No. ____

IN THE

Supreme Court of the United States

DANIEL A. BENCH,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was tried before a general court-martial for, *inter alia*, sexually abusing his autistic son. During the son's live remote testimony, he expressed concerns over testifying against his father. The prosecutor responded—without objection—by falsely stating that Petitioner was not then present in the courtroom.

On appeal, Petitioner alleged the prosecutor's lie constituted misconduct that prejudiced his Sixth Amendment right to confrontation. Reviewing the issue for plain error, the Court of Appeals for the Armed Forces (CAAF) found the matter to be one of first impression, in that no court has held that the Sixth Amendment requires a child testifying remotely to be aware that the defendant is viewing their testimony. Consequently, the CAAF found no plain or obvious error. The CAAF never addressed prejudice nor prosecutorial misconduct.

The Question Presented is:

> Does a prosecutor's in-court lie to secure a witness's testimony constitute misconduct that materially prejudices an accused's Sixth Amendment right to confrontation or other substantial right?

RELATED PROCEEDINGS

United States Air Force Court of Criminal Appeals:

United States v. Bench, No. ACM 39797 (May 24, 2020)

United States Court of Appeals for the Armed Forces:

United States v. Bench, 82 M.J. 388 (C.A.A.F. 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces (CAAF).

OPINIONS BELOW

The opinion in *United States v. Bench* from the United States Air Force Court of Criminal Appeals (AFCCA) is not reported, but is available at 2021 CCA LEXIS 306 (A.F. Ct. Crim. App. May 24, 2021). It is reproduced in the Appendix at Pet. App. 22a. The CAAF's affirmation is published at 82 M.J. 388 (C.A.A.F. 2022) and is reproduced in the Appendix at Pet. App. 3a.

JURISDICTION

The CAAF granted review of Petitioner's direct appeal on November 30, 2021. Pet. App. 20a. The CAAF subsequently affirmed the AFCCA's decision on August 8, 2022. Pet. App. 3a. On November 1, 2022 the Chief Justice extended the time to file a petition for a writ of certiorari to December 7, 2022. This Court's jurisdiction over the case emanates from Article 67a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867a, and 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him . . . ." U.S. CONST. amend. VI.

STATEMENT OF THE CASE

A. Legal Background

1. The Sixth Amendment

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him . . . ." U.S. CONST. amend. VI. "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). "The Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses." *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J. concurring).

In *Coy v. Iowa*, this Court determined that allowing two minor witnesses in a sexual assault case to testify from behind a screen, which blocked their view of the defendant, violated his Sixth Amendment right to confrontation. 487 U.S. 1012 (1988). Writing for the majority, Justice Scalia observed how the Supreme Court had "never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id.* at 1016. This was in part because "[a] witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." *Id.* at 1019 (citation and internal quotations omitted). The majority added that "[i]t 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." *Id.*

Two years later, in *Maryland v. Craig*, a five-justice majority of this Court held a state statute permitting a child victim to testify via one-way, closed-circuit television did not violate the Confrontation Clause. 497 U.S. 836 (1990). Relying upon the "indicia of reliability" rubric set forth in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), the Court determined "that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850 (citations omitted). Finding the procedure at issue "preserve[d] all of the other elements of the confrontation right[,]" specifically oath, cross-examination, and observation of the witness's demeanor, *id.* at 851, the Court concluded "the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation."[1] *Id.* at 857.

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[1] Justice Scalia, authoring a dissent on behalf of himself and three others, expressed particularized concern that *Craig*'s holding would permit an estranged parent who had lost custody of a child to be sentenced for sexual abuse without "so much as the opportunity to sit in the presence of the child" and to question whether the allegations were indeed true. *Id.* at 861.

Fourteen years after *Craig*, this Court overruled *Roberts* in *Crawford v. Washington*. 541 U.S. 36 (2004). Returning to the formal, textual and historical guarantee of the Confrontation Clause, this Court barred the state from introducing tape-recorded statements made by a witness to law enforcement in a stabbing case, when the witness did not appear at trial and the defendant had no opportunity for cross-examination. *Id*. at 68-70. In casting aside *Roberts*, the *Crawford* Court reasoned:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but 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.

Id. at 61. Although *Crawford* did not likewise overrule *Craig*, this Court has since emphasized that the case marked an "emphatic rejection of the reliability-based approach of *Ohio v. Roberts*." *Hemphill v. New York*, __ U.S. __, 142 S. Ct. 681, 691 (2022) (slip op.).

In interpreting this Court's Sixth Amendment jurisprudence, federal and state appellate courts have wrestled with *Craig*'s precedential value in light of *Crawford*. *See*, *e.g.*, *United States v. Carter*, 907 F.3d 1199, 1206 n. 3 (9th Cir. 2018) (suggesting that "[t]he vitality of *Craig* itself is questionable in light of the Supreme Court's later decision in *Crawford*, which

abrogated *Roberts*, a case relied upon heavily in *Craig*" and that "*Craig* and *Crawford* stand in 'marked contrast' in several respects . . ."); *People v. Jemison,* 505 Mich. 352, 356 (2020) (noting that "*Crawford* did not specifically overrule *Craig*, but it took out its legs"); *State v. Mercier*, 403 Mont. 34, 44-46 (2021) (questioning "*Craig*'s continuing utility" in light of a circuit split over its extension to two-way video procedures and this Court's decision in *Crawford*; expressing that it was "not prepared to declare the proverbial death knell to *Craig* just yet . . . prefer[ring] to await further direction from the Supreme Court."); *Coronado v. State*, 351 S.W.3d 315, 321 (Tex. Crim. App. 2011) (observing that this Court "has never overturned the holding in *Craig*, but, beginning with *Crawford v. Washington*, [ ] has nibbled it into Swiss cheese by repeating the categorical nature of the right to confrontation in every one of its more recent cases.") (footnotes with citations omitted). To reconcile these cases, one court recently "read *Craig*'s holding according to its narrow facts." *Jemison*, 505 Mich. at 356 (footnote with citations omitted).

The CAAF has similarly acknowledged "that aspects of *Crawford* are difficult to reconcile with aspects of *Craig*." *United States v. Pack*, 65 M.J. 381, 381 (2007). It repeated this refrain in the present case, but reiterated its "unequivocal" belief that "'*Craig* continues to control the questions of whether, when, and how, remote testimony by a child witness in a criminal trial is constitutional.'" Pet. App. 15a (quoting *Pack*, 65 M.J. at 385).

2. Prosecutorial Misconduct

Civilian prosecutors have unique professional duties and responsibilities. A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Consequently, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Id*.

To this end, "[t]he prosecution has a special duty not to mislead" and such government officials "should, of course, never make affirmative statements contrary to what [they know] to be the truth." *United States v. Della Universita*, 298 F.2d 365, 367 (2d Cir. 1962); *see also Davis v. Zant*, 36 F.3d 1538, 1548 (11th Cir. 1994) ("Little time and no discussion is necessary to conclude that it is improper for a prosecutor to use misstatements and falsehoods.") (footnote with citations omitted). Indeed, "the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations." American Bar Association (ABA) STANDARDS FOR CRIMINAL JUSTICE, Prosecution Function (hereinafter SCJ), Standard 3-1.4(a) (4th ed. 2017). A prosecutor is thus proscribed from "mak[ing] a statement of fact or law, or offer[ing] evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party[.]" SCJ, Standard 3-1.4(b).

An Air Force prosecutor's obligations largely mirror those of his civilian counterparts. For example, the duty of an Air Force prosecutor "is to

seek justice, not merely to convict." Air Force Instruction (AFI) 51-110, Attachment 7, Air Force Standards for Criminal Justice, Prosecution Function (hereinafter AFSCJ), Standard 3-1.2(c) (December 11, 2018). These Airmen must also "know and be guided by the standards applicable to military counsel by the [UCMJ], Manual for Courts-Martial (MCM), AFI 51-201, Administration of Military Justice; and the Air Force Rules of Professional Conduct[2][.]" AFSCJ, Standard 3-1.2(d). Accordingly, they are prohibited from "knowingly mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer." ARPC, R. 3.3(a). It is professional misconduct for a prosecutor, as it is for any Air Force attorney, "to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]" ARPC, R. 8.4(c). And "[i]n the course of representing a client, a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person[.]" ARPC, R. 4.1(a).

Consistent with these rules, the CAAF has long defined prosecutorial misconduct "as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual [for Courts-Martial] rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citations omitted). Akin to the civilian judiciary, however, the CAAF has concluded that the characterization of certain conduct as "prosecutorial misconduct . . . does not in itself mandate dismissal of charges against an accused or

[2] AFI 51-110, Attachment 2, Air Force Rules of Professional Conduct (ARPC), (Dec. 11, 2018).

ordering a rehearing in every case where it has occurred." *Id.* (citing *Greer v. Miller*, 483 U.S. 756, 765 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)) (quotation marks omitted). Rather, the CAAF requires military appellate courts to consider the legal norm violated by the prosecutor and determine whether it "actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)." *Id.* (citing *United States v. Hasting*, 461 U.S. 499 (1983); *United States v. Morrison*, 449 U.S. 361 (1981); *United States v. Rushatz*, 31 M.J. 450 (CMA 1990)) (emphasis in original). If so, then the reviewing court must still consider "the trial record as a whole to determine whether such a right's violation was harmless under all the facts of a particular case." *Id.* (citing *Morrison*, 449 U.S. at 365; *Zant*, 36 F.3d at 1546).

When assessing this latter prong, the nature of the violated right controls how to determine this impact. For plain or obvious constitutional errors, the CAAF has required the Government to prove the error harmless beyond a reasonable doubt. *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18 (1967)). When this error prejudices the Sixth Amendment's right to confrontation, harmlessness is assessed based on the remaining evidence introduced at trial. *United States v. Daulton*, 45 M.J. 212, 219-20 (C.A.A.F. 1996) (citing *Coy*, 487 U.S. at 1022).

B. Procedural and Factual Background

At the time of his court-martial, Petitioner had served in the military for approximately twenty-two years. Pet. App. 61a. In 2006, Petitioner met and

married MC,[3] who was an enlisted member in the United States Air Force Reserve Corps. Pet. App. 25a. Petitioner had one daughter from a prior relationship and, in 2010, welcomed fraternal twins (EC[4] and BC) with MC. Pet. App. 25a-26a.

At the age of two, EC was diagnosed with autism that affected his speech and motor skills. Pet. App. 54a, 69a-70a. When EC became overstimulated, he would engage in repetitive movements such as flapping his arms and running back and forth repeatedly. Pet. App. 54a, 69a.

Three years after the twins were born, MC and Petitioner separated, divorcing in 2014. Pet. App. 25a-26a. Initially, the parents shared joint legal custody of their children. *Id.* These arrangements later turned contested, and the allegations against Petitioner of sexually abusing the twins arose amidst the custody dispute. Pet. App. 26a, 28a-31a, 53a.

Prior to Petitioner's court-martial, the Government requested EC be permitted to testify remotely by video teleconference. Pet. App. 5a-6a. The Government contended that the now nine-year-old would "be traumatized without remote testimony because of the physical and verbal indications of his fear of [Petitioner] and that [Petitioner] will find out he has told their 'secret.'" *Id.* (citation omitted). Without a Defense objection, the military judge granted the request. *Id.*

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[3] Consistent with the courts below, this brief refers to MC by her initials, though she is not a minor. Pet. App. 25a.

[4] At trial, EC's initials were EB. Consistent with the courts below, this brief refers to EC by his current initials. Pet. App. 5a.

During EC's subsequent remote testimony, only the prosecutor,[5] defense counsel (DC), and special victims' counsel (SVC) were present in the room with him. Pet. App. 6a. Though a livestream video teleconference device was utilized, paper had been placed over the screen to block EC's view of the courtroom. Pet. App. 6a.

From the outset of EC's appearance, he repeatedly asked the prosecutor questions about the trial procedures and who could hear his testimony. *Id*. He almost immediately became distracted by the paper and asked the prosecutor why the screen was covered. *Id*. This led to the following exchange:

> [EC:] Are there people in there?
>
> [TC:] No, not so many.
>
> [EC:] What?
>
> [TC:] *Nope*, you just have to worry about us right here, okay? So you've got me, and [the SVC], and [the DC]. And so we're just—
>
> [EC:] —But are they going to—but are there going to be people—
>
> [TC:] —*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?

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[5] In the military, a prosecutor is called a "trial counsel." The prosecutor in this case was a senior-level prosecutor known as a "circuit trial counsel." The CAAF's opinion uses the abbreviation "TC" to refer to this prosecutor, whereas the record of trial uses "CTC."

Pet. App. 6a-7a (emphasis in original).

The prosecutor then attempted to ensure EC knew the difference between the truth and a lie. For example, she asked him four times for his current age before he answered "nine." Pet. App. 72a-73a. She next tried to verify the color of EC's shirt, which began a protracted colloquy that included EC asserting how "[b]oys cannot wear dresses" and that he did not like yellow shirts. Pet. App. 73a-75a. Finally, after the prosecutor asked EC eight times whether his shirt was yellow, the boy answered that it was not. Pet. App. Pet. App. 73a-75a. In the follow up question, he clarified that "a Hawaii shirt is never yellow." Pet. App. 75a.

Soon thereafter, as the prosecutor was still attempting to ascertain whether EC would be able to "tell us" the truth, *id*., EC again asked who could hear his testimony:

> [EC:] —What—the court can hear us?
>
> [TC:] *All you've got is the three people right here*.
>
> [EC:] But why is it—I thought there were court [sic] to hear us.
>
> [TC:] Well, who you've got to hear you right now—
>
> [EC:] We're just practicing?
>
> [TC:] *We're talking through you, yeah*. But we can hear you. And we just need you to. . . .
>
> [EC:] But why aren't we doing the court thing?

> [TC:] We are doing the court thing.
>
> [EC:] We are?
>
> [TC:] Yeah.

Pet. App. 7a-8a (emphasis in original).

EC's questions about what was happening continued until he finally asked the following question about Petitioner:

> [EC:] Is [Petitioner] going to be standing right next to them?
>
> [TC:] *No*.
>
> [EC:] Where is he going to be standing?
>
> [TC:] *He's not in there. He's not there.* All you've got to do is answer the questions that we have, okay?
>
> [EC:] Um-huh.

Pet. App. 8a-9a (emphasis in original). Neither the defense counsel nor the military judge interjected. Pet. App. 9a. The prosecutor followed this exchange by referencing her earlier questions about EC's shirt, asking if he would promise to "only tell us stuff that's true." Pet. App. 78a. EC responded "Um-huh," but added that his mother was afraid people would believe Petitioner. *Id.* EC then confirmed that he did not want Petitioner to find out what he said. *Id.* After this, EC began to discuss the substantive allegations, accusing both Petitioner and "[e]veryone in [his] [e]lementary [school]" of sexually abusing him. Pet. App. 79a-81a. After again expressing reticence about others knowing what he was saying, the prosecutor told EC "I promise [DC] . . . and [SVC] and I won't tell anybody else what you us" [*sic*]. Pet. App. 81a-82a.

After EC's direct examination, the defense counsel conducted a cross-examination. Pet. App. 9a. The defense counsel never informed EC of Petitioner's presence nor did he correct any of the prosecutor's false statements. *Id.*

A panel of officer members ultimately found Petitioner guilty of one charge and specification of indecent conduct, and one charge and two specifications of sexual abuse of a child—one of which related to EC and one to BC. Pet. App. 5a, 9a. The members acquitted Petitioner of a separate allegation of sexual abuse against EC. *See* Pet. App. 24a. The members sentenced Petitioner to twelve years' confinement, reduction to the grade of E-4, forfeiture of all pay and allowances, and a dishonorable discharge. Pet. App. 9a.

On appeal, the CAAF granted review of "[w]hether lying to a witness about [Petitioner's] presence in the courtroom to secure testimony materially prejudice[d] [Petitioner's] Sixth Amendment right to confrontation." Pet. App. 20a. The CAAF reviewed the issue for plain error based on the absence of objection at trial. Pet App. 4a.

The CAAF determined that "[s]everal of [the prosecutor's] responses, although indisputably intended to ease EC's concerns and facilitate his testimony, were misleading or false." Pet. App. 6a; *see also* Pet. App. 4a, 15a (recognizing the prosecutor's statements as false and misleading). The CAAF further opined "that [the prosecutor's] misleading statements might have lessened the pressure [Petitioner's] son felt to tell the truth," going so far as to note the Sixth Amendment's general guarantee of a face-to-face meeting with the witnesses because "[i]t

is always more difficult to tell a lie about a person to his face than behind his back[.]" Pet. App. 4a, 14a (citation omitted).

The CAAF then opined on the scope of its review:

> To determine whether the military judge committed plain error, we focus first on the second prong of the test: whether the alleged error would have been plain or obvious. [Petitioner] cites no precedent from any court holding that the Sixth Amendment confrontation right requires a child testifying remotely to be aware that the defendant is viewing their testimony. This appears to be a matter of first impression not just in this Court but in any court. The absence of any controlling precedent strongly undermines [Petitioner's] argument that the military judge committed plain or obvious error by admitting EC's testimony.

Pet. App. 16a (citations omitted). The remainder of the CAAF's opinion focused on EC's remote testimony and how—pursuant to *Craig*, 497 U.S. at 51—it satisfied the Sixth Amendment's confrontation elements of "oath, cross-examination, and observation of the witness'[s] demeanor." Pet. App. 16a-19a. The CAAF ultimately denied Petitioner relief, concluding that it "cannot say that it should have been plain or obvious to the military judge that [the prosecutor's] misstatements would prejudice [Petitioner's] right to confrontation." Pet. App. 19a. Based on this reasoning, the CAAF declined to address the prejudice prong of the plain error test. *Id*. Missing entirely from

its opinion was any reference to prosecutorial misconduct.

REASONS FOR GRANTING THE PETITION

At the heart of this case is whether a prosecutor can lie to a reticent witness during trial to procure that witness's testimony against an accused. Granting certiorari to answer this question would allow this Court to clarify the scope of the Sixth Amendment's confrontation right, a prosecutor's ethical obligations for candor, and the continuing viability of *Craig* in a post-*Crawford* world—an issue that, in and of itself, has sowed confusion among the federal, military, and state courts.

Petitioner's primary position is that, at minimum, the Sixth Amendment requires that a witness evince some minimal understanding that his or her testimony is being given against an accused in an adversarial court proceeding. This is particularly true where, as here, the witness is distressed that the accused will learn of his testimony. Consequently, Petitioner posits that the prosecutor plainly and clearly violated his right to confrontation by falsely telling EC that he was not present, resulting in EC providing his testimony under conditions tantamount to being the constitutionally prohibited "anonymous accuser."

Relatedly, although Petitioner asserts his rights were violated even under *Craig*'s parameters, he respectfully views this Court's subsequent Confrontation Clause jurisprudence as narrowing *Craig*'s import. Therefore, contrary to the CAAF's reasoning, *Craig* does not broadly sanction *all* remote testimony that involves an oath, cross-examination,

and witness observation; rather, the procedures must mirror those present or expressly condoned in *Craig*. Nothing in that case suggests that a prosecutor is free to misinform a child-witness regarding an accused's presence, nor that the child-witness's testimony will not be shared with others. There is likewise no other controlling authority that permits such conduct.

But even if the lower court was correct that the prosecutor's errors were cured by the presence of the Sixth Amendment's other essential elements, the prosecutor nevertheless violated a professional ethics canon by lying to EC. This represented plain and obvious prosecutorial misconduct that required a prejudice analysis, albeit one whose burden rested with Petitioner. The CAAF ignored this aspect of Petitioner's argument, contravening its own precedent in the process and effectively creating an ethical disparity between civilian and military prosecutors.

A. Lying to a witness about an accused's presence makes the testimony less reliable, thus violating the Sixth Amendment's right to confrontation.

As the lower court correctly concluded, the prosecutor's misleading statements might have lessened the pressure on EC to tell the truth. Pet. App. 4a. More than that, however, the prosecutor's lies permitted EC to believe not just that his father would be unaware of his testimony, but that those who were then present in the room with EC would not share it with others. *See* Pet. App. 78a, 82a. Such conditions eviscerated the integrity of the fact-finding process, effectively transforming EC into an "anonymous accuser" who was unaware of the

consequences of his testimony. *Green*, 399 U.S. at 179 (Harlan, J. concurring). Under both *Crawford* and *Craig*, this represented plain and obvious error that violated Petitioner's Sixth Amendment confrontation right.

The ultimate goal of the Sixth Amendment is to safeguard the fundamental fairness of trials. *Pointer*, 380 U.S. at 404. This Court's precedent has accordingly recognized the importance of face-to-face confrontation, aptly observing that "[i]t is always more difficult to tell a lie about a person to his face than behind his back" and, when the former occurs, the lie "will often be told less convincingly." *Coy*, 487 U.S. at 1019. Although *Craig* allowed an aberration from this particular form of confrontation, nothing in that case permitted the circumstances present here. To the contrary, and in contrast with the CAAF's conclusions, Pet. App. 16a-18a, the *other* essential elements of the Sixth Amendment upon which *Craig* relied—oath, cross-examination, and witness observation—were far from satisfied. 497 U.S. at 851. For similar reasons, EC's testimony was never truly tested under the crucible of cross-examination, which *Crawford* has clarified is the dispositive factor in determining the reliability of evidence. 541 U.S. at 61.

Addressing the oath requirement first, the prosecutor never impressed upon EC the importance of telling the truth nor the meaningfulness of his testimony or the seriousness of the matter at hand. *See United States v. Washington*, 63 M.J. 418, 424 (C.A.A.F. 2006) (citation omitted). From the outset, she falsely assured the boy that it was "just the three of us" he would be speaking to. Pet. App. 7a. The prosecutor then exacerbated her falsehood when she

reiterated that "[a]ll you've got is the three people right here." *Id.* EC was confused, as he initially believed he was only "practicing" and evinced surprise that "the court thing" was actually happening. Pet. App. 8a. And when the prosecutor finally seemed to orient EC as to who was pictured in the covered monitor and what they were doing, he still felt compelled to ask, "Some people in there?" Pet. App. 77a. Yet, instead of ensuring EC's understanding, the prosecutor merely responded: "Um-huh." *Id.* This single comment, when weighed against EC's previous uncertainty, is insufficient to establish that he truly comprehended what was happening at all, let alone the seriousness of the proceedings.

Even assuming, *arguendo*, the prosecutor's labors by this point were successful, she irretrievably shattered the image of an adversarial setting when she lied to EC and told him Petitioner was not present. Pet. App. 8a. Her misrepresentation was all the more egregious because she provided it *sua sponte*, in response to the boy's inquiry on where his father would be standing. *Id.* The prosecutor thus induced, without correction, a scared nine year-old witness into believing that not only would he be able to avoid having to "repeat his story looking at the man whom he will harm greatly," he could do so wholly unbeknownst to Petitioner. *Coy*, 487 U.S. at 1019 (internal citations omitted).

In very real terms, the prosecutor—who repeatedly encouraged EC to speak to just herself and the two others in the room with him—transformed EC into an anonymous accuser. This was precisely what the boy desired, since he did not "want [Petitioner] finding out." Pet. App. 78a-79a. Equally significant is the

timing: the prosecutor told the lie about Petitioner's absence *prior to* securing EC's "promise" to tell the truth. Pet. App. 78a. In fact, she made the misrepresentation immediately before seeking his pledge. Pet. App. 78a. It is thus unclear whether the boy would have testified at all had he known his father could hear him, or whether EC would have possessed the same intent regarding the veracity of his testimony. At the very least, it would be more palatable for EC to lie about his willingness to tell the truth if he thought he would be providing such falsehoods "behind [Petitioner's] back." *Coy*, 487 U.S. at 1019.

Though the circumstances surrounding EC's "promise" are in and of themselves sufficiently problematic, there are additional questions involving his capacity and intent to tell the truth. This is exemplified by the significant effort the prosecutor expended to have EC merely confirm that his shirt was not yellow. Pet. App. 73a-75a. It was this very line of questioning upon which the prosecutor predicated her ultimate inquiry into whether EC would be willing to tell truth, which the boy immediately followed with a disclosure that his mother was worried that "people will just believe [Petitioner]" and that he did not want his father to learn about what he was going to say. Pet. App. 78a-79a. Thereafter, EC's testimony was replete with fantastical allegations of school children sexually abusing him, of not stopping until Petitioner did, and of them visiting Petitioner in Missouri. Pet. App. 81a-82a. These are not facts that should instill confidence in EC's ability and willingness to tell the truth.

Turning next to *Craig*'s cross-examination requirement, which parallels with *Crawford*, Petitioner has never disputed that his counsel had the opportunity to question EC. Pet. App. 17a-18a. Petitioner further acknowledges that certain infirmities in EC's testimony arose during cross-examination, which can be an indicator that the Confrontation Clause is satisfied. *See Delaware v. Fensterer*, 474 U.S. 15, 22 (1985). But it is an entirely separate matter whether EC fully understood the adversarial process he was involved in.

As discussed above, it is unclear whether EC comprehended that the statement he was giving was for the purposes of a trial, that the people questioning him were attorneys representing different interests, that his father would ever receive this information, and that his father was facing significant punitive exposure. Moreover, if EC trusted the prosecutor's assertions—and nothing in the record suggests he did not—he would have believed that what he confided to her and the two others in their private room would never be shared with *anyone*. Pet. App. at 82a. This adversarial context, or rather lack thereof, is important because it undermined Petitioner's ability to conduct a *full and fair* cross-examination. *Fensterer*, 474 U.S. at 22. If EC, convinced by the prosecutor's falsities, never understood the stakes involved, then he was never truly subjected to the crucible of cross-examination. *Crawford*, 541 U.S. at 61; *cf. Green*, 399 U.S. at 199 (Brennan, J., dissenting) (noting that a man willing to perjure himself at a preliminary hearing "when the consequences are simply that the accused will stand trial may be less

willing to do so when his lies may condemn the defendant to loss of liberty.").

But even if the procedural aspects of EC's cross-examination were constitutionally firm, a problem remains regarding the fact-finders' ability to accurately gauge his demeanor. Without any understanding of the trial process or consequences for his testimony, EC would have no reason to fret over falsehoods. This, in turn, would preclude the panel of officer members from properly weighing mannerisms that may measure credibility. For similar reasons, EC's induced belief that his father was absent would lessen any nervousness about having to lie in his presence. EC was therefore able to testify without the panel "draw[ing] its own conclusions" about any potential aversions while directly accusing Petitioner. *Coy*, 487 U.S. at 1019.

Notably, the panel was also aware that EC is a child with autism. Pet. App. 69a-70a. They further understood, prior to his testimony, that his condition affected his speech, physical movements, and ability to process information. *Id.* These symptoms manifested themselves during his remote testimony, as he frequently evaded questions and provided non-responsive or rambling answers. He was also fidgety and did other physical acts not typically seen on the witness stand. Pet. App. 71a. The panel was thus placed in a situation where conduct that might normally indicate untruthfulness—like evasion, fidgeting, or unresponsiveness—could be cast aside for wholly legitimate reasons. Under such circumstances, the panel had no way of accurately evaluating "the manner in which" EC gave "his testimony [or] whether he is worthy of belief." *Green*,

399 U.S. at 158 (internal quotation marks and citation omitted).

Given the above facts, EC's remote testimony did not contain the Sixth Amendment's other essential elements found in *Craig*, nor did EC meaningfully endure the crucible of cross-examination championed in *Crawford*. The absence of these factors, brought upon through the prosecutor's affirmative misstatements, represents plain and obvious error. And to the extent that there may be no federal law directly on point—which the CAAF found compelling, Pet. App. 16a (citation omitted)—it is important to note that civilian prosecutors are generally guided to refrain from lying to witnesses. SCJ, Standard 3-1.4(b). Consequently, while the circumstances of this case should not have arisen in a court-martial, they were even more unlikely to arise in a civilian trial.

B. Assuming *Craig* still applies, it does not broadly permit all remote testimony by child witnesses, and certainly not under the circumstances by which the prosecutor procured EC's testimony.

The scope of *Craig*—by its own terms—was already quite narrow on the day it was decided. This Court "only" upheld the use of one-way, closed-circuit television in lieu of the Confrontation Clause's "preference" for face-to-face confrontation because there was a case-specific finding that utilization of this procedure (1) was necessary to further an important public policy interest, and (2) the reliability of the testimony was otherwise assured. 497 U.S. at 850. As discussed above, the second prong was not met here. And as to the first prong, lying to a witness

to secure his testimony by telling him that the accused is "not there" does not serve an important policy interest. In fact, it does the opposite because it "impinge[s] upon the truth-seeking" and "symbolic purpose of the Confrontation Clause." *Id*. at 852. The CAAF nevertheless opined that *Craig* permitted the circumstances here, essentially concluding that because *Craig* did not expressly condemn a particular feature of remote child witness testimony, it must be permissible. Pet. App. 15a-16a. Respectfully, this is incorrect.

Craig is a pre-*Crawford* remnant of this Court's Confrontation Clause jurisprudence that is, itself, premised upon a line of precedent which this Court has expressly overruled and abandoned. *See Crawford*, 541 U.S. at 67-69. Thus, in considering whether a departure from the normal dictates of the Confrontation Clause (e.g., knowledge that the accused can contemporaneously perceive one's testimony) can be dispensed with pursuant to *Craig*, the operative question is whether *Craig* expressly *permits* it, not whether *Craig* speaks to it at all. More simply, unless *Craig* explicitly sanctions departure from a normal feature of the confrontation right, the presumption should be that it is impermissible. The CAAF's conclusion erroneously inverted the analysis.

This Court's recent opinion in *Hemphill* underscores the point. 142 S. Ct. 681. In that near unanimous decision, this Court emphasized how *Crawford* marked an "emphatic rejection of the reliability-based approach of *Ohio v. Roberts*." *Id*. at 691. Since *Craig* is a product of this clearly abandoned line of "reliability" precedent, it should be read to permit only that which it unequivocally

condones. *See*, *e.g.*, *Jemison*, 505 Mich. at 356 (restricting *Craig* to its "narrow facts" in light of *Crawford*). Notably, *Craig* did not involve a child witness who was unaware that the defendant was present. Likewise, nothing in the decision suggests that the Government is free to misinform a child-witness regarding an accused's presence, nor that the child-witness's testimony will not be shared with others. The CAAF therefore erred in broadly applying *Craig* where it should have narrowly interpreted the decision based on its case-specific facts.

C. In declining to address prosecutorial misconduct, the CAAF contravened its own precedent and created an ethical disparity between military and civilian prosecutors.

The CAAF has long held that a prosecutor's violation of ethical or professional responsibility canons qualifies as misconduct. *Meek*, 44 M.J. at 5 (citing *Berger*, 295 U.S. at 88). This is consistent with the professional responsibility standards to which all Air Force attorneys must adhere in order to maintain the integrity of their profession. *See*, *e.g.*, ARPC, R. 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"); AFSCJ, Standard 3-1.2(d) (requiring military prosecutors "know and be guided by the standards applicable to military counsel by the [UCMJ, MCM, AFI 51-201, and the ARPC][.]"). Thus, both the CAAF and military Service Courts of Criminal Appeals have repeatedly relied on this precedent in determining appeals based on prosecutorial misconduct. *See*, *e.g.*, *United States v. Quintanilla*, 63 M.J. 29, 38-39 (C.A.A.F. 2006)

(finding advocate-witness-based prosecutorial misconduct pursuant to a violation of a Naval ethical rule); *United States v. Golston*, 53 M.J. 61, 65-66 (C.A.A.F. 2000) (evaluating prosecutorial misconduct based on an alleged breach of professional ethics and an Army Regulation); *United States v. Hamilton*, 41 M.J. 22, 26-27, 26 n. 2 (C.A.A.F. 1994) (evaluating alleged misconduct under the ABA's SCJ and Model Rules of Professional Conduct); *United States v. Bowser*, 73 M.J. 889, 899 (A.F. Ct. Crim. App. 2014) (relying on AFSCJ in evaluating discovery-related prosecutorial misconduct).

Notably, the CAAF here determined—in no uncertain terms—that "[s]everal of [the prosecutor's] responses . . . were misleading or false." Pet. App. 6a. This should thus represent plain and obvious violations of the fundamental tenets of professional responsibility and ethics; yet, the CAAF never addressed prosecutorial misconduct. Pet. App. 3a-19a. This departs from its well-established precedent dictating that "an appellate court usually considers the legal norm violated by the prosecutor" and then "determines if its violation actually impacted on a substantial right of an accused." *Meek*, 44 M.J. at 5; *see also United States v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018). This departure is problematic for at least two reasons.

First, assuming *arguendo* that the CAAF correctly concluded there was no plain or obvious Sixth Amendment error, the prosecutor's clear misconduct entitled Petitioner to a prejudice evaluation, albeit under a different standard. *See Meek*, 44 M.J. at 5; *Andrews*, 77 M.J. at 402; *United States v. Fletcher*, 62 M.J. 175, 179-84 (C.A.A.F. 2005). Absent error

implicating a constitutional right, discussed *supra*, the CAAF evaluates prejudice resulting from misconduct based on three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Andrews*, 77 M.J. at 402 (citation omitted).

Here, the material prejudice to Petitioner's substantial rights resulting from the prosecutor's misconduct was that a witness crucial to Petitioner's conviction testified under what amounted to false pretenses. Moreover, absent the prosecutor's ethical violations, EC might not have testified at all. While Petitioner maintains these circumstances cannot comport with the Sixth Amendment's guarantee of robust confrontation in an adversarial criminal proceeding, at a bare minimum there was material prejudice to "the fairness and integrity of his trial." *Andrews*, 77 M.J. at 402 (citation omitted). Simply put, once the CAAF determined that no Sixth Amendment right was implicated, it should have considered prejudice based on the clear and obvious prosecutorial misconduct. Its failure to do so was error and justifies this Court's intervention.

The second and potentially more problematic aspect of the CAAF's silence on prosecutorial misconduct is that it appears to create an ethical rift between civilian and military prosecutors. As mentioned above, Petitioner posits that there is likely no precedent for a prosecutor lying in court to a witness so as to procure that witness's testimony due to ethical guidelines. *See* SCJ, Standard 3-1.4(b), *see also* Standard 3-1.4(a). The CAAF's decision, however, implicitly sanctions such conduct in courts-

martial. Previously, this Court has favorably compared the military justice system to its civilian counterparts in terms of protections for the accused. *Ortiz v. United States*, 138 S. Ct. 2165, 2174-75 (2018) (citations omitted). And members of this Court have likewise acknowledged the diligence, professionalism, and integrity of the officers who work within the military's construct. *Id*. at 2203 (Alito, J. dissenting). The CAAF's tacit condonation of the prosecutor's misconduct here severs any such similarities in the fairness of the two judicial systems, and may ultimately serve to undermine the heretofore accurate perception regarding the integrity of military prosecutors. If a civilian prosecutor is prohibited from lying to a witness on the stand, no specialized military rationale should justify any contrary conduct by a military prosecutor.

CONCLUSION

The prosecutor in this case clearly, obviously, and improperly lied. The lies and distortions were made to a critical witness about facts material to his testimony. But for the prosecutor's misconduct, it is unclear whether EC would have testified at all, let alone openly accused his father of a crime.

Most importantly, the misconduct in this case rendered EC the paradigmatic "anonymous accuser" recognized as anathema to the Confrontation Clause. Simply put, no face-to-face confrontation occurred in this case—in actuality or in spirit—and the Government could not have met the appropriate burden of proving this error harmless beyond a reasonable doubt.

In addition, the CAAF ignored the prosecutor's violation of fundamental ethical tenets, finding no plain error and affirming Petitioner's conviction. Not only does this decision run counter to its own precedent, it renders the military justice system one in which prosecutors are free to lie to witnesses in order to secure testimony against an accused. The basic notions of integrity upon which a truth-seeking justice system rely cannot abide the outcome presented here.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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