

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

UNITED STATES,
Appellee

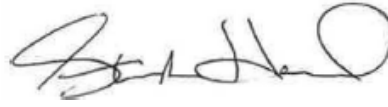
v.

Specialist (E-4)
JONATHAN R. PINKERTON
United States Army
Appellant

) BRIEF ON BEHALF OF
) APPELLEE
)
)
) Crim. App. Dkt. No. 20240353
)
) USCA Dkt. No. 26-0225/AR
)
)



MATTHEW C. WHEAR
Captain, Judge Advocate
Appellate Attorney, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0749
Matthew.c.whear.mil@army.mil
U.S.C.A.A.F. Bar No. 38200



STEPHEN L. HARMEL
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0762
Stephen.l.harmel.mil@army.mil
U.S.C.A.A.F. Bar No. 37493



RICHARD E. GORINI
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0793
Richard.e.gorini.mil@army.mil
U.S.C.A.A.F. Bar No. 35189



KYLE V. BURGAMY
Lieutenant Colonel, Judge Advocate
Deputy, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0747
kyle.v.burgamy.mil@army.mil
U.S.C.A.A.F. Bar No. 38349

Index of Brief

Index of Brief.....	ii
Table Cases, Statutes, and Other Authorities	iv
Statement of Statutory Jurisdiction.....	1
Statement of the Case.....	1
Summary of Argument	14
Statement of Facts.....	2
A. JP initially discloses sexual abuse to ST, a family friend.	3
B. Forensic interview of JP and AP reveal scope of their father’s sexual abuse.	5
1. JP detailed numerous incidents where Appellant sexually abused her.	5
2. AP detailed how Appellant touched her labia with his finger on one occasion when she was three years old.	7
C. Appellant’s semen was found on the comforter in DP’s room.	7
D. JP appeared at trial and was available for cross-examination.....	8
1. JP did not want to testify because she loved her father.....	8
2. JP returned to the stand and took the oath.....	10
3. Military Judge considers Confrontation Clause violation.....	10
4. The military judge finds no Confrontation Clause violation.....	12
5. Defense called JP during sentencing.	13
WHETHER APPELLANT’S RIGHT TO CONFRONTATION WAS VIOLATED WITH THE ADMISSION OF JP’S FORENSIC INTERVIEW.	15
<i>Standard of Review</i>	15

<i>Law</i>	15
<i>Argument</i>	16
A. Appellant had an opportunity to cross-examine JP and declined to do so. .	16
B. Neither the scope of direct-examination nor the risk of harmful answers deprived Appellant of confrontation.	18
C. Appellant’s “pathway to constitutional error” lacks merit.....	20
1. Appellant’s reliance on <i>Douglas</i> and <i>Owens</i> is misplaced.	21
2. Like <i>McGrath</i> , multiple courts have found no Confrontation Clause violation where defendants had the opportunity to, but declined, to cross- examine child victims.	23
<i>Conclusion</i>	28

Table Cases, Statutes, and Other Authorities

U.S. Supreme Court

<i>California v. Green</i> , 399 U.S. 149, 158 (1970)	15
<i>Crawford v. Washington</i> , 541 U.S. 36, 59 n.9 (2004)	15, 17, 26
<i>Delaware v. Fensterer</i> , 474 U.S. 15, 20 (1985)	14, 15
<i>Douglas v. Alabama</i> , 380 U.S. 415 (1965)	21
<i>Pennsylvania v. Richie</i> , 480 U.S. 39, 51–52 (1987)	17
<i>United States v. Owens</i> , 484 U.S. 554, 560, 108 S. Ct. 838, 843 (1988). ..	16, 21, 22

U.S. Court of Appeals for the Armed Forces

<i>United States v. Harcrow</i> , 66 M.J. 154, 158 (C.A.A.F. 2008)	15
<i>United States v. McGrath</i> , 39 M.J. 158, 163 (C.M.A. 1994)	16, 23, 24
<i>United States v. Piren</i> , 74 M.J. 24, 27 (C.A.A.F. 2015)	19
<i>United States v. Rankin</i> , 64 M.J. 348, 353 (C.A.A.F. 2007)	15
<i>United States v. Rhodes</i> , 61 M.J. 445, 450 (C.A.A.F. 2005)	16, 17, 18, 22

Service Courts of Criminal Appeals

<i>United States v. Jackson</i> , No. 201600299, 2017 CCA LEXIS 758, at *9 N-M Ct. Crim. App. Dec. 19, 2017	24
<i>United States v. Martindale</i> , 36 M.J. 870, 874 (N-M. Ct. Crim. App. 1993)	24
<i>United States v. Pinkerton</i> , ARMY 20240353, 2026 CCA LEXIS 197 (Army Ct. Crim. App. Apr. 20, 2026)	1

Other Courts of Appeal and Miscellaneous Authorities

<i>United States v. Figueroa</i> , 976 F.2d 1446, 1457 (1st Cir. 1992)	27
<i>People v. Sanchez</i> , 7 Cal. 5th 14, 42 (2019)	16
<i>State v. Cameron M.</i> , 55 A.3d 272, 279, 284 (Conn. 2012)	26
<i>State v. Nyhammer</i> , 963 A.2d 316, 334 (N.J. 2009)	20, 25, 26

<i>United States v. McHorse</i> , 179 F.3d 889, 900 (10th Cir. 1999)	27
--	----

Uniform Code of Military Justice

Article 120b, Uniform Code of Military Justice	1
Article 67(a)(3), Uniform Code of Military Justice, ...	1

Military Rules and Regulations

Mil. R. Evid. 611(b)	18, 19
Mil. R. Evid. 807	10

Federal Statutes

10 U.S.C. § 866(d)	1
10 U.S.C. § 867(a)(3)	1
10 U.S.C. § 920b (2019)	1

Issue Presented

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

Statement of the Case

On July 19, 2024, an enlisted panel sitting as a general court-martial convicted Appellant, contrary to his pleas, of three specifications of rape of a child and two specifications of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b (2019) [UCMJ]. (JA 7–9, 16–19). On July 20, 2024, the military judge sentenced Appellant to confinement for 120 months and a dishonorable discharge. (JA 10; STR). On August 2, 2024, the convening authority took no action on 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).

Statement of Facts

Appellant repeatedly raped and sexually abused his two young daughters, AP and JP. (JA 10, 132). Appellant's sexual abuse of JP began when she was three and continued until she was five years old. (JA 10, 132). Appellant sexually abused AP while she was three years old. (JA 10). In February 2023, JP disclosed to a family friend that Appellant had been touching her "private parts" beginning when she was three years old. (JA 271).

Days later, law enforcement forensically interviewed JP and AP. (JA 267). During the interview, AP disclosed Appellant had touched her labia on one occasion. (JA 368). JP disclosed: Appellant touched her labia more than once; JP touched Appellant's penis on more than one occasion; Appellant put his penis against JP's labia; Appellant last touched her labia while they were in her brother's room on the bed; and that JP grabbed Appellant's penis, pulled it down and "opened the hole to make it sing." (JA 171, 367).

Law enforcement seized the comforter from the brother's room and determined the stain on the comforter was Appellant's semen. (JA 152–56, 159, 203–05). Years later, both girls appeared at Appellant's court-martial, took the oath, and testified on direct-examination. (JA 160–63, 168–70, 172–74). Appellant

declined to cross-examine either girl but called JP during sentencing. (JA 170, 174, 230–32).

A. JP initially discloses sexual abuse to ST, a family friend.

During the periods of Appellant’s abuse, ST and her husband, an Army Chaplain, lived on-base at Fort Sill, Oklahoma. (JA 131). ST was a Sunday school teacher for the children’s ministry on-post and had met Appellant’s family through the church. (JA 131–33). ST became close with Appellant’s children from 2020 to 2023. (JA 132–36). Over the years, AP and JP began calling ST “grandma shay-tay.” (JA 134, 143). ST babysat the Pinkerton children whenever she was needed. (JA 132–33).

On February 19, 2023, ST, now a close family friend, held a tea-party for JP and AP while babysitting them at her house. (JA 137, 144). Before putting them to bed, ST bathed both girls in the bathtub and noticed both of JP’s hands were “under, or on top of . . . her vagina.” (JA 137–38, 146). ST testified that JP was “engaging in self-gratification” given the look on JP’s face. (JA 144–45).

ST interrupted JP and “began talking about safe touch policy, and [told JP] that we don’t really touch our parts.” (JA 138). ST then described times where someone touching JP’s vagina would be appropriate, such as using the bathroom, during a medical examination, or “when you get married” (JA 138).

In response to ST, JP paused “like she didn’t know how she was going to frame the question [and asked] ‘So, you mean nobody should ever ask you to touch there [sic] private parts?’” (JA 139). ST responded, “No.” (JA 139).

JP asked again “[a]nd nobody should ever ask to touch your private parts?” (JA 139). ST again said, “No.” (JA 139). ST asked JP if anyone had ever touched her vagina or asked her about touching her vagina—JP responded “yes” that her “daddy” had. (JA 139–40).

ST then removed the children from the bathtub, had them change into their pajamas, and put AP to bed. (JA 140). Before putting JP to bed, ST sat her down in the living room and created a digital recording of her conversation with the five-year-old girl. (JA 141–42). ST’s recording was admitted into evidence as Prosecution Exhibit 22. (JA 142, 366; Pros. Ex. 22).

At the beginning of the recording, JP asked ST whether it was acceptable for someone to ask if they could touch one’s private parts. (JA 366; Pros. Ex. 22, 0:00–0:35). JP, who did not know she was being recorded at the time, reiterated in this recorded conversation that Appellant touched her private parts “in the front” and it first started when she was three years old and living on Fort Sill. (JA 366; Pros. Ex. 22, 0:35–2:34).

JP promised ST she was telling her the truth. (JA 366; Pros. Ex. 22, 4:36). Finally, JP stated Appellant had also asked AP if Appellant could touch AP’s

private parts, and that AP had a similar experience of Appellant touching JP's vagina. (JA 366; Pros. Ex. 22, 5:06–6:37).

B. Forensic interview of JP and AP reveal scope of their father's sexual abuse.

On February 23, 2023, both JP and AP underwent forensic interviews. (JA 366–67; Pros. Ex. 23–24). The forensic interviewer first engaged in rapport building at the beginning of both interviews, asking the children what they liked to do for fun, who were members of their family, what activities they got to do with family members, what they had done today before the interview, and the like. (JA 367; Pros. Ex. 23, 0:00–9:00; Pros. Ex. 24, 0:00–8:15). The forensic interviewer also had the children promise to talk about things that really happened and were true. (JA 367; Pros. Ex. 23, 10:00–10:30). The forensic interviewer further had both children identify the male and female body parts on anatomical drawings, and both JP and AP correctly identified a male's penis and a female's labia. (JA 367–68; Pros. Ex. 23, 52:30–54:20; Pros. Ex. 24, 12:30–14:05).

1. JP detailed numerous incidents where Appellant sexually abused her.

JP informed the forensic interviewer she had told her mother, RP, about the situation involving Appellant's abuse the night before her forensic interview. (JA 367; Pros. Ex. 23, 24:45, 47:45). In turn, RP informed JP that Appellant could lose his job or go to jail if JP's information was true. (JA 367; Pros. Ex. 23, 9:00–10:00, 22:25–22:50). Consequently, talking about Appellant's sexual abuse was

“stressful” for JP and she commented on how stressful it was multiple times to the forensic interviewer. (JA 367; Pros. Ex. 23, 9:00–10:00, 19:40, 38:30–39:00, 49:30–50:05). In fact, talking about the situation with RP made JP feel “sad and miserable.” (JA 367; Pros. Ex. 23, 48:55–49:30).

During the forensic interview, JP disclosed Appellant began touching her when she was three years old when she was living at Fort Sill. (JA 367; Pros. Ex. 23, 20:00–21:15). JP stated the first time Appellant touched her she and Appellant were naked and were under the covers together in Appellant’s bed. (JA 367; Pros. Ex. 23, 21:15–22:25, 32:25). Appellant played with and tickled JP’s “personal privates” and labia with his hand. (JA 367; Pros. Ex. 23, 27:25–28:05, 57:30–59:00). JP grabbed Appellant’s penis, pulling it down and opened the hole to make it “sing.” (JA 367; Pros. Ex. 23, 28:05–29:35).

JP stated it happened more than once, where Appellant touched her and she touched him. (JA 367; Pros. Ex. 23, 30:35–30:55). JP also stated Appellant touched her in her brother DP’s room, and the last time Appellant touched her occurred in DP’s bed. (JA 367; Pros. Ex. 23, 34:00–38:30). JP stated Appellant touched her under the covers in DP’s room and that the same covers were still in DP’s room at the time since DP was living away in Washington state. (JA 367; Pros. Ex. 23, 1:12:00–1:12:20). Finally, JP described how Appellant put his

“squishy” penis on her labia once in Appellant’s bedroom and how it felt “very weird” when he did so. (JA 367; Pros. Ex. 23, 43:00–46:30, 1:10:00, 1:13:00).

2. AP detailed how Appellant touched her labia with his finger on one occasion when she was three years old.

During the forensic interview, AP, now five years old, disclosed her father “hurt her labia” on one occasion when he touched her labia with his finger in Appellant’s bedroom. (JA 368; Pros. Ex. 24, 17:15–17:30, 28:20). During this occurrence, AP stated she was clothed when Appellant, naked, stuck his finger down AP’s pants and touched her labia with his “skin.” (JA 368; Pros. Ex. 24, 17:30–21:10, 28:35, 37:30–38:05). Recalling the incident to forensic interviewers, AP felt like it was a “bad idea” for Appellant to touch her labia and stated “nothing good” happened on Appellant’s bed after he had told her to come into his bedroom and touched her labia. (JA 368; Pros. Ex. 24, 17:30–21:10). AP asked Appellant afterward if she could tell somebody about Appellant touching her labia in his bedroom, but Appellant instructed her not to tell anyone else. (JA 368; Pros. Ex. 24, 28:50–31:20). This incident happened during the nighttime when AP was just three years old. (Pros. Ex. 24, 23:10, 38:15, 39:55).

C. Appellant’s semen was found on the comforter in DP’s room.

Based upon JP’s forensic interview, law enforcement seized the comforter located in DP’s bedroom along with Appellant’s DNA sample. (JA 151–59).

Specifically, law enforcement was searching for evidence of ejaculate based upon JP's account of pulling on Appellant's penis and making it "sing." (JA 171).

The government called TL, a forensic biologist at the United States Criminal Investigation Laboratory and who was recognized as an expert in the field of DNA collection and analysis. (JA 198, 200). TL analyzed the comforter recovered from DP's room and identified one stain on it containing semen. (JA 201, 203). TL concluded the sperm cells' DNA profile was "1.0 quintillion times more likely it's [Appellant] versus an unknown individual." (JA 204).

D. JP appeared at trial and was available for cross-examination.

JP, now seven years old, appeared at Appellant's trial, was emotional, but promised to tell the truth. (JA 168, 172). Appellant's counsel declined to cross JP.

1. JP did not want to testify because she loved her father.

In the witness chair, JP climbed onto a booster chair, clipped the microphone to her dress, and spontaneously stated, "I don't want to testify." (JA 162). The military judge, while sympathetic, advised JP it was "a requirement for [her] to testify. And it's okay for you to have your teddy bear, okay?" (JA 162). JP did not respond to the judge and became emotional. (JA 162).

The trial counsel then asked JP if she could promise to tell the truth, to which JP began crying on the stand and stated, "I don't want to." (JA 163).

The military judge also observed the following when JP was initially called as a witness:

Trial counsel tried to ask her questions as she clutched her stuffed animal against her face and chest. She appeared to be hiding within herself and in search of help from her current circumstances.

...

[JP] appeared terrified and emotionally affected by being in the courtroom as she continued to clutch her teddy bear.

(JA 206–07).

The court-martial then took a twenty-minute recess and called an Article 39(a) session wherein the military judge reminded trial counsel that JP had not yet taken the oath. (JA 163–64).

Before calling the members, civilian defense counsel raised a Confrontation Clause objection, stating JP had refused the oath and requested that the government should have some time limit in getting JP to testify. (JA 165). The military judge clarified JP did not refuse the oath but stated she did not want to testify. (JA 165).

The military judge stated he would give leeway to the young girl and that he was not “putting a time limit on how long it will take for [JP] to feel comfortable testifying.” (JA 166). The civilian defense counsel stated he was not attempting “gamesmanship,” and stated, “I was just wondering—I mean, it’s uncomfortable for everybody.” (JA 166).

2. JP returned to the stand and took the oath.

After the break, the government recalled JP, explained the oath, and JP swore to tell the truth. (JA 168). After the oath, the following took place:

TC: [JP], do you know why you're here today?

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

TC: Okay, why is that?

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

TC: I understand. [Witness became emotional] [JP], who—who is your dad, can you—can you point to him?

[The witness did as directed, and pointed at [Appellant]].

TC: That's him right there? Okay. . . . [JP], will you talk about the things that happened, that brought us here today?

JP: No!

TC: Okay, thank you. No further questions, Your Honor.

MJ: Any cross-examination?

CDC: No, Your Honor.

(JA 168–70). After being temporarily excused and stepping down from the witness chair, JP spontaneously said, “I really wish I could hug my dad.” (JA 170).

3. Military Judge considers Confrontation Clause violation.

After JP and AP testified, the government sought to admit JP and AP's forensic interview under Mil. R. Evid. 807. (JA 176, 366–67). Appellant objected

under the Confrontation Clause, stating although JP took the oath, and “understood why she was here, she refused to answer questions.” (JA 176). The military judge stated, “you were given an opportunity to cross-examine, were you not?” (JA 176). Appellant’s counsel stated, “Yes, Your Honor, I absolutely was.” (JA 176).

The military judge then considered whether the Confrontation Clause had been satisfied because Appellant had the opportunity to cross-examine JP but chose not to. (JA 178). Appellant argued that although JP took the stand and swore to tell the truth, JP stated she was not going to testify. (JA 179). Appellant stated, “there was nothing to cross-examine” because the scope of direct was limited—arguing, “I can’t cross her on the fact that she loves her father, or doesn’t love her father” (JA 187–88).

Lastly, Appellant stated that because of the limited government direct, the defense would be forced to elicit facts prejudicial to Appellant. (JA 189). Defense asked the court to be given a second opportunity to conduct an “open[ed] up cross-examination” to allow defense to explore any areas it believes relevant. (JA 187, 190). The government stated it would not have opposed “to have allowed the defense to ask questions beyond the scope” of JP’s direct-examination. (JA 191). However, Appellant only called JP during sentencing and never followed up on its request. (JA 187, 189).

4. The military judge finds no Confrontation Clause violation.

Overnight, both sides submitted briefs to the military judge. (JA 350–65). The following day, the military judge made several findings of fact and found Appellant was not deprived of confronting JP. (JA 206, 223).

The military judge found JP, when initially called, “appeared to be terrified [but a] respectful, young child.” (JA 206). JP “expressed her feelings in a respectful manner, as ‘I don’t want to testify’ . . . Trial counsel asked if she promised to tell the truth, while clutching her stuffed animal, she didn’t say she would not, she stated, ‘I don’t want to’ . . .” (JA 207). Regarding JP’s recalled testimony after the twenty-minute recess, the military judge found that JP “still appeared scared, but not as scared as before,” and this time JP promised to tell the truth. (JA 207).

The military judge observed JP was emphatic in her understanding of why she was at Appellant’s trial and found JP had “indicated she knew why, and she didn’t like it, which is testimony. She further testified she didn’t want to testify because it goes against her dad and she loves him.” (JA 214).

The military judge found “defense was provided an opportunity to cross-examine [JP] on her in-court testimony, her potential biases, any potential influences on her regarding her prior statements of alleged offenses, and the defense declined to cross-examine her.” (JA 213).

The military judge found no Confrontation Clause violation because JP took the stand, faced appellant, promised to tell the truth, testified on direct, and was subject to Appellant’s cross-examination. (JA 223). The military judge stated, the “[c]onfrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish.” (JA 223).

5. Defense called JP during sentencing.

During sentencing proceedings, Appellant’s counsel called JP to testify on Appellant’s behalf. (JA 230). Defense counsel’s first question was how Appellant was as a father, to which JP stated, “[w]hen he gets angry, he kind of throws a fit . . . but otherwise, he’s a good dad.” (JA 230).

JP testified that she loves and misses Appellant, that her dad had not been home, that JP wants Appellant home “like, as soon as possible,” and that it would make her and her family happy for Appellant to return. (JA 230–32). JP responded intelligently to defense counsel’s questions, stating “[m]y mom says that [Appellant] still cannot come home because he needs to—because he needs to establish some things, which I’m not quite sure what things . . . But that’s just what she said.” (JA 231).

Appellant’s civilian defense counsel asked JP fourteen questions, JP understood each question and gave fourteen coherent answers. (JA 230–32).

Summary of Argument

Appellant was provided with an opportunity to cross-examine his seven-year-old daughter about his sexual abuse but declined to do so. The Confrontation Clause guarantees criminal defendants only the *opportunity* for effective cross-examination; it does not guarantee cross-examination that is comfortable, tactically unconstrained, or effective in whatever manner the defense might wish. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). (emphasis added).

At seven years old, JP took the stand, swore to tell the truth, and asserted that the love for her father prevented her from testifying against him. Defense counsel's tactical decision and refusal to cross-examine one of the named child-victims, a child that would have only provided inculpatory testimony regarding Appellant's rape of his daughters, should not now stand to benefit Appellant.

Further, defense requested an "opened up" cross-examination of JP. However, Appellant never recalled JP, even after the forensic interview was admitted. Instead, Appellant only called JP during sentencing—asking JP fourteen questions—and getting fourteen answers. This Court should not presume JP would have remained silent or unresponsive to questions defense counsel never asked. This Court should affirm the decision of the Army Court of Criminal Appeals.

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

Standard of Review

Whether admission of evidence violates the Confrontation Clause is a question of law reviewed de novo. *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008). If a preserved constitutional violation occurred, the Government must establish that the error was harmless beyond a reasonable doubt. *United States v. Rankin*, 64 M.J. 348, 353 (C.A.A.F. 2007).

Law

The Confrontation Clause guarantees an accused the opportunity to cross-examine the witnesses against him. *Fensterer*, 474 U.S. at 19–20. It does not guarantee questioning that succeeds in whatever manner or to whatever extent the defense desires. *Id.* at 20. “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004); *California v. Green*, 399 U.S. 149, 158 (1970).

“[W]hen a hearsay declarant is present at trial and subject to unrestricted cross-examination . . . the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness’ demeanor satisfy the constitutional requirements.” *United States v. Owens*, 484 U.S. 554, 560, 108 S. Ct.

838, 843 (1988). “Nothing in *Crawford* casts doubt on the continuing vitality of *Owens*.” *People v. Sanchez*, 7 Cal. 5th 14, 42 (2019); *see also United States v. Rhodes*, 61 M.J. 445, 450 (C.A.A.F. 2005). An accused who declines an available opportunity to question a witness cannot establish a denial of confrontation merely because he elected not to exercise that right. *United States v. McGrath*, 39 M.J. 158, 163 (C.M.A. 1994). “Having thus eschewed confrontation, appellant cannot now claim a denial of it.” *Id.*

Argument

A. Appellant had an opportunity to cross-examine JP and declined to do so.

JP appeared before the members, faced Appellant, promised to tell the truth, and answered questions. (JA 168–70). She understood why she was present and explained her reluctance to testify: “Because, it’s going against my dad and I love him.” (JA 169). When JP took the stand, swore the oath, and faced Appellant directly, the panel observed her demeanor, her emotional reactions, her body language in response to trial counsel’s questions, and heard her testimony regarding her love and loyalty towards her father. (JA 168–70, 194–95).

After JP declined to discuss the underlying events, the military judge offered cross-examination, which Defense declined. (JA 170). Defense counsel later acknowledged he had been given the opportunity to cross JP but declined to do so. (JA 176).

The Supreme Court has consistently called for “live testimony in court subject to adversarial testing.” *Crawford*, 541 U.S. at 43. That occurred in Appellant’s case as JP appeared at Appellant’s court-martial and Appellant made no attempt to show that was biased against him, had no memory of the sexual acts occurring, exaggerated her claims of abuse in her earlier forensic interview, lacked credibility, had a motive to fabricate, was inconsistent in her recounting of abuse, or was otherwise unworthy of belief. *See Pennsylvania v. Richie*, 480 U.S. 39, 51–52 (1987) (observing “the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable.”) (citations omitted).

Since JP “appear[red] for cross-examination at trial, the Confrontation Clause place[d] no constraints . . . on the use of [her] prior testimonial statements.” *Crawford*, 541 U.S. at 59 n.9. This is because “[t]he [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.” *Id.* ¹

Appellant could have had JP “defend or explain” the prior statements she made in her forensic interview. *Crawford*, 541 U.S. at 59 n.9. While Appellant argued he could not cross-examine JP’s forensic interview, Defense could have

¹ As this Court reaffirmed in *Rhodes*, 61 M.J. at 450, footnote 9 of *Crawford* did not *sub silentio* overrule *Owens*.

explored whether the statements made within it were true or not. (JA 190).

Appellant could have also explored the context for any touching to better support Appellant's speculative arguments—that the touching was “to teach [JP] about stranger danger” or to apply “medicine on [JP].”²

While Appellant might have felt it was not in his best interests to cross-examine JP and made a strategic judgment call to decline to do so, it does not negate the fact that he had the opportunity to do so, which is all the Confrontation Clause requires. In line with this Court's holding in *Rhodes*, the admission of JP's forensic interview did not violate “Appellant's Sixth Amendment right ‘to be confronted with the witnesses against him . . . because [JP] took the stand, testified, and was subject to cross-examination, thereby satisfying Appellant's confrontation right.’” *Rhodes*, 61 M.J. at 449.

B. Neither the scope of direct-examination nor the risk of harmful answers deprived Appellant of confrontation.

Military Rule of Evidence 611(b) permits cross-examination concerning both the subject matter of direct-examination and matters affecting credibility. Appellant therefore could have explored JP's potential biases, memory, ability to perceive, or otherwise pursued any other impeachment matters affecting her credibility, as permitted under Mil. R. Evid. 611(b). *See, e.g., United States v.*

² This was not included in the Joint Appendix but can be found within the record. (R. at 1854).

Piren, 74 M.J. 24, 27 (C.A.A.F. 2015) (permitting impeachment by contradiction where appellant’s prior statement was inconsistent since permitting such impeachment was designed to explore appellant’s credibility under Mil. R. Evid. 611(b)). JP’s testimony about loving her father and her testimony that she did not “like the reason” she was there also provided defense basis to examine her reluctance. (JA 169–70).

Appellant raped JP more than once, placed his penis on her vulva, and abused JP between 2020 and 2023. (STR). Given the fact that JP had just responded, “No!” when trial counsel asked if she would discuss what had happened to her, Appellant’s counsel’s choice not to cross JP was clearly a tactical decision. Appellant’s argument to this Court reiterates this point: “On cross-examination, any questions regarding JP’s allegations would have been beyond the scope . . . Moreover, it would have been negligent for defense counsel to present evidence incriminating their own client.” (Appellant’s Br. 16).

The Government concurs with Appellant. The likelihood JP would offer testimony consistent with her forensic interview, produce incriminating testimony, or otherwise reaffirm what she told ST and forensic interviewers explains why counsel declined to ask JP any additional questions. While it might have been a risky course of action to cross-examine JP regarding the falsity of her prior forensic interview, her statements to ST, or to justify any previous touching, Mil.

R. Evid. 611(b) would not have served as any impediment to doing so. Appellant's tactical choice to not cross-examine JP or question for potential bias or pursue other impeachment matters that might reaffirm her prior statements explain why counsel might decline that course; it does not establish that the opportunity was absent. *See State v. Nyhammer*, 963 A.2d 316, 334 (N.J. 2009).

Moreover, during an Article 39(a) session, Defense Counsel requested another opportunity to question JP beyond the scope of direct-examination, and the Government agreed. (JA 187, 190–91). However, despite being granted this opportunity, Defense again elected not to question JP on cross, or otherwise recall JP during Appellant's case-in-chief after the forensic interview was admitted. Appellant's claim that the scope of direct foreclosed meaningful questioning cannot be reconciled with his failure to pursue the broader examination he requested.

C. Appellant's "pathway to constitutional error" lacks merit.

Appellant's proposed "Two-Path Constitutional Dilemma" lacks merit. (Appellant's Br. 10–14). Appellant's first theory isolates JP's initial resistance before taking the oath. (Appellant's Br. 11–12). Appellant claims this created a constitutional dilemma extinguishing confrontation under *Douglas* and *Owens*. Appellant's reliance on *Douglas* and *Owens* is misplaced and unpersuasive.

Appellant’s second theory equates the seven-year-old girl’s refusal to recount her father’s abuse with the complete inability to confront JP. (Appellant’s Br. 13–14). On direct, JP explained her reluctance in testifying against her father, identified her father, and remained responsive to other questions. Defense elected not to explore whether JP would even answer questions. As discussed below, both pathways lack merit.

1. Appellant’s reliance on *Douglas* and *Owens* is misplaced.

Appellant relies on *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Owens*, 484 U.S. at 554, to argue that “defense was stripped of any ‘meaningful opportunity’ to cross-examine” JP because she refused to discuss what her father did to her. (Appellant’s Br. 10–11, 13).

Appellant contends that JP was “functionally unavailable” because before the oath JP stated she did not want to testify—and after the oath stated she did not want to discuss the allegations because it would go against her father. (JA 162, 170). Appellant claims this created a constitutional dilemma extinguishing confrontation under *Douglas*, 380 U.S. at 415.

However, *Douglas* dealt with a witness’s refusal to testify over his privilege of self-incrimination. 380 U.S. at 416. Despite that witness’s refusal to incriminate himself, the government read from the witness’s purported confession, pausing to ask the witness after every few sentences whether he made the statement or not. *Id.*

The Supreme Court found a Confrontation Clause violation because the government “created a situation in which the jury might improperly infer that the statement had been made and that it was true” and the witness, despite his privilege, “could not be cross-examined on a statement imputed to [him] but not admitted by him [on the stand].” *Id.* at 419.

Similarly, *Owens* affirmed that “assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists.” 484 U.S. at 562. Unlike *Douglas* or *Owens*, in Appellant’s case, JP did not invoke or assert any privilege. JP took the oath and answered questions despite expressing that she did not want to be there. (JA 168–70). Her initial reluctance did not permanently establish that she was unavailable for examination as seen by her willingness to return to the stand and further engage in the government’s questions.

Regardless of privilege, this Court has recognized that *Owens* requires only an opportunity for cross-examination. *Rhodes*, 61 M.J. at 449 (quoting *Owens*, 484 U.S. at 559 (“[T]he Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”)) (emphasis in original).

While JP refused to effectively testify for the government, Appellant nevertheless had an opportunity to question JP on matters such as bias, memory, or

her honesty in reporting to ST. Although it remains speculative whether JP would have answered Appellant's questions, JP's later appearance and testimony on Appellant's behalf during his sentencing proceedings indicates she might have answered Appellant's questions on cross-examination. (JA 230–32). This Court should not presume JP would have remained silent or unresponsive to questions defense counsel never asked.

2. Like *McGrath*, multiple courts have found no Confrontation Clause violation where defendants had the opportunity to, but declined, to cross-examine child victims.

Regardless of either proposed “pathways,” Appellant's case is like *McGrath*. 39 M.J. at 158. There, the military judge convicted the accused of multiple sex offenses he committed against his then thirteen- and fourteen-year-old daughter. *Id.* at 159. While the military judge encouraged the child-victim to testify, the victim ultimately refused to testify because it was difficult to testify in front of those in the courtroom and she did not want her father to go to jail. *Id.* at 160–61.

After the military judge had questioned the child-victim, “the defense was offered an opportunity to question her[,]” which they declined. *Id.* at 161. The United States Court of Military Appeals concluded the appellant “was not denied his rights under the Confrontation Clause” because he “waived cross-examination.” *Id.* at 163. “Having thus eschewed confrontation, appellant cannot now claim a denial of it.” *Id.*

Appellant emphasizes that the child in *McGrath* acknowledged her prior statement and denied lying, whereas JP did not ratify her forensic interview. (Appellant's Br. 18). That factual difference does not establish that JP was unavailable for questioning. Defense could have asked whether her earlier statements to ST in the bathtub were true, whether her statements to the forensic interviewer were true, could have explored possible influences on those statements, or challenged her recollection and credibility. 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.

Like *McGrath*, Appellant eschewed confrontation when he declined to cross-examine JP, and he cannot now assert his right to confrontation was violated. *See also United States v. Martindale*, 36 M.J. 870, 874 (N-M. Ct. Crim. App. 1993) (recognizing "[t]here is generally no Confrontation Clause issue . . . when the declarant testifies or when the declarant is available to testify") (citations omitted), *aff'd* 40 M.J. 348 (C.M.A. 1994); *United States v. Jackson*, No. 201600299, 2017 CCA LEXIS 758, at *9 N-M Ct. Crim. App. Dec. 19, 2017 (regarding a 4-year-old child-victim failing to recall what she told the forensic examiner; "[t]he appellant asserts that 'available' under the Sixth Amendment's Confrontation Clause requires the declarant to be 'meaningfully available to be cross-examined.' We disagree.").

In *Nyhammer*, the child-victim did not respond to multiple questions of whether the defendant touched her private areas. 963 A.2d at 319–23. On cross-examination, the defense “asked a number of safe questions—questions intended to elicit answers that would reveal only mundane information, rather than information that might damage or, even worse, implicate [the defendant.]” *Id.* at 323.

Like Appellant, the defendant alleged his Confrontation Clause rights had been violated when the trial court admitted the child-victim’s recorded interview into evidence against him. *Id.* at 331–32. The New Jersey Supreme Court rejected this contention and held the admission of the child-victim’s recorded interview did not violate the defendant’s Confrontation Clause rights. *Id.* at 333.

The Supreme Court of New Jersey noted that “[a]lthough [the] defendant had the opportunity to cross-examine [the child-victim] on the core allegations contained in [her videotaped] statement, he declined to do so at trial.” *Id.*

“However unresponsive [the child-victim] may have been on direct-examination, [the defendant] had the opportunity to question her on the inculpatory statements and descriptions she gave in her taped interview.” *Id.* For instance, the defense could have asked on cross-examination “[i]s it true that your Uncle John never touched your private parts and never touched or stroked his own private parts in your presence?” *Id.* at 334. While the court did not fault the defense counsel “for not pursuing cross-examination that may have damaged [the] defendant’s case[,]”

the court found the “defendant cannot now claim that he was denied the opportunity for cross-examination” because he chose a safe “strategic course.” *Id.*

Like the defense counsel in *Nyhammer*, Appellant chose a safe strategic course by declining to cross-examine JP. But Appellant certainly could have done so, especially since it was apparent to everybody present that JP knew exactly why she was in court, and that she would not testify against her father. (JA 161–63, 165–66). Again, if anything, she might have testified *for* her father, as she did later during sentencing proceedings. (JA 230–32). (emphasis added). In the end, Appellant could have pursued “many different and varied ways” to conduct cross-examination for confrontation purposes, perhaps even by asking JP if the information she provided to the forensic interviewer was true. *Nyhammer*, 963 A.2d at 334.

However, as stated *Supra*, Appellant feared cross-examining his seven-year-old daughter “about the core accusations” in her forensic interview for good reason. Any cross of JP would have elicited damning evidence against him. Yet, forgoing critical cross-examination “does not mean that [appellant] was denied the opportunity for cross-examination.” *Id.*

Several courts either agree with *Nyhammer*’s reasoning or have held similarly. *See State v. Cameron M.*, 55 A.3d 272, 279, 284 (Conn. 2012) (holding “that the defendant’s Confrontation Clause rights under *Crawford* were not

violated by the admission of the [child-victim's] forensic interview" where child had no memory of the defendant's sexual abuse nor the content of her forensic interview with the defense electing not to cross-examine the child-victim); *United States v. McHorse*, 179 F.3d 889, 900 (10th Cir. 1999) (holding the child-victim's "failure to recall the alleged incidents of sexual abuse against her coupled with the defendant's strategy choice not to cross-examine her regarding her lack of memory did not violate defendant's rights under the Confrontation Clause"); *United States v. Figueroa*, 976 F.2d 1446, 1457 (1st Cir. 1992) (recognizing "[t]he right to confrontation is not infringed if a defendant for tactical reasons chooses to forego cross-examination").

Appellant received the opportunity the Confrontation Clause guarantees. His decision to forgo it did not render JP's forensic interview constitutionally inadmissible. This Court should answer the granted issue in the negative and affirm the Army Court's decision.

Conclusion

The United States respectfully request this Court to affirm the findings and sentence.



MATTHEW C. WHEAR
Captain, Judge Advocate
Appellate Attorney, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0749
Matthew.c.whear.mil@army.mil
U.S.C.A.A.F. Bar No. 38200



STEPHEN L. HARMEL
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0762
Stephen.l.harmel.mil@army.mil
U.S.C.A.A.F. Bar No. 37493



RICHARD E. GORINI
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0793
Richard.e.gorini.mil@army.mil
U.S.C.A.A.F. Bar No. 35189



KYLE V. BURGAMY
Lieutenant Colonel, Judge Advocate
Deputy, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0747
kyle.v.burgamy.mil@army.mil
U.S.C.A.A.F. Bar No. 38349

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains 7,062 words.
2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

A handwritten signature in black ink, appearing to read "Matthew Whear". The signature is fluid and cursive, with the first name "Matthew" and last name "Whear" clearly distinguishable.

MATTHEW C. WHEAR
Captain, Judge Advocate
Attorney for Appellee

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at *usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil* on the 30th day of September, 2026.

A handwritten signature in black ink, appearing to read "Matthew Whear", written in a cursive style.

MATTHEW C. WHEAR
Captain, Judge Advocate
Attorney for Appellee