictive precursor to committing sexual assault for purposes of the polygraph). (Def. Ex. D, Part 1 of 3, 1:14-1:16); (Def. Ex. D, Part 1 of 3, 1:55:25-2:11:43). When same-sex intimacy was described that way, of course appellant denied having done it. Yet, when SA ■■■ told appellant the machine showed he was not being truthful on the noncriminal sexual deviancy questions, appellant falsely deduced that the polygraph must be accurate and had uncovered the actual truth, despite what his own memory told him. (Def. Ex. D, Part 1 of 3, 2:54:18). If the machine knew about his same-sex experimentation, it must also know what exactly he and PFC ■■■ did that night. Appellant concluded his memory must have been wrong.

Spurred on by SA ■■■ not-so-subtle suggestions, appellant changed his story to conform to the polygraph results. “I really do feel like that’s what I say is how it went,” appellant told Special Agent ■■■ “but if it’s saying not then, alright then, I’m wrong.” (Def. Ex. D, Part 3 of 3, 2:27:15). “The test doesn’t know what happened that night,” Special Agent ■■■ countered. (Def. Ex. D, Part 3 of 3, 2:36:00). Appellant insisted, “It determines it.” (Def. Ex. D, Part 3 of 3, 2:36:04).

Appellant's steadfast belief that the machine could divine the truth led him to contort his story to match its results. This false conclusion cast a dark pall over all of his post-polygraph statements. They are not his memories. Instead, they are the product of appellant's naïve belief in a machine's infallibility and an overzealous agent's suggestions. The court should not believe these statements, and without them this conviction must be overturned.

***2. The Numerous Other Risk Factors in Appellant's Interrogation Further Erode His Post-Polygraph Statements' Trustworthiness.***

If there is even one risk factor for a false confession present during an interrogation, that increases a person's likelihood of making an unreliable statement. (R. at 695). In appellant's case, there were *several* situational and dispositional risk factors that helped produce this false confession.

The most obvious situational risk factors in this case are the interview's length and appellant's struggle to stay awake. The polygraph interview was roughly ten-and-a-half-hours long. (Def. Ex. D; R. at 683-84).

Appellant's exhaustion during the interrogation is apparent, which is another risk factor. (R. at 684). He constantly yawned and struggled to stay awake—even during the polygraph examination. (R. at 717); (Def. Ex. D, Part 1 of 3, 2:12:20); (Def. Ex. D, Part 1 of 3, 2:20:40); (Def. Ex. D, Part 2 of 3, 1:17:15); (Def. Ex. D, Part 3 of 3, 0:10). Major [REDACTED] explained sleep deprivation is another risk factor

because it reduces cognitive function and impairs decision making and could lead to a false confession. (R. at 684).

Alcohol use and isolation are other situational risk factors present in this case. (R. at 685-90). Appellant told SA [REDACTED] his memory of the night in question was hazy because he was intoxicated. (Def. Ex. D, Part 1 of 3, 2:51.40). Of course, while SA [REDACTED] adopted PFC [REDACTED] claim that she could not remember due to alcohol, he completely rejected appellant's similar claim. Intoxication causes memory to be vulnerable to error, MAJ [REDACTED] testified, because there is a potential for a gap in memory and a natural inclination to fill in that gap. (R. at 689-90).

Isolation is also a risk factor because it increases a person's stress in the situation. (R. at 688). Here, appellant was kept inside a windowless room for several hours, often alone, without his phone or a way to contact friends or family, and had to be escorted to leave the room just to use the restroom. (R. at 688).

The interrogation techniques of minimization, maximization, and theme development are also concerning situational risk factors. Special Agent [REDACTED] engaged in minimization, offering a justification or permission for appellant to confess his alleged crime by stressing appellant was a young man with a high libido, PFC [REDACTED] was flirting with him, and they were both drunk. (Def. Ex. D, Part 1 of 3, 3:05:50-3:09); (Def. Ex. D, Part 1 of 3, 3:23:55); (R. at 685-86). Special

Agent [REDACTED] also used maximization to pressure appellant to confess by stressing the command hated liars. (Def. Ex. D, Part 1 of 3, 3:10-3:12); (R. at 686). Finally, Special Agent [REDACTED] used theme development to weave in this idea throughout the interview that either appellant made a mistake or he was a sexual deviant. (Def. Ex. D, Part 1 of 3, 26:24-30:30); (Def. Ex. D, Part 1 of 3, 3:05:50-3:10); (Def. Ex. D, Part 1 of 3, 3:23-24); (Def. Ex. D, Part 2 of 3, 1:26:25); (R. at 686-87). Under this formulation, appellant's innocence was not an option.

Finally, the dispositional risk factors of appellant's abnormal suggestibility (discussed above), compliance in the interview room, and young age, further erode the trustworthiness of these statements.

By the point appellant started writing his statement, as MAJ [REDACTED] observed, appellant was exhausted and showing signs of distress and hopelessness. (R. at 671-72). He accepted SA [REDACTED] direction to start his written statement by explaining why he gave a false official statement. (Def. Ex. D, Part 2 of 3, 2:05:51); (Pros. Ex. 2, p. 1). Even when appellant drifted from the interrogator's narrative by suggesting he didn't notice PFC [REDACTED] was unconscious, SA [REDACTED] made sure to interject, and appellant meekly complied and changed his statement. (Def. Ex. D, Part 2 of 3, 2:28:44-2:29:25); (Pros. Ex. 2, p. 2).

Appellant's youth is yet another dispositional risk factor. At the time of the interrogations he was only twenty years old. (R. at 671); (Pros. Ex. 7). As MAJ

█████ explained, one study found that of 125 false confessions, 63% of those were from people under the age of twenty-five. (R. at 670).

Appellant's conviction for Specification 1 of Charge I rises and falls on the veracity of his post-polygraph statements. PFC █████ never testified. Nor did the government introduce any of her statements. Rather, the government anchored its entire case to appellant's unreliable post-polygraph statements.

Appellant was a naïve young man, who, while struggling to stay awake, endured a ten-and-a-half-hour long interrogation about a sexual encounter he'd had seven months prior, the specifics of which he admitted were hazy because he was drinking that night. His high suggestibility left him especially vulnerable to negative feedback. He truly, albeit mistakenly, believed that a polygraph machine could infallibly ascertain the truth. When SA █████ repeatedly told appellant he failed the test, and foot-stomped the "truth," appellant believed the machine rather than his own memories. He adopted SA █████ insinuations that PFC █████ was unconscious as fact. Facing a growing hopelessness and anxiety after over five hours of interrogation, appellant complied with SA █████ suggestions for a written statement. He began the statement just the way his interrogator suggested: conveniently laying out the elements of a false official statement. If a portion of his written statement threatened the government's narrative, appellant acceded to his interrogator's objection and changed it.

For all these reasons, appellant's post-polygraph statements are untrustworthy, incorrect, and should not be believed. Because these statements are false, the sexual assault conviction they prop up must not stand. Therefore, this court should set aside and dismiss Specification 1 of Charge I.

**B. Appellant's Conviction for Specification 1 of Charge III is Factually Insufficient**

A false official statement conviction requires the accused to have made the statement with an intent to deceive. UCMJ art. 107(a). The problem here is that appellant did not have that intent. When he told the first CID agent who interrogated him, SA ■■■ that PFC ■■■ gave him oral sex and then got on top of him, he believed those statements were true. (R. at 866). That is because they were his true and honest memories of what occurred that night.<sup>4</sup>

The government used appellant's post-polygraph statements to secure the false official statement conviction. But, as discussed at length above, these statements are unreliable, false, and should carry no weight. Without this evidence, the government cannot establish appellant's intent. Therefore, this court should set aside and dismiss Specification 1 of Charge III.

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<sup>4</sup> A conviction under Article 107(a) also requires the statements to be false and the accused to know them to be false at the time of making them. Here, in addition to appellant's lack of intent to deceive, the statements themselves were also true. Appellant's conviction is insufficient because the government failed to prove three of the four required elements of this offense.

## **II. WHETHER DILATORY POST-TRIAL PROCESSING WARRANTS RELIEF.**

### **Facts Relevant to Assignment of Error**

Appellant's trial concluded on 18 June 2021. (R. at 879). The convening authority approved the findings and sentence in appellant's case on 16 July 2021. (Action). Ten days later, the military judge entered judgment. (Judgment of the Court). On 20 December 2021, the trial counsel completed his precertification review. (Trial Counsel Precertification Review). On 17 January 2022, the military judge authenticated the record. (Authentication of the Record of Trial in the Case of Christian G. Alvarado, Private First Class). On 20 January 2022, the court reporters finished certifying the record of trial and transcript. (Court Reporter Certification of Record of Trial and Transcript). On 8 February 2022, this court docketed this case. (Referral and Designation of Counsel). Between final adjournment and docketing 235 days elapsed, all attributable to the government.

### **Standard of Review**

Whether an appellant has been deprived of his due process right to a speedy appellate review is a question of law reviewed de novo. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).



## Law

A convicted soldier's right to due process includes a timely review and appeal of his conviction. *United States v. Toohey*, 63 M.J. 353, 356 (C.A.A.F. 2004). “[D]ilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice.” *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38 at \*4 (Army Ct. Crim. App. 10 Feb. 2020) ([sum. disp.](#)) (quoting *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001)).

Under the Military Justice Act of 2016,<sup>5</sup> this court finds delay presumptively unreasonable when more than 150 days elapses between final adjournment and docketing. *United States v. Brown*, 81 M.J. 507, 510 (Army Ct. Crim. App. 2021).

When there is a presumptively unreasonable delay, this court conducts a due process review by analyzing the four factors set out in *Barker v. Wingo*, 407 U.S. 514 (1972): “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice.” *Moreno*, 63 M.J. at 135 (C.A.A.F. 2006). No one factor is dispositive. *Id.* at 136.

Even if this court does not find a due process violation, it has the authority under Article 66, UCMJ, “to tailor an appropriate remedy, if any is warranted, to

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<sup>5</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

the circumstances of the case.” *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Intervention is necessary when “the convening authority fails to grant relief in his action or the staff judge advocate fails to document an acceptable explanation for the untimely post-trial processing.” *Bauerbach*, 55 M.J. at 507.

### **Argument**

This case is unlike many other post-trial delay claims. While the government no doubt took too long to process this case, without even an attempt at an explanation, the prejudice to appellant is much more pronounced than most similar cases. Put simply, appellant was convicted of a crime he did not commit, based on faulty, pseudo-scientific evidence and an overbearing CID interrogator. Sentenced to eighteen years of confinement, every extra day appellant waits in jail for his case’s resolution is a denial of justice. As such, the *Barker* factors weigh in appellant’s favor. Even if this court finds no due process violation occurred, *Tardif* relief is still appropriate in this case.

#### **A. Post-Trial Relief is Warranted Under the *Barker* factors and *Moreno*.**

##### ***1. Length of Delay***

The delay between final adjournment and docketing at this court was presumptively unreasonable, as 235 days elapsed, all of which the government is responsible for. *Brown*, 81 M.J. at 510. This factor favors appellant.

## ***2. Reasons for the Delay***

The second *Barker* factor also weighs in appellant's favor because the delay in this case is wholly unexplained. None of the post-trial documents even acknowledge the delay—much less provide a justification.

## ***3. Appellant's Assertion of His Right to Timely Review and Appeal***

Appellant did not make a speedy post-trial request. Nonetheless, this is just one, non-dispositive, factor in the analysis and one that CAAF has found only “slightly” weighed against an appellant. *Arriaga*, 70 M.J. at 57; *see also United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004). In light of the 2019 changes to the post-trial processing rules, this factor should weigh neither in favor of nor against appellant. Under the current post-trial processing system, trial defense counsel must submit matters for consideration to the convening authority faster than previously required. Thus, appellants will almost never be aware of any actual or potential post-trial delay when their trial defense attorney submits their post-trial matters and subsequently terminates their representation.

## ***4. Prejudice***

In *Moreno*, the CAAF adopted a modification of the *Barker* speedy trial prejudice factor analysis for post-trial delay. Under this approach, prejudice is assessed in light of three interests: “(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted

awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Moreno*, 63 M.J. at 138-39 (quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981)).

In this case, both of the first two forms of prejudice are present. Because of the government's inability to promptly process appellant's record, he was forced to wait to bring the meritorious issue raised in the first assignment of error to this court. This assignment of error, if successful, would result in half the specifications and charges being set aside and a significant sentence reduction. As a result, the government encroached upon appellant's due process rights by delaying this case's transmission, leading to oppressive incarceration as well as well as the heightened degree of anxiety one would expect of someone convicted of a crime they did not commit. Therefore, this factor heavily favors appellant.

Based on the *Barker* factors, appellant deserves sentence relief for the government's failure to timely process his case and the resulting due process violation.

**B. Even if this Court Finds No Due Process Violation Occurred, *Tardif* Relief is Appropriate in this Case.**

Alternatively, appellant requests that this court exercise its power under Article 66 and *Tardif* to provide sentence relief in his case. The government failed to provide "an acceptable explanation for the untimely post-trial processing," or

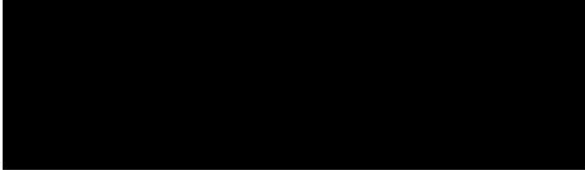
any reason at all. *Bauerbach*, 55 M.J. at 507. This court should not sanction this disregard for the post-trial processing timeline and should respond by granting sentence relief in this case.

### **Conclusion**


Wherefore, appellant respectfully requests this court provide the requested relief.



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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically submitted to the  
Army Court and Government Appellate Division on 20 September 2022.



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