

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

UNITED STATES,
Appellee

v.

Private (E-2)
JOSHUA C. DAVIS,
United States Army,
Appellant

) FINAL BRIEF ON BEHALF OF
) APPELLANT
)
)
) Crim. App. Dkt. No. 20130996
)
) USCA Dkt. No. 16-0306/AR
)
)
)

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WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN REFUSING TO APPLY DE NOVO REVIEW FOR FAILURE TO INSTRUCT ON AN AFFIRMATIVE DEFENSE RAISED BY THE EVIDENCE, AND INSTEAD FOUND FORFEITURE AND APPLIED A PLAIN ERROR ANALYSIS, CONTRARY TO THIS COURT'S PRECEDENT IN *UNITED STATES V. TAYLOR*, 26 M.J. 127 (C.M.A. 1987); *UNITED STATES V. DAVIS*, 53 M.J. 202 (C.A.A.F. 2000); AND *UNITED STATES V. STANLEY*, 71 M.J. 60 (2012). 1

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	)	USCA Dkt. No. 16-0306/AR
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JOSHUA C. DAVIS,	)	
United States Army,	)	
Appellant	)	

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

Issue Presented

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN REFUSING TO APPLY DE NOVO REVIEW FOR FAILURE TO INSTRUCT ON AN AFFIRMATIVE DEFENSE RAISED BY THE EVIDENCE, AND INSTEAD FOUND FORFEITURE AND APPLIED A PLAIN ERROR ANALYSIS, CONTRARY TO THIS COURT'S PRECEDENT IN *UNITED STATES V. TAYLOR*, 26 M.J. 127 (C.M.A. 1987); *UNITED STATES V. DAVIS*, 53 M.J. 202 (C.A.A.F. 2000); AND *UNITED STATES V. STANLEY*, 71 M.J. 60 (2012).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On September 24 and November 20-22, 2013, at Kaiserslautern, Germany, a general court-martial composed of officer and enlisted members convicted Private (PV2) Joshua C. Davis, contrary to his plea, of one specification of rape by force, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2012). Private Davis was sentenced to reduction to E-1, six months confinement and a bad-conduct discharge. On March 24, 2014, the convening authority approved the sentence as adjudged and credited PV2 Davis with one day against his sentence to confinement.

On November 25, 2015, the *en banc* Army Court affirmed the findings and sentence in appellant's case. (JA 1). Private Davis was subsequently notified of the Army Court's decision and petitioned this Court for review on January 29, 2016. On March 30, 2016, this Honorable Court granted appellant's petition for review.

Statement of Facts

Private Davis argued to the Army Court that the military judge erroneously failed to instruct on an affirmative defense that was raised by the evidence. (JA 29). Both PV2 Davis and the government agreed that failure to request an instruction on an affirmative defense does not waive or forfeit the issue on appeal.

(JA 29, 45). Nonetheless, the Army Court held that forfeiture did apply and conducted its review accordingly. (JA 1).

Summary of Argument

The Army Court erroneously held that this Court has overturned *United States v. Taylor*, 75 M.J. 537 (C.M.A. 1987). In reaching that conclusion, the Army Court relied on *dicta* in cases that did not involve affirmative defenses. Moreover, subsequent to every case relied on by the Army Court in reaching its decision that *Taylor* had been overruled, this Court has continued to apply the *Taylor* standard. See *United States v. Davis*, 73 M.J. 268 (C.A.A.F. 2014).

Likewise, this Court *should* not overturn the *Taylor* standard. Doing so would violate this Court's adherence to *stare decisis*, as there has been no showing of any reason to change the *Taylor* standard.

Argument

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN REFUSING TO APPLY DE NOVO REVIEW FOR FAILURE TO INSTRUCT ON AN AFFIRMATIVE DEFENSE RAISED BY THE EVIDENCE, AND INSTEAD FOUND FORFEITURE AND APPLIED A PLAIN ERROR ANALYSIS, CONTRARY TO THIS COURT'S PRECEDENTS IN *UNITED STATES V. TAYLOR*, 26 M.J. 127 (C.M.A. 1987); *UNITED STATES V. DAVIS*, 53 M.J. 202, 205 (C.A.A.F. 200); AND *UNITED STATES V. STANLEY*, 71 M.J. 60 (C.A.A.F. 2012).

Standard of Review

This Court reviews a lower court's legal conclusions de novo. *United States v. McCollum*, 58 M.J. 323, 336 (C.A.A.F. 2003).

Law and Argument

A military judge has a sua sponte duty to instruct the panel members on affirmative defenses that are raised by the evidence. R.C.M. 920(e)(3). While R.C.M. 920(f) states that failure to object to proposed instructions constitutes waiver absent plain error, this Court has consistently held that R.C.M. 920(f) does not apply to affirmative defenses. *See, e.g., United States v. Taylor*, 26 M.J. 127 (C.M.A. 1987).

This Court has noted that the Drafter's Analysis to R.C.M. 920(f) relied on two cases that did not concern affirmative defenses, while failing to consider one that did and which was inconsistent with R.C.M. 902(f) as applied to affirmative defenses. *Id.* at 128. Thus, at its inception, R.C.M. 920(f) was at odds with this Court's established jurisprudence on affirmative defenses. Additionally, the military judge's duty to sua sponte instruct on affirmative defenses is not solely, or even primarily, derived from R.C.M. 920(e). As this Court has explained, the duty to instruct on affirmative defenses is statutorily mandated by Article 51(c), UCMJ, 10 U.S.C. § 851(c). *Taylor*, 26 M.J. at 129 (citing *United States v. Ginn*, 4 C.M.R. 45 (C.M.A. 1952)).

This Court reaffirmed the holding in *Taylor* in *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000) and again, just four years ago, in *United States v. Stanley*, 71 M.J. 60 (C.A.A.F. 2012). Thus, this Court has consistently held that a military judge has a sua sponte obligation to instruct on affirmative defenses and that an accused's failure to request such an instruction does not constitute forfeiture.¹

In reaching the opposite conclusion, the Army Court looked to cases involving all types of instructional error, not just those involving affirmative defenses. These cases can be placed roughly into three groups: First, there are cases where the military judge fails to instruct on an element of an offense. Second, there are cases where the military judge fails to instruct on a lesser included offense. And third, there are the cases already discussed, which directly address the failure to instruct on an affirmative defense.

The Army Court is correct to note that this Court typically applies the forfeiture-plain error framework to address instructional error involving omitted elements and lesser included offenses. These cases, however, prove a poor analogy to cases involving affirmative defenses. The elements of an offense are listed in the Manual for Courts-Martial and whether one offense is a lesser included offense of

¹ Although R.C.M. 920(f) and much of this Court's precedent use the term "waiver," this brief will use the term "forfeiture," which appellant believes is more consistent with this Court's recent jurisprudence.

another can be determined objectively and mechanically by applying the test outlined in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

In other words, whether an element or lesser included offense should be instructed on is a binary question with no degrees or shades of grey in between. Thus, if a military judge fails to instruct on an element or lesser included offense, the error will necessarily be plain and the second prong of the plain error analysis – whether the error is clear and obvious – will rarely, if ever, stand as a hurdle that must be overcome before the error is tested for harmlessness.

On the other hand, there is no objective and mechanical means to determine whether the evidence has raised an affirmative defense. Evidence could fail to raise a defense, clearly prove a defense, or anything in between. Recognizing this fact, this Court’s rule is that a defense must be instructed upon if “some evidence [of the defense has been raised] to which the court members may attach credit if they so desire” and “[a]ny doubt whether an instruction should be given should be resolved in favor of the accused.” *Stanley*, 53 M.J. at 205.

Under the Army Court’s framework, however, an appellant will only find relief when the error is “obvious and substantial.” *United States v. Davis*, 75 M.J. 537, 547 (A. Ct. Crim. App. 2015). Thus, the Army Court held “even assuming the conversation had the meaning that appellant now argues, that meaning was not plain and obvious, and therefore any error did not amount to plain error.” *Id.* Here,

unlike the cases to which the Army Court has analogized, the second prong of the plain error test has become a critical hurdle to surmount.

Because the impact of applying forfeiture to affirmative defense cases has effects neither seen in nor anticipated by those cases involving elements and lesser included offenses, the approach taken in those cases proves minimally relevant to affirmative defense cases.

Beyond being poor analogs to affirmative defense cases, the language relied upon by the Army Court in the aforementioned cases is *dicta* and peripheral to the issues and outcomes. For example, the Army Court wrote:

Finally, and we find conclusively, in *United States v. Payne*, the C.A.A.F. determined that appellant's failure to properly object to or request a mandatory instruction forfeited the error. 73 M.J. 19, 23 (C.A.A.F. 2014). The *Payne* court specifically adopted the drafter's analysis to R.C.M. 920(f), in direct contrast to the Court of Military Appeals' analysis in *Taylor* over twenty-five years earlier.

Davis, 75 M. J. at 543.

The issue in *Payne* was whether failure to instruct on an element amounted to structural error or whether it could be tested for harmlessness. The holding was that the error could be tested for harmlessness. *Payne*, 73 M.J. at 25. Whether plain error – and therefore forfeiture – applied absent an objection occupied a single sentence. *Id.* at 22. The only discussion of R.C.M. 920(f) and the Drafter's Analysis involved the level of specificity needed to preserve an objection – a distinction that had no effect on the case's outcome because, as discussed above,

once this Court found elements were omitted from the instructions, the error was necessarily plain. *Id.* at 23. The case did not mention affirmative defenses, much less *Taylor*.

Concerning the third group of cases – those that do specifically address affirmative defenses – the Army Court dismissed them as “only the occasional precedent to the contrary.” *Davis*, 75 M.J. at 543. With that, the Army Court felt this Court’s *dicta* in poorly analogous cases amounted to a conclusive overruling of *Taylor* and its progeny.

Although the Army Court felt compelled to apply forfeiture to affirmative defenses, this Court did not feel compelled to do so in *United States v. Davis*, 73 M.J. 268 (C.A.A.F. 2014). In *Davis*, which was decided subsequent to every case relied upon by the Army Court in reaching its conclusion *Taylor* had been overruled, this Court applied the *Taylor* standard in an affirmative defense case as it has always done. *Id.* at 271. This Court did, however, express a willingness to consider whether plain error *should* apply. *Id.* at n.4.

Three months after applying the *Taylor* standard in *Davis*, this Court decided *United States v. MacDonald*, 73 M.J. 426 (C.A.A.F. 2014). Although in *MacDonald* the appellant requested an affirmative defense instruction at trial, the case is still instructive. Noting that the requested instruction was not a precise statement of the law, and to address what the impact of that imprecise request may

be, this Court reiterated that forfeiture is not at issue in cases involving the failure to instruct on an affirmative defense:

Because we hold that the military judge had a sua sponte duty to instruct on involuntary intoxication we do not reach the issue of whether the military judge should have instructed despite the technically imprecise instruction proffered by Appellant.

Id. at n.2.

Thus, the question is not whether, as the Army Court believed, this Court *has* overruled the *Taylor* line of cases – it has not – but whether it *should*.

“[A]dherence to precedent is the preferred course because it promotes evenhanded, predictable, and consistent development in legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *United States v. Quick*, 74 M.J. 332, 335-36 (C.A.A.F. 2015) (internal quotations omitted). Accordingly, the general rule is that “it is more important that the applicable law be settled than it be settled right.” *Id.* However, *stare decisis* need not be applied when precedent is poorly reasoned or unworkable. *Id.*

The standard set forth in *Taylor* is well reasoned. The military judge’s sua sponte obligation to instruct on affirmative defenses arises primarily from Article 51(c), UCMJ, and not R.C.M. 920(e)(3). *Taylor*, 26 M.J. at 129. To the extent R.C.M. 920(f) appears to conflict with the forgoing, the conflict is explained by the

Drafter's Analysis, which suggests R.C.M. 920(f) was based on cases dealing with instructional issues that did not involve affirmative defenses. *Id.* at 128.

Sound policy arguments support the current approach. For two reasons, the military judge is best situated to identify defenses raised by the evidence. First, the military judge will almost always have significantly more military justice experience than the trial defense counsel and is therefore more likely to identify defenses raised by the evidence. Second, a trial defense counsel will develop a defense strategy; a commitment to that strategy may result in tunnel vision which may cause him to miss defenses raised by the evidence that do not fit neatly with his chosen strategy. The military judge, on the other hand, sits impartially and unattached to the defense strategy. This makes him well situated to spot possible defenses raised by the evidence that the trial defense counsel may miss. For these reasons, it is desirable as a matter of policy that military judges retain their *sua sponte* obligation to instruct on affirmative defenses.

The *Taylor* approach to these cases has proven eminently workable. There is no evidence in the record, or in the Army Court's decision, to suggest otherwise. For example, nothing suggests that this standard creates a drag on judicial economy. By contrast, adopting the Army Court's approach would likely prove more challenging. If a trial defense counsel fails to request an affirmative defense instruction when some evidence at trial supports the defense, only to have the

possibility of appellate relief foreclosed because the evidence was not “substantial and obvious,” what would have been an assignment of error under *Taylor* will now be raised as ineffective assistance of counsel. Because IAC claims often involve additional fact finding, the Army Court’s approach would result in slower resolutions and additional work.

Finally, some members of the Army Court did recognize that the majority holding amounted to a departure from this Court’s well established precedent:

Considering *Taylor* and the considerable line of cases following it, I must therefore depart from the majority’s holding that an appellant may forfeit such an instruction by not requesting it or objecting to its omission. No case cited in the majority’s opinion so holds. Assuming arguendo that a discussion of forfeiture is required, we should hold that an appellant does not forfeit the benefit of this instruction by failing to request it or failing to object to a list of instructions which omits it. To hold otherwise contravenes *stare decisis* and deprives this statutory right of its *sua sponte* nature which our superior court has emphasized multiple times. *Taylor*, 26 M.J. 127; *United States v. Brown*, 43 M.J. 187, 190 (C.A.A.F. 1995); *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000); *Stanley*, 71 M.J. at 63; *United States v. Payne*, 73 M.J. 19, 24 (2014); *United States v. MacDonald*, 73 M.J. 426, 435 (C.A.A.F. 2014); *United States v. Davis*, 73 M.J. 268, 272 (2014).

Davis, 75 M.J. at 547 (Penland, J. concurring). The Army Court’s concurrence is correct on this point. This Court has not overruled *Taylor* and doing so without a compelling justification is antithetical to the principle of *stare decisis*.

Conclusion

WHEREFORE, based on the foregoing considerations, PV2 Davis respectfully requests this Honorable Court remand this case to the Army Court for review in accordance with *Taylor, Davis, and Stanley*.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Davis*, Army Dkt. No. 20130996, USCA Dkt. No. 16-0306/AR, was electronically filed with the Court and Government Appellate Division on April 29, 2016.



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