

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,  
Appellee

**BRIEF ON BEHALF OF  
APPELLEE**

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, 8 June, and 14–18  
June 2021, before a general court-  
marital convened 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**

**Assignment of Error I<sup>1</sup>**

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

**Assignment of Error II**

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

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<sup>1</sup> The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

## Statement of Case

On 18 June 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of false official statement, two specifications of sexual assault, and one specification of aggravated assault in violation of Articles 107, 120, and 128, Uniform Code of Military Justice; 10 U.S.C. §§ 107, 920, and 928 (2019) [UCMJ]. (Charge Sheet; R. at 879).<sup>2</sup>

The military judge sentenced appellant to be confined for eighteen years and three months and a dishonorable discharge.<sup>3</sup> (R. at 930). On 16 July 2021, the convening authority approved the findings and sentence. (Action). On 26 July 2021, the military judge entered judgment. (Judgment).

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<sup>2</sup> The military judge acquitted appellant of Specification 2 of Charge I (Sexual Assault), Specification 2 of Charge III (False Official Statement), Specifications 1 and 2 of Charge IV (Sexual Assault), and Specifications 1 and 2 of Charge V (Sexual Assault and Abusive Sexual Contact). (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 to six years confinement for Specification 1 of Charge, I; twelve years confinement for Specification 3 of Charge I; three years confinement for The Specification of Charge II; and three months confinement for Specification 1 of Charge III. (R. at 930). 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).

## Statement of Facts

### **A. Appellant sexually assaulted PFC [REDACTED] when she was unconscious.**

On or about 30 December 2019, appellant arrived to his barracks room with PFC [REDACTED] and PFC [REDACTED]. (R. at 129). At the time, SPC [REDACTED] and appellant were roommates. (R. at 129). SPC [REDACTED] testified that when they arrived to the room, he could tell that they all were intoxicated—PFC [REDACTED] appeared to be more intoxicated than the others. (R. at 130). Specifically, PFC [REDACTED] was “very sluggish when she first entered the room. She was like throwing herself kind of like to the wall to get balance holding onto the table. Like she was definitely intoxicated.” (R. at 130–31). She needed help walking, and SPC [REDACTED] could not understand her because she was slurring her words. (R. at 131). SPC [REDACTED] observed appellant “hold [PFC [REDACTED] up” supporting a portion of her weight to assist her out of the room. (R. at 131). SPC [REDACTED] testified that appellant later disclosed to him that he “piped [PFC [REDACTED] down, like fucked her down...” (R. at 132). On 28 July 2020, appellant waived his Article 31 rights and provided a written sworn statement wherein he admitted that PFC [REDACTED] passed out halfway through their sexual encounter, and he continued to have sex with PFC [REDACTED] after she passed out because “he was in the moment.” (Def. Ex. D; 28 July 2020; 2:07:27; Pros. Ex. 2, pg. 2).

**B. Appellant lied during his interviews with the Criminal Investigation Command (CID).**

On 11 June 2020, 27 July 2020, and 28 July 2020, appellant waived his Article 31 rights, and agreed to be interviewed by the Fort Bliss, Criminal Investigation Command (CID). (R. at 144, 171; Pros. Ex. 8; Def. Ex. D). On 11 June 2020, Special Agent (SA) [REDACTED] interviewed appellant. (R. at 144; Pros. Ex. 8). During the interview, appellant admitted that he, PFC [REDACTED] and PFC [REDACTED] were all intoxicated, and claimed he had consensual sex with PFC [REDACTED]. (Pros. Ex. 8; 11 June 2020; 40:19, 56:52). Specifically, appellant claimed PFC [REDACTED] sat on her bed, they rubbed on each other, had sex in the missionary and doggy-style position, she got on top, and they performed oral sex on each other. (R. at 145; Pros. Ex. 8; 11 June 2020; 58:16–59:01). Appellant also claimed they had sex “all over” PFC [REDACTED] room, to include the kitchen area. (Pros. Ex. 8; 11 June 2020; 58:16–59:01). Appellant agreed to undergo a polygraph examination. (Pros. Ex. 8; 11 June 2020; 1:03:09).

On 27 July 2020, SA [REDACTED] conducted a second interview with appellant. (R. at 801; Pros. Ex. 8). During this interview, appellant stated he and PFC [REDACTED] only had sex on PFC [REDACTED]'s bed. (Pros. Ex. 8; 27 July 2020; 23:58, 24:48). He also stated PFC [REDACTED] asked him, “Do you like that baby?” during their sexual encounter. (Pros. Ex. 8; 27 July 2020; 30:51, 31:29).

On 28 July 2020, SA [REDACTED] conducted an interview with appellant. (R. at 174–75). Initially, appellant told SA [REDACTED] that his sexual encounter with PFC [REDACTED] began with kissing and fondling, PFC [REDACTED] performed oral sex on appellant, she asked appellant to remove her shorts, and they proceeded to have sex in the missionary and doggy-style position. (R. at 175; Def. Ex. D). During the same interview, appellant told SA [REDACTED] that the doggy-style position never occurred, PFC [REDACTED] never made the comments to remove her clothing, and they did not engage in oral sex. (R. at 175; Def. Ex. D; 28 July 2020).

Additional facts are incorporated below.

### **Assignment of Error I**

#### **WHETHER SPECIFICATION 1 OF CHARGE I AND SPECIFICATION 1 OF CHARGE III ARE FACTUALLY SUFFICIENT.<sup>4</sup>**

#### **Additional Facts**

On 28 July 2020, appellant arrived at the Fort Bliss, Texas CID Office for a polygraph examination with SA [REDACTED] (R. at 213). This was appellant's third time at CID, as he had given his prior two verbal statements on 11 June 2020 and 27 July 2020 with SA [REDACTED] (Pros. Ex. 8). The polygraph and post-polygraph interview

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<sup>4</sup> Appellant's assigned error specifically addresses factual sufficiency, not the voluntariness of his confession. *See US v Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

were recorded. (Def. Ex. D).<sup>5</sup> The total length of the interview was approximately ten and a half hours, which includes the timeframe when appellant wrote his sworn statement. (Def. Ex. D; R. at 213). The polygraph examination took place in a room that is “smaller than the other interview rooms.” (R. at 219). During the polygraph examination, the door was closed but unlocked. (R. at 221).

At the start of the interview, SA [REDACTED] conducted brief rapport building with appellant. (R. at 220–22). SA [REDACTED] then explained the order of events for the day and what to expect. (R. at 223). Following completion of the necessary paperwork, SA [REDACTED] and appellant discussed his fitness to undergo a polygraph as well as his background and how it related to the polygraph. (Def. Ex. D). Appellant did not provide any responses that would indicate he was not able to undergo the polygraph examination. (R. at 222). Appellant was allowed to take comfort breaks inside and outside of the polygraph examination room, and took naps during some of the breaks. (R. at 249, 81). Although appellant stated he did not want any food, SA [REDACTED] still brought him something to eat. (R. at 281). SA [REDACTED] also asked appellant if he wanted to leave, and appellant stated he wanted to “finish and stay.” (R. at 283).

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<sup>5</sup> The military judge granted the defense request to enter Defense Exhibit D into evidence, which is appellant’s entire interview with SA [REDACTED], to include multiple polygraph examinations. (R. at 209). The military judge noted on the record that the results of the polygraph examination are not relevant, and would not be considered. (R. at 210).

After SA [REDACTED] reviewed the result of appellant's polygraph examination, he informed appellant that he did not pass the test. (Def. Ex. D; 28 July 2020; 2:33:24; R. at 250). SA [REDACTED] asked appellant why he thought he was having problems passing the polygraph examination. (Def. Ex. D; 28 July 2020; 2:33:24; R. at 250). In response, appellant still claimed his sexual encounter with PFC [REDACTED] was consensual; however, he may have exaggerated during the polygraph examination in an attempt to match what he told SA [REDACTED]. (Def. Ex. D; 28 July 2020; 3:20:23). Appellant then claimed [REDACTED] did not make a comment while they were having sex, and she was not on top during the sexual encounter. (Def. Ex. D; 28 July 2020; 3:28:15). During the same interview, appellant provided a written sworn statement wherein he admitted that he removed PFC [REDACTED] shorts, the two had sex in the missionary position, and PFC [REDACTED] passed out halfway through the sexual encounter. (Def. Ex. D; 28 July 2020; 2:07:27; Pros. Ex. 2, pg. 1–2). Appellant further acknowledged that he knew PFC [REDACTED] had passed out because her moans got softer, and she did not respond. (Def. Ex. D; 28 July 2020; 2:10:27; Pros. Ex. 2, pg. 2). Appellant stated he continued to have sex with PFC [REDACTED] after she passed out because he was “in the moment.” (Def. Ex. D; 28 July 2020; 2:10:27; Pros. Ex. 2, pg.2).

## **Standard of Review**

Questions of factual sufficiency are reviewed de novo. *United States v. Trigueros*, 69, M.J. 604, 612 (Army. Ct. Crim. App. 2010)

### **Law**

#### **A. Sexual Assault.**

In order to sustain a conviction for sexual assault, as alleged in Specification 1 of Charge II, the evidence must prove beyond a reasonable doubt that: the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva by the penis; (2) that the accused did so when the other person was unconscious; and (3) that the accused knew or reasonably should have known that the other person was unconscious. *Manual for Courts-Martial, United States*, (2019 ed.) [MCM], pt. IV, ¶ 60.b.(2)(B) (2019).

#### **B. False Official Statement.**

In order to sustain a conviction for false official statement, in violation of Specification 1, Charge III, the evidence must prove beyond a reasonable doubt that: the accused, (1) with the intent to deceive; (2) made an official statement; (3) knowing it to be false. MCM, pt. IV, ¶ 41.a.(2)(2019).

#### **C. Factual sufficiency.**

The 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. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). In its factual sufficiency review, this court “in considering the record . . . may weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard witnesses.” Article 66(d)(1), UCMJ. When assessing the credibility of witness testimony, “[o]ur system of justice rests on the general assumption that the truth is not determined merely by the number of witnesses on each side of the controversy . . . [t]he touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity.” *Weiler v. United States*, 323 U.S. 606, 608 (1945). Regarding the quality of witness testimony, this court has stated:

[M]uch is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court reporter notes may sometimes reflect a witness’ gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court martial.

*United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127, at \*12 (Army. Ct. Crim. App. 29 Feb. 2016) (mem. op.).

Further, “to say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious.”

*Id.* “Put differently, we are required to make credibility determinations on appeal, but those determinations . . . recognize the trial court’s superior position in making those determinations. Our assessment of evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint.” *United States v. Feliciano*, ARMY 20140766, 2016 CCA LEXIS 512, at \*8 (Army Ct. Crim. App. 22 Aug. 2016) (mem. op.) (citing *Washington*, 57 M.J. at 399). Finally, a military judge, sitting alone, is presumed to know the law and follow it, absent clear evidence to the contrary. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). This court has recognized that the degree of deference afforded to the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015); *see also United States v. Jimenez-Victoria*, 75 M.J. 768, 771 (Army Ct. Crim. App. 2012 (affirming where the findings turned on witness credibility)).

### **Argument**

#### **A. Appellant’s conviction for Specification 1 of Charge I (Sexual Assault) is factually sufficient.**

The evidence at trial proved beyond a reasonable doubt that appellant sexually assaulted PFC [REDACTED] while she was unconscious. SPC [REDACTED] testimony about PFC [REDACTED] level of intoxication shortly before the sexual assault occurred; coupled with appellant’s confession provides ample evidence to find the conviction factually sufficient. (R. at 130–31; Pros. Ex. 2.) Moreover, Appellant’s contention

that PFC [REDACTED] fabricated the allegations because he refused to sell drugs for her is unsupported by the weight of the evidence, and was considered and rejected by the military judge as factfinder. (R. at 522–25, 530). Accordingly, this court can be convinced beyond a reasonable doubt of appellant’s guilt.

As a threshold matter, appellant readily admitted to [REDACTED], and at trial that he had sexual intercourse with [REDACTED] (R. at 522–25; Pros. Ex. 1; Def. Ex. D). Thus, the only issue in this case is whether PFC [REDACTED] was unconscious when the sexual encounter occurred. Although appellant admitted during his post polygraph statement that he had continued to have sex with PFC [REDACTED] after she was passed out because he was “in the moment,” (Pros. Ex. 2), appellant now argues—much as he did at trial—that his post polygraph 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. (Appellant’s Br. 19). Appellant’s claims are not supported by the record.

**1. Appellant did not have a high suggestibility, and his post-polygraph statements are reliable.**

Appellant incorrectly states that his sexual assault conviction rests solely on his post-polygraph statements. (Appellant’s Br. 19). Contrary to appellant’s assertion, [REDACTED] testified about PFC [REDACTED] level of intoxication shortly before appellant sexually assaulted PFC AG (R. at 130–34). [REDACTED] testified that appellant, PFC [REDACTED]

and PFC [REDACTED] were intoxicated when they arrived, and PFC [REDACTED] appeared to be more intoxicated than the others. (R. at 130). He observed that PFC [REDACTED] was “very sluggish,” she needed help walking, and she was slurring her words. (R. at 130–31). SPC [REDACTED] also observed appellant “hold [PFC [REDACTED]] up” supporting a portion of her weight to assist her out of the room. (R. at 131). Although no one observed the sexual encounter between appellant and PFC [REDACTED] this circumstantial evidence corroborates appellant’s confession that he had sex with PFC [REDACTED] after she passed out. (Pros. Ex. 2). . *See United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2018) (noting that “the government is free to meet its burden of proof with circumstantial evidence”). Furthermore, our superior court “recognize[s] that the ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private.” *Id.* Accordingly, the evidence establishes beyond a reasonable doubt that appellant penetrated PFC [REDACTED] vulva with his penis while she was unconscious. Appellant relies upon his interaction with SA [REDACTED] and MAJ [REDACTED] testimony to support his position that he had a high suggestibility that undercut the reliability of his post-polygraph statements. (Appellant’s Br. 20–21).

Appellant’s claim fails for several reasons.

First, appellant’s argument that he was influenced by suggestibility is belied by the evidence. MAJ [REDACTED] forensic psychologist, administered the Gudjonsson

Suggestibility Scale (GSS) to appellant.<sup>6</sup> (R. at 666). MAJ [REDACTED] testified that appellant was unable to effectively resist SA [REDACTED]'s relentless feedback; which ultimately increased the likelihood of appellant making an unreliable statement. (R. at 681–89). Contrary to MAJ [REDACTED]'s testimony, the record clearly shows that appellant lied throughout his CID interviews and provided several inconsistent versions of what took place before the polygraph examination was administered. (Pros. Ex. 8). Initially appellant told SA [REDACTED] that he had consensual sex with PFC [REDACTED] “all over” her room and in various positions. (R. at 145; Pros. Ex. 8; 11 JUN 2020; 56:52, 57:12). During the second interview with SA [REDACTED] appellant stated he and PFC [REDACTED] only had sex on PFC [REDACTED] bed. (Pros. Ex. 8; 27 July 2020; 23:58, 24:48). He further added that PFC [REDACTED] asked him, “Do you like that baby?” during their sexual encounter. (Pros. Ex. 8; 27 July 2020; 30:51, 31:29). These inconsistent statements had nothing to do with any interactions appellant had with SA [REDACTED] during the polygraph examination.

Second, after appellant agreed to undergo a polygraph examination, he continued to give a different version of what took place. Appellant told SA [REDACTED] that his sexual encounter with PFC [REDACTED] began with kissing and fondling, PFC [REDACTED] performed oral sex on appellant, she asked appellant to remove her shorts, and they

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<sup>6</sup> The GSS is a standard diagnostic tool that measures the extent to which someone will yield or give into leading questions. (R. at 666).

proceeded to have sex in the missionary and doggy-style position. (R. at 175).

After the polygraph examination was administered, appellant still claimed his sexual encounter with PFC [REDACTED] was consensual; however, he may have exaggerated during the polygraph examination in an attempt to match what he told SA [REDACTED] (Def. Ex. D; 28 July 2020; 3:20:38). During the same interview, appellant told SA [REDACTED] that the doggy-style position never occurred, she never made the comments to remove her clothing, and that they did not engage in oral sex. (R. at 175; Def. Ex. D; 28 July 2020; 3:28:15).

Third, appellant typed the narrative and answers to his written sworn statement, and provided information that was never suggested by SA [REDACTED] (R. at 265–68; Def. Ex. D; 28 July 2020; 2:07:27; Pros. Ex. 2, pg. 2). Specifically, appellant told SA [REDACTED] that PFC [REDACTED] was “intoxicated, she continued to drink, and halfway everything changed for her.” (R. at 287; Def. Ex. D; 27 July 2020; 1:44). Once prompted, appellant clarified that PFC [REDACTED] changed “[h]alfway during the sex.” (R. at 287). SA [REDACTED] had not made any suggestions that PFC [REDACTED] had changed halfway through the sexual encounter. (R. at 287; Def. Ex. D. 27 July 2020; 60:44). Appellant provided this information on his own accord. Moreover, SA [REDACTED] did not suggest that PFC [REDACTED] moans got softer after he asked appellant how he knew she was passed out. (R. at 288; Def. Ex. D; 28 July 2020; 1:47). As such,

appellant's claim that he had a high suggestibility, and his post-polygraph statements are not reliable lack merit.

**2. Appellant's post-polygraph statements were not eroded by numerous other risk factors.**

Appellant argues that there were several situational and dispositional risk factors that helped produce his false confession. (Appellant's Br. 23). Appellant relies upon the fact that the entire polygraph interview was roughly ten and a half hours, and his claim that he was sleep deprived, isolated, and appellant's use of alcohol on the night in question to support his position. (Appellant's Br. 23–24). Appellant's claim falls flat for several reasons.

Although appellant's interview spanned over ten hours, appellant was provided breaks inside and outside of the polygraph examination room, and took naps during some of the breaks. (R. at 249, 81). Appellant stated he ate breakfast that morning, and SA [REDACTED] brought him something to eat. (Def. Ex. D; 28 July 2020; 24:48; R. at 281). SA [REDACTED] also asked appellant if he wanted to leave, and appellant stated he wanted to "finish and stay." (R. at 283). During the interview, SA AP never required the use of rank or military customs and courtesies. (Def. Ex. D.; 28 July 2020). He consistently called appellant by his first name. (Def. Ex. D; 28 July 2020). At no point during the interview did SA [REDACTED] physically touch appellant, threaten appellant, or invade his personal space in any way. (Def. Ex. D; 28 July 2020). Furthermore, appellant stated he was treated fairly during

the interview, and he did not feel that he was deprived of anything prior to and/or during the interview. (Pros. Ex. 2, pg. 2).

Appellant relies upon his alleged high suggestibility, compliance in the interview room, and young age to challenge the trustworthiness of his post-polygraph statements. (Appellant's Br. 25). Contrary to appellant's assertion, appellant made the same argument at trial, and the military judge did not find him credible. (R. at 531–545, 651–52). Specifically, during trial, appellant told the military judge that SA [REDACTED] asked him if PFC [REDACTED] was unconscious. (R. at 652). Appellant testified that after SA [REDACTED] asked this question, he began to believe that PFC [REDACTED] was at some point unconscious. (R. at 652). Here, the military judge was in the best position to assess appellant's credibility, and did not find appellant credible—neither should this court. *See United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995) (“In cases where witness credibility plays a critical role in the outcome of trial, this court should hesitate to second-guess the trial court's findings.”). Consequently, appellant's claim that his post-polygraph statements are “untrustworthy, incorrect, and should not be believed” should be denied. (Appellant's Br. 27).

**B. Appellant's conviction for Specification I of Charge III (False Official Statement) is factually sufficient.**

The totality of the evidence proves beyond a reasonable doubt that appellant knew he was providing a false official statement, with the intent to deceive when



he told SA [REDACTED] that PFC [REDACTED] “went down on me, then she got on top of me” or words to that effect. (Charge Sheet, Pros. Ex. 1). The government agrees with appellant’s position that a truthful statement is not a false official statement; however, those are not the facts presented in this case. (Appellant’s Br. 27). During appellant’s CID interviews, he consistently changed his version of events. *supra* pp. 4–5. Appellant’s version of events changed from having sex “all over” PFC [REDACTED] room—to only having sex on her bed—in various positions—to include PFC [REDACTED] being on top. (Pros. Ex. 8; 11 June 2020; 58:16–59:01; Pros. Ex. 8; 27 July 2020; 23:58, 24:48). Appellant’s version of events then elevated to PFC [REDACTED] making sexual comments during the sexual encounter—all different versions before the polygraph examination even took place. (Pros. Ex. 8; 27 July 2020; 30:51, 31:29). Furthermore, 1SG [REDACTED], appellant’s First Sergeant, testified that appellant “struggled with telling the truth.” (R. at 812)<sup>7</sup>.

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<sup>7</sup> Appellant’s lack of credibility is also illustrated through his direct examination. Appellant testified that PFC [REDACTED] approached him to sell drugs after they had sex, and he refused. (R. at 522–25). After appellant’s refusal, appellant testified that PFC [REDACTED] came to the CQ desk and stated, “I’m going to fuck [appellant’s] life up.” (R. at 530). Appellant never claimed PFC [REDACTED] fabricated the allegations against him because he refused to sell drugs for her during his CID interviews. (Pros. Ex. 8; 11 June 2020; 40:19). This motive to fabricate did not surface until appellant testified at the court-martial. (R. at 522–25). During his recorded interview, appellant told SA [REDACTED] that he had no interactions with PFC [REDACTED] between the time of the sexual assault and the interaction at the CQ desk. (R. at 801).

Ultimately, SPC [REDACTED] testified about PFC [REDACTED] level of intoxication shortly before she left to have sex with appellant. (R. at 130–31). The military judge had the opportunity to evaluate SPC [REDACTED] and appellant’s testimony firsthand, and did not find appellant credible—neither should this court. (R. at 522–654); *see United States v. Nicola*, 78 M.J. 223, 227 (C.A.A.F. 2019) (holding that “a trier of fact may disbelieve the accused’s testimony and then use the accused’s statements as substantive evidence of guilt”). Thus, the members of this court should “themselves [be] convinced of appellant’s guilt beyond a reasonable doubt.” *Rosario*, 76 M.J. at 117 (quoting *Oliver*, 70 M.J. at 68). Therefore, this court should affirm appellant’s conviction for Specification 1 of Charge I and Specification 1 of Charge III because they are factually sufficient.

## **Assignment of Error II**

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

#### **Additional Facts**

##### **Post-Trial Processing.**

The military judge announced appellant’s sentence on 18 June 2021, and the court-martial adjourned. (R. at 879; Statement of Trial Results). On 16 July 2021, the convening authority approved the adjudged finding and sentence. (Action). On 26 July 2021, the military judge entered judgment. (Judgment). On 20 December 2021, the trial counsel completed the precertification review of the

record of trial. (Trial Counsel Precertification Review). On 17 January 2022, the military judge certified the record of trial. (Authentication). 20 January 2022, the court reporter certified the record of trial. (Court Reporter Certification).

On 8 February 2022, this court docketed appellant's case. (Docketing Notice). The total number of days from adjournment to docketing was 235 days. (Statement of Trial Results; Chronology).

### **Standard of Review**

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

### **Law and Argument**

There are two distinct analyses in addressing claims of post-trial delay: determining whether appellant suffered a due process violation under the Constitution and determining sentence appropriateness under Article 66(d)(1), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

#### **A. Fifth Amendment Procedural Due Process.**

Servicemembers convicted at courts-martial have a due process right to a timely review and appeal of their convictions. *Moreno*, 63 M.J. at 135.

Unreasonable delay in post-trial processing is presumed when “more than 150 days’ elapse between final adjournment and docketing with [the Army Court of Criminal Appeals].” *United States v. Brown*, 81 M.J. 507, 510 (Army Ct. Crim.

App. 2021).<sup>8</sup> This presumption triggers a four-factor analysis (*Barker* factors) that examines: “(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 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The four *Barker* factors must be balanced, and “no single factor [is] required to find that post-trial delay constitutes a due process violation.” *Id.* at 136 (citing *Barker*, 407 U.S. at 533). However, the *Barker* analysis is not required if this court determines that any due process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

Military Courts of Criminal Appeals (CCAs) will also further examine prejudice, one of the *Barker* factors, in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant’s anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing. *Moreno*, 63 M.J. at 138–39. The first sub-factor “is directly related to the success or failure of an appellant’s substantive appeal. If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay,

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<sup>8</sup> “The government asks this court to overturn *United States v. Brown*. See *United States v Winfield*, ARMY 20210092, argued on 12 January 2023 (en banc), decision pending.”

even though it may have been excessive.” *Moreno*, 63 M.J. at 139 (citing *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 1991)). Similarly, for the third sub-factor, the showing of prejudice “is directly related to whether an appellant has been successful on a substantive issue of the appeal and whether a rehearing has been authorized.” *Id.* at 140. The second sub-factor requires an appellant to “show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.” *Id.*

In situations where the appellant is unable to show they have suffered prejudice, “[the court] cannot find a due process violation unless the delay is so egregious as to ‘adversely affect the public’s perception of the fairness and integrity of the military justice system.’” *Brown*, 81 M.J. at 511 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Ashby*, 68 M.J. at 125. This analysis is “separate and distinct from the consideration of prejudice as one of the four *Barker* factors.” *Id.* Under this review, the court considers “the totality of the circumstances” based on the “entire record.” *Id.* The court “will not presume

prejudice from the length of the delay alone,” but instead requires “evidence of prejudice in the record.” *Id.*

## **B. Sentence Appropriateness.**

Absent a due process violation, this court next considers whether relief for excessive post-trial delay is warranted based on the CCA’s sentence appropriateness authority under Article 66(d), UCMJ. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Pursuant to Article 66(d)(2), UCMJ, a CCA may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record. Similarly, in conducting its sentence appropriateness review under Article 66(d), a CCA has “broad discretion to grant or deny relief for unreasonable or unexplained [post-trial] delay . . . .” *Ashby*, 68 M.J. at 124 (quoting *United States v. Pflueger*, 65 M.J. 127, 128 (C.A.A.F. 2004)). Therefore, even without a showing of actual prejudice, this court may also grant relief for “unexplained and unreasonable post-trial delay.” *Tardif*, 57 M.J. at 224 (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)).

When there is post-trial processing delay, this court looks to the totality of the circumstances to determine what sentence should be approved. *United States v. Garman*, 59 M.J. 677, 678 (Army Ct. Crim. App. 2003). There is no “bright-line time limit” for post-trial processing; rather, various factors such as the length

of the record, existence of post-trial processing errors, and failure to demand speedy post-trial processing. *Id.* at 681–82. Moreover, even “unacceptably slow” post-trial processing does not immediately render a sentence inappropriate. *Id.* at 683. This is a “highly case specific” review. *Simon*, 64 M.J. at 207.

### **Argument**

Appellant’s case exceeded the presumptive 150-day standard under *Brown*. 81 M.J. at 510. However, the government did not violate appellant’s due process rights because there was no prejudice. Further, under the totality of the circumstances, he deserves no relief under a sentence appropriateness analysis. Therefore, this court should affirm the findings and sentence as adjudged.

#### **A. The first and second *Barker* factors weigh in favor of appellant.**

From the date the military judge adjourned appellant’s court-martial to the date of docketing with this court, 235 days elapsed, exceeding the timeline provided in *Brown* by 85 days. 81 M.J. at 510; (R. at 118; Docketing Notice). Thus, the first factor weighs in favor of appellant. The second factor also weighs in appellant’s favor because the record contains no explanation for the delay. *Moreno*, 63 M.J. at 137.

#### **B. The third and fourth *Barker* factors weigh in favor of the government.**

Turning to the third *Barker* factor, appellant never demanded speedy post-trial processing. While this does not waive appellant’s speedy post-trial rights,

(*Moreno*, 63 M.J. at 138), the third *Barker* factor nevertheless favors the government. The Supreme Court in *Barker* stated succinctly: “We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied speedy trial.” *Barker*, 407 U.S. at 531. As such, this factor weighs in the government’s favor.

Regarding the fourth *Barker* factor, appellant fails to establish prejudice. Appellant claim the first two forms of prejudice are present in his case because appellant was forced to wait to bring the issue raised in the first assignment of error. (Appellant’s Br. 32). Appellant’s sexual assault and false official statement convictions, when considered along with his other convictions, does not meet the level of “particularized anxiety” as required in *Moreno*. *Moreno*, 63 M.J. at 140. In *Moreno*, the appellant was prejudiced by the requirement to register as a sex offender. *Id.* Here, in light of his other convictions, appellant was still required to register as a sex offender. As such, the fourth *Barker* factor weighs heavily in the government’s favor.

**C. The delay does not impugn the fairness or integrity of the military justice system.**

Appellant has failed to show that the delay was so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system” and overcome the absence of prejudice. *Brown*, 81 M.J. at 511 (citing *Toohy*, 63 M.J. at 362). Here, the government exceeded the timeline provided in



*Brown* by 85 days, but well within the eighteen months allowed for this court to render its opinion.

This court has tended to find post-trial delays between trial and convening authority action to be egregious under the *Toohey* standard when they were much greater in length than 235 days. *See Brown*, 81 M.J. at 511 (finding that 373 days between adjournment and docketing at ACCA was “not so egregious as to adversely affect the public's perception of our system's fairness and integrity”); *see also United States v. Arias*, 72 M.J. 501, 507 (Army Ct. Crim. App. 2008) (finding no public perception issue based on a post-trial processing timeline of 294 days). Appellant does not argue that a delay of 235 days is “egregious” under *Toohey*. As such, under the “difficult and sensitive balancing process,” the facts of this case show that appellant did not suffer a due process violation. *Moreno*, 63 M.J. at 145.

**D. Appellant does not merit relief under a sentence appropriateness analysis.**

Even where no due process violation occurs, this court must still determine “on the basis of the entire record” what sentence “should be approved.” UCMJ art. 66(d). Here, appellant’s sentence is appropriate in light of his crime and the maximum allowable punishment for his conviction.

Appellant sexually assaulted PFC [REDACTED] sexually assaulted and strangled VP, and lied during his interview with SA [REDACTED]. Appellant applied so much pressure to [REDACTED] throat that she could not breathe, her vision became blurry and dark, and her

face started to tingle. (R. at 457). After [REDACTED] succumbed to appellant strangling her, appellant proceeded to penetrate her vagina with his fingers. (R. at 458). Appellant's convictions permitted a maximum punishment of confinement for over sixty years. (Statement of Trial Results); MCM, App'x. 12, at A12-6. The military judge sentenced appellant to confinement for eighteen years and three months, and a dishonorable discharge—a small fraction of his total punitive exposure. (R. at 930).

Consequently, the post-trial delay in this case is unrelated to the appropriateness of appellant's sentence. In light of the seriousness of the offenses for which appellant was convicted, and the fact that the trial proceeding was not tainted by the post-trial delay, this court should affirm appellant's sentence. *See Garman*, 59 M.J. at 678 (noting that this court “look[s] to the totality of the circumstances of the post- trial process” when assessing whether relief is warranted).<sup>9</sup>

## **Conclusion**

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence and deny relief.



PAMELA L. JONES  
MAJ, JA  
Branch Chief, Government  
Appellate Division



CHRISTOPHER B. BURGESS  
COL, JA  
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**CERTIFICATE OF SERVICE, U.S. v. ALVARADO (20210368)**

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [REDACTED] [REDACTED] on the 18th day of January, 2023.

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