

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES

Appellee

v.

Specialist (E-4)

JONATHAN R. PINKERTON

United States Army

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 20240353

USCA Dkt. No. 26-0225/AR

Alexis N. Dunlap
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-10682
USCAAF Bar No. 38336

Nicole K. Ulrich
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 38340

Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 36867

Frank E. Kostik Jr.
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 35108

Table of Contents

Statement of Statutory Jurisdiction	1
Statement of the Case	1
Summary of Argument.....	3
Statement of Facts.....	4
A. JP Discloses Her Allegation of Sexual Abuse to Ms. Taylor.....	4
B. A Forensic Interviewer Meets with JP.....	6
C. The Government Sought to Admit JP’s Forensic Interview as Residual Hearsay.	6
D. On Direct Examination, JP Immediately Stated She Did Not Want to Testify.....	7
E. The Military Judge Admitted JP’s Forensic Interview as Residual Hearsay.....	8
Specified Issue	9
I. WHETHER APPELLANT’S RIGHT TO CONFRONTATION WAS VIOLATED WITH THE ADMISSION OF JP’S FORENSIC INTERVIEW.....	9
Standard of Review and Law.....	9
Argument	10
A. The Two-Path Constitutional Dilemma: JP’s Absolute Refusal to Testify Extinguished Any Cognizable Opportunity for Cross-Examination.	10
1. Path 1: JP Refused to Testify Before Taking the Oath.	11
2. Path 2: JP Refused to Testify Substantively After Taking the Oath.	13
B. Civilian Courts Have Found Confrontation Clause Violations in Similar Situations where a Physically Present Witness Refuses to Testify.	14
C. The Constitutional and Ethical Trap: Unconstitutional Burden-Shifting and the Compromise of Defense Counsel’s Duties	16
D. JP’s Complete Silence Is Distinguishable from Active Ratification in <i>McGrath</i> and <i>Nyhammer</i>.	18
Conclusion.....	19

Table of Authorities

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI (Confrontation Clause).....9, 10, 16, 20

SUPREME COURT OF THE UNITED STATES

California v. Green, 399 U.S. 149 (1970).....10
Crawford v. Washington, 541 U.S. 36 (2004)10, 12
Delaware v. Fensterer, 474 U.S. 15 (1985).....17
Douglas v. Alabama, 380 U.S. 415 (1965) 10, 11, 13
Giles v. California, 554 U.S. 353 (2008) 9
United States v. Owens, 484 U.S. 554 (1988).....10, 11, 13, 17

COURT OF APPEALS FOR THE ARMED FORCES/COURT OF MILITARY CASES

United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010) 9
United States v. McGrath, 39 M.J. 158 (C.M.A. 1994)18, 19
United States v. Rankin, 64 M.J. 348 (C.A.A.F. 2007) 9
United States v. Washington, 63 M.J. 418 (C.A.A.F. 2006)10, 12

SERVICE COURTS OF CRIMINAL APPEALS

United States v. Pinkerton, ARMY 20240353, 2026 CCA LEXIS 197 (Army Ct. Crim. App. Apr. 20, 2026).....2

STATE & OTHER FEDERAL COURT CASES

People v. Sharp, 155 P.3d 577 (Colo. App. 2006)12, 15, 16
State v. Nyhammer, 197 N.J. 383 (2009)18, 19
State v. Waddell, 2006 Kan. App. Unpub. LEXIS 348, (Kan. Ct. App. May 19, 2006)14, 15, 16

UNIFORM CODE OF MILITARY JUSTICE

Article 66..... 1
Article 67(a)(3).....1

Article 120b.....	2
-------------------	---

MILITARY RULES OF EVIDENCE

Mil. R. Evid. 603	10, 12
Mil. R. Evid. 611(b)	3, 10, 16
Mil. R. Evid. 807	6, 8, 14

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES

Appellee

v.

Specialist (E-4)

JONATHAN R. PINKERTON

United States Army

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 20240353

USCA Dkt. No. 26-0225/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Granted Issue

**I. WHETHER APPELLANT’S RIGHT TO
CONFRONTATION WAS VIOLATED WITH THE
ADMISSION OF JP’S FORENSIC INTERVIEW.**

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3).

Statement of the Case

On July 19, 2024, a panel with enlisted representation sitting as a general court-martial convicted Appellant, Specialist Jonathan R. Pinkerton, contrary to his

pleas, of five specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice.¹ (JA 7-9, 16-19). On July 20, 2024, the military judge sentenced appellant to 120 months of confinement and to be dishonorably discharged from the service.² (JA 10, 16-19). On August 2, 2024, the convening authority approved the findings and adjudged sentence. (JA 13). On November 13, 2024, the military judge entered Judgment. (JA 12).

On April 20, 2026, the Army Court affirmed the findings and sentence. *United States v. Pinkerton*, ARMY 20240353, 2026 CCA LEXIS 197 (Army Ct. Crim. App. Apr. 20, 2026). (JA 3). On July 29, 2026, this Court Granted Appellant's petition for grant of review of the first presented issue and ordered briefing under Rule 25. (JA 1).

¹ The military judge granted appellant's motion to dismiss Specification 6 of The Charge pursuant to Rule for Court Martial 917. (JA 91).

² The military judge sentenced appellant as follows:

The Charge, Specification 1 (JP)	84 months
The Charge, Specification 2 (JP)	60 months
The Charge, Specification 3 (AP)	36 months
The Charge, Specification 4 (JP)	36 months
The Charge, Specification 5 (JP)	36 months

The military judge ordered Specifications 1, 2, 4, and 5 of The Charge to be served concurrently and consecutive to Specification 3 of The Charge. (JA 10).

Summary of Argument

Appellant was denied due process when the military judge committed reversible constitutional error by admitting JP's out-of-court forensic interview during his court-martial. The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him, securing a fundamental, procedural guarantee of a meaningful, face-to-face opportunity for cross-examination.

Physical presence on the stand is a prerequisite for confrontation, but it is not a constitutionally sufficient shield for the government if the witness has preemptively and categorically refused to discuss the abuse allegations like JP did here. A child witness' refusal to testify due to extreme fright or being overcome with emotion from the overwhelming experience of testifying is the functional equivalent of physical absence—rendering her physical presence on the stand a hollow gesture. JP's explicit refusal to discuss the allegations rendered the “opportunity” for a meaningful cross-examination a legal fiction. Furthermore, because the trial counsel's direct examination lacked substance related to JP's specifications, any defense cross-examination regarding the allegations would have been beyond the scope of direct under M.R.E. 611(b) and unconstitutionally shifted the burden of production to the defense.

Admitting JP’s out-of-court forensic interview, in the absence of a meaningful opportunity to cross-examine her, violated Appellant’s right to confrontation.

Statement of Facts

At the time of the alleged misconduct, Appellant and his wife had five children—two of whom were girls named JP and AP. (JA 132).

After moving to Fort Sill, Oklahoma, in August 2020, Appellant’s family befriended Ms. Shannon Taylor—a member of their church’s worship team and a chaplain’s wife. (JA 131, 133). Ms. Taylor grew particularly close to JP and AP. (JA 143).

A. JP Discloses Her Allegation of Sexual Abuse to Ms. Taylor.

On or about February 19, 2023, Ms. Taylor babysat JP and AP—then five and three years old respectively. (JA 136). While bathing the girls, Ms. Taylor noticed JP’s hand “lingering . . . down in her private part area” and told her with few exceptions, “we don’t really touch our parts.” (JA 137-38).

JP asked, “[s]o, you mean nobody should ever ask you to touch there [sic] private parts?” (JA 139). Ms. Taylor replied whether “somebody asked [her] that,” to which JP said, “[y]es.” (JA 139). JP said it was “[d]addy” that touched

her.³ (JA 140). During this conversation in the bathtub, AP sat silently next to JP. (JA 140).

After putting AP to bed, Ms. Taylor, using her cell phone to record the conversation, had JP repeat her earlier statement. (JA 140, 366). JP said Appellant asked her if she would touch his genitals and if she would touch her own genitals, and that he then touched her genitals. (JA 366).

Ms. Taylor intended to give the recording to Appellant's wife. (JA 141). Instead, as a mandatory reporter,⁴ Ms. Taylor delivered the recording to CID. (JA 101). Special Agent (SA) Richard Caldwell video recorded Ms. Taylor's recording and arranged for a child forensic interviewer to meet with JP.⁵ (JA 142, 157-58).⁶

³ At trial, the defense objected to JP's response as hearsay. (JA 138). The government argued the statement was being offered for its effect on Ms. Taylor.

⁴ Although the record is unclear as to why Ms. Taylor was a mandatory reporter, all sides recognized her as such.

⁵ A forensic interviewer also met with AP. At trial, AP, now five years old, testified that she never told anyone that she was inappropriately touched by someone and denied being asked about it previously. (JA 173). Appellant did not cross-examine AP. (JA 174). The government admitted AP's forensic interview; however, the remainder of the brief will only address JP as she is the only alleged victim pertaining to the granted issue.

⁶ There was no objection to the recording of Ms. Taylor's video of JP taken by SA Caldwell and it was admitted as Pros. Ex. 22.

B. A Forensic Interviewer Meets with JP.

On February 23, 2023, a forensic interviewer met with JP while SA Caldwell observed in an adjacent room. (JA 158). JP recounted and expanded upon her initial statement to Ms. Taylor. (JA 367).

C. The Government Sought to Admit JP's Forensic Interview as Residual Hearsay.

Fearing JP might forget the details of her allegations when called to testify, the government sought to pre-admit her prior statements pursuant to Mil. R. Evid. 807. (JA 246). The military judge issued a preliminary ruling finding the government had not satisfied Mil. R. Evid. 807(a)(2) as it was speculative that JP's memory faded, that she would refuse to testify, or that she would fail to appear for trial. (JA 277).

On the eve of trial, it seemed like JP would not appear. Since JP's interview, Appellant's wife declined the government's efforts to interview her daughter and indicated she would refuse to bring JP to Appellant's court-martial. (JA 234). Ultimately, the prospect of a warrant of attachment motivated Appellant's wife to bring JP to trial. (JA 102-28). Just before opening statements, Appellant's wife and JP boarded a flight from Washington to Dallas, Texas. (JA 129-30).

D. On Direct Examination, JP Immediately Stated She Did Not Want to Testify.

Several hours later, the government called JP, now seven years old, to testify. (JA 160-63). Before taking the oath and in front of the panel, JP stated “I don’t want to testify.” (JA 162). The military judge told JP, “I understand, but it’s a requirement for you to testify.” (JA 162). When asked by the prosecutor if she promised to tell the truth, JP said, “I don’t want to.” (JA 163). After JP appeared to become emotional, the military judge called for a twenty-minute recess. (JA 163).

The government recalled JP. (JA 168). Trial counsel told JP:

“... I’m not going to keep you here very long, because I know you said you don’t want to testify. But, before we can even talk about that, there’s a rule in this court, that we have to promise to tell the truth, before we can start talking. Can you promise to tell the truth?”

(JA 168).

JP answered, “Yes.” (JA 168). After answering some preliminary questions, JP acknowledged the circumstances of her presence:

GOV: [JP], do you know why you’re here today?

JP: [Witness becomes emotional.] Of course I do, and I don’t like the reason.

GOV: Okay, why is that?

JP: Because it’s going against my dad, and I love him.

(JA 169).

The government asked, “[JP], will you talk about the things that happened, that brought us here today?” JP answered, “No!” (JA 170). The government asked no further questions and Appellant offered no cross-examination. (JA 170).

E. The Military Judge Admitted JP’s Forensic Interview as Residual Hearsay.

After JP briefly testified, the government sought to admit Pros. Ex. 22 and 23—JP’s previously recorded statement—under Mil. R. Evid. 807. (JA 366-67). Appellant objected under the Confrontation Clause and argued the government failed to satisfy the requirements for residual hearsay. (JA 176).

Regarding the Confrontation Clause, the military judge found JP’s statement was testimonial. (JA 314). But she found Appellant’s confrontation rights were satisfied when she took the stand, thus providing Appellant with an opportunity for cross-examination. (JA 223). Lastly, the military judge found the government met Mil. R. Evid. 807’s requirements for the previously recorded statement. (JA 214, 223).

Although she did not make an explicit finding regarding JP’s unavailability, the military judge did find the government was “unable to elicit details of the alleged offenses” from JP and that she “refused to provide any further testimony on the alleged offenses.” (JA 212-13). She found that JP testified that “she didn’t want to testify” (JA 214).

Ultimately, the military judge admitted Pros. Ex. 22 and 23. (JA 220, 223). Appellant was convicted of Specifications 1, 2, 4, and 5 of The Charge relating to JP.⁷

On April 20, 2026, the Army Court summarily affirmed Appellant's convictions. (JA 3).

Specified Issue

I. WHETHER APPELLANT'S RIGHT TO CONFRONTATION WAS VIOLATED WITH THE ADMISSION OF JP'S FORENSIC INTERVIEW.

Standard of Review and Law

Whether admitted evidence violates the Confrontation Clause is a question this Court reviews de novo. *United States v. Blazier*, 68 M.J. 439, 442 (C.A.A.F. 2010). If it finds such a violation, this Court cannot affirm the conviction unless the evidence's admission was harmless beyond a reasonable doubt. *United States v. Rankin*, 64 M.J. 348, 353 (C.A.A.F. 2007).

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Giles v. California*, 554 U.S. 353, 357–58, 128 S. Ct. 2678, 171 L.Ed. 2d 488 (2008). Where testimonial evidence is at issue, the Sixth Amendment "demands what the common law required: unavailability and a prior opportunity for cross-

⁷ The conviction for Specification 3 of The Charge involves AP.

examination.” *Crawford v. Washington*, 541 U.S. 36, 68 (2004). “The Confrontation Clause is not violated by admitting a declarant’s out-of-court statements, as long as the declarant is testifying as a witness and subject to . . . cross-examination.” *California v. Green*, 399 U.S. 149, 158 (1970). “Ordinarily, a witness is regarded as subject to cross-examination when he is placed on the stand, under oath, and responds willingly to questions.” *United States v. Owens*, 484 U.S. 554, 561 (1988) (internal quotation marks omitted). The Court has recognized that a defendant does not have an opportunity to cross-examine a witness who refuses to testify. *Douglas v. Alabama*, 380 U.S. 415 (1965). While an oath or affirmation to testify truthfully is a prerequisite to testify, the oath is not a prerequisite to refuse to testify. Mil. R. Evid. 603; *See United States v. Washington*, 63 M.J. 418, 424 (C.A.A.F. 2006).

Mil. R. Evid. 611(b) limits cross-examination to the “subject matter of the direct examination and matters affecting the credibility of witnesses.”

Argument

A. The Two-Path Constitutional Dilemma: JP’s Absolute Refusal to Testify Extinguished Any Cognizable Opportunity for Cross-Examination.

The constitutional error in this case presents two alternative, yet equally fatal, pathways. Regardless of the pathway, the admission of the out-of-court forensic interview violated Appellant’s Sixth Amendment right to confrontation.

1. Path 1: JP Refused to Testify Before Taking the Oath.

The first pathway of constitutional error occurred when JP entered the courtroom and explicitly refused to testify before taking the oath. (JA 162). At that point, she was functionally unavailable, and admitting her forensic interview was a direct violation of Appellant's confrontation rights.

The baseline threshold of confrontation is a functionally interactive, communicative exchange, not merely a display of physical proximity. *Owens* and *Douglas* clearly state that a defendant is denied an opportunity for cross-examination with a witness that refuses to testify, and that such a witness is not truly subject to cross-examination when they do not willingly respond to questions. *Douglas*, 380 U.S. at 419; *Owens*, 484 U.S. at 561-62. This principle extends to a case, such as this, where a child witness, JP, was unable and unwilling to testify out of fright or due to being overcome with emotion from the perspective of testifying. JP's mere physical presence on the stand was an empty gesture and insufficient to satisfy Appellant's constitutional confrontation rights.

At the time seven-year-old JP was called to the stand, the record was entirely devoid of any substantive evidence supporting the allegations. The government's brief examination of her failed to bridge this evidentiary gap. Although JP was physically produced in the courtroom, her outright refusal to testify resulted in the government eliciting only scant biographical details before abruptly concluding its

examination. (JA 169-70). Merely placing a child witness on the stand without eliciting substantive, material testimony is constitutionally deficient and fails to satisfy the core requirements of the Confrontation Clause. *People v. Sharp*, 155 P.3d 577, 582 (Colo. App. 2006).

Before she was sworn in, JP clearly stated she did not want to testify. (JA 162). The military judge advised her that it was “a requirement for [her] to testify.” (JA 162). The government attempted the oath, and JP responded, “she didn’t want to,” when asked if she promised to tell the truth. (JA 163). After a brief exchange, the court recessed for approximately 20 minutes. (JA 163).

When JP initially took the stand—spontaneously declaring her refusal to testify and declining the oath—she was functionally unavailable. (JA 162-63). Because defense counsel had no prior opportunity to cross-examine her at that juncture, the admission of her forensic interview represents a direct *Crawford* violation. While an oath or affirmation to testify truthfully is a prerequisite to testify, the oath is not a prerequisite to refuse to testify. Mil. R. Evid. 603; *See Washington*, 63 M.J. at 424. JP’s pre-oath vocal refusal was sufficient to render her functionally and constitutionally unavailable under *Crawford* before the recess ever occurred. Absent a prior opportunity to cross-examine JP, admitting her forensic interview violated the Confrontation Clause, as her post-oath, highly limited testimony failed to yield a meaningful opportunity for cross-examination.

2. Path 2: JP Refused to Testify Substantively After Taking the Oath.

The next pathway to constitutional error occurred after JP took the oath upon recalling her to the stand. When JP finally agreed to tell the truth, her emphatic and vocal refusal to discuss the allegations left the direct examination a complete substantive void. (JA 169-70). Because the government elicited zero substantive testimony, the defense was stripped of any “meaningful opportunity” to cross-examine her under *Owens* and *Douglas*. *Owens*, 484 U.S. at 558; *Douglas*, 380 U.S. at 419. JP was not merely a “shy” or “forgetful” witness of the type contemplated by *Owens*, discussed *infra*. *Owens*, 484 U.S. at 558. Rather, the record demonstrates an affirmative, complete refusal to testify, leaving the defense with no factual assertions to test or challenge on cross-examination.

The government’s examination of JP was not a genuine attempt to develop substantive facts, but a designed effort to document a refusal on the record. Upon recalling JP, trial counsel initiated a sequence of questions that pre-emptively established her unwillingness to testify against her father. (JA 168-69). When reaching the substance, trial counsel did not direct or encourage JP to recount the events or caution her that she was required to answer the questions like the military judge did before recess. (JA 162). Instead, trial counsel posed a question designed to invite a negative response: “[JP], will you talk about the things that happened, that brought us here today?” (JA 169). JP exercised an immediate verbal veto,

emphatically responding, “No!” (JA 169-70). Trial counsel immediately accepted this refusal, asked no further questions, and concluded the examination.

The transcript demonstrates JP’s unequivocal refusal to testify and the government’s perfunctory attempt to elicit substantive evidence. Rather than conducting a genuine direct examination, the government did the bare minimum to satisfy the military judge and secure admission of the recorded forensic interview under Mil. R. Evid. 807. JP’s mere physical presence in the courtroom, coupled with her complete inability to address the allegations, does not satisfy the constitutional demands of the Confrontation Clause.

B. Civilian Courts Have Found Confrontation Clause Violations in Similar Situations where a Physically Present Witness Refuses to Testify.

In *Waddell*, a seven-year-old witness refused to testify to the sexual abuse she purportedly suffered from the defendant. *State v. Waddell*, 2006 Kan. App. Unpub. LEXIS 348, *13 (Kan. Ct. App. May 19, 2006). The witness did, however, testify during the hearing on her availability where she told defense counsel that “she remembered what happened, but did not want to talk about it.” *Id.* at *22-23. Over defense objection during trial, the court permitted the government to introduce the witness’s previously recorded forensic interview. *Id.* The Court of Appeals of Kansas ruled the admission of the witness’s statement violated the defendant’s right to confrontation. *Id.* at *24. Despite having a prior opportunity

to cross-examine the reluctant witness, that was still insufficient to overcome the Confrontation Clause hurdle.

JP sitting in the witness chair and refusing to testify is the functional equivalent of the witness in *Waddell* that refused to testify. *Waddell*, 2006 Kan. App. LEXIS 348 at *13. Both witnesses refused to discuss the allegations, and merely taking the stand and oath, without more, is not constitutionally sufficient for Confrontation Clause purposes. Like *Waddell*, this Court should find that the admission of the forensic interview violated Appellant's constitutional right to confrontation due to a lack of meaningful opportunity to cross-examine JP. *Id.* at *24.

In *Sharp*, the government attempted to have a five-year-old testify against her father. *Sharp*, 155 P.3d at 578. Nonetheless, after it became clear she was too upset to testify, the trial court found her to be unavailable and allowed portions of her previously recorded interview to be shown to the jury. *Id.* The Court of Appeals of Colorado, in finding a violation of his right to confrontation, determined the defendant did not have an opportunity to cross-examine the child witness. *Id.* at 582. JP's vocal, categorical refusal to discuss the allegations on the stand is the functional equivalent of the fear-induced silence in *Sharp*. Like *Sharp*, this Court should find that the admission of the forensic interview violated Appellant's constitutional right to confrontation. *Id.*

Taken together, *Waddell* and *Sharp* highlight the critical factual and constitutional distinction at play in this case: JP simply refused to testify meaningfully, and her vocal blockade deprived Appellant of any cognizable opportunity to confront her regarding the allegations. Under *Waddell*, merely taking the stand and oath cannot satisfy the Confrontation Clause where the child refuses to discuss the allegations; and under *Sharp*, a child's absolute trauma block from testifying is a complete denial of the opportunity to cross-examine. *Waddell*, 2006 Kan. App. LEXIS 348 at *13; *Sharp*, 155 P.3d at 578. By applying these principles to the record in Appellant's case, where JP emphatically refused to discuss the substantive allegations, her physical presence was a mere gesture. Like *Waddell* and *Sharp*, the admission of JP's out-of-court forensic interview, in the absence of a meaningful opportunity to cross-examine her at trial, violated Appellant's constitutional right to confrontation under the Sixth Amendment.

C. The Constitutional and Ethical Trap: Unconstitutional Burden-Shifting and the Compromise of Defense Counsel's Duties

As the military judge noted, JP, on direct, only answered peripheral questions regarding Appellant's identity and her understanding of why she was testifying. (JA 212). On cross-examination, any questions regarding JP's allegations would have been beyond the scope pursuant to Mil. R. Evid. 611(b). Moreover, it would have been negligent for defense counsel to present evidence incriminating their own client. The government argued that, even with a limited

scope, Appellant could have “expose[d] any bias. . . talk[ed] about any potential inconsistencies, any motivations to lie . . .” that JP may have expressed or stated. (JA 181).

Appellant could hardly challenge JP’s biases or memory regarding an allegation she did not even mention on direct. JP was not merely a “shy” or “forgetful” witness of the type contemplated by *Owens*. *Owens*, 484 U.S. at 558. In *Owens*, the defense was provided the opportunity to cross-examine a forgetful witness, whereas appellant was not, where JP outright refused to discuss the allegations. *Owens*, 484 U.S. at 558. This lack of cooperation runs afoul of the Confrontation Clause because it deprived counsel of an opportunity for an effective or meaningful cross-examination. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Because trial counsel’s direct examination of JP was a complete substantive void, not one plagued by forgetfulness, confusion, or evasion, the prosecution failed to produce any testimonial evidence that could have exposed inconsistencies or forgetfulness regarding the allegations. *Id.* at 22. This total absence of substance foreclosed any avenue for the defense to conduct a meaningful cross-examination. Had defense counsel attempted to cross-examine JP on the allegations, he would have been in the highly unenviable position, assuming JP changed her stance on refusing to testify, of introducing the substance of the government’s accusations under oath for the first time.

D. JP's Complete Silence Is Distinguishable from Active Ratification in *McGrath* and *Nyhammer*.

In *McGrath*, the fourteen-year-old witness took the stand, took the oath, and affirmatively testified that she had, (1) made a prior statement and (2) not lied in that statement. *United States v. McGrath*, 39 M.J. 158, 160 (C.M.A. 1994). This Court found counsel waived any confrontation clause violation because the defense chose to forgo cross-examining her after she had actively vouched for her prior statements on the record. *Id.* at 163. The witness in *McGrath* provided a real, sworn target. By testifying that her prior statement was true, she actively injected her prior accusations into the trial, which provided defense an opportunity to challenge on cross-examination. *Id.* at 159. In stark contrast, JP never vouched for her out-of-court statements, nor did she provide any substantive testimony. When asked if she would talk about the allegations, she emphatically said, “No!” (JA 170). Rather than adopting or discrediting her prior out-of-court statements or discussing the allegations outright, JP’s absolute refusal left the record completely devoid of anything for the defense to meaningfully challenge.

In *Nyhammer*, the child witness, eleven-years-old, was highly unresponsive on direct pertaining to the details in her prior statements; however, she testified that she “told the truth when she spoke to Detective Cooper” and that she told the detective “about certain things that happened between her and [the] defendant, even though it was ‘hard.’” *State v. Nyhammer*, 197 N.J. 383, 394 (2009). Like

McGrath, this testimony provided an opportunity for meaningful cross-examination, but counsel in *Nyhammer* made a strategic decision to forgo discussing the allegations. *Nyhammer*, 197 N.J. at 394–95. Meanwhile, JP’s testimony created an express substantive bar, not selective reticence as displayed in *Nyhammer* and *McGrath*. This utter silence deprived counsel of a meaningful opportunity to cross-examine JP, which resulted in a due process violation. Therefore, the admission of her forensic interview violated Appellant’s right to confrontation.

Conclusion

As JP refused to testify and did not willingly respond to any questions regarding her allegations against Appellant, he did not have an opportunity to meaningfully cross-examine her. Therefore, Appellant’s right to confrontation was violated with the admission of JP’s out-of-court statements. Furthermore, this Court cannot affirm Appellant’s convictions regarding her allegations, as the government cannot prove these statements were harmless beyond a reasonable doubt since they were the only evidence of JP’s purported abuse. Therefore, the admission of JP’s forensic interview prejudiced Appellant and each requires a similar remedy: this Court setting aside and dismissing all Charges and their Specifications.

Upholding the military judge's ruling establishes an improper precedent: it permits the government to introduce recorded hearsay statements in lieu of substantive testimony whenever a child witness expresses reluctance to testify. Reducing the constitutional requirement of confrontation to a perfunctory inquiry into whether a witness wants to testify hollows out the Sixth Amendment.



Alexis N. Dunlap
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar No. 38336



Nicole K. Ulrich
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 38340



Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 36867



Frank E. Kostik Jr.
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 35108

Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 4,155 words.
2. This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.



Alexis N. Dunlap
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0682
USCAAF Bar No. 38336

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Pinkerton*, Crim. App. Dkt. No. 20240353, USCA Dkt. No.26-0225 AR was electronically filed with the Court and Government Appellate Division on September 9, 2026.



Alexis N. Dunlap
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
Alexis.N.Dunlap2.mil@army.mil
(703) 693-0682
USCAAF Bar No. 38336