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

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Master Sergeant Daniel A. Bench, the Appellant, hereby replies to the Government's Answer (Gov. Ans.) concerning the granted issue, filed January 31, 2022.

ARGUMENT

1. There was no intentional relinquishment of Appellant's constitutional right to confrontation; accordingly, the issue is not waived but forfeited.

The Government duly acknowledges the presumption against finding a waiver of the constitutional right to confrontation. (Gov. Ans. at 22 (citations omitted)). The Government also correctly recounts how there was no explicit waiver on the record; rather, the Circuit Defense Counsel (CDC) failed to object. (Gov. Ans. at 10, 13-14, 24). Consequently, the Government is left to argue that the circumstances accompanying this "refusal to press the issue at trial" denote an intentional relinquishment, based on purported tactics and strategy. (Gov. Ans. at 24-28). It then argues that Rule for Courts-Martial (R.C.M.) 905(e) further mandates waiver. (Gov. Ans. at 28-29). The record and this Court's precedent demonstrate why the Government is wrong on both counts.

a. E.C.'s opening testimony was frenetic.

As a starting point, it is perhaps an understatement to label E.C.'s opening testimony as largely nonresponsive, disjointed, and unpredictable. He had trouble answering questions directly and was frequently distracted. *See generally* JA at 148-

155. While such circumstances do not excuse the Circuit Trial Counsel's (CTC) decision to *affirmatively* lie to E.C., it is against this frenetic backdrop that the CDC's mere failure to object must be evaluated.

b. E.C.'s out-of-court statements would not have qualified for admission as residual hearsay, nor does the record demonstrate the CDC so feared this possibility that he strategically declined to object to the CTC's lies.

The Government theorizes that—during E.C.'s chaotic opening testimony—the CDC strategically declined to object when the CTC lied because he feared the admission of E.C.'s prior statements as residual hearsay. (Gov. Ans. at 27). There are no explicit or implicit admissions by the CDC to support the Government's hypothesis, nor are there any findings of fact demonstrating E.C.'s out-of-court statements would have been admissible. On the contrary, the facts indicate that E.C.'s statements so lacked the necessary guarantees of trustworthiness and reliability, they would have not have been permitted under Military Rule of Evidence (Mil. R. Evid.) 807.

To begin, the Government appears to imply that the Defense's failure to "dispute[] the residual hearsay notice" conveyed the strength of the evidence. (Gov. Ans. at 25-26). However, the CDC actually relayed his understanding—which the CTC confirmed—that the Government did not then intend to seek the admission of E.C.'s out-of-court statements. JA at 316-17. The CDC accordingly deemed the matter unripe, but specifically requested the opportunity to brief the issue should it

later arise. JA at 316. So not only did the CDC decline to concede that the statements were admissible as residual hearsay, he expressly sought to reserve an opportunity to object at a future time—a clear indication he believed they were inadmissible. For numerous reasons, the record confirms the CDC's beliefs.

While it may be true that pretrial "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause" (Gov. Ans. at 25 (quoting *Ohio v. Clark* 576 U.S. 237, 247-48 (2015)), this is only because children are perceived to know little about the criminal justice system. Consequently, their out-of-court statements to certain non-law enforcement individuals (like teachers) regarding alleged crimes are not necessarily treated as testimonial because these statements are not offered for the purposes of a prosecution. *See Clark*, 576 U.S. at 247. But there is no blanket admissibility for a child's hearsay statements, nor is there a "categorical rule" that excludes from the Sixth Amendment's reach statements provided to all non-law enforcement personnel. *Id*. at 246.

To be admissible under the residual hearsay exception, a child's out-of-court statement must still contain circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions in the Military Rules of Evidence. Mil. R. Evid. 807(a)(1); *accord United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003) (citing *United State v. Giambra*, 33 M.J. 331, 334 (C.M.A. 1991)). To determine if a statement meets this trustworthiness requirement, courts "look to a number of

indicia of reliability." *Donaldson*, 58 M.J. at 488. These include, but are not limited to: "(1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; [ ] (4) whether the statement can be corroborated"; (5) the declarant's age; and (6) the circumstances under which the statement was made. *Id*. A child's motive to fabricate may also be considered, as can the motives of the individual who reported the child's statement. *See*, *e.g.*, *United States v. Vazquez*, 73 M.J. 683, 691-92 (A.F. Ct. Crim. App. 2014).

As applied here, the record does not indicate that E.C. himself had reason to invent any allegations against Appellant. The same cannot be said about his mother, M.C. *See generally* Brief on Behalf of Appellant (App. Br.) at 4-10. At the time of E.C.'s purported disclosures to M.C., which comprise some of the statements the Government sought to introduce as residual hearsay (JA at 320, 325, 328-29), M.C. was engaged in a contentious custody battle with Appellant. JA at 103, 105, 107, 115. When M.C. began taking her daughter, B.C., to a social worker, she expressed concern that *both of her children* had not divulged sufficient information to trigger action against Appellant. JA at 199. Yet even these meetings with the social worker failed to immediately spur M.C.'s desired allegations. It took B.C. months before claiming Appellant molested her, and this accusation—provided just prior to a scheduled custody hearing—was contradicted by her earlier assertions to the contrary. (*See* App. Br. at 7-8). These circumstances, especially given M.C.'s

admitted desires, raise serious questions as to whether she was influencing her young daughter. And the same is true for E.C.

Although one of E.C.'s disclosures occurred during his sister's meeting with her social worker, it happened in M.C.'s presence and was specifically due to M.C.'s insistence. JA at 107-08, 116. This was because E.C. purportedly made an earlier disclosure privately to M.C., under conditions known only to her. JA at 096-097; *see also* JA at 329 (the CTC acknowledging that M.C. was the only one who heard E.C.'s initial disclosure). Again, this alleged admission was among the residual hearsay statements the Government sought to introduce, which the Defense later challenged as being non-reliable due to its apparent lack of spontaneity, M.C.'s use of leading questions, and E.C.'s almost immediate recantation thereafter. JA at 334. Further notable is how, just five days after E.C.'s admissions to his sister's social worker, he denied to a separate social worker that Appellant had ever touched him and made no allegations of abuse. JA at 238-39.

Given these facts, there are significant issues regarding the circumstances behind E.C.'s purported statements to M.C., including their spontaneity (if any), the possible use of suggestive questioning by M.C. or other improper means to influence her son, and her clear interest in establishing allegations against Appellant. E.C.'s mental state is also highly relevant, as evidenced by his apparent inability to fully understand the trial proceedings, as well as the myriad inconsistencies and fantastical

claims contained in his testimony and pretrial statements. (*See generally* App. Br. at 11-23). Indeed, it is unclear whether he could truly distinguish fact from fiction at all, and it is far from certain he understood the consequences of his actions. But even assuming *arguendo* that E.C. knew what a lie was, there are a host of reasons why his out-of-court statements are unreliable. These range from a desire to please his mother[1] to the adulation he received when making an allegation against his father, wherein he was praised as "brave." JA at 109, 205; *cf.* JA at 206 (in her sessions with B.C., the social worker called it "celebrating" bravery when disclosures about Appellant were made). Finally, other than B.C.'s recollection that she heard E.C. tell Appellant that his "penis makes a funny sound" behind a closed door at a hotel (JA at 137)—in and of itself questionable given B.C. was similarly under the primary care and custody of M.C., and noted as a child who likes to please (JA at 204)—there is no physical evidence corroborating E.C.'s claims nor a neutral eyewitness who could validate their veracity.

Similar problems plague E.C.'s out-of-court statements to T.S., which the Government would have also sought to admit under Mil. R. Evid. 807. *See* JA at 326-27. As a predicate matter, T.S. is a close friend of M.C. and only knew Appellant in passing; accordingly, his less than impartial status is a factor to

[1] In addition to M.C.'s potential improper influence, she was E.C.'s primary caregiver, provided him a home he was more comfortable in, and apparently understood how to deal with his autism better. (*See* App. Br. at 2-5).

consider. JA at 207. But even if E.C. actually provided T.S. details of Appellant's alleged abuse, these disclosures once again occurred at the behest of M.C. As M.C. herself recounted, she had learned of E.C.'s allegations the day prior; however, instead of contacting the authorities, she invited T.S. over and allowed him to talk privately with E.C. JA at 109-110. She then appeared to feign shock when T.S. reported to her what E.C. told him. JA at 208. Again, when viewed in combination with M.C.'s motivations, E.C.'s mental state, and the lack of other corroboration, the circumstances under which E.C. purportedly made these out-of-court statements fail to meet the requisite guarantees of trustworthiness to permit their admission under Mil. R. Evid. 807. But the unreliability of these statements are not the sole factor undercutting the Government's intentional waiver argument.

"The residual-hearsay exception is 'intended to apply [only] to highly reliable and necessary evidence.'" *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003) (quoting *Giambra*, 33 M.J. at 334 (citation omitted)). This latter "prong essentially creates a 'best evidence' requirement . . . [which] may be satisfied where a witness cannot remember or refuses to testify about a material fact and there is no other more probative evidence of that fact." *Id*. (citations omitted). When asked to interpret this rule, the CDC answered that it was not "clear-cut black-and-white, just because the witness testifies . . . that residual hearsay does not apply." JA at 327-28. He then went on to state that, "Obviously there's more of an analysis that goes

to that, and goes to essentially, the necessity prong as to what came out, what questions were asked, and how were they answered on the stand, as to whether or not residual hearsay may still apply, in light of, when the a [sic] child testified." JA at 328. The CDC thus believed that residual hearsay could be an issue *regardless* of whether E.C. testified fully, partially, or not at all. This, in turn, wholly undercuts the Government's argument he strategically declined to object to the CTC's lies to preclude the Government from seeking to admit E.C.'s prior out-of-court statements.

Finally, in response to the Government's contention that the Defense waived its objections to retain its ability to confront E.C. in court and have the members observe his demeanor (Gov. Ans. at 27), the Defense would have been in a better position had the child not testified, and his statements were, instead, admitted as residual hearsay. While it is certainly true that E.C. contradicted himself on the stand, he did the same prior to trial. *See*, *e.g.*, JA at 238-39 (E.C. not reporting any abuse and telling a social worker Appellant never touched him); JA at 334 (recanting to M.C. that he had seen Appellant, or in fact anyone, masturbating). The Defense could have also challenged the motivations of the individuals reporting the statements, to include M.C.'s desire to establish allegations against Appellant, her efforts to place E.C. in positions to effectuate his accusations, and the positive reinforcement he received when providing this sought-after information. E.C.'s overall mental state would also have been at play, such as his inability to appreciate

boundaries, fertile imagination, behavioral challenges, and trouble focusing. JA at 088, 101, 127. Indeed, there were any number of different ways the Defense could have challenged the reliability of E.C.'s out-of-court statements, with the added bonus that these statements may not have included the additional details E.C. provided in his testimony, nor the potential that the panel would sympathize with E.C. if viewing his struggles first-hand. Moreover, given that E.C.'s autism affected his speech, movements, and ability to focus and process information, it is dubious that the panel's ability to observe him would actually assist it in gauging his truthfulness—his fidgeting and non-responsive answers, which might ordinarily indicate evasiveness or untruthfulness, would likely be attributed to his diagnosis. (*See* App. Br. at 44-45).

c. This Court has repeatedly recognized the presumption against waiver of constitutional issues despite R.C.M. 905(e). The Government has failed to provide cogent reasons requiring departure from this well-established precedent.

As the Government acknowledges, this Court consistently applies "a presumption against finding a waiver of constitutional rights." (Gov. Ans. at 28-29 (quoting *United States v. Jone*s, 78 M.J. 37, 44 (C.A.A.F. 2018) (internal quotation marks omitted)). To this end, it has long reviewed unpreserved constitutional claims for plain error, despite the existence of R.C.M. 905(e). *See*, *e.g.*, *Jones*, 78 M.J. at 44 (citations omitted); *United States v. Treat*, 73 M.J. 331, 335 (C.A.A.F. 2014); *cf. United States v. Elespuru*, 73 M.J. 326, 328-29 (C.A.A.F. 2014) (applying waiver

vice plain error due to the defense counsel "consciously and intentionally" failing to preserve the objection at issue); *United States v. Sweeney*, 70 M.J. 300 (C.A.A.F. 2011) (applying plain error based, in part, on a change in the law despite the lower court's application of waiver under R.C.M. 905(e)); *United States v. Curtis*, 44 M.J. 106, 144-146 (C.A.A.F. 1996) (analyzing the merits of a right to remain silent violation despite the Government arguing waiver by application of R.C.M. 905(e)). It has similarly reviewed for plain error unpreserved allegations of prosecutorial misconduct and noncompliance with the oath requirement for child witnesses, both of which are relevant here. *See*, *e.g.*, *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (citing *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018); *United States v. Washington*, 63 M.J. 418, 425 (C.A.A.F. 2006) (citations omitted))). Nevertheless, the Government contends that R.C.M. 905(e)'s waiver language mandates a departure from this well-established precedent. (Gov. Ans. at 28-29). This Court should decline the Government's request for several reasons.

First, as the dissenting Judges in *United States v. Quick* articulated, the doctrine of stare decisis "encompasses at least two distinct concepts . . . : (1) 'an appellate court [] must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself' (horizontal stare decisis); and (2) courts 'must strictly follow the decisions handed down by higher courts' (vertical stare decisis)." 74 M.J.

332, 343 (Stucky, J., joined by Ohlson, J., dissenting) (brackets in original) (quoting Black's Law Dictionary, 1626 (10th ed. 2014). The doctrine of stare decisis applies with even greater force when it concerns a question of regulatory as opposed to constitutional interpretation. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring) ("In statutory cases, stare decisis is comparatively strict, as history shows and the Court has often stated. That is because Congress and the President can alter a statutory precedent by enacting new legislation."). As applied in this case, which involves how this Court has long interpreted a regulation, the Government has not provided compelling reasons for this Court to overrule itself, nor a controlling case from the Supreme Court requiring modification.

Instead, the Government's position appears to mirror what it proffered in *Andrews*, where it argued R.C.M. 919(c)'s waiver provision—analogous to R.C.M. 905(e)'s language—required overturning this Court's precedent applying plain error review to unpreserved issues involving prosecutorial misconduct and improper argument. 77 M.J. 393. Like in *Andrews*, the Government focuses primarily on the language of R.C.M. 905(e) and does not advance any arguments regarding the unworkability of this Court's prior decisions regarding its presumption against the waiver of constitutional rights. (Gov. Ans. at 29). This is likely because this Court's precedent is and has proved extremely workable, requiring a consideration of "the particular circumstances in each case to determine whether

there was a waiver." *Jones*, 78 M.J. at 44 (citing *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008); *Sweeney*, 70 M.J. at 304). If it were otherwise, then the President would not have recently modified R.C.M. 905(e) to explicitly conform with this Court's plain error precedent. *See* R.C.M. 905(e)(2), *Manuel for Courts-Martial* (2019 ed.). In any event, this Court declined to make an unworkability argument on the Government's behalf in *Andrews*, and should do the same here. 77 M.J. at 400.

The remaining factors this Court evaluates to determine stare decisis jurisprudence also weigh in favor of Appellant. *See Andrews*, 77 M.J. at 400-02. This is particularly true with respect to undermining confidence in the law. As this Court concluded in *Andrews*, upholding its precedent involving appellate review of prosecutorial misconduct—"an issue that may, on its own, undermine confidence in the military justice system"—served to "bolster servicemembers' confidence in the law." *Id*. at 400 (citations omitted). Here, this Court is likewise presented with an issue involving prosecutorial misconduct, but this time one that directly implicates a constitutional right. If upholding precedent on prosecutorial misconduct is not alone sufficient to apply stare decisis, then surely the constitutional error involved tips the scales.

Turning next to whether this Court is bound to modify its precedent due to a superior court's holding, it is unclear whether the Government's reference to

Hemphill v. New York (Gov. Ans. at 29 (citing 2022 U.S. LEXIS 590, at *17 (2022)) is an attempt to overcome "the preferred course" of adherence to precedent. *Andrews*, 77 M.J. at 399 (citations and internal quotation marks omitted). But it is unpersuasive regardless, as *Hemphill*'s recognition "that the Sixth Amendment leaves States with flexibility to adopt procedural rules governing the exercise of a defendant's right to confrontation" does not represent new law; rather, it is merely restating a well-accepted and established principle. This is evidenced by its citation to *Melendez-Diaz v. Massachusetts*,[2] a case from 2009 which this Court was notably aware of as it continued to apply plain error for unpreserved constitutional claims. In fact, this Court actually cited it as support for declining to apply waiver under R.C.M. 905(e), despite the lower court's contrary conclusion. *Sweeney*, 70 M.J. at 300 n.8 (citing *United States v. Sweeney*, No. NMCCA 200900468, 2010 CCA LEXIS 458, at *4 (N-M Ct. Crim. App. April 29, 2010) (unpub. op.)). In sum, the Government cites no recent precedent that should modify this Court's treatment of unpreserved constitutional errors, and Appellant is likewise unaware of such controlling law. Accordingly, this Court should adhere to its own well-established precedent and review this case for plain error.

As a final point against applying waiver, the fault for allowing the CTC's lies to go unchecked does not rest solely with Appellant and his counsel. Rather, the

[2] 557 U.S. 305, 327 (2009).

military judge had a *sua sponte* duty to ensure Appellant received a fair trial. *Norwood*, 81 M.J. at 21 (citing *Voorhees*, 79 M.J. at 14 (citing *Andrews*, 77 M.J. at 403-44)); *cf.* R.C.M. 913(c)(4) (allowing the military judge to exclude evidence in the interest of justice without objection from a party); Mil. R. Evid. 103(f) (allowing "[a] military judge to take notice of a plain error that materially prejudices a substantial right, even if the claim of error was not properly preserved."). Given the constitutional interests at stake, the military judge should have corrected the CTC's falsehoods and his failure to do so likewise constitutes plain error.

2. The CTC's falsehoods materially prejudiced Appellant's constitutional right to confront an adverse witness.

The Government correctly acknowledges that the CTC's statement to E.C. regarding Appellant's status in the courtroom was "objectively untrue." (Gov. Ans. at 31). It also agrees "that attorneys must be truthful in their dealing with witnesses and that failing to do so could be considered a transgression of a legal norm." (*Id*.). And it further admits that the CTC perhaps "should have answered EC's questions more accurately, or not answered it at all." (*Id*.). All told, the Government does not meaningfully contest that its senior prosecutor's "objectively untrue" statement was improper. Rather, the thrust of its argument is that while she may have lied to this child witness, that lie did not implicate Appellant's right of confrontation. (*See* Gov. Ans. at 29.)

To the contrary, and as Appellant explained in his Opening Brief, the CTC's lie led E.C. to believe that he was, in effect, the paradigmatic "anonymous accuser" that has been recognized as an anathema to the Confrontation Clause. (*See* App. Br. at 29 (quoting *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring)). By lying to E.C. in this manner, she left him with the impression that Appellant would not know what E.C. was saying about him—either at present *or in the future*. *See* JA at 158 (the CTC assuring E.C. that the attorneys in the room "won't tell anybody what you [sic] us."). This is of special import here given that E.C. spontaneously expressed concern that he did not want Appellant to know what it was he was saying. *See* JA at 155.

Moreover, there is a real possibility E.C. would not have testified but for the CTC's lies. As discussed *supra*, it is unlikely his out-of-court statements were admissible as residual hearsay; however, even if they were, the Defense had myriad methods to undercut their impact. As the Government's remaining evidence was insufficient to support Appellant's conviction (*see* App. Br. at 45-47), he was clearly prejudiced by the CTC's misconduct.

Finally, the Government's citation to *United States v. Bodoh*, 78 M.J. 231 (C.A.A.F. 2019) is unavailing. (*See* Gov. Ans. at 32.) While the Government briefly characterizes that case as standing for the proposition that it is unnecessary to resolve whether a trial counsel's erroneous comments amounted to plain error because there

was no material prejudice, the facts of that case stand in stark contrast to the present situation. In *Bodoh*, "the military judge fully cured trial counsel's error." 78 M.J. at 237. And it was because of these curative measures that the appellant "failed to establish that trial counsel's improper questioning was prejudicial." *Id*. Here, however, the CTC's errors were left wholly uncured.

3. The Government misunderstands the error and its impact, and misapplies Confrontation Clause precedent.

The questions before this Court are not whether one-way remote testimony is permissible, or if a witness must be specifically reminded of an accused's presence. (Gov. Ans. at 32-35.) Rather, it is whether the CTC's statements to E.C. that Appellant was not present violated some legal norm or standard, such as a constitutional provision, a statute, or an applicable professional ethics canon. *See United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). If the CTC committed such a violation, then this Court must determine whether the error impacted a substantial right (i.e., resulted in prejudice). *Id*. (citations omitted). The nature of the right violated controls how to determine this impact, with constitutional violations requiring the Government to prove the error was harmless beyond a reasonable doubt. *See United States v. Tovarchavez*, 78 M.J. 458 (C.A.A.F. 2019). When the error impacts the right of confrontation specifically, harmlessness must be assessed on the basis of the

remaining evidence introduced at trial. *United States v. Daulton*, 45 M.J. 212, 219-20 (C.A.A.F. 1996) (citing *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988).

As applied here, the Government acknowledges that "the CTC's statement that Appellant was not in the courtroom . . . [was] untrue." (Gov. Ans. at 35; *see also id.* at 31). Accordingly, the CTC's error—which violated legal, professional, and ethical duties—was plain and obvious. (*See* App. Br. at 33-34). This error, which the CTC exacerbated by suggesting that E.C. was only providing his information to the three people in the room with him (JA at 148) and later promising they would not "tell anybody else what [he] told [them]" (JA 158), materially prejudiced Appellant's Sixth Amendment right to confrontation because it transformed E.C. into not just a constitutionally prohibited "anonymous accuser," but one who believed his accusations would never be disclosed. *Maryland v. Craig*, 497 U.S. 836, 851 (1990) (quoting *Green*, 399 U.S. at 179 (Harlan, J., concurring)).

The Government posits that *Craig* permits such a scenario, but it incorrectly reads whatever is left of this precedent to mean that so long as *Craig* does not expressly condemn a particular feature of remote child witness testimony, it must be permissible. (Gov. Ans. at 32-35). The opposite is true. *Craig* is a pre-*Crawford*[3] remnant of the Supreme Court's Confrontation Clause jurisprudence that is, itself, premised upon a line of precedent which has been expressly overruled and

[3] *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

abandoned. Thus, in considering whether a departure from the normal dictates of the Confrontation Clause (e.g., knowledge that the accused can contemporaneously perceive one's testimony) can be dispensed with pursuant to *Craig*, the operative question is whether *Craig* expressly *permits* it, not whether *Craig* speaks to it at all. Put more simply, and given the evolution of the Supreme Court's Confrontation Clause jurisprudence since *Crawford* was decided, unless *Craig* explicitly sanctions departure from a normal feature of the confrontation right, the presumption should be that it is impermissible. Adopting the Government's position would invert the analysis.

After Appellant filed his Opening Brief—wherein he argued that *Craig* stands on suspect ground (App. Br. at 36)—the Supreme Court decided *Hemphill*. In that near unanimous decision, the Supreme Court emphasized that *Crawford* marked an "emphatic rejection of the reliability-based approach of *Ohio v. Roberts*." *Hemphill*, 2022 U.S. LEXIS at *18-19 (citing *Roberts*, 448 U.S. 56 (1980)). And because *Craig* is a product of this now abandoned line of "reliability" precedent, it must be read to permit only that which it unequivocally condones. Nothing in *Craig* suggests that the Government is free to misinform a child-witness regarding an accused's presence, nor that the child-witness's testimony will not be shared with others. There is likewise no other controlling authority that permits such conduct.

Even in terms of non-binding authority, there does not appear to be any jurisdiction which allows a child witness to testify under the circumstances in the present case. The Government cites a Utah Rule of Criminal Procedure[4] to support its proposition that one-way testimony for child victims is permissible. (Gov. Ans. at 34). Irrespective of the fact that one-way testimony is not at issue, Utah's rules on remote testimony require observing a number of specific conditions. Utah R. Crim. P. 15.5(b). One such condition is that, after a judge determines that a child victim may testify remotely, "the court shall advise the child prior to testifying that the defendant is present at the trial and may listen to that child's testimony." Utah R. Crim. P. 15.5(b)(1)(C). This is consistent with the demands of the Sixth Amendment and *Craig*'s narrow holding, and expressly requires action that did not occur here. The Government's reference to *George v. Commonwealth*[5] is also unpersuasive, as the case did not turn on whether a child witness could testify under conditions where the child believed the accused was absent. (Gov. Ans. at 34).

The Government is effectively asking this Court to sanction what no other criminal justice system in the country would seem to allow: the remote testimony of a child victim who is *falsely* told the accused is absent and will not learn of the

[4] The Government's citation to Utah R. Crim. P 15.5(2)(a) is inaccurate. (Gov. Ans. at 34). The correct citation is Rule 15.5(b)(1). *See* Utah Rules of Criminal Procedure, https://www.utcourts.gov/resources/rules/urcrp/ (last visited February 9, 2022).
[5] 885 S.W.2d 938, 940 (Ky. 1994).

child's accusations. This far exceeds what even *Craig* allows and violates the Sixth Amendment.

4. E.C. was already testifying under a procedural aberration from that which the Confrontation Clause normally guarantees; affirmatively lying to the witness about Appellant's presence and the proceedings was a bridge too far.

Notwithstanding the "objectively untrue" representations the CTC made to E.C., the Government maintains that the essential elements of the confrontation guarantee were still met. (Gov. Ans. at 31, 35). For the reasons Appellant expounded upon in his Opening Brief, the Government is incorrect. (*See* App. Br. at 38-45). At bottom, the CTC's lies induced E.C.'s testimony based upon the false premise that no one else would know what it is he told them. Indeed, the record demonstrates that E.C. was unsure whether he was actually "doing the court thing" or merely "practicing" at the time he gave his testimony. JA at 152. The CTC's assurances that Appellant could not see or hear E.C., and that none of the attorneys in the room would later tell anyone else what E.C. said, not only failed to correct E.C.'s confusion, they exacerbated the problem.

The Government counters by arguing that children as young as three years-old have been permitted to testify at courts-martial, and because a child of such tender years would seemingly not be able to appreciate the true nature and seriousness of the proceeding by virtue of their age, there was no requirement to impart this upon E.C. either. (Gov. Ans. at 41-42). This misses the point. The fact

is, for all of the confusion E.C. may have evinced, he was *not* a three-year-old; and he *did* express some understanding that he would be testifying in "a court thing" at some point. JA at 152. The fact that he was able to distinguish "the court thing" from mere merely "practicing" shows that he was able to comprehend the former was more serious than the latter. E.C.'s testimony also demonstrates that his understanding of "the court thing" necessarily included Appellant's presence in some form or fashion—otherwise, he would not have repeatedly asked, *sua sponte*, where Appellant was standing. JA at 154. While the CTC may have told E.C. that they were "doing the court thing," E.C. immediately followed up by asking "We are?" JA at 152. As E.C. had attempted to explain, he thought that at "the court thing" there would be a "court to hear us." *Id*. Even after the CTC's brief clarification, E.C. demonstrated that he still did not understand what was happening when he then repeated, "What about the court thing? Is it today?" JA at 153. Shortly thereafter, but immediately prior to her attempt at securing E.C.'s understanding between truth and falsity, the CTC lied to E.C. and said that Appellant was not in the courtroom. JA at 154.

Accordingly, the Government's analogy to a three-year-old who does not have any concept of "a court thing" is inapt; E.C. knew there was a difference between "a court thing" and mere "practicing." In fact, his original preexisting concept of the "court thing" *correctly* included an understanding that Appellant would be present

in the courtroom, before the CTC's incorrect assertions to the contrary led E.C. to believe this may not have been "the court thing" after all. E.C. not only believed that at "the court thing" Appellant would be there, but that there would be a "court to hear us." JA at 154. When the CTC promised E.C. that no one in the room would tell E.C. what he said, she further eroded any confidence that E.C. truly understood what was going on. It might be a different matter if E.C. had no concept of "a court thing," but he *did*. And the CTC's lies in this case call into question all aspects of the confrontation right because E.C.'s testimony, from the oath and beyond, was secured and made on the basis of a fundamental misunderstanding as to what was occurring. Against this backdrop, and consistent with the second prong of *Craig* (to the extent it applies), there is simply not sufficient indicia of reliability under these circumstances given the false predicate upon which the testimony was founded.

5. Nothing in the Supreme Court's *Greer* decision justifies departure from this Court's holding in *Tovarchavez*.

The Government concedes that application of the harmless beyond a reasonable doubt standard in this case "would indeed be a very heavy burden for the government." (Gov. Ans. at 53). It nevertheless contends that its burden, as required by this Court under *United States v. Tovarchavez*,[6] has been called into question by more recent precedent; specifically, *Greer v. United States*[7] and *United States v.*

[6] 78 M.J. 458.
[7] 141 S. Ct. 2090 (2021).

Long.[8] (Gov. Ans. at 51-53). But the Government's argument in favor of a different standard of review fails because *Greer* did nothing to upset this Court's interpretation of Article 59, UCMJ. (*Id*.) Even if it had, Appellant—like the appellant in *Long*—has shown material prejudice.

First, *Greer* did not overrule *Tovarchavez*. The Supreme Court premised *Greer*'s holding on the text of the Federal Rules of Criminal Procedure (Fed. R. Crim. P.), not some overarching constitutional consideration that would apply with equal force to the military justice system. 141 S. Ct. at 2099. *Tovarchavez* likewise relied on the unique statute at play in the military—Article 59, UCMJ—as well as the continued applicability of *Chapman v. California*,[9] a case involving forfeited constitutional error. 78 M.J. at 463, 466-67. Thus, irrespective of how federal circuit courts may have approached this issue under a different set of rules, this Court concluded it "must interpret *our own statute* consistent with our precedent." *Id*. at 466 (emphasis added). It then expressly differentiated the statutory standard inherent to the military justice system from its federal counterpart, noting the former involved "assess[ing] prejudice—whether an error is preserved or not—based on the nature of the right." *Id*. at 467.

[8] 81 M.J. 362 (C.A.A.F. 2021).
[9] 386 U.S. 18 (1967).

Tovarchavez further made clear that abandoning harmless error review for unpreserved constitutional error was not new; in fact, this Court had "repeatedly rejected the argument" in past cases. 78 M.J. at 468. Consequently, the doctrine of stare decisis weighed in favor of its ultimate conclusion.[10] *Id*. And this was particularly true given that the Supreme Court had never meaningfully narrowed *Chapman* in the military justice context. *Id*. at 466. Accordingly, this Court was required to "follow the [Supreme Court] case which directly controls." *Id.* at 468 (quoting *Rodriguez de Quijas v. Shearson/Am. Exp. Inc.*, 490 U.S. 477, 484 (1989)).

The Government ignores these facts and instead attempts to resurrect that which *Tovarchavez* previously laid to rest, claiming *Greer* has now altered the analysis. The Government is wrong. *Greer* did not explicitly overrule or even cite to *Chapman*, nor did it discuss the military justice system. Instead, its focus was on two federal rules that differentiated between preserved constitutional error and forfeited constitutional error—altogether different from Article 59, UCMJ, which makes no distinction between preserved and forfeited errors. *Greer*'s technical interpretation of altogether different criminal rules of procedure that apply within an altogether different system of criminal justice does not provide a basis upon which

[10] This Court emphasized the "overwhelming weight of [its] precedent demonstrates that material prejudice for forfeited constitutional errors under Article 59, UCMJ, is assessed using *Chapman*'s 'harmless beyond a reasonable doubt' test." *Tovarchavez*, 78 M.J. at 463 (citation omitted).

this Court should depart from a question of interpretation it so recently resolved concerning a completely different statute. *See Andrews*, 77 M.J. at 399 ("Stare decisis is most compelling where courts undertake statutory construction," and that "[t]he party requesting that we overturn precedent bears a substantial burden of persuasion.") (internal quotations omitted). The Government's request would also potentially place this Court at odds with Supreme Court precedent. *See Tovarchavez*, 78 M.J. at 466 (noting how "[t]here is no Supreme Court precedent that meaningfully narrows *Chapman*'s application to this case," and concluding this Court was required to follow Supreme Court precedent) (citations omitted).

Separately, there is no need for this Court to even consider this matter because Appellant has sufficiently established material prejudice. As he noted in his Opening Brief, the Government's case involving E.C. largely hinged on his testimony at trial. (*See* App. Br. at 45-47). The other circumstantial evidence that it introduced in support of this specification could not, in and of itself, have secured a legally sufficient conviction. (*Id*. at 46). But more importantly, given E.C.'s sheer number of other contradicting statements and uncorroborated allegations against any number of other individuals at his school who—as it just so happened—were not there to confront him, Appellant has sufficiently established that had E.C. actually be made aware that Appellant was able to perceive his testimony and would, indeed, be made aware of it despite the CTC's assurances to the contrary, there is a

reasonable probability that E.C. may have testified differently—or not at all. No matter who bears the burden, Appellant is entitled to relief.

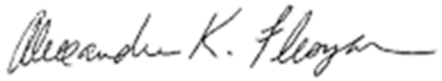
CONCLUSION

In his *Craig* dissent, Justice Scalia expressed that the very "purpose of enshrining [the right of confrontation] in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." *Craig*, 497 U.S. at 861 (Scalia, J., dissenting). Even under the most liberal reading of *Craig*, no legitimate policy interest is served when a senior prosecutor is permitted to affirmatively lie to a child witness and thus further depart from that which the text of the Confrontation Clause has been historically understood to demand.

This case presents a question of whether the Government is permitted an end-around the protections bound up in a categorical right ensured by the Sixth Amendment of the United States Constitution by making affirmative and "objectively untrue" representations to a child witness. Because the Government points to nothing in *Craig* or other precedent which would support such an aberration, and because basic notions of integrity upon which the military justice system relies directly undermine such a contention, this Court should hold that what happened here cannot withstand judicial scrutiny.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilt for Specification 2 of Charge I, and 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 February 10, 2022.

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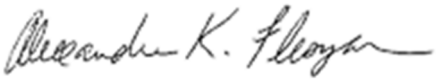

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CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37

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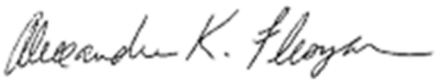

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