

**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

REPLY BRIEF ON BEHALF OF
APPELLANT

Crim. App. Dkt. No. 20240353

USCA Dkt. No. 26-0225/AR

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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.**

Argument

**A. JP’s Explicit Refusal to Testify Foreclosed Any Constitutional
Opportunity for Cross-Examination.**

A theme throughout the Government’s brief is that Appellant was provided with an “opportunity” for cross-examination because JP was physically seated in the courtroom and took the oath. (Gov’t Br. at 16-18). The Government’s argument reduces the Sixth Amendment to a mere physical ritual and ignores the defining requirement of constitutional availability: the witness’s willingness to communicate regarding the charged offenses. *United States v. Owens*, 484 U.S. 554, 561 (1988). The Government’s position overlooks that JP was unwilling to

discuss the abuse charged as she twice indicated on direct examination; therefore, counsel had nothing to cross-examine her about. (JA 162, 170). As Justice Story put it, “A party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him on other matters, he must do so by making the witness his own, and calling him as such, in the subsequent progress of the cause.”

Philadelphia & T. R. Co. v. Stimpson, 39 U.S. 448, 457 (1840).

In *Owens*, the Supreme Court explicitly conditioned constitutional availability on the declarant’s communicative responsiveness. *Owens*, 484 U.S. at 561. “Ordinarily a witness is regarded as subject to cross-examination when he is placed on the stand, under oath, and *responds willingly to questions*.” *Owens*, 484 U.S. at 561 (internal quotations marks omitted) (emphasis added). JP’s unwillingness to testify regarding the allegations foreclosed defense counsel’s opportunity to effectively or meaningfully cross-examine her.¹ The effectiveness turns on the ability to meaningfully challenge the substance of the allegations, but

¹ The Government asserts that defense counsel conceded that he had an opportunity to cross-examine JP during an Article 39(a) session. (Gov’t Br. at 16; JA 176). However, following a recess, counsel argued that the Government had failed to meet its burden of proof and JP’s testimony failed to satisfy the Confrontation Clause demands per *Crawford*. *Crawford v. Washington*, 541 U.S. 36, 68. (JA at 179).

counsel was deprived of that opportunity due to JP's refusal to testify about the matter.²

The critical constitutional divide separating this case from the Government's authorities is the distinction between communicative willingness and an outright refusal to speak.³ In both *United States v. Rhodes*, 61 M.J. 445, 448 (C.A.A.F. 2005), and *United States v. McGrath*, 39 M.J. 158, 159 (C.M.A. 1994), cross-examination was constitutionally viable because those witnesses took the stand and swore under oath that their prior statements were true, thereby injecting live, sworn assertions into the record for the defense to test.⁴

² The Government asserts that because JP testified for Appellant during the sentencing portion that she could testify to the merits on cross-examination. (Gov't Br. at 23, 26). However, JP's willingness to express affection for her father during a sentencing hearing does not show that she was willing to recount alleged sexual trauma during the merits portion. If anything, JP's testimony during the sentencing portion was consistent with her brief direct examination during the merits portion where she reiterated her loyalty to father and nothing more.

³ The government's reliance on *Cameron*, *Nyhammer*, *Jackson*, *McHorse*, and *Martindale* is entirely misplaced. *State v. Cameron M.*, 55 A.3d 272, 279, 284 (Conn. 2012); *State v. Nyhammer*, 963 A.2d 316, 333 (N.J. 2009); *United States v. Jackson*, No. 201600299, 2017 CCA LEXIS 758, at *9 N-M Ct. Crim. App. Dec. 19, 2017; *United States v. McHorse*, 179 F.3d 889, 900 (10th Cir. 1999); *United States v. Martindale*, 36 M.J. 870, 875 (N-M. Ct. Crim. App. 1993). Each of those authorities is fundamentally distinguishable, as they address witnesses who were forgetful, evasive, or unresponsive on the stand. By contrast, JP did not struggle to communicate; she asserted an explicit refusal to testify.

⁴ *McGrath* is a pre-*Crawford* case. *McGrath*, 39 M.J. at 160. To the extent *McGrath* allowed untested testimonial hearsay to be admitted upon a finding of residual reliability while the witness refused to discuss the offenses, its constitutional rationale likely does not survive *Crawford*.

In stark contrast, JP never affirmed or adopted her forensic interview under oath, but instead issued an explicit, categorical verbal veto—shouting, “No!” to discussing the allegations. (JA 170). This total refusal aligns Appellant’s case squarely with the persuasive post-*Crawford* holdings of *State v. Waddell*, 2006 Kan. App. Unpub. LEXIS 348, at *13, (Kan. Ct. App. 2006), and *People v. Sharp*, 155 P.3d 577, 582 (Colo. App. 2006), which established that when a child witness is placed on the stand but refuses or is unable to provide substantive testimony regarding the abuse, her physical presence in the witness chair is the functional equivalent of physical absence. Tellingly, while Appellant’s opening brief placed *Waddell* and *Sharp* front and center, the Government’s response offers no rejoinder to those two cases, indeed failing to cite or acknowledge either decision. Merely putting an uncooperative JP in the witness chair, in front of the panel, without eliciting substantive testimony fails to satisfy *Crawford* and reduces the Sixth Amendment to a hollow physical formality.

B. The Government’s “Tactical Waiver” Argument Confesses Its Failure of Proof.

The Government claims that Appellant waived confrontation because defense counsel made a “tactical decision” to forgo cross-examination out of concern that questioning JP would elicit damaging testimony. (Gov’t Br. at 19-20, 24, 26). This argument turns the Sixth Amendment on its head. By asserting that cross-examination would have elicited incriminating evidence that direct

examination lacked, the Government concedes that when it rested its direct examination, JP's testimony was a complete substantive void. As previously noted, cross-examination is premised on direct examination, as Justice Story wrote almost two centuries ago.

The burden of production rests exclusively with the prosecution. *In re Winship*, 397 U.S. 358, 364 (1970). Refusing to do the trial counsel's job is not a tactical waiver—it is the bedrock constitutional right to hold the government to its burden of production under *Winship*. *Winship*, 397 U.S. at 364. Defense counsel would have committed legal malpractice by introducing the Government's evidence. Defense counsel did not waive the Sixth Amendment; he preserved Appellant's due process rights by recognizing that there was no direct testimony to confront.

The Government cannot pinpoint a single statement by JP during direct examination that addresses the allegations because there isn't one. The Sixth Amendment guarantees an opportunity to test the prosecution's proof, not an obligation to produce it. The Government's reliance on Mil. R. Evid. 611(b) ignores not only Justice Story's age-old notion of how trials work, but also the fundamental structure of cross-examination. (Gov't Br. at 18). Before defense counsel can impeach a witness's perception, memory, or veracity, direct examination must first establish a substantive factual baseline to challenge.

Because trial counsel's direct examination of JP produced an absolute void regarding the alleged abuse, defense counsel was foreclosed from conducting impeachment under Mil. R. Evid. 611(b) without exceeding the scope of direct and introducing the allegations substantively for the very first time.

C. The Government's Assertion That Ms. Taylor's Testimony Supplied the "Subject Matter" for Cross-Examination Is Directly Contradicted by the Record.

In its attempt to avoid the scope limitations of Mil. R. Evid. 611(b), the Government demonstrates an erroneous view of the facts and law. The Government claims that defense counsel had a factual foundation to cross-examine JP: "JP's prior accusations, as ST recited without objection, supplied the subject for examination; JP did not need to repeat them before counsel could challenge their veracity." (Gov't Br. at 24). But defense counsel twice objected on hearsay grounds to the admission of JP's statement to Ms. Taylor in the bathtub. (JA 138-39). The military judge allowed the statement to come in only for the effect on the listener; to show what Ms. Taylor did next. (JA 138-40). The military judge immediately instructed the panel that these statements were "not considered evidence at this point." (JA 139). The military judge never instructed the panel it could consider Ms. Taylor's testimony as substantive evidence.

The Government cannot have it both ways. At trial, the prosecution secured the admission of Ms. Taylor's testimony regarding JP's bathtub

statements on the express condition that it was offered solely for the “effect on the listener,” not as substantive evidence of the charged conduct. (JA 139-40). The Government cannot now pivot on appeal and argue that this non-hearsay background evidence supplied the substantive “subject matter” for cross-examining JP on allegations she never made from the witness stand.

D. The Defense Was Under No Constitutional or Procedural Duty to Cure the Government’s Evidentiary Void by Recalling JP.

The Government argues that Appellant waived confrontation because trial defense counsel did not follow up on a request to re-open cross-examination or otherwise failed to recall JP during the defense case-in-chief. (Gov’t Br. at 20). Under either scenario, the Government’s position offends the Sixth Amendment and due process.

First, had counsel re-opened cross-examination following the Article 39(a) session, the direct examination remained an absolute substantive void. Any defense inquiry into the alleged abuse would have exceeded the scope of direct under Mil. R. Evid. 611(b) and impermissibly shifted the burden of production under *Winship*. *Winship*, 397 U.S. at 364.

Second, calling JP in the defense case-in-chief would circumvent the Confrontation Clause. The Sixth Amendment guarantees an opportunity to cross-examine adverse witnesses during the prosecution’s case, not a circumvention of this guarantee by relying on alternative trial procedures. *Crawford*, 541 U.S. at 68.

Recalling JP in the defense case-in-chief could not cure the constitutional violation that occurred when the Government rested direct examination with no substantive evidence on the record and then admitted JP's forensic interview.

Conclusion

Placing a recalcitrant witness, JP, on the stand who categorically refuses to discuss the allegations does not satisfy the Sixth Amendment. Because her direct examination was a substantive void, Appellant was denied a constitutionally adequate opportunity for cross-examination. Therefore, the admission of JP's forensic interview prejudiced Appellant and requires this Court to set aside and dismiss all Charges and their Specifications relating to JP.



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Certificate of Compliance with Rules 24(c) and 37

1. This Reply Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 1,983 words.
2. This Reply 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.



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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 October 8, 2026.



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