IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

DANIEL A. BENCH,
Master Sergeant (E-7),
United States Air Force,
Appellant.

USCA Dkt. No. 21-0341/AF

Crim. App. Dkt. No. ACM 39797

BRIEF ON BEHALF OF APPELLANT

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WHETHER LYING TO A WITNESS ABOUT APPELLANT'S PRESENCE IN THE COURTROOM TO SECURE TESTIMONY MATERIALLY PREJUDICES APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter "Air Force Court") reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2016).[1] This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

Master Sergeant (MSgt) Daniel A. Bench (hereinafter "Appellant") was tried by general court-martial before a panel of officer members at Whiteman Air Force Base, Missouri, on February 13, 2019, April 23, 2019, and May 13-17, 2019. Contrary to his pleas, the panel found Appellant guilty of two specifications of sexual abuse of a child—one specification for E.C. and one specification for B.C.—in violation of Article 120b, UCMJ; and one charge and one specification of indecent conduct, in violation of Article 134, UCMJ, for engaging in consensual sexual conduct with an

[1] References to the UCMJ, Military Rules of Evidence, and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.), except where noted otherwise.

adult woman in the presence of children. Joint Appendix (JA) at 302. Appellant was acquitted of another specification of alleged sexual abuse of E.C., in violation of Article 120b, UCMJ. *Id*. The members sentenced Appellant to confinement for 12 years, reduction to E-4, total forfeitures, and a dishonorable discharge. JA at 303.

The convening authority approved the sentence on October 10, 2019, and except for the dishonorable discharge, ordered the sentence executed. JA at 313-14. On May 24, 2021, the Air Force Court affirmed the findings and sentence. JA 002 024.

Statement of Facts

Background

Appellant and M.C. were married in October 2006.[2] JA at 090, 210. The couple's fraternal twins, B.C. (a girl) and E.C. (a boy), were born in 2010.[3] JA at 111, 211. Appellant moved out of the family home in December 2013, but remained married to M.C. until their divorce in April 2014. JA at 102, 112. Thereafter, Appellant and M.C. maintained joint legal custody of their children, who lived with their mother and spent every other weekend and one night a week at Appellant's Utah home. JA at 091, 213.

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[2] At the time of the charged offenses and Appellant's trial, M.C. was a Senior Master Sergeant in the U.S. Air Force Reserves. JA at 003 n.2, 087.

[3] The charge sheet refers to the children as B.B. and E.B., respectively. Like the Air Force Court, this brief uses the initials of their names at the time of trial. JA at 003 n.5.

For the most part, there were no problems with this custody arrangement for several years. JA at 102. An exception occurred a few weeks after Appellant's divorce to M.C. was finalized, when he introduced the twins to a new girlfriend, M.L. *Id*. M.C. was "[a] little distraught" that her children had met M.L., and questioned Appellant on "why he would do that." JA at 092. M.C. also asked whether Appellant had stayed in the same hotel room with the kids and M.L., and Appellant responded in the affirmative. JA at 224. Appellant further disclosed that he had been intimate with M.L. during the evening in question.[4] *Id*.

M.C. claimed that, following this hotel incident, E.C. began acting "very strange" and "doing things like trying to stick the corners of a blanket in his bum." JA at 092. Nevertheless, when M.C. responded to the event by seeking to modify their divorce decree, she did not request to limit Appellant's visitation or otherwise require supervised visits; rather, she merely asked the court to make each party wait until a relationship had lasted six consecutive months before introducing the children to a new romantic partner. *Id*. She also continued to permit the children to stay with their father

[4] Appellant and M.L. maintained that this consensual sex occurred in the early morning hours while the children—which included M.L.'s two boys and Appellant's daughter from a previous relationship—were asleep in a separate bed or on the floor. JA at 123-26, 214-17. However, other evidence suggested some of the children were awake. *See*, *e.g.*, JA at 097. The panel ultimately convicted Appellant for engaging in this conduct. JA at 302.

overnight. JA at 091, 102, 217-18.

Following two permanent changes of station, the first to Delaware and the second to Missouri, Appellant visited his children in Utah about twice a year for approximately 14 days apiece. JA at 091. E.C. suffered from autism and, due to his condition and the expense of transporting two children, Appellant agreed that he himself would travel for these visits. *Id*.

During one such visit in 2015, M.C. asked Appellant to babysit the twins at her house when she went out. JA at 093-94, 217-18. M.C. later claimed that upon her return, she found Appellant sleeping in B.C.'s bed. JA at 093, 099. M.C. further averred that B.C. started having nightmares in the months afterwards. JA at 093. However, M.C. apparently never suspected Appellant of indecent conduct, as neither she nor her daughter made any allegations against him at this time.[5] M.C. also continued to allow Appellant to see their children. JA at 219-20.

In September 2017, Appellant told M.C. that he was going to bring his new girlfriend to visit the twins. JA at 113. Despite Appellant having been in a relationship with this woman for more than six months, his announcement upset M.C. because she

[5] M.C. testified it was unusual to find Appellant sleeping in B.C.'s bed. JA at 099. Appellant countered that while he did not remember laying in B.C.'s bed on this particular occasion, he had laid down with her before when he read her stories. JA at 219.

had never met the girlfriend and did not even know her first name. JA at 103, 113. The ensuing visit did not help matters, as communication between Appellant and M.C.—which had never before been a problem—"was just off." JA at 113. Around this same time, Appellant "started demanding" that their children come visit him for the summer in Missouri. *Id*. M.C. was uncomfortable with the idea (JA at 103), purportedly due to Appellant being not "very familiar with [E.C.] and how [E.C.] works." JA at 113. M.C. ultimately retained an attorney and sought to have Appellant's custody rights restricted so he could not have overnight visits. JA at 103.

On October 2, 2017, the Department of Child and Family Services (DCFS) opened a case regarding the 2014 hotel incident involving Appellant and M.L.'s sexual intercourse. JA at 200. A little more than a week later, M.C. brought B.C. to a social worker, E.M. JA at 189. M.C. said she was worried about B.C.'s nightmares, which generally involved Appellant kidnapping B.C. JA at 191. M.C. also relayed that she suspected her daughter had been exposed to "some sort of sexual behavior in a hotel room between [Appellant] and his girlfriend." *Id*. In addition, M.C. expressed concern that the DCFS case against Appellant would be dropped, that he would ask for visitation, and that her children had not disclosed enough information to trigger action against their father. JA at 199. E.M. responded that she could make a report, but that certain criteria would have to be met first. *Id*.

E.M. began her treatment of B.C. by explaining that she was there to help the seven year-old with her nightmares and anxiety, that it was a safe place to talk, and "that it was okay for [B.C.] to tell [E.M.] anything."[6] JA at 190. Despite these assurances, B.C. did not allege any inappropriate touching by her father during her initial or several subsequent sessions with E.M. JA at 189-90, 193. On January 11, 2018, B.C. confided that she was worried about a mediation meeting between Appellant and M.C. JA at 202. This mediation was to re-determine custody of the twins. JA at 115, 202-03. Still, B.C. did not then allege any inappropriate touching by Appellant. JA at 203-04.

The mediation between Appellant and M.C. was conducted on January 12, 2018—the day after B.C.'s therapy session. JA at 105, 107. It was unsuccessful because the parties declined to reach a compromise. JA at 115. The case was then scheduled for court. *Id*.

During B.C.'s next therapy session, on January 18, 2018, E.M. discussed the issue of consent with the seven year-old. JA at 203-04. Prior to this, B.C. had never disclosed being touched by Appellant. JA at 204. B.C.—who idolized individuals who protected others and considered herself a protector too—did, however, inform

[6] M.C., who was present for this first session, relayed this latter information to B.C. at E.M.'s request. JA at 190.

E.M. that if M.C. "gets upset and starts crying [B.C. will] stand up . . . and tell everyone that she doesn't want to go with her dad." *Id*. But even with this promise, she did not then allege any molestation by Appellant. *Id*.

On January 25, 2018, E.C. joined his sister's session with E.M. JA at 108, 204-05. The apparent impetus for his inclusion was that M.C. had witnessed him masturbating. JA at 096. When she asked him about it, E.C. purportedly replied that he had seen his father do it. *Id*. M.C. did not ask E.C. any follow up questions, call the authorities, or even confront Appellant. JA at 110. Instead, she took him to E.M. because she "felt that [E.C.] had something to say, may be [sic] something more to say." JA at 116. During this session, E.C. disclosed to everyone that "Daddy's penis makes a funny noise," and that he had seen Appellant playing with his penis in the shower. JA at 107-08, 205. Afterwards, as was her common practice in providing positive reinforcement when patients share information (JA at 197), E.M. commended E.C. for being brave. JA at 205. B.C. was present both when E.C. made this disclosure and received this praise.[7] JA at 204-05

Approximately five days later, a social worker from DCFS interviewed E.C. regarding his statements about Appellant. JA at 237-38. During this interview, E.C.

[7] M.C. similarly praised E.C., and later B.C., for being brave when they disclosed information. JA at 109, 187-88.

made no disclosures of abuse. JA at 238. He also explicitly denied being touched by Appellant. JA 238-39.

On March 1, 2018, B.C. told E.M. that her father had cuddled with her in bed. JA at 205. When E.M. asked whether anything else had happened, B.C. said nothing more occurred. JA at 206.

The custody hearing between Appellant and M.C. was scheduled for the third week of March 2018. JA at 232. Appellant intended to fight to have his children visit him where he lived, as opposed to having to visit them in Utah. JA at 225. However, on March 10, 2018, E.C. told M.C.'s close friend—T.S.—that Appellant had touched him. JA at 207-08. T.S. responded that he loved E.C. and was proud of him, then reported the disclosure to M.C. JA at 208. Although T.S. described M.C.'s reaction as one of shock (*id.*), he was unaware that E.C. had apparently told his mother the same thing the day prior. JA at 209. Upon receiving this information from E.C., M.C. once again declined to call the authorities or confront Appellant; instead, she invited her friend over and allowed him to talk alone with E.C. about the incident. JA at 109-110. E.C. never provided M.C. or T.S. a timeline of when the alleged touching occurred. JA at 110, 208.

On March 19, 2018, B.C. reported—for the first time—that Appellant molested her. JA at 193. Specifically, B.C. told E.M. that Appellant touched her vagina through

her clothes and bedcovers. *Id*. A few days later, in another session with E.M., B.C. claimed Appellant touched her chest over her clothing. *Id*. B.C. said this touching occurred on the same day, when Appellant climbed into bed with her. JA at 194. B.C. explained that she had forgotten about the incident until she heard E.C. tell his story. JA at 206. Following B.C.'s report, E.M. praised her for being brave. *Id*. B.C. later provided more details about the alleged incident. JA at 195-96.

The custody hearing for the third week of March 2018 was cancelled and Appellant signed over his rights to his children on April 9, 2018. JA at 230-32. Appellant denied that his decision was an attempt to cover up any crime. JA at 223. Rather, M.C. had contacted him and told him "that she would be happy if [he] gave up [his] rights, and then she would finally feel like they were safe." JA at 230. Appellant also knew that he would be relegated to supervised visits, M.C. would only approve her own friends as supervisors for these visits, and he did not want to expose himself to additional false allegations.[8] JA at 223, 232-33.

Due to E.C.'s autism, he is unable to appreciate boundaries. JA at 101. This

[8] Appellant also believed that M.C.'s fiancé (MSgt S.J.) would adopt the twins, and signed paperwork to that effect. JA at 035. However, when Appellant followed up to see if the adoption had been carried out, the relevant agency reported that the process had not been initiated. *Id*. M.C. later told the agency that she had not started the adoption because she had not yet married her fiancé. *Id*. M.C. continued to collect $1,457 in child support from Appellant in the interim. *Id*. MSgt S.J. ultimately adopted the twins on October 10, 2018. JA at 181.

means he can sometimes get into people's personal spaces, such as trying to kiss them. *Id*. He is also an imaginative boy (*id*.) with behavioral challenges (JA at 088) who has trouble concentrating and can be distressed in unfamiliar places. JA at 127.

Appellant's Court-Martial

At Appellant's court-martial, E.C. and B.C. both testified via remote means. JA at 130, 147. The Government requested the remote testimony, in part, due to the children's emotional distress in having to see their estranged father. JA at 036, 128. The Government further noted E.C.'s fear that Appellant would learn he had revealed their "secret." JA at 036. The Defense did not object, and the military judge evaluated and approved the remote means in advance of the children's testimony before the members. JA at 127-28. The Circuit Trial Counsel (CTC), Circuit Defense Counsel (CDC), and Special Victim's Counsel (SVC) for E.C. and B.C. were present in the remote location during the twins' respective testimony. JA at 127-28, 130, 147. Appellant remained in the courtroom, along with other counsel, the military judge, the panel, and the court reporter. JA at 130, 147.

B.C.—now nine-years old—testified first, via video tele-conference (VTC).[9] JA at 131. After acknowledging she understood the difference between the truth and

[9] It is unclear from the record whether B.C.'s VTC testimony was two-way or one-way.

a lie, B.C. promised to tell the truth. JA at 132-33. She subsequently testified that Appellant "touched [her] in the wrong place." JA at 134. When asked where that wrong place was, B.C. bent her right elbow across her chest so that her fingertips touched her collarbone. *Id*. B.C. never explicitly testified that Appellant touched her breasts or vagina. *Id*. She also believed it was daytime when her mother returned home on the date of the incident, and denied that M.C. found Appellant in her bed. JA at 145-46.

With respect to her brother, B.C. testified that she stayed in a hotel with him and Appellant somewhere in Utah. JA at 135. B.C. recounted that their hotel room had two bedrooms, one for Appellant and one for her and E.C. JA at 135-36. B.C. also recalled a moment where Appellant was in the bathroom with E.C., due to the fact that her brother defecated in his pants. JA at 146. While in the bathroom, B.C. heard E.C. say that Appellant's "penis makes a funny sound." JA at 137. B.C. did not hear anything else from the bathroom. *Id*.

E.C. testified after his sister, from the same location. JA at 147. Almost immediately, E.C. noticed that the VTC screen was covered by a piece of paper, blocking the view of the courtroom. JA at 148. E.C. asked the CTC why she had done that, and the CTC answered it was to "make sure that [E.C.] would be able to answer our questions, not get distracted." *Id*. But E.C. had additional questions:

> [E.C.]: Are there people in there?
>
> CTC: No, not so many.
>
> [E.C.]: What?
>
> CTC: Nope, you just have to worry about us right here, okay? So you've got me, and [the SVC], and [the CDC]. And so we're just --
>
> [E.C.] -- But are they going to -- but are there going to be people --
>
> CTC: -- No, just the three of us right here, and we're going to ask you some questions, and then you'll be all done and you can go -- go back outside, okay?

JA at 148.

The CTC next asked E.C. some background questions. JA at 149. E.C. initially identified his full name, but said he did not want to say his current last name. *Id*. E.C. declined to clarify what this meant and, after the CTC removed an object he was playing with, provided an affirmative response as to his current last name. *Id*. E.C. then stated how "Bench used to be [Appellant's] last name," calling his father by his first name, "Dan." *Id*. E.C. proceeded to discuss how M.C. did not "want [his last name] to be Bench anymore," that Appellant was no longer M.C.'s "wife," and that his "Papa" shared E.C.'s current last name but had died "when [E.C.] was only four years old."[10] JA at 149-50. E.C. twice repeated how he was four when his "Papa"

[10] "Papa" was M.C.'s father, who passed away in 2016—when E.C. was approximately six years old, not four. JA at 186.

died before the CTC tried to transition into E.C.'s current age. JA at 150. After two unsuccessful attempts, the CTC was able to have E.C. acknowledge he was nine years old. *Id.*

The CTC then shifted to E.C.'s capacity to tell truth from lies:

> Q. I see. So what -- let me ask you this, what color is the shirt that you have on today?
>
> A. Hum?
>
> Q. What color is your shirt that you are wearing?
>
> A. Hawaii.
>
> Q. It's Hawaii? Doesn't [sic] have flowers on it?
>
> A. [B.C.] has the -- has the dress.
>
> Q. [B.C.] has a dress?
>
> A. But it's pink with a bunch of flowers on it too.
>
> Q. Sure. Okay. If I told you that you were wearing a dress what would you say?
>
> A. What?
>
> Q. If I told you that you had a dress on, what would you say?
>
> A. That would be horrible.
>
> Q. That would be horrible?
>
> A. Boys cannot wear dresses.

Q. Okay.

A. That's the law.

Q. If I told you that your shirt was yellow, what would you say?

A. I don't like yellow –

Q. You don't like yellow?

A. -- shirts. I don't like yellow shirts.

Q. Is your shirt yellow?

A. Hum?

Q. Is your shirt yellow?

A. Nope.

Q. Okay. So if I said your shirt was yellow would that be true?

A. Hum?

Q. If I told you that the shirt you had on right now was yellow, would that be true?

A. Hum.

Q. Yeah? Or would that be wrong?

A. Hum.

Q. If I said that the shirt that you're wearing right now was a yellow shirt would that be true? Is your shirt yellow?

A. No, my shirt is not yellow.

Q. Your shirt is not yellow? Okay.

A. It never -- a Hawaii shirt is never yellow.

Q. Okay. So if I said that your shirt was a Hawaii shirt, is that true?

A. Hum?

Q. If I said that the shirt that you're wearing right now was a Hawaii shirt --

A. -- True.

JA at 150-52.

At this point, the CTC tried to move into whether E.C. would agree to testify truthfully; however, the nine year-old had more questions about his surroundings:

Q. Is that true? Okay. That's true. So when we ask you some questions, I need you to make sure that what you tell us is –

A. -- What -- the court can hear us?

Q. All you've got is the three people right here.

A. But why is it -- I thought there were court to hear us.

Q. Well, who you've got to hear you right now –

A. -- We're just practicing?

Q. We're talking through you, yeah. But we can hear you. And we just need you to --?

A. -- But why aren't we doing the court thing?

Q. We are doing the court thing.

A. We are?

Q. Yeah.

A. I'm going to go back out in the room. You guys are going to take that off. [WIT referring to piece of paper blocking the remote sites view of the courtroom.]

Q. No, we are going to leave that there, and were just going to ask you a few more questions, and then you can go back out in that room, okay?

A. Hum.

Q. So let me ask you this, when we talk today I need you to make sure that when you answer our questions you tell us only stuff that's true, okay?

A. What about the court thing? Is it today?

Q. Um-huh. It's today.

A. Did mom just do it?

Q. She did before, but now we're going to ask you questions. Okay?

A. [No response.]

Q. So let me ask you that can you promise that when we ask you questions today the answers that you will give us our true?

A. [No response.]

Q. Do you promise to do that?

A. Why won't you guys -- why do -- the court people watch me?

Q. There's people on the camera.

A. What?

Q. There's people watching on the camera, but it's just us in this room. So can you -- let me ask --

A. Why don't we need that open?

Q. Why not?

A. Um-huh?

Q. Just because they don't need to look at us, and we don't need to look at them. So let me ask you that –

A. -- We need to look at them?

Q. Nope. You just need to look at me, and [the CDC], and answer our questions, okay?

A. Why couldn't they look at me?

Q. They can.

A. Then why aren't they going to look at me right now?

Q. They are. They are looking at you right now. And that's why we're going to ask you some questions, okay?

A. Some people in there?

Q. Um-huh. So we had talked a minute ago about your shirt.

A. What?

Q. We talked a second ago about your shirt, and stuff that's true. So can you promise me that when you answer our questions today you'll tell us stuff that's -- only stuff that's true?

A. Can I go out of the room?

Q. Not yet. We're going to ask you a few more questions.

A. Right now?

Q. From here. So can you -- can you --

A. -- Why can't I do the questions from there?

Q. Maybe later. But right now we've got to ask questions from right here -- in here right now, okay?

A. Is Dan going to be standing right next to them?

Q. No.

A. Where is he going to be standing?

Q. He's not in there. He's not there. All you've got to do is answer the questions that we have, okay?

A. Um-huh.

Q: Okay.

CTC: And that's an affirmative response from the witness.

JA at 152-155.

Before the CTC had a chance to transition into questions about the case, E.C. volunteered that M.C. was afraid people would believe Appellant. JA at 155. He then described how he did not want Appellant to find out because he thought Appellant would be angry; specifically, "[b]ecause if [Appellant] finds out that [M.C.] is not being his wife anymore, then he's going to be very, very angry." *Id*. E.C. later acknowledged how "[t]here's some stuff that is private" that he was afraid Appellant would learn E.C. talked about. *Id*. E.C. first attributed these private things to being "about the apartment at Lake Shield," but quickly switched to the "Fire Lane Hotel."[11] JA at 155-56. E.C. gestured at one point to his lap and told the CTC that he did not want tell what happened because "people might say that's gross." JA at 156. The CTC reassured E.C. that everything was okay. *Id.* She added: "You can tell us, and you can tell me and [the CDC], and [the SVC]. We won't think it's gross." *Id*.

E.C. then proceeded to describe to these individuals how Appellant touched E.C.'s penis. JA at 156. E.C. claimed it occurred when he got out of the shower, when E.C. "was only five, right after Papa died." *Id*. E.C. demonstrated how they played with Appellant's penis, explaining that was why he did not like "touching other people's penises." JA at 157. He then discussed how children at Layton Elementary

[11] According to the Government, the alleged incident occurred at the Mountain View Inn. *See*, *e.g.*, JA at 080, 259. On cross-examination, E.C. repeated that the incident occurred at the "Firelane Hotel and Apartment," in the apartment section. JA at 170.

"knew about it" and "decided to do it to [him] too." *Id*. He repeated this accusation against the Layton schoolchildren, blaming everyone for "doing it to [him]" as well as "other people." *Id*. E.C. continued to talk about Layton, ignoring the CTC's frequent attempts to interject. *Id*. Eventually, the CTC assured E.C. that "[the CDC], and [the SVC] and I won't tell anybody else what you [sic] us." JA at 158.

E.C. subsequently described Appellant as not doing anything when E.C. touched his penis, which E.C. depicted as having "hair all over it" after prompting from the CTC. JA at 158. Later, E.C. stated that B.C was not present in the hotel room when Appellant touched him. JA at 161. On cross-examination, he repeated that B.C. was "not at the hotel" but then stated "she was, but only on -- on the right -- she left right after -- right after Jan did that to -- Dan." JA at 172. When asked for Appellant's location when E.C. entered the shower, he responded that Appellant "was in his bedroom playing on a game on his phone." *Id*. E.C. said he could hear the phone through the wall because Appellant's "bedroom is on the right side of the bathroom, and me and [B.C.'s] and [G.G.'s] bedroom was -- was on the left side.[12] *Id*. E.C. then expounded on the layout of this "hotel that was actually an apartment,"

[12] G.G. is Appellant's daughter from a previous relationship. JA at 088-89. Other than E.C.'s statement at trial, there is no indication she was present during the alleged touching at the hotel, and the Government did not argue to the contrary. JA at 256.

to include the "creepy route" Appellant took to get into the bathroom. JA at 173. E.C. added that Appellant started living there when E.C. was "only two years old," and that E.C. "was four years old then he did that thing."[13] *Id*.

Among the other statements E.C. provided were: he denied touching his own penis, claiming he only played with himself once when he was six years old[14] (JA at 159); M.C. told him to start calling Appellant by his first name "because he's not [E.C.'s] dad anymore" (JA at 166); E.C. entered the shower, prior to the alleged touching, because he "was covered in dirt"[15] (JA at 171); E.C. never saw Appellant's penis anywhere else except the bathroom[16] (JA at 173); another boy did something to E.C. which made him think "it would be a good idea to have long hair and be like, a girl" (JA at 176); and he denied telling anyone that no one had ever touched his private parts.[17] JA at 176-77.

E.C. also expressed confusion as to why the CDC was taking notes during direct

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[13] E.C. was approximately seven years old when the alleged touching occurred. JA at 111, 211, 313.

[14] MSgt S.J. testified that he caught E.C. masturbating "multiple times" in the shower and his bedroom, with the last instance occurring the week before Appellant's court-martial. JA at 183.

[15] B.C. stated E.C. took a shower because he soiled himself. JA at 146.

[16] E.C. told an investigator he saw Appellant play with his penis everywhere, and later testified this statement was true. JA at 175-76.

[17] A DCFS social worker testified that E.C. specifically denied that Appellant touched him. JA at 238.

exam:

> [E.C.] Why did you write all of this stuff, for you -- [Addressing CDC.]
>
> [CTC]: You're going to have to ask -- he's just --
>
> [E.C.] -- That's what I say?
>
> [CTC] -- He's just -- no, no.
>
> CDC: We'll talk about.

JA at 162.

After E.C.'s testimony concluded, he insisted he was telling the truth:

> WIT: I want to be done.
>
> CTC: I know. Can you sit in the chair, just for one more minute?
>
> WIT: I've done all I can say.
>
> CTC: Okay.
>
> WIT: Everything -- everything I say is true.
>
> CDC: Okay.
>
> WIT: Everything.
>
> MJ: All right.
>
> WIT: But Dan might say it's not true, because -- it is true, because he just came in the room and did that. It is true.
>
> CTC: Okay.

MJ: Members –

WIT: -- I can actually remember everything Dan did to me. Everything because when -- when -- mom just told me why –

JA at 178-79. The military judge did not allow E.C. to finish this statement, directing the CTC to mute the microphone and instructing the members to disregard any statements not solicited by questions. JA at 179.

The Government provided no physical evidence corroborating E.C.'s allegations. T.S. testified about his conversation with E.C., wherein the boy purportedly disclosed that his father touched him. JA at 207. However, T.S. did not provide any additional details about the allege event, nor did he indicate whether E.C. was forced to touch Appellant. M.C. also testified about a "disclosure" by E.C., but did not provide details. JA at 115.

MSgt Bench later testified in his own defense. He denied all of the allegations against him. JA at 223.

Summary of Argument

As Justice Scalia recognized: "It is always more difficult to tell a lie about a person to his face than behind his back. In the former context, even if the lie is told, it will often be told less convincingly." *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) (internal quotation marks and citation omitted). In this case, the Government's

evidence against Appellant came from the statements of his son, E.C., who testified remotely. When this boy—who was nine years old and had autism—saw the VTC monitor displaying the courtroom was concealed, he asked whether people were present. The CTC falsely answered "nope," and assured E.C. that he need only answer questions for the three people in the room with him. The CTC reiterated this latter refrain multiple times and, when the child asked where his father would be standing, lied again by stating Appellant was not in the courtroom at all. No curative measures were taken to correct this falsehood, despite the common knowledge that E.C. feared Appellant learning of his accusations. Because the child never understood his father would hear him, the panel was left to evaluate his testimony absent the attendant sanctities the Constitution requires.

The CTC's material misrepresentations were plainly and obviously improper, and ultimately violated Appellant's Sixth Amendment confrontation rights. Although one-way remote testimony is constitutionally permissible under certain circumstances, the lies told here to obtain such testimony were a bridge too far and took this case past the limits of what the Supreme Court has sanctioned. Consistent with the Confrontation Clause, a prosecutor cannot take advantage of the remote testimony dynamic to purposefully misrepresent facts to a witness so as to secure crucial evidence against an accused—particularly where, as here, there is a real

possibility that but for the prosecutor's falsehoods, the witness would not testify.

At a minimum, the confrontation right requires that a witness evince some minimal understanding that his or her testimony is being given against the accused in an adversarial court proceeding. While it may be true that physical face-to-face confrontations are not necessarily required pursuant to *Maryland v. Craig*,[18] it is antithetical to both the prosecutorial function and the Confrontation Clause to so materially misrepresent the nature and circumstances surrounding a witness's testimony that he believes the accused will be unaware of it altogether. Such conduct eviscerates the integrity of the fact-finding process, effectively transforming witnesses into anonymous accusers unaware of the consequences of false testimony.

Ultimately, this case does not turn upon whether *Craig* remains viable in a post-*Crawford v. Washington*[19] world; Appellant's rights were violated even under *Craig's* narrow parameters. The Government cannot establish an important, let alone legitimate, interest in materially lying to a witness, nor can it establish this witness's testimony bore an adequate indicia of reliability under the particular facts of this case. And given the dearth of other evidence against Appellant, the Government cannot meet its onerous burden of proving the CTC's error was harmless beyond a reasonable

[18] 479 U.S. 836 (1990).
[19] 541 U.S. 36 (2004).

doubt. For these reasons and those detailed below, this Court should dismiss Appellant's conviction as to Specification 2 of Charge I, and set aside his sentence.

Argument

LYING TO A WITNESS ABOUT APPELLANT'S PRESENCE IN THE COURTROOM TO SECURE TESTIMONY MATERIALLY PREJUDICED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

Standard of Review

"Under plain error review, this Court will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused." *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011). "[W]here a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard . . . ." *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (citation omitted). Under this standard, a court must be left "confident that there was no reasonable possibility that the error might have contributed to the conviction." *Id*. When there has been a violation of the right to confrontation, "'harmlessness must . . . be determined on the basis of the remaining evidence.'" *United States v. Daulton*, 45 M.J. 212, 219-20 (C.A.A.F. 2016) (quoting *Coy*, 487 U.S. at 1022).

Law

The Sixth Amendment

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him . . . ." U.S. Const. amend. VI. "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). The Supreme Court has "noted the focus of the Confrontation Clause is to protect criminal defendants from prosecutorial abuse and the '[i]nvolvement of government officials in the production of testimony with an eye towards trial.'" *United States v. Magyari*, 63 M.J. 123, 126 (C.A.A.F. 2006) (quoting *Crawford*, 541 U.S. at 56) (alteration in original).

The Evolving Nature of Confrontation Clause Jurisprudence

In *Coy v. Iowa*, the Supreme Court determined that allowing two minor witnesses in a sexual assault case to testify from behind a screen which blocked their view of the accused violated his Sixth Amendment right to confrontation. 487 U.S. at 1020. Writing for the majority, Justice Scalia noted the Supreme Court had "never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face

meeting with witnesses appearing before the trier of fact." *Id*. at 1016. The Court went on to explain that this "guarantee of [a] face-to-face encounter between witness and accused serves ends related both to appearances and to reality." *Id*. at 1018. "A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." *Id*. at 1019 (internal quotations omitted). It then stressed "[t]he perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it." *Id*. And while the Sixth Amendment "does not, of course, compel the witness to fix his eyes upon the defendant . . . the trier of fact will draw its own conclusions." *Id*.

Two years later, in *Maryland v. Craig*, a five-justice majority of the Supreme Court concluded that a state statute which permitted a child victim to testify via one-way, closed-circuit television did not violate the Confrontation Clause. 497 U.S. 836. The Court reasoned that its jurisprudence up until then had reflected a "*preference* for face-to-face confrontation at trials . . . [which] must occasionally give way to considerations of public policy and the necessities of the case." *Id*. at 849 (emphasis in original & internal quotations omitted). It therefore determined "that a defendant's right to confront accusatory witnesses may be satisfied absent a physical face-to-face confrontation at trial only where denial of such confrontation is necessary to further

an important public policy and only where the reliability of the testimony is otherwise assured." *Id*. at 850.

The majority in *Craig,* relying upon the "indicia of reliability" rubric set forth in *Ohio v. Roberts*, 488 U.S. 56, 66 (1980), ultimately found that this standard was met because although Maryland's procedure prevented a child witness from "seeing the defendant as he or she testifies against the defendant at trial" it also "preserve[d] all of the other elements of the confrontation right" including "oath, cross-examination, and observation of the witness' demeanor . . . ." 497 U.S. at 851. Quoting from Justice Harlan's concurrence in *California v. Green*, 399 U.S. 149, 179 (1970), the Court reiterated that "[t]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, *trials by anonymous accusers*, and absentee witnesses." *Id*. (emphasis added). In sum, it concluded:

> [W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

Id. at 857.

Justice Scalia, on behalf of himself and three other Justices, authored a dissent which began by stating: "Seldom has this Court failed so conspicuously to sustain a

categorical guarantee of the Constitution against the tide of prevailing current opinion." *Id*. at 860 (Scalia, J., dissenting). The dissent then expressed particularized concern that *Craig*'s holding would permit an estranged parent who had lost custody of his child to be sentenced to prison for sexual abuse without affording that "parent so much as the opportunity to sit in the presence of the child" and to question whether these allegations were, indeed, true. *Id*. at 861.

Fourteen years after *Craig* was decided, the Supreme Court (again, in an opinion authored by Justice Scalia) overruled *Roberts* in the "landmark"[20] case, *Crawford v. Washington*. Returning to the formal, textual and historical guarantee of the Confrontation Clause, the Supreme Court barred the state from introducing tape-recorded statements made by a witness to law enforcement in a stabbing case, when the witness later did not appear at trial and the accused had no opportunity for cross-examination. 541 U.S at 68-69. In casting aside *Roberts*, the Court reasoned:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, *but it is a procedural rather*

[20] *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1559 (2021) (describing *Crawford* as a "momentous and consequential decision" falling within the class of Supreme Court cases constituting "landmark and historic criminal procedure decisions" and which "fundamentally reshaped criminal procedure throughout the United States and significantly expanded the constitutional rights of criminal defendants.").

> *than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner*: by testing in the crucible of cross-examination.

Id. at 61 (emphasis added).

Reconciling Craig with Crawford

Notwithstanding *Crawford* and its progeny, this Court has held that "*Craig* continues to control the questions whether, when, and how, remote testimony by a child witness in a criminal trial is constitutional." *United States v. Pack*, 65 M.J. 381, 385 (2007). At the same time, it has also recognized "that aspects of *Crawford* are difficult to reconcile with aspects of *Craig*." *Id*. at 381. Other federal and state appellate courts have similarly wrestled with *Craig*'s precedential value in light of *Crawford*. *See e.g.*, *United States v. Carter*, 907 F.3d 1199, 1211 (9th Cir. 2018) (suggesting that "[t]he vitality of *Craig* is itself questionable in light of the Supreme Court's later decision in *Crawford*, which abrogated *Roberts*, a case relied upon heavily in *Craig*" and that "*Craig* and *Crawford* stand in 'marked contrast' in several respects . . ."); *People v. Jemison,* 505 Mich. 352, 356 (2020) (noting that "*Crawford* did not specifically overrule *Craig*, but it took out its legs"); *State v. Mercier*, 403 Mont. 34, 45-46 (2021) (questioning "*Craig*'s continuing utility" in light of *Crawford* while expressing that it was "not prepared to declare the proverbial death knell to *Craig* just yet . . . prefer[ring] to await further direction from the Supreme Court.");

Coronado v. State, 351 S.W.3d 315, 321 (Tex. Crim. App. 2011) (observing that *Craig* has not been officially overturned, "but, beginning with *Crawford v. Washington*, the Supreme Court has nibbled it into Swiss cheese by repeating the categorical nature of the right to confrontation in every one of its more recent cases."). To reconcile these two cases, one court recently "read *Craig*'s holding according to its narrow facts." *Jemison*, 505 Mich. at 356.

Prosecutorial Misconduct

"Counsel are ethically required to be candid with the courts when they make factual assertions." *United States v. Lewis*, 42 M.J. 1, 4 (C.A.A.F. 1995). "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." JA at 029. "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Air Force Instruction (AFI) 51-110, Attachment 2, Air Force Rules of Professional Conduct (ARPC), Rule 8.4(c). (Dec. 11, 2018). "As a trial counsel, the prosecutor represents both the United States and the interests of justice." AFI 51-110, Attachment 2, Air Force Standards for Criminal Justice (AFSCJ), Standard 3-1.2(c). "In the course of representing a client, a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." AFI 51-110, ARPC, Rule 4.1(a). In determining whether or not impropriety

on the part of the prosecutor amounts to misconduct, it matters not whether her motives were benign or nefarious. *See United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) ("the prosecutorial misconduct inquiry is an objective one, requiring now showing of malicious intent on behalf of the prosecutor.").

Analysis

Under normal circumstances, an adverse witness testifying against an accused necessarily knows that the individual he is testifying against can both see him and hear what he has to say. But under the abnormal circumstances in which E.C. testified, he knew neither. Indeed, when E.C. asked where Appellant—whom he feared testifying against—was standing in the courtroom, the CTC took it a step further and falsely answered that the Appellant was not present at all. This material misrepresentation amounted to prosecutorial misconduct, represented clear and obvious error, and, even under *Craig*, violated the Confrontation Clause. Because the Government offered no other significant evidence of Appellant's alleged crime against E.C., the CTC's error was not harmless beyond a reasonable doubt.

1. *The CTC's lies were clear and obvious errors.*

Among the reasons the Government sought to have E.C. testify remotely was to decrease his emotional distress in having to see his estranged father in person. R. at 294. The Government was also aware that E.C. feared Appellant would learn he had

disclosed their "secret." JA at 036. When E.C. ultimately appeared remotely via VTC, Appellant was present. R. at 323. E.C. thereafter engaged in a meandering preliminary discussion with the CTC, during which he asked numerous questions about what was happening and who was present. R. at 324-30. Eventually, E.C. asked the CTC whether Appellant would be standing next to the people watching him on the camera. R. at 329-30. The CTC answered: "No." R. at 330. E.C. next asked where Appellant would be standing. *Id*. The CTC responded: "He's not in there. He's not there. All you've got to do is answer the questions that we have, okay?" *Id*.

The CTC lied to E.C. Appellant was present in the courtroom, yet—in response to a question about where Appellant would be located—she told E.C. that he was not there at all. An attorney's duty of candor to the tribunal is a fundamental tenet of the legal system. *See Lewis*, 42 M.J. at 4. Professional and ethical rules also require prosecutors to be truthful in the courtroom, and prohibit lying to third parties. JA at 029; AFI 51-110, ARPC, Rules 4.1(a) and 8.4(c). Affirmatively lying to a witness to secure testimony, regardless of subjective intent, is clear and obvious error that amounts to prosecutorial misconduct.

2. *The CTC's lies implicated the Sixth Amendment and did not further an important Government interest.*

The CTC's plain and obvious misrepresentations to E.C., problematic as they were in their own right, caused an even greater problem in this case. They implicated the very heart of the Confrontation Clause. To be clear, Appellant does not ask this Court to revisit its determination that "*Craig* continues to control the questions whether, when, and how, remote testimony by a child witness in a criminal trial is constitutional." *Pack*, 65 M.J. at 385. But he does submit that what happened in this case involves matters neither contemplated nor addressed in *Craig*. Given these specific concerns and the questions which continue to surround *Craig*'s utility in light of *Crawford*, this Court should hold *Craig* narrowly to its appropriate scope, as it does not strictly govern resolution of this case. Even if it did, Appellant's right of confrontation was still violated under the rubric of that decision.

The witness in this case—despite himself asking where Appellant would be in the courtroom—was lied to and told Appellant was not there at all. JA at 154. He was also repeatedly instructed that he only needed to concern himself with the three individuals presently in the room. JA at 148, 152, 154, 156. The witness was not even aware he was "doing the court thing" when he started his testimony and asked whether they were just "practicing." JA at 152-53. Especially given that this witness was

already testifying under constitutionally abnormal, non-preferred (albeit permissible) procedures in the first place, the prosecutor's lie was one departure too many from that which the Confrontation Clause demands.

Unlike his counterpart in *Pack*, Appellant does not facially attack the constitutionality of using one-way closed-circuit testimony for child witnesses in the abstract. But there comes a point where the means by which this mechanism is used in lieu of traditional, face-to-face testimony fails to satisfy the fundamental tenants inherent to the right of confrontation. In order for *Craig*'s aberration to pass constitutional muster, a prosecutor cannot purposefully misrepresent facts to a witness so as to secure his testimony under the mistaken impression that the accused cannot see or hear what the witness has to say. This vitiates the very point of confrontation, and nothing in *Craig* can be read to support or endorse such a practice. The fact that *Craig* has been "nibbled into Swiss cheese" by the Supreme Court since *Crawford* only further buttresses this conclusion. *See Coronado*, 351 S.W.3d at 321. All this to say, even if *Craig* technically remains, the constitutionally suspect ground on which it stands renders any further deviation from that which the Supreme Court has explicitly blessed a serious concern. Lying to a child witness about whether the criminally accused is in the courtroom raises such a specter.

The scope of *Craig*—by its own terms— was already quite narrow on the day

it was decided. The majority "only" upheld the use of one-way, closed-circuit television in lieu of the Confrontation Clause's "preference" for face-to-face confrontation because there was a case-specific finding that utilization of this procedure (1) was necessary to further an important public policy interest, and (2) the reliability of the testimony was otherwise assured. *Craig*, 497 U.S. at 850. Neither prong is met in this case.

As to the first prong, lying to a witness to secure his testimony by telling him that the accused is "not there" does not serve an important policy interest. In fact, it does precisely the opposite because it "impinge[s] upon the truth-seeking" and "symbolic purpose of the Confrontation Clause." *Id*. at 852. The majority in *Craig* was quite careful to cabin the precise state interest which justified departure from constitutional norms: the government has an interest in protecting against the traumatization of children "not by the courtroom generally, but by the presence of the defendant." *Id*. at 856. It then explained that "if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, *albeit with the defendant present*." *Id*. (emphasis added).

In the instant case, this government interest was already served through

application of the procedures allowed by R.C.M. 914A and Mil. R. Evid. 611(d)(3). Nothing in either of those rules suggest that the prosecutor is free to misinform the child witness as to the true nature as to who can see him on the other end of the camera. Indeed, R.C.M. 914A(a)(3) specifically requires that sufficient monitors be placed in the courtroom such that the military judge, the panel, the court reporter, the public, *and the accused*, will be able to both view and hear the testifying witness. Neither *Craig* nor the *Manual for Courts-Martial* sanction deliberately lying to a child witness about an accused's presence in the courtroom such that it would be commensurate with the interest in preventing individualized trauma by testifying in the same room.

3. *E.C.'s testimony was not otherwise reliable.*

Consistent with the reliability prong of *Craig* referenced above, the admission of E.C.'s testimony would be consonant with the Confrontation Clause only if there were no issues involving his oath, he was subject to full cross-examination, and his demeanor while testifying was observable by the military judge, panel, and Appellant. 497 U.S. at 846, 857. Because there are problems with each of these prerequisites, this Court should conclude that E.C.'s testimony against Appellant lacked sufficient indicia of reliability under *Craig*.

Addressing the oath requirement first, the CTC did not adequately impress upon E.C. the importance of telling the truth nor the meaningfulness of his testimony or the

seriousness of the matter at hand. *See United States v. Washington*, 63 M.J. 418, 424 (C.A.A.F. 2006) (citation omitted). From the outset, the CTC falsely assured E.C. that it was "just the three of us" he would be speaking to. JA at 148. Although she initially told him that there were "not so many" people on the VTC screen (presumably referencing the courtroom), she almost immediately retracted this statement when she answered "[n]ope" and "[n]o" to his follow-up questions as to whether other people were present. *Id*. The CTC then exacerbated her falsehoods when, in response to E.C. asking whether the court could "hear us," she again emphasized "[a]ll you've got is the three people right here." JA at 152. Notably, the CTC utilized similar language during other portions of E.C.'s testimony, further masking the solemnity of him having to testify before the members. *See*, *e.g.*, JA at 156 ("You can tell us, and you can tell me and [the CDC], and [the SVC]"), 157-58 ("Well, I promise [the CDC] . . . and [the SVC] and I won't tell anybody else what you [sic] us").

E.C. continued to express confusion about the trial, as he initially seemed to believe he was only "practicing" and evinced surprise that "the court thing" was actually happening. JA at 152. And even though the CTC attempted to address E.C.'s misunderstandings, it is dubious she succeeded. This is evidenced when, following E.C.'s numerous questions about the VTC and whether people could see him, and the CTC's repeated efforts to inform him "the court thing" was occurring and people were

indeed watching, he felt compelled to ask: "Some people in there?" JA at 154. This should have cued all trial participants, but particularly the CTC, that E.C. still did not fully grasp what was happening. Yet, instead of attempting to ensure E.C.'s understanding, the CTC merely responded: "Um-huh." *Id*. This single comment, when weighed against so much previous uncertainty on E.C.'s part, is insufficient to establish that he truly comprehended what was happening at all, let alone the seriousness of the proceedings.

Even assuming, *arguendo*, the CTC's labors by this point were successful, she irretrievably shattered the image of an adversarial setting when she lied to E.C. and told him Appellant was not present. JA at 154. Her misrepresentation was all the more egregious because she provided it *sua sponte*, in response to E.C.'s inquiry on where Appellant would be standing. *Id*. The CTC thus induced, without correction, the nine year-old witness into believing that not only would he be able to avoid having to "repeat his story looking at the man whom he will harm greatly," he could do so wholly unbeknownst to Appellant. *Coy*, 487 U.S. at 1019 (internal citations omitted). In very real terms, the CTC—who repeatedly encouraged E.C. to speak to just herself and the two others in the room with him—transformed E.C. into an anonymous

accuser[21]; precisely what the boy desired, since he did not "want Dan finding out." JA at 036, 155.

Equally significant is the fact that the CTC told the lie about Appellant's presence *prior to* securing E.C.'s "promise" to tell the truth. JA at 154. In fact, she made the misrepresentation immediately before seeking his pledge. JA at 154-55. It is thus unclear whether E.C. would have testified at all had he known his father could hear him, or whether E.C. would have possessed the same intent regarding the veracity of his testimony. Indeed, it would be far more palatable for E.C. to lie about his willingness to tell the truth if he knew that he would eventually be providing such falsehoods "behind [Appellant's] back." *Coy*, 487 U.S. at 1019.

Though the circumstances surrounding E.C.'s "promise" are in and of themselves sufficient to challenge the sufficiency of his oath, there are additional questions involving his capacity and intent to tell the truth. For example, the CTC expended significant effort getting E.C. to merely agree that his Hawaiian shirt was not yellow. JA at 151-52. She then utilized this hard-won concession to orient E.C. about being honest. JA at 155. Even if this Court were to assume that E.C.'s "Um-huh" response was sufficient to constitute a promise following such a troubling predicate, his testimony thereafter demonstrates an inability (or unwillingness) to

[21] *See Green*, 399 U.S. at 179 (Harlan, J., concurring).

fulfill his pledge. *Id*. Indeed, E.C.'s testimony was inconsistent with both his own statements[22] and the sworn statements of other witnesses,[23] and even contrasted with the Government's recitation of events.[24] It was also replete with fantastical allegations of school children from Layton Elementary touching E.C.'s penis and those of other children, how those students will not stop until Appellant stops, and how these other children frequently travel to Missouri (presumably to visit Appellant). JA at 157-58, 177. And in yet another instance, E.C. claimed to remember his own birth, in that he was too scared to enter the world because he thought he might die. JA at 161. Through

[22] *Compare* JA at 149-150 (E.C. recalling that he was four years-old when his "Papa" died) *with* JA at 156 (E.C. claiming he was five years-old when "Papa" died) *and* JA at 186 (MSgt S.J. confirming "Papa" died in 2016, when E.C. would have been approximately six years-old); *compare* JA at 161 (E.C. denying B.C. was present in the hotel when Appellant touched him) *with* JA at 172 (E.C. claiming that both B.C. and G.G. were present in the hotel/apartment); *compare* JA at173 (E.C. stating that he only saw Appellant's penis in the bathroom) *with* JA at 175-76 (E.C. claiming that, when he told an investigator he saw Appellant playing with his penis everywhere in the hotel, this statement was true).

[23] *Compare* JA at 159 (E.C. claiming he only played with himself once) *with* JA at 183 (MSgt S.J. testifying that he caught E.C. masturbating numerous times, including a week before trial); *compare* JA at 176-77 (E.C. denying that he told anyone Appellant never touched him) *with* JA at 240 (a DCFS social worker testifying that E.C. explicitly denied Appellant touched him).

[24] *Compare* JA 155-56 (E.C. first stating that the alleged incident with Appellant occurred at "the apartment at Lake Shield" and then switching to the "Fire Lane Hotel") *with* JA at 080, 259 (the Government alleging the incident happened at the "Mountain View Inn."); *compare* JA at 173 (E.C. claiming he "was four years old" when Appellant "did that thing") *with* JA at 079 (the Trial Counsel alleging E.C. was seven years old at the time of the offense).

these and other aspects of E.C.'s testimony, the record fails to demonstrate he "knew the difference between truth and falsity" and that he intended to tell the truth. *United States v. Morgan*, 31 M.J. 43, 48 (C.A.A.F. 1990). When viewed in combination with the significant problems associated with obtaining E.C.'s "promise" to tell the truth, this Court should be unconvinced that E.C.'s testimony was obtained under sufficiently reliable circumstances.

Turning next to *Craig*'s cross-examination requirement, Appellant does not dispute that his counsel had the opportunity to question E.C. Appellant also acknowledges that some of the infirmities in E.C.'s testimony were exposed through this questioning, which can be an indicator that the Confrontation Clause is satisfied. *See Delaware v. Fensterer*, 474 U.S. 15, 22 (1985). However, it is an entirely separate matter whether E.C. fully understood the adversarial process he was involved in.

As discussed above, it is unclear whether E.C. comprehended that the testimony he was giving was for the purposes of a trial, that the people questioning him were attorneys, and that his father would ever receive this information. Moreover, if E.C. trusted the CTC's assertions, he would have thought that nothing he confided to her and the two others in their private room would ever be shared with *anyone*. JA at 157-58. This adversarial context, or rather lack thereof, is important because it undermines Appellant's ability to conduct a *full and fair* cross-examination. *Fensterer*, 474 U.S.

at 22. If E.C., convinced by falsities, never understood the stakes involved—which included potential perjury charges and the wrongful conviction of his father if E.C. provided false testimony—then he was never truly subjected to the crucible of cross-examination. *Crawford*, 541 U.S. at 61; *cf. Green*, 399 U.S. at 199 (Brennan, J., dissenting) (noting that a man willing to perjure himself at a preliminary hearing "when the consequences are simply that the accused will stand trial may be less willing to do so when his lies may condemn the defendant to loss of liberty.").

But even if the procedural aspects of E.C.'s cross-examination were constitutionally firm, a problem remains regarding the panel's ability to accurately gauge his demeanor. Without any understanding of the trial process or consequences for his testimony, E.C. would have no reason to fret over falsehoods. This, in turn, would preclude the panel from properly weighing mannerisms that may measure credibility. For similar reasons, E.C.'s induced belief that his father was absent would lessen any nervousness about having to lie in his presence. E.C. was therefore able to testify without the panel "draw[ing] its own conclusions" about any potential aversions while directly accusing Appellant. *Coy*, 487 U.S. at 1019.

Finally, it should not be overlooked that the panel was well aware E.C. is a child with autism. JA at 088. They further understood, prior to his testimony, that his condition affected his speech, physical movements, and ability to process information.

Id. These symptoms manifested themselves during his remote testimony, as he frequently evaded questions and provided non-responsive or rambling answers. He was also fidgety and did other physical acts not typically seen on the witness stand. JA at 148 (nothing E.C.'s behavior). The panel was thus placed in a situation where conduct that might normally indicate untruthfulness—like evasion, fidgeting, or unresponsiveness—could be cast aside for wholly legitimate reasons. Under such circumstances, the panel had no way of accurately evaluating "the manner in which" E.C. gave "his testimony [or] whether he is worthy of belief." *Green*, 399 U.S. at 158 (internal quotation marks and citation omitted).

4. *The Government's remaining evidence was insufficient to support Appellant's conviction.*

The Government's case in support of Specification 2 of Charge I rested on E.C.'s testimony. There was no corroborating physical evidence. There was no medical evidence. There was no video evidence. There was no eyewitness testimony claiming to have seen any such abuse occur. And there was no confession. E.C.'s testimony thus served as the only direct evidence to support a conviction. Without it, the Government would have been left with little more than vague hearsay statements and weak circumstantial inferences to support its case. Consistent with the harmless beyond a reasonable doubt standard which applies by virtue of the constitutional error

that plagued Appellant's court-martial, there is more than a very real possibility that the Government could not have sustained a conviction in the absence of E.C.'s testimony.

To be sure, B.C. testified that she heard E.C. tell Appellant that his "penis makes a funny sound" behind a closed door at a hotel. JA at 308. However, even assuming *arguendo* that M.C. did not coax or coach this statement from B.C. in the midst of the custody battle, B.C. only remembered this statement *after* she heard her twin brother make "a disclosure" to E.M. and M.C., and was then praised for being brave. JA at 206. Moreover, the recollection itself—even if accurate—does not independently support the elements of the offense for which Appellant was convicted.

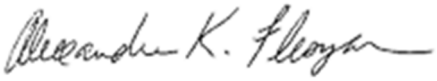
T.S.'s testimony likewise fails to sufficiently support this specification. The CTC asked him whether E.C. had ever made a "disclosure" to him "about being touched *by his father*." JA at 207 (emphasis added). But the specification Appellant was convicted of alleged that he caused E.C. to touch *him*. JA at 031. T.S. provided no information about such conduct and, in any event, provided no salient details regarding the alleged touching. The same is largely true of M.C.'s testimony; she spoke of E.C.'s "disclosure" in broad terms, but did not specify what it was that he actually disclosed. *See* JA at 115.

That the panel acquitted Appellant of Specification 1, in which Appellant was alleged to have masturbated in E.C.'s presence, is also telling. E.C.'s testimony did not directly support this allegation, suggesting that the panel more heavily weighed E.C.'s direct testimony. All told, the Government cannot meet its burden of proving there is "*no reasonable possibility*" that the plain and obvious error of constitutional in this case "*might have contributed to the conviction*." *Tovarchavez*, 78 M.J. at 472 n. 5 (emphasis in original).

CONCLUSION

The CTC clearly, obviously, and improperly lied. But for this lie, it is unclear whether E.C. would have testified at all, let alone openly accuse his father of a crime. The prosecutorial misconduct in this case violated Appellant's Sixth Amendment right to confront E.C., extending beyond the narrow parameters of remote testimony sanctioned by the Supreme Court. Simply put, no face-to-face confrontation occurred in this case, in actuality or spirit, and the Government cannot meet the burden of proving the CTC's error was harmless beyond a reasonable doubt. Accordingly, Appellant respectfully requests this Honorable Court dismiss the finding of guilt for the Specification 2 of Charge I, and set aside the sentence.

Respectfully Submitted,



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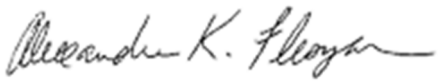
CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on December 30, 2021.

Respectfully Submitted,



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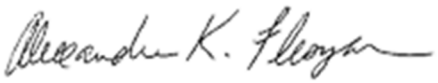
CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 10,852 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

Respectfully Submitted,



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