IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF THE UNITED STATES**
v.	)	USCA Dkt. No. 21-0341/AF
Master Sergeant (E-7) **DANIEL A. BENCH**, USAF *Appellant.*	)	Crim. App. No. 39797
	)	Date: 31 January 2022

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36083

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(612) 612-4800
Court Bar No. 34088

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

NAOMI P. DENNIS, Colonel, USAF
Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33821

INDEX OF BRIEF

TABLE OF AUTHORITIES

Page(s)

Authorities

United States Constitution

Supreme Court

Court of Appeals for the Armed Forces

Service Courts of Criminal Appeals

Other Federal Courts

State Courts

Other Authorities

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF THE UNITED STATES**
v.	)	USCA Dkt. No. 21-0341/AF
Master Sergeant (E-7) **DANIEL A. BENCH**, USAF *Appellant.*	)	Crim. App. No. 39797
	)	Date: 31 January 2022

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUE GRANTED

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 (AFCCA) reviewed this case under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2016).[1] This Court has jurisdiction to review the above-captioned case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

[1] Unless stated otherwise, all references to the UCMJ, Military Rules of Evidence (Mil. R. Evid.), and Rules for Courts-Martial (R.C.M.) are to the versions contained in the Manual for Courts-Martial, United States (2016 ed.) (MCM).

STATEMENT OF THE CASE

Appellant was tried by a general court-martial composed of officer members on four offenses. (JA at 1-2.) Specifications 1-3 of Charge I alleged various lewd acts committed against Appellant's children – EC and BC – in violation of Article 120b, UCMJ. (JA at 47-48.) The Specification of Charge II alleged Appellant committed indecent conduct in violation of Article 134, UCMJ, by having sex with a woman in the presence of children. (JA at 48.)

The granted issue involves the testimony of EC, who was the named victim for Specifications 1 and 2 of Charge I. (Id.) The first specification alleged that Appellant masturbated in front of EC; the second specification alleged that Appellant caused EC to touch Appellant's penis. (Id.)

The members convicted Appellant on all counts, except Specification 1 of Charge I – that Appellant masturbated in front of EC. (JA at 302.) They sentenced him to confinement for 12 years, reduction to E-4, forfeiture of all pay and allowances, and a dishonorable discharge. (JA at 303.) The convening authority later approved the sentence. (JA at 313-14.) Appellant raised five assignments of error before AFCCA, none of which are before this Court.[2] (JA at 2.) AFCCA

[2] In Assignment of Error III, Appellant alleged the oath administered to EC did not comply with Mil. R. Evid. 603. (JA at 2.) He did not, however, argue the CTC's comments undermined the oath or violated the Confrontation Clause.

found no error materially prejudicial to Appellant, and affirmed the findings and sentence. (Id.)

STATEMENT OF FACTS

Before trial, the government submitted a motion to permit remote live testimony for EC and his twin sister BC. (JA at 36.) They were nine-years old at the time of trial. (JA at 79.) The government explained that EC was "diagnosed with autism spectrum disorder" and testifying "in a courtroom setting, in light of his being autistic, [would] be particularly distressing, confusing, and potentially embarrassing." (JA at 36.) This concern was rooted in "the physical and verbal indications of his fear of [Appellant] and that [Appellant would] find out their 'secret.'" (Id.) The expected "level of stress and fear" for EC was expected to be "exacerbated by his autism." (Id.)

The government expounded on these facts, asserting that EC was "high functioning' on the autism spectrum," but was in therapy since he was two years old. (JA at 37.) EC had "difficulties with speech processing" and "receiv[ed] speech therapy." (Id.) When talking with EC, a person "often times ha[d] to touch her own nose to keep [EC's] attention so he can process the speech of the person talking to him."

Moreover, "[i]n order to successfully communicate with [EC], he require[d] a static, controlled environment and familiarity." (Id.) A new environment would

cause EC to be "severely distracted and distressed." (Id.) Disruption of his daily routine often caused him to become "distraught and confused." (Id.) EC used "[s]elf-stimulatory behavior" (i.e., "repetitive physical or vocal behavior") such as "running or pacing back and forth in the same pattern repeatedly." (Id.) At times, he would "lick[] the back of his hands." (JA at 38.)

Appellant voluntarily terminated his parental rights once the allegations of abuse surfaced. (JA at 223.) But before that happened, EC seemed to struggle with behavioral issues after spending time with Appellant. (JA at 38.) In particular, EC "would soil himself more frequently" and wet the bed. (Id.) Family members also observed EC "masturbating in the shower" to the point where he "rubbed his penis raw." (Id.) According to the government, EC vocalized his concern about testifying, stating, "I'm scared [Appellant] is going to found out that I told." (Id.)

Appellant did not submit a written response or contest the motion for remote live testimony, so these facts were uncontroverted. (JA at 127-28) The military judge summarized the government's argument about why remote live testimony was necessary to protect BC and EC's welfare. (JA at 128.) He then asked the defense if they "wish[ed] to be heard as to the request for remote testimony?" (Id.) The Circuit Defense Counsel (CDC)responded "[n]o, Your Honor, the defense is maintaining their position. We're not objecting to the use of remote live testimony

for [EC] or [BC]." (Id.) The military judge responded: "Very well. In the absence of defense objection I adopt trial counsel's assertions in Appellate Exhibit VII as my findings of fact" under Mil. R. Evid. 611(d)(3). (Id.) The military judge then permitted both children to testify remotely. (Id.)

The military judge then discussed the logistics of remote live testimony with the CDC:

> [A]s we discussed to ensure that you have communications with your client, I will permit you to – and your client – to have cell phone/text communication or email, whatever is easier so that [Appellant] you can consult with your counsel as the questioning is ongoing. So that you and he can have any inputs or communication that you deem necessary. If you need a recess as we are going through that, [CDC], please let me know, so that we can facilitate that, since this does create some difficulties.

(JA at 128-29.)

During remote live testimony, the Circuit Trial Counsel (CTC), the CDC, and the Special Victim's Counsel (SVC) were present at the remote location. (JA at 130, 147.) The remaining court-martial participants, including Appellant and the members, remained in the courtroom. (Id.) BC was the first witness to testify remotely, and the military judge placed on the record that a video teleconference (VTC) screen was set up for the remote witnesses. (JA at 130) He also reminded the members they were "still permitted to evaluate [the witnesses'] credibility and observe the witnesses [sic] mannerisms, in the way that you would were a witness

testifying right here in the courtroom." (Id.) Appellant and the other defense counsel were then permitted to reposition themselves in the courtroom to ensure they could view the VTC. (Id.)

EC was the second witness to testify remotely. (JA at 148-78.) The military judge advised the members that his previous instruction on remote testimony "applies to [EC's] testimony as well." (Id.) EC entered the room and sat in the witness chair as directed. (JA at 147.) A piece of paper covered the VTC screen at the remote location, which meant that EC's testimony was conducted through one-way VTC. (Id.) Appellant did not object to that procedure. (Id.) The following exchange took place between the CTC and EC:

> Q: So we are going to ask you a few questions, and if you can talk really loud so that everyone can hear that would help us out, okay?
>
> A: [Affirmative response.]
>
> Q: Is that a, yes?
>
> A: No.
>
> Q: Yeah. So an [sic] you just –
>
> A: – Why did you cover it up?[3]
>
> Q: So that we could – so that we could make sure that you would be able to answer our questions, and not get distracted.

[3] EC was referring to a piece of paper that covered the VTC screen at the remote location. (JA at 147.)

A: Are there people in there?

Q: No, not so many.

A: What?

Q: Nope, you just have to worry about us right here, okay? So you've got me, and [SVC] and [CDC]. And so we're just –

A: – But are they going to – but are there going to be people –

Q: – 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 147-48.)

The CDC did not object to these comments, or request an Article 39a session outside the presence of the members to address the issue with the military judge. (JA at 148.)

The court reporter noted that, throughout the testimony that followed, EC "was fidgety . . . at times [] leaning in towards counsel, standing up, placing his feet on the table while seated, sticking his legs in the air, standing and pacing back and forth behind his chair, but remaining in the view of the camera." (JA at 148.) Additionally, both the CTC and CDC needed to repeatedly touch their noses during the testimony because "[i]t helps get his attention and get[s] him to focus . . . " (JA at 268.)

EC's testimony began with him accurately stating his name in response to the CTC's question, although he did express reservations about sharing his last name. (JA at 148-49.) EC became distracted, playing with "an object on the table," which prompted the CTC to place the object outside his reach. (JA at 149.) After spending some time discussing his deceased grandfather, EC correctly answered that he was nine-years-old. (JA at 150.) The CTC then engaged in a colloquy to ensure that EC understood the difference between the truth and a lie:

> Q: 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: Is Hawaii? Doesn't have flowers on it?
>
> A: [BC] has the – has the dress.
>
> Q: [BC] 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.

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 –

(JA at 150-52.)

EC then became distracted by who could hear his testimony:

A: – What – the court can hear us?

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

The CDC did not object to this comment, or request an Article 39a session with the military judge to address the issue. (JA at 152.) EC continued:

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.[4]

Q: No, we are going to leave that there, and were [sic] 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]

[4] EC was referring to the piece of paper that blocked the VTC screen. (JA at 152.)

Q: So let me ask you that can you promise that when we ask you questions today the answers that you give us our [sic] 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 you –

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 [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 [Appellant] 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?

(JA at 152-54.)

The CDC did not object to this statement, or request relief from the military judge for the same. (JA at 154.) The testimony continued:

> A: Um-huh.
>
> Q: So we talked a minute ago about your shirt, and about telling us stuff that's true. Will you promise that when we ask you the questions today you'll only tell us stuff that's true?
>
> A: Um-huh.
>
> Q: And that's an affirmative response from the witness.

(JA at 154-55.)

The CDC did not object to the CTC's characterization of EC's response, or the oath administered. (Id.) The CTC again reminded EC that "all you have to do is tell us stuff that's true" before eliciting testimony about the charged offenses. (JA at 155.) EC then reiterated his concern – this time on the witness stand – that Appellant might learn about his testimony. (Id.) EC asserted Appellant would "get angry" if he finds out. (Id.) He elaborated that Appellant would be angry "if he finds out that mom is not being his wife anymore" and that "every time a husband did not have a wife anymore, it gets very angry." (Id.) EC also believed Appellant would be angry because "[t]here's some stuff that is private." (Id.) He tied that statement to "the apartment and Lake Shield" and a "boy's part" –

gesturing to his lap and saying, "[s]omething bad happened . . . . at Fire Lane Hotel."[5] (JA at 155-56.)

EC explained the "Layton Elementary kids knew about" him touching Appellant's penis. (JA at 157.) EC claimed the kids at Layton "are doing it to me" and that he wanted it "to stop." (Id.) He did not explain what "it" was, but asserted that "one of the rules at Layton Elementary" was "no pantsing or, like, or grabbing others' private parts." The CTC responded the "[CDC] and [SVC] and I won't tell anybody else what you [sic] us." (JA at 157-58.)

EC testified about touching Appellant's penis. (JA at 156-60.) Appellant "grabbed [EC's] hand and made [him] touch it." (JA at 156.) They then "just played with it by doing this back and forth."[6] (Id.) The CTC asked EC "[d]o you sometimes touch your penis" and "[d]o you play with yourself sometimes?" (JA at 158-59.) EC responded "I only did it one time when I was only six." (JA at 159.) He could not remember who showed him how to touch his penis, only "the thing [Appellant] did." (Id.) He also explained the hallway outside the "other building

[5] The charged offenses where EC was the named victim occurred at the Mountain View Inn at Hill Air Force Base, Utah. (JA at 80.) It is unclear why EC referred to the Mountain View Inn as "Lake Shield" or the "Fire Lane Hotel." (JA at 155-56.)

[6] EC gestured "in a repetitive motion rolling his wrist back-and-forth on the table causing a tapping noise. (JA at 156.)

we were in on – on – Sunday . . . the building that is [Appellant] is in, that court," smelled like Appellant's car. (Id.)

At the end of her direct examination, the CTC informed EC that she did not have any additional questions, but "[CDC] might have some questions for you." (JA at 162.) EC then asked the CDC why he was "writ[ing] all of this stuff," during his testimony, and the CDC answered "[w]e'll talk about it." (Id.)

The CDC began his cross-examination by saying "the reason I write all of this stuff down is because I have a hard time remembering things. And so, when you say things I have to write it down, so I can remember later. Okay?" (Id.) EC remembered meeting the CDC "the other day" in the room used for remote testimony. (JA at 162-63.) EC remembered the CDC's last name. (JA at 163.) Eventually, the CDC elicited that Appellant was EC's "first dad[.]" (JA at 165.) Before cross-examining EC on the charged offenses, the CDC developed the following testimony: (1) that EC stopped calling Appellant "dad" because "Mom told me because – because he's not my dad anymore;" (2) that EC had done fun things with Appellant, like swimming; (3) that EC's new father, SJ, does "more fun than [Appellant] does;" and (4) that SJ now lives with EC. (JA at 165-69.)

When the cross-examination turned to the charged offenses, EC described the hotel where Appellant "was in the bathroom[.]" (JA at 169-70.) He asserted the building was "called Firelane Hotel." (JA at 170.) EC agreed that he could

watch movies that night and swim in the hotel pool. (Id.) EC also claimed that he took a shower because he "was dirty" after "play[ing] on the playground" where there "was dirt." (JA at 171.) He at first testified that his twin sister, BC, was not at the hotel, but then claimed that "she left right after – right after Jan did that to – Dan." (JA at 172.)

The CDC asked whether "the bathroom door was opened or closed" during the charged incidents. (Id.) EC responded "[c]losed." (Id.) He testified that Appellant "was in his bedroom playing on a game on his phone" while EC showered. (Id.) Beyond what took place in the bathroom, EC denied seeing Appellant's penis "anywhere else in the hotel . . . " (JA at 173.)

The CDC impeached EC with his prior statement to law enforcement where EC claimed to have seen Appellant "play with his penis everywhere in the hotel[.]" (JA at 175.) EC asserted his prior statement was true. The CDC also impeached EC with his pretrial statement to another person that "no one has ever touched [EC's] private parts before[.]" (JA at 176-77.) EC denied that statement, insisting he "tell only [Appellant] did that." (JA at 177.) EC began "walking back and forth" and digressed into a discussion about various hotels that were visited on a road trip. (JA at 177-78.) When the CDC ended his cross-examination, EC volunteered several statements, including "[e]verything – everything I say is true" and "I can actually remember everything [Appellant] did to me. Everything

because when – when – mom just told me why – ” (JA at 178) The military judge sua sponte directed that EC's microphone be muted and instructed the members to disregard those statements.

At no point did the CDC inform EC that Appellant was in the courtroom and observing the testimony. The CDC also declined to raise any concerns about this issue with the military judge, or cross-examine EC on any underlying concern EC might have had about Appellant hearing EC's testimony.

SUMMARY OF THE ARGUMENT

No authority has ever established the Confrontation Clause[7] demands a child witness – who has shown his understanding of the truth and declared his intent to testify truthfully – must understand that his alleged abuser is observing the testimony on the other side of a one-way VTC.

The Confrontation Clause does, however, secure important rights. It is "a procedural rather 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." Crawford v. Washington, 541 U.S. 36, 61 (2004). To that end, "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trial of fact."

[7] U.S. CONST. amend. VI.

Maryland v. Craig, 497 U.S. 836, 845 (1990). It therefore provides a criminal defendant with "*opportunity*" to explore relevant issues, such as the concerns identified above, through "effective cross-examination[.]" *See* United States v. Owens, 484 U.S., 554, 559 (1988) (emphasis in original).

The Supreme Court has never recognized that criminal defendants have an "*absolute* right to a face-to-face" confrontation of witnesses at trial. Craig, 497 U.S. at 844 (emphasis in original). In fact, the procedural guarantees of the Confrontation Clause are met when the witness: (1) testified under oath; (2) was subject to full cross-examination; and (3) could be observed by the judge, factfinder, and defendant while testifying.[8] Craig, 497 U.S. at 857; Owens, 484 U.S. at 560 (referring to the "traditional protections" to ensure adequate confrontation of witnesses). Remote testimony that retains "[t]hese safeguards of reliability and adversariness" is therefore constitutionally permissible. Id. at 851.

Even if the CTC transgressed a legal norm by telling EC on the record – that Appellant was not in the courtroom when in fact he was – that action does not mean that Appellant is entitled to relief. This is especially true when Appellant repeatedly declined to address the issue at trial. First, Appellant did not contest the

[8] Physical presence of the witness is another "element[] of confrontation," but the Supreme Court concluded the Confrontation Clause did not require such face-to-face confrontation upon a case-specific finding of necessity. Craig, 497 U.S. at 851.

request for one-way remote testimony. Second, Appellant did not object to the CTC's comments, or any portion of the oath colloquy with EC. Third, Appellant passed on the chance to correct the misunderstanding created by the CTC's comment during cross-examination – despite ample opportunity to do so. If Appellant truly desired to correct this misunderstanding, the time to do so was at trial when it could have been easily rectified. Appellant should not receive a windfall on appeal after declining to address this issue time and time again.

The actions (and inactions) by the defense also reveal a tactical and strategic reason for not correcting EC's misunderstanding. Even on appeal, the defense believes EC may have been unavailable to testify if he knew Appellant was listening. That could have exposed the defense to unconfronted hearsay statements EC made to adults. It was therefore reasonable to preserve their opportunity to confront EC, which is strong evidence Appellant waived this constitutional claim. Moreover, R.C.M. 905(e) provides a rule based reason for finding waiver of this constitutional claim. Appellant failed to raise this objection at any point prior to adjournment, and the plain language of the rule states his claim is waived.

In the absence of waiver, Appellant is only entitled to relief if the violation of a legal norm actually impacted a substantial right. *See* United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996) (citation omitted). Under the plain error standard, the violation must have actually impacted a substantial right – such as the right to

confrontation – before this Court would assess the record for prejudice. Id. But the CTC's comment did not impact any of Appellant's rights, because each of the essential elements of cross-examination were preserved in Appellant's case. EC was produced for live testimony, albeit through remote means. EC took an oath. EC was subjected to unrestricted cross-examination. Additionally, his testimony – from start-to-finish – was observable by Appellant and the factfinder. This was a constitutionally permissible procedure.

If this Court disagrees, and a prejudice analysis is required, that raises new questions for this Court. This Court may need to reckon with the unresolved question from United States v. Long, 81 M.J. 362 (C.A.A.F. 2021), of which party bears the burden of establishing prejudice in a plain error review of a nonstructural constitutional error. If the burden remains with the government, the Court evaluates prejudice by examining only "the remaining evidence" beyond EC's testimony that was presented at trial. United States v. Daulton, 45 M.J. 212, 219-20 (C.A.A.F. 1996) (quoting Coy v. Iowa, 487 U.S. 1012, 1022 (1988)). But this exacting standard reinforces why waiver should apply. If Appellant had done something – anything – to address this issue at trial, and EC was unable to testify, the government could have sought admission of his nontestimonial hearsay statements. But, in the absence of an objection, the government relied on EC's live

testimony to meet its burden. Appellant should not receive a windfall after repeatedly declining to take any action to address the issue at trial.

ARGUMENT

THE CTC'S COMMENT DID NOT IMPACT THE PROCEDURAL RIGHTS SECURED BY THE CONFRONTATION CLAUSE.

Standard of Review

"When an appellant does not raise an objection to the admission of evidence at trial, [courts] first must determine whether the appellant waived or forfeited the objection." United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018) (citing United States v. Sweeney, 70 M.J. 296, 303 (C.A.A.F. 2011)). Waiver is the "intentional relinquishment or abandonment of a known right." United States v. Olano, 507 U.S. 725, 732 (1993). When an appellant fails to raise a Confrontation Clause objection at trial, this Court "consider[s] the particular circumstances of [the] case to determine whether there was waiver" but "appl[ies] a presumption against finding a waiver of constitutional rights." 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).

"In certain and exceptional circumstances, counsel may waive a constitutional right on behalf of a client." Id. (citing Harcrow, 66 M.J. at 157). Evidence that the lack of objection was part of a legitimate trial tactic or strategy can show that counsel's waiver was intentional. *See* id. If this Court finds that

plain error is the appropriate test, then "this Court will only grant relief where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused." Sweeney, 70 M.J. at 304 (C.A.A.F. 2011) (citation omitted).

Law and Argument

Appellant opens his argument with a quote from Justice Scalia: "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." (App. Br. at 23) (quoting Coy, 486 U.S. at 1019) (finding that the "constitutional right to face-to-face confrontation was violated" by permitting remote testimony without a case-specific showing of necessity). Justice Scalia's observation about the virtues of face-to-face confrontation lies at the foundation of each argument forwarded by Appellant.

But Appellant attempts to stretch the language from Coy beyond the limits of what it can bear. The Supreme Court has never endorsed an "absolute" right to face-to-face confrontation. *See e.g.*, Craig, 497 U.S. at 851. Indeed, a mere two years after Coy, the Supreme Court permitted a child witness to testify by one-way closed-circuit television.[9] Id. at 857. That procedure – by design – prevents face-

[9] While not disputing that Craig governs "when, and how, remote testimony by a child witness in a criminal trial is constitutional," Appellant calls the opinion an "aberration" that only "technically remains" binding law. (App. Br. at 35-36.)

to-face confrontation because "of the witness's inability to testify in the presence of the accused." Id. at 858 (citations omitted). As a result, Coy is inapplicable to this case.

Instead, for duly authorized remote-testimony, the Confrontation Clause demands procedures at trial that preserve "rigorous adversarial testing" of the child's testimony through the essential elements of confrontation. *See* id. at 851. Those elements – "oath, cross-examination, and observation of the witness's demeanor" – were present in this case. Id. Appellant's constitutional right to confront EC was thus preserved.

A. Appellant waived his Confrontation Clause claim.

The CDC did not object to the comment about Appellant's presence in the courtroom – despite ample opportunity and a plain and obvious basis for doing so. That is strong evidence of an "intentional relinquishment of a known right." *See* Jones, 78 M.J. at 44. But there is yet more evidence that Appellant's refusal to press this issue at trial was intentional, and the result of a tactical or strategic decision.

Those characterizations are incorrect; Craig has never been explicitly or implicitly overruled. *See* Eberhart v. United States, 546 U.S. 12, 19-20 (2005) (discussing the duty of lower courts to adhere to precedent even when later decisions call earlier Supreme Court decisions into question).

The defense knew a significant rationale for using remote live testimony was EC's fear about Appellant's "anger for telling 'the secret' of his abuse" at trial. (JA at 44.) The government said as much in its written motion. (Id.) Nevertheless, the defense declined to contest that motion in any way, affirmatively stating they had no objection to the remote live testimony. This decision was likely driven by EC's many pretrial statements, some of which may have been admissible as nontestimonial hearsay if EC could not testify. *See* Ohio v. Clark, 576 U.S. 237, 247-48 (2015) (concluding that pretrial "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause.) Indeed, the government had provided a residual hearsay notice to the defense in the event EC, in light of his age and disability, was unavailable to testify at trial.[10] (JA at 316-40.)

The defense never disputed the residual hearsay notice, so it was not attached to the record. The government did, however, attempt to put on some of EC's statements pursuant to that notice. (JA at 320.) One statement was EC telling his mother that Appellant was "playing with his penis in his hotel house"

[10] While the residual hearsay exception was intended "to be used rarely and in exceptional circumstances, such a circumstance 'generally exist[s] when a child sexual abuse victim relates the details of the abusive events to an adult.'" United States v. Vasquez, 73 M.J. 683, 690 (A.F. Ct. Crim. App. 2014) (citations omitted). The child's unavailability may satisfy the necessity prong of the residual hearsay analysis. Id.

and "asked his mother not to tell; it's a secret . . . " (Id.) The second statement was EC telling his sister that "daddy's penis was slimy, and that he doesn't like talking about this secret because it hurts his heart." (Id.) These statements went to the heart of at least one specification. The military judge considered the analysis for residual hearsay and expressed hesitation because the children would be testifying later. (JA at 322-33.) Ultimately, he was not required to rule because the parties came to an agreement off the record. (JA at 324.)

After the children did testify, the government again sought to introduce pretrial statements from EC as residual hearsay. (JA at 325.) On direct examination, EC could not recall who showed him how to touch his penis. (Id.) The government sought to introduce another pretrial statement, through EC's mother, that "Daddy taught me how to do this; this is our secret; daddy does this in the shower." (Id.) The military judge denied government's request, in part, because it failed to establish the "necessity" of the statement when EC was "not unavailable" to testify. (JA at 339) (quotations omitted).

During closing argument, the CDC argued that EC "has the capacity to say some pretty fantastical things" and highlighted EC's prior inconsistent statement about Appellant masturbating "everywhere" in the hotel room. (JA at 287-88.) But most importantly, the CDC identified the "even more exaggerated" testimony about kids at school doing similar things as Appellant, and said:

> "[Y]ou've had the opportunity to observe him. *He says all of those things with the exact same conviction*. Right? So when he said the statement about [Appellant] playing with himself everywhere in the hotel room, and I said, "Okay, but when you said that before, was that true?" And he was like, "Yeah. That's the truth. That's what happened." We know that's not the truth.

(JA at 288) (emphasis added).

This argument reveals the (reasonable) premium the defense placed on the members being able to observe EC's demeanor. The defense believed there was a "real possibility" EC "would not testify" if it was made clear that Appellant was watching the testimony. *See* (App. Br. at 25.) The defense was aware that unconfronted testimony from EC – delivered through adults – could be admissible and difficult to defend against. To mitigate this risk, it was a reasonable trial tactic to waive the objection, and, in the process, retain the ability to confront this particular child where the members could observe his demeanor.

That tactic proved successful, at least with regard to Specification 1 of Charge I. Appellant was able to secure an acquittal on that specification after impeaching EC with his prior inconsistent statement about Appellant masturbating "everywhere in the hotel" rather than just the bathroom. (JA at 175, 302.) The CDC's repeated decisions to forgo objections, coupled with the manner in which the defense attacked EC's testimony, shows a "course of conduct that is incompatible with a demand to confront [this] adverse witness[]" in the manner he

demands on appeal. *See* Hemphill v. New York, _____ U.S. _____, 2022 U.S. LEXIS 590, at *25 (20 Jan. 2022) (J. Alito concurring) (citation omitted). That, in turn, shows Appellant's clear waiver of this Sixth Amendment claim. *See* id.

Alternatively, there is a rule-based reason to find waiver in this case. R.C.M. 905(e) provides that "[o]ther motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, *unless otherwise provided in this Manual*, failure to do so shall constitute waiver." (emphasis added). Appellant failed to raise any motions, requests, or objections before adjournment based on the Confrontation Clause or the CTC's statement about Appellant's presence, and there is nothing in the MCM that requires this Court to treat unpreserved error like this as forfeited rather than waived.

While this Court typically "appl[ies] a presumption against finding a waiver of constitutional rights," Jones, 78 M.J. at 44, and typically reviews unpreserved allegations of prosecutorial misconduct for plain error, *see* United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018) (citation omitted), it did recently express interest in whether an appellant waived a constitutional objection to R.C.M. 912(f)(4) by operation of law under R.C.M. 905(e). *See* United States v. Van Valkenburgh, 80 M.J. 395, 395-96 (C.A.A.F. 2020) (declining to consider waiver under R.C.M. 905(e) because the government did not argue that point).

And the Supreme Court recently recognized that legislatures have the flexibility to adopt "reasonable procedural rules governing the exercise of a defendant's right to confrontation," such as requiring contemporaneous objections. Hemphill, 2022 U.S. LEXIS at *17. Interpreting R.C.M. 905(e) to require that Confrontation Clause objections be made before adjournment of the trial is consistent with this recognition. An objection requirement such as this is reasonable because an accused should not be granted relief on appeal when at trial he sat idly by and took no action to remedy what he now claims to be a Confrontation Clause violation.

If one follows the plain language of R.C.M. 905(e), Appellant failed to raise any motion, request, or objection regarding his confrontation rights, and so, by operation of law, the issue was waived. That leaves "nothing left for [this Court] to correct on appeal." United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2000) (citations omitted).

B. Assuming the CTC telling the witness that Appellant was not in the courtroom transgressed a legal norm, it did not impact a substantial right.

If Appellant forfeited rather than waived this issue, then this Court reviews for plain error. Appellant can only prevail if the alleged violation of a legal norm actually impacted a substantial right. Meek, 44 M.J. at 5. Assuming the CTC violated a legal norm by telling EC that Appellant was not in the court room, the statement did not affect Appellant's confrontation right.

Shortly after entering the room to testify, EC, referring to the video screen, asked "[a]re there people in there?" (JA at 147.) The CTC answered ambiguously: "No, not so many." (Id.) EC asked "[w]hat?" (Id.) The CTC tried to side-step his inquiry, stating: "Nope, you just have to worry about us right here, okay? So you've got me, and [SVC] and [CDC]. And so we're just – " (Id.) EC asked would there "be people" and the CTC interrupted: "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? (Id.) In context, this statement was not misleading and merely an attempt to focus the autistic child witness. In any event, the CDC did not object or request any relief from the military judge. (Id.)

EC's "autism ma[de] it severely distressing for him to be in an unfamiliar place with high levels of distraction and sensory input." (JA at 127.) Consistent with his disability, EC remained preoccupied by who could hear his testimony. (JA at 152.) The CTC sought to focus him by saying: "All you've got is the three people right here." Again, in context, this was not misleading for the same reason mentioned above. This conclusion is reinforced by the fact that Appellant's entire defense team observed this exchange, and did not see the need to intervene as the comment merely focused the child.

The CTC then reminded EC of his obligation to tell the truth and corrected those two comments by informing EC there were "people on the camera" who

could see him. (JA at 154.) After an extended exchange where the CTC answered EC's questions about who was watching him through the VTC, EC asked "[w]here is [Appellant] going to 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.) This last statement was objectively untrue, but, again, the CDC did not object or request relief or attempt to correct the statement. This showed the defense team understood this comment as merely focusing the witness and not improper under the circumstances. Or, if they believed this comment was objectionable, determined it was not in their interest to address the alleged error. After promising to "only tell us stuff that's true[,]" EC provided testimony about the charged offenses. (JA at 155.)

The government agrees with the general proposition 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. But here, the CTC was interacting with a nine-year-old autistic child who feared his sexually abusive father. Perhaps the CTC should have answered EC's question more accurately, or not answered it at all. But unlike cases such as Meek, where the trial counsel worked to dissuade witnesses from testifying, the CTC's comment tended to ensure live testimony from a witness and maintain Appellant's opportunity for cross-examination.

Of course a prosecutor's good-faith actions could still constitute prosecutorial misconduct. *See* United States v. Hornback, 73 M.J. 155, 160 (C.A.A.F. 2014) ("the prosecutorial misconduct inquiry is an objective one, requiring no showing of malicious intent on behalf of the prosecutor . . . ") But a fair reading of the record shows the CTC did not engage in "methods calculated to produce a wrongful conviction," Andrews, 77 M.J. at 402 (citation omitted); rather, her comment was a haphazard attempt to focus a child witness with special needs on the task at hand. Even if this Court is troubled by the CTC's comment, it need not decide whether this brief comment, made under difficult circumstances, amounted to prosecutorial misconduct. This is because, for the reasons stated below, this comment did not plainly or obviously impact Appellant's essential elements of confrontation under the Constitution. *See* United States v. Bodoh, 78 M.J. 231, 238 (C.A.A.F. 2019) (declining to resolve whether trial counsel made erroneous comments because there was no material prejudice).

C. When a child witness has been allowed to testify remotely under Craig, there is no constitutional right that the child be aware that the accused is observing the testimony.

As a threshold matter, the logical extension of Appellant's argument is that one-way remote live testimony is constitutionally impermissible unless the child witness has been reminded the defendant is observing his testimony. *See e.g.*, (App. Br. at 44) (arguing the opportunity for cross-examination was illusory

because of EC's "belief that his father was absent [] lessen[ed] any nervousness about having to lie in his presence.") Even though Appellant has the burden under a plain error review to show plain and obvious error, he has cited no legal authority establishing this alleged mandate. Importantly, nothing about the language of Craig, or the R.C.M.s that govern remote live testimony in courts-martial, contain this purported requirement. Appellant instead attempts to cull this alleged requirement from Coy. But, as stated above, that case is not applicable because the Supreme Court in Craig created an exception to the requirement of face-to-face confrontation for certain child witnesses.

Reminding child witnesses – just before their testimony – that a criminal defendant is watching them would undermine the purpose of remote testimony, which is to limit "trauma [that] would impair the child's ability to communicate" about the charged offenses because of the defendant's presence. *See* Craig, 497 U.S. at 856. The analysis for R.C.M. 914A echoes this concern as it states, "[t]he use of two-way closed circuit television, to some degree, may defeat the purpose of [remote live testimony] procedures, which is to avoid trauma to children." MCM, A21-64.

Awareness of the accused's presence also implicates the reliability of a child's testimony, just not in the manner suggested by Appellant. In Coy, Justice Blackmun recognized the presence of a criminal defendant "may so overwhelm the

child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself." 487 U.S. at 1032 (J. Blackmun, dissenting). He cited "experts and commentators [that] have concluded that the reliability of the testimony of child-sex abuse victims is actually enhanced by the use of protective procedures." Id. at n.5 (citation omitted). Two years later, the majority in Craig adopted Justice Blackmun's reasoning, writing, "there is evidence that [face-to-face] confrontation would in fact disserve the Confrontation Clause's truth-seeking goal." 497 U.S. at 856 (citation omitted).

At least one state court has recognized "the ample evidence that a child's live, in-court testimony in the presence of a guilty defendant may be unreliable because such confrontation may impair the child's ability to communicate and may promote inaccurate testimony." In re Jam J., 825 A.2d 902, 924, n.8 (D.C. Ct. App. 2003) (citation and quotation omitted). And at least one jurisdiction permits the use of one-way remote testimony "so that the child *need not be aware* of the defendant's presence." George v. Commonwealth, 885 S.W.2d 938, 940 (Ky. 1994) (emphasis added); *see also* Utah R. Crim. P. 15.5(2)(a) (permitting remote testimony when "the child's testimony will be inherently unreliable if he is required to testify in the defendant's presence.")

The bottom line is that other courts have recognized that one-way remote testimony where the child is unaware of the accused presence can enhance the

truth-seeking function of a trial by ensuring the accused's presence does not intimidate the child into providing false testimony. Appellant simply has not shown a constitutional right for EC to know Appellant was present on the other side of the camera, especially when Appellant affirmatively declined to object to EC testifying remotely under the parameters of Craig. And since Appellant had no right that EC be aware of Appellant's presence, the CTC's statement that Appellant was not in the courtroom – while untrue – did not impact his confrontation right.

D. The procedures used at trial preserved the essential elements of confrontation.

In its first case interpreting the Confrontation Clause, the Supreme Court observed:

> The primary object of the constitutional provision in question was to prevent deposition or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand *face to face with the jury* in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.,

Mattox v. United States, 156 U.S. 237, 242-43 (1895) (emphasis added).

About 110 years later, the Supreme Court echoed its earlier understanding: "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations

as evidence against the accused." Crawford, 541 U.S. at 50; *see also* Davis v. Washington, 547 U.S. 813, 835 (2006) (discussing the historical origins of the Confrontation Clause).

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant *by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact*." Craig, 497 U.S. at 845 (emphasis added). To accomplish this end, the Confrontation Clause affords "a procedural rather 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. Indeed, "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (citation omitted). The Supreme Court has therefore recognized:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to prove and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

Fensterer, 474 U.S. at 21-22.

For the reasons stated below, the three essential elements of confrontation applicable to remote testimony – the oath, cross-examination, and observation of the witness's demeanor – were preserved. *See* Craig, 497 U.S. at 851.

i. *The oath administered to EC was proper.*

Now that his case is on appeal, Appellant contends the colloquy with EC "did not adequately impress upon [EC] the importance of telling the truth nor the meaningfulness of his testimony or the seriousness of the matter at hand." (App. Br. at 38-39) (citing Washington, 63 M.J. at 424). But Appellant did not raise a timely objection at trial and therefore waived the claim under R.C.M. 905(e), or, at the very least, cannot show plain and obvious error with the oath. *See* Washington, 63 M.J. at 424 (citations omitted).

Every person who testifies must be competent to do so. *See* Mil. R. Evid. 601. There is a presumption of competence, and "[t]he trend is to follow the Rule as written and to allow all witnesses to testify."[11] Stephen A. Saltzburg, Lee D. Schinasi, David A. Schlueter, and Victor M. Hansen, *Military Rules of Evidence Manual*, § 601.02 (9th ed. 2021) (citation omitted) Appellant did not raise any

[11] A mental impairment does not preclude testimony when the witness understands the oath to testify truthfully and the factfinder had "a full opportunity" to evaluate the witness's credibility. United States v. Callahan, 801 F.3d 606, 622-23 (6th Cir. 2015). The only grounds for disqualifying a witness is that he "does not have knowledge of the matters about which he is to testify, that he does not have the capacity to recall, or that he does not understand the duty to testify truthfully." United States v. Lightly, 677 F.2d 1027, 1028 (4th Cir. 1982).

concerns about EC's competency at trial, and even argued that EC was "not an unintelligent child" and capable "of distinguishing between one question versus another." (JA at 284.) Given the low bar for competency, and the CDC's representations at trial, there were no issues with Mil. R. Evid. 601.

Turning to the oath, Mil. R. Evid. 603 requires that, "[b]efore testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience." The "rule is designed to afford the flexibility required in dealing with . . . children" and the "affirmation is simply a solemn undertaking to tell the truth . . . " Washington, 63 M.J. at 424 (alterations and citations omitted). Mil. R. Evid. 603 "requires no special verbal formula, but instead requires that the oath be meaningful to the witness, including a child witness, and impress upon the witness the duty to tell the truth." Id. (citations omitted).

"Any process that is sufficient to 'awaken the witness's conscience" is satisfactory." Id. (quoting United States v. Allen, 13 M.J. 597, 599 (A.F.C.M.R. 1982)) (second citation omitted). Additionally, "hesitancy and apprehension at the prospect of speaking before a room full of adults" is "a matter for the members, who heard and observed" the witness "to decide what weight should be given to her testimony." Morgan, 31 M.J. at 48 (finding no error in colloquy with four-year-old witness). "[C]onfusion by the child as to truth and fantasy [go] to the

weight" the factfinder may give the testimony. United States v. Morgan, 31 M.J. 43, 48, n.8 (C.M.A. 1990) (citing United States v. LeMere, 16 M.J. 682, 685-86 (A.C.M.R. 1983)).

At the time of trial, EC was a nine-year-old child with an autism diagnosis. (JA at 18.) His age and disability made it difficult for EC to communicate and focus, which is evident from the transcript. Even so, EC confirmed he understood the difference between a truth and a lie before testifying to the substance of his allegations against Appellant. The colloquy with EC about his shirt proves this point:

> 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 152.)

The CTC confirmed EC understood the need to tell the truth throughout the proceeding, asking, for example: "So we talked a minute ago about your shirt, and about telling us stuff that's true. Will you promise that when we ask you the questions today you'll only tell us stuff that's true?" (JA at 155.) EC responded "[u]m-huh." (Id.) The CTC clarified for the record "that's an affirmative response from the witness." (Id.) And the CDC did not object to that characterization. (Id.) EC therefore understood the difference between the truth and a lie and declared his intent to testify truthfully. *Cf* Morgan, 31 M.J. at 48, n.9 (recognizing the need for "even more tolerance" when child witnesses answer questions non-verbally, such as with gestures). That was sufficient to meet the requirements of Mil. R. Evid. 603.

Appellant attempts to undermine this oath by making arguments that range far beyond what the law requires. First, Appellant contends the colloquy failed to explain "the meaningfulness" of testifying or "the seriousness of the matter at hand." (App. Br. at 39.) Appellant cites no authority for requiring an oath to convey those ideas – because there is none. The plain language of the rule only requires "an oath or affirmation to testify truthfully" in a "form designed to impress *that duty* on the witness's conscience." Mil. R. Evid. 603 (emphasis added). The oath accomplished *that* limited purpose as it impressed on EC the

"solemn undertaking to tell the truth . . . " Washington, 63 M.J. at 424 (citation omitted).

Second, Appellant suggests the oath was "insufficient to establish that [EC] truly comprehended what was happening at all, let alone the seriousness of the proceeding." (App. Br. at 40.) Again, the plain language of the rule does not require an oath that conveys these concepts. *See* Andrews, 77 M.J. at 400 (stating questions of statutory interpretation "begin and end with the statutory text.") (citation and modifications omitted). And trial "defense counsel had the opportunity to cross-examine [EC] at length regarding [his] ability to appreciate the difference between the truth and a lie; whether [his] testimony was influenced by adults . . . and whether [he] understood why [he] was in court testifying." *Cf* United States v. Pacheco, 154 F.3d 1236, 1239, n.4 (10th Cir. 1998) (explaining why a special jury instruction on the credibility of a child victim was unnecessary). Moreover, to the extent that EC expressed confusion about whether "the court thing" was happening, the CTC responded "[w]e are doing the court thing," and EC confirmed his understanding. (JA at 152.)

Military courts have permitted children as young as three years old to testify. *See e.g.*, LeMere, 16 M.J. 682 at 685-86; *see also* United States v. Lyons, 33 M.J. 543, 548 (A.C.M.R. 1991) (permitting an 18-year-old girl with a mental age of about three to testify). One would not expect that a three-year-old witness "truly

comprehended what was happening" and the "seriousness of the proceeding" before providing competent testimony. (App. Br. at 40.) Instead, the "affirmation is simply a solemn undertaking to tell the truth," and the record shows that EC understood that duty. *See* Washington, 63 M.J. at 424 (alterations and citations omitted); Morgan, 31 M.J. at 47 (Mil. R. Evid. 603 "is written to permit . . . children and individuals with emotional difficulties to satisfy the basic criterion or affirming their duty to tell the truth.")

Third, Appellant claims the CTC "irretrievably shattered the image of an adversarial setting" during the oath colloquy when she told EC that Appellant was not in the courtroom. (App. Br. at 40-41.) It is hard to imagine how the adversarial setting was "irretrievably shattered" by this comment when EC was later subjected to unrestricted questioning in "the crucible of cross-examination." Hemphill, 2022 U.S. LEXIS at *19 (quoting Crawford, 541 U.S. at 61). That particular element of confrontation is "the greatest engine of our adversarial trial practice . . . " United States v. Kinney, 56 M.J. 156[12] (C.A.A.F. 2001) (J. Crawford, dissenting). The fact remains that EC demonstrated his understanding of the truth, and declared his intent to testify truthfully without any objection by

[12] The reporter page number is not visible on Lexis Advance. The quote can be found at 2001 CAAF LEXIS 1553, at *15.

trial defense counsel. *See* Washington, 63 M.J. at 424. That was sufficient under Mil. R. Evid. 603.

Fourth, Appellant points to the timing of the CTC's offending comment (i.e., during the oath colloquy) and argues it was "unclear whether [EC] would have testified at all had he known his father would hear him, or whether [EC] would have possessed the same intent regarding the veracity of his testimony." (App. Br. at 41.) These claims of "speculative prejudice" are insufficient to show how the CTC's comment implicated Appellant's right to confront the witness. *See* United States v. Robinson, 627 F.3d 941, 955 (4th Cir. 2010) (concluding that plain error review requires error that "actually resulted in prejudice and not merely possible or speculative prejudice."); Meek, 4 M.J. at 5 (requiring a threshold showing that a prosecutor's violation of a legal norm to have "actually impacted on a substantial right"). Appellant did not object to the CTC's comments, the oath administered, or EC's competency, and consequently there is a dearth of information to support his claims raised for the first time on appeal.

Given EC's age and disability, it is unsurprising that his oath colloquy was extended and, at times, meandering. But any lingering doubt about EC's understanding that he was supposed to tell the truth was resolved by EC

exclaiming "everything I say is true" at the end of his cross-examination.[13] For these reasons, Appellant has not met his burden to show plain and obvious error with EC's oath, and, thus, this essential element of confrontation was preserved.

ii. *EC was subject to unrestricted cross-examination.*

Cross-examination is the "greatest legal engine ever invented for the discovery of the truth[.]" California v. Green, 399 U.S. 149, 158 (1970) (quoting Wigmore, Evidence § 1018 (3d ed. 1940)). As a result, "the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony." Craig, 497 U.S. at 847 (quoting Fensterer, 474 U.S. 15). But "the Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way." Owens, 484 U.S. at 559 (citations and internal quotations omitted).

[13] The military judge told the members to disregard that statement. (JA at 179.) In light of that ruling, the testimony was not substantive evidence relating to Appellant's guilt. But this Court should not disregard the statement when considering EC's previously expressed intent to testify truthfully. *See* Washington, 63 M.J. at 424 (considering oath administered after child witness testified as evidence that child understood obligation to testify truthfully).

"Appellant does not dispute that his counsel had the opportunity to question [EC]." (App. Br. at 43.) He "also acknowledges that some of the infirmities in [EC's] testimony were exposed through [] questioning, which can be an indicator that the Confrontation Clause is satisfied." (App. Br. at 43) (citing Fensterer, 474 U.S. at 22). Appellant then makes several arguments as to why his opportunity to cross-examine EC at trial was materially prejudiced. None of them have merit.

First, Appellant's attempts to show that EC's testimony was unreliable. (App. Br. at 41-42.) These attempts are unavailing. To the extent that Appellant alludes to competency issues, this Court observed "there is simply no rule of evidence which precludes witnesses from testifying or renders their testimony . . . insufficient because they contradict themselves or are contradicted by others in their trial testimony." United States v. White, 45 M.J. 345, 348 (C.A.A.F. 1996). To that end, Appellant's arguments would be familiar in a brief addressing the legal sufficiency of the evidence, but that is not what this case is about. It is about whether the CTC's comments plainly and obviously impacted Appellant's rights under the Confrontation Clause. The Supreme Court was clear: the Confrontation Clause affords "a procedural rather 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." Crawford, 541 U.S. at 61. That is exactly what happened at trial.

Appellant next claims "it is unclear whether [EC] 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." (App. Br. at 43.) Appellant cites no authority for requiring a child witness generally, and a child witness with cognitive disabilities specifically, to understand the specific purposes of his testimony and the occupation of his questioners. Such a requirement certainly is not found in the plain language of the Mil. R. Evid. 601, 603, or the Sixth Amendment.

Despite a dearth of authority for the above proposition, Appellant forwards another purported constitutional requirement for otherwise competent witnesses, claiming that children must understand "the stakes involved – which included potential perjury charges and the wrongful conviction of [EC's] father . . . [to be] truly subjected to the crucible of cross-examination." (App. Br. at 44.) This Court specifically rejected the notion that a child witness must understand "the perils of perjury" before giving competent testimony. Washington, 63 M.J. at 425. Based on the lack of authority for this argument, and human experience with young children, it is dubious to suggest that cross-examination of a child is constitutionally infirm unless the child understands "the consequences" of providing false testimony. *See* id. All that is required of a child witness is to

"affirm[] their basic duty to tell the truth," Morgan, 31 M.J. at 47, and submit to cross-examination where any of these alleged infirmities can be attacked.

Appellant also takes the government to task for undermining the "adversarial context" of the proceeding by suggesting that EC's testimony would not be shared with anyone. (App. Br. at 43.) But Appellant fails to recognize the simple steps his trial defense counsel could have taken to address these concerns raised for the first time on appeal.

First, Appellant and his counsel contemporaneously observed EC's direct examination, and had several opportunities to object. They did not. Second, if the defense was concerned with raising this issue before the factfinder, they could have requested an Article 39(a) hearing outside the members' presence and addressed the issue with the military judge. They declined to do so. Third, and most germane to whether Appellant's constitutional right to confront this witness was materially prejudiced, the CDC could have cross-examined EC on his concerns that Appellant would "find out that [EC] told" (JA at 38) or simply corrected the CTC's misrepresentation that Appellant was not in the courtroom. That did not happen. Even if this Court does not believe these forgone opportunities show waiver, they do – at a minimum – show the lack of impact on his constitutional right to confront this witness. *See* United States v. Voorhees, 79 M.J. 5, 13 (C.A.A.F. 2019) ("defense counsel's failure to object to any of the prosecutorial

misconduct is 'some measure of the minimal impact of [the] prosecutor's improper argument.")

Through cross-examination, Appellant had the opportunity to impeach EC with "every mode authorized by the established rules governing the trial or conduct of criminal cases." Coy, 487 U.S. at 1017. Appellant nevertheless complains the CTC's comments went "without correction" (App. Br. at 40) even though the defense declined to object and, in the process, deprived the military judge (or the CTC) of the "opportunity to correct the error and obviate the need for appeal." *See* United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014) (citation omitted). Appellant has never claimed his trial defense counsel were ineffective for failing to object at trial. *Cf* United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) ("Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so.") (citation omitted). This, along with the decisions discussed above, suggests tactical and strategic decisions made by the defense team. But the fact remains that Appellant was provided with every "*opportunity"* to address these issues with "effective cross-examination[.]" *See* Owens, 484 U.S. at 559.

For these reasons, this essential element of confrontation was preserved.

iii. *EC was observed by the judge, factfinder, and Appellant.*

The factfinder observed EC's demeanor while testifying. (JA at 147.) Appellant does not dispute this fact, but suggests the CTC's comments permitted EC "to testify without the panel 'draw[ing] its own conclusions' about any potential aversions while directly accusing Appellant." (App. Br. at 44) (quoting Coy, 487 U.S. at 1019). This argument lacks merit.

In Coy, the Supreme Court "left for another day . . . the question whether any exceptions exist" to the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence at trial.'" 487 U.S. at 1021 (quoting Green, 399 U.S. at 175). That day arrived a mere two years later when the Court expressly cabined Coy's language about face-to-face confrontation, writing: "We have never held . . . that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against him at trial." Craig, 497 U.S. at 845 (emphasis in original). The Court then blessed the procedures for remote testimony used in Appellant's case "where necessary to further the important state interest in preventing trauma to child witnesses in child abuse cases . . . " Id. at 856-57.

Here, the military judge – with the defense stating it had no objection – found that one-way remote live testimony was necessary for this child to prevent trauma and aid communication. (JA at 127.) This unlocked a constitutionally

permissive procedure where EC would never be required to testify face-to-face with Appellant. But the CTC informed EC that individuals were observing his testimony and stressed the importance of telling the truth. Far from being "an anonymous accuser" (App. Br. at 40-41), EC stood in the presence of Appellant's lead attorney and delivered his testimony to the factfinder. He did so after agreeing to tell the truth as he understood it, and with full knowledge that people knew his name and were listening to his every word. It misstates the case to suggest that the CTC's errant comment transformed Appellant's court-martial into a "trial[] by anonymous accusers, and absentee witnesses." *See* Green, 399 U.S. at 179. This argument is irrelevant to the Confrontation Clause analysis under Craig.

Appellant also argues "the panel had no way of accurately evaluating 'the manner in which' [EC] gave 'his testimony [or] whether he is worthy of belief." (App. Br. at 45) (quoting Green, 399 U.S. at 158). This is because, in his telling, the physical manifestations of EC's mental disability (e.g., being "fidgety") caused the panel to disregard "conduct that might normally indicate untruthfulness" when evaluating his testimony. (Id.) Appellant cites no authority for this argument, and does not address how it would effectively exclude otherwise competent testimony from victims who suffer from disabilities. Nor does it undermine the fact that the members observed EC's testimony and could "look at him, and judge by his

demeanor upon the stand[,] and the manner in which he gives his testimony[,] whether he is worthy of belief." *See* Mattox, 156 U.S. at 242-43 (emphasis added).

In sum, procedures used at trial preserved the third and final essential element of confrontation.

E. Attempting to conduct a prejudice analysis in this case illustrates why waiver is appropriate.

The Court typically reviews violations of the Confrontation Clause for harmless error. *See* Coy, 487 U.S. 1021. Under this Court's current precedent, the government has the burden under a plain error analysis to show that a constitutional error was harmless beyond a reasonable doubt. United States v. Tovarchavez, 78 M.J. 458 (C.A.A.F. 2019). Assuming the government maintains this burden, the analysis must then focus on "the remaining evidence" beyond EC's testimony. Daulton, 45 M.J. at 219-20 (quoting Coy, 487 U.S. at 1022). This is because arguments about "whether the witness' testimony would have changed" or "whether the factfinder's assessment of the testimony would have been altered 'would obviously involve pure speculation.'" Id.

But attempting to conduct a prejudice analysis in this case proves complicated since Appellant at the very least forfeited this issue – and this Court has called into question the continuing viability of Tovarchavez. *See* Long, 81 M.J. at 371. In Long, this Court recognized that after Tovarchavez was decided, the Supreme Court held that, in a plain error review of nonstructural constitutional

error, *the appellant* – not the government – has the burden of providing prejudice. Id. (citing Greer v. United States, 141 S. Ct. 2090, 2100 (2021). To prove prejudice, the appellant must show "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Greer, 141 S. Ct. at 2095. And in conducting its plain error review, the appellate court can review the entire record. Id. at 2104.

In Long, this Court declined to decide the applicability of Greer to the military. 81 M.J. at 371. If this Court decides constitutional error occurred here, the issue will become ripe, and this Court should follow Greer and require Appellant to prove prejudice. Further, the Greer opinion raises questions about the applicability of Daulton and Coy to this case. If, under Greer, this Court can consider the "entire record" in its plain error review, then the Court should not be restricted to looking only to the "remaining evidence" that the government entered at trial. Instead, this Court should be able to consider evidence in the record that the government might have admitted, had EC been unavailable to testify.

Here, the entire record showed that the government had other potential means to establish Appellant's guilt, such as residual hearsay statements in which EC claimed Appellant made him touch his penis.[14] Thus, if Greer applies,

[14] Moreover, Appellant testified in his own defense, and that is substantive evidence of his guilt for the charged offense." United States v. Nicola, 78 M.J. 223, 227 (C.A.A.F. 2019) (quoting Wilson v. United States, 162 U.S. 613, 620-21

Appellant cannot meet *his* burden to show that, but for the alleged error, there was a reasonable probability that EC would have been unable to testify, that the government could not have otherwise proved its case, and that the outcome of the proceeding would have been different.

But assuming (1) the government maintains the burden to show harmlessness beyond a reasonable doubt or (2) the Court still is constrained to evaluate only the "remaining evidence," that would indeed be a heavy burden for the government. In fact, it shows why finding waiver is appropriate. The government relied primarily on EC's testimony to prove its case at trial. Because Appellant repeatedly declined to address EC's misunderstanding about Appellant's presence, the government was deprived of the opportunity to correct the issue or, if needed, adjust its case in light of EC refusing to testify. Appellant strategically avoided the risk of damaging pretrial statements being admitted against him at trial by not objecting to EC's live remote testimony. This Court should not allow Appellant to benefit again on appeal by requiring the government to show it presented enough to convict Appellant even without EC's testimony.

(1896)). He admitted to urinating next to EC in an attempt to show him how to do it "without making a mess." (JA at 221-22.) He also admitted that EC said "Daddy, your penis makes a funny sound." (JA at 222.) He then denied having "touched [EC's] penis in any sort of sexual or inappropriate way" or having EC touch his penis. (Id.) The members disbelieving his testimony could have aided in establishing the elements of the charged offense. (JA at 244.)

It would be an underserved windfall for Appellant to receive relief under these circumstances. Jurisdictions may enact "reasonable procedural rules governing the exercise of a defendant's right to confrontation," like contemporaneous objections. Hemphill, 2022 U.S. LEXIS at *17. Applying the plain language of R.C.M. 905(e) to find waiver in this case is imminently reasonable.

CONCLUSION

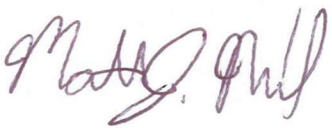
Time and time again, Appellant declined to address this alleged constitutional violation at trial. This Court should not grant Appellant a windfall for a strategic decision and should conclude, based on the facts, or by operation of law, that Appellant waived his constitutional objection.

Assuming this issue was not waived, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Van Arsdall, 474 U.S. at 680 (citation omitted). Even if the CTC transgressed a legal norm by telling EC that Appellant was not in the courtroom, it did not impact Appellant's constitutional right to confront EC. There is no constitutional right that a child witness must be aware of the accused's presence while testifying remotely under Craig. Indeed, such a requirement would undermine the premise relied upon by the Supreme Court for making an exception for child witnesses: to avoid trauma and enhance reliable testimony. *See* Craig, 497 U.S. at 857.

Ultimately, the procedures used at trial retained the requisite "safeguards of reliability and adversariness" that form the essential elements of confrontation. Id. (citing Mattox, 156 U.S. at 242; Green, 399 U.S. at 179). The oath, cross-examination, and ability to observe EC's demeanor were not affected and did not undermine the fairness of Appellant's trial. For these reasons, this Court should affirm the findings and sentence.

JOHN P. PATERA, Major, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
(240) 612-4800
Court Bar No. 36083

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
(240) 612-4800
Court Bar No. 34088



MATTHEW J. NEIL, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
(240) 612-4800
Court Bar No. 34156

NAOMI P. DENNIS, Colonel, USAF
Chief
Government Trial and
Appellate Operations Division
United States Air Force
(240) 612-4800
Court Bar No. 33821

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 31 January 2022 via electronic filing.

JOHN P. PATERA, Major, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
(240) 612-4812
Court Bar No. 36083

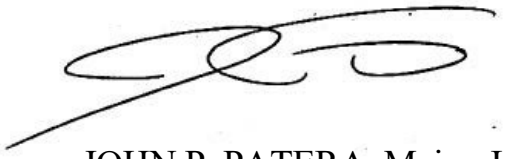
CERTIFICATE OF COMPLIANCE WITH RULE 24(d) AND RULE 37

1. This brief complies with the type-volume limitation of Rule 24(d) because:

☒ This brief contains 13,197 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a monospaced typeface using Microsoft Word Version 2016 with 14 characters per inch using Times New Roman.



JOHN P. PATERA, Major, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
(240) 612-4812
Court Bar No. 36083